Authorship Atomized: Modeling Ownership in Participatory Media Productions

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Authorship Atomized: Modeling Ownership in Participatory Media Productions

by ELISABETH S. AULTMAN

Abstract

This article presents a license model built with the intent of accommodating varying motivations in creative projects involving mass collaboration.

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I. Introduction: On the Precipice of Culture War or Everyone is a Creative

It may belabor the obvious to say that the advent of the Internet has had a tremendous impact on the way cultural content is created, disseminated, and consumed. That said, no conversation about present day issues in the regulation of intellectual property, its producers, and its consumers can be had without recognition of this transformation and the resulting "shift in the logic by which culture operates"—a shift that blurs historically bright-line legal distinctions regarding the who, what, and how of media. In the copyright context, legal response to the changes arising from technological development is predicated on a framework that, unfortunately, did not anticipate the kind of individual access to the tools of creating and disseminating content that the Internet brought. More specifically, it was not built for a world in which "public" does not inherently indicate commercial, or conversely, private amateur. It was not prepared for the widespread amalgamation of materials and production of bricolage, or "convergence culture" that followed. The road thus far

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1. The word "content" is used throughout this essay to indicate units of creative information. This includes traditional media such as books, television, and movies, but more to the point, includes new media divisions such as posts, entries, and webisodes.

2. HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006) [hereinafter CONVERGENCE CULTURE]. On his blog, Jenkins also provides illustration that belies where this article is going:

[W]e've seen American television evolve over time between highly episodic structures (more or less self-contained) to much more heavily serialized structures. Most shows, though, combine elements of the episodic (a procedural plot which can be wrapped up in a single episode) and the serial (an evolving character relationship, an unfolding mythology, a larger plot within which the individual episodes work as chapters). The shift towards servility on American television plays a large role in preparing audiences for transmedia storytelling. Most transmedia stories are highly serial in structure, but not all serials are transmedia.


4. Id.

5. CONVERGENCE CULTURE, supra note 2, at 2–3.
has left commercial authors and dilettantes in something of an uneasy truce, where individuals infringing on commercial rights are ignored until they seek to capitalize on their derivative works, while commercial authors regularly appropriate dilettante content, often to flash-in-the-pan protest followed by grudging acceptance of the new terms of service.  

Enter transmedia storytelling. Although the change is in its infancy, academics and industry professionals alike are coming to recognize the positive potential of harnessing convergence culture and dilettante enthusiasm, and are using this term to describe the attempts. The scope of what it means is still subject to debate, but broadly, it is used to encompass any number of storytelling mechanisms that share the following characteristics: (1) a fictional

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6. This word will be used throughout the article to indicate those cultural participants that commercial producers have long dismissed as passive recipients of culture; at turns dubbed consumers, audiences, or users. It was selected for its neutrality vis-à-vis the commercial-amateur dichotomy that pervades throughout copyright doctrine and traditional thinking, as well as for its original, positive connotation indicating a love of the arts.

7. Facebook is the perennial example of this phenomenon. For one example see C. Walters, *Facebook's New Terms of Service: “We Can Do Anything We Want With Your Content. Forever.”* CONSUMERIST (Feb. 15, 2009), http://www.consumerist.com/2009/02/15/facebook-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever/. In at least one notable scenario, however, licensees managed to force a commercial actor to retreat from a predatory term. See Alexandra Chang, *Instagram User Numbers Down; Updated Terms of Service in Effect This Week*, WIRED (Jan. 15, 2013), http://www.wired.com/gadgetlab/2013/01/instagram-terms-users/. This appears to be more of a too much, too soon problem for Instagram than proof users would not stand for the policy over time.


10. From *Transmedia 202, supra* note 2:

There is no transmedia formula. Transmedia refers to a set of choices made about the best approach to tell a particular story to a particular audience in a particular context depending on the particular resources available to particular producers. The more we expand the definition, the richer the range of options available to us can be. It doesn’t mean we expand transmedia to the point that anything and everything counts, but it means we need a definition sophisticated enough to deal with a range of very different examples. What I want to exclude from this definition is “business as usual” projects which are not exploring the expanded potential of transmedia, but are simply slapping a transmedia label on the same old franchising practices we’ve seen for decades.
universe or storyworld,¹¹ (2) explored across multiple distribution channels, (3) with narrative synchronization, (4) and, perhaps most importantly, some degree of audience interactivity or participation.¹² Before going further, consider a few words on each element.

A "storyworld" or "universe" is defined by a set of rules, implicit or explicit, that are enforced regardless of narrative or characters employed. For example, a rule might be something like: characters may acquire superpowers through genetic mutation but by no other means.¹³ This rule would apply in a book that takes place in the storyworld, as well as in a film that takes place in the storyworld, even if the characters that appear in each work are completely different and never interact.

This naturally leads to the multiple distribution channel element, which is a deceptively simple in principle—while any individual work (a film, a comic book) may be self-contained, the universe does not end with that one work.¹⁴ So, hypothetically, within a storyworld there might be a film trilogy that tells a simple epic, as well as a comic book series that explores the film characters’ origin stories, and a videogame where players’ missions involve delivering those characters to their places at the start of the film.¹⁵ There is some debate surrounding what “counts” as a distribution channel, such as whether two or more mediums are required or merely two or more related works, such that a film trilogy following the same narrative would not count as transmedia, but a television series and comic following the same narrative would.¹⁶

Narrative synchronization requires that each individual component contribute something unique to the storyworld as a whole.¹⁷ This is perhaps most comprehensible in contrast to the concept of franchise, which allows for rehashing the same familiar characters and narratives ad nauseam, sometimes with novel

¹¹. While there are without a doubt possibilities for transmedia techniques to be applied in the nonfiction and academic spheres, the scope of this article only addresses fictional works and will thus leave this definitional element unexamined.

¹². Transmedia 202, supra note 2.

¹³. This example is a rule of the X-Men series owned by Marvel Comics.


¹⁵. See e.g. Resident Evil Outbreak (Capcom Production Studio 1 2013) as it relates to Resident Evil 2 (Capcom 1998) and Resident Evil 3: Nemesis (Capcom 1999), or the Marvel Comics prologue comic (1997) packaged with the original Resident Evil game.

¹⁶. Transmedia 202, supra note 2.

¹⁷. Transmedia 202, supra note 2.
reimagining of motifs that define the property, but that do not contribute new plotlines or characters. For example, the content of the *Lord of the Rings* film trilogy\(^{18}\) is more or less the same as the content of the books.\(^{19}\) Superheroes are a great example of the bounds of franchise behavior. One recently abused protagonist is Spiderman, whose origin story has been rebooted twice in the last decade.\(^{20}\) Although new characters and plotlines appear, they act more like alternatives to each other rather than one complete story. In contrast, the content of the *Matrix* film trilogy\(^{21}\) is different from the content of the *Animatrix* animated series of shorts,\(^{22}\) but the stories in each series are interwoven. This is indicative of transmedia storytelling.

The fourth, final, and focal element for this article is audience participation.\(^{23}\) The invitation of large numbers of dilettantes to have an impact on the shape of ostensibly commercial ventures is new and unique to transmedia storytelling. Participation, of course, exists on a spectrum, where at its most basic it might consist of little more than finding the disparate components of a completely formed product.\(^{24}\) A higher level of participation might look something like a *Choose Your Own Adventure*,\(^{25}\) only the elements of the project change based on participation from a temporally synchronized audience. The logical far end of the spectrum is widespread collaborative storytelling, wherein a participant is at once an author and an audience member, both contributing to a narrative and subject to the decisions of others within that narrative.

This idea of incorporating the efforts of people traditionally relegated to the role of consumer precipitates a paradigm shift. Copyright law supposes a cogent entity, regardless as to whether


\(^{20}\) SPIDER-MAN (Sony 2002); THE AMAZING SPIDER-MAN (Sony 2012).

\(^{21}\) THE MATRIX (Warner Brothers 1999); THE MATRIX RELOADED (Warner Brothers 2003); THE MATRIX REVOLUTIONS (Warner Brothers 2003).

\(^{22}\) THE ANIMATRIX (Village Road Show 2003).

\(^{23}\) In *Transmedia 202*, *supra* note 2, Henry Jenkins also discusses the difference between participation and interactivity. While not particularly relevant here, it is of importance for a nuanced understanding of transmedia storytelling.


singular or joint, that can make unilateral decisions about a work, and this entity is referred to as the author or the copyright holder of that work. As Andrea Phillips put it, perhaps more to the point:

At the end of the day, the core owner of the property in question is the one with the power to choose who profits and how much, or what becomes canon and what doesn’t, and can pull the rug out from under the population of fans-turned-spec-creators at any time.26

What happens at that logical end of the spectrum then, when this control is atomized over those fans-turned-spec-creators, and an unprecedented number of people with varying opinions and indecipherable contributions have some nonnegligible say about a work? In the commercial media context, elevating dilettante participants into authorship can be as alarming as it is alluring, as losing control of that work may be tantamount to losing its profitability. From a dilettante perspective, commercial attempts to exercise control over something perceived to be owned by the culture that created it is equally problematic.27 In order to address this tension, consider a hypothetical:

Imagine a storyworld where there is no individual entity in charge. The closest analog would come in the form of moderators or curators; people who enforce a set of universe rules but have no more authority over the cannon than anyone else. This storyworld would be in a sense both a democracy and an anarchy; the former because the people decide rules to follow together, the latter because there is no one dictating those rules. Moderators may come and go with time, be “elevated” in by other moderators and perhaps in exchange barred from excessive submission to the collaboration to prevent any one person from becoming an overtly controlling author. Cannon28 in this hypothetical would be determined by the number of up votes a given submission gets by members of the participating online community. The participatory element can vary; if a visitor only wants to follow the story and up or down vote, but not contribute, there is a way to do


28. Cannon in the fan community is used to differentiate the purported real story from fan works.
that, too. Remember, transmedia storytelling need not entail this kind of mass collaboration, but mass collaboration at this point in time will by practical necessity end up being transmedia. The storyworld allows for a timeline where alternative universes can spin off and stub or reconnect with the main narrative later.  

Now imagine that a major film company wants to license the right to make a feature film based on this collaborative production, either as a franchise or as an addition to the existing narrative. Who is in a position to negotiate a license with the production company? And perhaps the question most relevant to commercial media: who pays, who gets paid, and for what?

The aim of this article is to posit a solution, grounded in legal realism, for the practical issues that arise when copyright law and content monetizers encounter a work (or perhaps more accurately, a series of interdependent works) with an unprecedented number of people who could ostensibly assert authorship over some element of the content. In order to have a cogent discussion about mass collaboration in storytelling, Part II of this article will outline in greater depth the history of how the commercial-dilettante relations question has been addressed in comparable contexts. Once the scenarios are established, they will be followed with something of a comparative analysis, looking at how the solutions employed there might be applied to mass collaboration. This will also help to define, by contrast, the scope of transmedia storytelling and the ways in which mass collaboration presents new challenges. Part III will posit a structure for projects involving mass collaboration, geared toward inclusion of commercial media producers, with an eye toward anticipating and circumventing the issues identified in the preceding section. Rather than reinvent the wheel, Part III will explain how, through careful blend of existing systems, content monetizers already have the tools necessary to establish an equitable balance of authorial power across all types of participants in a collaborative storyworld. If done correctly, dilettantes will be more passionately dedicated to and immersed in content than ever before, while the financially motivated will still be able to profit from their efforts.

29. Lest this appear to be no more than a thought experiment, an example of a project that comes tantalizingly close to the fact pattern introduced in this article can be found at HIT RECORD, www.hitrecord.org (last updated Feb. 25, 2014).
II. The Producer–Consumer Dichotomy: An Exploration of Existing Systems

Perhaps due to no more than an absence of foresight, history has created a class distinction between those who produce and those who consume. This is beginning to erode. Because copyright was designed with the commercial, rather than individual, cultural participant in mind, there has been significant and not entirely unpredictable public rejection of its application in an environment propelled by individuals, namely to dilettantes in the digital sphere. Two things have happened. First, in place of an effective and enforceable legal regime, so called Web 2.0 has effectuated social norms where some forms of infringement, while recognized as such, are ignored or even condoned by professional authors, and others are not. In other words, copyright supposes that there are people who produce and people who consume, but in practice sometimes those relegated to the role of consumer are able to make and win a tacit case from the bottom-up for stunted authorship rights in their derivative works. Second, there is also a top-down response: in some instances, original authors are even attempting to foil the system through contracting around provisions that exclude others from participation and development of their copyrightable work.

The hypothetical posed in Part I is designed specifically to illustrate a case where this legitimate versus tolerated versus illegitimate paradigm is moot by virtue of eliminating the cogent, central copyright owner. While recognizing that, the purpose of Part II is to understand massive and/or dilettante authorship in the context that such work is generally regarded, (first by the law and second in cultural practice), and to examine ways in which authors with comparable desires have addressed the problem in their own contexts. Part II is also edifying in the discussion of mass collaboration because it helps to define mass collaboration in storytelling by illustrating what stands in contrast, i.e., that it is not perfectly analogous to any cases discussed below, however comparable they may be in some regards.

32. Lee, supra note 30, at 1461.
33. See generally that www.fanfiction.net is up and running.
These ideas that have been subject to legal discussion will be analyzed in three groups: the traditional legal doctrine that touches on collaboration (joint authorship) and inordinate size (compulsory licensing) in Section A; the stop-gap cultural practices (treatment of fanfiction and other kinds of user-generated content) in Section B; and finally, areas where work around contracts have been developed (open source software, Creative Commons licenses) in Section C. The proffered solution to the unique challenges of mass collaboration will be built on the lessons learned from each of these examples.

A. Controlling Doctrine

The law has considered both the idea of creative collaboration and the idea that there can be enough copyright holders requiring consultation (in order to accomplish a distribution task) as to render individual negotiation impracticable—the nominative issues in mass collaboration. This section briefly examines how the Part I hypothetical might benefit from an understanding of these premises.

1. Joint Authorship.

Joint authorship is a concept familiar to copyright scholars; indeed, it is a building block of the copyright regime. Still and yet, it is fraught with philosophical questions about the intent of the parties in creating a work, the degree of collaboration between them, the threshold for originality, and reconciling inconsistent tests across courts.\(^35\)

While this is informative in a cursory, sweeping sense, and while it would be remiss to leave this entry point to a discussion of collaboration in the eyes of the law unacknowledged, scholarship and case law on joint authorship vastly deal with disputes between at most a handful of individuals.\(^36\) Thus, a deep analysis does not provide much insight for mass collaboration except in as much as it shows clear evidence that the courts are ill prepared to address potentially thousands of joint authors in tens of jurisdictions when they have difficulty evaluating even two such collaborators in a consistent manner.\(^37\)

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36. *Id.*

2. Compulsory Licensing.

The law has also attempted to address the issue of negotiating with multiple rights holders through compulsory licensing, although it should be distinguished that this solution does not address rights holders in mass collaboration with each other. Compulsory licensing allows a party seeking to use another's intellectual property to do so, without first seeking the copyright holder's consent, for a set fee. This scheme stems from the 1909 Copyright Act and exists in modified form today. Historically the United States has only issued compulsory licenses for copyrighted materials in cases particularly geared toward widespread public consumption, such as radio broadcast. The terms of the license are subject to negotiation between the content owner and the entity seeking to distribute, but in some cases elements are determined by a division of the Copyright Office. The most comparable application of compulsory licensing is in the context of music. There, the system is effectuated by performance rights organizations such as The American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and The Society of European Stage Authors and Composers ("SESAC"), which collect and distribute royalties to copyright holders.

Compulsory licensing is informative to mass collaboration because it is as close as major industry actors have come to a system in which use without prior permission is acceptable.

B. Social Systems

Whether due to backlash or the pure inefficacy of the copyright regime, social customs have emerged surrounding dilettante creativity in the shadow of commercial endeavors. Although

40. Id.
infringement is not per se an issue for the Part I hypothetical, many of the ownership issues surrounding dilettante works are highlighted by the social customs adopted in light of fanfiction. Appropriation of dilettante practices for work prepared by a commercial author is highlighted by the licensing customs surrounding user-generated content.

1. Fanfiction.

Fanfiction is the popular name given to a large class of derivative works that routinely arise under these circumstances: (1) the underlying work is (a) prepared commercially and (b) still protected by copyright, while (2) the derivative work (a) does not generate profit, (b) is unauthorized by the copyright holder, and (c) is digitally self-published. Like so many practices once relegated into obscurity, the advent of the Internet brought fanfiction to the fore of both popular culture consumption habits and copyright litigation, winning the vitriol of a number of prominent authors and losing as many matters in the courts. Despite this, and in keeping with conjecture of a bottom-up negotiation between the public and the law discussed about, the practice continues to thrive. One well established hub, fanfiction.net, boasted over 3.3 million stories when calculated in 2010, a number that has grown every day since.

Legal address of the fanfiction debate today is characterized by scholars calling for a fair use exemption as a means of allowing the

44. Id.
45. A discussion of the nuances in defining what constitutes fanfiction is also beyond the scope of this paper. Here, it will be used to describe all works that could ostensibly be included in the definition as provided.
47. Stendell, supra note 43, at 1552–53. It is also worth noting that self-publication predates the digital era, although no longer common practice.
48. Fiesler, supra note 46, at 736.
49. Id. at 734.
51. The most prominent and perhaps most bitter of these is the Harry Potter lexicographer. See Anemona Hartocollis, Sued by Harry Potter's Creator, Lexicographer Breaks Down on the Stand, N.Y. TIMES (Apr. 16, 2008), http://www.nytimes.com/2008/04/16/nyregion/16potter.html?_r=0/.
practice to continue under the existing copyright regime against copyright traditionalists, largely content monetizers and their licensees, condemning the practice based squarely on the fact that, currently, there is no such exemption. Interestingly, the issue has come to a head in a handful of incidents where the facts more or less are these: a copyright owner discovers public interest in a dilettante’s derivative work. The owner recreates the work and mass-produces it for public purchase. The owner subsequently shuts down the dilettante operation that precipitated an interest in monetization. For purposes of the Part I hypothetical, this serves to highlight a critical flaw in the copyright regime that favors the commercial; an underlying rights holder can infringe on the original elements of a derivative work when the author of the derivative work is not itself a commercial actor, i.e., when it favors the monetizer, it is perfectly acceptable to adopt the very practice it condemns by the dilettante. This demonstrates how easy it would be for the hypothetical film studio to take advantage of the dilettante authors’ work under current normative practices.

While a wary social tolerance for fanfiction may be a good temporary solution in the case of dilettante-authored derivative works, it is of little use in the mass collaboration context. Fundamental to the Part I hypothetical is a premise that content protectable under the copyright regime is accessible to anyone who wants to contribute, as is the case with open source software. What is most informative about fanfiction is what happens when commercial interest reasserts itself in the milieu. Even if the actions are facially legal, public opinion falls squarely in favor of dilettantes. If it is to succeed with the public, any solution in the mass collaboration context must take this power problem into account.

2. User-generated Content

User-generated content (“UGC”), like transmedia, is a "conceptual cloud" of a term meant to indicate a number of different activities dilettantes engage in online, which, by some

55. Needs citation.
56. For a recent example, see Ellie Hall, “Firefly” Hat Triggers Corporate Crackdown, BUZZFEED (Apr. 9, 2013), http://www.buzzfeed.com/ellievhall/firefly-hat-triggers-corporate-crackdown.
57. Id.
58. Gervais, supra note 3, at 843.
definitions, may include both fanfiction and mass collaboration. A broad definition can be made by breaking the term down into its individual components: content is information, and a user is a type of content creator or author whose works emerge in a digital environment. Of course the word “user” is another iteration of the same creator-consumer dichotomy discussed above, and is particularly problematic where content is creative information rather than factual in nature. It may be worth noting in the UGC context that even professional artists are “users” of programs that come with a license, but there is a discrepancy in treatment. For example, when Adobe Systems released the first edition of Photoshop in 1989 for professional use, it would not have considered that it might be able to acquire the ownership rights of all images that resulted from a professional photographer’s use of the program to manipulate a raw file—commercial authors would never have used a product that divested them of the ability to capitalize their own work. By contrast, that same photographer using Instagram to edit and post a photo, i.e., acting in a dilettante capacity, would have the same “user” status, and consequently limited rights, afforded to anyone who uploads a photo, with no regard for her expertise. In both contexts the photographer is a “user” creating new content with professional abilities, but the license for software meant to be used professionally versus that meant to be used casually changes the way she is viewed by fellow monetizers. This only throws the same fundamental discrepancy in treatment of dilettantes versus treatment of commercial producers seen in fanfiction into sharper relief.

To narrow the scope of the discussion in an attempt to find something more, UGC in the creative or storyworld context generally refers to a commercial, professionally manufactured world or program where dilettantes can come in and create within given parameters. This can be as simple as moderated posts on a forum and as complex as virtual realities. The latter largely follow traditional gaming rules, as in the case of World of Warcraft, where dilettantes’ participation is limited to elements like character design,

61. For the present Instagram terms of service, see Instagram Terms of Use (Jan. 19, 2013), http://www.instagram.com/legal/terms.
62. Lastowka, supra note 59.
and they play professionally planned stories. There are, however, some notable exceptions.

The most extreme example of dilettante participation in a virtual world context, and perhaps most comparable to premise of mass collaboration in transmedia storytelling, is the UGC parameters of the game Second Life. In this virtual reality, there is comparatively little design or planning by the nominative owner. Instead, the framework for building avatars and the digital building blocks for items are provided, but dilettantes are left to their own devices to create with the tools at their disposal. Individual creations can actually be bought and sold for real currency. In some respects it might be more comparable to a chat room than a true storyworld, and to that end it is distinguishable on the basis of story arc. In order to achieve the creative community that it does, Second Life loses its potential for any centralized storytelling element.

Unlike the tacit agreements that govern fanfiction or the daisy chain licenses that follow open source software (discussed below), however, UGC in creative contexts are almost unilaterally governed by end user license agreements (“EULAs”) that click away rights the dilettante would otherwise enjoy. In some cases this includes granting the licensor the right to monetize the dilettante’s content.

The treatment of creative UGC should sound like a warning to anyone intending to collaborate in dilettante-fueled media. From the licensor perspective, EULAs can only go so far as the four corners of the world they govern, be it a website, a program, or an application. If transmedia storytelling requires fluidity across media, this means that the moment the storyworld leaves its first context, so too go the rules of the controlling EULA. Once that happens, the licensor must resort to the same tactics used in fanfiction, because copyright infringement becomes the only leg left on which to stand. From the licensee perspective, EULAs are also daunting, in part because the terms vary so greatly between licensors, and in part because the bargaining power is unilaterally on the side of the licensor. A workable solution in mass collaboration will have to account for the lack of platform boundary and the power discrepancy in UGC.

63. Id.
66. See Walters, supra note 7.
C. The Free Culture Response

As demonstrated in their analysis, the methods described in Section B are by no means satisfactory solutions for all cases. The free culture movement, championed by Lawrence Lessig, seeks to promote public access to creative works, rejecting the need for permission espoused by copyright law. To this end, there have been some notable attempts by non-profit organizations to provide clear structure and rules pursuant to copyright law that allow authors to intentionally adopt free culture maxims. They do this by way of blanket licenses that follow the work. The goal can be seen narrowly as substituting in a contract for standard issue copyright doctrine to better meet public needs—in other words, to open access to material that could otherwise be copyrighted and subsequently stifle use or collaboration. This section will look at two scenarios in which authors have intentionally foregone their rights in order to allow for wider dissemination of their works and creation of new, derivative works.

1. Open Source Software

The Open Source Initiative has offered a comprehensive definition of what constitutes open source software. In brief, it must: be free to redistribute; include access to the source code; allow derivative works; and not discriminate against persons, groups, or fields of endeavor. The software license must: (1) be technology neutral, (2) not be tied to a specific product, (3) not restrict other software, and (4) apply to anyone to whom it is redistributed. While there are a couple of alternatives, most open source software is governed by the GNU Project’s General Public License, the basic purpose of which is to ensure that all code licensed under it remains accessible for anyone who wants to see or modify it. The primary legal concern in the open source space is the enforceability of such a license should an author wish to redact the initial license, although courts have ruled that a lack of monetary compensation or royalty payment does not impact enforceability.

Although transmedia storytelling is clearly not software (or at least not limited to the confines of a single software), the implications

68. For the full definition, see The Open Source Definition, OPEN SOURCE INITIATIVE, http://opensource.org/osd (last updated Feb. 25, 2014).
69. Id.
71. Id.
for mass collaboration in a creative context here are staggering, most notably in that open source is a similarly deliberate break from the standard vesting copyright. The one overwhelming difference that would need to be accounted for is, of course, monetization,\(^\text{72}\) which both commercial copyright holders and dilettantes have some interest in; the former because their businesses are predicated on making money from creative endeavors, and the latter because even small projects can have material costs associated that individuals may seek to recoup or derive comparatively small profits from.

2. Creative Commons

In a similar, although comparatively loose vein, Creative Commons licenses are gaining popularity with creators who wish to default to "some rights reserved" rather than copyright's standard "all rights reserved."\(^\text{73}\) Creative Commons is a tax-exempt charitable corporation that provides standardized blanket licenses such that content creators can voluntarily waive selected rights.\(^\text{74}\) Creative Commons currently offers six license variations that are binding on each new user depending on whether the licensor wants to allow modifications or commercial use.\(^\text{75}\) The closest license, called the Attribution-ShareAlike Unported License, allows for commercial use and modification so long as the commercial user does not impede access for anyone else who wants to use or modify the work.\(^\text{76}\) However, there are currently no Creative Commons licenses that incorporate a royalty or other compensation for the owner of the underlying work.

This model is also highly promising for application in the mass collaboration context. It differs from software licensing in two notable ways. First, it expands the application of "daisy chain" licensing to works that are less functional in nature than code.\(^\text{77}\) And second, it is more purely elective, because authors can select how

\(^{72}\) See infra Part III for why monetization is still a concern here despite the efforts of the free culture movement.

\(^{73}\) See for example flickr, which allows users to select a CC license in uploading or to search content filtered by type of CC license. FLICKR, https://www.flickr.com/ (last visited Mar. 31, 2014).

\(^{74}\) Ashley West, Little Victories: Promoting Artistic Progress Through the Enforcement of Creative Commons Attribution and Share-Alike Licenses, 36 FLA. ST. U. L. REV. 903, 904 (2009).

\(^{75}\) See About the Licenses, CREATIVE COMMONS, http://www.creativecommons.org/licenses (last updated Feb. 23, 2014) for the full list of Creative Commons licenses.

\(^{76}\) Id.

\(^{77}\) A daisy chain license binds a signatory to distributing derivative content under the same terms it agreed to in acquiring rights.
many of their rights to their original works they wish to license away. It is also interesting for mass collaboration to note the differences in scenario: In software there seem to be a relatively small number of works with many collaborators, whereas with Creative Commons, the licenses are attached to a large number of works that may not be repeatedly revisited for building and revision. In that sense, mass collaboration is probably more comparable to open source software, but needs to retain some of the rights in the mode of Creative Commons to prevent commercial abuse. The overarching lesson here is that such daisy chain licenses can work in both ways, and the trick will be to apply them in a way that is simultaneously conducive to the propagation of software style collaborative hubs, without stepping on the rights of smaller, disparate stubs.

Although the foregoing approaches are neither precisely on point for purposes of confronting issues in mass collaboration nor by any means bereft of their own quandaries, they are informative for the development of a practical framework for producers aiming to incorporate a participatory element into their projects. At the most basic level, this background demonstrates that companies need to be mindful of the way they approach crowd-sourced materials in order to preempt extensive snares in the creative process. What constitutes mindful design, of course, will depend on the scope of participation.

III. Modeling Ownership in Mass Collaboration

In drafting a solution for the problems of mass collaboration in transmedia storytelling, the foregoing overview of comparable scenarios provides a great deal of insight. There are both lessons appropriate to confront some elements, as well as fundamental issues with each of the approaches should they be used alone. First, the overview demonstrates that the statutory underpinnings for massiveness and collaboration are woefully inadequate when the two elements are combined. Second, it demonstrates how passive solutions in the form of tacit, widespread, bottom up negotiation lead to anger and confusion on behalf of cultural participants the moment money becomes a consideration. Finally, it demonstrates that a license-based work around has the potential to be highly effective if structured appropriately. Part III will attempt to synthesize the effective components of each example and avoid the noted pitfalls to provide a working model for mass collaboration in transmedia storytelling.

Where collaboration is tantamount to production, as in the Part I hypothetical, litigation is not a workable option. The legal process of
allocating liquid assets to potentially thousands of dilettante participants through litigation would consume at the very least time, and in most instances would also bear significant legal or administrative cost. These realities may very well unduly constrain creative efforts, and, in the worst case, be prohibitively impractical for a given project. Where avoiding litigation is key to the success of a creative endeavor, any system developed must take into account the interests that might otherwise motivate legal action. In other words, the goals of the framework must be in line with the goals of the participants, whether commercial or dilettante, as well as those of the copyright regime.

By now it must be overwhelmingly clear that the system advocated in this article will incorporate payment for the creative input of all authors, even if this is motivated solely by a desire to address the interests of commercial participants. Based on a recurring conversation in copyright at large, it is predictable that choosing to include payment at all will meet some criticism. The copyright regime in place today is predicated on the notion that in order to achieve great works, authors must be fiscally incentivized. Proponents of the system argue that authors should be compensated for the value they add to society and that no one would chose to become a professional author if the attendant compensation is meager or nonexistent, and also that the artistic value of the works will increase with this incentive. The regime has plenty of notable and vocal critics, who argue in varying ways that money is not a necessary motivator—even for professionals—or, if accepting the premise that it is, that there are ways to monetize without barriers to access to the work (e.g., advertising revenue or charging for attendant services rather than relying on copy purchases or subscriptions). For regime proponents, the undeniable success of open source software despite its being free is something of an elephant in the room.

For regime opponents, the high number of layoffs in the entertainment industry, at the very least attributed to decreased revenue at the hands of internet piracy, serves as a similar counterexample. Regardless of what the answer should be, the reality

78. That is, if a producer does not have the resources to address all participants using the legal system.
is that the current copyright regime does embrace financially-motivated creative activity. Furthermore, in an industry that has long suffered from an identity crisis surrounding the valuation of labor, a regime that does not allow for profit would be wildly unpopular—and if part of the effort here is to create a more equitable, realistic, and holistic solution, then some accommodation must be made for commercial producers. In short, if the proposed system for governing mass collaboration is to address the interests of all participants, this means addressing the interests of monetizers as much as it does dilettantes, and, thus, will strive for the flexibility needed to accommodate both perspectives.

Satisfying dilettante participants will largely be predicated on interest in facts and fairness.\textsuperscript{83} Facts in this context are pieces of real, concrete information about the rules of participation and the fate of the project to the extent commercial authors participate. While there are certainly differing notions of what should be included and what should be externalized in a calculation of fairness, commonly desired indicia include, inter alia: credit for work; some degree of control over what happens to a given contribution once it is made publically available;\textsuperscript{84} continued access to the project and any attendant endeavors if and when commercial authors become involved; and, where money is a concern, adequate compensation relative to the contribution.\textsuperscript{85} A point that must be impressed here is that the traditional methods of incentivizing or placating fans will not work for compensating dilettantes. Donating money or competing to win a walk-on role in a feature is inadequate because it fails to address the dilettante as a co-creator. The bottom line is that any individual component of the project that makes money must share profits with the community. From a practical perspective, ease of process in implementing a fair system is also relevant to dilettantes, who may not be interested in the legal labor required to meet these desires.\textsuperscript{86}

Finally, the government is, in a sense, an interested party in publically created works as well. However misguided or ineffective its legal progeny may be in this case, copyright was created with the

\textsuperscript{83} This assertion is based on the negative reactions of fans in many of the articles relied on for this article when these two components were deemed missing in a given scenario.

\textsuperscript{84} The solution will address the issue for U.S. participants without getting into a discussion of foreign copyright(s) or moral rights.

\textsuperscript{85} Most of these are obviated by the Creative Commons solutions discussed in Part II.

benefit of the public in mind through promotion of the arts. Any solution must take into account this fundamental tenet of the system of the legal grounds on which it rests.

Bearing these interests in mind, the remainder of Part III will outline the proposed solution in Section A and will go on to explain how it meets the goals delineated here in Section B.

A. Proposal: The Share-Commerce License

In order to meet the divergent interests of participating parties, this article proposes content producers initiate projects involving mass collaboration under the following system, to be called a share-commerce license: first, create a daisy chain license, similar to those drafted by Creative Commons and GNU. Second, ensure that it contains both a compulsory royalty element and an Attribution ShareAlike element, such that all new participants are bound by the same terms and such any monetizing entity must put some portion of profits back into the community. Ideally this license would also cover the way in which participants could collect or assign royalties. Third, make the license available through a nonprofit organization, preferably one with some administrative capability such that royalty funds can be easily redistributed to participants. Details of the vision for each element will be addressed in turn.

The share-commerce license proposed here blends the idea of compulsory licensing with the idea of Creative Commons or GNU daisy chain licensing. Like the Creative Commons Attribution-ShareAlike license, anyone can contribute under the exact terms of the license of all precedent work. The daisy chain license forms the basic relationship between all participants such that anyone introducing a new participant into the system via sharing inherently also passes on the license. Participants are incentivized to declare themselves as such if they want to receive the attendant financial benefits. If they are disinterested, their content is still free to exist until and unless they seek to monetize it, at which point the compulsory royalty component would be activated.

The compulsory royalty element, derived from compulsory licensing by the government, would need to be structured in a way that is neither prohibitively expensive for dilettantes nor meaningless for high revenue projects. The license itself is inherently already compulsory under the daisy chain terms. Where an individual participant seeks to monetize, either a percentage of the proposed

budget or a percentage of profits would be due back to the community. This is not unlike a common practice in the existing entertainment industry of compensating key participants with royalty points that lead to residual checks, so the infrastructure for major commercial participants is already in place. One consideration might be a cost-contingent schematic such that, for example, a participant who wants to make t-shirts with an initial investment of two thousand dollars need only contribute a small, one time royalty, whereas a film production with a two hundred thousand dollar budget would owe royalties from profits.

The non-profit organization element need not be specific to a project. It only needs to be able to manage royalty revenue. Potential recipients of residuals could either choose to receive a check, to donate to another cause, or to have the money go into the nonprofit organization’s overhead. There might even be a way for participants to allocate earned royalties to others in need of startup funds to make a new contribution to the project. Alternatively, all proceeds could be directed toward the 501(C)(3) and producer-participants could apply for funding that would be directed back toward the project.

For the share-commerce license to function, collaborators should be treated like a class rather than as individuals. There is already significant legal precedent for class action and settlement. Thus anyone who participated in the project can be contacted and funds can be either paid out or collected for overhead costs, which otherwise should be borne by the monetizer.

B. Why the Share-Commerce License

The share-commerce license addresses the interests laid out at the beginning of Part II in several respects, but most importantly for the copyright discussion it structures the relationships between participants in a way that is fair and not terribly radical or unfamiliar to the relevant parties.

First, it addresses the primary commercial interest of flexibility with regard to monetization. The share-commerce license allows anyone who wants to profit to do so, including the initial producer, but not without paying some portion back into the collective. At the same time, it allows dilettantes to continue to contribute without fear of either the project or their individual ideas being capitalized without some recognition, quashing two potential sources of litigation. The dilettante also is afforded an opportunity to elect to profit as the community profits, even if this is ultimately only pennies or is
processed as a donation. If dilettantes do not have an interest in their individual apportionment, it is amortized across the rest of the population. At the same time, this system allows the monetizing production to keep the majority of its profits while compensating individual achievement.

Second, the share-commerce license addresses dilettante interests in facts and fairness. The rules are simple and easy to adopt; all dilettantes must do is participate in order to be governed by the license, and unless they seek to be included in the monetary component by virtue of capitalizing on their contributions to the project, the only time they would need to think about money is if they have specific interest acquiring or assigning their apportioned royalties somewhere specific. Otherwise the non-profit organization can allocate unclaimed funds.

The interests of copyright are protected because all authors within the system are able to proliferate their works as they see fit, and, to the extent that they are incentivized by profit, they are able to capitalize accordingly.

The class treatment and compulsory elements are useful in meeting all participants' goals surrounding access to content and ability to create works by addressing the issues of speed and simplicity. These elements also preempt the possibility of a small minority of contributors potentiallystemming the creative efforts of others in any of the ways outlined in Part II. In other words, the class of dilettantes who collectively own the intellectual property generated in the hypothetical would be compelled to license to the film studio for a set fee, and the class of commercial participants would be required to allow dilettante participants to continue to use what they might otherwise copyright. This also ensures that contributors are compensated at some level, however minimal that fraction of the total license price may be ultimately.

IV. Conclusion

As transmedia storytelling and the invitation for public participation in creative endeavors become more prevalent, it is imperative that industry and law make careful decisions about intellectual property rights management. While the system outlined here is promising as a preemptive measure against problems in mass collaboration, a number of questions are left unaddressed.

The most pressing issue remaining is manageable enforcement. Regardless of the proposed solution, ultimately there will come a day
when a participant will have cause to litigate in mass collaboration project, and plenty of small-scale dilettante monetizers will intentionally or unintentionally fail to pay into a system that is not monitored. The idea here is to keep these projects as far from court as possible and it does not address what happens should best efforts fail. The article also does not address legality issues surrounding daisy chain licenses. Some discussion is starting to emerge about such contracts having the effect of binding third parties, which would bode poorly for the proposed model. It remains yet to be seen if this elegant solution will be quashed in its infancy. Another major unaddressed issue is the inherent waiver of moral rights, which in some counties are inalienable, and complicates the equation for international participants subject to such laws.

The share-commerce license is still more stable than a void, which is what exists now for fanfiction and original UGC, or using models that were not built for intentional mass collaboration, like standard issue joint authorship or compulsory licensing. The license idea is meant to be something producers can modify through careful drafting as needed to retain rights in core elements of a property, or for internally produced products with lesser degrees of participation from external collaborators who still might have some important creative input. In other words, the share-commerce license idea is a start that must be built upon through experimentation. Hopefully this article also serves as a point for greater discussion in the academic community about the intersection of law and collaborative creativity such that smart, fair choices can be made without relying on the courts or interested parties to dictate the rules of engagement.