

Praxis

Benefits of quantitative and doctrinal methodological approaches to fan studies research

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[0.1] Abstract—This discussion of the main practices of both legal research and fan studies research explores their key differences and similarities to demonstrate that there are important conclusions that can be drawn from the discourse between the two. The methodology of this research into copyright and fan fiction will be used as a case study to demonstrate how well these fields intersect. This research investigates whether transformative works of fan fiction should be covered by the new fair-dealing exception for pastiche within UK copyright law (Copyright Designs and Patents Act 1988), similar to parody. To discuss this, my research investigates whether it can be said empirically and doctrinally that fan fiction could be classified as a special case that that does not adversely affect the rights holders' interests, as required by Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights and Article 9 of the Berne Convention for the Protection of Literary and Artistic Works. By adding doctrinal and empirical research methods to fan studies, the argument can be made that fan fiction is not harmful to the underlying work and does not interfere with the copyright holders' normal exploitation of that work, and as such should be permitted as fair dealing.

[0.2] Keywords—Doctrinal studies; Ethical considerations; Law; Legal methodologies; Philosophical worldview; UK copyright law

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## 1. Introduction

[1.1] The study of fandom, "a daring and innovative topic" (Lamerichs 2018, 238), has been approached in many different ways, each with their own benefits and limitations. Research into fandom, shaped using the model set out in Jenkins's seminal work *Textual Poachers* (Jenkins 2012), has a traditional home in the humanities, with its preference for ontologies such as social constructionism and phenomenology. Yet fan studies is also essentially interdisciplinary, "with both bridges and divides" between researchers in the humanities and social sciences (Evans and Stasi 2014, 6). These different disciplinary approaches were used to great effect regarding research into the early adoption of online methods of dissemination of fan works such as vidding and fan fiction, covered by both humanities-based media studies research and social science analysis within economics and intellectual property law. This article will establish how doctrinal and empirical legal methodologies bridge the gap between social science and the humanities by permitting the addressing of new research questions into how the UK market and the law handles textual reuses (poaching). This article will demonstrate how this use of legal methodologies,

ontologies and epistemologies benefits fan studies as a whole. As the legal and fannish worlds are changing to reflect changes in society, it is urgent that this gap is bridged, especially in the UK, with its relative dearth of fan fiction–based copyright scholarship yet a growing number of fan writers.

[1.2] Fan studies and copyright scholarship can benefit each other by drawing on each other's backgrounds and research methods. Fan studies covers subjects as diverse as information studies and cultural studies. The historical majority of literature on fan studies situates it firmly within the humanities, mostly within media studies (Booth 2015; Coppa 2006); audience studies (Phillips 2011; Stein 2015); and archives (De Kosnik 2016). Legal research is improved by building on these theoretical, archival community-centered methods to further develop the research into the identity of fans and the incentives behind their outputs "to carefully consider just who we are speaking for" (Hills 2012, 14). Knowing whose voice we are supporting permits a sharp focus of methodology in relation to research questions and the ethics of the chosen approach. This consideration is one of the improvements that fan studies brings to legal research.

[1.3] One of the ways copyright research and fan studies can come together is in relation to the identity of producers and users of materials, which fan studies clarifies. Copyright scholarship and fan scholarship both focus on the identity of and incentives for producers. The identity of fan producers has been much discussed in fan studies in relation to many characteristics—race (Pande 2018; Stanfill 2018), feminism and gender (Coppa 2008; Jones 2014; McCracken 1999; Wanzo 2016), and power (Kelsey and Bennett 2014). Legal research has a much more simplistic view of production as incentivized by commercial considerations, and it could learn much from

fan studies. By focusing on individual, specific characteristics of fans, fan studies research has permitted important discussions on subjective elements of fan studies not seen in legal research in the UK. While US legal research into fandom dates back at least as far as 1997 (Tushnet 1997) and has been much developed (Schwabach 2011; Stendell 2005), the UK has yet to follow suit.

[1.4] If we recognize the importance of the proper framing of fan art works (Seymour 2018), this lack of legal research into fan fiction in the UK is important. The US legal regime has a substantially different copyright regime from the UK. Not only is the copyright protection of characters significantly less clear in the UK than in the US, but there are also important differences between copyright exceptions in the two locations. During the last legislative change in the UK, it was held impossible to import the US doctrine into the UK (Hargreaves 2011). This change to copyright law brought in a new copyright exception for pastiche and parody (Copyright Designs and Patents Act 1988 §30A) without clearly defining the term pastiche. While it is argued that fan fiction should fit within this definition (Hudson 2017), there has been no case law to back this up. Fan scholars within the UK (or researching the UK) thus have clarity from fan studies research regarding the identity of fans, yet lack information as to how the law sees their output. Research regarding the effect of copyright law on fandom in the UK can be done in the light of a variety of ontologies and epistemologies. This paper takes on the suspicions of the humanities regarding the applicability of legal ontologies such as objectivism and epistemologies such as positivism and postpositivism. It acknowledges the impact that the law has on fans, and thus the importance of bridging the gap between ontological and epistemological theories in both disciplines in order to resolve the friction. On one hand, copyright law applies (at least in theory) to all actors on the market, irrespective of the opinions

of those actors. Using this as the lens through which research is done permits research into how the rules (and the existence of legal teams retained by copyright holders to enforce them) can shape the behavior of fan fiction writers and their representatives (such as the Organization for Transformative Works (OTW)). On the other hand, the way fans interact with works can be seen as a question of the subjectivist position that is shown in social constructionism. This bridge between two methodologies (law and fan studies) answers the call by Ford to widen fan studies research to cover "new challenges...old stereotypes and power imbalances" (Ford 2014, 66).

[1.5] This article explores the importance of interdisciplinary research that bridges the gap between legal and sociological or media studies-based fan research. A legal empirical focus using quantitative data alongside doctrinal studies will fill the methodological literature gap seen within much of the fan/producer relationship research within fan studies. While much has been written in the fan/producer field (Bennett, Chin, and Jones 2014; De Kosnik 2012; Scott 2009; Turk 2014; Williams 2010), it is mostly practice-based, qualitative, or highly theoretical. This has many benefits for the field of study and is mostly due to the historical criticism within media and cultural studies toward the realism shown in legal and empirical research (Evans and Stasi 2014, 13). Despite the concerns felt by media and cultural researchers toward legal research methodologies, large-scale quantitative data analysis paired with doctrinal research permits an important different ontological and epistemological view, as called for by Evans and Stasi (2014, 6). Where fan studies research meets policy research, empirical copyright methodologies are highly important, as they can be used to check how accurate their conclusions are (Epstein and Martin 2014, 4). Empirical legal analysis also allows for a development of Jenkins's ideas on

transformative works (Jenkins, Ford, and Green 2013) and answers the call to widen fan studies research to cover "new challenges...old stereotypes and power imbalances" (Ford 2014, 66).

[1.6] This paper is laid out as follows. Section 2 describes the relevance of law to fan studies and fannish creativity to further the argument that legal methodologies should be used to bridge the gap mentioned above by Evans and Stasi. Section 3 gives an explanation of relevant legal work that approaches fan studies, including an analysis of how well copyright debates approach the different voices mentioned above contained within fandom, and who specifically is helped or harmed by strong copyright enforcement. Section 4 brings an analysis of the main ontologies and epistemologies contained within fan studies and copyright research, to compare and contrast each and demonstrate how the interplay between the two can benefit fan studies research. Section 5 lays out the limitations of these methods for fan studies scholarship. Finally, a conclusion is laid out that shows that using legal methodologies can have benefits for fan studies.

## 2. Relevance of law to fan studies and fannish creativity

[2.1] Legal approaches have much to offer fan studies and fannish creativity in relation to fan-producer relationships and the mainstreaming and commercialization of fandom. The significant work undertaken by the Organization for Transformative Work's Legal Advocacy team demonstrates this, working to promote legal policy within the US and elsewhere that balances the rights of creators and fans. The main focus of the OTW's work is that all fan works are legal under the US fair use copyright exception because of their transformative nature, and thus should be "accepted as a legitimate creative activity"

([http://www.transformativeworks.org/what\\_we\\_believe/](http://www.transformativeworks.org/what_we_believe/)). The OTW does this by working with legislators to include certain types of work used in fan works within the Digital Millennium Copyright Act fair use exceptions, as well as presenting amicus briefs to courts in intellectual property law cases. The OTW has also set up the online Archive of Our Own site to host noncommercial fan works, protecting it by hosting it on their own servers rather than risking it being taken down by a third-party ISP that receives an overenthusiastic takedown notice (Tandy 2013, 169). The OTW legal advocacy team defends the servers and forms networks to protect these works against legal claims by producers.

[2.2] There is much doctrinal research on fan works and copyright law, mostly situated within US law. This increases the scope of the theoretical underpinning of media studies, as called for by leading scholars (Hesmondhalgh and Toynbee 2008). US copyright research clearly describes the balance that intellectual property law treads between helping creators and helping fan fiction writers. Legal research can be broken down into two distinct types of methodology: doctrinal and interdisciplinary (Arthurs 1983). Doctrinal research (the study of how legal doctrines are formed via an analysis of legal rules) is the primary form of much legal research, with its focus on policy analysis, logic, and analogical reasoning (Chynoweth 2008, 37). It is composed of illustrative research about legal rules and research into legal theory such as legal philosophy.

Interdisciplinary research comprises fundamental research regarding such topics as law and economics or the sociology of law, and law reform research, such as sociolegal studies to put the law in context (Arthurs 1983; Chynoweth 2008, 29). Most doctrinal copyright research into fan fiction is interdisciplinary, focusing on the use of sociology to suggest law reform around the application of fair use to fan fiction (Chatelain 2012; Krato 2016; Schuster 2013). This is helpful

to fan scholars, as it clarifies the rules that society currently has at its disposal to apply to fan fiction.

[2.3] Legal research benefits fannish creativity, as it permits clarity regarding exactly what fans can and cannot do online with the works they love. Equally, knowing what producers can and cannot stop fans doing gives parity of knowledge and power, in an environment where producers are heavy-handed with cease-and-desist letters. While much fan fiction is noncommercial, created by amateur writers and posted on archives such as Archive Of Our Own, fandom is increasingly being commercialized. Commercial enterprises have started entering the market. For five years, Amazon permitted the sale of commercial fan fiction on its Kindle e-book reader through Kindle Worlds, whereby producers of certain fandoms licensed their works for others to use in their fan fiction writing. While this was a very niche market with limited fandoms (and was only somewhat successful while it remained open), by following on the heels of Fanlib it demonstrates a possible trend towards more commercial publication of fan fiction. How, then, do we enable the publication of noncommercial fan fiction, and how do we ensure that commercial fan fiction writers are not taken advantage of by overprotective license terms, or indeed a requirement to purchase a license where legally there is no need?

[2.4] The move toward commercializing fandom means fan studies should look toward legal research into commercial reuses of creative works, such as remix and parody. These works tend to rely upon similar copyright exceptions (Article 107 US Copyright Act 1976's fair use in the US, §28-30A CDPA 1988's fair dealing in the UK, Article 5 InfoSoc Directive's "Exceptions and Limitations" in the EU—see paragraph 3.3) to justify publication despite infringement claims



from the creator of the underlying work. In each jurisdiction, the commercial/noncommercial nature of the transformative work is only one of a number of judgments made regarding whether a "use" or "dealing" with a copyright work is "fair" and thus should not be prohibited by copyright law (Jacques 2015a; Jacques 2015b; Scharf 2012). "Fairness" exceptions and limitations ensure that copyright law is flexible enough to permit for new, socially beneficial uses of copyright works (see Section 3 "Law 101 for Fan Scholars"). Fan fiction, with its links to groups such as racial minorities or LGBTQ+ communities that mainstream media does not successfully represent, would seem to meet this test. As such, knowledge of how strictly copyright law is drawn around other commercial reuses of works is helpful to fan studies.

[2.5] It is clear, however, that producers and fan creators do not stick to the letter of the law. Producers overstep their boundaries, sending legal takedown and cease-and-desist letters to fans whose creations are legally permitted because of the fair use or fair dealing exceptions. Fair use itself has been called "merely the right to hire a lawyer to defend your right to create" (Lessig 2004, 187). While the existence of copyright exceptions should mean that fan creators do not need to ask permission to use the works in a way that the law permits, reality tells a different story. The lack of clarity on the boundaries of both fair use and fair dealing exceptions, the high costs of attending court to defend fan creations, and the relatively large financial liability that producers can threaten creators with should they be found guilty of infringement, mean many individual fan creators felt a need to give up their right to publish their work. This has led to the argument that "the astonishingly broad regulations that pass under the name 'copyright' silence speech and creativity" (Lessig 2004, 187). This reinforces the importance of the work of the

OTW (see ¶ 2.1) and other legal bodies, who have striven to defend the right of fan creators to write and share their works online.

[2.6] Equally, fan studies has much to offer IP legal studies. The focus on fan–producer relationships gives new insight into legal research that mostly focuses on commercial production and reuses, rather than the more personal, nonmonetary incentives engaged by fan studies. Fan studies therefore operates to push back against the assumption that creativity will not happen without money. In a digital age, where social engagement, development, and representation occur online through the sharing of cultural works across geographical boundaries, it is of vital importance that laws that constrain these interactions (such as copyright) fully understand and engage with their stakeholders when being updated (such as can be seen in the furore surrounding the passage of the Copyright in a Digital Single Market Directive in Europe). For example, online fandom groups interact in a different but complementary fashion to commercial creators and consumers, in order to protect their ability to create fan fiction (Lantagne 2016). As such, interdisciplinary legal and media studies research has benefits for both the humanities and the social sciences.

### 3. Copyright law for fan studies scholars

[3.1] Having explained the importance of legal research to fan studies, this paper will now give a brief explanation regarding exactly what copyright research tells us about fan activities. The issue of transformative, derivative uses of fictional works boils down to a simple question— "Who controls a story—its creator or its fans?" (Rose 2011, 75). In the traditional view of

copyright, the author is the one who controls and tells the story in a way they see fit, or gives permission to others to do so through a license. The standard incentive function of allowing the original creator a monopoly over their story states that but for this protection, original creators would not be able to charge enough to make it worth their while to create (Elkin-Koren and Salzberger 2013; Landes and Posner 1989). As such, the theory states that production of creative works falls where copyright protection is weakest, and that exceptions (like fair use/fair dealing) should be narrowly drawn. Drawing out this argument, it assumes that copyright protection benefits both the producer and society as a whole, which benefits from the increased production of creative works.

[3.2] In the UK, copyright protection is contained within the Copyright Designs and Patents Act of 1988, which states that copyright subsists in original literary dramatic, musical, or artistic works (S1(1)(a)) once the works are recorded. This provides protection for all underlying works such as TV shows, books, or movies that fan creators use to base their works on. It is illegal to copy the underlying work (or substantial parts of it) without a license (s17). Fannish creators struggle to have their creations deemed legal, especially if they use characters from US-based underlying works. In the US, characters have a long legal history of protection outside of the work in which they appear (although the test for when they are sufficiently creative to become so differs—see *Detective Comics Inc. v. Bruns Publications Inc.*, 1940; *Metro-Goldwyn Mayer v. American Honda Corp*, 1995; *Nichols v. United Pictures Corp*, 1930; and *Warner Bros Pictures Inc. v. Columbia Broad. Sys. Inc.*, 1954). Even if infringement of the underlying work as a whole cannot be proved, infringement of any characters from the original work that appear in the fan fiction is likely to be provable. This is problematic for fannish creativity.

[3.3] Fan fiction writers seeking to use UK-based works will likely do no better, despite the lack of legislative history on the topic of copyright protection of characters. There is a move toward looking at the importance of the taken part to the underlying work, rather than the definition of what was copied (*England and Wales Cricket Board Ltd. v. Tixdaq Ltd.*, 2016). Most characters that appear in fan fiction do so because they are sufficiently delineated to be a clear expression of original artistic choices made by the producer—and are thus both deserving of copyright protection and engaging to the audience. Characters, either as expressions of artistic choice or as substantial parts of the underlying work, may now attract copyright protection in the UK. Thus, without the benefit of a copyright exception such as fair use or fair dealing to cover them, courts will deem fan fiction to be infringing copyright in the underlying work in both the UK and US. By extension, current copyright law in this regard may harm fannish creators.

[3.4] Fan creators argue their works should be protected as either fair uses (if in the US) or fair dealings (UK) with the underlying work, as their use is one which a "fair minded and honest" person would make of the underlying work (*Hyde Park Residence v. Yelland*, 2000). This legal argument is the central focus of work to protect fan creations in both the UK and the US. The analysis of the fairness of the manipulation or utilization of the underlying work by fan creators is functionally different in the UK and US because of fundamental differences in the legislation. In the UK, the "dealing" must be defined within a closed list of specified types—research/private study, quotations, or parody/pastiche/caricature (§28–30 CDPA 1988) before a decision can be made on "fairness." In comparison, in the US the tests for "use" are open-ended (§107 US Copyright Act 1976).

[3.5] The argument for the application of the US fair use exception to fan fiction is well made in several scholarly articles (Lantagne 2011; Lipton 2014; Stendell 2005; Tushnet 1997), but is less popular in UK legal research on fair dealing (Bukatz 2013; Khaosaeng 2014). Legal fan studies scholars argue that the focus of copyright research is incorrect. Rather than assuming that unauthorized derivatives act as substitute goods and thus siphon demand away from the original, the copyright question should actually be framed as "What if...stories and characters actually gain value when people share them?" (Rose 2011, 101). Fan fiction in this light may have a neutral or maybe even positive effect on sales. Positive externalities, such as increased awareness of the underlying work, and prolonging demand for future works in the series based on the characters, are not sufficiently engaged with in the literature or in case law. If they were, fan creators argue that fan fiction would be clearly legal under both fair use and fair dealing.

[3.6] Even if fan fiction does not harm the underlying work by having a direct substitution function, producers still argue that it should not be permitted because of damage caused by harming the reputation of the underlying work, and as such fan fiction should still not be a fair use or a fair dealing with their copyrighted work. While important to producers, this form of harm is at best only one factor that is taken into account within the fair use/fair dealing exceptions (Buccafusco, Heald, and Wu 2017). The judgment for fairness protects uses that have important social welfare benefits while also bearing in mind the need to protect the expected returns to the copyright owner. The UK fairness test considers several things: the amount of "quotations" taken, the type of use made of them, and the proportions (*Hubbard v. Vosper*, 1972). Courts discuss tarnishment under the fourth factor of the fair use test in the US (the

potentially harmful effect of the unauthorized use on the market for the work). In the UK, arguments about tarnishment would be made under the economic impact test from *Ashdown v. Telegraph Group* (2002), which falls under the "use made" section of the exception. Counsel could also raise the issue within the overarching Berne Convention Article 9/TRIPs Convention Article 13 legislation that requires fair dealings do not conflict with the normal exploitation of the work. If courts in the UK were to accept that argument, fan creators might find it hard to publish their works without infringement proceedings. Because of the lack of clear legal precedent on how fair dealing in the UK applies to fan works, this is a clear research question where legal research has much to benefit fan studies.

#### 4. Ontology and epistemology

[4.1] The study of the law is not only important to fan studies because of its ability to open up important research questions surrounding the ability of fan creators to protect their work using the fair dealing or fair use exceptions. It also has much to offer because of the largely different ontologies and epistemologies it uses in comparison to fan studies. Ontologies and epistemologies are important as they show "how the researcher views 'reality'" (Jonker and Pennink 2010, 25; Crotty 1998). The values that underlie the thoughts and actions of the legal researcher as they carry out their tasks (Gummeson 1999) have important differences to those of the social or fannish researcher. Used together, they can investigate how important laws are to the fan community, as well as the organizations that protect against potential legal over-encroachment such as the OTW. By bringing together legal and fannish ontologies and

epistemologies, we can also build up our awareness of power structures within media production, one of the main questions in media studies (Couldry and Hobart 2010, 79).

[4.2] Ontologies permit for a discussion of the researcher's beliefs about the world—do social objects (like laws) exist outside of individuals (objectivism), or are they being constantly rebuilt and renewed by changing viewpoints and deeds (constructivism)? The question of which ontology and epistemology to ground research in arises when bridging the gap between fan studies and the law. Much legal research grounds itself within objectivism—the theory that "social phenomena and their meanings have an existence that is independent of social actors" (Bryman 2016, 29). Laws like copyright, they argue, at first instance apply to all actors on the market, irrespective of the opinions of those actors. The rules, and the existence of legal teams retained by copyright holders to enforce them, can exert pressure on fan fiction writers and readers and their representatives. For example, Fanfiction.net removed works relating to certain fandoms after communication from the authors or their lawyers rather than waiting for a court judgment to force them to take the works down, in spite of the lack of clarity in case law surrounding the application of copyright law to these types of work. Objectivism is the main ontology behind most empirical research, as it allows for research into social entities as tangible objects that can be standardized and investigated scientifically. This offers a very different standpoint from much media and fan studies research, and has benefits for policy review. However, as will be shown, there are also some drawbacks to it, meaning much humanities-based research rejects it as a foundation because of its lack of reflection of the importance of subjective experience and social power.

[4.3] Given that neither the law nor previous research gives a clear view of how copyright should apply to fan works, there is a distinct need for quantitative, empirical work, building on previous trends in media research (Bräuchler and Postill 2010, 2). This empiricism requires an objectivist grounding as it "entail[s] the collection of numerical data, a deductive view of the relationship between theory and research, a preference for a natural science approach...and an objectivist conception of social reality" (Bryman 2016, 149). Examining theories by testing the relationship between measurable numeric variables using statistics is helpful to fan scholars, as it permits for research questions to be asked, such as how relevant copyright law is to the specific actions of fans and producers—or how harmful fan fiction production is to sales figures of the underlying works. Researchers use deductive reasoning to test their theories to avoid bias and ensure they account for all explanations. It is important in quantitative research that later scholars and researchers (Creswell 2014) can replicate the findings.

[4.4] Building on quantitative research, empiricism states that theories must be tested before being categorized as knowledge, and that adding to the sum of human knowledge is a "legitimate goal in its own right" (Bryman 2016, 20). Empirical legal research has been further defined as legal research that "uses statistical techniques and analyses...that employ data...that facilitate descriptions of or inferences to a larger sample or population as well as replication by other scholars" (Heise 1998, 810). This large sample is of importance to fan research when trying to generate theories and laws in relation to transcultural fandom (Chin and Morimoto 2013), as it allows for analysis of issues not contained within national or cultural borders. There is a growing trend toward 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 (Asay, Sloan,



and Sobczak 2020; Barton 2008) and in the UK into the effect of peer-to-peer piracy (Oberholzer-Gee and Strumpf 2007; Rob and Waldfogel 2006). These works show that there is a growing demand for empirical work focusing on copyright exceptions such as relied upon by fan fiction, since policy work so often uses a cost-benefit approach to balance gains and losses to welfare from a suggested change in the law. The previous nonempirical legal approach, it is claimed, "has little credibility unless [gains and losses] can be measured empirically, since...the outcome depends upon quantitative not qualitative results" (Towse, Handke, and Stepan 2008, 4). There have been many calls within copyright for detailed empirical sociolegal studies to be undertaken (Bok 1983; Friedman 1986; Lee 2008; Png 2006). This would not only benefit the field of legal research, but also fan studies as it might strengthen the calling for a more structured fair use/fair dealing defense to permit fan fiction publication (should it show that social welfare benefits outweigh the harm caused to the producer). Even if research in this area demonstrated the reverse, that too would be beneficial as would develop understanding of the legal rules in the currently somewhat murky waters. Despite the rejection of its objectivist framework (see ¶ 4.7), empiricism can therefore have benefits to fan studies research.

[4.5] Of most relevance to fan researchers, empirical work into the optimal levels of copyright protection regarding unauthorized 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 (Towse, Handke, and Stepan 2008). It is therefore no longer sufficient in research for producers to argue that even direct piracy is harmful enough to society that we need strong copyright protection. This is an important research question for fan studies,

as it gives the opportunity for fannish creators to call for further empirical research regarding the effects of their works on the underlying product.

[4.6] Empirical methods are not only important within legal research. Leading fan researchers are beginning to use quantitative methodologies to undertake their work (De Kosnik et al. 2015; Yin et al. 2017). This research has used either a case study approach or a large-scale quantitative analysis of fan fiction archives to draw several important conclusions. Primarily, it has been strongly demonstrated that fan fiction 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" (De Kosnik et al. 2015, 161). The conclusions from these studies from outside legal research demonstrate specific positive social externalities that fan fiction demonstrates, which have yet to be analyzed by legal research in the UK. One of these positive externalities is that fan fiction is most often written as a work-in-progress, posted online by writers who use the websites as learning environments to develop their writing skills (Campbell et al. 2016; Evans et al. 2017). This research could benefit fannish creativity as it could, for example, be used to support a call for the fair dealing exception for research and study under §29(1) Copyright Designs and Patents Act 1988.

[4.7] In comparison to this historical use of empirical, objectivist methods in legal research, fan studies researchers predominantly situate themselves within the ontology of social constructionism. They look upon positivism and objectivism with deep mistrust, arguing that reality (even in relation to the laws that apply to society) is subjective—and is a construction of

the culture in which it appears, dependent on the role of social power within organizations and legal bodies (Locke and Becker 1998). This ontology states that social objects, such as laws or knowledge, are produced through social interaction, and are constantly being updated and changed through these interactions (Bryman 2016, 29; Guba and Lincoln 1994). There is no natural concept or understanding of ideas like intellectual property ownership, social constructionists argue, as all social rules are created specifically by the history and culture in which they appear (Rapley 2018, 4–5, citing Burr 2015). Fan fiction authors are perhaps using their writing like social constructivists to "seek understanding of the world in which they live and work" (Creswell and Creswell 2018, 8). This may be especially true of fan fiction that represents minorities, such as the LGBTQ+ community or ethnic minorities. This ontology has benefits for social and media researchers, for example when investigating the rules that fan fiction writers impose and abide by within their own communities. It seems that the two perspectives suffer from a necessary amount of friction, yet concepts and techniques are increasingly being borrowed and hybrid methods formed (Diesling 1966, 130) in order to bridge the gap between the two ontologies.

[4.8] Epistemologies concern what the knowledge is about a particular discipline, or what it should be (Bryman 2016, 24). The two main epistemologies in social research are positivism and interpretivism. Once again, fan studies research contrasts with legal research in that fan studies prefers the interpretivism-based phenomenology tradition rather than the more experiment-based positivism, which calls for the application of scientific methods such as quantitative studies to the investigation of "social reality" (Bryman 2016, 24). Phenomenology researchers argue that "the extent to which the law, in and of itself, can effect change...has been subject to debate"

(Barlow et al. 2019, 2; Smart 1989). Legal epistemologies will be examined before fan studies epistemologies in order to acknowledge the different approaches before moving on in part 5 to demonstrate how these differences may be bridged.

[4.9] Positivists believe that research should "test theories and provide material for the development of laws" (Bryman 2016, 24). They assume that there is an objective external reality that can be discovered through reliable, replicable, and valid empirical testing. To carry out the test scientifically, the researcher must remain separate from the research subjects they are testing in order to avoid their own biases influencing the research. However, the absolute purist view of positivism may not apply to people who are not as bound by rules as subjects within a scientific study. In social research, there may be other factors that influence the behavior of the test subjects. We cannot be sure that the specific action we are testing is the one that causes the outcome. Postpositivist philosophy, with a focus on determination, reductionism, empirics, and theory verification (Creswell and Creswell 2018, 6), is an improvement, and has an important place within fan studies research. Media studies has a strong history in empirical, positivist work (Hesmondhalgh and Toynbee 2008), which can be developed through the use of copyright research with its roots in postpositivism, deductivism, and inductivism.

[4.10] These legal epistemologies are looked at with mistrust by many humanities researchers, who argue that the research should be undertaken using interpretivism such as phenomenology. People and cultural institutions form their own reality distinct from other groups. In this instance, fan fiction authors and readers have a view of how copyright law applies and should apply to them that is different from the viewpoint of standard authors and publishers. These individuals

interpret the law and their behavior in relation to it to generate a reality that is therefore a social construction or creation (Becker 1982). Given its subjective nature, it is not possible to measure reality empirically. In preference, researchers that subscribe to this paradigm tend toward qualitative research such as interviews and surveys. This phenomenology research in fan studies is carried out using several different perspectives: either as scholar-fans/acafans (Jenkins 2012)), where academics write for other academics on fandom-related topics, or as fan-scholars, where fans use academic concepts to write for other nonacademics (Hills 2002, 2). However, I follow the current thinking (Hellekson and Busse 2006; Hills 2012) that there is less distinction between the academic and fan than Jenkins's term demonstrates.

[4.11] Legal objectivism and positivism therefore builds on the social constructivism and phenomenology of fan studies research to allow for research questions to be answered in relation to how well copyright law is internalized by fans and producers. Laws such as those regarding copyright are drawn up to encourage certain behaviors seen as socially beneficial, while stifling behaviors deemed harmful. Specifically, using both fan studies and copyright research allows for investigation into how constrained certain behavior of fans is by copyright law, as well as how empowered producers are. Therefore, ontologies and epistemologies from both backgrounds should be taken into account when undertaking research into the fandom and the law. However, it does have some limitations.

## 5. Limitations

[5.1] The methodological backgrounds of legal research are at times directly opposite to those of fan studies, and it can be hard to see how to bridge the gap between the two. This paper has sought to do just that. Legal research has been criticized for being too "technocratic and divorced from any human values save economic efficiency" (Williams 2009, 244). It is true that there has been a move toward empirical, objectivist, positivist thinking within legal research, given the belief that this research can more "accurately gauge the uncertainty of their conclusions" (Epstein and Martin 2014, 4). Hargreaves, in his review of copyright law, followed this in his conclusion that "policy should balance measurable economic objectives against social goals" (Hargreaves 2011, 8). However, there are several well-known issues that arise from the use of quantitative methodologies (Kitchin 2016, 34; Quan-Haase and McCay-Peet 2016, 45); namely, that with the increase in data analytics, correlation is being deemed sufficient to conclude advances in technology and policy without the need to prove causation. It is perhaps being forgotten in an age of big data that even large datasets are still only samples of larger populations, and their collection and analysis is not free of bias from the researcher that undertakes the project.

[5.2] While economics is therefore important when evaluating policy, to truly understand and evaluate the second part of Hargreaves' equation (social goals) may require more qualitative, subjectivist, and interpretivist research into how individuals understand the world around them and how they interact with it. Only then can the balance truly be struck between improving the economic welfare of the parties involved and their social welfare. Social constructionism aims to improve the understanding of how individuals such as fanish creators interact with each other, the original work, and the producer of that work, as well as the legal regime in which they

operate. By doing so, social constructionist researchers aim to overcome the issue with objectivist research that it is not representative of the wider society in which it operates.

## 6. Conclusion

[6.1] This paper set out to explain how legal doctrinal and empirical research may improve fan studies. By examining how legal research is undertaken and the relevance of copyright law to fan creators, I have demonstrated that it opens up research questions that may not yet have been answered within fan studies; namely, within the preexisting sphere of fan–producer relationships. Examples might include how fan creators in the UK can best protect their work, and how relevant is the work of bodies such as the Organization for Transformative Works.

There are natural links therefore between law and fandom studies, not least that there is a known "interplay between the actual and aspirational aspects of social and legal phenomena" (Williams 2009, 243). Legal research has a different methodological grounding from fan studies research in relation to ontology and epistemology, yet these distinctions are not always deterministic of research methods in either school of study (Bryman 2016, 625) and, increasingly, methods are shared between the two. As such, I believe it is possible to use the interdisciplinary nature of fan studies to bridge the gap between the humanities and social sciences (Evans and Stasi 2014, 6).

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