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OF COASE AND COPYRIGHTS: THE LAW AND
ECONOMICS OF LITERARY FAN ART

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INTRODUCTION

This Article explores the law and economics of “literary fan art”—unauthorized derivative works by third parties that are based on someone else’s literary work product. What is the legal status of such fan art? Because copyright laws extend to derivative works, the legal question often boils down to this: When does fan art constitute “fair use”? Literary fan art also poses a larger legal and economic puzzle: how far should property rights extend in the domain of literature?

The remainder of this paper is organized as follows. To motivate the paper, Part I presents some notable examples of contemporary literary fan art inspired by Ernest Hemingway’s classic novella *The Old Man and the Sea*. Part II then restates the legal puzzle this paper will attempt to solve. Next, Part III shows why the traditional fair use standard is utterly unhelpful in solving the fan art puzzle, while Part IV will sketch an alternative Coasean solution. Part V concludes with two cheers for fan art.

I

MOTIVATING EXAMPLES

Literary fan art comes in all shapes and sizes, as devotees of literature find new ways of reimagining their favorite works of fiction, whether it be a poem by Sylvia Plath, a short story by Junot Diaz, or a novel by J. K. Rowling, just to name a few notable examples. Ernest Hemingway’s *The Old Man and the Sea*, however, is one of the best-known examples of this practice. The character and story of Hemingway’s masterpiece have over the years been reimagined by countless “fan artists” in a wide variety of media. Here are just a few salient examples of fan art based on Hemingway’s classic novella:

A. Guy Harvey Pen and Ink Drawings



The original pen and ink drawing pictured above was painted by Guy Harvey, a marine-scientist-turned-wildlife-artist.¹ Dr. Harvey painted this work, along with 43 others, for his first art show, which took place on the island of Jamaica in 1985.² All 44 of these pen and ink paintings were inspired by *The Old Man and the Sea*, and based on the positive reviews he received during his first art show, Dr. Harvey then decided to devote himself full time to painting.³ In 1999, with permission from Hemingway's family, he self-published a book-length compilation of 59 pen and ink drawings of the Cuban fisherman's heroic ordeal.⁴ To my knowledge, however, none of Guy Harvey's Hemingway-inspired paintings and drawings were commissioned or authorized by Scribner, the publishing house that owns the legal rights to Hemingway's novella.

¹ *Guy Harvey Awards and Accomplishments*, GUY HARVEY, <https://www.guyharvey.com/Guy-Harvey-Heritage.pdf> (noting that Dr. Harvey received his doctoral degree in marine biology from the University of the West Indies).

² *Id.*

³ *Id.*

⁴ *Id.*; Guy Harvey, *SANTIAGO'S FINEST HOUR* (1999) (this book of illustrations also contains a short foreword by Mina Hemingway, one of the Ernest Hemingway's grandchildren).

B. Corban Wilkin Graphic Novel



Pictured above is another beautiful derivative work based on *The Old Man and the Sea*—the first panel of an open-access graphic novel created by Corban Wilkin, a contemporary British illustrator and comic book artist.⁵ Beginning with Santiago’s dream sequence, this graphic adaptation of Hemingway’s classic novella retells Santiago’s story in visual or comic book form via 80 black-and-white panels and just 385 words, or to quote from the artist Mr. Wilkin himself: “I compressed 100 pages of text down into 22 pages of comics, and with the story being something of a fable this [compression] allowed the strength of the plot to shine through in its most distilled form.”⁶

⁵ Corban Wilkin, *Ernest Hemingway’s The Old Man and the Sea*, <https://corbanwilkin.com/ernest-hemingways-the-old-man-and-the-sea/> (last visited on May 26, 2019).

⁶ See Corban Wilkin, *Doing Adaptations* (May 25, 2011, 11:54PM), <https://corbanwilkin.com/2011/05/25/doing-adaptations/>. By comparison, Hemingway’s novella contains 26,601 words. See Lawrence J. Epstein, *Word Counts in Novels* (Mar. 20, 2016), https://blog.bestamericanpoetry.com/the_best_american_poetry/2016/03/word-counts-in-novels-by-lawrence-j-epstein.html.

Wilkin begins his version of Hemingway's story with Santiago's dream sequence.⁷ In particular, the first page of his graphic novel (pictured above) consists of a single full-page panel that pictures a large fishing boat at sea along with the words "He no longer dreamed of storms."⁸ The second page contains a close-up of the fishing boat along with the words "nor of women" on top and the words "nor of great occurrences" on the bottom.⁹ The third page, which contains five panels, then concludes this dream sequence with the words "nor of great fish" on the top panel, "nor of great feats of strength" in the middle panel, and the words "nor of his wife" on the bottom left panel.¹⁰ The last two panels on the bottom right side of the page state, "He only dreamed of places now/and of the lions on the beach."¹¹

The fourth page of Wilkin's graphic novel shows the old man urinating outside his shack and going over to wake Manolin, and the fifth page, which contains four panels, pictures them drinking coffee and contains some dialogue between them.¹² The sixth page (seven panels) shows Santiago rowing out to sea, and the top panel on the seventh page displays a flying fish in the foreground and Santiago and his skiff in the background, while three smaller panels on the bottom of this page contain a sequence showing a close-up of the pull on one of his fishing lines.¹³ The next two pages (pp. 8-9) contain ten panels of various shapes and angles, while pages 10 and 11 contain a large central circular panel along with ten additional panels along the outer circumference of the circle, depicting the first stages of Santiago's long ordeal.¹⁴

Page 12, a full-page panel, then pictures the giant marlin flying above water, and page 13, another full-page panel, pictures Santiago in three action poses struggling with the fishing line across his shoulders.¹⁵ Neither page contains a single word.¹⁶ Pages 14 and 15 contain seven panels and show the giant marlin tied up along the skiff.¹⁷ Here (pp. 14-15), Wilkin breaks up Santiago's melancholic observation in the novel "I am only better than him [the giant marlin] through trickery and he

⁷ Wilkin, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* In Hemingway's version of the story, the old man runs four separate fishing lines before combining them into a single line. Ernest Hemingway, *THE OLD MAN AND THE SEA* (LIFE 1952).

¹⁴ Wilkin, *supra* note 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

meant me no harm” into two separate sentences.¹⁸ The bottom right panel on page 14 contains the trenchant words, “I am only better than you through trickery.”¹⁹ The bottom left panel on page 15, the poignant words: “He meant me no harm.”²⁰

Pages 16 and 17 contain nine panels that portray Santiago’s futile battle with the sharks, while pages 18 and 19 depict Santiago’s solitary return voyage.²¹ Although these two pages (pp. 18-19) contain 11 separate panels, just five words appear here: “I went out too far.”²² Page 20 contains four panels of dialogue between Manolin and Santiago, and page 21 (one full-page panel) contains an aerial view of Santiago and Manolin from afar along with the carcass of the marlin washed up against the tide.²³ The last page (p. 22) zooms in on the carcass along with the hopeful words: “But we will fish together now, for we still have much to learn.”²⁴

C. *Bob the Angry Flower* Webcomic



The two cartoon panels pictured above are from a *The Old Man and the Sea*-inspired webcomic created by Stephen Notley, a contemporary Canadian cartoon

¹⁸ *Id.*; Hemingway, *supra* note 13.

¹⁹ Wilkin, *supra* note 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* In Hemingway’s novella, these words are uttered by Manolin: “we will fish together now, for I still have much to learn.” In Wilkin’s version of the story, Wilkin replaces the singular “I” in the second clause of the sentence with the plural “we,” so the identity of the speaker is ambiguous. Hemingway, *supra* note 13.

artist.²⁵ This particular parody, which is titled tongue-in-cheek “Bob’s Classic Literature Sequels: The Old Man and the Sea 2,” is part of Notley’s “Bob the Angry Flower” series of webcomics.²⁶ It is also living proof that there is but one step from the sublime to the ridiculous.

In summary, Notley’s “The Old Man and the Sea 2” contains eight panels and features two characters: an old, dignified, and silent Santiago and Bob the Angry Flower, who does all the talking.²⁷ The webcomic begins with the two characters standing aboard the bow of an enormous ocean liner in the middle of the ocean.²⁸ Bob has his arm around Santiago in the first panel and begins the comic thus: “So when I heard about your story I just HAD to come!”²⁹ Bob then summarizes Santiago’s ordeal and then retells the story of *The Old Man and the Sea* in the second and third panels: “... you went out on the sea, made a supreme effort of mental and physical will, and somehow caught the biggest marlin EVER! AND THEN THE SHARKS ATE IT!!!”³⁰

Bob the Angry Flower then reassures Santiago that “Bob’s gonna make it all better!”³¹ How? Bob informs Santiago that “this boat’s got every shark-lasering gadget ever made!” and adds that, “we’ve located a marlin four times bigger than the one you caught.”³² All Santiago has to do to catch the massive marlin and fend off any possible sharks is to press a button.³³ Bob then urges Santiago in the penultimate panel to “Go for it, man!!! Win it all back!!!”³⁴ The last panel contains a close-up of Santiago against a black backdrop.³⁵ Although Stephen Notley’s tongue-in-cheek sequel to Hemingway’s novella contains only eight panels, it

²⁵ Stephen Notley, THE NIB, <https://thenib.com/stephen-notley> (last visited Sept. 13, 2019) (indicating that Stephen Notley has published nine collections of cartoons and now lives in Seattle, Washington).

²⁶ Stephen Notley, *The Old Man and the Sea 2*, <http://www.angryflower.com/357.html> (last visited May 26, 2019).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

nevertheless captures the quiet dignity and tenacious spirit of Hemingway's Santiago. He utters not a single word and refuses to hit the button.³⁶

D. Jodi Harvey-Brown Book Sculpture



The 3D “book sculpture” of *The Old Man and the Sea* pictured above was created by Pennsylvania-based book artist Jodi Harvey-Brown, who alters old books and gives them a second life by making paper sculptures out of their pages.³⁷ In the words of Ms. Harvey-Brown, “[t]he books that we love to read should be made to come to life. Characters ... should come out of the pages to show us their stories. What we see in our imaginations as we read should be there for the world to see.”³⁸ In the particular piece pictured here, the old fisherman’s epic battle with the noble marlin is brought to life from the pages of an old copy of the actual novella.

³⁶ *Id.*

³⁷ *Making Stories Come to Life*, JODI HARVEY, <https://www.jodiharveyart.com/ast> visited May 26, 2019).

³⁸ *Id.*

E. Olympia Le-Tan Canvas Book Clutch Bags



The canvas clutch bag pictured above is part of Olympia Le-Tan's collection of luxury book clutches.³⁹ This particular piece recreates the cover art of the first edition of *The Old Man and the Sea*.⁴⁰

To sum up: Guy Harvey's pen and ink drawings, Corban Wilkin's graphic novel, Stephen Notley's webcomic, Jodi Harvey-Brown's book sculptures, and Olympia Le-Tan's book clutches are just a few notable examples of the many forms of fan art inspired by Ernest Hemingway's *The Old Man and the Sea*. The art lover in me appreciates these whimsical works of literary fan art for their own sake. The business law professor in me, however, is perplexed and puzzled: what is the legal

³⁹ I thank my wife Sydja Robinson for bringing this beautiful piece to my attention. *Book Clutch The Old Man And The Sea*, OLYMPIA LE-TAN, <https://olympialetan.com/product/book-clutch-the-old-man-and-the-sea/> (last visited May 26, 2019).

⁴⁰ *Id.*

status of these works? Assuming these works of literary fan art were made without authorization of the copyright owner, they appear to come very close to the copyright infringement line, but that begs a deeper question: Where should we draw that line?

II THE LEGAL PUZZLE

We may contrast unauthorized literary fan art with art that has been commissioned by the copyright owner. Various publishers of *The Old Man and the Sea*, by way of example, have themselves commissioned a number of artists to illustrate Ernest Hemingway's timeless story, beginning with the editors of *Life* magazine, who commissioned Noel Douglas Sickles to illustrate the initial publication of Hemingway's novella in 1952.⁴¹ In all, Mr. Sickles contributed 18 two-tone drawings to illustrate Hemingway's novella.⁴² Likewise, the Reprint Society of London commissioned two noted wildlife artists, Raymond Sheppard and C. F. Tunnicliffe, for the first British edition of *The Old Man and the Sea*.⁴³ Now, fast forward to the present. The cover art on the most recent trade paperback edition of *The Old Man and the Sea* was illustrated by Aleksandr Petrov, who directed an award-winning short animated film with the same title in 1999.⁴⁴

These artworks were either commissioned or licensed by the publishers of Hemingway's novella. By contrast, literary fan art—i.e., unauthorized secondary works that reimagine the characters, events, and storyline of the original work—poses a puzzle. To the extent such fan art constitutes a derivative work, copyright owners have legally-protected veto rights over subsequent visualizations of their

⁴¹ Hemingway, *supra* note 13.

⁴² *Id.*

⁴³ Ernest Hemingway, *THE OLD MAN AND THE SEA* (Reprint Society of London 1953). According to a Publishers' Note in the front-matter section of the original 1953 Reprint Society edition of Hemingway's novella, the drawings of Sheppard and Tunnicliffe were "[o]riginally commissioned as alternatives," but "the Publishers considered that [readers] would find these two artists' different interpretations of the story so excellent and so interesting in their varying styles that both have been included." In all, Mr. Sheppard contributed 18 illustrations to the Reprint Society edition, while Mr. Tunnicliffe contributed 16 drawings, including the original cover art for the dust jacket.

⁴⁴ Ernest Hemingway, *THE OLD MAN AND THE SEA* (First Scribner Trade 2003); *THE OLD MAN AND THE SEA* (Direct Source Label 1999). This animation, which won the Academy Award for Best Animated Short Film, is also available in the DVD format.

works.⁴⁵ But at the same time, the fair use doctrine carves out a significant exception to this general rule.⁴⁶ Thus the legal puzzle posed by literary fan art is this: How far should property rights extend in the domain of literature?

III THE FOG OF FAIR USE

Because copyright laws extend to derivative works, and because derivative works are defined broadly, the legal status of literary fan art boils down to the following question: When does fan art constitute fair use?⁴⁷ Alas, trying to predict ahead of time whether a particular piece of fan art or other derivative work constitutes fair use is almost like the inscrutable task of an ancient augur, who must somehow divine the future by the minute inspection of the entrails of a goose,⁴⁸ or in the words of one copyright lawyer: “Unfortunately, the only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in federal court.”⁴⁹

Simply put, there is often no way of knowing ahead of time with any degree of certainty whether any particular derivative work constitutes fair use or not.⁵⁰ Why is the fair use test so fuzzy, so foggy? Because this test does not consist of a simple, clear-cut, bright-line rule, e.g., you may use up to 10% of another person’s work.⁵¹ Instead, fair use is a standard consisting of general guidelines.⁵² Specifically, when courts are deciding whether a particular piece of fan art constitutes fair use, they must weigh four general guidelines or fair use factors.⁵³ What are these factors? In a case involving literary fan art, we can restate them as four separate questions:

⁴⁵ 17 U.S.C. §101 (2019) (defining a “derivative work” broadly to include “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted” (emphasis added)).

⁴⁶ 17 U.S.C. §107 (2019).

⁴⁷ 17 U.S.C. §106(2) (2019); 17 U.S.C. §101.

⁴⁸ Cf. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183, 187 (1981) (source of the ancient augur metaphor).

⁴⁹ See Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. U. LIBR., <https://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited May 26, 2019).

⁵⁰ *Id.*

⁵¹ 17 U.S.C. §107.

⁵² *Id.*

⁵³ *Id.*

- How “transformative” is the fan art?
- Is the fan art based on an original work of fiction (like a play or novel) or on an original work of non-fiction (like a biography), and in either case, has that original work been published yet?
- How much material is the creator of the fan art stealing or borrowing, as the case may be, from the original work?
- Does the fan art help to increase or decrease sales of the original work?

What weight should be attached to each factor, i.e., which factor is the most important one? Or, if the factors are to be equally weighed, what happens when two of the factors point in one direction and the other two point in the other direction? Alas, courts are often coy when it comes to fair use. Although some courts have emphasized the first factor, they generally refuse to assign explicit weights to these fair use factors.⁵⁴ Therefore, instead of wasting any additional effort attempting to unlock the legal mysteries of the fair use doctrine, this Article will present an alternative approach to literary fan art.

IV COASE TO THE RESCUE

One reason the fair use standard is so nebulous is that fair use is not only about “fairness”; it is also about finding the optimal level of copyright infringement, and more often than not, the optimal level of infringement is a contested issue.

Now, before we proceed any further, one might well be asking, “How can an illegal act like infringement ever be optimal?” To answer this query, we must first take morality out of the copyright equation because, from an economic or Coasean perspective, copyright disputes are not really about right and wrong.⁵⁵ Instead, fair use is about *balancing* the interests of both creators and copiers, of both innovators

⁵⁴ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); see *Fair Use*, JUSTIA, <https://www.justia.com/intellectual-property/copyright/fair-use/> (last visited Nov. 25, 2019). As an aside, if I were declared “copyright law emperor” for a day, I would eliminate the first three factors and ask courts to focus on the last one. That is, I would simplify the fair use test as follows: no infringement unless the owner of the original work can produce credible evidence of lost sales.

⁵⁵ That is, by the way, why I disdain such judgmental terms like “piracy” and “theft” in this area of law. Cf. Floris Kreiken & David Koepsell, *Coase and Copyright*, 2013 U. ILL. J.L. TECH. & POL’Y 1, 29-30 (2013) (discussing how the music and movie industries have reframed copyright infringers as “pirates” and copyright infringement as “stealing”).

and imitators, of both intellectual property owners and intellectual property squatters.⁵⁶

Although the outer contours of the fair use defense are fuzzy at best, the fact that fair use even exists at all reveals something very important about the law: creators, innovators, and intellectual property owners are not the only ones who are morally worthy or legally deserving of copyright protection; so too are copiers, imitators, and intellectual property squatters.

To see why, let us set aside the fan art puzzle and focus instead on a more crass and clear-cut case of intellectual theft, like one of First Lady Melania Trump's plagiarized speeches.⁵⁷ Plagiarism involves two parties: an original creator owner on the one hand, whose words are being copied without authorization, and a mere copier on the other, who is partaking in the plagiarizing. Plagiarism thus looks like a wrongful act (i.e., one whose optimal level is zero), but as the late economist Ronald Coase once wrote in another context, even disputes between creators and copiers have a "reciprocal nature."⁵⁸

Coase made this important yet counter-intuitive observation in two papers, one on the FCC and another on "The Problem of Social Cost."⁵⁹ In both papers he reframed legal disputes involving harms, such as traditional common law cases involving nuisances, as reciprocal problems.⁶⁰ The social cost paper, for example, begins by considering a "standard example" in economics and law, the problem of factory smoke.⁶¹ In brief, a factory emits smoke and pollutes the air.⁶² Neighbors who live downwind from the factory are harmed (e.g., foul air, quality of life, decrease in property values, etc.), so they decide to sue the owners of the factory for the harm thus caused.⁶³

⁵⁶ See 17 U.S.C. §107.

⁵⁷ See, e.g., Erik Pederson, *Melania Trump's "Plagiarism" Of Michelle Obama Ignites Firestorm; Campaign Responds; Fox News Ignores Story*, DEADLINE (July 18, 2016, 9:40 PM), <https://deadline.com/2016/07/melania-trump-rnc-speech-michelle-obama-2008-dnc-1201788566/>. For a legal defense of plagiarism, see generally Brian L. Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133 (2016).

⁵⁸ R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 26 (1959).

⁵⁹ *Id.* at 26-27; R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

⁶⁰ Coase, *supra* note 58, at 26-27; Coase, *supra* note 59, at 1-2.

⁶¹ Coase, *supra* note 59, at 1-2.

⁶² *Id.*

⁶³ *Id.*

According to Coase, if one were to take a step back from this situation, one would see that the factory smoke problem is, in fact, a reciprocal one for two reasons.⁶⁴ One is that the problem is caused not just by the factory smoke; it is also caused by the neighbors' decision to live next to a factory.⁶⁵ The other reason is that one of the parties to this case is going to be harmed no matter how the case is decided.⁶⁶ If the court decides to dismiss the case or to rule in favor of the factory, then the neighbors are going to continue to be harmed, but *vice versa*, if the court rules for the neighbors by issuing an injunction or ordering the factory to pay damages, then it is the owners of the factory who are going to be harmed, since they will have to shut down the factory, relocate it somewhere else, or pay the neighbors money damages.⁶⁷

For Coase, then, the key question is not, "Who is harmed?" Both sides are. Nor is it, "How do we avoid harm?" Harm is unavoidable. The key question for Coase is, "How do we decide which side to harm?"⁶⁸

Before proceeding, I wish to make a brief digression regarding John Stuart Mill's famous harm principle. In Mill's immortal words: "The only purpose for which power [i.e., law] can be rightfully exercised over any member of a civilized community, against his will, is to prevent *harm* to others."⁶⁹ But in reality, Mill's harm principle is logically incoherent. Why? Because as Coase has taught us, harm is unavoidable.⁷⁰ To say "do no harm" or "your right to swing your fist ends where my nose begins" is unhelpful. Instead, we should ask, what legal rule or legal interpretation produces less harm.

Once the reciprocal nature of copyright disputes has been established, the literary fan art puzzle becomes soluble. Simply put, Coase's reciprocal analysis of the factory smoke case also applies to literary fan art. For example, if the law were to define fair use too broadly, making it easy for fans to produce any and all

⁶⁴ *Id.* at 2; F. E. Guerra-Pujol, *Coase's Paradigm: First Principles of the Economic Analysis of Law*, 1 INDIAN J. L. & ECON. 1, 15-17 (2010) (summarizing Coase's analysis of reciprocal harms). For an overview of justified versus unjustified harms in the domain of law, see F. E. Guerra-Pujol, *Breaking Bad Promises* 1, 34-36 (Nov. 25, 2019) (providing a definition of legal harms and discussing justified versus unjustified harms) (on file with NYU JIPEL).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ John Stuart Mill, ON LIBERTY 14 (Prometheus Books 1986) (emphasis added).

⁷⁰ Coase, *supra* note 59, at 2.

derivative works, then original creators will be harmed. But at the same time, if the law were to define fair use too narrowly, making it easy for copyright owners to veto fan art, then it is the fans who are going to be harmed. The question here is thus analytically identical to the question in the factory smoke case: Which group should we harm?

Once the fan art problem is formulated this way—in terms of reciprocal harms—the solution becomes apparent: *we should choose that legal rule or legal interpretation of an existing rule that minimizes the overall level of harm.* In the case of literary fan art, my lawyerly intuition tells me that a narrow reading of the fair use doctrine would do more harm than a broad reading would.⁷¹ In the extreme case, courts would produce a greater degree of harm if they granted copyright owners unlimited veto rights over fan art than if they allowed fans a reasonable amount of leeway in reimagining and reinterpreting established works of art.⁷² And I would further venture to speculate that—to the extent that fan art rekindles interest in the underlying literary works that are being depicted or introduces those original works to new audiences—literary fan art may generate new sales and expand the market for those underlying works.⁷³

Returning to the various revisualizations of Hemingway's *The Old Man and the Sea*, these examples of literary fan art illustrate the thesis of this Article. Imagine a world without Olympia Le-Tan's *The Old Man and The Sea* clutch bags, or a world without Guy Harvey's collection of *The Old Man and the Sea* watercolors, or a world without Jodi Harvey-Brown's *The Old Man and the Sea* book sculptures. None of

⁷¹ Of course, my intuition could be wrong. It needs to be tested empirically. Perhaps a scholar engaged in the field of empirical law and economics could design an empirical test of my theoretical claim. In the meantime, the larger point of this Article should not be missed: the optimal level of fair use is not zero.

⁷² To take an extreme example in the opposite direction, consider the rise and fall of Napster from 1999 to 2001, which facilitated the sharing of massive amounts of music files without authorization. See John Alderman, SONIC BOOM: NAPSTER, MP3, AND THE NEW PIONEERS OF MUSIC (Basic Books 2001). Even in this extreme case, empirical work is unable to prove conclusively whether the illegal downloading of music files was the main culprit for the decline in CD sales during this period of time. See, e.g., Patrick Mooney, et al., *Napster and its Effects on the Music Industry: An Empirical Analysis*, 6 J. OF SOC. SCI. 303, 303 (2010).

⁷³ Again, as I noted in a previous footnote (n. 72), this claim is subject to empirical testing; nevertheless, the theoretical rationale in support of my claim is based on signaling theory. Whether literary fan art brings the original work to the attention of potential new fans, or whether fan art generates higher levels of interest in the underlying work to existing fans of the original work, either way the very existence of fan art sends a credible signal to both new fans and old fans about the quality of the original work.

these derivative works syphons off new sales of Hemingway's book or dissuades people from reading the novella. On the contrary, these works breathe new life into Hemingway's story and invite us to read or reread, as the case may be, the old Cuban fisherman's futile struggle with the creatures of the sea.

CONCLUSION: TWO CHEERS FOR FAN ART

This Article has reframed copyright disputes in general—and the problem of literary fan art specifically—in economic or Coasean terms. Specifically, under what conditions do copyright owners get to have veto rights over fan art, and by the same reciprocal token, when do fans get to veto the veto rights of copyright owners when they revisualize or reimagine their favorite literary works? In plain English, who gets to harm whom?

Stated this way, the optimal level of fair use becomes a tractable problem: *we should choose that rule or legal interpretation that minimizes the overall level of harm.* Fan art harms creators who wish to maintain control or veto rights over derivative works, but the potential benefits of fan art far outweigh these potential harms. So, two cheers for fan art: one for rousing our collective imaginations and creating new worlds of beauty; another for expanding freedom and markets.