

CYBER CHAOS: THE CLASH BETWEEN BAND FANSITES AND INTELLECTUAL PROPERTY HOLDERS

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I. INTRODUCTION

Blues singer Bonnie Raitt once said, “I think my fans will follow me into our combined old age. Real musicians and real fans stay together for a long, long time.”¹ Raitt’s initial observation is true—where there are bands, there are fans—but modern technology is testing musicians’ and their fans’ ability to “stay together for a long, long time.” With the popularity of the Internet today, where there are fans, there are fansites.² While designed to pay homage to their favorite musical artists, fansites and their creators often find themselves at odds with the artists they seek to honor when they use materials created by the artists on their fansites.³ Although fans provide ready-made markets, develop highly-visited sites, and offer the basis for invaluable market research, they also tend to appropriate what intellectual property (IP) producers view as “key corporate assets.”⁴ These clashes between fansite creators and IP holders

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1. Cyber-Nation Int’l, Inc., *Quotes To Inspire You, Music*, Bonnie Raitt, at http://www.cyber-nation.com/victory/quotations/subjects/quotes_music.html (last visited on July 27, 2004) (on file with author).
2. For the purposes of this Article, fansites will be used to describe any unofficial, unauthorized websites devoted to one musical artist or band.
3. See, e.g., Special Report, May 1997, at <http://www.thei.aust.com/bsite/asp2.html> (describing the first known clash between musical artists and their fansites) (on file with author). In 1997, Sony recording artists Oasis became one of the first bands that went after fansites devoted to the band whose content included copyrighted lyrics, sound files, and photographs. *Id.* Sometimes, the intellectual property creators and producers involved do not see fansite issues in the same light. While Fox used a cease-and-desist letter campaign to threaten fansites built in homage of the popular TV show, *Buffy the Vampire Slayer*, the show’s creator “expressly endorsed fan activities deemed actionable by the corporate rights holder highlight[ing] the potentially triangular nature of IP disputes in a media environment where content creators rarely retain legal ownership of their creations.” Simone Murray, *‘Celebrating the Story the Way It Is’: Cultural Studies, Corporate Media and the Contested Utility of Fandom*, 18 J. OF MEDIA & CULTURAL STUD. 7, 11 (Mar. 2004) (on file with author).
4. Murray, *supra* note 3, at 11.

often cause backlash, leaving fans feeling bitter and alienated from the artists they once idolized.⁵

While no accurate statistics exist regarding the number of fansites on the Internet, thousands of artists have official websites as well as websites created by fans that exist independently of the official sites.⁶ Even newer artists, such as Revis or Evanescence who both released debut albums in 2003, boast large numbers of fansites dedicated to their respective bands on their official websites.⁷ Tech-savvy bands, such as Phish, have pioneered the use of the Internet as a promotional tool.⁸ Fans of the Vermont jam band have created more than 150 fansites that receive millions of hits per week.⁹ For both established musicians and newer artists, the Internet provides a unique promotional tool, but it can also be a “double edged sword” because others can easily build websites that use or misrepresent the artists’ works.¹⁰ Internet users often consider fansites better than official websites since the former often

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5. See, e.g., Special Report, *supra* note 3, at <http://www.thei.aust.com/bsite/asp2.html>. When the members of Oasis began their efforts to regulate their copyrighted materials on the Internet, it resulted in an unexpected movement launched by the fansites’ operators. *Id.* Some Oasis fansite creators retaliated by forming an Internet-based initiative called Oasis Webmasters for Internet Freedom. *Id.* When Warner Brothers began sending cease-and-desist letters to fans operating fansites dedicated to some of the company’s television shows, these fans followed a similar route as the Oasis fans and formed a group called the Warner Internet Fan Association. Amy Harmon, *Web Wars: Companies Get Tough On Rogues. Studios and Fortune 500 firms target unauthorized Internet sites that feature their products. Crackdown Affects Fans as well as Foes*, L.A. TIMES, National Desk, Nov. 12, 1996, available at 1996 WL 12755513 (on file with author). Some fans have even developed their own online support groups for those who have been burnt by IP holders. See, e.g., The Burned for Fandom Support Group’s website, at <http://www.dreslough.com/main/burned/> (last visited on May 4, 2005).
 6. Computeractive Staff, *Celebs on the Web (Roll Out the Virtual Red Carpet and Join Webactive As We Rub Shoulders With the Rich and Famous on the Web)*, Mar. 18, 2004 at <http://www.vnunet.com/features/1153618>.
 7. See, e.g., Evanescence’s official website, at <http://evanescence.com/#> (last visited on Apr. 14, 2005) and Revis’ official website, at <http://www.revismusic.com> (links) (last visited on May 11, 2005). Evanescence released its debut album, *Fallen*, in February of 2003, which has since gone quadruple platinum; the band’s official website lists fifty-six fansites although others not listed also exist. See, e.g., CRIMSON REGRET fansite, at www.crimson-regret.com (last visited on Apr. 14, 2005) (on file with author). Southern Illinois rock band, Revis, released its debut album in May of 2003, and although the band has not achieved the same commercial success as Evanescence, Revis’ official site lists eleven fansites dedicated to the band. Revis’ Official Website, at <http://www.revismusic.com> (links). In fact, one of the major benefits of the Internet is that it has “help[ed] independent artists close the gap on the giants. There’s now nothing to stop even an unsigned artist creating their own T-shirts and CDs, or digital downloads, to sell online.” *Bands rise to online demand*, DIGITAL BULL., Feb. 1, 2005, available at <http://www.brandrepublic.com/bulletins/digital/article/466524/bands-rise-online-demand/>.
 8. Posting of matrix9i@aol.com to rec.music.phish, May 17, 2000, available at <http://groups.google.com/groups?selm=20000517181154.15980.00000521%40ng-cg1.aol.com&output=gplain>.
 9. *Id.*
 10. See Computeractive Staff, *supra* note 6, at <http://www.vnunet.com/features/1153618>.

provide information and downloadable items not available on the official sites.¹¹ As one commentator said, “Fans are the lifeblood of entertainment . . . [t]hose who wish to profit from the fans would do well to court them in all the places they dwell.”¹² Thus, bands must also court their fans online and strike a balance between their rights as IP holders and those of their fans. This may prove difficult considering “the hyper-copying culture of the Internet, where anyone can be a publisher and ‘information wants to be free’ is a longtime motto.”¹³

This Article will first explore the proliferation of fansites and their creators’ clashes with IP holders. Next, it will identify the legal issues IP holders could assert against fansite creators and the possible defenses available to cyber fans. This Article will also examine how some IP holders have tried to control fans both legally and contractually via cease-and-desist letters and often one-sided terms of usage agreements. Next, it will explore the effectiveness of the disclaimers fansite operators commonly place on their fansites. Potential problems with how IP law would treat fansites will also be examined as well as the potential for fan backlash and damaging media coverage of disputes between fans and IP holders. Finally, this Article will propose a resolution in the form of IP holders providing authorized content packages for fansite creators and engaging in controlled fan interactions, which would more adequately balance the fans’ rights with those of the IP holders.

II. THE PROLIFERATION OF FANSITES AND THEIR CREATORS’ CLASHES WITH INTELLECTUAL PROPERTY HOLDERS

Use any search engine to run the name of a band, new or old, and it becomes readily apparent how difficult it would be to determine the exact number of fansites devoted to bands. Even artists, such as Def Leppard, who have not had a radio hit in decades have hosts of fansites dedicated to the band

11. *Id.*

12. Noelle Hay, *Fan Fiction: Bane Or Boone?*, SFFWORLD.COM, 2002, at http://www.sffworld.com/authors/h/hay_noelle/articles/fanficbane.html.

13. Harmon, *supra* note 5, available at 1996 WL 12755513 (where one copyright attorney observed that people refer to the Internet as the home shoplifting network because many Internet users display a sense of entitlement to unrestrained freedom). The Internet has also been described as “The National Copy Machine.” Fred M. Greguras, *Legal Environment for Broadband Interactive Services*, presented at the Developers’ Forum for CablePort™ Technology, May 22, 1995, available at <http://www.batnet.com/oikoumene/BroadbandLegal.html> (on file with author).

and its music.¹⁴ Even relative newcomers to the rock cyber world attract fans dedicated enough to build websites to honor them.¹⁵ Some record companies, such as Road Runner Records, acknowledge the presence of their artists' fansites even when the fansites include unauthorized materials.¹⁶ Some artists and their representatives actually attribute the Internet as critical to the commercial success of the artists' works.¹⁷

However, not every musical artist or band sings the praises of the Internet and fansites. Unlike official websites, fansites are built predominantly from content that the fansite creators do not own.¹⁸ Some fansite creators openly admit their sites' content has been obtained from other sources.¹⁹ Some wrongfully attribute another fansite where they obtained the copyrighted or trademarked materials rather than the true IP holders.²⁰ Many artists believe this widespread theft of IP must be stopped or else "the Internet will devolve

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14. The band's official website, DEFLEPPARD.COM, at <http://www.defleppard.com/community/index.html>, includes links to eighty-eight fansites.
 15. See, e.g., Trapt's official website, TRAPT.COM, at <http://www.trapt.com/site.html>, lists eighteen fansites in its Links' section.
 16. See, e.g., Road Runner Records' official site, ROADRUNNERRECORDS.COM, at <http://www.roadrunnerrecords.com>, choose an artist, and look through the Links' section. For example, the label lists eleven fansites dedicated to Roadrunner band, Nickelback, but includes comments on two of the sites—<http://www.roadrunnerrecords.com/artists/Nickelback/links.aspx> (<http://listen.to/nickelback> comes "highly endorsed, 1st Nickelback site on the net" and <http://nickelbackfans.cjb.net/> comes with the endorsement "holy shit, great site. Highly recommended for the Nickelback fan (include tabs & song meanings)"). The label's comments surely lend credence to these fansites in the online Nickelback community.
 17. See, e.g., Victoria Griffith, *Net Music Is A Phishy Business*, FIN. TIMES (LONDON), July 24, 1995, at <http://www.phisharchive.com/articles/1995/london.html> (attributing much of Phish's success to the band's unorthodox marketing approaches and use of the Internet as a vehicle to promote the band). Ben Moody, cofounder of rock band Evanescence, also attributed the band's seemingly overnight success to the power of the Internet. Interview with author in Sauget, Ill. (Feb. 5, 2003). Evanescence made all of the songs from its debut album available on the Internet six months before the album's release and sold out large clubs before received radio airplay, which the members attributed to the power of the Internet. *Id.*
 18. Computeractive Staff, *supra* note 6, at <http://www.vnunet.com/features/1153618> (noting that, on fansites, "content that could be considered to be copyright infringement is rife.").
 19. See, e.g., TIFFANY > TIFFANY, at <http://www.mbreo.com/tiffany/tiffany/> (last visited on May 1, 2005) (a fansite dedicated to 1980s pop icon Tiffany that contains the acknowledgment that "[l]ike most unauthorized fan sites, photos were taken from various sources. Most photos were taken from www.tiffanymusic.com."); THE ALL-INCLUSIVE DIXIE CHICKS PAGE, at <http://www.dixie-chicks.com> (last visited on May 1, 2005) (where the Dixie Chicks fansite creator admits, "Unless otherwise noted, all other images have been lifted from various company and fan sites, with attribution in the img tag.").
 20. See, e.g., EVANESCENCE fansite, at <http://mywebpage.netscape.com/CharmedOnes13/amyleegallery.html> (where the fansite creator notes that "the pictures [were] taken from WWW.EVANESCENCE.XAPOR.COM," yet the pictures were actually taken by Annamaria DiSanto for the February 2004 issue of *Metal Edge* magazine.).

toward anarchy, rather than evolve into a powerful tool for e-commerce and individual empowerment.”²¹

Some studies, such as the Pew Internet Project Report, have demonstrated support for the IP holders’ fears.²² This report, conducted in 2000, found that 78% of the people surveyed who downloaded music online did not think the practice constituted theft.²³ Even more troubling, more than 60% of the music downloaders expressed no concerns about the music files being copyrighted.²⁴ One critic of this attitude likened it to “a mindset that holds that creators shouldn’t be compensated for their work, that all human creation is the equivalent of a Web log by a hobbyist with a day job.”²⁵

Knowing that taking copyrighted material is illegal does not seem to matter to many Internet users, according to another study.²⁶ In that 2003 survey, analysts found that 54% of the college students polled believed that even if it was illegal, downloading music and other copyrighted materials did not violate any ethics.²⁷ The surveyed students expressed opinions that their positions as fans “entitled” them to have the music even if it was obtained through illegal downloading.²⁸ They viewed the act as more like sharing

21. Shane Ham & Robert D. Atkinson, *Napster and Online Piracy: The Need to Revisit the Digital Millennium Copyright Act*, PROGRESSIVE POL’Y INST., May 1, 2000, at http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=140&subsecID=289&contentID=646 (noting that “[t]heft of intellectual property is just as wrong if done on the Internet as it is on a Xerox machine or VCR.”).
22. See, e.g., Caslon Analytics’ intellectual property guide, CASLON.COM, Apr. 2004, at <http://www.caslon.com.au/ipguide25.htm> (containing excerpts from relevant studies about Internet users’ attitudes).
23. Caslon Analytics’ intellectual property guide, *supra* note 22, at <http://www.caslon.com.au/ipguide25.htm>.
24. Caslon Analytics’ intellectual property guide, *supra* note 22, at <http://www.caslon.com.au/ipguide25.htm>.
25. Caslon Analytics’ intellectual property guide, *supra* note 22, at <http://www.caslon.com.au/ipguide25.htm>. She further opined that “[m]embers of the Net community, whether born in 1954 or 1986, will pretty much always rally to oppose censorship. But don’t expect those same Netizens to consider authorship of a work of art on the Net to be important—or to pay for online content” *Id.*
26. Norma A. Mendoza & Carolyn Garcia, *Internet Ethics: College Students Say Downloading Copyrighted Material Is Not Unethical*, Aug. 29, 2003, at http://advancement.uark.edu/news/NEWS_ARCHIVES/AUG03/DOWNLOAD.html.
27. Mendoza & Garcia, *supra* note 26, at http://advancement.uark.edu/news/NEWS_ARCHIVES/AUG03/DOWNLOAD.html.
28. Mendoza & Garcia, *supra* note 26, at http://advancement.uark.edu/news/NEWS_ARCHIVES/AUG03/DOWNLOAD.html. The authors surmised that any successful Internet-based music subscription service would need to first address this “perceptual issue of fairness.” *Id.* They cited Apple as an example of a service that had done so through its practices of charging users a nominal fee for the downloading of a single song rather than a monthly fee conditioned on usage. *Id.* The service also allows subscribers to share their downloaded songs with three other friends. *Id.* The attitudes expressed by these students has led to what one comment has termed “the era of entitlement.” Marci Hamilton, *The Era of Entitlement: What Alabama Judge Roy Moore, File*

music with friends rather than the perpetuation of outright theft across the Internet.²⁹

Against this backdrop of fans who feel entitled to use or download IP from the Internet, many IP creators have chosen legal recourse to protect their interests. Such legal actions have been taken by everyone from major sports associations³⁰ to major television production companies.³¹ Some of these major entertainment organizations originally expressed nonchalance about the use of their materials on fansites but later launched campaigns to vigilantly police such unauthorized uses.³² Understandably, this shift from passive ambivalence to aggressive enforcement has met with resistance by both fansite operators and fans who visit these sites.³³

While fans use the Internet as a means of disseminating information about their favorite bands, artists, television shows, and movies, they also use it as a public forum to air their frustrations about these clashes with IP holders. One fan described the IP creators' efforts to control their materials online by attacking fans in this way:

At the heart of all this is the old ideological battle between Free Exchange of Ideas and Free Capitalist Growth. In this corner, weighing 98 pounds: the fans who just want to pay tribute to something they love. In this corner,

'Sharers,' and the Catholic Church Have in Common, FINDLAW'S WRIT, Aug. 28, 2003, available at <http://writ.news.findlaw.com/hamilton/20030828.html>.

29. Mendoza & Garcia, *supra* note 26, at http://advancement.uark.edu/news/NEWS_ARCHIVES/AUG03/DOWNLOAD.html.
30. See, e.g., Mark Ward, *Fan Websites Caught in the Net*, Dec. 14, 2000, BBC NEWS, available at <http://news.bbc.co.uk/1/hi/uk/1070392.stm> (discussing how British football fansite operators have experienced legal problems due to the existence of fixture lists on their sites); William Slawski (posted by), DELAWOFFICE.COM, available at http://www.delawoffice.com/2002_09_01_archive.html (discussing how several fansite operators received cease-and-desist letters from the Major League Baseball Association because of content on their sites).
31. See, e.g., Mark Aaron Polger, *Graduate Student Gets Threatened With Lawsuit From Degrassi Producers*, Dec. 20, 2000, available at http://news.degrassi.ca/article.php?a_id=159; Marcus Errico, *Fox Fights 'Millenium' Fan Sites*, Nov. 16, 1996, E! ONLINE, at <http://www.eonline.com/News/Items/0,1,379,00.html>.
32. Errico, *supra* note 31, at <http://www.eonline.com/News/Items/0,1,379,00.html>.
33. For some creators, this behavior seems contradictory. George Lucas, creator of *Star Wars*, has had a love-hate relationship with fans related to Internet issues. See ROSEMARY COOMBE, *THE CULTURAL LIVES OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 128 (Duke University Press 1998). As one author noted, "[i]nterestingly, *Star Wars* screenwriter George Lucas 'plundered' the work of Joseph Campbell and the myths of the collective domain. Despite such an overt and acknowledged reliance on others for his material, Lucas himself has used lawyers to intimidate *Star Wars* fans who distribute their own unauthorized fanzines." *Id.* For an even more in-depth discussion of these types of precarious relationships between copyright holders and television fans, see HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* (Routledge 1992).

weighing 5,000 pounds: the corporate monolith that sees such tribute not as a compliment, not as free advertisement for their wares, not as a reassuring sign that their product is popular, but as a threat to their bottom line Yes, artists should be paid for their work, yada yada yada. But I don't think posting a screengrab of Giles wearing a sombrero is going to take food out of Anthony Stewart Head's mouth.³⁴

Despite these widespread attempts to explain the issues from the fans' point of view, IP holders continued to step up their efforts to police their creative properties on the Internet. One of the earliest clashes between a band and its Internet fanbase occurred in 1997 when the rock band Oasis decided to pursue legal action against webmasters who hosted fansites where Oasis' music and lyrics were prominent features of the sites.³⁵ The move prompted widespread dissent among Oasis fans who immediately organized an Internet-based initiative, including a boycott of the band.³⁶

Other artists followed Oasis' lead, asserting various claims against fansite operators. In 1999, The Eagles filed suit against some of the band's fansite creators whose website addresses were domain names similar to the band and its members.³⁷ In that action, The Eagles accused their fans of infringing the band's trademark rights.³⁸ Metallica, the rock band that led the battle against file-sharing services, alleged more than trademark violations against one long-time fansite operator who boasts "the biggest and most visited Metallica fan site."³⁹ The band alleged both trademark and copyright violations along with the promotion of illegal music trading and publicity rights violations.⁴⁰ After telling all to the fans, the fansite operator removed the materials and continues to operate the popular site five years after the dispute occurred.⁴¹

By their very nature, bands are probably more susceptible to fans infringing their copyrighted materials because of the popularity of music downloading on the Internet. Some fansite operators offer more than just music files on their sites; some go even farther and offer lyrics, tablatures,

34. *There Can Only Be One Copyrighted Slayer*, at <http://www.angelfire.com/movies/oc/tirade/slayer.html> (last visited on May 3, 2005).

35. Special Report, *supra* note 3, at <http://www.thei.aust.com/bsite/asp2.html>.

36. Special Report, *supra* note 3, at <http://www.thei.aust.com/bsite/asp2.html>.

37. The Eagles, *Recent News*, ROCKONTHE.NET.COM, Oct. 1999, at http://www.rockonthenet.com/artists-e/eagles_main.htm.

38. The Eagles, *supra* note 37, at http://www.rockonthenet.com/artists-e/eagles_main.htm.

39. See ENCYCLOPEDIA METALLICA, at <http://www.encycmet.com> (on file with author); for information about the counts alleged against the fansite operator, see <http://www.encycmet.com/news/2000-02-10b50.shtml>. The fansite operator said the letter from Metallica's attorneys was thirty-five pages long. *Id.*

40. ENCYCLOPEDIA METALLICA, *supra* note 39, at <http://www.encycmet.com>.

41. See generally ENCYCLOPEDIA METALLICA, *supra* note 39, at <http://www.encycmet.com>.

wallpaper, buddy icons, and even videos.⁴² This can cross the line even to those artists that support the Internet and its promotional power.

One such artist, who has a reputation for being a “longtime artists’ rights advocate” but has not hesitated to go after Internet entities who cross the line, is Prince.⁴³ When Metallica led the charge against Napster, a popular music file-sharing service, Prince openly expressed his support of Napster during its legal battles with the record industry.⁴⁴ “From the point of view of the music lover, what’s going on can only be viewed as an exciting new development in the history of music,” said Prince in a statement released on his official website.⁴⁵ The artist further stated that “fortunately for (the music lover), there does not seem to be anything the old record companies can do about preventing this evolution from happening.”⁴⁶

Ironically, Prince made these statements the year following his own legal crusade against several online entities, which included several production companies and nine websites.⁴⁷ The artist accused one online production company of the unauthorized use of his likeness and trademarked symbol and copyright infringement via distributing copies of his lyrics online.⁴⁸ He accused another online production company of using its site to sell photographs and biographies about him without his permission.⁴⁹ He further

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42. See, e.g., EVANESCENCE FALLEN fansite, at <http://evanescence.xaper.com> (last visited on Apr. 23, 2005) (fansite offers lyrics, tabs, audios, videos, wallpaper, buddy icons, cd covers, etc.); BRING ME TO LIFE fansite, at <http://www.bringmetolife.com> (last visited on Apr. 23, 2005) (fansite offers photographs, videos, fonts, etc.); CRIMSON REGRET fansite, at www.crimson-regret.com (last visited on Apr. 14, 2005) (fansite contains animated avatars, video clips, fan fiction, fan art, and greeting cards).
 43. *Prince sues website over concert downloads*, ANANOVA.COM, at http://www.ananova.com/news/story/sm_680203.html (last visited on May 7, 2005) (on file with author).
 44. Reuters, *Prince Really Digs His Napster*, WIRED.COM (Aug. 9, 2000), at <http://wired-vig.wired.com/news/culture/0,1284,38142,00.html>. Metallica has since gone to great lengths to repair the bad publicity they received for leading the online music file-sharing battle. To encourage album sales of their latest release, the band included a code in each CD, which allowed the fans who bought the CD access to a special website that featured a “treasure trove of rare and unreleased music.” Walter Dawkins, *Metallica joins the digital age but for a price*, JOURNAL NEWS, LIFE & STYLE, June 27, 2003, available at 2003 WL57946189. Fans were able to download “music from three live Metallica concerts, including about 60 songs and six hours of music.” *Id.*
 45. Reuters, *supra* note 44, at <http://wired-vig.wired.com/news/culture/0,1284,38142,00.html>.
 46. Reuters, *supra* note 44, at <http://wired-vig.wired.com/news/culture/0,1284,38142,00.html>.
 47. *Prince (As He Was Formerly Known) Sues Net Sites*, Bytes In Brief, Issue 22 (Apr. 1999), at http://www.senseient.com/bytesinbrief/bytes.asp?page=April_1999.htm (describing three federal lawsuits the artist filed against several online entities, which claimed various alleged violations).
 48. *Prince (As He Was Formerly Known) Sues Net Sites*, *supra* note 47, at http://www.senseient.com/bytesinbrief/bytes.asp?page=April_1999.htm.
 49. *Prince (As He Was Formerly Known) Sues Net Sites*, *supra* note 47, at http://www.senseient.com/bytesinbrief/bytes.asp?page=April_1999.htm. The company, Uptown Productions, has produced a fanzine since 1991 about Prince, which it sells via its website. See

sought an injunction against nine websites that allowed visitors to download his pictures and bootlegged music files.⁵⁰

Unlike many online entities threatened with legal action, not all of Prince's fanzine and fansite operators removed the alleged infringing materials and faded quietly into the Internet sunset.⁵¹ One of the fanzine operators, Uptown Productions, decided to fight back and use its website as a promotional tool to give details about the battle between itself and the artist to which it paid homage.⁵² The website operators posted details about the lawsuit including correspondence from Prince's legal representatives so that fans could watch the legal drama unfold throughout its duration.⁵³

The fanzine fought back in the courtroom as well as on the Internet. Uptown Productions' legal counsel filed a counterclaim against Prince, alleging that he was "abusing the legal process to improperly shut down an independent publication to clear the way for an official fanzine which was understood to be in the works."⁵⁴ When the lawsuit was first filed, Prince released a statement that consisted of a single word—"one"—indicating to some that "the ultimate goal is to have only one sanctioned outlet to the world."⁵⁵ As one Prince website operator said, "The Artist wants to kill competition and completely control how he is perceived."⁵⁶ The lawsuit was ultimately settled with the fanzine continuing its publications largely unchanged except for the omission of discographies of bootlegged recordings it once included in its

Uptown Productions' official website at <http://www.uptown.se/2005/home.shtml>.

50. *Prince (As He Was Formerly Known) Sues Net Sites*, *supra* note 47, at http://www.senseient.com/bytesinbrief/bytes.asp?page=April_1999.htm.
51. *See Magazine, Sued By Former "Prince," Says It Will Fight Back To Defend Freedom Of Speech*, UPTOWN MAG. Press Release, Mar. 8, 1999, at http://www.uptown.se/2005/lawsuit_press_990308.shtml. The press release cited two online entities were surrendering to the threat of legal action while another chose the opposite course of fighting back. *Id.* An Australian fanzine shut down in 1997 after receiving notice from Prince's representatives that "they reserved the right to 'discuss' his work and even his merchandise." *Id.*
52. *Magazine, Sued By Former 'Prince,' Says It Will Fight Back To Defend Freedom Of Speech*, *supra* note 51, at http://www.uptown.se/2005/lawsuit_press_990308.shtml.
53. *See The victory is sho 'nuff*, UPTOWN MAG., at <http://www.uptown.se/2005/lawsuit.shtml> (last visited on Apr. 22, 2005). Other fansite creators have used this tactic when threatened with l action. *See Cease And Desist!*, THE ALL-INCLUSIVE DIXIE CHICKS PAGE, at <http://www.dixie-chicks.com/cease.shtml> (last visited on May 1, 2005).
54. David J. Magdziarz, *Call The Law, Will The Defendant Please Rise, Freedom Agrees With Us All, The Uptown Lawsuit*, at http://www.uptown.se/2005/lawsuit_freedomagrees.shtml (last visited on Apr. 22, 2005).
55. *Magazine, Sued By Former 'Prince,' Says It Will Fight Back To Defend Freedom Of Speech*, *supra* note 51, at http://www.uptown.se/2005/lawsuit_press_990308.html.
56. *Magazine, Sued By Former 'Prince,' Says It Will Fight Back To Defend Freedom Of Speech*, *supra* note 51, at http://www.uptown.se/2005/lawsuit_press_990308.shtml.

publications.⁵⁷ The failure to score a significant victory in court did not deter Prince from later taking legal action against another fansite operator.⁵⁸

As the popularity of Internet fandom continues to flourish, these clashes between IP holders and fansite operators will continue to increase. Although many artists choose not to pursue legal action against their fans, legal recourse remains an available option to those artists who disapprove of the use of their materials on fansites.

III. EXISTING LAW AND LEGAL BACKGROUND

Clashes between IP holders and their cyber fans are bound to occur given the speed and ease with which copyrighted and trademarked materials can be copied, displayed, altered, and distributed over the Internet. As one commentator noted, “[T]he recording and music publishing industries cannot rest easily, given the predilections of people who come from a culture that proceeds from the premise that everything on the Internet ought to be free (because of the origins of the Internet as a forum for the interchange of [research and development]).”⁵⁹ Because of some fans’ cultural attitude of entitlement, many IP holders view “fans as trespassers rather than collaborators.”⁶⁰

With the judicial trend leaning firmly toward viewing IP issues in the cyber world in the same manner as in the real world, IP holders likely would prevail if they chose to enforce their rights on the Internet. After all, as one commentator noted, “Piracy is theft. Stealing is wrong whether it takes place on the high seas, in your local Wal-Mart, or over the Internet.”⁶¹ The current relationship between IP creators and their Internet fan webmasters has been described as “an uneasy dance in which conglomerates’ desire for maximum circulation of content chafes uncomfortably against fans’ resourcefulness in

57. See “Freedom Agrees With Us All, You See”: Prince Drops Suit, Uptown Will Continue Publication, UPTOWN MAG. Press Release, July 29, 1999, at http://www.uptown.se/2005/lawsuit_press_990729.shtml.

58. *Prince Sues Owner of Me’Shell Ndegeocello Website Over Prince Bootlegs*, AUDIO REVOLUTION.COM, Oct. 1, 2002, at <http://www.audiorevolution.com/news/1002/01.prince.shtml>. The website creator ran a fansite for another artist that contained links to other websites that contained Prince’s music available for downloading. *Id.* The website operator said, “One of my favorite artists is coming after me for promoting him on my web site . . . For him to seek \$150,000 per song to try to ruin me for doing nothing more than promoting him is . . . overdoing it.” *Id.*

59. Don Beiderman, *Copyright Trends: With Friends Like These*, 17 ENT. & SPORTS LAW 3, 4 (Fall 1999).

60. Murray, *supra* note 3, at 18.

61. Andrew West, *Pirates of the Internet*, CAPITALISM MAG., June 30, 2000, available at <http://capmag.com/article.asp?ID=604>.

eluding the prescribed legal and economic frameworks for the circulation of that content.”⁶² This uneasy dance is predominantly choreographed by the IP holders due to their legal advantages as the owners of all rights to the materials fans seek to use on their websites.

A. Legal Issues Intellectual Property Holders Could Raise

IP creators can assert a number of claims against fansite operators who use content owned predominantly by others. One legal claim could be copyright infringement. The Copyright Act guarantees IP creators a bundle of exclusive rights that include reproduction, adaptation, performance, display, and distribution.⁶³ All of these exclusive rights granted to the IP creators can possibly be violated by fansite creators.

Copyright infringement would be easily found against fansite operators because courts have found that copying occurs when protected material is transferred to a computer’s memory.⁶⁴ Most fansites include elements, such as photographs, song lyrics, and album art, which are copyrighted to either the bands or their record labels.⁶⁵ Some of these include unauthorized derivative works, such as wallpaper, buddy icons, and winamp skins, created by other fans.⁶⁶ Courts have found that posting copyrighted artwork on a website violates the copyright holder’s public distribution rights,⁶⁷ and unauthorized derivative works, such as fan fiction, fan-made art, altered photographs, screen savers, and buddy icons, would not be eligible for copyright protection themselves.⁶⁸ Even copying a symbol, adopted by an artist in lieu of his name, has been asserted as copyright infringement.⁶⁹ Internet Service Providers can

62. Murray, *supra* note 3, at 9.

63. Copyright Act, 17 U.S.C. § 106 (2000).

64. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

65. See, e.g., EVANESCENCE FALLEN fansite, at <http://evanescence.xaper.com> (last visited on Apr. 23, 2005) (site offers lyrics, tabs, audios, videos, wallpaper, buddy icons, cd covers, etc.); BRING ME TO LIFE fansite, at <http://www.bringmetolife.com>, which offers photographs, videos, fonts, etc.; DEF LEPPARD SATELLITE OF LOVE fansite, at <http://www.defleppardsol.com>, which offers photographs, videos, and audio files.

66. See, e.g., EVANESCENCE FALLEN fansite, at <http://evanescence.xaper.com> (last visited on Apr. 23, 2005) (fansite contains lyrics, tabs, audios, videos, wallpaper, buddy icons, and cd covers).

67. Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs., 983 F. Supp. 1167, 1179 (N.D. Ill. 1997) (finding liability for copyright infringement lies with the persons who cause the display or distribution of the infringing material); MAI Sys. Corp., 991 F.2d at 518 (holding that when material is transferred to a computer’s RAM, copying has occurred; in the absence of ownership of the copyright or express permission by licence, such an act constitutes copyright infringement).

68. Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1174 (C.D. Cal. 1989).

69. Magazine, *Sued By Former ‘Prince,’ Says It Will Fight Back To Defend Freedom Of Speech*, *supra* note 51, at http://www.uptown.se/2005/lawsuit_press_990308.shtml.

also be held liable for copyright infringement that occurs on sites that they host.⁷⁰

Fansite operators' linking practices can also land them in hot water with IP owners. Providing links to other sites that contain infringing materials and encouraging users to visit these sites to download protected works has also been viewed as contributory infringement.⁷¹ Framing official sites within fansites could also violate the legal rights of the IP owners.⁷²

In addition to copyrighted materials, trademarked logos are often prominently displayed on fansites.⁷³ One Metallica fansite operator received a cease-and-desist letter from the band's attorneys due to his use of the Metallica logo on the front page of his website.⁷⁴ Domain names that are similar to trademarks can also prompt disputes.⁷⁵ Ironically, fansite creators that create derogatory sites that include Uniform Resource Locators like "sucks.com" have found some protection from trademark infringement claims.⁷⁶ IP owners could also use the Lanham Act as a basis to allege false designation of source or authorization, dilution, or passing off under certain circumstances.⁷⁷

70. See generally *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

71. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999).

72. See generally *Futuredontics, Inc. v. Applied Anagramic, Inc.*, 152 F.3d 925 (9th Cir. 1998).

73. See, e.g., *EVANESCENCE FALLEN fansite*, at <http://evanescence.xaper.com/> (last visited on Apr. 23, 2005); *THE DEFLEPPARD FREQUENCY*, at <http://www.defleppardfrequency.com/> (last visited on May 11, 2005).

74. See *ENCYCLOPEDIA METALLICA*, *supra* note 39, at <http://www.encycmet.com>; for information about the counts alleged against the fansite operator; see <http://www.encycmet.com/newsletter/Detailed/50.shtml>.

75. See, e.g., *The Eagles*, *supra* note 37, at http://www.rockonthenet.com/artists-e/eagles_main.htm (on file with author); Murray, *supra* note 3, at 15.

76. *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (noting that "although economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to the source, even when it involves criticism of a business."); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998) (noting that the defendant was simply "exercising his right to publish critical commentary about Bally."). As one commentator noted, "Ironically, the fan sites that exist almost solely to laud and promote a particular product have fewer defenses under current law than those slinging arrows." Harmon, *supra* note 5, available at 1996 WL 12755513.

77. The Lanham Act has also been invoked to claim initial interest confusion from a domain name use of a trademark. See *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999). As one commentator noted, "[M]edia corporations demonstrate increasing willingness to enforce World Intellectual Property Organization (WIPO) rulings to prosecute even non-commercial fan uses of trademarks and copyrights; and trademarks have predominantly eclipsed copyright as the basis for such actions, given trademark law's narrower fair use provisions and its lack of emphasis on the rights of the creator, in contrast to copyright law." Murray, *supra* note 3, at 13.

Entertainers, such as bands, could also assert publicity rights violations against fansite operators. In recent years, courts have expanded the scope of publicity rights to include everything from personal attributes such as voice⁷⁸ to a television set associated with a particular celebrity.⁷⁹ Despite the Supreme Court's ruling in *Zacchini v. Scripps-Howard Broadcasting Co.*⁸⁰ that the broadcasting of an entertainer's entire act violates the performer's publicity rights, some websites host video clips that do just that.⁸¹

Fansite creators have also sparked the ire of IP owners through the unauthorized distribution of music.⁸² Under current precedent, IP creators have an arsenal of legal weapons that they could use against their Internet fans. However, fansite creators would likely assert several defenses to their creative use of others' materials to pay homage to their favorite bands.

B. Defenses Fansite Operators Could Assert

Fansite creators would possibly assert a variety of defenses although these defenses might not necessarily trump the exclusive rights granted to IP owners via copyright and trademark laws. Copyright law grants creators limited exclusive monopolies on their creations in the form of rights of reproduction, display, distribution, performance, and adaptation.⁸³ Fansite creators engage in unauthorized copying through their acts of scanning in photographs from magazines and print media for use on their fansites, downloading pictures and music files from other sites, and typing up lyrics to the band's songs. By placing these copyrighted materials on their fansites, their creators violate the copyright holders' rights of display and distribution. Video and music files featured on fansites also implicate the IP holders' rights of performance. Finally, fan fiction, fan art, and the manipulation of original photographs and album art violate the creators' adaptation rights and create unauthorized derivative works that do not qualify for protection on their own.

78. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

79. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

80. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577-78 (1977).

81. *See, e.g.*, MOTORCYCLEJUMPERS.COM fansite, at <http://www.motorcyclejumpers.com/thirteenthpage.html> (hosting video footage of daredevil Robbie Knievel's entire act); EVANESCENCE FALLEN fansite, at <http://evanescence.xaper.com> (hosting live performances, taped interviews, and videos of rock band Evanescence).

82. *See, e.g.*, *Prince Sues Owner of Me'Shell Ndegeocello Website Over Prince Bootlegs*, *supra* note 58, at <http://www.audiorevolution.com/news/1002/01.prince.shtml>; *see Cease And Desist!*, *supra* note 53, at <http://www.dixie-chicks.com/cease.shtml>.

83. Copyright Act, 17 U.S.C. § 106 (2000).

Fansite creators also implicate trademark law via their unauthorized use of logos and other trademarked items on their websites. Fansite creators would seek protection under the most obvious defenses—implied license, freedom of expression, and fair use. The implied license defense basically would involve fansite creators arguing that the IP owners gave fans implied licenses to use protected materials when the owners made these materials available on the Internet. While this argument has gained the support of at least one commentator,⁸⁴ most courts would quickly find no implied license in light of the IP owners' exclusive rights to choose how, when, and where to display and reproduce these materials.

Protecting speech and expression about celebrities over the interests of IP owners provides a defense for fansite creators that has been sanctioned in the courts, especially in the context of biographies.⁸⁵ One biographer successfully asserted the First Amendment defense against an alleged publicity rights violation.⁸⁶ Even when biographers borrow copyrighted materials and use them within their works without the owners' permission, courts often refuse relief to the IP owners on First Amendment grounds.⁸⁷ However, even biographers must tread carefully because using the materials extensively or using the most valuable parts of the original works can be viewed as infringement.⁸⁸

Fair use would be the most valid defense fansite creators could assert in the face of infringement actions. Fair use allows for copying that would

84. Greguras, *supra* note 13, available at <http://www.batnet.com/oikoumene/BroadbandLegal.html> (on file with author). This commentator opined that "placing a product online with knowledge of permissive attitudes toward unauthorized copying and alteration may result in a grant of an implied license to users of online media to exercise one or more of the copyright owner's exclusive rights therein . . ." *Id.*

85. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (N.Y. App. Div. 1980).

86. *Frosch*, 427 N.Y.S.2d 828. The New York appellate court found "the book [was] a literary work and not simply a disguised commercial advertisement for the sale of goods or services." *Id.* at 829.

87. See, e.g., *Rosemont Enters., Inc.*, 366 F.2d 303 (finding the defendant's First Amendment rights and the public's interest in Howard Hughes outweighed the copyright holder's interests); *Monster Communications, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (noting that "too narrow a view of the fair use defense could materially undermine the ability of other Ali biographers to tell, in motion picture or perhaps still photographic form, an important part of his story."); *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001) (finding a use that "served to enrich the biography" was fair because it "was not shown to recreate the creative expression . . . [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business.").

88. *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (finding the unauthorized use of photographs, video clips, and music excerpts violated the copyright owners' rights).

otherwise be considered infringement.⁸⁹ If the unauthorized use fulfills an important purpose, such as “criticism, comment, news reporting, teaching . . . scholarship, or research . . . ,”⁹⁰ the Copyright Act exempts those works from being considered infringements. However, even works that fulfill some or all of these enumerated purposes do not automatically qualify as non-infringing just because the works comment on a famous person.⁹¹

The fair use doctrine, judicially created but now codified in the copyright statute, allows some unauthorized copying to be deemed acceptable rather than illegal.⁹² When evaluating fair use, Congress directed courts to examine:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for and value of the copyrighted work.⁹³

The purpose and character analysis of the fair use doctrine has been subdivided into three elements,⁹⁴ although courts do not always specifically discuss each element.⁹⁵ The first element involves evaluating whether the new work fulfills any of the elevated purposes set forth in the Copyright Act’s preamble.⁹⁶ Next, whether the new work is produced for a nonprofit,

89. Fair use is evaluated under four factors enumerated in the Copyright Act. Copyright Act, 17 U.S.C. § 107 (2000). Fair use remains an available defense in trademark actions as well but the scope of fair use is much narrower in the trademark context. Murray, *supra* note 3, at 13. Entertainment corporations have shown an increasing reliance on trademark actions to control fans’ uses of trademarks and copyrights even when the fans are not profiting commercially from their ventures. *Id.*

90. 17 U.S.C. § 107. For examples of courts applying these statutory exemptions to biographies see Hofheinz, 146 F. Supp. 2d at 446, and *Monster Communications, Inc.*, 935 F. Supp. at 493–94.

91. See generally *Passport Video*, 349 F.3d 622 (9th Cir. 2003) (protecting copyright owners’ materials from being used without permission in a video biography about Elvis Presley).

92. 17 U.S.C. § 107.

93. *Id.* Congress intended the list to be illustrative not exhaustive. *Id.*

94. See, e.g., Lloyd L. Rich, *How Much of Someone Else’s Work May I Use Without Asking Permission?: The Fair Use Doctrine, Part I*, THE PUBLISHING LAW CENTER, 1996, at <http://www.publaw.com/work.html>; Barbara Weil Gall, *What Is Fair Use in Copyright Law?*, GIGALAW.COM, Dec., 2000, at <http://www.gigalaw.com/articles/2000-all/gall-2000-12-all.html> (both identifying the purpose and character analysis as broken into the subelements of fulfilling preamble purposes, examining the commercial or noncommercial nature of the new work, and analyzing the degree of transformativeness of the new work).

95. Courts generally only discuss the relevant subelements in relation to the facts in each case. See also Hofheinz, 146 F. Supp. 2d at 446 (discussing the preamble purposes and commercial v. noncommercial distinction); *Monster Communications, Inc.*, 935 F. Supp. at 493–94 (discussing the preamble purposes and the degree of transformation); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584, 587 (1994) (discussing first the commercial versus noncommercial distinction and the preamble purposes and later addressing the degree of transformation).

96. See, e.g., Rich, *supra* note 94, at <http://www.publaw.com/work.html>; Gall, *supra* note 94, at <http://www.gigalaw.com/articles/2000-all/gall-2000-12-all.html>.

educational purpose or for commercial gain must be examined.⁹⁷ Finally, courts must look at whether the new work has effectively transformed the original work into a completely new expression.⁹⁸ The other three fair use factors are evaluated as stated without being subdivided into separate elements.⁹⁹

Commercial gain by the alleged infringer does not always make courts lean in favor of the IP owners, especially if the subsequent copier's use of the copyrighted materials could be viewed as transformative.¹⁰⁰ Basically, the new work should transform the old work by doing something more than just copying the original; instead, it must add something new, creative, and valuable.¹⁰¹ Courts have found that this transformation may actually "stimulate a market for the original rather than replace it."¹⁰² As the Supreme Court noted, transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."¹⁰³ If a new work can be properly viewed as transformative, its commercial nature becomes less significant.¹⁰⁴

The amount and substantiality factor involves both a quantitative and a qualitative inquiry.¹⁰⁵ As the Second Circuit noted, no exact measure of how much copying exceeds fair use has ever been articulated.¹⁰⁶ If the use of a small portion of the original work takes the "heart" of the work, it will not be deemed fair.¹⁰⁷

97. Rich, *supra* note 94, at <http://www.publaw.com/work.html>; Gall, *supra* note 94, at <http://www.gigalaw.com/articles/2000-all/gall-2000-12-all.html>.

98. Rich, *supra* note 94, at <http://www.publaw.com/work.html>; Gall, *supra* note 94, at <http://www.gigalaw.com/articles/2000-all/gall-2000-12-all.html>.

99. Rich, *supra* note 94, at <http://www.publaw.com/work.html>; Gall, *supra* note 94, at <http://www.gigalaw.com/articles/2000-all/gall-2000-12-all.html>.

100. *See, e.g., Campbell*, 510 U.S. at 584 (if commercial nature alone defeated fair use, it "would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107."); *Video-Cinema Films, Inc. v. CNN, Inc.*, No. 98 CIV. 7128IBSJ, 2001 WL 1518264, at *6 (S.D.N.Y. 28, 2001) (advising courts to examine "whether the new work will be used for a purpose favored by the statute rather than Defendants' status as a for-profit entity").

101. *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001).

102. *Id.*

103. *Campbell*, 510 U.S. at 579.

104. *Id.* The degree of transformation in the new work also is relevant in the First Amendment inquiry because the First Amendment does not seem to provide an affirmative defense for mere copying without adding new creative expression. *See Estate of Elvis Presley v. Russen*, 531 F. Supp. 1339, 1359 (D.N.J. 1981).

105. *Campbell*, 510 U.S. at 586.

106. *New Era Publ'ns Int'l ApS v. Carol Publ'g Group*, 904 F.2d 152, 158 (2d Cir. 1990).

107. *Campbell*, 510 U.S. at 587. The heart of the work is best described as "the key informational or creative component that serves as a substitute for the original." *Video-Cinema Films, Inc.*, 001 WL 1518264, at *8.

Fansite creators should tread carefully before assuming that fair use will protect their website creations. At least one commentator has noticed a trend of narrowing fair use defenses in the context of use of copyrighted and trademarked materials on the Internet.¹⁰⁸ In the contested waters of the Internet, fans doggie paddle around IP owners, and a balance should be struck so both can remain afloat on the World Wide Web.

IV. ANALYSIS

A. The Culture of the Internet and the Potential for Fan Backlash

Over time, technological changes have often prompted disputes between IP owners and members of the general public. The Internet joins the company of other inventions, such as the copying machine and the videocassette recorder, as another example of a technological change that has altered the way we all think and feel about copying. As one commentator stated, “The story of copyright law in the twentieth century has been the process of expanding, lengthening, and strengthening the ill-fitting [copyright] law to accommodate these changes.”¹⁰⁹ The most crucial difference between the Internet and other earlier inventions that allowed copying is the speed and ease with which copying, display, and distribution can occur. As one commentator noted:

The riddle is this: if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?¹¹⁰

The nature of the Internet thus plays a tremendous role. As one commentator explained, “digital formats collapse the distinction between using material and copying material . . . [d]igital distribution allows a higher level of regulation

108. Murray, *supra* note 3, at 13. Although one commentator has argued that “the scope of fair use permitted for a product online may prove to be broader than the fair use that would be permitted for the same work in traditional media.” Greguras, *supra* note 13, available at <http://www.batnet.com/oikoumene/BroadbandLegal.html>.

109. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 4 (New York University Press 2001). The author criticized copyright law's development, saying “the law now protects the producers and taxes the consumers. It rewards works already created and limits works yet to be created.” *Id.*

110. John Perry Barlow, *Selling Wine Without Bottles: The Economy on the Global Net*, at <http://www-frd.fsl.noaa.gov/~moninger/NOAATech2002/WineWithoutBottles.html> (on file with author).

than we ever imagined.”¹¹¹ Beyond the speed and ease of using the Internet to disseminate information, clashes with fansite creators are also harmful to the IP holders for several other reasons. Internet fan communities are often tight-knit associations, with some facilitating daily interactions with large numbers of fans.¹¹² Additionally, some of the fansite creators hold a great deal of power when it comes to influencing other fans.¹¹³ When these clashes give birth to fan-based initiatives to fight back against the IP holders, the resulting damage from the backlash can be extremely difficult to repair.¹¹⁴

Some commentators express doubts that the level of distribution explains the current clashes between IP owners and fansite creators. Renowned media analyst Henry Jenkins suggested that the heart of the problem lies in the expansive rights copyright and trademark holders have gained over the years, including the broadened scope of materials that can be protected and the increased duration of copyright terms.¹¹⁵ He suggested that “[c]ontemporary Web culture is the traditional folk process working at lightning speed on a global scale. The difference is that our core myths now belong to corporations, rather than the folk.”¹¹⁶ Other critics agree with the conclusion that IP law has evolved to tip too sharply in favor of the “haves.”¹¹⁷ One author concurred with many fansite creators’ belief that “[c]opyright should not be meant for Rupert Murdoch, Michael Eisner, and Bill Gates at the expense of the rest of

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111. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 182 (2001). This collapse of these actions into a single act has allowed enough regulation that the commentator quipped, “Soon we may have to apply for a license to listen or read, and the rule of law will no longer apply. America Online may be the cop, jury, and judge in matters of copyright.” *Id.*
 112. Erika S. Koster and Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, THE COMPUTER LAW., xlvi, Jan. 1998.
 113. Koster & Shatz-Akin, *supra* note 112, at xlvi. As Marvel studios chief Avi Arad said, “used to hate the Internet. I thought it was just a place where people stole our products. But I see how influential these fans can be when they build a consensus, which is what we seek. I now consider them filmmaking partners.” Scott Bowles, *Fans have the muscle to shape the movie*, USA TODAY, June 19, 2003, available at http://www.usatoday.com/tech/news/2003-06-19-movies-cover_x.htm. As the article noted, a handful of fansite creators “wield cachet in Hollywood” and studios that once found them a threat now fly them to premieres and give them exclusives to help with promotions. *Id.*
 114. Koster & Shatz-Akin, *supra* note 112, at xlix. As the commentators noted, “Tracking down all the outlets where fans congregate is nearly impossible in the constantly changing Internet, and newsgroup and chatroom participants don’t seek out the ‘other side of the story’ when they attack a company or person.” *Id.*
 115. Henry Jenkins, *Digital Land Grab*, MASS. INST. OF TECH. ALUMNI ASS’N TECH. REV., (Mar./Apr. 2000), available at <http://www.whoosh.org/jenkins.txt>.
 116. Jenkins, *Digital Land Grab*, *supra* note 115, available at <http://www.whoosh.org/jenkins.txt>.
 117. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 5 (2001).

us.”¹¹⁸ Despite these opposing views, at least some of the conflict between IP owners and fansite creators exists because of the massive distribution that is possible over the Internet.

In direct conflict with this massive digital distribution are the users’ attitudes toward copyright compliance. The atmosphere of the cyber world has been described as “decentralized, unregulated and anarchic . . . [m]any of its users have a cultural belief that content placed on the Internet should be available without charge for use, copying and alteration.”¹¹⁹ As one online publisher noted, “Fan sites are, overwhelmingly, the equivalent of placing posters in your room, stickers on your locker or notebook, or pictures on your refrigerator. The Internet is the means by which you can invite others into your room or school or kitchen.”¹²⁰ Thus, fansites simply allow fans to share their interests with others globally rather than just locally.¹²¹

Along with cyber fans’ renegade attitude toward copying, users also demonstrate a general misunderstanding of copyright law.¹²² Some fans believe a show or a celebrity has to obtain a certain stature before copyright will protect their creations from infringement.¹²³ Multitudes of fans believe fan fiction, altered photographs, and fan art enjoys protection from infringement claims.¹²⁴ As one author noted, “Copyright myths have as much power as copyright laws.”¹²⁵ One author suggested this “widespread public

118. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 5 (2001).

119. Greguras, *supra* note 13, available at <http://www.batnet.com/oikoumene/BroadbandLegal.html>.

120. Bret Rudnick, *Editor’s Page*, WHOOSH!, Apr. 16, 2000, at <http://www.whoosh.org/issue44/editor44.html> (on file with author).

121. Rudnick, *supra* note 120, at <http://www.whoosh.org/issue44/editor44.html>.

122. See, e.g., *The Price of Fandom*, Oct. 31, 2001, available at <http://www.blisspix.net/bts/fandom.html> (on file with author); VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 18 (2001). This trend may change in the future now that some cyber fans are launching websites that explain the law regarding intellectual property rights and the use of copyrighted and trademarked materials on fansites. See *The Bringers: Fighting For The Rights Of Fans Online*, THE BRINGERS website, at <http://web.ukonline.co.uk/bringers/temp/faq.html> (last visited on May 2, 2005). However, some of the information could be regarded as less than accurate. See *Guidelines*, DEFENSE AGAINST THE DARK ARTS website, at <http://www.dprophet.com/dada/guidelines.html> (last visited on Feb. 2, 2005). The fansite defense organization advises fans to include disclaimers, a link to the rest of the fansite, and a link to the artist’s official site. *Id.* It tells cyber fans this final item is crucial because “[n]o one can get mad if you if they know you’re just a detour.” *Id.*

123. *The Price of Fandom*, *supra* note 122, available at <http://www.blisspix.net/bts/fandom.html>.

124. *The Price of Fandom*, *supra* note 122, available at <http://www.blisspix.net/bts/fandom.html>.

125. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 5 (2001). IP owners enjoy significant advantages over fans in relation to the ability to engage in legal battles. *Id.* at 5–6. As one author noted, “Organizations of librarians and scientists have taken stands against odious policy proposals, but they are matched against lawyers for Microsoft and Disney. It is not a fair fight.” *Id.* See also Jenkins, *Digital Land Grab*, *supra* note

perception that copyright law protects ideas, information, and data has a chilling effect on journalism, scholarship, analysis, criticism, and debate.”¹²⁶

However, this global reach of fandom can also be beneficial to IP creators because these dedicated fans often provide an extensive and free promotions network.¹²⁷ IP holders’ interests are best served when they view their fans as “collaborators” rather than “trespassers.”¹²⁸ The Internet allows IP producers the ability to keep in close contact with their fans without geographic boundaries and provides an easy way to reward their dedication in exchange for free marketing.¹²⁹

For bands, the Internet provides a promotional tool of massive proportions—offering them a way to give away some music in exchange for reaching potential fans all over the world that traditional marketing strategies may have missed. Some bands have used such grassroots campaigns to build formidable fanbases—a strategy one author termed “the Grateful Dead business model.”¹³⁰ By embracing the fan community, IP creators could effectively reach and assemble a massive audience of fans who are willing to both buy and promote their creative products.

However, this massive cyber fan community can explode into a publicity nightmare in record speed, considering the truth of the old adage “there’s a fine line between love and hate” on the Internet.¹³¹ The most ardent fans can

115, available at <http://www.whoosh.org/jenkins.txt> (echoing Vaidhyathan’s sentiments).

126. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 18 (2001).
127. Although one commentator has suggested that these fan networks do not really work for free. Barlow, *supra* note 110, at <http://www-frd.fsl.noaa.gov/~moninger/NOAAtech2002/WineWithoutBottles.html>. In explaining the “collective ‘volunteer’ work” that cyber fans do, he noted, “Its denizens are not working for ‘nothing,’ as is widely believed. Rather they get paid in something besides money. It is an economy which consists almost entirely of information.” *Id.*
128. Murray, *supra* note 3, at 18.
129. Computeractive Staff, *supra* note 6, at <http://www.vnunet.com/features/1153618>. This is usually done through offering fans exclusive content or news tidbits released to fans before the general public. *Id.* Some media producers are changing their view about Internet fans and demonstrating an increasing willingness to disseminate usually highly guarded production information and intellectual property (IP) in the interests of sophisticated viral marketing and audience development schemes.” Murray, *supra* note 3, at 8.
130. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 179–80 (2001). The idea is relatively simple—[g]ive away free music to build a loyal following, establish a brand name, and charge handsomely for the entertainment package.” *Id.*
131. However, some executives view the backlash as less threatening than the massive infringement. As Mitch Bainwol, the chief executive of the Recording Industry Association of America (RIAA), noted when discussing the early file-swapping lawsuits, “If bad PR is the price, it’s a relatively small one compared to the size of the problem.” John Borland, *Why file swapping tide is turning*, CNETNEWS.COM, Sept. 18, 2003, available at <http://news.com.com/2008-1082-5078418.html>.

turn into defiant rebels overnight when IP owners threaten them with legal action regarding their fansites.¹³² Some fans remove the materials and simply post brief tirades explaining why the materials have been removed.¹³³ Other fansite operators post blow-by-blow details of the correspondence and interaction among the fansite creators, the IP owners, and their legal counsels.¹³⁴ Others form fan initiatives that continue after the legal battles have ended.¹³⁵

These clashes between fans and IP owners do not escape the attention of the traditional and online news media.¹³⁶ Many of these articles portray the struggle between the two entities as a sort of David versus Goliath struggle with the IP owners holding the upper hand.¹³⁷ Most fans lack the resources to fight back when threatened with legal action by opponents that are often large media corporations.¹³⁸ As one commentator noted, “If you are a housewife in Nebraska and you receive a letter from Viacom’s attorneys telling you to remove your Web site or they will take away your house and your kid’s college fund, you don’t think twice about your alternatives. You fold.”¹³⁹

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132. See, e.g., Special Report, *supra* note 3, at <http://www.thei.aust.com/bsite/asp2.html> (describing the backlash launched by Oasis fans who were asked to remove infringing music files and lyrics from their fansites); *The victory is sho 'nuff*, *supra* note 53, at <http://www.uptown.se/2005/lawsuit.shtml>; *Cease And Desist!*, *supra* note 53, at <http://www.dixie-chicks.com/cease.shtm> (last visited on May 1, 2005) (discussing the ire of a Dixie Chicks fansite operator after being asked to remove music files).
133. See *Cease And Desist!*, *supra* note 53, at <http://www.dixie-chicks.com/cease.shtm>.
134. See *The victory is sho 'nuff*, *supra* note 53, at <http://www.uptown.se/2005/lawsuit.shtml>.
135. Harmon, *supra* note 5, available at 1996 WL 12755513; see also The Burned for Fandom Support Group’s website, *supra* note 6, at <http://www.dreslough.com/main/burned/>.
136. See, e.g., Ward, *supra* note 30, available at <http://news.bbc.co.uk/1/hi/uk/1070392.stm>; Errico, *supra* note 31, at <http://www.eonline.com/News/Items/0,1,379,00.html>.
137. See generally *id.* While many media entities characterized the file-sharing debate in these terms, some of the younger fans caught up in the battle actually benefitted from their infringing activities. *Pepsi Joining the Revolution?*, 3 DISTRIBUTED COMPUTING INDUSTRY ASS’N’S NEWSL. 5, Jan. 26, 2004, available at http://www.dcia.info/News/newsletter_2004-01-26.htm. A Pepsi ad, created for Super Bowl XXXVIII, featured approximately twenty teenagers who were sued by the RIAA who made defiant statements about their intentions to continue downloading music without paying for it. *Id.* At least one teenager, who settled her case out of court, acknowledged that “she would use some of her undisclosed ad fee to help repay the costs of the settlement. *Id.*
138. Jenkins, *Digital Land Grab*, *supra* note 115, available at <http://www.whoosh.org/jenkins.txt>.
139. Jenkins, *Digital Land Grab*, *supra* note 115, available at <http://www.whoosh.org/jenkins.txt>. However, the chief executive of the RIAA upheld the move to sue regardless of the identity of the fans doing the file-swapping for two reasons. John Borland, *Why file swapping tide is turning*, CNETNEWS.COM, Sept. 18, 2003, available at <http://news.com.com/2008-1082-5078418.html> (on file with author). He said, “First, if your message is deterrence, you want people to understand that they face a risk of being a defendant in a lawsuit regardless of who they are.” *Id.* “Second, . . . the privacy implications of investigating your targets would be even worse than suing without knowing who the target is.” *Id.* As RIAA Vice President Matt Oppenheim noted, “[T]here is no free pass to engage in music piracy just because you haven’t come of age.” Alex Veiga, *Music Download Suits*

Oftentimes, these fansite creators express disbelief that the very artists they seek to honor and promote would threaten them with infringement actions.¹⁴⁰ However, some cyber fans refuse to go away quietly in the face of threatened legal action. These fans often assert that their uses of copyrighted and trademarked materials qualify as fair use and should not be considered infringement.

B. Could Fair Use Be a Successful Defense for Fansite Creators?

The fair use doctrine provides subsequent copiers with an affirmative defense to infringement claims in some circumstances. Courts predominantly use four factors to evaluate the allegedly infringing work: (1) the purpose and character of the use; (2) the nature of the infringed work; (3) the amount and substantiality of the part of the original work that was taken; and (4) the effect on both the primary and secondary markets for the original work.¹⁴¹ While these factors generally weigh in favor of the IP rights' owners, judicial application of fair use has been mixed.¹⁴² As one fansite activist noted, "the law is an interpreted thing, not an absolute thing. Fans and fan webmasters are users of copyright, and copyright law has, both in fact and in spirit, provisions that protect copyright users."¹⁴³ Another fansite creator further noted that "the infringements stated in the C and D letter (cease and desist) you receive might not be infringements if examined by a court, but webmasters like you and I hardly have the means to take Fox to court over our website that we do for free."¹⁴⁴

Not just fansite webmasters advocate fair use exceptions for fan-created items that pay homage to popular shows or celebrities—at least one commentator has advocated a blanket fair use exception for fan-created

Could Raise Backlash, AP ONLINE, Sept. 10, 2003, available at 2003 WL 63460483 (on file with author).

140. See *Prince Sues Owner of Me'Shell Ndegeocello Website Over Prince Bootlegs*, *supra* note 58, at <http://www.audiorevolution.com/news/1002/01.prince.shtml>. The website creator expressed outraged disbelief that an artist he sought to promote through his fansite would complain about his links' section, which included sites that offered the artist's music files for downloading. *Id.*

141. Copyright Act, 17 U.S.C. § 107 (2000).

142. See *The Bringers: Fighting For The Rights Of Fans Online*, *supra* note 122, at <http://web.ukonline.co.uk/bringers/temp/faq.html>.

143. See *The Bringers: Fighting For The Rights Of Fans Online*, *supra* note 122, at <http://web.ukonline.co.uk/bringers/temp/faq.html>.

144. Artemis, *Copyright Law For Internet Fans: FAQ By Artemis*, Dec. 30, 2002, at <http://www.geocities.com/willowgirl95/copyright.html> (on file with author).

fictional works.¹⁴⁵ While theoretically this sounds like a possible solution to the current cyber chaos, it would prove overinclusive in practice and exempt rogue websites that grossly violate IP laws. No standard model fansite exists either by definition or by content, and no uniform method of judging these websites has been suggested or developed. Because of the very nature of fansites, fansite creators rely on copyrighted and trademarked materials to build their sites, and arguably, some could qualify as fair use.

One of fansite creators' best arguments might be asserted under the first factor, which examines the purpose and character of the use. Most of the clashes between cyber fans and IP owners have involved fansites that used the works without permission but were noncommercial in nature.¹⁴⁶ However, this is no longer uniformly true due to many fansites finding their Internet homes via service providers that provide free hosting if the sites include pop-up advertisements.¹⁴⁷ Some fansite creators are pushing the limits even further by placing Paypal donation buttons on their sites and providing options to become paid subscribers to the message boards or donate to the continued maintenance of the sites.¹⁴⁸

The second factor, the nature of the original works, tips sharply in favor of the IP owners in the cyberspace context. Virtually all of the original works that are used on fansites are creative in nature. Recent file-sharing decisions do not support the concept of a fair use exception for fansites that host music files. Photographs could present more difficult questions because some courts have found that even "wholesale copying does not preclude fair use per se."¹⁴⁹ Additionally, the Ninth Circuit ruled in favor of a subsequent user who posted

145. See generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

146. Murray, *supra* note 3, at 10. Most of the fansite-related cases handled by the World Intellectual Property Organization (WIPO) have hinged on this commercial v. noncommercial distinction. See RAI Radiotelevisione Italiana S.p.A. v. Alessandro Pescetelli, Case No. D2002-0716, available at <http://arbiter.wipo.int/domains/decisions/html/2002/d2002-0716.html>. As the WIPO panel explained in a domain name decision, "Operating a 'non-commercial' fan site has been generally regarded as legitimate . . . with respect to the mere intention of launching a fan site. On the other hand, in a fan Web site where the fan also tries to take money, the domain name has been regarded as used in bad faith." *Id.*

147. See Computeractive Staff, *supra* note 6, at <http://www.vnunet.com/features/1153618>.

148. See EVAFANCENTRAL.COM, at <http://www.evafancentral.com> for the donation button and <http://www.evboard.com> for the paid subscription option (last visited on May 8, 2005). This practice seems to be known to the IP owners, considering the band's record company has provided the fansite operators with photo passes for concerts. *Id.*

149. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003). See also *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding fair use even though the Betamax machine allowed viewers to record entire television programs for later viewing).

thumbnails on his search engine.¹⁵⁰ Fans could potentially argue that many of the pictures they use were intended for publicity purposes, but this would hold little merit to justify the use of photographs from newspapers, magazines, and other print publications. The use of video clips proves even more troubling in light of the mixed results that have been obtained in the few courts that have addressed the issue.¹⁵¹

IP owners would generally prevail under the amount and substantiality factor. The success of a fansite rests largely on providing the most extensive collection of material related to the musical artists featured on the site. With the proliferation of fansites that include music files, video clips, and interviews, many fansite creators would be found guilty of taking the heart of the original works they used without permission.

The final factor, the market effects, would oftentimes lean heavily in favor of the IP owners. Fan-created works, such as fan fiction and fan art, are essentially unauthorized derivative works—many of which may have been potential future ventures of the original creators. Distributing unauthorized music files could realistically reduce album sales. The widespread availability of photographs could lower the fees photographers can charge to license the original pictures. The market harm factor would generally favor the original creators in most instances in cyberspace.

When it comes to fair use on the Internet, there simply is no-one-size-fits-all exception. The trend toward narrowing the scope of fair use on the Internet has been joined by IP owners' efforts to find even more ways to maintain control of their creations.

C. Legal and Contractual Constraints: Intellectual Property Holders' Attempt to Control Their Fans

Cease-and-desist letters and terms of usage provide the most common methods IP owners use to assert their rights against overly zealous fans. As one commentator noted, "Skirmishes between the holders of copyright and

150. *Kelly*, 336 F.3d at 821.

151. *Compare* *Monster Communications v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 S.D.N.Y. 2001; *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001); *Hofheinz v. Discovery Comm., Inc.*, No. 00 CIV. 3802(HB), 2001 WL 1111970 (S.D.N.Y. Sept. 20, 2001) (all finding video biographers could make limited uses of copyrighted materials in their biographies about celebrities) *with* *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (where the court found a video biographer's use of such materials was not a fair use of the materials).

trademarks and overzealous fans constitute one of the longest ongoing stories in cyberspace.”¹⁵² Throughout this checkered history, IP owners have sought cost-effective ways to enforce their legal rights with cease-and-desist notices being an industry favorite.

The cease-and-desist letter campaigns have proven effective largely because they “carry inordinate cultural power” when used against cyber fans who often do not understand the law.¹⁵³ To add to the confusion, many of these notices misstate or overstate the relevant law, leading critics to describe the tactics employed as “underhanded and sometimes sinister.”¹⁵⁴ For example, one cease-and-desist notice accused a fansite creator of multiple violations, including copyright and trademark infringement, misappropriation, unfair competition, and publicity and privacy rights violations.¹⁵⁵ The letter advised the fansite operator:

Since your website explicitly requests that users scan and send to you magazine articles and pictures concerning Ty Tryon, your infringement is obviously knowing and willing. Given this fact, there is little doubt but that if a court is requested to provide remedies for your infringement, the maximum damages will be awarded.¹⁵⁶

Furthermore, because almost anyone can be a publisher online, these type of broad proclamations are often directed at young fansite operators who lack legal resources.¹⁵⁷ Many fansite operators bow out of the Internet-publishing business without a fight.¹⁵⁸ Some entities seemingly realize their superior bargaining power and simplify the process for fans to seek permission to use

152. Sarah Kendzior, *Who Owns Fandom*, SALON.COM, Dec. 13, 2000, at <http://dir.salon.com/tech/feature/2000/12/13/fandom/index.html> (on file with author).

153. VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 187 (2001). The author further noted, “Whenever Americans encounter legal language, there is the distinct possibility that they will believe whatever it commands.” *Id.*

154. Artemis, *supra* note 144, at <http://www.geocities.com/willowgirl95/copyright.html>. As one commentator noted, “The greatest constraint on your future liberties may come not from government but from corporate legal departments laboring to protect by force what can no longer be protected by practical efficiency or general social consent.” Barlow, *supra* note 110, at <http://www-frd.fsl.noaa.gov/~moninger/NOAATech2002/WineWithoutBottles.html>.

155. *Propaganda You Can Trust*, NEOFLUX.COM, Jan. 10, 2003, at <http://www.neoflux.com/archive/data/002512.shtml> (on file with author).

156. *Propaganda You Can Trust*, *supra* note 155, at <http://www.neoflux.com/archive/data/002512.shtml>.

157. Artemis, *supra* note 144, at <http://www.geocities.com/willowgirl95/copyright.html>. One author described this as a “reality of the Internet: [m]any of the copyright violators in this youthful medium are minors with little or no means to pay damages.” Koster & Shatz-Akin, *supra* note 112, at xlix.

158. *See Magazine, Sued By Former ‘Prince,’ Says It Will Fight Back To Defend Freedom Of Speech*, *supra* note 51, at http://www.uptown.se/2005/lawsuit_press_990308.shtml (on file with author). In the face of legal threats, several long-time fansite and fanzine creators shut down their operations to avoid further problems. *Id.*

copyrighted and trademarked materials. The rock band Widespread Panic's official website includes the following information for its cyber fans:

FAN WEBSITES—Widespread Panic encourages the creation of fan web sites, but the images, text, audio and video material found on www.widespreadpanic.com belong to us and may only be used with our prior consent. Please e-mail us at mail@widespreadpanic.com if you want to use some of our material.¹⁵⁹

A more recent development involves IP owners forming alliances with cyber fans to further their interests.¹⁶⁰ Terms of usage agreements are often used to accomplish this objective.¹⁶¹ The Rolling Stones have joined the growing number of artists who now offer fans perks, such as E-tickets to concerts, to join fan communities developed by the IP owners.¹⁶² The terms of usage agreements, which frequently seal these deals between IP creators and their fans, are facing increasing criticism because of their often-overreaching conditions.¹⁶³ As one commentator noted:

Stripped of its communitarian rhetoric, [the intellectual property owner's] novel willingness to cultivate fan communities is merely a conditional agreement not to enforce its IP rights for the precise period during which fan activities further its commercial interests. Once fan behaviours cease to build business for rights' holders, tacit permission for such 'fair comment' usage will almost certainly be revoked.¹⁶⁴

This commentator's conclusion remains a fear for many fansite operators, especially considering the broad rights these agreements vest in the IP owners. For example, The Rolling Stones' official website's terms include a provision that provides they can "in our sole and absolute discretion, terminate the account or use privileges of any user who repeatedly violates the rights of

159. *On Tour: Policy*, Widespread Panic's official website, at <http://www.widespreadpanic.com/ontour/policy.asp> (last visited on May 8, 2005). (on file with author).

160. Murray, *supra* note 3, at 12.

161. See, e.g., *Terms of Use*, The Rolling Stones' official website, at <http://www.rollingstones.com/aup/index.php?goTo=terms> (last visited on May 2, 2005); *Official Don McLean Website Fan Community Terms And Conditons*, Don McLean's official website, at <http://www.don-mclean.com/d/code.asp> (last visited on May 11, 2005).

162. The Rolling Stones' official fan community, at <http://www.rollingstones.com/community/extras/index.php> (last visited on May 2, 2005). Some IP owners go even further and choose fansites on a regular basis to feature on the official website. Murray, *supra* note 3, at 16; see also *The Official Harry Potter Webmaster Community*, at <http://harrypotter.warnerbros.com/web/webring/index.jsp> (last visited on May 11, 2005).

163. Murray, *supra* note 3, at 21.

164. Murray, *supra* note 3, at 21.

others.”¹⁶⁵ The terms also advise fans that they should notify the band’s legal department if they know of any breaches to the agreement—of course, they reserve the “sole and exclusive discretion” to take whatever actions they decide may be warranted.¹⁶⁶

The agreement also grants the IP owners virtually all rights to any content users submit to the site, giving them:

a perpetual, worldwide, non-exclusive, royalty-free right and license to use, reproduce, display, perform, adapt, modify, distribute, have distributed and promote such content in any form, in all media now known or hereinafter created, anywhere in the world, and for any purpose. Furthermore, you thereby waive any so-called moral rights or other similar rights in your User Content.¹⁶⁷

This provision governs any content submitted via any and all means available on the site.¹⁶⁸ One commentator noted that amidst the current cyber chaos, “such minor shifts in tactical advantage to one or other party are inevitable.”¹⁶⁹ However, many of these agreements resemble more than minor shifts of power that will eventually end up balanced between the IP producers and the fans. Instead, it appears the IP owners have used the current state of uncertainty to hammer out one-sided alliances with fans that sometimes assert more rights than the law provides. This has led some fans to devise solutions, such as the prominent use of disclaimers, to try to persuade IP owners to leave their fansites alone.

D. Disclaimers: How Fans Have Tried to Ward Off Intellectual Property Holders

While IP owners assert their rights through strong-armed terms of usage agreements, fansite creators invoke even more colorful language to try to shield themselves from infringement claims. Many of their mistaken beliefs about copyright and trademark laws are obvious from the language used in their disclaimers. For example, one wrestling fansite creator, who had not

165. *Terms of Use*, *supra* note 161, at <http://www.rollingstones.com/aup/index.php?goTo=terms> last visited on May 2, 2005).

166. *Terms of Use*, *supra* note 161, at <http://www.rollingstones.com/aup/index.php?goTo=terms> (last visited on May 2, 2005).

167. *Terms of Use*, *supra* note 161, at <http://www.rollingstones.com/aup/index.php?goTo=terms> (last visited on May 2, 2005).

168. *Terms of Use*, *supra* note 161, at <http://www.rollingstones.com/aup/index.php?goTo=terms> (last visited on May 2, 2005).

169. Murray, *supra* note 3, at 21.

even finished building her site, announced the usual non-affiliation statement and added information regarding the owners of trademarked logos and wrestler names used on the fansite.¹⁷⁰ After this proper attribution, the fansite creator broadly proclaimed that, by doing so, her site was exempted from all legal disputes.¹⁷¹

Fansite disclaimers are used for a variety of purposes beyond seeking some level of confidence that the sites will not become the targets of IP owners' ire. Some fansite creators use their disclaimers as a way to plead for mercy from the appropriate entities who own the materials they use without permission. For example, one Nickelback fansite operator included the following statement in his disclaimer: "If any © holders find that anything on this page disrupts any ©'s, please email me, and I promise we can settle this very nice and easily."¹⁷² The fansite creator further asks cyber fans to contact him if they seek permission to use any of the materials on his site—both those belonging to him and those belonging to others.¹⁷³

Some of these alleged disclaimers actually acknowledge that the fansite creators have taken copyrighted materials without permission.¹⁷⁴ Some acknowledge the IP owners' tolerance of fansites and ask other cyber fans not to sell the materials.¹⁷⁵ Some fansites grant visitors permission to use unauthorized derivative works either the fansite creators or other cyber fans have created from copyrighted materials.¹⁷⁶ One fansite webmaster credits the lyrics to the band her site honors yet claims the rights to "the exact lyrics typed up on this site"¹⁷⁷

170. *Disclaimer*, DIVAS4EVER website, at <http://purelydivinemolly.tripod.com/homepagemolly.html> (last visited on Mar. 21, 2005) (on file with author).

171. *Disclaimer*, DIVAS4EVER website, *supra* note 170, at <http://purelydivinemolly.tripod.com/homepagemolly.html> (last visited on Mar. 21, 2005).

172. *Disclaimer*, LISTENTONICKELBACK fansite, at <http://listen.to/nickelback> (last visited on Apr. 7, 2005).

173. *Disclaimer*, LISTENTONICKELBACK fansite, *supra* note 172, at <http://listen.to/nickelback> (last visited on Apr. 17, 2005).

174. *See, e.g.*, TIFFANY > TIFFANY, at <http://www.mbreo.com/tiffany/tiffany/> (last visited on May 1, 2005); THE ALL-INCLUSIVE DIXIE CHICKS PAGE, at <http://www.dixie-chicks.com> (last visited on May 1, 2005).

175. *Disclaimer*, DANCINGBONES PRODUCTIONS website, The Xena Zone, at <http://dancingbones.org/xena/xenaindex.html> (last visited on May 1, 2005). The fansite creator stated, "I don't own the copyright to these images, their parent companies that made them do. Those companies have been gracious enough to tolerate fan sites and image distribution, but let's not test their patience with abuse, neh?" *Id.*

176. *See, e.g.*, CRIMSON REGRET fansite, at www.crimson-regret.com (last visited on Apr. 14, 2005) (on file with author).

177. *Terms Of Use*, THE EARLY NOVEMBER OFFICIAL FANSITE, at [http://www.thetenspot.net/v11/\(Terms\)](http://www.thetenspot.net/v11/(Terms)) (on file with author). Due to her "rights" to these typed lyrics, the webmaster directs fans to directly link to her site if they want to redistribute them. *Id.*

Thus, the current cyber chaos results from misstatements and misunderstandings from both IP owners and fansite creators. However, when clashes occur, the negative publicity seems to land firmly at the feet of those with superior rights—the legitimate IP owners.

E. How the Media Would Frame Such Disputes and the Effects of Potentially Damaging Media Coverage

Although IP owners may resort to legal recourse to vigilantly enforce their copyright and trademark rights, this method does not always provide these owners with the best route to protect their IP. As one commentator noted, “When a company aggressively asserts its rights to products and property, many people look on that negatively as a big bully pushing a little guy around.”¹⁷⁸ These power struggles between creative producers and cyber fans are often portrayed as David versus Goliath type battles—where the large, powerful media corporations go after the defenseless, little fans. The problem lies in the fact that “[c]ompanies have developed a habit of using the least-precise, most-threatening tactics available, and this produces extremely bad feelings and the appearance of a lack of respect for the fans.”¹⁷⁹ The Internet presents one forum where it is not always in the IP owners’ best interests to use heavy-handed tactics to control their creations because of the massive backlash that can result from such tactics.

How the media portray such power struggles greatly influences the public’s views on the issue. For quite some time, scholars have realized that the media are capable of creating images in their audience members’ minds that basically set the tone for determining what issues are important and how these issues should be viewed.¹⁸⁰ Basically, the media leads its viewers, listeners, and readers toward recognizing certain events as important by focusing their attention on these subjects.¹⁸¹ The media goes even further by shaping their audiences’ perspectives on these topics via its use of framing the news stories in a way that has the effect of shaping public opinion about key

178. Rudnick, *supra* note 120, at <http://www.whoosh.org/issue44/editor44.html>.

179. *The Bringers: Fighting For The Rights Of Fans Online*, *supra* note 122, at <http://web.ukonline.co.uk/bringers/temp/faq.html>.

180. Walter Lippman, *Public Opinion* (Harcourt Brace 1922).

181. Maxwell McCombs, *The agenda setting role of the mass media in the shaping of public opinion*, at 5, available at <http://sticerd.lse.ac.uk/dps/extra/McCombs.pdf>.

issues.¹⁸² This agenda-setting function of the media basically directs the public's attention to particular subjects and frames the stories in such a way that essentially paints a picture of who or what should be held responsible.¹⁸³ In the Internet context, this framing ability is even more influential for several reasons. First, anyone can be an online publisher; all it takes is the ability to build a website.¹⁸⁴ Second, online news publications have no geographic boundaries and are able to reach audiences globally rather than being limited only to local audiences. Third, Internet journalism "places far more power in the hands of the user, allowing the reader to challenge the traditional role of the publication as the gatekeeper of news and information."¹⁸⁵ Finally, online journalism allows Internet reporters to tell stories in a different way because they can use a variety of media, such as photographs, text, and video clips instead of being confined to one medium.¹⁸⁶

The way the media frames stories has had a demonstrable effect on how audiences perceive the people and events involved. For example, one study found that the more publicity a homicide case received (thus, more public attention), the less likely the prosecutor was willing to make a pre-trial deal with the defendant.¹⁸⁷ When taken into consideration with studies of online journalism, IP producers would be wise to tread carefully away from prompting negative publicity by pursuing too many strong-armed tactics against their fans. One study that compared traditional print reporters with online newspaper writers found that online journalists tended to write longer, more detailed stories than their print counterparts.¹⁸⁸ Additionally, online journalists wrote more commentary and opinion pieces than traditional print

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182. McCombs, *supra* note 181, at 5, available at <http://sticerd.lse.ac.uk/dps/extra/McCombs.pdf>. Faming suggests that the media takes a certain approach to news reporting that consists of media frames, which are basically the organizational ideas for the story that gives people the context for the story. *Id.* Media personnel frame issues by making choices such as selection, emphasis, exclusion, and elaboration. *Id.*
183. Maxwell McCombs & Donald Shaw, *The Agenda Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 176–85 (1972) (describing how the issues the public considered important were largely determined by the media's coverage of certain events).
184. As one commentator noted, "The Internet permits everyone who owns a computer to have his or her own printing press." Christopher Harper, *Journalism in a Digital Age*, May 9, 1998, available at http://web.mit.edu/m-i-t/articles/index_harper.html.
185. Harper, *supra* note 184, available at http://web.mit.edu/m-i-t/articles/index_harper.html.
186. Harper, *supra* note 184, available at http://web.mit.edu/m-i-t/articles/index_harper.html.
187. See generally David Pritchard, *Homicide and Bargained Justice: The Agenda-setting Effect of Crime News On Prosecutors*, 50 PUB. OPINION Q. 143, 143–59 (1984) (on file with author).
188. Donica Mensing, *Examining the Media Agenda: How Traditional and Online Media Presented the 2000 and 2004 Presidential Primaries*, paper presented at the 5th International Symposium on Online Journalism at the University of Texas, Austin, Mar. 17, 2004, at 15, available at <http://journalism.utexas.edu/onlinejournalism/2004/papers/donica.pdf>.

journalists.¹⁸⁹ Finally, the prominence and placement given to stories in print publications are not as easily discerned online. In other words, an Internet user who reads news online may not be able to tell which stories are on the “front page” and which ones are of lesser importance.

Because of competition with online publications, all media organizations find themselves stressing speed nowadays—sometimes accuracy gets misplaced by the need to get the news fast. One fansite creator learned this the hard way while embroiled in a legal battle with the artist his website honored. He found unsettling:

the sad degree to which news organizations, including many major media outlets (all of which shall remain unnamed), slavishly follow the text of a press release without making even the slightest attempt to verify the facts contained therein, and who make no attempt to present a balanced view of the story by reaching both sides of the dispute.¹⁹⁰

IP owners have also been caught seemingly unaware of the backlash prompted by their efforts to police their rights online. As one commentator noted the failure “to anticipate the resulting international wave of negative publicity suggests a corporate culture of IP policing more attuned to theoretical legal rights than to the practical need to secure the allegiance of core fan audiences.”¹⁹¹

Both cyber fans and IP owners must work together to achieve a balance between their often-conflicting goals so that the full promotional power of the Internet may be realized. IP owners should lean toward compromises rather than strong-armed tactics with their cyber fans.

V. PROPOSED RESOLUTION: COMPROMISE THROUGH CONTENT PACKAGES AND CONTROLLED INTERACTIONS WITH FANS

The Internet remains largely uncharted waters in relation to how IP law will evolve to the technological changes caused by such a massive distribution

189. Mensing, *supra* note 188, at 18, available at <http://journalism.utexas.edu/onlinejournalism/2004/papers/donica.pdf>.

190. Magdziarz, *supra* note 54, at http://www.uptown.se/2005/lawsuit_freedomagrees.shtml. The fansite webmaster noted that he often “saw the same distortions and lies about our magazine published over and over in various media outlets.” *Id.*

191. Murray, *supra* note 3, at 8.

network. Some IP owners are beginning to embrace the use of cyber fan communities “to distribute project publicity more rapidly and cost effectively than could be conceivably achieved through traditional film marketing channels.”¹⁹² However, this new willingness to build cyber fan networks is not free from potential clashes because the arrangement has not really given fans any rights—all rights remain in the hands of the IP owners who, for the time being, have chosen not to enforce their legal rights.¹⁹³

What IP owners have failed to realize is that building strong Internet fan communities may actually help them police their legal rights. Fan communities provide fans with a network of like-minded individuals with whom they can share their interests. Because of this, strong bonds are often formed within a fan community. As one renowned analyst noted, “an individual’s socialization into fandom often requires learning ‘the right way’ to read as a fan, learning how to employ and comprehend the community’s particular interpretive conventions.”¹⁹⁴ Once this bond forms, fans could be enlisted to help IP owners find and stop unauthorized infringing uses and enforce the owners’ established rules.¹⁹⁵ By building and nurturing this sense of community, IP owners could be gaining numerous allies in their war to stop infringement of their protected materials online.

192. Murray, *supra* note 3, at 8. As several commentators have noted, providing authorized content packages can serve two important purposes: (1) they allow the IP holders the ability to maintain “control over the way his/her work is presented online;” and (2) they provide the “basis for a potential reputation-enhancing communications effort” by reaching out to fansite creators. Koster & Shatz-Akin, *supra* note 112, at xlix. This development of embracing the cyber fan community is largely prompted by the demographics involved; some of the more popular movie fansites receive at least five million visitors per month. Bowles, *supra* note 113, available at http://www.usatoday.com/tech/news/2003-06-19-movies-cover_x.htm.

193. Murray, *supra* note 3, at 14. The author likened this to “the turning of the gatekeeper’s blind eye, rather than the legitimating of poaching per se.” *Id.* Ironically, some fans have already begun abusing the privileges and using the bonus content provided by rights’ holders for commercial purposes. *Id.* at 21. One commentator advised IP creators to let cyber fans “take [their] crumbs and feel ‘in the loop.’ There are things you can say via a fansite that you can’t say on the official system. Think about it.” *The Common Design Mistakes For Music Websites*, THE BAND FOUNDRY, available at <http://bandfoundry.draftlight.net/resources/designmistakes.php> (on file with author).

194. HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 89 (1992).

195. As one commentator noted, “[T]he initial force behind norm creation is an individual desire for respect and esteem.” Daniel B. Levin, *Building Social Norms on the Internet*, 4 YALE SYMP. LAW & TECH. 97, 109 (2002), available at <http://research.yale.edu/lawmeme/yjolt/files/20012002Issue/Levin.pdf>. This takes place when three conditions are met: (1) a consensus develops about the expected behavior; (2) detection of being caught violating the norm is inherently possible; and (3) individuals know about both the norm and the possibility of being caught violating it. *Id.* at 109–10. Thus, “esteem-based norms develop when, for most individuals, the cost in terms of lost esteem of not following the consensus outweighs the actual cost of doing so, and thus most individuals take the less costly route of adhering to the consensus.” *Id.* at 110.

At least one company has seen proof that such fan networks can produce bottom-line results. New Line created an Internet fan community, encouraging fan poaching and fan-created derivative works as long as they were not commercial in nature and did not hurt the company's image.¹⁹⁶ The cyber fans generated enough pre-event publicity that an Internet trailer for *The Fellowship of the Ring* was downloaded seventeen million times within its first full day of being available online.¹⁹⁷ Imagine New Line having to hire and pay a publicity department large enough to create that kind of impact. Instead, the company has a virtual army of free promotions foot soldiers at its disposal, ready to spread the word globally. This type of viral marketing cannot be easily replicated through paid staff.

The problem with the current arrangement is that the IP owners have secured these promotional armies to the detriment of the very fans who make up their ranks. Several of the large corporate cultural producers, such as New Line and Warner Brothers, have done well since settling their early skirmishes with their cyber fans and building Internet fan communities.¹⁹⁸ Warner Brothers had irked cyber fans when the company launched a massive campaign against fansite creators that were using its copyrighted and trademarked materials shortly before the company opened its Official *Harry Potter* Website.¹⁹⁹ Since the launch of its online fan community, the company has enjoyed the benefits of a massive, cost-effective distribution network gained through the illusion of a give-and-take relationship with the fans. But this relationship is far more take than give for the IP owners. Essentially, the fans now feel a more personal sense of ownership in the company's creative products, yet the company has truly given up none of its legal rights whatsoever.²⁰⁰ The company can now harness the creative energy and promotional power of its fanbase while keeping a close eye on their activities via the ability to monitor those sites within its fan community. Basically, the fans now must rely "not upon legal guarantees of a protected sphere of 'fair comment' usage for trademarked or copyright properties, but upon the vicissitudes of corporate public relations and corporations' need to minimize negative publicity at a sensitive point in the product cycle."²⁰¹ This lopsided power differential could one day create yet another fan uprising if the power advantage is once again used against the cyber fans.

196. Murray, *supra* note 3, at 19.

197. Murray, *supra* note 3, at 19.

198. Murray, *supra* note 3, at 17, 19.

199. Murray, *supra* note 3, at 15.

200. Murray, *supra* note 3, at 17.

201. Murray, *supra* note 3, at 17.

IP owners, particularly bands, would benefit from providing a less restrictive sense of community for their fans and encourage their continued devotion through more balanced relationships. A newer rock band called Alter Bridge (made up of former Creed members) has taken this approach and created an authorized content package for its “E-team” members.²⁰² Such authorized content packages allow IP owners to choose which copyrighted and trademarked materials will be available for cyber fans’ use. The content offered could be changed regularly, thus allowing fansite creators some creative freedom in what logos and photographs they can use on their sites. These authorized content packages seem to provide the most balanced approach to handling the clashes that can occur between IP producers and cyber fans.

IP owners who do not choose this route should, at the minimum, make contacting them to seek permission to use copyrighted and trademarked materials easier. Accurate and up-to-date contact information, handled promptly and efficiently, might allow those fans who want to follow the proper protocol to acquire permission to use protected materials an avenue for doing so. It would take minimal effort for the webmaster of a band’s official site to forward any such correspondence to the appropriate persons for approval.

IP holders should also consider going one step farther and engage in controlled interactions with their fans. As one commentator noted, “Artists big and small are benefitting by offering a direct link for fans.”²⁰³ Monitoring fan activities provides IP holders with more than a means to more effectively control their creations—it also allows them to gain a better picture of who their fans are and what they like and dislike.²⁰⁴ Some bands have embraced this concept and have added “fan-base managers” to their staffs.²⁰⁵ These fan-base managers can harness the fan collective into an effective and far-reaching promotions team, willing to work largely for valid information and perks. Fan-base managers can go beyond just monitoring activity and organize fan groups that give feedback through interactive Internet mailing lists. These lists

202. *Eteam Content*, ALTER BRIDGE’S official website, at <http://www.alterbridge.com/eteam/eteamContent.html> (last visited on Mar. 27, 2005).

203. *Bands rise to online demand*, *supra* note 7, available at <http://www.brandrepublic.com/bulletins/digital/article/466524/bands-rise-online-demand/>.

204. *Bands rise to online demand*, *supra* note 7, available at <http://www.brandrepublic.com/bulletins/digital/article/466524/bands-rise-online-demand/>.

205. *Bands rise to online demand*, *supra* note 7, available at <http://www.brandrepublic.com/bulletins/digital/article/466524/bands-rise-online-demand/>. This is largely because industry insiders are recognizing that “[t]he social context in which people discover news, music or videos is increasingly important.” *Id.* Additionally, newer additions to the Internet such as blogging have signalled that “the consumer’s voice is getting louder.” *Id.*

could be set up so that the members' identities and contact information are hidden, allowing the IP holders themselves to be part of the group and gain a firsthand perspective of the power of the fans. These groups could also be set up with chat technology so that organized chats between fans and IP holders could be conducted. By using a fan liaison, valid information could be given to the fans that comes directly from the IP holders, and the promotional potential of the fanbase could be effectively harnessed into a strong coalition.

Fans need to be seen as the essential part of the equation that they are rather than being treated as minions who must walk in lockstep in order to build and maintain fansites that pay homage to their favorite bands. That way, bands and their fans will stay together for a long time—both in the real world and the cyber world.

V. CONCLUSION

The Internet has provided fans with a virtually limitless forum for sharing their love of their favorite bands through creating fansites in the artists' honor. However, the majority of the content on such sites belongs to the IP creators not the fansite webmasters. With the ease and magnitude of dissemination of information on the Internet, clashes between IP holders and cyber fans will continue to test the legal boundaries of the World Wide Web. While IP owners could rely on legal recourse to control cyber fans, this would alienate fans and undermine the promotional power of the Internet. Cyber fans provide IP creators with an invaluable, cost-effective distribution network. Fans are, after all, the lifeblood of entertainment, and without them, there would be no celebrities to inspire fansites. Compromises, such as authorized website content packages and controlled fan interactions, could allow both sides to coexist peacefully on the Internet.