

## **‘Lextual Poaching’:**

**A doctrinal and empirical investigation into the importance of unauthorised derivative works of fanfiction to society in the digital age and how Article 17 CDSM undervalues them**

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## Abstract

Fanfiction is a type of user-generated content (UGC) produced mostly online for free on websites such as Fanfiction.Net. Amateur writers reuse characters, locations and plotlines from commercially successful works ('textual poaching') to bring alternative viewpoints and storylines to life. This raises issues in relation to copyright in a digital market. This thesis analyses

- (i) what in the underlying work attracts copyright,
- (ii) whether fanfiction writers benefit from any of the fair dealing exceptions available within the Copyright Designs and Patents Act (CDPA) 1988, and
- (iii) how the Copyright in a Digital Single Market (CDSM) Directive will apply these context-heavy exceptions to websites that host this material.

Most existing literature on the subject has been ethnographic in nature and focused on the media implications of fan activities. While legal research exists, most is doctrinal and based within the US legal system. This thesis adopts a distinctive approach, applying doctrinal and quantitative methods together to test the economic biases within copyright law as applied to certain unauthorised derivative works. It makes several important contributions to knowledge – it suggests that some characters and locations attract individual copyright post-*Infopaq*; analyses the fair dealing exceptions as they stand in UK law after the recent *Pelham/Funke Median* cases; suggests a potential test for the as-yet undefined s30A CDPA 1988 pastiche fair dealing exception; and analyses how the CDSM Directive may apply to websites that host fanfiction. Finally, by using a dataset of user posts from the world's largest online fanfiction archive (Fanfiction.Net) and sales data (Nielsen), this thesis further suggests that Article 17 of the CDSM Directive contains serious misapprehensions regarding culture in the digital age. This research suggests that existing

theories of copyright harm are incomplete, and there may be important social incentives and welfare benefits to permitting this type of use.

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# 1. Introduction

Imagine a child playing with their dolls. They dress them up, put them in a doll's house, and imagine all sorts of stories for them to play out. This scenario was first used to analyse fanfiction in 1997, using Barbie dolls<sup>1</sup>. However, in today's culture, that child could be playing with licensed Lego characters from the most recent blockbuster film franchise<sup>2</sup>, or on a tablet or computer, designing comic strips<sup>3</sup>. She could be using her tablet to film herself playing with her Lego characters<sup>4</sup>. No matter what technology is used when the child is creating, they would not be worried about the copyright law implications of their actions.

However, what if the child uploaded the video or comic strip online? This is the question that this research paper seeks to answer – should playing with other people's characters be permissible under copyright law? This will feed into important elements of copyright legislation such as the protection of characters, and the legal test for pastiche as fair dealing, which are yet to be fully elaborated on in the literature or the legislation, and yet are highly important when the EU is trying to control a Digital Single Market<sup>5</sup>. This research will focus on fanfiction as the element of fandom being carried out, as the literary nature of fanfiction has specific elements to be investigated<sup>6</sup>. It should not matter to the

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<sup>1</sup> R Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loyola of Los Angeles Entertainment Law Review 651, 651.

<sup>2</sup> For example, there are four sets relating to Marvel's Guardians of the Galaxy Vol 2, which was only released in the UK on May 1<sup>st</sup> 2017 – 'Marvel Super Heroes | 2017 | Guardians of the Galaxy Vol. 2' (*Brickset.com*) <<https://brickset.com/sets/theme-Marvel-Super-Heroes/year-2017/subtheme-Guardians-of-the-Galaxy-Vol-2>> accessed 2 May 2017.

<sup>3</sup> There are many free sites and apps online devoted to comic book creation, such as Comic Life and Superhero Comic Book Maker, designed for children as young as 5

<sup>4</sup> Figures from 2014 suggest that 34% of children aged between 5 and 15 have a personal tablet, and more than ten percent of 3-4 year olds, 'One in Three Children Now Have Their Own Tablet Computer' (*Ofcom*, 14 September 2016) <<https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2014/media-lit-audit-oct2014>> accessed 2 May 2017. The obvious privacy implications of this are not part of this study.

<sup>5</sup> By bringing in the Directive on Copyright in a Digital Single Market

<sup>6</sup> There is future scope for comparing this research with, for example, that of fans of musical works that make mashups or remixes. See for example Nick Scharf, 'Exploring the Changing Interface

law whether the activity is carried out by children or by adults, or whether the canon work being used is a film, book or TV show.

This research is important as the entertainment industry is “scrambling to find new sources of growth” in a highly congested market, and thus “developing a direct relationship with consumers is increasingly vital for realising incremental revenue”<sup>7</sup>. This research will test the claim that fanfiction can be a useful part of this strategy to “deepen...super-fans’ commitment, and encourage them to promote and support their brands all the more actively”<sup>8</sup>. This will improve the position of the copyright holder who will not only have a group of consumers likely to continue purchasing future works by the author, but will also have passionate advocates for the work who will hopefully drive sales up within their social networks too<sup>9</sup>.

This is a broad area of creation, with many websites such as Wattpad and deviantArt devoted to hosting user-generated content (both fanfiction and original content). Upon investigation in December 2016, there were more than 11 million works posted by approximately 3 million users across the four largest sites devoted specifically to fanfiction (Fanfiction.Net, Kindle Worlds, Archive of Our Own (AO3) and Asianfanfics<sup>10</sup>). The high level of activity in this field strengthens the rationale for this research.

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Between Copyright and Regulation in the Digital Environment’ Doctoral Thesis <<https://ueaeprints.uea.ac.uk/id/eprint/43164>> accessed 29 April 2017 and Bernd Justin Jutte, ‘The EU’s Trouble with Mashups - From Disabling to Enabling a Digital Art Form’ (2014) 5 *Journal of Intellectual Property, Information technology and Electronic Commerce* 172.

<sup>7</sup> ‘Engaging with the “Super Fan”: A Growing Source of Incremental Revenue’ 1 <<https://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/superfan.pdf>> accessed 16 May 2017.

<sup>8</sup> *ibid* 2.

<sup>9</sup> This research does not judge this attitude to growth in the market, although it may harm diversity.

<sup>10</sup> Compared to approximately 590,000 new books published in Europe that year ‘European Book Publishing Statistics 2016’ <<https://fep-fee.eu/European-Book-Publishing-920>> accessed 26 August 2020. For more, see Chapter 7.

## 1.1 Research Questions

The issue of transformative, derivative uses of fictional works boils down to a simple question – “Who controls a story – its creator or its fans?”<sup>11</sup> In the original world of fiction, the author is the one who controls and tells the story in a way they see fit. However, it has been argued that new forms of online and digital media has

“created an authorship crisis. Once the audience is free to step out into the fiction and start directing events, the entire edifice of twentieth-century mass media begins to crumble”<sup>12</sup>.

It is within this authorship crisis that this work is situated. Firstly, there has yet to be a clear statement made regarding the ownership of characters and locations. The creation of the internet and the improvement of laptop and mobile phone technology means that any user is now free to ‘step out of the fiction and start directing’ their own vision of the underlying story, and importantly they can share this new version with millions of other users via websites such as Fanfiction.Net and Archive of Our Own. Without clearly knowing whether characters and locations can be protected by copyright, it is not clear whether the author of the underlying work can prevent this happening.

The research questions this thesis sets out to answer several important research questions:

1. What elements are copyrighted in a fictional work? This is answered using a doctrinal analysis in Chapter 3 – Gasses of Digital Expression

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<sup>11</sup> Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 75.

<sup>12</sup> *ibid* 83.

2. What copyrighted elements are reused in user-generated content (UGC), and fanfiction especially, and how much can be reused before a finding of infringement? This is answered in Chapter 4
3. How do the fair dealing exceptions apply to online non-commercial UGC, especially fanfiction? Specifically, what issues are there with relying on quotation post-*Pelham*<sup>13</sup>/*Funke Median*<sup>14</sup>, and what might a pastiche test look like? Would fanfiction meet this test theoretically? This is answered in Chapter 5
4. How are these laws applied to the websites that host UGC content? How might this change in the future after the implementation of the DSM Directive? This is answered in Chapter 6
5. Why do fans create and consume fanfiction, and does this harm the market for fiction works? Is fanfiction sufficiently transformative to meet the test for fairness? This is answered in Chapter 7, pulling from the conclusions drawn in Chapter 2 Literature Review and Chapter 5

In a copyright sense these questions should perhaps also be framed as “What if...stories and characters actually gain value when people share them?”<sup>15</sup> Copyright legislation on derivative works is based on the assumption that they automatically harm the underlying work (usually by acting as a substitute). The presumption is that derivative works are not fair dealings, unless the secondary creator can prove they are transformative enough not to harm the underlying work. This research project seeks to examine whether fanfiction does indeed have this harmful effect, or whether it has a neutral or maybe even positive effect on sales, given positive externalities such as increased awareness and prolonging demand for future works based on the characters.

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<sup>13</sup> *Pelham v Hutter and Schneider-Esleben* (C-476/17).

<sup>14</sup> *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17).

<sup>15</sup> Rose (n 11) 101.

This paper will seek to answer these research questions to achieve a clearer legal position for homage-type derivative works that might benefit from the pastiche fair dealing exception. To show whether fanfiction could be argued to come within the current fair dealing pastiche copyright exception laid out in *Hubbard v Vosper*<sup>16</sup>, s29-30 CDPA 1988 and Article 13 TRIPS. It focuses on non-commercial fanfiction, as commercial fanfiction has yet to be successful enough to impact on the market.

## 1.2 “All the world’s a stage, and all the men and women merely players”<sup>17</sup>

To answer the research questions, the value ascribed to the stories and characters should be discussed, as must the cast of characters who are valuing them. This is important as it has been argued that the central challenge for copyright is the balance between access to copyright works and incentivising production<sup>18</sup>. However, it is important to note that it is difficult to ascribe a specific value to creative works, since there are emotional as well as economic factors at play. Both of these types of value will be discussed, although it should be remembered that fair dealing within copyright law is designed to protect the economic interests of the copyright holder in preference to their personal concerns. Should the values be seen to improve after fanfiction usage, this research will argue that the ‘legitimate interests’ of the author would not be unreasonably prejudiced. It should also be remembered that as in the speech from which the quote above is taken, our cast is constantly changing, and people may move from one group to another. For example, like Cassandra Clare and EL James, fanfiction writers can become authors, who may have different opinions about fanfiction of their works in their new role.

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<sup>16</sup> [1972] 2 QB 84.

<sup>17</sup> William Shakespeare, ‘As You Like It, Act II, Scene VII’.

<sup>18</sup> William M Landes and Richard A Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *The Journal of Legal Studies* 325, 326.

### 1.2.1 Cast

#### *Protagonists*

**Authors** value their stories as their output and their labour (as seen in the natural rights argument of John Locke). More importantly though, many authors have a non-economic, purely emotional response to their creations. They do not want other people to ‘play with’ them by putting them in different situations or for example using them in an adult fashion (especially true of authors of children’s books). There are also other reasons authors do not want to allow fanfiction of their works:

- They may object to how the work is used

This may be because they wish to control the commercial use of a certain work, for example Larry Niven, a science fiction author, has argued that did not want “the playground getting too crowded”<sup>19</sup>. He further sent a cease-and-desist letter to a fanfiction author using a species of characters he created because the versions in the fanfiction work

“did not conform to the detailed biological and behavioural rules that he must have used considerable imagination and originality to create”<sup>20</sup>

This is an interesting reason for objecting to fanfiction as it is closer to moral rights arguments (which do not exist in the US) than economic rights<sup>21</sup>.

The other reason authors may object to fanfiction is if they have written a work that is marketed towards children or young adults, which is then used in erotic fanfiction. This may be closer to the idea of tarnishment in trade mark law, rather than copyright, but “we

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<sup>19</sup> Larry Niven, ‘Introduction’, *Man-Kzin Wars IV* (Baen 1991). Cited in Aaron Schwabach, ‘Three Interests of the Author in Conflict with Fanfic’, *Fanfiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011) 96.

<sup>20</sup> Schwabach (n 19) 98.

<sup>21</sup> Although beyond the scope of this research, the US is currently reevaluating its traditional lukewarm reception to the idea of moral rights

must remember that the purpose of copyright is neither to allow maximum control over copyrighted content, nor to protect ‘brands’ from negative associations”<sup>22</sup>.

- They may fear that future works of theirs may be anticipated in some way

This fear is mostly based on what happened to Marion Zimmer Bradley in 1992, where a fan author (Jean Lamb) wrote fanfiction based on Bradley’s characters (‘Masks’) and sent it to her for inclusion in a fanzine that Bradley was editing<sup>23</sup>. The storyline of ‘Masks’ and the storyline of Bradley’s next book (‘Contraband’) were very similar, and it was accepted that Bradley had at least had the opportunity to have read it. Thus, Bradley offered Lamb \$500 and a special dedication in order to be able to continue writing ‘Contraband’, as a gesture of good faith<sup>24</sup>. Lamb however declined this offer and requested co-authorship recognition, which Bradley and her publishers refused. Because of this, Bradley’s publishers refused to publish ‘Contraband’ and Bradley had to abandon the work, losing “several years’ work, as well as the cost and inconvenience of having a lawyer deal with” the issue<sup>25</sup>.

While no legal case was ever brought in this situation, it has become infamous among some authors who have taken a firm line against fanfiction because of it. This may however demonstrate a lack of understanding of how modern, self-published fanfiction operates, since it occurred in 1992 and involved fanzines rather than online fanfiction. For example, given the sheer amount of fanfiction available online, it would now be easier for an author to deny having read any individual piece of fanfiction should the situation arise again. Also, Lamb’s work was complete when it was sent to Bradley, whereas online

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<sup>22</sup> Patrick McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011) 24 Regent University Law Review 117, 146.

<sup>23</sup> Schwabach (n 19) 110–116.

<sup>24</sup> Under the current copyright law, as a fanfiction author Lamb would most likely to have been held to be infringing the copyright in Bradley’s characters in her own story so would be unable to publish it. The question centred around whether she could claim copyright in her original plot ideas using someone else’s characters – a question that would have defined the law in this area should it have made it to court for a ruling.

<sup>25</sup> Marion Zimmer Bradley, ‘Letter to the Editor’ [1993] *Writer’s Digest*. Cited in Schwabach (n 19) 113.

fanfiction is often published in serial form or as a work in progress<sup>26</sup>. It is therefore also likely that a claim such as Lamb's, which was unlikely to succeed then, would be even less likely to succeed now.

**Publishers** (or producers) are an important character in this analysis as they are typically the ones financially supporting new works, whether that is new books or new TV shows or films<sup>27</sup>. This is not the only support they provide however<sup>28</sup> – they also provide support, marketing and other logistical assistance to authors. They are making an economic analysis, and to them

“the ‘value’ of a particular book...is understood in...its sales or sales potential, that is, its capacity to generate economic capital; and its quality, which can be understood in various ways but includes its potential for winning various forms of recognition...or its capacity to generate symbiotic capital.”<sup>29</sup>

This is vital, and it is important to understand the difference between economic and symbiotic capital in this analysis. Economic capital is all the financial revenue that the publisher has at their disposal – whether available in cash or other forms of capital. Symbiotic capital on the other hand is the reputation of the publishing house itself, as separate from the economic value. It is the “accumulated prestige and status”<sup>30</sup> that the publisher has. It is feared that fanfiction effects both of these values, and may explain why

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<sup>26</sup> Finn Upham, ‘ToastyStats: Fanfic Completion Rates’ (*ToastyStats: Fandom Statistical Analyses*, 20 April 2015) <<http://destinationtoast.tumblr.com/post/116932611769/toastystats-fanfic-completion-rates-i-discovered>> accessed 24 April 2017.

<sup>27</sup> However, this is changing due to the rising importance of self-publication in the book industry as a whole, see Morten Hviid et al, ‘From Publishers to Self-Publishing: Disruptive Effects in the Book Industry’ (2019) 26 *International Journal of the Economics of Business* 355.

<sup>28</sup> If their assistance was purely based in finance, it could be argued a more efficient response would be to design a licence or other financial incentive which would satisfy their interest and remove them from the decision-making process

<sup>29</sup> John B Thompson, *Merchants of Culture: The Publishing Business in the Twenty-First Century* (Second edition, Polity 2012) 10.

<sup>30</sup> *ibid* 6.

publishers are also more likely than the author to try to crack down on fanfiction<sup>31</sup>. The direct loss may be caused to sales figures if people are consuming the fanfiction rather than new original works. However it may be feared that self-published unauthorised, uncontrolled fanfiction which may not be at the same high editorial standard as the original work, which may then cause a loss to the symbiotic capital of the publisher and the original work.

There is also a risk of over-exposure – if publishers want to drive up demand for their works (either authorised tie-ins or future works in the same series), they want the customer to have unfulfilled demand. An important part of standard publication of fiction/release dates for films or TV shows is designed to incorporate a certain amount of delay, in order to build up excitement and demand on the margin. For example, *The Grand Tour* (Amazon's biggest new show to date), released one episode a week rather than a whole series at once. Therefore an important research question this chapter will seek to answer is whether fanfiction helps to increase this demand, or whether it satisfies the demand for new works and thus negatively affects the demand for the underlying works. This demand can be feared to be thwarted if the demand is taken up by thousands of fanfiction works available at the click of a link on open websites like Fanfiction.Net.

The counterfactual to this is that it has also been argued that official tie-ins “have turned out to be less important for trade publishers than...thought” and that it is “other aspects of our contemporary media culture, such as...‘well-knownness’ which stems from being seen and heard in the media, are more important for understanding the world of trade publishing”<sup>32</sup>. Is the perceived loss of ability to control derivative uses of works

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<sup>31</sup> “When movie copyright are involved and an extra layer of administration is added between the author and the fans, tolerance tends to diminish. Thus Warner Brothers, the maker of the Harry Potter movies, has cracked down on fan sites that Rowling herself would most likely have left undisturbed” Schwabach (n 19) 118.

<sup>32</sup> Thompson (n 29) 23–4.

actually outweighed by the increase in ‘fame’ of the underlying work? Should publishers/producers be more focussed on using “the power of the web to capture TV fans and extend the television experience”?<sup>33</sup> The question remains whether using fanfiction in this way focuses demand too narrowly, and along with the operation of scarcity of attention and search costs – is fanfiction crowding out other works of fiction?

### *Antagonists*

**Fanfiction readers** value the characters and stories from the position of a fan, and may purely be trying to enjoy more works involving them, and the extended variety that entails. Part of what this research aims to solve is whether fanfiction readers are reading fanfiction instead of reading other, different works of fiction (and thus having an anti-competitive effect on the market) or is it a hobby, replacing other activities such as TV, shopping, or blogging, which is healthy competition. It has, for example, been argued previously that online self-published fanfiction both “directly compete[s] with the commercial culture for people’s time spent on entertainment” and changes “how people think about mass-media properties”<sup>34</sup>.

**Fanfiction writers** “want to be immersed...to get involved in a story, to carve out a role for themselves, to make it their own”<sup>35</sup>. The issue is that if it is true that “the author creates the story the audience completes it” then this has a significant knock on effect on the ability of the author to control their own work<sup>36</sup>. However, fanfiction writers may have a more egotistical, personal reason for doing what they do:

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<sup>33</sup> Jeff Zucker, quoted in Brooks Barnes, ‘NBC Universal Boldly Weds TV Properties to Web’ [2006] *The Wall Street Journal* <<https://www.wsj.com/articles/SB114771348619953074>> accessed 16 May 2017.

<sup>34</sup> McKay (n 22) 123.

<sup>35</sup> Rose (n 11) 8.

<sup>36</sup> *ibid* 88.

“[T]elling a story...gives us an opportunity to claim the attention of people around us. So we compete to tell stories, to fill in the details of other people’s stories, to offer our own comment.”<sup>37</sup>

If this argument is followed through to its natural conclusion, is fanfiction a social form of bonding similar to online social commentary – and in which case should publishers take advantage of our need to be heard to get the word out about their product?

### 1.3 History of Fanfiction

Today's fanfiction has been defined as:

“...not just stories written about other stories (as has always happened). Fanfiction is stories being written about the same other story, all at the same time. *It is sharing these stories with increasing ease and speed and decreasing cost.*”<sup>38</sup>

It is therefore important to look at exactly how derivative works have historically been created and whether the relationship between each separate work and the author or artist has changed, and if so why, over the years, in order to understand why there are current issues with the legislation surrounding it.

Fanfiction is seen by many artists and lawmakers as a particularly 21<sup>st</sup> century phenomenon. Most authors only started commenting publicly on the issue around 2010<sup>39</sup>. Although the courts have approached the issues contained within a legal analysis surrounding fanfiction, they have actively avoided using the term 'fanfiction', preferring to

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<sup>37</sup> *ibid* 205.

<sup>38</sup> Anne Elizabeth Jamison, ‘Interlude: Growing Up Fic’, *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) 104. Emphasis mine.

<sup>39</sup> Although American academic authors had been commenting regularly on the issues since Tushnet's 1997 article Tushnet, ‘Legal Fictions’ (n 1).

relate to the pre-existing law on parody (despite the differing fact patterns behind the two cases<sup>40</sup>). However, these issues and behaviours have a long history.

The idea of taking the work of someone else and remaking it using your own ideas dates back at least as far as Ancient Greece, when Dionysius of Helicarnassus theorised about a new literary method referred to as '*imitatio*'<sup>41</sup>. His theory was that "art - at least the art of writing - was more truly a matter of imitating other good writers who'd gotten it right before you."<sup>42</sup> In fact, the close relationship between the Bible and the pre-existing *Epic of Gilgamesh* has been noted by many scholars<sup>43</sup>, and the concept continued through the ages. Much of Shakespeare's most well-known works took heavily from the wording and plots of other stories (most noticeably *Hamlet* and *Anthony & Cleopatra*).

What has changed is the method by which artists monetise their labour – which has important effect on their economic and emotional links to the works they produce, and to the market and artistic world as a whole. This completely changes the economic context of 'borrowing' work from others. Previously, artists were financed through patronage or performance (ticket sales). The incentive for creation for those funded by patrons was therefore not so much to create individual works that would sell high levels of units, but more that they were driven to create works that would have reputational value and therefore increase their importance to their patron. Artists were free to (and indeed often incentivised to) create works that were part of an existing artistic 'movement' and built on

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<sup>40</sup> This was seen to great effect in *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11th Cir 2001) where the facts realistically speak more to fanfiction than parody

<sup>41</sup> KK Ruthven, 'Imitation and Originality', *Critical Assumptions* (Cambridge University Press 1979) 103.

<sup>42</sup> Anne Jamison, 'A Prehistory of Fanfiction', *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) 26.

<sup>43</sup> Russell E Gmirkin, *Berosus and Genesis, Manetho and Exodus: Hellenistic Histories and the Date of the Pentateuch* (The Library of Hebrew Bible/Old Testament Studies 2006) 103; AR George, *The Babylonian Gilgamesh Epic: Introduction, Critical Edition and Cuneiform Texts* (Oxford University Press 2003) 70.

pre-existing themes and works. This is similar to the behaviour of fanfiction authors today self-publishing on the web, trying to increase their reputation in order to land a book deal for their original work.

Artists that were funded through ticket sales had slightly different incentives than those with a patron. In this regard they would possibly have a more similar need to artists today – they would be selling tickets to individual performances and would therefore be more interested in protecting the value of each individual play or performance. These artists may have been more concerned with preventing other artists from taking parts of their work to use, as it could have led to confusion or a substitute effect. However, the way consumers responded to works was also different at that time. In order to have a successful run of a play, it was necessary that it appealed to the audience – who were unlikely to be well read and who wanted plays built around ideas, themes and stories they already knew and could relate to. Thus, artists were less concerned about plagiarism and artistic theft<sup>44</sup>.

In comparison, today's artists are mostly paid in royalties, licences or book deals tied to individual works. This means that each use made of that individual work has an important emotional and economic effect on the author. With the invention of the Internet and improvements in mobile phone and laptop computing technology mentioned earlier in this chapter, it has become easier for users to create and interact with each other's works. While there is less issue when these users are utilising parts of people's work within the same community (in this case, the fan community), it becomes an issue

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<sup>44</sup> Although that is not to say that there were not claims made – for example about Shakespeare, Samuel Taylor Coleridge, Oscar Wilde and Brahms: Stephen Moss, 'A History of Plagiarism (Not My Own Work)' (*the Guardian*, 23 November 2005) <<http://www.theguardian.com/books/2005/nov/23/comment.stephenmoss>> accessed 25 February 2018.

when they are using the work of commercial artists in the same way. This is due to the speed and diffusion of these types of derivative works.

While the inspiration behind the 'taking' or 'use' of the original work may look similar, and may come from within the same community, there is an important difference between the 'taking' and 'creation' involved in fanfiction and other similar derivative works such as parody.

#### 1.4 Types of Fanfiction

While it may be tempting to academics, authors, and legislators to categorise fanfiction in a similar way to parody, and indeed try to subsume it within the higher-level derivative work subgroup, this may not be too easy:

"In a perfect world, the cultural and sociological underpinnings of the fanfiction community might merit special protection for every piece of fanfiction ever composed...In reality...the various forms fanfiction can take are wildly different and do not lend themselves to orderly classification."<sup>45</sup>

This lack of orderly classification and wide range of works can be seen later in this work within the quantitative analysis where its effects are studied in more detail. This repeats the issues that many legal academics who have attempted to describe and delineate fanfiction. The pre-eminent sociologist and fan scholar Henry Jenkins has laid out the ten-part definition that I will use going forward. In his seminal work *Textual Poachers* he explains that fanfiction is not a direct copy of the original and should not be legislated as such (although he may agree it should be judged as some form of derivative work right):

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<sup>45</sup> Meredith McCardle, 'Fanfiction, Fandom, and Fanfare: What's All the Fuss?' (2003) 9 B.U. J. Sci & Tech. L. 433, 437.

"...fan writers do not so much reproduce the primary texts as they rework and rewrite it, repairing or dismissing unsatisfying aspects, developing aspects not sufficiently explored...some of the dominant approaches employed by fan writers indicates the community's characteristic strategies of interpretation, appropriation, and reconstruction."<sup>46</sup>

It is this level of each strategy in comparison to the others (interpretation, appropriation, reconstruction) that changes in relation to each type of fanfiction he describes. Importantly for this analysis, interpretation and reconstruction could be argued to relate to the legal concept of originality, depending on how much of the original work they contain in relation to the new insights the work gives. The following table shows the ten distinct types of fanfiction he envisages, along with examples of the type of work, using Harry Potter as an example<sup>47</sup>:

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<sup>46</sup>Henry Jenkins, 'Scribbling in the Margins', *Textual Poachers: Television Fans and Participatory Culture* (20th anniversary ed, Routledge 2013) 162.

<sup>47</sup> A full list, including his full definitions, is given in *ibid* 162–177.

Type of fanfiction	Description	Example
Recontextualisation <sup>48</sup>	Off-screen actions are described and contextualised to give deeper meaning to the canon, original work.	Further description of Hermione's pastoral life at Hogwarts – for example, her relationship with her roommates, in order to more understand her experience of sneaking out at night
Expanding the Series Timeline <sup>49</sup>	Unauthorised prequels (and possibly sequels), giving more detail about character background and motivation.	An examination of Hermione's youth before Hogwarts (including how she realised she was a witch), or stories about Harry Potter's parents time at Hogwarts
Refocalisation <sup>50</sup>	<p>Shifting focus of the work away from main characters (who tend to be heteronormative and mostly male), writing about secondary female or BAME characters.</p> <p>It should be noted that it took until 2017 for an authorised film adaptation centred around a female superhero (and directed by a woman), which is what gives this type of work its importance<sup>51</sup>.</p>	More information about the female staff members of Hogwarts, or the female ghosts (ethnicities are not a focus in <i>Harry Potter</i> ).

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<sup>48</sup> ibid 162.

<sup>49</sup> ibid 163.

<sup>50</sup> ibid 165.

<sup>51</sup> Zoe Williams, 'Why Wonder Woman Is a Masterpiece of Subversive Feminism' *The Guardian* (5 June 2017) <<http://www.theguardian.com/lifeandstyle/2017/jun/05/why-wonder-woman-is-a-masterpiece-of-subversive-feminism>> accessed 3 December 2017.

Type of fanfiction	Description	Example
Moral Realignment <sup>52</sup>	A subtype of refocalisation, where fanfiction writers take villainous characters and rewrite them – especially by exploring their history and their motivations.	Stories focussing on Draco Malfoy, who in the canon works is seen as a youth villain but his background when seen is somewhat harsh and bleak.
Genre Shifting <sup>53</sup>	Taking plot points in the original work in order to move the story from the original genre into a new one. For example increasing the focus on character relationships and moving works from the sci-fi market into the young romance market.	Stories written around Harry Potter's relationship with Hermione, Ron, Lupin and other members of Dumbledore's Army where the relationship is the primary focus (rather than moving the plot on)
Cross Overs <sup>54</sup>	Taking characters and locations from more than one original work and mixing them, usually by taking characters from Work 1 and resituating them in the universe of and interacting with the characters of Work 2. This can lead to a mix of genres as well as storylines.	Hermione's life as a student at Malory Towers <sup>55</sup> , or how Ron would interact with Dr Who <sup>56</sup> .
Character Dislocation <sup>57</sup>	A subtype of genre shifting. The characters are moved from their original settings, giving them new identities to see how they function in different surroundings.	Harry Potter renamed as Hermione Potter, as a female student at Durmstrang School (one of the other wizarding schools).

<sup>52</sup> Jenkins, 'Scribbling in the Margins' (n 46) 168.

<sup>53</sup> *ibid* 169.

<sup>54</sup> *ibid* 170.

<sup>55</sup> Enid Blyton, *Malory Towers: First Term* (Hodder Children's Books 2016).

<sup>56</sup> Dr Who is a popular choice for crossover work, such as when crossed with the characters from the TV show *Supernatural* and the books/TV shows about Sherlock Holmes, to create 'SuperWhoLock' fanfiction.

<sup>57</sup> Jenkins, 'Scribbling in the Margins' (n 46) 171.

Type of fanfiction	Description	Example
Personalisation <sup>58</sup>	The most stereotypical type of fanfiction, and the most disputed <sup>59</sup> . So called 'Mary Sue/Gary Stu' stories where idealised versions of the author are inserted into the canon work and interact with the characters. Usually those characters are given vital importance in the story and overcome issues with the plot.	Where female Mary Sue characters are inserted, they tend to be sassy, beautiful and intelligent. An example would be <i>Ruth Flaherty and the Philosopher's Stone</i> .
Emotional Intensification <sup>60</sup>	Fan writers tend to focus on the moments in the canon where the character's emotions are heightened in order to develop ideas about motivation and relationships. For example, one of the most important subtypes of this is 'Hurt-Comfort' where one character is injured in some canon/off canon way and the second character is comforting them. The vulnerability of often central characters is the focal point here.	Tales describing in detail moments in the relationship between Harry/Ron, Harry/Hermione or Ron/Hermione after any of the battles or conflicts in the later books
Eroticisation <sup>61</sup>	Most canon works are subject to censorship of one type or another in order to be mass-marketed. Given that sex and erotic behaviour is an important part of many teen and adult lives, this is a large area of experience that is not examined in the canon works. This too is a disputed subgenre of fanfiction, as many canon authors are happy with other types of fanwork but fear that an association with this type of work will tarnish their own and harm its commercial nature.	Detailed descriptions of the sex lives of any of the main/secondary characters in the books, especially given their status as pubescent teenagers.

It should be noted that this is a scholarly classification and not one that is used in the field. Fanfiction authors use 'tags' or 'genres' depending on the website they are

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<sup>58</sup> *ibid.*

<sup>59</sup> *ibid*

<sup>60</sup> Jenkins, 'Scribbling in the Margins' (n 46) 174.

<sup>61</sup> *ibid* 175.

posting to<sup>62</sup>. It is useful to use Jenkin's categorisation however as it clearly lays out the difference between each type of fanfiction.

Fanfiction sits within the genre of work referred to as user-generated content, which has become a standard of creativity in today's internet 'read/write' culture<sup>63</sup>. It builds on the trend for remix and reuse originally developed by commercial musicians and artists. This raises several important issues relating to originality, creativity, and exactly how we wish copyright law to approach these works. The most important issue is how these reuses affect the market for the underlying work. It has been argued that these works are part of an 'informal' (as opposed to 'formal') media economy, where "the boundaries between profit, passion, and pleasure are not easily drawn"<sup>64</sup>. This is the central research question for this thesis.

It used to be that the only actors on the market with the ability to reach large enough numbers of consumers to have a noticeable market effect were those successful enough to also have recording studios and legal teams. These legal teams would ensure production of works that did not infringe on the copyright of other artists - and would be able to defend the works of their own artists at trial. This meant that new types of uses could be negotiated by legal and creative experts. However, now the majority of laptops, tablet and mobile phones have word processing software, inbuilt webcams and microphones, and many users have broadband access and data contracts on their phones. This now means any fan can write, act out, sing or draw anything they wish, and immediately share it with millions of other users on sites such as Wattpad, Archive of Our Own and Fanfiction.Net. They can even sell their works commercially if they wish on sites

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<sup>62</sup> Tags for example on Archive of Our Own, or 'Genres' on Fanfiction.Net. This is discussed further in Chapter 7.

<sup>63</sup> Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

<sup>64</sup> Ramon Lobato and Julian Thomas, *The Informal Media Economy* (Polity 2015) 41.

such as Etsy, Redbubble and Kindle Worlds. These sites have sprung up and survived the brutal internet market due to the high level of demand for exactly this type of sharing space. Although this is not a new form of behaviour for fans who have been creating and sharing works for decades<sup>65</sup>, it is the wide availability of access to international markets which has changed:

“The Web has made visible the hidden compromises that enabled participatory culture and commercial culture to co-exist throughout much of the twentieth century. Nobody minded, really, if you photocopied a few stories and circulated them within your fan club... But, as those transactions came out from behind closed doors, they represented a visible, public threat to the absolute control the culture industries asserted over their intellectual property”<sup>66</sup>.

This new era of collaborative creativity and sharing means that authors and producers who wish to make commercially successful works now have to consider what strategy they should be using to protect the income they are receiving from their works. The balance which needs to be struck is that between protecting direct income received from their work in the short run (by using high copyright protections to block unauthorised derivative uses) and protecting long-term income through promoting long-term engagement and demand for the work (by allowing certain types of unauthorised derivatives to be released on the market). Should they:

- Promote fanworks based on their works, in order to drive up engagement and long-term demand from their consumers/fans (such as the model used by Critical Role, a

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<sup>65</sup> The formal media market will continue to exist, with little effect on the number of commercial works created and released. However, it is likely that the informal, user-generated market is going to be interacting with that formal market more and more *ibid* 174.

<sup>66</sup> Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006) 137.

new form of online-based TV show, demonstrating the new format of TV production where programs are directly financed through subscribers to the site); or

- Ban fanworks in order to protect the direct investment they made in their work, to promote sales of authorised copies and protect their ability to sell authorised licences to their work (as shown in the recent *Paramount Pictures v Axanar*<sup>67</sup> case, where an authorised derivative (Star Trek Discovery) was in the works, which along with the high level of professional content in the unauthorised derivative may have explained the strong approach the copyright licence holders took); or
- Tolerate certain types of fanfiction, especially if written by younger fans (such as JK Rowling’s approach) – a flexible approach which may be fairer on many fan artists but has issues with legal certainty.

Historically, most artists who make a living from their art have situated themselves at the strict protection end of the spectrum - especially in more ‘old fashioned’ forms of art such as novelists, film producers and musicians in certain genres such as pop. These artists are likely to be more conservative than those in new forms of art such as rap/remix/R&B music, collage artists and online-based TV shows. There are risks involved in each of these approaches, which will be discussed later in this thesis.

### 1.5 Contributions made by this Research

Even before the birth of the digital era, fans of film, television and literary works have been socially active, sharing resources offline and publishing creative media via ‘zines’. As early adopters of many types of social media – such as forums, blogs and online archives – the fandom group provides a fascinating case study of the effect of social media on the consumption of media products. Most existing literature has been ethnographic in

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<sup>67</sup> *Paramount Pictures Corp v Axanar Prods, Inc No 2:15-cv-09938-RGK-E (CD Cal Jan 3, 2017)*.

nature and focuses on the literary and media<sup>68</sup> aspects of fandom. What legal literature that exists is situated within the US legal system. Although this can have some comparative benefits, it does not inform how the UK system will and should deal with the issues raised by fanfiction.

Therefore, without undertaking an objectivist, empirical view of the market for fanfiction and how it interacts with the underlying works on which it is based, current attempts at a solution to how copyright should approach non-commercial non-critical reuses such as pastiche (and fanfiction) are likely over-simplistic and inadequate. Most research in this area remains based within the assumption that the economic incentive for commercial authors to produce further creative works would be harmed by widening fair dealing to include UGC works such as fanfiction within the 'fair dealing' exceptions. Many hypotheses such as these regarding fanfiction and copyright law appear to be questionable in their conclusions surrounding the impact of fanfiction on the market for the original work, given their foundation in economic theory without the support of empirical data.

One of the main deficits in knowledge surrounding fanfiction is how trends fanfiction in production follow the standard trends in production of commercial fiction, and how closely the fanfiction work follows the underlying work. In other words, are fanfiction writers inspired by trends in cultural production as a whole, and by the underlying work? If so, what does this mean for the market impact for fanfiction? Despite the known importance of empirical research to support doctrinal studies, to date no-one has undertaken a large-scale empirical analysis to investigate trends in fanfiction production in relation to copyright in this way. To date, the only use of a similar methodology has been

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<sup>68</sup> Jenkins, *Convergence Culture* (n 66); Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Updated 20th anniversary ed, Routledge 2013); Anne Elizabeth Jamison, *Fic: Why Fanfiction Is Taking over the World* (Smart Pop, an imprint of BenBella Books, Inc 2013).

to investigate the importance of the use of these sites as skills development areas<sup>69</sup>, and thus does not approach the larger question of inspiration or effect on the audience for the underlying work, which is where much of the controversy remains.

In conclusion, this thesis will contribute to copyright research by (a) clearly stating the position regarding available protection for highly valuable elements of copyright works (characters and locations), (b) setting out how the ‘pastiche’ fair dealing exception may apply in practice – highly important for user-generated content creators, and (c) as part of this, examining fanfiction in particular in relation to the fairness tests in *Hubbard v Vosper* to explain whether it should be permitted without requiring a licence.

## 1.6 Theoretical Framework

This research uses a mainly doctrinal approach, supported by a quantitative empirical research strategy (specifically, a longitudinal online ethnography). This design is viewed through a mostly postpositivist epistemology and objectivist ontological philosophy<sup>70</sup>. The specific research methods used include a detailed discussion of the legislation as it stands at the time of the research in order to situate the project and develop the background to the research questions, before turning to a quantitative big data longitudinal quantitative study of all posts to a particular fanfiction archive. These are compared to sales trends in the fiction market in the UK as reported through the Nielsen Bookscan service, to investigate whether fanfiction does in fact interfere with the normal exploitation of the work as seen by the author.

The focus of this work is to enquire as to whether fanfiction “interferes with the normal exploitation of the work” in order to investigate whether fanfiction would qualify

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<sup>69</sup> Cecilia Rodriguez Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019).

<sup>70</sup> Ruth Flaherty, ‘Benefits of Quantitative and Doctrinal Methodological Approaches to Fan Studies Research’ (2020) 33 *Transformative Works and Cultures* <<https://journal.transformativeworks.org/index.php/twc/article/view/1719>> accessed 29 June 2020.

for a fair dealing exception to copyright under the Berne Convention and TRIPs Agreement. This is a legal test with a grounding in economics, so a postpositivist philosophy, with a focus on determination, reductionism, empirics and theory verification<sup>71</sup> will be used.

## 1.7 Conclusion

This thesis will carry out a review of the literature in Chapter 2 in relation to user-generated content and fanfiction, copyright law, law and economics and empirical works in this area, to specify the research gaps that this thesis will fill. The next four chapters contain a detailed doctrinal analysis of the law in this area. Chapter 3 investigates the status of characters and locations in copyright law, and Chapter 4 provides an analysis of how derivative reuses of these elements in works such as fanfiction may infringe the copyright in either those elements, or in the underlying work in which they appear. Chapter 5 explores the fair dealing exceptions that may permit for these reuses without requiring permission or payment of a licence. This chapter specifically elucidates on the pastiche exception as part of s30A CDPA 1988 and provides a suggestion on how it may apply in practice, drawing from recent case law on other types of fair dealing. Chapter 6 concludes this doctrinal section by analysing the liability of the websites that host fanfiction works in light of the new Copyright Directive in a Digital Single Market, and how this may change the market, especially given that the UK has stated that they will not be implementing the new legislation post-Brexit. Chapter 7 provides support for these conclusions through a quantitative empirical study of Fanfiction.Net, the largest fanfiction archive online. Finally, in Chapter 8, conclusions and policy recommendations are given, along with recommendations for further study.

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<sup>71</sup> John W Creswell, 'The Selection of a Research Approach', *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th ed, SAGE Publications Ltd 2014) 6.

## 2. Literature Review

### 2.1 Introduction

The rise of amateur content created online is one of the world's greatest challenges to intellectual property law. This trend towards individual creators writing from their homes yet having access to immediate international markets for their products has blurred the lines between different types of IP protection and different markets. While publishers and producers attempt to break the geographic market into rights territories, these writers ignore such restrictions. Moreover, many of these individual authors have no copyright law training and may be teens or young adults with little commercial awareness. This is a direct contrast to the historic dominance of big publishing houses who could control access to the market and authorise or refuse adaptations and reuses of the works within their catalogues. This may have important effects on the expectations of authors and rightsholders regarding what uses they can protect against using copyright. This is increasing in importance given the amount of derivative works that are being licensed - and novels are being written specifically for that market<sup>1</sup> and so calls for further research.

Hargreaves, in his 2011 review into the application of UK copyright law in the digital age, stated his belief that a "healthy creative economy should embrace creativity in all its aspects"<sup>2</sup>. It is arguable that fanfiction is a creative art similar to parody, and therefore this review will seek to explain the differences between the two, and state whether current literature demonstrates that it ought to be accepted if not embraced by the UK economy for similar reasons.

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<sup>1</sup> Neil Wilkof, 'When the Movie Drives the Book (Wait a Minute, There Is No Movie yet) - The IPKat' (13 May 2018) <<http://ipkitten.blogspot.com/2018/05/when-movie-drives-book-wait-minute.html>> accessed 4 January 2019.

<sup>2</sup> Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) 50 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)> accessed 19 May 2018.

This literature review will situate my research within the wider field in order to justify the quantitative methodology and explain the theoretical context and background to the research questions. It will begin by giving a definition of fanfiction in order to set the context for the investigation, before examining the current state of knowledge regarding copyright law exceptions in relation to unauthorised non-profit maximising derivative works published offline, in order to demonstrate that new research must be undertaken into online variants of these works. Given this research gap, this research will review the economic background to these types of work on both the demand and supply side in order to understand the creation of these derivative works to show that previous research has not sufficiently applied economic thought to this problem. Given Hargreaves' statement in his 2011 review into limitations and exceptions to copyright (above), this literature review will demonstrate that fanfiction should be 'embraced' as an integral part of the 'healthy creative economy'.

## 2.2 User-Generated Content (UGC) and Fanfiction

My research questions focus on whether copyright legislation operates in an optimal way in the digital age. Therefore, defining the types of work that appear online and specifying the unique elements of my chosen focus (fanfiction) sets out the scope of the research frontier of my analysis.

### 2.2.1 UGC

One genre of works that copyright does not currently handle in an efficient way is user-generated content (UGC), defined as "content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools"<sup>3</sup>. These types of work have been argued to be "the most significant copyright development of the

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<sup>3</sup> Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2008) 11 Vanderbilt Journal of Entertainment and Technology Law 841, 842.

twenty-first century”<sup>4</sup> as they represent a change in the way copyright works are handled on the market by consumers. Due to increasingly lower costs of digital distribution online and the ease of accessing digital works and other forms of derivative UGC works, the influence of users on production and copyright law is being felt. They can make copyright law change through mass usage of copyright works, rather than focusing on coordinating to lobby Parliament to change the law. UGC creates several issues that current copyright law does not handle well, mostly tied to the “rise of the non-professional user”<sup>5</sup> who creates for personal rather than professional reasons, and is either unable or unwilling to pay for a licence to carry out the reuse they desire of copyrighted works.

There are various types of UGC that raise issues for copyright (on which see later section on limitations and exceptions): memes<sup>6</sup>, parody<sup>7</sup>, sampling<sup>8</sup>, and mash-ups and remixes<sup>9</sup>. These transformative reuses of copyright work demonstrate how UGC can be a “disruptive” but also “creative force”, that comes from the “creativity of individual users newly enabled as expressive agents by digital technologies”<sup>10</sup>. This innovation can lead to

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<sup>4</sup> Edward Lee, ‘Warming Up to User-Generated Content’ [2008] *University of Illinois Law Review* 1459, 1460.

<sup>5</sup> Gervais (n 3) 846.

<sup>6</sup> Giacomo Bonetto, ‘Internet Memes as Derivative Works: Copyright Issues under EU Law’ (2018) 13 *Journal of Intellectual Property Law & Practice* 989.

<sup>7</sup> Sabine Jacques, ‘Are the New “Fair Dealing” Provisions an Improvement on the Previous UK Law, and Why?’ (2015) 10 *Journal of Intellectual Property Law & Practice* 699; Jonathan Griffiths, ‘Fair Dealing after Deckmyn - The United Kingdom’s Defence for Caricature, Parody or Pastiche’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 <<https://papers.ssrn.com/abstract=2770508>> accessed 2 December 2017; Graeme W Austin, ‘EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire’ (2016) 39 *University of New South Wales Law Journal* 684.

<sup>8</sup> Elizabeth Adenay, ‘How Much Is Too Much? The Gradual Coalescence of the Law on Sampling’ (2018) 2 *Intellectual Property Quarterly* 91.

<sup>9</sup> Bernd Justin Jutte, ‘The EU’s Trouble with Mashups - From Disabling to Enabling a Digital Art Form’ (2014) 5 *Journal of Intellectual Property, Information technology and Electronic Commerce* 172; J Cabay and M Lambrecht, ‘Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity’ (2015) 10 *Journal of Intellectual Property Law & Practice* 359; Maxime Lambrecht and Julien Cabay, ‘Remix Allowed: Avenues for Copyright Reform Inspired by Canada’ (2016) 11 *Journal of Intellectual Property Law & Practice* 21; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

<sup>10</sup> Ramon Lobato, Julian Thomas and Dan Hunter, ‘Histories of User-Generated Content: Between Formal and Informal Media Economies’ in Dan Hunter and others (eds), *Amateur Media* (Routledge 2013) 3.

benefits for society as more creative works such as adaptations are released onto the market. However, they also show a growing pressure on copyright law to protect the interests of authors and publishers through derivative work rights, as this may be where much of the economic value of a work lies (see later section on publishing). It may also have correlated social welfare problems as production is focused on an increasingly narrow amount of already produced works, rather than new ones.

### 2.2.2 Parody and Pastiche

The new parody and pastiche fair dealing in s30A CDPA<sup>11</sup> has been referred to as an improvement on previous copyright law due to its acceptance of new forms of copyright law, which it is theorised will have positive effects on society as it incentivises the spread of cultural, copyright works<sup>12</sup>. Before the implementation of s30A, parodists were required to seek a licence or permission, or risk infringement proceedings being brought. Given that there is a risk that those being made the subject of a parody (or their works) will not agree due to the negative connotations of parodies<sup>13</sup>, the law was deemed to block the publication and dissemination of works that were held to have positive social externalities. However, the issue is that neither the CDPA 1988 nor the InfoSoc Directive define any of the terms contained in the exception<sup>14</sup>. The only definition available is from case law in *Deckmyn*<sup>15</sup> - but this case only defined the two essential components of parody - which do not relate to fanfiction. Although most fanfiction is distinguishable from the underlying work despite calling it to mind (mostly due to the operation of disclaimers and tags), the vast majority is not “an expression of humour or mockery”<sup>16</sup>. Therefore, while research into

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<sup>11</sup> Contained in the Copyright and Related Rights (Caricature, Parody and Pastiche) Regulations 2014

<sup>12</sup> DJ Grout, ‘Seventeenth-Century Parodies of French Opera - Part I’ (1941) 27 *The Music Quarterly* 211. Cited in Jacques (n 7).

<sup>13</sup> Paul Jewell and Jennie Louise, ‘It’s Just a Joke: Defining and Defending (Musical) Parody’ (2012) 10 *Australian Review of Public Affairs* 1, 8.

<sup>14</sup> Jacques (n 7) 700.

<sup>15</sup> *Deckmyn v Vandersteen* (C-201/13).

<sup>16</sup> *ibid* 41.

parody may assist with research into some types of fanfiction, there are research gaps whereby it does not permit the discussion of other versions. It is therefore useful to look at the definition of pastiche, to see whether this would be a more natural home for fanfiction.

There is no definition given for pastiche, and there has been no clarifying court case like *Deckmyn* to lay down a judicial example. It has been argued that it “refers to laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre”<sup>17</sup>. This definition directly contradicts the statement of AG Villalon in *Deckmyn* who argued that parody, caricature and pastiche were indistinguishable<sup>18</sup>. However the topic was not discussed by the Grand Chamber as a whole, and AG Villalon’s comments have been deemed unclear by academics<sup>19</sup>, so doubts can be raised as to whether they are legislatively able to be defined as the same<sup>20</sup>. This is important due to the operation of the closed list of permitted exceptions within UK copyright law, that require the work to be one of the permitted types of use prior to the legal discussion on the fairness of the dealing. Fanfiction struggles for containment within the *Deckmyn* definition of parody, but would sit happily within the above definition of pastiche. This can be seen in the detailed discussion of fanfiction in the next section.

### 2.2.3 Fanfiction

Fanfiction is seen by many artists and lawmakers as a particularly 21st century phenomenon, as shown by most UK literature only tackling the issue around 2010<sup>21</sup>.

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<sup>17</sup> Emily Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?’ (2017) 4 Intellectual Property Quarterly 346.

<sup>18</sup> *Deckmyn v Vandersteen* (n 15) 42.

<sup>19</sup> Griffiths (n 7).

<sup>20</sup> Hudson (n 17) 347.

<sup>21</sup> Aaron Schwabach, *Fanfiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011); Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011); Tamara Bukatz, ‘Amazon’s Fanfiction Store: Opportunity or Fandom-Ination? The Legal Background to Commercial and Non-Commercial Creations from Canon: Part 1’ (2013) 18 Communications Law 122; Khanuengnit Khaosaeng, ‘Wands, Sandals and the Wind: Creativity as a Copyright Exception’ (2014) 36 EIPR 238.

Although the law has handled the issues surrounding fanfiction, it has actively avoided using the word 'fanfiction' in case law, preferring to refer to parody instead<sup>22</sup>. The idea of borrowing from the work of others is not a new concept. Dionysius of Halicarnassus stated that "art – at least the art of writing – was more truly a matter of imitating other good writers who'd gotten it right before you"<sup>23</sup>. This concept continued through the ages, including much of Shakespeare's writings (Hamlet, and Anthony & Cleopatra as noticeable examples). Fanfiction is a continuation of this trend.

The most often quoted definition of fanfiction comes from the strong background fanfiction has within US copyright literature<sup>24</sup>. According to that definition, fanfiction is:

"...any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as 'professional' writing. Fan authors borrow characters and settings...for use in their own writings. Fanfiction spans genres"<sup>25</sup>.

However, there are several issues with this definition, which will be examined before an updated definition is drafted. Firstly, it makes no reference to the context of the creation of these works. The current understanding of fanfiction<sup>26</sup> is as an output from

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<sup>22</sup> *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11th Cir 2001).

<sup>23</sup> Anne Jamison, 'A Prehistory of Fanfiction', *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) 26.

<sup>24</sup> Stacey M Lantagne, 'The Better Angels of Our Fanfiction: The Need for True and Logical Precedent' (2011) 33 *Hastings Comm & Ent LJ* 159; Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fanfiction' (2005) 58 *SMU Law Review* 1551; Meredith McCardle, 'Fanfiction, Fandom, and Fanfare: What's All the Fuss?' (2003) 9 *B.U. J. Sci & Tech. L.* 433; Mynda Rae Krato, 'Fictitious Flattery: Fair Use, Fanfiction, and the Business of Imitation' (2016) 8 *Intellectual Property Brief* 91; Babak Zarin, 'In the Restricted Section: Harry Potter and Unauthorised Sagas' (2017) 9 *Elon Law Review* 459. Also see later discussion on copyright for the lack of UK copyright analysis

<sup>25</sup> Rebecca Tushnet, 'Legal Fictions: Copyright, Fanfiction, and a New Common Law' (1997) 17 *Loyola of Los Angeles Entertainment Law Review* 651, 655

<sup>26</sup> Distinct from works such as the *Wide Sargasso Sea* by Jean Rhys (retelling of *Jane Eyre*), or *Mrs de Winter* by Susan Hill (reworking of *Rebecca*) and *Death Comes to Pemberley* by PD James, which were all written either with a license or of works out of copyright.

those within the 'participatory culture' field<sup>27</sup>. Members of this culture "want to be immersed...to get involved in a story, to carve out a role for themselves, to make it their own"<sup>28</sup>. They do this for example through the creation of fanfiction, fan art, cosplay and attending conferences. An important element of this culture is that they do not believe they are harming the underlying work (as they are passionate about it) and many believe that their efforts actually have positive spillover effects such as increasing future demand for works within the genre of the original work, as well as works by the original author or featuring their characters or locations. While it is long-settled precedent that courts will not "put themselves in the shoes of the infringer"<sup>29</sup> when judging whether an infringing use of copyrighted works is 'fair'<sup>30</sup>, the growth of participatory culture can have a wider effect on the market. They are highly engaged customers of the underlying work, who are "of increasing importance in social media promotion, customised pricing models and data mining"<sup>31</sup>, and have high marketing value to publishers for that reason. Thus, authors especially may be loath to bring copyright claims against them. They are also a part of a growing movement online towards different forms of interaction with copyrighted works, such as the Creative Commons movement, which may even change what is seen as 'normal exploitation' of the work within the fair dealing judgement.

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<sup>27</sup> Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006); Henry Jenkins, 'Confronting the Challenges of Participatory Culture: Media Education for the 21st Century' [2009] The MIT Press; Kristina Busse, 'In Focus: Fandom and Feminism: Gender and the Politics of Fan Production' (2009) 48 *Cinema Journal* 104; Cornel Sandvoss, *Fans: The Mirror of Consumption* (Polity Press 2005); Francesca Coppa, 'A Brief History of Media Fandom', *Fanfiction and Fan Communities in the Age of the Internet* (McFarland 2006); Matt Hills, *Fan Cultures* (Routledge 2002); Louisa Ellen Stein, *Millennial Fandom: Television Audiences in the Transmedia Age* (University of Iowa Press 2015); Abigail De Kosnik, *Rogue Archives: Digital Cultural Memory and Media Fandom* (The MIT Press 2016).

<sup>28</sup> Rose (n 21) 8.

<sup>29</sup> *Hyde Park Residence v Yelland* [2000] EMLR 363 (21).

<sup>30</sup> See section on Copyright Law

<sup>31</sup> Duncan Calow, 'Yet More Shades of Grey - Intellectual Property Magazine' (*Intellectual Property Magazine*, 3 March 2015) <<https://www.intellectualpropertymagazine.com/copyright/yet-more-shades-of-grey-106922.htm?origin=internalSearch>> accessed 4 January 2019.

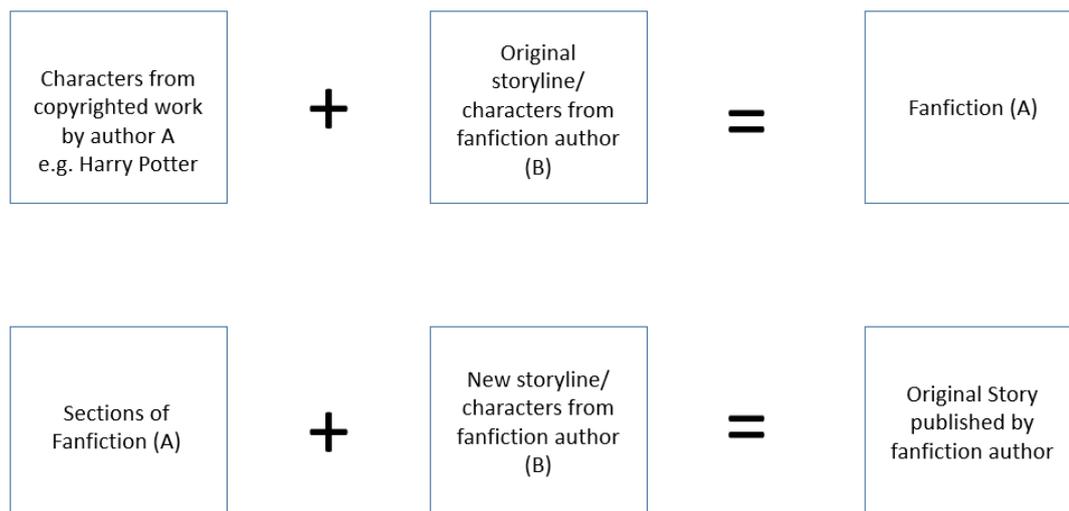
It seems like a tautology to relate fanfiction to an 'identifiable segment' of popular culture, but this is the most important section of Tushnet's definition in terms of copyright law. Fanfiction only raises issues when related to a part of copyright culture that is currently under copyright. A more recent definition of fanfiction highlighted the importance of this when it stated that fanfiction is "creative material featuring characters [from] works whose copyright is held by others"<sup>32</sup>. Should the inspiration be a part of popular culture that is not copyrightable, there would be no legal issues (shown by the idea/expression dichotomy<sup>33</sup>. Clarity is therefore important regarding which elements of a fictional work can be protected by copyright.

The explanation that fanfiction utilises a relationship between itself and a successful second work raises two issues. Firstly, a fanfiction writer may use a popular copyrighted work as inspiration, heavily borrowing from it, and 'file off the serial numbers' (i.e. changes the name/description of the characters in order to avoid infringement claims) to publish professionally. However, different questions may be seen if the writer creates fanfiction, gets a publishing deal for original fiction and copies substantial parts of the fanfiction (but not the separate copyrighted work which the fanfiction was based on) into their original fiction, as follows:

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<sup>32</sup> Francesca Coppa (ed), *The Fanfiction Reader: Folk Tales for the Digital Age* (University of Michigan Press 2017). Cited in Stephanie Burt, 'The Promise and Potential of Fanfiction' <<https://www.newyorker.com/books/page-turner/the-promise-and-potential-of-fan-fiction>> accessed 6 August 2019.

<sup>33</sup> *Baigent and Leigh v The Random House Group* [2007] EWCA Civ 247.



The final issue with Tushnet’s definition is that many fanfiction authors are now publishing professionally. There are two ways of doing this - the first is the ‘pull-to-publish’ ‘filing off the serial numbers’ version, where the fanfiction is taken down from the archive in which it appears, and superficial changes are made in order to remove references to copyrighted characters. The work is then sold as an original piece of fiction. This has increased in popularity over the years, as the works are seen as less of a commercial risk for publishers if they have already been read and reviewed by millions of readers online<sup>34</sup>.

Fanfiction authors are also participating in the new trend towards self-publication either through eBooks<sup>35</sup> or short-run prints of pBooks<sup>36</sup>. This provides vital context for this research. Firstly, authors of standard fiction works that self-publish are less likely to have the financial capital required to enforce their copyrights strictly. Thus, if the trend towards self-publication continues, there may be a related downwards trend in copyright cases and therefore, practically speaking if not legally, less strict copyright controls. A more important contextual issue with self-publication is that Kindle in the US now has a ‘Kindle Worlds’ section of the store, where fanfiction writers within a limited but growing number

<sup>34</sup> For example, EL James, *Fifty Shades of Grey* (Arrow Books 2012).

<sup>35</sup> Electronic books read on an eReader such as a Kindle or a Nook

<sup>36</sup> Physical books, either in hardback or paperback

of 'worlds' or fandoms can publish their works for profit. The support of a large company such as the Amazon-backed Kindle may demonstrate a new openness towards publication of these types of work and thus legitimise it<sup>37</sup>, which has historically been poorly thought of by publishers. This move may have an important effect on the market for fiction, and may well also have an effect on the attitudes authors have towards their works being reutilised in this way. This is important for this research given the reference within copyright legislation to the 'legitimate interests' of the rightsholder<sup>38</sup>.

Therefore, having analysed the standard definition of fanfiction used in much of the research, a better definition - and one that will be used throughout this thesis - is as follows. Fanfiction is a subset of the participatory culture fanwork genre, inspired by one or more identifiable form of copyrighted popular culture (which is generally self-identified by the writer). It is mostly produced by amateur writers and published for free online<sup>39</sup>. It spans a variety of types and genres of fiction<sup>40</sup>, some of which contain more original work than others in comparison to the amount of underlying work used.

Many types of fanfiction<sup>41</sup> have important sociological benefits (such as Refocalisation). Some are focused more on the writer's individual desire to hear more of the story (such as Recontextualisation and Expanding The Series Timeline), and some are even more focused on satisfying emotional needs of the writer (such as Emotional Intensification or Eroticisation). It can be said that

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<sup>37</sup> Suw Charman-Anderson, 'Amazon Legitimises Fanfic, Publishers Are Left Behind Again' (*Forbes*) <<https://www.forbes.com/sites/suwcharmananderson/2013/05/22/amazon-legitimises-fanfic-publishers-are-left-behind-again/>> accessed 27 May 2020.

<sup>38</sup> See later section on the Three Step Test

<sup>39</sup> While professional fanfiction publication sites have been attempted (such as FanLib and Kindle Worlds) these have not been successful and are not the focus of this research.

<sup>40</sup> It may be tempting to categorise fanfiction as a whole (and indeed this is what many authors and producers do when they talk about fanfiction), and to try to legally handle it en masse (such as by banning all of it, or by calling for a 'fanfiction' fair dealing category). This may not be easy as "the various forms fanfiction can take are wildly different and do not lend themselves to orderly classification" McCardle (n 24) 437.

<sup>41</sup> As categorised by Jenkins, see Introduction

“A categorical argument fails primarily because not all fanfiction can fit neatly into pre-defined categories...Taking an individualised approach...would help alleviate this dilemma by allowing a court to focus on the distinct qualities inherent to every work of fanfiction”<sup>42</sup>.

This statement demonstrates that the law as it stands (with no specific fair use/dealing exception for fanfiction but the possibility of arguing it on the facts of any given court case) may be best to continue with, despite its inherent lack of certainty.

#### 2.2.4 Summary

The term ‘user-generated content’ has been shown to cover a wide variety of types of creative work published online - whether commercially (such as mashups, parodies and remixes) or non-commercially (fanfiction). The recent implementation of s30A of the CDPA 1988 has opened up a new fair dealing category for works of parody and pastiche. This is important as works must demonstrate that they are of a closed list of permitted types in the UK before a judgement can be made as to whether they are ‘fair’ types of dealing with the work. Fanfiction is different from other types of derivative work such as parody – in that there is a wide variety of types and styles, each with a different rationale behind it. It is also more positive about the underlying work than parody and does not always seek to evoke humour. It is a perfect form of work to use to investigate the new ‘pastiche’ exception also contained within s30A, that has yet to receive legislative or judicial definitions. This research will therefore now move onto a discussion on the literature surrounding the copyright law issues in relation to works of pastiche such as fanfiction.

### 2.3 Copyright Law

Copyright undertakes a “necessary balancing act of divergent interests” between authors, publishers, readers and society as a whole<sup>43</sup>. It does so by defining the economic

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<sup>42</sup> McCardle (n 24) 437.

<sup>43</sup> Hargreaves (n 2) 41.

and moral rights that are protected in a copyright work, and the exceptions when they do not apply. Society is thought to benefit from the publication of creative works as it increases literacy, innovation and general wellbeing, and readers individually benefit from the enjoyment of reading. Therefore their interests are best served by increased supply, and lowered price. Publishers<sup>44</sup> and authors on the other hand are mostly deemed to have profit-maximising incentives such that they will only increase supply if the market price they can charge for their works over and above marginal cost also increases, which explains the default position that anyone wishing to reuse a copyrighted work should have to purchase a licence to do so (to reimburse the copyright owner).

Copyright enabled the interests of these 'divergent' groups to balance uneasily for decades, but with the advent of new technologies such as personal computing, broadband connectivity and the internet this balance was thrown off<sup>45</sup>. It is now easier than ever to create literary or dramatic works, record them and share them across borders. This is positive for society as innovation increases social welfare. However, copyright law has struggled to keep up with some new forms of creation that show a change in the way people are creating works and why. This clearly highlights fault lines between the original aims of copyright legislation, and its affect in practice.

### 2.3.1 Copyright and Characters / Settings

In order to discuss the application of copyright<sup>46</sup> to derivative UGC works such as fanfiction requires a clear understanding of which literary elements can attract their own copyright protection. Within fanfiction, the fictional elements most frequently reused are characters and locations (and occasionally languages such as Klingon and Elvish). Within the

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<sup>44</sup> Historically much copyright literature has lumped publishers and authors into a 'copyright holder' persona and not given much thought to how the two may differ.

<sup>45</sup> R Towse, 'The Quest for Evidence on the Economic Effects of Copyright Law' (2013) 37 Cambridge Journal of Economics 1187, 1188.

<sup>46</sup> While trademark law, the tort of passing off and unfair competition law may also be relevant, this research focuses on copyright since it arises automatically

UK legal system, there is little research or case law that has discussed whether these elements are protectable under copyright or whether they amount to ‘ideas’ and are thus in the public domain and free for reuse. It has been argued that courts in the UK have “shied away” from creating copyright protection for characters, instead preferring to rely upon the tort of passing off<sup>47</sup>.

Research has speculated<sup>48</sup> that fictional languages do not attract protection as they are likely to be seen as a collection of individual words, which are not considered ‘literary works’ in UK copyright jurisprudence post *Navitaire*<sup>49</sup> and *Exxon*<sup>50</sup>. While it is persuasive that “a language is only of benefit to society if it can be used”<sup>51</sup>, it is hard to see how this is anything beyond shaky ground for conclusions to be drawn without further research. This is a distinct issue as clarity on this topic is vital for understanding what the legal issues are surrounding copyright and fanfiction.

Given the lack of research in the UK, it is worth turning to the US system to explore how their legislature handles the issue. In 1958 a pre-eminent US legal scholar stated that “[t]he fictional character today is perhaps the most important commodity in the entire field of entertainment in the United States”<sup>52</sup>, due to the influence of strong character-driven TV programming such as sitcoms and soap operas. Yet, in 1990 it was argued that characters “are second class citizens” of the intellectual property world<sup>53</sup> due to inconsistent application of precedent in the US courts. Confusion, it is claimed, arises due to the application of different legal tests (such as the ‘story being told’ test, and the ‘sufficiently

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<sup>47</sup> Bukatz (n 21).

<sup>48</sup> Alexandra Allen-Franks, ‘Copyright Protection for Individual Words of an Invented Language’ (2018) 40 EIPR 311.

<sup>49</sup> *Navitaire Inc v EasyJet Airline Co Ltd (No 3)* [2004] EWHC 1725; [2005] ECC 30 (Ch D).

<sup>50</sup> *Exxon Corp v Exxon Insurance Consultants International Ltd* [1982] Ch 119, *Times*, June 13, 1981 (Ca (Civ Div)).

<sup>51</sup> Allen-Franks (n 48) 318.

<sup>52</sup> Leon Kellman, ‘The Legal Protection of Fictional Characters’ (1958) 25 Brooklyn Law Review 3, 3.

<sup>53</sup> David B. Feldman, ‘Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection’ (1990) 78 California Law Review.

delineated' test<sup>54</sup>, that do not take the literary elements of characters sufficiently into account<sup>55</sup>, as well as the convergence and overlap between copyright legislation, trademark and unfair competition<sup>56</sup>.

There is a lack of clarity in the UK regarding the application of the idea/expression dichotomy to elements of fictional works such as characters, locations and languages due to the lack of precedent on the topic and the scarcity of literature in the area. The US has a much more developed system that in certain circumstances permits the protection of characters, yet has a mix of different tests for protection in different Circuits and this has also led to clouded conclusions in this area. Therefore, the only test that can be used to judge the level of protection for these elements is whether the taking of them in a derivative work is 'substantial' enough to amount to infringement under the *Infopaq*<sup>57</sup> and *Tixdaq*<sup>58</sup> tests. This will depend on the facts of each individual case - which has benefits for the flexibility of the law but not for legal certainty or clarity.

### 2.3.2 Limitations and Exceptions in a Digital Age

Copyright limitations and exceptions have become increasingly more important in the digital age<sup>59</sup>, and provide important doctrinal legislative context for my research into UGC such as fanfiction. There are three main theoretical underpinnings to the existence of copyright limitations and exceptions, depending on the approach to the law being

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<sup>54</sup> For more on this, see Chapter 3

<sup>55</sup> Zahr K Said, 'Fixing Copyright in Characters: Literary Perspectives on a Legal Problem' (2013) 35 *Cardozo Law Review* 769.

<sup>56</sup> Kellman (n 52); Leslie A Kurtz, 'The Independent Legal Lives of Fictional Characters' (1986) 1986 *Wisconsin Law Review* 429; Kathryn M Foley, 'Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide Note' (2008) 41 *Connecticut Law Review* 921; Michael Todd Helfand, 'When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters' (1992) 44 *Stanford Law Review* 623.

<sup>57</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08).

<sup>58</sup> *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch).

<sup>59</sup> Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2016); Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions', *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017); Hargreaves (n 2).

undertaken. From a utilitarian, economic perspective strong copyright protection can be inefficient, leading to high search and transaction costs for authors<sup>60</sup> and thus exceptions in tightly defined circumstances can promote efficient allocation of resources on the market<sup>61</sup>. From a legal philosophy perspective, it has been argued that limitations and exceptions follow John Locke's theory that one should leave "as much and as good...in common for others"<sup>62</sup>. Finally, from a literary perspective, it is known that authors "stand on the shoulders of giants"<sup>63</sup>: that inspiration and innovation comes from previously published works. Picasso said that "Good artists copy; great artists steal"<sup>64</sup>.

### 2.3.3 Fair Dealing and Fanfiction

The UK copyright law exceptions relevant to this research are found within the fair dealing provisions of the Copyright, Designs and Patents Act 1988 (s29-30) as amended by the 2014 Regulations<sup>65</sup>. These list acts that are permitted in relation to the use of a copyrighted work, referred to under the name 'fair dealing'. The European legislative context for fair dealing is found in Article 5 of the InfoSoc Directive that lists certain limitations and exceptions that Member States can choose to enforce. As it is a choice at national level, historically it set a minimum standard and thus there has been variety across the Member States regarding which have been enforced. However, recent cases such as

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<sup>60</sup> Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and Its Predecessors' (1982) 82 Columbia Law Review 1600; Wendy J Gordon, 'Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story Part II' (2002) 50 Journal of the Copyright Society of the U.S.A. 149.

<sup>61</sup> Pierre N Leval, 'Towards a Fair Use Standard' (1990) 103 Harvard Law Review 31.

<sup>62</sup> John Locke, *Two Treatises of Government* (for Whitmore and Fenn, and C Brown 1821) Ch V para 27. Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo LJ 287, 297-310.

<sup>63</sup> Robert K Merton, *On the Shoulders of Giants: A Shandean Postscript* (Free Press 1965).

<sup>64</sup> Stefan Sonvilla-Weiss, 'Good Artists Copy: Great Artists Steal: Reflections on Cut-Copy-Paste Culture' in Eduardo Navas, Owen Gallagher and burrough xtine (eds), *The Routledge Companion to Remix Studies* (Routledge, Taylor & Francis Group 2015) 57.

<sup>65</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356); The Copyright and Rights in Performances (Disability) Regulations 2014; The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014; The Copyright (Public Administration) Regulations 2014; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014.

*Pelham*<sup>66</sup>, *Spiegel Online*<sup>67</sup> and *Funke Medien*<sup>68</sup> have stated that as these are methods of protecting fundamental freedoms, there should be parity across Member States, so this may be about to change.

Literature on fair dealing and fanfiction is minimal in the UK, partly due to the lack of research into fanfiction and law as a whole. Legal research on fanfiction has focused on other elements, such as moral rights<sup>69</sup> and the tort of passing off<sup>70</sup>, or an argument for extending the Three Step Test to include a “copyright exception for creativity”<sup>71</sup>. Much of the current literature on fair dealing instead focuses on transformative reuses for purposes that have a more commercial purpose, such as remix<sup>72</sup>. These operate persuasively for my research as case studies for the understanding of the requirements for fair dealing to be made out as enumerated in *Hubbard v Vosper*<sup>73</sup>. These are the number and length of the quotations, and the proportions of the work and the copied portion. The focus of this research is the factor regarding the use made of the quoted or copied work - whether it is for one of the listed dealings in s29-30 CDPA 1988, and whether the use is for a ‘rival purpose’<sup>74</sup>. However, given that remixes are broadly more commercial than fanfiction, the conclusions drawn regarding the application of fair dealing to those works may not transfer to fanfiction.

This lack of literature on fair dealing in the UK is distinct from the US literature, where almost all the literature discusses the application of the fair use test, whether

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<sup>66</sup> *Pelham v Hutter and Schneider-Esleben* (C-476/17).

<sup>67</sup> *Spiegel Online GmbH v Volker Beck* (C-516/17).

<sup>68</sup> *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17).

<sup>69</sup> Tamara Bukatz, ‘Amazon’s Fanfiction Store: Opportunity or Fandom-Ination? The Legal Background to Commercial and Non-Commercial Creations from Canon: Part 2’ (2014) 19 *Communications Law* 20.

<sup>70</sup> Bukatz (n 21).

<sup>71</sup> Khaosaeng (n 21) 248.

<sup>72</sup> While there are non-commercial parodies and remixes, in comparison with fanfiction they are broadly more commercial uses

<sup>73</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>74</sup> See following chapters

summarising the case law<sup>75</sup>, calling for some form of optional or compulsory licence for certain types<sup>76</sup>, or analysing the economic value of fanfiction<sup>77</sup>. Each of these works accept that fanfiction infringes copyright in certain elements of the underlying work (such as characters) through substantial reuse. However, they also argue that some types of fanfiction should benefit from protection within the fair use exception as they create substantial benefits for society in terms of new works (and new viewpoints) created. Furthermore, creators benefit from having an engaged online audience for their works - for example, the TV programme *Veronica Mars* has recently had new series produced after a long hiatus, after an online campaign by fans. This demonstrates that “in the Internet age, the correlation between an active fandom and increased economic incentive for the copyright holder (sic) to create is even more evident”<sup>78</sup>.

Much high level research has been undertaken to compare fair dealing with the US system of fair use and has concluded that there is a need for a more flexible, US style fair use exception<sup>79</sup>. While this may have significant benefits, the majority of commercial responses to the Hargreaves Review in 2011 were “implacably hostile” to the idea<sup>80</sup> due to fears of increased uncertainty regarding precedents (given that fair use precedents would be coming from a US jurisprudence, which has significant differences) which may lead to increasing numbers of high cost cases and confusion. Arguments have been made using a

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<sup>75</sup> Zarin (n 24); Krato (n 24); Lantagne (n 24); McCardle (n 24); Tushnet (n 25).

<sup>76</sup> Stendell (n 24); Brittany Johnson, ‘Live Long and Prosper: How the Persistent and Increasing Popularity of Fanfiction Requires a New Solution in Copyright Law Note’ (2015) 100 Minnesota Law Review 1645; W Michael Schuster, ‘Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of The Commercialisation of Fanfiction’ (2013) 55 South Texas Law Review 529; Jacqueline Lipton, ‘Copyright and the Commercialisation of Fanfiction’ (2014) 52 Houston Law Review 425.

<sup>77</sup> Stacey M Lantagne, ‘Sherlock Holmes and the Case of the Lucrative Fandom’ (2015) 21 Mich. Telecomm. & Tech. L. Rev 263.

<sup>78</sup> *ibid* 314.

<sup>79</sup> PB Hugenholtz and Martin Senftleben, ‘Fair Use in Europe: In Search of Flexibilities’ [2011] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1959554>> accessed 19 May 2018; Antony Dnes, ‘Should the UK Move to a Fair-Use Copyright Exception?’ (2013) 44 International Review of Intellectual Property and Competition Law 418.

<sup>80</sup> Hargreaves (n 2) 44.

constitutional and jurisprudential approach that there should be little functional difference between the two systems<sup>81</sup> and that we may already have more of a flexible system than many believe due to the non-optional nature of the fair dealing 'quotation' exception contained in Article 10(1) of the Berne Convention<sup>82</sup>.

Following the same arguments made to support parody, permitting the fair dealing exception for fanfiction within a pastiche heading would allow for the publication of important types of work with important positive externalities for society, such as the ability to discuss LGBTQ+ issues, and improve writing skills. It would then be for the 'fairness' elements of the exception to decide whether the specific iteration of fanfiction was acceptable on the facts. It seems like the sticking point for this analysis would be surrounding whether fanfiction operates for a 'rival purpose' i.e. whether it is operating as a substitute to harm the interest of the underlying work or the copyright holder. To understand how this part of the test is viewed in relation to uses of work that have yet to develop legal precedent in the UK and Europe requires an understanding of the Three Step Test contained within the Berne Convention and TRIPs Agreement. This is because Europe is a signatory to both, and this legislation has been used in arguments surrounding the application of new copyright norms to Member States<sup>83</sup>.

#### 2.3.4 Three Step Test

Historically, fair dealing exceptions were found within the so-called 'Three Step Test' contained in Berne Convention Article 9(2) (and TRIPs Agreement Article 13), both of which the EU (and the UK) is a signatory to. Therefore, all fair dealing provisions must be

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<sup>81</sup> Ariel Katz, 'Debunking the Fair Use vs Fair Dealing Myth: Have We Had Fair Use All Along? (Forthcoming)' in Shyam Balganes, Wee Loon Ng-Loy and Haochen Sun (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (2018).

<sup>82</sup> Lionel Bently and Tanya Aplin, 'Whatever Happened to Global, Mandatory Fair Use?' in Susy Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar Publishing 2019).

<sup>83</sup> *ibid.*

seen in the light of the wording of Articles 9(2) Berne Convention and Article 13 TRIPs Agreement, which

“...play a crucial role in the intersection between IP protection and areas of freedom that serve competing economic, social and cultural interests. The competing tests...are elastic guidelines for national policy makers seeking to reconcile IP protection with other societal needs”<sup>84</sup>.

Fanfiction offers a clear example of a situation where cultural interests (such as the ability of consumers to interact online socially with cultural works in the way they wish) may need to be investigated in the light of the need for creators and publishers to protect their economic interests (and indeed for policy makers to protect their economies). The wording of the articles are as follows:

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<sup>84</sup> Martin Senftleben, ‘From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test’ in T Mylly and J Griffiths (eds), *The Transformation of Global Intellectual Property Protection* (Oxford University Press 2020) 1.

Article 9(2) Berne Convention	Article 13 TRIPs Agreement
<p>“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in <i>certain special cases</i>, provided that <i>such reproduction does not conflict with a normal exploitation of the work</i> and <i>does not unreasonably prejudice the legitimate interests of the author</i>”</p>	<p>“Members shall confine limitations or exceptions to exclusive rights to <i>certain special cases</i> which <i>do not conflict with a normal exploitation of the work</i> and <i>do not unreasonably prejudice the legitimate interests of the right holder</i>”</p>

To analyse the effectiveness of limitations and exceptions to copyright law in the UK therefore, research must investigate:

1. Whether the circumstance in question is a ‘special case’;
2. What the ‘normal exploitation’ of a copyright work is; and
3. What the ‘legitimate interests of the right holder/author’ are<sup>85</sup>.

Much research has been undertaken into how the Three Step Test operates to harmonise fair dealing exceptions in copyright<sup>86</sup>. The legislative history of the Three Step

<sup>85</sup> While Berne refers to the author, TRIPs has a perhaps broader understanding of who may actually hold the copyright in a work - for example publishers or other licensed bodies.

<sup>86</sup> Gervais (n 3); Kamiel J Koelman, ‘Fixing The Three Step Test’ (2006) 28 EIPR 407; Patrick R Goold, ‘The Interpretive Argument for a Balanced Three-Step Test’ (2017) 33 American University International Law Review 187; Huaiwen He, ‘Seeking a Balanced Interpretation of the Three-Step Test-an Adjusted Structure in View of Divergent Approaches’ (2009) 40 International Review of Intellectual Property and Competition Law 274; Christophe Geiger, Jonathan Griffiths and Reto M Hilty, ‘Towards a Balanced Interpretation of the “Three-Step Test” in Copyright Law’ (2008) 4 European Intellectual Property Review 489; Martin Senftleben, ‘The International Three-Step Test: A Model Provision for EC Fair Use Legislation’ (2010) 1 JIPITEC 67; Martin Senftleben, ‘Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law’ in GB Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) <<https://ssrn.com/abstract=2241284>>; Bently and Aplin (n 82).

Test, and its operation as a “flexible compromise formula”<sup>87</sup> between open-ended copyright exceptions in some locations (such as the US) and closed lists of exceptions (such as in the UK), has been well demonstrated<sup>88</sup>. It is clear that it gives national policy makers the opportunity to implement certain limitations and exceptions, but only in specific ways. For example, in the EU, Article 5(5) of the InfoSoc Directive states that copyright limitations and exceptions can only be implemented in national laws if they are in accordance with the Three Step Test<sup>89</sup>. Thus new limitations and exceptions must be contained in Article 5 InfoSoc before being transposed into UK law – but they must also be implemented in light of the Three Step Test. The pastiche exception is contained in Article 5(3)(k), as well as the CDPA 1988 s30A, alongside parody and caricature. There is therefore a need for research to examine how a pastiche exception may meet the Three Step Test, which is sadly lacking in academic research. However, there are some conclusions that have been drawn regarding the individual tests, which may be applicable to pastiche, and therefore fanfiction.

#### *2.3.4.1 Is fanfiction a ‘certain special case’?*

The requirements for the first of the three steps of the test to be met were clearly discussed in the WTO panel when adjudicating on the US s110(5) case in 2000, where it held that the definition required both that the circumstance was (a) clearly defined and (b) for a limited application<sup>90</sup>. Several prominent academics<sup>91</sup> have demonstrated that many fair dealings that are currently relied upon (such as private copying) are based within the Three Step Test, and are therefore examples of how this test is applied in practice. Can this previous research inform much about whether fanfiction will be deemed a ‘certain special

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<sup>87</sup> Senftleben (n 84) 1.

<sup>88</sup> Christophe Geiger, Daniel Gervais and Martin Senftleben, ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2013) 29 *American University International Law Review* 581.

<sup>89</sup> Jonathan Griffiths, ‘The “Three Step Test” in European Copyright Law - Problems and Solutions’ [2009] *Queen Mary School of Law Legal Studies Research Paper* 24.

<sup>90</sup> ‘Report of the Panel - United States - S110(5) of the US Copyright Act’ (2000) *WT/DS160/R* 6.108.

<sup>91</sup> Senftleben, ‘Comparative Approaches to Fair Use’ (n 86) 53; Koelman (n 86); Griffiths (n 89).

case’? Given that pastiche is a specific dealing that appears in the InfoSoc Directive, an argument may be made that fanfiction meets this test as an example of pastiche. Yet, there has been little literature that would support this point<sup>92</sup>, and no case law.

#### 2.3.4.2 Normal Exploitation & Fanfiction

Derivative uses of copyrighted works can only be permitted if they do not interfere with the normal exploitation of the work. This test has been referred to as the central issue of the Three Step Test<sup>93</sup> and focuses on the economic effect of the proposed use. If the use would harm the copyright holder financially or cause them a disproportionate amount of harm, then the use should not be permitted, no matter how socially or culturally beneficial it may be. This has been held to include all such uses that the rightholder may reasonably expect to receive income from<sup>94</sup>, including both uses that currently generate income and, importantly, those which have the potential to do so in the future. This has been defined as “an actual or potential typical major source of royalty revenue that carries weight within the overall commercialisation of works”<sup>95</sup>. Parody, for example, is permitted under this test because while it is a commercial reuse of the work (and therefore may deprive the copyright holder of a stream of revenue), it is unlikely that copyright holders would ever permit their works to be licensed in such a way given its critical nature. There is little academic literature on this point regarding pastiche reuses such as fanfiction, a research gap which this thesis seeks to fill. It may be assumed that by being less overtly critical of the underlying work, pastiche may struggle to meet this section of the test. As an homage to the original, it may be argued that it (and fanfiction as an example of it) may be too harmful to the revenue stream from the original work.

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<sup>92</sup> Hudson (n 17).

<sup>93</sup> Koelman (n 86) 408.

<sup>94</sup> Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Kluwer 1987).

<sup>95</sup> Martin Senftleben, *Copyright, Limitations, and the Three Step Test: An Analysis of the Three Step Test in International and EC Copyright Law*, vol 13 (Kluwer Law International RV 2004) 194.

However, there are two questions that arise from this, which have yet to be answered in depth in academic literature. Firstly, is this type of reuse actually harming the revenue from the original work – are consumers actually choosing to consume these works rather than the original? Many mainstream fiction authors seem to presume this is true<sup>96</sup>, and yet there has been no causal link proven. This is part of the underlying issue – the burden of proof sits on fanfiction users to prove their work is not harmful, rather than on copyright holders to prove that it is. This means that there is an inherent bias in the law against uses which may be socially valuable. Fanfiction, with its potential benefits for literacy and social citizenship learning, provides an important area for analysis of this point which has yet to be taken up by academic literature.

#### *2.3.4.3 Legitimate Expectations of the Author/Copyright Holder & Fanfiction*

A final question that arises from the application of the Three Step Test is – how far can remuneration go towards permitting these types of uses? The final step of the Three Step Test is to protect the legitimate interests of the rightsholder from unreasonable interference. It has been held that usage will not unreasonably prejudice the legitimate interests of the copyright holder if compensation is paid<sup>97</sup>. If it is merely about protecting a revenue stream for the work, would providing some form of equitable remuneration for this type of use protect the rights of the creator sufficiently? Despite the case law in the EU, it remains unclear how it would operate in a non-commercial situation such as fanfiction. Would it be judged on a harm basis – which as stated above is hard to allocate, or would it be based on gains to the user? In commercial pastiche reuses this could be done on a licence fee basis, where the value of each character or location reused is calculated and multiplied by the proportion of the new work they make up and the commercial value of

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<sup>96</sup> Jenny Roth and Monica Flegel, 'It's like Rape: Metaphorical Family Transgressions, Copyright Ownership and Fandom' (2014) 28 *Continuum* 901.

<sup>97</sup> *Technische Universität Darmstadt* (C-117/13); Geiger, Gervais and Senftleben (n 88) 585.

that new work. However, with non-commercial fanfiction, no matter how highly valued the character or location is, the reuse is not generating income so it is unclear how a licence fee might be valued. It is of course possible that it could be valued just on how important the characters are in their own original works (for example, Harry Potter would obviously be highly commercially valued) and a set fee generated for reuse.

However, there are issues with this which the literature has not covered in depth. Firstly, this would require a commercial judgement to be made not only about main characters, but also secondary and tertiary characters. How important are characters such as Professor McGonagall, Colin Creevey, or Lee Jordan to the success of the *Harry Potter* franchise? This analysis would be difficult in many cases, and yet highly important to fanfiction writers who focus on these characters when ‘refocalising’ the works<sup>98</sup>. However, there is also an argument to be made that by focusing on this step too closely, courts are moving away from the issue behind limitations and exceptions. If the focus is merely on protecting potential revenue for authors, there is a danger that the objectives of limitations and exceptions are ignored – which has been discussed in EU case law<sup>99</sup>. This is especially true for fanfiction as a form of pastiche, as like parody it is a reuse that is unlikely to be voluntarily licensed by the author of the underlying work. Equitable compensation may not be sufficient anyway. Further, it is clear from the literature that protecting the economic value of the works is not the sole focus of this strand of the Test, which must also look to policy and normative expectations too<sup>100</sup>.

### 2.3.5 Summary

As shown by the preceding section of this chapter, the issue of the theoretical underpinnings of copyright, and how it applies to certain types of user-generated content,

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<sup>98</sup> Henry Jenkins, ‘Scribbling in the Margins’, *Textual Poachers: Television Fans and Participatory Culture* (20th anniversary ed, Routledge 2013).

<sup>99</sup> *Football Association Premier League Ltd v QC Leisure* (C-403/08).

<sup>100</sup> Geiger, Gervais and Senftleben (n 88) 595–596.

has been discussed in detail. For example, there has been much written on the topic of fair dealing generally, and the s30A parody, pastiche and caricature exception specifically. Yet, there has been little research on the issue of copyright protection for characters and locations, and equally little on pastiche as a fair dealing exception. In the current era, where legislatures are currently designing laws to try to ensure copyright is fit for a digital market, it is curious that these issues have not been clarified, and this is a research gap this thesis will fill in the coming chapters.

## 2.4 Law and Economics

It is important at this point to examine what economic research can add to the analysis: what do we know about the effect of IP protection (or the lack of) on supply and demand, in relation to works that inspire close creative derivatives?

To answer that question, this section will look at what can be learned from supply-side research such as incentives, pro-usage and peer-production to clarify exactly what is meant by 'normal exploitation' by the copyright holder - and what this means for their 'legitimate expectations'. Beyond this, the review will also summarise what is known about demand side issues such as the effect of intellectual property protection on demand, piracy and the operation of the long tail and scarcity of attention. Research from marketing and publishers will be adduced to analyse how these economic theories apply in practice.

Pure economic literature discussing intellectual property has historically prioritised the importance of corporate, commercial and competition law rather than intellectual property law to drive economic growth<sup>101</sup>. However, law and economics researchers have been more interested in the application of IP to the market, especially centring around

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<sup>101</sup> Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 51; Joseph Stiglitz, 'Intellectual Property Rights, the Pool of Knowledge, and Innovation' (National Bureau of Economic Research 2014) w20014 <<http://www.nber.org/papers/w20014.pdf>> accessed 31 May 2020.

whether IPRs are required to drive innovation in the market, or whether other factors such as first mover advantages<sup>102</sup> or strict protection of trade secrets or proprietary information<sup>103</sup> would act to provide sufficient reward mechanisms to incentivise production. Several reviews have been undertaken that examine how law and economics literature has been applied to copyright<sup>104</sup>, as well as how altering specific elements of copyright legislation may affect the market<sup>105</sup>. Most have specifically focussed on the supply-side, incentive function of copyright or the demand-side effects of piracy.

#### 2.4.1 Supply Side Research

There is a strong history of research into the supply-side effects of copyright law<sup>106</sup>.

Hurt and Schuchman defined IP rights as

“a device whereby scarce resources will be subject to exclusive control rather than exploitation at will by all comers, with the result that they will be used in an economically efficient manner”<sup>107</sup>.

Various justifications for copyright have been given in relation to the incentivising the use made of the scarce resources by creators, based either within personal rights of the artist (Kant) or benefits to social welfare as a whole from incentivising innovation and the

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<sup>102</sup> Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167.

<sup>103</sup> Jack Hirshleifer, ‘The Private and Social Value of Information and the Reward to Inventive Activity’ (1971) 61 *American Economic Review* 561.

<sup>104</sup> Robert M Hurt and Robert M Schuchman, ‘The Economic Rationale of Copyright’ (1966) 56 *The American Economic Review* 421; Stanley M Besen and Leo J Raskind, ‘An Introduction to the Law and Economics of Intellectual Property’ (1991) 5 *The Journal of Economic Perspectives* 3; Ruth Towse, Christian Handke and Paul Stepan, ‘The Economics of Copyright Law: A Stocktake of the Literature’ (2008) 5 *Review of Economic Research on Copyright Issues* 1; Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013).

<sup>105</sup> Such as Gordon’s 2002 study into transaction costs and fair use (Gordon, ‘Excuse and Justification in the Law of Fair Use’ (n 61).); and Kilbey’s study into likely effects of increasing the term of copyright protection (IC Kilbey, ‘Copyright Duration? Too Long!’ (2003) 25 *European Intellectual Property Review* 105.)

<sup>106</sup> despite historic interest within law and economics focusing on patents rather than copyright (Fritz Machlup and Edith Penrose, ‘The Patent Controversy in the Nineteenth Century’ (1950) 10 *The Journal of Economic History* 1.

<sup>107</sup> Hurt and Schuchman (n 104) 422.

production of creative works. These justifications will be examined in turn in relation to derivative works, in relation to the production of the initial work.

#### 2.4.1.1 Incentives

The idea that copyright is required in order to protect the incentive for initial production is one that has a long history in law and economics literature<sup>108</sup> especially in relation to the Chicago school of economics literature. The long-accepted theory is that publishers incur sunk costs of production and so in order to finance future works, they must ensure they can charge a monopoly price on successful works that make it to market. Copyright operates to ensure this monopoly price can be levied on the work<sup>109</sup>, by preventing those who come afterwards from merely copying and avoiding the sunk costs<sup>110</sup>. This means that market price is higher than marginal cost and profit is made. Those who promote strong copyright protection, especially for derivative works such as fanfiction, argue that without it the incentive to produce would be irredeemably harmed, leading to a decrease in the supply of creative works and the diversity of works that are produced<sup>111</sup>. Those who argue against copyright focus on the costs incurred by strong levels of protection. They argue that these search, transaction and administration<sup>112</sup> costs are too high and that it leads to exploitation of both consumers<sup>113</sup> and authors<sup>114</sup>. Ideally,

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<sup>108</sup> Elkin-Koren and Salzberger (n 104); Hurt and Schuchman (n 104); William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *The Journal of Legal Studies* 325; Plant (n 102).

<sup>109</sup> Adam Smith, *Lectures on Jurisprudence* (Ronald L Meek, DD Raphael and Peter Stein eds, Clarendon Press ; Oxford University Press 1978); Plant (n 102).

<sup>110</sup> Due to the impact of digital technology, the marginal cost of copying has dropped to almost zero - Paul Belleflamme, 'The Economics of Digital Goods: A Progress Report' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2903416 5 <<https://papers.ssrn.com/abstract=2903416>> accessed 31 May 2020; Jeremy de Beer and others, *The Informal Economy, Innovation and Intellectual Property: Concepts, Metrics and Policy Considerations* (WIPO 2013).

<sup>111</sup> Towse, Handke and Stepan (n 104) 15–16.

<sup>112</sup> As seen in Article 17 of the Directive on Copyright in a Digital Single Market, which calls for content recognition software to be utilised to filter out copyright infringing works before they can be hosted online. This software will require expensive hardware (such as powerful servers) to run.

<sup>113</sup> Through the artificial inflation of prices

<sup>114</sup> As it allows for the development of large film studios and publishing houses, who can then exploit their market power

copyright should find a balance between the two philosophies, but whether it does so in relation to fanfiction (and other forms of UGC) is not clear.

The incentive function of copyright relies upon the public-good nature of information goods<sup>115</sup> - i.e. that they are non-excludable and non-rival<sup>116</sup>. Digital goods are inherently non-excludable as they can be copied at virtual no cost, simply by clicking a mouse or tapping a few keys on a keyboard. The market price of such a product would therefore fall to the cost of production of a copy - almost zero. Therefore, should copyright not operate to artificially prevent the piracy of artistic works, production of new works and innovation to create improvements would fall<sup>117</sup>. Fanfiction is not a direct copy of the underlying work, and so does not operate to affect this direct form of production. However, it does affect production indirectly as copyright is also used to protect the ability of the author to sell derivative rights to their works<sup>118</sup>. This is becoming more important than ever given that the income an author receives from the adaptation of their works often exceeds their income from direct sales<sup>119</sup>.

The first question to ask is who we are trying to incentivise with copyright. Is it the original author, who we wish to create another work, or is it the producer/publisher, who we wish to release and disseminate the work to the public? The secondary rights in copyright law to adapt and distribute the work are at stake when discussing whether to broaden fair dealing and the Three Step Test to permit fanfiction - as this would have an immediate impact on the ability of producers to monetise adaptations. Shih Ray Ku argued that these secondary rights operate to provide strong incentives to publishers and

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<sup>115</sup> Elkin-Koren and Salzberger (n 104); Towse, Handke and Stepan (n 104).

<sup>116</sup> Landes and Posner (n 108); Elkin-Koren and Salzberger (n 104) 59.

<sup>117</sup> Belleflamme (n 110) 8.

<sup>118</sup> William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003) 329.

<sup>119</sup> Wilkof (n 1).

producers, but lesser to authors<sup>120</sup>. This is important in this analysis as the interests of the author and the interests of the publisher are different in relation to derivative works like fanfiction - and thus should be distinguished by copyright law<sup>121</sup>.

Financial incentives do not always drive creation within the arts, although they may drive publication or production. Many authors write for other, more emotional reasons<sup>122</sup>: “there is a natural drive to create, creative passion, the need to express oneself and to communicate one’s ideas and talents, to be acknowledged and to enjoy and be satisfied”<sup>123</sup>. These incentives can be seen both in the continued production of fictional works for the publication market in the face of well published drops in income for authors<sup>124</sup>, but also in the vast amount of fanfiction published for free online.

However, financial incentives may be strong motivators for publication or production. Stiglitz<sup>125</sup> distinguished between the motivation of artists to create and that of financial backers of the work to invest in it in order to ensure production. Copyright is seen in this regard to provide sufficiently high returns on the original investment made by the publisher or producer (i.e. the advance paid to the author) to attract further financing from their financial supporters. This ensures continued production of content in areas such as the creative arts that have such uncertain outcomes<sup>126</sup>.

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<sup>120</sup> Raymond Shih Ray Ku, ‘The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology’ (2002) 69 *The University of Chicago Law Review* 263.

<sup>121</sup> This follows the research by Hurt and Schuchman (n 104). It can be distinguished from previous research such as Landes and Posner (n 108); Stephen Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ (1970) 84 *Harvard Law Review* 281. Those works amalgamated the two roles

<sup>122</sup> Plant (n 102) 168–9; R Tushnet, ‘Economies of Desire: Fair Use and Marketplace Assumptions’ (2009) 51 *William & Mary Law Review* 513; JE Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 *UC Davis L Rev* 1151.

<sup>123</sup> Elkin-Koren and Salzberger (n 104) 65.

<sup>124</sup> Alison Flood, ‘Writers and Publishers Trade Blows over Plummeting Author Pay Levels’ *The Guardian* (29 June 2018) <<https://www.theguardian.com/books/2018/jun/29/authors-and-publishers-trade-blows-over-plummeting-author-pay-levels>> accessed 5 January 2019.

<sup>125</sup> Stiglitz (n 101).

<sup>126</sup> Joel Waldfoegel, *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture* (Princeton University Press 2018).

Risk is a vital part of this incentive paradigm<sup>127</sup>, and explains much about differences between how it functions for artists and producers. The distinction between producers and artists is that producers bear more risk than artists, and their costs tend to be higher - especially in relation to TV or film adaptations where costs can run into millions of pounds. While professional authors bear the original costs of expression<sup>128</sup>, they can offset this through a contractual demand for an advance, the value of which they can negotiate with the publisher (usually through an agent). Their post-production costs tend to be relatively low. In comparison, publishers bear much more pre-publication risk, offering advances for work before it has been completed and buying adaptation rights before filming has begun. The investment they make in the work by contractually agreeing to an advance or purchasing licensing rights is an insecure investment, with the possibility that the published work fails to recoup the investment. Therefore publishers have certain business strategies - such as using a hedging strategy to spread their risk over a wide group of authors within their 'stable'. They also use strong copyright protection to protect their work - as they view it as a financial investment. They are seen as more hawkish and are more likely than authors to pursue infringement cases<sup>129</sup>.

Bearing in mind producers are bearing the largest economic risk, as elaborated by Scherer, the level of copyright must enable the producer to charge more than simply recoupment costs in order to operate as sufficient incentive for continued production<sup>130</sup>. By ensuring a monopoly price can be charged for life of the author plus 70 years, copyright ensures that the income generated from successful works bears the weight of previous losses of similar works financed by the producer. In the field of creative works such as novels where hits can be hard to predict, this is vital to ensure continued production. This

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<sup>127</sup> Landes and Posner (n 118); Hurt and Schuchman (n 104).

<sup>128</sup> Landes and Posner (n 118).

<sup>129</sup> Zarin (n 24).

<sup>130</sup> Elkin-Koren and Salzberger (n 104) 79.

may function in relation to professionally published works, but it is hard to see how it functions in the fast-growing area of self-published works<sup>131</sup>, where the financial risk is purely borne by the author, who as stated above may have other incentives for production. This financial risk is also likely to be of lower value than professionally published works, as digital technology has led to disintermediation of the supply chain for creative works, with many authors and musicians now selling directly to fans<sup>132</sup> through pre-existing networks that do not cost them anything to set up<sup>133</sup>. This is especially concerning in relation to copyright for derivative works, given the attendant loss to consumers caused by strict protection against future authors improving or building upon the underlying work for the aforementioned life plus 70 year period.

There have been several leading critics of copyright as an incentive for production<sup>134</sup>, mostly in relation to the transaction costs as pioneered by Gordon<sup>135</sup> who argued that copyright operates as an additional cost for authors who may feel pressured into the purchase of an unnecessary<sup>136</sup> licence in order to create their works. This inefficient use of resources can lead to a 'missing market', for example where fanfiction writers decide that the value of using that underlying work in their own is exceeded by the likely costs of doing so. Even where fanfiction writers wish to purchase a licence, it is important to note that it may not be possible - especially in cases of crossover works where

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<sup>131</sup> Morten Hviid et al, 'From Publishers to Self-Publishing: Disruptive Effects in the Book Industry' (2019) 26 *International Journal of the Economics of Business* 355.

<sup>132</sup> Elkin-Koren and Salzberger (n 104) 81.

<sup>133</sup> This disintermediation has permitted the growth of new providers in the market for information goods - such as Wikipedia, and has changed the way goods are produced (ibid 82.). This could be seen to lead to a change in the way works are licensed in the future, as these new producers have new principles in relation to the sharing of information. Wikipedia for example operates using the Creative Commons licence, which has boosted its use and popularity online.

<sup>134</sup> ibid 99; Mark A Lemley, 'IP in a World Without Scarcity' (2015) 90 *NYU Law Review* 460; Towse, Handke and Stepan (n 104) 7.

<sup>135</sup> Gordon, 'Excuse and Justification in the Law of Fair Use' (n 60); Gordon, 'Fair Use as Market Failure' (n 60).

<sup>136</sup> Due to the operation of the fair dealing/fair use exception

overlapping copyrights mean licensing is prohibitively expensive<sup>137</sup>. One cost may be the purchase of a licence, but another may be the administration cost of replying to a legal claim by the publisher of the original work. Copyright may also have transaction costs for the publisher of the original work, who is likely to bear the cost of hiring legal representation. Highly trained IP lawyers are becoming vital in copyright infringement cases given how complicated the legal issues are surrounding issues such as copyright protection for characters and locations and the fair dealing exception<sup>138</sup>.

Contained within the transaction costs created by copyright is also the search cost<sup>139</sup> that relates to the resources required for an author to ensure that their work is not infringing copyright in previous works. Given that it is accepted that “creating a new work typically involves borrowing or building on material from a prior body of works as well as adding original expression to it”<sup>140</sup>, it is important to distinguish between material that is in the public domain (and therefore reused) and information that is protected by copyright. Time spent by authors checking this (and publishers prior to publication) is a transaction cost created by strong copyright protection. Therefore, even authors of original fiction bear this cost and may be disincentivised from certain types of production because of it.

These transaction costs are mitigated by the allowance of certain types of reuse through copyright exceptions such as fair dealing. In theory by setting these exceptions out in law, all parties are aware of them so there is no information inequality, and authors would avoid the search costs entailed within the above paragraph<sup>141</sup>. It has been argued that this “accord[s] the producer of the derivative work a zone of freedom from infringement as an incentive to produce new variations”<sup>142</sup>. This increases variety on the

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<sup>137</sup> Lemley (n 134).

<sup>138</sup> See above legal section

<sup>139</sup> Landes and Posner (n 108) 332–3; Towse, Handke and Stepan (n 104).

<sup>140</sup> Landes and Posner (n 108) 332.

<sup>141</sup> *ibid* 333.

<sup>142</sup> Besen and Raskind (n 104) 16.

market, and therefore social welfare. It is important that fair dealing only operates to permit reuse that is either creative or productive - i.e. does not just increase the number of copies on the market, but the amount of different works on the market<sup>143</sup> - as otherwise there may be increased, inequitable demand-side implications<sup>144</sup>.

Given these transaction costs, the chilling effect of copyright on information sharing in the digital economy has been the topic of much academic research<sup>145</sup>. However, it is worth remembering that there are high transaction costs involved with the implementation of fair use and fair dealing exceptions too<sup>146</sup> - given the high levels of uncertainty they cause. Stringent application of copyright law, especially in relation to the derivative work rights, can be a powerful disincentive for creation therefore both in the original market and in the market for derivative works. These works can have powerful social welfare merits where they permit discussion of issues such as raised by slash fiction, which improves engagement with the LGBTQ+ community.

Given the issues raised with the use of strong copyright protection for derivative UGC works, much research has been undertaken into alternative forms of protection for creative works<sup>147</sup>. These alternatives have been broken down into two varieties - incentivising changes to business models for authors and publishers, and incentivising

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<sup>143</sup> Landes and Posner (n 108) 329, 360.

<sup>144</sup> See next section on demand-side issues

<sup>145</sup> Elkin-Koren and Salzberger (n 104) 100; Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283; Niva Elkin-Koren, 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in P Bernt Hugenholtz and Lucie Guibault (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International RV 2006); Wendy J Gordon, 'Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property Copyright Symposium Part II - Copyright Protection for Computer Databases, CD-Roms and Factual Compilations' (1991) 17 *University of Dayton Law Review* 853.

<sup>146</sup> Joseph P Liu, 'Copyright and Breathing Space Symposium: Constitutional Challenges to Copyright' (2006) 30 *Columbia Journal of Law & the Arts* 429; Fred von Lohmann, 'Fair Use as Innovative Polity' (2008) 23 *Berkeley Technology Law Journal* 829.

<sup>147</sup> Glynn S Lunney Jr, 'Reexamining Copyright's Incentives--Access Paradigm' (1996) 49 *Vanderbilt Law Review* 483; Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281.

change at the governmental level, using paternalistic measures to protect the interests of authors and publishers<sup>148</sup>.

There are alternative methods for producers to protect their works without using copyright. The first example of this is the first mover advantage, where producers and publishers benefit from a time on the market with no competition due to the time it takes secondary users to reuse the work<sup>149</sup>. This can be presumed in the case of fictional works to be a long time, and thus offer a strong form of protection, given how long it takes to write a new work. However, in the digital age, especially in the case of fanfiction derivative works created by engaged fans, this time period is becoming increasingly short<sup>150</sup> due to the speed that works can be created and disseminated. There has been little research into exactly how fast fanfiction works are published after the original work is released, and so it is not clear how long publishers have to take advantage of this form of protection.

A secondary type of business model protection is licensing<sup>151</sup>, whereby instead of spending resources to prevent derivative works such as fanfiction, which can be seen to be difficult to achieve given the amount of websites that provide these types of work. There are several bodies that offer user-friendly derivative work licences, that would decrease the transaction costs involved in their application - for example Creative Commons. This is the model recommended by the European Parliament in Article 17 of the Proposed Directive

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<sup>148</sup> This breaks down into patronage of the arts (Breyer (n 147); Hurt and Schuchman (n 104); Plant (n 102).) or the provision of income via grants and prizes (Steven Shavell, 'Rewards versus Intellectual Property Rights' *The Journal of Law and Economics* 23.). However, in an age of austerity these are unlikely to be politically popular - and also focus heavily on the author rather than the publisher (although producers of certain creative arts receive governmental support through the provision of tax breaks

<sup>149</sup> Landes and Posner (n 108) 330; Michele Boldrin and David Levine, 'The Case Against Intellectual Property' 4; Maurizio Borghi, 'Why Tech Giants Have Little to Lose (and Lots to Win) from New EU Copyright Law' (*The Conversation*) <<http://theconversation.com/why-tech-giants-have-little-to-lose-and-lots-to-win-from-new-eu-copyright-law-103374>> accessed 1 June 2020.

<sup>150</sup> Elkin-Koren and Salzberger (n 104) 62.

<sup>151</sup> Landes and Posner (n 108) 330; Miriam Ettl and Paul WJ de Bijl, 'A next Step for Territorial Copyright Licenses for On-Demand Audio-Visual Services in the Light of the EU Digital Single Market' [2019] *Information, Communication & Society* 1.

on Copyright in the Digital Single Market, backed up by a requirement for all online content sharing service providers whose sole purpose is to give public access to copyrighted works, and who optimise those works, to scan works prior to hosting in order to filter out those that infringe copyright. The service providers will be required to negotiate licenses for each work they host. However, much academic literature has been devoted to the issues this will cause - mostly that the transaction costs of the licences will be prohibitive, given that the platform will need to get authorisation for the entire inventory of their works<sup>152</sup>, and thus content providers are highly unlikely to host material that matches an entry in their database of copyrighted materials<sup>153</sup>. It is also likely that such filtering is against European case law laid down in *Sabam v Netlog*<sup>154</sup>, because the legality of content is dependent on the application of fair dealing and other copyright exceptions, which vary from Member

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<sup>152</sup> In advance of any posts being made

<sup>153</sup> 'The Copyright Directive: Misinformation and Independent Enquiry | CREATE' <<https://www.create.ac.uk/blog/2018/06/29/the-copyright-directive-misinformation-and-independent-enquiry/>> accessed 1 June 2020; Ruth Flaherty, 'Articles 11 and 13 - Bad News for Some, or All of Us?' (*Information Society Policy (ISP) Blog*, 11 October 2018) <[http://webteam.uea.ac.uk/web/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=http%3A%2F%2Fwebteam.uea.ac.uk%2Fweb%2Fflaw%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](http://webteam.uea.ac.uk/web/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=http%3A%2F%2Fwebteam.uea.ac.uk%2Fweb%2Fflaw%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtvk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 6 January 2019; Sabine Jacques and Krzysztof Garstka, 'Automated Anti-Piracy Systems: A Call for Further Evidence-Based Policies - Information Society Policy (ISP) Blog @ UEA - UEA' <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/automated-anti-piracy-systems-a-call-for-further-evidence-based-policies?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Fflaw%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/automated-anti-piracy-systems-a-call-for-further-evidence-based-policies?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Fflaw%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtvk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 1 June 2020; Communia Association, 'Latest Article 13 Compromise by MEP Voss Is the Worst One Yet' (*International Communia Association*, 3 September 2018) <<https://www.communia-association.org/2018/09/03/latest-article-13-compromise-mep-voss-worst-one-yet/>> accessed 1 June 2020; Krzysztof Siewicz, 'Copyright Law Does Not Have to Criminalise Users' (*International Communia Association*, 14 March 2017) <<https://www.communia-association.org/2017/03/14/copyright-law-not-criminalise-users/>> accessed 2 December 2017; Andres Guadamuz, 'Mandatory Internet Filtering and The War on Memes' (*TechnoLlama*, 4 July 2018) <<https://www.technollama.co.uk/mandatory-internet-filtering-and-the-war-on-memes>> accessed 1 June 2020; Mitchell Longan, 'Big Brother Is Watching But He Doesn't Understand: Why Forced Filtering Technology on the Internet Isn't the Solution to the Modern Copyright Dilemma' (*Scripted Blog*, 17 August 2018) <<https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>> accessed 1 June 2020.

<sup>154</sup> *SABAM v Netlog* (C-360/10).

State to Member State. Thus, filtering will always be complex and disproportionately intrusive<sup>155</sup>, and the sites will be incentivised to over-filter rather than risk copyright liability, which could be disproportionately harmful for smaller, less commercial sites. In relation to fanfiction, Archive of Our Own is likely to remain viable given its powerful backing<sup>156</sup>, but sites such as Fanfiction.Net are likely to block access to European visitors rather than accept the huge costs involved. This may have effects on diversity and social welfare that exceed the benefits to copyright holders of having the works removed.

#### 2.4.1.2 *Producership*

‘Producership’ is an “essential concept”<sup>157</sup> to understand for research into participatory cultures and their output, as it explains the active, productive and transformative approach users within the culture have to the underlying work. ‘Producership’ is a development of Toffler’s research into ‘prosumers’<sup>158</sup> as members of an involved and informed society who not only passively consume the product, but also produce new products based upon it. This research was developed in Bruns’ paper<sup>159</sup> to a new form of engagement with work - that of the ‘producer’. Bruns used case studies of new forms of consumption and engagement<sup>160</sup> to demonstrate four different features of producership. Fanfiction meets all four criteria. The first, open participation and communal evaluation, is met as fanfiction is a subgenre of UGC, where works are hosted on open websites. Content

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<sup>155</sup> There is also the philosophical question regarding whether we should be using machines such as these powerful filtering technologies to police creative works

<sup>156</sup> Supported by the Organization for Transformative works, a non-profit with a strong Legal Advocacy team to protect these types of works.

<sup>157</sup> Mar Guerrero-Pico, Maria-Jose Masanet and Carlos A Scolari, ‘Toward a Typology of Young Producers: Teenagers’ Transmedia Skills, Media Production, and Narrative and Aesthetic Appreciation’ [2018] *New Media & Society* 146144481879647. 1-18, 4

<sup>158</sup> Alvin Toffler, *The Third Wave* (Bantam Books 1990).

<sup>159</sup> Axel Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Producership* (Peter Lang 2008).

<sup>160</sup> within online blogging communities, the online encyclopaedia Wikipedia and online computer game Second Life

production is led by the user<sup>161</sup>, who is supported by a host of reviewers and supporters through the usage of comments and 'likes'<sup>162</sup>. While works are written and controlled by the individual fan author, there is a higher proportion of peer-collaboration than in standard fiction<sup>163</sup>. The second criteria, 'heterarchical, permeable community structures'<sup>164</sup>, requires high levels of usage and engagement for successful produsage to occur, as they are fast moving, evolving bodies. The two largest fanfiction sites have hundreds of thousands of active users<sup>165</sup>. The third criteria for works of produsage is that they are developed through a method that is 'palimpsestic, iterative, [and] evolutionary'<sup>166</sup>. Fanfiction is published in an unfinished format - which is one of the vital differences between it and other forms of UGC derivative works like remix or parody. The last criteria for produsage is that it operates best within a system of common property, where ownership of work is not blocked by barriers such as copyright. This can be seen at work on fanfiction archives, where work is reviewed and adjusted freely across the site (although norms differ surrounding the reuse of one fan writer's work in another work).

This definition of the way these specific users relate to underlying works is important as it enables understanding of norms surrounding media consumption in an active community<sup>167</sup>. Despite Bird's conclusion that this is not the standard method of engagement online, it is happening more frequently and overlaps with Jenkin's theory of

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<sup>161</sup> Axel Bruns, 'Some Exploratory Notes on Producers and Produsage' (*iDC*, 2005) <[https://distributedcreativity.typepad.com/idc\\_texts/2005/11/some\\_explorator.html](https://distributedcreativity.typepad.com/idc_texts/2005/11/some_explorator.html)> accessed 1 June 2020.

<sup>162</sup> See explanation of fanfiction in section 1

<sup>163</sup> Sarah Evans and others, 'More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring' (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 23 April 2017.

<sup>164</sup> Bruns (n 161).

<sup>165</sup> See Chapter 7

<sup>166</sup> Bruns (n 161).

<sup>167</sup> S Elizabeth Bird, 'Are We All Producers Now? Convergence and Media Audience Practices' (2011) 25 *Cultural Studies* 502.

participatory culture<sup>168</sup> and fandom. It also relates to Benkler's common's based peer production theory<sup>169</sup>, whereby inputs and outputs are shared, consumed and reused - and there is no need of or use of proprietary information. This relates to my research regarding how law can best solve the transaction costs issue surrounding the application of stringent copyright laws online.

#### *2.4.1.3 Summary of S-Side issues relating to Fanfiction*

I have analysed literature covering the application of the incentive function of copyright to the production of new works to conclude that strong protection of the underlying work does not necessarily lead to higher output from authors or producers - and that there is a need for further literature that distinguishes between the incentives of authors, producers and derivative work creators (i.e. fanfiction writers) in an era when the European Parliament is attempting to harmonise national copyright laws and create a 'Digital Single Market'.

The interests of fanfiction writers have been further investigated through the lens of 'produsage'. This research demonstrates that in an era of content creation online, new norms have formed where consumption and production are merged and users are creating content for online distribution based on works they have previously consumed. Therefore, the distinction between users and producers is being blurred. The outcome of this research is that fanfiction writers can be generally thought of as 'producers', given that they satisfy the four requirements laid out in Bruns' seminal work, and given the overlap of produsage with the fandom-focused convergence or participatory culture. There is little

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<sup>168</sup> Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Updated 20th anniversary ed, Routledge 2013). Although c.f. N Couldry, 'More Sociology, More Culture, More Politics: Or, a Modest Proposal for "Convergence" Studies' (2011) 25 *Cultural Studies* 487; H Linden and S Linden, *Fans and Fan Cultures: Tourism, Consumerism and Social Media* (Palgrave Macmillan 2017). This research questions how far produsage and participatory culture overlap in practice

<sup>169</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).

literature available on produsage and fandom<sup>170</sup>, and what exists tends towards specific case studies of often American or Asian media. Thus, further general research into the area of produsage and fanfiction would greatly benefit my research questions.

#### 2.4.2 Demand Side Research

There is a strong research background focusing on the demand side effects of derivative works on the market for the original. Much research has been carried out to investigate whether unauthorised derivative works act as a substitute for the original work, with leading academics unable to agree<sup>171</sup>. Many focus on the issue that unauthorised derivative works operate like copies, and that consumers focus on cost rather than legitimacy of the copy – meaning that non-commercial derivatives may harm the market for the original work<sup>172</sup>.

However, Landes and Posner disagree, arguing that that there are two possible impacts from close derivative works like pastiche and fanfiction:

“By definition, the derivative work is an imperfect substitute; often it is no substitute at all...Even where there is no element of substitution or complementarity – that is, where the derivative work is not part of the copiers’

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<sup>170</sup> Cecilia Rodriguez Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019).

<sup>171</sup> Glynn S Lunney Jr., ‘Copyright, Derivative Works, and the Economics of Complements’ (2010) 12 *Vanderbilt Journal of Entertainment and Technology Law* 779; Christina Chung, ‘Holy Fandom, Batman - Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure Note’ (2013) 19 *Boston University Journal of Science & Technology Law* 367; Jeanne C Fromer, ‘An Information Theory of Copyright Law’ (2014) 64 *Emory Law Journal* 71; Alan L Durham, ‘Consumer Modification of Copyrighted Works’ (2006) 81 *Indiana Law Journal* 851; Alan L Durham, ‘Copyright and Information Theory: Toward an Alternative Model of Authorship’ (2004) 2004 *Brigham Young University Law Review* 69.

<sup>172</sup> Ian E Novos and Michael Waldman, ‘The Effects of Increased Copyright Protection: An Analytic Approach’ (1984) 92 *Journal of Political Economy* 236; Rafael Rob and Joel Waldfogel, ‘Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students’ (2006) 49 *The Journal of Law and Economics* 29; Hal R Varian, ‘Buying, Sharing and Renting Information Goods’ (2000) 48 *The Journal of Industrial Economics* 473; Brian Kahin and Hal R Varian (eds), *Internet Publishing and beyond: The Economics of Digital Information and Intellectual Property* (MIT Press 2000).

supply curve....so that the demand faced by the author for the original is independent of the demand for the derivative work – giving the original author the exclusive right over derivative works will enhance his income"<sup>173</sup>.

This question of the economic status<sup>174</sup> of close derivative works such as pastiche and fanfiction ties into the earlier research in this chapter regarding the Three Step Test and the fair dealing test for economic harm, and is an important part of this thesis.

Authorised derivative works play an important role in the development of successful media products, whose success is often dependent on appealing to different segments of the market. An analysis of the importance of derivatives is an example of the different stakeholders in copyright decisions. Arguably this is an example of the strength of the role of publishers, as this is generally part of their role<sup>175</sup>. Analysing this function will develop understanding of the decisions surrounding how copyright is enforced by the copyright holder, as in many cases they are lead in this area by their publisher.

Publishers spend valuable resources on market research to understand demand on the market, which is derived from customer wants (described by Kotler and Armstrong as “the form human needs take as they are shaped by culture and individual personality”<sup>176</sup>) supported by the ability to pay<sup>177</sup>. Thus, they will want a strong return on this investment, and may be highly protective of the copyrighted products they publish. Social media companies like Facebook have successfully marketed consumer marketing information to third parties, for example. Given the propensity for high levels of engagement with online fanfiction communities, it could be of benefit to marketing agencies to permit highly

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<sup>173</sup> Landes and Posner (n 108) 354.

<sup>174</sup> I.e whether the work is a complement or a substitute

<sup>175</sup> Giles N Clark and Angus Phillips, *Inside Book Publishing* (Fifth edition, Routledge, Taylor & Francis Group 2014) 3.

<sup>176</sup> Philip Kotler and Gary Armstrong, *Principles of Marketing* (14. ed., global ed, Pearson 2012) 30.

<sup>177</sup> *ibid.*

transformative fanfiction as a method of understanding the wants and demands of this section of the potential audience. Publishers are spending more time and resources “pursuing direct relationships with readers, to gain the valuable additional information that can promote longer-term and profitable future content”<sup>178</sup>. The problem with this argument is that authorised fanfiction may operate to confuse the mainstream audience of the works, who may have different wants - and thus their level of demand may fall. There is also a risk of over-exposure – if publishers want to drive up demand for their works (either authorised tie-ins or future works in the same series), they want the customer to have unfulfilled demand.

The issue of confusion is tied to a further stage of the marketing process- that of creating a customer led plan or strategy for the goods. It is important that the strategy is led by the customer and not the book being sold “so that their needs, wants and values are prominent”<sup>179</sup>. This allows publishers to consider how their product is positioned in the market, including the “emotional relationship that a would-be consumer has” with the book and the brand<sup>180</sup>. This stage involves communicating the ways in which they are serving their customers and meeting their needs by creating a value proposition that they use to distinguish their publication from others. Kotler and Armstrong define this value proposition as “the set of benefits or values it promises to deliver to consumers to satisfy their needs”<sup>181</sup>. This is vital in a crowded market such as that for fiction, where in the EU and EEA, 575,000 new titles were released in 2015<sup>182</sup>. It is especially important given that

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<sup>178</sup> Alison Baverstock, *How to Market Books* (Fifth edition, Routledge, Taylor & Francis Group 2015) 36.

<sup>179</sup> *ibid* 8.

<sup>180</sup> Which can relate to the author or the publisher

<sup>181</sup> Kotler and Armstrong (n 176) 33.

<sup>182</sup> ‘The Book Sector in Europe: Facts and Figures 2017’ (Federation of European Publishers 2017) <<https://fep-fee.eu/The-Federation-of-European-844>>.

books as a whole are competing not only with other books but also with other leisure products<sup>183</sup>.

The difficulty for publishers therefore is to ensure that they overcome the issue of scarcity of attention. They wish to ensure that their message is heard “above the noise of everything else available”<sup>184</sup>, whether that be marketing for other books or for other leisure activities - such as TV shows or films. By positioning the work well and using a customer-led marketing strategy, it is much more likely to be heard<sup>185</sup>. Many academics have investigated the issue of scarcity of attention on a variety of crowded markets<sup>186</sup>, including whether copyright is the correct form of intellectual property to protect the underlying work in this way. Many authors fear that unauthorised fanfiction will create confusion regarding their ‘brand’<sup>187</sup>, and these fears will only be compounded if the publishers are seen to permit fanfiction, or use it for market research. This is especially important for publishers, as they are marketing not only the work but the author behind it. Sales are higher for authors who write multiple works - and authors are often a more well known brand than the publisher<sup>188</sup>.

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<sup>183</sup> Baverstock (n 178) 93.

<sup>184</sup> *ibid* 23.

<sup>185</sup> *ibid* 144.

<sup>186</sup> Ellen P Goodman, ‘Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets’ (2004) 19 *Berkeley Technology Law Journal* 1389; Thomas H Davenport and John C Beck, *The Attention Economy: Understanding the New Currency of Business* (Harvard Business School Press 2001); Karen Nelson-Field, *Attention Economy and How Media Works* (Palgrave Macmillan 2020) <<https://link.springer.com/book/10.1007/978-981-15-1540-8>> accessed 1 June 2020; Jake Linford, ‘Copyright and Attention Scarcity’ (Social Science Research Network 2020) SSRN Scholarly Paper ID 3590733 <<https://papers.ssrn.com/abstract=3590733>> accessed 1 June 2020; Waddick Doyle, ‘Brand Communication and the Attention Economy’ in Waddick Doyle and Claudia Roda (eds), *Communication in the Era of Attention Scarcity* (Springer International Publishing 2019) <[https://doi.org/10.1007/978-3-030-20918-6\\_5](https://doi.org/10.1007/978-3-030-20918-6_5)> accessed 1 June 2020; Christopher Pokarier, ‘Creative Activity Under Attention Scarcity’ in Nissim Otmazgin and Eyal Ben-Ari (eds), *Creative Context: Creativity and Innovation in the Media and Cultural Industries* (Springer 2020) <[https://doi.org/10.1007/978-981-15-3056-2\\_2](https://doi.org/10.1007/978-981-15-3056-2_2)> accessed 1 June 2020.

<sup>187</sup> Aaron Schwabach, ‘Three Interests of the Author in Conflict with Fanfic’, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011).

<sup>188</sup> Baverstock (n 178) 30. This is in comparison to the educational market, where publishers may have more market recognition.

These arguments regarding marketing and copyright highlight an issue that is being seen increasingly often in arguments surrounding derivative works. With references to consumer demand and likelihood of confusion, it may be that these arguments, and the ‘mercantile’<sup>189</sup> turn that copyright law is taking, is showing an overlap with trademark protection, and may lead to confusion<sup>190</sup>.

A specific example of demand-side copyright research focuses on piracy and lost sales, from demand being taken up by consumption of the derivative work rather than the underlying work. Much work in this area has been done in the area of peer-to-peer sharing and other forms of digital piracy<sup>191</sup>. This assumes that, as in the start of this section on demand-side economics, these derivatives are close enough to the original to operate as substitute works – i.e. to take up space on the demand curve for the original<sup>192</sup>. However, it is not clear how much this applies to close derivative works such as fanfiction, which are not direct copies, but are closer to the original work than parody. This thesis will seek to add to the literature in this area (digital derivative production) to examine whether fanfiction is on the same demand curve as the original, or whether it is sufficiently different to operate as a complement on its own demand curve.

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<sup>189</sup> Glynn S Lunney Jr, ‘Copyright’s Mercantilist Turn’ (2014) 42 Florida State University Law Review 95.

<sup>190</sup> Helfand (n 56).

<sup>191</sup> Paul Belleflamme and Martin Peitz, ‘Digital Piracy: An Update’ [2014] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2537269>> accessed 1 June 2020; Mark Cenite and others, ‘More Than Just Free Content: Motivations of Peer-to-Peer File Sharers’ (2009) 33 Journal of Communication Inquiry 206; Michael A Einhorn and Bill Rosenblatt, ‘Peer-to-Peer Networking and Digital Rights Management: How Market Tools Can Solve Copyright Problems Part I’ (2004) 52 Journal of the Copyright Society of the U.S.A. [i].

<sup>192</sup> Michael J Meurer, ‘Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works Focus on Cyberlaw’ (1997) 45 Buffalo Law Review 845; Surbhi Garg, ‘Laws Surrounding Counterfeit Goods and Piracy in the United Kingdom’ (2020) 7 Court Uncourt 2; Jacqueline Lipton, ‘A Taxonomy of Borrowing’ (2014) 24 Fordham Intell Prop Media & Ent LJ 951; Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (University of Chicago Press 2010); Robin Andrews, ‘Copyright Infringement and the Internet: An Economic Analysis of Crime Note’ (2005) 11 Boston University Journal of Science & Technology Law 256.

Linked to this research on piracy is research on the ‘Long Tail’ of the demand curve. The idea, as elaborated by researchers such as Mandelbrot<sup>193</sup> and popularised by Anderson<sup>194</sup>, is that the demand curve for any product is shaped in a way that the top 20% of the curve represents less than 50% of the demand for the goods – and that 50% of sales are made up of products from the remaining 80% of the market. It has been argued that “In short, the long tail refers to the idea that the Internet promotes the availability of a wide variety of products, like a store with infinite shelf space”<sup>195</sup>. In the digital book market, this is seen in the consumer welfare gained by “liberat[ing] a lot of appealing products from the imaginations and desk drawers of would be creators”<sup>196</sup>. The original market for books would not have included many of these works, as they would not have sold strongly enough to have been worth stocking in a bricks-and-mortar shop, but given the low transaction costs involved with selling digital works, the market can be broadened and a wider variety of works sold. Thus, derivative works that might be designated as not a risk to the original product as they are at the far end of the demand curve (where fanfiction may be presumed to sit), may in fact have a noticeable effect on the market for the original, for example due to the operation of a power law. However, there is growing disagreement among academics regarding whether or not the long tail functions in the way we expect<sup>197</sup>.

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<sup>193</sup> ‘Edge: The Father of Long Tails — Interview with Benoît Mandelbrot by Hans Ulrich Obrist’ <[https://www.edge.org/3rd\\_culture/obrist10/obrist10\\_index.html](https://www.edge.org/3rd_culture/obrist10/obrist10_index.html)> accessed 1 June 2020.

<sup>194</sup> Chris Anderson, ‘The Long Tail’ [2004] *Wired* <<https://www.wired.com/2004/10/tail/>> accessed 1 June 2020; Chris Anderson, *The Longer Long Tail: How Endless Choice Is Creating Unlimited Demand* (updated and expanded ed, Random House Business 2009).

<sup>195</sup> Waldfogel (n 126) 167.

<sup>196</sup> *ibid* 164.

<sup>197</sup> ‘Revisiting the Long Tail Theory as Applied to Ebooks’ (*Publishing Perspectives*, 8 January 2015) <<https://publishingperspectives.com/2015/01/revisiting-long-tail-theory-applied-ebooks/>> accessed 1 June 2020; ‘New Data on the Long Tail Impact Suggests Rethinking History and Ideas about the Future of Publishing’ (*The Idea Logical Company*, 25 June 2014) <<https://www.idealog.com/blog/new-data-long-tail-impact-suggest-rethinking-ideas-future-publishing/>> accessed 1 June 2020; Neil Wilkof, ‘What Happened to the “Long Tail” Theory of Commerce on the Internet?’ (*The IPKat*) <<http://ipkitten.blogspot.com/2020/04/what-happened-long-tail-theory-of.html>> accessed 20 May 2020.

There are several important areas of law and economics demand side research themes that demonstrate a need for the research contained in this thesis. Despite the relative importance of demand-side issues to the fair dealing test of transformative use<sup>198</sup> and the Three Step Test, it is unclear whether fanfiction is on the same demand curve as the underlying work, or whether it is merely part of a growing demand for further complementary works, that should not be included in the copyright protection for the original<sup>199</sup>.

### 2.4.3 Summary

This section has analysed law and economic literature from both the supply and demand side, as well as research from marketing and publishing as far as it can apply to my research questions. This has demonstrated that much of the literature “leave[s] out many aspects of creativity and innovation”<sup>200</sup>. It does not approach the social forms of creativity seen in relation to UGC and fanfiction<sup>201</sup>. I also distinguish many of the earlier reviews dating from the pre-digital era. Cost structures and the technology available to producers (and therefore entry into the market) were different before print ready works were sent digitally to publishers from authors. Furthermore, the effects of UGC can only really be seen on the market for creative works post-2010, given the increase in the amount of users with the technology to create and importantly share the works globally after that time<sup>202</sup>. Thus, while much of the above is persuasive, it cannot convincingly answer my research

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<sup>198</sup> See ‘Fairness and Fanfiction’ chapter

<sup>199</sup> Glynn S. Lunney Jr. (n 171).

<sup>200</sup> Elkin-Koren and Salzberger (n 104) 52.

<sup>201</sup> “Creative activity has inherent satisfactions; economic gain is not the only motivation for creators. Purely market-oriented theories of copyright disregard the inherent power of storytelling.” Tushnet (n 25) 685–686.

<sup>202</sup> Mostly in relation to the increased uptake of broadband internet connectivity around that time ‘Broadband Penetration 2007-2019’ (*Statista*) <<https://www.statista.com/statistics/272228/broadband-penetration-in-the-united-kingdom-uk/>> accessed 2 June 2020; ‘Fixed Broadband Subscriptions Worldwide 2005-2019’ (*Statista*) <<https://www.statista.com/statistics/273015/number-of-fixed-broadband-subscriptions-worldwide-since-2005/>> accessed 2 June 2020.

questions. I join the call for empirical research within law and economics that seeks to draw in conclusions from other disciplines such as sociology and media studies to address temporal and theoretical issues relating to law and economic literature<sup>203</sup>.

## 2.5 Empirical Work

To justify my empirical chapter, a review must be made of existing empirical literature in order to distinguish it from my own and demonstrate the need for my research.

### 2.5.1 Empirical Work and Copyright

There is a growing trend towards empirical work within copyright literature on both sides of the Atlantic. Empirical studies have been undertaken in the US into the opinions of judges in fair use cases<sup>204</sup> and in the UK into the effect of peer-to-peer piracy<sup>205</sup>. These works show that there is a growing demand for empirical work within law since policy work so often uses a cost-benefit approach to balance gains and losses to welfare from a suggested change in the law. Given that my research calls for an analysis of the law into a new area of creative content for UK academia, a strong argument can be made that it should follow Professor Hargreaves' statement that

“Government should ensure that the development of the IP system is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests”<sup>206</sup>.

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<sup>203</sup> Elkin-Koren and Salzberger (n 104) 52; J Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

<sup>204</sup> B Barton, 'An Empirical Study of US Copyright Fair Use Opinions, 1978-2005' (2008) 156 *Uni Penn. Law Review* 549.

<sup>205</sup> Felix Oberholzer-Gee and Koleman Strumpf, 'The Effect of File Sharing on Record Sales: An Empirical Analysis' (2007) 115 *Journal of Political Economy* 1; Rob and Waldfogel (n 172).

<sup>206</sup> Hargreaves (n 2) 8.

The previous non-empirical approach, it is claimed, “has little credibility unless they [gains and losses] can be measured empirically, since...the outcome depends upon quantitative not qualitative results”<sup>207</sup>. Hargreaves’ report has led to various empirical analyses being completed within the law and economics field<sup>208</sup> that have focussed on topics such as measuring losses to copyright holders and society from unauthorised works; how copyright industries contribute to national economies, and how earnings are generated from copyright work.

Of most interest to my research is that empirical work into the optimal levels of copyright protection regarding unauthorised derivative works has shown that the welfare gains for consumers when file-sharing (i.e. exchanging a direct copy of a work) extend beyond the direct losses suffered by producers<sup>209</sup>. This follows research that demonstrated giving copies of a work away for free does not impact sales of that work and could operate as advertising for future works<sup>210</sup>. Given this, the research demonstrates the need for future empirical research that quantifies the harm to copyright holders, as it is not sufficient just to argue that piracy is harmful. The harm that may be caused is to social welfare, as piracy may either lead to lower levels of production by authors, or less works being accepted for publication by publishing houses. Empirical work such as that which I propose to undertake should provide an answer to this through a macro-level analysis of sales as well as a comparison with levels of fanfiction<sup>211</sup>.

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<sup>207</sup> Towse, Handke and Stepan (n 104) 4.

<sup>208</sup> Towse (n 45); Simone Schrott, ‘The (Non) Convergence of Copyright Policies – A Quantitative Approach to Convergence in Copyright’ (2013) 10 SCRIPTed 411.

<sup>209</sup> Towse, Handke and Stepan (n 104). Ruth Towse, Christian Handke and Paul Stepan, ‘The Economics of Copyright Law: A Stocktake of the Literature’ (2008) 5 Review of Economic Research on Copyright Issues 1

<sup>210</sup> Cory Doctorow and Tim O’Reilly, *Context: Further Selected Essays on Productivity, Creativity, Parenting, and Politics in the 21st Century* (First Edition, Tachyon Publications 2011); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (Penguin Press 2004).

<sup>211</sup> There are issues with the reliability of data due to reliance upon Nielsen data, but this analysis should permit for correlation to be drawn

There have been many calls for further detailed empirical studies within copyright<sup>212</sup>, which provides a vital rationale for my work. While Lee's work on UGC has some relation to my research, it is important to note that fanfiction is a specific subset of that genre. It may have distinct effects on the market, different from other types of UGC and it is certainly different from peer-to-peer file sharing given its creative element.

### 2.5.2 Empirical Fanfiction Research

Empirical research is also being undertaken in relation to fanfiction in other fields, namely media studies<sup>213</sup> and computing<sup>214</sup>. This research has either utilised a case study approach or a large-scale quantitative analysis of fanfiction archives to draw several important conclusions. Primarily, it has been strongly demonstrated that fanfiction archives such as Fanfiction.Net contain a large amount of information regarding how fans interact with media, and importantly that "data scraping and data analysis of these sites can yield a range of insights about consumers' mindshare as measures through their creative activities"<sup>215</sup>. The conclusions from these non-legal studies provides a strong rationale for my chosen methodology as well as my focus on fanfiction as a case study within copyright. They demonstrate specific positive social externalities that fanfiction demonstrates, which have yet to be analysed by legal research in the UK.

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<sup>212</sup> Towse, Handke and Stepan (n 104) 17; Edward Lee, 'Warming Up to User-Generated Content' [2008] University of Illinois Law Review 1459; Ivan PL Png, 'Copyright: A Plea for Empirical Research' Review of Economic Research on Copyright Issues, Vol. 3, No. 2, pp. 3-13, 2006

<sup>213</sup> Abigail De Kosnik et al, 'Watching, Creating, and Archiving: Observations on the Quantity and Temporality of Fannish Productivity in Online Fanfiction Archives' (2015) 21 Convergence: The International Journal of Research into New Media Technologies 145; Yin and others, 'Where No One Has Gone Before: A Meta Dataset of the World's Largest Fanfiction Repository' CHI 2017

<sup>214</sup> Campbell J et al, 'Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities' (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 14 February 2017; Evans S et al, 'More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring' (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 24 April 2017; Milli, S., and Bamman, D., 'Beyond Canonical Texts: a computational analysis of fanfiction. In *Proceedings of the Empirical Methods on Natural Language Processing Conference (EMNLP 2016)*.

<sup>215</sup> De Kosnik (n 213), 161

One of these positive externalities is that fanfiction is most often written as a work-in-progress, posted online by fanfiction writers who use the websites as learning environments to develop their writing skills. This is an important difference between fanfiction and many other forms of derivative UGC works such as parody and remix (which are released in their final form). Fanfiction research has, for example, shown that the review functionality of the online archives is highly used, which leads to a process of spontaneous, distributed mentoring<sup>216</sup>. This is because

“[u]nlike a published book, which has gone through an extended editing and revision process, a fanfiction site is a place to workshop new material, and reviewers are conscious of being part of the process”<sup>217</sup>.

This demonstrates one of the research gaps that my research will fill, as non-finished works are less likely to compete with completed, edited and published works. Another reason this distinction is highly relevant for my research is that it could also support a more specific argument that the fair dealing exception for research and study under s29(1) CDPA 1988 may apply to this form of “sophisticated informal learning”<sup>218</sup>. This is another research gap as this argument has yet to be made in UK academic research.

### 2.5.3 Summary

Empirical copyright methodology is important in the digital age, especially in relation to ‘new’ unauthorised derivative uses (new in the sense that copyright legislation has yet to approach it) such as fanfiction. Where fanfiction research has been undertaken, it has mostly been ethnographic and using limited cases, which can have several important implications for how users work together on these websites, but cannot be extrapolated easily to answer my research questions. Therefore, while several other research projects

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<sup>216</sup> Campbell J et al (n 214)

<sup>217</sup> Evans S et al, (n 214) 3

<sup>218</sup> Campbell J et al (n 214) 691

have covered topics that may have an influence on my research, there has yet to be a comprehensive analysis of how fanfiction affects the fiction market within the UK. My research will contain the first full analysis of the posts on a fanfiction archive in the UK in comparison with Nielsen sales data (despite some issues with using that data as a comparative tool), which should permit a comprehensive longitudinal view of the activity on a UGC archive. This will have importance to researchers within publishing and copyright, as well as media fandom scholars.

## 2.6 Conclusion

This chapter has provided a review of the doctrinal and methodological research that is the state of the art regarding user-generated content that has a non-commercial incentive and uses the work of another copyright holder in its creation.

### 2.6.1 Research gaps

The primary research gaps that have been identified, and will be met by this research, are as follows:

- Theoretical:
  - within the utilitarian perspective on copyright, not enough focus has been paid to non-profit maximising production within fandom
- Doctrinal:
  - Fanfiction and user-generated content is discussed at length in US copyright literature, but the research undertaken into constituent elements (copyright in characters, copyright in settings, and the application of the fair dealing exception) here in the UK has been lacking in depth.
- Methodological:

- Empirical research into the incidence of fanfiction and trends in production, especially in comparison with sales data for fiction has yet to be carried out within UK or US copyright research.

### 3. “The Gasses of Digital Expression”<sup>1</sup> Characters and Locations in a Digital Age - Indistinct Ideas or Elucidated Expressions?

#### 3.1 Introduction

“Haven't Luke Skywalker and Santa Claus affected your lives more than most real people in this room?...And the same could be said of Bugs Bunny and Superman and Harry Potter. They've changed my life, changed the way I act on the Earth. Doesn't that make them kind of "real"? They might be imaginary, but they're more important than most of us here. And they're all gonna be around long after we're dead. So in a way, those things are more realer than any of us.”<sup>2</sup>

Characters in the current cultural age are highly important. For many people, the strong links they form with fictional characters are analogous to how they relate to their family members<sup>3</sup>. Moral dilemmas played out on the screen influence how fans interact with people in their daily life. Characters also guide how fans interact with media, whether that be a tightly organised and regulated meet-and-greet at a convention or through purchase of authorised merchandise. However, fans have always found a way to interact with characters (and locations, such as the TARDIS or Tattoine) outside of these places. They discuss them in forums, and scour canon writings for hints as to character development. Copyright holders promote this as a method of engaging with potential consumers. Yet a further category of fan goes beyond this, and interacts with these literary creations and elements as a form of ‘play’. They draw fanart, create fanvids and fanfiction - all using characters and locations from copyrighted works. Characters ‘affect their lives’ more than most, and it only seems fair that they are permitted to interact in this way with these imaginary friends and foes.

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<sup>1</sup> John Perry Barlow, ‘Selling Wine Without Bottles: The Economy of Mind on the Global Net’ (2019) 18 *Duke Law & Technology Review* 8, 10.

<sup>2</sup> ‘Imaginationland Episode III’, *South Park* (31 October 2007).

<sup>3</sup> J Cohen, ‘Audience Identification with Media Characters’ (2006) 13 *Psychology of Entertainment* 183.

There is a second group of people that interact with characters, but in a different way, who must be discussed when talking about copyright and literary elements such as characters. These people are the meme creators, who use characters to make a cultural point. Characters, for these creators, are shorthand for the works they appear in, or a specific character type. These memes can be highly important culturally - images of Winnie the Pooh have been used in protests against the Chinese Communist Party, for example<sup>4</sup>. More broadly, memes are used to create cultural connections between internet users. They require the use of characters and locations that are so successful they are known worldwide. Yet, it is these characters that are likely to be of most value to their creators and licence-holders. Can, and should, copyright apply to these types of work? While the focus of this chapter (and thesis) is fanfiction, memes offer a useful parallel to frame the arguments given.

The following analysis will agree that certain characters, like Luke Skywalker, Santa, Bugs Bunny and Superman, are 'real' in the sense that they are drawn in an incredibly firm manner. The clarity of the artistic choices made in their creation mean that characters which attain this status of 'real' should be protected as examples of original expression. Beyond that, with the rising importance of the experience economy, characters are becoming more and more important for merchandising reasons. Attaching copyright protection to characters in the UK may strengthen the position of dominant producers and licence-holders at the expense of authors, and may lead to a chilling effect on future innovation. This chilling effect on creativity may actually harm the market for creative works. Increasingly, merchandising is an important part of the reason for creativity, as will be shown in this chapter and the following one on derivative works and licensing.

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<sup>4</sup> 'Hong Kong Protesters Mock Chinese Leader in Defiance of Masks Ban' (*ITV News*) <<https://www.itv.com/news/2019-10-19/hong-kong-protesters-mock-chinese-leader-in-defiance-of-masks-ban/>> accessed 12 June 2020.

Historically, trade mark rights were deemed the right protection for characters that were important enough to protect with intellectual property rights, due to their more commercial nature. The fear may be that books start to be created not as stories, but as mere containers to carry commercial characters – so the market may be narrowed or otherwise harmed. However, these fears have not been realised in the analogous legislature of the US, which is used in this analysis as a comparator.

This chapter seeks to respond to a specific gap in UK copyright literature in relation to unauthorised, non-commercial derivative user-generated content works such as memes and fanfiction. Clarity is sought and given over what literary elements can be protected using copyright - specifically in relation to characters and locations. This is done by using the relatively clear jurisprudence on the lack of protection for plotlines as a comparison, to demonstrate why protection should in certain situations, be extended. This permits for a discussion into the wider element of how the incentive function of copyright<sup>5</sup> operates in an age of ‘spreadable media’<sup>6</sup>.

This chapter examines how *Tixdaq*<sup>7</sup> and *Meltwater*<sup>8</sup> may apply to characters that appear in literary fiction works. It uses a doctrinal review of copyright law in the UK and EU and focuses on the ways in which fanfiction authors and meme creators may use these laws to argue for the publication of their works (and how the authors of the underlying work may protect against them). In this way, I suggest that characters are likely now copyrightable in the UK (or are at least substantial enough that reuse may be considered infringing). The (legal) position of locations is less clear.

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<sup>5</sup> William M Landes and Richard A Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *The Journal of Legal Studies* 325, 325; Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013).

<sup>6</sup> Henry Jenkins, Sam Ford and Joshua Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York University Press 2013).

<sup>7</sup> *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch).

<sup>8</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.

This is an important question to ask at a time when more and more indistinct creations are attempting to be brought within the long and strong protection offered by copyright. For example in recent times the design of a pair of jeans (*Cofemel*), and the taste of cheese (*Levola Hengelo*), have both been litigated on<sup>9</sup> in Europe. The outcome of this trend is that the legislative history in the UK requiring subject matter to appear within specific closed lists in order to be protectable is almost certainly incompatible with European law. The only case on the topic of extending copyright protection to literary characters was decided on this exact point, and thus is probably no longer good law, and should a case come to court is likely to be overruled. This demonstrates the timely nature of this research.

This analysis will be of benefit to many commercial authors, as it will extend protection to areas of their works which are increasingly being commercialised and thus have economic value outside of the works in which they appear. It also provides clarity to derivative creators, as it provides that certain less well-defined characters are open to reuse. In this way the chilling effect of increasing legal protection in this area may be mitigated.

This chapter, and the thesis, focuses on protection for literary characters. Fully drawn out characters in cartoons, manga or anime, are likely to be covered by s4(1)(a) CDPA 1988 as artistic works if reused, as seen in *King Features v Kleeman*<sup>10</sup> where unauthorised copies of Popeye were deemed infringing. The only difficulty for creators of characters of this type would be if there was an interaction with design law under s51 CDPA. However, this is unlikely to be a problem in relation to artistic works in relation to characters. Furthermore, due to the different nature of the tests for artistic works and

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<sup>9</sup> *Cofemel v G-Star Raw* (C-683/17); *Levola Hengelo v Smilde Foods* (C-310/17).

<sup>10</sup> [1941] AC 427

films, this is outside the scope of this thesis, which focuses on characters which require an element of imagination on the part of the reader to conjure up. This element of imagination justifies the focus on this specific type of reuse, as it distinguishes this research from the above settled areas of case law.

This chapter answers the following research question, as laid out in the Introduction:

- 1) What elements of the fictional work are protected by copyright, separate from the wording of the story itself?

### 3.2 Changes in Copyright Protection for Literary Elements

“In truth, in literature...there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature...borrows, and must necessarily borrow, and use much which was well known and used before.”<sup>11</sup>

It is well known that ‘originality’, despite being a requirement for copyright protection, is not a straightforward issue. LJ Story in 1845 accepted that literature stands on the shoulders of what has gone before. This sets up the analysis for this section of the chapter - what can and cannot be ‘borrowed’ in a future work without requiring a licence? In an age when attention can be measured in single images (memes), gifs and TikTok videos, and 1000 word fanfictions, what is being ‘borrowed’ is likely to be a recognisable character or a location only. Can these literary elements be protected by copyright? If so, a substantial amount of the way society interacts online in forums and social media sites such as Facebook, Twitter and Reddit is likely to be de facto infringing.

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<sup>11</sup> Story LJ, *Emerson v Davies* 8 F Cas 615 (D Mass 1845) (No 4436) 619

This analysis requires a specific definition of 'character'. Academic thought in this area states that there are a limited number (between 4-9) of different 'types' of character that appear in most forms of literature, including protagonist, antagonist, confidante, foil, and ego. These 'character types' are often stock characters. Yet it is the way the author creates tension in the work by playing on the different archetypes and the expectations of the reader, and the way individual characteristics are applied to these stock creations, that makes a work engaging<sup>12</sup>. This analysis focuses on these types of 'real' characters only<sup>13</sup>, and argues they should be protected as an example of originality, artistic judgement or choice. The analysis that follows therefore relates to individual characters, not character 'types': 'Harry Potter' rather than 'Protagonist', 'Voldemort' rather than 'Antagonist'.

The growing importance of characters should not be underestimated. The creation of such cultural products as memes, gifs, fanfiction, and fanart has been argued to be an example of the experience economy. Sunder has argued that:

"From Star Wars to Harry Potter, fans do not just want to watch or read their favorite characters. They want to be them. They want to don the robes of Gryffindor, flick their wands, and drink the butterbeer"<sup>14</sup>.

Thus, literary elements are being increasingly commodified and ring-fenced by creators or licence-holders, who are increasingly aware of the income to be generated not only from selling copies of their works, but also of the value of merchandising rights surrounding those works. It could be argued that this is a different incentive for creation for authors than the standard theory of creative incentives, as discussed in the Literature Review. Those that are writing to make money by creating stories merely as containers for characters they think would attract merchandising rights are not creating for the same

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<sup>12</sup> D Fishelov, 'Types of Character, Characteristics of Types', (1990) 24 *Style* 422.

<sup>13</sup> As laid out in the Introduction to this chapter

<sup>14</sup> Madhavi Sunder, 'Intellectual Property in Experience' 117 *Michigan Law Review* 197, 200.

purpose as those writing to create stories that are sellable as fiction works. Those who are selling merchandising rights for characters, usually making use of the trade mark system, are already being rewarded for their creations. It could be argued that they should not be rewarded more than once (i.e. using copyright and trade marks) for the same creation, as the initial investment has been covered. Copyright holders wish to extend their rights into the social interactions and collaborative productions that take place online in the “networked information economy”<sup>15</sup>, in what historically has been a vast untapped and unregulated market of ideas and content<sup>16</sup>. For example, audiences that historically have been mere passive consumers of cultural works are taking on active roles as prosumers<sup>17</sup>, creating user-generated content such as fanfiction. Due to the utility-maximising focus of these groups, and their strong non-commercial nature, many believe it is highly inappropriate for commercially driven copyright holders to attempt to monetise the cultural labour undertaken.

### 3.2.1 Requirements for Protection under Copyright in UK Law

Before investigating whether characters and locations specifically can be copyrighted, I will demonstrate why the stories they appear in are protectable. This will lead to a discussion as to whether the types of derivative works at hand are protectable under copyright.

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<sup>15</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006) 4

<sup>16</sup> P Bouquillion and J Matthews, ‘Collaborative Web and the Cultural Industries System: A Critical Appraisal’ (2012) <<http://www.observatoire-omic.org/fr/art/497/collaborative-web-and-the-cultural-industries-system-a-critical-appraisal.html>> accessed 12 June 2019.

<sup>17</sup> B Nixon, ‘Toward a Political Economy of “Audience Labour” in the Digital Era’ (2014) 12 *Triple C* 713.

### 3.2.1.1 LDMA Works

Copyright in the UK protects “original literary, dramatic, musical or artistic works” and “films”<sup>18</sup>. The definition of LDMA works is clear in the legislation<sup>19</sup>, and covers all works which are likely to spark the types of derivative use that this analysis focuses on - mainly novels, TV programmes and films. It is clear therefore that the works in which the characters and locations appear are at first instance protectable by copyright. The requirement for fixation of these types of work is a moot point, as the discussion focuses on successful characters and locations - without being fixed, they would not be well-known enough and well-defined enough to attract sufficient awareness to be reused in memes, gifs, and fanworks.

### 3.2.1.2 Originality

The ability of creators to use copyright to protect their stories turns on whether the works meet the test for ‘originality’. Given the roots of UK copyright legislation lie in utilitarianism<sup>20</sup> and the principles laid out by Foucault (that no man is an island, creatively speaking)<sup>21</sup>, it is perhaps a surprise that the term is not fleshed out in the statute itself. This has allowed for a certain amount of ‘futureproofing’ of the legislation - whereby new forms of creativity are not closed out from protection merely due to failing to meet the legislative tests.

The definitions of ‘originality’ are found in two other places: other legislation to which the UK is a signatory, and case precedents from both the UK and Europe. These demonstrably conflict due to the differing historical backgrounds of the UK, Europe and the rest of the world. For example, the Berne Convention uses the word in Articles 2(3), 2(5), 8 and 14*bis*, in a sense that is “based on the author’s creativity, that is, the making by the

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<sup>18</sup> Copyright Designs and Patents Act 1988 s(1)(1)(a) and (b)

<sup>19</sup> s3(1) and s5B CDPA 1988

<sup>20</sup> William Dibble, ‘Justifying Intellectual Property’ (1994) 1994 UCL Jurisprudence Review 74.

<sup>21</sup> Michel Foucault, ‘Authorship: What Is an Author?’ (1979) 20 Screen 13.

author of creative choices not dictated by...external constraints”<sup>22</sup>. It, and other European legislation<sup>23</sup>, use the word to mean that the work is the author’s own intellectual creation. This has been further developed by EU jurisprudence in cases such as *Bezpečnostni, Infopaq* and *Football Dataco* to refer to “the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result that is an intellectual creation”<sup>24</sup>, or the way in which the creator’s ‘personal touch’ is shown in the work<sup>25</sup>.

In comparison to the European and Berne definitions of ‘originality’, the UK historically required a non-copied ‘expression of thought’ from the author<sup>26</sup>, which focused on the demonstration of ‘skill, labour and judgement’ (as laid out in *Ladbroke*<sup>27</sup> and *Interlego*<sup>28</sup>). This is built on the idea of copyright as a property right as seen by John Locke<sup>29</sup>. This focus on the thought originating with the author would seem less strict than the European test as it does not permit a discussion of the creativity of the work. However, it is not that simple. The way UK case law handled the originality issue in derivative works for example demonstrates that work beyond mere ‘skill labour and judgement’ must have gone into the secondary piece in order to “impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material”<sup>30</sup>. In practice, this means that choices made by the author are relevant in the

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<sup>22</sup> Daniel J Gervais, ‘The Compatibility of the Skill and Labour Originality Standard with the Berne Convention and the TRIPs Agreement’ (2004) 26 EIPR 75, 80.

<sup>23</sup> Such as Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases

<sup>24</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [45].

<sup>25</sup> *Eva-Maria Painer v Standard Verlags GmbH* (C-145/10).

<sup>26</sup> *University of London Press Ltd v University Tutorial Press Limited* [1916] 2 Ch 601.

<sup>27</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

<sup>28</sup> *Interlego AG v Tyco Industries* [1989] 1 AC 217.

<sup>29</sup> John Locke, *Two Treatises of Government* (for Whitmore and Fenn, and C Brown, 1821).

<sup>30</sup> *Macmillan v Cooper* (1924) 40 TLR 186, 188 [17].

analysis. Indeed, Rahmatian argues that the use of the word ‘judgement’ in the UK test is merely a different way of saying the same thing as ‘artistic choice’:

“The author must apply her judgement to make selections and choices when she creates the work, and through these choices the author expresses original creative ability and thus stamps her personal touch: in this way the result will be an intellectual creation”<sup>31</sup>.

This certainly seems to be the precedent which the UK courts are following, after cases such as *Meltwater*<sup>32</sup>, which brought the UK much closer to the European cases. The UK Intellectual Property Office seems to have accepted this as the test<sup>33</sup>. Practically speaking, how can a creator demonstrate sufficient artistic choice to merit protection for their work? The common theme taken from the cases mentioned is that artistic choice is whatever steps the creator has taken to move from an indistinct idea to an elucidated expression. It is well known in copyright jurisprudence that mere ideas do not attract copyright protection. Ideas require illustration and formalising in order to be entitled to safeguarding as expressions, due to the foundation of copyright protection upon the technology of the printing press. John Perry Barlow argues that

“...the rights of invention and authorship adhered to activities in the physical world. One didn’t get paid for ideas but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not the thought conveyed. In other words, the bottle was protected, not the wine.”<sup>34</sup>

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<sup>31</sup> Andreas Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine under Pressure’ (2013) 44 *International Review of Intellectual Property and Competition Law* 4, 30.

<sup>32</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* (n 8).

<sup>33</sup> ‘Copyright Notice Digital Images, Photographs and the Internet’ (Intellectual Property Office 2014) 1/2014

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481194/c-notice-201401.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf)> accessed 22 October 2019.

<sup>34</sup> John Perry Barlow (n1) 10.

The 'conveyance' is demonstrated clearly by the physical book or film. In the case of an author, the 'conveyance' is shown by the specific word choices they make, or the type of camera, length of cuts or use of edits for TV/film directors<sup>35</sup>. The analysis following will therefore use this 'artistic choices' test to demonstrate that (a) images of literary characters reused in memes and gifs, and (b) literary characters reused in fanfiction, are expressions of artistic choices or judgement and thus attract copyright protection, but that most locations and settings are less likely to meet this test. It appears obvious that the full underlying work (be it novel, TV programme, or film) will pass the tests for both originality and fixation and so will not be discussed further in this section. In comparison, copyright protection specifically for literary elements such as characters or locations has received little legislative attention in the UK.

#### *3.2.1.3 Characters and Locations as LDMA works*

In one of the few UK cases concerning the ability of copyright to be extended to characters or locations as well as the works that contain them, it was argued that literary elements of this type are not suitable for copyright protection as they are not LDMA works within the closed list laid out in S1 CDPA 1988<sup>36</sup>. This would seem to preclude any further analysis of their originality, and avoid the creator being able to claim any protection for them separate from the novel, film or TV programme in which they appear. It would require any case to be decided on the later (but closely related) discussion as to whether they are a 'substantial part' of the story in which they appear, meaning that unauthorised reuse infringes the copyright of the story they appear in<sup>37</sup>.

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<sup>35</sup> However, it is very much harder in the digital age to see how these principles can apply when the expressions trying to be protected do not take place in the physical world, but online or as part of the 'experience economy' - see later sections

<sup>36</sup> *Conan Doyle v London Mystery Magazine Ltd* (1949) 66 RPC 312; *Tyburn Productions Ltd v Conan Doyle* [1991] CH 75, [1990] 1 All ER 909.

<sup>37</sup> See next section

A statement that characters as literary elements are de facto not capable of copyright protection would seem to make it easier for unauthorised derivative reusers, as in theory it places the burden on the copyright holder - it is for them to prove that their character or their location is such a vital part of the story that reusing it takes a 'substantial' part of the underlying work. This would seem to follow the spirit of copyright law - that we do not wish to ringfence too much of the public domain, and that protection should only be given to specified types of work. Other forms of work, such as databases, are protected as needed by *sui generis* rights created through legislation, as policy dictates that they should not receive the same form of protection as the LDMA works. However, there is good reason why this is not the way copyright should handle these types of work - namely, that they are creative works, and thus should be treated as LDMA works, as opposed to other types of less artistic/more technical works such as databases or sound recordings. This can be seen in the different originality standards that apply to LDMA works and the other more technical, entrepreneurial works that copyright protects. The following section will show that characters - and to a lesser extent locations - are sufficiently original that they could be judged as literary works, especially given the trends in recent cases to protect elements such as newspaper headlines. If an 11-word headline is a literary work and attracts protection, surely a well-fleshed out literary character should, too?

#### [3.2.1.4 Originality and Literary Elements](#)

##### [3.2.1.4.1 Plots](#)

To analyse whether characters are sufficiently original to attract copyright protection, as previously stated<sup>38</sup>, requires an investigation of the use of the author's choices and judgement as a form of expression. In order to attract protection separate from the literary work that gives them life, the character or place must go beyond an

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<sup>38</sup> In the above section on 'Originality'

indistinct idea and be fixed in some form of elucidated expression. This idea/expression distinction, that operates to define originality, has fixed legislative history in the UK, dating back to the seminal case of *University of London Press*. This ties in to the theme of artistic choices already discussed - in order to clearly express a work, the creator needs to make clear artistic choices. This demonstrates why a similar literary element - the plot - does not attract copyright protection in UK law. Storylines and plots struggle to demonstrate a clear expression of artistic choice beyond that of an idea, because they do not show choices made by the specific author. They are either insufficiently described by the author<sup>39</sup>, or the author struggles to show that they have made sufficient changes to the plot to move it beyond a stock type of story<sup>40</sup>. This reflects the standard policy that copyright should be used to incentivise future production, and that permitting creators to use copyright to monopolise the expression of standard ideas and themes, as demonstrated by many plotlines, would preclude this.

#### 3.2.1.4.2 Originality and Locations

The originality test plays out differently for locations or settings. These, like plotlines, are mostly deemed to be 'stock' or basic, and will fail to go beyond indistinct ideas. Many young adult novels are set in schools, and many thrillers take place in or around governmental departments. An author must therefore be highly specific in order to attract protection for their location - and must use completely new locations that they have dreamed up, rather than setting their works in pre-existing places such as MI5 or London. In many cases, this is unlikely to be an issue as the location is not of such central importance to the author as to raise issues leading to a case for infringement<sup>41</sup>. However,

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<sup>39</sup> *Baigent and Leigh v The Random House Group* [2007] EWCA Civ 247.

<sup>40</sup> Christopher Booker, *The Seven Basic Plots: Why We Tell Stories* (Continuum 2004). See also the *scènes à faire* doctrine in the US - for example *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.), cert. denied, 476 U.S. 1159 (1986)

<sup>41</sup> And, where locations are highly important to authors, they can use trademark protection instead - I use Hogwarts in the following analysis, which has been trademarked in the UK and the EU (under number EU001301761) by Warner Bros (the film producers and owners of the related theme parks).

for example after seven Harry Potter novels, this analysis would lead to the conclusion that Hogwarts has been sufficiently described (and therefore demonstrates sufficient artistic choices) by JK Rowling to be protectable under copyright. It is described so well geographically that readers know it is somewhere in the Highlands of Scotland<sup>42</sup>. By authorising a film adaptation of the books, and being highly involved personally in the production choices, it may also be argued that the physical layout and look of Hogwarts has also been sufficiently delineated to be protectable. This is an outlying example however, and most fictional location will fail the 'expression of artistic choice' test and thus not attract their own copyright protection. Only on rare occasions, such as if floor plans or pictures, or strict literary descriptions are provided, will locations attract protection. The only genre of novel that might attract more protection for locations is science-fantasy, where the story takes place in a different universe and artistic choices related to physics, biology and chemistry are clearly demonstrated. All other literary locations are likely to be unprotectable under this test. If locations are reused, for example in alternate reality (AU) fanfiction<sup>43</sup>, it would be up to the author to prove that they are such a 'substantial part' of the underlying story that their reuse amounts to infringement. In reality however this is unlikely to matter much. In most cases, if the location is being taken, it is probably also being reused alongside characters from that story, in which case the analysis would turn on the clearer point as to the ability of those characters to attract protection.

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The protection, and economic reward, is retained by Warner Bros rather than JK Rowling, which demonstrates the commercial rather than creative focus of trademark protection. It is fair to say that most authors do not register their locations or characters as trademarks when they create the works, as it requires a financial investment which at the time of creation they are unaware of whether they will recoup.

<sup>42</sup> The Hogwarts Express takes a day to travel the distance from Kings Cross, London to Hogwarts, and passes a real-world town (Peebles, near Edinburgh) on its journey.

<sup>43</sup> For example, popular locations for crossover fanfiction are the TARDIS from Dr Who or The Shire from Lord of the Rings

### 3.2.1.4.3 Originality and Characters

Copyright of characters as a literary element has received little legislative attention in the UK, in direct contrast to the US. However, as part of the move towards protecting separate elements of written work demonstrated in *Meltwater*<sup>44</sup>, an analogy could be drawn that states characters should also be protected as an element of the work they appear in. It is important that this is the approach taken, rather than seeing the characters as a subset of the writing of the story itself, as after *Hyperion Records*<sup>45</sup>, subsistence of copyright in a work must take into account the entirety of the work. The argument that characters are important elements of the work rather than merely sections of wording has support from many prominent literary theorists and philosophers<sup>46</sup> and follows the legal precedent set down in UK cases to date.

The infrequent cases in the UK in relation to copyright and characters approach the issue in one of two broad ways, only one of which is now good law. As stated above, in *Conan Doyle*<sup>47</sup> and *Tyburn Productions Ltd*<sup>48</sup>, the judge refused to grant copyright protection to the character of Sherlock Holmes because he could not see how to include a literary character within the closed list of works protected by copyright in s1 CDPA 1988, and therefore refused to discuss the originality element. As already stated, after the ruling in *Meltwater*, this is no longer good law. Rather, the somewhat older ruling from *Kelly v*

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<sup>44</sup> Proudman J in *Newspaper Licencing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099, at para 71 stated “In my opinion headlines are capable of being literary works, whether independently or as part of articles to which they relate”. Affirmed [2011] EWCA Civ 890, 22.

<sup>45</sup> *Hyperion Records v Sawkins* [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688).

<sup>46</sup> Reina Hayaki, ‘Fictional Characters as Abstract Objects: Some Questions’ (2009) 46 *American Philosophical Quarterly* 141; Paisley Nathan Livingston and Andrea Sauchelli, ‘Philosophical Perspectives on Fictional Characters’ (2011) 42 *New Literary History* 337; Ioan-Radu Motoarcă, ‘Are Fictional Characters and Literary Works Ontologically on a Par?’ [2016] *Pacific Philosophical Quarterly* <<http://doi.wiley.com/10.1111/papq.12182>> accessed 18 June 2018; Enrico Terrone, ‘On Fictional Characters as Types’ (2017) 57 *The British Journal of Aesthetics* 161.

<sup>47</sup> *Conan Doyle v London Mystery Magazine Ltd* (n 35)

<sup>48</sup> *Tyburn Productions Ltd v Conan Doyle* (n 35)

*Cinema Houses*<sup>49</sup> has probably been resurrected, whereby judgement on the availability of copyright protection for the character at hand was deemed to turn on whether the character was sufficiently depicted (i.e. under today's parlance, whether sufficient 'judgement' or 'artistic choices' had been demonstrated). While in that case, the judge deemed the characters too trivial to merit protection, he admitted that in a different case with more accurately portrayed characters, he may have made a different decision:

"If, for instance, we found a modern playwright creating a character as distinctive and remarkable...as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion"<sup>50</sup>.

The distinction between James Bond and Jason Bourne illuminates this point. Both are described as cold, hard men who have no issues killing others while in the service of a governmental or quasi-governmental body. They have the same initials and similar sounding names. They are both examples of a male protagonist operating in a thriller novel. However, they also have specific elements and characteristics that distinguish them both from each other, and from the stock male character within those types of novel. Differences such as nationality, conscience and background. Bond is a British character who never develops much of a sense of right or wrong, merely follows orders as given, based on a background as an orphan. His lack of respect for authority and womanising ways are begun at Eton, where he is expelled for a dalliance with a maid. He ends up working for MI5. In comparison, Bourne is American, develops a strong sense of conscience

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<sup>49</sup> *Kelly v Cinema Houses* (In MacGillivray, EJ, "Copyright Cases 1928-35, Vol 6 (Publishers Association 1936) at 362).

<sup>50</sup> 'The Six Detectives - Copyright' (*CopyrightUser*, 23 May 2017)

<<http://www.copyrightuser.org/educate/the-game-is-on/episode-2-case-file-21/>> accessed 3 December 2017. The issue of commercial derivatives, and the potential value of the harm done to the original by unauthorised derivatives, is covered in the next chapter, and in Chapter 7.

over the course of his storyline, and is much more honourable in his dealings with women and as a whole is much more family oriented - he has a wife and child at one point, and a brother is also part of the plot. These choices by Ian Fleming and Robert Ludlum clearly ensure that it would be clear which character is which, and they are not interchangeable.

This struggle to be seen as sufficiently described or different to what has gone before provides the distinction between the two types of work listed above (characters that appear in memes/gifs, and characters used within fanfiction and locations as a whole). Characters that are popular enough to be shared in memes or gifs are likely to do so because they are sufficiently different to what has gone before, and are sufficiently obvious as to what they are, that they call to mind a specific section of media - indeed, that is the whole point behind their existence<sup>51</sup>. An example is given below:

	
<i>Example A: The Shocked Pikachu Meme</i>	<i>Example B: The Distracted Boyfriend Meme</i>

Example A uses a famous character (Pikachu, from the Pokemon series). In distinction, Example B uses a stock image of unknown models. In Example A, the meme works precisely because it uses a character that is well known, and whose characteristics

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<sup>51</sup> The trademark issues relating to these images are outside the scope of this discussion

are being played upon to make a cultural point. In Example B, the characters being used are not known, and do not have sufficiently well-delineated characteristics beyond what is being played upon in the image itself. While both images attract copyright as images, the Pikachu character has copyright protection that has arisen from its previous existence in the Pokemon franchise, while the characters in Example B do not. There are sufficient artistic choices used in the creation of the Pikachu character to meet the test (such as character traits, voice, colour, Pokemon sub-type). However there are few artistic choices demonstrable in the characters in Example B, other than those which are 'stock' characteristics (indeed, that is why the meme is shared - precisely because the idea of a distracted boyfriend is so common).

### 3.3 Copyright and Characters in the US: A Comparison

The US has a detailed history of cases (and learned opinion<sup>52</sup>) on the ability of copyright owners to copyright the characters they create separate from the story in which they appear. This would seem to support the argument that authors are better protected against derivative reuses of their works, given the specific protection given by the courts. However, although on principle this type of protection is permitted, the courts have repeatedly redrawn the boundaries meaning the protection has been weakened by a lack of legal certainty. While in principle this type of protection is optimal for authors, for true protection to be given there must be a clear legal test. This confusion can be seen from the following overview of the history of character copyright in the US (while locations are not discussed, the same arguments would apply as for characters).

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<sup>52</sup> Leon Kellman, 'The Legal Protection of Fictional Characters' (1958) 25 Brooklyn Law Review 3; Franklin Waldheim, 'Characters - May They Be Kidnapped Part I' (1964) 12 Bulletin of the Copyright Society of the U.S.A. 210; Zahr K Said, 'Fixing Copyright in Characters: Literary Perspectives on a Legal Problem' (2013) 35 Cardozo Law Review 769.

The test for originality in US copyright is that laid out in *Feist*<sup>53</sup>: for a work to be copyrightable, it must be “a word of authorship” with “some minimal degree of creativity” that goes beyond ‘sweat of the brow’<sup>54</sup>. How then does this apply to protection for characters and locations? The first case in which characters were discussed separate from the story in which they appear in the US was *Nichols*<sup>55</sup> where Learned Hand laid out the ‘sufficient delineation’ test, whereby “characters can only be protected if they are sufficiently developed enough in the underlying work”<sup>56</sup>. This would be a reasonably easy test for characters on TV, in cartoons or in films to achieve, since they have clear descriptive elements and fixed attributes. Literary characters would need much more work to be capable of achieving this. This was followed in *Detective Comics*<sup>57</sup>, where it was held that the abstract outlines of fictional characters are not copyrightable, but that developed creative specifics are. In that case, the outcome suggested that derivative fiction of a superhero wearing a cape, with a name ending in ‘-man’ would be allowed, but that of Clark Kent/Kal-El having a relationship with Lois Lane and working at a newspaper would not, as those characteristics were developed enough for protection.

However, this test has not been fully accepted judicially and many further tests have been described. This was started by the ruling in *Warner Bros v Columbia*<sup>58</sup>, where a different test was laid out – that of the ‘story being told’. In this case, it was held that there can only be copyright protection for a character when that character is the embodiment of the whole story being told. In this case, if the character could exist outside of the plot of the story, they may attract copyright protection. If not, they were just “the chessman in

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<sup>53</sup> *Feist Publications, Inc, v Rural Telephone Service Co* (499 US 340).

<sup>54</sup> *ibid* [38,41,29].

<sup>55</sup> *Nichols v United Pictures Corp* (45 F2d 119 (2d Cir)).

<sup>56</sup> Meredith McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 B.U. J. Sci & Tech. L. 433, 446.

<sup>57</sup> *Detective Comics Inc v Bruns Publications Inc* (111 F2d 432 2d Cir).

<sup>58</sup> *Warner Bros Pictures Inc v Columbia Broad Sys Inc* (216 F2d 945 (9th Cir)).

the game of telling the story”<sup>59</sup> and they would not be copyrighted separate from the underlying work. This seems to have strengthened the protection of characters, and some scholars argue that this was overstepping the boundaries between copyright and other forms of intellectual property protection, such as trademark<sup>60</sup>.

The *Warner Bros* test in some ways mirrors the protection in the EU of works that show sufficient artistic choice. The test requires that characters are sufficiently well drawn out to have consistent and clear descriptive characteristics, that do not change except where necessary for the storyline<sup>61</sup>.

This was confused further by another test being drawn out in *Sid & Marty Krofft*<sup>62</sup>—that of the ‘look and feel’ test, which was then followed in *Air Pirates*<sup>63</sup>. Although dicta, the judge in *Air Pirates* stated that the ‘story being told’ test should be limited to literary characters, and that the ‘look and feel’ test should apply in all other cases. Thus, it is copyright infringement to copy Disney character images even separate from their appearance in the underlying work. This would seem to block any literary derivative works of Disney characters being published.

In the 1980s, character protection was extended to reach its high point, before receding, and finally being extended again. Firstly, further examples of how characters could attract perception were laid out in *United Artists v Ford*<sup>64</sup> where the idea of substantial similarity and the look and feel test was further developed and such things as personality, gait, shade, and theme music could all make a character distinguishable

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<sup>59</sup> *ibid* 16.

<sup>60</sup> Michael Todd Helfand, ‘When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters’ (1992) 44 *Stanford Law Review* 623, 641, 644.

<sup>61</sup> *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir.2008) and *DC Comics v. Towle*, 989 F. Supp. 2d 948 (C.D. Cal. 2013).

<sup>62</sup> *Sid & Marty Krofft Television Prod v McDonalds Corp* 562 F2d 1157,1169 (9th Cir, 1977).

<sup>63</sup> *Walt Disney v Air Pirates* 581 F2d 751 CA Cal [1978].

<sup>64</sup> *United Artists Corporation v Ford Motor Company* 483 F Supp 89 [1980].

enough to satisfy the test for protection. However, following that in *Warner Bros v American Broadcasting*<sup>65</sup> it was held that the copyright protection for characters does not arise distinct from that for the underlying work. At the end of that decade however, copyright was extended again such that there could be infringement of a character as part of a group rather than individually<sup>66</sup>.

Protection fluctuated after cases such as *American Honda*<sup>67</sup> and *Castle Rock*, which stated that there needed to be substantial similarity between the two works, reaffirming the distinction between the use of expressions (which are not permitted) and ideas (which are)<sup>68</sup>. To fully analyse whether works were substantially similar, the “total concept and feel” test laid out originally in *Sid & Marty Krofft* was further defined as looking at “the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting of the original and allegedly infringing works”<sup>69</sup>.

The importance of the interaction between the ‘sufficient delineation’ test and the ‘story being told’ test has recently been seen in *Daniels v Walt Disney*<sup>70</sup>, where it was held that both tests should be used when determining protection for characters. Following these judgements, it is likely that the majority of main characters in underlying works of fiction will be considered under US law to attract copyright protection, whether used in memes, gifs or fanfiction. This has led to scholars referring to “courts....granting an alarmingly expansive level of protection to characters and, in so doing, began to commingle the separate doctrines of copyright and trademark”<sup>71</sup>.

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<sup>65</sup> *Warner Bros v American Broadcasting* 720 F2d 231 [1983].

<sup>66</sup> *Anderson v Stallone* 11 USPQ2D 1161 [1989].

<sup>67</sup> *Metro-Goldwyn Mayer v American Honda Corp* (900 F Supp 1287, 1296 (CD Cal)).

<sup>68</sup> *Castle Rock Entertainment Inc v Carol Publishing Group* 150 F3d 132 (2d Cir 1998) [138].

<sup>69</sup> *ibid* 140.

<sup>70</sup> *Daniels v. Walt Disney Co.*, Case No. 18-55635 (9th Cir. Mar. 16, 2020)

<sup>71</sup> Michael Todd Helfand (n59) 644.

This is an issue for legal certainty, as authors and users may become confused about exactly how their works are protected, and may lead to unnecessary claims being brought<sup>72</sup>, or derivative works that would be allowable being blocked from publication by powerful publishers. Further, using copyright protection to protect commercial characters (such as in the *Disney* case) can be argued to harm the market as a whole as it incentivises production of sequels/prequels that are seen as less commercially risky for producers or publishers. This has a knock-on effect of decreasing diversity in the market – as can be seen by the current importance of follow-on works in the US film market<sup>73</sup>.

It can be concluded that the fictional novel or TV programme or film that contains the character is clearly protectable by copyright in the US, and is highly likely to be protectable by copyright in the UK. The position of characters and locations within the work as literary elements is less clear. Where images of characters are used, and the reason for that use is in relation to some specific characteristic of the character itself, such as the 'Shocked Pikachu' meme, it may demonstrate that sufficient artistic choices or judgement has been used to render the character protectable outside of the story or novel in which they appear. Furthermore, literary characters that are sufficiently well described to be recognised outside their storyline (to reach the definition of 'real'<sup>74</sup>) are likely to attract copyright protection as literary elements, so long as they meet that 'originality' test and are substantially described. Locations may also succeed under this test, but it is less likely. Finally, it is important to note that this analysis only applies to well-fleshed out, main characters. The same arguments apply for all characters in a work, and it is much less likely that secondary, tertiary or background characters will meet the artistic choice

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<sup>72</sup> This is especially important for self-published authors who may not be able to afford legal representation to fight an infringement claim, even if the claim would later be dismissed or lose in court.

<sup>73</sup> See Chapter 7

<sup>74</sup> As discussed in the introduction to this chapter

originality standard<sup>75</sup>. In essence, while it is less clear due to the lack of case law on the subject, it broadly follows the American jurisprudence in this area.

### 3.4 How is copyright functioning in a Digital Age?

Extending copyright to cover 'real' characters and locations would have little effect if it were not also part of an ongoing trend towards the digitalisation of content - and the sharing of content online. This is the issue facing legislatures and content creators in a digital age:

"Humanity now seems bent on creating a world economy primarily based on goods which take no material form. In doing so, we may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others may find in their works."<sup>76</sup>

By turning physical pages and ink into bits and bytes on a webpage, content is becoming much less solid and hard to contain, both physically and metaphysically. Fanfiction and memes are examples of the way creative content 'leaks' from authorised containers and spreads across the net. Attaching copyright protection to content such as characters and locations ought to operate as a closed container, keeping them firmly within their creator's control. In practice, following established literary theory, this cannot be the case. As soon as works are released, theorists such as Barthes argue, the author loses control over them<sup>77</sup>. Therefore, copyright protection has at its heart the protection of the ability to commoditise the creative work, rather than the ability to control it completely - Barlow's idea of 'fair reward'. It does this by preventing certain reuses of copyrighted

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<sup>75</sup> Except, possibly as a nominative group. For example, the students that make up 'Dumbledore's Army' in Harry Potter would be protected as a group, even if many of the students were too indistinct to meet the test themselves individually.

<sup>76</sup> John Perry Barlow (n1) 13.

<sup>77</sup> Roland Barthes, 'The Death of the Author' in S Heath (tr), *Image-Music-Text* (Fontana 1977); Roland Barthes, 'From Work to Text' in Stephen Heath (ed), Stephen Heath (tr), *Image-Music-Text* (Hill & Wang 1977) 160..

content. As will be demonstrated in subsequent chapters, the trend for tightly protecting content is also seen in the way case law and legislation handles the dealings with the work reserved to the creator.

### 3.5 Conclusion: Copyright and the Contradiction

Characters and settings “might be imaginary, but they’re more important”<sup>78</sup> than many other forms of literary element (such as plots). They influence behaviour and guide consumers through hard times, and can operate as much-needed friends in time of crisis<sup>79</sup>. Many, such as Bugs Bunny or Luke Skywalker, attain life outside the works that birthed them, and may even be called ‘real’. They may also be much loved by fans, even where they appear in stories where fans disagree with the plot – indeed, this is possibly why many fans write fanfiction<sup>80</sup>. Thus, characters and locations may even be more important commercially than plots. To achieve this level of existence, their author or creator must have made a significant amount of artistic choices or judgements, and Thus in these specified cases the characters ought to achieve protection as individual elements, following the logic laid out in cases such as *Infopaq*, *Cofemel*, and *Levola Hengelo*<sup>81</sup>. Beyond this, as will be seen in the next chapter, they attract a secondary level of protection as ‘substantial parts’ of the underlying work, so reuse in fanfiction is in almost all cases going to be deemed an infringing copy of that work under s16 CDPA, even if the EU precedents from the cases above are not followed.

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<sup>78</sup> ‘Imaginationland Episode III’ (n2)

<sup>79</sup> Such as the current political upheaval occurring around the world, when minorities are feeling particularly pressured and under stress (Joan E Greve Martin Belam, Alex Hern and Ben Quinn, ‘George Floyd: US Gears up for Weekend of Black Lives Matter Protests – Live Updates’ *The Guardian* (12 June 2020) <<https://www.theguardian.com/us-news/live/2020/jun/12/george-floyd-protests-black-lives-matter-donald-trump-live>> accessed 12 June 2020.)

<sup>80</sup> Christine Handley, ‘Distressing Damsels: Narrative Critique and Reinterpretation in Star Wars Fanfiction’, *Fan Culture: Theory/Practice* (Cambridge Scholars Publishing 2012); Anne Jamison, ‘Love Is a Much More Viscious Motivator’ in Anne Jamison, *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013).

<sup>81</sup> *Cofemel v G-Star Raw* (C-683/17); *Levola Hengelo v Smilde Foods* (C-310/17).

This analysis is becoming highly important in the digital age, as an example of the somewhat misguided way copyright functions. The “greatest challenge” for any form of copyright regime in a digital age, is how it operates in “the age of social production”<sup>82</sup>. Due to a lack of legal clarity on topics such as whether copyright can in fact be used to protect characters and settings, the rights of ownership in these literary elements have been left in “such an ambiguous condition that once again property adheres to those who can muster the largest armies...of lawyers”<sup>83</sup>. Thus, copyright holders and license-holders for the underlying work have been able to undertake a ‘land grab’ of part of the public domain (characters and locations), using jurisprudence to encroach on commons best left to the masses. This ‘land grab’ will be investigated in the following chapter, which analyses whether derivative reuses such as fanfiction amount to infringing copies of the underlying copyrighted works.

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<sup>82</sup> Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013) 346.

<sup>83</sup> John Perry Barlow (n1) 14.

## 4. Cumulative Creativity and Derivative Drama: What Does Fanfiction Infringe?

### 4.1 Introduction

Having demonstrated in the previous chapter that copyright protection could in theory be extended to literary elements such as characters and locations, I will now turn to the types of reuses that are made of these elements to demonstrate how they operate as an important case study for how copyright should apply to works in the digital environment. For clarity's sake, it is important at the start of this analysis to recognise that there are two types of people who may interact with copyrighted works, and against whom copyright holders (and alongside them, licence holders) may wish to pursue action. These two groups of people are fanfiction writers themselves, and those who run websites which host fanfiction material. Each group has different incentives to carry out their interactions with the copyrighted work, as recognised by the CDPA 1988 in the different rights<sup>1</sup> that might be infringed. The actions restricted to copyright holders (and licence-holders) are detailed in s16(1) CDPA 1988, and apply to this analysis as follows:

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<sup>1</sup> i.e Primary/secondary infringement

<b>Rights potentially infringed by fanfiction authors</b>	<b>Right potentially infringed by fanfiction archive websites</b>
Economic Rights: Right to copy the work (s16(1)(a) and s17 CDPA 1988)	Right to communicate the work to the public (s16(1)(d) and s20 CDPA 1988) <sup>2</sup>
Economic Rights: Right to make an adaptation (s16(1)(e) and s21 CDPA 1988)	
Moral Rights: Integrity (s80 CDPA 1988)	
Moral Rights: Paternity (s77 CDPA 1988)	
Moral Rights: False Attribution (s84 CDPA 1988)	

This chapter demonstrates that fanfiction is a type of user-generated content (UGC), and that these types of reuses do in fact infringe copyright, as copies of the copyrighted characters and locations themselves. Alternatively, even if the analysis in the previous chapter regarding the application of copyright to literary elements is not accepted, it is likely that most fanfiction would still infringe the copyright in the underlying work, by substantially taking from that underlying work. The adaptation right is also analysed to show that fanfiction is substantially less likely to infringe that right - in comparison to the US derivative work right. The analysis then accounts for the emotional reasons that authors may wish to prevent their works being altered - and whether any of these reasons amounts to a valid claim under the moral rights regime. Finally, it is concluded that literary derivative UGC works which make use of primary characters or locations that meet the previous chapter's definition of 'real'<sup>3</sup> are highly likely to infringe

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<sup>2</sup> See Chapter 7

<sup>3</sup> See Chapter 3.1

copyright in that first work, although it is less clear whether they will infringe the adaptation right.

This chapter therefore seeks to answer the following research questions:

- Given that copyright can be used to protect the ‘real’ characters and locations within the underlying story as well as the story itself, what derivative uses of those works infringe the economic rights of the author?
- Given the emotional link between authors and the works they create, do derivative UGC uses such as fanfiction infringe the moral rights of the author?
- Which rights should authors rely on if they wish to prevent fanfiction being written of their work?

## 4.2 Cumulative Creativity

Standard copyright theory focuses on the importance of the individual creator to the creation of works, and the development of culture as a whole. Creation relies upon sunk costs incurred by authors and publishers. To incentivise the creation of future works, copyright must be used to ensure a monopoly price can be charged for as long as possible on a successful work<sup>4</sup>. This applies to the different ‘cast members’ of this thesis<sup>5</sup> in different ways. For authors, the theory states that it is only the sure knowledge that success will bring in a worthwhile income that incentivises an author to create - and that they will be able to protect their works from copying. Their incentive is based mainly in the success of direct sales of that individual work. However, that success is directly reliant on

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<sup>4</sup> Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013); Robert M Hurt and Robert M Schuchman, ‘The Economic Rationale of Copyright’ (1966) 56 *The American Economic Review* 421; William M Landes and Richard A Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *The Journal of Legal Studies* 325; Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167

<sup>5</sup> See Chapter 1.2

the willingness of publishers to produce their work commercially<sup>6</sup>. Given the high level of uncertainty in the market as to what will or won't be commercially successful<sup>7</sup>, copyright ensures for publishers that the monopoly price charged on successful works covers the cost of failures. Copyright law assumes non-critical derivative reuses, such as fanfiction, are substitutes rather than complements and are thus harmful due to the above theories<sup>8</sup>. This is strongly supported by the move towards the 'experience economy', where derivative uses are being increasingly monetised<sup>9</sup>. Due to this, the income for authors and publishers is moving away from direct sales (royalties) and towards licensing and adaptation rights<sup>10</sup>. Strong copyright protection is therefore essential to promote creation of high quality works. It ensures the effort authors and publishers put into producing interesting characters and locations and well-crafted stories is sufficiently rewarded.

However, there are issues with these theories. The above models focus too strongly on incentives for individual creators, and the effect the market economy has on them<sup>11</sup>. There are actually two other distinct models for creation of cultural works – the gift economy<sup>12</sup> and patronage. Also, these theories ignore the fact that creativity is historically collective and has always relied upon non-economic, community-driven incentives - such as peer production, produsage, and ideas of distributed mentoring<sup>13</sup>. It is merely the digital

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<sup>6</sup> Unless they are willing to self-publish, which is a growing section of the market –see Morten Hviid, Sofia Izquierdo-Sanchez and Sabine Jacques, 'From Publishers to Self-Publishing: Disruptive Effects in the Book Industry' (2019) 26 *International Journal of the Economics of Business* 355.

<sup>7</sup> Joel Waldfogel, *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture* (Princeton University Press 2018).

<sup>8</sup> Landes and Posner (n 4).

<sup>9</sup> Madhavi Sunder, 'Intellectual Property in Experience' (2018) 117 *Michigan Law Review* 197

<sup>10</sup> Ruth Towse, Christian Handke and Paul Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5 *Review of Economic Research on Copyright Issues* 1.

<sup>11</sup> Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar Publishing 2018).

<sup>12</sup> Lewis Hyde, *The Gift: How the Creative Spirit Transforms the World* (Cannogate Books 2012).

<sup>13</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006); Cecilia Rodriguez Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019); Julie Campbell and others, 'Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities' (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 14 February 2017; *ibid*; Axel Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Produsage*

method of creativity that has changed, not the reasons for that creativity. By allowing these digital reuses of works, we may be lowering barriers to entry to the cultural market, such as gatekeeping, that is traditionally done by publishing houses. In doing so, we lower costs of production and democratise talent<sup>14</sup> by opening the market to self-publication.

Fanfiction operates as a case study for these new theories of copyright, and will be used to test the application of copyright theory to a digital arena. It is a part of a growing movement referred to as user-generated content - content created by users of websites, who do so for pleasure rather than employment. This informal type of use is markedly different to most commercial forms of use of copyright works, and has been referred to as the “most significant development of the twenty-first century”<sup>15</sup>. As I will show, the old ideas regarding the incentive function of copyright do not apply to this type of non-commercial creativity, as it is driven by an idea of maximising utility rather than profit. UGC is therefore a “disruptive” force, which arises from the “creativity of individual users newly enabled as expressive agents by digital technologies”<sup>16</sup>. The ‘users’ in question are “non-professional”<sup>17</sup> “ordinary, everyday individuals, both young and old alike”<sup>18</sup>, who may share

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(Peter Lang 2008); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008); Mar Guerrero-Pico, Maria-Jose Masanet and Carlos A Scolari, ‘Toward a Typology of Young Producers: Teenagers’ Transmedia Skills, Media Production, and Narrative and Aesthetic Appreciation’ [2018] *New Media & Society* 21(2) 336.

<sup>14</sup> Andrew Keen, *The Cult of the Amateur: How Blogs, Myspace, YouTube and the Rest of Today’s User-Generated Media Are Destroying Our Economy, Our Culture, and Our Values* (Revised paperback ed, repr, Nicholas Brealey Publ 2011); Waldfoegel (n 7)

<sup>15</sup> Edward Lee, ‘Warming Up to User-Generated Content’ [2008] *University of Illinois Law Review* 1459, 1460

<sup>16</sup> Ramon Lobato, Julian Thomas and Dan Hunter, ‘Histories of User-Generated Content: Between Formal and Informal Media Economies’ in Dan Hunter and others (eds), *Amateur Media* (Routledge 2013) 3.

<sup>17</sup> Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2008) 11 *Vanderbilt Journal of Entertainment and Technology Law* 841, 846

<sup>18</sup> Lee (n 15) 1499–1500.

similar outlooks on the ways they should be permitted to consume and create culture, albeit for different reasons.

Young, post-Millennial UGC creators may have never been offline. These are people in their early teens who have never known a non-connected, non-technical existence, and for whom this type of creation and sharing is their normal. These users grew up with computers and tablets in their schools and in their bedrooms; using the web, word-processing, video-creating and editing software daily and as part of both their education and their leisure activities. Schools use these types of software as part of a form of pedagogy<sup>19</sup> in all subjects, not just the creative arts – so young users have a different outlook on the usage of technology to develop ideas and information than those who grew up in different eras. Importantly, they are too young to have experienced the peer-to-peer networking phenomenon and the heavy-handed ring fencing of creative content that was created by the litigious nature of some content providers and copyright holders.

Equally, while many older users may pre-date the Internet, they may be used to sharing their ideas on culture based in experiences of creation within book clubs, music groups and crafting groups<sup>20</sup>. Both young and old users stream, comment and share content as a basic form of communication within what Lessig referred to as the read/write culture<sup>21</sup>, rather than to generate income, and therefore do not fit within the standard copyright equation that assumes those who steal from previous works do so for nefarious rather than advantageous reasons. These users are either unable or unwilling to pay for a

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<sup>19</sup> Neil Mercer, Sara Hennessy and Paul Warwick, 'Dialogue, Thinking Together and Digital Technology in the Classroom: Some Educational Implications of a Continuing Line of Inquiry' (2019) 97 *International Journal of Educational Research* 187.

<sup>20</sup> These groups are growing again in importance, reinforcing this idea of shared cultural experiences through creation Hannah Marriott, 'A Stitch in Time: The Very Modern World of the Instagram Sewing Circle' *The Guardian* (20 August 2015) <<https://www.theguardian.com/fashion/2015/aug/20/a-stitch-in-time-the-very-modern-world-of-the-instagram-sewing-circle>> accessed 15 June 2020.

<sup>21</sup> Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

license to reuse the characters, locations and other copyrighted materials they use, as they are sharing the works for free. Yet, with the growth of platforms such as YouTube and Wattpad, UGC works can be useful to copyright holders, as either a method of marketing<sup>22</sup> or engagement with potential consumers<sup>23</sup>. Thus, the response by copyright holders to UGC and fanfiction has been wary.

New technologies such as personal and mobile computing, broadband connectivity and the internet have had an important effect on creation, innovation and collaboration. Anderson argued in 2013 that “[t]he past ten years have been about discovering new ways to create, invent, and work together on the web. The next ten years will be about applying these lessons to the real world”<sup>24</sup>. While using a network as a place for discussing and engaging with media is not new<sup>25</sup>, the use, reach, and popularity of sites such as Fanfiction.Net has meant that these groups can now share their output and skills development with a much wider group. Thus, the sharing of, and commenting on, fanfiction online is a ‘new way’ for these writers to create, invent, and work together’.

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<sup>22</sup> AK Fox and others, ‘Selfie-Marketing: Exploring Narcissism and Self-Concept in Visual User-Generated Content on Social Media’ (2018) 35 *Journal of Consumer Marketing* 11.

<sup>23</sup> George Ritzer, Paul Dean and Nathan Jurgenson, ‘The Coming of Age of the Prosumer’ (2012) 56 *American Behavioral Scientist* 379; Leisha Jones, ‘Contemporary Bildungsromans and the Prosumer Girl’ (2011) 53 *Criticism* 31; Jack Bratich, ‘User-Generated Discontent: Convergence, Polemology and Dissent’ (2011) 25 *Cultural Studies* 621; S Elizabeth Bird, ‘Are We All Producers Now? Convergence and Media Audience Practices’ (2011) 25 *Cultural Studies* 502; George Ritzer and Nathan Jurgenson, ‘Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital “Prosumer”’ (2010) 10 *Journal of Consumer Culture* 13; Jose Van Dijck, ‘Users like You? Theorizing Agency in User-Generated Content’ (2009) 31 *Media, Culture and Society* 41; Robert V Kozinets, Andrea Hemetsberger and Hope Jensen Schau, ‘The Wisdom of Consumer Crowds: Collective Innovation in the Age of Networked Marketing’ (2008) 28 *Journal of Macromarketing* 339; Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006); Matt Hills, *Fan Cultures* (Routledge 2002).

<sup>24</sup> Chris Anderson, ‘The New Industrial Revolution’, *Makers: The New Industrial Revolution* (Crown Books 2013) 17.

<sup>25</sup> For example, within fandom artistic as well as literary works have been created and shared through offline networks since the 1960s using ‘zines’ Camille Bacon-Smith, ‘Training New Members’, *The Fan Fiction Studies Reader* (University of Iowa Press 2014).

However it is important to note that these methods only appear to function when discussing how fanfiction writers interact with other fanfiction writers<sup>26</sup>, and the incentives behind their behaviours. Sites such as Fanfiction.Net bring together culture and technology to create vast marketplaces for ideas and content<sup>27</sup>, known as the “networked information economy”<sup>28</sup>. This social, cooperative online form of production has created the opportunity for many different forms of cultural labour - for example audience labour, where audiences as passive consumers are replaced by active roles as prosumers<sup>29</sup> - consumers of works who use them to produce new works.

There are two reasons behind this type of behaviour. Firstly, members may do so out of a wish to participate in the media they consume - to be “immersed...get involved...carve out a role for themselves”<sup>30</sup>. They may wish to rework the relationships they see in mainstream media to represent a less cis-gender, heteronormative culture for it to better represent their lived experience<sup>31</sup>. This highly personal reason for creation is an example of creative prosumage<sup>32</sup> and focuses on the individual concerned as they relate to culture, rather than on the social group themselves.

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<sup>26</sup> Many of the lessons we have seen in how these groups interact conclude that copyright is not a functional form of protection for them, instead relying on a system of social norms - Stacey M Lantagne, ‘The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright’ (2016) 32 Georgia State University Law Review 459; Steven Hetcher, ‘Using Social Norms to Regulate Fan Fiction and Remix Culture’ (2009) 157 University of Pennsylvania Law Review 1869.

<sup>27</sup> P Bouquillion and J Matthews, ‘Collaborative Web and the Cultural Industries System: A Critical Appraisal’ (2012) <<http://www.observatoire-omic.org/fr/art/497/collaborative-web-and-the-cultural-industries-system-a-critical-appraisal.html>> accessed 12 June 2019.

<sup>28</sup> Benkler (n 13) 4

<sup>29</sup> B Nixon, ‘Toward a Political Economy of “Audience Labour” in the Digital Era’ (2014) 12 Triple C 713

<sup>30</sup> Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 8.

<sup>31</sup> Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Updated 20th anniversary ed, Routledge 2013)

<sup>32</sup> Bruns (n 13).

Beyond the individual desire to indulge in their favourite media, there is also an important social incentive for user-generated content creation such as fanfiction. It is an example of Benkler's notion of peer production<sup>33</sup>. The conception of the issue with the cultural work (for example, a lack of LGBTQ+ characters) and the execution of improvements to that work (by suggesting new non-cis gender characters or non-heteronormative relationships) is done in a decentralised manner by individual members of the group who operate as peer editors and peer reviewers. These individual members are organised, governed, and managed using participatory, meritocratic and charismatic principles rather than strict employment or contractual models. Fanfiction.Net is highly automated and lacks editors or a screening panel<sup>34</sup> so is a good example of Benkler's theory. It is completely open to post to, and many users post predominantly incomplete works. The management of the community and the works themselves is therefore done through social interaction with the site, where works with more 'favs' (likes) or comments are prioritised. Only in extreme circumstances (such as threats of legal action) are works removed from the site by moderators. Fans using these sites used commons-based information, such as the reviews left on their works, to improve their writing. Fannish outputs are 'open commons' that can be reused by other fan writers (with acknowledgement)<sup>35</sup>.

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<sup>33</sup> Yochai Benkler, 'Peer Production and Cooperation', *Handbook on the Economics of the Internet* (Edward Elgar 2016) 92.

<sup>34</sup> Maryanne Murray Buechner, 'Families: Learning Corner: Pop Fiction' [2002] *Time* <<http://content.time.com/time/magazine/article/0,9171,1001950,00.html>> accessed 31 October 2018.

<sup>35</sup> This is very similar to the ideals behind the Creative Commons movement (Niva Elkin-Koren, 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in P Bernt Hugenholtz and Lucie Guibault (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International RV 2006); Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2006) 14 *George Mason Law Review* 271; Lawrence Lessig, 'The Creative Commons Commentary' (2004) 65 *Montana Law Review* 1.) However, it is unlikely that Creative Commons licensing would be helpful to fanfiction authors as commercial authors are unlikely to make their works available non-commercial grounds using a CC license when they would otherwise be able to exploit it economically. A similar issue has been seen in fanfiction communities – where anger has

While much is understood about peer production and prosumage, there is no clear path yet towards a 'new way' for fanfiction writers to work with the authors whose works they base their works on. It is unclear whether any of the lessons learned from studying these sites can be applied in the real world to the interaction between the two groups. The global reach of these sites means the economic harm of such interactions may also be magnified, meaning that any form of creative collaboration between the two groups remains unlikely. Copyright holders claim the wide reach and high level of engagement with unauthorised derivative works on these sites has a harmful effect on the protected works of theirs that are reused in this way. Yet fanfiction writers claim their works are not harmful, and in fact have positive spillover effects such as increasing future demand for works within the genre of the original work, as well as adaptations or future works by the original author, especially those featuring their favourite characters or locations. Even if this form of reuse is harmful, fanfiction writers also argue they are acting out of frustration with the author/copyright holder, who they see as having failed them in some way<sup>36</sup>. Understanding the viewpoints of each group is important when deciding how copyright law should apply.

Fanfiction is a form of collective storytelling or communal gesture that springs from the traditions of oral folklore<sup>37</sup>, is historically non-commercial, and created for the joy of engagement with peers and the underlying work. It is a form of cumulative creativity that does not necessarily obey the standard theories that underlie copyright protection -

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arisen when fanfiction authors have taken their free fanfiction works offline (which follow a similar theory to non-commercial CC works on fanfiction archives) and 'scratch off the serial numbers' and publish for profit. For more see 4.3.3 of this chapter.

<sup>36</sup> Lesley Goodman, 'Disappointing Fans: Fandom, Fictional Theory, and the Death of the Author' (2015) 48 *The Journal of Popular Culture* 662; Michel Foucault, 'What Is an Author?', *The Death and Resurrection of the Author* (Greenwood Press 2002).

<sup>37</sup> Karen Hellekson and Kristina Busse, 'Introduction: Why a Fan Fiction Studies Reader Now?', *The Fan Fiction Studies Reader* (University of Iowa Press 2014) 6, 8.

namely, the non-commercial and utility maximising nature of these works stand in opposition to the standard ideas of creativity being driven by profit maximising and sales.

### 4.3 Derivative Drama: Rights retained by an author

It is important to define the interactions permitted with the copyrighted work (i.e. the rights potentially infringed by fanfiction). In relation to fanfiction writers, these are the:

- Right to copy the work (s16(1)(a) and s17 CDPA 1988); and
- Right to make an adaptation (s16(1)(e) and s21 CDPA 1988)

#### 4.3.1 Right to copy the work

The right to copy the work is the most fundamental right retained by the copyright holder, and is the clearest example of the standard economic theory behind copyright protection. By preventing others copying the work, the theory states that creators will be rewarded for their efforts by being able to charge a monopoly price<sup>38</sup>.

This right applies to the work in its entirety, or any substantial part of it (s16(3) CDPA 1988). As previously demonstrated, it is likely that characters and locations are protected by their own copyright, should they be a sufficient exposition of artistic choice. Thus, fanfiction which uses primary characters from copyrighted works are likely to be infringing copyright in that character as well as any specific copyright contained in the wording of the story that describes them (for example, lifting and reusing specific wording from the underlying story that describes Harry Potter's scar<sup>39</sup>, or Anne of Green Gable's red hair<sup>40</sup>).

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<sup>38</sup> Landes and Posner (n 4).

<sup>39</sup> Which, as an idea, bears distinct similarities to Zorro

<sup>40</sup> Again, a character trait that is only expressive as the character is Canadian. Had she been from Ireland or Northern Italy, this may have had lesser value as an expression of artistic choice.

Even if the analysis in the previous chapter is disregarded, it is likely that fanfiction would still infringe the right to copy the work, as an infringing reuse of a ‘substantial part’ of the underlying work. There has been a shift in UK copyright cases over time in relation to what amounts to ‘substantiality’. A “relatively elastic” approach<sup>41</sup> was originally shown in *Glyn*<sup>42</sup> and *Joy Music*<sup>43</sup> in the early to mid-part of the 20<sup>th</sup> century. However, this creative freedom for writers was curtailed from the 1980s when courts began to recognise increasingly smaller sections of the original work as ‘substantial’ enough to amount to infringement when copied<sup>44</sup>. This follows the discussion above on the importance of artistic choice in copyright<sup>45</sup>. If an element of the work is expressive enough to be judged as ‘original’, it will almost certainly be judged ‘substantial’ enough to amount to copying if reused. This has been the reasoning behind many judgements in this area post-*Infopaq*<sup>46</sup>, where the courts have held that so long as the original work comprised the author’s own intellectual creation, it should be protected (in that case, an 11-word newspaper headline). It could be argued that, following the argument “what is worth taking is worth protecting”<sup>47</sup> if a character or location is specific enough to attract UGC based upon it, then it should be deemed “substantial”.

A further issue for fanfiction writers in relation to substantial taking from the original work is that courts take into account whether the unauthorised derivative work creates the same overall impression as the first work<sup>48</sup>. Therefore, any character

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<sup>41</sup> Jonathan Griffiths, ‘Fair Dealing after Deckmyn - The United Kingdom’s Defence for Caricature, Parody or Pastiche’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 2 <<https://papers.ssrn.com/abstract=2770508>> accessed 2 December 2017.

<sup>42</sup> *Glyn v Weston Feature Film Co* ([1916] 1 CH 261).

<sup>43</sup> *Joy Music Ltd v Sunday Pictorial Newspapers* ((1920) Ltd [1960] 2 QB 60).

<sup>44</sup> *Schweppes Ltd v Wellingtons Ltd* ([1984] FSR 210).

<sup>45</sup> See Chapter 3.2.1.2 on ‘Originality’

<sup>46</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08); *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890; *SAS Institute v World Programming Limited* [2013] EWCA Civ 1482.

<sup>47</sup> *University of London Press Ltd v University Tutorial Press Limited* [1916] 2 Ch 601 [610].

<sup>48</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 [276].

sufficiently described as to be recognisable outside of the work in which they appear<sup>49</sup> (for example recognisable by name or description) will be ‘substantial’ enough a part of that work to merit a finding of copyright infringement under s17 CDPA 1988 (copying) of that work if reused in fanfiction. Therefore, any writer who wishes to reuse either a character or a location from an original work will either need to apply for a licence, or defend their work in court in infringement proceedings<sup>50</sup>.

Many fanfiction writers opt for a third option (rather than purchasing a licence or defending an infringement claim in court) - giving a soft nod to the law through an acknowledgement that they do not own the work and mean no harm, and so hope that the rights-holders will turn a blind eye. While this has historically worked, the future of the internet, and the growing importance of the experience economy, means that it is unlikely to continue to be a sufficient form of protection for fanfiction writers. Thus, they will need to rely more heavily on the fair dealing exceptions to copyright discussed later in this chapter, as their works will infringe the right to reproduce or copy the work in s17 CDPA 1988.

#### 4.3.2 Right to Adapt the Work

A further right which may be infringed by fanfiction is the adaptation right. The right to adapt the work contained in s21 CDPA 1988 is both highly important in a digital age of user-generated content, and has been written so strictly that it “binds the courts’

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<sup>49</sup> Which will apply to the majority of characters reused in fanfiction

<sup>50</sup> This may explain the dearth of case law on this topic, as many fanfiction writers would prefer to take their work down than risk expensive litigation. There are many copyright infringement threats made every year – there have been 3 million takedown notices sent just on one service (the Publishers’ Licensing Services Copyright Infringement Portal) since 2009 (‘UK Collective Licensing - The Publishers Licensing Society - Secondary, Transactional and Blanket Licensing for Publishing House’ <<https://www.pls.org.uk/services/the-copyright-infringement-portal>> accessed 16 June 2020; Sarah Blankfield and Iain Stevenson, ‘Towards a Digital Spine: The Technological Methods That UK and US Publishers Are Using to Tackle the Growing Challenge of E-Book Piracy’ (2012) 28 *Publishing Research Quarterly* 79.) In this regard, they follow the behaviour of many derivative creators, such as remixers (Sabine Jacques, ‘Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?’ (2016) 27 *Entertainment Law Review* 3, 5.

hands”<sup>51</sup> when deciding whether certain ancillary markets should be retained for the copyright holder. In relation to literary works (which form the basis of much fanfiction), the only actions retained to the copyright holder under s21 are the rights to translate the work into another language or a dramatisation, or to make a picture book version. In relation to dramatic works (such as plays, films and TV shows), the copyright holder retains the right to adapt the work into a non-dramatic form.

This closed list will be read strictly, as it is based in historic antipathy towards creators being able to control the use of goods after releasing them onto the market. This was seen in the discussions surrounding the Copyright Act 1956 (the predecessor to the CDPA 1988), where it was stated that

“[W]e should have found it difficult...to accept the contention that, after selling his wares for a price which he himself has fixed, the [copyright holder] was thereafter justified in controlling the use to which they were subsequently put, or of preventing their use altogether. This principle, if applied generally in trade, would produce astonishing results”<sup>52</sup>.

These ‘astonishing results’ may go some way to explaining why Parliament rejected the request made at the time<sup>53</sup> that the clause should be written as an open-ended list of potential uses, rather than the closed, exhaustive list it became. This request was again raised and denied when Parliament discussed the 1988 legislation<sup>54</sup>. Instead of permitting an open-ended list of potential adaptations, the UK law relies upon the flexibility found

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<sup>51</sup> Patrick R Goold, ‘Why the UK Adaptation Right Is Superior to the US Derivative Work Right’ (2014) 92 *Nebraska Law Review* 843, 877.

<sup>52</sup> ‘The Report of the Copyright Committee Presented by the President of the Board of Trade to Parliament in October 1952’ (Board of Trade 1952).

<sup>53</sup> By Lord Lucas, referenced in Patrick R Goold, ‘Why the UK Adaptation Right Is Superior to the US Derivative Work Right’ (2014) 92 *Nebraska Law Review* 843, 872

<sup>54</sup> The issue was raised at this point by Sir Geoffrey Pattie (132 Parliamentary Debate, HC (6th Ser) (1988) 541 UK, but Lord Beaverbrook’s argument against it (490 Parliamentary Debate, HL (5th Ser) (1987) was found more persuasive

within the “undefined concept of ‘substantial part’” within the s16(3) clause, and the reference to “any material form” in s17(2) to ensure the law has “a desirable, indeed a necessary, flexibility”<sup>55</sup> to ensure it is reasonably future-proof against new forms of technology such as those that permit the proliferation of UGC.

This focus on the format of the work means that while judges have been seen to be relatively expansive in their judgements regarding the types of work they will permit to fall within a category, it may be a step too far to argue that literary UGC would fall within this type of infringement. For example, it is highly likely that were cases such as *Castle Rock Entertainment Inc v Carol Publishing Group Inc*<sup>56</sup> to come before a UK court, they would receive the opposite judgement. Therefore, at this stage of the analysis it may be argued that fanfiction is highly unlikely to infringe this right, as it is specifically not permitted for within UK law which is read narrowly and highly limited<sup>57</sup>.

This is an area of law where the US legislation would perhaps be preferable for copyright holders as it is broader, more flexible and therefore more forward thinking. Rather than a closed list, the US ‘derivative work right’ contained in s106(2) US Copyright Act 1976 merely refers to “any other form in which a work may be recast, transformed or adopted”. This much more flexible list means that a much wider selection of secondary works would be deemed infringing, such as trivia books and remounted art works<sup>58</sup>, neither of which would be infringing the UK legislation. UGC such as fanfiction would likely infringe this right as a ‘recasting’ or ‘transformation’. This is important as it strengthens the position

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<sup>55</sup> Lord Beaverbook, *ibid*.

<sup>56</sup> Where a Seinfeld trivia collection was deemed to give rise to a case for copyright infringement as the ‘trivia’ was not factual but fictional about the characters and storylines of the TV show, and thus was a fictional protectable expression: *Castle Rock Entertainment Inc v Carol Publishing Group*, 150 F3d 132 (2d Cir 1998)

<sup>57</sup> Mitchell Longan, ‘The Inadequacy of UK Law To Address User-Generated Content: A Comparative Analysis with the US and Canada’ [2017] *Queen Mary Law Journal* 109, 111.

<sup>58</sup> *Castle Rock Entertainment Inc v Carol Publishing Group* (n 56); *Mirage Studios and Others v Counter-Feat Clothing Ltd and Another* [1991] FSR 145.

of the copyright holder, who does not have to rely on an analysis of what amounts to a 'substantial part' of the underlying work in order to prove infringement. Yet this is unlikely to have as strong of an effect as the real world outcomes are likely to remain the same. Fanfiction, were it to be brought to court in the UK, would likely be deemed an infringing reproduction of the underlying work, either as a reproduction of the characters and locations themselves which have attracted their own copyright, or as a reproduction of a substantial part of the underlying work in which they appear. Copyright holders in the UK have no real need to rely on the secondary adaptation right contained in s17 CDPA 1988.

#### 4.3.3 Licensing

Protecting the right to copy the work, and the derivative work right in the US, is important as this also protects the ability of the author to license their works for adaptation commercially. An argument can be made that some form of licensing would be a more efficient method for all parties concerned, rather than running the risk of expensive litigation. There are benefits to this - it has been referred to as "more permissive and cooperative" than relying on fair use copyright exceptions<sup>59</sup>. By granting a contractual licence for a type of work, the author can accept certain types of reuse of their work while restricting other forms<sup>60</sup>. This can be seen to work well with some forms of UGC - for example, Wikipedia is created and shared using Creative Commons licensing. CC licences come in six different forms, which can be added together or substituted at the licensor's choice. For example, should a writer wish to retain their economic rights yet license their

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<sup>59</sup> Brittany Johnson, 'Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law Note' (2015) 100 Minnesota Law Review 1645, 1660.

<sup>60</sup> For example, the Mitchell estate will only license sequels of *Gone With The Wind* if it avoids issues they disagree with – namely miscegenation and homosexuality (Jennifer Schuessler, 'The Long Battle Over "Gone With the Wind"' *The New York Times* (14 June 2020) <<https://www.nytimes.com/2020/06/14/movies/gone-with-the-wind-battle.html>> accessed 16 June 2020.). This has some obvious issues with freedom of speech, and demonstrates why some fanfiction writers who are otherwise skilled enough to write professionally, may prefer to write unauthorised non-commercial sequels that permit them artistic freedom.

work for fanfiction type uses, they may wish to use the 'Attribution', 'Non-Commercial' and 'Share Alike' licences in order to ensure that their right to be known as the author of the underlying work is retained, that the work is not shared for profit (a major concern for authors) and that the fanfiction is shared on the same basis as the original work - i.e. that the fanfiction author cannot add further protections to the fanfiction which do not apply to the original work. Some of these licences even permit for commercial reworkings of the underlying work<sup>61</sup>. However, the original owner does not receive any money from the reuse, and so these can be unpopular with many authors, especially when they are struggling to receive a sufficient income from their works<sup>62</sup>.

A further issue with licensing as a method for regulating UGC is that the market price for a licence is usually generated by the publisher or producer of the copyrighted work. In many cases, this is a large commercial company such as 20<sup>th</sup> Century Fox, who as monopolists can set the price for these licences above a reasonable market price, especially if only an excerpt of the work is being taken. The process for applying for a licence to cover UGC work is also often complicated. Thus, licences are seen as out of reach for many UGC creators, especially when they are producing non-commercially themselves<sup>63</sup>. Contractual

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<sup>61</sup> These licenses could be used by authors who wish to develop their brand and customer following by permitting some forms of fanfiction or other derivative reuse, without permitting more skilled writers from taking their works (namely their characters and locations) and improving them to make more money than the original author).

<sup>62</sup> While most fanfiction is based on works such as *Harry Potter* that are already commercially successful, there are several different fandoms that generate relative prolific amounts of fanfiction when the underlying work was not commercially successful. *Firefly*, a cult US science-fiction TV show that only ran for three months in 2002 before being cancelled due to low ratings (despite large fan support campaigns) ("*Firefly*" Feature Aligns - Entertainment News, Film News, Media - Variety' (29 June 2011) <<https://web.archive.org/web/20110629170540/http://www.variety.com/article/VR1117901954?refCatId=13>> accessed 16 June 2020.)

<sup>63</sup> This has been seen recently in the large number of takedown notices being sent to UGC creators on Twitch 'Why Twitch Users Are Getting Takedown Notices' (*Billboard*, 15 June 2020) <<http://www.billboard.com/articles/business/digital-and-mobile/9401590/twitch-users-takedown-notices-copyright-explained>> accessed 16 June 2020.

licensing is therefore not a popular method of dealing with certain types of UGC such as fanfiction.

A second type of licence that could be used for fanfiction permits authors to charge for re-workings of their creations. Known as collective licensing, it was tried by Amazon between 2013-2018 on their self-publishing site Kindle Worlds. This was a much stricter type of licence than Creative Commons, but allowed fanfiction writers to publish commercially. Specific copyright holders licensed their 'Worlds' to Amazon, with certain rules about the ways their works could be used by fanfiction writers<sup>64</sup> - for example, whether characters could or could not be killed off, and how<sup>65</sup>. The fan author was entitled to receive a royalty per purchase of their work of between 20-35% of the purchase price<sup>66</sup> - which is capped by Amazon at less than \$4<sup>67</sup>.

There were some issues with the site. Only American Amazon users could participate, and only 100 'Worlds' were ever licensed (mostly relating to young adult TV shows), which drastically curtailed the importance and relevance of this license, and the system was closed in 2018 with little fanfare. While it demonstrated that a licensing system could perhaps be brought in, and that some creators at least were open to the idea, it required the intervention of a large publishing corporation such as Kindle (supported by Amazon) to get it off the ground, and to sign licensing agreements with sufficient creators to make it even temporarily worthwhile. Given that Amazon shows no signs of wanting to

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<sup>64</sup> 'Kindle Worlds - How It Works' (28 October 2016)  
<<https://web.archive.org/web/20161028070329/https://kindleworlds.amazon.com/how>> accessed 16 June 2020.

<sup>65</sup> Johnson (n 59) 1662

<sup>66</sup> 'Kindle Worlds - Rights and the Publication Agreement' (8 December 2017)  
<<https://web.archive.org/web/20171208010237/https://kindleworlds.amazon.com/faqs?topicId=A31DTV3VSRP82B>> accessed 16 June 2020.

<sup>67</sup> Presumably to either avoid competing with the release of new authorised works, or as a value mechanism by Amazon regarding the presumed quality of the work. 'Kindle Worlds - Sales, Royalties and Payments' (8 December 2017)  
<<https://web.archive.org/web/20171208010223/https://kindleworlds.amazon.com/faqs?topicId=A3T3UQCG5AG03W>> accessed 16 June 2020.

re-enter into this market, and it is unlikely that any other publishers would wish to try given Amazon's failure, it is unlikely that licenses will be forthcoming in the near future to cover fanfiction reuses.

#### 4.3.4 Summary

To judge the ability of authors to prevent their works being reused for fanfiction requires clear understanding of the specific rights they retain in their copyrighted creations. This section, alongside the previous chapter, has demonstrated that the reuse of many characters and locations from fictional works is likely to infringe the s17 CDPA 1988 right to copy the work. Fanfiction will be deemed either a direct copy of the taken characters and locations if they themselves attract copyright, or a copy of a substantial part of the underlying story in which they appear. Furthermore, in the US fanfiction also risks infringing the derivative work right, but due to differences in the corresponding legislation, it is unlikely that it will infringe the UK right to adapt the work in s21 CDPA 1988. While certain forms of licensing (such as Creative Commons or the short-lived Kindle Worlds collective licensing scheme) have been attempted in order to allow for these types of UGC works, they have been mostly unsuccessful in approaching fanfiction uses. This may be due to the author and publisher having emotional as well as economic concerns regarding fanfiction, which will be dealt with in the following section.

#### 4.4 UGC and Moral Rights

Economic rights are undeniably important to authors, and the incentive function they perform goes a long way to explaining standard commercial creativity. Yet it does not fully explain why many authors object to their works being used for UGC such as fanfiction. Emotional rather than economic issues also have a role to play in the interaction between

authors and unauthorised UGC derivatives of their works<sup>68</sup>. It has been argued that “The simple fact is that moral rights impinge upon economic activity and, where they exist, cannot be ignored.”<sup>69</sup>

#### 4.4.1 Moral Rights

The importance of moral rights to protect an author’s non-financial interests in their work has been thoroughly established<sup>70</sup>. It has been argued that moral rights become highly important in a digital age<sup>71</sup>, yet clarity on its real-world application has been lacking - partly due to the distinction between the methods used by the UK and the US to protect what amounts to similar ideas of attribution, paternity and protection from mutilation, as well as the lack of focus on moral rights in both jurisdictions<sup>72</sup>. Where harmonisation

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<sup>68</sup> Jenny Roth and Monica Flegel, *It's Like Rape: Metaphorical Family Transgressions, Copyright Ownership and Fandom* (2014) 28 *Continuum* 901

<sup>69</sup> Gerald Dworkin, ‘The Moral Right of the Author: Moral Rights and the Common Law Countries’ (1994) 19 *Columbia-VLA Journal of Law & the Arts* 229, 263.

<sup>70</sup> On both sides of the Atlantic. For research on moral rights in the US see A Dietz, ‘Authenticity of Authorship and Work’, *Copyright in Cyberspace: Copyright and the Global Information Infrastructure, Amsterdam, 4-8 June 1996 : ALAI Study Days* (Otto Cramwinckel Uitgever 1997); MA Lemley, ‘Rights of Attribution and Integrity in Online Communications’ [1995] *Journal of Online Law*; Jane C Ginsburg, ‘The Most Moral of Rights: The Right to Be Recognized as the Author of One’s Work Symposium Transcript: Authors, Attribution, and Integrity: Examining Moral Rights in the United States: Session 3: Keynote Address’ (2016) 8 *George Mason Journal of International Commercial Law* 44; Henry Hansmann and Marina Santilli, ‘Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis’ (1997) 26 *The Journal of Legal Studies* 95. For research into moral rights in common law countries such as the UK see Dworkin (n 474); Tania Cheng-Davies, ‘Honour in UK Copyright Law Is Not “A Trim Reckoning” – Its Impact on the Integrity Right and the Destruction of Works of Art’ (2016) 36 *Oxford Journal of Legal Studies* 272; Mike Holderness, ‘Moral Rights and Authors’ Rights: The Keys to the Information Age’ (1998) 1 *Journal of Information Law & Technology* 1; Robert C Bird and Lucille M Ponte, ‘Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.’s New Performances Regulations’ (2006) 24 *Boston University International Law Journal* 213..

<sup>71</sup> Given how works can be “speedily and endlessly transmitted and retransmitted, readily modified and reshaped, and integrated, in whole or in part, in other works” Abbe EL Brown and others, *Contemporary Intellectual Property: Law and Policy* (Fifth edition, Oxford University Press 2019) 214. In essence, that works can be subject to so many ‘treatments’ that protecting the reputation and honour of the original author is becoming more and more important.

<sup>72</sup> Simone Schroff, ‘The Evolution of Copyright Policies (1880-2010) A Comparison between Germany, the UK, the US and the International Level’ (Thesis, University of East Anglia 2014) <<https://ueaeprints.uea.ac.uk/id/eprint/49708/1/2014SchroffSPHD.pdf>>.

efforts have been made in many elements of copyright legislation, these efforts have neatly sidestepped the issue of moral rights<sup>73</sup>.

These moral rights linking authors strongly with their works even after they are released on the market goes against literary theory such as that referred to by Barthes as the 'death of the author'<sup>74</sup>. In this theory, once the work is published, the author's desires become irrelevant as the interpretation of the reader takes over. Barthes uses this theory to explain why no one text can stand on its own, by referring to the importance of 'intertextuality'. No work, according to Barthes, can "be reduced to a problem of sources or influences". Reuses may be either "unconscious or automatic...given without quotation marks"<sup>75</sup>. This theory would seem to support the idea that derivative reuses such as fanfiction should be permitted. Characters, according to this theory, are always altered and reshaped by readers beyond that which the author intended. Furthermore, any created character is an intersection of other characters that have gone before. Thus, any form of play with characters that does not infringe the purely economic rights should be permitted.

Fans who interact with characters in this way are doing so because the commercial, copyrighted character they love is failing them in some way. The theory states that although fanfiction writers recognise the power that copyright holders have, "they contest the ways in which it is wielded, and they do so on the grounds of a distinction, commonly-made in fictional-worlds theory, between texts and fictional universes."<sup>76</sup> The fictional universe is one the fans love, but they wish to improve upon it as they see a distinction

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<sup>73</sup> MTS Rajan, 'Moral Rights in Information Technology: A New Kind of "Personal Right"?' (2004) 12 *International Journal of Law and Information Technology* 32.

<sup>74</sup> Barthes, 'The Death of the Author' (n 399).

<sup>75</sup> Roland Barthes, 'The Theory of The Text' in Robert JC Young (ed), *Untying the Text: A Poststructuralist Reader* (Routledge 1981) 39.

<sup>76</sup> Lesley Goodman, 'Disappointing Fans: Fandom, Fictional Theory, and the Death of the Author' (2015) 48 *The Journal of Popular Culture* 662, 664.

between the character and the text that bears them. Fans see no moral issue with becoming a part of the storytelling they enjoy<sup>77</sup>.

Although fanfiction writers may not see any ethical issues with how they interact with copyrighted works, moral rights are highly important when discussing the ways many authors feel about fanfiction. Many authors who disagree with fanfiction do so for emotional rather than economic reasons. Robin Hobb<sup>78</sup>, for example, referred to ideas such as paternity<sup>79</sup>, integrity<sup>80</sup>, and false attribution<sup>81</sup>. In amongst his many reasons for disliking fanfiction, George RR Martin said that “My characters are my children, I have been heard to say. I don't want people making off with them, thank you”<sup>82</sup> - referring both to the integrity right and the paternity right<sup>83</sup>. Diane Gabaldon<sup>84</sup> agreed, referring to fanfiction as selling her children into ‘white slavery’<sup>85</sup>. These objections to fanfiction do not relate to the interference such works may have with the sales of the underlying fiction<sup>86</sup> - yet all the

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<sup>77</sup> Katherina Freund and Paul Booth, ‘Becoming a Part of the Storytelling’, *A Companion to Media Fandom and Fan Studies* (Wiley-Blackwell 2018).

<sup>78</sup> A well-known fantasy author, whose works such as *Assassin's Apprentice* have been the subject of a reasonable amount of fanfiction until she banned it on sites such as Fanfiction.Net

<sup>79</sup> “When it's creative identity theft, fanfiction can sully your credit with your readers...the [fanfiction] reader's impression of the writer's work and creativity is changed. My name is irrevocably attached to my stories and characters.” (Robin Hobb, ‘The Fan Fiction Rant’ (*Robin Hobb's Home*, 30 June 2005)

<<http://web.archive.org/web/20050630015105/http://www.robinhobb.com/rant.html>> accessed 16 June 2020.)

<sup>80</sup> “A writer puts a great deal of thought into what goes into the story and what doesn't. If a particular scene doesn't happen ‘on stage’ before the reader's eyes, there is probably a reason for it.” *ibid.*

<sup>81</sup> The exact moral rights contained in the CDPA 1988: “No one should be able to connect your good name to work you did not create yourself” *ibid.*

<sup>82</sup> George RR Martin, ‘Someone Is Angry On the Internet’ (*Not A Blog*, 7 May 2010) <<https://grrm.livejournal.com/151914.html>> accessed 16 June 2020. This is perhaps a weak analogy, as children grow into adults, have romantic relationships (which is what many author's object to in fanfiction), and leave home such that their parents lost control over them eventually.

<sup>83</sup> See following sections

<sup>84</sup> Another well-known author, who writes works that take elements of historical fiction, romance, mystery and science fiction in her *Outlander* series.

<sup>85</sup> “It's revolting to see your characters being made to do and say idiotic things, or be forced to enact simple-minded sex fantasies (which is what most fan-fic that comes to my unwilling attention is). Like someone selling your children into white slavery.” (archived weblink Diane Gabaldon, ‘Firefly! Fanfic!’ <<https://www.webcitation.org/6TEU6QXTb>> accessed 16 June 2020.)

<sup>86</sup> I.e. the economic rights above relating to reproduction or creation of derivative works

authors seem to believe they have a legal right to prevent their emotional responses to fanfiction. This would seem to point to the importance of moral rights as well as economic rights.

Moral rights in the UK are laid out in sections 77-89 of the CDPA, which effectuates the Berne Convention Article 6*bis*. In order of importance to authors when discussing UGC content based on their works are the integrity right, the paternity right, and the right to object to false attribution.

#### 4.4.2 The Integrity Right

The integrity right, or the right to object to derogatory treatment of the work, is contained within s80 CDPA 1988, and prohibits any 'treatment' of the work that is 'prejudicial to the honour or reputation of the author'. By doing so, it casts a wide net over much UGC content such as fanfiction. The definition of 'treatment' as "addition to, deletion from or alteration to or adaptation of the work" demonstrates that it is intended to cover a wide range of works - and go beyond purely covering 'adaptations' as previously narrowly defined in s21 CDPA 1988. s80(3) and s80(6) state that this right applies to those who publish commercially or communicate to the public a derogatory treatment of either a LDMA work or a film. While fanfiction writers may have a valid defence in claiming they are not commercially publishing their fanfiction (should they remain on sites such as Fanfiction.Net rather than publishing for profit), this defence will not be extended to those who run fanfiction archives that are supported by advertising revenue (such as Fanfiction.Net)<sup>87</sup>.

This right to protect their 'honour and reputation' as far as it is attached to their work may cover many of the complaints made by authors about fanfiction. It prevents

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<sup>87</sup> Sites such as Archive of Our Own, that are supported in a non-commercial way, may be able to avail themselves of the defence of non-commercial action

others from reusing copyrighted works by distorting or mutilating it. This would seem to cover the attitude that authors such as Robin Hobb<sup>88</sup> and Diana Gabaldon<sup>89</sup> have towards fanfiction - they attack the distortion of their characters and stories, and the negative effect the distortion has on the reputation of their characters. An attack on their characters is seen as an attack on them as writers, given that

“[a]s an expression of an author’s inner thoughts, a written or other creative text has, perhaps more than any other ‘thing’, the capacity to be perceived as an extension of the author...Instead of invoking property to protect their monetary rights, that is, these authors link their creative products to their own personhood”<sup>90</sup>.

Yet, the defence many fanfiction writers return with is that there is an obvious distinction between a character and the author that created them. They argue that fanfiction makes a distinction between canon and fanfiction, and that the original characters (and therefore the reputation of the original author) remain untouched by the unauthorised nature of fanfiction (indeed, much time and energy is spent in fandom clarifying and explaining the canon characters, and how fannish reinterpretations are different to the originals). Furthermore, fanfiction authors claim that as characters are not real, they cannot be ‘distorted or mutilated’<sup>91</sup>.

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<sup>88</sup> Who presented the following analogy: “You send me a photograph of your family reunion, titled “The Herkimer’s Get Together”. I think it looks dull. So I Photo-Shop it to put your friends and relations into compromising positions in various stages of undress. Then I post it on the Internet.” Cited in Roth and Flegel (n 68) 903.

<sup>89</sup> Who used the analogy that fanfiction is like finding a note in “your daily mail...detailing an explicit sexual encounter between, say, your twenty-one-year-old daughter and your forty-eight-year-old neighbour – written by the neighbor” ibid.

<sup>90</sup> ibid 904.

<sup>91</sup> One fanfiction writer asks “How exactly does fanfiction do that? Does it take it out to cheap brothels and feed it bad gin? Make it read ‘Lolita’? Induce it to mainline Jackson Pollock?” ibid 905.

There has been a “cautious approach”<sup>92</sup> to the implementation of the integrity right in case law in the UK, which may explain why it is not relied upon more by authors wishing to protect their works - despite it being philosophically more aligned with their complaints than economic concerns. Although cases such as *Morrison Leahy Music Limited v Lightbond Limited*<sup>93</sup> demonstrate that courts are open to the idea of finding a distortion or mutilation of works where the work is removed from its original context and used in the creation of a new work (which is analogous to fanfiction), further cases such as *Tidy v Natural History Museum Trustees*<sup>94</sup>, *Pasterfield v Denham*<sup>95</sup>, *Confetti Records v Warner Music UK Ltd*<sup>96</sup>, and *Harrison v Harrison*<sup>97</sup> show how difficult it is to pass the test for the treatment to be derogatory. These cases show that the test for derogatory treatment is objective and not subjective - it is not enough that authors may feel personally unhappy with how their works are being reused; the harm to the author’s reputation must be proved - which is almost certainly a step too far to prove when the works are (a) non-commercial and published as works in progress, and thus are not in the same market as the original, and (b) clearly stated to be unauthorised adaptations, with disclaimers that clearly remark on the distinction between the fanfiction and the original characters.

#### 4.4.3 The Paternity Right<sup>98</sup>

The importance of the paternity right was made clear in the UK in 2017 when John Lewis released their Christmas advert featuring a blue monster that lived under a child’s

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<sup>92</sup> Abbe EL Brown and others, *Contemporary Intellectual Property: Law and Policy* (Fifth edition, Oxford University Press 2019) 210.

<sup>93</sup> [1993] EMLR 144

<sup>94</sup> (1995) 39 IPR 501

<sup>95</sup> [1999] FSR 168

<sup>96</sup> [2003] EMLR 35

<sup>97</sup> [2010] ECDR 12

<sup>98</sup> Parts of the following analysis were published in 2017 - see Ruth Flaherty, *How Underhanded was John Lewis’ Use of a Big Blue Monster That Lives Under The Bed?*

[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/how-underhanded-was-john-lewis-use-of-a-big-blue-monster-that-lives-under-the-bed-creativity-and-copyrig-2?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Flaw%2Fresearch%2Fispblog](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/how-underhanded-was-john-lewis-use-of-a-big-blue-monster-that-lives-under-the-bed-creativity-and-copyrig-2?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Flaw%2Fresearch%2Fispblog)

bed. This monster bore more than a passing resemblance to a monster called Mr Underbed created by Chris Riddell. Despite accusing the department store of stealing his character, he stated that he would not sue for copyright infringement. He was actually more focused on attribution, stating that "...it's important for creative people to get the recognition for the work they do."<sup>99</sup> Many authors find it highly important that they are credited for the work they create, given the emotional labour they put into the work.

To make a claim for infringement of an author's paternity right under s77(7)(a) CDPA 1988, the author must first assert that right in the front of the book. They must then show their work was used without his attribution in a situation where none of the limitations or exceptions apply. In effect they would need to prove their work is one that attracts copyright, and that the new work (for example, in relation to the John Lewis/Chris Riddell example, that the John Lewis monster Moz was a reuse of Mr Underbed). This would not be hard for many authors to prove, as almost all books contain the assertion of moral rights required, and TV shows and films carry the same assertion as part of their credits sequence at the end. As already argued the underlying works used for fanfiction are ones that attract copyright (either as a substantial part of the story, or standalone copyright in the characters/locations). Finally, fanfiction admits openly that they are reusing the copyrighted characters.

So why do authors not claim that fanfiction is an infringement of their paternity right? The main reason is that it would be relatively easy for the fanfiction writer to defend against, due to the prevalence of disclaimers and attributions on fanworks such as fanfiction. For example,

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[%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](#)

<sup>99</sup> Alison Flood, 'John Lewis Plagiarism Row Gives Christmas Sales Boost to Mr Underbed' (*The Guardian*, 20 November 2017) <<https://theguardian.com/books/2017/nov/20/john-lewis-plagiarism-row-gives-christmas-sales-boost-to-mr-underbed>> accessed 16 June 2020.

“Some disclaimers are very matter-of-fact, stating "I don't own these characters" or "Not mine," while others specifically credit individuals ("Firefly belongs to Joss Whedon") or the corporate TPTB<sup>100</sup> who may own the actual copyright ("Due South belongs to Alliance Atlantis.")”<sup>101</sup>.

Should a disclaimer have been used, it would be difficult for the author of the underlying work to claim that their paternity right had been infringed. The only way an action could continue against a fanfiction author would be if the disclaimer had been completely missed, or if it was included only at the start or end of the work and thus could possibly be missed by a visitor to the site.

#### 4.4.4 The False Attribution Right

The false attribution right can also be used to protect the author’s reputation - by avoiding them being linked to works they do not agree with. Under s84 a person has a right “not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; or not to have a film falsely attributed to him as director”. This can be highly important in relation to secondary works such as parody, which seek to mimic the original work and thus seek to imply a link between the original author and a new work that may be highly critical. Unlike the integrity right, there is no requirement for harm to the author’s reputation. Thus, this may be a strong method for authors to prevent fanfiction based on their works.

However, the case history on the topic would seem to favour fanfiction writers.

*Clark v Associated Newspapers*<sup>102</sup> stated that if counter measures are used by the secondary work to disclaim attribution to the original author, they may be sufficient to

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<sup>100</sup> The Powers That Be, a term frequently used in fandom to relate to commercial parties that hold the balance of power - for example large production companies like 20th Century Fox

<sup>101</sup> ‘Disclaimer - Fanlore’ <<https://fanlore.org/wiki/Disclaimer>> accessed 2 December 2017.

<sup>102</sup> [1998] 1 All ER 959

defend against a claim of false attribution so long as they are clear and compelling. One would imagine that the standard fanfiction disclaimers used (and the fact that sites such as Fanfiction.Net are clear about their status as fanwork archives and not archives of original content) would be compelling enough to demonstrate that there should be no attribution falsely made to the author of the underlying work. Thus, readers are lead to understand that the author of the fanfiction is not the author of the underlying work<sup>103</sup>.

#### 4.4.5 Moral Rights in the US

In comparison to the UK, moral rights traditions in the US are much less well developed (despite recent governmental research into whether or not to increase their scope or strength)<sup>104</sup>. Despite signing the Berne Convention, the US has a “checkered past”<sup>105</sup> with this type of right, and indeed it remains unclear whether the US fully meets its responsibilities under this statute. Even learned copyright scholars struggle at times to support stronger legislation for moral rights such as the right of attribution<sup>106</sup>.

Thus, fanfiction authors may have the upper hand here due to a lack of unified legislation. While creators in the US have some moral rights protection given under the VARA<sup>107</sup> - namely rights that amount to integrity, paternity and false attribution<sup>108</sup> - they are only granted to works of visual arts such as paintings and sculptures<sup>109</sup>. They are not

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<sup>103</sup> *Harrison v Harrison* [2010] ECDR 12

<sup>104</sup> ‘Authors, Attribution, and Integrity: Examining Moral Rights in the United States’ (United States Copyright Office 2019) <<https://www.copyright.gov/policy/moralrights/>> accessed 16 June 2020.

<sup>105</sup> Jacqueline D Lipton, ‘Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas’ (2010) 21 *Fordham Intellectual Property, Media & Entertainment Law Journal* 537, 538.

<sup>106</sup> Tushnet points out that US copyright legislation struggles with concepts of ownership of creative works, and is too fragmented, to recommend its use to legislate authorship (Rebecca Tushnet, ‘Naming Rights: Attribution and Law’ [2007] *Utah Law Review* 789.)

<sup>107</sup> Visual Artists Rights Act 1990

<sup>108</sup> S106A US Copyright Act 1976

<sup>109</sup> Definition added to s101 US Copyright Act 1976. For example, works of graffiti were deemed protectable in 2018 Alan Feuer, ‘Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals’ *The New York Times* (12 February 2018) <<https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html>> accessed 16 June 2020. (<https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html>)

applicable to most works that would attract fanfiction. This has been argued to be due to the strong economic rationale behind US copyright law, in comparison to the artist's rights background within Europe<sup>110</sup>.

Despite this weak moral rights regime, US authors may still be able to protect the integrity of their works, the link to their own brand, and avoid being linked to works they do not appreciate. To do so, they must rely on economic rather than moral rights, which “come very close to achieving the same result in protecting certain aspects of the author's integrity and paternity rights”<sup>111</sup>. For example, the US derivative work right prevents against most adaptations that would otherwise be protected by the right of integrity. In certain limited circumstances, they may also be able to prevent false attribution too, through s43 of the Lanham Act which prohibits false advertising. In *Gilliam v ABC*<sup>112</sup> the court held that the claimants (the *Monty Python* comedy group) could prevent the defendants (American Broadcasting Company) from rebroadcasting highly edited episodes of their TV series. While the court agreed there was no cause of legal action in the US for breach of moral rights, it held that the Lanham Act could be used to prevent derogatory edits as false designation of the origin of the TV show. However, the application of the Lanham Act in this way has been curtailed and narrowly focused in *Dastar*<sup>113</sup> and it is unlikely that it would lead to a successful claim in court for authors who wish to prevent fanfiction of their works. It is economic rights, rather than moral rights, that have been referred to by the US government as providing the most important level of protection of the more ‘emotional’ rights authors may have in their works<sup>114</sup>.

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<sup>110</sup> Thomas F Cotter, ‘Pragmatism, Economics, and the Droit Moral’ (1997) 76 North Carolina Law Review 1.

<sup>111</sup> Marshall A Leaffer, *Understanding Copyright Law* (5th ed, LexisNexis 2010) 389–390.

<sup>112</sup> *Gilliam v American Broadcasting Company* (538 F2d 14 (2d Cir 1976)).

<sup>113</sup> *Dastar Corp v Twentieth Century Fox Film Corp* (539 US 23 (2003)).

<sup>114</sup> Authors, Attribution, and Integrity: Examining Moral Rights in the United States’ (United States Copyright Office 2019) <<https://www.copyright.gov/policy/moralrights/>> accessed 16 June 2020.

These economic rights do not always go far enough according to authors, especially in today's digital cultural market. It has been argued that "authorial concerns are not particularly well protected by current copyright laws"<sup>115</sup>, as they do not do enough to recognise the relationship that exists between an author and their work<sup>116</sup>, or the incentives for creation that go beyond the economic. However, it does not appear that the US will be developing their moral rights regime any time soon.

#### 4.4.6 Moral Rights Conclusion

It has been argued that "the adoption of a moral rights agenda will always necessitate a careful balancing act between the rights of original authors...and audiences for their works."<sup>117</sup> The difficulty of carrying out this balancing act has been made clear in how the UK treats the moral rights of integrity, paternity and false attribution - and the vast distinction between the UK system and the US system. Despite both countries going through modernisation and harmonisation efforts in recent years, neither have implemented stronger moral rights regimes. Due to the philosophy behind their intellectual property regimes, the US and UK both rely upon the economic rights to protect the rights of the original authors. Thus, it remains unclear quite how these rights interact with works created in the digital environment, such as fanfiction. While many authors have moral objections to these types of re-workings of their cultural products, it is unlikely they will rely on moral rights to protect their interests.

#### 4.5 Conclusion

Literary derivative UGC works such as fanfiction which use characters, locations or substantial amounts of the underlying work are highly likely to infringe copyright in that

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<sup>115</sup> Lipton (n 105) 541

<sup>116</sup> Margaret Ann Wilkinson and Natasha Gerolami, 'The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright' (2009) 26 *Government Information Quarterly* 321.

<sup>117</sup> Lipton (n 105) 578

first work. It remains unclear but unlikely that these works will infringe the right to create an adaptation under s21 CDPA 1988, but they will almost certainly infringe the right to copy the work in s17. Given this, if fanfiction writers wish to publish their works, even non-commercially, they will either require a copyright exception to do so, or must purchase a licence from the original author. This market for licensing is highly important to authors and may partially explain why they feel attacked by fanfiction. Yet, there are also emotional, rather than economic reasons why authors dislike literary UGC reuses of their works. These reasons may be better situated within the moral rights regime as contained in s77-80 CDPA 1988, yet most authors remain more concerned with their economic rights. This may be to do with the historically strict reading of the moral rights in courts, and due to the lack of a strong moral rights regime in the US, which has a strong cultural influence on how authors treat their works.

This chapter has contributed to the overall thesis by answering the specific research questions set in the introduction regarding how UGC works such as fanfiction legally interact with the underlying work. Most popular UGC derivative reuses, such as memes or fanfiction, would *prima facie* infringe the economic rights of the author as an infringing copy under s17 CDPA 1988, although they are unlikely to infringe the s21 right to make an adaptation (due to the strict wording of that provision). In comparison, the open-ended nature of the US derivative work right means that these derivative uses are likely to infringe both the right to copy, and the right to make a derivative work, in the US. Due to the prevalence of disclaimers in UGC works such as fanfiction, it is unlikely that a claim under the moral rights of integrity, paternity or false attribution would succeed (especially as these rights have been applied cautiously in the courts). Therefore, authors and publishers who wish to prevent fanfiction of their copyrighted works should frame their claims around the s17 right to copy the work, as that is the most likely claim to succeed.

In a wider sense, this chapter provides clarity to both fanfiction writers and authors of the underlying works by demonstrating that fanfiction is a de facto infringement of the right to copy the work in the UK, and the derivative work right in the US - and shown why these rights are highly important in a digital age. It also approaches the main non-economic complaints which authors have regarding fanfiction, and investigated them in the light of the moral rights regimes in the UK and US. This has highlighted some issues with the application of these regimes to non-commercial UGC works created and shared in the digital arena.

Having proved which rights are infringed by fanfiction in this chapter, the next chapter will demonstrate how the copyright exceptions may apply to enable fanfiction writers to publish such works on sites such as Fanfiction.Net.

# 5. Fairness and Fanfiction

## 5.1 Introduction

The previous two doctrinal chapters have so far concluded that copyright protection is now available for both the underlying story and certain characters and locations - and that therefore fanfiction which reuses these characters or locations may be an infringing reproduction of that work (and, in the US may also be an infringement of the derivative work right). Attention must therefore now turn to potential defences available to fanfiction writers to permit publication of their work – namely the fair dealing exceptions to copyright infringement for research/private study, criticism/review/quotation, or caricature/parody/pastiche, contained within s28-30 CDPA 1988. These exceptions are defined in case law, as originally set out in *Hubbard v Vosper*<sup>1</sup> and prevent copyright holders from abusing their copyrights to prevent publications. If they apply, the defendant is “entitled to publish...and the law will not intervene to suppress freedom of speech”<sup>2</sup>. Given the jurisprudential nature of these exceptions, they require the court to judge both the type of dealing being undertaken with the work, and whether in the courts’ opinion the defendant was using only as much as necessary for the type of dealing.

This research is highly important for all the ‘cast members’<sup>3</sup> or stakeholders in fanfiction such as commercial authors and publishers. The digital environment has opened up self-publishing to those who could not have previously been able to get their works published by a publishing house, but at the same time has made it harder for authors to

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<sup>1</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>2</sup> *ibid* 97.

<sup>3</sup> See Chapter 1

make a living through sales of their works. Sales of fiction have been falling since 2007<sup>4</sup>, and remain “significantly below” levels from the previous decade<sup>5</sup>. Some of this can be linked to changes in reading habits – for example, there has been increases in sales of non-fiction works such as cookbooks and workout guides, especially within digital sales<sup>6</sup>. It is also due to a relatively strong link between fiction and other leisure activities. The Publishers Association’s Chief Executive states that “[o]ut of all the books we produce, fiction is most exposed to people’s leisure time. Whether it’s Netflix or playing computer games or going on social media, they are in competition”<sup>7</sup>. This is highly important to this analysis as fanfiction could be analogous to ‘going on social media’, and so be competing in some ways with the underlying work. The question for this analysis will therefore be whether this is something that copyright should be protecting – or whether it is a step too far.

The average sale price for fictional works is also falling<sup>8</sup>. This means any theory of copyright that relies upon the income received from sales as an incentive for creation may

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<sup>4</sup> Arts Council England and others, ‘Literature in the 21st Century: Understanding Models of Support for Literary Fiction’ (2017) 3 <<http://www.artscouncil.org.uk/sites/default/files/download-file/Literature%20in%20the%2021st%20Century%20report.pdf>> accessed 11 June 2018; Alison Flood, ‘Death of the Novel Is Greatly Exaggerated, Say UK Booksellers’ *The Guardian* (28 June 2019) <<https://www.theguardian.com/books/2019/jun/28/death-of-the-novel-is-greatly-exaggerated-say-uk-booksellers>> accessed 17 June 2020.

<sup>5</sup> Arts Council England and others (n 4).

<sup>6</sup> ‘Statistics Galore: European and International Publishing Figures Released’ (International Publishers Association, 31 January 2019) <<https://www.internationalpublishers.org/news/776-statistics-galore-european-and-international-publishing-figures-released>> accessed 9 August 2019; Flood (n 4).

<sup>7</sup> Flood (n 4)

<sup>8</sup> Arts Council England and others (n 4). It should be noted that the standard limitations apply when using this data as it relies upon Nielsen Bookscan data which does not cover the full market (for example, it does not include self-published books without an ISBN). See limitations section of Chapter 7. This data is used in this research however as it is the industry standard for sales reporting in the market, and is the best available.

be outdated and need reexamination. This argument is strengthened by the growth in number of titles published over the same time period<sup>9</sup>, as the fall in revenue on the market due to decreasing sales and prices has not led to the expected drop in output. It also means that authors may instead be turning to secondary markets to generate income, meaning markets for authorised derivative works will increase in legislative and economic importance. The Publishers Association's Chief Executive confirms this:

“...storytelling is key to all our creative industries, with so many conversions from books into theatre, film, television... We find that very encouraging. The adaptations happen and it comes back, so it's a wonderful virtuous circle”<sup>10</sup>.

If an author is relying on licensing their works for adaptation commercially (i.e. as a TV programme or film), they have an incentive to strongly protect their rights in this secondary market. Thus, online fanfiction archives that each host upwards of 5 million unauthorised derivative works<sup>11</sup> posted by upwards of 2 million users<sup>12</sup> will become subject to increasing scrutiny from legal teams on behalf of authors - and legislators as well<sup>13</sup>. This has been demonstrated by the furore by lobbying groups for both users and authors

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<sup>9</sup> 'Statistics Galore: European and International Publishing Figures Released' (International Publishers Association, 31 January 2019) <<https://www.internationalpublishers.org/news/776-statistics-galore-european-and-international-publishing-figures-released>> accessed 9 August 2019; Joel Waldfoegel, *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture* (Princeton University Press 2018).

<sup>10</sup> Flood (n 4)

<sup>11</sup> Fanfiction.Net had 6.8million works posted to it at the time of data collection for this research (May 2017). Archive of Our Own, a growing archive, had 5million works by July 2019 ('July 2019 Newsletter, Volume 137 – Organization for Transformative Works' <<https://www.transformativeworks.org/july-2019-newsletter-volume-137/>> accessed 17 June 2020.)

<sup>12</sup> 8,492,273 user accounts have been created on Fanfiction.Net over the time researched (John Frens and others, 'Reviews Matter: How Distributed Mentoring Predicts Lexical Diversity on Fanfiction.Net' arXiv preprint arXiv:1809.10268 7; Cecilia Rodriguez Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019) 87.) (although many of these accounts are now inactive – see Chapter 7), and 2 million users were registered on Archive of Our Own by July 2019 ('July 2019 Newsletter, Volume 137 – Organization for Transformative Works'.)

<sup>13</sup> Rainer Schultes, 'Puls 4 v YouTube in Austria Does Not Anticipate Article 17' (*Kluwer Copyright Blog*, 2 April 2019) <<http://copyrightblog.kluweriplaw.com/2019/04/02/puls-4-v-youtube-in-austria-does-not-anticipate-article-17/>> accessed 19 June 2020.

surrounding the passage of the Copyright in a Digital Single Market Directive in 2019<sup>14</sup>. In Austria, a recent preliminary ruling held that YouTube was partially liable for copyright breaches of users, given that it influences the way users consume content by sorting and filtering works. While this was overturned on appeal, it shows both the increasing likelihood that hosting sites will be sued by copyright holders, and how national courts are likely to interpret Article 17 once implemented.

This chapter will therefore answer the following research question:

- Given that fanfiction has been shown to infringe copyright in the underlying work and certain characters and locations that appear, does it benefit from any of the fair dealing copyright exceptions?

It does so in the following way. The fair dealing exception is introduced, and the limited types of 'dealings' permitted by this exception are laid out, including the new and as yet unclearly defined 'pastiche' fair dealing exception in s30A CDPA 1988, as brought in by the 2014 Regulations. This analysis will provide a suggested legal test for pastiche, and will argue that certain types of fanfiction (namely those published online for free) should benefit from that exception (and if not, there are good arguments to be made for it to shelter under the other types of permitted act such as research). This chapter will then argue that fanfiction also satisfies the required legislative tests for 'fairness'. Although (as proved in Chapters 3 and 4), fanfiction may take a substantial part of the underlying work<sup>15</sup>,

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<sup>14</sup> And in previous changes to copyright law, the most notable example being the extension of the copyright period to life of the author plus 70 years (Michael Todd Helfand, 'When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters' (1992) 44 *Stanford Law Review* 623; Monica Horten, *A Copyright Masquerade: How Corporate Lobbying Threatens Online Freedoms* (Zed Books Ltd 2013); Christopher J Buccafusco and Paul J Heald, 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension' (2013) 28 *Berkeley Technology Law Journal* 1.)

<sup>15</sup> *Hubbard v Vosper* (n 1). (It relies on repeated reuses of characters and locations)

it is a type of transformative use<sup>16</sup> that a fair minded and honest person<sup>17</sup> would make, which does not have a significant economic impact on the underlying work<sup>18</sup> as fanfiction posts may contain proportionally more original work than copied work<sup>19</sup>, and do not operate in the same market as the original work. This chapter provides a comparative analysis of fair use in the US, to see what lessons can be learned from that jurisdiction, as well as a comparison with Canada's user-generated content right, to show an alternative, more flexible approach to UGC works.

This chapter makes an important contribution to the thesis. It will show that while most fanfiction does infringe the right to copy or reproduce the work (or a substantial part of it) under s17 CDPA 1988, there is a good argument to be made that the social welfare gains that come from the work, such as literacy education and acting as a homage to the original work, mean that online non-commercial fanfiction should be deemed a fair dealing with the original under the 'pastiche' or 'research and private study' exceptions. However, due to issues with lack of clarity and strength of the fair dealing exceptions, especially considering the newer headings such as pastiche that have yet to be legislated upon, there are other methods that might be more efficient ways for the law to interact with this type

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<sup>16</sup> *Newspaper Licensing Agency v Marks & Spencer plc* [1999] EMLR 369.

<sup>17</sup> *Hyde Park Residence v Yelland* [2000] EMLR 363 [21]. (Seen by the wide ranging types of people that interact with these types of work, and by the large numbers of posts on fanfiction archives - this will be developed in the data analysis in Chapters 8 and 9) (also seen by the increasing number of commercial authors who accept that these types of reuses occur, and publishers that use fanfiction contests to develop their stable of authors, both of which may lead to a reasonable assumption by fanfiction authors that this is an acceptable form of creativity)

<sup>18</sup> *Ashdown v Telegraph Group Ltd* [2002] Ch 149 [2001] ECWA Civ 1142.

<sup>19</sup> *Hubbard v Vosper* (n 1) (this is case dependant and some fanfiction may not satisfy this test).

of beneficial creativity - namely the UGC exception that was discussed during the drafting stages of the new Directive on Copyright in a Digital Single Market.

## 5.2 Permissible ‘Dealings’ with Copyrighted Works

Analysis will now turn to the copyright exceptions that UGC fanfiction writers may use to argue for publication of their works. The importance of this form of creativity (that created by amateur users) is recognised at the highest level by lawmakers, who have stated that

“The evolution of digital technologies has changed the way works and other protected subject matter are created, produced, distributed and exploited. New uses have emerged as well as new actors and new business models”<sup>20</sup>.

Given the importance of this form of creation, production, distribution and exploitation is to copyright holders, it is important to understand exactly how copyright handles, and should handle, these types of work, bearing in mind the underlying conflict between ideas of political economy<sup>21</sup> and creativity that underpin this thesis. The majority of the analysis to date in EU and UK copyright literature focuses on UGC in relation to

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<sup>20</sup> ‘Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market’ (European Parliament 2016) COM/2016/0593 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>> accessed 26 August 2020.

<sup>21</sup> Hargreaves, in his 2011 review into the application of UK copyright law in the digital age, stated his belief that a “healthy creative economy should embrace creativity in all its aspects” and that copyright should be used to achieve this though balancing the “divergent interests” of authors, publishers, readers and society as a whole (Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (2011) 41, 50 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)> accessed 19 May 2018.). It should do so clearly, by defining the economic and moral rights that are protected in a copyright work, and the exceptions when they do not apply. Having defined the economic rights that are protected in the works concerned in the previous chapter, this chapter will set out the rights that copyright holders have to protect their works from uses such as fanfiction, and equally the exceptions that may apply to permit these forms of user-generated content.

musical or artistic works of copyright - for example, remix<sup>22</sup> or parody<sup>23</sup>. These forms of commercial transformative works have been deemed to have sufficient social welfare gains to be worthy of permitting and protecting within the fair dealing exceptions to copyright

For works of UGC that contain copyrighted material (such as fanfiction) to be legally publishable without a licence, they must benefit from a copyright exception. The most important copyright exception for UGC works is fair dealing, contained within s28-30 CDPA 1988. If a user can prove that their work is a fair dealing with the original work as defined within this statute, the permitted acts within copyright do not apply and the user is free to carry out the dealing as they require - i.e. fanfiction writers would be permitted to publish their works, even though the works would otherwise infringe copyright.

Fair dealing has been defined by the UK Government as asking “how would a fair-minded and honest person have dealt with the work?”<sup>24</sup>. As I will demonstrate, fanfiction as a type of UGC is, and should be recognised legally as, a ‘fair minded and honest’ method of interacting with the works underneath, and should benefit from the application of the fair dealing copyright exception. This analysis is “...a true test of fanfiction, logically

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<sup>22</sup> Nick Scharf, ‘Exploring the Changing Interface Between Copyright and Regulation in the Digital Environment’ Doctoral Thesis <<https://ueaeprints.uea.ac.uk/id/eprint/43164>> accessed 29 April 2017; Bernd Justin Jutte, ‘The EU’s Trouble with Mashups - From Disabling to Enabling a Digital Art Form’ (2014) 5 *Journal of Intellectual Property, Information technology and Electronic Commerce* 172; Maxime Lambrecht and Julien Cabay, ‘Remix Allowed: Avenues for Copyright Reform Inspired by Canada’ (2016) 11 *Journal of Intellectual Property Law & Practice* 21; J Cabay and M Lambrecht, ‘Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity’ (2015) 10 *Journal of Intellectual Property Law & Practice* 359; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008)

<sup>23</sup> Jonathan Griffiths, ‘Fair Dealing after Deckmyn - The United Kingdom’s Defence for Caricature, Parody or Pastiche’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 <<https://papers.ssrn.com/abstract=2770508>> accessed 2 December 2017; Sabine Jacques, ‘Are the New “Fair Dealing” Provisions an Improvement on the Previous UK Law, and Why?’ (2015) 10 *Journal of Intellectual Property Law & Practice* 699.

<sup>24</sup> ‘Exceptions to Copyright - GOV.UK’ <<https://www.gov.uk/guidance/exceptions-to-copyright>> accessed 2 December 2017. The ‘fair and honest person’ test is a reference to the leading judgement in *Ashdown v Telegraph Group Ltd* [2002] Ch 149 [2001] EWCA Civ 1142

evaluating each factor,” and is “invaluable in moving the fanfiction debate past the emotions of the participants”<sup>25</sup>.

### 5.2.1 ‘Dealing’

The CDPA 1988 envisages several different types of ‘dealing’ or ‘permitted acts’ as being ‘fair’. The most relevant of these for fanfiction are as follows:

Type of Fair Dealing	CDPA 1988 Subsection
Research/Private Study	S29(1)
Criticism/Review	S30(1)
Quotations	S30(1ZA)
Parody, Caricature, Pastiche	S30A(1)

This is (part of) a closed list of exceptions and for a UGC work of fanfiction to benefit from protection under these exceptions, the creator would need to prove their work is one of these types of ‘dealing’. Otherwise, the claim for fair dealing fails<sup>26</sup>. Once they have argued this, the analysis moves on to whether the work is ‘fair’<sup>27</sup>, which includes whether the original work was made available to the public<sup>28</sup> and sufficiently acknowledged<sup>29</sup>. Thus, a description of each type of fair dealing will be given, including how each type of ‘permitted act’ may apply to UGC works. Once this has been carried out, an

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<sup>25</sup> Stacey M Lantagne, ‘The Better Angels of Our Fanfiction: The Need for True and Logical Precedent’ (2011) 33 *Hastings Comm & Ent LJ* 159, 179.

<sup>26</sup> Like the derivative work right, this again shows the distinction between the UK system of certainty through use of closed lists in copyright, and the US system of flexibility and future-proofing achieved through use of open lists. In the US, the fair use system is an open list of exceptions (see later section 6.4)

<sup>27</sup> *Hubbard v Vosper* [1972] 2 QB 84

<sup>28</sup> This requirement is easily met by most fanfiction, given that it is based on works which have a pre-established fandom – which logically requires prior publication of the work it is based on

<sup>29</sup> The requirement for ‘sufficient acknowledgement’ of the original work is likely to be met given the prevalence of disclaimers within fanfiction works whereby the copyright holder is recognised (‘Disclaimer - Fanlore’ <<https://fanlore.org/wiki/Disclaimer>> accessed 2 December 2017.) Thus, this aspect will not be touched upon further.

argument will be made as to how UGC may or may not satisfy the general test of 'fairness' from *Hubbard v Vosper*.

### 5.2.2 Research/Private Study

Given the analysis made earlier<sup>30</sup> that fanfiction is a form of produsage and peer production, whereby many users undertake these forms of work in order to develop their technical skills as well as in furtherance of general educational aims, the research/private study exception contained in s29 CDPA may be relevant. To make out a claim under this heading, the user must prove that valid educational purpose must be the **only** reason for the use of the work, it cannot be mass-marketed, and must only have been intended for use in schools or other educational locations. The original work must also be sufficiently acknowledged, unless it is impossible to do so<sup>31</sup>.

For fanfiction authors to succeed with a defence of fair dealing under this heading, they must prove they are only carrying out the work to develop their skills - an analysis that can be supported by the new theory of distributed mentoring<sup>32</sup> which shows how different creativity is in a digital age. Prior to the digital age, creation and invention was an individual effort whereby authors sent their works to publishing houses, who employed professional editors and reviewers<sup>33</sup>. This gatekeeping of reviewers meant that many authors were working alone until they got their first publishing deal, which operates as an emotional as well as practical barrier to entering the market. Copyright, and the restricted acts it protects, is central to this old form of creation and to the birth and development of the

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<sup>30</sup> See Chapter 2.4.1. Also see Cecilia Rodriguez Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019).

<sup>31</sup> s29(1B). This is not usually an issue for fanfiction.

<sup>32</sup> Aragon, Davis and Fiesler (n 30); Julie Campbell and others, 'Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities' (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 14 February 2017.

<sup>33</sup> Jen (JL) Pecoskie and Heather Hill, 'Beyond Traditional Publishing Models: An Examination of the Relationships between Authors, Readers, and Publishers' (2015) 71 *Journal of Documentation* 609; TJ Adams and N Barker, 'A New Model for the Study of the Book', *A Potencie of Life: Books in Society* (Oak Knoll Press 2001).

creative industries<sup>34</sup>, as it produced the social structures for many cultural works - for example enshrining the gatekeeping role of publishers. Amateur writers do not have access to reviewers or editors under this system, and thus may struggle to improve their writing skills.

Some amateur writers therefore turn to fanfiction sites such as Fanfiction.Net to practice and improve their writing skills, due to the ability to post freely and get instantaneous feedback on work in progress. These sites demonstrate a complicated marketplace of ideas, wherein the majority of users both publish frequently and follow and review the works of their peers, and are therefore motivated by some element of skill improvement<sup>35</sup>. This type of intertwined relationship with the site and other active users takes this form of production beyond Benkler's concept of peer production and into a special form of network-enabled informal social production referred to as 'distributed mentoring', which may be sufficient to claim that the work should benefit from the research/private study fair dealing exception.

Fanfiction can be seen to demonstrate the key features of social interaction required by 'distributed mentoring'<sup>36</sup> that distinguish it from standard forms of mentoring or teaching and can explain why it is popular for users who may not engage with standard forms of teaching. The online, free to access nature of the sites mean that users from a variety of backgrounds can participate, and therefore increases the number of reviewers likely to see and engage with each work ('aggregation'), as seen by the high number of

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<sup>34</sup> Barbara Townley, Philip Roscoe and Nicola Searle, 'Introduction: Creating Economy', *Creating Economy: Enterprise, Intellectual Property, and the Valuation of Goods* (Oxford University Press 2019).

<sup>35</sup> Many users can be argued to be either aspirational or expert producers under Guerrero-Pico et al's 2018 analysis, given the literary type of work produced, the moderate to high level of planning that goes into creation, and the high consideration and use of narrative values (Mar Guerrero-Pico, Maria-Jose Masanet and Carlos A Scolari, 'Toward a Typology of Young Producers: Teenagers' Transmedia Skills, Media Production, and Narrative and Aesthetic Appreciation' [2018] *New Media & Society* 21(2) 336, 343.)

<sup>36</sup> Aragon, Davis and Fiesler (n 30).

average reviews on the site above. Furthermore, reviewers are likely to be posters themselves, and due to loyalty and engagement with the site and the fandom are likely to return to the site frequently and post more engaged reviews. This leads to the production of a commons-based knowledge bank both generally and specific to the individual writer ('accretion'). Due to the online nature of the site, it is continually accessible to users from around the world in a variety of time zones ('asynchronicity') who can post continuously and engage in conversations (with other reviewers and the writer) in real time (leading to 'acceleration' of information through the 'abundance' of engagement). Due to the long-term nature of sites such as Fanfiction.Net, which has been running since 1998, reviews are accessible over a long time period, and can therefore be used and built upon and revisited in order to improve both the fanfiction work and the quality of the review being given (the 'availability' factor). Finally, reviews on these sites tend to be constructive and positive for the writer, which is an important distinction between this form of mentoring and standard teaching<sup>37</sup>. The positive 'affect' this has on the writers may show why many writers engage with this type of learning – it is focused on a form of cultural work that the writer is already highly engaged with and the responses are mostly encouraging, as distinct from the methods of assessment used in standard schooling.

Although at first glance there would seem a strong argument to be made for applying this fair dealing subheading to fanfiction, there are some issues. Primarily, in order to do so one must prove that the educational purpose is the only reason for the use. The motivation for many writers is to improve their skills and reputation rather than their income<sup>38</sup>, and should perhaps be permitted to claim that their work is research for a

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<sup>37</sup> Sarah Evans and others, 'More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring' (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 23 April 2017.

<sup>38</sup> Axel Bruns and Jan-Hinrik Schmidt, 'Produstage: A Closer Look at Continuing Developments' (2011) 17 *New Review of Hypermedia and Multimedia* 3.

writing career. However, some authors, such as Cassandra Clare and EL James, are successful in using this network to improve their skills and reputation to such an extent that they can develop a commercial career as an author<sup>39</sup>. It is the improvement to their reputation that may cause an issue - as this is not a strictly educational purpose and may be too commercial a reason for permitting this type of use. Furthermore, it remains hard to see how UGC works posted to international sites such as YouTube - and fanfiction posted to Fanfiction.Net - would pass the test given how easy it would be for copyright holders to argue that those sites are 'mass marketing' the works<sup>40</sup> and are commercial, not 'educational', locations<sup>41</sup>.

### 5.2.3 Criticism/Review

The fair dealing exception for criticisms or reviews has been referred to as the "most general of all"<sup>42</sup>. To make a claim out for a work of UGC to be covered by this exception, the source material must be sufficiently acknowledged<sup>43</sup>. So long as this happens, this exception is fairly wide ranging, given that it can include criticism or review of the source material, or another work – and covers the ideas contained within the source

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<sup>39</sup> Pecoskie and Hill (n 33)

<sup>40</sup> For example, by using reviews and algorithms to rank works and recommend them to other users, and by using advertising to monetise videos.

<sup>41</sup> If works are published on a less commercial site – for example, one that does not rely on advertising revenue or charge for the works, this issue may be overcome. This is one of the most important issues surrounding this exception and would be a hard barrier for fanfiction archives to cross. One possible way of doing this would be to create paid-for membership only areas, whereby the content is placed behind a paywall and only accessible to those who pay to join the 'writers group'. This 'private group' would be less likely to be held 'commercial' as it would be less likely to be considered 'available to the public'. However, it is unclear whether this would work to avoid the legislative issue, and it is unlikely to function in a normative sense due to the demographics of fanfiction writers and consumers. Fanfiction.Net is an example of a site that is likely to be deemed commercial, as it is supported by advertising on the landing page. If sites turn to non-commercial means for support (such as Archive of Our Own, which is run without advertising), then there would be a much stronger argument for applying this exception. However, if sites turn to more pervasive methods of advertising that cannot be blocked (such as many freemium mobile games use), then this would not be applicable.

<sup>42</sup> W Cornish, D Llewelyn and T Aplin, 'Infringement of Copyright and Moral Rights', *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8<sup>th</sup> ed, Sweet & Maxwell, 2013) 494

<sup>43</sup> S30(1) CDPA 1988

material as well as the specific form of expression used<sup>44</sup>. Many forms of UGC work, especially remix, may be covered at first instance by this exception.

Many fanfiction authors and scholars would argue that they are creating their work as a criticism of the original work. This is a strong argument, given that courts have held that it is an objective test<sup>45</sup>, meaning the derivative work does not have to be a criticism of the specific words in the underlying work.

The problem with situating fanfiction within this exception is that many of the standard works argued under this heading are substantive, factual reviews of the underlying work. Fanfiction is fictional. It may be hard to extend this exception to a fictional work based on and criticising another. This is especially true given the statement by Walker LJ in *Pro Sieben* that “the nearer that any particular derivative use of copyright material comes to the boundaries, unplotted though they are, the less likely it is to make good the fair dealing defence”<sup>46</sup>. Thus the related exception for quotations will be analysed.

#### 5.2.4 Quotation

A similar exception for quotation was inserted into s30 CDPA by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. S30(1ZA) lays out the broad nature of the exception, explaining it can protect reuses for criticism or review, or ‘otherwise’. This broad nature means that it has been at the forefront of the argument between freedom of expression and copyright protection. It has been applied to such diverse uses as publication of unauthorised excerpts of written articles<sup>47</sup>, military reports<sup>48</sup>,

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<sup>44</sup> *Time Warner Entertainment v Channel Four Television* (1994) EMLR 1

<sup>45</sup> *Pro Sieben Media v Carlton Television* [1999] FSR 610

<sup>46</sup> *Pro Sieben Media* (ibid) [621]

<sup>47</sup> *Spiegel Online GmbH v Volker Beck* (C-516/17)

<sup>48</sup> *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17).

or remix<sup>49</sup>. In each case, the question was whether the need for freedom of speech<sup>50</sup> should trump the need for copyright protection. For example, in *Pelham*<sup>51</sup>, the CJEU held that the need for a functioning internal market for trade of creative works requires copyright law to be firmly balanced against the fundamental freedoms “in particular freedom of artistic expression”, and that this balance was found within the scheme of limitations and exceptions<sup>52</sup>.

Clarity on the types of use permitted within this heading is therefore vital. *Pelham* clarified that the quotation must only be “to the extent required” for that purpose<sup>53</sup>, and further defined quotation strictly in paragraph 71 as the use, by someone else, of either a whole work or an extract, for the purposes of illustrating an assertion, or defending an opinion – or of giving a comparison between that work and the assertions of the user – such that the user is entering into a dialogue with the work. The CJEU specifically referred to paragraph 64 of the Advocate General’s opinion, where he stated that this dialogue could be in tribute to the underlying work. Furthermore, the CJEU in *Pelham* held that samples of work, such as music clips, could amount to quotations, so long as they remained recognisable as part of the underlying work. Characters and locations as reproduced in fanfiction would, arguably, pass this test.

A strong example of this dialogue with the underlying work is refocalisation<sup>54</sup>, used as a criticism of the lack of strong female lead characters. It shows a desire for audiences to see old stories in a new light, especially if those old stories, written as they were in a

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<sup>49</sup> *Pelham v Hutter and Schneider-Esleben* (C-476/17).

<sup>50</sup> Or freedom of the press, which can also be covered by the ‘news reporting’ exception also contained within s30 CDPA 1988 (but which is irrelevant to fanfiction).

<sup>51</sup> *Pelham* (n49) [60]

<sup>52</sup> Martin Senftleben, ‘From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test’ in T Mylly and J Griffiths (eds), *The Transformation of Global Intellectual Property Protection* (Oxford University Press 2020) 14.

<sup>53</sup> At paragraph 69

<sup>54</sup> See Chapter 1.4 for definition

different era, no longer satisfy their audiences. Recognisable characters are therefore taken and repurposed, while remaining within their original universe. As stated by one prominent (female) fanfiction writer:

“But one thing disturbed me: the lack of female characters. The main party of adventurers accompanying the hobbit protagonist, Frodo, didn’t contain a single female. Not only did I feel shut out—the way I sometimes did in school when my teachers told me that girls weren’t supposed to be good at math—but it offended my sense of fairness. Surely girls and women could have adventures and take on risky challenges too?...By reimagining Tolkien’s fantasy world, I was creating a place where someone like me could feel at home. Writing my story gave me comfort.”<sup>55</sup>

Gender changes of modern fiction works is nothing new. In authorised adaptations, it operates as part of the current trend in Western creative media for remakes, prequels and sequels. Blockbuster films with all-male casts such as *Ghostbusters*, *Dr Who* and even *Ocean's Eleven* have all been remade recently with all female casts<sup>56</sup>. This could be both good and bad for fanfiction writers seeking to claim fair dealing. It is harmful to their claim as it is becoming a mainstream idea and therefore could be argued to be within the purview of derivative works that should be retained for the author to licence as they will. However, it also operates as proof that these types of story satisfy some form of social welfare:

“...fan writers reclaim female experiences from the margins of male-centred texts, offering readers the kinds of heroic women still rarely available elsewhere in

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<sup>55</sup> Cecilia Aragon, ‘What I Learned from Studying Billions of Words of Online Fan Fiction’ (*MIT Technology Review*) <<https://www.technologyreview.com/2019/12/27/131111/online-fan-fiction-learning-communities/>> accessed 19 June 2020.

<sup>56</sup> ‘7 Film Classics That Need an All-Female Reboot’ (*Evening Standard*, 20 June 2018) <<https://www.standard.co.uk/go/london/film/oceans-8-seven-film-classics-that-need-an-allfemale-cast-remake-a3867861.html>> accessed 21 June 2018.

popular culture: their stories address feminist concerns about female autonomy, authority, and ambition.”<sup>57</sup>

People feel a need to read or watch these sorts of stories. This argument could also be made for Eroticisation<sup>58</sup>, given that this category is used by members of the LGBTQ+ community to write stories that cater to their own needs. This type of fanfiction is referred to as ‘slash’, and dates back as far as most common fanfiction, to a time when homosexuality was illegal in many Western countries. Thus, slash fiction gave these authors a method to work out their sexuality when questioning it openly may have led to a prison term. It is still true today that teens are using this form of writing to engage with non-cisgender, non-heteronormative feelings they may have. Its important sociological elements have been called “progressive”, explained as:

“...it’s development of more egalitarian forms of romantic and erotic relationships, its transcendence of rigidly defined categories of gender and sexual identity, its critique of the more repressive aspects of traditional masculinity.”<sup>59</sup>

While it could be argued that increasing equality could be done purely by writing more powerful female-led or LGBTQ+ original works, given the operation of scarcity of attention and the long tail, it would be hard for these types of work to get the coverage that an all-female reworking of a classic would.

The problem with situating fanfiction within this exception is that in *Pelham*<sup>60</sup> it appears that the purpose of a quotation must be informative – the assertion or opinion must be non-fictional. Given the strict statement in paragraph 69 that “the use at issue for

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<sup>57</sup> Henry Jenkins, ‘Scribbling in the Margins’, *Textual Poachers: Television Fans and Participatory Culture* (20th anniversary ed, Routledge 2013) 167.

<sup>58</sup> And possibly Character Dislocation to a lesser extent

<sup>59</sup> Henry Jenkins, “‘Welcome to Bisexuality, Captain Kirk’: Slash and the Fan-Writing Community’, *Textual Poachers: Television Fans and Participatory Culture* (20th Anniversary ed, Routledge 2013) 219.

<sup>60</sup> *Pelham* (n 49)

the purposes of quotation must not be extended beyond the confines of what is necessary to achieve the purpose of that particular quotation”, it would be arguably likely that stretching it to cover fanfiction would be a step too far. Thus, this chapter will move on to investigate a more relevant exception – that of caricature, parody and pastiche.

### 5.2.5 Caricature, Parody and Pastiche

The new fair dealing exceptions for caricature, parody and pastiche will be shown to have demonstrated a thawing of the attitude towards certain types of content<sup>61</sup> under these headings, and fanfiction will be shown to be arguably permitted within the ‘pastiche’ heading, should a case ever come to court in the UK.

Following the Quotation and Parody Regulations 2014, ‘caricature, parody and pastiche’ became a permitted act within UK copyright law under s30A CDPA 1988. While the exact meaning of the words ‘caricature’, ‘parody’, or ‘pastiche’ was not given in the legislation, the UK government gave the following example within its explanatory materials:

“...a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well-known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork”<sup>62</sup>.

While there is yet to be a clear judicial or legislative definition of pastiche<sup>63</sup>, it appears logically to cover most types of UGC such as “mash-ups, fanfiction, music sampling, appropriation art and other forms of homage and compilation” as “laudatory and non-critical imitation[s]”<sup>64</sup>. Pastiche has been defined as mimicking the underlying work either

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<sup>61</sup> Such as memes and gifs, which are likely transformative enough to rate protection under the parody heading Anupam Chander and Madhavi Sunder, ‘Dancing on the Grave of Copyright?’ (2019) 18 Duke Law & Technology Review 143, 154.

<sup>62</sup> ‘Exceptions to Copyright - GOV.UK’ (n 24).

<sup>63</sup> In *Deckmyn*, it was merely stated to mean something very similar to parody

<sup>64</sup> Emily Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed Up Drafting?’ (2017) 4 Intellectual Property Law Quarterly 346, 347.

by imitating style or idiosyncrasies from within the original<sup>65</sup>, in a nostalgic way, without satirising it (unlike parody, which will be discussed below). It is not a new form of creativity, having been employed by authors such as Proust. These historical pastiches are somewhat distinct from today's UGC versions, as they were created commercially during a time when stringent rules of copyright did not preclude their use. Like fanfiction, they were controlled through the use of social norms: leading theorists of the time such as Marmontel felt pastiche was 'affected' and should not be promoted<sup>66</sup>.

While there are many similarities between parody and pastiche, the lack of criticism is what distinguishes pastiche as an homage from parody - and is why some legal scholars believe parody has a stronger claim to fair dealing than pastiche<sup>67</sup>. Leading scholars refer to it as 'blank' or 'empty' parody<sup>68</sup>. Yet, pastiche was specifically included in the legislation and therefore there must have been the intention for these works to be permitted. This remains true, despite the fact that the word appears to have been lifted wholesale from the European legislation, as there was no debate on the word in Parliament at the time the new exceptions were brought in. The word has been used 24 times in the House of Commons yet never defined<sup>69</sup> which perhaps implies that Parliament believes it is a standard English word that does not require specific legislative definition<sup>70</sup>. In a 2015 debate on the topic of harmonising copyright and related rights, the importance of pastiche

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<sup>65</sup> Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press 1991) 16.

<sup>66</sup> Jean François Marmontel, *Éléments de Littérature* (Firmin Didot Brothers 1846).

<sup>67</sup> Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32 *Quarterly Review of Film and Video* 728; Joshua Marshall, 'Balancing the Right to Integrity with Caricature, Parody and Pastiche' (2018) 13 *Journal of Intellectual Property Law & Practice* 955.

<sup>68</sup> Such as Jameson (n 65) and Petridis (n 67)

<sup>69</sup> 'Find References - Pastiche' (*Hansard*)

<<https://hansard.parliament.uk/search/Contributions?endDate=12%2f29%2f2019+00%3a00%3a00&house=Commons&searchTerm=pastiche&startDate=01%2f01%2f1800+00%3a00%3a00&page=1>> accessed 22 June 2020.

<sup>70</sup> Using standard English usage of words when those terms are not further defined in the legislation has precedence – *Pelham* used a similar argument when using the term 'quotation'.

and caricatures were specifically mentioned. Without them, “Latin writers such as Plautus or Terence, instead of occupying a prominent place in the history of literature, would have ended up in trouble for the copyright infringement held by Greek authors.”<sup>71</sup> Therefore, although there is a lack of case law on which to base an argument for pastiche as a fair dealing exception to protect fanfiction, it can be argued that it is within the spirit of the legislation - and would be permitted should a case come to court.

Parody however has been specifically defined and has been used in the US to protect fanfiction in the past<sup>72</sup>. Thus, it should be considered whether the same defence could be used in the UK. Parody was defined in the leading case of *Deckmyn*<sup>73</sup>, where two requirements were laid out. The second work must (a) call to mind the underlying work but be different enough from it to be distinctive; and (b) be a humorous or mocking expressive work<sup>74</sup>. The first characteristic can be demonstrated by works that target either the underlying work (target parodies), or the sociology of the group behind the work or that the original work is marketed at (weapon parodies)<sup>75</sup>. Thus, UGC works that specifically operate as a parody are now permitted, so long as they are ‘fair’.

In the US fanfiction has previously been discussed under the ‘parody’ fair use exception<sup>76</sup>. However, there are important differences between parody and fanfiction that mean they will not be treated the same way in the UK, due to the importance within the EU and UK of principles of statutory interpretation. The most important difference between parody and fanfiction is the way the underlying work has been treated. This relates to the

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<sup>71</sup> Dario Tamburrano, (‘Debates - Harmonisation of Certain Aspects of Copyright and Related Rights (A8-0209/2015 - Julia Reda) - Thursday, 9 July 2015’ <[https://www.europarl.europa.eu/doceo/document/CRE-8-2015-07-09-ITM-013-22\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-8-2015-07-09-ITM-013-22_EN.html)> accessed 22 June 2020., translation from Italian.

<sup>72</sup> *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11<sup>th</sup> cir 2001)

<sup>73</sup> *Deckmyn v Vandersteen* (C-201/13)

<sup>74</sup> *Ibid*, 20

<sup>75</sup> Griffiths (n 23) 14–15. Also see Opinion of Advocate General Cruz Villalón, *Deckmyn v Vandersteen* (n 73) paras 60–65.

<sup>76</sup> *Suntrust Bank v Houghton Mifflin* 268 F.3d 1257 (11th Cir) 2001

second, ‘functional’ part of the *Deckmyn* definition – that parodies must be made up of some form of ‘humour or mockery’. While there are some works of fanfiction that operate in that way intentionally<sup>77</sup>, this is not the main reason fanfiction is created. It is mostly created out of love for and engagement with the community itself, rather than humour.

One final important difference between fanfiction and parody (which also explains why the legislation for parody should not be implied to cover pastiche type works such as fanfiction) is the status of the work. While parodies are released onto the market in completed form, it has been shown that there is much more focus on the release of works-in-progress in fanfiction<sup>78</sup>, which is why much is released for free. This may be due to the amateur nature of some fanfiction writers: 62.3% of Fanfiction.Net users are teenagers<sup>79</sup>, who are at an age where they are developing their writing skills – and are therefore more open to the form of reviews and mentoring that communities such as Fanfiction.Net provide. Writers of that age group are also much less likely to be writing original fiction professionally<sup>80</sup> – possibly due to lack of education or training. Thus, engaging with an active fandom on Fanfiction.Net may be seen to be similar to professional writers joining professional organisations such as the Writers’ Guild of Great Britain or the Alliance of Independent Authors. In the same way, fanfiction may be a form of vocational writing training – which may explain why much fanfiction is released chapter by chapter. This is a

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<sup>77</sup> A search for works tagged as ‘parody’ on Fanfiction.Net returns 23,484 works, and 754 works on Archive of Our Own.

<sup>78</sup> Finn Upham, ‘ToastyStats: Fanfic Completion Rates’ (ToastyStats: Fandom Statistical Analyses, 20 April 2015) <<http://destinationtoast.tumblr.com/post/116932611769/toastystats-fanfic-completion-rates-i-discovered>> accessed 24 April 2017. This research showed that while 88% of works on Archive of Our Own (AO3) are rated as ‘complete’, only 50% on Fanfiction.Net were.

<sup>79</sup> Frens et al (n 12) 7; Kodlee Yin and others, ‘Where No One Has Gone Before: A Meta-Dataset of the World’s Largest Fanfiction Repository’, *CHI 2017* (ACM Press 2017) <<https://faculty.washington.edu/aragon/pubs/Yin-FFData-CHI2017.pdf>> accessed 24 April 2017.

<sup>80</sup> In a recent survey, authors who write professionally were found to be mostly over the age of 45 (Martin Kretschmer and others, ‘UK Authors’ Earnings and Contracts 2018: A Survey of 50,000 Writers’ 11 <<https://zenodo.org/record/2649059>> accessed 23 June 2020.

point that will be discussed further in Chapter 8 regarding the transformative nature of fanfiction.

The predominance of incomplete works within fanfiction may be explained by the community nature of fandoms, and fanfiction groups specifically. It has been argued that fanfiction writers and readers form a community for pleasure (in their hobby of writing/reading of amateur works and fanfiction in general) or to develop their skills in hopes of developing a professional literary career<sup>81</sup>. Importantly, fandom offers the ability to normalise and validate the desire to interact with the works in this way, while acquiring further writing or other creative skills<sup>82</sup>. The community aspect is important, as shown in Fanfiction.Net’s Guidelines: ““Everyone here is an aspiring writer. Respect your fellow members and lend a helping hand when they need it”<sup>83</sup>. The works posted are therefore released in draft form and comments and criticisms are welcomed (both Fanfiction.Net and Archive of Our Own have clear spaces underneath each work for comments). This is different to commercial works like parody that seek reviews once the work is completed and released onto the market.

To summarise:

	<b>Parody</b>	<b>Fanfiction</b>
Is it a derivative work?	Yes	Yes
Is it released as a complete work or designed to provoke feedback from others	Completed work	WIP / Feedback from others
Does it “evoke an existing work while being noticeably different from it” <sup>84</sup> ?	Yes	Yes
Does it “constitute an expression of humour or mockery from it” <sup>85</sup> ?	Yes	No

<sup>81</sup> Aarthi Vadde, ‘Amateur Creativity: Contemporary Literature and the Digital Publishing Scene’ (2017) 48 *New Literary History* 27, 33.

<sup>82</sup> Matt Hills *Fan Cultures* (Routledge, 2002).

<sup>83</sup> ‘Guidelines | Fanfiction’ <<https://www.fanfiction.net/guidelines/>> accessed 7 May 2017

<sup>84</sup> *Deckmyn v Vandersteen* (n 73)

<sup>85</sup> *ibid*

These differences between parody and fanfiction are vital to the analysis as to how copyright law should approach each type of work. Copyright law assumes that all unauthorised derivative works operate against the interest of the copyright holder by acting as a substitute, or by harming the integrity of the original work. When that argument is applied to parody, one can see why there is a justified exception made: while a parody is a derivative work, it is unlikely to operate as any form of substitute for the underlying work<sup>86</sup>. This argument can be taken even further in the case of fanfiction. The *writers* of fanfiction are likely to have already purchased the underlying work (how else would they know what to base their works on?) and are in fact likely to be repeat loyal purchasers given their status as fans. They are also likely to be high volume, high cost purchasers who buy 'Extended/Director's Editions' instead of the standard version of the underlying work. Thus, the demand from those users is not 'satisfied' by the fanfiction. The question remains whether the *readers* of fanfiction are having their demand for the original work satisfied. The works are mostly published differently (online and non-commercially in comparison to print and commercially), and as mentioned are mostly released as 'works in progress' rather than as completed work. These issues will be picked up on in Chapter 7 in relation to the analysis of posts on Fanfiction.Net.

#### 5.2.6 A Suggested Legal Test for Pastiche

Given that there is a strong argument made that UGC such as fanfiction is not covered by current legislation regarding parody, could it instead be covered by the 'pastiche' exception also contained in s30A CDPA 1988? To answer this question, this thesis will now attempt to draft a potential legal test for pastiche, using analogies where

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<sup>86</sup> although it may harm the size of the market for the underlying work – for more, see Sabine Jacques, *The Parody Exception in Copyright Law* (Oxford University Press 2019).

possible with case law from other forms of fair dealing – specifically quotation and parody, which (as already discussed) are the closest forms of dealing to pastiche.

The suggested legal test for pastiche is as follows:

- 1) The use of the whole or an important extract which evokes an existing work;
- 2) which must be noticeably different from that first work, displaying original thought such as to clearly represent a new work;
- 3) must constitute an intellectual and laudatory comment of the author on the previous work such as to be a dialogue with that work; and
- 4) the underlying work must have been legitimately made available to the public.

This test reflects the homage, non-critical, intertextuality nature of pastiche as distinct from parody and quotation. While this may seem a broad definition, it would permit for works whose value to society lies not in their critical nature but in their transformative nature to be analysed on that point (i.e. it would permit derivative reuses to be analysed with regard to their transformative nature and effect under the ‘fairness’ question, on a case-by-case basis). Further, it follows the recent jurisprudence of the EU in cases such as *Pelham*, *Funke Median* and *Spiegel Online* in that it permits for a precise test that can be effectively applied to a specific range of dealings with a specific purpose. By doing so, this test ensures the pastiche exception, like other limitations and exceptions, operates as a balance between the need to protect the intellectual output of creators and the need to protect the fundamental rights such as freedom of expression<sup>87</sup>. This balance will be demonstrated regarding each part of the test in the following paragraphs.

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<sup>87</sup> *Pelham* (n 49) para 60.

#### 5.2.6.1 *The use of the whole or an important extract which evokes an existing work*

This part of the test is drawn from paragraph 71 of the *Pelham* judgement (similar themes also appear in *Deckmyn*), but is based within the jurisprudence from other similar cases that for a dealing to be analysed under the fair dealing exceptions, it must be an infringing use of the underlying work – either the whole work, or an important extract – which brings the existing work to mind. As in the *Deckmyn* judgement, it must only use as much as is necessary to evoke that work. However, this research accepts that pastiche may require drawing more from the underlying work than a parody – for example, the reuse of a character or location, which may constitute a whole copyrighted work separate from the story in which they appear<sup>88</sup>.

This part of the legal test is likely to be easily met by Fanfiction.Net fanfiction, given the previous comments in this thesis that fanfiction is the use of the whole of a copyrighted character, such as Harry Potter, if my analysis in Chapter 4 is followed regarding characters attracting their own copyright protection. Even if that analysis is not accepted, the characters reused are likely to be deemed an important extract. Given the definition of fanfiction outlined in the introduction to this thesis - that it is inspired by one or more identifiable form of copyrighted popular culture<sup>89</sup> - this is not surprising and it is to be presumed that fanfiction would be utilising an important extract of the underlying work, whether that be characters or locations.

However, the counterfactual is that it is possible that fanfiction may be posted that does not rely heavily on the underlying work – for example that written to expand the series timeline<sup>90</sup>, or to personalise the underlying work<sup>91</sup> by insertion of new characters, especially self-referential characters referred to as ‘Mary Sues’. The Star Wars Extended

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<sup>88</sup> See Chapter 4

<sup>89</sup> See Chapter 1

<sup>90</sup> Jenkins (n 57) 163.

<sup>91</sup> *ibid* 171.

Universe novels may be good examples of these works. They are intended as fanfiction, but although they take place in the same 'universe' as the copyrighted works, they do not refer to too much of the original. They would stand on their own as fictional works, if they were not specifically described as Star Wars novels.

Regarding the posts on Fanfiction.Net however, this counterfactual is unlikely to apply, as the works are specifically posted on a fanfiction site, and are specifically tagged – and use specific characters/locations in the title – as to be using the underlying work. Similarly, the second string of this analysis – that it evokes an existing work – would be easily met by fanfiction posted on Fanfiction.Net (or Archive of our Own) as the functionality of the site means that it is tagged under the name of the work which it is based upon.

This test may therefore seem to overly protect producers such as fanfiction writers, and be an unfair imposition on the rights of the copyright holder – however, the permissibility of this part of the suggested test is balanced by the next step.

*5.2.6.2 Be noticeably different from that first work, displaying original thought such as to clearly represent a new work*

This is an important test for derivative works to meet, as it is the first way in which works such as fanfiction can be seen to diverge from works such as adaptations, which are specifically not fair dealing under UK law and would require a license to be published. Whereas adaptations do display some form of original thought, for example in the way that they frame the adapted work (taking books and adapting them for the screen, for example, may require new ideas on camera angles and editing), they are unlikely to meet the second

part of this test – to clearly represent a ‘new work’ by being ‘noticeably different’<sup>92</sup>. For adaptation to meet this step of the test, it would need to follow the *Deckmyn* jurisprudence regarding sufficient originality to be a new work that would stand on its own. Thus, slavish copies of any form would not be sufficiently original. Some forms of fanfiction would therefore fail this test for lack of originality. This protects the rights of the copyright holders. Yet it also permits for works which do demonstrate sufficient post *Infopaq*-originality and artistic choice to be examined on their own merits under the ‘fairness’ aspect of the fair dealing test.

In comparison to adaptation, fanfiction is “about twisting and tweaking and undermining the source material...and in the process adding layers and dimensions of meaning to it that the original never had”<sup>93</sup>. This is similar to much of the analysis on parody, albeit creativeness for a different purpose. Fanfiction is honest about its derivative nature, and many critics claim that it is purely “slavishly adoring”<sup>94</sup> of the underlying work and does not add enough to be worth protecting. However many scholars also argue that it brings an additional level of insight into the original work that is worth protecting<sup>95</sup>. For example, using Jenkins’ categorisations of fanfiction<sup>96</sup>:

- Recontextualisation: uses new locations, new plots and dialogue, and may make changes to pre-existing characters;
- Expanding the series timeline: uses new plots and dialogue as well as a new ending, which acts as a “rejection” of the canon ending – a “refusal to legitimise unpopular

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<sup>92</sup> Johannes Fehrle and Werner Schäfke-Zell, *Adaptation in the Age of Media Convergence* (Amsterdam University Press 2019); Linda Hutcheon and Siobhan O’Flynn, *A Theory of Adaptation* (2nd ed, Routledge 2013).

<sup>93</sup> Lev Grossman, ‘Foreward’ in Anne Jamison (ed), *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) xiii.

<sup>94</sup> *ibid* xii.

<sup>95</sup> In practice, this analysis is closely linked to the test for transformativeness within the ‘fairness’ analysis to be undertaken in the next section and in Chapter 8.

<sup>96</sup> Jenkins (n 57).

endings”<sup>97</sup>, and may bring in original characters created by the fanfiction writer as well as new locations;

- Refocalisation: uses new plots and dialogue, and may bring in a new ending, as well as maybe changing the genre;
- Moral realignment: makes changes to pre-existing characters, and may bring in new locations or alternate universes, as well as new dialogue, such that it may change the genre of the work;
- Genre shifting<sup>98</sup>: uses new plots and dialogue to change the genre of the work, sometimes making changes to canon characters, and either occurring in new locations within the standard universe or in a whole new alternative universe designed by the fanfiction writer, perhaps giving it a new ending;
- Crossovers: use changes to pre-existing characters, bringing in characters from other fandoms to interact with each other, taking place in new locations (i.e. transplanting characters from one fandom to another – such as taking characters from the TV series *Supernatural* and putting them in a different series, such as *Dr Who*), with new plots and dialogue, a new ending and sometimes moving the works into a new genre;
- Character dislocation: makes changes to existing characters, using new plot and dialogue and creating a new ending, perhaps using original characters created by the fanfiction writer;
- Personalisation: uses new characters created by the fanfiction writer to interact with the original characters using new plots and dialogues and creating a new ending for the characters;

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<sup>97</sup> ibid 164.

<sup>98</sup> Discussed in more detail in next section on transformativeness and in Chapter 7

- Emotional intensification: uses new dialogue and may use new plot points to make changes to the original characters<sup>99</sup>, whether in the canon universe or in a new universe of the fanfiction writers choosing; and
- Eroticisation: makes changes to the original characters<sup>100</sup>, using new plots, dialogue and possible alternate universes to move the work into a new genre.

Therefore, it could be suggested that these fanfiction works all demonstrate sufficient originality to meet the test for pastiche, as given.

The counterfactual, however, is that many of these types of work admittedly draw heavily from the underlying work. Many use pre-existing characters and locations, for example 'expanding the series timeline', 'refocalisation' and 'personalisation', and some may not change the genre, for example 'refocalisation', 'moral realignment', and 'character dislocation'. Thus, they may remain within the same market as the original work. Yet, this thesis argues that that analysis ought best to be contained within the analysis for 'transformative use' within the 'fairness' *Hubbard v Vosper* test. At this stage, we are only testing whether these posts may be contained within the correct type of dealing to be analysed for fairness. This thesis argues that most Fanfiction.Net fanfiction is likely to meet these first two tests for pastiche.

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<sup>99</sup> "Because fan reading practices place such importance on issues of character motivation and psychology, fans often emphasise moments of narrative crisis...One genre of fanfiction 'hurt comfort' centres almost entirely on such moments, sometimes building on a crisis represented within the series proper...other time inventing situations where the characters experience vulnerability" Jenkins, 'Scribbling in the Margins' (n 57) 174.

<sup>100</sup> Because fan works are not constrained in the same way as commercial publishing or network television, many fans wish to add to the underlying work by exploring the characters romantic and sex lives. This is a type of fan work that is heavily tied into the role of fanfiction as a feminist or minority representation, as women and minorities have used fanfiction as a proxy to explore their own sexuality. Jenkins argues that "their stories transform the relatively chaste, though often suggestive, world of popular television into an erogenous zone of sexual experimentation" *ibid* 175.

*5.2.6.3 Must constitute an intellectual and laudatory comment of the author on the previous work such as to be a dialogue with that work*

This is the hardest part of the test for fanfiction to meet, as it does not exist in jurisprudence at present so it is unclear how courts would interpret the meaning of this test. The requirement for an intellectual comment of the author on the underlying work is drawn from *Pelham*, and would permit for the protection of derivative works that have a purpose behind them beyond pure slavish adoration. This section of the test is vital for much UGC work as it would permit for works such as mashups or fanfiction that are not directly critical of the work, but are created in relation to the underlying work and are intended to be a reflection on that work and act as a conversation with it. Fictional stories using these reworked characters are laudatory in that they are written as fans of the underlying work, and are not intended to mock or castigate that underlying work (so cannot operate as parodies).

Fanfiction as an example of this strand of the test provides the required additional elements to the work. For example, by changing characters' gender or race, the fanfiction is adding information or operating in a somewhat academic sense by bringing in ideas of sociology or gender studies. By permitting these types of derivative works, the freedom of artistic expression is protected, and the benefit to society from permitting fanfiction as a form of writing development is reflected. Yet, by requiring there to be some form of intellectual engagement, this test would still prevent the less expressive, less scholarly, forms of UGC from being permitted.

*5.2.6.4 The underlying work must have been legitimately made available to the public*

This strand of the test is drawn from *Painer*, and reflects the need for permissible works to not impinge on the right of the copyright holder to monetise their works prior to

the release of the derivative work such as fanfiction. Similar tests are seen in the other fair dealing exceptions – and can be traced back to the Three Step Test requirement for limitations and exceptions to not conflict with the normal exploitation of the work. Fanfiction would easily meet this test, as it requires a pre-established fandom group to interact with – which can only exist should the underlying work have already been released onto the market (and, presumably, met with some form of success or cult popularity). Where this test may lead to discussion, however, is if the underlying work is released in a series, and fanfiction is created alongside the canon work – *Harry Potter* fanfiction would be a good example of this.

### 5.2.7 Conclusion

In conclusion, it has been demonstrated that audio-visual types of UGC tend to rely on the fair dealing exception within copyright to be publishable in the UK. This is because the underlying works they use are usually (a) of the correct type and (b) original enough to be copyrightable<sup>101</sup>. While parody has been the subject of judicial description and analysis, neither caricature nor pastiche has received the same level of scrutiny, and many forms of UGC that have yet to be brought before a court (such as fanfiction and mashups) would be well suited within its boundaries.

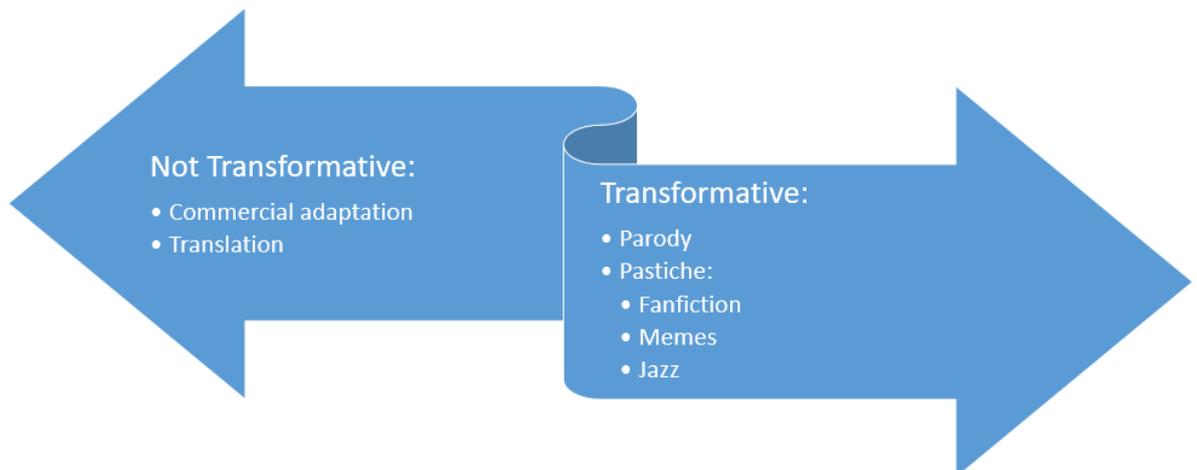
Having analysed the three main permitted acts within the fair dealing copyright exception, quotation and research/private study are unlikely to be interpreted in a way that would cover fanfiction. While some of the legislative reasoning behind the new parody exception can be used to argue for fanfiction type works to also be contained within a fair dealing exception in general, fanfiction cannot be argued to come within the specific

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<sup>101</sup> As will be shown, this is true of copyright in both the UK and the US. The US (see Chapter 5.4) has a more established legal history of dealing with commercial derivative works such as mash-up and parody, but due to the flexible nature of its fair use doctrine it can occasionally struggle with legal certainty. In contrast, to make out a fair dealing claim, the UGC must prove that it is one of the permitted types of dealing within the closed list in the CDPA 1988.

wording of that exception. It may be more suited to the as yet unformed 'pastiche' exception, which this research has attempted to sketch out using analogies from other fair dealing cases.

The issue with pastiches or homages, is that by their nature they are further away from the critical forms of reuse that have been permitted in the past under the parody exception, and move closer to derivative use or copying. This puts pressure on the 'fairness' tests for fair dealing, as will be seen, and means that there must be a strong case made for how transformative these new forms of cultural dealing such as fanfiction are, in order to distinguish them from uses that require a license under s16-21 CDPA 1988 such as adaptations or translations:



### 5.3 Fairness

Having demonstrated that there are good arguments for allowing fanfiction as one of the 'permitted acts' referred to and protected by fair dealing - specifically research or as

a pastiche - the analysis must move on to whether the dealing is 'fair'. There are several cumulative factors within this judgement to be considered<sup>102</sup>:

- "...the number and extent of the quotations....[a]re they altogether too many and too long to be fair?"
- "...the use made of them"; and
- "...the proportions"<sup>103</sup>.

Having argued that the use made of the work might be one of those permitted in the CDPA 1988, the English fanfiction author must prove that their work satisfies this 'fairness' requirement. This is where the majority of fanfiction scholarship focuses, since it is the most flexible area of copyright law and, should a claim be made out, the work which has been deemed infringing would be permitted on the market with no further claims against it in copyright. Due to the variety of types of fanfiction, some may fall within these exceptions, and some will not.

### 5.3.1 Number and Extent

In relation to UGC content, the first step of the analysis, regarding the number and extent of the quotations, is a vital part of the decision regarding the fairness of the work. This is because "lengthy and numerous extracts, **or extracts of the most important parts of a work**, will reduce the expected returns to the copyright owner"<sup>104</sup>. This shows the link between the fair dealing exception and the utilitarianism philosophy behind all UK copyright law<sup>105</sup>. Returning to my earlier conclusion on the importance of characters to the

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<sup>102</sup> There are other factors that determine fairness that are outside the purview of this thesis, as it focuses on literary forms of UGC based on previously published fictional works.

<sup>103</sup> *Hubbard v Vosper* (n 1) para 94.

<sup>104</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (Fourth edition, Oxford University Press 2014) 224. (Emphasis mine)

<sup>105</sup> For musical or audio-visual works, this would require a quantitative as well as qualitative analysis as to whether the new work would conflict with normal exploitation of the underlying work - the question asked by the second stage of the Three Step Test (*Eva-Maria Painer v Standard Verlags GmbH* (C-145/10))

primary work<sup>106</sup>, it seems clear that if characters are substantial enough to attract copyright, then they will probably also be deemed an ‘important part’ of the work. Thus, if characters are taken wholesale from the first work for use in the UGC (for example in parody videos where people cosplay as main characters, or fanfiction using only leading characters), the fanfiction may fail this section of the test. This becomes much more likely if my assertion that characters attract their own copyright is accepted. If it is, then 100% of that ‘work’ is being taken and reused, which means the dealing is less likely to be deemed fair. Where fanfiction only uses secondary characters that are not sufficient to attract their own copyright, or uses artistic choices to change the characters beyond recognition, or inserts original characters into a new location within the same universe, then the UGC may be deemed fair.

This is important because the fair dealing exception will not be used to bypass the market completely, and the presumption is that “if there is nothing stopping the user from paying, then the user must pay”<sup>107</sup>. This can be seen in the current debate surrounding the Copyright in a Digital Single Market Directive, where the default position appears to be that licenses should be used more in interactions with copyrighted works, in order to avoid the ‘value gap’<sup>108</sup>.

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<sup>106</sup> See Chapter 3.2.1

<sup>107</sup> Alan L Durham, ‘Consumer Modification of Copyrighted Works’ (2006) 81 *Indiana Law Journal* 851, 871.

<sup>108</sup> Ruth Flaherty, ‘Articles 11 and 13 - Bad News for Some, or All of Us?’ (Information Society Policy (ISP) Blog, 11 October 2018) <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2F%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2F%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtvk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 6 January 2019.

### 5.3.2 The Use Made

To rely on the fair dealing exception, the UGC use being made of the work must be one which ‘a fair minded and honest person’<sup>109</sup> would have made. This includes not only whether the use fits within one of the specified headings within s28-30 CDPA 1988 (above), but also whether the work has been used for a transformative purpose<sup>110</sup>, or whether it has been used to “convey the same information as the author”<sup>111</sup>.

#### 5.3.2.1 Transformative Purpose

Transformativeness is recognised by copyright as important for promoting creativity, as it is part of the life cycle of human productivity – each new work is consumed by society and used as the foundation of the next generation of creativity and innovation – “creative works are often the primary resource for further creation”<sup>112</sup>. This has been recognised by many different aspects of copyright law – for example, the lack of requirement for novelty in the test for originality – and the extension of protection to expressions rather than ideas – demonstrating the importance copyright places on permitting unlimited reuses of certain types of creative thought.

Strong copyright protection is important to protect the ability to create and disseminate future works specific to the author’s view for another reason – if close unauthorised adaptations are permitted and become popular, they may block off certain areas and stories that the author wishes to write in the future. There is a risk that fans notice subtext in previous works and end up writing similar stories to future planned novels by the author. If this fanfiction is shared widely, it may lead to accusations of plagiarism or copyright infringement when the author publishes their own work – such as was seen by

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<sup>109</sup> *Hyde Park Residence* (n 17); *Pro Sieben Media* (n 47)

<sup>110</sup> *Newspaper Licensing Agency* (n 16)

<sup>111</sup> *Hubbard v Vosper* (n 1) [94].

<sup>112</sup> Niva Elkin-Koren, ‘Copyright in a Digital Ecosystem: A User Rights Approach’ in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 146.

Marion Bradley Zimmer, who had a book she was working on rejected by publishers because a fanfiction author claimed she based it on a work from a fanfiction magazine she edited at the time<sup>113</sup>. While fanfiction would struggle to make a claim for copyright infringement against the original author, merely by vocalising an issue the fanfiction writer made the publishers wary of getting involved with the authorised work. Thus, it might be arguable that the more transformative the fanfiction, the less threat it would be to the original work.

Fanfiction authors are more likely to be able to argue their work is fair than other forms of pastiche such as appropriation art, as they can argue that they have used them for a transformative purpose – i.e. if they have “added to or recontextualised” the part taken<sup>114</sup>. This is important for fanfiction authors in the UK as they could argue that certain types of fanfiction meet this test – especially recontextualisation, refocalisation, cross overs, character dislocation, personalization and emotional intensification. Fanfiction is an important example of what has been referred to as the ‘Participation Age’ and ‘New Enlightenment’, whereby in increasing number “the culturally unrepresented (or misrepresented) are asserting themselves as authors in their own right, rather than as the passive receptors of culture from above.”<sup>115</sup> Thus, not only are they transforming the works more than some other forms of fair dealings - but they are also doing so for a reason that would have strong social welfare gains. Improving the lives of marginalised communities who do not feel represented by mainstream media as a form of democratising culture would be a strong defence for this type of work<sup>116</sup>.

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<sup>113</sup> Aaron Schwabach, ‘Three Interests of the Author in Conflict with Fanfic’, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011).

<sup>114</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (Fourth edition, Oxford University Press 2014) 225.

<sup>115</sup> Madhavi Sunder, ‘IP3’ (2006) 59 *Stanford Law Review* 257, 307.

<sup>116</sup> It is important to note however that fanfiction does not escape criticism regarding diversity. It is argued that it still skews heavily towards white culture (Mel Stanfill, *The Unbearable Whiteness of Fandom and Fan Studies*, in Paul Booth (eds) *A Companion to Media Fandom and Fan Studies*, (Wiley

How, then, to judge the transformative nature of fanfiction? Several variables could be used to judge whether the works are sufficiently transformative to meet this test. For example, changing the segment of the market which the works are marketed to could arguably be sufficiently transformative, as it would mean that different themes are being developed in the works, and that different levels of language are being used.

Age category is one of the most important variables for authors and publishers, as it is one of several ways that publishers use to segregate markets<sup>117</sup>. Age segmentation, based on reading or developmental age, permits for a stable, functional framework when marketing products such as novels to an international market<sup>118</sup> and allow assumptions to be made about consumer behaviour within certain sections of the market<sup>119</sup>. Children's books (i.e. books marketed at those aged 8 or younger) contain less text and more pictures, meaning characters are described more by the illustrations than the wording – and are designed to be bought by adults to be read to children and have relatively simple language<sup>120</sup>. Thus, they have a high nostalgia value, and works in the back catalogue may still have high demand<sup>121</sup>. This means the surrounding brand may have strong emotional meaning to consumers, and unauthorised derivative transformations may have more of an impact – both economically and in relation to moral rights. This is especially true if

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Blackwell, 2018)) and can be highly toxic ([https://www.vox.com/platform/amp/2019/12/30/21004981/fandom-history-changes-corporate-marvel-veronica-mars-k-pop?\\_twitter\\_impression=true](https://www.vox.com/platform/amp/2019/12/30/21004981/fandom-history-changes-corporate-marvel-veronica-mars-k-pop?_twitter_impression=true) ; <https://www.themarysue.com/diversity-in-fanfic/>) and exclusionary (CarrieLynn D. Reinhard, *Fractured Fandoms: Contentious Communication in Fan Communities (Communication Perspectives in Popular Culture)* (2018, Lexington Books))

<sup>117</sup> Alison Baverstock, *How to Market Books* (Fifth edition, Routledge, Taylor & Francis Group 2015) 16. Along with geographic, behavioural, and psychographic factors.

<sup>118</sup> Jan-Benedict EM Steenkamp and Frenkel Ter Hofstede, 'International Market Segmentation: Issues and Perspectives' (2002) 19 *International Journal of Research in Marketing* 185, 185.

<sup>119</sup> Susan Mitchell, *American Generations: Who They Are, How They Live, What They Think* (4th ed, New Strategists 2003).

<sup>120</sup> Which will have an impact on the copyright protection available for characters that appear

<sup>121</sup> Baverstock, (n 117), 372-374.

characters from children’s books are transformed and placed in adult works that may contain sexual content or violence.

Young adult works, in comparison, are the first books pre-teens and teens may purchase for themselves, and is “probably the most price sensitive area of the book trade”<sup>122</sup>. Sales in this market are increasingly media-driven, and there may be more of a superstar effect than in other markets. Young adults are more likely to be aware of online discounts and shop around; they are also more likely to be influenced by the media, and have increasing amounts of purchasing power<sup>123</sup>. Finding the right level of copyright protection is therefore highly important to authors and copyright holders in this segment of the market as it permits for control over pricing. Consumers in these age groups are also more likely to be using new formats to consume and interact with fiction<sup>124</sup>. Consumers in this market are proportionately more likely to engage with online non-commercial fanfiction such as that published on Fanfiction.Net - teens and young adults make up the majority of users on Fanfiction.Net<sup>125</sup>. Therefore, copyright holders may wish to prevent transformative reuses in this market as it is both more price sensitive than other segments of the market, and consumers are more likely to also consume the unauthorised derivative works.

For both children’s books and young adult books, character licensing is likely to be highly important – for example, branded clothing will be an important secondary market.

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<sup>122</sup> *ibid* 375. However, this is perhaps less important than it was, given that Generation Y (those born between 1980 and 1999, deemed the first generation to engage with technology to this extent and use it in making sophisticated shopping decisions, has grown up PS Norum, ‘Examination of Generational Differences In Household Apparel Expenditures’ (2003) 32 *Family and Consumer Sciences Research Journal* 52; Vanessa Jackson, Leslie Stoel and Aquia Brantley, ‘Mall Attributes and Shopping Value: Differences by Gender and Generational Cohort’ (2011) 18 *Journal of Retailing and Consumer Services* 1.

<sup>123</sup> Catherine Gidney, ‘It’s so Pervasive, It’s Like Kleenex: Schools - the Last Frontier’, *Captive Audience: How Corporations Invaded Our Schools* (Between the Lines Publishing 2019).

<sup>124</sup> Baverstock, (n 117) 370

<sup>125</sup> Frens (n 12) 7.

Thus, protecting copyright in those characters will be highly important to copyright holders, in order to protect the ability to sign these licensing agreements. However, this strict control over the characters may mean that less work must be done by fanfiction writers in order to demonstrate a transformative effect in fanfiction. The more work the copyright holder does to clarify their artistic choices and make their characters ‘real’<sup>126</sup>, the easier it is for any change in the character in fanfiction to be seen. This can even be seen in non-fanfiction derivative works – the character of Hermione in the original *Harry Potter* books was highly implied in the writing to be Caucasian, and JK Rowling was involved in the casting of Emma Watson for the film adaptations. Among fans, there was furore when, many years later, in an authorised derivative work (the play *Harry Potter and the Cursed Child*) JK Rowling rewrote the character as black. Therefore, a change to the age market – for example a change from Children’s or Young Adult to Adult, with the attendant changes to themes and activities, may have a stronger impact than a change of other variables such as genre or length of work.

The book market also relies heavily upon segmentation of the market through genres in order to make decisions regarding which books to publish<sup>127</sup> – and so genre must also be investigated as a variable in order to judge whether the fanfiction is sufficiently transformative to be ‘fair’. This is because genre is used as one of the primary means by which publishers predict sales data and returns on investment – and is a key marketing variable for deciding where to pitch new works (and whether they believe the market is too crowded in a specific genre to be worth publishing at all)<sup>128</sup>. Thus, a change to genre may be implied to be a change to a fundamental feature of the work, and therefore be a strong indicator of transformative use. A change of genre may mean that sufficient artistic choice

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<sup>126</sup> See Chapter 3.1

<sup>127</sup> Giles Clark and Angus Philips, *Inside Book Publishing* (5th ed, Routledge 2014) 41.

<sup>128</sup> *ibid* 257.

has been used to demonstrate the derivative work is transformative – especially as it means the work is also less likely to be acting as a rival purpose (i.e. economically compete) with the underlying work.

The fear many authors have is that fanfiction of their work is pornographic – the only transformative feature is that it takes works of other genres and transforms them into romance works. At its heart, this criticism argues that fanfiction takes the underlying work and merely focuses on potential romances between characters, rather than on any other part of the work. This is especially true where the work is not specifically written as a romance novel, but rather a school adventure such as *Harry Potter*. This can operate directly against the author's interests – both economic and moral – as it may harm the branding and integrity of the underlying work. This is different to the way a satire or parody may function. Parody changes the genre of the work to make a biting, critical point. Fanfiction, as already stated in this chapter, is critical – but in a more laudatory way. Thus, it is less obvious in its criticism. It may be questioned whether, by emphasising transformativeness of genre here, the effect is to unintentionally interfere with the normal exploitation of the work, which would create an interaction with the Berne Convention/TRIPs Convention obligations.

A further important variable when analysing the transformative nature of fanfiction, especially in relation to protecting the interests of the author, is language. The copyright holder has the right to control direct translations of their works under s21 CDPA 1988, as although they require skill labour and judgement to create, they do not require much artistic choice, and so direct translations are not deemed transformative enough to become new works and be judged as 'fair' dealing with the work. Therefore, for fanfiction

to merit protection as transformative, it must be more than merely a direct translation<sup>129</sup>. Should it be able to show this extra transformative element, it may go towards a ‘fairness’ judgement.

A further method of judging transformativeness of fanfiction is to look at the genre of the fanfiction in comparison to the original work. The book market also relies heavily upon segmentation of the market through genres in order to make decisions regarding which books to publish<sup>130</sup>: marketers state that “the prolific and diverse nature of the marketplace demands it; the sheer number of individual product lines calls out for some sort of taxonomy”<sup>131</sup>. Genre is also used as one of the primary means by which publishers predict sales data and returns on investment – and so is a key marketing variable for deciding where to pitch new works (and whether they believe the market is too crowded in a specific genre to be worth publishing at all)<sup>132</sup>.

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<sup>129</sup> i.e. this variable is not sufficient for a conclusion to be drawn surrounding the fairness of fanfiction as a dealing with the work, but it can be analysed in light of the other variables mentioned in this chapter (such as genre and age range)

<sup>130</sup> Clark and Philips (n 127) 41.

<sup>131</sup> Claire Squires, *Marketing Literature: The Making of Contemporary Writing in Britain* (Palgrave Macmillan 2007) 71.

<sup>132</sup> Clark and Philips (n 127) 257

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### 5.3.2.2 Use Made For a Rival Purpose

Fanfiction is unlikely to pass the test regarding the ‘use made’ of the work. It is under this heading that the economic effect of the work is to be judged in the UK, due to the *Hubbard v Vosper* judgement that “if they are used to convey the same information as the author, for a rival purpose that may be unfair”. It must be questioned therefore whether fanfiction is a rival purpose to the original work, or whether it can operate in tandem and even complement the original. This is important to authors given the importance of licensing and associated secondary markets as mentioned above<sup>134</sup>. Many fictional works have had successful commercial adaptations made of them under a licence. Given the success of the Harry Potter films, for example, it is obvious that JK Rowling has been happy to grant a licence to adapt her works. In this case, it may be reasonable to expect that all users who wish to write derivative works should pay for the license to do so. Further, since the Internet has made these secondary markets more visible and therefore more viable, control of derivatives may be as important as control of the original. For example, children’s books are priced relatively low compared to adult works – but the income for successful copyright holders and publishers may come from branded toys.

The test to discover whether the works are in competition by conveying the same information as the original was originally set out in *Ashdown*<sup>135</sup> where both the “economic impact of the use on the claimant and the “significant commercial value” extracted by the defendant from its use of the protected work”<sup>136</sup> are accounted for. Thus, where a use is made that would be available under a commercial licence the use is unlikely to succeed in a fair dealing claim<sup>137</sup>. However, where a commercial licence would be impractical – for

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<sup>134</sup> Paul Goldstein *Derivative Rights and Derivative Works in Copyright* 30 J Copyright Soc’y USA 209 (1983)

<sup>135</sup> *Ashdown v Telegraph Group Ltd* (n 18)

<sup>136</sup> Griffiths (n 23).

<sup>137</sup> HM Government, ‘Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying the Law’ (2012) 31. Cited in *ibid*.

example in relation to incomplete non-commercial UGC works, it is possibly unreasonable to expect amateur users to pay for a licence. In comparison, this would not be true of professional cover artists, who should still have to pay to license the work they are using, especially if they are doing a cover and not a reworked version (even if they are releasing the work for free on platforms such as YouTube). This is because a professional ‘cover’ is a complete work, and is therefore much more likely to commercially injure the underlying work by acting as a substitute. A second argument against a strict reading of this section of the test is that it completely ignores the operation of the entirety of the fair dealing exception, which, similar to fair use, “protects uses the author would not otherwise permit”<sup>138</sup>. It should not be used by copyright holders to block (or wall off) publication of works that they would never intend to publish, as this type of ringfencing of material would lead to an inefficient use of materials on the market, and would be an inexcusable use of the copyright monopoly<sup>139</sup> as a form of censorship.

While it may be logical to assume that the existence of a market for licensed adaptations may mean that fanfiction would struggle for acceptance, it is unclear how fanfiction interacts with this market. Without quantitative analysis of the effect of unauthorised adaptations on the market, mere logic cannot be used to argue that fanfiction would negatively impact that market and thus fail the test for ‘purpose’. Furthermore, it is published in a different format (online archives and posts, as works-in-progress, and other short-form writing) and may satisfy different consumer demand (and may even artificially inflate demand during gaps in production of the underlying canon

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<sup>138</sup> *Campbell v Acuff-Rose Music* (1994) 510 US 569

<sup>139</sup> The point can be conceded however that this would be hard to prove in practice. How would a UGC creator be able to prove that the copyright holder would never plan to release similar works? Even authors that have firmly stated that they will no longer be creating content within a series have been known to change their mind (for example, JK Rowling originally said after publication of the final Harry Potter novel that she would not write any further works in that universe, but has collaborated on ‘The Cursed Child’ and has written ‘Fantastic Beasts and Where To Find Them’). Indeed, such a statement would not be legally binding due to the operation of contract law.

works). An analysis of the market, as will be carried out in Chapter 8, will permit for a conclusion to be drawn in this area.

### 5.3.3 Proportions

The final step of the analysis for UGC, fanfiction and fair dealing is to consider the proportion of the new work that is made up of the old work. Denning LJ stated in *Hubbard v Vosper* that “[t]o take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair”<sup>140</sup>. This is where much analysis on UGC works lies – with remixes<sup>141</sup>, sampling<sup>142</sup> or mash-ups for example<sup>143</sup>. If UGC is made of mostly original content, this is likely to be less of an issue, even if the ‘short extract’ being taken is of fundamental importance to the original work under the first strand of the ‘fairness’ analysis, such as a character. Fanfiction is likely to succeed under this test, as the majority of it is original writing by the fanfiction author, albeit as a transformative reuse of the underlying work.

### 5.3.4 The Three Step Test

Fair dealing as a copyright exception is defined as one of the ‘special cases’ within the three step tests in the Berne Convention Article 9 and TRIPS Convention Article 13<sup>144</sup>. While there are three ‘steps’ to this test, the first step (‘certain special cases’) is met by the fact that I situate fanfiction within a pre-existing clearly defined special case - pastiche - that has already been accepted by the EU and UK. In order to argue that fanfiction, a new specific type of work, fits within this ‘special case’, it must also satisfy the remaining two parts of that test – namely that it does not conflict with the normal exploitation of the

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<sup>140</sup> *Hubbard v Vosper* (n 1)

<sup>141</sup> Cabay and Lambrecht (n 22).

<sup>142</sup> Elizabeth Adenay, ‘How Much Is Too Much? The Gradual Coalescence of the Law on Sampling’ (2018) 2 Intellectual Property Quarterly 91.

<sup>143</sup> Sabine Jacques, ‘Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?’ (2016) 27 Entertainment Law Review 3.

<sup>144</sup> Also seen in other legislation, such as Article 10 WIPO Copyright Treaty and Article 16 WIPO Performances and Phonograms Treaty.

work, and that it does not unreasonably prejudice the legitimate rights of the author. There are added levels of difficulty to this, given that the “myriad tests have different wordings with slightly varying purpose and operation”<sup>145</sup>, are designed so that signatory states could “accommodate existing national limitations and afford them discretion on how to give effect to the test”<sup>146</sup>. This was especially important when the US joined the Berne Convention in 1989<sup>147</sup>, given how different its copyright background was to the more author-centric European nations<sup>148</sup>. While there is no definitive definition given of either strand of the test in case law<sup>149</sup>, the test has been reproduced in EU law in Article 5(5) InfoSoc Directive and the jurisprudence from the CJEU on the topic may provide clarity<sup>150</sup>.

#### 5.3.4.1 *Conflicting with the normal exploitation of the work*

Given what is known about how copyright law incentivises creation, it would be easy to argue for a broad interpretation of this strand of the test. Logically speaking, if copyright law exists to ensure that authors can charge a monopoly price for their works (and thus protect their income), then courts should protect that exploitation strongly - and

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<sup>145</sup> João Quintais, ‘Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law’ (2017) 2017/6. AMI-tijdschrift v oor auteurs-, media-en informatierecht 197, 198.

<sup>146</sup> Ibid, referencing Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, Oxford University Press 2006) 182–3.

<sup>147</sup> Patrick Goold, ‘The Interpretive Argument for a Balanced Three Step Test’ (2017) 33 American University International Law Review 187, 203.

<sup>148</sup> Such that it has been argued that the US fair use doctrine does not meet the Three Step Test requirements, *ibid*; Ruth Okediji, ‘Toward an International Fair Use Doctrine’ (2000) 39 Columbia Journal of Transnational Law 75, 119.

<sup>149</sup> It is not even clear whether it is a cumulative test, whereby each strand must be strictly met, as argued by Martin Senftleben, ‘Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law’ (2006) 37 International Review of Intellectual Property and Competition Law 407; Huaiwen He, ‘Seeking a Balanced Interpretation of the Three-Step Test - An Adjusted Structure in View of Divergent Approaches’ (2009) 40 IIC - international review of intellectual property and competition law 274. Other academic argue it is a mere “enabling clause, allowing for different interests and for a better calibration of rights and limitations” (such as Quintais (n 145), 201, referencing academics such as Daniel J Gervais, ‘Towards a New Core International Copyright Norm: The Reverse Three-Step Test’ (2005) 9 Marquette Intellectual Property Law Review 1. Given that this remains unclear, I will proceed using the strictest possible interpretation (i.e. the restrictive cumulative interpretation).

<sup>150</sup> From cases such as *Premier League / Murphy Cases C-403/08 and C-429/08*, and *Meltwater*, Case C-360/13

therefore read this test broadly to cover many digital reuses such as fanfiction. Yet, this reasoning has been debated and rejected as too broad and self-referential<sup>151</sup> and the definition of normal exploitation has been read more strictly as interfering with such economic effects on the underlying work as the loss of licensing fees and lost profits from sales<sup>152</sup>. These effects do not have to be proven - it is sufficient that the exploitation being affected “with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance”<sup>153</sup>.

This is highly important to this analysis since copyright holders would claim that the authorised adaptation market is one that holds ‘considerable economic or practical importance’ and is thus an ‘exploitation’ that comes within the meaning of this test. By writing and posting fanfiction stories to online sites, the argument goes that the fanfiction writers are in economic competition with the original authors/copyright holders - and are in conflict with them. Case law on this topic has agreed - in *ACI Adam and Others*<sup>154</sup> it was held that allowing unauthorised derivative works encouraged piracy, reduced available profits to creators, and conflicted with the normal exploitation of the work and should not be permitted under this test. Fanfiction, along with many other forms of UGC, would struggle for acceptance after this ruling.

Yet, *ACI Adam* did not produce any empirical evidence to back up its claim that there is a substitution effect occurring when unauthorised derivatives are released onto the market. Therefore, should empirical research be able to suggest that this substitution effect does not occur in relation to specific forms of reproductions and reuses - such as

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<sup>151</sup> Paul Goldstein and PB Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd ed, Oxford University Press 2013).

<sup>152</sup> Alexander Peukert, ‘A Bipolar Copyright System for the Digital Network Environment’ (2005) 28 *Hastings Communications and Entertainment Law Journal* (Comm/Ent) 1.

<sup>153</sup> ‘Report of the Panel - United States - S110(5) of the US Copyright Act’ (n 162) para 6.180.

<sup>154</sup> *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandeligen Thuiskopie vergoeding* (Case C-435/12).

UGC content and fanfiction - then an exception may be made and this case distinguished.

Furthermore, fanfiction writers could also argue that this form of reuse is not within the scope of the test for normal exploitation - given how difficult it may be practically to license or profit from<sup>155</sup>, and that those carrying out the work are doing so for non-economic reasons.

#### *5.3.4.2 Unreasonably prejudice the rights/interests of the copyright holder/author*

The conservative, traditional<sup>156</sup> reading of the Three Step Test argues that the third step applies where the potential reuse (such as fanfiction) has the “potential to cause an unreasonable loss of income”<sup>157</sup>. This step has been argued to “offer considerable flexibility for the balancing of competing interests...[and] offers several filters that transform it into a reformed proportionality test”<sup>158</sup>. It does this by only restricting exceptions and limitations that (a) interact with legitimate interests of the copyright holder or author, and (b) do so unreasonably - such as leading to loss of income.

This is important as according to EU jurisprudence, exceptions should be read in the light of fundamental freedoms in the EU such as freedom of expression<sup>159</sup> as well as the objectives of the legislation they are contained in<sup>160</sup>. Thus, the legitimate interest of the

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<sup>155</sup> The failure of commercial fanfiction sites such as Fanlib and Kindle Worlds may support this statement. Many fanfiction scholars also vehemently oppose any form of commercial fanfiction, as it “creates a market to license the right to draft fanfiction” which “may negatively impact the assertion that fanfiction is fair use” (W Michael Schuster, ‘Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of The Commercialisation of Fan Fiction’ (2013) 55 South Texas Law Review 529, 530. Also see Brittany Johnson, ‘Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law Note’ (2015) 100 Minnesota Law Review 1645; Jacqueline Lipton, ‘Copyright and the Commercialisation of Fanfiction’ (2014) 52 Houston Law Review 425.)

<sup>156</sup> Goold (n 147).

<sup>157</sup> ‘Report of the Panel - United States - S110(5) of the US Copyright Act’ (2000) WT/DS160/R para 6.229.

<sup>158</sup> Christophe Geiger, Daniel Gervais and Martin Senftleben, ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2013) 29 American University International Law Review 581, 595.

<sup>159</sup> *Deckmyn v Vandersteen* (C-201/13) 27.

<sup>160</sup> *Eva-Maria Painer v Standard Verlags GmbH* (C-145/10) 133; *Football Association Premier League Ltd v QC Leisure* (C-403/08).

copyright holder should be balanced against the interests of users to carry out free speech. Once again, by referring to unreasonable prejudice to the interests of the right holder, it calls for an empirical investigation into whether or not the use requesting safe harbour within the Three Step Test does in fact lead to such economic harm as the loss of income. Even if it does, if the effect is small enough, it could be argued that it is not unreasonable to prioritise the free speech rights of users in certain special cases such as fanfiction.

There is a growing trend in copyright research to call for flexible approaches to the Three Step Test in a digital environment<sup>161</sup>, especially regarding UGC works such as fanfiction, given that “breathing space for UGC creation and dissemination substantially enhances freedom of expression and information in the digital environment”<sup>162</sup>. These academics argue that the balancing act inherent in the Three Step Test between the interests of users to free speech and copyright holders to an income from their work in a digital age gives solid justification to a call for a new UGC fair dealing exception<sup>163</sup>.

### 5.3.5 Conclusion

It can be seen therefore that in principle there is nothing blocking the use of the fair dealing exceptions for UGC works of fanfiction, or for that matter remix or mash-ups, given that many types of these works could be seen as ‘fair’. Many audio-visual forms of UGC rely successfully on these exceptions, as the underlying works they use are usually (a) of the correct type, and (b) original enough to be copyrightable. However, the issue for literary variants of UGC works (such as fanfiction) is that with no legislative definition or explicit exclusion on which to build the foundation of legal protection, many courts will

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<sup>161</sup> Martin Senftleben, ‘The International Three-Step Test: A Model Provision for EC Fair Use Legislation’ (2010) 1 JIPITEC 67.

<sup>162</sup> Martin Senftleben, ‘User-Generated Content – Towards a New Use Privilege in EU Copyright Law’ in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 18. Also see Edward Lee, ‘Warming Up to User-Generated Content’ [2008] *University of Illinois Law Review* 1459.

<sup>163</sup> Senftleben (n 162).

decide not to extend fair dealing to new types of work. This was seen in the case of works of parody, which required a governmental investigation and report before being brought within the remit of fair dealing (despite the European legislation specifically providing for it).

While caricature and pastiche works have been established as a variation of the quotation fair dealing exception, they have yet to receive the same level of scrutiny, judicial description and analysis as parody. Thus, logically it can be said that works such as fanfiction might be able to be protected through use of the copyright exception for pastiche, as they are a 'certain special case' within the Three Step Test, and could make a good justification for how they meet the other two steps of the test.

However, it is important to note that by extending this form of protection to fanfiction, it should be realised that not all fanfiction will be fair dealing. It merely permits for the fairness analysis to be judged on each case, based on the tests given above. Certain forms of fanfiction are more likely to pass these tests. Mary Sue (Personalisation) fanfiction (where a new character based often on an idealised version of the author is inserted into the story) is more likely to be transformative<sup>164</sup>, as is fanfiction written in a completely different genre than the original work. However, this research accepts that some types are too close to the original work to meet the fairness tests. Therefore, further empirical research is required to assess whether it may be possible to suggest<sup>165</sup> that:

- a) different types of fanfiction treat the underlying work in a sufficiently expressive way to pass the test given above for pastiche;
  - b) certain types of fanfiction are sufficiently transformative to pass the 'fairness' tests;
- and

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<sup>164</sup> Anupam Chander and Madhavi Sunder, 'Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use Essay' (2007) 95 California Law Review 597.

<sup>165</sup> regarding the specific dataset of Fanfiction.Net posts

- c) a similar lack of harm exists to the underlying work being used by fanfiction as if it were the subject of a parody.

## 5.4 A Tale of Two Systems: Fair Use (US) and Fair Dealing (Canada)

In the light of scarcity of legislative and academic opinion on fanfiction and fair dealing in the UK, an analysis of how the US and Canada handle UGC and fanfiction may deliver some much needed clarity on the subject (especially given that many sites that host UGC and fanfiction are based in North America, and much of the English-language UGC on the web is based on works by American or Canadian artists).

### 5.4.1 US Fair Use

Many legal and fan studies scholars in the US have discussed the topic of fanfiction and fair use<sup>166</sup> with the conclusion being drawn that some forms of fanfiction should be allowed on the market under the fair use doctrine<sup>167</sup>. It will be shown that the US system is more flexible, as it is based on an open ended list of uses that may be made of copyrighted works.

The fair use defence in the US is based historically on Justice Story's declaration that

"In truth, in literature, and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in

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<sup>166</sup> Stacey M Lantagne, 'Sherlock Holmes and the Case of the Lucrative Fandom' (2015) 21 Mich. Telecomm. & Tech. L. Rev 263; Babak Zarin, 'In the Restricted Section: Harry Potter and Unauthorised Sagas' (2017) 9 Elon Law Review 459; Leanne Stendell, 'Fanic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fanfiction' (2016) 58 SMU Law Review 1551; Rachel L Stroude, 'Complimentary Creation: Protecting Fanfiction as Fair Use' (2010) 14 Intellectual Property L. Rev. 191

<sup>167</sup> This is the belief of the Organisation for Transformative Works, the body which supports the Archive of Our Own and lobbies governments on the topic of user-generated fanfiction and fan works.

literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before”<sup>168</sup>.

This idea of ‘standing on the shoulder of giants’ runs through much of the legislative history of the fair use doctrine, which stretches over more than 150 years and is centred in the 2nd and 9th Circuit courts. The legislative defence contained in s107 US Copyright Act 1976 is based on the ruling in *Folsom v March*<sup>169</sup> in which Justice Story stated that there were several factors that should be investigated for a fair use to be found. These were the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale of the original work. Legislators took these factors up and wrote them into US copyright law in the US Copyright Act 1976 s107, which states that “The fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright.”

There are four factors to be considered within the analysis of fair use under this section, which are:

1. “the purpose and character of the use”;
2. “the nature of the copyrighted work”;
3. “The amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and
4. “the effect of the use upon the potential market for or value of the copyrighted work”.

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<sup>168</sup> *Emerson v Davies* 8 F. Cas. 615 (D. Mass. 1845) (No. 4436).

<sup>169</sup> *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841)

#### 5.4.1.1 *The Purpose and Character of the Use*

The first factor in the analysis is “deceptively simple”<sup>170</sup> yet it is where much of the argument regarding UGC has been based. There are two factors to be discussed within this heading – whether the work is commercial or non-commercial, and whether the work supplants the original work in the market, or is sufficiently transformative to attract protection. The transformative nature of the work is the most important: “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”<sup>171</sup>. Transformativeness is “the extent to which the defendant has injected new insights and understandings into the original work”<sup>172</sup>. For works such as parody, this is likely to be easier to find than mash-up or remix, given that parody tends to have more of a social focus than the other two types.

The purpose and character of the use heading was discussed at length in the first case in the US that contained a fanfiction-type work: *Suntrust Bank*<sup>173</sup>. It was held that the alteration of characteristics and timelines in *The Wind Done Gone* was enough to satisfy the requirement for the first stage of the fair use analysis (the purpose and character of the use, specifically in relation to the transformative nature of the work), despite the work being of a commercial nature. This laid the groundwork for commercial works of fanfiction to be potentially publishable. Following this case, in *Authors Guild*<sup>174</sup> it was held that uses that are transformative and provide a different function to the original would be deemed fair use under this test, despite their commercial nature, given that other commercial uses are also permitted (such as news reporting, commentary, and parody). The analysis therefore seemed to hinge on what exactly is meant by ‘transformative’ and how it would

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<sup>170</sup> Jacqueline Lipton, ‘Copyright and the Commercialisation of Fanfiction’ (2014) 52 *Houston Law Review* 425, 446

<sup>171</sup> *Campbell v Acuff-Rose Music* (1994) 510 US 569

<sup>172</sup> Lipton, ‘Copyright and the Commercialisation of Fanfiction’ (n 170) 446., citing *Campbell v Acuff-Rose Music*

<sup>173</sup> *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11th Cir 2001)

<sup>174</sup> *Authors Guild Inc v Google Inc* 804 F3d 202 (2d Cir 2015).

be judged. Due to the open nature of the US copyright system, it appears that this is a matter of fact for each individual case, but turns on how much work (or artistic choice) has been put into changing the focus of the story, the characters and the plot, and whether the new work was written for anything more than just 'entertainment'<sup>175</sup>. The argument given for this was that copyright should be for the promotion of 'useful arts', and that permitting fair use to be used to protect works of a similar type that had no further redeeming factors would be going too far. *Suntrust Bank* held that the secondary work promoted freedom of speech regarding civil rights, by putting the focus on the slaves rather than the plantation owners. Using the arguments already made regarding the use of fanfiction to represent the underrepresented and marginalised, and democratise culture in the 21st century, much fanfiction would be promoting the 'useful arts' and thus succeed under this heading.

A further statement from *Salinger v Colting* however harms the ability of fanfiction authors to claim fair use. It was held that "merely aging the main character of a novel and altering the novel's setting was not sufficient to make the use transformative"<sup>176</sup>, and that while the court accepted that there may have been a desire to write the work as a commentary, *60 Years Later* took too much from the original in order to do so, mainly due to the use of the main character from *The Catcher in the Rye* appearing in both works. This would mean that alternative universe (or character dislocation) fanfiction is unlikely to be deemed fair, and may be used to argue against the fairness of other forms of fanfiction such as expanding the series timeline. However, given that the court agreed that there was some transformative value to the insertion of a new 'JD Salinger' character in *60 Years Later*, it may be possible to argue that cross overs and personalisation would be fair.

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<sup>175</sup> *Castle Rock Entertainment Inc v Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998); *Salinger v Colting* 607 F.3d 68 (2d Cir 2010).

<sup>176</sup> Lantagne (n 25) 170, quoting *Salinger v Colting* 607 F.3d 68 (2d Cir 2010)

Despite showing that much commercial fanfiction would fail this first test, much of these cases only set precedent in the case of commercial works of fanfiction – and that they would stand as “imperfect representation”<sup>177</sup> of the law for not-for-profit fanfiction. In *Suntrust Bank* it was insinuated that fanfiction posted online and accessed for free was a non-commercial use that may be more likely to lead to a finding of fair use.

#### *5.4.1.2 The Nature of the Copyrighted Work*

The second factor of the fair use test is unlikely to cause an issue in relation to much UGC content, given that most fanfiction tends to use creative works that have already been released such as other musical tracks, segments of films/tv shows or photographs<sup>178</sup>. For the same reason, it is unlikely to cause an issue for much fanfiction, as it is exclusively written about fictional works that are already published and have fandoms of their own.

#### *5.4.1.3 Amount and Substantiality*

The third element of the fair use test is likely to be hard for most user-generated content creators to satisfy. This element asks how much of the second work is made up of the first work, and whether what was taken was substantial in relation to the first work. Some cases, especially in relation to parody, have permitted the use of relatively large parts of the original work.

Fanfiction writers are also likely to struggle to make out an argument that their work is fair under this subsection. This is because it rests on the idea that although the amount taken may be small, the value to the original work may be higher<sup>179</sup>. Indeed the

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<sup>177</sup> *ibid* 171.

<sup>178</sup> *Harper & Row v Nation Enterprises* (1985) 471 US 539

<sup>179</sup> *Ibid*.

three main cases that fanfiction academics refer to<sup>180</sup> all held that “the fanfiction authors borrowed too heavily from the respective original works”<sup>181</sup>. Given the earlier argument that it may be possible for characters to attract their own copyright, it is probably fair to argue that any fanfiction that uses characters from the original works would fail to make out a fair use defence. However, where the works are more original, or where they use less of the original work – there are possibly some types of fanfiction that may succeed.

#### 5.4.1.4 *The Effect on the Market for the Original*

The final question asked in a fair use analysis is whether the derivative UGC work will harm the market for the original work. There are two markets that are important in this analysis – that of the sales of the original work itself, and also any authorised derivative market the author may wish to use (under s106 US Copyright Act). However, it can be argued that if the UGC is sufficiently transformative to pass the first element of the fair use test, then it is less likely to compete either directly with the first work, or with any authorised secondary work the author or artist has in mind<sup>182</sup>.

The ‘effect on the market for the original’ is a vital area for discussion in relation to fanfiction. The case law in this area is based on the ruling in *Suntrust Bank*<sup>183</sup> which held that

“The “highly transformative” character of *The Wind Done Gone* demonstrated that it would have little effect on the market for *Gone With The Wind* or any of its licensed derivative works”<sup>184</sup>.

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<sup>180</sup> *Twin Peaks Productions, Inc v Publications International, Ltd*, 996 F2d 1366 (2d Cir 1993); *Paramount Pictures Corp v Carol Publishing Group* 11 FSupp 2d 329 (SDNY 1998); *Warner Bros Entertainment Inc v RDR Books* 575 F Supp 2d 513, 540 (SDNY 2008).

<sup>181</sup> Rachel L Stroude, ‘Complimentary Creation: Protecting Fan Fiction as Fair Use’ (2010) 14 *Intellectual Property L. Rev.* 191, 205.

<sup>182</sup> Jutte (n 22).

<sup>183</sup> *Suntrust Bank v Houghton Mifflin*

<sup>184</sup> Lantagne (n 25) 172.

This argument seems to focus on how original the new work is – given how original *The Wind Done Gone* was in relation to *Gone with the Wind*, consumers who were likely to be in the market for the original were not likely to purchase *The Wind Done Gone*. This argument can be extended to many works of fanfiction – that given how different from the original it is, it is unlikely to have any noticeable affect on the market for the original work.

However, the court in *Salinger* reached a different conclusion, when it held that “fair use should not protect the ability to publish unauthorised sequels”<sup>185</sup>: it should be up to the artist to choose whether to make authorised sequels, but also whether they want unauthorised sequels on the market too. This is important in relation to works of artists such as Harper Lee, who were against the publication of further works based on their original work. It could also be important in relation to works such as *A Streetcar Named Desire*<sup>186</sup>, where in a pivotal scene a main character (Blanche) is carried offstage by another character (Stanley). In the next scene, we are told Blanche claims Stanley raped her – but we are never told explicitly whether this is true. The theme of the work is that of misdirection and the use of insinuation and lies to cover the truth, and so it is arguable that Tennessee Williams would specifically dislike any fan reworking which specifically stated one way or another whether this is true.

#### 5.4.1.5 Conclusion

The fair use defence therefore can be seen to be more open to handling new forms of content, given that it is an open-ended list and therefore allows judgement to be made on the facts of the case in court, rather than requiring legislation to extend protection to new types of work. However, this elasticity can also be an issue, given that it can make it unclear before a case is decided whether a certain type of work will be protected or not.

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<sup>185</sup> Ibid, 170.

<sup>186</sup> Tennessee Williams, Elliott Martin Browne and Arthur Miller, *A Streetcar Named Desire* (Penguin Books 2009).

In relation to the analysis at hand in this thesis, despite the amount of cases that have been decided on fanfiction and other forms of UGC in the US, it is still a contentious issue and there is still a lack of clarity on the subject. This subsection showed another potential legislative method for dealing with fanfiction (and other forms of literary UGC), and confirmed that it is at least clear that in certain cases, where the works would benefit society and would not unreasonably harm the first work, some types of fanfiction would be permitted in the US. Thus, returning to the research question underpinning this chapter ('how do fair dealing copyright exceptions apply to fanfiction?'), it can be suggested that the US fair use approach is marginally clearer than the UK fair dealing approach, but does not provide sufficient clarity to any of the stakeholders being discussed (commercial authors, publishers, and fanfiction readers and writers). Furthermore, it has been accepted by the UK legislature that while some of the philosophies surrounding the way US law approaches limitations and exceptions may be used to assist with clarifying UK law in the same area, the differences between the open-list US fair use approach and the closed-list UK approach mean US law cannot be imported wholesale into the UK<sup>187</sup>. Thus, this research connects the previous academic work into US copyright exceptions, specifically in relation to fanfiction - the core topic of this thesis - to new research into potential exceptions in the UK. This supports the conclusions being drawn by this chapter and this thesis

#### 5.4.2 Canada's UGC fair dealing exception

There may be a better way of legally handling fanfiction and other forms of produsage such as UGC. Canada has had a clear 'user rights' exception since 2004, when the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>188</sup> held that it was in the public interest for a copyright fair dealing exception should be brought in. This 'user

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<sup>187</sup> Hargreaves (n 21).

<sup>188</sup> 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395

centric'<sup>189</sup> judgement focused on several tests similar to UK fair dealing: the purpose of the dealing, the character and amount of the dealing, what alternatives there were to the specific type of dealing in order to achieve the required output, the nature of the underlying work, and the effect of the dealing upon that underlying work.

Canada developed this user-right when they modernised their copyright legislation to reflect the digital environment in 2012, through the Copyright Modernisation Act. In s29.21, they introduced a non-commercial UGC exception to copyright, that holds that

“It is not an infringement of copyright for an individual to **use** an existing work or **other subject-matter or copy** of one, which has been published or otherwise made available to the public, **in the creation of a new work** or other subject-matter in which copyright subsists and for the individual...**to use** the new work or other subject-matter or to authorize an **intermediary to disseminate** it”.

This would seem to cover most elements of fanfiction, especially given that the statute goes on to state the requirement for the UGC seeking to rely on this exception to be (a) non-commercial, (b) sufficiently acknowledged, and (c) based on work validly released onto the market. These are all requirements which I have already demonstrated in this chapter can be met by fanfiction with ease. Fanfiction is undeniably a use of an existing work<sup>190</sup> in the creation of a new work, which is then used by the fanfiction writer and the community as well as disseminated by the archive that hosts it - such as Fanfiction.Net. The remaining requirement for the UGC exception is similar to that laid out in the Three Step Test: that it does not substantially harm the exploitation of the original work. Thus, it could be argued that this is a clear example of a new copyright exception

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<sup>189</sup> Gluseppina D'Agostino, 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' (2008) 53 McGill Law Journal 309.

<sup>190</sup> and the Canadian legislation sidesteps the UK issue of 'substantiality' by covering the 'subject matter or copy' of a work

that meets the requirements of the Three Step Test - it is clearly limited, it only permits works that do not conflict with the normal exploitation of the work, and it protects the rightsholders legitimate interests in their work. However, it has been the subject of much criticism.

#### 5.4.2.1 Conclusion

Much criticism of Canada's user-generated content right has been made in Europe. It has been argued to be unreasonably broad and too harmful to standard copyright incentives, and the European Commission recently published a paper criticising Canada's IPR protection as a whole for similar issues<sup>191</sup>. The strategy behind Canada's protection of copyright was argued to be lacking in strength, and the report in particular criticised a perceived issue with the way take-down notices are handled, for example. The report stated that

“Broad exceptions in copyright law are applied in a way that appears to be detrimental to right holders<sup>192</sup>. EU stakeholders are particularly concerned about the fair dealing exception for...non-commercial user-generated content”<sup>193</sup>.

Given this specific criticism, and its background in strong groups that lobby to protect the interests of rightsholders in the EU, it is unlikely that we will see a UGC exception in the near future. The idea has been mooted in Europe. It was first proposed by the Committee on Culture and Education of the European Parliament in September 2017<sup>194</sup>, but restricted

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<sup>191</sup> 'Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries' (European Commission 2019) Commission Staff Working Document 15330/19 <[https://cdn.technadu.com/wp-content/uploads/2020/01/eu\\_piracy\\_report.pdf](https://cdn.technadu.com/wp-content/uploads/2020/01/eu_piracy_report.pdf)>.

<sup>192</sup> Which may be harmful to the creative industries by harming incentives to produce – see Introduction and Literature Review, especially Chapter 2.4.1

<sup>193</sup> 'Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries' (n 716) 47.

<sup>194</sup> European Parliament Committee on Culture and Education, *Opinion of the Committee on Culture and Education for the Committee on Legal Affairs for the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market 4/9/17*, Doc. COM (2016) 0593

any potential exception to those types of UGC use already covered by fair dealing exceptions - criticism, review, illustration, caricature, parody or pastiche. This proposed exception would not provide much benefit to many UGC creators for this reason, and when the Directive on Copyright in the Digital Single Market was approved by the European Parliament in 2019, there was no UGC exception contained within it. This is a shame given that a UGC exception has clear benefits regarding improving the way copyright law interacts with the internet.

Some scholars have proposed a halfway house, whereby a UGC exception is brought in with the added proviso that the rightsholders receive fair compensation for the dealings with their work<sup>195</sup> - a form of compulsory licensing. This is an interesting idea - given that it seems to provide value to both rightsholders and users. Yet, it faces the same struggle that all transformative works face - how would one value the fair compensation for this type of use? While musical remix may handle this issue by referring to a percentage of the revenue gained by the new work, this would not work for non-commercial online fanfiction as it does not generate revenue. Further, even if one could approximate a fair value for the licensed use of a character, for example, it remains unclear how any licensing scheme would value crossover fanfiction - whereby several different rightsholders works are mixed with original work by the fanfiction writer. One potential way would be similar again to the method musical remix covers this topic – by investigating how much of the fanfiction is made up by each character from each fandom<sup>196</sup>, and calculating how much of any potential revenue is made up of each work. However this would be much harder to quantify in a written piece of work than a musical piece. It also does not really approach

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<sup>195</sup> Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law' (n 162); Martin Senftleben, 'Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3565175 <<https://papers.ssrn.com/abstract=3565175>> accessed 29 June 2020.

<sup>196</sup> Possibly by generating a proportion of words used for each fandom in each work

the issue that these works are released for free and as works-in-progress. If a fanfiction writer posted three short works-in-progress, would they have to pay once, or three times? These issues are important when the works are released non-commercially. There is also the issue that using a form of compulsory licensing for this type of work completely disregards the reasoning behind the existence of the fair dealing exceptions in the first place - these dealings are surely the type of dealing that the legislature had in mind, as they provide many social, cultural and educational benefits. If these works are 'fair', surely they should be permitted without a copyright license - and if they are not, then they should be deemed infringing unless the writer wishes to pay for a standard license, the terms of which can be decided between each party.

## 5.5 Conclusion

This chapter has given an update on the state of UK copyright law in relation to literary remix UGC works such as fanfiction. The research question this chapter answered was - given that fanfiction has been shown to infringe copyright in the underlying work and certain characters and locations that appear, does it benefit from any of the fair dealing copyright exceptions? To answer this, the current law on fair dealing in the UK has been described, and fanfiction has been distinguished from musical or videographic reuses to explore how current research into these forms of UGC may not be applied by analogy to fanfiction. While most types of fanfiction would infringe copyright in the underlying work, this chapter has answered the research question set in the affirmative - several may be permissible under the fair dealing categories of research/criticism or pastiche<sup>197</sup>. As part of this, this chapter argued that specifically pastiche, rather than parody, is the right exception

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<sup>197</sup> If they contain sufficient acknowledgement – which is not an issue for most forms of fanfiction which by their very nature contain either specific, or implicit, acknowledgement.

to apply to UGC – and made an important contribution to knowledge by synthesising a potential legal test for pastiche through analogy with other copyright exceptions.

A further contribution this chapter makes is that it demonstrates how copyrighted works can be used, especially in relation to online non-commercial fiction. These reuses, such as fanfiction, parody and memes, have important cultural and social benefits as recognised by copyright limitations and exceptions such as fair dealing, as these permit for a discussion of the benefits of these reuses before deciding whether these works infringe copyright and ought to be removed. This highlights the importance of the fair dealing exceptions for derivative literary works to society, and demonstrates further that there is a distinct need for clarity in this area to protect freedom of expression.

This is highly important for users who face losing online spaces for their works due to the hosting liability due to be imposed on websites under Article 17 of the Directive on Copyright in a Digital Single Market, which will be discussed in the next chapter. It also highlights the need for the empirical analysis contained later in this thesis, as these exceptions focus on an analysis of how transformative the new work is and how it affects the market for the first work. Assumptions can be made through comparison with audio-visual types of remix, but these should be tested.

## 6. Liability of Fanfiction Websites

### 6.1 Introduction

“Everyone here is an aspiring writer. Respect your fellow members and lend a helping a hand when they need it. Like many things, the path to becoming a better writer is often a two way street.”<sup>1</sup>

“[Fanfiction]...is not just stories written about other stories (as has always happened). Fanfiction is stories being written about the same other story, all at the same time. It is sharing these stories with increasing ease and speed and decreasing cost.”<sup>2</sup>

So far this thesis has detailed the legal ramifications of writing fanfiction for the writers themselves, and concluded that most forms of fanfiction would infringe the copyright in the underlying work, and some may infringe the moral rights of the author of that underlying work. However, it has also been shown that some forms of fanfiction are likely transformative enough to benefit from the use of the fair dealing copyright exceptions for either research or pastiche. This exception becomes more important when the analysis turns to the actions of the websites that host these works.

When discussing fictional derivative works published online, no analysis is complete without a discussion of the responsibilities of the website that hosts the works. If the host decides that the risk of liability is too high, they can remove either individual works or whole groups of works, which can be devastating for amateur writers and the

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<sup>1</sup> ‘Guidelines | FanFiction’ <<https://www.fanfiction.net/guidelines/>> accessed 7 May 2017.

<sup>2</sup> Anne Elizabeth Jamison, ‘Interlude: Growing Up Fic’, *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) 104.

community<sup>3</sup>. In this regard, the websites themselves operate as a form of decision-making body, except their decisions are made not on the basis of the law, but on what they perceive the law to be. This perception can be heavily influenced by the copyright holders, and can mean that works that ought to be permitted under the fair dealing exceptions are taken down unnecessarily - for example, Fanfiction.Net has a list of authors whose works cannot be used as the basis of fanfiction on that site due to legal claims. The loss of these cultural works operates as a form of censorship based not on the strict wording of the law (which would permit these works as a fair dealing) but on the ability of a copyright holder to send take-down notices.

How did we arrive at this point? Prior to the invention of the Internet, fan works were created and shared on a much smaller scale. A fan artist may have attended fan conventions and sold small batches of works to the attendees - who at most numbered in the thousands. Some groups got together to form magazines, which were circulated by post. Due to the costs inherent in these production methods, the fan works - including art and stories - did not have much economic effect on the market. However, fan groups were early adopters of Internet-based sharing technologies such as USENET discussion boards. This meant that stories could be written and shared with increasing ease and efficiency and global reach. Copyright holders in the USENET days did not see the harm in these types of forums, and generally turned a blind eye to these communities, which tended to remain reasonably small and focused given discrepancies in the availability of and quality of websites (even text based sites that require less technology to run than audio-visual content sites). User-generated content did exist at this point, but it could only really be

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<sup>3</sup> It is especially problematic for writers, who may have typed their work directly into the website and may not have physical backups, in comparison to audio-visual remix works that are usually created offline (in programmes such as Adobe Premiere Pro or Apple iMovie) and then uploaded. These written fanworks may be lost forever.

shared using email chains and listservs<sup>4</sup> which curtailed its reach and economic effect.

However, once the Internet developed, and these smaller discussion boards merged and became larger entities, they started to take note.

Copyright holders firmly believe that they need strong copyright protection for their works to prevent this loss, and that this high level of protection is “the fuel that turns the engine of cultural production”<sup>5</sup> This is tied into the supply-side economic theory behind standard copyright principles already discussed in this thesis<sup>6</sup>. Many copyright holders prefer to issue copyright takedown notices to the fan sites themselves, rather than individual writers that post to the sites. This is seen as a more efficient method of getting these derivative works out of the public view, as it is quicker and can lead to hundreds of thousands of posts being taken down immediately, rather than merely dozens or hundreds of works by individual writers. These sites often take down works quickly, and do not permit any form of appeal, due to fear of legal costs. The legal fees to fight these claims are a demonstrably high transaction cost that many sites, given their smaller budgets (that are mostly raised through advertising on each webpage), may not wish to incur. Therefore, it is the understanding of the law by the platforms that is important, due to their gatekeeping role. If the sites shut off access, fanfiction writers and readers would be stymied. Due to this imbalance of power, it is important to clearly lay out the legal position of the website hosts to ensure that the law is being used correctly and efficiently, rather than to take advantage. This chapter will therefore answer the following research question: what liability do websites have for hosting user-generated content, and how will this change with the implementation of the Copyright in a Digital Single Market (CDSM)

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<sup>4</sup> A form of electronic mailing list, whereby the original message is sent to one listserv address and then forwarded to all those who subscribed to that list.

<sup>5</sup> Barbara Townley, Philip Roscoe and Nicola Searle, ‘Introduction: Creating Economy’, *Creating Economy: Enterprise, Intellectual Property, and the Valuation of Goods* (Oxford University Press 2019) 1.

<sup>6</sup> See Chapter 2.4.1

Directive? The liability of sites under the current law (s20 CDPA 1988 and Article 3 InfoSoc Directive) will be explained and applied, along with the current 'safe harbour' defences for sites contained in Articles 14 and 15 of the E-Commerce Directive. While these provisions will be overridden by the new CDSM Directive, it is important to be clear how they apply in relation to online fanfiction archives, as the UK Government has confirmed they will not implement the new law. Once this is clear, the chapter will move on to explore the new obligations in relation to content filtering or licensing contained in Article 17 of the CDSM Directive, to argue that the legal position of these sites will change. Thus, this chapter will then explore issues with technology and internet jurisdiction that may arise should the UK retain the current law while the EU moves on.

## 6.2 Liability of Websites that Host UGC

Copyright holders claim that the websites that host this material do so in contravention of s20 CDPA 1988 and Article 3 InfoSoc Directive, as they act as a communication of the work to the public. The criteria used by courts to decide whether sites infringe this right was laid out in *Svensson*<sup>7</sup>. Firstly, they provide an 'act of communication' by making the works available to the public in a way that the works could be accessed. Many fanfiction websites such as Fanfiction.Net and Archive of Our Own are freely accessible without signing up for an account. This would satisfy the requirement for the act of communication. In relation to the second requirement from *Svensson* that the communication is directed at a 'new public', this requires "a public different from the public at which the original act of communication of the work is directed"<sup>8</sup>. This concept of a new public was enumerated clearly to be either a group not within the contemplation of the copyright holder when originally distributing their work, or a group who would not

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<sup>7</sup> *Nils Svensson and Others v Retriever Sverige AB* (C-466/12).

<sup>8</sup> *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA* [2006] (Case C-306/05) [40].

otherwise have access to the content without paying for it. Following previous case law such as *Svensson* and *SGAE*, fanfiction writers and readers (as fans of the underlying work) are not likely to be 'new' in relation to the first category given. Indeed, they are likely to be the exact group that the copyright holder is aiming to communicate their works to. However, given that the original work is only available if it is purchased, it is likely that users of fanfiction websites are likely to be a 'new public' under the second category. This is supported by the *Tom Kabinet* case, which held that the reselling of e-books legally owned would amount to a communication to the public<sup>9</sup>. By analogy, even if every single fan using the sites such as Fanfiction.Net owned the underlying work (for example, they all had copies of the *Harry Potter* novels they were basing their fanfiction on), the website is still potentially liable (unless they can prove every single post benefits from a fair dealing exception)

However, historically in order to avoid the chilling effect that would arise from websites being required to scan every work that they host for copyright content, there were several exceptions and limitations to this liability. Mainly, sites are only liable for user-generated copyright infringing content if they refuse to act to take down work within a reasonable amount of time after receiving sufficiently clear notice by copyright holders (notice-and-takedown claims)<sup>10</sup>. So long as they act in this way when they are put on notice, Article 15 E Commerce Directive states that there is no requirement for sites to monitor works as they are posted. This was to avoid placing heavy financial responsibility on sites that receive millions of posts daily, and was intended to both facilitate trade<sup>11</sup> in cultural works online and maintain freedom of expression<sup>12</sup>.

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<sup>9</sup> *Tom Kabinet* (C-263/18).

<sup>10</sup> Article 14 E-Commerce Directive; *Google France and Google Inc v Louis Vuitton Malletier SA and others* (Joined Cases C-236/08 & C-238/08); *L'Oreal SA v eBay International AG* (C-324/09).

<sup>11</sup> Preamble 7 of the E Commerce Directive

<sup>12</sup> Preamble 9 of the E Commerce Directive

Fanfiction provides a clear example of how this worked in practice. Most fanfiction archives respond quickly to notice-and-takedown claims. For example, Fanfiction.Net takes down all posts relating to authors or publishers who send these communications, without allowing the writers any opportunity to appeal – and works relating to the fandoms of certain authors who have banned fanfiction of their works are blocked from being uploaded<sup>13</sup>. This has led to many works being lost, despite the fact that as demonstrated in previous chapters these works are probably safe from infringement claims as a fair dealing<sup>14</sup>. In this regard, it could be argued that the legislation was working – and indeed was operating to the advantage of the copyright holders as sites were taking works down that may have benefitted from a fair dealing exception. The legislation meant that while the individual works were being removed, the sites themselves (such as Fanfiction.Net) were not held liable for copyright infringement.

### 6.2.1 Problems with the Old Regime – the Value Gap

The avoidance of liability of UGC hosting sites, and the linked increase in engaging with larger and larger populations online, led to the emergence of the ‘value gap’ argument which was strongly featured in the legislative debates surrounding the Copyright in a Digital Single Market Directive. This argument “rests on the policy objective to ensure the payment of adequate remuneration for the online distribution of copyrighted content”<sup>15</sup> In essence, this argument states that the value of the copyrighted content is being lost, due to unauthorised reuses such as fanfiction posted online on content sharing sites such as YouTube or Fanfiction.Net. There is simply too much infringing UGC online for copyright

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<sup>13</sup> ‘Guidelines | FanFiction’ (n 1).

<sup>14</sup> The reason these sites take down works so quickly, and do not permit any form of appeal, is due to fear of legal costs. The legal fees to fight these claims are a demonstrably high transaction cost that many sites, given their smaller budgets (that are mostly raised through advertising on each webpage), may not wish to incur

<sup>15</sup> Martin Senftleben, ‘Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability’ ((Social Science Research Network 2020) SSRN Scholarly Paper ID 3565175 <<https://papers.ssrn.com/abstract=3565175>> accessed 29 June 2020), 3.

holders to be expected to monitor it and issue notice-and-takedown requests to websites, and it was argued that the responsibility should be transferred to large websites such as YouTube that have been taking advantage of the size of the market in infringing works to generate illicit income from those works<sup>16</sup>. This led to the recent change in the law found in the Copyright in a Digital Single Market Directive, which aimed to rebalance the scales.

### 6.3 Changes to Liability – the CDSM Directive<sup>17</sup>

The CDSM Directive is one of the most debated pieces of legislation on intellectual property to come out of Europe in recent times, and should be seen within the context of international legislation aimed at implementing territorial borders to the web in order to apply national laws to internet users (such as the GDPR in the EU, and net neutrality in the US). Those in favour of the proposals argue broadly that the law currently fails to sufficiently prevent copyright infringement online, and that there is a ‘value gap’ between those who invest in the generation of creative works and those who exploit them online without paying. Artists such as Paul McCartney believe the Directive is necessary to “assure a sustainable future for the music ecosystem and its creators, fans and digital music services alike”<sup>18</sup>. This statement is laudable, as is the intention behind it to incentivise creation by protecting the income of creative individuals in a time when the vast majority are suffering from low returns on their efforts. Few would disagree that artists should be

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<sup>16</sup> European Commission, ‘Towards a Modern, More European Copyright Framework’ (European Commission 2015) COM(2015) 626.

<sup>17</sup> Parts of the following section were previously published as Ruth Flaherty, ‘Articles 11 and 13 - Bad News for Some, or All of Us?’ (Information Society Policy (ISP) Blog, 11 October 2018) <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvIk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Fflaw%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvIk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvIk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Fflaw%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtvIk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 6 January 2019.

<sup>18</sup> Joanna Plucinska, ‘Ticket to Copyright: Paul McCartney Joins Crowded Fight over Online Rules’ (*POLITICO*, 4 July 2018) <<https://www.politico.eu/article/paul-mccartney-joins-celeb-lobbying-european-parliament-over-copyright-reform-vote/>> accessed 6 January 2019.

remunerated for infringing reuses of their works online<sup>19</sup>. The argument surrounds the practicality of the suggested methods for doing this - especially in regards to upload filters.

It has also been argued that rather than increasing intervention into online reuses of copyright works (as this legislation seeks to do), artists should work with online users and use other non-legislative methods such as licensing to control their work<sup>20</sup>. There are a variety of options available now to artists who wish to permit specific reuses, such as the GNU General Public License from the Free Software Foundation specifically for software, or the user-friendly selection applicable to all types of creative works available through Creative Commons (CC). There is a need for more licensing options like these and an improvement in how they link with platforms and content. A strong example to build on could be the relationship between Wikipedia and Creative Commons, which asks users to choose from the list of CC licenses when uploading media.

The Directive aims at protecting the rights of copyright holders, to protect incentives to create. However, this myopic fixation on the profit-maximisation incentive fails to understand that much user-generated creation in the digital era is utility-maximising rather than profit-maximising – done for love, not money<sup>21</sup>. Much of the furore regarding this Directive has focused on this mostly non-commercial type of creation, such as parodies, memes and fanworks. These works can have important social welfare benefits, promoting discussion and debate and the spread of news and information, especially

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<sup>19</sup> although there should be a limit to income as an incentive

<sup>20</sup> Mitchell Longan, 'Big Brother Is Watching But He Doesn't Understand: Why Forced Filtering Technology on the Internet Isn't the Solution to the Modern Copyright Dilemma' (Scripted Blog, 17 August 2018) <<https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>> accessed 1 June 2020.

<sup>21</sup> Fiona Morton and Joel Podolny, 'Love or Money? The Effects of Owner Motivation in the California Wine Industry' (National Bureau of Economic Research 1998) w6743 <<http://www.nber.org/papers/w6743.pdf>> accessed 18 May 2018.

among young adults who have historically been disengaged from standard forms of news consumption.

### 6.3.1 Control and Context

The most important element of the CDSM Directive is that it walks back the 'hosting' defence websites previously relied upon, contained in Article 14 of the E-Commerce Directive. It instead replaces it with its own 'safe harbour' provisions in Article 17(4), which require the site to use its 'best efforts' to: (a) obtain a license or authorisation for the work being used; (b) prevent infringement before it occurs on their pages, presumably by using some form of content filtering system, and (c) delete and block any infringing works that do make it onto their site once a notice has been received by the copyright holder. If it does not, it is liable for copyright infringement under the 'communication to the public' provisions already mentioned.

In Article 17 it states that service providers such as Fanfiction.Net<sup>22</sup> will "in co-operation with rightholders, take measures" to make sure that licenses or other "agreements concluded with rightholders for the use of their works". This responsibility directly overturns the protection previously permitted by Article 14 E-Commerce Directive and places liability back on the service providers. Given how economically harmful a finding of infringement could be to a hosting website, especially one that provides access to works for free, the fear is that many will cease to host non-commercial works at all in order to avoid any claims for liability. Alternatively, those that can afford to continue will have to perform some form of automatic algorithmic filtering of content.

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<sup>22</sup> These sites will almost certainly meet the definition of 'online content-sharing service provider' contained in Article 2(6) of the CDSM Directive which states that it covers websites where "the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes". It remains to be seen whether Archive of Our Own, which is a non-commercial site which does not operate to make a profit, would be covered by this definition.

This system is designed to promote and prioritise licensing agreements between copyright holders and technology companies (and their users) as a solution to the ‘value gap’. However, there are legal and practical issues with this as a solution. Firstly, it remains unclear exactly how the requirement for licensing agreements will interact with other forms of international copyright law, such as the TRIPs Agreement, and the WIPO Copyright Treaty<sup>23</sup>. This is especially important as at least one of the possible interpretations may mean that the Three Step Test does not apply<sup>24</sup>. However, despite this possible interpretation, the clear intention of the drafters of the Directive are that the Three Step Test should be used in the implementation of its provisions. Recital 6 of the Directive states that where limitations and exceptions to copyright exist (such as those for pastiche), they will continue to be applied “only in certain special cases that do not conflict with the normal exploitation of the works or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders”.

By passing Article 17, the European Parliament demonstrates a belief that there is an efficient, effective tool already in existence that could be used to identify copyrighted works within other works as they are uploaded to the internet. However, there are relatively few current iterations of this technology - for example YouTube’s Content ID, Audible Magic, Digimarc and ACR Cloud. This immediately means that any smaller sites will be at an economic disadvantage, as they will either need to devote resources to develop their own technology before the enforcement of this legislation (and pay for an expensive, powerful server to run it), or pay to license existing technology. The liability for errors in the system will also hit smaller firms disproportionately as fines under Article 13 of the Enforcement Directive 2004/48/EC are calculated on the harm to the value of the work

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<sup>23</sup> Martin Husovec and João Quintais, ‘How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms’ 5 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3463011](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011)>.

<sup>24</sup> *ibid* 7.

being shared, not on the ability of the firm to pay (although they should be proportionate under Article 3(2)).

Content recognition software currently works through the creation and maintenance of huge databases of copyrighted material and the application of scanning technology to check whether any part of a suggested new work matches an entry on the database (hence the need for strong servers). However, even Content ID operating on YouTube, the industry standard for this filtering software, has been proved not to work correctly – either failing to identify approximately 1/3 of the sound recordings contained within it, or throwing up false positives<sup>25</sup>.

As well as being insufficiently functional from a technological standpoint, this filtering technology has also been proved unable to handle the complex and contextually-driven issues surrounding copyright limitations and exceptions such as fair dealing<sup>26</sup>, which fanfiction relies upon<sup>27</sup>. Article 17(7) specifically highlights that the Directive should not be used to prevent the sharing of works which are covered by exceptions or limitations, and specifically names the fair dealing exceptions which this thesis discusses (namely quotation, criticism, review, and caricature, parody. and pastiche). The inclusion of this subsection shows an understanding on the part of the legislature that these works are of importance<sup>28</sup>, yet also highlights a misunderstanding of the technology available to base

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<sup>25</sup> “‘YouTube’s Content ID Fails to Spot 20%-40% of Music Recordings’” (*Music Business Worldwide*, 13 July 2016) <<https://www.musicbusinessworldwide.com/youtubes-content-id-fails-spot-20-40/>> accessed 13 July 2020; ‘The Future Is Here Today: You Can’t Play Bach on Facebook Because Sony Says They Own His Compositions’ (*Boing Boing*, 5 September 2018) <<https://boingboing.net/2018/09/05/mozart-bach-sorta-mach.html>> accessed 13 July 2020.

<sup>26</sup> Evan Engstrom and Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (Engie 2017) <<https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>> accessed 6 January 2019.

<sup>27</sup> The variety of limitations and exceptions between member states and the correlated incompatibility of indefinite general monitoring of UGC was discussed in *SABAM v Netlog* (C-360/10).

<sup>28</sup> It is also another reuse of the term ‘pastiche’, without providing a legal definition of that term – see Chapter 5.2.4 p158.

this exception on. While this potentially offers protection to UGC works such as fanfiction, unless the technology improves such that the algorithms can differentiate between parody, pastiche and other reuses, it is hard to see how it can be useful in practice.

There are also issues with how filtering technology would work without capturing certain types of personal data (such as usernames and locations) that could also be incompatible with users' privacy rights under the General Data Protection Regulation. Finally, it has been argued that it is hard to see how the requirement for the use of content recognition software differs from 'general monitoring', which is specifically disclaimed in Article 17(8)<sup>29</sup>.

Given the large fines possible to be levied in cases of copyright infringement, it is likely that service providers will block the upload of any work that matches the content management software. This puts the onus on users to appeal to the service provider if they believe their work is protected by an L&E, presumably through the complaints procedure referred to within Article 17(9). However, the response rates and efficiency of online redress mechanisms can vary widely, and it is feared that this could create a chilling effect on freedom of speech.

### 6.3.2 Summary

The "difficult legislative process"<sup>30</sup> that surrounded the passage of the CDSM Directive (Copyright in a Digital Single Market Directive) demonstrates just how difficult it is to balance the interests of all interested stakeholders in this market. Some see it as a battle

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<sup>29</sup> 'Upload Filters for Online Platforms: A Toll on Cultural Diversity? - Information Society Policy (ISP) Blog @ UEA - UEA' <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtlk35W7q/blog/upload-filters-for-online-platforms-a-toll-on-cultural-diversity?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Flaw%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtlk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtlk35W7q/blog/upload-filters-for-online-platforms-a-toll-on-cultural-diversity?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Flaw%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtlk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 13 July 2020.

<sup>30</sup> Krzysztof Garstka, 'Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression', *Intellectual Property and Human Rights* (4th ed, Wolters Kluwer Law & Business 2019) 1 <<https://ssrn.com/abstract=3471791>> accessed 10 July 2020.

between entertainment companies (acting as copyright license holders) and technology companies such as Google (acting as providers of online space for user-generated content to be created and hosted)<sup>31</sup>, focusing on the commercial rights of both parties. Others see it as an argument between users and big entertainment companies, focusing more on the human rights argument around freedom of speech<sup>32</sup>. It is likely that the implementation of the CDSM Directive will continue to be fraught, and will lead to a surfeit of case law in the first few years after it is transposed into Member State's legislation. One reason for this is the lack of clarity regarding how exactly specific subsections of Article 17 will apply in the real world.

The CDSM Directive will directly harm fanfiction archives such as Fanfiction.Net, despite being hosted outside the EU. As a site that holds and provides access to user-generated content that relies on copyrighted works for creation, it meets the definition of an Online Content Sharing Service Provider as laid out in Article 2(6) of that Directive. This definition was written to ensure that the Directive applied to commercial sites such as YouTube, but given that Fanfiction.Net is supported by advertising it would also be deemed to be a 'profit making' site. In comparison, Archive of Our Own is likely to remain unaffected, given that it is supported by the Organization for Transformative Works and does not rely on advertising. Furthermore, despite the fact that Fanfiction.Net is only lightly commercialised (i.e. only relies on banner advertising, in comparison to sites like YouTube which monetises content directly), it has been in existence for longer than three years, and so would not be able to take advantage of the limited liability provisions in Article 17(6). Although there has been a move towards Archive of Our Own by many users, Fanfiction.Net is still a large archive of fanfiction materials, especially historic posts by fans

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<sup>31</sup> Julia Reda, 'Why Americans Should Worry About the New EU Copyright Rules' (*Medium*, 20 December 2019) <<https://medium.com/berkman-klein-center/why-americans-should-worry-about-the-new-eu-copyright-rules-97800be3f8fc>> accessed 10 July 2020.

<sup>32</sup> Garstka (n 30).

who may have stopped posting before the migration. Thus, the impact of the CDSM Directive will be felt strongly by the fandom community.

#### 6.4 Issues with Jurisdiction Post-Brexit

It was confirmed on the 21<sup>st</sup> January 2020 that due to Brexit, the UK will not be implementing the CDSM Directive<sup>33</sup>. This highlights a major technological and regulatory challenge for copyright law as it applies online – how do we define and apply territoriality to hyperspace? It is a long held issue, with arguments dating back 15 years, as summarised by Reidenberg:

“The current Internet technology creates ambiguity for sovereign technology because network boundaries intersect and transcend national borders. At one level, this technologically-created ambiguity challenges sovereign jurisdiction. Yet, the evolution of the Internet’s technological infrastructure is intertwined with sovereign jurisdiction because the relationship between technology and law is dynamic. As sovereign states grapple with the challenges of existing technologies, they must still protect their citizens in the online environment.”<sup>34</sup>

It has been suggested that the way individual states could apply national laws online could be through the concept of purported use – i.e. where the deliberate intervention in the market occurs<sup>35</sup>. This has been followed in case law, whereby if technology exists to split audiences online by geographic boundaries (such as by ISP), then

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<sup>33</sup> ‘Copyright: EU Action:Written Question - 4371’ (*UK Parliament*, 21 January 2020) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371>> accessed 13 July 2020.

<sup>34</sup> Joel R Reidenberg, ‘Technology and Internet Jurisdiction’ (2005) 153 *University of Pennsylvania Law Review* 1951, 1951.

<sup>35</sup> Thomas Hoeren, ‘Law, Ethics and Electronic Commerce’ (2005) 3 *The International Review of Information Ethics* 46.

this can be done to apply specific national laws online<sup>36</sup>. This could create issues if the UK remains within the old system using the E Commerce Directive<sup>37</sup> as the basis for avoiding liability for content hosting sites.

While it is unclear what the UK position is likely to be in the future, and it is unlikely to get legislative attention in the near future due to the impact of the pandemic, some conclusions can be drawn from looking to political and legislative history. The UK has historically, like the US, been more protective of intellectual property rights than the EU (for example, as seen in the historic difference between the UK and EU originality standards<sup>38</sup> and moral rights regimes<sup>39</sup>). In the long run, given the commercial links between the US and the UK, and philosophical differences between the UK and EU, it is possible that this protectionism will be seen again in UK copyright law, although that is difficult to predict.

If we apply the concept of purported use, users in the UK may be able to access sites such as YouTube or Fanfiction.Net, as they are accessing the market in that location – but EU users will not be able to do so. This may have unintended effects on culture in the EU, as it will act as a barrier to entry into the EU market for UK creators of certain types of content such as parody or pastiche or fanfiction.

## 6.5 Conclusion

This chapter has analysed the position of fanfiction websites in relation to the liability they bear for UGC posts. It has clearly shown that under the legislation prior to the Copyright in a Digital Single Market, the defences contained in Articles 12-15 of the E

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<sup>36</sup> *Yahoo! Inc v La Ligue Contre Le Racisme et l'antisemitisme (LICRA)* (433 F3d 1199 (9th Cir 2006)). While this is a US case, the logic and arguments made are likely to be persuasive in other jurisdictions, such as the EU.

<sup>37</sup> Likely in the short term at least, due to legislative delays caused by Brexit and the COVID-19 pandemic

<sup>38</sup> See Chapter 3.2.1

<sup>39</sup> See Chapter 4.4

Commerce Directive meant that these sites were unlikely to be found liable for copyright infringement by communication to the public under s20 CDPA 1988, so long as they responded within a reasonable time to take down any works that were brought to their attention as infringing copyright by the copyright holders.

Given this, the chapter discussed the 'value gap' issue that arose from sites such as Fanfiction.Net and YouTube being permitted to monetise content that may infringe others' copyright, before explaining the new liability regime these sites will face under the CDSM Directive. It is highly likely these sites will need to either find some way to pay collective license fees (which failed for Amazon in their Kindle Worlds system) or enforce some kind of algorithmic filtering for content prior to uploading. Legal and technological issues with this were discussed, including the impact these obligations will have on freedom of expression and on the fandom community especially. This will become more complex due to the UK's refusal to implement the CDSM Directive post-Brexit, which may lead to complicated conflict of laws issues arising (and attendant issues with trade).

The issue of legislative failure to prevent harmful reuses of copyright-protected materials is one that requires legislative attention. However, the CDSM Directive has several important issues that mean it will not create the 'Digital Single Market' it desires. Most of these issues relate to incompatibility with other European legislation, but they also highlight a fundamental misunderstanding regarding creation in the digital era, especially in relation to fanfiction. This means there is a need for empirical investigation into the likely impact of these policies and how they will impact cultural engagement online<sup>40</sup>. This will

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<sup>40</sup> Sabine Jacques and Krzysztof Garstka, 'Automated Anti-Piracy Systems: A Call for Further Evidence-Based Policies - Information Society Policy (ISP) Blog @ UEA - UEA' <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvIk35W7q/blog/automated-anti-piracy-systems-a-call-for-further-evidence-based-policies?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Faw%2Fresearch%2Fispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvIk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvIk35W7q/blog/automated-anti-piracy-systems-a-call-for-further-evidence-based-policies?inheritRedirect=false&redirect=https%3A%2F%2Fwww.uea.ac.uk%2Faw%2Fresearch%2Fispblog%3Fp_p_id%3D101_INSTANCE_hoPtvIk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 1 June

be carried out in the following chapter which will analyse the supply side and demand side issues that arise in relation to online self-published fanfiction.

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2020; Sally Broughton Micova, Felix Hempel and Sabine Jacques, 'Protecting Europe's Content Production from US Giants' (2018) 10 *Journal of Media Law* 219

# 7. Does Fanfiction harm the fiction market?

## An empirical investigation

### 7.1 Introduction

“The artistic desire is for autonomy; the creative process is non-standardised and unpredictable, economically irrational. The commercial imperative is for predictability in profit generation...[there is a] strained relation between art and commerce, culture and the economic.”<sup>1</sup>

Fanfiction is among the most widely used and well-known form of non-commercial transformative reuse of copyright works. A Google search for ‘fanfiction’ retrieves 157million results, with the largest sites such as Fanfiction.Net and Archive of Our Own hosting more than 6.8million works and 5.1million works respectively. This is part of a growing trend of online creation and sharing that has led to archives for amateur creation such as Wattpad engaging with a user base of more than 80million users. This level of engagement is a publisher's dream, and many publishers are turning to online sites such as these to find writers to add to their stable of published authors. These sites are set up around several basic principles - they operate to (i) help writers find inspiration, (ii) develop their writing skills, and (iii) find a receptive audience for their works. These skills would otherwise require investment from publishers - so writers who have already demonstrated their abilities through successful fanfiction posts become more popular to publishing houses (as they are perceived to be lower risk). Thus, they can be seen to be upsetting the infrastructure of the creative landscape by enabling authors to overcome the barriers to entry to the market contained within the gatekeeping role of the publisher. Several

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<sup>1</sup> Barbara Townley, Philip Roscoe and Nicola Searle, ‘Introduction: Creating Economy’, *Creating Economy: Enterprise, Intellectual Property, and the Valuation of Goods* (Oxford University Press 2019) 10.

writers, such as Cassandra Clare and EL James, have commenced successful commercial careers in this way. This raises further questions regarding the type of creation being incentivised - and whether we should be using copyright legislation to protect commercial successes such as these in the same way as more 'serious' works.

### 7.1.1 Research Questions

Fair dealing exceptions rely on proving two main elements: that the dealing with the work does not economically harm the first work, and that the work is sufficiently transformative. Thus, there are important research questions for this chapter to answer: (i) why do people consume fanfiction, (ii) why do people create fanfiction, and so (iii) does this harm the fiction market? If the answer to the last question is yes, because people are creating and consuming fanfiction as a substitute for the original work, a fair dealing claim for fanfiction is likely to fail, no matter how transformative the work is. These questions are important as pastiche is an untested part of the legislation, and no cases on fanfiction have ever reached the UK courts.

These questions will thus permit an empirical answer to be provided to the issue regarding whether fanfiction should be deemed a 'fair dealing' under s28-30A CDPA 1988, by focusing on the important 'economic impact' test laid out in *Ashdown*, along with the 'transformative purpose' test from *Newspaper Licencing Agency*.

## 7.2 Methodology

The first stage of the project is to undertake research to select the theories that will drive the research project. Primarily, this is a socio-legal project to look at theories relating to the economics of copyright law as enumerated by Elkin Koren and Saltzburger<sup>2</sup> and

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<sup>2</sup> Niva Elkin-Koren and Eli M Saltzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013).

Landes and Posner<sup>3</sup>, and suggest how these apply to the real world application of the Berne Convention/TRIPs Agreement ‘certain special cases’<sup>4</sup> test regarding normal exploitation of the work. These theories have been brought together through the previous chapters and generated a proposed hypothesis – namely that certain types of fanfiction are not harmful to the underlying work and do not interfere with the normal exploitation of the work. Thus, they should be permitted under a fair dealing exception, as it is a special case that does not harm the interests of the copyright holder.

This chapter will undertake longitudinal research using a big data set based mainly on posts to Fanfiction.Net from its opening in 1998 to 2017 when the data was collected.

**Table 1: Codebook for Fanfiction.Net Variables**

<u>Code</u>	<u>Explanation</u>	<u>Type of Variable</u>
Type	Type of fanfiction (single fandom or crossover)	Dichotomous
Name	Story title	Nominal
Fandom	Fandom	Nominal
Fandom Type	Fandom format (Books, Cartoons, Comics, Games, Misc, Movies, Plays, TV)	Nominal
Fandom 2	If crossover work, fandom of second work	Nominal
Fandom 2 Type	If crossover work, fandom format of second work (as above)	Nominal
Words	Number of words in the posted work in total	Interval/ratio
Chapters	Number of chapters the posted work is broken down into	Interval/ratio
Reviews	Number of reviews of the work from other Fanfiction.Net users	Interval/ratio
Favs	Number of other Fanfiction.Net users who have favourited the work	Interval/ratio
Follows	Number of other Fanfiction.Net users who have selected to follow the work (i.e. be updated once a new part of the work has been posted)	Interval/ratio
Rated	Suggested Audience Age Rating (K = General Audience, 5 years +; K+ = More mature children, 9 years +; T = Teens, 13+; M = Mature Teens 16+ <sup>22</sup> )	Ordinal
Language	Language work published in (42 options, including non-Western languages)	Nominal
Genre	Where given, genre the author has self-selected for work to belong to (21 options)	Nominal
Genre 2	As above, if second genre selected	Nominal
Published	Publication date	Interval/ratio

<sup>3</sup> William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003).

<sup>4</sup> Berne Convention Article 9(2), TRIPs Agreement Article 13

The research site chosen for this research is Fanfiction.Net, along with Nielsen Bookscan data. This site was chosen as at the time of my research it had the most items posted on it and the information was easiest to access due to the open layout of the site. Nielsen Bookscan data was chosen as, despite its limitations, it is the most accurate data available for sales of fictional works.

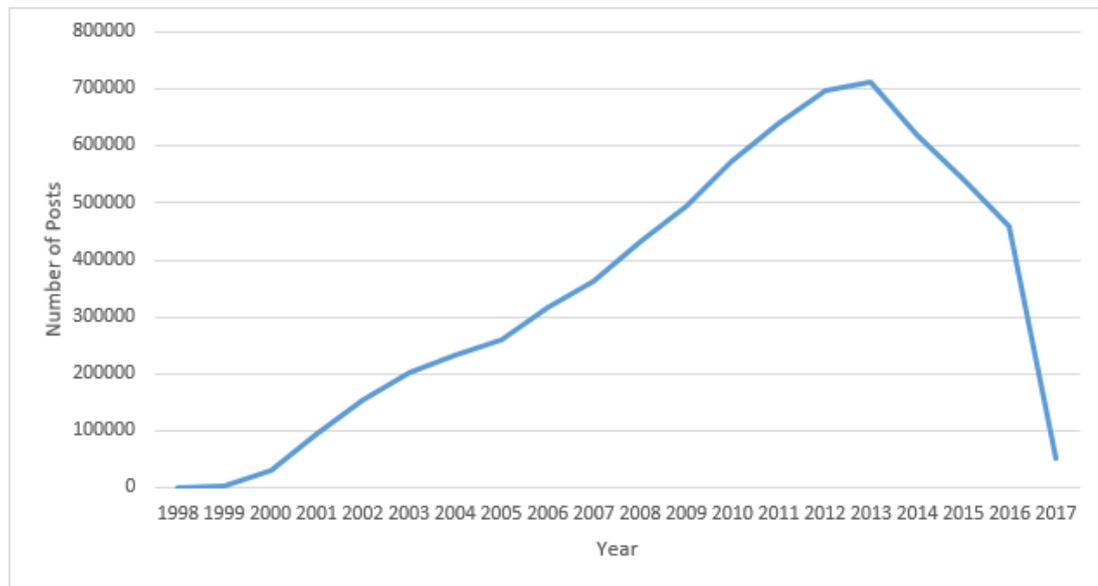
### 7.2.1 Fanfiction.Net

To carry out this research, I used a web scraping programme to create a dataset of all posts to the (at the time) largest online non-commercial fanfiction archive - Fanfiction.Net. The data was obtained using C#, with data management and cleaning carried out in Microsoft Excel. Statistical significance and data analysis was performed through the use of SPSS and Microsoft Excel where relevant. The specific method is similar to that used by in similar studies<sup>5</sup> into fanfiction and computational learning. I refined the method used to make it fully compliant with the specific ethical and data protection regulations applicable to research in the UK at the time of writing. This method was chosen because it was the most practical way at the time of commencing research to investigate the effect of fanfiction on the market for UK fiction, as Fanfiction.Net was the largest online freely accessible site for these types of work, especially those geared towards the English language market. C# was deemed the most efficient language to use for the scraping programme due to its ease of use and efficient interaction with Microsoft Excel.

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<sup>5</sup> Sarah Evans et al, 'More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring' (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 23 April 2017; Julie Ann Campbell et al, 'Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities' (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 14 February 2017.

**Figure 1: Overview of Posts to Fanfiction.Net site over Time**



The specific supply-side issues this data raises will be discussed in section 8.4, especially as pertaining to market share and external effects felt on the market. At this introductory stage, Figure 1 demonstrates the big data and longitudinal elements of this research, as well as the overall pattern of posts to the site over time<sup>6</sup>. The steep drop in 2017 is due to the cut-off point of data collection<sup>7</sup>, although there was a loss of dominance shown after 2012. As such, there is a risk that patterns recorded after that date may be over-interpreted – this will be considered when drawing conclusions.

Where this research refers to fanfiction-averse authors, the names of those who ban fanfiction based on their works from Fanfiction.Net were used: Nora Roberts, Laurell K Hamilton, Raymond Feist, Terry Goodkind, Anne Rice, JR Ward, Robin Hobb, Dennis L McKiernan, Robin McKinley, PN Elrod and Irene Radford<sup>8</sup>. The characteristics of these authors are then compared with the authors of the ten highest ranking books on

<sup>6</sup> This shows similar trends to research undertaken by academics in other fields (such as Cecilia R Aragon, Katie Davis and Casey Fiesler, *Writers in the Secret Garden: Fanfiction, Youth, and New Forms of Mentoring* (The MIT Press 2019))

<sup>7</sup> The last posts recorded for this research were posted 28<sup>th</sup> February 2017.

<sup>8</sup> 'Guidelines | FanFiction' <<http://www.fanfiction.net/guidelines/>> accessed 7 May 2017.

Fanfiction.Net, most of whom have been publicly supportive of fanfiction in one way or another (and are therefore categorised as fanfiction-friendly. Cecily von Ziegesar was one of the original authors to sign up her work to Kindle Worlds; Cassandra Clare started her career writing Harry Potter fanfiction; Stephanie Meyer has been publicly somewhat accepting of fanfiction and supportive of the 50 Shades of Grey series, which began as Twilight fanfiction; JK Rowling is publically supportive of non-commercial fanfiction. Others such as James Patterson, Erin Hunter, Suzanne Collins, and Rick Riordan have no published opinions on fanfiction but have not asked for it to be taken down. Finally, CS Lewis, JRR Tolkien and Gaston Leroux were authors who published in a time before the internet and so have no published opinions on the matter - but again their publishers and their heirs have not asked for fanfiction to be removed. As the top works on the site, it is to be presumed that they are aware of the use of the underlying works for fanfiction, but are choosing not to get involved.

### 7.2.2 Nielsen Bookscan

This chapter analyses sales data for the top 100 bestselling novels in the four years from 2015-2018, as collected by Nielsen Bookscan and published in The Guardian newspaper<sup>9</sup>. This data is used to try to overcome the known issue in the creative industries that 'no one knows anything' about which works will be a success<sup>10</sup>. These four years were

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<sup>9</sup> John Dugdale, 'Bestselling Books 2015: Fifty Shades Still on Top' *The Guardian* (24 December 2015) <<https://www.theguardian.com/books/2015/dec/24/bestselling-books-2015-analysis-fifty-shades-on-top>> accessed 13 June 2019; John Dugdale, 'Bestselling Books 2016: The Ghosts of Christmas Charts Past' *The Guardian* (31 December 2016) <<https://www.theguardian.com/books/2016/dec/31/bestselling-books-2016-analysis-ghost-christmas-past>> accessed 16 May 2017; John Dugdale, 'Bestselling Books of 2017: The Top 100' *The Guardian* (30 December 2017) <<https://www.theguardian.com/books/2017/dec/30/bestsellers-2017-top-100-philip-pullman-jamie-oliver-margaret-atwood>> accessed 13 June 2019; John Dugdale, 'The 100 Bestselling Books of the Year: From Eleanor Oliphant to Michelle Obama' *The Guardian* (29 December 2018) <<https://www.theguardian.com/books/2018/dec/29/100-bestselling-books-of-the-year-from-eleanor-oliphant-to-michelle-obama>> accessed 13 June 2019.

<sup>10</sup> Joel Waldfogel, *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture* (Princeton University Press 2018); Barbara Townley, Philip Roscoe and Nicola Searle, 'Nobody Knows: Managing Uncertainty', *Creating Economy: Enterprise, Intellectual Property, and the Valuation of Goods* (Oxford University Press 2019).

chosen as they reflect current information on the fiction market in the UK, which will be used by publishers to design their strategies for choosing new authors to sign, and new works to publish. While a larger, longer dataset would be preferable, the Nielsen data is only available in this format from 2015 onwards. It can still give important information regarding patterns in the behaviour of publishers and consumers. Several independent variables are discussed in order to show that there are possible trends that authors and publishers use to mitigate this uncertainty and turn it into a manageable risk, from which they can profit.

The Nielsen Bookscan data on successful fiction works, and the descriptive statistics gleaned from it, is used as a case study for the market for the most successful works on the market<sup>11</sup>. This permits for an investigation into the economic and financial effects on authors and producers who have a significant impact on the market. Conclusions drawn on characteristics of successful works present useful information for this analysis as they permit for a discussion on economic incentives of publishers and authors at the top end of the market, however many authors who publish do so for other, more utility maximising reasons.

### 7.2.3 Justification of the Empirical Methodology

This is an important methodology for this research due to the recent legislative upheaval in Europe relating to the Directive on Copyright in a Digital Single Market. On the one hand, UGC creators and hosts such as YouTube wish to be able to create, consume and share their works freely, while on the other hand copyright holders and licence holders such as big music production companies wish to control the reuses of their works online, in order to avoid the 'value gap'. Much of the discussion surrounded theoretical, doctrinal

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<sup>11</sup> Christian Schmidt-Stölting, Eva Blömeke and Michel Clement, 'Success Drivers of Fiction Books: An Empirical Analysis of Hardcover and Paperback Editions in Germany' (2011) 24 *Journal of Media Economics* 24.

analyses - and yet did not follow Hargreaves' principles in his analysis that a change to the law required not only doctrinal but also empirical study to truly understand the impact of a change to the rules. This chapter aims to develop the doctrinal research that has been carried out in this area, using data to discuss how these derivative works actually interact with the originals. Insufficient attention has been paid to the idea that most fanfiction posts are not operating within the same market as the underlying work, as they are published online, non-commercially and as works in progress<sup>12</sup>.

The Nielsen dataset was chosen as it can be assumed that many publishers are incentivised by appearance in Bestseller lists, as this is the best way to recoup their investment in publishing and marketing these works. Appearing in the Bestseller list may also be a strong incentive for authors, as it is the only way to guarantee financially recouping some of their outlay incurred in creating the work. More importantly though, it will give them power to negotiate with their publishers to avoid stringent 'management oversight' of their work.

#### 7.2.4 Limitations of Research Methods

While this methodology provides a strong foundation for the analysis that will follow, it is important to note that there are several important limitations and challenges to its use. These limitations can be broken down into issues arising from the use of a quantitative methodology to study social behaviour; issues surrounding the specific research sites selected; and issues with the use of Nielsen Bookscan sales data.

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<sup>12</sup> This is also an important and timely topic given that commercial enterprises such as Amazon are entering the market for commercial, licensed fanfiction - and then leaving the market. This causes upheaval.

#### *7.2.4.1 Limitations of Quantitative Methodology and Big Data*

There are several well-known issues that arise from the use of quantitative methodologies and big data sets<sup>13</sup>. Given that I am investigating social behaviours among a specific community, and participants' relationship with copyright legislation, it could be argued that a qualitative methodology would be more appropriate, possibly involving a survey of attitudes and awareness. Content analysis of reviews left on the site would also be an appropriate methodology when investigating whether fanfiction is being used as a training tool for budding authors. These are both methods I would be very interested in using in the future to develop this research but for practical considerations of time the project was restricted to the preliminary quantitative study.

#### *7.2.4.2 Limitations of Research Site*

While Fanfiction.Net has the largest amounts of posts of any fanfiction archive, it is a passive site with little editorial control or interaction. It is also a very basic website with few options for users to select when uploading their works (in comparison with other sites). The other – rapidly growing - fanfiction archive, is Archive of Our Own<sup>14</sup>. This is supported by a non-profit organisation (the Organization for Transformative Works<sup>15</sup>), who are very much more proactive in their relationship with the Archive and their users - for example giving users more options to use when uploading their works. While this would lead to a more detailed dataset, there are still more works on Fanfiction.Net overall and it is the most relevant site to use currently. This research could be further developed in the future

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<sup>13</sup> Rob Kitchin, 'Big Data – Hype or Revolution?' in Luke Sloan and Anabel Quan-Haase, *The SAGE Handbook of Social Media Research Methods* (SAGE Publications Ltd 2016) <<http://sk.sagepub.com/reference/the-sage-handbook-of-social-media-research-methods/i698.xml>> accessed 1 November 2018, 34; Anabel Quan-Haase and Lori McCay-Peet, 'Building Interdisciplinary Social Media Research Teams: Motivations, Challenges, and Policy Frameworks' in Luke Sloan and Anabel Quan-Haase, *The SAGE Handbook of Social Media Research Methods* (SAGE Publications Ltd 2016) <<http://sk.sagepub.com/reference/the-sage-handbook-of-social-media-research-methods/i791.xml>> accessed 1 November 2018, 45.

<sup>14</sup> 'Home | Archive of Our Own' <<https://archiveofourown.org/>> accessed 14 February 2018.

<sup>15</sup> 'Organization for Transformative Works' <<http://www.transformativeworks.org/>> accessed 1 November 2018.

by running a similar methodology on posts on Archive of Our Own, which would also permit investigation into the effect of the strength of the legal and administrative support from the Organization for Transformative Works.

#### 7.2.4.3 Limitations of Sales Data

A vital caveat regarding quantitative research into publishing is that sales are difficult to count, and thus comparisons and conclusions may be hard to draw. Sales data is mostly drawn from the Nielsen Bookscan dataset, harvested from point of sales data which is reliant upon ISBN numbers. This creates several issues regarding the accuracy of the data, given how books are published. Many books, especially successful works, are heavily translated. How should these translations be counted - individually or as one title? Books are now being published in a variety of different formats<sup>16</sup> due to windowing marketing techniques. How should these different formats of the same work be counted? These issues are not raised in relation to research into musical copyright works. Like books, music is released in different formats - for example streaming in comparison to the purchase of MP3 files, and records in comparison to CDs. However, music sales data is generated in a different, more accurate format<sup>17</sup>. This accuracy issue may explain the previous historic lack of research in this area, and will be an issue solved through careful consideration of my measures of concepts and data analysis. While my research may be able to demonstrate correlation between certain areas, it is not likely to be able to prove causation conclusively.

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<sup>16</sup> "If a book comes out as a hardback, then a trade paperback, then a B format paperback, then an A format paperback, each with a different ISBN, is that one title, or two, or four? What about the export edition or the airside edition (sold in duty-free bookshops at airports)?...And then there are ebooks. An ebook may be available in 10 different e-formats, but is that one book or ten - or is it none because it is available as a printed book and counted as that?" Alison Baverstock, *How to Market Books* (Fifth edition, Routledge, Taylor & Francis Group 2015) 6.

<sup>17</sup> Brian Moon, 'How Data Is Transforming The Music Industry' (*The Conversation*) <<http://theconversation.com/how-data-is-transforming-the-music-industry-70940>> accessed 31 October 2018.

However, a correlation relationship also has merit for analysis as it can suggest new avenues for research and opportunities for growth in the market.

### 7.3 Why do People Consume Fanfiction? Demand Side Issues

This section will lay out statistics for demand for fanfiction to investigate whether the demand for fanfiction has any relation to the demand for the underlying work.

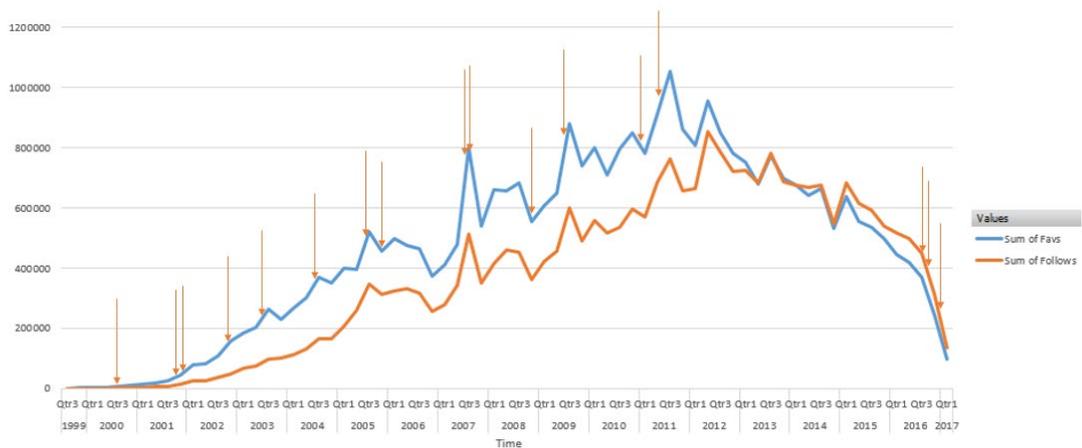
#### 7.3.1 How Does Demand Interact with Supply of the Original Work?

If fanfiction is being read by users around the same time as canon is being released, this may imply that there is some substitution effect being felt, as consumers have a finite amount of leisure time and must therefore be making a choice regarding what to consume. Using Harry Potter as a case study (as it amounts to more than 10% of posts to Fanfiction.Net and is the single largest fandom in the 'Book' category) we can see this is not happening<sup>18</sup>.

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<sup>18</sup> 'Favs' and 'Follows' are used as proxies for demand here, as they are the functions within the site that users with accounts can use to signal demand for works. 'Favs' are used as 'likes' – i.e. they are a method for users to signal they like the specific post/chapter. 'Follows' are used to bookmark works such that users are sent updates to that work once they are uploaded.

**Figure 2: Trends in Fanfiction Demand Compared to Canon Release (Harry Potter)**



The data above<sup>19</sup> shows that Harry Potter fanfiction consumers were more likely to use the 'favs' function than the 'follow' function until 2014, and that the use of both functions was only indirectly related to canon production and release. Peaks for fanfiction demand were in the weeks after the release of the canon work. This is supported when analysing the numbers of interactions in relation to posts in the weeks before and after canon production:

<sup>19</sup> And in Tables 2 and 3 below

**Table 2: Growth in Demand for Harry Potter Fanfiction.Net Posts After Marketing for Canon Works (Favs)**

Type	Canon	Canon Publication Date	4 weeks before	3 weeks before	2 weeks before	1 week before	1 week after	2 weeks after	3 weeks after	4 weeks after	difference 4wb 4wa	% change
Book	Goblet of Fire (book)	08/07/2000	27	65	115	1071	82	156	217	259	232	859.26%
Film	Philosophers Stone (film)	16/11/2001	111	1708	2613	4518	3787	6190	1766	4958	4847	4366.67%
Book	Fantastic Beasts and Where to Find Them (book)	01/12/2001	2613	4518	3787	6190	1766	4958	4839	5084	2471	94.57%
Film	Chamber of Secrets (film)	03/11/2002	5806	11250	11328	8945	8503	9766	14232	13800	7994	137.69%
Book	Order of the Phoenix (book)	21/06/2003	17897	10396	4236	21340	24442	17979	20910	25158	7261	40.57%
Film	Prisoner of Azkaban (film)	31/05/2004	16239	18044	19113	16475	29428	26786	32078	36204	19965	122.94%
Book	Half Blood Prince (book)	16/07/2005	37355	32861	41267	45821	52356	45379	41581	46756	9401	25.17%
Film	Goblet of Fire (film)	18/11/2005	22005	47486	26587	19473	33257	40801	37593	42958	20953	95.22%
Film	Order of the Phoenix (film)	12/07/2007	38774	53873	48553	54279	77562	73471	93900	62043	23269	60.01%
Book	Deathly Hallows (book)	21/07/2007	53991	42280	60962	78922	75155	92907	57593	49027	-4964	-9.19%
Book	The Tales of Beedle The Bard (book)	04/12/2008	40446	40000	33685	35584	34622	44111	43370	68595	28149	69.60%
Film	Half Blood Prince (film)	15/07/2009	49666	58822	71908	68222	71966	87558	83182	62476	12810	25.79%
Film	Deathly Hallows Part One (film)	19/11/2010	49078	72173	57596	58911	48672	85089	72704	66349	17271	35.19%
Film	Deathly Hallows Part Two (film)	07/07/2011	58857	82048	62877	79994	81375	92198	89461	100832	41975	71.32%
Play	Harry Potter and the Cursed Child	30/06/2016	28193	37603	30404	28285	25970	30727	39583	31144	2951	10.47%
Book	Harry Potter and the Cursed Child (Special Rehearsal Edition Script)	31/07/2016	22557	34439	37761	27872	32364	24716	36743	27537	4980	22.08%
Film	Fantastic Beasts and Where to Find Them (film)	18/11/2016	16089	22571	18947	17478	25119	18590	14632	15913	-176	-1.09%

**Table 3: Growth in Demand for Harry Potter Fanfiction.Net Posts After Marketing for Canon Works (Follows)**

Type	Canon	Canon Publication Date	4 weeks before	3 weeks before	2 weeks before	1 week before	1 week after	2 weeks after	3 weeks after	4 weeks after	difference 4wb 4wa	% change
Book	Goblet of Fire (book)	08/07/2000	8	10	15	194	65	24	54	43	35	437.50%
Film	Philosophers Stone (film)	16/11/2001	19	293	697	1121	1073	1481	488	1334	1315	6921.05%
Book	Fantastic Beasts and Where to Find Them (book)	01/12/2001	697	1121	1073	1481	488	1334	1562	1531	834	119.66%
Film	Chamber of Secrets (film)	03/11/2002	1956	3521	2292	3360	2466	3406	3828	4290	2334	119.33%
Book	Order of the Phoenix (book)	21/06/2003	5953	4213	1274	7887	6856	5794	6066	10444	4491	75.44%
Film	Prisoner of Azkaban (film)	31/05/2004	7045	7876	8406	9536	14880	12692	14026	14785	7740	109.87%
Book	Half Blood Prince (book)	16/07/2005	22763	22179	23706	27209	30758	29020	30050	27469	4706	20.67%
Film	Goblet of Fire (film)	18/11/2005	14536	39714	20339	14916	24653	24842	23204	36466	21930	150.87%
Film	Order of the Phoenix (film)	12/07/2007	25186	36963	34219	36411	47056	43882	63905	38105	12919	51.29%
Book	Deathly Hallows (book)	21/07/2007	37561	28320	40402	48864	45904	58769	39618	35157	-2404	-6.40%
Book	The Tales of Beedle The Bard (book)	04/12/2008	29482	25711	23772	21114	22351	29658	22010	40772	11290	38.29%
Film	Half Blood Prince (film)	15/07/2009	39645	35492	51138	45712	46812	55127	60124	40223	578	1.46%
Film	Deathly Hallows Part One (film)	19/11/2010	39413	47969	41974	44462	37998	68785	52397	37894	-1519	-3.85%
Film	Deathly Hallows Part Two (film)	07/07/2011	43172	62356	46287	64022	57121	69251	63087	70461	27289	63.21%
Play	Harry Potter and the Cursed Child	30/06/2016	36897	43050	34109	34124	29176	37706	46981	39737	2840	7.70%
Book	Harry Potter and the Cursed Child (Special Rehearsal Edition Script)	31/07/2016	26736	41437	46828	33777	40097	28997	43677	36800	10064	37.64%
Film	Fantastic Beasts and Where to Find Them (film)	18/11/2016	22154	28373	25545	21363	32433	25145	18201	20147	-2007	-9.06%

In almost all cases there was more interaction with posts after canon production – especially where canon released prior to the end of 2005 (up to and including the *Goblet of Fire* film). This follows the upward trend in volume of posts to Fanfiction.Net<sup>20</sup> over that time. In almost all cases, the demand for posts was already trending upwards, likely due to increased interest due to marketing efforts around the time of release of the books or films (as marked by orange arrows in Figure 2 above). However, in almost all cases there is an increase in demand for posts after canon is released (and in theory consumed – these are likely to be ‘superfans’ that purchase in the first week of release). This growth continues over the next four weeks. This growth in interest in fanfiction is sustained over some weeks, but obviously has an upper limit, as there are only so many fans, and these fans will have scarcity of attention affects eventually. This suggests that this is a symbiotic relationship – fans are responding to new works on the market, and show preference for canon works. Once the canon is consumed, they turn to new fanfiction posts. This can be seen in the drop in interest in posts after 2010, where the release of the play *Harry Potter and the Cursed Child*, the script published separately, and the film *Fantastic Beasts and Where to Find Them*, had less effect. Once there is a long period where no new canon works are produced (such as the gap between the release of the *Deathly Hallows Part Two* film in 2011 and the *Harry Potter and the Cursed Child* play in 2016), this symbiotic relationship means there is a gradual fall in demand for fanfiction as well as the original.

This data suggests a certain relationship between canon production and demand for fanfiction – however there is an important counterfactual to be considered. For all these releases, the release dates for each work was pre-released in advance, which created fan hysteria and may have influenced the demand for fanfiction posts. Unfortunately it has

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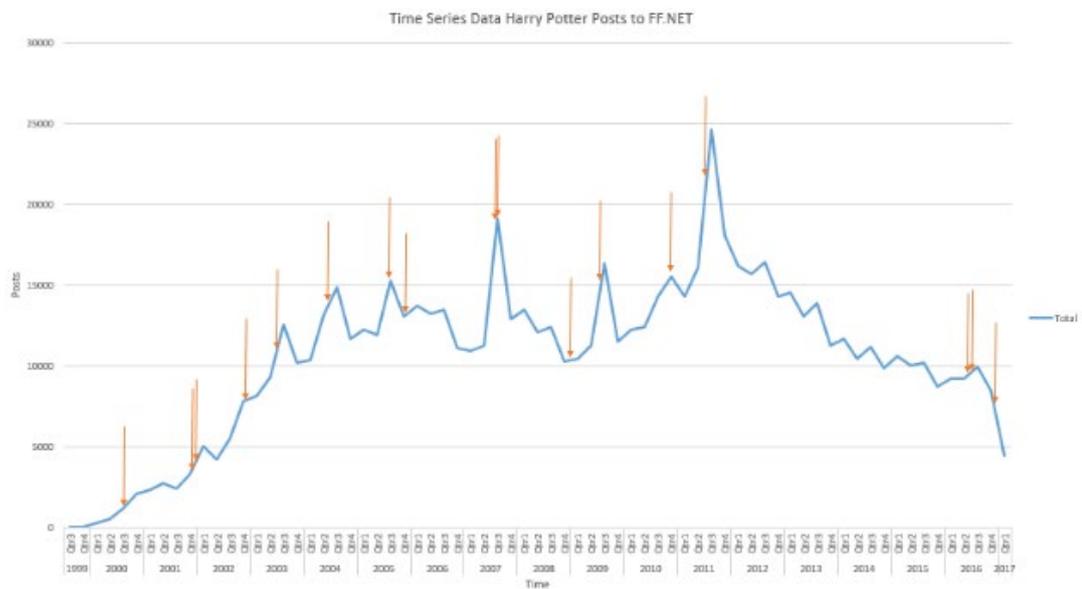
<sup>20</sup> See Figure 1 above and Table 5 below

not been possible to find announcement dates for canon works, meaning that this inference is weakened.

***Inference: Demand for fanfiction is reactive not proactive – fans are consuming the canon work/authorised work, then consuming the fanfiction. This may infer fanfiction is a complementary good, rather than a substitute.***

By their very nature, authorised adaptations are mostly released after the underlying work has been created and released. This is also shown in data in relation to unauthorised adaptations like fanfiction, and may further suggest that fanfiction is not economically harmful to the underlying work as supply is reactive rather than proactive. By studying the trends in fanfiction production in relation to canon production (i.e. the release of either original books in the series, or authorised adaptations), more fanfiction is produced in the weeks following the release of canon works (either novels or authorised adaptations). Those engaging with fanfiction do so after consuming the original. Through an investigation of *Harry Potter* fanfiction (as the largest fandom on Fanfiction.Net), fanfiction was already trending upwards prior to the release of each item of canon (whether book or film), but there was a significant increase afterwards (orange flags representing release dates of canon works (dates in Table 4 below).

**Figure 3: Harry Potter Fanfiction Production Reactive to Canon Production**



This suggests that anticipation and excitement for the release may also play a role in the production of fanfiction, so consumption of fanfiction may have positive spillover effects for the market for the underlying work by contributing to increased interest and hype in the work (and thus require less money to be invested in advertising and marketing the underlying work). Fanfiction being written prior to canon release is likely written based on previous works, and is not intended as a substitute for the new canon<sup>21</sup>. This is strongly supported by the impact of authorised adaptations on fanfiction production.

<sup>21</sup> Although some fans may write predictive fanfiction, using subtext and prior plot points to guess how the new works will play out. An interesting development of this research may be to undertake content analysis of fanfiction posts to investigate this.

**Table 4: Harry Potter Fanfiction.Net Posts as Reactive to Canon Production**

Type	Canon	Canon Publication Date	4 weeks before	3 weeks before	2 weeks before	1 week before	1 week after	2 weeks after	3 weeks after	4 weeks after	difference 4wb 4wa	% change
Book	Goblet of Fire (book)	08/07/2000	49	51	47	58	75	70	88	93	44	90%
Film	Philosophers Stone (film)	16/11/2001	53	93	173	274	390	462	368	386	333	628%
Book	Fantastic Beasts and Where to Find Them (book)	01/12/2001	195	283	432	413	387	419	450	480	285	146%
Film	Chamber of Secrets (film)	03/11/2002	466	497	535	531	613	564	762	967	501	108%
Book	Order of the Phoenix (book)	21/06/2003	748	808	496	986	1380	1447	1366	955	207	28%
Film	Prisoner of Azkaban (film)	31/05/2004	809	948	990	1022	1264	1525	1704	1789	980	121%
Book	Half Blood Prince (book)	16/07/2005	1288	1227	1254	1289	1652	1676	1491	1501	213	17%
Film	Goblet of Fire (film)	18/11/2005	901	917	927	1007	1194	1399	1187	1238	337	37%
Film	Order of the Phoenix (film)	12/07/2007	1189	1260	1247	1438	1831	2444	2503	2173	984	83%
Book	Deathly Hallows (book)	21/07/2007	1270	1220	1480	1874	2563	2392	2115	1797	527	41%
Book	The Tales of Beedle The Bard (book)	04/12/2008	890	853	779	882	897	855	1097	1229	339	38%
Film	Half Blood Prince (film)	15/07/2009	1120	1243	1295	1314	1855	1986	1806	1600	480	43%
Film	Deathly Hallows Part One (film)	19/11/2010	1084	1230	1118	1091	1469	1708	1565	1368	284	26%
Film	Deathly Hallows Part Two (film)	07/07/2011	1442	1568	1610	1671	1832	2798	2980	2624	1182	82%
Play	Harry Potter and the Cursed Child	30/06/2016	843	894	889	892	883	882	864	853	10	1%
Book	Harry Potter and the Cursed Child (Special Rehearsal Edition Script)	31/07/2016	833	880	860	856	1080	974	908	907	74	9%
Film	Fantastic Beasts and Where to Find Them (film)	18/11/2016	659	724	674	618	710	823	727	694	35	5%

On average, 241 more posts were written in the 4th week after the release of a new book in the series than in the 4th week before, but this rises to 512 more posts surrounding release of a film adaptation. The strongest impact on fanfiction production was the release of the first film in the series (*Harry Potter and the Philosophers Stone*) on 16<sup>th</sup> November 2011. Despite the 628% increase in fanfiction production, the film had an incredibly successful opening weekend in the US and the UK (where it can be presumed most of the fanfiction was being produced). Thus, it could be argued that fanfiction is a reflection of the hype around authorised adaptations, rather than being a substitute for the original book. This effect is seen in other works subject to a lot of fanfiction – for example the releases of the authorised film adaptations of the *Lion, Witch and the Wardrobe* series by CS Lewis were commercially successful, and also generated a relatively large increase in fanfiction production (686% on average across the three films). While the success of adaptations is important for authors and their publishers, if copyright is mostly focused on the incentive to produce the original work, it can be argued that it goes beyond its' remit when protecting against a 'dealing' with the work that (a) mostly affects adaptations, and (b) cannot be proved to have a negative impact on either the market as a whole or the individual work.

A further reason for this lack of effect of fanfiction on the original is that fanfiction may be argued to sit in the 'long tail' of the demand curve for the original. It can be assumed therefore not to have a strong detrimental effect on the canon work. There are two important counterfactuals to this argument however. Firstly, the idea of the 'long tail' itself is being questioned by some leading experts<sup>22</sup>. Secondly, the industry as a whole may suffer from the associated issues from over-supply of works, meaning that fanfiction

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<sup>22</sup> Neil Wilkof, 'What Happened to the "Long Tail" Theory of Commerce on the Internet?' (*The IPKat*) <<http://ipkitten.blogspot.com/2020/04/what-happened-long-tail-theory-of.html>> accessed 20 May 2020.

may harm the market for the underlying work, albeit in a less direct way. Furthermore, other fanfiction authors may struggle against the search costs such that their works do not receive the attention they seek – although this is mitigated by the strong and detailed tagging functions on sites such as Fanfiction.Net. This can be seen to be analogous to the issues within self-publishing as a whole, where “asymmetric information about quality”<sup>23</sup> creates market failure.

### 7.3.2 Limitations

The inferences drawn from the data in this section of the chapter have been based on the functionality of the Fanfiction.Net website, which only covers users with accounts on the site. While the ‘favs’ and ‘follows’ data has shown some interesting results, it should be remembered that it is possible to interact with works on the site without an account. Works can be followed by internet users by using bookmarks within their personal web browsers, rather than by creating an account on the site to ‘follow’ it. Thus, it could be concluded that the inferences above only relate to those particularly keen users of the site that have accounts, which mean they only apply to a small subsection of the fanfiction market.

### 7.3.3 Summary

This section has given some conclusions regarding the first research question – why do people consume fanfiction, and, considering the overall hypothesis of the thesis – is this harmful for the underlying work? In comparison to the conclusions from previous academic works<sup>24</sup>, demand for fanfiction posts does not have any provable negative effect on the demand for the underlying work, and seems to be more a function of the marketing hype around the underlying work. There is an indirect correlation between demand for

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<sup>23</sup> Morten Hviid, Sofia Izquierdo-Sanchez and Sabine Jacques, ‘From Publishers to Self-Publishing: Disruptive Effects in the Book Industry’ (2019) 26 *International Journal of the Economics of Business* 355, 2.

<sup>24</sup> Such as Landes and Posner (n 3).

fanfiction and demand for the underlying work, but it is likely that the release of canon works drives demand for fanfiction, rather than the reverse. This may, with the provisos given above, support a claim that fanfiction does not impact the normal exploitation of the work and thus should be protected by the fair dealing exception. However, we need to know more about the supply of fanfiction before making that conclusion.

## 7.4 Why do People Create Fanfiction? Supply Side Issues

### 7.4.1 Is the Supply of Fanfiction Increasing?

Fanfiction has existed since before the arrival of the internet, but with free-to-access forums and archives its popularity soared. One of the first successful websites devoted to hosting these works was Fanfiction.Net, which opened in November 1998. It steadily grew in popularity, peaking in 2013 when 712,741 posts were added to the site (Figure 1). At the time of research, there were 6,873,646 posts in total. It grew in popularity around the same time as other similar user-generated content sites such as Wikipedia, albeit on a smaller scale (Wikipedia had more than 123,559,719 total pages by the time of research)<sup>25</sup>.

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<sup>25</sup> 'Wikimedia Statistics - All Wikipedias - Pages to Date' <<https://stats.wikimedia.org/#/all-wikipedia-projects/content/pages-to-date/normal|line|2001-01-01~2017-05-01|~total|monthly>> accessed 11 May 2020.

**Table 5: Trend in posts to Fanfiction.Net over time, showing peak in 2013**

Year	No. of Posts	Year on Year Change	% Change
1998	89		
1999	3308	3219	3617%
2000	29156	25848	781%
2001	94937	65781	226%
2002	153421	58484	62%
2003	201743	48322	31%
2004	232477	30734	15%
2005	259441	26964	12%
2006	316277	56836	22%
2007	361603	45326	14%
2008	431366	69763	19%
2009	496144	64778	15%
2010	572861	76717	15%
2011	640944	68083	12%
2012	696574	55630	9%
2013	712741	16167	2%
2014	617976	-94765	-13%
2015	540879	-77097	-12%
2016	460312	-80567	-15%
2017	51397	-408915	-89%

Fanfiction.Net grew in popularity between 2007 and 2012. This is likely due to several factors, such as the popularity of the *Harry Potter* series, which was published during that period and which provides more than 10% of all posts to the site. Furthermore, over the same time period, there has been an increase<sup>26</sup> in ‘serious leisure’ activities – i.e. activities that require the acquisition of skills through continued effort and engagement,

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<sup>26</sup> Ciara M Kelly and others, ‘The Relationship between Leisure Activities and Psychological Resources That Support a Sustainable Career: The Role of Leisure Seriousness and Work-Leisure Similarity’ (2020) 117 *Journal of Vocational Behavior* 103340; Melina A Throuvala and others, ‘The Role of Recreational Online Activities in School-Based Screen Time Sedentary Behaviour Interventions for Adolescents: A Systematic and Critical Literature Review’ [2020] *International Journal of Mental Health and Addiction* <<http://link.springer.com/10.1007/s11469-019-00213-y>> accessed 20 May 2020; Atara Sivan and others, ‘Adolescents’ Choice and Pursuit of Their Most Important and Interesting Leisure Activities’ (2019) 38 *Leisure Studies* 98.

even in the face of difficulties, in order to develop an identity as talented in that area<sup>27</sup>.

Fanfiction may meet this definition, with its focus on improvement on writing and developing skills which may be useful in a future career, either as an author or in any job which requires improved writing skills.

The decline in Fanfiction.Net posts after 2013 could be argued to be due to a lack of interest in fanfiction and a fall in demand and supply of works on the site<sup>28</sup>. However, it is more likely to be due to the purge of adult-content studies (i.e. those judged highly sexual or violent) that started in May 2012<sup>29</sup> - yet a similar purge in 2002 did not have the same effect. This can be further explained by the lack of competition on the fanfiction market in 2002 – while there were sites such as FictionAlley and FanDomination.Net in 2002, neither were popular. Thus neither site provided an alternative home for users. In comparison, Archive of Our Own was launched in November 2009 and has been highly popular with users. Given this popularity, when the second purge occurred alongside other actions taken by the administrators of Fanfiction.Net that were seen as abuses of power<sup>30</sup>, it could be argued that many Fanfiction.Net users moved their works to Archive of Our Own – which would account for the drastic reduction in the rate of posts to the site. Is this true?

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<sup>27</sup> Robert A Stebbins, 'The Semiotic Self and Serious Leisure' (2011) 42 *The American Sociologist* 238.

<sup>28</sup> It could also be due to external effects such as a move of users to other fanfiction archives, such as Archive of Our Own, as discussed later in this section.

<sup>29</sup> 'FanFiction.Net's NC-17 Purges: 2002 and 2012 - Fanlore'

<[https://fanlore.org/wiki/FanFiction.Net%27s\\_NC-17\\_Purges:\\_2002\\_and\\_2012](https://fanlore.org/wiki/FanFiction.Net%27s_NC-17_Purges:_2002_and_2012)> accessed 24 July 2019.

<sup>30</sup> Such as the controversial banning of Cassandra Clare for plagiarism – despite her strong defence that it was an error on the part of the Fanfiction.Net moderators – see 'What Everyone Should Know About Fanfiction.Net - Fanlore'

<[https://fanlore.org/wiki/What\\_Everyone\\_Should\\_Know\\_About\\_Fanfiction.net#Fan\\_Comments:\\_2012](https://fanlore.org/wiki/What_Everyone_Should_Know_About_Fanfiction.net#Fan_Comments:_2012)> accessed 24 July 2019.. This was controversial as Clare was a highly popular writer, who eventually turned her fanfiction following into a commercial career writing Young Adult works.

**Table 6: Migration of Posts from Fanfiction.Net to Archive of Our Own<sup>31</sup>**

Date	No. of Posts on Archive of Our Own	Growth	No. of Posts on Fanfiction.Net	Growth
October 2012	459,655		4,341,937	
July 2013	763,326	66.06%	4,890,385	12.63%
February 2014	1,000,000	31.01%	5,293,497	8.24%
December 2015	2,000,000	100%	6,340,900	19.79%
October 2016	2,615,000	30.75%	6,750,271	6.46%

Table 6 shows that while Archive of Our Own was slow to grow in popularity, the rate of posts grew increasingly fast from 2014-15. While it took more than 5 years to gain 1 million posts, it only took 22 months to double in size to 2 million, 16 months to achieve 3 million posts, 15 months to achieve 4 million posts, and 12 months to achieve 5 million posts. Thus, there is evidently increasing supply to the site, and given the community nature of fanfiction, likely to be increasing levels of demand, too. Over the same period, while Fanfiction.Net grew, it did so at a much slower rate.

Does this mean that the decline in posts to Fanfiction.Net can be attributed to the growth in Archive of our Own? It is possible that the counterfactual would be that there are merely more fanfiction writers starting to post every day, that are choosing to post on Archive of Our Own instead of, or as well as, Fanfiction.Net. Adults in their late thirties now, who grew up in fandom and the infancy of internet fan communities, may now have children who are old enough to be writing their own fanfiction online. The increase in posts on Archive of Our Own may be an unrelated coincidence and purely due to increases in its own supply. While this may be true, this would require information about the

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<sup>31</sup> 'Archive of Our Own' (*Fanlore*) <[https://fanlore.org/wiki/Archive\\_of\\_Our\\_Own](https://fanlore.org/wiki/Archive_of_Our_Own)> accessed 11 May 2020.

personal characteristics of users of Fanfiction.Net and Archive of Our Own, which is outside of the remit of this work for ethical reasons.

While there is still a small community of users actively posting to Fanfiction.Net, many of the more prolific users have admitted<sup>32</sup> that they have moved to other websites, such as Archive of Our Own, due to growing unhappiness with how the site was being run<sup>33</sup>. The sudden decrease in posts to Fanfiction.Net can be directly linked to the growth of Archive of Our Own. Immediately after the purge of mature works on Fanfiction.Net in 2012, which many users felt was done in a heavy-handed manner, Archive of Our Own experienced temporary technical failures due to a sudden increase in demand<sup>34</sup>. Thus, the decline noted in the figure above is possibly not demonstrating a decline in the production of fanfiction itself, but more a shift to other websites such as Archive of Our Own.

The peak dates for production of works on Fanfiction.Net were the first two days of January in every year, which supports the conclusions drawn by Thomas<sup>35</sup> and Garcia<sup>36</sup> that fanfiction is a leisure activity, distinct from consumption of the underlying work and more akin to posting on social media or review sites. The start of January are days that adults and children both tend to be out of work or education, and works of fiction are a popular gift to receive over the holiday period<sup>37</sup>. This suggests that fanfiction is a reactive form of production, created after canon works are purchased read and enjoyed, rather than being consumed instead of the new work. This will be tested later in the chapter.

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<sup>32</sup> Nicole Pellegrini, 'FanFiction.Net vs. Archive of Our Own | HobbyLark' (14 February 2017) <<http://web.archive.org/web/20180823121518/https://hobbylark.com/fandoms/fanfictionnet-vs-archive-of-our-own>> accessed 13 May 2020.

<sup>33</sup> 'FanFiction.Net's NC-17 Purges: 2002 and 2012 - Fanlore' (n 29).

<sup>34</sup> Lucy Pearson, 'Update on AO3 Performance Issues (Archived Page)' (<https://archiveofourown.org/>, 11 June 2012) <<https://www.webcitation.org/6Q0SZ9luN>> accessed 13 May 2020.

<sup>35</sup> Bronwen Thomas, 'What Is Fanfiction and Why Are People Saying Such Nice Things about It??' (2011) 3 *Storyworlds: A Journal of Narrative Studies* 1.

<sup>36</sup> Antero Garcia, 'Making the Case for Youth and Practitioner Reading, Producing, and Teaching Fanfiction' (2016) 60 *Journal of Adolescent & Adult Literacy* 353.

<sup>37</sup> 'Nielsen Book Research: 2015 In Review' (The London Book Fair Quantum Conference 2016) 40.

If the problem is reframed as an issue with a reallocation of the finite amount of leisure time of consumers, and an increase in the ways we can use that time, especially online, it is possible to argue that the demonstrated increase in fanfiction production during a decrease in sales of fiction works shows that fanfiction may merely be acting indirectly to crowd out reading as an activity. This is not a direct form of harm and would not require intervention by copyright law to protect the position of the authors or publishers.

***Inference: Supply of fanfiction has been growing over the time period researched. The data does not suggest whether this has any impact on the fiction market (see 8.5.2).***

#### 7.4.2 Why is supply of fanfiction growing?

So far this chapter has illustrated that the fanfiction market is growing. This leads to a need to investigate why the supply of fanfiction has grown, in order to answer the last question: can the decline in the fiction market be tied to fanfiction? Two alternate theories regarding the supply of fanfiction are discussed in this section – either that it is operating as a form of workshop to improve writing skills using ‘distributed mentoring’, which may have social welfare benefits and support a call for fanfiction to be supported by a pastiche fair dealing exception – or that it is merely following trends in fiction production for continuations, in which case it may be deemed competing with the fiction market by conveying the same information for the same purpose<sup>38</sup>.

##### 7.4.2.1 Distributed Mentoring

The instantaneous ability to comment and review serial works increases “the dynamic communication between speaker and listeners into the novel” in comparison with the engagement with published novels that are “the output of a solitary individual in a

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<sup>38</sup> *Hubbard v Vosper* [1972] 2 QB 84.

room of her own”<sup>39</sup>. The data from this research supports work done by several prominent academics that fanfiction is a form of peer production produsage<sup>40</sup>. This type of intertwined relationship with the site and other active users takes this form of production beyond Benkler’s concept of ‘peer production’ and into a special form of network enabled informal social production referred to as “distributed mentoring”<sup>41</sup>, supply is driven not by a lack of demand for the underlying work but by a desire to engage with the fandom and their peers on the site in order to improve their writing skills, which could benefit the fiction market as well as society. If this leads to improvement in writing skills, it could lead to more commercial works being released on the market, as well as general literacy improvements.

Over the 20 year period, 1.5 million accounts posted to the site, with 280,888 accounts remaining active and accessible in 2017 when data was collected. Each post on Fanfiction.Net over the period received on average 26.33 reviews, with the highest reviewed work receiving 61,644 reviews, which supports the distributed mentoring claim at first glance.

**Table 7: Influence of Reviews on Production (Cumulative Distribution)**

Number of Reviews	Number of Posts
0	1,747,862
At least 1	2,755,301
At least 5	4,439,667
At least 10	5,200,353
At least 15	5,584,490
At least 20	5,823,486
More than 20	1,090,365

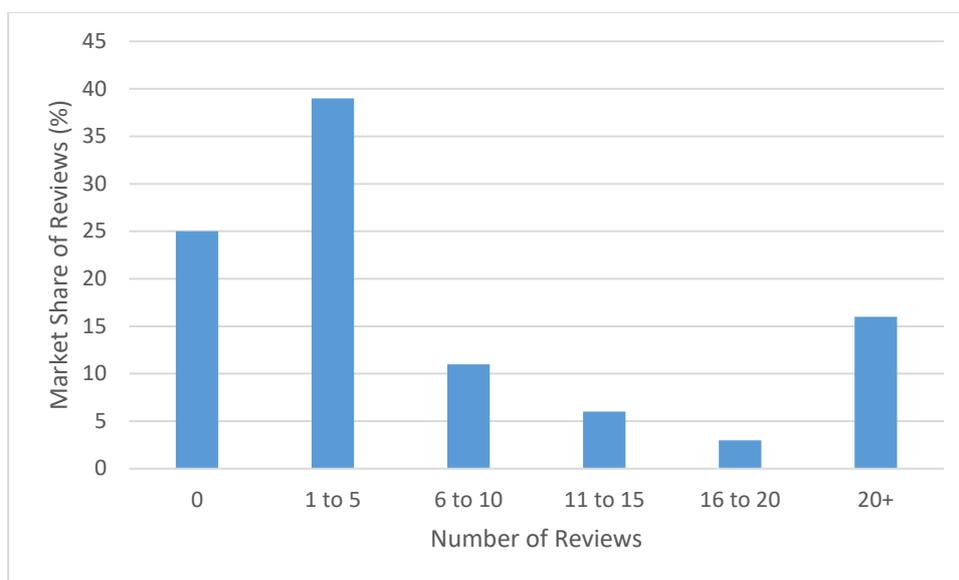
<sup>39</sup> Nick Levey, ‘Post-Press Literature: Self-Published Authors in the Literary Field « Post45’ (3 February 2016) <<http://post45.research.yale.edu/2016/02/post-press-literature-self-published-authors-in-the-literary-field-3/>> accessed 24 April 2017.

<sup>40</sup> such as Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008); Aragon, Davis and Fiesler (n 10); Rebecca W Black, ‘English-Language Learners, Fan Communities, and 21st-Century Skills’ (2009) 52 *Journal of Adolescent & Adult Literacy* 688.

<sup>41</sup> Aragon, Davis and Fiesler (n 6).

As shown in Table 7, the majority of works (92.46%) have at least one review, with the majority receiving between 1-20 reviews (77.60%). It can therefore be inferred that the review function of the site is highly used. However, the distribution is very skewed, so further analysis is required.

**Figure 4: Influence of Reviews on Production ('Market Shares' of Reviews)**



When analysing the percentage of works reviewed that received a certain number of reviews, a clearer pattern appears. Most works are receiving less than 6 reviews (65%)<sup>42</sup>. As such, it could be argued that while reviews are important to production, this relationship may not be a strong one.

***Inference: Reviews are somewhat important to Fanfiction.Net users. However, this does not suggest whether users are merely leaving reviews for others, or whether they are***

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<sup>42</sup> The Herfindahl–Hirschman Index can be used here to better judge what an ‘average’ post looks like, as it permits for a more informative analysis. It is a method of measuring the importance of the number of reviews in relation to the dataset as a whole. The HHI is 0.26, meaning the data is highly skewed to the left.

***engaging with reviews in their own production, so we need more information before making inferences about the impact of reviews on supply of fanfiction.***

This mentoring argument is supported by statistics regarding the length of works on the site. The majority of the works that users are creating on Fanfiction.Net are shorter and less formal than the original work, and mostly published as works in progress rather than complete works. The average novel is between 100,000 and 150,000 words<sup>43</sup>, with variations for genre (fantasy tends to be longer, romance tends to be shorter, for example) and market (youth works tend to be shorter, around 16,000 words<sup>44</sup>). 98.7% of works on Fanfiction.Net (6,786,284 posts) are shorter than or equal to standard adult novel length (100,000 words), and 86.5% of works (5,951,418 posts) are shorter than or equal to standard youth novel length (16,000 words). The average amount of chapters in each work is 4.21, which is much shorter than standard fiction works. While the reasons for this is not clear from this type of data, it may support a claim that these works are a form of non-harmful produsage such as distributed mentoring. These works may be being posted more as vague ideas that are then workshopped and developed over time online, possibly in response to reviews posted on previous sections of that work or previous works by the fanfiction writer. Thus, this may strengthen the argument that fanfiction should be a fair 'dealing' with the work.

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<sup>43</sup> Jane Smiley, *Thirteen Ways of Looking at the Novel* (2006).

<sup>44</sup> Nancy Lamb, *The Writers Guide to Crafting Stories for Children* (1st ed, Writer's Digest Books 2001). However, the length of a published novel is fluid, and is up to the author and the publisher as to whether they believe the work will sell (Anna Quindlen, 'WRITERS ON WRITING; The Eye of the Reporter, The Heart of the Novelist' *The New York Times* (23 September 2002) <<https://www.nytimes.com/2002/09/23/books/writers-on-writing-the-eye-of-the-reporter-the-heart-of-the-novelist.html>> accessed 20 May 2020.)

**Table 8: Positive Influence of Reviews on Length of Work**

		Number of Reviews					
		0	1 to 5	6 to 10	11 to 15	16 to 20	20 +
Words	Mean	3192.54	3057.96	4399.36	6312.23	8391.42	29192
	Mode	100	100	1000	1000	1282	65535
Chapters	Mean	1.88	1.81	2.39	3.25	4.19	11.26
	Mode	1	1	1	1	1	1

Table 8 suggests that as the number of reviews increases, so does the length of the work, both in terms of word count and number of chapters. This is perhaps surprising, as it may have been expected that shorter works would receive more engagement from readers as they are quicker to read. This supports the claim that fanfiction is distributed mentoring, as fanfiction writers are receiving reviews and using them to further develop their works. This may lead to a positive feedback loop whereby readers leave reviews, the writer develops the work, and readers return to read further instalments of the work. If so, this is positive in that it may suggest that the writing is being developed. However, this data does not suggest anything about the quality of writing – and so this may merely be incentivising further production of low-quality work, as feared by Waldfoegel<sup>45</sup>.

***Inference: Works on Fanfiction.Net are mostly posted as works in progress, published as short works that are built upon as the users writing skills improve. Thus, they do not interact with supply of the underlying work as they are probably not operating on the same market, but in a complementary market such as social networking or blogging about the fandom.***

<sup>45</sup> Joel Waldfoegel, 'Digitization in Books: 50 Shades of Dreck?' in Joel Waldfoegel, *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture* (Princeton University Press 2018).

#### 7.4.2.2 *Following trends in fiction production for continuations*

The alternate viewpoint for the increase in production of fanfiction is that it is following trends in the fiction market for writing in a series rather than writing standalone works. 7.54% of works on Fanfiction.Net (518,391 posts) have no reviews, and 45.89% of works have 5 or fewer. Therefore, there must be other incentives for at least some of the fanfiction writers on the site.

It is well known that there is a trend in the fiction market for reusing popular characters by writing in a series rather than standalone works. Publishers, it is argued, are “keen to develop series based around fictional characters, which could lead to sales of associated merchandise”<sup>46</sup>, especially within children’s and young adult publishing. At the top end of the fiction market, the importance of being part of a pre-existing series is gradually increasing over time, from 38% of bestsellers in 2015 to 49% in 2018.

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<sup>46</sup> Giles Clark and Angus Philips, ‘The Development of Modern Trade Publishing’, *Inside Book Publishing* (5th ed, Routledge 2014) 55.

**Table 9: Growing link between ‘Return Ticket’ to Previous Worlds and Success**

Year	Number of top 100 books that are fiction	Standalone	Series
2015	65	40	25
		62%	38%
2016	60	34	26
		57%	43%
2017	78	46	32
		59%	41%
2018	74	38	36
		51%	49%
Overall	277	158	119
		57%	43%

The importance of being part of a pre-existing series is gradually increasing over time, but across the four years measured it has never made a work more likely to be a success than if a work was a standalone piece. This is similar to certain types of fanfiction, whose focus is on continuing the story, filling in gaps in the storyline and giving context<sup>47</sup>.

***Inference: Fanfiction is following a growing trend in fiction production for writing in a continuing series.***

What does this mean for fanfiction writers and readers? It may imply that if authors intend to publish in an ongoing series, they may be more concerned about

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<sup>47</sup> Such as fanfiction designated “Expanding the Series Timeline”, “Crossovers” and “Character Dislocation”, Henry Jenkins, ‘Scribbling in the Margins’, *Textual Poachers: Television Fans and Participatory Culture* (20th anniversary ed, Routledge 2013).

protecting the characters and locations they intend to use, and that fanfiction may be interacting with supply in that market.

**Table 10: Importance of Protecting Pre-Existing Characters and Locations among Fanfiction-Averse Authors**

<b>Fanfiction-Averse</b>		<b>Fanfiction-Friendly</b>	
<b>Author Name</b>	<b>Proportion of standalone works</b>	<b>Author Name</b>	<b>Proportion of standalone works</b>
Robin McKinley	36%	Gaston Leroux	76%
PN Elrod	14%	C S Lewis	38%
Anne Rice	13%	James Patterson	35%
Nora Roberts	8%	Suzanne Collins	25%
Terry Goodkind	6%	Stephanie Meyer	20%
Irene Radford	5%	Cecily von Ziegesar	7%
Dennis L McKiernan	4%	JK Rowling <sup>48</sup>	5%
Laurell K Hamilton	0%	Rick Riordan	2%
Raymond Feist	0%	Cassandra Clare	0%
JR Ward	0%	Erin Hunter	0%
Robin Hobb	0%	JRR Tolkein	0%

The above table shows that this is broadly speaking true – fanfiction-averse authors are much more likely to be writing in a series, and so reusing their characters or locations, possibly for reasons of time constraints and tight publishing deadlines<sup>49</sup>. It is therefore not unusual that they are highly protective of the characters, locations and general storylines that they create, as they are strongly aware of the commercial importance of those aspects of their output.

Only 8% of the works by fanfiction-averse authors were written as standalone works. Many of the authors, such as Raymond Feist and Robin Hobb, generate small trilogies or sagas, using the same characters across many series, meaning that their characters are even more economically valuable to them<sup>50</sup>. This may be due to the genre of

<sup>48</sup> As either JK Rowling or Robert Galbraith

<sup>49</sup> Or possibly due to insecurity or lack of imagination

<sup>50</sup> For example, Robin Hobb has 6 series to her name (The Farseer Trilogy, Liveship Traders Trilogy, The Soldier Son Trilogy, The Tawny Man Trilogy, The Rain Wild Chronicles, and The Fitz and The Fool

fiction that these authors write in - other than Nora Roberts<sup>51</sup>, they all write in the fantasy genre, which tends towards epic, long running stories set in highly descriptive worlds. The fantasy genre has been argued to “unlock imagination” as it enables us to “enter worlds of infinite possibility”<sup>52</sup>. Thus, it might be argued that it requires more investment from its authors in relation to not only storyline and character but also physics, biology, and chemistry - all topics taken for granted in other forms of fiction. This high level of investment may explain why many works are written in series form - as the initial outlay of inspiration is so costly, returning to the same world again and again may be the only way to generate works sufficiently quickly to meet publishing deadlines. It is also likely to lead to higher emotional attachment to these works, and explain why these authors may wish to rely more on moral rights arguments than economic rights.

The counterfactual here is that these characters and locations are being reused so much because the writers are less successful, and are so called ‘jobbing writers’ who struggle to support themselves economically with their writing. They may either need to publish more prolifically than successful authors, or support themselves with outside work. Thus, their potential lack of creativity may be explained, and may tie back into their fear of economic harm.

Compared to the works by fanfiction-averse authors, fanfiction-friendly writers were three times more likely to write standalone works (24% of works by fanfiction-friendly

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Trilogy). However, they are all set in the same ‘world’ and the same characters feature in many of the works.

<sup>51</sup> Nora Roberts, as a romance writer, is an outlier. She has banned fanfiction of her work on Fanfiction.Net, yet has said in public that she is happy for people to write it (Nora's Official Stance on Fan Fiction. AJ at InDeath.net, quoting Nora Roberts' post at ADWOFF, 14 June 2003. (Archived by the Wayback Machine 25 May 2010). However, she subsequently asked her fansite to remove all their fanfiction, as she did not approve of the way it was being written and moderated (↑ AJ at InDeath.net. ATTENTION ALL: FAN FICTION HAS BEEN SUSPENDED, posted 15 December 2014. Archived by the Wayback Machine 26 August 2016). Her objections appear to be purely emotional rather than economic.

<sup>52</sup> Richard Mathews, *Fantasy: The Liberation of Imagination* (1. Routledge paperback ed, Routledge 2002) xi.

authors were standalone works, compared to 8% of works by fanfiction averse authors)<sup>53</sup>. This demonstrates that these authors face higher costs of expression – by writing more standalone works, they are generating more ‘new’ ideas. However, it is not the standalone works that are being the subject of fanfiction. Thus, this research suggests that these authors have a different and possibly more successful viewpoint of fanfiction – they are permitting it on a small proportion of their works (written in a series), as they are aware the majority of their works (standalone works) are not affected by fanfiction. For them, successful characters and locations are important (as they generate fans who engage with the series and purchase the works in the series), but they are also more likely to generate new characters. They may see this as an advertising feature – readers and writers of *Percy Jackson* fanfiction are likely to be strong fans of Rick Riordan’s other works - in which case, they may be more likely to purchase any of his standalone works (or works in other series).

The fear of economic harm is seen in writers who reuse their characters more themselves - meaning that they individually may benefit from stronger copyright laws but that society is not benefitting from any incentive to create new works. Fanfiction averse authors all demonstrate the trends discovered in the bestselling works research already discussed - in that they are all prolific writers, who generate fictional works set within the same series and reusing the same characters. As shown in Table 4, there is only one author on the list with more than 15% of their works published as standalone works rather than in a series- Robin McKinley. However, that does not mean she prioritised original unique stories – many of her standalone works were retellings of folk tales and other works in the

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<sup>53</sup> However, this number might be swayed by the high output of Gaston Leroux, who published before modern fanfiction or the internet existed, so who will not have felt the impact of it on his incentives to write

public domain<sup>54</sup>. Only 4 of her standalone works are actually original stories that do not rely on pre-existing characters.

***Inference: Characters and locations are more reused by fanfiction-averse authors.***

***Fanfiction is more likely to be seen as a substitute by these authors. Fanfiction-friendly authors are more likely to write standalone works and therefore not reuse their characters or locations. Fanfiction may be seen by these authors as a complementary good rather than a substitute – and so not be economically harmful at all.***

#### *7.4.2.3 Transformativeness of Fanfiction – Not the ‘Same Information’?*

While fanfiction may be following trends in fiction towards reuse of characters and locations (either in terms of remakes or works released as continuations or series), there is an important argument that must be analysed regarding whether fanfiction competes with the original work. Fanfiction writers argue that it does not compete as it is transformative, and thus does not convey the same information for the same purpose.

The test for transformativeness looks at whether the derivative work adds to the original in some way, for example changing it to have a different motivation or meaning, adding “new information, aesthetics...insights and understandings”<sup>55</sup>. This is part of the analysis surrounding the ‘use made’ of the underlying work by the new work. We must be clear about the type of transformativeness the fair dealing analysis calls for. Merely expanding the series timeline for example is unlikely on its own to be transformative as continuations are clearly within the normal exploitation of the work. It is transformativeness that is the distinction between infringing reuses and fair dealings.

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<sup>54</sup> Such as ‘Beauty: A Retelling of Beauty and the Beast’ or ‘The Outlaws of Sherwood’ (a retelling of Robin Hood).

<sup>55</sup> Pierre N Leval, ‘Towards a Fair Use Standard’ (1990) 103 Harvard Law Review 31, 1111.

In order to judge whether works have a harmful effect on other works that merits legal interference, they must be in the same market (or a closely related one). The relevant market for fiction works can be defined in economic terms by asking whether there is “reasonable interchangeability of creative products in the eyes of consumers”<sup>56</sup> - do consumers act such that they believe the creative works (the canon and the fanfiction) are substitutes for each other? The following research uses several characteristics as proxies to investigate the transformative nature of fanfiction, as discussed in Chapter 6.3.2. The following characteristics of fanfiction posts in the ‘Books’ category<sup>57</sup> were analysed, and compared with the characteristics of the underlying work to judge whether they are providing the ‘same information’:

- language,
- fandom,
- genre,
- whether it is published in parts or as one complete work,
- the age market,
- and the length (word count) of the work.

If the fanfiction bears different characteristics to the original (it is published in a different language or as a crossover work, for example), it is more likely to meet the test regarding ‘transformative’ nature, and therefore support the argument that these works are non-competing and should be permitted under the fair dealing exception.

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<sup>56</sup> Sara K Stadler, ‘Relevant Markets for Copyrighted Works Invention, Creation, & Public Policy Symposium: The Copyright Act & the Public Interest’ (2008) 34 *Journal of Corporation Law* 1059, 1060.

<sup>57</sup> See Codebook (Table 1 of this chapter)

**Table 11: Overall Proportion of Transformative Works in Fanfiction.Net ‘Books’ Category**

Characteristic	Transformative	Not Transformative
Overall	50.87%	49.13%

There is almost an even split between posts that exhibit the same characteristics as the original work, and works that are different in some way. This is surprising as much literature on fanfiction refers to how transformative it is<sup>58</sup>. However, when each individual characteristic is separated out, some trends become clear.

**Table 12: Transformative Works by Characteristic**

Characteristic	Transformative	Not Transformative
Language	197,471 (17.31%)	943,586 (82.69%)
Fandom	45,406 (3.98%)	1,095,651 (96.02%)
Genre	780,901 (68.44%)	360,156 (31.56%)
Completed work <sup>59</sup>	520,044 (45.58%)	621,013 (54.42%)
Age Category	679,554 (59.55%)	461,503 (40.45%)
Length <sup>60</sup>	1,140,346 (99.94%)	711 (0.06%)

The first two categories (language and whether the work remains in the same fandom or crosses over with another) are heavily weighted towards non-transformative works. Yet this is possibly due to the characteristics of the users of Fanfiction.Net, rather than the posts themselves – the majority of works in this category are written in English, and the majority of users of the site are also English speakers, so it is not surprising they write in their first language.

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<sup>58</sup> Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006); Patrick McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011) 24 Regent University Law Review 117; Aragon, Davis and Fiesler (n 6).

<sup>59</sup> For this analysis, the test was whether the work was published as 1 chapter or many chapters, due to the functionality of Fanfiction.Net. Further research would be needed to investigate whether fanfiction writers are posting complete works as different chapters at the same time.

<sup>60</sup> This is not exact length, but within 1 chapter/5,000 words

It is not surprising that so many works remain within their own fandoms. Across the site, only 3.3% of works are crossover works. This shows again the importance of characters and locations to the author and publisher of the underlying work, as it suggests that fans are preferring to interact with characters in their own settings, rather than transplanting them elsewhere. This may be due to the importance of the story to the development of the character.

Distinct to language and fandom, the remaining characteristics investigated raise a suggestion that fanfiction on the site may be transformative, and, it could be suggested that these works are not acting as substitutes, as they are not in the same market. They are in a non-commercial market, and they are mostly published as very short posts (99.94% are shorter than the original work, with an average word count of 9,516 words, which is the length of 2-4 standard chapters in a normal novel<sup>61</sup>).

Analysis of the genre of fanfiction posts also supports an argument that these posts are transformative as they mostly cover different genres (68.44% are tagged as a different genre to the original). This appears to be due to the preponderance of fanfiction to be tagged as 'Romance' – 2,497,664 posts across the site are tagged in this genre (36.33%), while few of the novels that the posts are based on are within that genre. This has led to the fear from many authors that fanfiction is merely a way for fans to write pornography about their characters. This fear may be supported – 9.2% of posts on Fanfiction.Net are within the M age category and the Romance genre (after the purge of more explicit posts in 2012). Within the 'Book' category, this raises to 11.48%. This may be good for fanfiction writers, as this is clearly transformative- although it may have related issues for the analysis

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<sup>61</sup> This data is highly skewed – the median is 2,384 and the mode is 100.

regarding economic harm to the underlying work, as many authors are scared these works will tarnish their brand<sup>62</sup>.

***Inference: Fanfiction is transformative in certain characteristics.***

#### 7.4.3 Summary

From the analysis carried out in Chapter 6, much research and case law around fair dealing is focussed around the question of how unauthorised derivative works impact supply of the underlying work, as copyright law aims to encourage freedom of expression. At first instance therefore, we should perhaps be celebrating the creation and sharing of the 6.8million Fanfiction.Net posts, as they are increasing the supply of cultural works available to consumers, demonstrating a possible stimulation of productive thought<sup>63</sup>.

The analysis therefore turned to the further question - why are these works being produced? This is important as the essence of the fair dealing exceptions is that the derivative work does not act as a substitute for the original and thus does not economically harm that work. It was inferred that for many users, the review functionality of the site is important and has an impact on their works, and that they are interacting with a large number of other users' works. However, there is a significant minority that do not receive reviews, and thus cannot be using the site in that way. It is possible that these users are following trends in the fiction market for sequels and series of works rather than standalone books. This means that they may be competing with the underlying work. However, an investigation of the transformative nature of fanfiction demonstrates that it is

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<sup>62</sup> Patrick McKay, 'Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century' (2011) 24 Regent University Law Review 117; Steven Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2009) 157 University of Pennsylvania Law Review 1869.

<sup>63</sup> Especially since it has been stated repeatedly that the analysis should not take into account the subjective quality of the works being created Waldfoegel (n 10).

likely that fanfiction is not competing directly with the original work (or its authorised adaptations) as it is different either in focus or format. This supports a claim that fanfiction could be a fair 'dealing' with the work as significant amounts would meet the legal test for transformativeness. However, would it also meet the legal test for lack of interference with the normal exploitation with the work – does it have a negative effect on the fiction market, or the market for individual works? If so, this may harm the claim for fair dealing protection.

## 7.5 How does this interact with the fiction market?

### 7.5.1 Does fanfiction harm the fiction market as a whole?

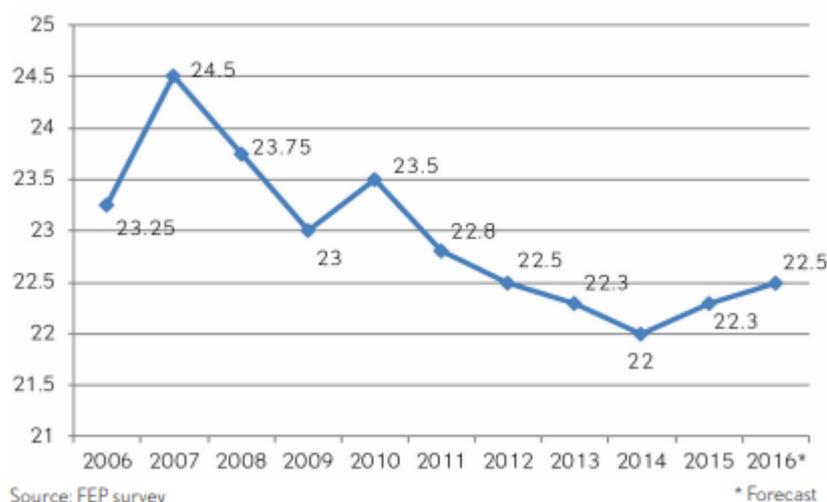
Cultural industries in the 21<sup>st</sup> century exist in a space characterised by a fight between inspiration, ingenuity and inventiveness on one side, and moneymaking, mercantile ideas and marketability on the other. For a creative product to be a success on the market, it needs to both be written well and also exploited well.

In order to judge whether permitting a certain type of reuse (in this case, fanfiction) is harmful to the underlying work, an investigation must be made into the market for which the original work is created. The first question that must be answered is whether or not the market is currently facing some type of economic harm. If it is not, then the reasons for creating and consuming fanfiction are likely to be less important to any fair dealing analysis.

Publishers in Europe have been facing ongoing challenges in the digital era, as shown by Figure 5.

**Figure 5 – Fall in Turnover for Publishers Over Time<sup>64</sup>**

**Net publishers' turnover from book sales in the EU + EEA, 2006-2016 (€ billion)**



Turnover from sales<sup>65</sup> has been steadily falling since 2007 across the EU, from a peak of 24.5 billion Euros in 2007 to 22.5 billion Euros in 2016. There are several possible reasons for this, including the fear that fanfiction is taking up demand, which will be tested later in this chapter. This fall in turnover may imply that the book market as a whole is struggling, yet this is not necessarily the case. Global sales are falling, especially within physical book sales, which dropped 5% in 2018 to £2.9 billion. However, certain segments of the market are stable - there was a 5% increase in digital book sales (to £653 million) in 2018, and the market may be showing signs of improvement based on the 2019 sales figures. Income for UK publishers is up 4% in the UK market and 3% in the export market, with digital sales income increasing 4% from 2018<sup>66</sup>. Thus, it could be stated that the publishing industry is improving, and publishers may be less conservative about the choices they make regarding the authors they publish (and the derivative works they permit).

<sup>64</sup> The Book Sector in Europe: Facts and Figures 2017 (Federation of European Publishers 2017) <<http://fep-fee.eu/The-Federation-Of-European-844>> 2. These figures relate purely to sales and thus do not include "revenues in terms of selling rights for translation, audio-visual adaptation etc". This is highly important in relation to fanfiction and will be returned to later.

<sup>65</sup> European Book Publishing Statistics 2017 <<https://fep-fee.eu/European-Book-Publishing-995>>

<sup>66</sup> 'Publishers Association Yearbook 2019' (*Publishers Association*)

<<https://www.publishers.org.uk/publications/yearbook2019/>> accessed 27 July 2020.

However, this is unlikely to be the case, as the increase in sales is supported specifically by the non-fiction market and audiobooks<sup>67</sup>. In comparison, within the fiction market, sales are falling. Fiction sales specifically fell 5% in 2018 to £386 million<sup>68</sup>. At the top end of the market, where the majority of profits are made, 6.5 million fewer fiction works were sold over the four years tested for, as shown in Table 1 below. This is despite an increase in overall sales across this period. Fiction’s share of the total book market has therefore fallen.

**Table 13: Decrease in Fiction Sales over Time**<sup>69</sup>

<b>Year</b>	<b>Total Sales (m)</b>	<b>Of which fiction (m)</b>	<b>Fiction as % of sales</b>
2015	608	117.7	19.36
2016	642.5	114.3	17.79
2017	647.4	117.9	18.21
2018	652	111.2	17.06

The book market is being supported mainly by increases in non-fiction and children’s books. Non-fiction sales grew 21.9% from 108.8m to 132.6m, and children’s books grew 17.2% from 109m to 127.7m. This trend in non-fiction works is due to the influence of online influencers such as Joe Wicks (fitness) and Zoella (beauty), parody works such as Ladybird spoofs, adult colouring books, and computer game companion guides such as Minecraft. While trends in non-fiction success may lead to allied research, such as the gender or background of successful authors, it is beyond the scope of this research as it does not attract fanfiction.

<sup>67</sup> ‘Book Sales Hit Record Highs in 2019, but Publishers “Now Need Help”’ (*the Guardian*, 21 July 2020) <<http://www.theguardian.com/books/2020/jul/22/book-sales-record-highs-2019-publishers-need-help-government>> accessed 27 July 2020.

<sup>68</sup> ‘Yearbook 2018’ (The Publishers Association 2018) <<https://www.publishers.org.uk/resources/yearbook>> 2,6

<sup>69</sup> Yearbook 2018 (The Publishers Association 2018) <<https://publishers.org.uk/resources/yearbook>>

However, it is worth noting that over this period, there were general economic difficulties due to an economic recession. Consumers had less disposable income, and may for example have changed their spending habits, choosing to borrow books from libraries rather than purchase them outright. Yet, libraries also experienced a fall in demand over the same time period<sup>70</sup>, which suggests that the fall in sales may be due to a fall in interest in fiction as a whole.

***Inference: The publishing market as a whole has historically faced problems, but it is now improving, but the fiction market is facing difficulties as the market turns towards audiobooks and non-fiction works.***

Publishers are not the only ones suffering from a contraction of the fiction market. Income for authors, like turnover for publishers, has been falling over the last decade<sup>71</sup>. Thus, even those at the top end of the market are struggling to make sufficient income from sales. This can be seen by comparing the approximate income for the author and publisher at the top of the bestseller list in 2017 with that of the author and publisher at the bottom of the bestseller list.

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<sup>70</sup> 'Public Library Usage in England 2005-2018' (*Statista*) <<https://www.statista.com/statistics/290193/public-library-usage-uk-england/>> accessed 24 July 2020; 'Public Library Visits in the UK 2002-2014' (*Statista*) <<https://www.statista.com/statistics/290581/number-of-visits-to-uk-public-libraries/>> accessed 24 July 2020.

<sup>71</sup> Danuta Kean, 'Publishers are Paying Writers a Pittance, Say Bestselling Authors' *The Guardian* (27 June 2018); Alison Flood, 'Writers and Publishers Trade Blows over Plummeting Author Pay Levels' *The Guardian* (29 June 2018).

**Table 14: Income for Authors and Publishers of Works on Bestseller List, comparing top and bottom of list**

	<b>No 1 Bestseller<sup>72</sup></b>		<b>No 100 Bestseller<sup>73</sup></b>	
Gross Sales		£7,375,955.82 <sup>74</sup>		£775,501.41 <sup>75</sup>
Less Corporation Tax	£1,475,191.16	£5,900,764.66	£155,100.28	£620,401.13
Less Author's Royalties <sup>76</sup>	£590,764.66	£5,310,688.19	£62,040.11	£558,361.02
Less Print costs <sup>77</sup>	£1,703,454	£3,607,234.19	£291,177	£267,184.02
Less Distribution costs	£2,452,919.25		£181,685.13	
Publisher profit		<b>£1,154,314.94</b>		<b>£85,498.89</b>

The above table demonstrates that while successful authors at the very top of the market can earn significant sums of money, most do not. *Everything, Everything*, a highly successful work that topped the New York Times Bestseller list for a debut work, only occupied the number 100 spot in 2017's UK sales chart. The author, Nicola Yoon, earned approximately £62,040.11 in royalties that year. While that is higher than the average household income of £29,300, this is not particularly high in comparison to the time it takes to write a novel, and the financial risks taken by the author. The royalties received by David Walliams, the author of the book in the number one spot that year, are more likely to incentivise authors. However, authors are becoming very aware that very few can earn that level of income. The average author earns less than £10,500 a year<sup>78</sup>. This suggests

<sup>72</sup> David Walliams, *Bad Dad* (HarperCollins, 2017)

<sup>73</sup> Nicola Yoon, *Everything Everything* (Corgi, 2015)

<sup>74</sup> RRP £12.99 x 567,818 sales

<sup>75</sup> RRP £7.99 x 97,059

<sup>76</sup> Approximately 10% standard on hardbacks, shared between author and artist in picturebooks, and 7.5% on paperbacks. Given the bias towards hardback books in year of publication, this analysis presumes all sales are hardbacks. (Publishing Agreements <<https://www.writersandartists.co.uk/writers/advice/162/after-publication/rights-and-legal-advice/publishing-agreements>>)

<sup>77</sup> Assuming approximately £3 per copy

<sup>78</sup> 2018 Authors Earnings (Authors Licensing and Collecting Society 2018)

that authors, especially those yet to have a publication contract with a publishing house, may bear high pre-production costs of expression, and these high costs may not be balanced out once they have a publishing contract<sup>79</sup>.

***Inference: Authors are facing a harsh market for fiction and falling income from direct sales. This may mean secondary markets become more important to them.***

For the stakeholders in the market, the fall in fiction sales is highly important. The full economic risk of the work is borne at the outset by publishers, who decide which authors to provide advances to, and how much the advances should be. They minimise this risk through several strategies, such as hedging, where they spread the risk over a wide range of authors - but this means that each author must bear some risk. Further, publishers minimise risk (and try to maximise returns) through marketing and publishing strategies, including strategies regarding how intellectual property is protected. Authors often do not have much input into marketing strategies - the publishers' interests are prioritised as they paid for the marketing as well as all the publishing costs and so bear the financial risk. These interests broadly align with those of the author – in that both want high sales, for example. Yet there are some important differences between the interests of the author and the publisher (as licence holder). For example, if fanfiction is seen to be helpful to advertising<sup>80</sup>, licence holders/publishers may be more open to permitting its use, while authors may not feel the same incentive to permit it if they find it emotionally harmful. These different incentives are important to this research due to the reference

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<sup>79</sup> When writing prior to booking an agent or getting a publishing contract, they are bearing all the costs involved, including living costs – and the opportunity costs of not using their time to either create income, or carry out leisure activities. After signing a contract, their income may only raise to between £10,500 -£62,040.11, which may not be enough to cover the sunk costs they incurred prior to entering the market/signing a contract.

<sup>80</sup> See 'Demand Side' section of this chapter

within the Three Step Test contained within the Berne Convention/TRIPs Agreement to the “legitimate interests” of the right holder *and* the author. It appears from that wording that both parties’ interests should be considered.

Regarding the interests of the author, this data suggests that it is becoming harder for authors to share the works they create, as the fiction market may be declining. Creativity is driven by several factors, the most important of which is *the desire to create and share their story successfully*<sup>81</sup>. Success for authors in this context relates partially to income from sales but there are other, more important incentives involved, namely the *ability to disseminate their work widely, and be the only writer associated with it*. This explain why publishers and authors are fearful of any influence (such as fanfiction) which may impact the market – if the fiction market is shrinking, any individual author’s or publisher’s share of that market is also likely to shrink.

In comparison, the data tells us that it is likely that publishers are becoming more risk-averse to protect their financial resources. Thus their desire to remain with a new author and develop their career in the face of slow initial sales is decreasing<sup>82</sup>, while their desire to use copyright law to protect already successful works is increasing. This could harm first-time authors and society as a whole if it leads to a contraction of the market and a decrease in diversity. This is especially true, as publishers have been referred to as “Janus-faced”<sup>83</sup>, competing for both customers and content. This is accomplished best through protecting the quality of the work they already publish through high levels of copyright control, as this will protect sales of their current works as well as hopefully bring in future authors who will be attracted by their reputation.

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<sup>81</sup> Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid* (2018) 41 Colum J L & Arts 269, 382

<sup>82</sup> Kean (n 71); Flood (n 71).

<sup>83</sup> John B Thompson *Merchants of Culture: The Publishing Business in the Twenty-First Century* (Second edition, Polity 2012) 11

It appears a general change in leisure activities may be more likely to be to blame for the contraction of the fiction market. Internet usage has drastically increased over the time period researched. In 2006, only 35% of Britons surveyed used the internet daily, but by 2019 that had increased to 87%<sup>84</sup>. Given that leisure time is a finite resource, it could be argued therefore that the fall in turnover on the market for books is tied to a change in the way consumers choose to relax. Instead of purchasing and reading books, consumers are choosing to spend their time communicating online through emails, instant messaging or social networking<sup>85</sup>. This means there are fewer consumers within the market, meaning demand may continue to fall, and factors which it is feared impact demand (such as fanfiction) will become more important to stakeholders.

Having shown the fiction market is shrinking, and that authors and publishers in that market may be facing economic harm, it is important for this analysis to turn to whether this decline in the market can be directly linked to fanfiction in any way. If fanfiction cannot be proved to be interacting with the fiction market, or if the effect it is having is not provably negative, it will support a claim to extend the fair dealing pastiche exception to fanfiction.

#### 7.5.2 Is there a link between permitting fanfiction and effects on sales?

Having shown that there is only an indirect link between the shrinking of the fiction market and the growth in the fanfiction market, and that supply of fanfiction as a whole is likely to be a mix of distributed mentoring and a desire to create more of the underlying work to ‘fill in the gaps’, it is important to also investigate the impact of fanfiction on

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<sup>84</sup> ‘Internet Usage Frequency in Great Britain 2006-2019’ (*Statista*)  
<<https://www.statista.com/statistics/286075/internet-usage-frequency-in-great-britain/>> accessed 24 July 2020.

<sup>85</sup> ‘Internet Activities Performed in Great Britain 2019’ (*Statista*)  
<<https://www.statista.com/statistics/275805/internet-activities-performed-in-great-britain/>> accessed 24 July 2020.

individual works and authors in order to illustrate whether fanfiction should benefit from a pastiche fair dealing exception.

#### 7.5.2.1 *Success of fanfiction friendly authors*

A supply side question leading on from the data analysed so far that this research must answer is whether permitting fanfiction would harm the legitimate economic interests of the author, or whether banning supply of fanfiction leads to an increased supply of authorised works from that author. Given the protective nature of copyright, many authors presume that stronger levels of protection – and thus protectiveness against fanfiction – may lead to stronger sales of their work. They assume that fanfiction will have direct economic harm to their works. One method of analysing whether this is true (and whether fanfiction should not be a fair dealing with the work), is to analyse the sales of works of fanfiction averse authors in comparison to fanfiction friendly authors.

An important part of this research is that the incentive to create for both authors and publishers is closely tied to future works, not just the individual work at hand – the author is not as dead as Barthes presumes<sup>86</sup>. Increasingly, commercial authors remain invested in their works and the characters and locations they contain<sup>87</sup>. While every year many debut authors attempt to break into the market with their first work, or established authors attempt to publish literary fiction, their path is often blocked by commercial authors who are returning to the same characters and locations to generate more works, such as sequels, prequels and full series of works. This desire is fully supported by publishers, as it is presumed that this requires less budget for marketing as there is a pre-existing market for these works.

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<sup>86</sup> Roland Barthes, 'The Death of the Author' in S Heath (tr), *Image-Music-Text* (Fontana 1977).

<sup>87</sup> It could be questioned whether career authors ought to be protected using strong copyright law, especially if they are publishing commercial genre fiction, as this is not adding quality works to the market.

**Table 15: Success for Fanfiction-Friendly Authors on Amazon.co.uk<sup>88</sup>**

Fanfiction Averse		Fanfiction Friendly	
Author Name	Highest Ranking	Author Name	Highest Ranking
Robin Hobb	3,886	JK Rowling	396
Raymond Feist	8,355	JRR Tolkein	885
Nora Roberts	22,275	Rick Riordan	1,691
Terry Goodkind	37,481	Suzanne Collins	2,102
Laurell K Hamilton	42,346	Stephanie Meyer	4,480
JR Ward	43,198	Cassandra Clare	4,839
Anne Rice	52,381	Erin Hunter	17,766
Robin McKinley	306,540	Gaston Leroux	63,816
PN Elrod	1,108,675	James Patterson	88,379
Dennis L McKiernan	2,918,723	CS Lewis	166,715
Irene Radford	3,164,006	Cecily von Ziegesar	189,296

This research suggests those most strongly against fanfiction do not benefit financially from their position. These authors fear that economic harm is being done to their work either through fanfiction acting as a substitute, taking demand from the original, or through fanfiction harming the 'brand' of the author or the characters<sup>89</sup>. However, this research suggests that this theory is not correct, and that it is possible that the counterfactual may in fact be true – that by banning fanfiction, they are harming their sales, possibly due to scarcity of attention and their position in the long tail of the market.

Given that other variables remain similar (all these authors tend to write in similar markets and genres), it could be argued that demanding fanfiction be removed from the internet may cause more economic harm to the author than permitting it within certain

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<sup>88</sup> Exact sales figures for fictional works are not possible to research as they are proprietary information. As an alternative, the Amazon.co.uk sales ratings for the authors listed above were compared (while these too have some issues with reliability and change daily, it provides a stable framework for comparison). The highest ranking for each writer (either fanfiction-friendly or fanfiction-averse) in the 'Books' category was taken and compared, and shows that fanfiction-friendly authors are on average much more successful on Amazon.co.uk than fanfiction-averse authors – the average sales ranking for fanfiction friendly authors is 49,124, compared to 700,715 for fanfiction averse authors).

<sup>89</sup> although the 'branding' issue is closer tied to commerce and ought possibly be raised more as a trade mark issue than a copyright law issue

constraints. This supports research that copyright may affect different parts of the market in different ways. Fanfiction-averse authors, as they are at the lower end of the market, may need the support of copyright protection to protect their income, and thus may not feel like they can 'afford' to permit fanfiction.

However, this success for fanfiction authors is likely not to be directly linked to permitting fanfiction. It is more likely to be due to these authors being better known on the market. Modern publishers tend to give more support to brand name authors<sup>90</sup>, recognising that that success drivers for fiction works are tied to customer recognition as a method to overcome oversupply on the market and the attendant scarcity of attention issue. These so called 'brand authors' are given more support and financial investment in relation to advertising, advances and preferential publication dates around high-purchase dates such as holidays<sup>91</sup>. The fanfiction-friendly authors are all (bar Gaston Leroux) in the teen market, which as previously established is both a growing field, and highly important for fanfiction writers. Thus success may be due to the use by authors and fans of other, non-productive fan spaces such as Facebook pages and the Goodreads review site. As successful authors, they are also likely to be able to afford to do large book tours to market their works further to and meet and engage with fans. Thus, it might be possible to argue that they are easier to 'brand' and have more name recognition.

***Inference: Banning supply of fanfiction does not lead to increased sales of works by the underlying author. Permitting supply of fanfiction has a correlation with higher sales, but there is not enough information to imply causation. Thus, it cannot be proved that permitting fanfiction would unreasonably prejudice the legitimate interests of the author to derive income from their work.***

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<sup>90</sup> Clark and Philips (n 46) 40.

<sup>91</sup> Giles Clark and Angus Philips, 'The Characteristics of the Main Publishing Sectors', *Inside Book Publishing* (5th edn, Routledge, Taylor & Francis Group 2014) 86.

Success for authors is not tied solely to direct sales of the underlying works – adaptation rights are also highly important to authors and publishers. Adaptations “express or address a desire to return to an ‘original’ textual encounter; therefore, adaptations are perhaps symptomatic of a cultural compulsion to repeat”<sup>92</sup>. This is seen in the desire of fanfiction writers to write fanfiction, and also in commercial, authorised adaptation. At the top end of the fiction market, the Bestseller lists is dominated by authors that have had adaptations of their works.

**Table 16: Importance of Adaptations over time to Appearing in the Bestseller**

**Lists**

Year	Adaptation of anything by the author	Direct adaptation released of this book?	Adaptation of other works in series?
2015	80%	20%	25%
2016	70%	25%	30%
2017	76%	28%	31%
2018	74%	18%	34%

The importance of these rights to success over time is demonstrated by the incidence of works on the Bestseller list over the four years measured where the author had at least one previous adaptation. At least 70% of the works in the top 100 bestsellers belonged to this category. This factor seems to link to the author rather than the specific work, as the data does not show a strong link between direct adaptations of that work and success on the market. Despite the research into the sales lift a work receives around the time an adaptation is announced and released<sup>93</sup> at most only 28% of the bestselling fiction works had an adaptation in the same year they were published. The link does not get much

<sup>92</sup> Rachel Carroll (ed), *Adaptation in Contemporary Culture: Textual Infidelities* (Continuum 2009) 1.

<sup>93</sup> Thompson (n 83) 281, 283

stronger when investigating whether adaptations of other works influence success – at most only 34% of the fiction Bestseller list met that criteria in the same year of publication. However, these low numbers may be due to the amount of time it takes to release an adaptation – many do not make it to market the same year that the book is released.

There are several different types of adaptation rights – namely foreign language adaptations, serialisation rights and film adaptations – which have been referred to as “part of the symphony that, if carefully managed, can help to make a book a commercial success”<sup>94</sup>. Fanfiction may strike a discordant note in this symphony, as certain types of reuses (for example slash fiction/eroticisation) may detract from the attractiveness of the underlying work as a basis for an adaptation. It may also interfere with the timing of the release of commercial adaptations. This is especially important as a very low number of rights options are actually exercised even if purchased – so interfering with incentives in this regard may have a disproportionate effect. It has been said that only “...between 5 per cent and 10 per cent of options are exercised and of those perhaps one in ten finally proceeds to production; television options have a higher success rate than film options”<sup>95</sup>.

Adaptations are important to sales of the work as they operate as ‘recognition triggers’<sup>96</sup>. This effect has been seen in many big-budget thrillers, such as film adaptations of the Dan Brown novel *Angels and Demons* and Ian McEwan’s novel *Atonement*, which each saw uplifts in sales around the time of the announcement of an upcoming film adaptation, and again when the film was released<sup>97</sup>.

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<sup>94</sup> Thompson (n 83) 66.

<sup>95</sup> Giles N Clark and Angus Phillips, *Inside Book Publishing* (Fifth edition, Routledge, Taylor & Francis Group 2014) 294.

<sup>96</sup> Thompson (n 83) 278.

<sup>97</sup> This is also seen in the fanfiction market – see section 7.3.1 of this chapter.

***Inference: The ability to adapt the work is a strong indicator of future success in the fiction market, so fiction authors and publishers will be protective of anything that may negatively impact it.***

The importance of protecting the market for authorised adaptations by strongly preventing unauthorised adaptations such as fanfiction is would suggest that authors who permit unauthorised adaptations such as fanfiction would struggle to sign contracts for adaptations. Yet, the research does not support this hypothesis. Fanfiction-friendly writers, and their works, have all been the subject of successful commercial adaptations. Of the top fandoms on Fanfiction.Net, all had adaptation agreements signed for production, and all bar one had film adaptations released<sup>98</sup>.

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<sup>98</sup> The only one that has not, 'Warriors' by Erin Hunter, has a film in pre-production due for release in 2023.

**Table 17: Lack of proof of link between banning fanfiction and ability to adapt works**

Fanfiction Averse		Fanfiction Friendly	
Author Name	Adaptations	Author Name	Adaptations
Anne Rice	8: 5 films, 2 TV shows, 1 stage show	Gaston Leroux	56: 55 films, 1 stage show
Nora Roberts	4: 4 films	JRR Tolkein	18: 9 films, 1 TV show, 8 stage shows
Terry Goodkind	1: 1 TV show	C S Lewis	14: 5 films, 3 TV shows, 6 stage shows
Irene Radford	0	James Patterson	13: 5 films, 8 TV shows
Dennis L McKiernan	0	JK Rowling	12: 10 films, 1 stage show, 1 TV show
Laurell K Hamilton	0 <sup>99</sup>	Stephanie Meyer	6: 6 films
Raymond Feist	0 <sup>100</sup>	Suzanne Collins	4: 4 films
JR Ward	0	Rick Riordan	3: 2 films, 1 TV show
Robin Hobb	0	Cassandra Clare	2: 1 film, 1 TV show
Robin McKinley	0	Erin Hunter	2: 1 film, 1 stage show
PN Elrod	0	Cecily von Ziegesar	1: 1 TV show

<sup>99</sup> While an adaptation agreement was signed, it never made it to air 'TV Movie Adaptation' (*Anita Blake Wiki*) <[https://anitablake.fandom.com/wiki/TV\\_Movie\\_Adaptation](https://anitablake.fandom.com/wiki/TV_Movie_Adaptation)> accessed 20 May 2020.

<sup>100</sup> While an agreement was signed, it was subsequently cancelled Stubby the Rocket, 'The Riftwar TV Show Is No Longer Happening' (*Tor.com*, 23 August 2019) <<https://www.tor.com/2019/08/23/the-riftwar-tv-show-is-no-longer-happening/>> accessed 20 May 2020.

This research suggests that permitting fanfiction has very little effect on the ability of authors and publishers to sign adaptation deals for their works, either specifically of the work in question, or other works of the same author. This may be due to fanfiction's effect as representation of a strong and loyal consumer base for film studios to market to, and thus reduce the risk of investing in the adaptation (and adaptations of future works in the series). It may also extend the lifecycle of the work in question, keeping demand high for the book long after the standard year-long period of demand has ended.

This support of demand over time can be demonstrated strongly by the return to the top 100 bestseller lists of many works published in previous years but with successful adaptations: 10 of the 74 bestselling fiction works in 2018 were published in previous years – for example *Harry Potter and the Philosophers Stone* was still in the 2018 bestseller list despite being published in 2014, as was *Ready Player One* despite publication in 2012. Thus, it can be argued that permitting non-commercial fanfiction does not necessarily impact on the normal exploitation of the underlying work, and the fanfiction should be permitted as fair dealing.

***Inference: Permitting fanfiction has no negative impact on the ability to sign rights deals for authorised adaptations, possibly because fanfiction operates as a complementary good which maintains interest in the underlying work. This may also be because there is less adult fanfiction than feared, within which there is less pornography than expected.***

### 7.5.3 Summary

This section has suggested that while the fiction market is suffering from a decline, it cannot be directly linked to the increase in supply of fanfiction. Furthermore, on an individual level, authors that permit fanfiction are provably more successful than those that do not. Fears that it is harder to sign adaptation deals for works with high levels of fanfiction were also found to be unfounded. Thus, it is possible to argue that fanfiction of

this type (online, non-commercial) ought to be seen as a fair 'dealing' with the work, as it does not interfere with the normal exploitation of the work. The research suggests that fanfiction-friendly authors are perhaps more creative, as they do not reuse their previous works in the same way as fanfiction-averse authors. As such, they are less threatened by fanfiction, and can take advantage of the advertising and 'hype' functions of fanfiction. These authors also appear to operate in different sections of the market. Can we therefore use the broad strokes of copyright to protect the interests of all parties? If not, should copyright be protecting the more creative (fanfiction-friendly) authors, or the more prolific (fanfiction-averse) authors? This is an important policy question for copyright law.

## 7.6 Conclusion

Research in this chapter has suggested that copyright research makes several incorrect assumptions about the incentives that drive authors and copyright holders to carry out the writing and the exploitation of works. Creativity is deemed by copyright lawyers to be "a pre-existing preference that matters only to the extent that it is presumptively enhanced by the possibility of an economic reward"<sup>101</sup>. However, this relatively simplistic approach does not take into account the 'unpredictable, irrational' behaviour that leads to imaginative productivity, especially in a digital economy where readers absorb the stories they consume, and use them to interact with communities online to generate discussions and future works of fiction.

This chapter has set out and answered several research questions regarding the market for commercial fiction, which is going through changes due in part to digitalisation. Demand for fanfiction was shown to increase after supply of the underlying work, implying that the fanfiction is now acting as a substitute. The reasons for production

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<sup>101</sup> J Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

of fanfiction were illustrated to show that fanfiction writers may either be doing so to improve their writing skills, through a process of distributed mentoring, or be merely following trends in fiction production for continuing the storyline. The former may have important social welfare benefits that are worth protecting, while the latter does not. The transformative nature of fanfiction was also discussed, to suggest that fanfiction creation is due to writers wishing to create more works related to the original, but sufficiently different to be operating in a different market to the original. Thus, this supports a claim that fanfiction could be protected as a fair 'dealing' with the underlying work as pastiche.

Finally, on a specific level, the effect of permitting fanfiction was compared to the effect of banning fanfiction to demonstrate fanfiction-friendly authors are more successful both in terms of direct sales, and in relation to the ability to sign rights deals to support their income through authorised adaptations. Further, the supply of fanfiction was compared to the supply of the canon work, in order to illustrate that at least in relation to popular fandoms in literature, production of fanfiction is reactive rather than proactive, which supports the argument that fanfiction is a complement rather than a substitute. Thus, this chapter supports the hypothesis of this thesis that fanfiction ought to be covered by a fair dealing exception as in principle it is both sufficiently transformative and does not harm the underlying work or the market. By applying the s30A pastiche exception, analysis can be undertaken regarding the fairness of the reuse in each specific case. This would avoid works that are not sufficiently transformative from being permitted, while permitting those that are transformative and provide some form of social welfare.

This research supports previous arguments that "we should judge the health of a creative regime by the works created, and their value to users, and not be the revenue of incumbent producers"<sup>102</sup>. There is a large amount of these types of works created.

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<sup>102</sup> Waldfogel (n 10) 253.

Fanfiction readers and writers demonstrate they hold these types of interaction in high esteem, by interacting strongly with each other's works.

These conclusions come with an important warning label, however. They are based on a reading of the statistics regarding the top end of the market, and thus can give us some hints about what makes a successful fiction work in the UK. However, given the small dataset, it must be remembered that they cannot suggest much beyond correlation, and should not be used to imply causation. Furthermore, while authors and publishers may have a strong wish to enter the top 100 bestseller list, the market is obviously substantially bigger than this – there were 610,000 new titles published in 2018 alone<sup>103</sup>. Thus, it is vastly more likely for any given author that they will sit in the middle of the market, meaning the incentives shown may possibly have less effect. Further, the fanfiction archive, Fanfiction.Net is still the largest site in terms of total posts. However, there has been a steady decline in posts, which may be due to moves to other archives such as Archive of Our Own. Thus, these conclusions may benefit from further testing against works on that site.

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<sup>103</sup> 'Statistics Galore: European and International Publishing Figures Released' (International Publishers Association, 31 January 2019) <<https://www.internationalpublishers.org/news/776-statistics-galore-european-and-international-publishing-figures-released>> accessed 9 August 2019.

## 8. Conclusion

### 8.1 Findings and Policy Recommendations

This thesis set out to analyse the way copyright law applies to fanfiction, in a time when the entertainment industry is facing both a highly congested market and falling sales, and new forms of online and digital media have created an “authorship crisis”<sup>1</sup>. Ownership of successful creative properties (such as characters and locations like *Harry Potter* or *Hogwarts*) is increasing in importance, and copyright holders are becoming increasingly litigious<sup>2</sup>, and are looking for new ways to protect their intellectual property outside of trademarks. This analysis used both standard social science based doctrinal research, as well as media studies and audience research from the humanities, to present evidence that theoretically, fanfiction ought to be protected from copyright infringement claims by application of the pastiche fair dealing exception. This argument was supported by large scale empirical analysis of an online fanfiction archive to suggest that supply of fanfiction does not impact supply of fictional works, and that demand for fanfiction does not harm the demand for the underlying work. Thus, this data enables this thesis to support its claim that fanfiction as a form of pastiche would pass the Three Step Test: it is a certain special case that does not conflict with the normal exploitation of the work nor prejudice the legitimate interests of the author.

The background to this thesis was laid out in Chapter 2, where the literature in relation to user-generated content and fanfiction, copyright law, law and economics, and empirical work, was summarised and synthesised in order to demonstrate the research gap this thesis answers. It introduced the theoretical issue that not enough focus has been paid

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<sup>1</sup> Frank Rose, *The Art of Immersion: How the Digital Generation is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1<sup>st</sup> ed, WW Norton & Co 2011) 83

<sup>2</sup> as shown by the furore surrounding the new Copyright in a Digital Single Market Directive

to non-profit maximising production of creative works, as demonstrated within the fandom community, and the doctrinal issue that there has yet to be sufficient research into user-generated content in the UK. This doctrinal research gap contains several important issues. Primarily, that the basis of copyright protection for creative properties such as characters is unclear in the UK, but also that the fair dealing exception for 'pastiche' contained in s30A CDPA 1988 has yet to be examined in sufficient depth. Finally, a methodological gap is identified – that there is a need for more empirical research in copyright research. Specifically in relation to fanfiction, there has yet to be any quantitative analysis undertaken into the incidence of fanfiction and trends in production in comparison to sales data for commercial fiction works. The importance of these research gaps was explained in this chapter, to support the research questions and methodology used in this research.

Chapter 3 answers the first research question underpinning this thesis: what elements are copyrighted in a fictional work? It makes an important contribution to knowledge by analysing current copyright law in the UK in order to conclude that, post-*Infopaq*, it is likely that many characters and locations are now protectable by copyright in their own right, not just as a 'substantial part' of the underlying work. This analysis is founded on the argument made that copyright protection is attached to original works that exhibit sufficient elements of artistic choice. This is important as it strengthens protection for copyright holders in their works, and makes it easier for them to claim derivative works infringe their right to control their works. The analysis was supported by a comparison with the US, where the concept of copyright in characters is well-known. This permitted for a discussion on how well copyright in this area is functioning in a digital age.

The second research question focused on how much copyrighted material is reused in user-generated content such as fanfiction, and whether this amounts to an infringement of the copyright in the underlying work. This was investigated in Chapter 4, which

established both the importance of controlling licensing for the copyright holder, and that it is likely that UGC such as fanfiction infringes the s17 CDPA 1988 right to copy the work, although admittedly this depends on the characters and locations reused and the type of fanfiction.

Chapter 5 of this thesis answered the third research question – how do the fair dealing exceptions apply to non-commercial UGC, especially fanfiction? This chapter analysed the application of fair dealing exceptions to other forms of UGC in cases such as *Pelham* and *Funke Median* in order to conclude it is unlikely that well-known forms of fair dealing such as research/private study or parody would provide a sufficient safe haven for this type of content. A persuasive argument was given that some UGC such as fanfiction would however be permissible as a fair dealing of the original work under the accepted but as yet untested ‘pastiche’ exception contained within Article 5 of the InfoSoc Directive, and Article 30 CDPA 1988, especially as it would arguably meet the Three Step Test for qualification. However, with a lack of case law to support this statement, this chapter conceded that this argument requires strong empirical support, as well as support from other similar legislatures that have handled the issue. This chapter contributes to knowledge in that it focuses on the pastiche exception, which has received little research attention to date. As part of the analysis of this chapter, it elaborates on what a potential pastiche fair dealing exception may look like, through comparison with case law on other similar forms of fair dealing. This is important as it clarifies the freedom of expression position for many UGC creators, as well as providing clear limitations for copyright holders regarding what they can and cannot object to being done with their works in a digital age.

Chapter 6 looked at the liability of websites hosting these works, such as Fanfiction.Net and Archive of Our Own, under both the old regime (covered by the InfoSoc and E-Commerce Directives) and the new regime, and questioned what liability the UK is

likely to attach to these sites post-Brexit. The benefits and issues of the new CDSM Directive were illustrated as part of this chapter, which showed that the new regime may not be successful in closing the 'value gap'.

Chapter 7 analysed posts to the largest fanfiction archive, Fanfiction.Net. It found the following conclusions specific to the posts studied. The fiction market is suffering economic harm as sales are falling. Authors are increasingly reusing their creative outputs (characters/locations) or licensing them for adaptation to ensure success in a highly risky market. Fanfiction merely follows this trend. Specifically in relation to the data analysed, fanfiction writers may be utility maximising producers, either creating for love of the underlying work and desire to create more of it, or in order to interact with an active network of helpful and supportive critics to improve their writing skills, through a system of distributed mentoring. The data does not support any claim of negative impact on the supply of creative works, either as a whole market or in relation to the individual works concerned. This is likely to be due to the transformative nature of the fanfiction works, which are in a secondary market to the original, rather than acting on the same supply curve. Specifically in relation to the data analysed, demand is increasing for derivative works in both the commercial and fanfiction markets (see Q5). Demand for fanfiction is reactive to the production of canon works, suggesting these may be complementary goods rather than substitutes. No negative relationship can be drawn from the data regarding demand for fanfiction and demand for the canon work, again likely due to the transformative nature of the fanfiction works. Users may be acting as mentors (see Q5) or merely demonstrating unmet demand for the work.

To summarise this thesis therefore, the answers to the research questions set in the introduction are as follows:

Research Question	Answer
What is protectable in a fictional story, beyond the wording of the story itself?	Characters and locations, so long as they demonstrate sufficient elements of artistic choice
What is reused in fanfiction, and does this infringe copyright in the underlying work?	If protectable characters and locations are reused (see Q1), this amounts to infringement of the s17 CDPA 1988 right to copy. Reuse of other characters or locations may infringe this right as 'substantial taking' from the underlying work too.
Is this protected by a fair dealing exception?	It is unlikely to amount to any of the well-defined fair dealing exceptions (s30 CDPA 1988 quotation, s30A CDPA 1988 parody) but is theoretically likely to meet a possible test for pastiche (s30A CDPA 1988). As this is an untested area of law, this requires further quantitative analysis to investigate the effects of this on the market.
What liability do websites have for hosting this material?	<p>Currently sites are protected by the safe harbour provisions in Article 5 InfoSoc Directive/Articles 12-15 E-Commerce Directive, so long as they act expeditiously once given notice of infringing works. This is likely to continue in the short run in the UK.</p> <p>Elsewhere in the EU, Article 17 of the the CDSM Directive means sites will be liable unless they meet certain exceptions.</p>
Why do users consume and create fanfiction, and what impact does this have on the supply of commercial creative works?	There are several reasons for creation and consumption of fanfiction. Some may have a negative effect on the market for fiction, but most have no strong economic effect on the authors or works involved.

The aims and objectives of this thesis were met through undertaking a strong literature review, which demonstrated the lack of research into fanfiction in the UK. My doctrinal and empirical research methods permitted me to analyse the law in detail to draw the conclusions stated above, and frame my work in a structured way. This provides a

strong foundation for my conclusions, and also enables me to clearly state the boundaries of this research - the conclusions can only be drawn in relation to the laws, cases and data analysed, and thus in other locations, circumstances, or in the future, this may change.

The significance of this research is in its timely application to copyright and its use in the digital environment, at a time when the legislation in this area is being changed in a fundamental way by the Copyright in a Digital Single Market Directive. It provides clarity on certain areas of law that previously were not subject to much academic thought: for example, it draws together case law on copyright protection for literary works and concludes that it is likely that the UK and Europe have followed the US in providing copyright protection for characters and locations, although no cases have come to court to test this hypothesis. It also clarifies the position that while fanfiction is likely to be deemed an infringing derivative reuse under s17 of the CDPA 1988, it ought to be protected as fair dealing as it follows much jurisprudence in the area. This thesis does so by analysing the previous fair dealing exceptions for quotation and parody to provide a clear possible test for the as yet unused pastiche exception contained in s30A CDPA 1988. Much literature has been devoted to the parody exception contained in that subsection, but very little has been written about pastiche, and no potential legal tests have been drafted yet in UK academic literature. This research therefore accepts that this is only a hypothetical test that would require substantially more work, but uses the potential test as a method for pursuing freedom of expression while balanced with the need for protecting incentives for production. The analysis undertaken in chapters 8 and 9 permitted me to support that conclusion, specifically in reference to the data drawn from Fanfiction.Net, that while the fiction market is facing difficult circumstances, there is no proof that fanfiction posts are harming the market as a whole, or the individual works to which they relate.

The implication of these conclusions is that there is potential breathing space for UGC such as fanfiction within the pastiche exception, which has a basis in homage and is therefore a more natural home for many produsage based works. This would mean the analysis for each of the works would be whether it was 'fair', not whether it was the correct type of dealing. It is arguable that the fair dealing exceptions as a whole should permit for some of these types of work. Whether to permit them should be a discussion surrounding the extent of the reuse in the fanfiction. This research does however restrict its conclusions to non-commercial forms of engagement with culture such as fanfiction posted to Fanfiction.Net.

This thesis made several contributions to knowledge. It has clarified the position for commercial creators as to how much of their work can be protected by copyright - and equally how much of other people's work they need to avoid infringement claims. This is an important transaction cost for commercial authors. For fanfiction writers and readers, it clarifies their position such that they may be able to make a clear case for fair dealing should their works be non-commercial and sufficiently transformative, while also engaging with the underlying work in an intellectual and laudatory sense. This is important given the changes that the Copyright in a Digital Single Market Directive is going to bring - and strengthens calls for that Directive, which includes safeguards within its provisions for fair dealings, to be balanced in its application in order to protect freedom of expression. Finally, it supports these conclusions with an empirical investigation of the effect of fanfiction on the fiction market to suggest that while the fiction market is in decline, this cannot be tied back to fanfiction either directly or indirectly.

## 8.2 Further research

### 8.2.1 Specific to this thesis

There are several clear paths for extending this research in the future. Firstly, my research provides an important doctrinal discussion of the current application of UK and EU copyright law to literary elements such as characters and locations, which has yet to be the subject of much academic scrutiny (in direct comparison with the US). The research in this thesis focused on reuses in fanfiction, but an interesting endeavour would be to undertake interdisciplinary research with humanities scholars on the importance of these literary elements to writers themselves. My research proposal for my thesis originally contained a survey of early stage authors and their emotional as well as economic attitudes to their output, especially in relation to characters and locations. This proposal was approved by the General Research Ethics Council, but was dropped from the PhD project in preference for further development of my dataset.

Secondly, I engage both doctrinally and empirically with the importance of the fair dealing exceptions to non-commercial derivative works, especially given their social welfare benefits. Using fanfiction as a case study, my research deepens academic analysis of the legal definition of 'pastiche' within s30A of the Copyright Designs and Patents Act 1988. These fair dealing exceptions interact with the 'hosting' defence within Article 14 of the E-Commerce Directive and currently provide a framework for protection of authors and internet service providers of unauthorised but 'fair' creative interactions with copyrighted works, however shaky and misunderstood. This framework will be removed by the suggested implementation of Article 17 of the Copyright in a Digital Single Market Directive and my research contains critical discussion of this policy change. It is unclear how this will operate in the UK after Brexit, given that the UK have made it clear they will not implement the CDSM Directive. Thus, there is much timely and critical research to be done in this area to add to the surrounding literature, and my dataset still has much to give.

### 8.2.2 Further afield

There are two further areas of research that may be developed from this research, in relation to how content should be regulated online. Firstly, the UK government is currently in the process of undertaking a broad review of harmful content hosted online as discussed in the 2019 Online Harms White Paper. The Government aims to introduce new legislation to protect vulnerable internet users from content that may harm them, such as enforcing codes of practice on sites that host content. This may affect sites such as Fanfiction.Net by adding censorship to the mature content that they host. This could be harmful to those users who are using these sites to engage with mature themes such as pornography, violence, self-harm and bullying in their writing. Further research could be done in this area surrounding such topics as whether this is the type of content that the Government would deem 'harmful' or 'unacceptable', as this is so far not clear in the documentation. Should it be seen to be so, this could cause unexpected levels of harm to these self-policing communities, which are "in most ways positive and supportive for people who spend time in them"<sup>3</sup>. A further way this legislation could impact fanfiction is if it is used to impose a strict duty, such as seen in the Copyright in a Digital Single Market Directive, for sites to enforce copyright protection under their 'duty of care'. Given that the UK disavowed the Directive, it might be suggested that this is unlikely to take place in practice. Given the earlier hypothesis however that the UK may move towards a more US-style protectionism of copyright post-Brexit<sup>4</sup>, it is possible that this could shape future UK content regulation in this area, which could be developed with further research.

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<sup>3</sup> Paul Bernal, 'Response to Online Harms White Paper' < <https://paulbernal.wordpress.com/2019/07/03/response-to-online-harms-white-paper/>> accessed 6 March 2021.

<sup>4</sup> See Chapter 6.14, p216

Many leading theorists have claimed that user-generated content, as a new form of sharing culture, should not be regulated by law at all, which is an important area of research which could be drawn from the conclusions of this thesis. John Perry Barlow in his 2019 paper states that he was “convinced that the best obstacle to crime is a society with its ethics intact”<sup>5</sup>. Ethics, he argues, are “more important than rules” and understandings “were preferred over [largely unenforceable] laws”<sup>6</sup>. By using ethics, Barlow argued, we can assess the power structures inherent in cultural creation, and make better decisions about whose interests we protect. In this way, if cultural works are being shared in a way that benefits those with less power, that form of sharing can be protected in order to protect the associated social welfare gains. Ethics are also more flexible and are arguably better used to regulate something as ever-changing as digital culture<sup>7</sup>. There are also issues inherent in copyright law (and intellectual property law as a whole), in that it “is rife with inconsistencies at best, and racial and cultural biases, at worst”<sup>8</sup>.

If not using law to protect cultural works, how should these works be protected? Intellectual property laws are used as a method to protect certain values, such as autonomy, culture, democracy, equality and development<sup>9</sup>. These values focus both on the importance of the individual and of society. Copyright law can be seen to struggle with issues such as culture, democracy and equality, as its stifling over-protectiveness curtails the development of certain sub-groups in society. It is also based in a power structure that prioritises the powerful and wealthy over those with less cache - Lessig referred to the fair

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<sup>5</sup> John Perry Barlow, ‘Selling Wine Without Bottles: The Economy of Mind on the Global Net’, 18 *Duke Law and Technology Review* 8, 24

<sup>6</sup> *ibid*

<sup>7</sup> Leading philosopher Kwame Anthony Appiah has argued that “[t]he rhetoric of ownership [of culture] is alluring and potent, but when we’re describing the quicksilver complexities of culture, it just isn’t appropriate” ‘Cultural Borrowing is Great: The Problem is Disrespect’, *Wall Street Journal* 30/8/2018 (available at <https://www.wsj.com/articles/cultural-borrowing-is-great-the-problem-is-disrespect-1535639194> )

<sup>8</sup> Anupam Chander, Madhavi Sunder, ‘Dancing on the Grave of Copyright?’ *Duke Law & Technology Review*, Vol 18, Special Symposium Issue, 143, 158

<sup>9</sup> Madhavi Sunder, ‘IP3’ (2006) 59 *Stanford Law Review* 257, 324–5.

use exceptions for example as merely the “right to hire a lawyer”<sup>10</sup>. How else can these values be protected?

Fanfiction demonstrates one way that these values can be protected, while also incentivising production of future works. Instead of relying on strict legal rules to police content, there is a shared set of values and social norms that exist to regulate behaviour. For example, the strict adherence to non-commercial use and reuse of both original works and fanfiction works within the community - and the requirement for attribution<sup>11</sup> of both the original commercial author, and the writer of any fanfiction works that are being utilised in a new piece of fanfiction<sup>12</sup>. Norms can be a highly effective method of regulating behaviour in certain circumstances<sup>13</sup>, and have been seen to be both “highly consistent” and “remarkably effective” at policing the ways communities interact with culture<sup>14</sup> - both regarding disincentivising and punishing bad behaviour, and incentivising and encouraging beneficial acts. They also promote a better idea of how society believes it should be regulated. Rather than being imposed by The Powers That Be from on high, social norms are created and shaped from the ground up, taking differing perspectives into account<sup>15</sup>. By doing so, the norms are internalised and are cheaper and have more effect than externally enforced legislation, which is often either unknown or ignored<sup>16</sup>. These norms can be seen to be highly important in the way cultural works are created, shared and consumed online -

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<sup>10</sup> Lawrence Lessig, *Free Culture* (The Penguin Press, New York, 2004) 187

<sup>11</sup> Rebecca Tushnet, ‘Payment in Credit: Copyright Law and Subcultural Creativity’, *Law & Contemp. Probs* (2007) 135

<sup>12</sup> Casey Fiesler. ‘Everything I need to know I learned from fandom: How existing social norms can help shape the next generation of user-generated content.’ *Vand. J. Ent. & Tech. L.* 10 (2007): 729.

<sup>13</sup> Alex Geisinger, ‘Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation’, *57 Ala L. Rev* 1 (2005) 9

<sup>14</sup> Casey Fiesler and Amy S Bruckman, ‘Creativity, Copyright, and Close-Knit Communities: A Case Study of Enforcement of Social Norm Formation and Enforcement’ (2019) *Proc. ACM Hum-Comput Interact* 3, Group, 241, at 241

<sup>15</sup> Steven A. Hetcher, ‘Using Social Norms to Regulate Fanfiction and Remix Culture’, *University of Pennsylvania Law Review*, Vol. 157, No. 6, *Symposium: The Foundations of Intellectual Property Reform* (June 2009), 1869, 1875

<sup>16</sup> Debora Halbert, ‘Mass Culture and the Culture of the Masses: A Manifesto for User Generated Rights’ *11 Vand. J. Ent. & Tech. L* 921, 955

for example, GIFs and memes are shared and regulated not by copyright or trademark law, but by the norms that exist in the communities that generate them. It has even been argued that standard commercial culture could not exist without these ‘informal’ practices<sup>17</sup>.

While social norms are therefore to be celebrated as a possible method of regulating online non-commercial interactions with cultural works, it would be unwise and unrealistic to expect to replace the whole copyright regime of derivative works with a norms-based system<sup>18</sup>. Instead, the benefits of social norms could be used to reshape and strengthen the current fair dealing exceptions, being used more in the argument regarding the ‘fairness’ of the dealing. More research is needed in this area.

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<sup>17</sup> Edward Lee, ‘Warming Up to User-Generated Content’ (2008) U. Ill. L. Rev. 1459

<sup>18</sup> Not least because The Powers That Be would never permit their power-structure to be undermined in this way.

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The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356)

The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014

The Copyright (Public Administration) Regulations 2014

## Appendix A – Research Methods

### Data Collection

The data for this research was collected using a web-scraping tool designed using C# programming language. In order to make my work replicable, I have included screenshots to show how the program worked – however since this is an open website, any further research will necessarily have somewhat different results as posters add new works or edit or remove works altogether.

The following shows how I downloaded the data for each of the ‘fandoms’: on the left is the page from Fanfiction.Net, and on the right, highlighted and circled, is the information I wanted (in this case ‘Naruto’):

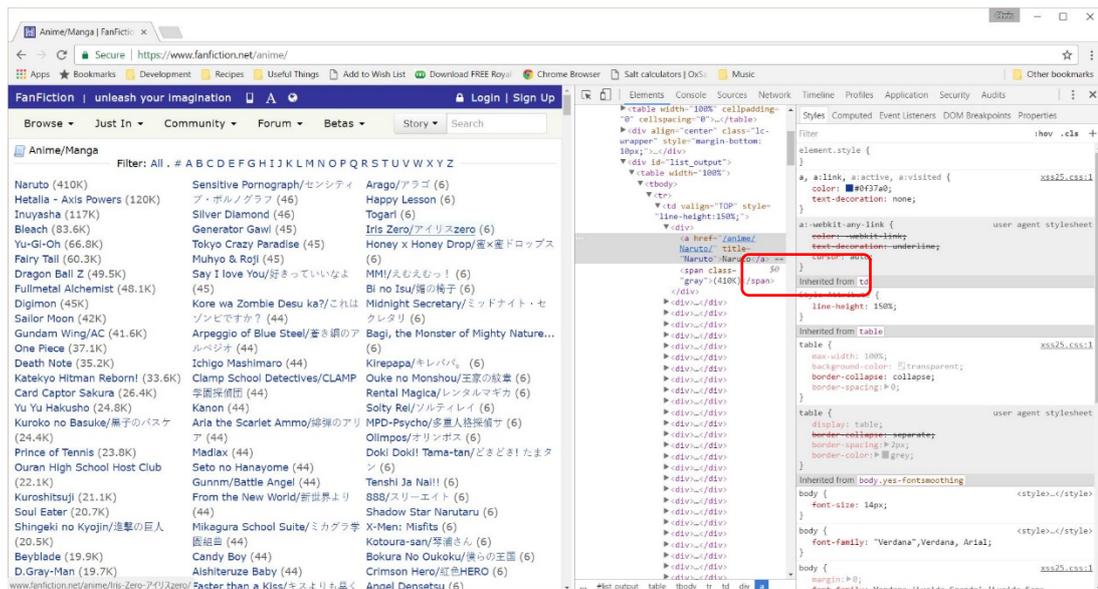


Fig 2: Scraping tool for ‘Categories’

The web scraping program then scraped the number of stories per category as follows:



To get the matches per crossover, the scraping script was as follows:

```

349         using (var sqlcon = new SqlConnection("SELECT TOP 100 [name], [url] FROM [tbl_crossovers] WHERE ISNULL([processed], 0) = 0 ORDER BY quantity DESC", sqlcon))
350         {
351             sqlcon.CommandType = CommandType.Text;
352             using (DataSet ds = new DataSet())
353             {
354                 using (var da = new SqlDataAdapter(sqlcon))
355                 {
356                     da.Fill(ds);
357                     if (ds.Tables[0].Rows.Count == 0)
358                     {
359                         return;
360                     }
361                     foreach (DataRow dr in ds.Tables[0].Rows)
362                     {
363                         var data = new DataTable();
364                         data.Columns.Add("storyname");
365                         data.Columns.Add("storytwo");
366                         data.Columns.Add("url");
367                         data.Columns.Add("quantity");
368                         Console.Clear();
369                         Console.WriteLine("Processing: " + dr["name"]);
370                         var html = new WebClient().DownloadString(ur1 + dr["url"]);
371                         var document = new HtmlDocument();
372                         document.LoadHtml(html);
373                         var div = document.GetElementsByTagName("list_output");
374                         var name = "";
375                         foreach (var story in div.SelectNodes("//tr/div"))
376                         {
377                             name = "";
378                             try
379                             {
380                                 name = story.SelectSingleNode("//a").InnerText;
381                                 Console.WriteLine(name);
382                                 var storyId = story.SelectSingleNode("//a").GetAttributeValue("href", "");
383                                 var numberStr = story.SelectSingleNode("//span").InnerText.Replace("(", "").Replace(")", "").Replace(" ", "");
384                                 var number = 0;
385                                 if (numberStr.Contains("K"))
386                                 {
387                                     number = (int)Convert.ToDecimal(numberStr.Replace("K", "")) * 1000;
388                                 }
389                                 else
390                                 {
391                                     number = Convert.ToInt32(numberStr);
392                                 }
393                                 var row = data.NewRow();
394                                 row["storyone"] = dr["name"];
395                                 row["storytwo"] = name;
396                                 row["url"] = storyId;
397                                 row["quantity"] = number;
398                                 data.Rows.Add(row);
399                             }
400                             catch (Exception ex)
401                             {
402                                 Console.WriteLine(name);
403                             }
404                         }
405                     }
406                 }
407             }
408         }
409     }
410 }
411
412 static void GetCrossovers(SqlConnection sqlcon, string ur1, IList<string> categories)
413 {
414     foreach (var category in categories)
415     {
416         Console.Clear();
417         Console.WriteLine("Processing: " + category);
418         var html = new WebClient().DownloadString(ur1 + "/" + category + "/");
419         var document = new HtmlDocument();
420         document.LoadHtml(html);
421         var div = document.GetElementsByTagName("list_output");
422         var name = "";
423         foreach (var story in div.SelectNodes("//tr/div"))
424         {
425             name = "";
426             try
427             {
428                 name = story.SelectSingleNode("//a").GetAttributeValue("title", "");
429                 Console.WriteLine(name);
430                 var storyId = story.SelectSingleNode("//a").GetAttributeValue("href", "");
431                 var numberStr = story.SelectSingleNode("//span").InnerText.Replace("(", "").Replace(")", "").Replace(" ", "");
432                 var number = 0;
433                 if (numberStr.Contains("K"))
434                 {
435                     number = (int)Convert.ToDecimal(numberStr.Replace("K", "")) * 1000;
436                 }
437                 else
438                 {
439                     number = Convert.ToInt32(numberStr);
440                 }
441                 using (var sqlcon = new SqlCommand("INSERT INTO [tbl_crossovers] ([name], [url], [quantity], [category]) VALUES (@name, @url, @quantity, @category)", sqlcon))
442                 {
443                     sqlcon.Parameters.Add("@name", SqlDbType.NVarChar).Value = name;
444                     sqlcon.Parameters.Add("@url", SqlDbType.NVarChar).Value = storyId;
445                     sqlcon.Parameters.Add("@quantity", SqlDbType.Int).Value = number;
446                     sqlcon.Parameters.Add("@category", SqlDbType.NVarChar).Value = category;
447                     sqlcon.ExecuteNonQuery();
448                 }
449             }
450             catch (Exception ex)
451             {
452                 Console.WriteLine(name);
453                 Console.WriteLine(ex.StackTrace);
454                 throw;
455             }
456         }
457     }
458 }
459
460 static void GetCrossoverStories(SqlConnection sqlcon, string ur1)
461 {
462     while (true)
463     {
464     }
465 }

```

Fig 5: Scraping Tool for Matches Per Crossover

The data for the crossovers per category was scraped using the following script:

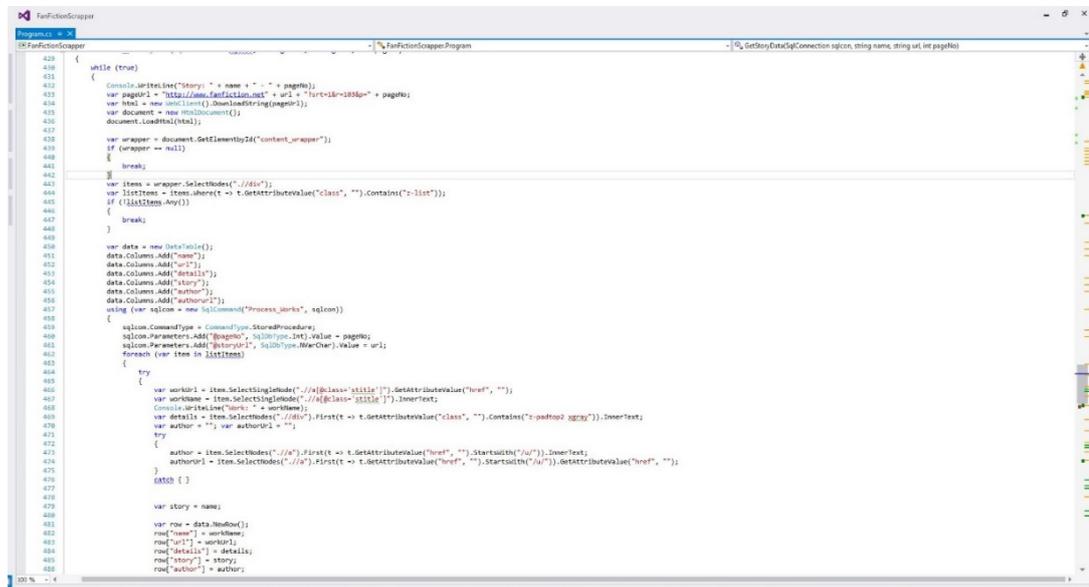
```

293         Console.WriteLine(ex.StackTrace);
294         throw;
295     }
296 }
297
298 }
299
300 static void GetCrossovers(SqlConnection sqlcon, string ur1, IList<string> categories)
301 {
302     foreach (var category in categories)
303     {
304         Console.Clear();
305         Console.WriteLine("Processing: " + category);
306         var html = new WebClient().DownloadString(ur1 + "/" + category + "/");
307         var document = new HtmlDocument();
308         document.LoadHtml(html);
309         var div = document.GetElementsByTagName("list_output");
310         var name = "";
311         foreach (var story in div.SelectNodes("//tr/div"))
312         {
313             name = "";
314             try
315             {
316                 name = story.SelectSingleNode("//a").GetAttributeValue("title", "");
317                 Console.WriteLine(name);
318                 var storyId = story.SelectSingleNode("//a").GetAttributeValue("href", "");
319                 var numberStr = story.SelectSingleNode("//span").InnerText.Replace("(", "").Replace(")", "").Replace(" ", "");
320                 var number = 0;
321                 if (numberStr.Contains("K"))
322                 {
323                     number = (int)Convert.ToDecimal(numberStr.Replace("K", "")) * 1000;
324                 }
325                 else
326                 {
327                     number = Convert.ToInt32(numberStr);
328                 }
329                 using (var sqlcon = new SqlCommand("INSERT INTO [tbl_crossovers] ([name], [url], [quantity], [category]) VALUES (@name, @url, @quantity, @category)", sqlcon))
330                 {
331                     sqlcon.Parameters.Add("@name", SqlDbType.NVarChar).Value = name;
332                     sqlcon.Parameters.Add("@url", SqlDbType.NVarChar).Value = storyId;
333                     sqlcon.Parameters.Add("@quantity", SqlDbType.Int).Value = number;
334                     sqlcon.Parameters.Add("@category", SqlDbType.NVarChar).Value = category;
335                     sqlcon.ExecuteNonQuery();
336                 }
337             }
338             catch (Exception ex)
339             {
340                 Console.WriteLine(name);
341                 Console.WriteLine(ex.StackTrace);
342                 throw;
343             }
344         }
345     }
346 }
347
348 static void GetCrossoverStories(SqlConnection sqlcon, string ur1)
349 {
350     while (true)
351     {
352     }
353 }

```

Fig 6: Crossovers Per Category Script for Scraping Tool

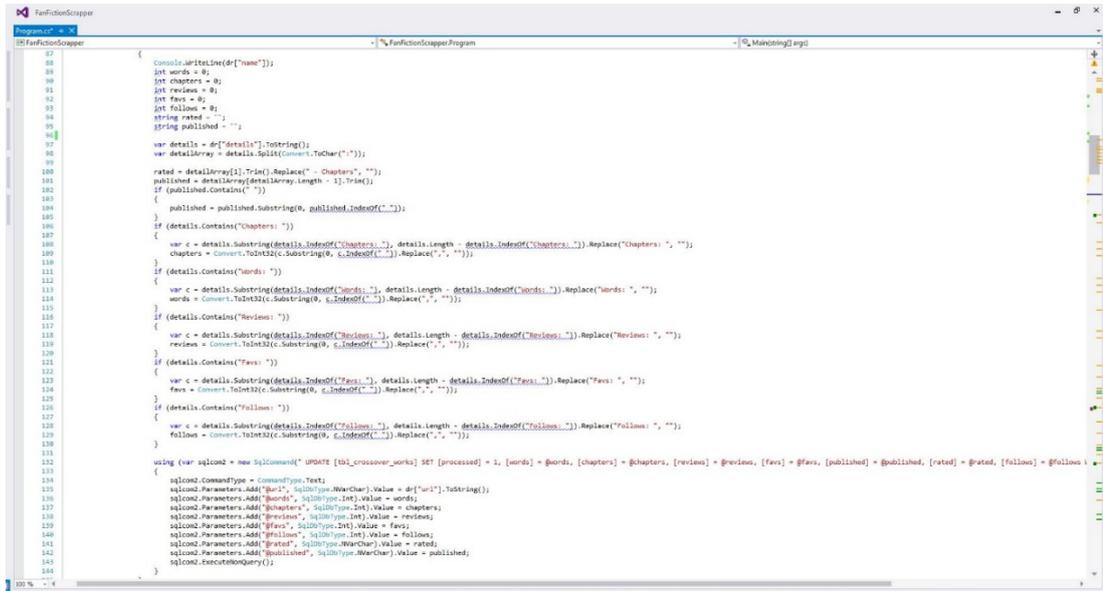
A similar tool was used to scrape the data for single story fanfiction (non-crossover works):



```
428 while (true)
429 {
430     console.log('Story: ' + name + ' ' + pageNo);
431     var pageInfo = 'http://www.fanfiction.net' + url + '?r=1&ps=1000' + pageNo;
432     var html = new XMLHttpRequest().open('GET', pageInfo);
433     var document = new XMLHttpRequest().open('GET', pageInfo);
434     document.onreadystatechange();
435     if (document.readyState === 'complete')
436     {
437         var wrapper = document.getElementsByTagName('div');
438         if (wrapper == null)
439         {
440             break;
441         }
442     }
443     var items = wrapper.getElementsByTagName('div');
444     var listItems = items.Where(t => t.getAttribute('class').Contains("list"));
445     if (listItems.Any())
446     {
447         break;
448     }
449     var data = new DataTable();
450     data.Columns.Add("name");
451     data.Columns.Add("url");
452     data.Columns.Add("details");
453     data.Columns.Add("story");
454     data.Columns.Add("author");
455     using (var sqlcon = new SqlConnection("Process_Works", sqlcom))
456     {
457         sqlcon.CommandType = CommandType.StoredProcedure;
458         sqlcon.Parameters.Add("PageNo", SqlDbType.Int).Value = pageNo;
459         sqlcon.Parameters.Add("StoryURL", SqlDbType.NVarChar).Value = url;
460         foreach (var item in listItems)
461         {
462             try
463             {
464                 var workUrl = item.SelectingAttribute("a").GetAttribute("href");
465                 var workName = item.SelectingAttribute("a").GetAttribute("title");
466                 Console.WriteLine("Work: " + workName);
467                 var details = item.SelectingAttribute("a").First(t => t.Attributes["class"].Contains("padding-right")).InnerText;
468                 var author = ""; var authorUrl = "";
469                 {
470                     author = item.SelectingAttribute("a").First(t => t.Attributes["href"].StartsWith("/u/")).InnerText;
471                     authorUrl = item.SelectingAttribute("a").First(t => t.Attributes["href"].StartsWith("/u/")).GetAttribute("href");
472                 }
473                 data.Rows.Add(
474                     workName,
475                     workUrl,
476                     details,
477                     story,
478                     author);
479             }
480             catch { }
481         }
482     }
483     var row = data.NewRow();
484     row["name"] = workName;
485     row["url"] = workUrl;
486     row["details"] = details;
487     row["story"] = story;
488     row["author"] = author;
```

Fig 7: Script for Data for Single Story works

The data that had been scraped then needed to be split into parameters and into separate columns, such as number of words, number of chapters, number of reviews, number of 'favs', number of 'follows', the rating of the work and the publication date). This was done using this script:



```
87 {
88     Console.WriteLine(@"name");
89     int words = 0;
90     int chapters = 0;
91     int reviews = 0;
92     int favs = 0;
93     int follows = 0;
94     string rated = "";
95     string published = "";
96
97     var details = d["details"].ToString();
98     var detailArray = details.Split(Convert.ToChar(","));
99
100     rated = detailArray[1].Trim().Replace(" - Chapters", "");
101     published = detailArray[detailArray.Length - 1].Trim();
102     if (published.Contains(" "))
103     {
104         published = published.Substring(0, published.IndexOf(" "));
105     }
106     if (details.Contains("Chapters: "))
107     {
108         var c = details.Substring(details.IndexOf("Chapters: "), details.Length - details.IndexOf("Chapters: ")).Replace("Chapters: ", "");
109         chapters = Convert.ToInt32(c.Substring(0, c.IndexOf(" ")).Replace(", ", ""));
110     }
111     if (details.Contains("words: "))
112     {
113         var c = details.Substring(details.IndexOf("words: "), details.Length - details.IndexOf("words: ")).Replace("words: ", "");
114         words = Convert.ToInt32(c.Substring(0, c.IndexOf(" ")).Replace(", ", ""));
115     }
116     if (details.Contains("Reviews: "))
117     {
118         var c = details.Substring(details.IndexOf("Reviews: "), details.Length - details.IndexOf("Reviews: ")).Replace("Reviews: ", "");
119         reviews = Convert.ToInt32(c.Substring(0, c.IndexOf(" ")).Replace(", ", ""));
120     }
121     if (details.Contains("Favs: "))
122     {
123         var c = details.Substring(details.IndexOf("Favs: "), details.Length - details.IndexOf("Favs: ")).Replace("Favs: ", "");
124         favs = Convert.ToInt32(c.Substring(0, c.IndexOf(" ")).Replace(", ", ""));
125     }
126     if (details.Contains("Follows: "))
127     {
128         var c = details.Substring(details.IndexOf("Follows: "), details.Length - details.IndexOf("Follows: ")).Replace("Follows: ", "");
129         follows = Convert.ToInt32(c.Substring(0, c.IndexOf(" ")).Replace(", ", ""));
130     }
131     using (var sqlConn = new SqlConnection(@"SERVER [sql_server_name]; SET [processed] = 1; [words] = @words, [chapters] = @chapters, [reviews] = @reviews, [favs] = @favs, [published] = @published, [rated] = @rated, [follows] = @follows;"))
132     {
133         sqlConn.CommandType = CommandType.Text;
134         sqlConn.Parameters.Add("@url", SqlDbType.NVarChar).Value = d["url"].ToString();
135         sqlConn.Parameters.Add("@words", SqlDbType.Int).Value = words;
136         sqlConn.Parameters.Add("@chapters", SqlDbType.Int).Value = chapters;
137         sqlConn.Parameters.Add("@reviews", SqlDbType.Int).Value = reviews;
138         sqlConn.Parameters.Add("@favs", SqlDbType.Int).Value = favs;
139         sqlConn.Parameters.Add("@follows", SqlDbType.Int).Value = follows;
140         sqlConn.Parameters.Add("@rated", SqlDbType.NVarChar).Value = rated;
141         sqlConn.Parameters.Add("@published", SqlDbType.NVarChar).Value = published;
142         sqlConn.ExecuteNonQuery();
143     }
144 }
```

Fig 8: Script for Splitting the Details of the Works into Columns

Finally, the data needed to be written into individual lines of data as a CSV file in order to import it into Excel. The following lines of script show this being done (specifically lines 633-636 and 660-663), including separation into crossover or single fandom work:

```

633 row["url"] = url;
634 row["storyline"] = storylineCount;
635 row["favouriteauthors"] = favouriteAuthorsCount;
636 }
637 }
638 static void WriteTable(SqlConnection sqlcon)
639 {
640     var letters = "0,1,2,3,4,5,6,7,8,9,a,b,c,d,e,f,g,h,i,j,k,l,m,n,o,p,q,r,s,t,u,v,w,x,y,z".Split(',').Reverse();
641     foreach (var name in letters.Select(t => t.ToString()))
642     {
643         var csv = new StringBuilder("");
644         //using (var sqlcon = new SqlConnection("SELECT [Name], [Story], [Words], [Chapters], [Reviews], [Favs], [Follows], [Rated], [Language], [Genre], [Published] FROM [tbl_archive_works] WHERE [name] NOT LIKE '[0-9a-z-2]' ORDER BY [name]", sqlcon))
645         //using (var sqlcon = new SqlConnection("SELECT [Name], [Story], [Words], [Chapters], [Reviews], [Favs], [Follows], [Rated], [Language], [Genre], [Published] FROM [tbl_archive_works] WHERE [name] LIKE '% ' + name + '% ' ORDER BY [name]", sqlcon))
646         //using (var sqlcon = new SqlConnection("SELECT [Name], [Story], [Words], [Chapters], [Reviews], [Favs], [Follows], [Rated], [Language], [Genre], [Published] FROM [tbl_crossover_works] WHERE [name] NOT LIKE '[0-9a-z-2]' ORDER BY [name]", sqlcon))
647         {
648             sqlcon.CommandType = CommandType.Text;
649             using (var da = new DataAdapter(sqlcon))
650             {
651                 using (var ds = new DataSet())
652                 {
653                     da.Fill(ds);
654                 }
655                 var row = new List<string>();
656                 foreach (int column in ds.Tables[0].Columns)
657                 {
658                     row.Add(string.Format("{0}|", ds.Tables[0].Columns[column]));
659                 }
660                 csv.AppendLine(string.Join(",", row));
661                 foreach (DataRow dr in ds.Tables[0].Rows)
662                 {
663                     row = new List<string>();
664                     foreach (int column in ds.Tables[0].Columns)
665                     {
666                         row.Add(string.Format("{0}|", dr[column].ToString().Replace("'", "")));
667                     }
668                     csv.AppendLine(string.Join(",", row));
669                 }
670                 File.WriteAllText(@"C:\fanfiction\crossovers\" + name + ".csv", csv.ToString());
671                 //File.WriteAllText(@"C:\fanfiction\crossovers\others.csv", csv.ToString());
672                 //File.WriteAllText(@"C:\fanfiction\stories\other.csv", csv.ToString());
673                 //File.WriteAllText(@"C:\fanfiction\stories\" + name + ".csv", csv.ToString());
674             }
675         }
676     }
677 }

```

Fig 9: Script for Splitting the Data into individual lines for import to MS Excel

## Process Data

The data scraped from Fanfiction.Net required cleaning and preparation before being processed. This was done using Microsoft Excel and SPSS<sup>19</sup> v25 to visualise the data and format it into readable data. This primary stage allowed for two different data errors to be seen and corrected. The first error came from the formatting of the Fanfiction.Net website, where single fandom fanfiction is listed separately to crossover works. Thus, crossover works have two more variables than standard fanfiction. In order to avoid transposition of variables into the wrong heading, I created new blank columns in the non-crossover data before entering the data into SPSS. The second data error seen was due to the wide variety of languages used on Fanfiction.Net. Where the scraping tool had returned non-Western characters, it generated random symbols instead (for example,

<sup>19</sup> Statistical Package for Social Sciences software

'Pokemon' became 'Pok©mon'). This was solved by running the data through Notepad, stripping out the non-Western characters. This processing took six months due to time required to learn how to use SPSS, and the large amount of data involved.

### Data analysis

The analysis of the data generated by this project will seek to accomplish the three aims of empirical research – generating a clear and accurate summary of the information contained within it, presenting persuasive inferences, and creating a public data set<sup>20</sup>. This will be done in the analytical chapters of this project, and the data set will be uploaded to the UK Data Service once the research is complete.

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<sup>20</sup> Epstein, Lee and Martin, Andrew D., 'Some Preliminaries', *An Introduction to Empirical Legal Research* (Oxford University Press 2014) 15.

## Appendix B – Ethics

### Ruth Flaherty (LAW)

---

**From:** Ruth Flaherty (LAW)  
**Sent:** 15 March 2017 10:41  
**To:** 'support@fanfiction.com'  
**Subject:** Support Request  
**Attachments:** Individual project Letter of Approval 01.02.17.pdf

**Importance:** High

Dear Support Team at Fanfiction.Net

I am a PhD student in Law at the University of East Anglia, undertaking research into the incidence and effect of fan fiction on the fiction market and whether fan fiction can have a positive outcome on the market. This research builds on my passion for intellectual property research (the focus of my previous undergraduate and Masters level research) and fan fiction itself (which myself and my husband have been very involved with over the course of our lives).

As an engaged, passionate user of Fanfiction.Net, I will be undertaking research on your website as I feel it is the most important fan fiction site on the Internet. This will purely be on the information that is freely available online and will strictly follow your Terms of Service. I am specifically not saving any personal, sensitive or confidential information about your users, and will be undertaking high level statistical analysis rather than research on individual postings/authors. I have already received ethical clearance to conduct the study from the General Research Ethics Committee at my university (which I attach to this email as proof).

Since the information I will be accessing/using is freely available online, it isn't strictly necessary for me to ask permission in this context. As I've said, however, I'm a passionate user of Fanfiction.Net, so I wanted to mention it to you as a matter of courtesy, best practice, transparency and politeness. If you have any comments and/or concerns I'm sure you will let me know.

Many thanks,

Ruth

**Ruth Flaherty**  
PhD Candidate & Associate Tutor, UEA Law School  
Chair, Postgraduate Assembly, UEA Student Union

Earlham Hall Room 0.02  
University of East Anglia  
Norwich Research Park  
Norwich, NR4 7TJ  
Email: [r.flaherty@uea.ac.uk](mailto:r.flaherty@uea.ac.uk)



UK Top 15 (Complete University Guide 2017)  
Top 5 for student satisfaction (National Student Survey, 2005-2016)  
World Top 1% (Times Higher Education World Rankings 2015-16)  
World Top 100 for research excellence (Leiden Ranking 2016)



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Ruth Flaherty  
School of Law  
UEA

Wednesday 1 February 2017

Dear Ruth,

Our reference: GREC 16-587

I am writing to you on behalf of the University of East Anglia's General Research Ethics Committee, in response to your request for ethical approval for your project 'How 'Fair' is Self-Published Fanfiction? A Mixed Methods Law & Economics Study'.

Having considered the information that you have provided in your correspondence I am pleased to confirm that your project has been approved on behalf of the Committee.

You should let us know if there are any significant changes to the proposal which raise any further ethical issues.

Please let us have a brief final report to confirm the research has been completed.

Yours sincerely

**pp. Polly Harrison, Secretary  
General Research Ethics Committee**

*Letter of Ethics Approval from General Research Ethics Committee*

## Appendix C - List of Publications

Ruth Flaherty, 'How Underhanded Was John Lewis' Use of a Big Blue Monster That Lives under the Bed? Creativity and Copyright' (Information Society Policy (ISP) Blog, January 2018) <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/how-underhanded-was-john-lewis-use-of-a-big-blue-monster-that-lives-under-the-bed-creativity-and-copyrig-2?inheritRedirect=false&redirect=https://www.uea.ac.uk/law/research/ispblog?p\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/how-underhanded-was-john-lewis-use-of-a-big-blue-monster-that-lives-under-the-bed-creativity-and-copyrig-2?inheritRedirect=false&redirect=https://www.uea.ac.uk/law/research/ispblog?p_p_id%3D101_INSTANCE_hoPtvk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 18 July 2020

Ruth Flaherty, '[Guest Post] Dawson's, Dresden, and Copyright' (Fanhackers, 18 May 2018) <<https://fanhackers.tumblr.com/post/174013035116/guest-post-dawsons-dresden-and-copyright>> accessed 18 July 2020

Ruth Flaherty, 'Articles 11 and 13 - Bad News for Some, or All of Us?' (Information Society Policy (ISP) Blog, October 2018) <[https://www.uea.ac.uk/law/research/ispblog/-/asset\\_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https://www.uea.ac.uk/law/research/ispblog%3Fp\\_p\\_id%3D101\\_INSTANCE\\_hoPtvk35W7q%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D1](https://www.uea.ac.uk/law/research/ispblog/-/asset_publisher/hoPtvk35W7q/blog/articles-11-and-13-bad-news-for-some-or-all-of-us-?inheritRedirect=false&redirect=https://www.uea.ac.uk/law/research/ispblog%3Fp_p_id%3D101_INSTANCE_hoPtvk35W7q%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1)> accessed 18 July 2020

Ruth Flaherty, 'Benefits of Quantitative and Doctrinal Methodological Approaches to Fan Studies Research' (2020) 33 Transformative Works and Cultures <<https://journal.transformativeworks.org/index.php/twc/article/view/1719>> accessed 29 June 2020