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SCARY MONSTERS: HYBRIDS, MASHUPS, AND OTHER ILLEGITIMATE CHILDREN

*Rebecca Tushnet**

She didn't really make it. She made it but she shouldn't have. She made it but look what she made it about. She made it but she isn't really an artist, and it isn't really art. She made it but it's derivative. She made it but it's infringing. She made it but it violates the DMCA. She made it but she's a thief and a pirate. She made it BUT¹

History has many themes. One of them is that women should be quiet.²

[S]ometimes a scream is better than a thesis.³

INTRODUCTION

Reproduction means two things: In copyright, we generally use the term to mean duplication. But sexual reproduction is not duplication. It is the creation of something new from something old. And it's perhaps this double meaning that often makes reproduction seem uncanny, whether because of its exactness or because of its divergences from the original.

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* Professor, Georgetown University Law Center. Thanks to participants at the Notre Dame Creativity Conference, particularly Jessica Silbey, and to Francesca Coppa.

1 Francesca Coppa & Rebecca Tushnet, *How to Suppress Women's Remix*, CAMERA OBSCURA (forthcoming 2011) (remixing JOANNA RUSS, *HOW TO SUPPRESS WOMEN'S WRITING* (1983)); cf. RUSS, *supra*, at 76 ("She didn't write it. She wrote it, but she shouldn't have. She wrote it, but look what she wrote about. She wrote it, but 'she' isn't really an artist and 'it' isn't really serious, of the right genre—i.e., really art She wrote it, but there are very few of her.").

2 KATHLEEN HALL JAMIESON, *ELOQUENCE IN AN ELECTRONIC AGE* 67 (1988).

3 The Cherokee Letter (Apr. 23, 1838), in 4 *JOURNALS OF RALPH WALDO EMERSON* 426, 427 (Edward Waldo Emerson & Waldo Emerson Forbes eds., 1910).

Human creativity, like human reproduction, always makes new out of old in ways that copyright law has not fully recognized. The genre of vidding, a type of remix made mostly by women, demonstrates how creativity can be disruptive, and how that disruptiveness is often tied to ideas about sex and gender. The most frightening of our modern creations—the Frankenstein’s monsters that seem most appropriative and uncanny in light of old copyright doctrine—are good indicators of what our next generation of creativity may look like, especially if creators’ diversity in gender, race, and economic background is taken into account.

I. MONSTERS FROM THE ID⁴

Mary Wollstonecraft Shelley spawned a monster. *Frankenstein: or, The Modern Prometheus* (1818) introduced Dr. Frankenstein as well as his creation, who shares his name. Frankenstein’s monster is put together out of parts of other people, given new, independent life by men through science.⁵ Dr. Frankenstein is the creator/repurposer in the narrative, but Mary Shelley is the puppetmaster behind him.⁶ *Frankenstein* is still timely two centuries later; anxieties about reproduction, who gets to control it, and whether appropriate reproduction can consist of cutting and pasting what’s gone before are central both to this key early science fiction text and to current debates over fair use, especially with respect to so-called “user-generated content.”

The connection between copying and horror has been noted before. Michael Newman, for example, discusses the “uncanny” appropriation art of Richard Prince, who re-photographed mainstream ads. To Newman, Prince’s works “have the quality of *déjà vu*, of repetition, which renders them strange, like the cadaver brought

4 See FORBIDDEN PLANET (Metro-Goldwyn-Mayer 1956); cf. MONSTERS FROM THE VIDS, <http://giandujakiss.com> (last visited June 25, 2011).

5 As Francesca Coppa pointed out to me, there is a reading of *Frankenstein* that figures male, scientific reproduction as uncanny and dangerous in contrast to “natural” female reproduction; however one valorizes the different positions, the poles of male/female and science/nature come up again and again in the history of creativity, with “science” replaced by “literature” at appropriate points. The Intellectual Property Clause of the U.S. Constitution itself uses the word “Science” to identify the appropriate subject matter of copyright. U.S. CONST. art. I, § 8, cl. 8 (granting Congress power to give authors exclusive rights in their writings in order to promote science). Women doing science, and women doing literature, are troublesome to such a gendered divide.

6 Not incidentally, critics attempted to deny that Shelley herself could have written the book, because they believed that a woman, most especially a young one, could not have done so. See RUSS, *supra* note 1, at 21.

back to life in a horror story.”⁷ Note the implication that the source was dead before being revived. The intervention of the artist brought it back to life, but that is not unqualifiedly a good thing. It raises the issue of whether dead, commodified things should stay dead. Reproduction is uncanny because it creates life where there was none, and because of its double meaning: reproduction results in an entity that is the same/not the same as the original/its mother.

Today, a largely female community of artists creates in similar fashion to Dr. Frankenstein and Richard Prince, though we tend to call the overall genre “remix” or “mashup.” Vidders make vids: re-edited footage from television shows and movies, set to music that directs viewers’ attention and guides them through the revised images. This practice, growing out of media fandom, can trace its genealogy starting in the early 1970s with slideshows carefully coordinated with music.⁸ A vid, Francesca Coppa has written, is an argument made through quotation and narrative.⁹ This type of creativity foregrounds its constructedness, its debts to earlier works, with editing (“cutting”) taking the place of the stitches used to suture the limbs of Frankenstein’s monster. “Whatever their explicit themes and narratives, [vids] represent a queer form of reproduction that mates supposedly incompatible parents (‘original’ media source and ‘original’ creativity) to spawn hybrid offspring.”¹⁰

Tisha Turk draws attention to the ways in which re-editing visuals and changing the soundtrack serve to transform the original narrative in ways that conventional text-based literary theories find difficult to recognize:

[A] vid always represents at least two stories: the story contained within the original source text, and the story of the vidder’s

7 Michael Newman, *Revising Modernism, Representing Postmodernism: Critical Discourses of the Visual Arts*, in *POSTMODERNISM* 95, 132 (Lisa Appignanesi ed., 1989).

8 See Francesca Coppa, *Women, Star Trek, and the Early Development of Fannish Vidding*, 1 *TRANSFORMATIVE WORKS & CULTURES* (2008), <http://journal.transformativeworks.org/index.php/twc/article/view/64>.

9 See Francesca Coppa, *An Editing Room of One’s Own: Vidding as Women’s Work*, 77 *CAMERA OBSCURA* (forthcoming 2011) [hereinafter Coppa, *Editing Room*] (“Unlike MTV-style music video, in which a filmmaker creates images to illustrate a song, vidders use music to interpret a visual source; in other words, the song tells the spectator how to understand the montage the vidder has constructed.”); Francesca Coppa, *A Fannish Taxonomy of Hotness*, *CINEMA J.*, Summer 2009, at 107, 107–08 [hereinafter Coppa, *Fannish Taxonomy*] (“[V]idding is an art in which clips from television shows and are set to music to make an argument or tell a story. The song is used as an interpretive lens; the music and lyrics tell us how to understand what we see.”).

10 Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, *CINEMA J.*, Summer 2009, at 126, 126.

response to and transformation of that text at the level of narration. H. Porter Abbott has observed that the burden of narration in film and television is borne not by a speaker but “by the camera (the angles, duration, and sequencing of what it sees) and not uncommonly by music”; these elements of discourse are exactly what vidders alter. A vidder chooses which camera angles to keep or discard, how long each clip should be, and what order those clips should be presented in; and of course she also adds a soundtrack, a song that provides a voice for a character or in some cases for the vidder herself.¹¹

For example, *Vogue*,¹² by Luminosity, takes footage of violence and suffering from the film *300* and sets it to Madonna’s hit song, transforming the homoeroticism of the original into something blatant and ludicrous (the vid ends with a caption directed at the comic artist and writer responsible for the story: “Fuck you, Frank Miller!”). *Vogue* is a useful work not only because of the criticism of the film it offers—the vid argues that the movie provides us in the end only the pornography of violence, fetishizing the (white) male body and its suffering while pretending to be about some principle of honor—but also because of the way Luminosity mixes and matches.¹³ Why shouldn’t a woman’s voice, strongly associated with the 1980s and referencing classic American film stars, guide us through this feast of male flesh set in an imaginary Greek prehistory? The one is no more artificial than the other, and possibly more honest about its performativity. As Luminosity told *New York Magazine*, *Vogue* “was my chance to do a bait and switch, and turn the ‘male gaze’ back onto itself.”¹⁴ Behind Madonna, Luminosity is the puppetmaster, changing the narrative, taking on the role of the unseen director/auteur.

As Turk explains, “Luminosity uses the lyrics of ‘Vogue’ to force us to recognize the possibility of seeing the bodies onscreen as ‘objects of erotic display.’ The vid’s humor is grounded in the tension between this possibility and the movie’s refusal of it; that refusal is framed as both anxious and pointless.”¹⁵ The song is vital to the vid because it celebrates female sexuality, dancing, and the female gaze, all of which the original film attempted to suppress or ignore. *Vogue*’s

11 Tisha Turk, *Metalepsis in Fan Vids and Fan Fiction*, in *METALEPSIS AND POPULAR CULTURE* (Karin Kukkonen & Sonia Klimek eds., forthcoming 2011).

12 Luminosity, *Vogue*, BLIP. TV, <http://blip.tv/file/2289271> (last visited June 25, 2011).

13 See *id.*

14 See Logan Hill, *The Vidder*, *New York Movies*, N.Y. MAG. (Nov. 12, 2007), <http://nymag.com/movies/features/videos/40622/>.

15 Turk, *supra* note 11, at 4.

editing and manipulation of the 300 footage is also aesthetically pleasing and plays on the meaning of the song *Vogue*: “Beauty’s where you find it,”¹⁶ Madonna sings, and the vid finds beauty in the monstrosity of the initial images as well as in the juxtaposition between visual and audio.¹⁷

In mid-2010, the Register of Copyright released her recommendation for new exemptions to the prohibition in the Digital Millennium Copyright Act (DMCA) on circumventing technologies that control access to copyrighted works.¹⁸ In the course of explaining a recommendation for an exemption for noncommercial remix video—allowing vidders and other creators to “rip” small portions of encrypted DVDs for reuse in their own new works—the Register mentioned *Vogue* twice: once as using so much of the original that it might not count as a fair use,¹⁹ and once to illustrate the extensive editing that vidders perform.²⁰ Because such editing results in some visual degradation with every generation of manipulation, vidders must start with high-quality source in order to end up with effective vids, and this need for high-quality source was a major justification for granting the exemption.²¹ The recommendation also discussed several other vids in the course of concluding that noncommercial remix was likely enough to be fair use to justify an exemption and that remixers could not reasonably use non-circumventing methods to achieve the same result.

The treatment of *Vogue* is noteworthy because the Register both relied on the vid and others like it to show that an exemption was necessary to enable fair use and simultaneously disavowed any such reliance. The exemption was justified because the proponents had shown with evidence that substantial numbers of fair uses were subject to interference by the DMCA. And yet, although the only artist to testify before the Copyright Office was a vidder, and although vids were the only examples discussed in the text of the recommendation to show that substantial numbers of fair uses were implicated by the DMCA, the Register nonetheless insisted that the Copyright Office’s

16 MADONNA, *VOGUE* (Sire Records 1990).

17 See *Luminosity*, *supra* note 12.

18 Recommendation of the Register of Copyrights in RM 2008-8; Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress on Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (June 11, 2010) [hereinafter Rulemaking].

19 See *id.* at 51 n.187.

20 See *id.* at 67.

21 See *id.*

ruling was not a statement that even the specific vids discussed were fair uses.²²

The Register's conflicted reaction exemplifies a general legal discomfort with the unauthorized creativity expressed by vids²³: their critical interventions are understandable as transformative, as fair use doctrine has defined transformiveness, yet at the same time they may seem to copy excessively. It is no accident that excessiveness and femininity have been associated in Western culture, as have copying and femininity.²⁴ From the dominant perspective, vids take too much; they are created by people (women) who care too much about popular culture: their imaginations at once too fertile and too close to home. Anxiety about female creativity and denigration of domains where women are active creative forces have a long history. From the exclusion of intellectual property protection for cooking, fashion, and other traditionally feminine endeavors to concern over whether novels, or reading generally, were too female, women's subordinate status has transferred to their intellectual creations as easily as to their actual daughters.²⁵

Proper transformiveness, by contrast, is restrained, no matter how vicious it is in its assault on its target. Fair use doctrine now purports to allow taking greater amounts of an original when an accused work is transformative, and yet the case law still tells judges that they should make sure that the transformative user doesn't go beyond the leeway justified by the transformation.²⁶ How this is to be assessed remains unclear.

22 See *id.* at 68.

23 See also Sarah Trombley, *Visions and Revisions: FanVids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647 (2007) (analyzing vids under fair use doctrine).

24 See MARCUS BOON, IN PRAISE OF COPYING 90 (2010) (discussing fears of copying or mimesis as feminized, unstable, and hysterical).

25 See, e.g., Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 448–52 (2006) (summarizing history of Western male anxiety over female literary pursuits); cf. BOON, *supra* note 24, at 162 (positing that cooking, quilting, and other “stereotypically feminine arts” were considered “second-rate” and “derivative” because they were seen as mere copying “and are thus seen as lacking the originality and authenticity of heroic fine arts such as painting and sculpture”). Unlike Boon, I'm not sure the causation runs in that direction, since patriarchal cultures seem quite satisfied to denigrate what women do because women do it. Cf. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 343 (2005) (discussing the defense of the exclusion of women from formal combat roles in the U.S. military as “reflect[ing] the underlying belief that a warrior is valuable precisely because women cannot do it”).

26 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586–88 (1994).

II. TOO MUCH IS NEVER ENOUGH: ON EXCESSIVENESS

What does it mean to add new meaning or message to an original? How does that play out when the dominant culture sees careful attention to popular media as an embarrassing overinvestment? In such circumstances, it's easy for those whose aesthetic commitments are elsewhere to dismiss vidders' interventions as not adding significant meaning.

This is especially true because vids and similar cultural forms, which often start from a position of love for the original, don't fit the prototype of biting, hateful criticism that courts often set up for parody. But then the prototype doesn't work very well either: the kind of passion that inspires transformative reworking often has some love in it even when criticism is at the forefront. We rarely bother to parody something that lacks any hold on us. Indeed, Alice Randall's *The Wind Done Gone*, a modern prototype of transformative fair use,²⁷ came out of Randall's intensely passionate relationship to *Gone with the Wind*. Margaret Mitchell's novel hurt Randall so much because she loved it and it was sexist and racist. The love and the hurt had to combine for her to write a novel in response.²⁸

Without acknowledging the love remixers often have for an original work, it is difficult to understand the resulting transformations. Just as vidding held an ambiguous place in the DMCA rulemaking, it has yet to make it into the academic canon surrounding remix. Vidding has often been excluded from academic discussions of video remix because of its hybrid character, both critical of its sources and emotionally engaged with them in a way that seems feminine and suspect, as well as because of its subtlety and commitment to aesthetics compared to the more hamfisted parodies that tend to draw more critical attention.²⁹ Understanding a vid often requires knowledge of the underlying source, just as understanding literary criticism often

27 See *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (vacating district court's grant of preliminary injunction brought pursuant to the Copyright Act as an abuse of discretion).

28 See *A Conversation with Alice Randall*, HOUGHTON MIFFLIN HARCOURT, http://www.hmhbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation (last visited June 25, 2011) (quoted in Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 9 (2010)).

29 See Kristina Busse, *Affective Aesthetics*, TRANSFORMATIVE WORKS & CULTURES SYMP. BLOG (Nov. 23, 2010, 6:17 PM), <http://symposium.transformativeworks.org/2010/11/affective-aesthetics/>; cf. CLIVE YOUNG, *HOMEMADE HOLLYWOOD* (2008) (identifying many genres of amateur video, including amateur video based on works such as *Star Wars*, without discussing vids).

does.³⁰ Audiences can also benefit from understanding the community out of which the vid arises, because a vid often participates in a larger conversation (again, just as a work of literary criticism often does).³¹ When transformation operates within a community rather than as an apparently isolated autonomous act, it merges appreciation and criticism, creativity and context, in ways that can seem unfamiliar to observers used to thinking about the individual artistic genius/rebel. And yet the very idea of transformative fair use requires reliance on existing works, which is why it has been so difficult to fit into standard stereotypes of artistic innovation.

Because they are passionate and context-specific, I see fanworks such as vids as providing a model for multiple prototypes of transformativeness, which could better account for creative practice as it exists before encountering law. As Kristina Busse writes, “fans have long been trailblazing not just remixes but the ability to interrogate and criticize and culturally resist without dismissing the text and their relationship to it or ironically distancing themselves.”³² Fandom is also particularly suitable for producing multiple prototypes because multiplicity is at the heart of fan cultures: it is possible to make fifty vids celebrating the epic love of two characters, or five hundred, because one vidder’s efforts don’t create any sort of canon blocking

30 See Dana Sterling, *Fandom as a “High Context” Culture*, TRANSFORMATIVE WORKS & CULTURES SYMP. BLOG (Feb. 4, 2011, 4:34 PM), <http://symposium.transformativeworks.org/2011/02/fandom-as-a-high-context-culture> (“‘High context’ cultures . . . always rely on more than the literal written or verbal words in order to convey the message. History, relationships, subtext, symbolism, connotation—all these things are not extra decoration that can be efficiently stripped away from the message. They are part of the message Fandom is an extremely ‘high context’ culture. In fact, it can be almost incomprehensible to someone from outside, because it’s so thickly woven with inside jokes, references to past stories, past fandoms, fandoms next-door, past relationships. To ignore all that and focus only on literal, explicit, written messages is to miss a great deal.”).

31 See Kristina Busse, *Introduction*, CINEMA J., Summer 2009, 104, 105 (2009); Busse, *supra* note 29.

32 Busse, *supra* note 29.

another's.³³ (If you doubt those numbers, look for some vids on YouTube. I suggest searching for "Kirk/Spock.")³⁴

Commercial media and attempts to commodify fan labor, by contrast, tend to buy in to a rhetoric of scarcity by attempting to reward the "best" fans of a particular series rather than accepting multiplicity. Copyright owners hold contests and award badges to identify superfans, those people who are the best at marketing a book or show to others, converting fandom into a kind of multilevel marketing scheme.³⁵ Commercial culture generally promises an infinity of options but cannot deliver; nobody gets to go home with the entire contents of the store. Selectivity seems so natural to the commercial project that the copyright owners trying to turn user-generated content into a revenue source don't even seem to notice the way in which their baseline assumptions about value, coherence, and scarcity contradict the assumptions of the fans they're trying to reach.

Turn again to the question: aren't vidders just overreading? Gianduja Kiss made a vid, *It Depends on What You Pay*, illustrating the way in which the television show *Dollhouse*,³⁶ which was created by TV auteur Joss Whedon, depended on a premise that was fundamentally about rape. On the show, characters repeatedly had their minds wiped and personalities implanted so that they would believe they

33 See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 528–30 (2009). Marcus Boon identifies similar dynamics in the development of dub and rap:

Folk cultures in the industrial era have understood that industrial products are not merely "objects" attaining form and power through being fetishized commodities; they are samples of infinity, of infinite variety, which is a source of spiritual insight and enjoyment. For example, consider the phrases used on early Jamaican DJ-ing records, such as *Version Like Rain* or *Rhythm Shower*, which express the idea of an infinite number of copies of a song or a rhythm, something that became actually possible in Jamaica in the early 1970s, when local record producers such as Lee Perry gained access to multi-track recording technology and the techniques of sound manipulation and distortion The phrase "version like rain" establishes this process of infinite multiplication as part of a second nature, of technology mimicking the excess and plenitude of nature. . . . Saying "version like rain" means staking a claim to the right to make, consume, and embody . . . abundance

BOON, *supra* note 24, at 67.

34 See, e.g., bluefairy113, *Must Be Dreaming (Kirk/Spock)*, YOUTUBE (Feb. 3, 2010), http://www.youtube.com/watch?v=F-tY_TuJOrk.

35 See Zahr Said Stauffer, *Taking the Grr' out of Grrrl: Gender and Fandom in the Cathy's Book Series* (Apr. 24, 2009) (unpublished manuscript) (delivered at the 6th Annual IP/Gender Symposium).

36 *Dollhouse* (Fox television broadcast).

wanted whatever scenario the people who rented them desired. What those people desired was quite often sexual. The show tried very hard to distance itself from rape both by appealing to concepts of prior consent (even as the narrative explained that, at minimum, several key characters had not consented to this treatment) and by defining and distinguishing “real” rapists from the other people responsible for the scenario. *It Depends on What You Pay* sets scenes from *Dollhouse* to a song from *The Fantasticks*. As Gianduja Kiss explains, “[b]y 1990, . . . *It Depends On What You Pay* had been largely excised from the show. Recent productions of *The Fantasticks* either include the song with a different set of lyrics, or delete it entirely and substitute a new song in its place.”³⁷ The song is about—indeed, it celebrates—rape.³⁸ The juxtaposition of this now-suppressed song with the images from *Dollhouse* forces the ugly premise of the show to the surface.

Interestingly, when the vid crossed over from the vidding community to the more general Joss Whedon fan community, there were a significant number of negative responses, falling into two categories. First: the vid said nothing new, because *Dollhouse* was obviously a rape narrative already. Second: the vid constituted unfair criticism because the show was clearly not about rape at all.³⁹ The second response demonstrated that the first was a more hopeful assessment of popular audiences than justified by reality. Plenty of people wanted to watch *Dollhouse* and also absolve themselves of enjoying a rape narrative. The vid itself argued that *Dollhouse* was part of rape culture: a failure to see rape as rape, which the holders of the second view then enacted.

Relatedly, when a videomaker created a remix showing James Bond’s use and abuse—sexual and physical—of women, some of the

37 Gianduja Kiss, *It Depends on What You Pay*, MONSTERS FROM THE VIDS (Apr. 25, 2009), <http://www.giandujakiss.com/index.php?set=videos&video=119>.

38 The opening lines:

Rape!
 R-a-a-a-pe!
 Raa-aa-aa-pe!
 A pretty rape!
 We’ve the obvious open schoolboy rape,
 With little mandolins and perhaps a cape.
 The rape by coach; it’s little in request.
 The rape by day, but the rape by night is best.

THE FANTASTICKS, *IT DEPENDS ON WHAT YOU PAY* (1960) (lyrics by Harvey Schmidt & Tom Jones).

39 See, e.g., Comments on *It Depends on What You Pay*, WHEDONESQUE (Apr. 27, 2009, 8:15 AM), <http://whedonesque.com/comments/20046>.

responses on YouTube read the remix as a celebration of James Bond rather than as a criticism. As Elisa Kreisinger explained,

By isolating (and occasionally repeating) the images of glorified aggression, objectification and, as the artist puts it, “womanizing”, the remix creates a rarely acknowledged but more accurate portrayal of Bond’s misogynistic masculinity.

. . . .

. . . Many of the commenters responding to the original remix upload seemed to see very little wrong with the 007 brand of masculinity. Sadly, in fact, the highest rated . . . comments [] illustrated that a larger number of viewers did not see this remix as a critique but as a *celebration* of Bond’s treatment of women.

. . . Here, the tongue in cheek introduction along with the additive text, in my mind, clearly illustrates that this piece intends to expose the misogyny behind the James Bond character and question an image of masculinity rather than reinforcing or glorifying it.⁴⁰

Note that if we were to accept the reaction of some viewers that these vids merely reinforced their impressions of the original, the implication would be that the vids are not transformative and thus not fair use.

The district court in *Salinger v. Colting* applied exactly this mistaken reasoning.⁴¹ Rejecting the defendant’s claim that the book *60 Years Later* was transformative because it exposed and highlighted the ultimate ridiculousness and failure of Holden Caulfield’s angst, the court reasoned that “Holden Caulfield as delineated by Salinger was *already* often ‘miserable’ and ‘unconnected’ as well as frequently ‘absurd[]’ and ‘ridiculous,’ as Colting says of his elderly version of the character. . . . [T]hose effects were *already* thoroughly depicted and apparent in Salinger’s own narrative about Caulfield.”⁴² While some people surely always saw Caulfield as a pathetic loser, others disagreed.⁴³ This disagreement itself demonstrates that a version of

40 Elisa Kreisinger, *The Real James Bond*, POL. REMIX VIDEO (Apr. 4, 2011), <http://www.politicalremixvideo.com/2011/04/04/the-real-james-bond-2/>.

41 *Salinger v. Colting*, 641 F. Supp. 2d 250, 257–58 (S.D.N.Y. 2009), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010) (first alteration in original) (emphasis added) (citation omitted).

42 *Id.* at 258.

43 See, e.g., Jennifer Schuessler, *Get a Life, Holden*, N.Y. TIMES, June 21, 2009, at WK 5, available at <http://www.nytimes.com/2009/06/21/weekinreview/21schuessler.html> (“‘The Catcher in the Rye,’ published in 1951, is still a staple of the high school curriculum, beloved by many teachers who read and reread it in their own youth. . . . Teachers say young readers just don’t like Holden as much as they used to. . . . But Holden won over the . . . 1960s generation who saw themselves in the disaffected

Holden Caulfield focused on his pitiable and failed life is a critical intervention into an ongoing debate.

The history of parody and similar forms is one in which defenders of a targeted work always have available the responses, “that’s not really in there; you’re seeing things!” and “that’s obvious; your so-called parody is not subverting anything.” Converted into legal reasoning, both these responses could underlie a finding that a new work was not transformative of an old one,⁴⁴ and yet the interaction between those responses, as with *It Depends on What You Pay*, can demonstrate how the new work is transformative by making parts of the old more salient (and more uncomfortable for its fans). To take an older, nonlitigated example, before he wrote *The Clansman*⁴⁵ (made famous in film as *Birth of a Nation*), Thomas Dixon wrote a “sequel” to Harriet Beecher Stowe’s *Uncle Tom’s Cabin*. Dixon intended to refute Stowe’s novel by turning Simon Legree into a carpetbagger and defending the honor of the South, but many (though not all) reviewers saw his book as a superior successor to Stowe’s.⁴⁶ Many others also rewrote *Uncle Tom’s Cabin* to criticize the novel and defend slavery, often styling the results as “sequels”, suggesting that they could be read either as criticism or as logical extension.⁴⁷ This pattern repeats with other works, from *Don Quixote* to works by Alexander Pope and *The Rape of the Lock*.⁴⁸ Even individual understandings of whether work is transformative or simply imitative can change

preppy, according to the cultural critic Morris Dickstein. ‘The skepticism, the belief in the purity of the soul against the tawdry, trashy culture plays very well in the counterculture and post-counterculture generation,’ said Mr. Dickstein, who teaches at the Graduate Center of the University of the City of New York.”)

44 *Salinger* is an example of the latter (that’s obvious) response, while *Dr. Seuss Enterprises v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997), is an example of the former (that’s not in there). In *Dr. Seuss*, the court found that a parody of the O.J. Simpson trial in which Simpson played the role of the mischievous Cat in the Hat did not serve as a critique of the childish denial of responsibility by the original Cat in the Hat, and that the defendants’ claim to critique was mere unconvincing schtick.

45 THOMAS DIXON, JR., *THE CLANSMAN* (1906).

46 See MELVYN STOKES, D.W. GRIFFITH’S *The Birth of a Nation* 37, 41–42 (2007); see also Brief for American Library Ass’n et al. as Amici Curiae Supporting Appellants at 19–20, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878-cv) (recounting the history).

47 See SARAH ROBBINS, *THE CAMBRIDGE INTRODUCTION TO HARRIET BEECHER STOWE* 103 (2007).

48 See SIMON DENTITH, *PARODY* 36 (2000) (“[P]arody has the paradoxical effect of preserving the very text that it seeks to destroy This can have some odd effects, even running counter to the apparent intentions of the parodist. Thus the classic parody of *Don Quixote* . . . preserves the very chivalric romances that it attacks—with the unexpected result that for much of its history the novel has been read as a cele-

over time: Noted art critic Douglas Crimp first read Robert Mapplethorpe's photography as simply copying, rather than commenting on, classical styles, then reevaluated as he came to understand how Mapplethorpe radically changed the meaning of those styles by addressing the spectator as a homosexual subject.⁴⁹

One way in which vids challenge copyright's concepts is by forcing us to confront the excess of meaning in most (if not all) creative works: they can be read in multiple different ways. Doctrine tells us that a use is more likely to be fair when it targets something that is really in the original work.⁵⁰ But that means we aren't exactly looking for "new" meaning but more for excavation of existing meaning, or identification of structures and concepts in the original work that are susceptible to particular critical interpretations. This in turn means that the transformative user will readily be subject to the criticism that she didn't say anything we (who are of course perceptive and thoughtful) didn't already know. Without recognizing that works mean different things to different people, transformativeness as a concept is at war with itself.

To work as an expression-promoting concept, transformativeness must be recognized as highly variable and even audience-specific. The media studies literature has shown that different audiences read mainstream works differently, meaning that there is no one message that a transformative user could then reject and criticize.⁵¹ For example, prejudiced and unprejudiced viewers ascribed different meanings to *All in the Family*, as evidenced by the fact that "some viewers write letters . . . which applaud Archie for his racist viewpoint, while others

bration of misplaced idealism rather than a satire of it."); *id.* at 105–06 (discussing debates among literary critics over whether texts are parodic or respectful).

49 See Johanna Burton, *Subject to Revision*, ARTFORUM, Oct. 2004, reprinted in APPROPRIATION 205, 206 (David Evans ed., 2009) (citing DOUGLAS CRIMP, *Photographs at the End of Modernism*, in ON THE MUSEUM'S RUINS 7, 27 (1993)) (discussing Crimp's change of heart). Crimp was assessing the copying of style, not the copying of particular works, but the issue was the same: whether Mapplethorpe was commenting and changing the style or simply reproducing it.

50 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994) (holding that a use is more likely to be fair if it targets something within the original work rather than using the original as a stepping-off point for unrelated commentary); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 161–62 (2007) (arguing that transformation regularly emerges from highlighting elements in the original).

51 See, e.g., JOHN FISKE, *READING THE POPULAR* (1989); John Fiske, *TV: Re-Situating the Popular in the People*, 1 CONTINUUM: AUSTRAL. J. MEDIA & CULTURE 56 (1987), available at <http://www.mcc.murdoch.edu.au/ReadingRoom/1.2/Fiske.html>; Trombley, *supra* note 23, at 652.

applaud the show for effectively making fun of bigotry.”⁵² Viewers’ perception of the program’s intent to satirize Archie Bunker’s prejudices was greatest among nonprejudiced viewers and least among prejudiced viewers.⁵³ Indeed, it’s possible to read many popular works in directly contradictory ways—this openness may be part of why they *are* popular. But this multivalence should not insulate them from transformative uses. There is room for contradictory transformative reactions to the original, even when some viewers think that a particular remix just reiterates what’s already present in the original.

“Nondiscrimination” is a fundamental principle of modern copyright law: courts are not art critics.⁵⁴ Yet if courts are truly committed to the idea that they should avoid aesthetic judgments in copyright cases whenever possible, they should assess transformativeness from multiple perspectives.⁵⁵ What is needed is a greater degree of epistemological humility. The current version of transformativeness tends to involve a fair amount of courts knowing it when they see it.⁵⁶ But as Catharine MacKinnon says, they may not know “what I know when I see what I see.”⁵⁷ Or, in the words of Eve Kosofsky Sedgwick on

52 Neil Vidmar & Milton Rokeach, *Archie Bunker’s Bigotry: A Study in Selective Perception and Exposure*, 24 J. COMM. 36, 37–44 (1974).

53 *Id.* This may also do something to explain why satisfied fans of *Dollhouse* and James Bond didn’t see anything legitimate or critical about the respective vids. Having already been satisfied with the views expressed in the original, they were less likely to perceive criticism or alternative readings as justified.

54 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582–83 (1994) (quoting Justice Holmes’s caution against judging artistic merit in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). Though nondiscrimination is formally a foundational principle of modern copyright, many have persuasively argued that artistic judgments of some sort are both pervasive and inevitable in copyright cases. See, e.g., Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

55 Cf. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection. Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act.”) (citation omitted).

56 See, e.g., *Dr. Seuss Enters. v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997) (rejecting transformativeness claim out of hand).

57 Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3 (1985).

another topic, “it’s only by being shameless about risking the obvious that we happen into the vicinity of the transformative.”⁵⁸

III. THE SOFTER SIDE: HYBRIDS VERSUS MONSTERS

In past work I’ve discussed remix as hybridity,⁵⁹ drawing on Donna Haraway’s image of the cyborg, a female/feminized figure whose boundaries are ever-changing, reaching out to incorporate parts of the external world. Haraway specifically identified remixing canonical stories as a cyborg tactic.⁶⁰ I used “hybrid” because of its connotations of hybrid vigor, while Haraway’s cyborg highlights both the possibilities of technology to enable such changeability and the threat that lurks along with the promise of the power to reconfigure oneself. Science fiction has taught us that cyborgs may rebel against their creators: the liquid metal Terminators and the human-mimicking Cylons of the revisioned/remixed *Battlestar Galactica* are only the most prominent recent examples of cyborgs who intend us harm and slip past our defenses by looking like us. (The tagline for the new *Battlestar Galactica* was, “[T]here are many copies. And they have a plan.”)⁶¹

Here, in contrast to my earlier work, I want to emphasize that threat of rebellion.⁶² Hybrids, like Frankenstein’s monster, challenge the existing order.⁶³ Copyright owners of course often fear remix because they fear the loss of control over their works (often conceived of—pun intended—as the kidnapping or molestation of the authors’ “children”).⁶⁴ While remix often looks less “professional” than the

58 EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22 (1990).

59 See Tushnet, *supra* note 28.

60 See DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN* 149 (1991).

61 *Battlestar Galactica* (Syfy Channel television broadcast Oct. 18, 2004).

62 Caveat: vidders by no means uniformly experience themselves as threatening. Often, they see their work as celebration and tribute, an expression of love. I speak in the text of copyright owners’ fears and perceptions. Cf. ALISON YOUNG, *JUDGING THE IMAGE* 71 (2005) (“The spectator’s imputation of aggression to graffiti writing erases the writer’s identity, subjectivity and self; and the labor, pleasure and love that wrote the graffiti is replaced with blank space.”).

63 Cf. BOON, *supra* note 24, at 50 (endorsing the idea of “abundant nature as an endless, changing profusion of forms produced and reabsorbed,” which is perceived as “degradation” in dominant discourse about copying).

64 See, e.g., Jacqueline D. Lipton, *Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1 (2010) (discussing Anne Rice and Stephenie Meyer); see also MARK ROSE, *AUTHORS AND OWNERS* 61–62 (1993) (discussing the author/parent comparison); Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 62 (2001) (developing the idea of joint authors as co-parents).

content that it remixes,⁶⁵ this is not always the case. When a remix or other form of amateur content has a compelling enough story to tell, some audiences may attend to it regardless of its amateurishness. As a result, remix seems to be part of an invasion: a flood of competitors for professionally produced content whose presence will destroy the incentive to create such content in the first place. Remix is the worst, though, because—like the T-3000 from the *Terminator* franchise—it takes the form of that which it seeks to destroy.

Vogue provides an excellent example of the monstrousness of vidding. Luminosity gives us men's bodies, dancing to a woman's voice, so that lines of gender are blurred—even Frankenstein's monster was only made of bits of *men*. Beyond Madonna, there is Luminosity, controlling the narrative in a way regularly reserved for male authors. Luminosity is a woman in charge, but not a Lady Macbeth, a common cultural script for a woman who sets events in motion.⁶⁶ Luminosity can see, and can show us what she sees, but she can't be seen (though there will always be commenters willing to speculate about her body, because that's what we do to women in public). The vidder is a disembodied presence, focusing our attention on the male bodies we *do* see. Women, in conventional discourse, including legal discourse, are looked at and spoken about. Their bodies convey men's messages.⁶⁷ To be the one looking instead is a powerful, threatening position, as the next section will elaborate.

By appropriating and remixing *300*, Luminosity takes the narrative away from Frank Miller. With her cuts (an editing term that persists past its physical instantiation), she both divides the film from

65 Unauthorized copying is linked to unauthorized sexuality through ideas about “fidelity” and purity. Both in videotape vidding and even digital vidding, owing to the effects of editing and processing on digital files, the resulting vid often shows evidence of the work done on it that makes it less than pure/pristine. Cf. LUCAS HILDBRAND, *INHERENT VICE* 62 (2009) (“[F]idelity and authenticity are a ruse, an ideology to promote newer and more expensive formats. Infidelity is the marker of the analog amateur. Bootleggers are promiscuous and polyamorous.”).

66 See MARJORIE GARBER, *SHAKESPEARE AND MODERN CULTURE* 94–95 (2008).

67 Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 *YALE J.L. & HUMAN.* 227, 249 (2009) (“Think, for example, of who asserts First Amendment rights in obscenity cases: producers, distributors, vendors, publishers, curators, photographers, directors. These are the First Amendment speakers, not the women who display their bodies. Thus Catharine MacKinnon writes of women's bodies in pornography: ‘Pornographers use our bodies as their language. Anything they say, they have to use us to say.’ Women's bodies are just vehicles for pornographers' speak. This silence that we expect from the sexually objectified woman normally extends into case law.” (quoting Catharine A. MacKinnon, Op-Ed, *Who Was Afraid of Andrea Dworkin?*, *N.Y. TIMES*, Apr. 16, 2005, at A13)).

itself and creates new connections between works, situating her vid as a response to the film.⁶⁸ Vidders focus on the cut: isolating moments and images from a larger whole “presented to them as unified and complete,” vidders then reassemble those parts “into coherent wholes of their own devising.”⁶⁹ Or, as Francesca Coppa puts it,

Cutting and editing (with its historical connections to sewing) create a new entity. In the case of vidding, editing isn’t just about bringing images together; it is also about taking mass media images apart. A vidder learns to watch television and movies fetishistically, for parts; to look for patterns against the flow of narrative structure; to slice desired images out of a larger whole [A] vidder can tailor-make her media to be as she likes it, and can convey her preferred reading of a text by *showing us exactly what and how she sees*.⁷⁰

“[C]yborg fluidity insists that borders between works matter because they are permeable.”⁷¹ Of course this is frightening. Penetration of boundaries is often threatening, potentially disruptive, but penetration is also the condition of creativity, outside mixing with inside and generating something new. (Not incidentally, penetration is also the condition of reproductive heterosexuality for women.) Influence, borrowing, and all the other terms we use to describe how the author mixes what exists with what does not yet exist involve an interpenetration of author and external world. We don’t stand on the shoulders of giants; we stand partly inside them.

Horror, as a genre, has regularly—indeed, almost exclusively—concerned itself with the penetration of boundaries, especially the boundaries of the body. Horror provides us with a reminder that creativity can be dangerous and destructive, and not just in the bloodless way that most references to “creative destruction” in the intellectual property literature suggest. Sometimes our children eat us up as they claw their way out of our bodies. Sometimes they eat other people. Remix, with its connotations of chopping up, loss of control, and ungovernability, can be seen as a kind of horror, especially since horror also makes very clear the associations between women and mon-

68 See Tushnet, *supra* note 28, at 2–3 (“Being stitched together means that a work (or a monster) wears its antecedents on its outsides, rather than having its family tree be the kind of thing that can easily be set aside. We can forget, at least for a while, that ‘original’ works always have sources. But the remix does not allow us the illusion that we are dealing only with an individual—self-produced and independent.”).

69 Coppa, *Fannish Taxonomy*, *supra* note 9, at 110.

70 Coppa, *Editing Room*, *supra* note 9 (manuscript at 1).

71 Tushnet, *supra* note 28, at 10.

sters.⁷² The danger of creativity is also connected to authors' experience of creativity as an external imposition. Whether welcome or not, creativity is often understood not as a matter of choice but as an imperative from outside the self—Zeus impregnating Danaë in a golden shower of light.⁷³

Thus, authorship as horror and authorship of horror are connected. Carol Clover has identified a recurring character in modern horror: the Final Girl. Often bearing a masculine name, she survives and triumphs, at least for a time, over the monster. Final Girls are characterized by “smartness, gravity, competence in mechanical and other practical matters, and sexual reluctance.”⁷⁴ Vidders are not quite Final Girls—they appropriate male (as well as female) bodies, not names. They are not on-screen for viewers to enjoy their terrorization and their triumph. But, like Final Girls, they are technically competent: in the 1980s, they used dual VCR decks and stopwatches to make their edits, which required extraordinary amounts of time and patience; now they master various technologies used to get source footage and then the editing suites that allow them to cut and mix.⁷⁵ And, though they are not reluctant like Final Girls to engage with sexual topics, it's not *their* bodies they're putting on the line.

The greatest difference between the vidder and the Final Girl, though, and the reason why the vidder creates and the Final Girl at most survives, is that vidders create within and for a community of viewers and other vidders.⁷⁶ The Final Girl is, by definition, alone.

72 See, e.g., BARBARA CREED, *THE MONSTROUS-FEMININE* (1993) (exploring how horror films play on male fears of female creative/reproductive capacities). By the end of the *Alien* series, for example, Ripley has merged with the alien, sharing its DNA, taking on the power of the creature she bore. See *ALIEN: RESURRECTION* (Twentieth Century Fox 1997).

73 See Kwall, *supra* note 64; Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and 'Work-Makes-Work,' Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011); Tushnet, *supra* note 28.

74 CAROL J. CLOVER, *MEN, WOMEN, AND CHAIN SAWS* 40 (1992).

75 See Francesca Coppa, *Pressure—A Metavid by the California Crew*, IN *MEDIA RES* (Jan. 28, 2008), <http://mediacommons.futureofthebook.org/imr/2008/01/28/pressure-a-metavid-by-the-california-crew>.

76 See Coppa, *Fannish Taxonomy*, *supra* note 9, at 109–10; Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, 15 *FIRST MONDAY* (2010), <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528> (“The goal of much of [anime music video, or AMV] creation is participation in this fan scene, not creating a media work that is going to stand on its own, apart from this social and cultural context. Many creators, particularly beginning creators, see the process of AMV creation as an end in itself, and may only share their videos with a few close friends. Even AMVs that are submitted to animemusicvideos.org or to a convention screening are designed to circulate among a

One of the techniques Joanna Russ identifies to suppress women's writing (and painting, et cetera) is to treat every female artist who manages to fight through the barriers to her success as an exception, without a context or a history.⁷⁷ Each woman thus has to refight battles never encountered by men; each woman is a surprise, not a normal product of an artistic culture.

Part of the legal/cultural project of investigating vidding and similar practices is to reclaim its context and history. Luminosity is one of thousands of artists. She learned from others and is teaching others with her work. Documenting this artistic heritage, one might hope, will help explain to those unfamiliar with it that remix in general, and vidding in particular, is a legitimate practice, as artistic practices with generally recognized histories are already considered.⁷⁸ Vidding as a model for remix culture could then offer a different ideal of creativity than the imagined isolation of a creative genius, a status vidders were always going to have trouble attaining anyway.

IV. IT'S ABOUT POWER

"It's about power."⁷⁹ This line occurs at the end of the first episode of the final season of *Buffy the Vampire Slayer*, introducing the season's theme, which later developed as an argument about female empowerment through community-building and power-sharing. The entity who delivers the line appears to us (and to the ostensible target of its lecture) as a rapidly changing array of past seasons' villains, demonstrating its supremacy—its control—over them all. Vidders exercise the same sorts of power over the narratives they cut up, borrow, and repurpose, assuming the identity of the editor and thus of the writer/director.⁸⁰ They apply the sadistic, controlling gaze Laura Mul-

community of peers who share similar subcultural, niche interests, rather than being media works that are meant to circulate to broad and undefined audiences.”).

77 See Russ, *supra* note 1, at 76–96 (discussing the false perception of anomalousness and the lack of models for female artists).

78 See Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 351, 356–57 (2010); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623 (2004).

79 *Buffy the Vampire Slayer: Lessons* (WB television broadcast Sept. 24, 2002).

80 Cf. Young, *supra* note 62, at 16 (arguing that graffiti is transgressive because “[t]he writer is on display, yet hidden; while the resulting graffiti manifests a rejection of the codes of propriety and ownership regulating practices of signification in urban space”).

vey attributed to classic cinema,⁸¹ but they do it in pursuit of women's pleasures. As Coppa writes:

There are certainly vids that feature, and even eroticize, women, often from a lesbian perspective, though many fewer than those featuring men as the object of the gaze But, in general, fans tend to be critical of the eroticized female image.

Instead, vidding lets women experience the pleasure and power of not being seen. Vidders relish the godlike control of the editing room, bending images to their will. A concomitant pleasure is that of not having to be overtly figured in the text themselves There is . . . a powerful disincentive to identify with women in mainstream media: one is likely to be ambushed by sexism ranging from narrative irrelevance to depictions of graphic sexual violence and murder.

The powerful invisibility of the video editor and the pleasurable invisibility of the vid spectator to whose sensibility footage has been tailored comes as a welcome change from the pain of objectification and identification.⁸²

Most responses to Mulvey's thesis treat the viewers as viewers: their "uses" of film are uses of reception, not production of additional artifacts.⁸³ Vidders, however, demonstrate that "[i]t is one thing to assume that cinema is determined in ideological ways . . . and to assume, that is, that the various institutions of the cinema *do* project an ideal viewer, and another thing to assume that those projections *work*."⁸⁴ Or, as Carol Clover wrote about the reaction of female spectators to horror, "women, practiced as they are at wresting their own pleasure from forms made by and addressed to men, can presumably translate from horror, too."⁸⁵ Vidding allows women to share those translations, claiming a space for them in the world, rather than keeping them private.

If conventional Hollywood cinema enacts the male gaze, what does it mean to have a female gaze? One model is the Medusa: men fear the destructive power of a woman's gaze.⁸⁶ (And perhaps Frank Miller should fear it, given what Luminosity sees when she looks at his

81 See Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 *SCREEN* 6 (1975) (arguing that voyeurism and fetishism are the two ways the male gaze of the director and the spectator controls the threat of women).

82 Coppa, *Editing Room*, *supra* note 9 (manuscript at 2) (footnotes omitted).

83 See, e.g., Judith Mayne, *Paradoxes of Spectatorship*, in *VIEWING POSITIONS* 155, 158–59 (Linda Williams ed., 1995).

84 *Id.* at 159. Mayne is not talking about vidders but making a general point about Mulvey's argument.

85 CLOVER, *supra* note 74, at 223.

86 See Adler, *supra* note 67.

work.) To see is to be able to judge. Consider that the common Western image of blindfolded, impartial Justice is specifically about blinding a *female* gaze so that it cannot make particularized judgments; male images of justice are not so treated.⁸⁷ Pure reversals are rarely possible in relations of domination, but there is something satisfying about being the one looking and judging for once. Many vids explicitly celebrate the beautiful bodies—male and female—mainstream media offer up for our entertainment, reconfiguring the narrative so that female pleasure in looking is not glossed over.⁸⁸ Vids thus defy the cultural disapproval that historically results from women's artistic expressions of desire as well as our artistic expressions of rage.⁸⁹

We could instead explain the power of vidding in terms of democratic discourse and participation, rather than the psychoanalytically-derived language of film theory. Making a remix is an empowering experience, allowing the author to insist that she has something worthwhile to say about the existing world.⁹⁰ In early modern England, literate men (and women, though less care has generally been taken to preserve their records) often kept commonplace books, transcribing fragments of texts that caught their attention, arranged together in what we would now call collage or montage.⁹¹ As Robert

87 See Martin Jay, *Must Justice Be Blind? The Challenge of Images to the Law*, in *LAW AND THE IMAGE* 19, 26–27 (Costas Douzinas & Lynda Nead eds., 1999); *id.* at 28–29 (“The blindfolding of Justitia is thus not a thwarting of the gaze per se, but of the specifically female gaze, or at least of those qualities that have been associated with it in our culture.”).

88 See, e.g., ash4897, *The Look of Love (SPN fanvid)*, YOUTUBE (Apr. 20, 2009), <http://www.youtube.com/watch?v=FWIzDXx49bs> (suggesting homoerotic desire in *Supernatural*); Charmax, *Xena Video (Remastered)*, ME, MYSELF & I (Mar. 30, 2006, 3:48 AM), <http://charmax.livejournal.com/44817.html> (focusing on the women of *Xena*, with strong lesbian overtones); dualbunny, *Fanvid: “If I Had You” - (Darken Rahl & Richard)*, LIVEJOURNAL (Aug. 10, 2010, 1:21 PM), http://community.livejournal.com/seeker_vids/39669.html (suggesting homoerotic desire in *Legend of the Seeker*); jescflowne, *Vividcon Premiering Vids*, LIVEJOURNAL (Aug. 20, 2009, 12:34 AM), <http://community.livejournal.com/vidding/1984442.html> (celebrating the physicality and power of cheerleaders in various movies and TV shows); talitha78, *New Vid: Don't Cha (Clark/Lex, Lex/Lana-ish)*, LIVEJOURNAL (July 13, 2006, 10:11 PM), <http://talitha78.livejournal.com/104810.html> (suggesting homoerotic desire in *Smallville*).

89 See RUSS, *supra* note 1, at 30.

90 See Tushnet, *supra* note 28, at 12; Henry Jenkins, *DIY Video 2010: Political Remix (Part Three)*, CONFESSIONS ACA-FAN (Nov. 17, 2010, 9:15 AM), http://henryjenkins.org/2010/11/diy_video_2010_political_remix_1.html (discussing the influence of vidding on political remix video: many remixers are not self-consciously part of a political remix community, but are making things they care about; vidding practices also provide valuable education in technique and use of audiovisual narrative to make arguments).

91 See KEVIN SHARPE, *READING REVOLUTIONS* 277 (2000).

Darnton explains, “Reading and writing were therefore inseparable activities. They belonged to a continuous effort to make sense of things, for the world was full of signs . . . by keeping an account of your readings, you made a book of your own, one stamped with your personality.”⁹² Kevin Sharpe argues that the process of selecting, copying, and arranging helped create the reader-turned-author as a citizen, developing his sense of himself as an autonomous individual with specific preferences and beliefs.⁹³

Now that we communicate predominantly with audiovisual material, vidding and similar practices offer the same opportunities for self-constitution and self-exploration. The remix offers a point of view from someone who does not have the power of a major studio behind her but still wants to talk about what the popular culture surrounding her means. What’s more, the practice is self-reinforcing: people who realize that a remix was made by another fan or anti-fan feel empowered to try it themselves.⁹⁴ As political remix artist Jonathan McIntosh notes about his experiences teaching others to remix, “[a]fter engaging in remix culture, people young and old[] find it nearly impossible to experience media in a passive or uncritical way. As members of that remix culture even if we never make a remix video ourselves, we can’t help but make imaginary mash-ups in our heads when watching television or movies.”⁹⁵

Vidding is also about economic power: new technologies allow people with somewhat limited financial resources to talk back to mass culture in language that audiences are ready to hear, both because they are familiar with the referents in a remix and because the quality

92 Robert Darnton, *Extraordinary Commonplaces*, N.Y. REV. BOOKS (Dec. 21, 2000), <http://www.nybooks.com/articles/archives/2000/dec/21/extraordinary-commonplaces/?pagination=false>.

93 See SHARPE, *supra* note 91, at 280–81.

94 See, e.g., Ito, *supra* note 76 (“In contrast to their relation to professionally created videos, fans see [anime music videos, or AMVs] as an accessible media practice that they can aspire to. The fannish appreciation of anime and AMVs is integrally tied to the impulse to create. One aspiring editor, Starfire2258[,] describes how after viewing his first AMV competition ‘that inspired me immediately to 1) Find out how to get more of these awesome creations . . . 2) Watch some of the cool anime series that these AMVs showed me and 3) Figure out if I could create one myself.’”); see also Mimi Ito, *Media Literacy and Social Action in a Post-Pokemon World*, MIMI ITO (Feb. 24, 2009), http://www.itofisher.com/mito/publications/media_literacy.html (explaining that “it is the flow between the serious and the playful where we are seeing so much energy and engagement” and arguing that fandom played a major role in political mobilization of young people, particularly women, in South Korea, whose “participation in the protests was grounded less in the concrete conditions of their everyday lives, and more in their solidarity with a shared media fandom.”).

95 Jenkins, *supra* note 90.

of a remix can now be sufficient to keep it from being dismissed out of hand as ludicrously amateurish or unwatchable.⁹⁶ Opponents of the DMCA exemption for noncommercial remix video, discussed above, argued that people who wanted to engage in fair use of DVDs should have to set up a tripod and a camera in a perfectly dark room and film the screen as it played, a proposal that would have had startup costs of \$1200–\$1500 in 2009.⁹⁷ The Copyright Office rightly rejected this alternative, accepting the argument that fair use should not be reserved to those who can afford such an expensive setup.⁹⁸ When protected as fair use, remix allows marginalized groups to intervene in and even shape broader cultural conversations. As Marcus Boon notes, “Montage is obviously important for cultures that can’t afford to buy new things—it is a poor people’s art. We see this in hip-hop too, where it was in part economics that led DJs like Grandmaster Flash and Afrika Bambaataa to assemble new dance tracks out of fragments of cheap old vinyl records.”⁹⁹

CONCLUSION: *CREATOR*

Tell me no, I say yes, I was chosen
 And I will deliver the explosion
 . . . Me, I’m a Creator
 Thrill is to make it up
 The rules I break got me a place
 Up on the radar
 Me, I’m a Taker
 Know what the stakes are¹⁰⁰

When talitha78 made a vid celebrating Sarah Walker, the main female character on NBC’s show *Chuck*, she chose Santigold’s song *Creator*.¹⁰¹ The vid refocuses us on a woman who is objectified by the

96 See Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 903–05, 930 & n.168 (2010).

97 See *id.* at 931–32.

98 See Rulemaking, *supra* note 18; see also Ito, *supra* note 76 (“Video remix has entered the ranks of other fan creative practices such as fan art, fan fiction, and costume play as accessible forms of creative production.”). *But cf. id.* (noting that the anime music vidding community, which has a distinct history from the live-action vidding community, remained majority-male, overwhelmingly white, and predominantly college-educated or college-bound).

99 BOON, *supra* note 24, at 147.

100 SANTIGOLD, *CREATOR* (Downtown Records 2008).

101 See talitha78, *New Vid: Creator—Chuck (Sarah Walker)*, LIVEJOURNAL (Jan. 3, 2009, 3:29 PM), <http://talitha78.livejournal.com/183304.html> (stating that Sarah Walker is “strong, capable, compassionate, and kick-ass. Most importantly, she creates her own reality.”).

show, repeatedly shown in skimpy outfits, but is positioned by the vid as using her sexuality aggressively and instrumentally in a way that allows her to carry out her spy missions just as much as her skills in hand-to-hand combat and knife-throwing do. Though some might doubt whether this kind of reinterpretation can be done successfully, the vid takes the position that Sarah is the one in charge, even in her underwear. Popular culture gives us *Chuck*; vidders take the focus off of the title character and give us *Sarah*.¹⁰²

I am still struggling for the best way to join the legal language of transformativeness with the lived understanding of creative repurposing in the vidding community, among others. Attention to how these very real, very active artists produce and discuss their work would aid us in developing the multiple perspectives on creativity that would reflect more accurately what art is like than the current economic, incentive-based conception. This would, in turn, allow law to understand and accommodate the varieties of transformative uses that pervade current culture, realizing fair use's promise not just for elite artists but for everyone who has something to say about the popular culture that is so powerful a force in creating our world.

102 Over a year and a half later, the show also included *Creator* in a scene featuring Sarah Walker's fighting skills—though at the end of the scene she was rescued by her male partner, and the episode featured a running gag in which her fearsome demeanor leads the people around her (in Thailand, to add some extra racially coded lampooning) to call her a “giant blonde she-male.” *Chuck: Chuck Versus Phase Three* (NBC television broadcast Nov. 22, 2010). As the Television Without Pity reviewer says of this episode, “this show has always tried to have its cake while simultaneously keeping its cake in a perpetual wet t-shirt contest.” Jacob, *Sarah Versus the Whole Entire World*, TELEVISION WITHOUT PITY, http://www.televisionwithoutpity.com/show/chuck/chuck_versus_phase_three_1.php?page=3 (last visited June 25, 2011). That's the kind of treatment that vidders deal with by taking out the parts they want to see and re-presenting them: having the cake without the leering misogyny.