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## LETTER FROM THE EDITOR

Dear Reader,

One of the attractive aspects to The University of Denver – Sturm College of Law is its proximity to some of the finest skiing and snowboarding in the world. Resorts like Vail, Breckenridge, and Winter Park are all easily accessible weekend getaways from Denver. As a result, many students who enjoy mountain activities choose to attend The University of Denver.

In Colorado, the ski industry is big business; and like in other types of big business, it comes with significant legal concerns. One overriding concern of the Colorado legislature is skier safety and who ought bear its burden. Both legislative action and case law have attempted to address this issue, however, the question still remains. Is the ski area operator or the skier herself best suited at evaluating risk on the mountain?

The Sports & Entertainment Law Journal posed the following prompt to Journal candidates during our spring and summer candidacy periods:

*Discuss whether or not injuries resulting from night skiing qualify as “inherent dangers and risks of skiing” under the Colorado Ski Safety Act of 1979 (C.R.S. § 33-44-101). Support your argument citing primary and secondary authorities including, but not limited to, statutory and case law, periodicals, and treatises.*

Second year law students, **Thomas Loegering** and **Zachary Warkentin**, each wrote compelling essays on the subject. Both students are avid participants in the sport and each offered his unique insight on the issue.

As Editor-In-Chief, I would like to personally congratulate Thomas and Zachary for their efforts towards publication. It took hard work and dedication to finalize these commentaries, and I am extremely proud and pleased to publish them in our Fall 2008 Volume.

Enjoy reading!

Todd Stoneman  
Editor-In-Chief

## DARKNESS FALLS: SHOULD NIGHT SKIERS BE GIVEN A FREE PASS?

*Thomas Loegering*

Night skiing continues to emerge as an increasingly popular alternative to day skiing among ski enthusiasts. Many resorts offer discounted lift ticket prices for night skiers with the appeal of shorter lift lines, uncommon during the day.<sup>1</sup> Despite the fact night skiing accounts for only 7% of all annual ski visits, the National Ski Area Association (NSAA) reports that nearly 200 NSAA member resorts offer night skiing.<sup>2</sup> With the increasing number of Colorado resorts offering night skiing, the issue of liability pertaining to the “inherent dangers and risks” of night skiing is up for debate.<sup>3</sup> Coincidentally, the question of whether the “inherent dangers and risks” of night skiing should be treated equivalently under the Colorado Ski Safety Act as the dangers inhering in day skiing remains unanswered.

A 1990 amendment to the Colorado Ski Safety Act of 1979 states that “no skier can make any claim or recover against any ski area operator for an injury that was sustained due to the ‘inherent dangers and risks of skiing.’”<sup>4</sup> Ski area operators are not required to post warning signs regarding the inherent dangers and risks of skiing, and in any negligence claim against a ski area operator the essential determination will be whether the injury is based on the inherent dangers and risks of skiing.<sup>5</sup> Inherent risks and dangers of skiing are defined as “dangers and conditions which are an integral part of skiing.”<sup>6</sup> They include: changing weather, snow and surface

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<sup>1</sup> Mike Doyle, *Night Skiing: Skiing Under the Lights and the Stars*, 2008, available at <http://skiing.about.com/od/downhillskiing/a/nightskiing.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Terminology “inherent dangers and risks” adopted by Colorado Legislature to define dangers or conditions that inhere in sport of skiing. *See*, Ski Safety Act of 1979, C.R.S. § 33-44-103 (2008).

<sup>4</sup> C.R.S. § 33-44-112 (2008).

<sup>5</sup> *Graven v. Vail Assoc., Inc.*, 909 P.2d 514, 518 (Colo. 1995).

<sup>6</sup> *Id.*

conditions, collisions with natural and artificial objects and other skiers, variations in steepness and terrain, and failure to ski within one's ability.<sup>7</sup>

A basic reading of the text of the Colorado Ski Safety Act and the subsequent 1990 amendments suggest that injuries resulting from night skiing should qualify as “inherent dangers and risks of skiing.” Although night skiing injuries are not specifically mentioned as inherent dangers or risks of skiing in the Colorado Ski Safety Act, common sense and judicial efficiency recommend their inclusion.<sup>8</sup> The Colorado legislature states that the word “include,” which is used before a listing of common inherent dangers of skiing, is not mutually exclusive and does not encompass all inherent dangers associated with skiing.<sup>9</sup>

The legislative history relating to the Ski Safety Act evidences the legislature's intent to include night skiing injuries as inherent in skiing. The purpose of the 1990 amendments was to clarify the law regarding duties and responsibilities of skiers and provide greater protection for ski area operators.<sup>10</sup> The public policy concern, addressed by the legislature through the amendments, was the increased operating costs for Colorado resorts due to accident claims and litigation involving snow skiing.<sup>11</sup> The general assembly felt increased costs and litigation were due to confusion about whether or not a skier accepts and assumes the inherent dangers and risks of skiing.<sup>12</sup>

To classify night-skiing injuries as outside the risks and dangers inherent to skiing would complicate the Act and subject resorts to increased claims and litigation, which is precisely the inverse of the legislature's intent. Disqualifying night skiing injuries from coverage under the

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<sup>7</sup> *Id.*

<sup>8</sup> *See* C.R.S. § 33-44-103 (2008) (listing examples considered “inherent risks and dangers of skiing”).

<sup>9</sup> *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) (stating “include” is not equivalent to the word “mean” and is ordinarily an extension and enlargement of a particular class or list, not a complete list which cannot be supplemented).

<sup>10</sup> *Gravin*, 909 P.2d at 517.

<sup>11</sup> *Id.* at 518.

<sup>12</sup> *Id.*

Ski Safety Act counteracts the Act's purpose.<sup>13</sup> Permitting someone who chooses night skiing, rather than day skiing, recovery from the same resort for the same injury resulting from the same inherent dangers and risks of the sport is patently unfair. The aim of the Ski Safety Act and the 1990 Amendments were to ensure that no one injured due to the inherent risks and dangers of skiing would be able to recover from ski area operators - regardless of whether the accident occurred during the day or night.<sup>14</sup>

Night skiing involves the same inherent risks and dangers as day skiing; however, the possibility of these risks and dangers increase as visibility diminishes. Many obstacles and hazards that are readily visible during the day may become difficult to see at night. This idea is neither unforeseeable nor beyond the knowledge of a reasonable person. Such an elementary concept should be borne by skiers and should not subject ski area operators to increased liability. The fundamental notion of darkness and its attendant circumstances is widely understood, and heightened use of caution should be charged to night skiers who undertake the inherent risks and dangers of skiing at night. Reduced visibility is inherent in night skiing and can be qualified as a "condition" which is referenced in the Colorado Ski Safety Act's definition of "inherent dangers and risks of skiing."<sup>15</sup>

Weather conditions at ski resorts frequently change throughout the day causing similar changes in visibility as well. A common visibility condition is known as "flat" light<sup>16</sup> which usually occurs on overcast days and creates a lack of contrast making it difficult to see the snow surface clearly. A ski area is not expected to mark all areas and obstacles that suddenly become

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<sup>13</sup> See, *Supra*, 10 (stating the purpose of the 1990 amendments were to provide greater protection for ski area operators).

<sup>14</sup> C.R.S. § 33-44-112 (2008).

<sup>15</sup> C.R.S. § 33-44-103 (2008) (defining "inherent risks and dangers of skiing" as dangers or *conditions* that are part of skiing).

<sup>16</sup> Stu Campbell, *Skiing in Flat Light*, 2008, available at <http://www.skinet.com/article.jsp?ID=1000038427>

hazardous upon the occurrence of shifting visibility conditions.<sup>17</sup> Likewise, there should be no greater responsibility owed by ski area operators to skiers at night than there is during the day when visibility conditions are poor. Traditionally, it is the responsibility of the skier to know the range of his own abilities, ski within his control and be aware of his surroundings at all times.<sup>18</sup> Under conditions of decreased visibility, it is the skier's duty to locate and ascertain all posted signs and warnings.<sup>19</sup> Based on this assertion, a skier should also be aware of hazards and obstacles that may be hidden or difficult to see due to decreased visibility associated with night skiing. Just as a reasonable skier would proceed with caution and slow down in order to remain under control in flat-light conditions, the skier should be held to the same standard when night skiing. Night skiers should not receive a free pass to ski irresponsibly and be afforded a remedy for their failure to recognize and adhere to changing visibility conditions inherent in night skiing. The remedy and expense for the careless disregard of these inherent conditions will fall on the ski area operator, and ultimately, other responsible ski area patrons. If injuries while night skiing are not considered as inherent risks of skiing, night skiers effectively get a waiver for reckless behavior. This opens the door for countless lawsuits. This scenario, however, is avoided by treating the inherent dangers and risk of night skiing as identical to those of day skiing.

The inherent risks of skiing are dangers that skiers choose to confront. They are essential characteristics of the sport and are hazards that cannot be eliminated by the use of ordinary care by the ski area operator.<sup>20</sup> The Utah legislature reinforces the idea that it is impracticable for ski area operators to try to undertake the elimination of all potential hazards and dangerous conditions that inhere in skiing.<sup>21</sup> Included in those hazards and dangerous conditions are

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<sup>17</sup> Arthur N. Frakt & Janna S. Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 Idaho L. Rev. 227.

<sup>18</sup> See generally C.R.S. § 33-44-109 (2008) (addressing duties and responsibilities of all skiers).

<sup>19</sup> *Id.*

<sup>20</sup> *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1046-47 (Utah 1991)

<sup>21</sup> *Id.*

changes in visibility, an essential element of night skiing. The Utah legislature recognizes the universal idea that hazards may exist in locations where they are not easily discoverable, and changes in weather and snow conditions can create decreased visibility and new hazards where none had previously existed.<sup>22</sup> Additionally, it is foreseeable that as a result of such conditions a skier may lose control or fall unexpectedly and that there is no way for ski area operators to alleviate these risks.<sup>23</sup> Therefore, ski area operators should not be responsible for injuries caused by such visibly foreseeable risks.

It appears Colorado's legislature shared Utah's legislative intent when it drafted the Colorado Ski Safety Act and the 1990 Amendments. Colorado and Utah are both extremely popular ski destinations for skiers all over the world.<sup>24</sup> They offer numerous world class resorts and boast some of the best snow conditions and terrain available anywhere.<sup>25</sup> Both legislatures list public policy and the fact that the ski industry contributes significantly to the state's economy and is practiced by a large number of its state's residents as reasons to include an "inherent dangers and risks of skiing" provision in each respective state's ski safety act.<sup>26</sup>

Colorado, like Utah, is concerned about protecting ski areas from frivolous lawsuits concerning accidents that are common to the sport of skiing.<sup>27</sup> Many ski areas contend that the only way to guard against being subject to unreasonable and unwarranted liability is through legislative protection.<sup>28</sup> The Colorado legislature has tried to alleviate these concerns through the enactment of the Colorado Ski Safety Act and the subsequent 1990 amendments. Disqualifying night skiing injuries as not "inherent" within the risks of skiing completely undermines this

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See generally*, <http://www.utah.com/ski/>; <http://www.skicolorado.com/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Clover*, 808 P.2d at 1046-47; *Graven*, 909 P.2d at 518.

<sup>27</sup> C.R.S. § 33-44-102 (2008) (legislative declaration explaining Colorado has legitimate state interest in economic viability of ski industry).

<sup>28</sup> *Frakt & Rankin*, *supra* note 12 at 263.

effort. Conversely, it subjects ski area operators to the very same unreasonable and unwarranted liability and augmented insurance costs from which they seek protection.

Case law on this particular subject is rare, but a pair of New York cases reinforce the idea that injuries resulting from night skiing qualify as inherent dangers and risks of skiing.<sup>29</sup> In *Ruepp*, the court held on appeal that the defendant ski area's motion for summary judgment should have been granted because no factual issues existed as to plaintiff's injury which occurred during night skiing.<sup>30</sup> The court concluded that "...the forest environment where the sport of skiing takes place and the time of day chosen by plaintiff in which to ski, the possibility of encountering shadows in an irregular topography was an obvious and inherent risk of night skiing."<sup>31</sup> The court stated that because the plaintiff acknowledged skiing involves risk, and he voluntarily chose to ski at night, he effectively "assumed the risk of encountering inevitable shadows which might conceal depressions in the terrain."<sup>32</sup>

In *Sontag*, the court repeated the idea that night skiing injuries are part of the inherent dangers of skiing.<sup>33</sup> The court held that inherent risks of skiing included the risk of injury caused by terrain variations regardless of whether or not they could be seen.<sup>34</sup> Additionally, the court stated that the plaintiffs failed to submit sufficient evidence showing that defendant ski area had created a dangerous condition above that of the inherent dangers of skiing.<sup>35</sup> The court concluded poor lighting conditions giving way to unseen dangers are open, obvious, and inherent dangers of skiing.<sup>36</sup>

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<sup>29</sup> See generally, *Ruepp v. West Experience*, 272 A.D.2d 673 (N.Y. App. Div. 2000); *Sontag v. Holiday Valley*, 38 A.D.3d 1350 (N.Y. App. Div. 2007).

<sup>30</sup> *Ruepp*, 272 A.D.2d at 674.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Sontag*, 38 A.D.3d at 1351.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

These cases hold that night skiing injuries are included in the inherent risks and dangers of skiing because they are foreseeable and obvious risks that are assumed by skiers choosing to ski at night. The dangers accompanying decreased visibility and hidden obstacles associated with night skiing are comprehensible by those who chose to participate. To hold night skiers to a lower standard than day skiers will hurt the entire sport of skiing and jeopardize the availability of night skiing as a viable option. Skiers should be held accountable, both day and night, and a particular group cannot be allowed to drive up costs for all skiers through needless and easily preventable litigation. Following the intent of Colorado's legislature, as well as case-law and common sense, night skiing injuries should be included as inherent dangers and risks of skiing under Colorado's Ski Safety Act to ensure the Colorado ski industry continues to thrive.

# MAN VS. MOUNTAIN

## *How Colorado Season-Pass Waiver Provisions Limit Liability Claims by Injured Skiers against Negligent Ski-Area Operators*

*Zachary Warkentin*

### INTRODUCTION

Mountains can be unforgiving places, and sports that take place on their terrain are endeavors of risk. Every year, numerous skiers and snowboarders accept this fact as a necessary evil, endured to participate in winter sports. The ever-present risk of injury, however, is no longer mitigated by reasonable liability protections against ski area operator negligence. In Colorado, current season-pass waiver provisions have removed liability protections from the sport. Such season-pass liability waivers (“waivers”) constitute adhesion contracts, mandating that pass-holders give up all legal recourse opportunity for negligent injury in order to participate in the sport on a season-pass basis. Moreover, these provisions are buried deep within dense contractual language, and are non-negotiable.<sup>1</sup> Ski area operators offer season-passes at reduced rates with the caveat that participation absolves the ski area operator from almost all liability, **even in situations that result in death.**<sup>2</sup> Therefore, ski operators profit from engendering the endeavor of risk by providing a platform for participation, yet they refrain from sharing in the inherent liability of faulty risk prevention. The Colorado legislature has been explicit and successful in its attempts to limit negligence claims against ski-areas.<sup>3</sup> Further, the crafty drafting of waiver provisions leaves season-pass holders unknowingly bereft of nearly any legal recourse for severe injury incurred as a result of ski area negligence.

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<sup>1</sup> See, Colorado Pass, Season Pass Application, *Warning, Assumption of the Risk, Release of Liability and Indemnification Agreement* (2007-08).

<sup>2</sup> *Id.*

<sup>3</sup> Eric A. Feldman and Alison Stein, *Assuming the Risk: Tort Law, Policy and Politics on the Slippery Slopes*, 41.

## I. THE CURRENT STATE OF SEASON-PASS LIABILITY IN COLORADO

The controlling Colorado statute of skier liability, The Colorado Ski Safety Act (“CSSA”) of 1979 (amended in 1990 and 2004), aims to limit liability claims against Colorado Ski Areas by skiing participants.<sup>4</sup> The CSSA is an example of how powerful political and economic actors strategically use the assumption of risk to protect their material interests.<sup>5</sup> It provides, “no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing.”<sup>6</sup> “Inherent dangers” is intentionally ambiguous and allows ski areas to argue almost any cause of an injury as being encompassed in its purview.<sup>7</sup> The Colorado legislature added this provision to the CSSA in 1990 with the dual-intention of decreasing ski areas liability and of deterring future tort claims.<sup>8</sup>

However, Colorado courts have not been completely compliant with the legislature’s intentions when interpreting, “inherent dangers.”<sup>9</sup> For example, in the early 1990s, David Graven, a Denver-based attorney, claimed that he was injured due to Vail’s negligence after he slipped down an unmarked, steeply pitched ravine off an in-bounds run, and careened downward for over forty feet.<sup>10</sup> As a result of the fall, Graven suffered several serious injuries.<sup>11</sup> The Colorado Court of Appeals dismissed a claim of negligence against Vail because the definition of “inherent dangers” in the Colorado Ski Safety Act precluded Graven’s basis for a claim.<sup>12</sup> However, in 1995, the Colorado Supreme Court reversed and remanded the case.<sup>13</sup> The Court held that despite the Court of Appeal’s finding as a matter of law, there was sufficient evidence

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<sup>4</sup> Ski and Safety Act, C.R.S § 33-44-101 (1990).

<sup>5</sup> Eric A. Feldman and Alison Stein, *Assuming the Risk: Tort Law, Policy and Politics on the Slippery Slopes*, 42.

<sup>6</sup> Ski and Safety Act, C.R.S. § 33-44-112 (1990).

<sup>7</sup> See, Eric A. Feldman and Alison Stein, *supra* note 5.

<sup>8</sup> 1990 Amendments to Ski Safety Act of 1979, S.B. 90-80, Ch. 256, Laws of 1990, Section 1.

<sup>9</sup> Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

<sup>10</sup> See, *Graven v. Vail Associates, Inc.*, 909 P.2d 514, 515 (Colo. 1995).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

of causation to raise an issue of fact for a jury to decide whether the ravine itself constituted an inherent danger in skiing.<sup>14</sup> The *Graven* ruling effectively narrowed the legal perception of inherent dangers to include only those dangers reasonably encountered in the normal endeavor of skiing.

As a result of the *Graven* holding and other similar decisions, Colorado courts construe the CSSA to require a jury determination to the nature and extent of the duty owed by a ski area operator relative to the alleged "inherent danger" which caused the injury.<sup>15</sup> If the danger that caused the injury is "inherent" in the assumption of risk of skiing, the ski operator is absolved of liability; if not, the operator may be liable.<sup>16</sup> Naturally, ski areas are wary leaving a determination like this in the unpredictable hands of juries; and subsequently, they attempted to eliminate any potential for a finding by expanding the definition of inherent dangers within the text of season-pass waivers.<sup>17</sup> The non-exhaustive list of current dangers includes: marked and unmarked obstacles, bumps, stumps, rocks of various sizes and failure of protective barriers and fencing.<sup>18</sup>

The waivers inappropriately lump man made and natural hazards into the same definition. Concededly, the on-mountain presence of stumps, bumps and rocks is part of the assumed risk of skiing. These hazards are naturally occurring characteristics of the terrain on which the sport takes place. But the failure of protective barriers is not a naturally occurring part of the assumed risk of skiing. Essentially, the waiver absolves ski areas of liability even if operator negligence is

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<sup>14</sup> See, *Graven*, 909 P.2d 514.

<sup>15</sup> James H. Chalath, *2006 Survey of Ski Law in the United States*, <http://www.chalathatten.com/CM/Articles/2006-Survey-of-Ski-Law-in-the-United-States.asp>.

<sup>16</sup> See, *Id.*

<sup>17</sup> Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

<sup>18</sup> *Id.*

the cause of serious injury.<sup>19</sup> He or she promises not to sue the resort operator by “releasing any right to make a claim or file a lawsuit against any released party.”<sup>20</sup>

Ski area operators and waiver proponents defend the waivers as necessary to keep ticket prices low because costly litigation results in increased overhead, which is naturally passed on to the consumer.<sup>21</sup> In this regard, they are in line with the legislative intent of the CSSA, serving as a liability shield for ski areas.<sup>22</sup> But critics counter that the liability waivers are essentially adhesion contracts that effectively vitiate the rights of skiers.<sup>23</sup> By vitiating any legal recourse for skiers through the use of the waiver provisions, Colorado ski areas have mitigated the risk of litigation in provisions that are neither negotiated nor often read by oppositional contracting parties. By signing a season-pass application, skiers give away their private right to contract freely as to liability, as well as their right to seek just remedy in a situation of negligent or gross-negligent operator action resulting in injury or death.

## II. ADHESION CONTRACTS

The underpinnings of adhesion contracts lie in the doctrine of unconscionability.<sup>24</sup> Legislatures often prohibit, and courts often invalidate, adhesion contracts as a matter of public policy because they undercut one party’s private right to contract.<sup>25</sup> Governmental bodies are reticent to encourage policy that limits options for consumers operating in a free-market economy.<sup>26</sup> One reason for this is that adhesion contracts generally involve a great disparity in

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> It is important to note that the cited liability waiver is in relation to season passes only, and does not apply to single-day lift tickets.

<sup>22</sup> Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

<sup>23</sup> James H. Chalat, *supra* note 15.

<sup>24</sup> *See*, DAVID G. EPSTEIN, ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (2d Ed., Matthew Bender & Company, Inc) (2006).

<sup>25</sup> Eric A. Feldman and Alison Stein, *supra* note 5, at 16, FN 52 (Citing Peter Schuck, *Rethinking Informed Consent*, 103 YALE L. J. 899, 912 (1994)).

<sup>26</sup> *See, Id.*

bargaining power between the parties.<sup>27</sup> A great disparity in bargaining power usually requires one of two things: (1) a demonstration by the plaintiff that no opportunity for negotiation was present at the time the contract for services was formed; or (2) that the services could not be obtained elsewhere.<sup>28</sup> When a party with modest bargaining power signs a commercially unreasonable contract, with little or no knowledge of its terms, it is unlikely that consent was present.<sup>29</sup>

Here, the waiver provisions are non-negotiated, and likely never read by consumers. Season-passes are unobtainable without assenting to the liability waiver, which is likewise tucked deep within the voluminous waiver verbiage.<sup>30</sup> As a result, most people barely give the waiver provision and the additional contract language a second thought as they fill out the application.<sup>31</sup> Additionally, the season passes are offered on a take-it or leave-it basis. They include the abrogation of private rights of action that likely would not be released by an informed party.<sup>32</sup> Thus, the waivers run contrary to modern conceptions of equitable contract negotiation, and contain a provision of absolute liability release that undermines the courts' ability to shape public policy in governing the system of torts.<sup>33</sup>

### III. ARGUMENTS IN FAVOR OF THE USE OF THE WAIVER PROVISIONS

Ski areas argue that skiers are welcome to buy single-day passes, which have less extensive liability releases.<sup>34</sup> The argument is a smokescreen. The ultimate issue here does not concern day passes, but the validity of the contractual terms embodied within the season-pass

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<sup>27</sup> See, *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472 (D. Colo. 1992).

<sup>28</sup> *Bauer*, 788 F. Supp. at 474-75.

<sup>29</sup> DAVID G. EPSTEIN, *supra* note 24, at 431.

<sup>30</sup> Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

<sup>31</sup> Eric Dexheimer, *Skier Beware: Vail Hits Back When an Injured Woman Sues*, WESTWORD.COM (2005), <http://www.westword.com/2005-04-07/news/skier-beware/>.

<sup>32</sup> *Id.*

<sup>33</sup> DAVID G. EPSTEIN, *supra* note 24, at 416.

<sup>34</sup> Eric Dexheimer, *supra* note 31.

waivers. Skiers are not in a position to discover and correct risks of harm, and they cannot insure against a ski area's negligence.<sup>35</sup> Ski areas, not skiers, are best suited to foresee and control hazards and to guard against negligence of their agents and employees.<sup>36</sup> Therefore, by offering day-passes as an alternative, ski areas remedy none of the concerns created by the particular waiver provisions at issue. Moreover, ski-areas are aware that the low cost of season passes keeps liability concerns away from the forefront of season pass-purchasers' thoughts.<sup>37</sup>

Liability waivers are additionally creeping into Colorado single-day passes. Both Silverton Mountain and Echo Mountain have recently incorporated complete liability waiver provisions into day passes.<sup>38</sup> The two separate areas are the only mountains in Colorado ever to do so.<sup>39</sup> Critics decry the liability waivers as ignoring the intention of the CSSA, which only immunized ski area operators from the inherent dangers of skiing.<sup>40</sup> Proponents counter that Silverton and Echo Mountain are unique areas, and that their actions simply serve notice to the skier that he is about to engage in a more dangerous ski experience.<sup>41</sup> It is too soon to determine whether or not other Colorado ski areas will follow their lead. Furthermore, the statutory validity of these waivers has yet to be challenged in Colorado courts.

Waiver proponents further argue that limiting ski-operator liability is necessary to promote the success of the ski-industry, an industry the Colorado government relies on as a source of taxable income.<sup>42</sup> Indeed, Colorado is recognized as one of the premier ski vacation destinations in North America, and during the 2006-2007 ski season, 11.6 million people skied at

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<sup>35</sup> DAVID G. EPSTEIN, *supra* note 24, at 417.

<sup>36</sup> *Id.*

<sup>37</sup> Eric Dexheimer, *supra* note 31.

<sup>38</sup> Jason Blevins, *Ski-resort Waivers a Slippery Slope?*, THE DENVER POST, Mar. 28, 2006, <http://www.newsmode.com/2006/03/27/ski-resort-waivers-slippery-slope/display.jsp?id=4455>.

<sup>39</sup> *Id.*

<sup>40</sup> Jason Blevins, *supra*, note 38.

<sup>41</sup> *Id.* (Silverton is generally regarded as an advanced-skier only mountain, and Echo Mountain primarily consists of terrain parks).

<sup>42</sup> See, e.g., U.S. Census Bureau, *2002 Economic Census, Arts, Entertainment, and Recreation Colorado*, CENSUS.GOV, [http://www.census.gov/econ/census02/data/co/CO000\\_71.HTM](http://www.census.gov/econ/census02/data/co/CO000_71.HTM).

least one day at resorts in the United States.<sup>43</sup> The ski areas argue—similar to the Proponents of the approved 1990 CSSA amendments—that increased liability for ski resorts will increase overall costs, having a ripple effect through the industry eventually landing on consumers' shoulders.<sup>44</sup>

As the price for a single day lift ticket in Colorado nears \$100,<sup>45</sup> it is increasingly difficult to validate a pro-waiver argument. It makes good policy, however, that the party best suited to monitor the facility carries the burden of protection.<sup>46</sup> The ski area operator (as opposed to the skiers) is in the principle position to maintain and patrol its runs.<sup>47</sup> Skiers submit to the ski area's control when they pay to play.<sup>48</sup> They are in no position to monitor the safety of the ski area.<sup>49</sup>

#### IV. NEW DEVELOPMENTS IN SKI-AREA RESPONSE

Ski operators may be attempting to deter litigation on their own by aggressively challenging new claims. In a recent, high-profile case stemming from an incident that occurred in 2004, Vail's attorneys not only contested a \$4,000 claim by season-pass holder and Eagle-Vail resident, Julia Parsons, they *countersued* for \$100,000 dollars in attorney's fees.<sup>50</sup> The suit originated when Parsons was crossing Lionshead Bridge at the bottom of the front side of Vail Ski Resort and caught her knee on a metal bracket of the bridge that had been bent into oncoming traffic by a snowplow.<sup>51</sup> The injury to Parsons's knee required three layers of stitches.<sup>52</sup> Vail had planned to tear the bridge down in two months.<sup>53</sup> Colorado District Judge

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<sup>43</sup> David Williams, *Ski Execs Target Asian Markets*, ROCKY Mtn. NEWS, Jan. 4 2008.

<sup>44</sup> Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

<sup>45</sup> A single day pass to Vail in 1996 cost \$38. Tickets presently cost \$97 (vail.com); a 255.3% increase over a 13-year period. Inflation over that period was never over 3.3% and adjusted accordingly, a 1996 single day pass would cost approximately \$54 today.

<sup>46</sup> Discussed *supra*.

<sup>47</sup> See, *Hanks v. Power Ridge Restaurant Corp.*, 276 Conn. 314, 331-32 (2005).

<sup>48</sup> *Id.* at 332.

<sup>49</sup> *Id.*

<sup>50</sup> Eric Dexheimer, *supra* note 31.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Thomas Moorhead dismissed the claim because Ms. Parson signed the liability waiver on the season pass application.<sup>54</sup> But Vail was not finished. Vail countersued Parsons for its attorney's fees, arguing that because she signed its liability release waiver she released Vail from all liability except in matters of "wanton or willful" conduct.<sup>55</sup> A portion of the "Assumption of Risk, Release of Liability and Indemnification Agreement" in the 2007-08 Colorado Pass (similar to the one Parsons signed, which grants access to Vail, Beaver Creek, Keystone, Breckenridge and Arapahoe Basin Mountains) reads, "The Undersigned agree to pay all costs and attorney's fees incurred by any Released Party [Vail and Associates] in defending a claim or suit brought by or on behalf of the Undersigned."<sup>56</sup>

Parsons subsequently dropped her option to appeal the District Court's dismissal in exchange for a drop of the countersuit.<sup>57</sup> Parsons and her attorney, Joseph Bloch, admitted to being blindsided by Vail's aggressive countersuit.<sup>58</sup> Afterward, Parsons acknowledged that she never would have filed the suit had she known that Vail's attorneys would file the countersuit.<sup>59</sup> Vail defended its unusually aggressive actions as simply a justified response to a claim without merit.<sup>60</sup>

But Vail also intended to make an example of Parsons. Because Parson's \$4,000 request pales in comparison to rewards previously sought in multi-million dollar negligence actions against Vail, it appears that Vail's countersuit represents a preemptive strike against future claimants. Its primary purpose aimed at preventing a flood of similar claims. By permitting small-award, negligence-based litigation to go unchallenged, Vail would passively open itself

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

<sup>57</sup> Eric Dexheimer, *supra* note 31.

<sup>58</sup> Steve Lipscher, *Vail Drops Its Countersuit Against Skier Hurt at Bridge*, THE DENVER POST, Feb. 28, 2006.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

(and other Colorado ski areas) to a potential wave of litigation. But the Parsons case marks a dramatic shift in Colorado ski-area litigation policy.<sup>61</sup> Vail's actions are a threat to future claimants that ski-areas will not only defend their actions or omissions in court, but will aggressively counter-sue tort claimants.<sup>62</sup>

## VI. CONCLUSION

In the interests of public policy, the Colorado government should reassert equitable liability in ski-area operators. It is reasonable to expect them to be accountable for operator negligence. Ski areas, not skiers, are in the best position to maintain and regulate safety within their boundaries. In short, the nature of the ski business should place implicit responsibilities on ski-area operators, and they should not be allowed to immunize themselves from basic conceptions of negligence liability. Moreover, the permitted use of adhesive waiver provisions in season and some day passes gives ski areas less incentive to enact measures better protecting their patrons. This leaves skiers with two unsatisfactory choices: to boycott their favorite mountain in hopes that it will amend its negligence policy; or, to go ahead and ski, absent the typical protections afforded consumers in the normal course of business.

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<sup>61</sup> *Id.*

<sup>62</sup> Eric Dexheimer, *supra* note 31.

THERE WILL BE BLAME: MISFORTUNE AND INJUSTICE IN *THE SWEET  
HEREAFTER*

*Timothy P. O'Neill* †

INTRODUCTION

The scene is a January morning in a small town. A school bus on its regular route veers off a road, crashes through a guardrail, and sinks through the ice of a water-filled sandpit. Fourteen children are killed. One of the survivors is paralyzed for life. The bus driver escapes with relatively minor injuries.

There is no apparent reason for the crash. A man driving behind the bus did not notice any reckless conduct by the experienced bus driver. The bus simply left the road, killing fourteen children.

How does a small town react to this sudden loss of so many of its children? How does it explain to itself what happened? How does it begin to bind its wounds? This is the basic story of *The Sweet Hereafter*, a 1991 Russell Banks novel that Atom Egoyan turned into a film in 1997.

Judith Shklar divides disasters such as this into two categories: misfortunes and injustices.<sup>1</sup> A misfortune is a dreadful event that is caused by external forces of nature; because it could not be prevented, people must resign themselves to their suffering. An injustice, on the other hand, is a disaster brought about by human agency; because it could have been prevented, people express outrage, assign blame, and seek relief.

Injustices can result in legal recoveries; misfortunes do not. Much of the book and film follow an out-of-town personal injury lawyer in his attempts to enlist the grieving parents as prospective clients in a lawsuit. A lawsuit against whom? He does not know, but he is convinced that he will find some negligent human or corporate agent with deep enough pockets to result in

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<sup>1</sup> JUDITH SHKLAR, *THE FACES OF JUSTICE 1* (Yale University) (1990).

a financial bonanza for the parents ---- and, of course, for himself. It is clearly in his interest to view the bus crash as an “injustice.”

He is pitted, however, against several townspeople who see the crash as merely a “misfortune.” They are convinced that the crash was an accident and that no one was at fault. They want the out-of-town lawyer to leave so that the town can begin healing.

The conflict is resolved when a witness lies at a deposition. She tells the lie because she knows that it will destroy any possibility of a lawsuit. She succeeds. The lawyer leaves. The town goes on ---- without fourteen of its children.

The film of *The Sweet Hereafter* has attracted a number of law review commentaries. They largely reflect hostility towards the lawyer. They note the divisive effects of litigation on a community. They regard as heroes those townspeople who consider the crash to be merely an accident and thus refuse to sue. Some of the commentators even justify the lie at the deposition because it ended any possibility of a lawsuit.

The purpose of this Essay is to challenge this traditional law review reading of the film. In doing so, it will make several points.

First, it questions the idea that ---- when a disaster occurs with no obvious negligence ---- the “misfortune/injustice” dichotomy is in equipoise. Instead, it argues that the ordinary human reaction is to assume it is an “injustice” unless proved otherwise. In other words, “injustice” is the default position when people look at a bad outcome. In making this point, the Essay draws on new work by Charles Tilly on how human beings assign blame.<sup>2</sup>

Second, because “injustice” is the default mode, the lawyer’s coming to town does not stir up feelings that are not already present in the grieving townspeople. On the contrary, until the community positively believes it was a misfortune rather than an injustice, *there will be blame*.

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<sup>2</sup> CHARLES TILLY, CREDIT AND BLAME (Princeton University Press) (2008).

The only issue is where that blame will be directed. The idea that without the lawyer the town would naturally come together and heal is a chimera.

Third, the Essay will look at the effect of the witness's lie. In both the book and the movie, the lie assigns blame to the innocent bus driver. Yet the film ---- and the law review commentaries ---- both gloss over what effects this had on the driver. The Essay examines how Russell Banks' novel, however, takes a hard, uncompromising look at what really happens when blame for what is considered an injustice is misdirected.

The Essay concludes by contending that commentators may be too quick to criticize lawyers who look at disasters as opportunities for lawsuits. If there is a natural tendency for people to view a bad outcome as an injustice for which there must be blame, the litigation process serves two purposes. First, if the tragedy turns out to have been a preventable injustice, litigation can direct the community's blame towards the proper parties. But, second, if investigation reveals that it was merely a misfortune, the litigation process can help defuse the community anger that had sought someone to blame. Without this knowledge that the litigation process can provide, we may be left with the worst of all worlds ---- blame directed against an innocent person. And this, indeed, this is what occurs at the conclusion of the Russell Banks novel. The refusal of Atom Egoyan's film ---- and its law review commentators ---- to acknowledge this sad truth must be challenged.

#### I. *THE SWEET HEREAFTER*: THE FILM

Atom Egoyan's 1997 film *The Sweet Hereafter* tells the story of a small Canadian town's reaction to a school bus accident.<sup>3</sup> It is unclear what caused it. On the bus's usual morning run driven by its regular driver Dolores Driscoll, it suddenly left the road, crashed through a

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<sup>3</sup> *THE SWEET HEREAFTER* (Alliance Communications Corporation 1997).

guardrail, and sank through the ice on a lake. Most of the children were killed. One girl, Nichole Burnell, survived but was paralyzed from the waist down. Dolores survived with relatively minor injuries.

The film begins with the arrival of attorney Mitchell Stephens in the town, which is named Sam Dent. It traces Stephens' quest to retain clients for his proposed lawsuit. He first convinces Wendell and Risa Walker, owners of the local motel, to sign with him. The Walkers had a son die on the bus. Stephens tells them he is only looking for "good, upstanding neighbors" to join them in the lawsuit. They suggest Hartley and Wanda Otto, who lost their adopted Native-American son Bear in the crash.

The Ottos are not anxious to join in any suit. Stephens responds by telling them that he is there "to give your anger a voice, to be your weapon against whoever caused the bus to go off the road." He assures them that he has no interest in suing Dolores, their friend and the local bus driver. Rather, "the really deep pockets are in the town and the company that made the bus." When Mrs. Otto suggests that what occurred was merely an accident, Stephens responds "[T]here is no such thing as an accident. .... [S]omebody, somewhere made a decision to cut a corner .... They decided to sacrifice a few lives .... And now it is up to me to insure moral responsibility in this society." In the end, the Ottos agree to join the suit.

Stephens then talks to Nichole Burnell's parents. Sam, the father, is anxious to join the lawsuit, eagerly asking "When do they award the damages?" Stephens is particularly interested in the Burnells because Nichole ---- a very attractive young girl who is now partially paralyzed and confined to a wheelchair ---- will make such a compelling witness.

Intertwined with this story of Stephens' offering to compensate people for their lost children is the story of Stephens' daughter Zoe, his own "lost child." Zoe calls him collect

several times while he is in Sam Dent. In flashbacks as well as flash-forwards, we learn that Zoe is a drug addict. Unlike the cases Stephens litigates, this is a problem that for him is insoluble.

Not all the townspeople join Stephens' suit. Dolores Driscoll refuses when her husband Abbott advises her not to join. Billy Ansel also refuses. Ansel, the town's garage owner, was driving behind the bus waving to his two children when the accident occurred. His children were both killed. Convinced it was an accident, he angrily rejects Stephens' suggestions that he join the lawsuit.

In one of the crucial scenes of the film, Ansel goes to the Burnell house to try to convince them to drop the suit. He tells them, "I don't want a darn thing to do with it. Lawyers are suing lawyers, [and] people are pointing fingers at each other and making side deals and dickering over percentages. He [Stephens] is going to force me to testify in court. I was driving behind the bus and I saw it happen. He's going to force me to go over all this again. Then all those other lawyers are going to line up behind him and try to do the same thing." The Burnells refuse to drop the lawsuit.

Unbeknownst to Billy and the Burnells, Nichole is behind her bedroom door listening to this conversation. Throughout the film, we have learned several things about Nichole. We know that her father Sam had sexually abused her for years before the accident. We also know that Nichole was very close to Billy's family. She baby-sat for the two dead children. When Billy's wife died of cancer, Billy even gave Nichole some of his wife's clothes. It's clear that Billy's words have had an impact on Nichole.

The denouement is Nichole's deposition. Nichole ---- who up to this point has denied remembering any details of the accident ---- tells the defense attorney that "I remember it clearly now." She testifies that "[W]e were going too fast down the hill and I was scared. The

speedometer was large and easy to read from where I was sitting .... [Dolores] was going 72 miles an hour.”

Because Nichole’s lie places the blame on the person with the shallowest pockets, all the lawsuits are now dead.<sup>4</sup> Nichole has succeeded in both helping Billy and hurting her abusive father. Stephens leaves Sam Dent.

In a flash-forward epilogue two years later, we see Stephens arriving in an airport in another city. From a distance he sees a driver of a hotel shuttle ---- it is Dolores. She sees him and smiles.

The film ends with a voice-over by Nichole: “[T]wo years later, I wonder if you realize something. I wonder if you understand that Dolores, me, the children who survived, the children who died, that we are all citizens of a different town now, a place with its own special rules, its own special laws, a town of people living in the sweet hereafter.”

## II. LAW REVIEW COMMENTARY ON THE FILM

The film has been the subject of a number of law review articles written by law professors and lawyers. They are almost uniformly critical of Stephens and supportive of Billy and Nichole.

First, consider Austin Sarat’s analysis of the legal issues in the film.<sup>5</sup> Sarat sees it as “telling two stories at once.”<sup>6</sup> The first is a story about civil law’s need to turn a serendipitous

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<sup>4</sup> For the purposes of the story, the reader must accept the fact that Nichole’s perjury destroys the lawsuit. Whether this would be true in real life is questionable. See Margaret J. Fried & Lawrence A. Frolik, *The Limits of Law: Litigation, Lawyers, and the Search for Justice in Russell Banks’ THE SWEET HEREAFTER*, 7 CARDOZO STUD. L. & LITERATURE 1, 14 n.55 (1995) (contending that Banks is merely using “poetic license” to heighten the drama of Nichole’s perjury, the authors explain how under the law of New York (where the accident occurs in the book) Dolores’ speeding would not necessarily break the causal connection between negligence on the part of either the town or the state and the plaintiffs’ injuries).

<sup>5</sup> Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425 (2000).

<sup>6</sup> *Id.* at 431.

“misfortune” into an “injustice.”<sup>7</sup> It does this through a three-stage process Sarat calls “naming, claiming, and blaming.” Law begins by re-defining the misfortune as an injury (the “naming” stage). It then transforms the perceived injury into a grievance; it does this by attributing the injury to the “fault of another individual or social entity” (the “blaming” stage). Finally, law provides a vehicle for the injured party to voice its grievance to the party it believes is responsible and to ask for a remedy. This final stage is the “claiming” stage. Thus, the film shows us Stephens gathering the parents of Sam Dent as clients for his lawsuit by convincing them that what happened to their children was a preventable injustice, rather than a mere misfortune.

Sarat contrasts this with the film’s second story. This concerns those people of the town who refuse to use law as a vehicle for their misfortunes. Abbott Driscoll, Billy Ansel, and Nichole Burnell insist on what Sarat calls the “continuing claims of community over law, of fatalism over blame.”<sup>8</sup> These are the people who insist that the crash was a misfortune rather than an injustice. These are the people who resist the allure of Stephens’ “Pied Piper.”<sup>9</sup>

As Sarat views it, Stephens “represents the alien presence of legality, with its habits of assigning guilt and constructing hierarchy.” The community is “endangered by the law’s .... invitation to turn grief into greed.” Legality “threatens to pit people against one another,” advantaging some and disadvantaging others. And “[r]ather than providing closure, the law promises to prevent the healing of psychological wounds left behind after the accident.”<sup>10</sup> Thus,

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<sup>7</sup> Again, this is how Judith Shklar has made this distinction: “[W]hen is a disaster a misfortune and when is it an injustice? Intuitively, the answer seems quite obvious. If the dreadful event is caused by external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent, human or supernatural have brought it about, then it is an injustice and we may express indignation and outrage.” SHKLAR, *supra* note 1, at 1.

<sup>8</sup> Sarat, *supra* note 5, at 431.

<sup>9</sup> See ROBERT BROWNING, *THE PIED PIPER OF HAMELIN* (Everyman’s Library 1993) (1888). The image of the Pied Piper leading away the town’s children is a motif that runs through the film, but does not appear in the novel. At different times in the film, The Pied Piper may describe Stephens the lawyer, Nichole’s sexually abusive father, or even the bus crash itself.

<sup>10</sup> Sarat, *supra* note 5, at 432.

Sarat traces what he terms Stephens' "seductions" of the Walkers, the Ottos, and the Burnells into his lawsuit.

Sarat contrasts this with the reaction of Dolores's husband, Abbott. When Stephens asks Dolores to join the suit, Abbott responds forcefully, if inarticulately (because of his disability). Dolores tells Stephens that Abbott told her not to join the lawsuit: "Abbott said that the true jury of a person's peers is the people of her town. Only they, the people who have known her all her life and not twelve strangers can decide her guilt and innocence."<sup>11</sup> Sarat characterized Abbott's reaction as "introducing a story of community against law."<sup>12</sup>

As for Billy, Sarat sees him as heroically resisting the siren song of the lawsuit. Billy insists to Risa that "It was an accident" and that no one was to blame.<sup>13</sup> When Billy refuses Stephens' invitation to join the lawsuit, Sarat characterizes this as Billy's allying himself "with the community and its interests, acting as its protector even as he expresses deep incredulity that his neighbors would use the law to respond to their loss."<sup>14</sup> When Billy asks the Burnells to drop their suit and tells them he will pay for Nichole's expenses, Sarat calls it a "classic confrontation between good and evil, between fidelity and greed."<sup>15</sup>

As for Nichole Burnell, Sarat concedes that her assertion that Dolores was speeding was indeed a lie. Yet he insists that it was also an "act of love," because she "saves Billy from the law he so deeply dreads" and by doing so "she asserts the priority of ethics over duty."<sup>16</sup>

This theme of a sense of community being threatened by civil law is reiterated by other commentators. Naomi Mezey and Mark C. Niles refer to the source of Billy Ansel's disgust as being "The gap between what the law can provide in the form of compensation or comfort and

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<sup>11</sup> *Id.* at 443.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 445.

<sup>14</sup> *Id.* at 446.

<sup>15</sup> *Id.* at 448.

<sup>16</sup> *Id.* at 449.

what a united community can provide.”<sup>17</sup> Tony McAdams states that “[A] crusade to assign blame .... [which forms] the core of Western jurisprudence, is precisely the determination the people of Sam Dent do not need.”<sup>18</sup> Jeffrey Abramson describes the movie as a “story about the unraveling of a community in a small town when the outside plaintiff’s lawyer descends upon simple folk and overrides their initial honest reaction that accidents sometimes happen.”<sup>19</sup> Referring to Nichole’s lie that placed the blame squarely on Dolores, Robert Waring insists that “If the film has a hero, it is Nichole .... [who has] the courage to single-handedly terminate the lawyer’s efforts to secure clients for a negligence case.”<sup>20</sup> Not content to merely describe Nichole’s lie as heroic, Carrie Menkel-Meadow ups the ante by describing Nichole’s lying as actually “telling her own truth.”<sup>21</sup>

Richard Weisberg stands out as a commentator willing to criticize the film.<sup>22</sup> Reminding us that Atom Egoyan’s movie is based on Russell Banks’ novel of the same name, he flatly states that “The film is quite different from, and simply not as good as, the novel.”<sup>23</sup> He suggests that Egoyan may have been “caught up in the .... mid-1990’s anti-lawyer atmosphere” that caused him to settle on Mitchell Stephens, Esquire, as the “one villain” in the story.<sup>24</sup>

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<sup>17</sup> Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 152 (2005).

<sup>18</sup> Tony McAdams, *Law and Film: Blame and THE SWEET HEREAFTER*, 24 LEGAL STUD. FORUM 599, 605 (1999).

<sup>19</sup> Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 499 (2000).

<sup>20</sup> Robert Waring, *Film Commentary*, 24 LEGAL STUD. FORUM 301, 313 (2000).

<sup>21</sup> Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1328 (2001). For an example of one of the few articles willing to explore the possibility that the lawsuit might actually have been beneficial, see Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S.C. L. REV. 351 (2003) (“[I]s it not plausible that the lawsuit may have the effect of preventing future harm? Is this not a means toward ensuring some kind of responsibility, moral or otherwise in our society?”).

<sup>22</sup> Richard H. Weisberg, “*The Verdict*” *Is In: The Civic Implications of Civil Trials*, 50 DEPAUL L. REV. 525 (2000).

<sup>23</sup> *Id.* at 532. Weisberg criticizes Sarat for incorrectly maintaining that Egoyan’s film leaves the book’s plot “intact.” *Id.* at n.30. Indeed, Sarat has made this contention in at least two articles. Sarat, *supra* note 4, at 426; Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in THE SWEET HEREAFTER*, 34 LAW & SOC’Y REV. 3, 20 (2000).

<sup>24</sup> Weisberg, *supra* note 22, at 531, 532.

What is disturbing in so much of the law review commentary is a tendency to see the film in a simplistic, dichotomous way. The lawyer looking to assign blame is the “bad guy” seeking to destroy a community in his attempt to make a fast buck. Billy and Nichole are the “good guys” for stonewalling any attempt to discover if there was any culpability ---- legal or otherwise ---- involved in the bus crash. They wish to preserve the community by simply accepting the children’s deaths and moving on. And for some commentators, “preserving community” even justifies Nichole’s lie that inculpates the innocent bus driver.<sup>25</sup>

But in the face of such tragedy, is it realistic to expect that a community will simply eschew any attempts to discover if there was human culpability involved in the deaths of its children? Is it possible --- indeed, is it *healthy* ---- for a community to avoid blaming and simply “move on”?

Charles Tilly, a professor of social science at Columbia, has recently addressed these issues in his book *Credit and Blame*.<sup>26</sup> Tilly notes that it is a basic human response to look for causes and culpability when tragedy occurs. Tilly writes that “On the whole, victims of visible damage do not settle for ‘Things happen. It was the breaks.’ They look for someone or something to blame.”<sup>27</sup> And victims become “indignant if authorities .... say that no one was to blame.”<sup>28</sup> Tilly adds, “Blame occurs in public debate, in courts, and in everyday life. Although the word ‘justice’ alone often calls up a warm glow, justice commonly consists of fixing blame, then of imposing penalties for blame....[W]hen carried out successfully....*blaming brings struggles to an end.*”<sup>29</sup>

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<sup>25</sup> See, e.g., Menkel-Meadow, *supra* note 20, at 1328 (Carrie Menkel-Meadow’s characterization of Nichole’s lie as simply Nichole’s way of “telling her own truth.”).

<sup>26</sup> TILLY, *supra* note 2.

<sup>27</sup> *Id.* at 16.

<sup>28</sup> *Id.* at 94.

<sup>29</sup> *Id.* at 119 (emphasis added).

Is it odd that some of the parents of the dead children in Sam Dent are trying to fix blame for the deaths through a lawsuit? Indeed, it would be odd if they did not.

There is nothing oxymoronic about a “community” seeking to affix “blame.” Tilly calls blaming a “fundamentally social” act. This is true for two reasons. First, people who live with others are not content to attribute results to luck or fate. They demand that whoever caused the results should take responsibility for them. Second, people are willing to expend great effort to assign responsibility ---- be it blame *or* credit ---- on others in the community.<sup>30</sup>

When there has been a bad outcome, Tilly says there are three inquiries that are part of the process of assessing blame: agency, responsibility, and competence. Agency refers to proof that the person actually caused the outcome. But beyond simple causation is proof of responsibility, *i.e.*, that the person did not perform the acts accidentally or unwittingly. Finally, the actor must be competent, *i.e.*, capable of deliberate action. We do not “blame” either small children or the mentally disabled for bad results they have directly caused. Thus, we blame agents to the extent they have exercised competent responsibility for the bad outcome.<sup>31</sup>

Tilly summarizes with a striking image: “We should salute just blame’s creative destruction.”<sup>32</sup>

So much for “just blame.” But what about the destruction caused by “unjust blame”?

The unsettling part of so many of the law review commentaries is their refusal to consider the effect of Nichole’s lie on Dolores Driscoll, the bus driver. In viewing Nichole’s lie as a “heroic” act to preserve “community” in Sam Dent in the face of the onslaught of the civil law system, the articles overlook the shocking victimization of Dolores. Of course, the reason the

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<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 12, 15.

<sup>32</sup> *Id.* at 119.

commentary ignores Dolores' victimization is that Egoyan's film ignores it.<sup>33</sup> And what is even more troubling about this omission is that it was very much a part of Russell Banks' excellent novel.

### III. *THE SWEET HEREAFTER*: THE NOVEL

Russell Banks' novel *The Sweet Hereafter* was published in 1991. Contrary to Austin Sarat's contention that the film leaves the novel's plot "intact"<sup>34</sup>, the book differs from the film in a very significant way: it explores the effect of Nichole's lie on Dolores Driscoll's life.

The book is organized very differently from the film. It consists of five chapters. The first four chapters present the "testimony" of four narrator-witnesses who each give their views of the bus crash: Dolores Driscoll, Billy Ansel, Mitchell Stephens,<sup>35</sup> and Nichole Burnell. It is similar to reading a trial transcript or a deposition. The reader, as a kind of juror, "is thus put upon to sort out the 'real facts' by establishing the chronological order of the events, uncovering the motives of the witnesses, discarding the irrelevancies, and deciding which narrators are finally credible."<sup>36</sup> The film picks and chooses from these four chapters, rearranging time, and adding several elements.<sup>37</sup>

Yet the fifth chapter of the book is not in the film. This final chapter, like the first, is narrated by Dolores Driscoll. But, unlike the film, it deals directly with the effect of Nichole's lie on Dolores' life. Ironically, this chapter is probably the most cinematic in the book and yet was

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<sup>33</sup> Indeed, Egoyan has acknowledged that his interest in Nichole's choice led him to essentially ignore the impact of Nichole's lie on Dolores. See *The Charlie Rose Show* (interview with Atom Egoyan, January 9, 1998). The film excludes the last chapter of the novel that deals with precisely this issue.

<sup>34</sup> See Waring, *supra* note 20.

<sup>35</sup> Significantly, the chapter heading reads "Mitchell Stephens, Esquire".

<sup>36</sup> Fried & Frolik, *supra* note 4, at 2.

<sup>37</sup> For example, the film has Nichole read "The Pied Piper" to the Ansel children whom she is babysitting. The poem's images resonate through the machinations of Stephens to put together his lawsuit, as well as with Nicole's father's blandishments in leading her into an incestuous relationship. Another addition is a plane trip two years after the bus accident in which Stephens sits next to a childhood friend of his daughter Zoe. This provides the film with an opportunity for Stephens to tell his stories about Zoe that appear in the novel.

not included in the film.<sup>38</sup> The entire chapter takes place at the Sam Dent County Fair's Demolition Derby.

The Derby takes place about eight months after the bus crash. Dolores tells us that the school board terminated her shortly after the crash.<sup>39</sup> Since that time, she and her husband have stayed away from the Sam Dent community. She describes herself and her husband as having “faced our life toward Lake Placid.”<sup>40</sup> She now drives a hotel van.

For the Driscolls, attending the Demolition Derby is important not only because they attend it every year, but because this year they wish to see if the town has accepted them back as members of the community.

As Dolores pushes Abbott in his wheelchair towards the racetrack, she notices that none of the townspeople will acknowledge them. And unlike previous years, none of the townspeople offer her assistance in moving the wheelchair up the stairs. Suddenly, a drunken Billy Ansel appears with a drunken woman Dolores does not recognize. Billy helps her with the wheelchair and then sits down with them.

The crowd begins cheering when Nichole Burnell arrives, with her father pushing her in her wheelchair. When Billy's girlfriend asks why the crowd is cheering, Billy responds “That kid has saved this town from a hundred lawsuits. She's kept us all out of court, when it looked like half the damned town wanted nothing else but to *go* to court.”<sup>41</sup>

When Abbott looks quizzically at Billy, we realize for the first time that he and Dolores do not know anything about Nichole's lie at the deposition. Dolores asks what Nichole said and

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<sup>38</sup> Interestingly, Egoyan said he did not use the Demolition Derby in the film because he ironically found it too “cinematic” for the movie. Likewise, Banks has said that although he liked the use of the Pied Piper in the film, he could never have used it in the book because he considered the device too “literary.” See “Before and After THE SWEET HEREAFTER”, a video discussion of the book and film on the DVD of the film (New Line Home Video, N4654, 1998).

<sup>39</sup> RUSSELL BANKS, *THE SWEET HEREAFTER* (Harper Perennial Books 1992) (1991).

<sup>40</sup> *Id.* at 224.

<sup>41</sup> *Id.* at 239 (emphasis in original).

Billy tries to avoid answering. Finally, when he can no longer ignore Dolores, he tells her that Nichole testified that Dolores was driving 72 m.p.h.

Dolores' thoughts are worth quoting at length: “[The townspeople] were learning that Dolores Driscoll, the driver of the school bus, was to blame for the terrible Sam Dent bus accident last January. They were learning that Dolores had been speeding, that she had been driving recklessly, driving the bus in a snowstorm at nearly twenty miles an hour over the limit....Dolores Driscoll was the reason why the bus had gone off the road and tumbled down the embankment and into the icy water-filled sandpit. Dolores Driscoll was the reason why the children of Sam Dent had died.”<sup>42</sup>

While Dolores is thinking this, she is watching a car she used to own in the Demolition Derby. It is an old Dodge station wagon that Dolores used as her first school “bus” in Sam Dent. She had jokingly named it “Boomer,” and indeed the driver in the Derby had painted the name on the top. Dolores observes that “[E]very time Boomer got hit, no matter who hit it, the crowd roared with sheer pleasure.”<sup>43</sup> The car is bashed again and again by the other cars, always to the cheers of the crowd. Yet Boomer refuses to die and is one of the last three cars running. When Boomer appears stuck, the other two cars come at it from either side, with the entire crowd applauding its imminent demise. Yet somehow Boomer moves and the two cars end up ramming each other. Now the crowd is rooting for, not against, Boomer. Boomer finishes off the other cars and wins, to the cheers of the crowd.

Dolores tells us that after Billy told her Nichole's lie she “had come to feel utterly and permanently separated from the town of Sam Dent and all of its people .... [All of the children on the bus whether living or dead] and I, Dolores Driscoll ---- we were absolutely alone .... And

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<sup>42</sup> *Id.* at 247.

<sup>43</sup> *Id.* at 250.

even if we weren't dead, in an important way which no longer puzzled or frightened me and which I therefore no longer resisted, we were as good as dead."<sup>44</sup> After this, she and Abbott leave.

#### IV. THE TRAGEDY OF DOLORES DRISCOLL

It is true that the Demolition Derby scene was in the book and not in the film. But it is nonetheless disturbing that ---- in their rush to condemn Stephens the lawyer ---- so many of the legal commentators who wrote about the film failed to consider the serious damage that Nichole's lie would obviously have caused Dolores. And the reason for this myopia may have been a naïve willingness to dichotomously believe that the alternative to the "name and blame" lawsuit was simply a community that could somehow "come together" and muddle through without any attribution of blame. As Charles Tilly's work shows, that belief is more than naïve ---- it is wrong.

Abbott, Billy, and Nichole wanted to believe that what happened was an accident or, in Judith Shklar's terms, a "misfortune." That is, they wanted to believe the bus crash was simply caused by some external force of nature and was not the product of some ill-intentioned human agent.<sup>45</sup> If this is true, there would be no need for divisive litigation.

Mitchell Stephens, on the other hand, wanted to believe that the crash was an injustice, rather than a misfortune. That is, he hoped to prove that there was some human or corporate culpability that resulted in the deaths of the children. And let us be clear: Stephens' reasons for wanting to believe this are purely self-serving and in his financial benefit.

Who was right?

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<sup>44</sup> *Id.* at 253, 254.

<sup>45</sup> *See* SHKLAR, *supra* note 1.

We will never know for sure. Nichole's lie derailed any financial incentive for ferreting out culpability for the accident.

Note the irony. Stephens' reasons for not wanting to blame Dolores Driscoll are purely litigation-related. In the novel, Stephens says "I damn sure did not want to go after Dolores Driscoll.... Never mind that her pockets weren't an inch deep; she was well-liked.... Worse, the parents viewed her as having been victimized....and a jury would agree with them."<sup>46</sup> Regardless of the purity of his motives, Stephens had no intention of blaming Dolores.

Who is responsible for falsely blaming Dolores? The "heroic" Nichole, who by "telling her own truth" ostracizes Dolores from the community.

But how much can we really "blame" Nichole for what she did to Dolores? Recall Charles Tilly's test for blame in which he says that when faced with a bad outcome we must consider not only agency and responsibility, but competence. The last word that Mitchell Stephens says to Nichole ---- in both the novel and the film ---- after she has lied at the deposition is crucial: "You'd make a great poker player, *kid*."<sup>47</sup> And Nichole, after all, is just a "kid"; moreover, she is a child who had experienced serious sexual abuse. It could certainly be argued that her lack of "competence" would militate against placing formal "blame" on her. Yet ---- as Stephens undoubtedly realized ---- when she is no longer a "kid" she will nevertheless have to come to grips with the enormous injury her lie caused Dolores.

And how about Billy Ansel? Sarat characterizes Billy's urging the Burnells to drop the lawsuit as a "classic confrontation between good and evil, between fidelity and greed."<sup>48</sup> Billy is adamant in both the novel and the film that he does not want to testify. The legal commentators attribute this solely to his attempts to preserve a spirit of community in Sam Dent. Billy

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<sup>46</sup> BANKS, *supra* note 39, at 129.

<sup>47</sup> *Id.* at 215 (emphasis added).

<sup>48</sup> SARAT, *supra* note 5, at 448.

apparently believes this so strongly that he is willing to forego learning if the crash that killed his children was caused by a negligent human or corporate agent. He even offers to pay for Nichole's hospital bills if the Burnells drop their suit.

But is Billy's civic spirit really the only conceivable reason he did not want to testify?

Consider this. If Billy had had to testify concerning Dolores' speed, the defense lawyers would certainly have explored just how carefully he was observing the bus. In both the film and the novel, Billy is talking on his cell phone to his married lover Risa Walker while he is following the school bus in his car. Billy ---- although apparently not the legal commentators ---- would have realized that the defense attorneys would have wanted to know if he had been distracted in some way while he was driving. A check of his cell phone records would indicate that he was not only on the phone at the time, but that he was talking to a married woman. Isn't it remotely possible that Billy's adamant opposition to anyone in town bringing a lawsuit may have had more to do with protecting his married lover than with preserving Sam Dent's sense of community?<sup>49</sup>

Did Billy "cause" Dolores' ostracism? True, he never lied about her speed. And he did not know that Nichole was listening to his conversation with the Burnells. But his anti-lawsuit comments may very well have influenced Nichole's decision to smear Dolores.

And there is more. When Dolores in the novel tells us about Billy's informing her of Nichole's lie, Billy says:

"The girl has done us all, every single person in town, a valuable service. Even you, Abbott. Even you, Dolores, believe it or not."

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<sup>49</sup> And Billy understood the consequences. The lawsuit ---- and his testimony ---- would be a way to conclusively exonerate Dolores Driscoll. Without the lawsuit, the community would not "come together"; it would continue to blame Dolores. As Billy admits in the novel, "Was it [the crash] Dolores's fault? A lot of people thought so." BANKS, *supra* note 39, at 73.

Abbott said "Why .... us?" Billy looked like he understood him fine, so I didn't translate. What he did, though, was stammer a bit and then say something to the effect that what was good for the town was good for everyone in it . . . .<sup>50</sup>

It seems inhuman that Billy could so cavalierly justify the ostracism ---- the civic death sentence ---- that Nichole's lie caused Dolores by simply pointing out that it was good for the town.

This observation by Charles Tilly has particular relevance to Billy Ansel: "[A]ssignment of .... blame also involves relations to other people....[U]tilitarians may imagine worlds in which relations to specific other humans don't matter so long as accounts come out right with the cosmos, with the gods, or with humanity at large. [If so,] [t]hey are rejecting their own humanity."<sup>51</sup>

But perhaps the saddest irony concerns Abbott Driscoll. He convinced his wife Dolores not to join Stephens' lawsuit because he thought that only the people who had known her all her life ---- and not a jury of twelve strangers ---- were capable of deciding her guilt or innocence.

Yet if Dolores had joined Stephens' lawsuit, her innocence would have been established. But, ironically, it was the people who knew her all her life who ---- based on a lie ---- sentenced her to civic death. Abbott had every reason to feel betrayed by the community; Dolores had every reason to feel as if she were "as good as dead."

Dolores Driscoll did not deserve the community's blame. But the community "killed" her anyway. The blame for a perceived injustice had to go somewhere; Dolores was available. And turning Dolores into a scapegoat functioned as a catharsis for the Sam Dent community.

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<sup>50</sup> *Id.* at 244.

<sup>51</sup> TILLY, *supra* note 2, at 3. And in the novel Dolores makes this observation about Billy at the Demolition Derby: "[W]hat frightened and saddened me most about him was that he no longer loved anybody. All the man had was himself. And you can't love only yourself." BANKS, *supra* note 39, at 237.

Dolores' story has eerie overtones of the story of another woman killed by her community. Her name was Tessie Hutchinson. She lived in a town where once a year a drawing was held to determine who would be stoned to death by the victim's neighbors. In Shirley Jackson's short story *The Lottery*, Tessie Hutchinson's name was drawn.<sup>52</sup> The ritual killing of one citizen a year appeared to be a way for the community to purge itself of its collective anger and blame.

The weakness of the Egoyan film lies in not squarely facing the effect of Nichole's lie on Dolores. Her lie had two effects. First, of course, it unfairly placed all the blame for the children's deaths on Dolores. But equally important, by eliminating any possibility of a lawsuit, the lie destroyed any chance for Dolores to ever prove to her neighbors that she was indeed innocent. Nichole obtained revenge against her greedy father; Billy got his wish not to testify; his married lover remained a secret; and Dolores unfairly became the object of the town's hatred.

In the rush to celebrate how wonderful it was for the community to have Mitchell Stephens leave, the film ---- and its law review champions ---- are strangely silent about how the Sam Dent community actually did "heal": by killing Dolores Driscoll with their blame just as surely as another town killed Tessie Hutchinson with their stones.

## V. CONCLUSION

On its surface, the film *The Sweet Hereafter* celebrates Nichole's (and the town's) victory over litigious lawyers and incestuous fathers. And it is the film, rather than the novel, that has attracted most attention ---- and praise ---- in the law reviews. Yet Russell Banks' novel takes a far more nuanced approach to the destructive effects of Nichole's lie.

This Essay is not a celebration of litigation *per se*. Litigation can be expensive, divisive, and acrimonious. But when "bad things happen to good people," there is a very human tendency

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<sup>52</sup> SHIRLEY JACKSON, *The Lottery*, in *THE GRANTA BOOK OF THE AMERICAN SHORT STORY* 62 (Richard Ford ed., 1992).

to try to assess blame. At its best, the litigation process may work to convince the victims that what occurred was simply a misfortune with no one to blame. Yet the process may also uncover culpable people or entities that deserve society's blame.

And as difficult as this process can be, it is wrong to discourage it. As Charles Tilly has written, “[B]laming brings struggles to an end. We should salute just blame’s creative destruction.”<sup>53</sup>

When a tragedy occurs, we can be sure of one thing ---- *there will be blame*. The litigation process can either dissipate it or properly direct it. But when the legal process gets derailed, as in *The Sweet Hereafter*, the danger is that the blame will get placed on the blameless. For at the end of the day, *The Sweet Hereafter* is not about Mitchell Stephens’ defeat or Nichole Burnell’s revenge. It is about Dolores Driscoll’s final realization that, once her community mistakenly directed its blame at her, she was “as good as dead.”<sup>54</sup>

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<sup>53</sup> TILLY, *supra* note 2, at 119.

<sup>54</sup> BANKS, *supra* note 39, at 254.

# WHO IS RESPONSIBLE WHEN SPECTATORS ARE INJURED WHILE ATTENDING PROFESSIONAL SPORTING EVENTS?

*Leigh Augustine, Esq.*<sup>†</sup>

## INTRODUCTION

More than 15 million Americans attend professional sporting events each year, and injuries to spectators as a result of objects leaving the field (or rink) are commonplace.<sup>1</sup> One study found that during 127 National Hockey League (“NHL”) games, pucks injured 122 people, 90 of which required stitches, and 57 required transport to a hospital emergency room.<sup>2</sup> Another study found that injuries to Major League Baseball (“MLB”) fans from foul balls occur at a rate of 35.1 injuries per million spectator visits.<sup>3</sup>

Contrast this with the incidence of injuries on passenger planes, defined as having 10 or more seats. In 2006 there were only four serious injuries of the total 750 million passenger enplanements<sup>4</sup> and going to a professional sporting event is comparatively much more risky than air travel.

Although injuries can happen at virtually any professional sporting event, they are most common at baseball and hockey games,<sup>5</sup> with auto racing and golf rounding out the top four.<sup>6</sup>

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<sup>1</sup> James E. Winslow and Adam O. Goldstein, *Spectator Risks at Sporting Events*, THE INTERNET JOURNAL OF LAW, HEALTHCARE AND ETHICS, 2007, Vol. 4, No. 1.

<sup>2</sup> *Id.*, citing D. Milzman, *The Puck Stops Here: Spectator Injuries, A Real Risk Watching Hockey Games*, ANNALS OF EMERGENCY MEDICINE, Oct. 2000.

<sup>3</sup> *Id.*, citing A.M. Milstein et al., *Variables Influencing Medical Usage Rates, Injury Patterns, and Levels of Care for Mass Gatherings*, PREHOSPITAL DISASTER MED., 2003.

<sup>4</sup> See <http://www.nts.gov/aviation/Table3.htm>.

<sup>5</sup> See Winslow and Goldstein, *supra* note 1.

<sup>6</sup> See Dave Scheiber, *Danger in the Grandstands*, ST. PETERSBURG TIMES ONLINE, Mar. 26, 2002, [http://www.sptimes.com/2002/03/26/Floridian/Danger\\_in\\_the\\_grandst.shtml](http://www.sptimes.com/2002/03/26/Floridian/Danger_in_the_grandst.shtml). Although more injuries occur at baseball and hockey games, more fatalities occur to spectators at auto racing events. For example, from 1990-2002, 29 spectators have been killed by cars or flying parts, and another 70 have been injured, at the Daytona Beach Racetrack in Florida.

So where does the law stand on this issue? Consistently in favor of the teams, leagues, and/or event promoters. Courts operate under the premise that spectators assume the risk of attending a game/event, and that it should be obvious to the spectator that a baseball, puck, tire, or golf ball can hit them.<sup>7</sup>

“Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom will it be proper for an ‘inherent-risk’ case to go to the jury,”<sup>8</sup>

Notwithstanding of the court decisions, some leagues and state legislators have taken matters a step further. Most, if not all leagues and teams, now place a disclaimer and an assumption of the risk statement on the back of each spectator ticket. Additionally, the NHL responded to a recent spectator death by increasing safety devices at venues.<sup>9</sup> Specifically, protective screens (the “glass”) around the rink must be at least five feet high and protective netting must stretch from the top of the glass to the ceiling of the venue.<sup>10</sup>

But the law has not always been so favorable to venue owners; from the early 1900’s through the 1950’s, courts ruled consistently in favor of the injured spectators.

This paper discusses several of such early cases favoring spectators, and the shift in the law toward legislative and court protection of venue owners and operators.

## I. THE 1900’S THROUGH THE 1950’S: VENUE LIABILITY

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<sup>7</sup> See, for example, *Loughran v. The Phillies*, 888 A.2d 872 (2005). See also *Jones v. Three Rivers Management Corp.*, 394 A.2d 546 (1978).

<sup>8</sup> *Loughran*, 888 A.2d 872 (2005) (holding that getting hit by a ball after a play has stopped is the same risk that a baseball attendee assumes when they are hit by a ball in play, Senior Judge Peter Paul Olszewski wrote).

<sup>9</sup> Darren Smith, *Obstruction Crackdown, Safety Netting Usher in New NHL Season*, Oct. 7, 2002, <http://www.nhl.com/nhl/app?articleid=3551&page=NewsPage&service=page>.

<sup>10</sup> See [www.nhl.com](http://www.nhl.com).

A. *Shanney v. Boston Madison Square Garden Corp.*

Through the first half of the twentieth century, courts consistently found the venue liable for fan injuries which occurred during the course of the game.

For example, in the 1930s, Josephine Shanney's sister purchased a second-row ticket for Ms. Shanney to attend her first hockey game at the Boston Garden.<sup>11</sup> During the game, Ms. Shanney "was suddenly struck and injured by a 'puck' which was driven off the playing surface."<sup>12</sup> At trial, Ms. Shanney argued that "[t]he defendant gave no notice of the danger from flying 'pucks'"<sup>13</sup> and that the arena "failed to perform the duty which it owed to her as its invitee to use due care to see that its premises were reasonably safe for the intended use or to warn her of dangers which were not obvious."<sup>14</sup>

In turn, the arena argued that "persons attending such a game must be presumed to know where they are going, and that the risk is in effect an obvious one which the patron must be held to have assumed."<sup>15</sup>

Despite a three-foot protective fence which extended above the boards, the court partially relied on the fact that Ms. Shanney had never attended a hockey game as it held, "[T]here was no presumption that the plaintiff knew and appreciated the risk," upholding the jury's verdict and award for her injury.<sup>16</sup>

B. *Lemoine v. Springfield Hockey Ass'n.*

A few years after *Shanney*, another lawsuit was filed in Massachusetts. The facts were distinguishable because the injured fan admitted to attending hockey games for several years,

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<sup>11</sup> *Shanney v. Boston Madison Square Garden Corp.*, 5 N.E.2d 1 (Mass. 1936).

<sup>12</sup> *Id.* at 1. (Note that the word *puck* is in quotes in the court's decision.).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

and had knowledge that pucks can and do enter the stands.<sup>17</sup> During the game the fan became sick and left his seat to go to the bathroom; it was at that time when he was struck with a puck.<sup>18</sup> The court upheld the jury's verdict for the fan, holding that the fan's knowledge of the game was not an issue, and that a jury could find that pucks entered the stands so frequently that the fan could properly rely on protections provided (or, in this case, not provided) by the arena.<sup>19</sup>

C. *Schwilm v. Pennsylvania Sports*

The *Schwilm* case involved a woman sitting in a high risk part of a hockey arena, specifically, "behind the goal cage at which the players shoot."<sup>20</sup> Ms. Schwilm was struck in the head with a puck, and the jury awarded her \$2,500 for her injuries.<sup>21</sup> The appellate court affirmed the award despite an explicit acknowledgement that baseball fans assume the risk of being hit by balls and bats at baseball games, because it held the hockey fan had "a right to rely on the protection afforded."<sup>22</sup>

The aforementioned cases demonstrate the willingness of courts to find arenas liable through the first half of the twentieth century, however, and as mentioned earlier, the proverbial pendulum began to swing the other direction in the second half of the 1900's.

## II. THE SHIFT IN THE LAW

A. *Caselaw*

The public's (and, correspondingly, the courts') awareness of the inherent injuries that can occur to fans during sports events, coupled with the increased popularity of professional

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<sup>17</sup> *Lemoine v. Springfield Hockey Ass'n*, 29 N.E. 2d 716, 717 (Mass. 1940)

<sup>18</sup> *Id.* at 717.

<sup>19</sup> *Id.* at 718.

<sup>20</sup> *Schwilm v. Pennsylvania Sports*, 84 Pa. D. & C. 603, 605. The facts of this case involved an injury to a hockey fan, however, in the holding, the court stated it was "not unmindful of the fact that our appellate courts have held that spectators at baseball games assume the risk [of injury]."

<sup>21</sup> *Id.* at 604.

<sup>22</sup> *Id.* at 605.

sports in the second half of the twentieth century forced the courts to protect the business of professional sports, and, rulings against venue owners diminished.<sup>23</sup>

The 1986 case of *Neinstein v. Los Angeles Dodgers* looked at whether the owner of a baseball stadium had a duty to protect spectators from the natural hazards generated by the way in which the game itself is played.<sup>24</sup> The court explained the shift when it held for the venue, reasoning,

As we see it, to permit plaintiff to recover under the circumstances here would force baseball stadium owners to do one of two things: place all spectator areas behind a protective screen thereby reducing the quality of everyone's view, and since players are often able to reach into the spectator area to catch foul balls, changing the very nature of the game itself; or continue the status quo and increase the price of tickets to cover the cost of compensating injured persons with the attendant result that persons of meager means might be 'priced out' of enjoying the great American pastime. To us, neither alternative is acceptable. In our opinion it is not the role of the courts to effect a wholesale remodeling of a revered American institution through application of the tort law.<sup>25</sup>

The majority of the lawsuits brought against venues by spectators allege breach of duty and negligence on the part of the owner/operator of the venue, as well as against the teams and players themselves. Courts generally started to accept the position asserted by the owner/operator of the venues, that people who attend sporting events assume the risks inherent to the game.

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<sup>23</sup> In 1960-61, total hockey tickets sold to fans were 2.3 million (*National Hockey League Official Guide & Record Book 2008*) while the 2007-08 season had 21,236,255 sold (<http://puckstopshere.blogspot.com/2008/04/nhl-sets-regular-season-attendance.html>).

<sup>24</sup> *Neinstein v. Los Angeles Dodgers, Inc.*, 185 Cal.App.3d 176 (1986).

<sup>25</sup> *Id.* at 180-81.

Therefore, determining what constitutes risks “inherent to the game” is the main issue courts must decide. In a baseball game, if a foul ball is hit into the stands during the regular action of the game, courts will avoid findings of liability. The same is generally true for hockey when the puck goes in to the stands during the normal course of play. However, situations that are not so easily definable as being a part of the regular action of the sport make the question of liability more difficult.

Courts have long held that there is no liability for a spectator struck by a batted ball, whether during the course of the game or in pre-game practice. A good example of this is *Lorino v. New Orleans Baseball & Amusement Co.*,<sup>26</sup> where a batted ball injured a spectator during the pre-game practice, while the spectator voluntarily watched the practice from the “bleachers.”<sup>27</sup> The court defined “bleachers” as unprotected seating, the nearest point to home plate of which was 158 feet.<sup>28</sup> “It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.”<sup>29</sup> The court found that the appellant had assumed the risk of common, known, and inherent parts of the game, and affirmed the trial court’s dismissal of the suit.

In *Loughran v. The Phillies*, the court sustained the trial court’s grant of summary judgment based on the general ‘no duty’ rule to spectators for injuries happening in the course of the game.<sup>30</sup> On July 5<sup>th</sup>, 2003, Philadelphia Phillies Center Fielder Marlon Byrd flipped the ball into the stands after catching the last out of the inning.<sup>31</sup> Jeremy Loughran was struck by the ball

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<sup>26</sup> *Lorino v. New Orleans Baseball & Amusement Co., Inc.*, 16 La.App. 95, 133 So. 408 (1931).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 96-97.

<sup>30</sup> *Loughran*, 2005 PA Super 396, No. 652 EDA, 888 A.2d 872 (2005).

<sup>31</sup> *Id.* at 873-74.

and treated at the hospital on more than one occasion for various injuries to the head.<sup>32</sup> There were five questions at issue on appeal: “1) Whether a spectator at a baseball game assumes the risk of being struck in the face by a ball; 2) Whether being struck in the face by a ball is an inherent risk of attending a game; 3) Whether the “no duty” defense is available to appellees; 4) Whether the “no duty” rule was properly applied; and 5) Whether summary judgment was appropriate.”<sup>33</sup>

The court stated that that the “application of the ‘no duty’ rule hinges on whether the activity in question is a ‘common, frequent, or expected part of the game.’”<sup>34</sup> To that end the court stated that “[e]ven a casual baseball spectator would concede it was not uncommon for a player to toss a memento from the game to nearby fans,”<sup>35</sup> and as such it constituted an inherent and known risk of the game. Therefore, the court affirmed the judgment of the trial court finding that it did not err in applying the “no duty” rule and finding no liability on the part of any of the defendants, who, in this case, were the Phillies organization and Marlon Byrd.<sup>36</sup>

Similarly, in *Rees v. Cleveland Indians Baseball Co.*,<sup>37</sup> the court affirmed a judgment in favor of the defendant in a suit alleging “negligence and willful and reckless failure to protect spectators from objects flying into unprotected and uncovered stands and failure to warn spectators of these risks.”<sup>38</sup> In that case, a woman was struck in the face by a broken bat and the trial court issued a summary judgment for the team on the grounds of primary assumption of the risk (another name for the “no duty” rule).<sup>39</sup> In so affirming, the appellate court rejected the appellants argument that “a genuine issue of material fact exists regarding whether they are

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<sup>32</sup> *Id.* at 874.

<sup>33</sup> *Id.* (Citing Appellant's Brief, at 4.)

<sup>34</sup> *Id.* at 875.

<sup>35</sup> *Id.* at 876.

<sup>36</sup> *Id.* at 877.

<sup>37</sup> *Rees v. Cleveland Indians Baseball Co.*, 2004 WL 2610531 1 (Ohio 2004).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

subject to the defense of primary assumption of the risk.”<sup>40</sup> The appellants argued, “they agree that baseballs entering the spectator stands are a common occurrence and the dangers of such are open, obvious, and expected. However, they maintain that broken bats are not a common occurrence and, thus, they claim they were unable to appreciate such a risk.”<sup>41</sup>

The court explained, “While we recognize that a majority of these cases focus on injury sustained when baseballs enter the stands, Ohio courts and other jurisdictions have applied the same principles of primary assumption of the risk in non-baseball cases.”<sup>42</sup> Moreover, the court posited that Mrs. Rees had received the tickets from a relative, and had been going to the same seats at different games for years prior to the incident.<sup>43</sup> She voluntarily sat in the unprotected portion of the stadium and had never contacted any of the stadium personnel about a fear of sitting in that area.<sup>44</sup> For those reasons, the court found persuasive the argument for primary assumption of the risk extending to injury caused by the flying broken bat.<sup>45</sup>

Courts have also used the doctrine of primary assumption of the risk in hockey cases. In *Nemarnik v. The Los Angeles Kings Hockey Club, L.P.*,<sup>46</sup> a woman sued the Los Angeles Kings, the NHL, and the owners and operators of the arena (the “Forum”) for alleged negligence when, on April 18, 1999, she was struck by a puck during pre-game warm ups while her view of the ice was obstructed by the crowd in front of her.<sup>47</sup> The court affirmed the judgment of the trial court which had “granted defendants’ motion for nonsuit at the beginning of trial,” and had “concluded, as a matter of law, that defendants were immune from liability under the primary

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<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Nemarnik v. The Los Angeles Kings Hockey Club, L.P.*, 103 Cal.App.4th 631, 127 Cal.Rptr.2d 10 (2002).

<sup>47</sup> *Id.*

assumption of risk defense.<sup>48</sup> Further, the “[t]rial court also awarded defendants costs of \$12,870.”<sup>49</sup>

An interesting factual difference in that case is that the Forum has a policy regarding late-comers which states that the ushers prohibit them from obstructing the view of seated patrons, and that they stand along the back wall until there is a stoppage in play and the risk of errant pucks flying into the stands is at a minimum.<sup>50</sup> Further, the appellants expert testified at trial that the ushers did not comply with these standards on the day of the incident.<sup>51</sup> Despite this, the court stated that “[o]bstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of attending a sporting event. Views are blocked whenever fans spontaneously leap to their feet or move to and from their seats.”<sup>52</sup> The court further stated that no court has imposed a legal duty upon an athletic team, sports league, or sports arena to prevent large crowds of spectators, during pregame warm-ups, from congregating in the aisles near the front of the arena, or from blocking the views of seated spectators.”<sup>53</sup>

Ultimately, the court followed the analysis of *Knight v. Jewett*,<sup>54</sup> and held “‘defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,’ and have done nothing to increase the risks inherent in the sport. Just as stadium owners owe no duty to eliminate the risk of injury from foul balls, we similarly conclude defendants owe no duty to eliminate the inherent risk of injury from flying pucks.”<sup>55</sup>

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<sup>48</sup> *Id.* at 634..

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 634-35.

<sup>51</sup> *Id.* at 635.

<sup>52</sup> *Id.* at 638-39

<sup>53</sup> *Id.* at 639.

<sup>54</sup> *Knight v. Jewett*, 3 Cal.4<sup>th</sup> 296, 11 Cal.Rptr.2<sup>nd</sup> 2 (1992).

<sup>55</sup> *Nemarnik*, 103 Cal.App.4<sup>th</sup> at 643 (quoting *Knight*, 3 Cal.4<sup>th</sup> at 315).

In another hockey case, *Hurst v. East Coast Hockey League, Inc.*, the court held similarly to the *Nemarnik* court.<sup>56</sup> There, the spectator entered the arena during pre-game warm-ups through a curtained entrance/exit positioned behind the goal and was struck in the face by a puck.<sup>57</sup> The court stated the law on the issue as follows:

Primary implied assumption of risk is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff... [T]he Tennessee Supreme Court summarized the doctrine in the following way: In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care.... Clearly primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.<sup>58</sup>

In that regard, the court held “under the doctrine of implied primary assumption of risk, respondents' duty of care did not encompass the risk involved. The risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey.”<sup>59</sup> Moreover, as the court did in *Nemarnik*, the court here held that the action failed as a matter of law under the theory of primary assumption of the risk.<sup>60</sup>

The conclusion in these cases seems to be where no duty is owed, the courts will enter a judgment as a matter of law for the defendants. The courts are increasingly broad in their

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<sup>56</sup> *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 39, 637 S.E.2d 560, 563 (2006).

<sup>57</sup> *Id.* at 35-36.

<sup>58</sup> *Id.* at 37.

<sup>59</sup> *Id.* at 38.

<sup>60</sup> *Id.* at 39.

definitions of what constitutes common or inherent risks of the game and it does not seem to matter whether the injuries happened in pre-game warm-ups or during the actual game, courts will find no duty exists in either instance. Further, if more states follow suit, and adopt non-liability statutes such as the one in Colorado, the question of negligence and duty owed to the spectator will not make it as far as it has in these cases.

*B. Statutes*

Although the majority of state courts addressing the issue have adopted a pro-venue stance,<sup>61</sup> several state legislatures, including Illinois and Colorado, took further steps and passed laws explicitly pushing the liability from the inherent dangers and risks of observing professional baseball onto the spectators. This is commonly known as the “limited duty rule” or the “baseball rule.”<sup>62</sup> Colorado Revised Statute 13-21-120 is known as the “Colorado Baseball Spectator Safety Act of 1993,” and states in part, “Limiting the civil liability of those who own professional baseball teams and those who own stadiums . . . will help contain costs, keeping ticket prices more affordable.”<sup>63</sup> Furthermore, “[s]pectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary.”<sup>64</sup> Therefore, “the assumption of risk set forth . . . shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks.”<sup>65</sup>

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<sup>61</sup> See Charles Toulant, *Baseball Fan Hit by Foul Allowed to Sue Park Owner for Negligence*, LAW.COM, September 23, 2005, <http://www.law.com/jsp/article.jsp?id=1127379914733>.

<sup>62</sup> *Turner v. Mandalay Sports Entertainment*, 180 P.3d 1172, 1175 (Nev. 2008) (“In addressing this issue, at least 12 jurisdictions have adopted the “limited duty rule,” which places two important requirements on stadium owners and operators. First, the rule requires stadium owners and operator to provide a sufficient amount of protected seating for those spectators ‘who may be reasonably anticipated to desire protected seats on an ordinary occasion.’ Second, it requires owners and operators to provide protection for all spectators located in the most dangerous parts of the stadium, that is, those areas that post an unduly high risk of injury from foul balls (such as directly behind home plate).”).

<sup>63</sup> Colo Rev. Stat. § 13-21-120 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

### C. *Exceptions*

As always, there are exceptions to the rule. One notable exception occurred in 2002 in Ohio, after a thirteen year old girl was struck and killed by a hockey puck which was deflected into the stands at an NHL game.<sup>66</sup> The family of the girl threatened to sue the NHL, the Columbus Blue Jackets, and Nationwide Arena, but settled with the three entities for \$1.2 million.<sup>67</sup> In response, the NHL mandated that protective nets from the top of the glass to the ceiling be installed behind the goals in all NHL venues.<sup>68</sup>

### III. CONCLUSION

In sum, when spectators attend professional sporting events, they assume the risks of the inherent dangers of the event, including pucks, balls, bats or tires and other objects inherent to the game which may come off the playing field and cause bodily injury of even death, unless the venue owner/operator severely deviates from their duty of care.

So when you hear the coach yell, “Keep your eye on the ball,” they may be talking to you.

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<sup>66</sup> Associated Press, *Coroner's Report-Puck Snapped Girl's Head Back, Damaging Artery*, Mar. 20, 2002, [http://sportsillustrated.cnn.com/hockey/news/2002/03/20/puck\\_death\\_ap/](http://sportsillustrated.cnn.com/hockey/news/2002/03/20/puck_death_ap/).

<sup>67</sup> Associated Press, *Ohio High Court: Release Settlement in Case of Girl Killed by Puck*, Apr. 14, 2004, <http://www.thefirstamendmentcenter.org/news.aspx?id=13176>.

<sup>68</sup> See NHL '02-'03: New Rules, new fan protection, new Red Wings, <http://www.nhl.com/nhl/app?articleid=3211&page=NewsPage&service=page> (October 5, 2002).

# SPORTS OFFICIAL LIABILITY: CAN I SUE IF THE REF MISSED A CALL?

*John Cadkin*<sup>†</sup>

## INTRODUCTION

It is game seven of the World Series, the score is tied and your favorite team is batting in the bottom of the ninth. The bases are loaded with two outs as your star player steps to the plate. The hitter jumps on the first pitch, trickling a ball towards the shortstop. Checking to first base the shortstop realizes the only play is at home plate. The runner on third base is charging and dives head first to beat the throw home. He's safe by a mile! The stadium erupts. But, wait – the home plate umpire calls him out! The announcers are speechless as the televised replays show the runner clearly beating the tag. Unfortunately, without instant replay there is no chance of the umpire's call being overruled. Your team goes on to lose the World Series in extra innings.

The next morning, still in disbelief from your team's misfortune, you grab the paper and see the following headline: "Team Sues Umpire For Blown Call!" Can it be? Is there such a cause of action as negligent officiating or referee malpractice? Are courts willing to hold a sports official liable for an unintentional error in judgment? And, if courts do recognize such claims, what standard of care must the referee's conduct meet? This paper will discuss the claim of negligent officiating, and determine whether existing case law precludes such a cause of action. This paper will not discuss liability deriving from intentional acts of sports official misconduct, *i.e.*, tampering, bribery or fraud, as the States have clearly placed such conduct within the ambit of the courts.

### I. LIABILITY OF A SPORTS OFFICIAL FOR UNINTENTIONAL ERRORS MUST BE ANALYZED UNDER A THEORY OF NEGLIGENCE.

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Modern professional sports are an industry of staggering financial size.<sup>1</sup> Players, owners, agents, retailers and cities all derive substantial revenue from professional sports.<sup>2</sup> Sports officials play perhaps the most important role supporting professional sports, yet they receive little to no attention until they have in fact erred, or the fans perceive error.<sup>3</sup> An official's error can cause a professional team significant monetary harm.<sup>4</sup> Liability of a professional sports referee, sometimes referred to as referee malpractice, has received significant academic commentary. However, while tort liability for referee malpractice is firmly grounded in negligence theory, jurisdictions differ as to the appropriate standard of care placed on referees. The current prevailing standard appears to be ordinary negligence. Standard defenses to negligence may present a bar to recovery. Contributory negligence, assumption of risk and lack of causation may all prove fatal to a claim.<sup>5</sup>

Numerous states have granted sports officials qualified tort immunity to civil suit.<sup>6</sup> When present, qualified immunity jurisdictions require a showing beyond simple negligence before liability is found. Rather, qualified immunity jurisdictions require a showing of either "recklessness" or "gross negligence" before the courts will recognize a claim for negligent officiating.<sup>7</sup> Qualified immunity statutes generally refer to liability for *physical* harm sustained during athletic contests, as opposed to *financial* harm resulting from an improper call.

Regardless of the standard of care, to recover for an action sounding in negligence, the standard tort elements must be demonstrated: duty, breach, causation, and harm.<sup>8</sup> The plaintiff

<sup>1</sup> Kenneth W. Biedzynski, Comment, *Sports Officials Should Only Be Liable For Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 375 (1994).

<sup>2</sup> *Id.* at 376.

<sup>3</sup> *Id.* at 376-77.

<sup>4</sup> Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 214 (1997).

<sup>5</sup> Biedzynski, *supra* note 1, at 384.

<sup>6</sup> *Id.* at 379.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 381.

must demonstrate that the “referee’s conduct deviated from a required standard of care and that such a deviation resulted in a different outcome for the game.”<sup>9</sup>

#### A. *Duty*

Before liability can attach to a sports official, breach of an affirmative duty must be demonstrated.<sup>10</sup> Duty arises in the context of sports officiating given statutes, common law,<sup>11</sup> or an “implied contractual obligation to officiate competently.”<sup>12</sup> The job of a sports official is to “possess and implement adequate knowledge of the rules and their application.”<sup>13</sup> To determine if a prospective plaintiff possesses interests which are entitled to legal protection, *i.e.*, whether the referee owes them a duty, courts consider many factors. Specifically, courts consider: the foreseeability of harm; the degree of certainty that plaintiff has suffered the alleged harm; the closeness of connection between the referee’s alleged misconduct and potential injury; any existing policy preventing future harm; and the external consequences of placing the burden of liability upon the defendant.<sup>14</sup> The factors balance both public policy interests and the practical implications of allowing sports official liability. It is likely the “duty” prong of the negligence inquiry is satisfied by explicit reliance on the referee as an impartial and competent on-field arbiter.

#### B. *Breach*

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<sup>9</sup> Jason Loomis, *The Emerging Law of Referee Malpractice*, 11 SETON HALL J. SPORTS L. 73, 88 (2001).

<sup>10</sup> Feiner, *supra* note 4, at 217.

<sup>11</sup> Loomis, *supra* note 9, at 88.

<sup>12</sup> Feiner, *supra* note 4, at 217.

<sup>13</sup> Feiner, *supra* note 4, at 217.

<sup>14</sup> Darryll M. Halcomb Lewis & Frank S. Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673, 690 (1990).

Once a duty has been found to exist, a prospective plaintiff must establish breach. Breach is commonly defined as a “failure to perform a duty or ‘failure to exercise that care which a reasonable [person] would exercise under similar situations.’”<sup>15</sup> If this duty is breached, only the non-breaching party is in a position to sue. Generally, the non-breaching parties include the league and athletic participants.<sup>16</sup> Third-parties, such as fans, retailers and gamblers, will be unable to demonstrate that they were intended beneficiaries of the contract between the referee and team, *i.e.*, there is no privity of contract.<sup>17</sup> Therefore, if a claim of negligent officiating is allowed, the most likely party to recover would be the team itself.

### C. Causation

The plaintiff will typically face great difficulty when trying to prove that the harm was in fact *caused* by the referee’s negligent act or omission. Furthermore, the court may require a showing of proximate causation. Proximate cause is proven when the relationship between the “initial conduct and the ultimate harm” is not so disparate “as to discredit the imposition of liability.”<sup>18</sup> The negligent act must be the cause-in-fact of the monetary harm. In other words, but for the incorrect call by the official, the outcome of the game would have been different.<sup>19</sup> The causation element will prove fatal to most claims. The negligent decision *must* be outcome determinative. Therefore, the scope of plays eligible to satisfy this element is necessarily limited to plays occurring in the final seconds of a game.

### D. Harm

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<sup>15</sup> Loomis, *supra* note 9, at 94 (quoting Shlomi Feiner, *The Personal Liability of Sports Officials: Don’t Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 215, 229 (1997)).

<sup>16</sup> Feiner, *supra* note 4, at 217.

<sup>17</sup> *Id.*

<sup>18</sup> Lewis & Forbes, *supra* note 16, at 691.

<sup>19</sup> Loomis, *supra* note 9, at 89.

Harm must be considered reasonably foreseeable to allow recovery.<sup>20</sup> Because modern professional sports involve tremendous sums of money, such high financial stakes make the harm reasonably foreseeable and the determination of monetary injury rather easy. When a team fails to make the playoffs, or fails to advance in the post-season, a team's lost revenue can be substantial.<sup>21</sup> Winning teams, and especially teams that consistently compete for championships, earn far more revenue than those that do not.<sup>22</sup> Each loss on the field may result in a decrease in team value.<sup>23</sup> Gate receipts, broadcasting rights, box sales, concessions, parking and license fees may all be affected by sports official negligence.<sup>24</sup> Wins, losses and championships have been found to significantly affect a team's value, as well as impact future earnings.<sup>25</sup> While many injuries in professional sport are quantifiable, others such as "team pride, emotional distress, and fan support" can be supported only by qualitative data.<sup>26</sup> Monetary harm becomes more difficult to ascertain the further removed the sporting contest is from the professional level.

## II. COURTS AND COMMENTATORS DISAGREE AS TO WHAT STANDARD OF CARE SHOULD BE APPLIED WHEN JUDGING ALLEGEDLY NEGLIGENT ACTS

Referees are generally required to use reasonable care to ensure that the sporting contest adheres to the rules of competition.<sup>27</sup> Reasonable care requires acting with the diligence of a reasonable and prudent referee of similar training and experience: reasonableness equates to an ordinary negligence standard.<sup>28</sup> Published case law supports a finding that the perceived standard of care by which referee conduct is measured is ordinary negligence.<sup>29</sup> In the context of

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<sup>20</sup> Feiner, *supra* note 4, at 217.

<sup>21</sup> Loomis, *supra* note 10, at 84.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 86-87.

<sup>26</sup> *Id.* at 86.

<sup>27</sup> Biedzynski, *supra* note 1, at 385.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 417.

referee negligence, an “error” is defined as a sports official’s misidentification of fact.<sup>30</sup> Under an ordinary negligence standard, the law would attempt to hold an official liable for such errors. However, courts have historically refused to interfere with an officiating decision unless it is “found to have been based on corruption, bad faith or fraud.”<sup>31</sup>

The “duty of care owed by a player *to an umpire* during the course of a game is the same as that owed *to another player*.”<sup>32</sup> Commentators argue by analogy that this rule should be applied conversely: since participants and competitors “owe their fellow players a duty to not act recklessly, recklessness and *not* ordinary negligence should define the sports official’s duty.”<sup>33</sup> Sports decisions are made instantaneously and under intense pressure.<sup>34</sup> Commentators therefore argue that referee conduct should be measured against a more lenient standard which does not restrict a referee’s discretion; referees should be free to properly officiate without fear of litigation.<sup>35</sup>

Assuming referees are acting in good faith and make an unintentional error in judgment, it seems reasonable that an ordinary negligence standard would suffice. However, for cases involving unintentional torts, commentators argue the proper standard of care is a gross negligence or recklessness standard: a referee will only be liable where their acts or omissions are reckless.<sup>36</sup> In line with this view, many states have enacted sports-specific laws limiting civil liability to reckless action.<sup>37</sup> States have adopted this view in part due to the aggressive campaigning of the National Association of Sports Officials (“NASO”). The NASO supports a

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<sup>30</sup> *Id.* at 418.

<sup>31</sup> *Id.*

<sup>32</sup> *Stewart v. D & R Welding Supply Co.*, 366 N.E.2d 1107, 1108 (Ill. Ct. App. 1977).

<sup>33</sup> Biedzynski, *supra* note 1, at 412.

<sup>34</sup> Feiner, *supra* note 4, at 229.

<sup>35</sup> *Id.*

<sup>36</sup> Biedzynski, *supra* note 1, at 387-88.

<sup>37</sup> Legislation covering sports official liability have been enacted in Arkansas, Georgia, Indiana, Louisiana, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island and Tennessee.

gross negligence standard, and has set forth model legislation specifically dealing with the civil liability of a sports official. The NASO model legislation includes:

Section 1. Sports officials ... shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

...

Section 3. Nothing in this law shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inaction which are intentional, willful, wanton, reckless, maliciously or grossly negligent.<sup>38</sup>

The NASO has petitioned organizations to support its position to “limit the liability sports officials may incur as a result of the reasonable and customary decisions they make in fulfilling their duty.”<sup>39</sup> The gross negligence standard provides a “compromise between the reluctance of the judiciary to intervene and the concern for compensating parties injured by the negligent conduct of others.”<sup>40</sup>

### III. INSTANT REPLAY MAY SERVE AS A CATALYST ENCOURAGING COURTS TO RECOGNIZE CLAIMS OF NEGLIGENT OFFICIATING

Regardless of the standard used to judge sports official conduct, courts have been extremely reluctant to find a justiciable controversy: the decision of the referee is left on the field with those parties who are best trained, and in a position, to make the proper call; the court will not intervene.<sup>41</sup> Absent a showing of bad faith or corruption, courts routinely refuse to interfere and, rather, presume the official’s on-field decision to be correct.<sup>42</sup> The immediate on-field reaction and decision of an official made in the midst of a sporting event is nearly *always* given

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<sup>38</sup> National Association of Sports Officials, Model Legislation, Limited Civil Liability for Sports Officials, *available at* <http://www.naso.org/legislation/page3.htm>.

<sup>39</sup> National Association of Sports Officials, Guidelines for Officials: A Covenant with Sports Officials, Preamble (2002), *available at* [http://www.naso.org/officiating\\_codes/Covenant.pdf](http://www.naso.org/officiating_codes/Covenant.pdf).

<sup>40</sup> Feiner, *supra* note 4, at 234.

<sup>41</sup> *Id.* at 214.

<sup>42</sup> *Id.* at 224.

impenetrable credence, deference and consideration. However, the recent phenomenon of instant replay, which would clearly allow a judge to evaluate and review the decision of an on-field official, may begin to persuade the court to entertain claims of referee liability in certain situations.<sup>43</sup>

Generally, instant replay allows in-game review of either questionable or critical referee judgment calls. Instant replay acts as a safety net.<sup>44</sup> However, when instant replay is available sports officials may be under an increased duty to *use* the instant replay to ensure the call is correct.<sup>45</sup> Although the courts have not addressed the issue, if the failure to use instant replay results in monetary loss to the team, officials may be liable for a negligent omission.<sup>46</sup>

Finally, instant replay may serve as an “evidentiary tool.”<sup>47</sup> High-definition, multiple-angle video may provide sufficient evidence to persuade the courts to overcome their resistance to intervene in the decisions of sports officials. Instant replay was originally created to limit or stifle the effect of incorrect applications of in-game rules. However, over time and given the right set of facts, instant replay may provide the foundation for finding sports officials liable for “economic losses resulting from an incorrect” judgment.<sup>48</sup>

#### IV. LEADING CASE LAW CREATES A NARROW WINDOW IN WHICH A CLAIM FOR NEGLIGENT OFFICIATING MAY EXIST

A brief discussion of leading case law is helpful to understand how courts have historically approached the issue of referee liability.

##### A. *Shapiro v. Queens County Jockey Club*

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 230.

<sup>45</sup> *Id.* at 231.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> S. Christopher Szczerban, Article, *Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials*, 6 VA. SPORTS & ENT. L.J. 277, 322 (2007)

The *Shapiro* decision stands as one of the earliest opinions setting forth the general rule regarding interpretation of a referee's on-field decision.<sup>49</sup> The *Shapiro* court found that umpires, sitting closer in position and time to the questionable event, are in the best position to act as "judges of facts."<sup>50</sup> The *Shapiro* plaintiff sought an injunction, which the court denied. In essence, the *Shapiro* court gave the sports official's decision a presumption of correctness.

*B. Georgia High School Ass'n v. Waddell*

As in *Shapiro*, the Supreme Court of Georgia refused to find that it possessed the authority to review a call made by a high school football referee.<sup>51</sup> In addition, the court found that a high-school football player, as opposed to the team or school, had no property interest in the outcome of the game and, therefore, had no basis for recovery.<sup>52</sup> The *Waddell* court refused to grant an injunction ordering the game replayed. *Waddell* supposes that a *team's* property interest in the game's outcome is sufficient to allow recovery for a referee's negligent acts.

*C. Bain v. Gillispie*

*Bain* involved a third-party's attempt to recover due to an alleged error of a college basketball referee.<sup>53</sup> In *Bain*, a third-party marketer sued the referee because the plaintiff perceived the referee's error as the sole reason that the team failed to advance in the NCAA basketball tournament. The plaintiff argued he was denied the opportunity to produce and sell products branded with the team's logo. Under these facts, the court found that the tort of "referee malpractice" did not exist, but relied on the fact that the duty of a referee *did not* extend to third-parties, but can reasonably be read to assume that the duty was present *if* applied to the team itself.<sup>54</sup>

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<sup>49</sup> 53 N.Y.S.2d 135, 136-37 (1945).

<sup>50</sup> *Shapiro*, 53 N.Y.S.3d at 138-9.

<sup>51</sup> *Georgia High Sch. Ass'n v. Waddell*, 285 S.E.2d 7, 9 (Ga. 1981).

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Bain v. Gillispie*, 357 N.W.2d 47 (Iowa Ct. App. 1984).

<sup>54</sup> *Id.* at 49.

D. *Carabba v. Anacortes Sch. Dist. No. 103*

The leading case in support of setting a reasonableness standard for referee liability is *Carabba v. Anacortes Sch. Dist. No. 103*.<sup>55</sup> The *Carabba* decision involved referee liability where a referee's negligent omission resulted in severe and permanent physical injury. The *Carabba* court found that a sports official must exercise the care of an ordinary, prudent referee under similar circumstances: sports official liability should be measured against a reasonableness or ordinary negligence standard.

E. *Summary*

The foregoing decisions present the legal framework within which a claim for negligent officiating may lie. While it may seem that such a claim has been extinguished by the courts, all is not lost. The decisions in *Shapiro*, *Waddell*, and *Bain* are instructive and distinguishable. *Shapiro* and *Waddell* sought an injunction rather than money damages, while *Bain* involved attempted recovery by a third-party, as opposed to a party in privity. Therefore, these cases may be reasonably read to *allow* a claim of negligent officiating where *money damages* are sought by a party in privity with the referee. Of course, the elements of duty, breach, causation and harm must be present, but the case law does not wholesale preclude a claim.

V. PUBLIC POLICY STRONGLY MILITATES AGAINST IMPOSING LIABILITY UPON A SPORTS OFFICIAL

Commentators argue that public policy is strongly against imposing liability on a sports official for negligent acts.<sup>56</sup> Clearly, if sports officials and referees become yet another target of our society's litigious nature, few men and woman would be willing to officiate athletic contests. Even at the professional level, where the financial rewards are substantial, the risk is simply too

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<sup>55</sup> *Hays v. Robertson*, 435 P.2d 926 (Wash. 1967).

<sup>56</sup> Biedzynski, *supra* note 1, at 414.

high.<sup>57</sup> While potential financial risk to professional referees is staggering, it is likely any such risk would be mitigated. For example, union officials may require teams to subsidize the cost of insurance to cover claims of negligence. The practical impact would likely be an increase in ticket cost for the fans. This is perhaps a small price to pay to ensure access to one of America's favorite modes of entertainment. But, if official conduct were to be measured against a negligence standard, the sports official would be forced to "not only ... perform his or her tasks in such a manner so as to reduce the risks of physical injuries, but also to reduce the risk of errors which may deprive a team of a victory or monetary gain."<sup>58</sup> Clearly, the job of a referee is difficult enough without adding a likelihood of suit should they unintentionally err in judgment.

If the courts become amenable to actions against sports officials, the true impact will not be felt at the professional level. Rather, high school, club sports and under-funded college programs may feel the true impact. Such programs, already lacking sufficient funds, would likely be unable, or even unwilling, to absorb the financial cost required to mitigate against the risk of referee liability. Furthermore, referees at this level, participating truly for the love of the game, would no longer be willing to officiate for this nation's children and young adults. If courts were to find officials liable for negligent officiating, any impact would be disproportionately felt at the lower levels of sport. Parties would stretch to find financial harm and, even if unsuccessful, would place the enormous burden of litigation on parties ill equipped to fund the fight. However, if the cause of action were limited to a very specific set of facts, as discussed below, a proper balance may be met, and sport would not suffer.

## VI. OPINION

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<sup>57</sup> *Id.*

<sup>58</sup> Lewis & Forbes, *supra* note 16, at 694.

My opinion is that while sports official liability may technically present a valid cause of action, absent a “perfect storm” of available facts, I believe the decision of the referee should be left on the playing field. In most situations there is simply no need to arm litigants with another cause of action. Good-faith referee conduct should normally receive a near impenetrable presumption of correctness, or be measured against a gross negligence or recklessness standard. Thus, such a presumption would shield our courts from the vast majority of allegedly negligent acts. However, litigants should obviously be free to recover for intentional acts or omissions and, arguably, any act or omission resulting in *physical*, as opposed to monetary, harm.

Nonetheless, I argue that when only monetary relief is requested and where the allegedly negligent call is an: (1) on-the-spot judgment, (2) made in good faith, (3) absent instant replay, and (4) is outcome determinative, the court should allow such a cause of action and measure the referee’s conduct against an *ordinary negligence* standard. Consider the fictional baseball scenario set forth above: the team *should* have won on the final play before extra innings *but for* the negligent act of the referee. While I argue that a cause of action exists only in an exceedingly narrow area of judgment-call situations, I feel a cause of action exists nonetheless.

Clearly, indisputable video evidence must exist to prove the claim. The on-field call must be made instantaneously without the benefit of *any form* of instant replay. So, if a league uses, either discretionary or mandatory, instant replay to review the type of call allegedly made in error, the proposed cause of action would be unavailable. The only major American sport which may be presented with liability under this rubric is Major League Baseball (“MLB”) and some collegiate sports. The NFL, NHL and NBA all utilize some form of instant replay to review, either through a coach’s challenge or referee discretion, a potentially negligent call. Baseball largely stays true to tradition and uses a team of umpires without access to instant

replay to determine most on-field decisions. However, MLB now allows the use of instant replay for disputed boundary calls, *e.g.*, home runs and fan interference.<sup>59</sup> Time will tell if baseball limits its use of instant replay to home run calls or, perhaps facing a lawsuit for an unintentional missed call, at home plate for example, expands the use of instant replay to protect referees from a claim of negligent officiating. In sum, while I feel there is a valid legal basis to support a claim of sports official liability, I believe the “perfect storm” of facts will likely never be presented to the court.

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<sup>59</sup> ESPN.com, MLB approves replay in series that start Thursday, Aug. 27, 2008, *available at* <http://sports.espn.go.com/mlb/news/story?id=3554357>.

# WHEN HOLDING ON MEANS LETTING GO: WHY FAIR USE SHOULD EXTEND TO FAN-BASED ACTIVITIES

*Nathaniel T. Noda*<sup>†</sup>

## INTRODUCTION

In a celebrated children’s song, Malvina Reynolds observes that love is “just like a magic penny, / hold it tight and you won’t have any. / Lend it, spend it, and you’ll have so many / They’ll roll all over the floor.”<sup>1</sup> Just as love sometimes means letting go, the doctrine of fair use recognizes that the purposes of copyright are sometimes better served by allowing certain forms of infringing activity to occur. The four-factor test for fair use, codified at 17 U.S.C. § 107, affords courts sufficient latitude to fine tune the analysis in light of changing circumstances. The recent surge of interest in anime and manga, or Japanese animation and comics,<sup>2</sup> brings with it distinctive examples of what may be dubbed “fan-based activities,” which indicate how courts can adapt the fair use analysis to best balance the public’s access to creative works with the interests of copyright holders.

The joint popularity of anime and manga is no coincidence: the origin and evolution of manga is entwined with the origin and evolution of anime, representing a symbiosis between the industries that persists to this day.<sup>3</sup> It is this symbiosis that nurtures and maintains groups of

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<sup>1</sup> Charles H. Smith & Nancy Schimmel, *Magic Penny*, by Malvina Reynolds, available at <http://www.wku.edu/~smithch/MALVINA/mr101.htm>.

<sup>2</sup> See, e.g., Paul West, *Japanese Anime Imports Invade America*, THE DAILY OF THE U. OF WASH., Jan. 16, 2003, <http://thedaily.washington.edu/2003/1/16/japanese-anime-imports-invade-america/> (commenting that anime’s “worldwide popularity ranks alongside--and likely surpasses--Disney animation”); Masami Toku, *Shojo Manga: Girl Power!*, CHICO STATEMENTS, Spring 2006, [http://www.csuchico.edu/pub/cs/spring\\_06/feature\\_03.html](http://www.csuchico.edu/pub/cs/spring_06/feature_03.html) (observing that “[a]t the beginning of the 21st century, the popularity of Japanese manga has spread all over the world”).

<sup>3</sup> The 1963 anime series *Astro Boy* (*Tetsuwan Atomu* or “*Mighty Atom*” in Japanese), considered by many to be the first example of the anime aesthetic, was itself adapted from a 1951 manga series under the same name. This practice of adaptation from manga to anime continues to this day (e.g., the manga series *Lucky Star*, which saw adaptation into a 2007 anime series after garnering a fervent fan following), and occasionally functions in reverse (e.g., *Neon Genesis Evangelion*, a landmark 1995 anime series that gave rise to an ongoing manga adaptation by the

dedicated, cross-media, multinational fans, many of whom engage in two potentially copyright-infringing activities, which, despite their propensity for inflicting creative and economic injury, the respective industries tolerate, and, at times, even embrace. One of those activities, the creation and sale of fan-made comics, or doujinshi,<sup>4</sup> represents a form of fan activity that paradoxically infringes upon the rights of the copyright holder, yet garners active support and participation from the anime and manga industries.<sup>5</sup> The other, the production and distribution of anime episodes subtitled by fans, or fansubs,<sup>6</sup> represents a form of fan activity that exploits what some characterize as a “grey area” of copyright law: the sharing of anime episodes not yet commercially licensed in the United States.<sup>7</sup>

This paper will analyze the effects of those two intrusions on the rights of the copyright holder as well as the effects of other fan-based activities from the perspective of United States copyright law, and

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series’ character designer, Yoshiyuki Sadamoto). *See e.g.*, <https://exc2.law.du.edu/exchweb/bin/redirect.asp?URL=http://www.sonic.net/~anomaly/japan/manga/matom.htm>.

<sup>4</sup> “Doujinshi” are fan-made comics, commonly deriving characters and milieus from manga, anime, or video game sources, which are sold by doujinshi artists for profit without the copyright holder’s authorization. Numerous doujinshi markets are held throughout the year in Japan, the largest of which is the biannual Comic Market, or Comiket. *See, e.g.*, <http://manga.about.com/od/glossary/g/doujinshi.htm>

<sup>5</sup> *See, e.g.*, COMIC MARKET 73 CATALOG 1169-80 (2007) (listing more than one hundred commercial vendors’ booths participating in the event) (on file with author). The catalog itself is replete with sponsoring advertisements for anime, manga, and video games.

<sup>6</sup> “Fansubs” truncates “fan-subtitled anime,” which refers to the process of subtitling and releasing anime episodes for free distribution. A likeminded process exists for translating and distributing manga chapters, commonly called “scanlations.” For present purposes, this paper uses the term “fansubs” broadly to encompass both fansubs and scanlations. *See, e.g.*, <https://exc2.law.du.edu/exchweb/bin/redirect.asp?URL=http://www.knowledgerush.com/kr/encyclopedia/Fansub/>

<sup>7</sup> *See* Frank Sanchez, LING 102: Sub and Dub Basics, Animeinfo.org, <http://www.animeinfo.org/animeu/ling102-p.html>. Sanchez explains:

As far as legality goes, fansubs are in a relatively grey area at the moment. Technically, they are illegal--however, fansubbers have limited their scope of influence to works which have -not- been licensed by a company for commercial release. If a certain title is commercially released, fansubbers do not make fansubs of it. If a title that was previously fansubbed becomes licensed for commercial release, fansubbers will stop distributing the title in question. This is done so that fansubbers do not take away from profits the commercial companies may make, as well as avoid legal troubles regarding license. Incidentally, fansubs and their popularity have been in some instances noticed by the commercial companies, and some of them may even pick up a title to be commercially distributed in response to good fan opinion about it via fansubs.

explain why copyright holders have chosen not to enforce their rights against doujinshi or fansubs. Based on those effects, it not only appears to be in the interest of the public, but also within the copyright holder's economic and creative interests to foster, or at least abide, fan-based infringing activities.

These observations are far from novel,<sup>8</sup> but commentators thus far have either restricted their analysis to a single activity,<sup>9</sup> or otherwise stopped short of proposing a refinement of the fair use analysis based on the characteristics of doujinshi, fansubs, and likeminded activities.<sup>10</sup> Ultimately, a close examination of doujinshi and fansubs suggests a judicial-level reinterpretation of the fair use analysis—one that enables the statutory four-factor test to account for the supplementary nature of fan-based activities—may do more than further the copyright holder's interests: it may better serve copyright's constitutional goal of promoting the arts.<sup>11</sup>

Part II summarizes the comingled history of anime and manga, as well as the development of doujinshi, fansubs, and other fan-based activities. Part III explores United States copyright law with particular attention to the doctrine of fair use and judicial interpretations of its statutory four-factor test. Part IV analyzes the effects of doujinshi and fansubs on the Japanese and United States anime and manga markets, deriving from those contexts the defining characteristics of fan-based activities. Utilizing those

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<sup>8</sup> See Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 134 (2003) (arguing that, “as fansubs and like activities sit on the edge of fair use, public policy has a compelling reason to give some fan activities limited protection from prosecution”); Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 193 (2005) (“assert[ing] that spheres of economic and cultural activity were created [by fansub activity] that existing copyright regimes would have denied, and that these regimes directly contributed to the rapid explosion in anime consumption and profit for all parties involved”); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155, 160 (2002) (arguing that “there is evidence that the manga industry and the do[u]jinshi markets do not merely coexist; rather, they appear to provide benefits to each other”); Jaime E. Muscar, Note, *A Winner is Who? Fair Use and the Online Distribution of Manga and Video Game Fan Translations*, 9 VAND. J. ENT. & TECH. L. 223, 225 (2006) (arguing that copyright “protection stifles the very creativity it seeks to defend” when it targets “fan-translated video games . . . and that courts should modify the test for transformative use in order to promote the intended purposes of copyright law”); Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 684 (2007) (arguing that while “fanvids” may fail the fair use test, “under a market-failure theory, fanvidders should be allowed to assert [a fair use] defense”); Rebecca Tushnet, Symposium, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997) (“argu[ing] that the secondary creativity expressed in noncommercial fan fiction deserves the protection of the law”);

<sup>9</sup> See, e.g., Mehra, *supra* note 8.

<sup>10</sup> See, e.g., Leonard, *supra* note 8.

<sup>11</sup> U.S. CONST., art. I, § 8, cl. 8.

characteristics, Part V proposes that the interest of increasing public access to creative works, coupled with the mutually beneficial relationship between fan-based activities and the creative and economic interests of the copyright holder, not only encourages looser enforcement, but also warrants a refinement of the judicial application of the four-factor test for fair use. Part VI concludes.

#### I. THE CONJOINED WORLDS OF ANIME AND MANGA—AND THE FANS WHO LOVE THEM

Anime and manga are not the only forms of entertainment that motivate fan endeavors. However, the symbiotic relationship between anime and manga, as well as their corresponding fan bases, highlights the defining characteristics of fan-based activities. Thus, doujinshi and fansubs serve as prime examples of infringing activities that not only provide a public benefit, but may also bolster, rather than degrade, the creative and economic interests of the copyright holder.

##### A. *The Cross-Media Skein of Anime and Manga*

It could be said that the anime and manga industries owe their greatest debt to one man: Osamu Tezuka.<sup>12</sup> Debuting as a manga artist in 1946, Tezuka won national acclaim with his manga, *The New Treasure Island (Shin Takarajima)*, which, despite being within the niche akahon<sup>13</sup> market, sold approximately 400,000 copies.<sup>14</sup> His subsequent works encountered similar success, and in 1963, his animation company, Mushi Production, released the first televised anime series with recurring characters in Japan: *Astro Boy (Tetsuwan Atomu)* based on Tezuka's manga by the same name.<sup>15</sup> Two years later, Mushi Productions released the first color anime, again based on one of Tezuka's manga: *Kimba the White Lion (Janguru Taitei)*.<sup>16</sup> Until

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<sup>12</sup> See Profile: Tezuka Osamu, Anime Academy, [http://www.animeacademy.com/profile\\_tezuka\\_osamu.php](http://www.animeacademy.com/profile_tezuka_osamu.php) (last visited Apr. 26, 2008) (noting that Tezuka adapted the “big eyes and head” style from Disney and other contemporary American animation).

<sup>13</sup> “Akahon,” or “red books,” were given their name “because of the red ink used in the covers. Akahon were a niche market at the time, mainly due to the dire postwar economic problems in Japan.” *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

his death in 1989, Tezuka continually expanded the scope and genres of anime and manga, earning memorialization as a “god of manga” and father of anime.<sup>17</sup>

Beyond his contributions to the mediums of anime and manga, Tezuka’s works and career epitomize the symbiosis between the anime and manga industries in Japan, a legacy that persists to this day. Anime adaptations of manga consistently dominate rankings of the all-time most popular anime series.<sup>18</sup> By the same token, several original anime series have spawned successful manga adaptations.<sup>19</sup>

Today cross-media interconnections extend beyond the anime and manga industries to the video game and light novel industries as well.<sup>20</sup> The ultimate commercial result of these interconnected industries is the emergence of the thriving character goods industry,<sup>21</sup> which produces consumer items based on the characters and elements of successful anime, manga, and video game franchises, from toys to household goods.<sup>22</sup> Given this web of cross-media franchises, it is no small wonder that the anime and manga industries, along with the works that fuel their success, ensnare distinctive fan bases that are summed up best by the Japanese loanword used in the United States to denote fans of anime and manga: otaku.<sup>23</sup> The otaku’s

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<sup>17</sup> *Id.*

<sup>18</sup> *E.g.*, AnimeNewsNetwork.com, TV Asahi Top 100 Anime, <http://www.animenewsnetwork.com/news/2005-09-23/tv-asahi-top-100-anime> (last visited Apr. 26, 2008) (listing web poll results ranking adaptations from manga as eight of the top ten television series); AnimeNewsNetwork.com, TV Asahi Top 100 Anime Part 2, <http://www.animenewsnetwork.com/news/2005-09-23/tv-asahi-top-100-anime-part-2> (last visited Apr. 26, 2008) (listing nation-wide survey results ranking adaptations from manga as nine of the top ten television series).

<sup>19</sup> A prime example is the *Mobile Suit Gundam* series, which has not only spawned a manga adaptation, but several anime, manga, and novel spin-offs, and a fan base so large that “GUNDAM’S” stores, selling nothing but Gundam-related goods, thrive in areas like Osaka’s Nipponbashi district.

<sup>20</sup> Video game adaptations include the adaptation of Square-Enix’s *Kingdom Hearts* into manga, Capcom’s *Devil May Cry* and Atlus’s *Persona* into anime; light novels such as *Kino no Tabi* and *Suzumiya Haruhi* have been adapted into successful anime series.

<sup>21</sup> Leonard, *supra* note 8, at 233.

<sup>22</sup> *See, e.g.*, Jbox.com, Anime and Toy Items (View All), Jbox.com, <http://www.jbox.com/ANIME/> (last visited Apr. 26, 2008) (listing hundreds of anime-related items for sale).

<sup>23</sup> *See* Otaku – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/Otaku> (last visited Apr. 26, 2008) (stating while many anime and manga fans in the U.S. identify themselves enthusiastically as “otaku,” the original Japanese word possesses a distinctly negative connotation, denoting an individual with poor social skills and an obsessive interest in an esoteric topic.)

activities, in turn, are unique among infringing uses in that they appear to garner acquiescence—and, at times, active endorsement—from copyright holders.

*B. Otaku Subculture and the Rise of Doujinshi and Fansubs*

1. The Doujinshi Markets

The development of grassroots doujinshi markets is exemplified by the evolution of the largest among them: Comic Market, or Comiket. The first Comiket was held in December 1975, with thirty circles, or artist groups, participating and attracting roughly seven-hundred attendees.<sup>24</sup> In December 2007, Comiket garnered the participation of approximately thirty-five-thousand circles, and boasted more than half-a-million attendees over a three-day period.<sup>25</sup> Comiket did not, however, derive its exponential growth from a vacuum; it was fueled by the outgrowth of the otaku subculture, both in Japan and abroad.

To the uninitiated, otaku subculture may seem at best odd, at worst inscrutable. The world of the otaku is, however, analogous in many significant ways to the Star Trek and Star Wars subcultures in the United States, primarily due to the common characteristics that all fan-based activities tend to share. Like the otaku subculture, both Star Trek and Star Wars fandoms feature fervent fan bases cultivated at least in part due to the cumulative output of a cross-media skein of related consumer goods, spanning the television, movie, publishing, toy-manufacturing, and video game industries. In turn, the fandoms perpetuated interest in the Star Trek and Star Wars franchises, carrying each beyond their respective “dry spells”<sup>26</sup>—the twenty-year gaps between the original works and their canonical sequels, or prequels. A similar dynamic pervades

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<sup>24</sup> Comiket – Wikipedia, the Free Dictionary, [http://en.wikipedia.org/wiki/Comic\\_Market](http://en.wikipedia.org/wiki/Comic_Market) (last visited Apr. 26, 2008).

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in “Star Trek: The Next Generation,”* 24 U. TOL. L. REV. 43 (1992) (noting that “[w]hile [Star Trek] began as a short-lived and marginally rated television series which survived only three seasons before final cancellation, the Star Trek phenomenon did not end there. . . . Star Trek conventions provide gathering points for the faithful. . . . Fan pressure prompted NASA to name the first space shuttle ‘Enterprise’ after the starship of the show”).

the anime and manga industries, where continual fan interest has driven perennial anime spin-offs of the 1979 anime *Mobile Suit Gundam*—roughly twenty-five in the span of twenty-nine years<sup>27</sup>—the latest of which, *Mobile Suit Gundam 00*, continues to air new episodes on Japanese TV in early 2008.

Moreover, Star Trek fans, Star Wars fans, and otaku share a deep-seeded affinity for the characters and milieus of their favorite franchises, one that transcends the original works themselves, as evidenced by the sizable market for non-canonical works<sup>28</sup> and character-related goods.<sup>29</sup> For some among all three camps, the affinity runs deeper, and they find themselves motivated to create their own storylines within the familiar trappings of their favorite franchise. Those efforts often culminate in the composition and exchange of gigabytes of fan fiction.<sup>30</sup> In Japan, however, otaku possess another viable creative outlet: the doujinshi markets.

Online publication of fan fiction and the publishing of doujinshi share several essential commonalities. Both represent forums in which fans are able to share their derivative works with a like-minded audience, a creative exchange that ultimately reaffirms interest in the work underlying their fandom. But what distinguishes doujinshi markets from repositories of fan fiction is that doujinshi artists, by and large, create and distribute their derivative works with the express purpose of turning a profit. The pecuniary aspect of doujinshi markets makes them distinctive among fan activities—and leads to ostensible infringement under either Japanese or

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<sup>27</sup> Gundam – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/Gundam> (last visited Apr. 26, 2008).

<sup>28</sup> This market is most strongly represented by the commercial success of the Star Wars Extended Universe, comprising the non-canonical stories told by novels, comic books, and video games based on the Star Wars milieu. See, e.g., MICHAEL A. STACKPOLE, I, JEDI (1999); MATTHEW STOVER, THE NEW JEDI ORDER: TRAITOR (Del Ray 2002) (both bestselling novels).

<sup>29</sup> A prime example of the thriving character goods industry in Japan lies in the various plastic models (“plamos,” pronounced “pu-ra-mo-z”) of mobile suits from the anime series *Mobile Suit Gundam* and its spinoffs. Plamos usually occupy a significant amount of floor space in any hobby store, and occupy an entire floor of the GUNDAM’S store in Nipponbashi, Osaka.

<sup>30</sup> See, e.g., Fanfiction.net, <http://www.fanfiction.net> (last visited Apr. 26, 2008) (archiving over ten thousand Star Trek fan fiction pieces, over nineteen thousand Star Wars fan fiction pieces, and hundreds of thousands of fan fiction pieces based on various anime and manga series).

United States copyright law. It also makes the continued existence of doujinshi—and, to a certain extent, their endorsement by commercial vendors—all the more puzzling, and warrants a closer examination of the doujinshi markets’ effects on the interests of the copyright holder.

## 2. The Fansub Groups

Born of a separate collective of fans and entailing distinct goals and activities, the fansub phenomenon is a vastly different animal from the doujinshi markets. Fansub groups in the United States predate the United States anime boom by at least a decade, originating in the 1980s, at a time when the United States market for anime was virtually nonexistent.<sup>31</sup> Recognizing many anime series would never see translation and release in the United States through licensed channels, fans took it upon themselves to subtitle and distribute anime episodes to “promote Japanese animation” in the United States.<sup>32</sup> Up until the late 1990s, fansub groups distributed subtitled episodes through the mail, often from club-to-club, in a process Professor Sean Leonard describes as a “closed proselytization commons.”<sup>33</sup>

The advent of broadband internet opened that proselytization commons and augmented its participants both within the United States and abroad. No longer limited to club-to-club transmission, fansubbers can use broadband to post episodes for download via website, peer-to-peer BitTorrent link, or Internet Relay Chat (“IRC”) server. Moreover, the internet streamlines the fansubbing process, reducing the procurement, input of subtitles, and eventual distribution of a particular anime episode to as little as a week from its original airing on Japanese TV.<sup>34</sup> Most fansub groups adhere to a self-imposed policy of ceasing fansub production and distribution once

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<sup>31</sup> See Leonard, *supra* note 8, at 201 (“By 1982 the Japanese studios calculated that they were not going to succeed in the American market”).

<sup>32</sup> *Id.* at 210.

<sup>33</sup> *Id.* For a similar discussion of the internet as an innovation commons, see LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 23 (Random House 2001), available at <http://the-future-of-ideas.com>.

<sup>34</sup> Kirkpatrick, *supra* note 8, at 135.

a given anime series is licensed for release in the United States,<sup>35</sup> although others continue the process until the entire series is complete. The link between the proselytization commons generated by fansub activity and the emergent popularity of anime and manga in the United States merits a closer look at the effects of fansub activity on a copyright holder's creative and economic incentives. That inquiry in turn calls for an overview of United States copyright law, with particular attention to the doctrine of fair use.

## II. UNITED STATES COPYRIGHT AND THE FOUR-FACTOR TEST FOR FAIR USE

There is no worldwide copyright for creative works like anime and manga; copyright is a construct of the laws of individual countries.<sup>36</sup> While doujinshi and the rights of Japanese copyright holders fall under the Chosakuken, or the Japanese Copyright Act, rather than United States law, an examination of doujinshi under the U.S. Copyright Act, alongside United States-based fan activities, provides a broader understanding of the qualities of fan-based activities and better illustrates how courts can refine their analysis of the existing fair use test to account for those characteristics.

### A. *Foundations of United States Copyright Law*

Premised on the constitutional imperative “to Promote the Progress of Science and the Useful Arts,”<sup>37</sup> the United States Copyright Act, 17 U.S.C. § 101, et seq., provides a copyright holder with a limited-time monopoly on a variety of works of authorship, including “pictorial, graphic . . . [and] audiovisual works.”<sup>38</sup> A United States copyright extends to any work of authorship for which, “on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty

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<sup>35</sup> See Bram Cohen, *Licensed Anime*, Animesuki.com, <http://www.animesuki.com/doc.php/licensed/> (last visited Apr. 26, 2008) (describing the policy of discontinuing distribution of licensed anime series).

<sup>36</sup> PAUL EDWARD GELLER, 1-INT INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 1[1] (2007).

<sup>37</sup> U.S. CONST. art. I § 8, cl. 8.

<sup>38</sup> 17 U.S.C. § 102(a) (2006).

party . . . or the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party.”<sup>39</sup>

The United States Copyright Act “does not give a copyright holder control over all uses of his copyrighted work. Instead, § [106] of the Act enumerates [six] 'rights' that are made 'exclusive' to the holder of the copyright.”<sup>40</sup> Three of those exclusive rights are directly relevant to fan-based activities like doujinshi and fansubs: reproduction, distribution, and creation of derivative works.<sup>41</sup> Those rights, however, are subject to a series of limitations,<sup>42</sup> most notably the doctrine of fair use.

#### *B. The Four Factors of Fair Use*

The precise purpose of the fair use doctrine is debatable. Many courts have treated fair use not as a limitation on the exclusive rights of the copyright holder, as titled by the Act itself,<sup>43</sup> but as an affirmative defense to infringement.<sup>44</sup> As a practical matter, however, the issue is largely moot. Whether enlarging the shield or shrinking the sword,<sup>45</sup> the effect of the fair use doctrine is to demarcate where enforcement of the copyright holder’s exclusive rights ends and legally legitimate use begins.

Section 107 of the Copyright Act provides that “the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by [§ 106] . . . is not an infringement of copyright.”<sup>46</sup> The statute specifies four factors that must be considered in analyzing fair use:

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<sup>39</sup> *Id.* § 104.

<sup>40</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 392, 393-95 (1968)).

<sup>41</sup> 17 U.S.C. § 106(1)-(3) (2008).

<sup>42</sup> *See id.* §§ 107-122 (titling sections 107-12, 117, 119, & 121-22 as explicit “limitations” on exclusive rights).

<sup>43</sup> *See id.* § 107.

<sup>44</sup> Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 679 (2004).

<sup>45</sup> *Id.* at 679 n.71 (describing the crux of the fair use debate as “whether the fair use doctrine benefits the defendant by providing the defendant with a larger shield or by limiting the plaintiff to a smaller sword”).

<sup>46</sup> 17 U.S.C. § 107 (2008).

- “(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 or value of the copyrighted work.”<sup>47</sup>

Section 107 notes fair use includes reproduction for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” but the listed purposes are neither exhaustive,<sup>48</sup> nor themselves exempt from the principle four-factor test.<sup>49</sup>

At the same time, the four factors themselves are “‘not meant to be exclusive’ . . . but rather ‘illustrative,’ representing ‘only general guidance about the sorts of copying courts and Congress most commonly have found to be fair uses.’”<sup>50</sup> The result renders fair use fact-intensive<sup>51</sup> and grossly discretionary,<sup>52</sup> thereby necessitating case-by-case<sup>53</sup> analysis—much as Judge Learned Hand described it seventy years ago, before § 107’s factors.<sup>54</sup> While each must

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<sup>47</sup> *Id.*

<sup>48</sup> H.R. REP. NO. 94-1476 at 65, 66 (1976) (noting that the “examples enumerated . . . [are] by no means exhaustive”).

<sup>49</sup> *Id.* at 67, reprinted in 1976 U.S.C.C.A.N. at 5680-81 (noting that the references given are “not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use”).

<sup>50</sup> *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) and *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994), respectively).

<sup>51</sup> *E.g.*, Duhl, *supra* note 44, at 682 (citing Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1191 (2002) and Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1183 (2000)).

<sup>52</sup> *E.g.*, Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 62 (1998) (noting that some “[a]uthorities regularly call fair use so malleable as to be indeterminate”).

<sup>53</sup> *E.g.*, Duhl, *supra* note 44, at 682 (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994) and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985)).

<sup>54</sup> *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (dubbing the pre-1976 fair use analysis “the most troublesome in the whole law of copyright”).

be considered in connection with one another,<sup>55</sup> the four factors form the basis of a court's assessment of fair use, and therefore warrant individual scrutiny.

1. Purpose and character of use

Courts have construed the first fair use factor to entail the assessment of three dichotomies.<sup>56</sup> The first dichotomy distinguishes between commercial and noncommercial purposes.<sup>57</sup> While commerciality does not preclude a finding of fair use, it does pull against it; noncommerciality, on the other hand, tends to lean toward fair use.<sup>58</sup>

The second dichotomy is transformative versus non-transformative use.<sup>59</sup> Uses generally qualify as transformative if “they add value to the public domain and are not mere replications of what the copyright holder has already created.”<sup>60</sup> However, as with a finding of noncommerciality in the first dichotomy, a finding of transformative use does not by itself guarantee the use's fairness, although it does weigh in its favor.<sup>61</sup>

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<sup>55</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (“[T]he four statutory factors [cannot] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

<sup>56</sup> Duhl, *supra* note 44, at 682.

<sup>57</sup> *E.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (describing the inquiry as “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”).

<sup>58</sup> *E.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”).

<sup>59</sup> *See* Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 *COMM. L. & POL’Y* 1, 4 (2002) (noting that the controversial “transformative” requirement typically enters the fair use analysis through the first factor).

<sup>60</sup> Duhl, *supra* note 44, at 684.

<sup>61</sup> *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works”).

The third and final dichotomy is factual or historical<sup>62</sup> versus expressive use.<sup>63</sup> Focusing on the distinction between expression—which is protectable by copyright—and ideas, facts, or history—which are not—courts usually count the copying of a mode of expression against a finding of fair use.<sup>64</sup> The degree to which a use borrows expression from a copyrighted work depends on whether the copyright work itself is “creative, imaginative, and original”<sup>65</sup> under the second fair use factor.

## 2. Nature of the copyrighted work

In assessing how close the copyrighted work is to “the core of intended copyright protection,”<sup>66</sup> the second factor asks a court to chart the position of the copyrighted work on the continuum between original, creative works and works that are primarily functional<sup>67</sup> or informational.<sup>68</sup> The closer the work is to the original, creative end of the continuum, the less likely the appropriation of that work will constitute fair use. In determining where a work lands within that spectrum, courts respect the creator’s right to choose how, when, and if a work

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<sup>62</sup> *E.g.*, *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy”); *see also* Michael A. Einhorn, *Miss Scarlet’s License Done Gone!: Parody, Satire, and Markets*, 20 *CARDOZO ARTS & ENT. L.J.* 589, 591 n.16 (2002) (noting that “[t]he scope of fair use is more limited with respect to non-factual works than factual works; the former necessarily involves more originality and creativity than the reporting of facts. Factual works are believed to have a greater public value and unauthorized uses of them are more readily tolerated by copyright law.”).

<sup>63</sup> *E.g.*, *Harper & Row*, 471 U.S. at 547 (noting that “copyright is limited to those aspects of a work—termed ‘expression’—that display the stamp of the author’s originality”); *Holdridge v. Knight Publ’g Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (rejecting the fair use claim because defendant’s work “mirrors the manner and style in which the plaintiff chose to set down the factual and historical material she used, and to express her thoughts and conclusions”).

<sup>64</sup> *See, e.g.*, *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* 109 F.3d 1394, 1401 (9th Cir. 1997) (holding that a work which appropriates the style of another work without holding that style up to ridicule does not constitute fair use).

<sup>65</sup> *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

<sup>66</sup> *Campbell*, 510 U.S. at 586.

<sup>67</sup> *See, e.g.*, *Baker v. Selden*, 101 U.S. 99, 104 (1879) (finding that the copyright on a book describing a system of bookkeeping does not extend to subsequent use and description of that system); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524-25 (9th Cir. 1992) (holding use of a video game’s functional elements fair).

<sup>68</sup> *See, e.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363-64 (1991) (finding that a telephone book was informational, lacking the *de minimis* originality for copyrightability).

should be published at all, affording unpublished or undistributed works greater protection than works that have already seen public dissemination.<sup>69</sup>

### 3. Amount and substantiality of the portion used

The third factor entails an inquiry in which courts exercise a great deal of discretion. While some courts have ruled a use employing a fragmented<sup>70</sup> or trivial portion of a copyrighted work *de minimis*, at least one court has held “a small degree of taking [] sufficient to transgress fair use if the [portion copied] is the essential part of the copyrighted work.”<sup>71</sup> Nevertheless, in certain instances regarding home video recording, even wholesale copying does not inherently preclude a use from being fair.<sup>72</sup>

### 4. Effect upon potential market or value

Called “the single most important element of fair use,”<sup>73</sup> the fourth and last factor is nonetheless marred by the same ambiguity as the other three. Section 107(4) calls for an examination of the effects, both beneficial and detrimental, of the use on the potential market for the copyrighted work.<sup>74</sup> The burden of proof normally rests with the copyright holder to demonstrate market harm as a result of the use.<sup>75</sup> However, once the copyright holder establishes that a use is commercial and that there is a causal connection to a loss of revenue, the “burden properly shifts to the [alleged] infringer to show that [the] damage would have occurred [even

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<sup>69</sup> See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (holding that “[t]he fact that a work is unpublished is a critical element of its ‘nature,’” and that “[t]he scope of fair use is narrower with respect to unpublished works”).

<sup>70</sup> *Werlin v. Reader’s Digest Ass’n*, 528 F. Supp. 451, 464 (S.D.N.Y. 1981).

<sup>71</sup> *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) (citing *Harper & Row*, 471 U.S. at 565-66; *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977); *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980)).

<sup>72</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1994) (holding “the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use” in the case of home videotaping television programming); see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (noting that “wholesale copying does not preclude fair use *per se*”).

<sup>73</sup> *Harper & Row*, 471 U.S. 539, 566.

<sup>74</sup> See 17 U.S.C. § 107(4) (2008).

<sup>75</sup> *Harper & Row*, 471 U.S. at 567.

were there] no taking of copyrighted expression.”<sup>76</sup> Despite the importance of the fourth factor, even “[e]vidence favorable to an alleged copyright infringer concerning relevant markets, without more, is no guarantee of a finding of fair use.”<sup>77</sup>

### III. EFFECTS OF DOUJINSHI AND FANSUBS ON CREATIVE AND ECONOMIC INCENTIVES

When examined from the perspective of United States copyright law, which grants largely the same exclusive rights to copyright holders as the Chosakuken,<sup>78</sup> doujinshi seem to infringe upon the copyright holder’s right to create or exploit derivative works. Likewise, fansubs appear to encroach upon the exclusive rights of copyright holders to reproduce and distribute their works. On its face, then, the continued existence of doujinshi markets and fansub groups, largely with the tacit consent of copyright holders, represents something of a conundrum.

#### A. *Why the Anime and Manga Industries Support Doujinshi Markets*

Contrary to the theory that more protection” fosters “more authorship,”<sup>79</sup> the anime and manga industries and the doujinshi markets appear to be surprisingly good bedfellows. Some of the most successful manga artists of the past decade began their careers as doujinshi artists,<sup>80</sup> and doujinshi publishing remains a viable means of segueing into the manga industry. In addition, several popular manga artists employ doujinshi as a medium to publish limited-edition items<sup>81</sup> or

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<sup>76</sup> *Id.*

<sup>77</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 591 n.21 (1994).

<sup>78</sup> Japanese Copyright Act (Chosakuken), art. 21-28, *available at* [http://www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html) (attributing the rights of reproduction, performance, presentation, public transmission, recitation, exhibition, distribution, transfer of ownership, lending, translation, adaptation, and exploitation of a derivative work to the holder of a Japanese copyright).

<sup>79</sup> Mehra, *supra* note 8, at 190.

<sup>80</sup> The four-woman manga artist group CLAMP (composed of Nanase Ohkawa, Mokona, Tsubaki Nekoi and Satsuki Igarashi), responsible for over twenty manga series, is a prime example of a doujin-artist-turned-manga-artist. Many of their manga have been adapted into popular anime series, and several of their creations have enjoyed success in the U.S. and abroad, in both manga and anime forms.

<sup>81</sup> *See, e.g.*, BARASUI, SUBARASUI: BARASUI’S ROUGH SKETCHES BOOK (2005) (compiling rough sketches of the characters from the artist’s popular manga series *Strawberry Marshmallow*) (on file with author).

works that otherwise might not see publication due to stricter regulations on content within official publishing circles.<sup>82</sup>

Beyond serving as a recruiting ground for new talent and providing existing manga artists with an additional outlet for their creative endeavors, doujinshi markets can perpetuate interest in the original works even decades after publication.<sup>83</sup> Moreover, doujinshi themselves serve as alternative means of advertisement for current anime and manga series, attracting new fans from the hundreds of thousands of market attendees.<sup>84</sup> Larger doujinshi markets like Comiket provide a direct opportunity for anime studios to advertise their works by participating in the industry vendors' section of the event and handing out promotional goods.<sup>85</sup>

Another argument could be made that doujinshi—the majority of which are adult-oriented<sup>86</sup>—compromise the integrity of the characters and milieus they appropriate. This concern was at issue in an incident dubbed the “Pokemon doujinshi case,” where Japanese police arrested a doujinshi artist who published an adult-oriented doujinshi featuring characters from Nintendo’s Pokemon franchise.<sup>87</sup> Nintendo initiated the complaint that led up to the arrest because “even though the number of copies [was] small, the company could not overlook the fact that the pornographic contents of the work were ‘destructive’ of the Pokemon image.”<sup>88</sup>

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<sup>82</sup> An example of a manga artist for whom doujinshi serves as an outlet for otherwise unpublishable works is Maki Murakami, author of the *Gravitation* manga series, who has published several doujinshi under the circle name Crocodile Avenue that feature her characters in non-canonical, sexually explicit situations.

<sup>83</sup> See COMIC MARKET 73 CATALOG, December 29, 2007, at 623 (listing at least fifteen circles selling new doujinshi featuring characters from Osamu Tezuka’s 1970s manga *Black Jack*).

<sup>84</sup> To a certain degree, determining the extent to which a given anime or manga’s popularity drives the volume of doujinshi based on it, or whether the volume of doujinshi influences the popularity of a given anime or manga, is a chicken-or-the-egg proposition. Nevertheless, the positive correlation between the popularity of a given anime or manga and the number of doujinshi featuring its characters is undeniable. See generally COMIC MARKET 73 CATALOG, December 29, 2007 (featuring hundreds of circles advertising doujinshi based on popular anime/manga like *Gintoki*, *Naruto*, and *Prince of Tennis*).

<sup>85</sup> See COMIC MARKET 73 CATALOG, December 29, 2007, at 1169-81. As this author learned firsthand, the industry vendors’ promotional booths are often the most popular segments of the event.

<sup>86</sup> See generally *id.* (listing thousands of doujinshi circles, the majority of which advertise adult-oriented doujinshi).

<sup>87</sup> Mehra, *supra* note 8, at 180-81.

<sup>88</sup> *Id.* at 180 n.136 (citing Pikachu doujinshi na henshin dame [Alteration of Pikachu in Doujinshi a Violation], Asahi Shimbun, Jan. 14 1999, at 37).

Despite Nintendo's public stance on the matter, the Pokemon doujinshi case remains the sole example of a copyright holder speaking out against the doujinshi artists, and the incident appears to have done little to curtail doujinshi-related activities. Nearly ten years later, doujinshi artists continue to appropriate anime, manga, and video game characters in their works, including Nintendo's.<sup>89</sup> The anime and manga industry's endorsement of doujinshi markets indicates that, in the final cost-benefit analysis, the benefits of allowing doujinshi artists to continue their infringing conduct unabated far outweighs any pecuniary loss on the part of the industries.<sup>90</sup> While doujinshi artists do profit from their appropriation of characters from anime, manga, and related industries, they do so not as competition but as complementary influences whose success only bolsters the industries' own prosperity.

*B. Why the Anime and Manga Industries Tolerate Fansubs*

The anime and manga industries' tolerance of fansubs involves a more complex, but related, analysis. The complexity lies primarily in two factors: (1) the extent to which Japanese copyright law overlaps with United States copyright law, before and after a series is licensed in the United States, and (2) the reproductive and distributive, as opposed to derivative, natures of fansub activity. While the analysis diverges from the costs and benefits of the doujinshi markets, the balance still indicates that fansub activity, in aggregate, is more helpful to the U.S and Japanese anime and manga industries than it is costly.

1. Unlicensed anime and manga

The first step in the analysis considers anime or manga that is fansubbed before it is licensed in the United States. Before licensing, 17 U.S.C. § 104 affords the Japanese copyright

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<sup>89</sup> See generally COMIC MARKET 73 CATALOG (listing several doujinshi circles offering works featuring Nintendo characters).

<sup>90</sup> See Mehra, *supra* note 8, at 197 (“[T]he profitable coexistence of manga and anime with [doujinshi] may suggest that the commercial nature of a work that ‘borrows’ from another copyrighted work should not necessarily give rise to negative presumptions against allowing that borrowing”).

holder of an anime or manga series the same exclusive rights § 106 grants to United States copyright holders.<sup>91</sup> After more than two decades of fansub activity in the United States,<sup>92</sup> however, a Japanese company has yet to pursue an infringement lawsuit against a fansub group in either United States or Japanese courts. The lack of enforcement is not due to ignorance of fansub activities on the part of Japanese anime and manga industries. Before the anime boom and the digital age of fansubbing, many Japanese licensors permitted conventions and associated fansub groups to subtitle and screen their works.<sup>93</sup> Today, a Japanese anime or manga executive would only need to search the internet for the word “fansub” to discover more than six-million web references, including links to many fansub distribution sites.<sup>94</sup>

The potential reasons why the anime and manga industry in Japan turn a blind eye toward fansub activity in the United States are many. The efforts of fansub groups and anime clubs in the 1980s and 1990s may have directly contributed to the present success of United States anime and manga licensees by cultivating the nascent fan base into the blossoming otaku subculture that serves as the market for United States-licensed anime and manga.<sup>95</sup> Today’s digital fansub groups still serve as dowsing rods for United States distributors, who continue to look to popular fansubbed anime series for United States distribution.<sup>96</sup> For the Japanese licensor, fansubs provide a free means of increasing their exposure to United States fans and distributors alike, in exchange for the remote possibility that fansubs themselves might scare away potential distributors. However, United States distributors increasingly acquire licenses for a series even

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<sup>91</sup> See 17 U.S.C. § 104 (2006); see also the Berne Convention, art. 5(3). July 24, 1971, S. Treaty Doc. No. 99-27, 1971 WL 123138. The United States and Japan are both parties to the Convention.

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See Leonard, *supra* note 8, 196-216 (providing a detailed account of the growth of fansubs from their inception in the 1970s to the early 1990s).

<sup>93</sup> *Id.* at 216.

<sup>94</sup> Fansub – Google Web Search, <http://www.google.com> (search for “fansub”).

<sup>95</sup> Leonard, *supra* note 8, at 217.

<sup>96</sup> See Animesuki.com, License Database, <http://www.animesuki.com/licensed.php> (last visited Apr. 26, 2008) (cataloging literally hundreds of formerly fansubbed anime series that have since been licensed by U.S. distributors, as well as a “rumors” section indicating series that may soon be licensed).

before it reaches production,<sup>97</sup> thereby decreasing the opportunity for fansubs that restrict themselves to unlicensed titles to interfere with Japanese licensors' interests. Ultimately, until a United States distributor expresses interest in licensing a title, the potential benefits of fansub distribution for the Japanese licensor usually outweigh the potential detriments.

## 2. Licensed anime and manga

Despite the self-imposed ethical code adopted by the majority of fansub groups, some groups continue to subtitle and distribute episodes long after they are licensed in the United States.<sup>98</sup> Once licensed, the rights of reproduction and distribution for a given series in the United States fall to the United States distributor, as does the capacity to enforce those rights. United States distributors have proven more aggressive than their Japanese counterparts in curbing fansub activity. At least one United States distributor has sent numerous cease-and-desist letters even before they acquired the license for corresponding series, “to remove all illegal fansubs before announcing acquisition.”<sup>99</sup>

Unlike the fansubbers of unlicensed anime, groups that continue to subtitle and distribute a series after it has been licensed<sup>100</sup> present an unequivocal threat to United States distributors. Post-license groups directly compete with United States distributors, stealing away consumers who opt to download their releases in lieu of purchasing episodes from the distributor. Real economic harm necessarily ensues. Ultimately, post-license subtitling and distributing groups diverge so markedly from unlicensed fansub groups in intent and effect on economic and

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<sup>97</sup> Licensed Anime, Animesuki.com, <http://www.animesuki.com/doc.php/licensed/> (last visited Apr. 26, 2008) (attributing the following quote to David Williams of the U.S. Distributor ADV Films: “One thing fans might not know is most shows are licensed now during the financing stage, before the show is even produced”).

<sup>98</sup> See, e.g., AnimeCorpX, <http://www.animecorp.com/index.php?id=projects> (last visited Sept. 20, 2008) (listing of their DVD-quality releases, all of which were released after the anime series in question was licensed for distribution in the U.S.).

<sup>99</sup> Dominic von Riedemann, *FUNimation Threatens Fansubs: Distributor Sends Out Cease-And-Desist Letters For Animes* [sic] (October 6, 2006), [http://animatedfilms.suite101.com/article.cfm/funimation\\_threatens\\_fansubs](http://animatedfilms.suite101.com/article.cfm/funimation_threatens_fansubs).

<sup>100</sup> While these groups tend to call themselves “fansub” groups like their unlicensed anime counterparts, their efforts fall outside the sphere of fan-based activities described *infra* Part V, and therefore do not merit classification as “fansubs” in the original and primary sense of the term.

creative incentives for copyright holders and licensees as to fall outside the sphere of fan-based activities, as discussed below.

#### IV. HOW EVERYONE CAN WIN: COPYRIGHT HOLDERS, THE FANS, AND FAIR USE

The propensity of doujinshi and fansubs to increase the depth and breadth of creative works publicly accessible, coupled with their positive impacts on copyright holders' economic and creative interests, indicate infringing activities in the vein of doujinshi and fansubs actually further the countervailing goals of United States copyright.<sup>101</sup> Accordingly, the continuation of beneficial, fan-based activities like doujinshi and fansubs should be more than an exercise in largesse on the part of the copyright holder; those activities should fall squarely within the penumbra of fair use. This judicial-level refinement of the fair use doctrine would enable courts to recognize fairness in situations where the typical zero-sum game of copyright, which usually pits the interests of the copyright holder against those of his audience, does not apply, because practices that benefit the fans and public at large concurrently benefit the copyright holder. Deriving criteria for a class of "fan-based" activities is the first logical step in the analysis.

##### A. *Drawing Connections Between Doujinshi and Fansubs*

The usefulness of examining doujinshi and fansubs side-by-side lies in how markedly the two activities differ from one another. Where doujinshi merely appropriate characters and settings for what otherwise might constitute original works of authorship, fansubs copy the original work in entirety; their only modicum of original input lies in the translation of dialogue and the typesetting of those translations as subtitles. By contrast, one of the primary aspects of doujinshi is that they are produced and sold for a profit, whereas fansubs are largely devoid of

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<sup>101</sup> See, e.g., Duhl, *supra* note 44, at 729 (describing the "two purposes of copyright law" as "preserv[ing] an artist's or author's incentive to create," counterbalanced by "the desire to augment the quality and quantity of creative works available to the public").

pecuniary interests.<sup>102</sup> Despite these dissimilarities, however, both activities appear to benefit the copyright holder. That copyright holders find it within their interests to allow both to continue largely unabated attests to that fact.

Ultimately, the unifying thread between doujinshi and fansubs may lie in the individuals responsible for all fan-based activities: the fans. Fans represent a distinct group with a set of interests uniquely aligned with those of the copyright holder. A fan's well-being is linked to the success of the object of his or her fandom: a creator's economic or creative ruination usually spells the end of a creative work.<sup>103</sup> Moreover, when fan bases are characterized by strong social networks—such as those responsible for the doujinshi markets and fansub groups—the stakes for a fan are even higher, as the end of a franchise could also spell the end of the relationships garnered through interconnected fan activity. Given the alignment of interests between the creator and the fans, the defining characteristics of fan-based activity can be derived from the examples provided by doujinshi and fansubs.

#### B. *Defining Characteristics of Fan-Based Activities*

##### 1. The copyright holder's interests are the fans' interests

Regardless of the type or extent of infringement, or whether the fan derives a pecuniary benefit from the activity in question or not, fans are predisposed to refrain from activities that erode the copyright holder's economic or creative interests. A fan relies too much on the

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<sup>102</sup> Admittedly, however, money does factor into some aspects of the fansub process (for example, server fees). A number of fansub sites attempt to offset this cost by providing users with the option of donating money via online services like PayPal. Others employ ad services like AdSense to generate revenue on per-click or per-thousand-impression basis. See AdSense – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/AdSense> (last visited Apr. 26, 2008). While these practices have the potential to enable fansubbers to generate a profit for their activities, any revenue gleaned from these practices would have no perceivable impact on the market for or revenue from yet-to-be-licensed anime and manga titles.

<sup>103</sup> Cancelled television series like *M.A.N.T.I.S.* and *Dark Angel* exemplify this maxim. But see Neva Chonin, *When Fox Canceled 'Firefly,' It Ignited an Internet Fan Base Whose Burning Desire For More Led to 'Serenity,'* S.F. CHRON., available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/08/DDGQJD4D2O1.DTL> (last visited Apr. 26, 2008) (describing a reversal of this trend in Joss Whedon's TV series *Firefly*, which garnered a fan base so committed that it enabled Whedon to continue his *Firefly* "Verse" in the motion picture *Serenity*, three years after FOX canceled the series).

copyright holder's output to endanger it by engaging in competitory or predatory practices that could push the creator's works off the air or out of print. Currently airing anime and recent manga and video game releases consistently serve as the basis for the majority of new doujinshi releases,<sup>104</sup> and fansub groups could hardly continue their operations without a constant stream of new anime episodes from Japanese airwaves. Moreover, fan dependence on the copyright holder's output stretches beyond the scope of anime and manga; if fan fiction could have deterred J.K. Rowling from completing *Harry Potter and the Deathly Hallows*, it is unlikely her fans would have tempted fate by strewing reams of Potter "fanfics"<sup>105</sup> across the internet. Simply put, fans will not risk jeopardizing a creator's incentives. If the creator's work sinks, it is the fans who go down with the ship.

## 2. Evangelizing Evangelion: fans as missionaries<sup>106</sup>

Second, fans are predisposed to engage in activities that proselytize the object of their affections. This tendency is readily corroborated by the history of United States fansubs,<sup>107</sup> but holds true across the spectrum of fan-based activities. Conventions are held, websites managed, and newsletters distributed not only to maintain lines of interaction between fans, but to expand exposure to and interest in the underlying work. Numerous fans of professional football paint or garb themselves in the colors and emblems of their championed team on game day, just as many trekkies and other science fiction fans attend conventions garbed in the uniforms and attire of their favorite characters. Fans do so in part to identify with others of their fandom, but also to draw the attention of others—some of whom might, having been made aware of their fandom,

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<sup>104</sup> See, e.g., COMIC MARKET 73 CATALOG 75-411 (containing a majority of doujinshi circle listings that advertise works based on recently released manga, video games, or currently airing anime series).

<sup>105</sup> See, e.g., Fanfiction.net – Books, <http://www.fanfiction.net/books> (last visited Apr. 26, 2008) (indicating well over three-hundred thousand works of fan fiction based on J.K. Rowling's Harry Potter books).

<sup>106</sup> The 1995 anime series *Neon Genesis Evangelion* is an aptly named cult classic that has amassed a huge following outside of Japan.

<sup>107</sup> See Leonard, *supra* note 8, at 213-14 (asserting that "fans built fervor for anime by constructing an open proselytization commons, whose chief aim was to spread anime as far and wide as possible").

join their ranks. Perhaps in part because their self-interest is so closely aligned with the interests of the creator and the success of his or her work, proselytizing activities serve to bolster simultaneously the popularity of the underlying work and, by extension, the fans' own sense of self-esteem.

3. Community values: shared interests beget a shared culture

Third, because fans thrive not only on the object of their affections, but through the community that grows from their mutually shared interests, they tend to engage in activities that reinforce those fan-based communities. In this way, there are noteworthy parallels between contemporary fan culture and traditional folk culture:

Fan culture, like traditional folk culture, constructs a group identity, articulates the community's ideals, and defines its relationship to the outside world. Fan culture, like traditional folk culture, is transmitted informally and does not define a sharp boundary between artists and audiences. Fan culture, like folk culture, exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous. Fan texts, like may folk texts, often do not achieve a standard version but exist only in process, always open to revision and appropriation.<sup>108</sup>

Fan communities often adopt their own extralegal codes of conduct, enforcing them informally through peer pressure or ostracism from the community itself. By doing so, the community functions to a certain extent as internal regulatory force, discouraging aberrant activities that erode the original creator's incentives and threaten the existence of the community while encouraging involvement in activities that benefit both the fans and the works they adore.

4. Canon to the left of them, non-canon to the right: official versus unofficial

Fourth, the fans' own preoccupation with the delineation between canon (what may be considered "official" or to have "actually happened" within a fictional universe) and non-canon

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<sup>108</sup> Tushnet, *supra* note 8, at 656 (quoting Henry Jenkins, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 272-73 (Routledge 1992)).

(what may not be considered “official” or to have “actually happened”) prevents their activities from eroding the copyright holder’s incentives. The canonical/non-canonical distinction arises from situations where a fictional franchise expands to the point where the account contained within one medium contradicts the account contained within another—for example, where an event in a manga transpires differently in the anime adaptation, or not at all.<sup>109</sup> Fan preoccupation with the canonical/non-canonical distinction occurs most prominently in the United States among fans of science fiction franchises like Star Trek and Star Wars, where fans have created entire databases to elucidate canon from non-canon.<sup>110</sup> The canon/non-canon distinction preserves the creator’s artistic and economic integrity, drawing a firm line between the original work and the subsequent derivative works crafted by fans.

The fan preoccupation with distinguishing canon from non-canon extends beyond the fictional realm. As the success of branding “official” NFL merchandise demonstrates,<sup>111</sup> fans will pay a premium for works and merchandise that bear the copyright holder’s seal of approval. Correspondingly, even if fans engage in an activity that seemingly encroaches on a potential market for the copyright holder—fan-made merchandise, like prop replicas, for example—the fans’ own propensity to favor the “official” over the “unofficial” will ensure fan-made products never compete with official products licensed by the copyright holder. In the fans’ eyes—and, therefore, in the marketplace—the latter will always trump the former.

## 5. A two-part definition for fan-based activities

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<sup>109</sup> An example of this situation arises between the original manga version and anime adaptation of *Rurouni Kenshin*, where the events of volumes nineteen through twenty-eight of the manga are replaced by another story arc in the anime.

<sup>110</sup> See, e.g., Memory Alpha, <http://memory-alpha.org> (containing a fan-maintained, Wikipedia-like database of Star Trek information, wherein most articles distinguish between canonical and non-canonical accounts); Firefly Wiki, <http://fireflywiki.org> (containing a similar database for the TV series *Firefly*).

<sup>111</sup> See, e.g., Geoff Mulvihill et al., *Big Super Bowl Winners: Giants, Merchandise Sellers*, at <http://www.thespread.com/ap-news-nfl-100/big-super-bowl-winners-giants-merchandise-sellers.html> (last visited Apr. 26, 2008) (noting that “[h]ats, [t]-shirts, and other gear bearing the Giants logo started flying off the racks at sporting goods stores” shortly after the game ended).

The four preceding fan characteristics help to establish the principle criteria for delineating a class of fan-based activities. First, because the fan's interests are largely entwined with those of the original creator, fan-based activities are never undertaken with the intent to exploit or profiteer from the fruits of the original creator's labor. Instead, they are undertaken either to proselytize the underlying work or strengthen the interconnections between constituent fans and the fan community at large. Second, the tie between the fan community and the success of the underlying work means fan-based activities augment—rather than subtract from—the creator's aggregate economic and creative incentives.

Given these criteria, an activity is fan-based if it is (1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the creator's economic and creative interests. This definition of fan-based activity helps to clarify the extent to which the same arguments in favor of doujinshi and fansubs apply to other similar-minded activities. In addition, it allows one to draw a distinct line between fansubbers and those who subtitle and distribute episodes after a United States distributor has licensed them. Fansubbers do what they do to enable others without access to an unlicensed anime series or an understanding of the Japanese language to enjoy the anime series and participate in the fan culture that arises as a result. Their actions bring an unlicensed anime series to the attention of an audience beyond its current boundaries of viewership, and more than that, help to attract the attention of United States distributors who are in a position to allow the Japanese copyright holder to expand those boundaries. Fansubbers do so largely without adverse effect on the anime series' domestic Japanese market, and thus the aggregate effect of their activity on the creator's economic and creative incentives is positive.

By contrast, those who subtitle and distribute licensed anime series do so in the face of United States companies who, at great commercial expense, have already given United States viewership access to the series in question. They directly compete with those distributors, and, because licensing has expanded the series' boundaries of viewership to include the United States, they directly compete with the original Japanese copyright holder as well. The aggregate impact of their activities is sharply negative, and thus falls far outside the sphere of what could be properly considered a fan-based activity.

The two-part definition for fan-based activities highlights the distinction between fansubbers and the latter group; while the subtitling and distribution process for both are mechanically the same, the context in which the activity is undertaken and the aggregate effect on economic and creative incentives are not. A useful, if colorful, analogy can be drawn between fansubs and evangelism. Whereas traditional fansubs proselytize the original work by reaching out to those who have yet to hear the gospel-according-to-anime, licensed "fansubs" do no more than preach to the choir. Not only is the latter practice unhelpful, it is downright counterproductive: the process of supplying free subtitled episodes in competition with existing licensees dilutes the existing market for the original work, creating opportunities for the existing audience to become free riders.

*C. How the Four-Factor Test Misjudges Fan-Based Activities*

Many uses that fall within the realm of fan-based activities fail to qualify as fair under § 107's four-factor test as courts currently interpret it. Doujinshi, for example, may satisfy the third and fourth factors, but would likely fail the first two. First, despite the characterization of doujinshi as parodies—and therefore transformative works—by the doujinshi markets, doujinshi are undoubtedly motivated by a commercial purpose. Doujinshi are printed and priced to sell at

a profit, and many doujinshi artists even obviate printing and shipping costs by making their works available for purchase and download through online “markets.”<sup>112</sup> Second, anime and manga are nothing if not “creative, imaginative, and original,”<sup>113</sup> and therefore deserve heightened copyright protection.

On the other hand, doujinshi may satisfy the third factor because they only appropriate the characters and general milieu of the copyrighted work, and otherwise constitute original works of authorship. This conclusion is debatable, however, because an argument could be made that characters and milieu are essential elements of a creative work, and therefore direct appropriation of those attributes significantly usurps a copyrighted work’s mode of expression. Ironically, it is the usually ambiguous fourth fair use factor that weighs most heavily in favor of doujinshi’s fairness, as doujinshi are complementary to original works rather than substitute goods,<sup>114</sup> and therefore do not diminish the works’ potential markets. Nevertheless, under the four-factor analysis, a court could very easily determine that doujinshi, as a commercial use, appropriating elements that could be considered part of the creative core of a copyrighted work, fall beyond the scope of fair use.

In contrast to doujinshi, fansubs may satisfy the first fair use factor, but they would certainly fail the second and third factors. If one includes licensed “fansubs” in the fair use calculus—as one might, without considering the two-part definition for fan-based activities—fansubs could fail the fourth as well. While fansubs are entirely non-commercial in nature, the

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<sup>112</sup> See, e.g., Digiket, <http://www.digiket.com> (hosting thousands of doujinshi in digital format, available on a pay-for-download basis).

<sup>113</sup> See *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

<sup>114</sup> See Duhl, *supra* note 44, at 690 (citing Mareen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1229 (2002) (citing *Sony Computer Entm’t, Inc. v. Connectix*, 203 F.3d 596, 598 (9th Cir. 2000); *Sega Enters. Ltd. V. Accolade Inc.*, 977 F.2d 1510, 1514-16, 1522-23, 1527 (9th Cir. 1992)); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 309 n.307 (2002) (noting that “[e]conomists define a complementary good as a product whose fall in ‘price will cause the quantity demanded for the other product to rise’”) (quoting Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 49 (5<sup>th</sup> ed. 1998))).

works they appropriate are creative ones, and, to make matters worse, they appropriate the work wholesale. If a court lumps licensed “fansubs” in with unlicensed fansubs when analyzing potential market effects, it will likely find fansubs as a whole harmful to the potential United States markets for anime and manga, especially if it follows the judicial trend of focusing on adverse impacts to the exclusion of possible benefits.<sup>115</sup>

The analyses of doujinshi and fansubs indicate that something is fundamentally awry in the current methodology of assessing whether a given activity qualifies as a fair use. The four-factor test, as courts presently interpret it, is ill-equipped to evaluate the fairness of uses like fan-based activities, which further the constitutional core of copyright by widening the spectrum of creativity available to society while simultaneously enhancing the creative and economic incentives for copyright holders. By looking closely at how fan-based activities manage to break out of the zero-sum paradigm of copyright, which views growth of the public domain and maintenance of the copyright holder’s economic incentives as diametrically opposed goals, one can discern how the four-factor test could be modified to encompass technically infringing activities that nonetheless enhance both goals.

*D. Viewing Original Works and Fan Activities From Complementary Angles*

The economic concept of “complementary goods” provides insight into the relationship between fan-based activities and the original works that spawn them. Goods are complementary if their cross-elasticity of demand is negative; that is, if purchasing more of one good results in the purchase of a greater quantity of the other good. Complementary goods include hot dogs and hot dog buns, computer consoles and computer monitors, and, most usefully for immediate purposes, movies based on novels and novels based on movies. In each case, a change in

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<sup>115</sup> See, e.g., *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 591 n.21 (describing the fourth factor inquiry as assessing “the amount of harm” to potential markets).

demand for one of the goods induces a similar change in demand for the other good. For example, one could imagine an FDA ban on hot dogs would cripple, if not destroy, the hot dog bun industry. By the same token, the popularity of J.R.R. Tolkien's *The Lord of the Rings* trilogy likely contributed to the box-office success of its movie adaptations, and, in turn, viewership of the movies increased interest in and purchases of the original novels.

Similarly, the success of doujinshi or fansubs is conjoined with the success of the underlying works they are based on. This bond makes it self-destructive for the fans behind either activity to engage in practices that compete with, and therefore erode the market for, the original work. Just as it makes little sense for hot dog bun makers to develop a food product that eliminates demand for hot dogs—and, consequently, hot dog buns—it makes even less sense for a doujinshi artist or fansubber to engage in activities that undermine the works upon which their labors are based. Instead, it behooves the doujinshi artist or fansubber to implement steps that increase demand for the original work, because the more popular the original work becomes, the higher the corresponding demand for doujinshi and fansubs.

The complementary relationship between doujinshi, fansubs, and the anime and manga industries bears significant resemblance to the symbiosis between original works and “tie-in” media, most often seen in the United States between the publishing and movie industries. Just as there are people who would not dream of reading a book unless they saw it as a movie first (or vice versa), there are people who cannot watch an episode of anime or read a volume of manga until it has been translated and made accessible to United States shores. In the same way, just as some people discover J.K. Rowling's Harry Potter books through movie, video game, or other media tie-ins, there are people who discover an anime or manga series solely by happening upon a well-drawn doujinshi at Comiket. All it takes for the original works to reach those people is

for something to bridge the gap. Media tie-ins bridge some; fan-based activities bridge others. The only difference between media tie-ins and fan-based activities is that, while the former uses are authorized by the copyright holder, the latter are not. Whether authorized or not, however, the beneficial effects of either set of practices remain the same. In the interest of upholding the purposes of copyright, courts should be allowed to recognize as fair those uses which, in their estimation, fall within the narrow and nuanced category of fan-based activities. Accordingly, the four-factor analysis should be refined to enable courts to account for the complementary nature of fan-based activities in their fair use calculus.

*E. Accounting for Fan-Based Activities in the Four-Factor Test*

Although legislative reform may be the most direct way to modify the four-factor test to account for fan-based activities, it is by far the most drastic. It is also the least likely to succeed, as copyright holders and their lobbyists are unlikely to abide legislation that reduces their enforcement rights, even if the ultimate effect of the reduction is beneficial. United States copyright holders could point to the Japanese system as an example. The Chosakuken utilizes a laundry list of exceptions in lieu of fair use, but fan-based activities like the doujinshi markets are not among them;<sup>116</sup> instead, the markets exist primarily at the largesse of the Japanese copyright holders themselves.

The United States trend toward stricter enforcement, however, indicates that at least some copyright holders may ignore the complementary effects of fan-based activities and choose to enforce their rights against the fan-based activities. If copyright holders bring suit, the present judicial construction of the fair use analysis may ultimately hinder the goals of copyright rather than uphold them. By ignoring the characteristics of fan-based activities, the current fair use analysis may cause both public access to creative works and the copyright holders' incentives to

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<sup>116</sup> Japanese Copyright Act (Chosakuken), art. 30-49, available at [http://www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html).

suffer. Fortunately, the current four-factor test under § 107 affords the courts themselves sufficient latitude to refine the fair use analysis in light of changing circumstances.<sup>117</sup> Judicial-level adjustments to the first and fourth fair use factors allow courts to consider the characteristics of fan-based activities where appropriate, and enable them to find fair a use possessing the defining characteristics of a fan-based activity—even if the copyright holder fails to recognize the fairness of the use.

Some critics may dismiss this stance as a form of judicial paternalism. Legal paternalism, however, traditionally entails a situation involving “interference with a person’s liberty of action justified by reasons referring *exclusively* to the welfare, good, happiness, needs, interests or values *of the person being coerced*.”<sup>118</sup> That is not the case here, as the primary reason for the proposed judicial-level refinement concerns the ability of third parties—specifically the fans—to engage in activities that further the purposes of copyright, and ultimately the right of society at large to benefit from those activities. The fact that those same activities cause no aggregate harm to the incentives of the copyright holder—or produce an aggregate augmentation of those incentives—is a secondary, albeit noteworthy, factor that underscores the need to protect fan-based activities.

In addition, some commentators believe a certain degree of paternalism may be inevitable where “preferences are unclear and ill-formed, and [] choices [are] inevitably [] influenced by default rules, framing effects, and starting points.”<sup>119</sup> Given the overwhelmingly beneficial impacts of fan-based activities on copyright holders’ incentives, it seems that a desire for strict

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<sup>117</sup> See H.R. REP. NO. 94-1476, at 66, reprinted in 1976 U.S.C.C.A.N. at 5679 (noting that “the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change”).

<sup>118</sup> William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1762 n.450 (1988) (quoting G. Dworkin, *Paternalism*, in MORALITY AND THE LAW 107-108 (R. Wasserstrom ed. 1971)) (emphasis added).

<sup>119</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

enforcement of copyright against those activities could only stem from an over reliance on the classical more-protection-equals-more-authorship rationale. A copyright holder who has grown too accustomed to associating strict copyright enforcement with the maximization of his or her interests may take actions to curtail fan-based activities on reflex or force of habit alone, all the while remaining blissfully ignorant of the benefits, both public and private, that are part-and-parcel with fan-based activities.

Worse yet, it is not only the copyright holder's interests that are at stake in regard to the fairness of fan-based activities, but more importantly the interests of the fans and society at large. Where public interests beyond those of the decision maker are at stake, and a curtailment of the decision maker's freedom of choice yields no private detriment, courts should be allowed to intervene, not to protect the decision maker but to protect the public interests involved. This approach is no more paternalistic than the criminalization of certain forms of behavior: laws and courts curtail a man's freedom to assault his neighbor not because it is in his own interest—although it probably is, as a man who pummels his neighbor is likely to be pummeled himself one day—but because it is in his neighbor's, and more broadly, the public's interests. In the same way, a judicial-level expansion of the fair use doctrine curtails a copyright holder's freedom of enforcement against fan-based activities not because it is in the copyright holder's because interest—even though it is—but to preserve the interests of the fans and the public in general.

1. Complementary versus competitory purposes: a fourth dichotomy

First, the fact that an activity is undertaken by fans, and therefore carried out with a purpose complementary to that of the original work, should weigh in favor of a determination of fair use under the “purpose and character” factor. This fourth dichotomy, distinguishing between

complementary and competitory purposes, more closely aligns the first factor with the purposes of copyright. Courts are thereby enabled and encouraged to find a wider range of complementary uses fair under § 107.

The integration of a complementary-versus-competitory dichotomy under the first factor instills the four-factor test with a greater scope of analysis. It softens the commercial-versus-noncommercial distinction by acknowledging that some commercial uses—specifically complementary ones—actually favor a finding of fair use. This dichotomy also brings complementary uses beyond the sphere of fan-based activities into the realm of fair use, such as unauthorized tie-in media. So long as they do not encroach upon the copyright holder’s existing markets under the fourth fair use factor—and thus constitute a competitory rather than complementary purpose—unauthorized tie-in media and related commercial activity should fall under the scope of fair use. A complementary-versus-competitory dichotomy brings them within the fair use penumbra.

One might argue the suggested dichotomy enables knock-off manufacturers to justify their activities under the fair use doctrine. For example, a manufacturer who produces Harry Potter-branded merchandise without J.K. Rowling’s authorization may argue that his/her appropriation is fair because his/her activities serve to promote the characters and settings contained within Rowling’s books. The complementary-versus-competitory distinction might overlook the possibility that the unauthorized manufacturer’s products will hinder Rowling’s ability to pursue “official” Harry Potter merchandise in the same vein. In this way, while the unauthorized manufacturers may be complementary to the Harry Potter books themselves, they nonetheless erode the creator’s incentives by competing in the potential market for branded goods.

This critique, however, ignores one of the four characteristics of fan-based activities, which applies just as readily to unauthorized merchandise: the fans' propensity to distinguish the canonical from the non-canonical. Just as fans tend to prefer canonical works and merchandise to non-canonical fan-made works and goods, they will tend to gravitate toward "official" branded merchandise over unofficial, unauthorized goods. As a result, any first-to-market advantage enjoyed by the unauthorized manufacturer will evaporate the moment the copyright holder decides to enter the branded goods market. Accordingly, the activities of the unauthorized manufacturer do not erode the creator's incentives, and thus qualify as legitimate fair uses. It is important to note, however, that once "official" goods enter the market, the activities of the unauthorized manufacturer, if continued unabated, are converted from a complementary to competitory purpose, and thereafter fall beyond the scope of fair use.

The real-life J.K. Rowling provides another example of the complementary-versus-competitory dichotomy in her lawsuit against Steven Vander Ark's "Harry Potter Lexicon."<sup>120</sup> The book represents an attempt by Vander Ark to publish the contents of his Harry Potter Lexicon website for \$24.95 a copy.<sup>121</sup> Interestingly, while the lexicon in its for-profit, book form drew a lawsuit, the same content in its free, web-based form drew an award, bestowed by Rowling to "encourage an enthusiastic fan."<sup>122</sup>

The complementary-versus-competitory dichotomy, coupled with the characteristics of fan-based activities, helps to justify Rowling's seemingly schizophrenic stance on the matter. In its free, web-based form, Vander Ark's lexicon exhibited all the characteristics of a fan-based activity. First, it was undertaken as a complement to, rather than in competition with, Rowling's Harry Potter books: a dictionary of Harry Potter terms and concepts is a poor substitute for the

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<sup>120</sup> Associated Press, *J.K. Rowling Testifies: Fan's Book is 'Wholesale Theft,'* available at <http://today.msnbc.msn.com/id/24122901/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Harry Potter saga itself. The lexicon probably whetted its visitors' appetites for Rowling's fiction—or, for that matter, the movies based on it—especially if they had not read the Harry Potter series before. Second, Vander Ark's website, with roughly 1.5 million page views a month,<sup>123</sup> likely enhanced Rowling's aggregate economic and creative interests by bringing new readers into her world of muggles and wizards.

However, when converted into its for-profit, print form, Vander Ark's lexicon sheds its fan-based mantle. While still not directly competing with the market for Rowling's novels, the print-form lexicon appears to be primarily motivated by a desire to exploit rather than promote the underlying works. Rowling had every right to “almost choke[] on her coffee” when “she realized Vander Ark had warned others not to copy portions of his Web site”:<sup>124</sup> by doing so, he revealed that his goal had indeed shifted from proselytizing Rowling's works to profiteering from them, something no true fan—nor truly fan-based activity—would seek to do.

## 2. Accounting for market benefits under the fourth factor

Second, the fact that fan-based activities uniformly enhance the copyright holder's economic and creative incentives can help to refine the scope of inquiry called for under the “potential market effect” factor. The beneficial tendencies common to fan-based activities suggest that, in order to obtain a fuller and more robust understanding of the effects of a use, courts should expand their fourth-factor inquiries to include not only harmful impacts, but favorable impacts as well. Section 107(4) does not restrict the fourth-factor analysis to either harmful or beneficial effects alone, and neither should the courts. In accounting for both positive and negative market impacts, courts will be better able to discern the aggregate effect of the use in question, and thereby better serve the purposes of copyright.<sup>125</sup> This approach runs closer to

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 578 n.10 (describing the goals of copyright as “stimulat[ing] the creation and publication of edifying matter”) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV.

the language of § 107 than the harm-based inquiry currently employed by the courts,<sup>126</sup> and enables courts to weigh a finding of beneficial market effects more strongly in favor of fair use than a finding of neither detrimental nor beneficial market effects.

Admittedly, expanding the fourth factor inquiry to consider benefits as well as harms does little to ameliorate the ambiguity that plagues both the fourth factor and the overall fair use analysis as a whole. Assessing fair use under the modified standard remains just as fact-intensive, and continues to grant courts a great deal of latitude in weighing the various factors of a fair use claim. The ambiguity, however, appears endemic to the fair use doctrine, and therefore no easy method of curtailing the current level of judicial discretion presents itself. The proposed judicial-level refinement of the four-factor test is no panacea for the test's various shortcomings; it merely represents a means by which the test can be brought into closer synchronization with the underlying purposes of copyright, and therefore denotes a single, and perhaps significant, step in the right direction.

### 3. The modified four-factor test

By accounting for the characteristics of fan-based activities, the proposed refinements to the first and last factors of the fair use test better align it with the purposes of copyright,<sup>127</sup> promoting the public domain while preserving—and, in the case of fan-based activities, enhancing—incentives for creativity. The modified four-factor test, informed by the characteristics of fan-based activities, furnishes courts with the ability to find fair use in activities that benefit both the copyright holder and the public, but would likely fall beyond the scope of the current judicial interpretation of the fair use test. These win-win scenarios demonstrate

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L. REV. 1105, 1134 (1990)).

<sup>126</sup> See *id.* at 587 (describing the fourth factor as assessing the “likelihood of market harm”).

<sup>127</sup> See Trombley, *supra* note 8, at 683 (arguing that “when courts and legislatures seek to strike the balance between protection of property rights and freedom of expression, the value of [fanvids and similar activities] should be taken into account”).

copyright need not—and should not—be viewed as a zero-sum game that inevitably pits the interests of copyright holders against the interests of their audiences.<sup>128</sup> At least where fan-based activities are concerned, copyright holders and their audiences can work hand-in-hand, resulting in a boon both for the copyright holder’s interests and the general level of creative discourse available to society at large. Even if copyright holders themselves cannot recognize the fairness of fan-based activities, the courts should, much as they recognize and uphold more traditional fair uses such as parody and criticism, regardless of whether those uses meet with the copyright holder’s express approval or not.

The potential advantages of this modified approach extend beyond the realm of fan-based activities. Professor Duhl advocates a similar benefit-and-harm-based approach for the fourth fair use factor on the basis of “crystalliz[ing] the tension in copyright law between private property rights and the public’s interest in using and accessing creative works.”<sup>129</sup> However, where Professor Duhl proposes an intellectual property version of the doctrine of eminent domain as a paradigm for analyzing the non-harmful or beneficial impacts of an unlicensed use<sup>130</sup>—which involves the added problem of calculating “compensation” for unlicensed takings<sup>131</sup>—the refinement of the four-factor test indicated by fan-based activities constitute a subtler, less drastic approach.

While there may be some advantages to importing the concept of eminent domain from real to intellectual property law, it seems likely that adoption of a solution that has already

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<sup>128</sup> See Leonard, *supra* note 8, at 194 (noting that many commentators “instinctively or purposefully pit[] owners against audiences”).

<sup>129</sup> Duhl, *supra* note 44, at 727.

<sup>130</sup> *Id.* at 728.

<sup>131</sup> See, e.g., Natasha N. Aljalian, *The Role of Patent Scope in Biopharmaceutical Patents*, 11 B.U. J. SCI. & TECH. L. 1, 62 n.231 (2005) (noting that, like the compulsory licensing scheme for patents, eminent domain regulatory taking scheme “is inadequate and unable to adequately predict and determine a royalty rate as would the competitive market”) (citing Arti K. Rai, *Fostering Cumulative Innovation in the Biopharmaceutical Industry: The Role of Patents and Antitrust*, 16 BERKELEY TECH. L.J. 813, 843 (2001)).

proven itself something of a mixed blessing for real property<sup>132</sup> will only introduce additional problems to the fair use analysis. By contrast, the refinement raised by the characteristics of fan-based activities represents a measured approach requiring no statutory revision. It also refrains from introducing new levels of potentially controversial analysis to the already complicated fair use calculus. The proposed approach maintains the standard encapsulated in § 107, instead refining the existing inquiries into purpose and market effects so they account for the situations conjured by fan-based activities. In this way, the approach upholds not only the letter of the law but the *lex parsimoniae*<sup>133</sup> as well: it does nothing to the four-factor test that is not made necessary by the light cast on it by fan-based activities. Accordingly, the judicial reinterpretation of the fair use analysis suggested by fan-based activities represents the least drastic means by which the penumbra of fair use can be expanded to encompass win-win activities that benefit the copyright holder and the public alike.

## V. CONCLUSION

As numerous analyses spanning the spectrum of fan-based activities have shown,<sup>134</sup> it is often foolish for creators to try to control how their works are interpreted once released into the public, and largely futile for them to try. Perhaps the evolution of the role-playing game *Dungeons & Dragons*, or *D&D*, epitomizes this precept. While the game's core mechanic capitalizes on the creativity of its players within the attributes of the role-playing system, TSR, the game's initial producer, pursued vigorous legal action against smaller publishers of

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<sup>132</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005) (in which a fractured Supreme Court broadened the scope of eminent domain to include takings for economic development); see also Scott P. Ledet, Comment, *The Kelo Effect: Eminent Domain and Property Rights in Louisiana*, 67 LA. L. REV. 171, 172-73 (2006) (noting that the "initial reaction among many is that Kelo was wrongly decided" and advocating "measures that might prevent the type of taking that occurred in Kelo" from occurring in Louisiana).

<sup>133</sup> Also known as Occam's Razor: "*entia non sunt multiplicanda praeter necessitatem*," or "entities should not be multiplied beyond necessity." Occam's Razor – Wikipedia, the Free Encyclopedia, [http://en.wikipedia.org/wiki/Occam%27s\\_razor](http://en.wikipedia.org/wiki/Occam%27s_razor) (last visited Apr. 26, 2008).

<sup>134</sup> Mehra, *supra* note 8; Tushnet, *supra* note 8; Kirkpatrick, *supra* note 8; Muscar, *supra* note 8.

derivative materials in the 1980s.<sup>135</sup> Those actions generally antagonized *D&D* fans and industry insiders alike.<sup>136</sup> In part due to negative fan reaction to their heavy-handed management of the *D&D* franchise, TSR fell on hard financial times in the 1990s, and eventually sold its assets to Wizards of the Coast, the publisher behind the successful *Magic: The Gathering* card game.<sup>137</sup> Perhaps responding to the will of the fans, Wizards of the Coast reclassified the franchise under the newly introduced Open Gaming License, allowing for the production of derivative materials based on the *D&D* system.<sup>138</sup> Under the Open Gaming License, the franchise continues to thrive to this day, with a Fourth Edition of the system's core rules due to be released in mid-2008.<sup>139</sup>

Moreover, as others have indicated,<sup>140</sup> a copyright holder sometimes stands to benefit from loose enforcement of his exclusive rights, where fan activities serve to proselytize the copyright holder's work. Recognition of those situations should go beyond mere largesse or indifference on the part of the copyright holder. Instead, it should be reflected in the way courts interpret the four-factor test for fair use.

The alignment of the fans' interests with those of the original creator, the proselytizing function of fan activities, the internal regulatory function of the fan communities themselves, and the fans' preference for canonical over non-canonical works and goods all ensure that fan-based activities will never jeopardize the creator's economic or creative incentives. Moreover, the nature of fan interactions and their tie to the success of the underlying work predispose fan-based activities to benefit the copyright holder's economic and creative incentives. Adding a

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<sup>135</sup> Dungeons & Dragons – Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/Dungeons\\_and\\_dragons](http://en.wikipedia.org/wiki/Dungeons_and_dragons) (citing Bob Bledsaw, *From the Sorcerer's Scroll: What has Judges Guild done for Dungeons and Dragons*®, THE DRAGON #27 Vol. IV, No. 1, at 10-11 (TSR Hobbies, Inc. 1979)) (last visited Apr. 26, 2008).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing Wizards of the Coast, *The d20 System*, <http://www.wizards.com/default.asp?x=d20/welcome>).

<sup>139</sup> *Id.* (citing Bill Slavicsek, *4th Edition Player's Handbook, Dungeon Master's Guide, and Monster Manual*, <http://www.wizards.com/default.asp?x=dnd/dramp/20071019> (only viewable with a D&D Insider account)).

<sup>140</sup> Leonard, *supra* note 8.

complementary-versus-competitory dichotomy to the “purpose and character of use” factor, along with accounting for beneficial as well as detrimental market impacts under the fourth and most important fair use factor, accounts for the unique characteristics of fan-based activities. This refinement welcomes a greater number of complementary and beneficial uses under the fair use penumbra, and thereby brings the four-factor test into closer synchronicity with the purposes of copyright.

Ultimately, to better uphold the constitutional purposes of copyright, courts must take into account the broader facets of fair use encapsulated by fan-based activities. Perhaps the song that “Browncoat”<sup>141</sup> fans of *Firefly* and *Serenity* are fond of reciting sums it up best:

Take my love, take my land  
Take me where I cannot stand  
I don't care, I'm still free  
You can't take the sky from me;  
Take me out to the black  
Tell them I ain't comin' back  
Burn the land and boil the sea  
You can't take the sky from me;  
There's no place I can be  
Since I found Serenity  
But you can't take the sky from me . . .<sup>142</sup>

If the post-cancellation success of the crew of the Firefly-class transport *Serenity*,<sup>143</sup> the uncancellation of *Family Guy*,<sup>144</sup> or the revival of the city of *Jericho*<sup>145</sup> serve as any indication, copyright holders and related powers-that-be really can't take the sky from the fans. More than

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<sup>141</sup> Many *Firefly* fans assume the nickname of the Independents who lost a civil war against the Alliance at the Battle of Serenity Valley, a campaign in which *Serenity*'s captain and first officer, Malcolm Reynolds and Zoe Washburn, fought on the side of the Browncoats.

<sup>142</sup> Joss Whedon, Firefly Theme Song, available at <http://www.fireflywiki.org/Firefly/FireflyThemeSong>.

<sup>143</sup> See Done the Impossible – The Fans' Tale of Firefly and Serenity, <http://www.donetheimpossible.com/about.php> (describing a documentary detailing how fans did “the impossible” by helping to resurrect the cancelled television series *Firefly* in the form of the movie *Serenity*).

<sup>144</sup> See Gary Levin, 'Family Guy' Un-canceled, Thanks to DVD Sales Success, USA TODAY, March 24, 2004, available at [http://www.usatoday.com/life/television/news/2004-03-24-family-guy\\_x.htm](http://www.usatoday.com/life/television/news/2004-03-24-family-guy_x.htm).

<sup>145</sup> Nina Tassler, A Message From CBS Entertainment, <http://jerichoboard.cbs.com/n/pfx/forum.aspx?tsn=1&nav=messages&webtag=CBSMBJericho&tid=13329> (applauding successful fan efforts to revive the canceled television series *Jericho* by announcing the ordering of seven episodes for the series' second season).

that, as the benefits of doujinshi, fansubs, and other fan-based activities demonstrate, they ought not to even try.