

## Derivative Works 2.0

Jacqueline D. Lipton\* and John Tehranian\*\*

Wikipedia defines crowd-sourcing as: “the act of outsourcing tasks, traditionally performed by an employee or contractor, to an undefined, large group of people or community (a “crowd”), through an open call.”<sup>1</sup> Wikipedia itself is an example of a literary work produced by crowd-sourcing, involving global participation from large numbers of contributors. Digital technologies such as the Internet enable crowd-sourcing on a scope and scale never before possible. However, crowd-sourcing projects existed before the Internet came into being. The creation of the Oxford English Dictionary is, in fact, one of the most well known examples of a very early crowd-sourced project – also a literary work - with entries contributed by many different people over many years.<sup>2</sup>

Digital technologies have not only expanded the global reach of crowd-sourced projects, but have also enabled new forms of crowd-sourcing, notably in the area of derivative works. A derivative work, for the purposes of the copyright act, is a work based substantially on one or more pre-existing works.<sup>3</sup> Digital technologies allow groups of people to create new forms of derivative works such as video mash-ups involving combinations of pre-existing works. A recent large-scale example of a derivative work created via crowd-sourcing is the movie *Star Wars: Uncut*.<sup>4</sup> This is a crowd-sourced fan fiction project where individual amateur film-makers were invited to select a 15 minute segment of a *Star Wars* movie (*Episode IV: A New Hope*)<sup>5</sup> and film their own version of that segment. These segments were then submitted to the project organizers who spliced chosen selections together to make the new film. A number of the segments also borrowed from other copyrighted works, including appearances by characters from *The Simpsons* cartoon series, amongst others.

The use of interactive digital technologies to crowd-source literary and artistic derivative works potentially raises a number of issues for copyright law. The goal of this paper is to explore the most salient of these issues from a

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\* Professor of Law, Associate Dean for Faculty Development and Research, Case Western Reserve University School of Law, 11075 East Boulevard, Cleveland, Ohio 44106, USA, Email: Jacqueline.Lipton@case.edu, Fax: (216) 368 2086.

\*\* Professor of Law, Southwestern Law School, email: john.tehranian@gmail.com

<sup>1</sup> Definition from Wikipedia, available at <http://en.wikipedia.org/wiki/Crowdsourcing>, last viewed on April 23, 2011.

<sup>2</sup> The development of the dictionary is chronicled in: SIMON WINCHESTER, *THE PROFESSOR AND THE MADMAN* (1999).

<sup>3</sup> 17 U.S.C. § 101 (defining “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted...”)

<sup>4</sup> See <http://www.starwarsuncut.com/>, last viewed on April 25, 2011.

<sup>5</sup> STAR WARS: EPISODE IV: A NEW HOPE (1977).

number of different perspectives: that is, interests of the copyright holders of original source works, interests of the organizers of a crowd-sourced derivative work, and interests of participants contributing to the project. Balancing the often competing interests of these groups requires consideration of a number of challenging questions, including the following.

- (a) In what circumstances will a crowd-sourced derivative work be regarded as infringing on original copyright(s) if no permissions/licenses have been obtained from copyright holder(s)?
- (b) If no permissions have been obtained, in what circumstances might a derivative work be excused as a fair use of the original source material?
- (c) As a matter of policy, to what extent should copyright owners be entitled to control expressive downstream crowd-sourced derivative works?
- (d) Who should be entitled to assert copyright in a crowd-sourced derivative work in the absence of contractual agreements defining ownership rights?
- (e) How should copyright law deal with the globalization of crowd-sourced derivative works enabled by the Internet and sophisticated digital technologies? Globalization raises both jurisdictional issues for copyright law as well as problems of accommodating competing cultural norms about acceptable uses of literary and artistic works.

Naturally, this paper will not be able to definitively answer all of these questions. It is nevertheless the authors' hope that they can frame the debate for the future to ensure that competing interests in creative derivative works can be effectively identified, balanced and protected by laws, market practices, and evolving social norms.