Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use

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Lieutenant Mary Sue took the helm of the Starship Enterprise, saving the ship while parrying Kirk's advances. At least she did so in the unofficial short story by Trekkie Paula Smith. "Mary Sue" has since come to stand for the insertion of an idealized authorial representative in a popular work. Derided as an exercise in narcissism, Mary Sue is in fact a figure of subaltern critique, challenging the stereotypes of the original. The stereotypes of popular culture insinuate themselves deeply into our lives, coloring our views on occupations and roles. From Hermione Granger-led stories, to Harry Potter in Kolkata*, to Star Trek same-sex romances, Mary Sues re-imagine our cultural landscape, granting agency to those denied it in the popular mythology. Lacking the global distribution channels of traditional media, Mary Sue authors now find an alternative in the World Wide Web, which brings their work to the world.*

Despite copyright law's grant of rights in derivative works to the original's owners, we argue that Mary Sues that challenge the orthodoxy of the original likely constitute fair use. The Mary Sue serves as a metonym for all derivative uses that challenge the hegemony of the original. Scholars raise three principal critiques to such fair use: (1) why not write your own story rather than borrowing another's? (2) even if you must borrow, why not license it? and (3 won't "recoding" popular icons

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destabilize culture? Relying on a cultural theory that prizes voice, not just exit, as a response to hegemony, we reply to these objections here.

> *"Gee, golly, gosh, gloriosky," thought Mary Sue as she stepped on the bridge of the Enterprise. "Here I am, the youngest Lieutenant in the fleet-only fifteen and half years old." Captain Kirk came up to her.*
> *"Oh, Lieutenant, I love you madly. Will you come to bed with me?"*
> *"Captain! I am not that kind of girl!"*
> *"You're right, and I respect you for it. Here, take over the ship for a minute while I go for some coffee for us."*
> *Mr. Spock came onto the bridge. "What are you doing in the command seat, Lieutenant?"*
> *"The Captain told me to."*
> *"Flawlessly logical. I admire your mind."*[1]

Going where only men had gone before, Lieutenant Mary Sue took the helm of the Starship Enterprise, performing to acclaim and earning the Vulcan Order of Gallantry.[2] This was, of course, fantasy, but doubly so. By 1974, no woman had commanded the Enterprise bridge, according to the *official* Star Trek fantasy.[3] Indeed, it would take another two decades before a woman would command the principal starship in a later Star Trek series.[4] Trekkie Paula Smith, however, was impatient. So she inserted the young Lieutenant Mary Sue into the Star Trek universe, not as communications officer, nurse, the voice of the onboard computer, or passing Kirk love interest, but as commander. In so doing, Smith began the modern incarnation of an old and often celebrated phenomenon—retelling a canonical story to better represent oneself.[5]

The name of her character, Mary Sue, has come to stand for all such characters in the universe of fan fiction.[6] Fan fiction spans all genres of popular culture, from anime to literature. In every fan literature, there is the Mary Sue: "She fences with Methos and Duncan MacLeod; she saves the

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1. Paula Smith, *A Trekkie's Tale* (1974), *reprinted in* Camille Bacon-Smith, Enterprising Women: Television Fandom and the Creation of Popular Myth 94-95 (1992).

2. *Id.* at 95-96.

3. *See infra* note 29 and accompanying text.

4. *Id.*

5. *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1, 8 n.34 (2002) (offering examples of retellings from a different character's perspective, including Tom Stoppard's *Rosencrantz and Guildenstern Are Dead* (a play on *Hamlet*), Jean Rhys's *Wide Sargasso Sea* (a play on *Jane Eyre*) and Henry Fielding's *Joseph Andrews* (a play on *Pamela*); *see also* Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. Miami Ent. & Sports L. Rev. 437, 441 (1994) (describing fiction and non-fiction stories employing characters created by others).

6. Fan fiction is "fiction about characters or settings written by fans of the original work, rather than the original creators." Wikipedia, *Fan Fiction*, http://en.wikipedia.org/wiki/Fan_fiction (last visited Sept. 29, 2006).

Enterprise, the *Voyager*, or the fabric of time and space; she fights with Jim Ellison in defense of Cascade; she battles evil in Sunnydale alongside Buffy Sommers."[7] She stands as the only female member of the fellowship of the ring.[8] According to Wikipedia, a "Mary Sue" is "a fictional character who is portrayed in an idealized way and lacks noteworthy flaws" and appears in the form of a new character beamed into the story or a marginal character brought out from the shadows.[9] Harry Potter's sidekick Hermione Granger, for example, stars in her own popular stories, which recast her as leader or find her romance, especially in Harry, Draco Malfoy, or Ginny Weasley.[10]

"Mary Sue" is often a pejorative expression, used to deride fan fiction perceived as narcissistic.[11] We dissent from this view. In this essay, we rehabilitate Mary Sue as a figure of subaltern critique and, indeed, empowerment.[12] Cultural studies scholars define "empowerment" "as a function and possibility of participation in popular culture."[13] We see empowerment also in terms offered by the civil rights movements-as increasing social, economic, and political power.[14] As exemplified by Lieutenant Mary Sue, this figure serves to contest popular media stereotypes of certain groups such as women, gays, and racial minorities. Where the popular media might show such groups as lacking agency or exhibiting other negative characteristics, Mary Sues are powerful, beautiful, and intrepid.[15] Through a survey of social science research that

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7. Pat Pflieger, *Too Good to be True: 150 Years of Mary Sue*, Paper Presented at the American Culture Association conference (March 31, 1999) *available at* http://www.merrycoz.org/papers/MARYSUE.HTM (last visited Dec. 18, 2005).

8. Greendaychica365, *Friends till the End* (2005), Lord of the Rings Fan Fiction, http://www.lotrfanfiction.com/viewstory.php?sid=5770.

9. Wikipedia, *Mary Sue*, http://en.wikipedia.org/wiki/Mary_Sue_fanfiction (last visited Sept. 29, 2006).

10. Harry Potter fan fiction is wildly popular, with some 260,000 entries on FanFiction.net alone. *Books*, http://www.fanfiction/net/cat/202 (last visited Sept. 29, 2006).

11. Keidra Chaney & Raizel Liebler, *Me, Myself & I—Fan Fiction and the Art of Self-Insertion*, Bitch, Winter 2005, at 52.

12. This Essay then itself becomes an exercise in recoding. *Cf*., *e.g*., Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753 (1996) (describing recoding of pink triangle once used by Nazis to target gays as new symbol of gay liberation); Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,* 49 Stan. L. Rev. 143 (1997) (discussing gay Irish-Americans' symbolic effort to claim their heritage as both Irish and gay by participating in Boston's annual St. Patrick's Day Parade).

13. Cheryl Harris, *A Sociology of Television Fandom*, *in* Theorizing Fandom: Fans, Subculture and Identity 41, 42 (Cheryl Harris & Alison Alexander eds., 1998) [hereinafter Theorizing fandom].

14. Susan Sturm, *Introduction: Reconnecting Labor and Civil Rights Advocacy*, U. Pa. J. Labor & Emp. L. 617, 617 (2005).

15. The gendered appellation for this form—Mary Sue—reflects its popularity among female authors, who often work against the gender stereotypes of the canon work.

reveals how media affect our racialized and gendered view of occupations, we connect cultural power with economic power.[16]

The emergence of the World Wide Web amplifies this relationship. In the past, Mary Sue authors might have stashed what they penned in a drawer, distributed Xeroxed copies, or, at most, published their work in an underground magazine.[17] The World Wide Web offers writers a relatively inexpensive and simple mass distribution vehicle. Posting a story to a fan fiction website is literally free, at least for those with access to the Internet. Lacking the global distribution channels of print media, Mary Sue authors now find an alternative in the Web, which brings their work to the world. The increasing power and affordability of digital tools may make it possible to go beyond rewriting stories in words, to permit video and audio creations, often through mash-ups of existing copyrighted material. They usher in a whole new universe of imagined possibilities—if the law will allow us there.

Our Essay has two goals, one practical and the other theoretical. First, we hope to clarify the law so that writers of Mary Sues will not be chilled by possible legal threats to such speech. We argue that such authors should not readily "cease and desist," as copyright owners demand. Rather than illegal art, Mary Sues may well constitute fair use. Second, we use Mary Sues to probe the theory of fair use itself. Mary Sue becomes a metonym for fair uses that rewrite the popular narrative. Implicitly, we defend fair use against efforts to narrowly interpret it as merely a response to transactions' cost-induced market failure, an explanation that leads ultimately to its evisceration as technologies reduce transaction costs.[18] Under that view, the cultural and speech consequences of transformative uses of copyrighted works lie hostage to the ability of the transformers to pay. We also defend against the foremost cultural critique of fair use—that reinterpretation (or "recoding") of the text destabilizes cultural foundations.[19] This critique, forcefully offered in 1999, remains largely unanswered to this day.[20] We respond here.

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16. In another paper, Madhavi Sunder sees intellectual property as the fulcrum linking recognition and redistribution. Madhavi Sunder, *IP*^{3}, 59 Stan. L. Rev. 257 (2006); *see also* Iris Marion Young, Inclusion and Democracy 105 (2000); Nancy Fraser & Axel Honneth, Redistribution or Recognition?: A Political-Philosophical Exchange (2003); Richard t. Ford, Racial Culture: A Critique (2005).

17. David Plotz, *Luke Skywalker Is Gay?*, Slate, Apr. 14, 2000, http://www.slate.com/id/80225 ("Fanfic used to be confined to fanatics who attended conventions and mailed their zines to several dozen (or, in rare cases, several hundred) subscribers. That zine industry still exists, but most fanfic has decamped to the Web.").

18. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600, 1628-30 (1982).

19. *See* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 Tex. L. Rev. 923, 940-66 (1999).

20. *See, e.g.*, William W. Fisher, Promises to Keep 36-37 (2004) (accepting cultural destabilization as one cost of his preferred semiotic democracy); *cf.* Note, *"Recoding" and the*

Our Essay proceeds in two parts. Part I explores the cultural background against which Mary Sues are drawn. As we show, Mary Sues challenge a patriarchal, heterosexist, and racially stereotyped cultural landscape. These popular stereotypes have subtle yet important consequences for our social, political, and economic relations, as social science research reveals. The phenomenon of rewriting the story to revalue one's place in it is not simply an exercise in narcissism. Mary Sues offer important epistemological interventions in the reigning discourse, confronting the traditional production of knowledge by reworking the canon to valorize women and marginalized communities. They exemplify the tactic that Arjun Appadurai describes as *commodity resistance*—a strategy of popular struggle through the resignification of common goods.[21] One of the most important recent copyright cases[22] revolves around a Mary Sue: for much of a century, the most popular account of life on a slave plantation has been *Gone with the Wind*; Alice Randall disturbed Margaret Mitchell's idyll in *The Wind Done Gone*, exposing oppression through a slave protagonist while imbuing the African-American characters with complexity and agency.

Part II argues that Mary Sues that challenge the orthodox representations in the original work should constitute fair use under U.S. copyright law in many cases. Yet, the skeptic will ask the Mary Sue author: Why not write your own original story rather than inserting yourself into a story written by someone else? Alternatively, why not license the original? Such arguments go far beyond Mary Sues: They represent the fundamental challenges to any fair use claim. We respond to these challenges here, relying upon theories of cultural critique and change. Specifically, we argue that semiotic democracy[23] requires the ability to resignify the artifacts of popular culture to contest their authoritative meaning. We show that concerns for resulting cultural destabilization misunderstand the nature of culture itself.

Derivative Works Entitlement: Addressing the First Amendment Challenge, 119 Harv. L. Rev. 1488, 1507 (2006) ("Even if recoding threatens a meaning change, copyright owners may also be well enough endowed from their success to meet the recoding challenge head-on by spending money on preservation of the old meaning."). An important exception is Mark Lemley, who offers a different set of responses than the ones we offer. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1056 n.103 (2005). *See also infra* note 158.

21. *See* Arjun Appadurai, *Introduction: Toward an Anthropology of Things*, *in* The Social Life of Things: Commodities in Cultural Perspective 3, 30 (Arjun Appadurai ed., 1986) [hereinafter The Social Life of Things] (citing as an example Gandhi's tactics regarding cloth); *see* C. A. Bayly, *The Origins of Swadeshi (Home Industry): Cloth and Indian Society*, *in* The Social Life of Things 285.

22. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

23. On semiotic democracy, *see* Fisher, *supra* note 20, at 30-31; Anupam Chander, *Whose Republic?*, 69 U. Chi. L. Rev. 1479, 1491 (2002).

I
Marry, Sue!

When Star Trek debuted on television in 1966, it was groundbreaking. Its creator, Gene Roddenberry "envisaged a multi-racial and mixed-gender crew, based on his assumption that racial prejudice and sexism would not exist in the 23rd century."[24] Lieutenant Uhura was the first African-American woman to be featured in a major television series.[25] Officer Sulu offered a rare Asian-American face outside a martial arts milieu.[26]

But despite these laudable aspirations, equality was not yet truly complete in Federation space. Uhura was relegated to the communications station. Women generally played secondary roles, often serving as episode-long love interests for the white male members of the crew. Uhura broke ground again when she participated in network television's likely first interracial kiss—with Captain Kirk, of course.[27] However, same-sex romantic relationships apparently did not survive into our future.

A. Popular Media's Persistent Stereotypes

Women, gays, and racial minorities certainly made major strides over the past four decades of television. In 1993, for example, an African American commanded the station in the Star Trek series *Deep Space Nine*.[28] And, in 1995, more than two decades after Lieutenant Mary Sue, Captain Kathryn Janeway commanded the deck of the starship in *Star Trek: Voyager*, the only Star Trek series to have a lead female captain.[29]

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24 Wikipedia, *Star Trek: The Original Series*, http://en.wikipedia.org/wiki/Star_Trek:_The_Original_Series (last visited Dec. 18, 2005); Yvonne Fern, Gene Roddenberry: The Last Conversation 107 (1994) (quoting Roddenberry as saying, "One of the things Star Trek says is that when the future comes, we will have successfully dealt with all of those issues of race and sex and class, and we will have evolved.").

25. BBC UK, Black History Month: 1969, http://www.bbc.co.uk/1xtra/bhm05/years/1969.shtml (last visited June 16, 2006).

26. "In his role as Sulu, [George] Takei challenged convention by being one of the first Asian American television icons to speak without an accent, without exotic costume, without any of the burden of the stereotypes that encumbered earlier TV portrayals. In doing so, he helped to make the idea of 'Asian as normal' possible." Jeff Yang, *Out, Beyond The Stars*, S.F. Gate, Nov. 10, 2005, http://sfgate.com/cgi-bin/article.cgi?f=/g/a/2005/11/10/apop.DTL. Takei observes that his role served another purpose, to counter images of Asians as the enemy during the Vietnam War:

> On the 6 o'clock news, every night you saw people with the same kind of face that I have wearing black pajamas, who were being shot up, who were being characterized as the hoard that was dangerous in the jungles of Vietnam. That was followed by this counterbalancing image of Sulu, something that never existed in American media.

Asian Week, Sept. 23, 1994. at 11.

27. BBC UK, Lt. Uhura, http://www.bbc.co.uk/cult/st/original/uhura.shtml (the kiss "essentially takes place off-screen, because of the network's concerns about upsetting viewers in the southern states") (last visited Dec. 18, 2005).

28. StarTrek.com, Deep Space Nine Cast, http://www.startrek.com/startrek/view/series/DS9/cast/69054.html (last visited June 16, 2006).

29. Star Trek.com, Voyager Cast, http://www.startrek.com/startrek/view/series/voy/cast/69079.html (last visited June 16, 2006).

Yet there remains a long way to go, as demonstrated by American television, a principal source of information about our world.[30] A recent Children Now report shows that male characters remain dominant, consistently outnumbering female characters by nearly two to one since 1999.[31] Prime time television portrays "a world in which women are significantly younger than their male counterparts and where older women are hard to find."[32] Perhaps especially telling is the occupational differentiation of men and women: "Male characters outnumbered female characters as attorneys (71% were male), executives/CEOs (80%), physicians (80%), law enforcement officers (82%), paramedics/firefighters (84%), elected/appointed officials (92%) and criminals (93%)."[33]

The racial divide on primetime television remains alarming. While 40% of American youth ages nineteen and under are children of color,[34] nearly three-quarters of all primetime characters during the 2003-04 television season were white. The racial diversity that does exist is found mostly during the ten o'clock hour, when American children are least likely to be watching: "The 8 o'clock hour remained the least racially diverse hour in prime time with one in five shows (20%) featuring mixed opening credits casts."[35] Latino characters are often cast in "low-status occupations."[36] Even when they were represented, Asian American characters "were far less likely than characters from other racial groups to appear in primary roles."[37] An earlier study by Children Now concluded that youth watching primetime television would most likely see a "world overwhelmingly populated by able bodied, single, heterosexual, white, male adults under 40."[38] When minority groups are depicted in the media, they are generally stereotyped, with Asian women, for example, cast as "China dolls" or "dragon ladies" and Asian men denied any positive

30. The Fall 2006 television lineup, for example, has gay and lesbian characters constituting just one percent of lead or supporting characters in scripted broadcast series. *See* Lisa de Moraes, *The New Season: Straight and Narrow*, Wash. Post, Aug. 22, 2006, at C1.

31. Children Now, Fall Colors: 2003-04 Prime Time Diversity Report, at 11, *available at* http://publications.childrennow.org/publications/media/fallcolors_2003.cfm [hereinafter Children Now 2003-04].

32. *Id.* at 7.

33. *Id.* at 8.

34. *Id.* at 1-2; *see also* Sam Dillon, *In Schools Across U.S., the Melting Pot Overflows*, N.Y. Times, Aug. 27, 2006, at A1 ("In 2004, . . . 57 percent of all public school students were white, while 43 percent were minorities.").

35. *Id.* at 4 (emphasis omitted).

36. *Id.* at 6.

37. *Id.* at 3. The Children Now report does not break down roles according to the intersection of race and gender.

38. Children Now, Fall Colors: 2000-01 Prime Time Diversity Report 2 (2001).

sexuality.[39] Latinos are commonly depicted as "criminals, buffoons, Latin lovers, or law enforcers."[40]

Movies may not be much better. In a study of black female characters in the top movies of 1996, 89% were shown using profanities, 56% were shown being physically violent, and 55% were shown being physically restrained.[41] By contrast, 17% of white female characters were depicted using profanities, 11% were shown being physically violent, and 6% were shown being restrained.[42]

Popular books also evince similar disparities. A study on children's books published in the early 1980s showed that adult male characters appeared almost three times more frequently than females.[43] Even more importantly, central characters were almost two-and-a-half times more likely to be boys than girls. Consider Winnie the Pooh. The lovable bear is Disney's most valuable character, generating revenues of a billion dollars annually.[44] But despite his apparent wide appeal, the bear's universe is quite narrow. In the nearly dozen characters in the Hundred Acre Wood, only one is female—Kanga, Roo's mother, who often dons an apron.[45] Winnie the Pooh and his friends, of course, were created in a different era,

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39. *See* Media Action Network for Asian-Americans, A Memo from MANAA to Hollywood: Asian Stereotypes, http://www.manaa.org/articles/stereo.html (last visited Dec. 19, 2005). *See also* David L. Eng, Racial Castration: Managing Masculinity in Asian America 15-19 (2001) (describing the feminization of the Asian-American male in the U.S. cultural imagination); Gina Marchetti, Romance and the "Yellow Peril": Race, Sex, and Discursive Strategies in Hollywood fiction 2 (1993) (noting that Asian men are depicted as either "rapists or asexual eunuch figures," while Asian females are depicted as "sexually available to the white hero"); Darrell Y. Hamamoto, Monitored Peril: Asian Americans and the Politics of TV Representation 6-31 (1994) (discussing how racist images have been imposed upon Asian-Americans on television); Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in The World of Suzie Wong, M. Butterfly, and The Adventures of Priscilla, Queen of the Desert*, 5 Asian L. J. 99 (1998).

40. Dana E. Mastro & Bradley S. Greenberg, *The Portrayal of Racial Minorities on Prime Time Television*, J. Broad. & Elec. Media 690, 691 (2000). One website community titled "DeadBroWalking" hosts a "people of color deathwatch," with entries critical of the representation (or absence) of minority characters in popular media. DeadBroWalking, People of Color Deathwatch, http://community.livejournal.com/deadbrowalking.

41. Robert M. Entman & Andrew Rojecki, The Entman-Rojecki Index of Race and Media (2000), http://www.press.uchicago.edu/Misc/Chicago/210758.html (last visited Nov. 15, 2006).

42. *Id.*

43. Elizabeth Grauerholz & Bernice A. Pescosolido, *Gender Representation in Children's Literature: 1900-1984*, 3 Gender and Soc'y 113, 118 (1989).

44. Meg James, *Ruling on Pooh Is a Setback for Disney*, L.A. Times, May 3, 2003, at C1 ("At the peak of Winnie the Pooh's popularity in the late 1990s, it brought in more than $1 billion in revenue annually to Disney and companies it licensed to produce Pooh products.").

45. As one fan explains on a Winnie-the-Pooh FAQ, "every character in 'Winnie-the-Pooh', and 'The House at Pooh Corner' are boys except Kanga. There are references to other female characters, namely some of Rabbit's friends and relations, but none of them have any speaking parts." http://www.lavasurfer.com/pooh-faq4.html. For an image of Kanga, see http://us.penguingroup.com/static/packages/us/yreaders/pooh75/characters/kanga.html. Of Kanga, the publisher of the *Winnie-the-Pooh* books explains, "She displays many maternal attributes, such as: wanting to Count Things, making sure that there are enough watercress sandwiches to go round, telling you what to do, giving baths, and knowing how to play a joke." *Id.*

written to cheer a young boy, but today these characters appeal to both boys and girls.[46] While Winnie the Pooh is the British literary creation popular among younger children, older children are currently entranced by the magic of Harry Potter. But despite the fact that the stories are penned by a woman, J. K. Rowling, the lead role is played by a boy, and the principal parts are mostly male.[47] Moreover, Hogwarts, in both teachers and pupils, is very largely white, especially so among the principal characters.[48]

Even magazines written specifically for girls fail to guarantee an empowering experience. Reviewing *Seventeen* magazine, sociologist Kelley Massoni observes that "men dominate its pages, as both subjects and job holders."[49] It is not only what is depicted that is important. It is also what is omitted. Magazines for teenage girls, according to Massoni, "overtly suggest, through content and pictures, how women should look, dress, and act; they more subtly suggest, *through exclusion of pictures and content*, what women should not do, be, or think."[50] Massoni concludes: "In the occupational world of *Seventeen*, Prince Charming still exists as the ultimate goal."[51] The implicit instruction in the pages of teen-girl magazines: "Marry, Sue!"

Such images are not confined to U.S. borders.[52] Hollywood and other American media multinationals have globalized American television shows, the Hundred Acre Wood, and Harry Potter. Disney and Time Warner offer their fare on the many television channels they own around the world. The fictional worlds envisioned therein now charm the real

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46. The self-insertion in the original is quite vivid. The stories are told to "you," as if they recount the adventures of the reader (Christopher Robin) himself in the Hundred Acre Wood. A. A. Milne, Winnie the Pooh (1924) ("Was that me?" Said Christopher Robin in an awed voice, hardly daring to believe it./ "That was you."). *Id*. at 2.

47. Christine Schoefer, *Potter's Girl Trouble*, Salon.com, Jan. 12, 2000, http://archive.salon.com/books/feature/2000/01/13/potter/index.html ("The world of everyone's favorite kid wizard is a place where boys come first.").

48. Non-whites in the Harry Potter novels are specifically identified by race, while whiteness is assumed for all others. Keith Woods, *Harry Potter and the Imbalance of Race*, PoynterOnline, July 15, 2005, http://www.poynter.org/column.asp?id=58&aid=85445 (last visited Dec. 24, 2005).

49. Kelley Massoni, *Modeling Work: Occupational Messages in* Seventeen *Magazine*, 18 Gender & Soc'y 47, 56-57 (2004).

50. *Id.* at 49 (emphasis added). Indeed, even Mary Sue is influenced by this culture; Mary Sue is often conventionally beautiful and perfectly coiffured. The worlds we inhabit crucially influence the worlds we imagine. Yet, there is a difference between the agency reflected in the Mary Sue and in that offered in teen magazines. *Cf.* Margaret Jane Radin & Madhavi Sunder, *Foreword: The Subject and Object of Commodification*, *in* Rethinking Commodification (Martha M. Ertman & Joan C. Williams eds., 2005) (considering importance of agency when assessing commodification's harms and benefits).

51. Massoni, *supra* note 49, at 58.

52. *See*, *e.g.*, Hassan Fattah, *Comics to Battle for Truth, Justice and the Islamic Way*, N.Y. Times, Jan. 22, 2006, at 8. ("For comic book readers in Arab countries, the world often looks like this: superheroes save American cities, battle beasts in Tokyo and even on occasion solve crimes in the French countryside. But few care about saving the Arab world.").

world's youth. Hollywood's global cultural hegemony translates Hollywood's prejudices to the world.

B. The Effects of Stereotypes

Psychological and sociological research reveals that cultural representations may have social and economic consequences.[53] Racial and gender stereotypes depicted in popular media may impact children's perceptions of career paths. Children "as young as five years of age learn to gender stereotype occupations based on the gender of a television role model."[54]

Early media studies research established a correlation (though not necessarily a causation) between high television watching and stereotyped views of gender occupations and traits. In one study published in 1980, children in the first, third, fifth, and seventh grades were asked to associate a given trait, such as shyness or confidence, with a man or a woman.[55] Children who were heavy television watchers showed a marked increase with age in male stereotyped responses, while children who watched relatively little television demonstrated a decrease in such answers with age.[56] In another study published in 1974, children between the ages of three and six were asked about their career aspirations.[57] The result showed that 76% of children who were classified as "heavy viewers" chose professions stereotypical for their gender, compared with 50% of "moderate viewers" who chose stereotypical professions.[58] The occasional counter-stereotypical media portrayal may not suffice to overturn engrained prejudices. In a study published in 1979, five- and six-year-olds were shown four films of less than two minutes each and questioned afterwards about what they had seen.[59] Each film presented two actors who portrayed doctors and nurses in various gender combinations. Of the films with a female doctor and a male nurse, 53% of the children stated that they had seen a movie about a male doctor and a female nurse. In contrast,

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53. *See* Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1549-53 (2005) (describing cognitive process of internalizing bias from violent crime news).

54. Mark Watson & Mary McMahon, *Children's Career Development: A Research Review From a Learning Perspective*, 67 J. Vocational Behavior 119, 124 (2005) (citing S.L. O'Bryant & C.R. Corder-Bolz, *The Effects of Television on Children's Stereotyping of Women's Work Roles*, 12 J. Vocational Behavior 233 (1978)).

55. Paul E. McGhee & Terry Frueh, *Television Viewing and the Learning of Sex-Role Stereotypes*, 6 Sex Roles 179 (1980).

56. *Id.*

57. Ann Beuf, *Doctor, Lawyer, Household Drudge*, 24 Journal of Commc'n 142,144 (1974).

58. *Id.*

59. Glenn D. Cordua et al., *Doctor or Nurse: Children's Perception of Sex Typed Occupations*, 50 Child Dev. 590, 591 (1979).

100% of the children correctly identified the actors' genders in the film with a male doctor and a female nurse.[60]

A recent study demonstrates stereotypical correlations with respect to race. Researchers Rebecca Bigler and her colleagues invented new, fictional occupations and presented various combinations of white and black persons in those occupations to children.[61] Poorer African-American children were less likely to aspire to jobs that had been depicted with white workers exclusively.[62] The study authors point out the potential for a vicious cycle:

> African American children, especially those from disadvantaged backgrounds, may preferentially seek out low-status jobs in which minorities are well represented and thereby ensure that such jobs remain overpopulated by minorities, thus perpetuating the skewed models for new generations of poor African American children.[63]

The effects of media portrayals reach beyond children. One study asked college students to complete questionnaires about their racial and gender attitudes after they viewed stereotypical or counter-stereotypical racial and gender portrayals in a newsletter.[64] Those who first viewed stereotypical portrayals were more likely to favor policy judgments against blacks or women when asked who bears responsibility for Magic Johnson contracting HIV and the police beating of Rodney King, and whether to accept the credibility of Anita Hill and Patricia Bowman in their respective claims.[65]

Minorities internalize the stories they read, see and hear every day. A U.S. Civil Rights Commission study found that minority stereotypes in the media reinforced the negative beliefs that minorities have about themselves,[66] echoing one author's argument that "the television roles in which Blacks are cast communicate to Black children the negative value society places on them."[67] The importance of televised role models is not

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60. *Id.*

61. Rebecca S. Bigler et al., *Race and the Workforce: Occupational Status, Aspirations, and Stereotyping Among African American Children*, 39 Developmental Psychol. 572 (2003).

62. *Id.* at 578. Interestingly, richer African-American children were more likely to aspire to jobs that they saw performed solely by whites or by both whites and blacks than by blacks exclusively. *Id.*

63. *Id.*

64. Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 Annals Am. Acad. Pol. & Soc. Sci. 165 (1998).

65. *Id.* at 168-69.

66. Minn. Advisory Comm'n to the U.S. Comm'n on Civil Rights, Stereotyping of Minorities by the News Media in Minnesota 35 (1993), http://www.usccr.gov/pubs/sac/mn1203/mn1203.pdf (providing 2003 update to 1993 study); *see also* Camille O. Cosby, Television's Imageable Influences: the Self-Perceptions of Young African-Americans 25 (1994).

67. Amber McGovern, *Neutralizing Media Bias Through the FCC*, 12 DePaul-LCA J. Art & Ent. L. & Pol'y 242 (2002) (citing Carolyn A. Stroman, *Television's Role in Socialization of African-American Children and Adolescents*, 60 J. Negro Educ. 314, 315 (1991)).

lost, even on the National Aeronautics and Space Administration. It hired Nichelle Nichols, who had played Lieutenant Uhuru, to help recruit women and African-American astronauts.[68]

C. Self-Insertion as Self-Empowerment

Lieutenant Mary Sue and those Mary Sues that have followed in her wake appear against this backdrop. Yet, within fan subcultures, Mary Sues are typically derided because of their perfection. Indeed, websites offer budding writers tutorials instructing them how to avoid the pitfall of writing a Mary Sue.[69] "Flaming" and negative reviews are deployed to discipline fan fiction writers who stray from acceptable additions to the particular fictional universe.[70] Where texts have long been subject to socially regulated readings,[71] the fan fiction community—formed today principally through cyberspace—extends this discipline even to acceptable reworkings of the text.

We seek here to reclaim Mary Sue not only from the *official guardians* of the *official story*, but also from the *unofficial guardians* of the *unofficial story*. The fact that Mary Sues are marked by relentlessly superlative qualities becomes more understandable when viewed against a popular culture that marginalizes certain groups. Flattering self-insertion offers a partial antidote to a media that neglects or marginalizes certain groups. Victims of prejudice often internalize its claims; indeed, oppressive societies have often relied on this psychological trick to maintain hierarchies.[72] A process of consciousness-raising and self-empowerment requires that one recognize one's own potential, even if others do not. Denied the principal role in the official canon, Mary Sue is no passive peripheral character: "She *does*, not just simply *exists*. She slays, she runs a

68. Wikipedia, *Nichelle Nichols*, http://en.wikipedia.org/wiki/Nichelle_Nichols (last visited Dec. 19, 2005).

69. *See, e.g.*, TA Maxwell, *The Mary Sue Manual*, Nov. 6, 2003, http://www.fictionpress.com/read.php?storyid=1440163; Flourish, *Mary Sueage (And How to Avoid It)*, http://www.lumosdissendium.org/essays/ms.html; James Lyn, *Saving Mary Sue*, http://www.reflectionsedge.com/archives/dec2004/sms_jl.html; Melyanna, *The Trouble with Mary*, TheForce.Net (July 1, 2002), http://fanfic.theforce.net/articles.asp?action=view&ID=33. For a remarkable electronically scored personality test variant, see The Original Fiction Mary-Sue Litmus Test, http://www.ponylandpress.com/ms-test.html.

70. Fiona Carruthers, *Fanfic is Good for Two Things-Greasing Engines and Killing Brain Cells*, 1 Particip@tions (May 2004).

71. Speaking of disciplining the consumption of texts, the French theorist Michel de Certeau observes: "By its very nature open to plural reading, the text becomes a cultural weapon, a private hunting reserve, the pretext for a law that legitimizes as 'literal' the interpretation given by socially authorized professionals and intellectuals." Michel de Certeau, The Practice of Everyday Life 171 (Steven Rendall trans., 1984) (emphasis in original).

72. *See generally* Frantz Fanon, The Wretched of the Earth (1963).

starship, she types, she wields a sword."[73] Mary Sues help the writer claim agency against a popular culture that repeatedly denies it.[74]

Some commentators worry that the "Mary Sue often reinforces the impossible idea that women must strive for effortless perfection."[75] But would not the intrepid Captain Kirk or the invincible Superman suggest the same goal for men? Based on the social science literature canvassed above, we suggest instead that relentlessly positive portrayals of people who look like you may lead to (1) people thinking that people who look like you are capable and desirable; and (2) believing in your own capability and self-worth. Rewriting popular culture is a step towards breaking the cyclical reproduction of dominance. Take three examples.

1. Same Sex Romance: Kirk/Spock

Even though Star Trek envisioned a purportedly egalitarian future, the reality it posited was far from the ideal. Just as Paula Smith had introduced Lieutenant Mary Sue to make up for the absence of female leaders, early fan fiction writers often imagined same-sex romantic relationships among the ship's crew. Referenced often as "K/S" for "Kirk/Spock," such same-sex pairings in fan fiction came to be known as "slash."[76] Slash thus functions as a kind of Mary Sue, reflecting a desire to introduce homosexuality where it has been omitted.

This may be true even when the author is a heterosexual woman. Consider the following accounts of why women write male same-sex pairings:[77]

- Given the priority given to the hero in the original, the female reader may identify with the hero, not the heroine, and then use the hero to "'feel' the adventure with";[78]

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73. Pflieger, *supra* note 7 (emphasis in original).

74. *See* Chaney & Liebler, *supra* note 11, at 54 ("The desire to insert take-charge female characters especially makes sense considering that the source texts for so much fan fiction—from Lord of the Rings to HBO prison series Oz—feature male characters running the show."). Anecdotal evidence from English language fan fiction sites suggests that Mary Sues are more likely to be female (with race often unspecified) than from clearly specified minority racial groups. For examples of Mary Sues involving minority characters, see http://www.teland.com/remember (introducing "archive dedicated to bringing you fan fiction about characters of color" with picture of Lieutenant Uhura); Te, *Just As Foxy As Can Be* (Jan. 2001), http://teland.com/foxy.html (beginning camp story inserting African-American characters in Buffy universe with an author's note saying, "I'm Black. I'm allowed to do this."). (We thank Rebecca Tushnet for these references.)

75. *Id.* at 57.

76. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 J. Gender, Race, & Justice 461 (2006) (arguing in favor of permitting slash fan fiction in order to allow recoding of texts).

77. Shoshanna Green et al., *Normal Female Interest in Men Bonking: Selections from* The Terra Nostra Underground *and* Strange Bedfellows, *in* Theorizing Fandom, *supra* note 13, at 9.

78. *Id.* at 16-17.

- Rewriting masculinity places emotional responsibility on men;[79]
- Male slash is erotic to the female writer;[80] and
- It rearranges the expected sexuality.[81]

The ripping, mixing, and slashing of traditional sexual roles may allow the writers to reimagine their own place in the sexual order.[82]

2. Heroes and Heroines: The Adventures of Hermione Granger

Some *Harry Potter* fan fiction gives center stage to Hermione Granger.[83] Given that the *Harry Potter* books already depict Hermione with extraordinary, positive characteristics, it may have seemed unnecessary to rewrite her story. But the stories offer two twists on the official tale. First, they make it *her* story, not someone else's story in which she plays a part. Second, the stories often find her a romantic partner, especially Ginny Weasley, Draco Malfoy, or Harry Potter. As one critic points out, the last pairing is especially satisfying for some: "As the Potter series' brilliant bookworm, Hermione is a role model for smart girls (and boys) who find themselves overshadowed by their flashier peers. There's a certain appeal to thinking that a young academic could couple with the hero of the wizarding world."[84]

3. Cultural Adaptation: Harry Potter in Kolkata

"Harry gets onto his Nimbus 2000 broom and zooms across to Calcutta at the invitation of a young boy called Junto," reads the text of an Indian tale, *Harry Potter Kolkataye—Harry Potter in Kolkata*.[85] Written in Bengali, the book brings Harry Potter to Kolkata where he "meets famous fictional characters from Bengali literature."[86] Uttam Ghosh, the author,

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79. *Id.* at 19-20.

80. *Id.* at 30-34.

81. *Id.* at 19-20.

82. We do not mean to suggest an entirely sanguine view of slash or other fan fiction. For example, the typically male focus of slash leads to concerns of misogyny, as even women in the original story may be written out of the slash. *Id.* at 36.

83. *See, e.g.*, wolfgirlami, *The OFA Series: Book One: The Miraculous Miracle*, http://www.fanfiction.net/s/2523593/1(2005) (imagining Hermione's home life, focusing on Hermione's relationships with her mother and baby sister).

84. Neva Chonin, *If You're an Obsessed Harry Potter Fan, Voldemort Isn't The Problem. It's Hermione versus Ginny*, S.F. Chron., Aug. 3, 2005, at E1.

85. *Potter Translations Withdrawn*, May 1, 2003, http://www.news24.com/News24/Entertainment/Abroad/0,,2-1225-1243_1354257,00.html (last visited Dec. 18, 2005). *See also* Pogrebin, *Dissipate*, http://www.fictionalley.org/authors/pogrebin/dissipate01a.html (two minor South Asian female characters from *Harry Potter* visit India).

86. Manjira Majumdar, *When Harry Met Kali*, Outlook (India), July 7, 2003. The fictional characters include Professor Shanku, a protagonist in science fiction stories by Satyajit Ray. *See* Wikipedia, *"Professor Shanku,"* http://en.wikipedia.org/wiki/Professor_Shanku (last visited Mar. 2, 2006). Potter also meets historical figures, such as Satyajit Ray's father. Priyanjali Mitra,

describes the story as a "poor man's Potter," costing just thirty rupees—less than one U.S. dollar.[87] But does this poor man's Potter simply further insinuate a foreign character into the imagination of Bengali youth? To some extent, yes, but we must not overlook the power of global mass media, which makes Potter difficult to avoid for the middle-class Kolkata youth likely to buy the book.[88] *Harry Potter in Kolkata* is yet another variant of the Mary Sue. It introduces a young Indian boy into the Harry Potter legend and also a new environment—Kolkata—rather than Harry's familiar England. By situating Harry in Kolkata, it makes it easier to imagine the local street corner as a place of magic.[89]

II
Suing Mary

Potter in Kolkata was quickly pulled. Indian lawyers for Rowling and Warner Brothers issued a cease and desist letter to the "pirate" work's Indian publisher, which quickly complied.[90] J. K. Rowling, however, has generally tolerated literally hundreds of thousands of other fan fiction stories based on her characters, including stories that focus on Hermione—but these have been largely non-commercial and web rather than print-based. The owners of the Star Trek franchise contemplated legal action against Star Trek slash, but did not bring suit because of strategic considerations.

What are the respective legal rights of the owner of the official work and the author of the Mary Sue? We argue that U.S. copyright law permits Mary Sues that challenge the orthodox depictions in the original.[91]

Bengali Babu, Indian Express, Apr. 20, 2003, http://www.indianexpress.com/full_story.php?content_id=22323 (last visited Mar. 2, 2006).

87. Majumdar, *supra* note 86.

88. Soutik Biswas, *Harry Is Hypnotic*, Outlook (India), July 7, 2003 (describing *Harry Potter and the Order of the Phoenix* as "easily the fastest selling book ever in India," with its Indian publisher estimating the sale of some 200,000 copies of the hardback version alone).

89. *Cf.* Joyce S. Sih, *Just a Japanese Girl Prodigy,* http://pottersues.livejournal.com/277924.html (Harry Potter meets a Japanese girl with magical powers of her own) (last visited Nov. 16, 2006). The website which reposts this story ridicules *Harry Potter* Mary Sues.

90. The letter asserted copyright, character merchandise, trademark, and fraud claims. Urmi A. Goswami, *Illegally Cashing in on* Harry Potter, Economic Times (India), Apr. 3, 2003, *available at* http://economictimes.indiatimes.com/cms.dll/html/uncomp/articleshow?msid=42205835 (last visited Mar. 2, 2006). The book included stills from the film *Harry Potter and the Sorcerer's Stone*. *See* Mitra, *supra* note 86.

91. This Essay interprets the law as it stands today rather than propose revisions to that law. *Cf.* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. Copyright Soc'y 513, 524 (1999) (suggesting eliminating fair use but denying copyright holders the ability to enjoin derivative works).

A. The Fair Mary

United States law permits the copyright owner to claim not only his or her own stories, but also the characters in those stories.[92] It grants the exclusive right to make derivative works to the copyright holder.[93] The unauthorized author of a derivative work such as fan fiction cannot claim a copyright in that work. This places the fan fiction writer at the mercy of the copyright owner, unless the fan fiction constitutes fair use. Thus, a fan fiction writer can pen stories employing copyrighted characters only if: (1) the copyright owner explicitly permits such fan fiction, (2) the copyright owner chooses not to pursue legal action against the fan fiction writer, or (3) the fan fiction constitutes fair use of the copyrighted work.

This third avenue allows fan fiction writers the freedom to create using existing creative worlds without needing the permission, either explicit or tacit, of the copyright owner. If a use is judged "fair," then the copyright owner cannot bar it. Whether a use is fair depends on a number of factors, including the character of the work (is the use either commercial or transformative?) and whether the use injures the copyright owner's market for the work.[94] Courts enjoy wide discretion when weighing these factors, drawing upon the statute as well as a long line of interpretive case law.

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92. *See* Judge Posner's list of cartoon characters in Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004); DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 25, 28 (2d Cir. 1982) (assuming Batman to be copyrightable); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753-55 (9th Cir. 1978) (Mickey Mouse et al.); Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 433-34 (2d Cir. 1940) (Superman); Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 73 F.2d 276, 278 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1934) (Betty Boop). *See also* Judge Jon Newman's list of even earlier cases in Warner Bros., Inc. v. Am. Broad. Co., 720 F.2d 231, 240 (2d Cir. 1983): King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924) (Barney Google's horse, Spark Plug); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914) (Mutt and Jeff); Empire City Amusement Co. v. Wilton, 134 F. 132 (C.C.D. Mass. 1903) (Alphonse and Gaston). Cartoon characters seem to have received greater protections than literary characters. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 Wis. L. Rev. 429, 451 (1986); Gregory S. Schienke, *The Spawn of Learned Hand—A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?*, 9 Marq. Intell. Prop. L. Rev. 63 (2005); Cathy J. Lalor, *Copyrightability of Cartoon Characters*, 35 IDEA 497 (1995). Even the setting—the world created by a writer devoid of its specific characters—will likely be subject to copyright. Pupiling Hogwarts with newly invented characters is not enough to escape Rowling's copyright claim.

93. 17 U.S.C. § 106(2) (2002).

94. The Copyright Act enumerates two other non-exhaustive factors to be considered: the nature of the copyrighted work and the amount of the original that is copied. 17 U.S.C. § 107 (1978). To the extent that fan fiction focuses on copyrighted works, those works are generally highly creative and worthy of substantial protection; thus, this factor tends to favor the copyright owner. The other three factors are less predictable, as we discuss herein. We briefly consider the "amount copied" factor *infra* note 119 and accompanying text.

1. Campbell v.Acuff-Rose Music, Inc.

The leading case defining the contours of fair use as it applies to critical commentary concerns a rap group's reworking of an earlier song, "Oh, Pretty Woman." In *Campbell v. Acuff-Rose Music, Inc*., the copyright owner of Roy Orbison's song sued the rap group 2 Live Crew for copyright infringement for their song "Pretty Woman."[95] The Supreme Court reversed the Sixth Circuit's decision that the use was presumptively unfair because of the song's commercial nature, holding that 2 Live Crew's parody of the original might constitute fair use. Justice Souter, writing for the Court, characterized 2 Live Crew's version as a parody of the original:

> "[W]e think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies."[96]

The Court observed that parodies like 2 Live Crew's "Pretty Woman" transform the original, providing "social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[97] Even the commercial nature of 2 Live Crew's work did not defeat the group's fair use defense, though the Court remanded the case for fact finding as to whether the 2 Live Crew rap parody harmed the copyright owner's market for a *non*-parodic rap version of the song.[98]

Similarly, many Mary Sues comment on or criticize the original, while at the same time create something new. They highlight the absence of society's marginal voices in the original works, the stereotyped actions or inactions of certain characters, and the orthodoxy of social relationships in the original. Lieutenant Mary Sue beamed on board, finally bringing a leading woman character to the bridge, saving the day while parrying Captain Kirk's advances. The depiction of Lieutenant Mary Sue served to challenge the original in a uniquely powerful way. It demonstrated the glaring lacuna in the original, despite its pretensions of egalitarianism (exemplified in the first Star Trek movie's risible use of "Mr." to reference both male and female crew members). Such Mary Sues comment on the disappointments of the original, particularly its racial, gender, and sexual hierarchy.

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95. 510 U.S. 569 (1994).
96. *Id.* at 583.
97. *Id.* at 579.
98. *Id.* at 593-94.

2. The Wind Done Gone

Mary Sues help us rewrite not just the future, but also the past. For nearly a century, the most popular account of life on a slave plantation has been Margaret Mitchell's literary classic *Gone With the Wind* (*GWTW*), a book second only to the Bible in worldwide sales.[99] That account presented an idyll disturbed only by the actions of the North:

> In the world of *GWTW*, the white characters comprise a noble aristocracy whose idyllic existence is upset only by the intrusion of Yankee soldiers, and, eventually, by the liberation of the black slaves. . . . Mitchell describes how both blacks and whites were purportedly better off in the days of slavery: "The more I see of emancipation the more criminal I think it is. It's just ruined the darkies," says Scarlett O'Hara. . . . Free blacks are described as "creatures of small intelligence . . . [l]ike monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild."[100]

In *The Wind Done Gone* (*TWDG*), Alice Randall, an African-American novelist, retold the tale from the perspective of a slave, Cynara, on the O'Hara plantation. Mitchell's heirs sued for copyright infringement. The trial court held that Randall had infringed Mitchell's work. On appeal, the Eleventh Circuit reversed, holding that *TWDG* likely constituted a parodic fair use.[101] The two novels' depictions of race and sex relations could hardly be more different, as characterized by the Eleventh Circuit:

> It is clear within the first fifty pages of Cynara's fictional diary that Randall's work flips *GWTW's* traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify *GWTW* and strip the romanticism from Mitchell's specific account of this period of our history.…
> In *GWTW*, Scarlett O'Hara often expresses disgust with and condescension towards blacks; in *TWDG*, Other, Scarlett's counterpart, is herself of mixed descent. In *GWTW*, Ashley Wilkes is the initial object of Scarlett's affection; in *TWDG*, he is homosexual…[102]

The Sueification of the African Americans in the story is unmistakable. As the Eleventh Circuit noted, "[i]n *TWDG*, nearly every black character is given some redeeming quality-whether depth, wit, cunning, beauty,

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99. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001).

100. *Id.* at 1270.

101. Other recent cases (often tellingly involving the female nude) reaffirm that parody often constitutes fair use. *See, e.g.*, Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (Pregerson, J.) (upholding photographs of nude Barbie in various sexualized positions as parodic fair use); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir. 1998) (Jon O. Newman, J.) (upholding photograph of "pregnant" nude actor Leslie Nielson as parodic fair use of photograph of pregnant nude Demi Moore).

102. *SunTrust Bank*, 268 F.3d at 1270.

strength, or courage-that their *GWTW* analogues lacked."[103] But given the racist caricatures in the original, Randall's redemption of the African Americans is not only understandable but overdue.

3. Public Majority Opinion, Parody, and the Marketplace

Whether Mitchell's heirs must tolerate *The Wind Done Gone* did not turn on whether either they or *even the public* liked the retelling. Courts have insisted that "public majority opinion" is irrelevant to the question of whether a work is a parody;[104] making the inquiry an issue of law helps insulate uses that society disfavors. Of course, relying upon judges to make the parody determination inserts judges' own prejudices into the decision making.[105] Yet, on occasion judges have endorsed as fair use parodies they have found objectionable.[106]

While parodies often constitute fair use, satires often do not (though they may).[107] Satires employ the original work "as a vehicle for commenting on some individual or institution and not on the work itself."[108] As the Supreme Court explained in the *Campbell* case: "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[109] That decidedly does not mean that parodies cannot comment simultaneously on the underlying work *and* on society at large. Indeed, this is the norm for parodies that courts have found fair. Justice Souter recognized that a particular work might exhibit both satire and parody: "[N]o workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements."[110] This will be especially true of source works that are cultural icons—because of their popularity, critiquing these icons carries a larger message. When the canon works stand for an era, a mood, a history, the Mary Sue becomes a subversive intervention.

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103. *Id.* at 1271.

104. *Mattel*, 353 F.3d at 801.

105. Consider, for example, the appellate court opinion in *Campbell*. Yet, we rely in part on Ely's admittedly optimistic vision of judges as platonic guardians for the powerless in society. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

106. For example, the Second Circuit upheld an actor's right to poke fun of the pregnant female body, even though it found the act "unchivalrous[]." *Leibovitz*, 137 F.3d at 115.

107. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 n.14 (1994).

108. 2 Paul Goldstein, Goldstein on Copyright §12.2.1.1(b), 12:31 (3d ed. 2005).

109. *Campbell*, 510 U.S. at 580-81.

110. *Id.* at 581.

Mary Sues can be commercial and still be fair.[111] Indeed, the history of fair use is replete with commercial uses, including all of the cases cited above.[112] In *Campbell*, the Supreme Court declared "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[113] While amateur fan fiction is typically authored without remuneration in mind,[114] not all Mary Sues have a noncommercial motive. The possibility of remuneration is important, as it spurs creation by allowing writers a livelihood in such work, while potentially giving them the financial means to reach a larger audience. Alice Randall, for example, found a commercial publisher for her story, and will have the right to challenge Mitchell's film version with her own.

Even when a work is found to be a parody, courts will analyze the effect of the parody on the market for both the original work and for potential derivatives in the work. But when a new work transforms the original in some substantial way, the market harm resulting from the copying can be difficult to ascertain. The *Campbell* court noted that "as to parody pure and simple, it is more likely that the new work will not affect the market for the original . . . by acting as a substitute for it."[115] Mary Sue works — which by their very nature are subaltern critiques of the dominant stories — are not likely to supplant the market for the originals. Rather, they are likely to serve a different market of specialized consumers who identify more closely with Mary Sue versions than with dominant versions. If part of the market for the original disappears because the Mary Sue exposes the original's prejudices, that is not the type of adverse effect on a market for which the fair use calculus should account. The Copyright Act

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111. *See, e.g.*, *id.* at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use"); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 110 (2d Cir. 1998) (noting that commercial use weighed against fair use, but nonetheless holding that the advertisement at issue was fair use). A popular misconception holds that noncommercial use is legally *required*. *See*, *e.g.*, Bacon-Smith, *supra* note 1, at 45 ("Because the sources of the fan fiction are copyrighted by their creators, fanwriters and publishers may not earn a profit from their work, so no writer of fan fiction may be paid for her work, and no publisher may show a profit on the sale of her fanzines."). While not required, noncommercial use is a factor weighing in favor of fair use. *Cf.* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 Loy. L.A. Ent. L.J. 651, 654 (1997) ("Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder's characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work."). Furthermore, copyright owners might be less likely to sue authors of noncommercial fan fiction.

112. Goldstein, *supra* note 108, at § 12.2.2.1(a), 12:38 ("by far the great bulk of decisions finding fair use have involved commercial, rather than noncommercial, uses").

113. *Campbell*, 510 U.S. at 579.

114. Writing fan fiction helps many amateur writers to develop their craft, occasionally leading to commercial success through book contracts for original stories. John Jurgensen, *Rewriting the Rules of Fiction*, Wall St. J., Sept. 16, 2006, at P1.

115. *Campbell*, 510 U.S. at 591.

must be concerned with illegitimate free riding, not the speech effects of the use.[116] Take for example scholarly criticism that borrows quotes or images from the subject of the critique. That criticism might ridicule or deride the original and thus harm the market for that work, yet that market harm should not be cognizable in the fair use inquiry. While scholarly criticism can be effective, critiques written in the language of the original may prove equally persuasive.

Not all Mary Sues that challenge stereotypes constitute fair use under existing law.[117] Fair use is a contextualized, fact-specific determination requiring courts to carefully consider the factors enumerated in the statute. In deciding whether a use is fair or unfair, a court must "work its way through the relevant factors, and . . . judge[] case by case, in light of the ends of copyright law."[118] While parodies by their nature require some amount of borrowing in order to evoke the original,[119] the question of how much is too much is one that can only be determined in a particular context. For example, a Mary Sue masquerading as the canon work would likely go too far.[120]

B. Critiques of Mary Sue

Like any claim to use another's original work, the author of a Mary Sue will face three fundamental objections:

1. Why not write your own entirely original story?
2. Why not license the original?
3. Won't liberal recoding of icons destabilize culture?

These objections are raised with respect to a wide variety of fair use claims. We respond to all three critiques here.

1. Critique #1: Why Not Write Your Own Entirely Original Story?

Why not simply write your own story from whole cloth rather than borrow from a canon work? In *Campbell v. Acuff-Rose*, the Supreme Court indicated its distaste for someone who borrows someone else's copyrighted

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116. William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 Calif. L. Rev. 1639, 1644-45 (2004) (complaining that this factor "fails to distinguish between a use that impairs the potential market for the copyrighted work by criticizing it from a use that impairs the copyrighted work's market or value by free riding on the work").

117. Dennis Karjala suggests that courts draw the dividing line between idea (lacking copyright protection) and expression (receiving copyright protection) in fan fiction carefully so as not to encompass too much within the scope of the author's copyrighted character. Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 Ariz. St. L.J. 17, 39 (2006).

118. *Campbell*, 510 U.S. at 581.

119. *See* Berlin v. E.C. Publ'ns Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (holding that the amount copied should be no more than necessary to conjure up the original).

120. Fan fiction authors have developed conventions to avoid such false advertising. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 Loy. L.A. Ent. L.J. 651, 680 (1997) (describing disclaimers in fan fiction as "[r]itual").

work merely "to avoid the drudgery in working up something fresh."[121] Indeed, a skeptic might ask: Why not simply write your own world? In a letter to her fans, this is precisely the advice of the writer Anne Rice: "I do not allow fan fiction. The characters are copyrighted. . . . I advise my readers to *write your own original stories* with your own characters."[122]

Both the preference for parody over satire and the penchant for entirely original stories have typically turned on economic analysis and the underlying notion of substitutability. The critical legal inquiry is: Is there a viable substitute for the copyrighted work? That is, can the later writer employ a public domain work or invent a wholly original work as an alternative vehicle for expressing his or her critique? Paul Goldstein expresses confidence that, for satire at least, such alternatives will be readily available: "There will rarely be a shortage of works, including public domain works, that with some ingenuity can be made to serve as equally effective vehicles for the intended satire."[123] If a viable substitute exists, it is no longer necessary to use the copyrighted work. The focus on substitutability explains why courts generally favor parody over satire. For satire, as Goldstein reminds us, a substitute generally exists. But if the point is to comment on a particular work, and to seek to resignify it for oneself, there is no substitute for the use of the original work.

Yet there is only one Superman.[124] Parodic social commentary gathers its unique power *because* of its use of cultural icons.[125] The abstract statement may not hold the same cultural currency as the one directed at, and employing, Superman. Thus, it is not the absence of creative genius on the part of the later author that requires the use of an earlier work. Rather, while the canon work's inventiveness or brilliance may have contributed to its current cultural status, it is the very popularity of the canon work that is the focus of the Mary Sue.[126] Of course, by piggybacking on the canon

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121. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

122. Anne Rice.com, http://www.annerice.com/fa_writing_archive.htm (emphasis added) (last visited Sept. 30, 2006).

123. Goldstein, *supra* note 108, at §12.2.1.1(b), 12:31. Hughes' optimism that there are alternatives for the bulk of intellectual properties seems more far-reaching than Goldstein, who after all limits his claim to satire, as that term has come to be understood in law. *See* Hughes, *supra* note 19, at 969-72.

124. Of course, this is untrue—there are multiple official Supermans. *See infra* note 148 and accompanying text.

125. *Cf.* Tushnet, *supra* note 111, at 656 ("Media creations on which fandom is based serve the same function for fan authors as Paul Bunyan, Coyote, and Ulysses did in earlier times in that they provide a common language."); Kurtz, *supra* note 91, at 441 ("Fictional characters help form the modern myths out of which we operate and are an important part of the cultural heritage on which an author can draw to create something new. They can encapsulate an idea, evoke an emotion, or conjure up an image."); Karjala, *supra* note 117, at 26 ("Popular fictional characters become a part of the vocabulary of modern life and can serve as building blocks for development and expansion of our cultural heritage.").

126. There are many Mary Sues of texts that are not broadly popular, but Mary Sues tend to focus on texts that are, at a minimum, popular within certain subcultures. *See, e.g.*, the distribution of fan

work, the Mary Sue cannot guarantee itself a share in the original's popularity. But, for the author and a particular set of readers, the Mary Sue helps re-imagine the world by reworking the most powerful elements of popular culture.

This dynamic is particularly important where the popular culture is widely discriminatory and non-inclusive. As Henry Louis Gates, Jr. testified in a declaration before the Court in the *Wind Done Gone* case, "*Gone With the Wind*—especially in its book form—is widely regarded in the black community as one of the most racist depictions of slavery and black slaves in American literature."[127] In her declaration in the same case, Toni Morrison asked simply, "Who controls how history is imagined? Who gets to say what slavery was like for the slaves?"[128] Randall's retelling of the master narrative is a hoary tactic: as Gates testified, "African Americans have used parody since slavery to 'fight back' against their masters."[129] Keith Aoki describes the need to open up "more cultural space for 'talking back' at, or *through*, the pervasive and dense media languages which constitute much of our social environment."[130] As Rosemary Coombe powerfully asks: "What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations we cannot contest?"[131] Theorists, both traditional and postmodern, affirm the discursive nature of creativity: all creators borrow from earlier masters.[132] But contemporary cultural theorists recognize as an important discursive tactic the reworking of a *discriminatory* narrative to retell history and empower oneself.[133] Rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of *self-*

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works by canon book at one popular fan fiction site. Fan Fiction.net, http://www.fanfiction.net/cat/202 (last visited Sept. 30, 2006).

127. Henry Louis Gates, Jr., Decl. at 1, SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, No. 1:01 CV-701-CAP (N.D. Ga. 2001).

128. Toni Morrison, Decl. at 1, SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, No. 1:01 CV-701-CAP (N.D. Ga. 2001).

129. Gates, *supra* note 127.

130. Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights*, 68 Chi.-Kent L. Rev. 805, 836 (1993) (emphasis added).

131. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 Tex. L. Rev. 1853, 1879 (1991).

132. Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y U.S.A. 209, 218 (1983) ("*all* works are to some extent based on works that precede them") (emphasis in original).

133. *See* Henry Louis Gates, Jr., The Signifying Monkey (1988); Henry Louis Gates, Jr., Figures in Black: Words, Signs, and the 'Racial' Self 236 (1987) ("describing the black writer as he who dwells at the margins of discourse, ever punning, ever troping, ever embodying the ambiguities of language" and engaged in "repetition and revision . . . repeating and reversing simultaneously . . . in one deft discursive act."). Building on de Certeau, Henry Jenkins describes fan fiction as "textual poaching," in which fans "reconstruct meanings according to more immediate interests." Henry Jenkins, Textual Poachers: Television Fans & Participatory Culture 35 (1992).

empowerment. In Gates' words, "[S]ignifying can also be employed to reverse or undermine pretense or even one's opinion about one's own status."[134]

But would not women and minorities who find themselves misrepresented in culture be better off creating wholly new stories, rather than redeploying the icons already offered by cultural authorities? As we have already noted, this is a common criticism of Star Trek slash fiction, which, paradoxically *is often penned by women but at the same time often excludes women* in its glorification of the male bodies of Kirk and Spock.[135] Though we have already posited some possible explanations for this phenomenon,[136] here we consider the phenomenon as an example of a discursive practice known in cultural theory as "bricolage", which describes the practice of creating by "making do" with the hodgepodge of cultural elements that already exist.[137] One study, for example, found that women writers of Star Trek slash fiction focused on the lead males in the show because (1) the women characters in the story are not interesting, and (2) the writers were just "working with what's out there" already.[138] In another paper, one of us, Madhavi Sunder, posited a theory of cultural belonging and participation that goes beyond describing how individuals create within culture.[139] Sunder argues that, more and more, individuals seek a right to develop their autonomous selves within the normative communities that matter most to them. Mary Sue fan fiction affirms Jane Austen's observation that "[o]ne does not love a place the less for having suffered in it."[140] There are, of course, brilliant, entirely original texts that reflect an egalitarian worldview. Yet, for whatever reason, few such texts have attained the popular cultural status of a small set of iconic works. Popularity may arise through a grassroots, word-of-mouth groundswell, which the Internet has made increasingly possible. However, more often than not, popularity is carefully cultivated, often requiring a large capital investment that is out of the reach of many marginalized communities.[141]

Even when popular alternatives emerge, they can often be co-opted by the dominant players simply through acquisition. Take the alternative teenage girl magazine *Sassy*, purchased by *Teen* magazine, "which first

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134. Gates, Figures in Black, *supra* note 133, at 240.

135. *See supra* note 77 and accompanying text.

136. *See* discussion *supra* notes 78-82 and accompanying text.

137. de Certeau, *supra* note 71, at 29.

138. Constance Penley, *Brownian Motion: Women, Tactics, and Technology, in* Technoculture 135, 155 (Constance Penley & Andrew Ross eds., 1991).

139. Madhavi Sunder, *Cultural Dissent*, 54 Stan. L. Rev. 495, 555-567 (2001).

140. *Id.* at 551 n.315 (quoting Jane Austen, Persuasion 162-63 (Bantam Classic ed. 1984) (1818).

141. *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Calif. L. Rev. 1331, 1351-52 (2004) (explaining why few developing country corporations have successfully commercialized traditional knowledge for a global consumer market).

integrated it as a column and later phased it out completely."[142] *Teen* itself was later acquired and integrated into *Seventeen* magazine.[143]

Yet another obstacle to "wholly" invented alternatives is the possible use of intellectual property law by dominant players against newcomers. For example, Marvel and DC Comics both claim a joint trademark in the use of the phrase "Super Heroes" in comic books. Faced with a threat of suit, the creator of the comic book "Super Hero Happy Hour" changed his comic's name to "Hero Happy Hour."[144] While there are reasons to doubt the validity of the "Super Heroes" mark (e.g., the term "super hero" is generic; the mark owners have failed to meet their obligation to police unauthorized uses of the mark),[145] Marvel and DC can employ their questionable trademark against parties without the resources to test their claims in court.

2. Critique #2: Why Not License the Original?

Why not require that the Mary Sue be licensed from the copyright owner? Copyright law assumes that copyright owners will be reluctant to license criticism of their work.[146] The Supreme Court so stated in *Campbell v. Acuff-Rose*: "Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."[147] The Court accordingly concluded that, if there is no derivative market for criticism, criticism of the original work cannot interfere with the potential market for the copyrighted work. This supports the conclusion that critique of the work itself will likely constitute fair use. But some might argue that this is too pessimistic. If there is a market for a work, then the copyright owner should seek to maximize his or her profit by exploiting it—even if it means tolerating criticism. (An alternative view is that rather than calling for fair use for criticism, any reluctance to license criticism should simply imply a compulsory license, requiring a royalty payment in lieu of a royalty-free

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142. Massoni, *supra* note 49, at 50.

143. *Id.* To take another well-known example, BET (Black Entertainment Television) emerged as a music television alternative to MTV and VH1, only to be bought by MTV's and VH1's owner, Viacom. Lynette Clemetson, *Chief of BET Plans to Broaden Programming Appeal*, N.Y. Times, Jan. 10, 2006, at E1.

144. USPTO registration #1179067 purports to give Marvel and DC exclusive rights to the name in the marketing of "PUBLICATIONS, PARTICULARLY COMIC BOOKS AND MAGAZINES AND STORIES IN ILLUSTRATED FORM." Todd Verbeek, Super-Heroes® a Trademark of DC and Marvel, http://briefs.toddverbeek.com/archives/SuperHeroes_a_Trademark_of_DC_and_Marvel.html (Jan. 30, 2004); Editorial, *Set our Super Heroes (trademark symbol) free*, L. A. Times, Mar. 26, 2006, at M4.

145. *See* 74 Am. Jur. 2d *Trademarks and Tradenames* § 31 (2005).

146. Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79, 104-07 (1991).

147. 510 U.S. at 592. The Court bolstered the point with literary support: "'People ask . . . for criticism, but they only want praise.' S. Maugham, Of Human Bondage 241 (Penguin ed. 1992)."

use.) Bruce Keller and Rebecca Tushnet point out that DC Comics, the owner of Batman, Superman, and other popular characters, has authorized "Elseworld" alternative universes, in which the heroes are villains, and the villains, heroes.[148]

Two recent moves by corporate America further suggest that "Official Mary Sues" are not entirely unlikely. Marvel Enterprises, Inc. licensed an Indian version of Spider Man, with the superhero donning a traditional Indian loincloth and sparring with the Green Goblin recast as a Rakshasa, a demon from Hindu cosmology.[149] As the Indian publisher announces: Spider Man India interweaves the local customs, culture and mystery of modern India, with an eye to making Spider Man's mythology more relevant to this particular audience. Readers of this series will not see the familiar Peter Parker of Queens under the classic Spider Man mask, but rather a new hero – a young, Indian boy named Pavitr Prabhakar. As Spider Man, Pavitr leaps around rickshaws and scooters in Indian streets, while swinging from monuments such as the Gateway of India and the Taj Mahal.[150]

In late 2005, Disney announced that it would revise its most lucrative story, *Winnie the Pooh*, by replacing Christopher Robin as the central human figure with a "red-haired six-year-old tomboy" girl.[151] The reaction to Disney's announcement was mixed. Nicholas Tucker, author of *The Rough Guide to Children's Books*, declared the new character "a huge error," explaining that the original stories are "built around a boy who arrives and puts things right, like little boys do."[152] Yet another scholar of children's literature doubts whether the absence of female characters in *Winnie the Pooh* has a deleterious effect: Kathleen Horning, who instructs children's book librarians at the University of Wisconsin-Madison, reports

148. Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 Trademark Rep. 979, 996 (2004).

149. The move coincides with a concerted push by leading comic book publishers to offer readers more diverse heroes. This year DC Comics introduces the new Blue Beetle, "aka Jaime Reyes, a Mexican American teenager in El Paso," and Batwoman, whose alter ego is a lipstick lesbian socialite named Kathy Kane. And Marvel celebrated the comic-book social event of the season: the nuptials of two of its most popular black superheroes, Storm and Black Panther. George Gene Gustines, *Straight (and Not) Out of the Comics*, N.Y. Times, May 28, 2006, at B25. In the meantime, new creators are stepping up to fill the void in the industry. *See* Hassan M. Fattah, *Comics to Battle for Truth, Justice, and the Islamic Way*, N.Y. Times, Jan. 22, 2006, at A8 (reporting the Kuwaiti publisher Teshkeel Media's plans to publish "'The 99,' a series of comic books based on superhero characters who battle injustice and fight evil, with each character personifying one of the 99 qualities that Muslims believe God embodies."); Virgin Comics, http://www.virgincomics.com/aboutus.html (introducing a Bangalore-based comics series seeking to "tap into the vast library of mythology and re-invent the rich indigenous narratives of Asia").

150. http://www.gothamcomics.com/spiderman_india (last visited Jan. 11, 2006).

151. BBC News, *New-look Pooh 'has girl friend*,' Dec. 9, 2005, http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/4512770.stm.

152. Will Pavia, *My, Christopher Robin, You've Changed*, The Times (Britain), Dec. 9, 2005, at 5.

that, "growing up, I had no problem relating to Christopher Robin. He almost had a non-specific gender."[153] Do these two events—involving what are likely to be the single most popular superhero in the world and the single-most popular children's cartoon character—suggest that underground versions of popular culture are unnecessary?

Despite the examples above, the possibility of an official Mary Sue is inadequate for at least three reasons. First, Disney's move comes after almost eighty years of the male-dominated Hundred Acre Wood; Spider-man's new ethnicity comes after more than forty years of a white-only superhero. It seems unreasonable to expect the world's women and minorities to wait patiently for each such move.[154] Second, the official Mary Sue may still leave much to be desired in the characterization of the newly represented group. Third, even where it expands the representation, it still leaves large omissions: the new tomboy girl replacing Christopher Robin will be white. Finally, the masters of popular characters are unlikely to license the most disfavored uses.[155] For example, while DC Comics produced an alternative strip featuring an evil Batman, it issued a cease and desist letter to an artist depicting Batman and Robin as lovers (sometimes explicitly).[156] An evil Batman, it seems, is more palatable than a gay one.

3. Critique #3: Won't "Recoding" Popular Icons Destabilize Culture?

If popular icons are recoded, will a society's culture suffer? Justin Hughes worries that a permissive attitude towards transforming social meanings will undermine cultural stability.[157] Hughes worries that a

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153. Marco R. della Cava, *Disney Lets Girl into Winnie's world*, USA Today, Dec. 7, 2005, at 1D.

154. As we were working on this paper, the producers of Sesame Street, acknowledging their failure to produce "a single female character with anything close to the name recognition of Big Bird or Cookie Monster or Ernie and Bert" (not to mention Elmo), introduced a new girl character. Susan Dominus, *A Girly-Girl Joins the 'Sesame' Boys*, N.Y. Times, Aug. 6, 2006, at B1. This introduction comes in this progressive television show's 37th season. *Id* ("The feminist minded parent might not only applaud the decision to make a more high-profile female character, but wonder why on earth it took so long.").

155. When the Mitchell estate sought out an author of a sequel to *Gone with the Wind*, it required a pledge that the author "will under no circumstances write anything about miscegenation or homosexuality." SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1282 (11th Cir. 2001) (Marcus, J., concurring).

156. *"Gay Batman" Artist Gets "Cease & Desist,"* Artnet.com, Aug. 18, 2005, http://www.artnet.com/magazineus/news/artnetnews/artnetnews8-18-05.asp (last visited Sept. 30, 2006).

157. Hughes, *supra* note 19; *see also* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 486-88 (2003) (arguing that the value of a copyrighted work may decrease if individuals were free to create derivatives of the copyrighted material, but conceding that the works of Shakespeare, for example, do not seem to suffer from the proliferation of derivative works).

generally passive audience will suffer as cultural minorities disturb their icons. We disagree for four reasons.[158]

First, human beings have the capacity to hold multiple, even contradictory, meanings simultaneously. Despite the multiplicity of meanings that any given word can hold, communication stumbles on. This may at times require disambiguation,[159] but that does not seem an unreasonable price for a richer discourse.

Second, the canonical text itself might have multiple interpretations, both official and unofficial. Literary criticism does not seek to uncover the one authentic meaning of a text, but rather understands that it can accommodate multiple interpretations. Homosexual readings of Batman have been offered since at least the 1950s, yet Batman's womanizing remains a popular motif.[160] Official owners have themselves "forked" meanings—consider Frank Miller's "grittier" Batman offered by DC Comics to revive the classic character.[161]

Third, the meaning of a text evolves over time, and cannot be firmly fixed to some romantic original intention. This reflects the contemporary understanding of culture, rejecting the static, thing-like terms of early cultural anthropology.[162] Today's anthropologists understand culture as "traveling," engaging "in both internal and external dialogue" along the way.[163]

Fourth, demeaning representations in popular culture require contestation. A semiotic democracy in which the power of meaning-making has been democratized cannot declare certain icons sacred, even more so for icons that valorize only the already dominant segments of

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158. Compare Mark Lemley's critique of the stability argument:

> First, this effect would seem to apply only to the subset of works that have become cultural icons around which people have expectations. . . . Second, there is substantial social value to allowing people to criticize and subvert cultural icons. At a minimum, that social value needs to be weighed against any demand-reducing effect. Third, the problem seems self-limiting. If customers want the original *Gone With the Wind*, not the rather more sordid story of Alice Randall, The Wind Done Gone (2001), there won't be a large market for the latter, and we shouldn't expect them to proliferate sufficiently to drive out demand for the former. . . . Fourth, the prospect of competition to produce sequels may actually spur creators to write their own sequels more quickly and make them better. . . . Even if these negative externalities were a significant concern, copyright owners can and occasionally do take steps to deal with them even without a right to control negative portrayals.

Lemley, *supra* note 20, at 1056 n.103 (internal citations omitted).

159. We use this word in the sense employed by Wikipedia—as a process for resolving ambiguities arising from multiple meanings for a single word or phrase. Wikipedia, *Disambiguation*, http://en.wikipedia.org/wiki/Disambiguation (last visited Sept. 30, 2006).

160. Wikipedia, *Batman*, http://en.wikipedia.org/wiki/Batman (last visited Sept. 30, 2006).

161. *Id.*; *see generally* Wikipedia, *The Dark Knight Returns*, http://en.wikipedia.org/wiki/The_Dark_Knight_Returns. *See also supra* note 150 and accompanying text (describing official Indian Spider-man).

162. Sunder, *Cultural Dissent*, *supra* note 139, at 509-516.

163. James Clifford, Routes: Travel and Translation in the Late Twentieth Century 43 (1997); Sunder, *Cultural Dissent*, *supra* note 139, at 519.

society.[164] While many in society may not wish to despoil their romance with Scarlett and Rhett Butler, the pair's position in the fiction as lords of a slave plantation cannot be whitewashed.

164. Wikipedia's entry on "semiotic democracy" goes so far as to cite Harry Potter slash as its exemplar. Wikipedia, *Semiotic Democracy*, http://en.wikipedia.org/wiki/Semiotic_democracy (last visited Mar. 23, 2006).

Conclusion

"Everyone's a superhero, everyone's a Captain Kirk."
-Nena, 99 Red Balloons[165]

Reworking the proprietary icons of our age is a strategy for both political resistance and economic empowerment. Media stereotypes play an important role in educating us about the capacities of others. More sinister yet, they play an important role in educating us about our own capacities. Given a popular media that marginalizes various segments of society, the act of reworking popular stories to assert one's own value is empowering. That act opens the path to new livelihoods and roles. Self-insertion changes popular meanings, laying the foundation for economic change.

The act of copying can be simultaneously homage and subversion.

165. For lyrics, see http:// www.eightyeightynine.com/music/nena-99luftballoons.html.