

## Bloodsucking Copyrights

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# Response

## BLOODSUCKING COPYRIGHTS

ANN BARTOW\*

Some bloodsuckers live off the life sustaining fluids of involuntary hosts<sup>1</sup> and leave behind diseases or venom.<sup>2</sup> Fleas, ticks, bedbugs, and mosquitoes are all bloodsuckers that are best avoided. Others, like the leech, suck blood in ways that can be very helpful to a host, promoting blood flow and healing.<sup>3</sup> Vampires are fictional, sentient bloodsuckers that have populated various entertainment genres for centuries. Copyrights, too, can suck blood metaphorically in productive and destructive ways, or simply suck, period, when they senselessly impede free-flowing veins of information. And though they are not (yet) immortal, copyrights last a very long time.<sup>4</sup>

In *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, Professor Jacqueline D. Lipton lays out the tensions between copyright law and the online diffusion of culture, compellingly illustrating these tensions with examples taken from the popular *Twilight* books and movies.<sup>5</sup> To engage in rather extreme reductivism, Professor Lipton's fine article chronicles the legal and ethical complications posed by the desire of copyright holders to cultivate a large, enthusiastic, and profitable fan base while simultaneously retaining artistic and distributive control over their creative works.<sup>6</sup>

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\* Professor of Law, University of South Carolina School of Law. The author thanks the *Maryland Law Review* for the opportunity to write and publish this Response with Professor Jacqueline D. Lipton's interesting Article on copyright law scholarship.

1. See, e.g., *Top 10 Bloodsuckers: Vampire Finches*, ANIMAL PLANET (Nov. 19, 2009), <http://animal.discovery.com/videos/top-10-bloodsuckers>.

2. See, e.g., Derby Cox, *Don't Let Ticks Ruin Your Fun This Summer*, MYRTLE BEACH SUN NEWS, June 13, 2009, at E7 (describing ticks as "tiny bloodsuckers" that "can be chockfull of maladies including Lyme disease, blood parasites, Rocky Mountain Spotted Fever, relapsing fever and Colorado Tick Fever").

3. *Bloody Suckers: Leech Therapy*, NATURE, <http://www.pbs.org/wnet/nature/bloody-suckers/leech.html> (last visited Sept. 19, 2010).

4. See 17 U.S.C. §§ 301–305 (2006) (outlining provisions for the duration of the copyright).

5. Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1 (2010).

6. See generally *id* at 1–6.

This Response hungrily extracts and feeds upon a nutritional portion of its vital life forces.

## I. NO WOODEN STAKES OR SILVER BULLETS

Copyright law is all about control: control over creative content, control over distribution, and control over cultural diffusion.<sup>7</sup> Professor Lipton identifies online copyright conflicts that can be resolved by copyright law and other copyright conflicts that can be effectively addressed only by a culture of norm enforcement, if at all.<sup>8</sup> One of her most interesting observations concerns the roles that intentions—and assumptions about intentions—play in the legal and normative regulation of non-permissive uses of copyrighted works.<sup>9</sup> Copyright law has been structured statutorily and through judicial opinions to grant copyright holders “heads I win, tails you lose” prerogatives with respect to intentions, both those of the accused infringer and those of the copyright holder herself. Pure motives do not protect accused defendants<sup>10</sup> any better than garlic or holy water would<sup>11</sup> while bad motives

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7. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517 (2009) (explaining the central role of control in copyright law (citing Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT Soc'y U.S.A. 513, 524 (1999))).

8. See generally Lipton, *supra* note 5, at 6.

9. *Id.* at 14–15, 19, 23, 47–50.

10. See *Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995) (noting that “[d]irect infringement does not require intent or any particular state of mind”); Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 594 n.65 (2004) (“Courts have held that copyright infringement is not truly strict liability, unlike patent infringement, but requires at least intent to copy, although not intent to infringe.”); Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 405–06 (2002) (explaining that (1) a court can reduce statutory damages “to account for the innocence of the defendant,” but the infringer must prove that she did not know and had no reason to think her acts were infringing, and (2) the efficacy of the provision is “likely diluted” because the Copyright Act does not define “innocence” or “willfulness”); Carissa L. Alden, Note, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729, 1730 (2008) (“Copyright law in the United States dictates that an author’s intention is irrelevant to a determination of whether she copied from an earlier author; subconscious copying is as actionable as conscious copying.”); see also *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997) (“The Copyright Act forbids only copying; if independent creation results in identical work, the creator of that work is free to sell it.”); *Pritikin v. Liberation Publ'ns, Inc.*, 83 F. Supp. 2d 920, 923 (N.D. Ill. 1999) (explaining that infringement is not strict liability but requires at least intent to copy).

11. *The Top Ten Vampire Myths*, FED. VAMPIRE & ZOMBIE AGENCY, <http://www.fvza.org/vmyths.html> (last visited Sept. 19, 2010) (noting that garlic does not repel vampires nor does holy water “burn[ ] the skin and flesh of vampires”).

are practically presumed if there are similarities between two copyrighted works.<sup>12</sup>

Any time fair use is raised to explain or excuse a potentially infringing act,<sup>13</sup> intent is interjected into the fact-finding whenever the judge evaluates the nature and character of the use pursuant to the analytical framework of Section 107.<sup>14</sup> Rarely does the alleged infringing defendant decline to assert fair use. When the motives of an accused infringer in a civil dispute are seemingly innocent—or even selfless and charitable—the copyright holder can correctly point out that copyright infringement is premised on strict liability.<sup>15</sup> As such, the defendant's intentions are not relevant, at least with respect to the liability question.<sup>16</sup> When the purpose of a non-permissive use of copyrighted material seems dishonest or unethical (such as an attempt to avoid remitting royalties), a copyright holder can leverage

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12. *See supra* note 10.

13. Section 107 of the Copyright Act expressly states that a fair use is not an infringing use, which suggests that fair use is an explanation for a non-permissive use that would preclude a finding of infringement if successfully established. *See* 17 U.S.C. § 107 (2006). Some courts and scholars, however, prefer to characterize fair use as an affirmative defense that excuses actions that are otherwise infringing. *See, e.g.,* *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010) (explaining the Eleventh Circuit's treatment of fair use as an affirmative defense based on binding Supreme Court precedent (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994))); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 551 (2008) (noting that Section 107 establishes fair use as an affirmative defense). For an extensive discussion on how the difference is more than merely linguistic, see Pamela Jones, *Fair Use: Affirmative Defense or Right? Do I Have to Choose?*, GROKLaw (Sept. 9, 2007, 1:40 PM), <http://www.groklaw.net/article.php?story=20070907195435565>.

14. 17 U.S.C. § 107; *see, e.g.,* *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 379, 384–85 (S.D.N.Y. 1993) (finding that a sculpture modeled on a copyrighted cartoon character was commercial in nature and did not qualify for the fair use defense because the sculptor sold two copies of the art for \$250,000, indicating that he intended to profit from his use).

15. Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1514 (2009) (noting that “[c]opyright law . . . effectively establishes a strict liability regime”). In my view, copyright infringement is correctly construed as a tort rather than as a theft of property, but this view is contested by others. *See, e.g.,* William Patry, *Does It Matter if Copyright is Property?*, PATRY COPYRIGHT BLOG (June 20, 2006, 9:57 AM), <http://williampatry.blogspot.com/2006/06/does-it-matter-if-copyright-is.html> (explaining that “if copyright is just a tort,” then it might lead “to consideration of things in a different light, one that involves more of the balancing of interests” (emphasis added)). This debate is sometimes characterized as “property rules versus liability rules.” Lawrence B. Solum, *Legal Theory Lexicon: Property Rules and Liability Rules*, LEGAL THEORY BLOG (Sept. 2, 2007, 7:20 PM), <http://lsolum.typepad.com/legaltheory/2007/09/legal-theory-le.html>.

16. The infringer's intentions are expressly considered when a statutory damages award is calculated, and intentions probably also play a role in the determination of actual damages. *See* *Playboy Enters. Inc. v. Sanfilippo*, 46 U.S.P.Q.2d (BNA) 1350, 1354–56 (S.D. Cal. 1998) (discussing the factors courts consider in determining willfulness and its relationship to enhanced statutory damages and attorney's fees).

evidence of bad intent in both the liability and damages contexts,<sup>17</sup> driving a stake through the heart of “substantially similar”<sup>18</sup> and “unauthorized derivative”<sup>19</sup> works regardless of their artistic merit or cultural importance.

## II. HYPNOTIC CONTROL<sup>20</sup>

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>21</sup> the Supreme Court ruled that a copyright holder’s right of first publication was so important that even a quantitatively small, non-permissive use that arguably falls within the news reporting and commentary categories of fair use (which is expressly enumerated in Section 107 to emphasize copyright’s subordination to the First Amendment)<sup>22</sup> could be infringing.<sup>23</sup> Congress tempered this startling conclusion by adding a sentence to Section 107, which states that the published or unpublished nature of a work should not be dispositive with respect to fair use.<sup>24</sup> But, it did not legislatively overrule the Court’s holding, which remains Undead such that courts may legitimately consider whether a work has been published before a non-permissive use of it is made.<sup>25</sup>

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17. See, e.g., Mike Masnick, *Judge Says Damages In Tenenbaum Case Were “Unconstitutionally Excessive,”* TECHDIRT (July 9, 2010, 11:48 AM), <http://www.techdirt.com/articles/20100709/11305410154.shtml> (discussing a judge’s ruling that damages awarded by a jury in a music file-sharing case were “unconstitutionally excessive”); Jonathan Saltzman, *Judge Slashes Penalty in Illegal Music Downloading Case*, BOSTON.COM (July 9, 2010), [http://www.boston.com/news/local/breaking\\_news/2010/07/judge\\_slashes\\_p.html](http://www.boston.com/news/local/breaking_news/2010/07/judge_slashes_p.html) (same).

18. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 412 (4th ed. 2005) (“In an action for copyright infringement, plaintiff must prove . . . that defendant copied a sufficient amount of the protectible elements of the plaintiff’s copyrighted work as to render the two works substantially similar.”).

19. *Id.* at 299 (noting that the copyright holder’s “adaptation right is infringed when a third party makes an unauthorized derivative work in which a pre-existing copyrighted work is recast, reformed, or adapted,” such as “a translation, abridgement, musical arrangement, motion picture version, or dramatization without the consent of the copyright owner” (footnote omitted)).

20. Terry O’Brien, *Esoteric Hypnotic Vampires*, TRANSPARENT HYPNOTIST (May 31, 2008, 5:52 AM), <http://theunwindingpath.com/transhypno/2008/05/31/esoteric-hypnotic-vampires/> (“Vampires are some of the most popular supernatural characters, and one of their most salient features (aside from living forever) is their hypnotic power.”).

21. 471 U.S. 539 (1985).

22. 17 U.S.C. § 107 (2006).

23. *Harper & Row*, 471 U.S. at 549, 560–69.

24. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified as amended at 17 U.S.C. § 107).

25. *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987). The court stated: “The fact that a work is unpublished is a critical element of its “nature.” *Harper & Row*, [471 U.S. at 564]. *Salinger’s* letters are unpublished, and they have not lost that attribute by their placement in libraries where access has been explicitly

Consequently, the copyright holder's motives and actions with respect to publication of a particular work become extremely important. Copyright law has been invoked to facilitate restrictive control of the distribution of letters that the writer wanted to keep private,<sup>26</sup> but it has also been deployed to extract compensation for the creation of unauthorized copies of a work that have intentionally and robustly been placed in the cultural circulatory system.<sup>27</sup>

Sometimes authors write with an expectation that their work will be commercially exploited. Stephenie Meyer penned the *Twilight* novels with mainstream publication in mind. Other authors may write without contemplating publication or with a preference against it. For example, Stephenie Meyer may keep a scheduling journal to help her keep track of her obligations and deadlines, which she assumes would never interest her readership and thus not bother to publish. She may also keep a diary in which she records very personal observations that she wishes to keep private and unpublished. Copyright law

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made subject to observance of at least the protections of copyright law. In considering this second factor, we encounter some ambiguity arising from the Supreme Court's observation that "the *scope* of fair use is narrower with respect to unpublished works." *Id.* (emphasis added). This could mean either that the circumstances in which copying will be found to be fair use are fewer in number for unpublished works than for published works or that the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works. Some support for the latter view can be derived from the statement in *Harper & Row* that, though "substantial" quotations might be used in a review of a published work, the author's right to control first publication weighs against "such use" prior to publication. *Id.* However, we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower "scope" seems to refer to the diminished *likelihood* that copying will be fair use when the copyrighted material is unpublished.

*Id.*

26. See, e.g., *id.*

27. Music file-sharing cases are a good example of this phenomenon. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–21, 941 (2005) (holding that the companies that created the Morpheus and Grokster file-sharing systems may be secondarily liable for copyright infringement by users of their systems if the companies distributed their systems "with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement"); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645, 653, 656 (7th Cir. 2003) (affirming an injunction against Aimster, "one of a number of enterprises . . . that have been sued for facilitating the swapping of digital copies of popular music, most of it copyrighted, over the Internet"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) ("We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.").

cares about her authorial intentions and desires and will punish those who unfairly interfere with her ability to control her writings.<sup>28</sup>

But, that control is never absolute, and once it has been breached and the writings have been non-permissively circulated in cyberspace, the vampire venom cannot be stuffed back into the fang. Professor Lipton reported that after an unfinished draft of a Stephenie Meyer novel began circulating on the Internet without her authorization, Meyer publicly posted the draft to inculcate a norm within her readership of respecting her distributive choices and prerogatives.<sup>29</sup> As Lipton noted, Meyer asserted that she decided to provide her fans with a venue where they could *honestly* access the draft novel rather than read it on a rogue website.<sup>30</sup> This allowed her to officially reassert control over the project but reduced her enthusiasm for finishing the work to her satisfaction; she has so far refrained from publishing it commercially.<sup>31</sup> The public has lost access to a finished version of the work, and Meyer has undoubtedly lost income. If she ever changes her mind, she has done nothing to forfeit her copyrights as a legal matter. She can use the notice and take down provisions of the Digital Millennium Copyright Act to effectuate their removal from public websites.<sup>32</sup> But, thwarting private exchanges of the work to enforce her copyrights will, as a practical matter, be time-consuming and technologically difficult.

### III. BLOODLUST VERSUS SANGUINITY

Professor Lipton explained how Stephenie Meyer interacts with her readers online and encourages them to participate in the ongoing evolution of the *Twilight* meta-narrative, writing:

Stephenie Meyer's active participation in the blogosphere, maintaining a blog where she updates her readers on developments with her work and links to fan websites, encourages the online dialogue. She invites fans to participate in new releases of the *Twilight* films; she cites reader comments on her blog; she shares outtakes from early draft novels with her fans. She has also been actively involved in the development of the film adaptations of her novels (even taking a small cameo role in the first *Twilight* film). She is not the only

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28. See generally *Harper & Row*, 471 U.S. at 546–47 (explaining that “the Copyright Act confers a bundle of exclusive rights to the owner of the copyright” that allows the author “to publish, copy, and distribute [her] work”).

29. Lipton, *supra* note 5, at 13–21.

30. *Id.* at 15.

31. *Id.* at 18.

32. See generally 17 U.S.C. § 512(c) (2006).

copyright-creator to communicate online with fans and commercial adaptors of her work, but the immense popularity of her work and the scope and scale of her online communications generates a useful set of anecdotal data about emerging Web 2.0 copyright norms.<sup>33</sup>

Copyright law gives Meyer powers of domination and control that she has chosen to keep cloaked, in reserve. As she writes primarily for a teenage audience interacting on the Internet, Meyer is wise to partake in this web phenomenon in order to communicate with and learn from her fans. Online interactions are probably not her only source of information about relevant traits of continually morphing teen customs, but they may provide relatively low stakes testing grounds for slang expressions or cultural references she contemplates integrating into her writings. Though I personally did not find the novel *Twilight* to be particularly interesting or compelling, I sometimes recognized Bella's thoughts and experiences, having once been a teenage girl myself several decades ago. I would imagine that younger women find quite a bit of emotional common ground with the character; I did even though the good-looking, cold, and aloof students at my high school tended to be elite athletes rather than vampires.

#### IV. SEX AND THE SINGLE VAMPIRE

While the majority of *Twilight* aficionados are probably female, anecdotally at least, the series provides teenage boys with a platform to build relationships with their female romantic interests. For the purposes of researching this Response, I asked an eighteen-year-old male acquaintance<sup>34</sup> (in front of his friends) whether he had ever seen one of the *Twilight* movies. He responded, "No, because I have too much self-respect." But privately he conceded that he had taken a girl he was dating to one of them to illustrate—by his willingness to risk public censure by his peers—the magnitude of his affection for her. Although his public qualitative assessment of the cinematic production was that "it made the *Pokemon* series look like the *Chronicles of Narnia* by comparison," he was stoically prepared to see another installment in the *Twilight* series as necessary for the flourishing of his love life. Another teen boy admitted reading several of the *Twilight* novels to reduce the severity of awkward pauses during phone conversations with his long-distance girlfriend.

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33. Lipton, *supra* note 5, at 10–11 (footnotes omitted).

34. My own flesh and blood, in fact.

In some modern vampire tales, humans are primarily sources of nutrition. Cultural observer Lance Mannion noted:

In *Stargate: Atlantis*, the chief villains are an alien race of technologically advanced vampires called the Wraith. The Wraith don't drink their victims' blood. They suck the life force out of them in one gulp, leaving behind instantly aged and desiccated husks of the dead. The Wraith look and sound and generally act evil, but from their own point of view they are simply out on an interstellar deer hunt. They need to eat. Humans are food. The thing about the Wraith that make them evil from humanity's point of view—as opposed to something like a plague of soul-sucking locust—is that the Wraith seem to expect humans to understand and accept their place on the food chain. It pisses them off when a meal fights back. They also seem to get a kick out of it when dinner shows it's afraid and begs not to be eaten.<sup>35</sup>

More traditional vampires are often vested with strong erotic powers<sup>36</sup> (a notable exception is *Sesame Street's* Count Von Count, who acts the part of a batty buffoon and possibly suffers from obsessive compulsive disorder).<sup>37</sup> According to Michael Sims, editor of *Dracula's Guest: A Connoisseur's Collection of Victorian Vampire Stories*, the vampire story originated in the early nineteenth century as a blend of “rural folklore and urban decadence,” “refin[ed]” by literary elites from “the raw ore of peasant superstition” created when “the peasant brain . . . sort[ed] information into explanatory narratives.”<sup>38</sup> After immersing himself in vampire lore, Sims observed:

I found in older vampire stories that often the person who returns as a vampire was irreligious during life—irreverent, scornful of the infallibility of the church, or the need for communion, for example. People worried especially about

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35. Lance Mannion, *Vampires, Wraith, Banksters, and Other Villains Meet for Dinner at the Restaurant at the End of the Universe*, LANCE MANNION BLOG (Aug. 04, 2010), [http://lancemannion.typepad.com/lance\\_mannion/2010/08/vampires-wraith-banksters-and-other-villains-meet-for-dinner-at-the-restaurant-at-the-end-of-the-universe.html](http://lancemannion.typepad.com/lance_mannion/2010/08/vampires-wraith-banksters-and-other-villains-meet-for-dinner-at-the-restaurant-at-the-end-of-the-universe.html).

36. See Roxanne Rhoads, *The Erotic Vampire: How Literature Has Changed the Image of Vampires*, ASSOCIATEDCONTENT (Oct. 22, 2007), [http://www.associatedcontent.com/article/416037/the\\_erotic\\_vampire\\_how\\_literature\\_has.html](http://www.associatedcontent.com/article/416037/the_erotic_vampire_how_literature_has.html) (explaining the evolution of today's erotic vampire).

37. Jennifer Merritt, *What Your Favorite Sesame Street Character Says About You*, IVILLAGE (Nov. 6, 2009, 11:36 AM), <http://www.ivillage.com/count-von-count-which-sesame-street-character-are-you/1-b-63435> (noting that Count Von Count, like people who “[i]f they get anxious, . . . have to count things[] or . . . have to touch a certain door knob before [leaving] the house,” suffers from obsessive compulsive disorder).

38. Michael Sims, *All the Dead Are Vampires*, CHRON. HIGHER EDUC. (June 13, 2010), <http://chronicle.com/article/All-the-Dead-Are-Vampires/65829>.

those who had been excommunicated and denied burial in a church-approved cemetery. If your soul didn't sleep peacefully in the arms of the Lord, what might it be up to?<sup>39</sup>

He further noted:

Your behavior before death was more important because it might increase your odds of coming back as a vampire. Felons, especially murderers, were thought likelier to be cursed in this way—as were those poor souls presumptuous enough to commit suicide and take their departure schedule out of the hands of God. Here's a list of other likely vampires: murderers' victims, the battlefield dead, the drowned, stroke victims, the first person to fall in an epidemic, heretics, wizards, alcoholics, grumpy people, *women with questionable reputations*, people who talk to themselves, and redheads.<sup>40</sup>

By “women with questionable reputations,” Sims is alluding to women who have engaged in what society views as sexual misbehavior.<sup>41</sup> They pay for this in folklore and literature by attracting the macabre attentions of the bloodthirsty undead. Vampires as metaphors for dangerous sex pre-date *Twilight* by centuries, dating back to *The Vampyre*, a novella written by John Polidori<sup>42</sup> (published in *The New Monthly Magazine* on April 1, 1819),<sup>43</sup> and *Dracula*, written by Bram Stoker (published in 1897).<sup>44</sup> One literary scholar noted that the “fear of female sexuality is . . . explicit” within the pages of *Dracula*, writing:

Most readers of Stoker's novel are struck by the latent sexuality encoded in the text. As in many Victorian novels, its pure women are pursued and seduced by a sexually aggressive men [sic]. But it goes beyond this, in that the threat of *Dracula* can also be read as the releasing of aggressive female sexuality.<sup>45</sup>

Because *Dracula* transforms virginal women into sexual aggressors, he is “the man whom all other men fear, the man who can, without any loss of freedom or power himself, seduce other men's women

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39. *Id.*

40. *Id.* (emphasis added).

41. *Id.*

42. JOHN WILLIAM POLIDORI, *THE VAMPYRE* (Woodstock Books 1990) (1819).

43. Elizabeth Miller, *Dracula and Frankenstein: A Tale of Two Monsters*, WATERSHED ONLINE (2005), <http://watershedonline.ca/literature/frankensteindracula/taleof2monsters.html>.

44. BRAM STOKER, *DRACULA* (Glennis Byron ed., Broadview Press reprt. 2000) (1897).

45. Miller, *supra* note 43.

and make them sexually insatiable with a performance that the others cannot match.”<sup>46</sup> *Twilight*’s Bella certainly undergoes a sexual awakening when she begins interacting with the brilliant,<sup>47</sup> charming,<sup>48</sup> wealthy,<sup>49</sup> and beautiful<sup>50</sup> vampire Edward. Both the *Dracula* novel and embedded Dracula character are in the public domain.<sup>51</sup> Currently, undead authors can harvest Dracula’s metaphorical organs and transplant them into any derivative work of their devising or copy the original *Dracula*, having their ways with him without obtaining anyone’s consent.

Another Bella, Bela Lugosi, titillated millions with his cinematic depiction of *Count Dracula* in 1931.<sup>52</sup> The erotic overtones of his actions were not subtle. Unlike Edward Cullen, Dracula profligately enjoyed the sins of the flesh, attacking women in their beds as they slept and converting them to a life of physical hedonism.<sup>53</sup>

Meyer was free to model Edward after Dracula as much or as little as she cared to, at least from a copyright perspective. But, grafting her own creative flourishes onto existing vampire legends were probably necessary to make the initial *Twilight* book commercially viable and artistically satisfying.

*Twilight*’s Bella is initially depicted as a wholesomely virginal and sensible person, but her attraction to Edward increases her lusty asser-

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46. Judith Weissman, *Women and Vampires: Dracula as a Victorian Novel*, in *DRACULA: THE VAMPIRE AND THE CRITICS* 74, 76 (Margaret L. Carter ed., 1988).

47. See Valerie Strauss, *The Education of Twilight’s Edward Cullen*, WASH. POST: ANSWER SHEET (July 16, 2010, 12:46 PM), <http://voices.washingtonpost.com/answer-sheet/literature/the-education-of-twilights-edw.html> (noting that the partial draft of Meyer’s *Midnight Sun* novella indicates that Edward Cullen has received “two graduate degrees in medicine”).

48. See, e.g., STEPHENIE MEYER, *TWILIGHT* 43 (2005) (highlighting a charming exchange between Edward and Bella: “‘My name is Edward Cullen,’ he [said]. ‘I didn’t have a chance to introduce myself last week. You must be Bella Swan.’”).

49. Bella noted: “Now that I looked, it was obvious that [the Cullens and the Hale twins] were all dressed exceptionally well; simply, but in clothes that subtly hinted at designer origins . . . . It seemed excessive for them to have both looks and money.” *Id.* at 32.

50. *Id.* at 27 (describing Edward as “absurdly handsome”); *id.* at 87 (“He was still smiling. It was hard to believe that someone so beautiful could be real.”).

51. See Miles P. Zatkowsky, Case Comment, *Dracula Draws Blood from the Right of Publicity—Lugosi v. Universal Pictures*, 25 *Cal. 3d* 813, 603 P.2d 425, 160 *Cal. Rptr.* 323 (1979), 15 SUFFOLK U. L. REV. 181, 182 n.9 (1981) (“Because Bram Stoker, the author of the 1897 fictional account of *Dracula*, failed to comply with the copyright requirements effective in this country, the main character from the novel, as well as the book itself, has always been in the public domain in the United States.”).

52. *DRACULA* (Universal Pictures 1931); see also *Dracula*, IMDB, <http://www.imdb.com/title/tt0021814/> (last visited Sept. 19, 2010).

53. Cf. Glennis Byron, *Introduction to STOKER*, *supra* note 44, at 18 (arguing that Dracula “releases [something] in others,” such as Lucy, who “becomes a voluptuous, seductive, wanton” woman after her encounter).

tiveness and causes her to flagrantly disregard the danger he poses to her.<sup>54</sup> Edward makes most of the binding decisions about their relationship and determines if—and how—it will progress.<sup>55</sup> Bella consistently pushes him for more attention and intimacy, which he resists out of concern for Bella's safety and well-being by controlling his own desires.<sup>56</sup> Meyer invokes many tropes related to both vampires and teen romances that develop across cultural boundaries, but by mixing and matching them, she makes her characters and plot seem original—at least in places. Reformulating Romeo and Juliet as vampires certainly gives the literary philistine's colloquial phrase of disparagement "Shakespeare sucks" some fresh bite.

Pre-*Twilight*, accounts of vampires who affirmatively resist feeding on or sleeping with humans are rare. Still, there are numerous vampire entertainment resources where Meyer may have drawn creative blood in terms of vampirical carnal appeal. Between 1966 and 1971, vampire Barnabas Collins was a featured character on the gothic soap opera called *Dark Shadows*,<sup>57</sup> which provided daytime drama audiences relief from stock plot lines driven by adultery, amnesia, and uncertain parentage.<sup>58</sup> Like ordinary soap opera denizens, however, Collins had complicated on-screen romantic interactions.<sup>59</sup> The bloodsucking added a gothic twist to his scripted immortal life. Buffy, the eponymous heroine of the television show, *Buffy the Vampire Slayer*,<sup>60</sup> fell in love with a vampire named Angel, and they engaged in consensual sexual relations.<sup>61</sup> Sookie Stackhouse, the protagonist of *True Blood*,<sup>62</sup> a television series pulsing with hot, steamy human-on-vampire action, fell in love with a vampire named Bill Compton, and this relationship

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54. See, e.g., MEYER, *supra* note 48, at 282 (describing Bella and Edward's first kiss, particularly Bella's lusty response—"fingers knotted in his hair, clutching him to me" and "breath[ing] in his heady scent").

55. See, e.g., Gail Collins, Op-Ed., *A Virginal Goth Girl*, N.Y. TIMES, July 12, 2008, <http://www.nytimes.com/2008/07/12/opinion/12collins.html> (stating that in Meyer's *Twilight* books "the guy [is] in charge of setting the [relationship's] sexual boundaries").

56. STEPHENIE MEYER, ECLIPSE 444–55 (2007).

57. *Dark Shadows* (Dan Curtis Productions 1966).

58. Dark Shadows Journal, *About the Show: A Brief History of Dark Shadows*, DARK SHADOWS, <http://www.collinwood.net/info/> (last visited Aug. 10, 2010).

59. *Id.*

60. *Buffy the Vampire Slayer* (WB television series broadcast 1997–2001, UPN television series broadcast 2001–2003).

61. Cynthia Burkhead, *Innocence: DVD Commentary*, ENCYCLOPEDIA OF BUFFY STUD., [http://www.slayageonline.com/EBS/btvs/DVD\\_Commentaries/innocence.htm](http://www.slayageonline.com/EBS/btvs/DVD_Commentaries/innocence.htm) (last visited Sept. 19, 2010) (analyzing Joss Whedon's DVD commentary about *Innocence*, a second season episode of *Buffy the Vampire Slayer*, which he wrote and directed).

62. *True Blood* (HBO television series broadcast 2008); see also *True Blood*, HBO, <http://www.hbo.com/true-blood> (last visited Sept. 19, 2010).

was also consummated.<sup>63</sup> Anne Rice's successful *Vampire Chronicles* novels<sup>64</sup> channel the eroticism of bloodsucking for an adult audience with a sultry New Orleans taste, and the vampire has plenty of sex with willing participants, as well as enjoying their plasmic ragin' Cajun flavor.

The *Twilight* books, however, endorse and eroticize sexual abstinence.<sup>65</sup> Stephenie Meyer did not spawn vampires or the vampire tropes she deploys throughout her novels. She has mined from and contributed to alternative cultural understandings of vampires. Meyer's vampires do not abhor daylight: Sunshine makes their skin sparkle rather than weakening or destroying them.<sup>66</sup> The vampires do not sleep in coffins; in fact, they do not sleep at all.<sup>67</sup> They fly only in airplanes, attend high school or pursue productive careers, and pair off into traditional heterosexual romantic couples.<sup>68</sup>

The romance between Bella and Edward is a metaphor for the struggle to remain abstinent and to avoid the dangers of sex in the face of strong physical attraction.<sup>69</sup> The heroic Edward fights against his desire to take and consume Bella and against her desire to be taken and consumed by him, because becoming a vampire would make her soulless and ruined—a woman damned.<sup>70</sup> Edward controls the relationship with a firm and loving hand, protecting Bella from

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63. See EW Staff, True Blood *Sex-Scene Tally Just Keeps Climbing and Climbing*, EW.COM (July 20, 2009, 3:49 PM), <http://popwatch.ew.com/2009/07/20/true-blood-cast-nudity-1/>; see also Linda Stasi, *Bloody Murder—In HBO's New Series About Sexy Vampires, It's the Normal People Who Really Suck*, N.Y. POST, Sept. 5, 2008, at 139 (noting that Sookie, the protagonist, played by Anna Paquin, “takes a shine to handsome 173-year-old vampire Bill Compton,” played by Stephen Moyer).

64. See, e.g., ANNE RICE, BLACKWOOD FARM (2002); BLOOD AND GOLD (2001); BLOOD CANTICLE (2003); INTERVIEW WITH THE VAMPIRE (1976); MEMNOCH THE DEVIL (1995); MERRICK (2000); THE QUEEN OF THE DAMNED (1988); THE TALE OF THE BODY THIEF (1992); THE VAMPIRE ARMAND (1998); THE VAMPIRE LESTAT (1985).

65. See Sarah Seltzer, *Twilight: Sexual Longing in an Abstinence-Only World*, HUFFINGTON POST (Aug. 9, 2008, 3:55 PM), [http://www.huffingtonpost.com/sarah-seltzer/twilight-sexual-longing-i\\_b\\_117927.html](http://www.huffingtonpost.com/sarah-seltzer/twilight-sexual-longing-i_b_117927.html) (“Meyer, a practicing Mormon, has said she draws a line at premarital sex for her characters.”).

66. MEYER, *supra* note 48, at 260 (“EDWARD IN THE SUNLIGHT WAS SHOCKING. . . . His skin, white despite the faint flesh from yesterday's hunting trip literally sparkled, like thousands of tiny diamonds were embedded in the surface.”). R

67. *Id.* at 185–86 (responding to Bella's question about whether vampires sleep in coffins, Edward says that he “can't sleep”).

68. STEPHENIE MEYER, NEW MOON 420 (2006); MEYER, *supra* note 48, at 289, 341. R

69. See Seltzer, *supra* note 65 (“*Twilight's* sexual flowchart is the inversion of abstinence-only/purity ball culture, where girls are told that they must guard themselves against rabid boys, and that they must reign in both their own and their suitors' impulses.”). R

70. See *id.* (explaining that Edward, as a “sexual gatekeeper,” must prevent Bella's “death” by avoiding intercourse).

her own sordid carnal impulses until they are married.<sup>71</sup> This sets him apart from most fictional vampires and has resulted in an appealing narrative for a large cohort of readers.<sup>72</sup> It is likely that Meyer was at least initially inspired by the popularity of *Buffy the Vampire Slayer*. One self-described “media literacy advocate”<sup>73</sup> noted:

There are strikingly similar narrative elements present in both the television series *Buffy the Vampire Slayer* and in the 2008 feature film *Twilight*. Both stories follow a teenage heroine as she develops a relationship with an older male vampire. Both also contain stalking sequences in which the female protagonist walks alone at night and is followed by shadowy figures.<sup>74</sup>

However, the protagonists respond to the attentions of the smitten undead in markedly different ways.<sup>75</sup> Buffy makes it clear that she considers being followed, spied on, and subject to overprotective male

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71. See *supra* note 56 and accompanying text.

72. Cf. Seltzer, *supra* note 65 (explaining that the series is appealing to a wide variety of readers because it, for example, gives mothers a platform to talk about sex and gender roles with their children).

73. Jonathan McIntosh, *What Would Buffy Do? Notes on Dusting Edward Cullen*, WOMEN IN MEDIA & NEWS (July 1, 2009), <http://www.wimnonline.org/WIMNsVoicesBlog/?p=1272>.

74. Jonathan McIntosh, *Buffy vs. Twilight—Stalking Scene Comparison*, CRITICAL COMMONS (July 8, 2009), [http://criticalcommons.org/Members/RebelliousPixels/clips/bella\\_reaction.mov/view](http://criticalcommons.org/Members/RebelliousPixels/clips/bella_reaction.mov/view) [hereinafter, McIntosh, *Buffy vs. Twilight—Stalking Scene Comparison*]; cf. Jonathan McIntosh, *Buffy vs. Edward: Twilight Remixed—[original version]*, YOUTUBE (June 19, 2009), <http://www.youtube.com/watch?v=RZwM3GvaTRM> (mashing scenes from the *Buffy the Vampire Slayer* television show and the *Twilight* movies).

75. This observation is paraphrased from Jonathan McIntosh:

In *Twilight* Bella is confronted by a group of aggressive, drunken frat boys, and begins to defend herself—but is interrupted when Edward, her vampire love interest, swoops in to rescue her. In the next scene, when pressed, Edward admits to stalking her but insists it is only for her protection, saying: “I was trying to keep a distance unless you needed my help.” Bella responds by condoning his behavior, timidly telling him not to stay away from her.

In contrast, Buffy turns the tables on her pursuer by knocking him to the ground, stepping on his chest and demanding answers (episode #1). Later Buffy stops in a dark ally and, annoyed, confronts her pursuer again—who again turns out to be her own vampire love interest, Angel. When questioned he also admits to following her in case she might need his help. Buffy’s having none of it, asserting that she can take care of herself and delivering her brilliantly pointed line: “You know, being stalked isn’t really a big turn on for girls” (episode #13).

Comparing these sequences we see examples of how the dynamics embedded in the two relationships are completely different. Buffy quickly establishes control in each potentially dangerous situation while Bella is perpetually cast as the damsel in distress. Stalking, spying and over-protective male behavior is present in Buffy’s world but it is always framed as creepy or inappropriate and is often the subject of ridicule. The same type of male behavior in the *Twilight* series is framed as romantic, sexy and a sign of “true love.”

McIntosh, *Buffy vs. Twilight—Stalking Scene Comparison*, *supra* note 74.

behaviors creepy and unappealing—once telling Angel: “You know, being stalked isn’t really a big turn on for girls.”<sup>76</sup> When Edward, unbeknownst to Bella, follows her and sneaks into her bedroom to watch her sleep, Bella is unsettled but understands his actions as evidence of their strong romantic bond and his desire to keep her safe.<sup>77</sup> She accepts him as her one true love and is prepared to make enormous personal sacrifices to be with him eternally.<sup>78</sup>

It is unclear how much overlap in fan base exists between Buffy and Bella, but it could be substantial despite the differences between the television series, *Buffy the Vampire Slayer*, and the *Twilight* books and movies and the vastly disparate levels of humor, plot, and engaging dialogue. In *Reading the Romance: Women, Patriarchy, and Popular Literature*,<sup>79</sup> Professor Janice Radway asserts that female readers may enjoy books in which strong, smart women submit to male control and resign themselves to accepting conventional roles in life to deal with their own fears about masculine dominance and to make peace with either their private fantasies or actual life choices.<sup>80</sup> Some fans may alternate between wanting to be independent and strong (like Buffy) and protected and desired (like Bella), and they can thus simultaneously be emotionally invested in both protagonists.

## V. THE SEXUALLY LIBERATING POTENTIAL OF PARODY

Copyright law is ripe with ambiguities.<sup>81</sup> Two frequently intersecting ambiguities are the uncertain scope of copyright protection in fictional characters independent of the works in which they appear and the unpredictability of determining when a transformative work constitutes an unauthorized parody that is permissible as a fair use rather than an unauthorized infringing derivative work.<sup>82</sup>

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76. *Buffy the Vampire Slayer: When She Was Bad* (WB television broadcast Sept. 15, 1997).

77. MEYER, *supra* note 48, at 292–94 (describing Bella’s reaction when she first learns that Edward has been watching her sleep at night).

78. MEYER, *supra* note 68, at 531–36 (describing the plan for Bella to become a vampire and noting Bella’s emotional struggle over “the people she would lose” by becoming a vampire).

79. JANICE A. RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR LITERATURE* (1984).

80. *See generally id.* at 3–18, 74–79, 208.

81. *Cf.* Michael G Bennett et al., *Vogue Juridique & the Theory Choice Problem in the Debate over Copyright Protection for Fashion Designs*, 70 MD L. REV. ENDNOTES 1 (2010) (exploring the copyright null zone in regard to fashion design).

82. *See* Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 448–51 (“For now, the truth remains that the test for copyright protection of fictional characters is something of an irregular guessing game.”).

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The scope of copyright protection in characters themselves (disambiguated from underlying literary or audiovisual works) is keyed to the intricacy with which the characters are developed.<sup>83</sup> Stereotypical characters or those who are vaguely described should receive less copyright protection than those who are more detailed, unique, and compelling. But how particular characters will be characterized can be difficult to predict.

Fair use is the legal doctrine under which unauthorized uses can be made of copyrighted expression without constituting infringement.<sup>84</sup> If a work that employs elements or portions of preexisting works is highly transformative, it is more likely to be considered a fair use than one that hews more closely to the work from which it borrows.<sup>85</sup> But how transformative a work must be to escape infringement is uncertain.<sup>86</sup>

It is the parody subdoctrine of fair use that could sexually liberate the *Twilight* characters. Uncertainties about what constitutes a parody may metaphorically keep the vampires' clothing on, at least in a commercial context.

As Professor Lipton details, Stephanie Meyer is very accessible to her fans and learns from them.<sup>87</sup> Some of the information she gleanes from her fans may disturb her, but other information apparently proves very helpful. Meyer's instrumental propensities for synthesizing reader suggestions into her plot lines and character development are understandably undelineated. There is a fine line between accepting detailed, helpful suggestions from one's readers and ripping them off. Like her conceptual vampires, Meyer can conceptually feed on her readers and leave them stone-cold dead; or she can live among them in peace and satiate her creative bloodlust in alternative ways,

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83. See generally *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). In *Nichols*, Judge Learned Hand asserted that both plots and characters could be infringed, particularly noting "that the less developed the characters, the less they can be copyrighted." *Id.* at 121; see also Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 918–24 (2007) (explaining how "[l]iterary characters, in particular, have proven to be troublesome for the courts because of their abstract and non-visual composition.").

84. See 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

85. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994); Lipton, *supra* note 5, at 27 n.179.

86. See generally Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 703–04 (2010) (exploring the "doctrinal confusion" that "the concept of transformative use" has caused among courts).

87. Lipton, *supra* note 5, at 2–3.

simply staying home on sunny days to avoid disclosing the sparkling superpowers that may be vested by high barrier approaches to copyright laws.

The outer limits of Meyer's tolerance for non-permissive uses of her writings by fans are similarly unclear. But, the symbiosis between Meyer and her audience is obvious. There is a commercial benefit to her, but her fans also benefit from the participatory nature of her enterprise.<sup>88</sup> Just as Edward and Bella are drawn to each other despite a strong undercurrent of danger, there is a copyright law imposed edge to the relationship between Meyer and her readers. If readers do something to antagonize Meyer, she can attempt to destroy non-permissive uses of her work with the wooden stake<sup>89</sup> of an injunction.<sup>90</sup> Copyright litigation is vampire venom that can inflict excruciating pain even if the reader's homage, adaptation, or parody ultimately survives and achieves immortality.<sup>91</sup>

Participating in her fan community is probably an astute commercial move by Meyer. While forgoing attempts to monetize every mention of her characters may cost her some licensing revenue in the short run, building a long-term audience of active fans likely pays off in book sales, movie tickets, and related peripherals.<sup>92</sup> A sense of belonging is something for which all humans have a tenacious thirst, especially teenagers. Even Meyer's vampires form communities of interest, and the teenage ones sit together at the same lunch table.<sup>93</sup>

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88. Cf. Eric S. Trautmann, *The Observatory: Fans With Sharp Teeth*, PARALLEL UNIVERSE, <http://paralleluniverse.msn.com/features/movies/the-observatory-twilight-fans/story> (last visited Sept. 19, 2010) (stating that *Twilight* fans are "rabid" and "vocal").

89. See *Vampires and Werewolves: Destroying Vampires*, ZEROTIME PARANORMAL, <http://www.zerotime.com/night/destroy.htm> (last visited Sept. 19, 2010) (noting that while "[v]ampires cannot be killed," "[s]taking a vampire in the heart with a wooden stake is the most popular way of *destroying* vampires" (emphasis added)).

90. See 17 U.S.C. §§ 502, 512(j) (2006) (providing a copyright holder with injunctive relief).

91. See, e.g., Lipton, *supra* note 5, at 18–19 (explaining that copyright litigation involves the investment of significant time and money). R

92. Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1890 (2009) (noting that copyright owners may sometimes benefit from the unauthorized use of their work "through the fostering of a more devoted fan base"); cf. Jacqueline Lipton, *How to Make a Twilight Fan Remix Film Without Getting Sued*, THR, ESQ (June 15, 2010, 8:51 AM), <http://thresq.hollywoodreporter.com/2010/06/how-to-make-a-twilight-fan-film-without-getting-sued.html> (noting that Summit Entertainment, the studio that produced the *Twilight* films, allows a significant amount of online fan activity, "including fan-made trailers for forthcoming films and even copying and posting extras from DVD releases," because such activities "ultimately benefit[ ] the producers").

93. MEYER, *supra* note 48, at 18 (describing the first time that Bella saw the group of vampires "sitting" together at one table "in the corner of the cafeteria," not speaking and not eating anything). R

The *Twilight* fan communities offer Meyer's readers something they value, and Meyer obviously recognizes this.

Meyer's forbearance sets her apart from many successful authors who assert copyrights quite aggressively.<sup>94</sup> Copyright laws should reward her forbearance and encourage this trait in others.

Punishing Meyer for openly abiding fan fiction that makes use of her creative work by shrinking the practical scope of her copyright protections would do just the opposite. Forbearance cannot mean that Meyer cannot assert copyrights when she chooses, even though putative fair users may detrimentally rely on expectations that Meyer will continue to tolerate fairly expansive unauthorized copyright transgressions.<sup>95</sup>

Practically, just because Meyer allows some non-permissive uses of her works, she must not be legally bound to accept all of them, even if they are functionally identical. Otherwise, Meyer and authors like her will feel forced to consistently raise copyright claims to avoid creating situations that could lead to successful laches or estoppel claims and deprive themselves of control levers otherwise instantiated by copyright law.

One alarming consequence, however, is that Meyer can make content-based decisions about which actionable, unauthorized uses she will tolerate and which she will smite.<sup>96</sup> *Twilight* fan fiction sites offer access to plentiful fan fiction featuring the characters' sexual intrigues with each other, including "non canon pairings" stories in which Bella and Alice are romantically involved<sup>97</sup> and opportunities for "a contest for the greatest 'Dirty Talking Edward' story."<sup>98</sup> The contest "[c]ategories include[d] Domination, Virgin, Geek, Submission, Vampire, Threesome, Fetish, Exhibitionist and Human."<sup>99</sup> It is

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94. See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 350 (2008) (noting that Anne Rice "use[s] copyright law to prevent even non-commercial transformations of her vampire novels").

95. See, e.g., *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 715 (S.D.N.Y. 1987) (stating that the defendants asserted the affirmative defenses of estoppel and laches in light of the plaintiff's "deliberate inaction" in the face of other works infringing on the copyright at issue, but rejecting those same defenses based on the factual record).

96. Cf. William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1437 (2010) (noting that J.K. Rowling "tolerates most forms of [*Harry Potter*] fan fiction but aggressively pursues the writers of stories that include 'pornographic or sexually explicit material . . . not meant for kids'" (quoting Ariana Eunjung Cha, *Harry Potter and the Copyright Lawyer*, WASH. POST, June 18, 2003, at A1)).

97. See, e.g., Hollowgo, *Blood Solstice: Feelings*, FANFICTION.NET (May 19, 2010), [http://www.fanfiction.net/s/5984272/11/Blood\\_Solstice](http://www.fanfiction.net/s/5984272/11/Blood_Solstice).

98. LeechLover85, *Dirty Talking Edward Contest*, FANFICTION.NET (Sept. 22, 2008), [http://www.fanfiction.net/community/Dirty\\_Talking\\_Edward\\_Contest/62571/99/0/1/](http://www.fanfiction.net/community/Dirty_Talking_Edward_Contest/62571/99/0/1/).

99. *Id.*

unclear how Meyer reacts when fan fiction strips protagonist Bella Swan of her virginity before she marries Edward or features her engaging in debauched threesomes with other characters. Perhaps Meyer simply ignores the reader-driven choices her characters make that she would never permit them. But, she could attempt to control Bella's fan-based sexuality selectively based on her own moral, social, or political views. The statutory bulwark that could constrain this—facilitating freer expression by her fans, critics, or emulators and less control by Meyer—is fair use (codified in Section 107 of the Copyright Act).<sup>100</sup>

Some courts might be persuaded to enjoin unauthorized fictional consensual sexual relations between *Twilight* characters premised on copyright considerations.<sup>101</sup> Alternatively, courts could deem any linguistic deflowering within the bounds of fair use.<sup>102</sup> Professor Rebecca Tushnet has asserted that when women's bodies are contested intellectual property, the scope of fair use may be broader than usual.<sup>103</sup> From a First Amendment perspective, sex-related speech generally enjoys vigorous protections from government intervention. Fair use is one mechanism through which copyright law is infused with First Amendment values.<sup>104</sup> Nonprofitably engaging *Twilight* characters in sexual activity might be viewed as fair use if no money changes hands. Any effort to commercialize Bella's sex life outside of Meyer's control, however, would likely be enjoined at Meyer's behest,<sup>105</sup> unless she and Edward (or whoever) copulated in a work that a court was willing to accept as a parody protected by the fair use doctrine.<sup>106</sup>

A "Fact Sheet on Fair Use" published in 1961 by the United States Copyright Office notes that Congress mentioned parody as an unauthorized use of copyrighted works that fair use can facilitate.<sup>107</sup> In

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100. See generally 17 U.S.C. § 107 (2006).

101. See *supra* note 90 and accompanying text.

102. See 17 U.S.C. § 107 (providing that "the fair use of a copyrighted work . . . is not an infringement of copyright" and noting factors to be considered in evaluating whether the use is a fair use).

103. Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 277–78 (2007) ("[W]hen a woman's image becomes public, it is so public that ripping her clothes off is a natural critical response.").

104. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles.").

105. Assuming she holds the requisite copyrights.

106. See generally *infra* text accompanying notes 108–39.

107. *Copyright: Fair Use*, U.S. COPYRIGHT OFFICE (May 2009), <http://www.copyright.gov/fls/fl102.html>. Stating:

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1994, the Supreme Court concluded that a rap-style reworking of a copyrighted pop song may be fair use, even though the rap version was commercially released, because it was a parody.<sup>108</sup> The original song, *Oh, Pretty Woman*,<sup>109</sup> describes singer and co-songwriter Roy Orbison's reactions to an attractive woman and the desires regarding the interactions he would like to have with her in fairly pedestrian terms.<sup>110</sup> The lyrics in 2 Live Crew's rap version are cruder and more explicit. As the Supreme Court noted (adopting the district court's language), the lyrics "'quickly degenerate[ ] into a play on words, substituting predictable lyrics with shocking ones' . . . to show 'how bland and banal the Orbison song' is."<sup>111</sup> Alternatively, the Court stated that 2 Live Crew's version "was clearly intended to ridicule the white-bread original and reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences."<sup>112</sup> Furthermore, the Court noted that "[t]he singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses."<sup>113</sup>

The Court reasoned: "The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."<sup>114</sup> But, "[w]hether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."<sup>115</sup>

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The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

*Id.*

108. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–72 (1994).

109. ROY ORBISON, *Oh, Pretty Woman*, on PRETTY WOMAN (Monument Records 1964).

110. *See id.* ("Pretty woman, walking down the street/Pretty woman, the kind I'd like to meet/Pretty woman/I don't believe you, you're not the truth/No one can look as good as you/Cause I need you, I'll treat you right/Come to me baby, be mine tonight").

111. *Campbell*, 510 U.S. at 573 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991)).

112. *Id.* at 582 (internal quotation marks omitted).

113. *Id.* (internal quotation marks omitted).

114. *Id.*

115. *Id.*

The Court articulated the reasons that 2 Live Crew's song crossed this threshold, writing:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joiinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.<sup>116</sup>

The Court further explained that meeting the definitional criteria made something a parody but did not necessarily mean that it was fair use: "[P]arody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."<sup>117</sup>

A few years later, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,<sup>118</sup> the Ninth Circuit concluded that a book entitled *The Cat NOT in the Hat!* (which mocked aspects of the O.J. Simpson double murder trial) was satire rather than parody.<sup>119</sup> Consequently, the use of the copyrighted expression taken from Dr. Seuss's *The Cat in the Hat*<sup>120</sup> was not fair.<sup>121</sup> The opinion credited the Supreme Court's *Campbell v. Acuff-Rose Music, Inc.* decision with "point[ing] out the difference be-

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116. *Id.* at 583.

117. *Id.* at 581. According to the Court:

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and non parodic elements.

*Id.* (citation omitted).

118. 109 F.3d 1394 (9th Cir. 1997).

119. *Id.* at 1396, 1400–01.

120. DR. SEUSS, *THE CAT IN THE HAT* (1957).

121. *Dr. Seuss*, 109 F.3d at 1401, 1403.

tween parody (in which the copyrighted work is the target) and satire (in which the copyrighted work is merely a vehicle to poke fun at another target).<sup>122</sup> The mere fact that the book was advertised as a parody did not, according to the Ninth Circuit, make it one.<sup>123</sup>

In 2001, the Eleventh Circuit held that Alice Randall's retelling of portions of *Gone with the Wind*<sup>124</sup> from the viewpoint of the slaves who worked at Tara plantation was a fair use of the *Gone with the Wind* plot points and characters.<sup>125</sup> The Eleventh Circuit stated that "[i]n light of the admonition in *Campbell* that courts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character," it would "take the broader view" of what constituted a parody, under which *The Wind Done Gone*<sup>126</sup> qualified.<sup>127</sup> Randall's book was subsequently issued with a very noticeable sticker on its cover explicitly declaring the work a parody.<sup>128</sup>

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122. *Id.* at 1400 (citing *Campbell*, 510 U.S. at 580–81). The court further noted that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." *Id.* (quoting *Campbell*, 510 U.S. at 580–81).

123. *See id.* at 1402–03.

124. MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

125. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259, 1276 (11th Cir. 2001). For a description of the book, see Joseph Stutzman, *The Wind Done Gone by Alice Randall*, *EZINE@RTICLES* (June 25, 2010), <http://ezinearticles.com/?The-Wind-Done-Gone-by-Alice-Randall&id=4550701>.

126. ALICE RANDALL, *THE WIND DONE GONE* (2001).

127. *Suntrust*, 268 F.3d at 1268, 1276.

128. Publisher Houghton Mifflin explains why the sticker was included:

The goal of parody is to comment critically and to expose and explode the flaws of the original. The goal of a sequel, by contrast, is to continue a story, generally using the principal characters, style, tone, and themes of the original; a sequel might take a slightly different point of view, but it would not overturn or ridicule the basic assumptions of the original. Think of it as the difference between revolution and evolution.

Parody works by ridicule. It is not necessarily comedy. It is the classic speech of protest for oppressed peoples. And it fits within the American tradition articulated by the U.S. Supreme Court justices [sic] Holmes and Brandeis that the cure for objectionable speech is more speech.

Randall's book couldn't be a sequel on any number of counts. 1) Cynara, the main character, doesn't exist in *Gone With the Wind*; in fact, given the racial purity throughout *Gone With the Wind*, a character like Cynara couldn't exist in *Gone With the Wind's* world. 2) The white characters from *Gone with the Wind* to whom Randall alludes serve mainly as foils for her central characters, all of whom are black. 3) To the extent that *The Wind Done Gone* uses similar characters, they have been radically transformed; they may bear some superficial resemblance, but they are in fact quite different: Other (Scarlett) is not charming; Mealy Mouth (Melanie) is a serial murderer; Garlic (Pork) is the real master of Tata, a brilliant and manipulative man; most of the white characters are ineffectual, and many have African blood. 5) The story of *The Wind Done Gone* in no sense picks up

In 2007, in *Burnett v. Twentieth Century Fox Film Corp.*,<sup>129</sup> Carol Burnett brought a copyright infringement suit over a segment of the cartoon *Family Guy*.<sup>130</sup> In the segment, the Peter Griffin character “enters a porn shop with his friends” and “remarks that the porn shop is cleaner than he expected.”<sup>131</sup> In the words of the court:

One of Peter’s friends explains that “Carol Burnett works part time as a janitor.” The screen then switches for less than five seconds to an animated figure resembling the “Charwoman” from the Carol Burnett Show, mopping the floor next to seven “blow-up dolls,” a rack of “XXX” movies, and a curtained room with a sign above it reading “Video Booths.” As the “Charwoman” mops, a “slightly altered version of Carol’s Theme from The Carol Burnett Show is playing.” The scene switches back to Peter and his friends. One of the friends remarks: “You know, when she tugged her ear at the end of that show, she was really saying goodnight to her mom.” Another friend responds, “I wonder what she tugged to say goodnight to her dad,” finishing with a comic’s explanation, “Oh!”<sup>132</sup>

Burnett argued that this could not constitute parody because *she* was targeted rather than a particular work.<sup>133</sup> The court disagreed, concluding that placing a cartoon version of Carol Burnett portraying “the Charwoman in an awkward, ridiculous, crude, and absurd situation” to ridicule her as a public figure had an adequately parodic character.<sup>134</sup> Ultimately, the court suggested—in far more diplomatic language—that Burnett needed to lighten up, get with the times, and learn how to take a joke.<sup>135</sup>

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where *Gone With the Wind* left off; in fact, it simply couldn’t, given the two novels’ radically differing points of view.

*The Wind Done Gone* is an ingeniously executed parody that, in telling its own story, turns *Gone With the Wind* upside down and inside out and explodes that work’s familiar stereotypes along the way. *The Wind Done Gone* does not, as any sequel would, exploit the reader’s love of the original work; instead it makes readers question the reasons for that love, if it ever existed.

*The Wind Done Gone: Questions and Answers About This Dispute*, HOUGHTON MIFFLIN HARCOURT, [http://www.houghtonmifflinbooks.com/features/randall\\_url/qandas.shtml](http://www.houghtonmifflinbooks.com/features/randall_url/qandas.shtml) (last visited Sept. 19, 2010).

129. 491 F. Supp. 2d 962 (C.D. Cal. 2007).

130. *Family Guy* (Twentieth Century FOX television series broadcast 1999-2002, 2005-2010).

131. *Burnett*, 491 F. Supp. 2d at 966; see also *Family Guy: Peterotica* (Twentieth Century FOX television broadcast Apr. 23, 2006).

132. *Burnett*, 491 F. Supp. 2d at 966 (citations omitted).

133. *Id.* at 968.

134. *Id.* at 969.

135. See *id.* at 974. According to the court:

Last year, a court enjoined the publication of Fredrik Colting's novel, *60 Years Later: Coming Through the Rye*,<sup>136</sup> because it featured a character called Mr. C who seemed to be an older version of Holden Caulfield, the teenage protagonist in J.D. Salinger's *Catcher in the Rye*.<sup>137</sup> Colting somewhat turgidly characterized his work as "an Unauthorized Fictional Examination of the Relationship Between J.D. Salinger and his Most Famous Character."<sup>138</sup> Perhaps he should have injected the word "parody" in there somewhere.<sup>139</sup>

At least on a very superficial level, these cases suggest that an unauthorized derivative work is more likely to be deemed a parody if it has a sexual theme.<sup>140</sup> As at least one legal academic has trenchantly

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Carol Burnett is an icon in American culture as is her character the "Charwoman." The Court has no doubt that she is, and rightly so, well known, respected, and beloved by a large segment of the American public based upon her persona and her outstandingly successful entertainment career. The Court fully appreciates how distasteful and offensive the segment is to Ms. Burnett. Debasing the "Charwoman" and also making Ms. Burnett's parents participants in a crude joke is understandably disheartening to Ms. Burnett, her family, and many fans. To some extent this dispute is indicative of just how far the "new media" has come from the "old media." The old media harkens back to days when crude jokes and insensitive, often mean spirited, programming was perhaps found in live night club performances but was not present on television. In the new media, any self imposed restraint essentially has been eliminated. Public figures, such as Ms. Burnett, are frequent targets of parodies and crude innuendo. As Ms. Burnett well knows, it takes far more creative talent to create a character such as the "Charwoman" than to use such characters in a crude parody. Perhaps Ms. Burnett can take some solace in that fact.

*Id.*

136. JOHN DAVID CALIFORNIA [FREDRIK COLTING], *60 YEARS LATER: COMING THROUGH THE RYE* (2009). For a (negative) review of the book from a blogger who was able to purchase it on Amazon UK, see Juliet Lapidos, *What a Phony!: I Read the Banned Catcher in the Rye "Sequel" So You Don't Have To*, SLATE (July 15, 2009, 7:00 AM), <http://www.slate.com/id/2222831>.

137. J.D. SALINGER, *THE CATCHER IN THE RYE* (1951); see *Salinger v. Colting*, 607 F.3d 68, 71–72, 83–84 (2d Cir. 2010) ("*60 Years Later* tells the story of a 76-year-old Holden Caulfield, referred to as 'Mr. C,' in a world that includes Mr. C's 90-year-old author, a 'fictionalized Salinger.'"); see also Julie Steinberg, *Holden Caulfield, Grumpy Old Man?*, WALL ST. J. (USA), July 9, 2009, <http://online.wsj.com/article/SB124709489282814769.html>.

138. Laura Hodes, *The Salinger Copyright Case: Reading the Colting Book Shows It Is "Fair Use"*, FINDLAW (July 20, 2009), [http://writ.news.findlaw.com/commentary/20090720\\_hodes.html](http://writ.news.findlaw.com/commentary/20090720_hodes.html) (internal quotation marks omitted).

139. See *Salinger*, 607 F.3d at 83 (endorsing the district court's view that "[i]t is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents' previous statements regarding the book discuss no such critique, and in fact reference various other purposes behind the book" (quoting *Salinger v. Colting*, 641 F. Supp. 2d 250, 262 (S.D.N.Y. 2009))).

140. I reserve for another day a discussion about the ways in which trademark law constructs can influence the ways that copyrights in characters are perceived and protected, which even in a clear parody, could start to look like actionable disparagement that is somehow outside the acceptable bounds of commentary or criticism.

noted, parody “seems like an almost arbitrary exception to the original creator’s exclusive right to control his characters.”<sup>141</sup> He wondered: “Why allow somebody else to write a parody of *The Catcher in the Rye*, but prohibit a Holden Caulfield sequel?”<sup>142</sup> Is this due to an expectation that an author is far more likely to further capitalize on her successful literary venture with a straightforward derivative work than a parodic one?<sup>143</sup> A related question might be whether some classes of parodies are likely to be privileged over others: Would Bella be permitted to engage in sex acts but not literary criticism?

Whether an explicit sex-driven story about the *Twilight* characters could effectively constitute a parody for copyright fair use purposes is a provocative question.<sup>144</sup> Pornography and erotica are protected by the First Amendment,<sup>145</sup> which is doctrinally linked to fair use.<sup>146</sup> The arguments that are made in favor of broad First Amendment protec-

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141. Edward A. Fallone, *Caulfield Meets Quixote*, MARQ. U. L. SCH. FAC. BLOG (Aug. 16, 2009), <http://law.marquette.edu/facultyblog/2009/08/16/caulfield-meets-quixote/>.

142. *Id.*

143. Compare Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Complements*, 12 VAND. J. ENT & TECH. L. 779, 782–83 (2010) in which Glynn Lunney asserts:

The justification for allowing a copyright owner to control the production of substitutes is reasonably straightforward. Absent a legal right to do so, a would-be competitor could simply copy another’s work, thereby avoiding the authorship costs entailed in creating the work, and offer competing copies of the work for less. This competition would directly reduce the money that the original author could expect to earn from sales of her own copies of her work. In contrast, there is no similarly straightforward justification for allowing a copyright owner to control the production of complements. By definition, the production of complements will not reduce, as competing substitutes do, the profits or rents available to the original author from sales of her own copies or of access to her original work in its original form. Indeed, even in the absence of a legal right to control them, the production of complements will increase the rents the original author will earn.

144. See generally David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright*, 98 KY. L.J. 517, 540 (2009) (“Explicit reference to sexual acts has caused substantial problems for raunchy spoofs that are defended as being parodies.”).

145. HENRY COHEN, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 2 (2009), available at <http://www.fas.org/sgp/crs/misc/95-815.pdf>.

146. According to C. Edwin Baker:

The power the law gives the property owner does not turn on the content of the other’s speech. In contrast, defamation and copyright present relevantly similar contexts. For both, the legal restriction directly and specifically aims at controlling speech—either false, negative speech (defamation) or already-said speech (copyright). Doctrinally, both are *content-based* limitations on speech. The law bars a person from saying, duplicating, or distributing some specific content that she wants to say, duplicate, or distribute. Unlike the land owner who can throw off her land any speaker or nonspeaker she chooses irrespective of the intruder’s speech content, the person claiming libel or copyright violation must identify spe-

tions of pornography indirectly undermine the case for strong copyright protections, because, like obscenity statutes, copyright laws also regulate speech and restrict expressive liberty.<sup>147</sup> A governmental edict that prevents the distribution of a literary work constitutes an alarming act of prior restraint when analyzed through a First Amendment lens,<sup>148</sup> but it is generally viewed as an acceptable approach to harm reduction in the copyright law context. Watching the law continue to unfold in this area will be interesting, particularly when authors like Meyer make unconventional copyright choices.

#### VI. CONCLUDING COAGULATING DROPLETS

Professor Lipton's article helpfully focuses attention on interesting intersections between copyright law and a productive and commercially successful author. It increases understandings of the impact of copyright law, which proves significant in some contexts and distinctly underwhelming in others. Her detailed observations are probably a lot more useful than this brief Response, but it was fun to write, which is not something I often say about legal scholarship. Thanks also to the *Maryland Law Review* for fearing neither vampires, nor a bit of bleeding whimsy.

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cific offending speech content of the defendant before invoking the law. The person is told, "You can speak but you must say something else!"

C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 906 (2002) (footnote omitted).

147. Christina Bohannon, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 673–76 (2010); Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 724 (2005).

148. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70–71 (1963) (finding an informal system designed to prevent the distribution of allegedly obscene literary materials an impermissible prior restraint).