

ARTICLE

FAME: A CONVERSATION ABOUT COPYRIGHT, BORROWING, AND SOUP

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ABSTRACT

Copyright is not often thought of as something that engages in the concept of “fame.” Other areas of IP do: trademark and right of publicity, for sure. This Article argues that fame and the relationship to fans creating works should be part of the conversation. The Article argues that much of copyright law already recognizes the fame component, including fair use and the owner’s control over § 106 rights. But as copyrighted works have become more commodified and

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fans have become more engaged in very public discourses surrounding copyrighted works, it might be time to adopt the *Rogers* test as part of the analysis of what is allowable expression and what is moving into the economic and source identifier sphere for the copyright owner. The piece uses examples from contemporary fan communities, musicals, and crafting.

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I. INTRODUCTION

“That’s how this story starts. A bunch of words on a page. *Words . . .* At some point, other forces like fate and luck and magic will turn those words into something else; something that nobody could have possibly imagined. But first things first . . .”¹

“No. *This* is soup and *this is art!*”²

An author writes a story. And if they are lucky, people respond to it. And sometimes people identify with the words and the characters that they feel emotionally connected. And maybe the story is made into a movie (or a musical or a TV show). And more people are moved, and those people become fans.³ And fans create groups to talk about the work, make drawings, and create everything one can imagine.⁴ Sometimes fans sell their works to other fans. The author usually (sometimes directly or often indirectly) benefits from these outpourings too—more people find

1. Opening of *The Outsiders: A New Musical* by Adam Rapp with Justin Levine, based on the book *The Outsiders* by S.E. Hinton and Francis Ford Coppola’s Motion Picture. ADAM RAPP & JUSTIN LEVINE, *THE OUTSIDERS: A NEW MUSICAL* 1–2 (2024). The musical won four Tony’s including Best Musical, Best Director (Danya Taymor), Best Lighting Design of a Musical, and Best Sound Design of a Musical. *The Outsiders* was also up for Best Performance by an Actor in a Leading Role in a Musical (Brody Grant), two actors for Best Performance by an Actor in a Featured Role in a Musical (Joshua Boone and Sky Lakota-Lynch), Best Original Score, Best Book of a Musical, Best Orchestrations, Best Scenic Design of a Musical, and Best Choreography. For the full list, see Jordon Freiman, *Who Won Tony Awards for 2024: Full List of Winners and Nominees*, CBS NEWS, <https://www.cbsnews.com/news/tony-awards-winners-2024-list/> [https://perma.cc/Z7AV-8PEX] (last updated June 17, 2024, 9:56 AM).

2. Lily Tomlin explaining Campbell’s soup and Andy Warhol’s art in *Search for Signs of Intelligent Life in the Universe* by Jane Wagner. JANE WAGNER, *THE SEARCH FOR SIGNS OF INTELLIGENT LIFE IN THE UNIVERSE* 29 (It Books ed. 2012) (1990).

3. Fan Studies is interdisciplinary, with major conferences and journals. Key work in this field includes HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 12 (1992). For anyone working on the legal issues with fandoms and fan works, you have to start with Rebecca Tushnet’s seminal article. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651, 655–56 (1997). For other law review articles related to fan works, see Alice Preminger, *Rebranding Batman*, 22 *CHI.-KENT J. INTELL. PROP.* 37, 40–41, 43 (2023) and more recently, Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 *N.Y.U. L. REV.* 453, 559 (2022).

4. Thomas V. Maher, *Fans and Fan Activism*, in *THE OXFORD HANDBOOK OF DIGITAL MEDIA SOCIOLOGY*, 394, 399–400 (Deana A. Rohlinger & Sara Sobieraj, eds., 2020).

[F]andom is based on a set of common characteristics including knowledge of the fan object and its media world, engagement with the object beyond appreciation, participation in the objects’ fan community, self-identification as a fan, and an emotional connection with the object. Not only will fans embody most of these elements, but it is also through them that we can understand how fan communities are sustained and how they connect with other aspects of social life. *Id.* at 394–95.

and love their work, and more people discuss it, advocate for more work from the author, and more.⁵ When that happens, the author as well as their work becomes famous. The creation of fame is part of copyright and the promotion of copyrighted works. We just do not dwell on it that much. And along the way, to get to fame, fans have necessarily *borrowed* the story and characters. The question is what does copyright have to say about that?

Through “fate and luck and magic,”⁶ original works become bigger than just their original form, whether it be through derivatives, adaptations, allusions, or inspiration for new works.⁷ No one can know how famous something will be when they’re creating, but “fate and luck and magic” are all tied up in people emotionally responding to what you have made—in the fans who find your work meaningful. We assert that fame, borrowed or otherwise, has become an important part of our copyright ecosystem, particularly in the Internet Age, and that copyright, along with borrowed tools from trademark law, help protect all of those involved. And not only is fame an important part of our copyright ecosystem, but it is also more nebulous than it first appears.

The relationship of copyright and fame could be seen as a metaphorical soup filled with many ingredients: the work created by the content owner, the underlying influences on the work, nonprotectable elements, *scènes à faire*, stock characters, styles, public domain works, explicit references, fair use, permissions, the marketing and branding of the work, as well as the fans, fandoms, the fans’ works, new works that are inspired or use the original work, and everything in between. Every work has some combination of these elements. Every work. The relationships are multifaceted.

Everything is a little bit borrowed. That is how we build culture.⁸ For example, when you are in art school or writing workshops, you are always asked about your influences. And somehow when you put together all kinds of elements, add your own creativity and style, a

5. Cf. Hannah Ravell, *#RIPJKRowling: A Tale of a Fandom, Twitter and a Haunting Author Who Refuses to Die*, 12 PUB. RELS. INQUIRY 239, 241–42 (2023) (discussing the Harry Potter fandom and how its members have become both producers and consumers of the author’s original creation).

6. See RAPP & LEVINE, *supra* note 1, at 2.

7. See Tushnet, *supra* note 3, at 655–56.

8. The phrase “standing on the shoulders of [g]iants,” a metaphor often referred to in copyright (that you borrow from the past), is usually attributed to Isaac Newton, but the phrase has been attributed as far back as the Middle Ages. See CHAOMEI CHEN, *MAPPING SCIENTIFIC FRONTIERS: THE QUEST FOR KNOWLEDGE VISUALIZATION* 135–36 (2003); see, e.g., William T. McGrath, *Copyright Protection for User Interfaces in the Nineties: Of Perilous Journeys on the Drooping Shoulders of Giants*, 4 SOFTWARE L.J. 597, 599 (1991).

story starts. A bunch of words on a page, a sketch, an idea for an animation. Borrowing is often thought of as plagiarism, copyright infringement, or wrongness. But when we look at any creative work, we see all kinds of borrowing taking place. Whatever the artistic or literary form, makers are constantly borrowing and reworking, whether intentionally or not. Borrowing has always been available, but social media speeds up borrowing, makes it more public, and provides the world with access to the new creations in unimaginable ways and makes creating, and the impact of borrowing, available to the masses.⁹

For us, borrowed fame can mean a number of things. Fans borrow famous works to comment on them, make their own, or get inspiration for something entirely different.¹⁰ Fans also borrow niche, but still in their own way famous, works.¹¹ But famous and niche works also borrow and depend on fan culture—the fans create the fame and excitement about a given work. It is a soup of sorts. More than that, the relationship between content owners and borrowers has become blurred sometimes, and even codependent.

This Article looks at the relationship between the soup and the law. Where we see the law coming in is when suddenly a content holder believes that borrowing has gone too far or a fan's use is unfair. And yet, how does one explain "too far?" If one sticks only to copyright case law and statutes, one may get it wrong. The world is weirder than that. But there are legal and cultural clues, which is what this Article is about. The boundary between adequate and "too far" seems to be a combination of a fair-use analysis, what a content owner tolerates, and perhaps borrowing the *Rogers* test from trademark law. We suggest using the concepts of commercialism,

9. See Maher, *supra* note 4, at 399.

10. *Id.*

11. Niche fame is a term of art used in trademark law. For instance, dilution rejects niche fame as a requirement for dilution. See, e.g., *Monster Energy Co. v. Maple Leaf Sports & Ent. Ltd.*, 2021 WL 1828119, at *23 (T.T.A.B. 2021). But niche fame is also a term recognized in fan cultures and fandoms as well. The concept of niche fame is so prevalent that Reddit's r/FanFiction includes a thread titled "What is the most niche, smallest fandom you are part of," which states in its description, "You've got all the big names, like Pokemon and Dragon Ball and all those, but there are also minuscule ones out there, ones that there are few stories in, ones that you'll have trouble finding anyone else in." *r/FanFiction*, REDDIT, https://www.reddit.com/r/FanFiction/comments/7oo6av/what_is_the_most_niche_smallest_fandom_you_are_a/ [<https://perma.cc/D2LF-3HYP>] (last visited Sept. 27, 2024). It seems to be a common question posed. There are also, in contrast, massive fandoms. See Ravell, *supra* note 5, at 242.

copyright acting like source-identifiers, *de minimis* uses, and “fans celebrating” to help us sort out the soup, legally speaking.¹²

Copyright is not a discipline that overtly discusses fame as part of the legal analysis. Trademark does.¹³ Right of publicity does.¹⁴ You could say that the Visual Artists Rights Act (VARA) does.¹⁵ Definitely!¹⁶ You could say that “access” as part of a copyright infringement analysis does sometimes.¹⁷ But fame is there. Nearly every copyright case involving fair-use parodies (successful or not) concerns a famous work.¹⁸ And we recognize that it is unfair when a famous artist takes work from less famous ones.¹⁹ People longingly wait for famous works to come into the public domain.²⁰ Of course, without fans, where would all of those copyrighted creations be? Fame matters in copyright, whether we directly address it or not.

Often there is a binary in legal cases: copyright holder versus infringer.²¹ But with the soup metaphor, we do not see those binaries existing in copyright at the moment—the soup is more fluid. In reality, the borrower and the original creator form a broth. Throw in social media, fan culture, and the idea of “adaptation” and soon enough it becomes a full-on soup—a fame-based soup. Sometimes fan culture elevates a copyrighted work, sometimes the copyright holder spends gobs of money to get fan culture to take off, and sometimes weird things just happen.²²

12. See *infra* Section IV.C. For instance, Adler and Fromer suggest that memes are a “prototype of a new mode of creativity,” that are far from being a “*sui generis*, a one-off exception to the premises of copyright law.” Adler & Fromer, *supra* note 3, at 545.

13. See generally 15 U.S.C. § 1125 (discussing fame as an integral requirement of dilution).

14. See, e.g., WASH. REV. CODE § 63.60.020 (2024). Right of publicity is sometimes divided literally between regular people and famous people. For example, Washington State law provides: a “[p]ersonality” is someone whose “name, voice, signature, photograph, or likeness ha[d] commercial value” at the time of death. The post-mortem period is ten years for individuals and seventy-five years for personalities. See *id.* §§ 63.60.020, 63.60.040.

15. Most memorable is the 5Pointz case, where “recognized stature” was found for graffiti works. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162–64, 166, 173 (2d Cir. 2020).

16. See, e.g., Sue Liemer, *Works of “Recognized Stature” Under VARA: Recognized by Whom?*, in *THE CAMBRIDGE UNIVERSITY HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE* 265, 272 (Steven D. Jamar & Lateef Mtima eds., 2024).

17. The requirement of access as part of a copyright-infringement analysis provides a balance to independent creation. If a work was popular on the radio, for example, an alleged infringer would have access to it. See, e.g., *Copyright Infringement—Copying—Access Defined*, U.S. CTS. FOR THE NINTH CIR., <https://www.ce9.uscourts.gov/jury-instructions/node/340> [https://perma.cc/3P67-HMBP] (last updated Mar. 2024).

18. See *infra* Section III.B.

19. See *infra* Section III.C.

20. See *infra* Section III.A.

21. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994); *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1182–83 (C.D. Cal. 1998).

22. See *infra* Sections IV.D, VII.B.

This Article attempts to merge conversations across creative disciplines and generations. (How do you explain copyright to Generation Z, or worse, Generation Alpha?) Specifically, we will be looking at case law, popular culture, musicals (authorized and unauthorized), and crochet and knitting events. It is eclectic, and not in any way comprehensive, but it is a place to begin. And there is a reason why both musicals and crafting provide tasty studies of fame soup. We find that crossing disciplines gives us a better picture of the world out there, and how the copyright and its fame-based ecosystem is working.

When we talk about borrowed fame and fame-based soup we are seeking to bridge the gap between the world of lawyers and legal scholars with the world of the Internet, fandoms, and everyday people looking at something and saying, “Hey I want to make that too.” Ultimately, there is enough collective fame soup for everyone to get a bowl, but to understand how the soup is made, one needs to take a look at our recipe.

Part II discusses a brief history of borrowing. Part III revisits the traditional copyright approach of borrowing with an eye towards the concept of fame and the boundaries between content owners and borrowers of copyrighted culture, looking at the public domain, parody, and when fair use fails. Part IV turns to the idea of borrowing not from a legal perspective but from the point of fan culture, and the rise of content creation by fans. Part V compares Anne Rice and Ginger Rosers’s reaction to fanfiction and suggests there might be a place for the *Rogers* test when discussing and evaluating fan works. Part VI turns to Broadway musicals as a way of understanding the intersection of fame and copyright. Part VII culminates in a turn towards crocheting and knitting, usually not something one wants as part of a soup, but a surprisingly great addition to our fame soup. In many ways, the examples in this section pull together the ingredients of fame soup: a copyright holder; the alteration, reorientation, and reformulation of their work; and mass responses that transform the original work into something so much more. Part VIII sums up the Article, where we return to the question of soup or art.

We are not asserting that only fame and famous works count. Anonymous, unnoticed works matter. We love works made by small creators, writers, crafters, and artists. Most works out in the world

are not the big, famous ones with devoted fandoms.²³ But here we are looking to fame to understand the workings of copyright, and in the end, provide guidance for different kinds of creators and creations—famous or otherwise. This is a story for artists and makers, as well as lawyers and law scholars.

II. BORROWING—A BRIEF HISTORY

People borrow. They always have.²⁴

III. COPYRIGHT'S TRADITIONAL LEGAL APPROACH TO BORROWING

When we think of copyright, we often see the law as creating a dichotomy between the copyright owner and someone wanting to use the work, legally or illegally. When will a copyright holder object to the use? What defenses are available if that happens? This is the heart of copyright. But we know that people borrow all the time—the question is how does the law regulate that borrowing?

We, in fact, find that for much of the time, the regulation of borrowing is, in practical terms, working, and the whole system is providing a fairly clear roadmap of unprotected works, permissions, fair use, and going too far (or unfair uses). This part looks at borrowing within a copyright construct from a number of categories: public domain works, fair use and parody cases, and cases where fair use was not found. The law has a lot of mechanisms already. This Part sorts them out, with an eye towards the role of fans, fame, and various levels of participation in the copyright ecosystem.

23. In 2024, YouTube published its *Culture & Trends Report Fandom*, which begins: “As any devoted fan will tell you, fandom isn’t some frivolous pastime. It can be a deeply fulfilling and mood-elevating experience, helping people shape their identities and cultivate stronger connections to their community.” YOUTUBE, CULTURE AND TRENDS REPORT 2024: FANDOM, <https://services.google.com/fh/files/misc/youtube-trends-fandom-report-2024.pdf> [<https://perma.cc/H8RU-VLLM>] (last visited Nov. 19, 2024). The subtitle of the report? “How fans have shifted from consumers to creators — and how they brought viewers along with them.” *Id.*

24. See, e.g., *Borrowing, Appropriating and Stealing as Old as Art Itself*, WASH. POST (Mar. 20, 2015, 4:35 PM), https://www.washingtonpost.com/entertainment/borrowing-appropriating-and-stealing-as-old-as-art-itself/2015/03/19/9e832ac2-c8f3-11e4-b2a1-bed1a1aea2816_story.html [<https://perma.cc/P3Q4-2CLK>].

A. *Borrowing from the Public Domain:
The Copyright Holder Becomes Irrelevant*

The world waits impatiently for famous works to come into the public domain, a space free for all of us to borrow.²⁵ Creators *borrow* from other creators to make new creations. We have had a few significantly famous works cross that threshold in the last few years.²⁶ In 2024, *Steamboat Willie*, *The Gallopin' Gaucho*, and *Plane Crazy*, three early Walt Disney animated shorts, entered the public domain.²⁷ As of 2024, the original versions of Mickey and his beloved Minnie are now in the public domain.²⁸

Mickey Mouse is many things: a beloved American icon of childhood, a racist caricature, and a brand name you cannot escape.²⁹ But he is now also a symbol and a celebration of works and characters finally coming into the public domain after decades of being frozen.³⁰ Scroll through the Mickey Mouse tag on Tumblr for five minutes, and you will find countless posts celebrating Mickey being a part of the public domain, along with a shocking amount of fanart of Mickey making out with Jay Gatsby, a character who is

25. See, e.g., Glenn Fleishman, *For the First Time in More Than 20 Years, Copyrighted Works Will Enter the Public Domain*, SMITHSONIAN MAG. (Jan. 2019), <https://www.smithsonianmag.com/arts-culture/first-time-20-years-copyrighted-works-enter-public-domain-180971016/> [<https://perma.cc/CKF4-3PCU>]. The public domain is a legal structure that allows works that are not protected to be available for everyone to use. See Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 147, 149 (a classic study on the public domain).

26. Copyright law had frozen the published public domain for twenty years. See Elizabeth Townsend Gard, *The Public Domain Line Is Moving Again — One Year Later*, INTERNET ARCHIVE BLOGS (Dec. 13, 2019), <https://blog.archive.org/2019/12/13/the-public-domain-line-is-moving-again-one-year-later/> [<https://perma.cc/2ZTN-PR6S>].

27. See Sidne K. Gard, *Mickey Mouse Met the Public Domain*, F NEWSMAG. (Mar. 3, 2024), <https://fnewsmagazine.com/2024/03/mickey-mouse-met-the-public-domain/> [<https://perma.cc/VY5B-JAF8>].

28. See Jennifer Jenkins, *Mickey, Disney, and the Public Domain: A 95-Year Love Triangle*, DUKE CTR. FOR THE STUDY OF THE PUB. DOMAIN, <https://web.law.duke.edu/cspd/mickey/> [<https://perma.cc/5N8P-V48L>] (last visited Sept. 27, 2024).

29. See NICHOLAS SAMMOND, BIRTH OF AN INDUSTRY: BLACKFACE MINSTRELSY AND THE RISE OF AMERICAN ANIMATION 5 (2015).

Commercial animation in the United States didn't borrow from blackface minstrelsy, nor was it simply influenced by it. Rather, American animation is actually in many of its most enduring incarnations an integral part of the ongoing iconographic and performative traditions of blackface. Mickey Mouse isn't *like* a minstrel; he *is* a minstrel.

Id.

30. The Copyright Term Extension Act of 1998 extended the term of copyright for works published after 1922 for twenty additional years. See U.S. COPYRIGHT OFF., CIRCULAR 15A: DURATION OF COPYRIGHT 2 (2024), <https://www.copyright.gov/circs/circ15a.pdf> [<https://perma.cc/CS8W-EPTF>].

also in the public domain.³¹ In others, Winnie the Pooh welcomes Mickey into “freedom.”³² For instance, one Tumblr-user wrote:

[W]e’ve decided that he’s one of us now. [H]e’s a hero of the working class, newly liberated from his capitalist oppressors who sought to shackle him to traditional values and conservatism for decades. [H]e’s supportive of leftist causes. [H]e’s trans. [H]e’s married to [J]ay fucking [G]atsby. [W]e’re not celebrating that [M]ickey [M]ouse is dead. [W]e’re celebrating that Mickey Mouse is *free*. [A]nd that’s beautiful.³³

Copyright is clear on one thing: we can all use these wonderful original creations however we want once they are in the public domain.³⁴ Trademark mucks it up: if the characters are used as source identifiers, that use is still off-limits, even when the original copyrightable character is in the public domain.³⁵ As many expected, due to similar reactions when Winnie the Pooh came into the public domain, one place where Mickey is emerging is the horror world.³⁶ Two Mickey-based horror movies have already been announced, and a Mickey horror video game (with some very

31. See #mickeymouse, TUMBLR, <https://www.tumblr.com/tagged/mickey%20mouse> [<https://perma.cc/C6J3-MAZ5>] (last visited Sept. 27, 2024).

32. See, e.g., Diana Jakobsson (@artofdiana), TUMBLR, <https://www.tumblr.com/artofdiana/738521814954835968/now-lets-go-get-tigger-said-poo> [<https://perma.cc/87C9-S42E>] (last visited Sept. 27, 2024).

33. @sixty-silver-wishes, TUMBLR (Jan. 3, 2024, 3:24 PM), <https://www.tumblr.com/sixty-silver-wishes/738529999767945216/gotta-say-i-love-the-direction-were-taking> [<https://perma.cc/VFZ8-XEDA>].

34. That is the essence of the public domain. See Samuelson, *supra* note 25, at 148–49, 161; see also *Welcome to the Public Domain*, STAN. LIBRS.: COPYRIGHT & FAIR USE, <https://fairuse.stanford.edu/overview/public-domain/welcome/> [<https://perma.cc/SN4J-WU>] (last visited Sept. 27, 2024).

35. While a work may be out of copyright, the work may still be protected by trademark as a source identifier. *What Does a Trademark Have to Do with the Public Domain?*, PUB. DOMAIN SHERPA, <https://publicdomainsherpa.com/trademark.html> [<https://perma.cc/S69P-L9DN>] (last visited Sept. 27, 2024) (providing an explanation for the general public). And when Mickey and Winnie went into the public domain as their original characters, there were many stories about the fact that they were still protected by trademark. See Timothy Lee, *Why Ryan Reynolds Can Use Winnie-the-Pooh to Sell You a Phone Plan*, REASON (Aug./Sept. 2022), <https://reason.com/2022/07/16/why-ryan-reynolds-c-an-use-winnie-the-poo> [<https://perma.cc/C53V-CMUP>]; see also Cyrus Moulton, *Mickey Mouse Raises Question: What Is the Difference Between Copyright and Trademark? It’s a ‘Gray’ Area, Expert Says*, NE. GLOB. NEWS (Jan. 5, 2024), <https://news.northeastern.edu/2024/01/05/mickey-mouse-public-domain-copyright-trademark/> [<https://perma.cc/X2TE-KYXN>].

36. See WINNIE THE POOH: BLOOD AND HONEY (ITN Studios 2023), and the sequel, WINNIE THE POOH: BLOOD AND HONEY 2 (ITN Studios 2024).

questionable alt-right politics) was released on January 1, 2024.³⁷ There was also a short analog horror film³⁸ posted on YouTube with the conceit of the *S.S. Willie* being a boat that mysteriously disappeared.³⁹ Aside from horror, there are many different versions of Mickey on YouTube. The three original shorts are all up on YouTube,⁴⁰ and users have now also posted remixed animations and dubstep audio of *Steamboat Willie*,⁴¹ a concept for a *Steamboat Willie* cozy video game,⁴² and 3D animations of the shorts.⁴³ Eisner-winning comic artist Erica Henderson is now selling *Steamboat Willie* T-shirts that depict the mouse in her art style surrounded by the text, “No Gods No Masters.”⁴⁴ The short four-panel comic, *The Undying Love of Mickey Mouse*, by streamer and artist Tanookitalez sums it up best. The comic shows a 1928 Mickey and Minnie standing together on a shoreline, holding hands with speech bubbles that read:

37. Gene Maddaus, ‘*Steamboat Willie*’ Horror Film Announced as Mickey Mouse Enters Public Domain, VARIETY (Jan. 2, 2024, 6:00 AM), <https://variety.com/2024/film/news/steamboat-willie-horror-film-mickey-mouse-public-domain-copyright-1235849861/> [<https://perma.cc/4AAS-HJKJ>]; see also James Whitbrook, *Steamboat Willie Horror Game Deus Swear They’re Not Making Neo-Nazi References*, GIZMODO (Jan. 2, 2024), <https://gizmodo.com/steamboat-willie-horror-game-nazi-references-mickey-88-1851134655> [<https://perma.cc/UA3J-CUGB>].

38. For more information on analog horror, see Jordan Maison, *Everything There Is to Know About the Analog Horror Genre*, VIDEOMAKER, <https://www.videomaker.com/how-to/directing/film-history/everything-there-is-to-know-about-the-analog-horror-genre/> [<https://perma.cc/6H6G-BN4R>] (last visited Sept. 28, 2024).

39. Night Signal Entertainment, *The Vanishing of S.S. Willie (Horror Short Film)*, YOUTUBE (Jan. 1, 2024), <https://www.youtube.com/watch?v=gQOVMzzDd5s> [<https://perma.cc/FJL4-Z2XK>]. This is posed as a lost documentary from 1928. *Id.* They also used public domain music from the Library of Congress. *Id.*

40. See Walt Disney Animation Studios, *Walt Disney Animation Studios’ Steamboat Willie*, YOUTUBE (Aug. 27, 2009), <https://youtube.com/watch?v=BBgghnQF6E4&si=9qj3CUHQDmknwiFY> [<https://perma.cc/G4XG-XJKV>]; Sam P., *Mickey Mouse #002 — The Gallopin’ Gaucho (1928)*, YOUTUBE (Jan. 1, 2024), <https://youtube.com/watch?v=q8N8yC5ZH4c&si=fjQZh3ubGkyvS6dg> [<https://perma.cc/HKX8-7H2K>]; see also Vintage Cartoons Channel, *Plane Crazy (1928) Mickey Mouse*, YOUTUBE (June 21, 2016), <https://www.youtube.com/watch?v=eJQMiuQ1eKI> [<https://perma.cc/267Z-46JU>].

41. Eclectic Method, *Steamboat Willie Remix*, YOUTUBE (Jan. 1, 2024), <https://www.youtube.com/watch?v=1llhF-FwNS4> [<https://perma.cc/8HYR-SQRX>].

42. Muller Digital, *I Made a Cozy Steamboat Willie Game*, YOUTUBE (Feb. 18, 2024), <https://www.youtube.com/watch?v=P0gGecC9eM> [<https://perma.cc/4JS3-X4Z7>].

43. Dami Akinbode, *Steamboat Willie — Unreal Engine 5*, YOUTUBE (Jan. 1, 2024), <https://www.youtube.com/watch?v=j5CdicEpBcI> [<https://perma.cc/MV8L-KAYP>].

44. *About Erica Henderson’s Shop*, ERICA HENDERSON, <https://ericafails.threadless.com/about> [<https://perma.cc/XD2H-JNSS>] (last visited Sept. 5, 2024); see also *Steamboat Willie*, ERICA HENDERSON, <https://ericafails.threadless.com/designs/steamboat-willie> [<https://perma.cc/YL5A-YYDY>] (last visited Aug. 26, 2024).

We're free, Minnie, Mickey says.

Oh, Mickey . . . what are we going to do? We're free, but only as fragments of ourselves, Minnie says.

With time, our identity, our friends will return to us, piece by piece. Mickey says, all we can do is wait.⁴⁵

Now, many more non-famous works come into the public domain every year, and it is the famous ones that get the most attention and alert the public to how copyright works.⁴⁶ There are no limits to the expressive uses of public domain works, but of course, users of these public domain works also have to be wary of trademark, source-identifying uses, and later versions that are still under copyright.⁴⁷

Another way to think about borrowed culture is that we actually do not wait for copyrights to expire, that there are many elements that can be used, even before that occurs. While fans and creators love that Mickey and Minnie are “free,” works still under copyright are used too. The days of waiting for something to be in the public domain are still here, but we also do not wait for works to be in the public domain. The public domain is just a different kind of freedom.

45. @tanookitalez, *The Undying Love of Mickey Mouse*, TUMBLR (Jan. 1, 2024, 10:40 PM), <https://www.tumblr.com/tanookitalez/738376216378228736/the-undying-love-of-mickey-mouse> [https://perma.cc/46CX-HUW5]; see @tanookitalez, TWITCH, <https://www.twitch.tv/tanookitalez> [https://perma.cc/M529-RNH2] (last visited Sept. 6, 2024).

46. Duke University School of Law celebrates “Public Domain Day” on January 1. See Jennifer Jenkins, *January 1, 2024 Is Public Domain Day: Works from 1928 Are Open to All, as Are Sound Recordings from 1923!*, DUKE CTR. FOR THE STUDY OF PUB. DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2024/> [https://perma.cc/7RJT-8AGU] (last visited Aug. 30, 2024). Others that actively celebrate include Project Gutenberg, Open Knowledge and the Public Domain Review, and the Internet Archive. Michael Hart, *January 1, 2011 Will Be Public Domain Day*, PROJECT GUTENBERG NEWS (Nov. 27, 2010), <https://www.gutenbergnews.org/2010/11/27/public-domain-day-2011/> [https://perma.cc/QN7W-7N4J]; Jonathan Gray, *Launch of the Public Domain Review to Celebrate Public Domain Day 2011*, OPEN KNOWLEDGE (Jan. 1, 2011), <https://blog.okfn.org/2011/01/01/launch-of-the-public-domain-review-to-celebrate-public-domain-day-2011/> [https://perma.cc/F26J-87XX]; Caralee Adams, *Public Domain Day Celebrates Creative Works from 1928*, INTERNET ARCHIVE BLOGS (Jan. 26, 2024), <https://blog.archive.org/2024/01/26/public-domain-day-celebrates-creative-works-from-1928/> [https://perma.cc/LVB3-63UC]. All published works come into the public domain in the United States no later than ninety-five years after publication. 17 U.S.C. § 304(b). That means that everything published ninety-six years ago is now in the public domain in the United States.

47. See Laura Grebe, *Disney's Icon Unleashed: Mickey Mouse & the Dual Dance of Copyright and Trademark Laws*, AMUNDSEN DAVIS (Feb. 19, 2024), <https://www.amundsendavis.com/alert-disneys-icon-unleashed-mickey-mouse-the-dual-dance-of-copyright-and-trademark-laws> [https://perma.cc/9MLA-6PFY]. For a story on LinkedIn, see Devin Miller, *Mickey & Pooh Enter Public Domain: What You Can—and Can't—Do*, LINKEDIN (Feb. 2, 2024), <https://www.linkedin.com/pulse/how-use-mickey-mouse-winnie-pooh-without-getting-trouble-devin-miller-nlj5c/> [https://perma.cc/U9J2-HFJ8].

B. *The Parody/Commentary Cases*

Fair use serves as an important means for using copyrighted works during their term, and parody is one of the key elements for creators using other creators' works to comment and criticize.⁴⁸ And we, as a society, accept and encourage that. We develop fair use and First Amendment defenses to protect these spaces.⁴⁹ Interestingly, fame seems part of the equation. The audience must know the original work to understand where the “joke” is—what is being commented on and criticized.⁵⁰ When we examine the Fair Use Index at the U.S. Copyright Office, a searchable database of all fair-use cases, we find that almost every parody/commentary case (whether successful or not) borrows from famous works.⁵¹

48. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 36–38 (1987).

49. See, e.g., Geoffrey P. Hull, *Fair Use*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/fair-use/> [<https://perma.cc/U8EQ-F37C>] (last updated July 2, 2024).

50. Mark Lemley argues that parody proves fame in the trademark context:

If we want trademark owners to be motivated not to sue parody and criticism sites, we should make the existence of those sites a good rather than a bad thing for trademark owners. I propose that the law view the existence of parody and criticism of a brand as affirmative evidence that the brand is famous and maybe even treat it as a requirement for fame.

Mark A. Lemley, *Fame, Parody, and Policing in Trademark Law*, 2019 MICH. ST. L. REV. 1, 13–14.

51. See generally *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use/index.html> [<https://perma.cc/QX7T-PV9M>] (last updated Nov. 2023). Some examples of fair use cases include *Benny v. Loew's, Inc.*, 239 F.2d 532, 533 (9th Cir. 1956) (parody of *Gas Light* by Jack Benny); *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 543, 545 (2d Cir. 1964) (*Mad Magazine's* satirical parody of lyrics by Irving Berlin); *DC Comics Inc. v. Crazy Eddie, Inc.*, No. 79 Civ. 3786(PNL), 1979 WL 1069, at *1 (S.D.N.Y. Aug. 3, 1979) (business using “Superman” in a commercial); *Dall. Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1186 (5th Cir. 1979) (naughty cheerleaders); *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741, 743 (S.D.N.Y. 1980) (Saturday Night Live using the New York state jingle *I Love New York* in a sketch), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986) (DJ Rick Dees parodying song *When Sunny Gets Blue* with *When Sonny Sniffs Glue*); *New Line Cinema Corp. v. Bertlesman Music Grp., Inc.*, 693 F. Supp. 1517, 1519–20 (S.D.N.Y. 1988) (Zomba and D.J. Jazzy Jeff using *Nightmare on Elm Street* copyright material in a song); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1291 (C.D. Cal. 1995) (Honda using James Bond in a commercial); *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1182–83 (C.D. Cal. 1998) (documentary filmmaker Michael Moore using *Men in Black* elements in advertising of *The Big One*); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 (2d Cir. 1998) (Leslie Nielsen in advertising for *Naked Gun 33 1/3* parodying Leibovitz's famous Demi Moore pregnancy shot for *Vanity Fair*); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003) (Barbie being used in art); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148 (C.D. Cal. 2010) (Don Henley songs being used in political campaigns); *CCA & B, LLC v. F + W Media Inc.*, 819 F. Supp. 2d 1310, 1316 (N.D. Ga. 2011) (naughty version of book *Elf on the Shelf*, titled *Elf Off the Shelf*) to name a few examples. We will get to others shortly.

Take for example, Alice Randall's novel *The Wind Done Gone*, published in 2001, which rewrites and critiques the story of *Gone with the Wind*, a novel published in 1936.⁵² *The Wind Done Gone* borrows the fame of the original work. It is not hard for us to remember that *Gone with the Wind* won the Pulitzer Prize for Fiction in 1937, with more than thirty million copies of the novel sold, and the movie won Best Picture in 1940.⁵³ A central reason of choosing *Gone with the Wind* to write *The Wind Done Gone* is that the latter borrowed significant fame from the original novel.⁵⁴ The fame of the original work matters. The question is: who can build on that fame and in what manner?

This is true for many of our most famous fair-use cases. The 2 Live Crew version of *Pretty Woman* built on the fame of Roy Orbison's *Oh, Pretty Woman*, for example.⁵⁵ One needs to know the famous bits, or in copyright language “the heart of the work,” to understand the parody.⁵⁶

C. *Protecting the Copyright and Trademark Holder's Commercial Spaces*

An unauthorized, real version of the fictional SpongeBob restaurant, the “Krusty Krab,” was found to not be protected by fair use. This unauthorized use likely caused confusion with the fictional depiction.⁵⁷ The fictional world is protected by copyright;

52. See Megan Harlan, *The Wind Done Gone*, N.Y. TIMES (July 1, 2001), <https://archive.nytimes.com/www.nytimes.com/books/01/07/01/bib/010701.rv105803.html> [<https://perma.cc/S7R3-JQY9>] (last visited Sept. 28, 2024), for a book review. Hugh Ruppensburg, *The Wind Done Gone*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/arts-culture/the-wind-done-gone/> [<https://perma.cc/26F4-WFWF>] (last updated Aug. 6, 2013).

53. See Jane Thomas, *Margaret Mitchell*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/arts-culture/margaret-mitchell-1900-1949/> [<https://perma.cc/D2MR-WDTW>] (last updated Oct. 11, 2021); *Gone with the Wind: Awards*, IMDB, <https://www.imdb.com/title/tt0031381/awards/> [<https://perma.cc/8ACY-VDTV>] (last visited Oct. 3, 2024).

54. *The Wind Done Gone* borrows characters, plot, and other elements from *Gone with the Wind*. This is the essence of the case, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

55. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

56. See *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998).

57. *Viacom Int'l Inc. v. Pixi Universal, LLC*, No. H-21-2612, 2022 WL 909865, at *2–3, *8, *12 (S.D. Tex. Mar. 25, 2022). For commentary, see Alexandra Jane Roberts, *Viacom Possesses Trademark Rights in 'Krusty Krab' Based on Its Central Role in the SpongeBob Universe—Viacom v. IJR (Guest Blog Post)*, TECH. & MKTG. L. BLOG (June 9, 2018), <https://blog.ericgoldman.org/archives/2018/06/viacom-possesses-trademark-rights-in-krusty-krab-based-on-its-central-role-in-the-spongebob-universe-viacom-v-ijr-guest-blog-post.htm> [<https://perma.cc/22FM-9NHU>] (“While deception without registered or common law trademark rights is actionable under 43(a), this decision purports to rest on such rights. Yet those

the fictional restaurant, even though not registered, is protected by trademark. In this case, the court would find that you cannot create a real-world version of a fictional restaurant. And that is because Viacom/Nickelodeon did not want that to occur.⁵⁸

We get a line of cases that warn unauthorized writers, restaurants, and artists that the right to capitalize on fame belongs to the copyright holder. Most of the cases concern unauthorized publication of books that are not parodies like *The Wind Done Gone*. These cases include the *Seinfeld* trivia case, the *Twin Peaks* case, one of the Salinger cases, and two Dr. Seuss cases.⁵⁹ In five of the six cases the courts found an unauthorized use of the original work, and that the user infringed on the rights of the copyright holder, while the court thought the infringement claim was likely to succeed in the sixth.⁶⁰ And the most recent case, of course, Andy Warhol.⁶¹ The formula seems pretty simple: do not compete commercially with the original work. In each of these cases, an unauthorized creator tried to use a famous work to profit. In the end, what seems to matter most is the line of commercialism.

trademark rights are sometimes anchored to nothing more than use in a cartoon world under the sea. Assigning real trademark protection to fake restaurants without directly addressing the discrepancy is nautical nonsense.”). See also Alexandra Jane Roberts, *Too Rusty for Krusty*—Nickelodeon v. Rusty Krab Restaurant (*Guest Blog Post*), TECH. & MKTG. L. BLOG (May 30, 2022), <https://blog.ericgoldman.org/archives/2022/05/too-rusty-for-krusty-nickelodeon-v-rusty-krab-restaurant-guest-blog-post.htm> [https://perma.cc/63SR-5FNC] (explaining the *Viacom* case which involved a real restaurant adopting a name similar to the fictional Krusty Krab restaurant’s name) (“This case builds on not only the prior Krusty Krab case, but the broader line of cases assessing intellectual property rights in elements of fictional universes and under what conditions unauthorized use of those elements might be allowed. Fanworks seek to create something pleasurable—and sometimes profitable—that exploits’ [sic] fans love for the universe and its characters but risk trademark and copyright liability in the process. In this case, imbuing the fictional marks with real trademark rights, finding a brick-and-mortar restaurant to be in close proximity to a restaurant in a television show, and making quick work of dispensing with defenses grounded in the First Amendment are consistent with prior case law and suggest the creators of those fictional worlds will retain the ability to rein in use by others—especially uses as uncreative as this one.”).

58. See *Viacom Int’l Inc.*, 2022 WL 909865, at *1, *3, *12.

59. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998); see *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993); *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987); *Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 452 (9th Cir. 2020); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

60. *Castle Rock Ent., Inc.*, 150 F.3d at 146; *Twin Peaks Prods. Inc.*, 996 F.2d at 1372, 1378; *Random House, Inc.*, 811 F.2d at 99–100; *ComicMix LLC*, 983 F.3d at 461, 463; *Penguin Books USA, Inc.*, 109 F.3d at 1403, 1406; see also *Colting*, 607 F.3d at 83 (case was remanded but the court considered that the copyright infringement claim was likely to succeed on the merits).

61. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1272, 1287 (2023).

What matters to the copyright holder is key. And behavior is tolerated, until it is not. One could see this as fans or others going “too far,” or that their uses are “unfair,” not falling under copyright’s fair use. Sometimes they cause a “likelihood of confusion” under trademark.⁶² But in the end, what we are trying to understand is when does someone’s borrowing of a work cross the line, and is there a way to understand where that line is, particularly with copyright?

1. *Crossing the Line.* How do we understand when the line into commercialism has been crossed? It is when the work competes with the heart of the interests of the copyright holder. Take *Warner Bros. Entertainment v. RDR Books*, or the tale of going from being loved by the content holders to being sued.⁶³ Steve Vander Ark, a serious fan of the *Harry Potter* series, decided to create a website, *The Harry Potter Lexicon*, which launched in 2000,⁶⁴ and it is still live.⁶⁵ He gathered every detail about the *Harry Potter* series, and developed hyperlinks, cross-listings, and an index.⁶⁶ People loved it, including even J.K. Rowling, the author of the *Harry Potter* series. She posted: “This is such a great site that I have been known to sneak into an internet cafe while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing). A website for the dangerously obsessive; my natural home.”⁶⁷ So, that’s exciting. Vander Ark was invited to Warner Brothers to visit the set of *The Order of the Phoenix*, where he was told that Warner Brothers uses the *Lexicon* every day.⁶⁸ So, all was good, right? Then, Vander Ark attempted to publish the *Lexicon* without getting permission.⁶⁹ Now, remember, he had not received permission to do the website. But publishing the *Lexicon* was different. And Warner Brothers sued.⁷⁰ Suddenly, there was scrutiny as to how much Vander Ark used to create the *Lexicon*. The court looked carefully and found unauthorized copying.⁷¹ And, what is worse, they applied § 103(a),

62. *Viacom Int’l Inc.*, 2022 WL 909865, at *5.

63. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d. 513, 521, 551 (S.D.N.Y. 2008).

64. *Id.* at 520.

65. THE HARRY POTTER LEXICON, <https://www.hp-lexicon.org/> [<https://perma.cc/3HG7-R6SL>] (last visited Sept. 4, 2024).

66. *Warner Bros. Ent. Inc.*, 575 F. Supp. 2d. at 520.

67. *Id.* at 521.

68. *Id.*

69. *See id.* at 523.

70. *See id.* at 521, 524.

71. *See id.* at 525, 534, 545.

which does not give copyright protection to the *Lexicon*.⁷² But, just in case one might be curious, used copies of the *Lexicon* are available on Amazon.⁷³ We get the lesson early: publishing fan works can get you into a lot of legal trouble. Do not do that. But publishing a website does not necessarily raise the same scrutiny. And, in the end, one can still get a copy of the book on Amazon.

But the line is not always as clear as the cases make it out to be. Fredrik Colting wrote a sequel to J.D. Salinger's *The Catcher in the Rye* without permission called *60 Years Later: Coming Through the Rye*.⁷⁴ The Salinger Estate was unhappy and sued.⁷⁵ After an appeal to the Second Circuit, the lawsuit ended in a settlement that barred the publication and distribution of the sequel in the United States until *The Catcher in the Rye* enters the public domain, which will be in 2046.⁷⁶ Until then, Colting can publish and distribute the unauthorized sequel outside of the United States, which is *fascinating* and unexpected.⁷⁷ The Salinger Estate is only concerned with the U.S. reading population. This is not usually part of what gets told.

2. Defining the Line. The *Axanar* movie fits into this subset as well. There is a character in *Star Trek* named Garth, and Axanar Productions decided to make a twenty-one-minute film based on the character. Axanar Productions raised over \$1 million through crowdsourcing to fund their projects.⁷⁸ They did not get permission from the owners of *Star Trek*, and they were borrowing from the *Star Trek* lore.⁷⁹ CBS and Paramount sued.⁸⁰ The court found the work infringing, but then turned to a fair-use analysis.⁸¹ The court found that Axanar's use was not transformative because it served

72. See *id.* at 539; 17 U.S.C. § 103(a).

73. *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials*, AMAZON, <https://www.amazon.com/Lexicon-Unauthorized-Fiction-Related-Materials/dp/1571431748> [<https://perma.cc/5GG9-J4BX>] (last visited Sept. 5, 2024).

74. *Salinger v. Colting*, 607 F.3d 68, 70–71 (2d Cir. 2010).

75. See *id.* at 72.

76. Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHERS WKLY. (Jan. 11, 2011), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html> [<https://perma.cc/8F57-AAGB>]; Elliot Chan, *Why The Catcher in the Rye Was Not Made into a Movie*, ELLIOT CHAN (Sept. 25, 2019), <https://elliottchan.com/2019/09/25/why-the-catcher-in-the-rye-was-not-made-into-a-movie/> [<https://perma.cc/WEW5-MSWT>].

77. Albanese, *supra* note 76.

78. *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *1 (C.D. Cal. Jan. 3, 2017).

79. See *id.* at *6.

80. *Id.* at *1.

81. *Id.* at *3–5, *7.

the same purpose as the original *Star Trek* works, that is, making films.⁸² The use was also determined to be commercial, even though it was free, because it profited from the views and also was raising money.⁸³ The third factor was hard to quantify, said the court, but the Axanar version had the “Star Trek feel.”⁸⁴ And the fourth factor weighed against fair use.⁸⁵ One cannot make their own version of things that are protected by copyright.

Later, CBS (the copyright holder) came out with parameters on when fans could use and create works.⁸⁶ Fan productions using *Star Trek* can only be fifteen minutes long and the title must include the phrase “A STAR TREK FAN PRODUCTION.” Further, the content must be original; it must use official merchandise and no bootleg items; it must be a “fan” production with amateurs without compensation; it must be noncommercial (under \$50,000 budget); it can only be shown on streaming services without generating revenue; it “cannot be distributed in a physical format”; it cannot be used for advertising revenue (meaning no advertising revenue on YouTube); no creation of merchandise related to the film; it must be family friendly; must include a disclaimer; creators cannot register the works under copyright or trademark; and work cannot imply an association with CBS or Paramount Pictures.⁸⁷ That is a lot of restrictions. But at this point, that is what copyright holders can do—they can decide who and under what circumstances derivative works are made. Contrast that to fair use, where content owners have no say if fair use applies.⁸⁸

But this also tells us an interesting threshold. A budget of \$50,000 is a lot of money. Anything under that amount, and following the restrictions, is fine. One wonders how this compares to other brands and copyrighted empires. They are not interested in the little guy’s use of *Star Trek*.

82. *Id.* at *7.

83. *Id.* at *7–8.

84. *Id.* at *8.

85. *See id.* at *9–10.

86. *Fan Films*, STAR TREK, <https://www.startrek.com/fan-films> [<https://perma.cc/2N26-YD7Q>] (last visited May 2, 2024).

87. *Id.*

88. *See Paramount Pictures Corp.*, 2017 WL 83506, at *10 (demonstrating that courts decide if the fair use defense applies, not content owners).

3. *Respect the Little Guy.* To understand another aspect of fame, we have a number of cases where famous artists use less famous works without permission under the guise of “appropriation” art—Jeff Koons and Richard Prince are infamous for this, and Andy Warhol too. In *Andy Warhol*, the U.S. Supreme Court did not find fair use, and in some ways, you can see the pattern: market substitutes or uses that impact on the purview of the original are not generally protected by fair use, unless something like parody or criticism comes into play.⁸⁹ The Jeff Koons series of cases had held the same sort of ruling—the famous artist using a less famous work in the same manner did not constitute fair use.⁹⁰ So too with the recent Richard Prince case.⁹¹ An artist’s fame is not a shield for bad behavior, at least at the moment with fair use.

And we see this same thing happening with the Copyright Claims Board (CCB) and photographers. When commercial photographers have their photographs used on websites without licenses, the CCB can award damages of up to \$30,000.⁹² You cannot just use someone else’s work in the manner that would require a licensing fee.

And then there’s the fans. There’s always the fans.

Fans want to make and sell fan creations. It is just part of our world. And fandoms come in all sizes. It is not just *Star Wars* and DC Comics and Mattel. Smaller creative works and entities can have huge fan bases as well.⁹³ It is really hard to become a market replacement for Pokémon. It is not as hard to become a market replacement for merchandise of a small scripted series that a TikToker makes. And here is where things get interesting.

89. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1266 (2023); see *Paramount Pictures Corp.*, 2017 WL 83506, at *9; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001).

90. See *Legalities 30: Jeff Koons and Copyright Infringement*, OWEN, WICKERSHAM & ERICKSON, P.C., <https://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/> [<https://perma.cc/SMN2-W36L>] (last visited Sept. 6, 2024).

91. See Daniel Grant, *Richard Prince Ordered to Pay Damages to Photographers in Copyright Infringement Lawsuits over Instagram Portraits*, ART NEWSPAPER (Jan. 26, 2024), <https://www.theartnewspaper.com/2024/01/26/judge-rules-against-richard-prince-copyright-infringement-instagram-portraits> [<https://perma.cc/6WFC-ZC76>].

92. *What Photographers Need to Know About Copyright Law*, COPYRIGHT ALL., <https://copyrightalliance.org/education/industry/photographers/> [<https://perma.cc/9YTB-ND88>] (last visited Sept. 8, 2024); see U.S. COPYRIGHT OFF., COPYRIGHT CLAIMS BOARD HANDBOOK—DAMAGES 1 (2024), <https://ccb.gov/handbook/Damages.pdf> [<https://perma.cc/C4PN-9SR3>].

93. See, e.g., *Drawfee Show*, YOUTUBE, <https://www.youtube.com/@Drawfee> [<https://perma.cc/3RL5-ME86>] (last visited Oct. 24, 2024) (Drawfee, a comedy illustration channel, has 1.87 million subscribers on YouTube as of October 24, 2024).

Remember that copyright holders seem to legally control the uses of their works, and that we saw that when works compete with the original, content holders are more likely to put a stop to it.⁹⁴ We see the same kind of behavior and social respect within the small-creator communities.

So, how far can you go in making and selling derivative works of smaller creators? Often, not as far as you might think, but it is a case-by-case basis because different creators have diverse perspectives regarding what they consider acceptable or unacceptable behavior from fans. Sometimes they will have set guidelines. Sometimes they will not. And often, their fandoms respect these guidelines. Similar to CBS's *Star Trek* fan-production guide, two of our favorite smaller creators have made similar statements, giving their audiences guidelines for what is acceptable and unacceptable. In both instances, the key commercial markets are merchandise, and they ask their fans to be respectful.

Drawfee is a YouTube collective of four professional artists based out of New York where they challenge each other to do various silly art prompts. It is part comedy video and part very cool drawings.⁹⁵ On their website, Drawfee has a section in their Frequently Asked Questions (FAQ) titled "Fan Merch Guide" which outlines their guidelines regarding fans selling merch based on Drawfee videos and characters:

THE OVERALL OKAYS:

Making and selling limited numbers (under 100) of hand-made items inspired by our show is very cool! Just make sure it's clear that it's *unofficial*. Otherwise, you don't need our permission!

THE OVERALL DON'TS:

- Don't make large batch items for selling (anything over 100 units of an item)
- Don't use [D]rawfee logo, Drawfee assets (images created on the show, photos of our faces)
- Don't make it anything offensive, racist, sexist, defamatory.
- Don't sell items very similar to items we sell in our DFTBA merch store.

94. See *supra* Section III.C.

95. *What We Do*, DRAWFEE, <https://drawfeeshow.com/> [<https://perma.cc/JM5N-LVLF>] (last visited Sept. 7, 2024).

-Don't sell on large distribution websites like RedBubble, Society6, Amazon, etc.

-Don't sell art that you didn't make.

-No NFTs or cryptocurrencies involving Drawfee IP.

NON-COMMERCIAL:

-Making a small batch of a Drawfee thing for a small personal event is fine! If you aren't selling it and just using it for person[al use], you're fine.

GAMES:

-Games based on Drawfee properties can be listed for free on itch as long as they follow the general do's and don'ts.⁹⁶

It then ends with reminding the reader that they reserve the right to ask people to take fan merchandise down at any time, but they are incredibly open to fans making fan works of the show so long as it is done in small batches.⁹⁷ Why is this? We cannot say for sure, but we think there are two factors to consider: (1) Drawfee's primary revenue is not through merchandising. It is through their YouTube videos, Patreon, and Twitch. They have their own merchandise, but it is a fairly small pool of options and is secondary to their main focus, and (2) a lot of what Drawfee does and what the four artists on the channel do as part of their art practice is making fan art of other IPs.⁹⁸ It is not surprising that they are willing to let people make small batches of fan art of their work. And it is interesting that they do not want large-scale production to occur.

Welcome to Night Vale, a long-running and groundbreaking podcast with a cult-following of Zillennials, takes a very different approach.⁹⁹ On their website, their FAQ also gives some insight into fan works:

96. *FAQs*, DRAWFEE, <https://www.drawfeeshow.com/faq-1> [<https://perma.cc/S7NB-ZZFS>] (last visited May 2, 2024).

97. *Id.*

98. *See Drawfee Show*, *supra* note 93; *Drawfee*, DFTBA, <https://store.dftba.com/collections/drawfee> [<https://perma.cc/N8SF-EN89>] (last visited Oct. 24, 2024); *Drawfee*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/YMMV/Drawfee> [<https://perma.cc/6W8W-XGEP>] (last visited Oct. 24, 2024) (stating that Drawfee really began hitting its stride after its release of the "Pokémon from Memory" challenge). "IPs" is a term used by the public, and generally refers to patent, copyright, and trademark collectively. *See Intellectual Property: The Term*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/intellectual-property/the-term> [<https://perma.cc/E4LV-WLF4>] (last visited Oct. 24, 2024).

99. Sidne K. Gard, *Why "Night Vale" Still Resonates, 9 Years Later*, F NEWSMAG. (Sept. 16, 2021), <https://fnewsmagazine.com/2021/09/why-night-vale-still-resonates-9-years-later/> [<https://perma.cc/KRE9-ELUM>].

I designed my own Night Vale T-shirt/phone case/poster/etc. Can I sell it? Please don't.

I have an idea for a fan project where I _____. Non-commercial fan projects are fine by us. Please keep it free and let us know how it goes!

I want to host a listening party at my home/my library/my bar/my store/etc. Non-commercial listening parties are fine by us. We ask that you please do not sell tickets to or otherwise sell food/drink/merchandise at a listening party. This is a free podcast.

Can my radio station play Welcome to Night Vale episodes on the air? We are not currently licensing Night Vale out for radio use, so please do not do this.¹⁰⁰

It is clear that they do not want fans selling their own fan merchandise, but at the same time, they seem very encouraging of noncommercial fan works. Why is this? Well, *Night Vale* as a brand relies on their merchandising. They have an extensive online store with pins, tarot cards, T-shirts, plushies, and posters.¹⁰¹ They make custom posters for each of their live-show tours, and they have a professionally published series of novels and script books.¹⁰² They care about not having a market replacement for their own merch.

Of course, fans still sell fan art of *Night Vale*. There are *Night Vale* earrings and patches on Etsy.¹⁰³ One has a decent chance of finding a fan-made *Night Vale* poster at a fan convention. But their guidelines may change a consumer's thought process and risk-assessment depending on what one may find acceptable or not. And as a fan, one may be less likely to purchase from unauthorized sellers out of respect to the creators. Every creator is going to have their own opinions and feelings about others selling derivative works.

100. *Frequently Asked Questions*, WELCOME TO NIGHT VALE, <https://www.welcometonightvale.com/faqs> [<https://perma.cc/4U4R-HUXX>] (last visited May 12, 2024).

101. *Weird and Beautiful Gifts for the Holidays*, WELCOME TO NIGHT VALE, (Nov. 1, 2019), <https://www.welcometonightvale.com/news/tag/merch> [<https://perma.cc/H3VR-RJ9J>]; *see also Welcome to Night Vale*, TOPATOCO, <https://topatoco.com/collections/wtnv> [<https://perma.cc/8TNS-WYNP>] (last visited Sept. 7, 2024).

102. *Books*, WELCOME TO NIGHT VALE, <https://www.welcometonightvale.com/books> [<https://perma.cc/V4RP-AKNJ>] (last visited Sept. 7, 2024); *see also Welcome to Night Vale* (@nightvaleofficial), INSTAGRAM (Sept. 1, 2024), https://www.instagram.com/p/C_YkFUWvPoM/ [<https://perma.cc/74DG-92J9>].

103. *Welcome to Night Vale Market*, ETSY, https://www.etsy.com/market/welcome_to_night_vale [<https://perma.cc/Y39E-6PNQ>] (last visited Sept. 20, 2024).

Ultimately, the copyright holder legally sets the tone and expectations, whether a large content holder or a small maker, in their FAQs and information on their websites. Whether that can be enforced, of course, is another matter. But what is amazing is the freedom to make what we see at every level. The line of large commercial projects, including publication, seems to be becoming universal.

One other key element: Fan spaces in particular, are full of fame soup, and when it comes to borrowing niche fame, social enforcement is just as important as the rules of the law. This is where one sees the “don’t compete commercially” principle in action on an everyday basis outside of large litigation. There is a social policing that occurs, a protectiveness of the content owners. That does not mean that others do not still create beyond what content owners would like. And then sometimes there are Etsy takedown notices and other legal things that occur—or not. The content owner must decide what they want to do.

IV. A NUANCED FAN APPROACH TO COPYRIGHT

A. *Fan Culture Within Pop Culture*

Pop culture is everywhere. The media we consume dominates our lives from box offices to scrolling on TikTok to the books we add to our “to read” list but never get to. The world is oversaturated with content, and as part of this culture of content, there are the fans. The ones who spend hours writing fanfiction about their favorite characters falling in love, the ones who share memes and live-Tweet about a series’ finale, the ones who knit and sell stuffed animal recreations of fictional creatures from a video game, the ones who obsess, create, share, and connect through their love of a property. The ones that find a place to talk about their identities with others.¹⁰⁴ And we, the Authors, have been the nerdy weirdos dressed up in costumes and going to a late-night showing of the New Year’s *Doctor Who* special in a movie theater. We are no stranger to the realm of fandom. Fandoms are a way to connect to other people in a world where connection can feel increasingly hard.

104. For a particularly powerful piece, see Briony Hannell, *Muslim Girlhood, Skam Fandom, and DIY Citizenship*, GIRLHOOD STUD., June 2021, at 46.

B. Defining the Borrowing of Fans

Borrowing is the life-blood of fan culture. A movie comes out, and fans buzz.¹⁰⁵ Fans latch on to their favorite characters. They chatter with friends in person and find community spaces online to share their thoughts, critiques, and fan-creations. They make their own versions of the story through writing, art, crafting, and costuming. They are actively borrowing elements and characters from the original story because that is the point of what they are doing. Some form of original content has to exist and from that, countless fan interpretations and creations spring forth.

And then there are times when borrowing goes so far that it is hard to tell what the original was, or if the original even matters. One area where that can be seen is within popular literature. Remember when *Fifty Shades of Grey* became a huge deal and people kept talking about how, before being published as a novel, it was posted online as *Twilight* fanfiction?¹⁰⁶ Well, this is something that is becoming increasingly common. So much so that a *Fifty Shades of Grey* fanfiction was also published as an original novel called *365 Days*.¹⁰⁷ Yes, a fanfiction of a fanfiction, both of which became proper novels with film adaptations. It is fame borrowing on fame borrowing on fame borrowing. These novels and their fame borrowing ask the question of how far removed does a work need to be before it becomes an original work instead of a derivative? There are certainly no vampires in *Fifty Shades of Grey*. But it also helps to show one place where the lines between “original” content and fan-created content blend, blur, and become a little soupy.

Borrowing occurs. When does a new copyright exceed what has been borrowed, and become something new on its own? For instance, *Super Mario: How Nintendo Conquered America* by Jeff Ryan tells the origin story of Mario and his gang.¹⁰⁸ In the days of arcade games,

105. This can take the form of videos, posts, memes, and other content created about the movie by fans.

106. Hayley C. Cuccinello, *Fifty Shades of Green: How Fanfiction Went from Dirty Little Secret to Money Machine*, FORBES (Dec. 10, 2021, 9:34 AM), <https://www.forbes.com/sites/hayleycuccinello/2017/02/10/fifty-shades-of-green-how-fanfiction-went-from-dirty-little-secret-to-money-machine/> [https://perma.cc/6R84-SA4R].

107. So, this happens, when the fanfiction is just starting out, they include their influences, but once it gets bigger, it gets scrubbed from the Internet. In this case, his was heavily inspired by *Fifty Shades of Grey*. Sagarika Biswas, *365 Days: An Honest Movie Review*, MEDIUM (June 29, 2020), <https://medium.com/@sagaciouslisa/365-days-an-honest-movie-review-2cb4b0a7f8c1> [https://perma.cc/LK3V-HPMT].

108. See JEFF RYAN, *SUPER MARIO: HOW NINTENDO CONQUERED AMERICA* 30, 47–48, 71 (2011).

Nintendo needed something new. The game designer started with the idea of making a game based on the cartoon *Popeye*, but a new live-action film had just been released.¹⁰⁹ Nintendo found that, while they could eventually get the rights to *Popeye*, it would take years. “So no Popeye.”¹¹⁰ But they had their core story: defeat the villain to save the girl. They used archetype characters. Bluto became a big, angry gorilla. What a perfect antagonist. “A big, angry, dumb gorilla won’t let Olive Oyl—er, some other lady—go free.”¹¹¹ The gorilla came from *King Kong*, named after a stubborn animal, the donkey: Donkey Kong. And Popeye turned into Mario. So, when you look at these characters and stories, do you see the original?¹¹² Maybe, barely. *Popeye* was the starting point, but *Super Mario* was the result. And there is no doubt that Super Mario is protected by copyright—in all of its forms.

Can you taste the soup?

C. *Creating by and for Fans*

Fans create. But there are also people that create works *for fan groups*. Those are people who sell online and at fan shows.¹¹³ Sometimes they are also fans of a particular fandom and sometimes they are not necessarily fans of a fandom but see the opportunity to sell their art or writing. This too is borrowing—borrowing of the original content and borrowing of the fan space.

D. *Content Holders Need Fans*

But going back to fandom as whole, media needs fans. Content holders need fans. Target, Walmart, and other merchandise outlets need fans. The video game and immersive-experience industry learned this early. People, being so excited about a musician, a movie, a book, a TV show, a YouTuber, or a video game, actively buy significant amounts of merchandise and create derivative content and share those derivatives with others, which is often a good thing for the original content holder. The fans are borrowing the famous, or not-so-famous work, and the content holders borrow the attention, time, money, and love of their fans.

109. *See id.* at 23.

110. *Id.*

111. *Id.* at 23–24.

112. *Id.*

113. *See discussion supra* Section III.C.; *discussion infra* Part VII.

Taylor Swift has dominated headlines, charts, radios, and concert sales.¹¹⁴ She is able to re-record her old albums and release them with massive success as well as put on a three-hour-long concert spanning her entire career.¹¹⁵ And all of this is because of her extremely loyal fan base. The Swifties obsess over her. They love her. They dress up in crazy outfits and buy all the merchandise they can get their hands on. They borrow her song lyrics and imagery to make friendship bracelets to trade at her shows,¹¹⁶ and that trend got so popular that Taylor Swift uses friendship bracelets as the credits of her official tour film and includes real friendship bracelets she was given on tour in her Country Music Hall of Fame exhibit.¹¹⁷ She borrows the traditions her fans have created. And together, Swift and the Swifties create a massive pot of fame soup.

TV shows need their fans too. There is a history all the way back to *Star Trek: The Original Series* of fan bases rallying behind shows and petitioning for networks (and with more modern shows, streaming services) to bring shows back after they have been canceled.¹¹⁸ The fans borrow the fame of the show for their fandom spaces, and then these shows borrow the love of their fans when they need support to keep making their series.

This is the power of the cult following, and the Internet and social media, as seen with Taylor Swift, which has boosted this power immensely. One can see this as well with the success of two animated

114. Kit Montgomery, *Karma Is a Cat, Taylor Is a Phenomenon*, F NEWSMAG. (Oct. 11, 2023), <https://fnewsmagazine.com/2023/10/karma-is-a-cat-taylor-is-a-phenomenon/> [<https://perma.cc/C922-XYDU>].

115. Sophie Caldwell, *What Exactly Does 'Taylor's Version' Mean? Here's What to Know*, TODAY, <https://www.today.com/popculture/music/taylors-version-meaning-swift-rerording-albums-rcna98513> [<https://perma.cc/ULE5-QN3X>] (last updated Nov. 10, 2023, 9:55 AM); Chris Willman, *Taylor Swift's 'Eras' Show Is a Three-Hour, 44-Song Epic That Leaves 'Em Wanting More: Concert Review*, VARIETY, (Mar. 18, 2023, 10:31 AM), <https://variety.com/2023/music/concert-reviews/taylor-swift-eras-tour-concert-review-glendalephoenix-1235558467/> [<https://perma.cc/2WP3-XHLM>].

116. Emily Wind, *What's Behind the Taylor Swift Friendship Bracelets Trend?*, GUARDIAN (Feb. 7, 2024, 9:00 AM), <https://www.theguardian.com/music/2024/feb/07/taylor-swift-eras-tour-australia-friendship-bracelets-inspiration-beads-explained> [<https://perma.cc/5E56-9ZQX>].

117. TAYLOR SWIFT | THE ERAS TOUR (TAYLOR'S VERSION) (Taylor Swift Productions 2024); Jack Irvin, *Taylor Swift Displays Friendship Bracelets Received from Fans on Eras Tour at Country Music Hall of Fame*, PEOPLE (Apr. 24, 2024, 12:10 PM), <https://people.com/taylor-swift-eras-tour-friendship-bracelets-country-music-hall-of-fame-8638128> [<https://perma.cc/R2J5-J4YD>].

118. Devon Maloney, *How Star Trek Fans Helped Change TV Forever*, VOX (Sept. 29, 2017, 11:00 AM), <https://www.vox.com/culture/2017/9/29/16369692/star-trek-history-fan-campaign-original-series-discovery> [<https://perma.cc/XQH8-YT6V>].

TV shows, *Hazbin Hotel*, on Amazon Prime and produced by A24, and *Smiling Friends*, which airs on Adult Swim and streams on Max.¹¹⁹ *Hazbin Hotel* started as an indie-animation pilot on YouTube, made by a small creator who quickly gained an online following. *Smiling Friends* was created by two other indie-animators who got known for silly, rough animations on YouTube and live streaming.¹²⁰ Borrowed fame from cult followings helped both *Hazbin Hotel* and *Smiling Friends* make the jump to fully produced series. Even as these two series step into the mainstream and many new viewers watch them without knowing about their origins, they continue to have large online fandoms because of their cult-following origins.

E. Some Stats: We Love Creating Things

In 2024, there are a number of reports on the impact of fandom produced. In June 2024, YouTube put out its annual “Culture and Trends Report” on Fandom, subtitled: “How fans have shifted from consumers to creators — and how they brought viewers along with them.”¹²¹ “Fans aren’t just consuming their favorite content anymore — they’re actively in conversation with it — creating their own videos to showcase their devotion to the source material and to strengthen bonds with other fans.”¹²² The report notes that:

Of fans surveyed—defined as 14–44-year-olds online—80% “use YouTube to consume content about the person or thing they’re a fan of at least weekly.”¹²³

Of those surveyed, 85% identified as a fan of something or someone. Of those, 42% identified themselves as a casual fan; 29% as a big fan; 21% as a super fan; and 8% as a professional

119. *Hazbin Hotel* (A24 Television 2019); *Official Merchandise Store*, HAZBIN HOTEL, <https://hazbinhotel.com/> [<https://perma.cc/W9WX-QTKG>] (last visited Sept. 2, 2024); *Smiling Friends* (Bento Box Entertainment 2020); Jack Harris, ‘*Smiling Friends*’ Is Adult Swim’s Biggest Hit in Years, W. SIDE STORY (Mar. 5, 2022), <https://wsspapier.com/76122/aelsmiling-friends-is-adult-swims-biggest-hit-in-years/> [<https://perma.cc/AV2V-QZJC>].

120. Hope Mullinax, *How ‘Hazbin Hotel’ Went From Middle School Sketches to Internet Sensation*, COLLIDER (May 23, 2024), <https://collider.com/hazbin-hotel-series-inspiration-explained/> [<https://perma.cc/TT7Z-WSSE>]; necrotech, *Smiling Friends Has Changed Everything*, YOUTUBE (Feb. 18, 2022), <https://www.youtube.com/watch?v=vLIbwNLSwV4> [<https://perma.cc/SPR2-G49U>].

121. CULTURE AND TRENDS REPORT 2024: FANDOM, *supra* note 23.

122. *Id.*

123. *Id.*

fan. A professional fan is one who earns revenue from the fandom.¹²⁴

Of the 14–24-year-olds surveyed (Gen Z), 66% agreed that they spend more time watching content that unpacks or discusses the fan work, rather than the fan work itself.¹²⁵

Of the Gen Z surveyed, 65% considered themselves creators.¹²⁶ According to Tubefilter, this number is up 25% from YouTube’s last annual trend in 2023.¹²⁷

That last statistic is something to pause on. Here is how the YouTube Report interprets this large number: “Today’s fans understand the value their participation creates for the things they’re fans of. And the people and things they are fans of have become increasingly responsive to their participation, from conceptualization to distribution. As a result, fan culture has become the central driver of emerging popular culture.”¹²⁸ And we saw in 2023 that “82% of the respondents uploaded their own online video content” to YouTube at least once during the year, with 40% self-identifying as video content creators.¹²⁹

The impact of these active fandoms is not to be dismissed. The report gives an example of the interaction and relationship between the object and the fans, what we believe creates the fame soup.

When *Rockstar Games* released the trailer to its long-awaited sequel, *Grand Theft Auto VI*, fans began watching immediately. The trailer was viewed over 93 million times in 24 hours, setting a record for a 24-hour debut of a non-music video. But beyond that, fans also started creating reaction videos, trailer breakdowns and analytic deep dives with and about the trailer. And those videos accumulated over 192 million views in that same 24-hour period. That fan content expanded the cultural moment,

124. *Id.*

125. *Id.*

126. *Id.*

127. Sam Gutelle, *For the First Time, More Than Half of Gen Z Self-Identifies as Content Creators*, TUBEFILTER (June 28, 2024), <https://www.tubefilter.com/2024/06/28/youtube-culture-and-trends-report-2024-gen-z-content-creators/> [https://perma.cc/NZG5-SY5H].

128. CULTURE AND TRENDS REPORT 2024: FANDOM, *supra* note 23. (emphasis omitted).

129. Sam Gutelle, *Airrack Joins YouTube to Unveil 2023 Culture and Trends Report, Dissect “Many Layers of Fandom.”* TUBEFILTER (June 23, 2023), <https://www.tubefilter.com/2023/06/23/airrack-youtube-culture-trends-report-2023-fandoms/> [https://perma.cc/H4AQ-XBGU].

allowing viewers to re-experience and re-interpret it through different lenses.¹³⁰

What is interesting about the report is that it is focused on educating content owners about fans and fan capital. The report ends with four points on “What this means for you”: It’s worth quoting:

01. Your success isn’t just about your content anymore. Because the popularity of fan content often eclipses that of the original work, the volume and success of that content can be even more impactful. *Closely follow what your fans are creating* to get a better idea of what your audience is and isn’t responding to in your own content.

02. Maximizing your cultural relevance requires loosening the grip you have on your creations, letting your fans remix and remake your creations in their own image. *Your fans are going to play with your content anyway; you may as well use it as an opportunity* to strengthen your connection to your audience.

03. *Be responsive to what your fans are passionate about* and highlight the things you’re passionate about, even when it isn’t directly related to your own content. This can help you build stronger, more authentic connections with your audience.

04. With YouTube, fans of anything, no matter how niche, can easily create content and connect with other fans, 24/7. So *don’t be afraid to lean into new and unfamiliar phenomena* that people are becoming fans of. Today’s niche can be tomorrow’s mainstream.¹³¹

They want content owners to lean into the soup—that the only way to achieve fame is to not only engage with fans but allow fans to make their own borrowed creations. Notice that copyright is not anywhere mentioned, nor is their ContentID program. This is trying to get the content owners to see the fans’ mucking about as a benefit, an asset. The soup is real.

But the YouTube report is not the only one reporting such expression by the fans. The fourth annual *Inside Gaming* report found that self-expression amongst gamers was a key motivator,

130. CULTURE AND TRENDS REPORT 2024: FANDOM, *supra* note 23; Alex Gomez, *Grand Theft Auto VI Trailer Launch Sets New 24-Hour Record on YouTube*, YOUTUBE: OFF. BLOG (Dec. 5, 2023), <https://blog.youtube/culture-and-trends/grand-theft-auto-breaks-record/> [https://perma.cc/Y2GB-EACW].

131. CULTURE AND TRENDS REPORT 2024: FANDOM, *supra* note 23.

with 60% claiming that self-expression was more important than ever before.¹³² They cited *Minecraft*, *Fortnite*, and *Roblox* as examples.¹³³ And the Fanalytics 2024 study also found a rebound in sports fandoms.¹³⁴

V. ANNE RICE IS A LOT LIKE GINGER ROGERS

Not everyone is happy that others are using their work. That is the essence of litigation in copyright, right of publicity, and even trademark. And then our world suddenly changed. The question became when is it legally allowable to use someone else's work and when is it not. We have already discussed the public domain, nonprotectable elements, and fair use. We see those boundaries. We are now headed into borrowing right of publicity/trademark and the *Rogers* test. But first, let's start with Anne Rice.

A. Understanding the Anne Rice Effect Inside Fandom Spaces

There are different expectations for fan writing—usually called fanfiction—and fan art. Fan art has become much more mainstream and acceptable than its writing counterpart. Creators, actors, and writers from original intellectual properties (IPs) often even share fan art on their social media, sign fan art at convention meet-and-greets, and sometimes even own copies of fan art for the media they are a part of. Fan art is pretty celebrated. The animated show, *South Park*, even did a whole episode, “Tweek x Craig” where they crowdsourced relationship-based fan art of the titular characters of the episode and featured that fan art throughout the episode, lovingly making fun of their fans.¹³⁵

There are several different websites that act as a place to post fanfiction—the most prominent of which is Archive of Our Own (Ao3).¹³⁶ Ao3 serves as an archive for virtually any kind of fanfiction one can imagine. It was created as a response to a paid fanfiction site that was starting and to the restrictive terms of

132. *Fandom Explores the Growing Importance of Gaming & Self-Expression in 2024 Inside Gaming Report*, FANDOM (May 20, 2024), <https://about.fandom.com/news/fandom-explores-the-growing-importance-of-gaming-self-expression-in-2024-inside-gaming-report> [https://perma.cc/LQ5Y-E6FG].

133. *Id.*

134. *Next Generation Fandom Survey 2024*, FANALYTICS (Apr. 30, 2024), <https://www.fandomanalytics.com/post/next-generation-fandom-survey-2024> [https://perma.cc/M8L3-RPBD].

135. *South Park: Tweek x Craig*, IMDB, <https://www.imdb.com/title/tt5113838/> (last visited Sept. 7, 2024).

136. See ARCHIVE OF OUR OWN, <https://archiveofourown.org/> [https://perma.cc/W2B9-Q2M9] (last visited Aug. 26, 2024).

service on other fanfiction platforms, such as FanFiction.net, which limited the types of content allowed, affecting the overall accessibility of fanfiction.¹³⁷ If we were following the exact law of copyright infringement with no wriggle room, fanfiction often does not qualify for fair use because it is not parody or commentary. It is an *unauthorized derivative work*.

Fanfiction writing still has more of a stigma in large part due to vampire novelist Anne Rice's aggressive anti-fanfiction message in the early 2000s. Rice's novels had a huge fan base, and because of that, along with the homoerotic nature of *Interview with the Vampire*, many people were writing fanfictions about her work.¹³⁸

Rice's response? "I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes."¹³⁹ To this day, this response is famous. She saw fanfiction as a problem. Not a celebration. She sent cease-and-desist letters to fans writing stories using her characters.¹⁴⁰ Over time, Rice's view on this seemed to have lightened to some degree (even admitting in 2012 that fanfiction can be a transitional space for young writers to experiment with), but within fan communities, there is still a great deal of tension surrounding the legality of fanfiction.¹⁴¹ To this day, fanfiction authors still put author notes disclaiming not to own the characters they are writing about because of Rice's lasting effect on this fan space.¹⁴² Nevertheless, fanfiction remains a huge part

137. See Jay Castello, *Archive of Our Own's 15-Year Journey from Blog Post to Fanfiction Powerhouse*, VERGE (Aug. 15, 2022, 9:30 AM), <https://www.theverge.com/2022/8/15/23200176/history-of-a03-archive-of-our-own-fanfiction> [<https://perma.cc/UU5F-UB77>]. It also hosts an academic journal about fanfiction that is one of the leading journals on the subject. *Fan Studies Journals*, FAN STUD. NETWORK, <https://fanstudies.org/fan-studies-journals/> [<https://perma.cc/26WQ-H74S>] (last visited Sept. 20, 2024); ORG. FOR TRANSFORMATIVE WORKS, <https://www.transformativeworks.org/> [<https://perma.cc/4EWC-EP5Y>] (last visited Oct. 24, 2024).

138. Sisi Jiang, *New Interview with the Vampire Show Encourages Fanfic, Anne Rice's Spirit Likely Furious*, KOTAKU (Oct. 12, 2022), <https://kotaku.com/interview-with-vampire-fanfic-anne-rice-amc-lestat-2022-1849649058> [<https://perma.cc/W8AX-P33H>].

139. Anne Rice, *Important Message from Anne on "Fan Fiction"*, ANNE RICE, <https://web.archive.org/web/20010527210007/http://www.annerice.com/> [<https://perma.cc/5F8F-RXTF>].

140. AJ McDougall, *Is It Time to Rethink the Rules of Fanfiction?*, DAILY BEAST, <https://www.thedailybeast.com/how-a-league-of-their-own-and-anne-rice-are-making-the-interne-t-rethink-the-rules-of-fanfiction?> [<https://perma.cc/AYQ6-9MFH>] (last updated Oct. 23, 2022, 4:12 AM).

141. Jiang, *supra* note 138.

142. See Stacey M. Lantagne, *The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright*, 32 GA. ST. U. L. REV. 459, 499 (2016).

of fan communities, and most fanfiction writers are not being sent cease-and-desist letters.

B. Applying Mattel and the Rogers Test to Fanfiction

So, what is a fanfiction writer to do? In her 1997 seminal article, Rebecca Tushnet argued that “the secondary creativity expressed in noncommercial fan fiction deserves the protection of the law.”¹⁴³ She wrote, “Fan fiction deserves protection because it gives authors and readers meaning and enjoyment, allowing them to participate in the production of culture without hurting the legitimate interests of the copyright holder.”¹⁴⁴ Since this writing—nearly a decade before Web 2.0—the world of fan works has grown well beyond fanfiction. But the idea still makes sense. The question is how do we protect stories created by fans?

We understand the commercial line must not be crossed. We have many cases that tell us that. And *Andy Warhol* helps us get there.¹⁴⁵ But sometimes fan work does not fall easily under fair use. They are reproducing a photograph as a charcoal drawing, or they are making 3D versions of a 2D-animated character. We know that these will not be successful from the *Three Stooges* case and the early Jeff Koons cases.¹⁴⁶ So, what is a fan to do? These uses coexist everywhere, even at conventions where authorized uses compete for convention-goers’ dollars.

We have two thoughts. First, could the use of characters, plots, and other elements of a copyrighted work be more akin to vocabulary and ways of communicating, rather than merely “copying”? Fans are working to express emotions and commonalities. They are using copyrighted works to do that. Second, could fanfiction (and fan art) be more akin to Judge Kozinski’s words from the *Mattel* case: “The problem arises when trademarks transcend their identifying purpose. Some trademarks enter our public discourse and become an integral part of our vocabulary. How else do you say that something’s ‘the Rolls Royce of its class’? What else is a quick fix, but a Band-Aid?”¹⁴⁷

143. Tushnet, *supra* note 3, at 654.

144. *Id.*

145. See discussion *supra* Section III.C.

146. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.2d 797, 800–01, 810–11 (Cal. 2001) (holding that an artist’s reproduction of a photograph of the Three Stooges as a charcoal drawing was not fair use); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 384–85 (S.D.N.Y. 1993) (holding Koons’s sculpture of the “Odie” character was not fair use); see also *Rogers v. Koons*, 960 F.2d 301, 305, 310–12 (2d Cir. 1992) (holding Koons’s sculpture based on another artist’s photograph was not fair use).

147. *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 900 (9th Cir. 2002).

Judge Kozinski further explained that, “Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law.”¹⁴⁸ Judge Kozinski was writing in 2002, before the iPhone and before social media dramatically altered how we communicate with each other.¹⁴⁹ And while he was writing about trademarks, his idea that creative works become part of our vocabulary and daily expressions are true for fandoms. The copyrighted work begins the conversation, and fans engage and transform the work into language and vocabulary, adding means of expressing identity and thoughts, feelings, and experiences. The work lives beyond the author’s imagination; it is now part of the culture. The YouTube study reminds us that fans are communicating when they are using others’ works. The question is where does that communication fall within the legal environment of copyright?

Trademark seems to have worked out the problem using the *Rogers* test. Could copyright borrow the *Rogers* test to help us distinguish between commercially competing fan works and artistic expression?¹⁵⁰ Fan use of works sometimes looks more like expressive and artistic use of trademarks than it does infringement of copyright. There may be no confusion as to source, and what they are doing does not have an impact on the commercial aspects of the original work.

The *Rogers* test comes from when Ginger Rogers objected to Fellini’s film *Ginger and Fred*.¹⁵¹ But in many ways, this seems a lot like fanfiction: the story follows a couple that impersonates Ginger and Fred. It is their story about their love and interaction as those characters. And the court found that it was legally permissible to do that.¹⁵² Could *Rogers* not help us sort out and provide legal assistance to fan works?

Is the use artistic expression or is the work being used as a source-identifier, and would someone believe that the fan work was authorized and can be identified with the copyright holder?

148. *Id.*

149. *What Has the iPhone Done to our Lives?*, B.U. CTR. MOBILE COMM’N STUD. (Nov. 16, 2017), <https://sites.bu.edu/cmcs/2017/11/16/what-has-the-iphone-done-to-our-lives/> [https://perma.cc/X7PM-W38R].

150. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (establishing a test to determine whether an artistic work violated the Lanham Act by evaluating (1) whether the use of the mark has some artistic relevance, and (2) whether use of the mark explicitly misleads consumers as to the source or content of the work).

151. *Id.* at 996–97.

152. *Id.* at 996–97, 1005.

That is *Axanar*, *Dr. Seuss*, *Salinger*, *Twin Peaks*, to name a few.¹⁵³ Warner Brothers and J.K. Rowling are upset when the *Lexicon* is published as a book.¹⁵⁴ When fan works become commercial products, it is the competing use with the original that is the problem, not necessarily whether there was copying. Everyone agrees that the original source materials are being used in fan works. The question is, does it compete with the original commercially and would consumers mistake it as authorized?

We are suggesting that the copyright system might need to import the *Rogers* test from trademark. We have fair use already. But perhaps this adds a broader means of reviewing when copyrighted works become part of our language and vocabulary, when fans are expressing themselves without creating consumer confusion and/or being used as a source-identifier. We would hit the commercial/likelihood of confusion analysis pretty quickly if the work was competing with the original.

VI. BORROWING IN ACTION: A FAME-APPROACH TO MUSICALS

As we were working on sorting through the law versus reality, four aspects of musicals caught our attention for a number of reasons. First, the number of musicals currently on Broadway that rely on fame is remarkable; and second, the TikTok phenomenon of unauthorized musicals borrowing from famous source materials seems to point to rules of “fans celebrating” as tolerated uses, and when those uses go “too far.” Third, musicals take a great deal of capital to produce (unlike say, a book), so there is more legal risk. Fourth, unlike television or film, there is a finite set to review, in this case fifty-four works over two years. For reference, see Part IX for a list of musicals on Broadway in 2022–2024. How does fame operate within the field of musicals, both authorized and unauthorized?

153. See *supra* notes 59, 78 and accompanying text.

154. See *supra* Section III.C.

A. *Broadway Fame*

Musicals have hit a weird point because a large chunk of the new musicals are actually borrowed adaptations of movies and books or based on the repertoire of a famous band or musician. And, of course, there are also the revivals of famous, well-known older shows. Today, few Broadway musicals are actually “original” in their source materials. But maybe this has always been true. *Cabaret*, being revived for the fourth time on Broadway, is based on a play, which was based on a short story from the 1930s.¹⁵⁵ *Cats* was based on a book of poetry.¹⁵⁶ Musicals have a history of borrowing, but it is on a much larger scale now. Today, pre-existing fame and instant audience recognition is everything. You must have a hook. To get those tourists in, you must use fame as a source.¹⁵⁷ There was a moment when adaptations from movies to Broadway were seen as odd. It is not so now. The modern lineup of musicals that borrow from something else is startling. Could Broadway musicals help us understand the importance of fame as a basis for success in a particular endeavor? We looked at all the Broadway musicals that have been on stage from 2023 through 2024 in order to understand a curious pattern of borrowed culture. Musicals can fall into multiple categories, but in total our data covers sixty-three shows.

We see a significant portion of the shows on Broadway being musicians-created musicals based on their life or their musical works. We count sixteen of those in the last two years. For example, *& Juliet* is based on the pop music of Max Martin, with

155. Christopher Isherwood’s original 1937 short story, *Sally Bowles* formed the basis for the 1951 play *I Am a Camera* by John Van Druten, which was then adapted into the 1966 *Cabaret* musical by John Kander, lyrics by Fred Ebb, and book by Joe Masteroff. The musical has been revived and reinterpreted, including as the 1972 film version, but also the 1993/1998 revival with Alan Cumming and the 2023/2024 current version. Michael Riedel, *The Untold History of Cabaret: Revived and Kicking*, VANITY FAIR (Mar. 26, 2024), <https://www.vanityfair.com/style/cabaret-revival> [https://perma.cc/6TGX-P3V9].

156. Andrew Lloyd Webber’s musical *Cats* (1981) was based on T.S. Eliot’s 1939 poetry collection, *Old Possum’s Book of Practical Cats*. ANDREW LLOYD WEBBER, *CATS: THE BOOK OF THE MUSICAL* (1983). Currently, there is a reimagined version, *Cats: The Jellicle Ball*, playing off-Broadway, which is playing with queer ballroom culture. For more, see Joshua Barone, *‘Cats’ Returns, Ditching the Junkyard for Queer Ballroom*, N.Y. TIMES, <https://www.nytimes.com/2024/06/18/theater/cats-ballroom-revival-pac-nyc.html> [https://perma.cc/TU9D-HHRU] (last updated June 22, 2024).

157. “According to the League, tourists still form the biggest audience for Broadway shows by far: only about 35% of show attendees during the 2022–23 season were from the city itself or the surrounding metropolitan area, while 17% came from foreign countries.” Anastasia Tsioulcas, *Broadway Audiences Are Getting a Little Bit Younger and More Diverse*, NPR (Dec. 12, 2023, 5:00 AM), <https://www.npr.org/2023/12/12/1218654987/broadway-audiences-are-gettin-g-a-little-bit-younger-and-more-diverse> [https://perma.cc/K2LP-Q8AE].

all but one song culled from his existing hit songs.¹⁵⁸ This is also true of *The Notebook*, which is a movie adaptation with music by Ingrid Michaelson;¹⁵⁹ *Hell's Kitchen*, an original story with music by Alicia Keys;¹⁶⁰ and *A Beautiful Noise*, a bio-musical of Neil Diamond;¹⁶¹ *MJ*, a bio-musical about Michael Jackson;¹⁶² and many more of these.¹⁶³ The fan bases are built in.

Counting long-running shows that continue to stay open, there have been twenty musicals in the last two years that are adaptations from screen (and sometimes screen and novel) to theater.¹⁶⁴ (This excludes *Hamilton* which is based on Ron Chernow's biography of Alexander Hamilton). Then we see three new shows coming from tried-and-true traditional Broadway composers¹⁶⁵ and seventeen

158. Jesse Green, *Review: On Broadway, 'Juliet' (& Britney & Katy & Pink)*, N.Y. TIMES (Nov. 17, 2022), <https://www.nytimes.com/2022/11/17/theater/and-juliet-review.html> [<https://perma.cc/H7EM-Z9D3>]; Jade Ali, & *Juliet OCR Album Song-by-Song Review*, LONDON THEATRE DIRECT, <https://www.londontheatredirect.com/news/juliet-ocr-album-song-by-song-review> [<https://perma.cc/4VGM-KXXZ>] (last updated Oct. 9, 2023).

159. Rob Tannenbaum, *To Make 'The Notebook' a Musical, She Wove in Memories of Her Parents*, N.Y. TIMES, <https://www.nytimes.com/2024/03/08/theater/ingrid-michaelson-the-notebook-broadway.html> [<https://perma.cc/BQP3-77T3>] (last updated Mar. 9, 2024).

160. Dalton Ross, *Hell's Kitchen Review: The Alicia Keys Broadway Musical Is a Rousing Delight*, ENT. WKLY. (Apr. 20, 2024, 11:59 PM), <https://ew.com/hells-kitchen-review-broadway-alicia-keys-8635661> [<https://perma.cc/DD8L-HSTJ>].

161. A.D. Amorosi, *'A Beautiful Noise' Review: Neil Diamond Musical Unpacks Hitmaker's Life in Therapy and Song*, VARIETY (Dec. 5, 2022, 6:45 AM), <https://variety.com/2022/legit/reviews/a-beautiful-noise-review-neil-diamond-musicalbroadway-1235449537/> [<https://perma.cc/V874-B883>].

162. David Browne, *New Michael Jackson Musical Celebrates His Greatness While Mostly Avoiding the Dark Stuff*, ROLLING STONE (Feb. 1, 2022), <https://www.rollingstone.com/music/music-live-reviews/michael-jackson-musical-review-1292818/> [<https://perma.cc/L9CP-G47G>].

163. Huey Lewis's musical *The Heart of Rock and Roll* is closing. See Dave Quinn, *Huey Lewis Tears Up at Closing Performance of Broadway Musical The Heart of Rock and Roll: 'A Very Sad Thing for Me'*, PEOPLE (June 28, 2024, 3:13 PM), <https://people.com/huey-lewis-broadway-musical-the-heart-of-rock-and-roll-closes-8668712> [<https://perma.cc/UC2Y-52HX>]. And the musical about Louis Armstrong is set to open. Andrew Gans, *James Monroe Iglehart Will Star in A Wonderful World: The Louis Armstrong Musical on Broadway*, PLAYBILL (Feb. 28, 2024), <https://playbill.com/article/james-monroe-iglehart-will-star-in-a-wonderful-world-the-louis-armstrong-musical-on-broadway> [<https://perma.cc/FT9-G3YL>]. They just keep coming.

164. Examples include *Some Like It Hot*, *The Notebook*, and *Back to the Future*, to name three. See *infra* Part IX for the Appendix: List of Musicals Reviewed from the Years 2023 and 2024, for musicals on Broadway in 2022–2025 with adaptations noted.

165. This includes Lin Manuel Miranda's *Hamilton*, Sondheim's *Merrily We Roll Along*, and Kander/Ebb's *Cabaret*, *New York/New York* as well as *Chicago*. Note, these are mostly revivals and long-running shows. See *infra* Part IX for the Appendix, which includes List of Musicals Reviewed from the Years 2023 and 2024.

revivals of musicals.¹⁶⁶ These twenty-four shows fit a more conventional pattern for Broadway. Of the fifty-seven shows, there are only about six Broadway musicals that debuted in the last two years that did not have automatic name recognition: *A Strange Loop*, *Lempicka*, *Suffs*, *Kimberly Akimbo*, *Six*, and *Hadestown*. But even these often had major, well-known producers attached to them, including Hillary Clinton for *Suffs*.¹⁶⁷ Interestingly, these fame-on-your-own musicals do actually quite well, with three of the six earning Best New Musical, along with other awards.¹⁶⁸ But the pattern was real: most Broadway productions were famous for something else before they were made into a Broadway production.

What is interesting about fame in these musicals is that fame is where the works begin. But these musicals make the original materials their own in many different ways—expanding, enhancing, and deepening them. *Death Becomes Her*, for instance, becomes more a story of mental health and friendship.¹⁶⁹ *The Outsiders* embraces that elegant heartbreak of the original novel, expanding it through song, dance, and conversation, but adds entirely new layers of artistry, particularly the fight-ballet with falling rain.¹⁷⁰ But these musicals

166. The revival and long-running musicals included: *Cabaret*, *Hamilton*, *Moulin Rouge!*, *The Phantom of the Opera*, *Lion King*, *Wicked*, *Aladdin*, *Camelot*, *The Wiz*, *Into the Woods*, *Sweeney Todd*, *Sunset Boulevard*, *1776*, *Funny Girl*, *Bob Fosse's Dancin'*, *Once Upon a Mattress*, and *The Book of Mormon*. See *infra* Part IX for the Appendix: List of Musical Reviewed from the Years 2023 and 2024.

167. Martha Teichner, *Hillary Clinton, Malala Yousafzai on Producing Broadway Musical "Suffs"*, CBS NEWS (Mar. 31, 2024, 9:42 AM), <https://www.cbsnews.com/news/suffs-hillary-clinton-malala-yousafzai-on-broadway-musical-about-suffragists/> [<https://perma.cc/A9C2-TFLZ>].

168. See *A Strange Loop*, TONY AWARDS, <https://www.tonyawards.com/shows/strange-loop/> [<https://perma.cc/K4XU-SNZ3>] (last visited Sept. 13, 2024); *Kimberly Akimbo*, TONY AWARDS, <https://www.tonyawards.com/shows/kimberly-akimbo/> [<https://perma.cc/CM2S-KA98>] (last visited Sept. 13, 2024); *Hadestown*, TONY AWARDS, <https://www.tonyawards.com/shows/hadestown/> [<https://perma.cc/Y2TB-SAKV>] (last visited Sept. 13, 2024). *Six* was nominated for Best New Musical, but did not win. *Six: The Musical*, TONY AWARDS, <https://www.tonyawards.com/shows/six-musical/> [<https://perma.cc/PRR5-XCQQ>] (last visited Sept. 13, 2024). *Lempicka* was not nominated for Best New Musical but was nominated for other awards. See *Lempicka*, TONY AWARDS, <https://www.tonyawards.com/shows/lempicka/> [<https://perma.cc/C8K6-5ZKF>] (last visited Sept. 13, 2024). *Suffs* was nominated for Best Musical, did not win, but did earn major awards. See *Suffs*, TONY AWARDS, <https://www.tonyawards.com/shows/suffs/> [<https://perma.cc/44XZ-8UBA>] (last visited Sept. 13, 2024).

169. Steven Oxman, *'Death Becomes Her' Review: Promising Pre-Broadway Musical Makes for a Campy Improvement on the Cult Film*, VARIETY (May 20, 2024, 11:34 AM), <https://variety.com/2024/legit/reviews/death-becomes-her-review-musical-chicago-1236010777/> [<https://perma.cc/6CPC-WWWS>].

170. Casey Mink, *'The Outsiders' Choreographers on that Jaw-Dropping Fight Scene*, BACKSTAGE (May 15, 2024), <https://www.backstage.com/magazine/article/the-outsiders-broadway-choreography-interview-77255/> [<https://perma.cc/FM88-L6JD>].

also know what their audiences, their fan base want. *A Beautiful Noise*, the Neil Diamond biography, plays *Sweet Caroline*—twice, knowing their fan base must sing it with “Neil” at both the end of Act 1 and after the curtain call. (The show has as many matinees as evening performances, again recognizing their older fan base).¹⁷¹ Even *Death Becomes Her*, which has become a gay-cult classic movie, has a song early in the show titled *For the Gaze*, playing off of LGBTQ+ tropes in a most amazing way.¹⁷²

These properties understand the fan base. In an interview, Mark Knopfler of Dire Straits, in reference to their hit “The Sultans of Swing,” discusses needing to play the “twiddly bits” for his audience, the things the audience expects.¹⁷³ In each of these works, based on previously famous properties, they do just that—including the “twiddly bits” and so much more. When it works, the fans should love the continuation of the property and provide insight into the original.

B. On-Stage off-Broadway Parodies

We also see a genre of off-Broadway shows: *The Office*, *Friends*, *Golden Girls*, and *Seinfeld* all have parodies. And there are cases that support that: one about *Grease*, another about *Three’s Company*, and a third about the *Grinch*. In each case, the courts found fair use.¹⁷⁴ These are sometimes musical, but other times not.

171. Ken Davenport, [Case Study] *The Thursday Matinees at A Beautiful Noise: The Neil Diamond Musical*, MEDIUM (Oct. 27, 2023), <https://medium.com/@thekendavenport/case-study-the-thursday-matinees-at-a-beautiful-noise-the-neil-diamond-musical-845f57a9cdc5> [https://perma.cc/53LL-UHMD] (noting there were four matinees per week instead of the standard three); Grey Evans, *Struggling Neil Diamond Musical ‘A Beautiful Noise’ Breaks Broadway Tradition with Fourth Weekly Matinee*, DEADLINE (Aug. 23, 2023, 1:57 PM), <https://deadline.com/2023/08/neil-diamond-a-beautiful-noise-broadway-schedule-1235526412/> [https://perma.cc/4NDA-J3YN].

172. Kerry Reid, *Doing It for the Gaze*, READER (May 20, 2024), <https://chicagoreader.com/arts-culture/theater/theater-review/death-becomes-her-broadway-in-chicago/> [https://perma.cc/QCZ2-4HB5]; Grey Evans, *‘Death Becomes Her’ Broadway Review: Megan Hilty & Jennifer Simard Shine in Life Force of a Musical*, DEADLINE (Nov. 21, 2024), <https://deadline.com/2024/11/death-becomes-her-broadway-review-1236182456/> [https://perma.cc/6NAL-5FVD].

173. See Mark Knopfler, *Mark Knopfler—Sultans of Swing (An Evening with Mark Knopfler, 2009)*, YOUTUBE (Mar. 28, 2019), <https://www.youtube.com/watch?v=leZ4T8kt-1o> [https://perma.cc/P4WD-2AL7].

174. *Sketchworks Indus. Strength Comedy, Inc. v. Jacobs*, No. 19-CV-7470-LTS-VF, 2022 WL 1501024, at *7 (S.D.N.Y. May 12, 2022); *Adjmi v. DLT Ent. Ltd.*, 97 F. Supp. 3d 512, 535 (S.D.N.Y. 2015); *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 512–13 (S.D.N.Y. 2017), *aff’d*, 729 F. App’x 131 (2d Cir. 2018).

And like the fame-based musicals, they deliver what the fans of these properties are expecting, and then go beyond that. One of these, a touring company of the *Golden Girls* parody, for example, does have one musical number, but the focus is really that it is a drag rendition of the *Golden Girls*.¹⁷⁵ The characters remain the age they were when the show went off the air in 1992 (and there are jokes about this), as they set the story in the same late-1980s, early-1990s design of the house and clothing style but within contemporary times.¹⁷⁶ The piece plays with all of the familiar aspects of *Golden Girls* that we have grown to love. Yet, this version is also critiquing the original and adding more depth and discovery of the characters and that world. And in some way, when you go back to the original TV show, you see more. You cannot help but remember the parody's vision as you watch.

C. *TikTok Musical Fan Adaptations: A New Trend, and What They Tell Us About Boundaries of "Fans Celebrating"*

We are seeing another category of works—TikTok unauthorized musical adaptations of famous properties. *Ratatouille the Musical* started during the COVID-19 pandemic when Emily Jacobsen wrote a tribute song to Remy, the main character in *Ratatouille*, a Disney/Pixar film, and posted it on TikTok.¹⁷⁷ Then, others followed. In 2020, Seaview Productions (which produces real Broadway shows), with director Lucy Moss (co-director of the musical *Six*), and a professional cast that included Broadway actors, put on a more polished version as a charity event for the Actors Fund, raising \$2 million.¹⁷⁸ Over 200,000 tickets priced between \$5 and \$100 were sold as donations

175. See *Golden Girls: The Laughs Continue*, BROADWAY IN CHI., <https://www.broadwayinchicago.com/shows/golden-girls-the-laughs-continue/> [https://perma.cc/HVZ6-4PSK] (last visited Sept. 13, 2024).

176. See *id.*; see also *Golden Girls*, SAENGER THEATRE (May 15, 2024), <https://www.saengernola.com/events/golden-girls/> [https://perma.cc/T7KB-QMXV]. The Authors went to the show in Chicago.

177. Eliana Dockterman, *How the Ratatouille Musical Went from TikTok Sensation to All-Star Broadway Production*, TIME, <https://time.com/5925560/ratatouille-tiktok-musical/> [https://perma.cc/TAC3-V47B] (last updated Dec. 31, 2020, 10:11 AM).

178. Dan Meyer, *Ratatouille: The TikTok Musical Raises \$2 Million for the Actors Fund*, PLAYBILL (Jan. 11, 2021), <https://playbill.com/article/ratatouille-the-tiktok-musical-raises-2-million-for-the-actors-fund> [https://perma.cc/WL33-BCRY].

and it is estimated that 350,000 people viewed the show.¹⁷⁹ So, how did this occur? This is not a parody and does not fall under fair use. This is the full movie reimaged as a musical by fans on TikTok. And Disney? They did not shut it down. According to *Vox* reporter Rebecca Jennings, “Seaview Productions . . . secured a green light from Disney to put on a one-time benefit concert.”¹⁸⁰ The show itself is a combination of the original script, with new materials, and references to different elements thrown in—the first number, for instance, “Anyone Can Cook,” includes references to *A Chorus Line*, *Beauty and the Beast*, and *Cats*.¹⁸¹ The other part is context. Both the original TikTok version and the professional versions were made during the COVID-19 pandemic.¹⁸² Each person was in their own home. In some ways, it is an ode to the experience of the pandemic.

We can take another look at this same boundary with the Netflix lawsuit over *The Unofficial Bridgerton Musical*. In 2020, people fell in love with *Bridgerton*, a Netflix original series following a fictional high society in early-1800s England. Within a

179. *The Actors Fund Announces that “Ratatouille: The TikTok Musical” Has Raised \$2 Million*, ENT. CMTY. FUND (Jan. 12, 2021), <https://entertainmentcommunity.org/about-us/news/actors-fund-announces-ratatouille-tiktok-musical-has-raised-2-million> [https://perma.cc/DVK2-NX5S]; Christopher Zara, *How to Watch ‘Ratatouille: The TikTok Musical’: Start Time and Tickets for the On-Demand Event*, FAST CO. (Jan. 1, 2021), <https://www.fastcompany.com/90589958/how-to-watch-ratatouille-thetiktok-musical-start-time-and-tickets-for-the-on-demand-event> [https://perma.cc/SG83-HZMD].

180. Rebecca Jennings, *This Week in TikTok: How a Ratatouille Joke Led to a Broadway Musical*, VOX (Jan. 5, 2021, 8:00 AM), <https://www.vox.com/the-goods/2021/1/5/2213890/ratatouille-musical-tiktok> [https://perma.cc/W4BB-WEX3].

181. See for yourself! Freak of N8ure, *Ratatouille The Musical (full show)*, YOUTUBE (Jan. 5, 2021), https://www.youtube.com/watch?v=pdTi-R-Apw&ab_channel=FreakOfN8ure [https://perma.cc/3HRZ-UA4F]. Their references to “a chance to dance,” is a direct line from *A Chorus Line* opening. *Music and the Mirror Lyrics — Chorus Line, A*, ALL MUSICALS, <https://www.allmusicals.com/lyrics/choruslinea/musicandthemirror.htm> [https://perma.cc/DQH7-SAYZ] (last updated June 10, 2013). It is followed by the Jellicle Ball musical and lyrics from *Cats*. See Joshua Chong, *Review: The Ratatouille Musical Has Too Much Cheese and Too Little Spice, But Is Still Digestible*, TRINITY TIMES (Jan. 15, 2021), <https://trintimes.ca/arts/review-the-ratatouille-musical-has-too-much-cheese-and-too-little-spice-but-is-still-digestible/> [https://perma.cc/FA6K-AVF7] (“Creators . . . pack so many cringeworthy theatre references into the 60 minute show (jellicle songs for jellicle rats, anyone?) . . .”); *Prologue: Jellicle Songs for Jellicle Cats — Cats*, ALL MUSICALS, <https://www.allmusicals.com/lyrics/cats/prologuejelliclesongsforjelliclecats.htm> [https://perma.cc/MH53-9NKF] (last updated Jan. 21, 2015). Finally, it ends with references to *Beauty and the Beast*’s kick line in *Be Our Guest*.

182. An example of the original version: TikTok Tingz, *Ratatouille Musical Tik Tok Compilation*, YOUTUBE (Dec. 10, 2020), <https://www.youtube.com/watch?v=s-9dH9FKqtI> [https://perma.cc/E29V-VN58]. The professional version: Freak of N8ure, *supra* note 181.

year, over eighty-two million people watched.¹⁸³ And fans celebrated in every way. Two of the people that loved it were Abigail Barlow and Emily Bear (Barlow & Bear), who started making their own unauthorized musical songs based on dialogue and situations in *Bridgerton*.¹⁸⁴ Barlow & Bear based the songs they were writing on scenes and dialogue from the series, including using verbatim dialogue, characters, plot, pace, sequence, mood, setting, and themes.¹⁸⁵ And Netflix was not filing a lawsuit. They saw Barlow & Bear as fans celebrating.¹⁸⁶ Barlow & Bear were not authorized to use the work or create a derivative version. And they are not commenting or criticizing the original work; they are fans celebrating.¹⁸⁷ So, fair use likely does not apply. Netflix described what they were doing as “fans’ expression of their appreciation for the series.”¹⁸⁸

Then, Barlow & Bear released an album on Spotify in September 2021.¹⁸⁹ Netflix found out before its release, and “stressed to Barlow & Bear’s representative that Netflix would not authorize and did not want them to engage in any live performances . . . or other derivative works that might compete with Netflix’s own planned live events.”¹⁹⁰ Netflix was creating the *Bridgerton Experience*.¹⁹¹ Barlow & Bear’s representatives agreed no live events were planned.¹⁹²

183. Tom Nunan, *‘Bridgerton’ Makes History on Netflix with 82 Million Viewers; \$100 Million Shonda Rhimes Gamble Pays Off*, FORBES (Jan. 27, 2021, 9:55 PM), <https://www.forbes.com/sites/tomnunan/2021/01/27/bridgerton-makes-history-on-netflix-with-82-million-viewers-100-million-shonda-rhimes-gamble-pays-off/> [<https://perma.cc/3873-RVLT>]; *Season 1 — Bridgerton*, ROTTEN TOMATOES, <https://www.rottentomatoes.com/tv/bridgerton/s01> [<https://perma.cc/V8Z7-BKBY>] (last visited Oct. 24, 2024).

184. Barlow & Bear, *Barlow & Bear: The Backstory and Creation of “The (Unofficial) Bridgerton Musical,”* YOUTUBE (Sept. 10, 2021), <https://www.youtube.com/watch?v=7Uhg0f0fwfA> [<https://perma.cc/MS77-VC3Q>].

185. *Id.*; Complaint at 2, Netflix Worldwide Ent., LLC v. Barlow, No. 1:22-cv-02247 (D.D.C. July 29, 2022).

186. We actually get this narrative from the lawsuit that Netflix does eventually file. Complaint, *supra* note 185, at 13–14.

187. *Id.* at 9, 13.

188. *Id.* at 14.

189. See BARLOW & BEAR, THE UNOFFICIAL BRIDGERTON MUSICAL (Barlow & Bear 2021).

190. Complaint, *supra* note 185, at 14.

191. *Id.*

192. *Id.*; see THE QUEEN’S BALL: A BRIDGERTON EXPERIENCE, <https://bridgertonexperience.com> [<https://perma.cc/D23Y-ESYD>] (last visited Sept. 2, 2024). This is an authorized experience with Shondaland/Netflix Fever included under the title.

Six months later, Barlow & Bear were nominated for a Grammy for their album, *The Unofficial Bridgerton Musical*.¹⁹³ Netflix still did not file a lawsuit. Still, fans were celebrating. Barlow & Bear then won the Grammy for Best Musical Theatre Album for 2022.¹⁹⁴ This was a big deal because it meant that musical theater songs that originated on TikTok had won a Grammy. All the previous winners since 1959 were Broadway shows.¹⁹⁵ This was a big moment. Fans celebrating and creating fan content had just won a Grammy and Netflix still did not file a lawsuit, but the ground did shift.

Barlow & Bear wanted to perform *The Unofficial Bridgerton Musical* in Washington, D.C. and the United Kingdom. They had previously tried to plan a charity event, but that had fallen through. And here is where Netflix said no: no commercial performances. Barlow & Bear still went ahead with advertising the D.C. performance. And, Netflix filed a lawsuit.¹⁹⁶ That was what it took for Netflix to sue. That was going pretty far. Barlow & Bear admitted that they did not have a license to create a derivative work, but their attorney took the position that they did not need to get a license because Netflix did not object sooner.¹⁹⁷ Netflix responded: “That is not how copyright law works. Netflix is not required to sue every infringer.”¹⁹⁸ And this is true. This is the law. The copyright holder gets to decide. And Netflix asserted that the live concert “stretches ‘fan fiction’ well past its breaking point.”¹⁹⁹ The lawsuit was settled, and the scheduled United Kingdom live performance never occurred.²⁰⁰

193. Laura Wheatman Hill, *From TikTok Trend to GRAMMY Nominee: How the ‘Bridgerton’ Musical Is Changing Theater Culture*, GRAMMY AWARDS (Mar. 24, 2022, 8:31 AM), <https://www.grammy.com/news/bridgerton-musical-bear-and-barlow-tik-tok-trend-changing-theater> [https://perma.cc/RK6X-PTZ9].

194. Jazz Tangcay, *‘Unofficial Bridgerton Musical’ Becomes First Grammy-Winning Album to Originate on TikTok*, VARIETY (Apr. 3, 2022, 1:38 PM), <https://variety.com/2022/artisans/news/unofficial-bridgerton-musical-tiktok-grammy-1235222248/> [https://perma.cc/ZU4H-8PH3].

195. *See Genre: Musical Theater*, GRAMMY AWARDS, <https://www.grammy.com/music-genre/musical-theater> [https://perma.cc/WFZ2-Y3BQ] (last visited Sept. 2, 2024).

196. Complaint, *supra* note 185, at 14, 16; Deanna Schwartz, *The Netflix v. ‘Unofficial Bridgerton Musical’ Lawsuit, Explained*, NPR (Aug. 4, 2022, 12:42 PM), <https://www.npr.org/2022/08/04/1115212455/netflix-bridgerton-musical-lawsuit> [https://perma.cc/E86B-QRBB].

197. Complaint, *supra* note 185, at 13.

198. *Id.*

199. *Id.* at 2, 13.

200. *Id.* at 17–19; Gene Maddaus, *Netflix Settles Copyright Lawsuit Over ‘Unofficial Bridgerton Musical’*, VARIETY (Sept. 23, 2022, 6:08 PM), <https://variety.com/2022/music/news/netflix-bridgerton-musical-lawsuit-dropped-barlow-bear-1235382454/> [https://perma.cc/

D. The Borrowed Fame in Schmigadoon!

One other key space for musicals is on television. We have had many shows that either do covers of musical songs (think *Glee*) or make up versions that sound like parodies of musicals (think *Crazy Ex-Girlfriend* or *Galavant*).²⁰¹ *Schmigadoon!*, Seasons 1 and 2 were something else. The AppleTV musical borrowed specific characters and paid homage to songs. This was not a parody. In one interview, the creator Cinco Paul said:

[T]his is not a spoof . . . [I] wanted to clarify right off the bat . . . I think Apple wanted us to legally call it that for legal reasons . . . it's a satirical homage . . . and that was always the intent. To sort of lovingly point out the things that were kind of backwards and messed up . . . or just stupid . . . but always with love.²⁰²

Here we have a full production doing what we saw in the fan world: fans celebrating, but now with a big budget, and no doubt, likely clearance for the songs used. But here is one more example of borrowing *a lot* and doing it on a big-budgeted project.

VII. BORROWING BEYOND BINARIES: CRAFTING COEXISTENCE

The soup is real. The original work coexists with different inputs, dialogue, creations, and commentaries, and they all live together in what we are calling a soup. We even have studies showing the importance of the soup.²⁰³ Fans are no longer passive consumers, but creators in dialogue.²⁰⁴ And how copyright holders approach a moment of viral-ness is important. Fans glom onto something and the enthusiasm is gold. Here are three examples from the last few years that convey the joy of fan enthusiasm, and even the potential for everyone to prosper, even financially.

F3GJ-3B43]; Bruce Haring & Dominic Patten, *'Bridgerton The Musical' Lawsuit Tossed by Netflix as UK Performances of Live Show Cancelled—Update*, DEADLINE (Sept. 23, 2022, 6:27 PM), <https://deadline.com/2022/09/netflix-sues-bridgerton-the-musical-creators-for-infringement-1235081610/> [<https://perma.cc/ZQ2V-J8T5>].

201. See *List of Artists/Musicals Covered by Glee*, GLEE WIKI https://glee.fandom.com/wiki/List_of_Artists/Musicals_Covered_by_Glee [<https://perma.cc/6WYX-VEDY>] (last visited Nov. 25, 2024).

202. GoldDerby, *Making of 'Schmigadoon!': Lively Roundtable Panel with 5 Cast Members and Creator Cinco Paul*, YOUTUBE (June 6, 2022), <https://www.youtube.com/watch?v=tOC9PvYjJAA> [<https://perma.cc/7XEQ-WKAF>].

203. CULTURE AND TRENDS REPORT 2024: FANDOM, *supra* note 23.

204. *Id.*

A. *Commercial Use of a Copyrighted Property:
Crocheted Baby Yodas on Etsy*

On November 12, 2019, Disney released a new *Star Wars* series, *The Mandalorian*, and with it a new, adorable, unexpected character, Grogu, otherwise known as Baby Yoda.²⁰⁵ Disney had purposely kept Grogu a secret, and fans went crazy.²⁰⁶ The trouble was that there was no merchandise with Baby Yoda out in the world because Disney wanted it to be a surprise.²⁰⁷ Enter the crocheters.²⁰⁸

205. Rebekah Barton, *A Surprising ‘Star Wars’ Character Is the New “Mandalorian,”* INSIDE THE MAGIC (July 2, 2021), <https://insidethemagic.net/2021/07/bad-batch-wrecker-neighbor-din-djarin-rwb1/> <https://perma.cc/C46T-74JC>.

206. See, e.g., *Baby Yoda and the Appeal of Cuteness (Business Brilliance #17)*, STONEMAIER GAMES (Dec. 2, 2019), <https://stonemaiergames.com/baby-yoda-and-the-appeal-of-cuteness-business-brilliance-17/> [<https://perma.cc/W3RT-YEWV>]; Katherine K.M. Stavropoulos, *Why Is Everyone in Love with Baby Yoda? Neuroscience and Behavioral Data Can Help Explain the Baby Yoda Craze*, PSYCH. TODAY (Dec. 5, 2019), <https://www.psychologytoday.com/us/blog/neuroscience-in-translation/201912/why-is-everyone-in-love-baby-yoda> [<https://perma.cc/X9YG-SU2D>]; Alexis Morillo, *Why Do I Want to Eat Baby Yoda? It’s the Same Reason You Want to Pinch a Baby’s Cheek*, DELISH (Dec. 13, 2019), <https://www.delish.com/food/a30200000/cute-aggression-eat-baby-yoda/> [<https://perma.cc/HP3M-8JVA>]; Paul Tassi, *Even Disney Is Talking About That Secret ‘Mandalorian’ Character Now so I Give Up*, FORBES (Nov. 19, 2019, 9:31 AM), <https://www.forbes.com/sites/paultassi/2019/11/19/evendisney-is-talking-about-that-secret-mandalorian-character-now-so-i-give-up/> [<https://perma.cc/JD8G-CG4B>].

207. See, e.g., Zach Vasquez, *Big Deal, He Is: How Baby Yoda Became 2019’s Biggest New Character*, GUARDIAN (Dec. 3, 2019, 11:26 AM), <https://www.theguardian.com/tv-and-radio/2019/dec/03/baby-yoda-the-mandalorian-star-wars> [<https://perma.cc/837N-APXC>]. (“I don’t think it’s overly cynical to suggest that *The Mandalorian*’s creative team intentionally fashioned several of Baby Yoda’s scenes with the express purpose of having them go viral. Initial reports that Disney was actively scrubbing the web of Baby Yoda gifs proved unfounded, and it’s now practically impossible to scroll through any social media platform without being inundated with pics, videos, memes and gifs of the bug-eyed, big-eared tot. Obviously, anything as eye-catchingly adorable as that puppet was always destined to take social media by storm, but still – it’s impossible to look at the shot from Episode 4 of him sipping broth from an oversized mug and not immediately think of the Kermit Sipping Tea meme. (For what it’s worth, that episode’s director, Bryce Dallas Howard, has claimed the response took her by surprise, but you’ll forgive me if I don’t buy that.) Meanwhile, on the merchandising front, Disney surprised everyone by holding back, at the request of Favreau, the announcement of tie-in toys, apparel and accessories so as to avoid spoiling the character’s surprise reveal, although they have since announced the first round of products just in time for Christmas shopping (much of it having already sold out on Cyber Monday).”); see also Aimee Picchi, *Baby Yoda: Why You Can’t Get the Star Wars Toy for the Holidays*, CBS NEWS (Dec. 13, 2019, 8:47 PM), <https://www.cbsnews.com/news/baby-yoda-mandalorian-official-toys-from-hasbro-now-available-but-wont-ship-until-may-2019-12-13/> [<https://perma.cc/9VLE-CHKM>].

208. See Vincent, *Crochet Baby Yoda Round-Up*, KNOT BAD (Dec. 3, 2019), <https://knotbadami.com/crochet-baby-yoda-round-up/> [<https://perma.cc/86AL-LN5S>], where he provides a sampling of the various patterns out as of December 2019, with images. Other examples of patterns include a story picked up by ABC10 News San Diego, Claire Gillespie, *Here’s How You Can Crochet Your Own Baby Yoda*, SCRIPPS MEDIA, <https://www.ktvq.com/>

It was Christmas 2019, and people wanted their Baby Yodas. People started making and selling unofficial Baby Yoda crocheted dolls, and they were incredible. The craze was real.²⁰⁹ One Etsy shop reported having 200 views for Baby Yoda dolls per day.²¹⁰ By January 2020, Disney had their legal team on the case, to put a stop to this—or sort of.²¹¹ The large producers were taken down on Etsy, but one can still find Baby Yoda crocheted dolls on the site even today. Why? Because Disney cannot take them all down and, from a public relations standpoint, it may not be beneficial. The craze helped make Baby Yoda famous. The crocheters contributed to the fame soup. They filled a gap in the market by promoting Baby Yoda. And now? Disney has extensively marketed Baby Yoda—making the crocheters Baby Yoda fame borrowers and soup contributors.²¹² This is fame soup in action.

B. That Photograph of Bernie Set off a Mitten Craze

On January 20, 2021, at President Joe Biden’s inauguration, Senator Bernie Sanders arrived with a mask, warm coat, and large, distinctive, knitted mittens made for him by Vermont school teacher, Jen Ellis.²¹³ Photographer Brendan Smialowski took a photo as Bernie sat in a folding chair with his hands crossed over

how-to-crochet-your-own-baby-yoda/ [https://perma.cc/XRF2-UR7F] (last updated Feb. 5, 2021, 12:35 PM), pointing to a number of patterns on Etsy. This is a mainstream media outlet pointing people how to make unauthorized versions of a copyrighted character. Seriously. It is everywhere. They also note that there is some official merchandise available through Amazon’s Mandalorian shop as well. “But you still have to wait for a plush!” *Id.*

209. See, e.g., Anthony Breznican, *Baby Yoda Has Conquered the World*, VANITY FAIR (Nov. 26, 2019), https://www.vanityfair.com/hollywood/2019/11/the-mandalorian-star-wars-baby-yoda [https://perma.cc/UE4P-2LNQ].

210. Georgia Slater, *Disney Is Reportedly Shutting Down Etsy Vendors Who Are Selling Unofficial Baby Yoda Toys*, PEOPLE (Jan. 17, 2020, 2:18 PM), https://people.com/ho-me/disney-shut-down-etsy-baby-yoda-copyright/ [https://perma.cc/2M2N-M7D8].

211. See Chaim Gartenberg, *Disney Is Hunting Down the Most Popular Baby Yoda Toys on Etsy*, VERGE (Jan. 17, 2020, 8:00 AM), https://www.theverge.com/2020/1/17/21069124/baby-yoda-dolls-etsy-disney-mandalorian-copyright-takedown-enforcement [https://perma.cc/AS67-DUWE].

212. See Jonathan Bailey, *The Battle Over “Baby Yoda”: Well, I’m Not Dumb, But I Can’t Understand . . .*, PLAGIARISM TODAY (Dec. 19, 2019), https://www.plagiarismtoday.com/2019/12/19/the-battle-over-baby-yoda/ [https://perma.cc/RSW3-BZE9].

213. Jo Yurcaba, *Meet the Vermont Teacher Behind Bernie Sanders’ Viral Mittens*, NBC NEWS (Jan. 30, 2021, 5:00 AM), https://www.nbcnews.com/feature/nbc-out/meet-vermont-teacher-behind-bernie-sanders-viral-mittens-n1256206 [https://perma.cc/U6XF-XESU]. “Ellis made the mittens for Sanders in 2016, after he lost the Democratic presidential nomination to Hillary Clinton. She asked Sanders’ daughter-in-law, who owns the preschool Ellis’ daughter attended at the time, to deliver them to the senator.” *Id.* The mittens were actually made from repurposed old wool sweaters. Jen Ellis has actually written a book about the experience. See generally JEN ELLIS, *BERNIE’S MITTEN MAKER: A MEMOIR* (2023). It’s quite a lovely account.

his chest.²¹⁴ The photograph went viral and instantly became an incredibly popular meme.

But it was also the mittens that attracted quite a lot of attention. Ellis received thousands of requests for mittens. Too many requests. She did make three pairs, two that were donated to charities, one called Outright Vermont, an LGBTQ+ youth group, and the other to Passion 4 Paws, a dog rescue group, with the third pair placed on eBay to auction off to help with her kid's college fund.²¹⁵ But once again, the Ravelry, Etsy, and individual knitters filled the gap with mittens for sale and their pattern as well.²¹⁶ The Vermont Teddy Bear Company asserted that it had mittens designed "by our favorite teacher, Jen Ellis," so they were the authentic, authorized version.²¹⁷ And of course, makers also made crochet dolls based on the photograph, one of them auctioned off for \$20,000 to benefit Meals on Wheels America.²¹⁸ Bernie's campaign organization ended up having merchandise made with the photograph, too! Sweatshirts, T-shirts, and stickers. In fact, they were able to raise over \$1.8 million for charitable organizations in Vermont.²¹⁹ And if you think the photographer got left out of the story, do not fear. First, the photographer works for the news agency Agence France-Presse, so he might not even

214. Reed Dunlea, *The Photographer Behind the Bernie Sanders Chair Meme Tells All*, ROLLING STONE (Jan. 22, 2021), <https://www.rollingstone.com/culture/culture-news/bernie-sanders-photographer-1118174/> [<https://perma.cc/753M-TTEH>].

215. Yurcaba, *supra* note 213.

216. See, e.g., *Bernie Mittens, Socks and Sweater Patterns*, MOTHER KNITTER, <https://motherknitter.com/bernie-mittens-socks-and-sweater-patterns/> [<https://perma.cc/Z8VS-5DZM>] (last visited Oct. 25, 2024); Marina Hayes, *Another Bernie Mitten*, RAVELRY (Feb. 2021), <https://carts.ravelry.com/patterns/library/another-bernie-mitten> [<https://perma.cc/L2TU-SPAY>]; *Knit or Crochet Your Own Bernie Sanders' Mittens*, TOP CROCHET PATTERNS, <https://www.topcrochetpatterns.com/blog/knit-your-own-bernie-sanders-mittens> [<https://perma.cc/8659-U8D3>] (last visited Oct. 25, 2024).

217. *Vermont Mittens from the Vermont Mitten Co.*, VT. TEDDY BEAR, <https://vermontteddybear.com/products/vermont-mittens-from-the-vermont-mitten-co-1-pair> [<https://perma.cc/Y9EZ-C66A>] (last visited Oct. 25, 2024). They now sell Ellis's book about the mittens as well as the mittens themselves. *Bernie's Mitten Maker Book*, by Jen Ellis, VT. TEDDY BEAR, <https://vermontteddybear.com/products/bernie-mitten-maker-book-by-jen-ellis?> [<https://perma.cc/B58Z-88JF>] (last visited Oct. 25, 2024).

218. *Corpus Christi Woman Sells Bernie Doll for Over \$20k, Donates to Charity*, NBC 5 DALL.-FORT WORTH, <https://www.nbcdfw.com/news/local/texas-news/woman-sells-bernie-doll-for-over-20k-donates-to-charity/2536148/> [<https://perma.cc/8KBF-GKT6>] (last updated Jan. 28, 2021, 8:23 AM).

219. Kelly McCleary & Amanda Jackson, *Bernie Sanders Raises \$1.8 Million for Charity with Inauguration Meme-Inspired Merchandise*, CNN (Jan. 27, 2021, 10:13 PM), <https://www.cnn.com/2021/01/27/politics/bernie-sanders-sweatshirt-meme-fundraising-total-trnd/index.html> [<https://perma.cc/VA3H-A63F>]. In the article, Bernie is quoted: "Jane and I were amazed by all the creativity shown by so many people over the last week, and we're glad we can use my internet fame to help Vermonters in need." *Id.*

be the copyright holder, depending on his employment situation.²²⁰ You can license the image from Getty Images and the credit reads: “Photo by BRENDAN SMIALOWSKI/AFP via Getty Images.”²²¹ This is fame soup in action.

C. *Everyone Wants to Wear Harry Styles’s Knitted Cardigan*

Harry Styles is one of the biggest musicians in the world.²²² Originally from the boy band *One Direction*, he is known for his colorful and crazy fashion. On tour, he wore a knitted patchwork cardigan while performing on *The Today Show*.²²³ And then it went viral on TikTok. Everyone wanted to make the sweater. People learned to knit just to make this cardigan.²²⁴ It was everywhere. The cardigan was designed by British fashion label JW Anderson, and it originally sold for over \$1,560.²²⁵ What did the designer do when everyone wanted to make the pattern? “I am so impressed and incredibly humbled by this trend and everyone knitting the cardigan. I really wanted to show our appreciation so we are sharing the pattern with everyone. Keep it up!”²²⁶

So, here is a situation again where the copyright holder embraces the viral trend, and even offers the pattern for free. It is how our world sometimes works. The publicity garnered by a free pattern is more important. Locking up culture behind a paywall is

220. See Tanner Curtis, *Wire Photographer Spotlight: Political Perspective with Brendan Smialowski*, TIME (Oct. 8, 2013, 4:00 AM), <https://time.com/3803012/wire-photographer-spotlight-political-perspective-with-brendan-smialowski/> [<https://perma.cc/48WQ-VN82>].

221. Bernie Mittens, GETTYIMAGES, <https://www.gettyimages.com/photos/bernie-mittens> [<https://perma.cc/9UEB-RGV4>] (last visited Nov. 12, 2024).

222. Harry Styles was named the No. 2 Pop Star by Billboard in 2022. See Rania Aniftos, *Billboard’s Greatest Pop Stars of 2022*, BILLBOARD (Dec. 16, 2022), <https://www.billboard.com/music/pop/harry-styles-greatest-pop-stars-2022-1235188132/> [<https://perma.cc/PBV7-MUAQ>].

223. Kati Chitrakorn, *How JW Anderson’s Cardigan Went Viral on TikTok*, VOGUE BUS. (July 2, 2020), <https://www.voguebusiness.com/companies/how-jw-anderson-harry-styles-cardigan-went-viral-on-tiktok> [<https://perma.cc/2QCR-6B6J>].

224. See *#harrystylesweater*, TIKTOK, <https://www.tiktok.com/tag/harrystylesweater> [<https://perma.cc/J6UX-5L46>] (last visited Nov. 12, 2024).

225. Darcy Schild, *TikTok Users Sparked a Massive Trend Recreating Harry Styles’ Colorful Cardigan, so the Sweater Designer Responded by Sharing Detailed Sewing Instructions*, BUS. INSIDER INDIA (July 4, 2020, 1:39 PM), <https://www.businessinsider.in/thelife/news/tiktok-users-sparked-a-massive-trend-recreating-harry-styles-colorful-cardigan-so-the-sweater-designer-responded-by-sharing-detailed-sewing-instructions/articleshow/76791281.cms> [<https://perma.cc/R659-59QC>]. Note that this story is coming out of *Business Insider India*. The TikTok sweater was a worldwide phenomenon.

226. *JW Anderson Colour Block Patchwork Cardigan / Knit Pattern*, JW ANDERSON, <https://www.jwanderson.com/us/cardigan-pattern> [<https://perma.cc/XZM9-8UHN>] (last visited Nov. 25, 2024).

not always the answer in our Internet-filled, engaged world. We want to make that cardigan we saw on *The Today Show*, and the designer, in this case, understood. The pattern is available for free on the designer's website, and a tutorial too!²²⁷ Fame soup in action once again. The original work—the sweater—is worn by one of the most famous musicians—and then TikTok took it viral; others started making the sweater; others learned to knit just to make the sweater; and the designer released the pattern and embraced the making of the sweater.

VIII. A SUMMING UP

Copyright provides the tools for copyright holders and fans to coexist and play in the same soup, and that soup has grown in the years to be part of the status quo—how original works become famous requires interaction and creative engagement with fans. We have tools like permissions, fair use, the public domain, and perhaps one day, the *Rogers* test. We also see content holders and platforms recognizing the benefit of fans celebrating, and we are recognizing the commercial boundaries, which are different for each content holder.

This Article attempts to think about the concept of fame within copyright from a variety of spaces, and ways copyright regulates the use, creation, and borrowing of fame. Fans' enthusiasm helps create fame. Again, they are the Swifties, the Beatles' screaming girls, the musical-goers, and the devoted fans of *Smiling Friends*. Which is the soup, and which is the art? One could argue the original work is the soup, and the fans' reactions and enthusiasm is the art. And together, the work is transformed into magic well beyond the author's original imagination. The original Baby Yoda was the soup; what the crocheters did was art. The original mittens were the soup; what the world did with the mittens was art. The original sweater was soup; what TikTok did after Harry Styles wore the sweater was art.

The question is what role copyright plays in making the soup. Nonprotectable elements, ideas, and public domain elements help. Fair use helps. Content owners recognizing that fans' creations help promote and lift up the original work helps. But in the end, we also need the law itself to step in, and perhaps this is the *Rogers* test. If the fan work is expressive and no one would confuse it as a source identifier or substitute for the original, could the fan know

227. *Id.*

that there would be no repercussions for their work? Right now, one can only hope that the content owner is enlightened on the concept of soup, and the benefits of fan-created works (e.g., they have read the most recent YouTube report on fandoms). But that does not really feel like enough. Works under copyright often look like identifiable goods, and we are clever enough to understand when something is fan-based and when it is related to the original. When it is not, the fan has crossed a line, and that line looks more like competing with the original (*Andy Warhol*) as well as confusing to the source identifier, like trademark. And that is what has been developed—using private ordering systems on platforms like ContentID on YouTube and Rights Manager on Roblox. But in the end, should we not also have a means of understanding that as part of copyright law? *Rogers* might just help with the making of the soup.

IX. APPENDIX: LIST OF MUSICALS REVIEWED
FROM THE YEARS 2023–2024

We reviewed musicals that were playing in the years 2023 and 2024 using the *Broadway Now and Next* website for data, along with other websites from each show.²²⁸

A. *New Musicals 2023–2024*

There were twenty-nine musicals that were on Broadway during 2023 and 2024 playing in the years 2023 and 2024. We counted musicals that started in 2022 but were eligible for Tonys in 2023. We therefore spanned the 2022–2023, 2023–2024, and 2024–2025 seasons. If a work was not going to be publicly available until 2025 (in the 2024–2025 season), we did not include it.

Musical	Website	Preview	Opening	Closing	Information
<i>& Juliet</i>	https://andjulietbroadway.com/ [https://perma.cc/6SXB-WEDD]	10/28/22	11/17/22	Still running as of July 2024.	This is a jukebox musical based on the work of pop writer Max Martin, famous for <i>Since U Been Gone</i> , <i>Roar</i> , <i>Baby One More Time</i> , <i>Larger Than Life</i> , <i>That's The Way It Is</i> , and more, combined with a rewriting of Shakespeare's <i>Romeo and Juliet</i> . Nominated for Best New Musical 2023.
<i>A Beautiful Noise: The Neil Diamond Musical</i>	https://abeautifulnoisethemusical.com/ [https://perma.cc/PY5T-V4TR]	11/2/22	12/4/22	6/30/2024 (on tour as of 2024)	This is a jukebox musical, based on a famous songwriter/singer.
<i>A Strange Loop</i>	https://strangeloostran.co/ [https://perma.cc/DF3Q-LVHR]	4/14/22	4/26/22	1/15/23	Produced by Barbara Whitman, as well as Benj Pasek, Justin Paul, Jennifer Hudson, RuPaul Charles, Marc Platt, Megan Ellison of Annapurna Pictures, Don Cheadle, Frank Marshall, James L. Nederlander, Alan Cumming, Ilana Glazer, Mindy Kaling, and Billy Porter. Tony Winner for Best New Musical 2022.
<i>A Wonderful World: The Louis Armstrong Musical</i>	https://www.louisarmstrongmusical.com/ [https://perma.cc/YK6J-GZAT]	10/16/24	11/11/24		Jukebox musical based on a famous musician.

²²⁸ *Current & Upcoming Broadway Shows*, BROADWAY NOW & NEXT, <https://www.broadwaynowandnext.com/> [<https://perma.cc/73FR-4QQM>] (last visited Nov. 25, 2024).

Musical	Website	Preview	Opening	Closing	Information
<i>Almost Famous</i>	https://playbill.com/product/almost-famous-broadway-2022 [https://perma.cc/LQ4B-RWHX]	10/3/22	11/3/22	1/8/23	This is based on the 2000 film of the same name.
<i>Back to the Future</i>	https://playbill.com/product/back-to-the-future-broadway-winter-garden-theatre-2023 [https://perma.cc/XY9L-YF82]	6/30/23	8/3/23	Still running as of July 2024	Based on the 1985 movie.
<i>Bad Cinderella</i>	https://badcinderellabroadway.com/ [https://perma.cc/SPU3-MSSY]	2/17/23	3/23/23	6/4/23	This is a musical by Andrew Lloyd Webber and based on a rewriting of the fairytale <i>Cinderella</i> .
<i>Days of Wine and Roses</i>	https://www.broadway.com/shows/days-of-wine-and-roses/ [https://perma.cc/2J66-6FT6]	1/6/24	1/28/24	3/31/24	Based on 1962 film.
<i>Death Becomes Her</i>	https://deathbecomesher.com/ [https://perma.cc/ZPL6-AQBF]	10/23/24	11/21/24		Based on 1992 film.
<i>Harmony</i>	https://harmoneyanewmusical.com/ [https://perma.cc/Y52A-JJVR]	10/18/23	11/13/23	2/4/24	Music by Barry Manilow, about The Comedian Harmonists.
<i>Hell's Kitchen</i>	https://www.hellskitchen.com/ [https://perma.cc/E2KQ-247Y]	3/28/24	4/20/24	Still running as of July 2024	Musical by famous singer Alicia Keys.
<i>Here Lies Love</i>	https://herelieslovebroadway.com/ [https://perma.cc/BKE3-LR6S]	6/17/23	7/20/23	11/26/23	Jukebox musical with music by David Byrne and Fatboy Slim.
<i>How to Dance in Ohio</i>	https://howtodanceinohiomusical.com/ [https://perma.cc/9VN9-DQHE]	11/15/23	12/10/23	2/11/24	Based on a true story and 2015 documentary.
<i>Illinoise</i>	https://illinoiseonstage.com/ [https://perma.cc/BH74-55B5]	No preview	4/24/24	8/10/24	Jukebox musical based on the album <i>Illinoise</i> .

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Musical	Website	Preview	Opening	Closing	Information
<i>Lempicka</i>	https://playbill.com/product/lempicka-broadway-longacre-theatre-2024 [https://perma.cc/8B7Q-WJYS]	3/19/24	4/24/24	5/19/24	Based on the life of a Polish painter.
<i>Kimberly Akimbo</i>	https://kimberlyakimbothemusical.com/ [https://perma.cc/5EQY-GUNR]	10/12/22	11/10/22	4/28/24 (on tour as of 2024)	Tony Winner of Best Musical, 2023.
<i>KPOP</i>	https://playbill.com/product/kpop-broadway-circle-in-the-square-theatre-2022 [https://perma.cc/M3FK-6Q38]	10/13/22	11/27/22	12/11/22	New Musical. Based on various KPOP musical groups, including casting KPOP idols in the show.
<i>Maybe Happy Ending</i>	https://www.maybehappyending.com/ [https://perma.cc/42UM-UETU]	10/16/24	11/12/24		
<i>New York, New York</i>	https://en.wikipedia.org/wiki/New_York,_New_York_(musical) [https://perma.cc/5FUS-ZADM]	3/24/23	4/26/23	7/30/23	Based on the famous 1977 film, <i>New York, New York</i> , with music by the famous Broadway duo John Kander and Fred Ebb, along with additions by Lin-Manuel Miranda. Tony Nominated for Best Musical in 2023.
<i>Once Upon a One More Time</i>	https://en.wikipedia.org/wiki/Once_Upon_a_One_More_Time [https://perma.cc/K8HD-US27]	5/13/23	6/22/23	9/3/23	Jukebox musical based on the music of Britney Spears.
<i>Shucked</i>	https://shuckedmusical.com/ [https://perma.cc/B34Z-KRMQ]	3/8/23	4/4/23	1/14/24 (with National Tour beginning in fall 2024)	New Musical. Music written by country musicians Brandy Clark and Shane McAnally. New Musical. Tony Nominated for Best New Musical in 2023.
<i>Some Like It Hot</i>	https://someiketothmusic.com/ [https://perma.cc/U8CH-YYGR]	11/1/22	12/11/22	12/30/23 (with National Tour 2024)	Based on 1959 film, <i>Some Like It Hot</i> . Nominated Best Musical for 2023.
<i>Suffs</i>	https://suffsmusical.com/ [https://perma.cc/S4AA-TUCK]	3/26/24	4/18/24	Still running as of July 2024	Co-producers are Hillary Clinton and Malala Yousafzai.
<i>Swept Away</i>	https://sweptawaymusical.com/ [https://perma.cc/UC78-ZVUT]	10/29/24	11/19/24		Jukebox musical by Avett Brothers.

Musical	Website	Preview	Opening	Closing	Information
<i>Tammy Faye</i>	https://tammyfayebway.com/ [https://perma.cc/XTR2-RQEB]	10/19/24	11/14/24		Famous subject, and the music is by Elton John.
<i>The Great Gatsby</i>	https://broadwaygatsby.com/ [https://perma.cc/W2T4-HVKL]	3/29/24	4/25/24	Still running as of July 2024	Based on F. Scott Fitzgerald's 1925 novel, and multiple film versions.
<i>The Heart of Rock and Roll</i>	https://playbill.com/product/the-heart-of-rock-and-roll-broadway-james-earl-jones-theatre-2024 [https://perma.cc/GS6H-CEWS]	3/29/24	4/22/24	6/23/24	A new story inspired by the songs of Huey Lewis and the News.
<i>The Notebook</i>	https://notebookmusical.com/ [https://perma.cc/L49H-WDWW]	2/10/24	3/14/24	12/15/24	Based on the 1995 novel by Nicholas Sparks and the 2004 film, and music by Ingrid Michaelson.
<i>The Outsiders</i>	https://outsidersmusical.com/ [https://perma.cc/LD3K-VGJY]	3/16/24	4/11/24	Running as of July 2024	Based on the S.E. Hinton 1967 novel and the Francis Ford Coppola 1983 film.
<i>Water for Elephants</i>	https://www.waterforelephantsmusical.com/ [https://perma.cc/S9KF-HJWG]	2/24/24	3/21/24	Running as of July 2024	Based on the 2006 novel by Sara Gruen and the 2011 film.

B. Continuing Musicals and Musical Revivals

Musical	Website	Preview	Opening	Closing	Information
1776	https://www.roundabouttheatre.org/get-tickets/2022-2023-season/1776/ [https://perma.cc/G2PY-FTGN]	9/16/22	10/6/22	1/8/23	<i>Revival.</i>
<i>Aladdin</i>	https://www.aladdinthemusical.com/ [https://perma.cc/W395-HCMG]	2/26/14	3/20/14	Still running as of July 2024	<i>Continuing.</i> Based on Disney's 1992 animation film.
<i>Bob Fosse's Dancin'</i>	https://playbill.com/article/bob-fosses-dancin-announces-closing-date-on-broadway [https://perma.cc/8PRT-MBPU]	3/2/23	3/19/23	5/14/23	<i>Revival.</i> Bob Fosse was famous dancer, choreographer and director.

Musical	Website	Preview	Opening	Closing	Information
<i>Cabaret at the Kit Kat Club</i>	https://kitkatclub/cabaret-broadway/ [https://perma.cc/64S6-EDRD]	4/1/24	4/21/24	Still running as of July 2024	<i>Revival.</i> Kander and Ebb musical.
<i>Camelot</i>	https://www.lct.org/shows/camelot/ [https://perma.cc/8DAX-97EE]	3/9/23	4/13/23	7/23/23	<i>Revival.</i> Music and lyrics by Lerner and Loewe and made famous by the 1967 movie version.
<i>Chicago</i>	https://chicagohemusical.com/ [https://perma.cc/2Y85-Q9TE]	10/23/96	11/14/96	Still running as of July 2024	<i>Continuing revival.</i> Kander and Ebb musical.
<i>Funny Girl</i>	https://funnygirlonbroadway.com/ [https://perma.cc/U348-56ZE]	3/26/22	4/24/22	9/3/23	<i>Revival.</i>
<i>Gutenberg! The Musical!</i>	https://gutenbergbroadway.com/ [https://perma.cc/7U36-5MJ8]	9/15/23	10/12/23	1/28/24	<i>Broadway revival of an off-Broadway show.</i> Based on the life of Johannes Gutenberg, inventor of the printing press.
<i>Gypsy</i>	https://gypsybroadway.com/ [https://perma.cc/92TM-UH5K]	11/21/24	12/19/24		<i>Revival.</i>
<i>Hadestown</i>	https://hadestown.com/ [https://perma.cc/PM8G-GM5C]	3/22/19	4/17/19	Still running as of July 2024	<i>Continuing.</i> Based on Greek mythology.
<i>Hamilton</i>	https://hamiltonmusical.com/new-york/ [https://perma.cc/6W8Y-VVTK]	7/13/15	8/6/15	Still running as of July 2024	<i>Continuing.</i> Based on a biography by Ron Chernow, and created by Lin-Manuel Miranda who was famous, at that point, for <i>In the Heights</i> .
<i>Into the Woods</i>	https://www.broadway.com/shows/into-the-woods/ [https://perma.cc/8CX3-XT85]	6/28/22	7/10/22	1/8/23	<i>Revival.</i> Stephen Sondheim musical.
<i>Merrily We Roll Along</i>	https://merrilyonbroadway.com/ [https://perma.cc/2K4B-2N83]	9/19/23	10/10/23	7/7/24	<i>Revival.</i> Stephen Sondheim revival with Daniel Radcliffe, Jonathan Groff, and Lindsay Mendez.
<i>MJ</i>	https://newyork.mjthemusical.com/ [https://perma.cc/XDR9-DD3G]	12/6/21	2/1/22	Still running as of July 2024	<i>Continuing.</i> Music and story of Michael Jackson.
<i>Moulin Rouge!</i>	https://moulinrougemusical.com/new-york/home/ [https://perma.cc/A4WC-XZ9F]	6/28/19	7/25/19	Still running as of July 2024	<i>Continuing.</i> Jukebox musical based on the 2001 Baz Luhrmann film.

Musical	Website	Preview	Opening	Closing	Information
<i>The Music Man</i>	https://www.broadway.com/shows/music-man/ [https://perma.cc/W2L3-DXDL]	12/20/21	2/10/22	1/15/23	
<i>Once Upon a Mattress</i>	https://onceuponamattressnyc.com/ [https://perma.cc/NK56-UVQJ]	7/31/24	8/12/24	11/30/24	<i>Revival.</i> Based on the <i>Princess and the Pea</i> fairytale.
<i>Parade</i>	https://playbill.com/production/parade-broadway-bernard-b-jacobs-theatre-2023 [https://perma.cc/6CH3-VE5T]	2/21/23	3/16/23	8/6/23 (with National Tour beginning 2025)	<i>Revival.</i> Dramatization of 1913 trial and imprisonment of Leo Frank.
<i>Six</i>	https://sixonbroadway.com/ [https://perma.cc/GJ6U-QB2N]	9/17/21	10/3/21	Still running as of July 2024	<i>Continuing.</i> Based on the story of Henry VIII's six wives.
<i>Monty Python's Spamalot</i>	https://spamalothemusical.com/ [https://perma.cc/UG96-7PLX]	10/31/23	11/16/23	4/7/24	<i>Revival.</i> Based on 1975 film <i>Monty Python and the Holy Grail</i> .
<i>Sunset Boulevard</i>	https://sunsetbvdubroadway.com/ [https://perma.cc/2S3Z-34T3]	9/28/24	10/20/24		<i>Revival.</i> Based on 1950 film.
<i>Sweeney Todd</i>	https://sweeneytoddbroadway.com/ [https://perma.cc/4DGS-4RPP]	2/26/23	3/26/23	5/5/24	<i>Revival.</i> Stephen Sondheim musical.
<i>The Book of Mormon</i>	https://bookofmormonbroadway.com/ [https://perma.cc/P6MD-9WYC]	2/24/11	3/24/11	Still running as of July 2024	<i>Continuing.</i> Created by the <i>South Park</i> team, Trey Parker and Matt Stone, along with Robert Lopez.
<i>The Lion King</i>	https://www.lionking.com/ [https://perma.cc/SX38-4EAG]	10/15/97	11/13/97	Still running as of July 2024	<i>Continuing.</i> Based on Disney's 1994 animated film.
<i>The Who's Tommy</i>	https://tommythemusical.com/ [https://perma.cc/BZT9-CZHD]	3/8/24	3/28/24	7/21/24	<i>Revival.</i> Based on the 1975 film <i>Tommy</i> .
<i>The Wiz</i>	https://wizmusical.com/ [https://perma.cc/E5XT-DAFV]	3/29/24	4/17/24	8/18/24	<i>Revival.</i> Based on the 1978 film and also the original <i>Wizard of Oz</i> .
<i>Wicked</i>	https://wickedthemusical.com/tickets/#broadway [https://perma.cc/X766-5RJC]	10/8/03	10/30/03	Still running as of July 2024	<i>Continuing.</i> Based on Gregory Maguire's 1995 novel, <i>Wicked</i> , and L. Frank Baum's 1900 novel, <i>The Wonderful Wizard of Oz</i> , as well as the 1939 film adaptation, <i>The Wizard of Oz</i> .