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A Study in Fan Mediated Works

After reading about the views of legal scholars on the relationship between federal copyright laws and fan-based mediated works, I have formulated a number of opinions on the topic. Through further research and analysis, I will explore the dynamic relationship between copyrighted material and fanworks and evaluate how a future reform could serve a purpose in promoting creativity, while outlining the powers of a copyright holder in the internet age. First, I will outline the basics to fan practices and the capitalist structure as it applies to the media. Second, I will outline the morality of fan writings. Third, I will exemplify that published fan writings have been sold legally. To end, I will predict how the current laws will be changed with wider understanding of fan culture. If the intended goal of copyright is to protect original works of authorship as a means to promote the development of the arts and sciences, then these goals should be fulfilled through law. Media-inspired works that expand upon ideas and concepts that do not harm the copyright owner's ability to publish their works and receive capital should be considered as creative works, and therefore should not be demeaned as infringements of copyright material.

Crash Course in Fan Culture History

Historically, the origin of media fan-based communities (fandoms) in the current use of the term is popularly attributed to the 1960s science fiction television series *Star Trek*. The series ran for three seasons, inspiring fans to create a sense of community through the creation of a *Star*

Trek fandom. In *Payment in Credit: Copyright Law and Subcultural Creativity*, Rebecca Tushnet, Assistant Professor of Law at Georgetown University Law Center, explains that the fandom was distinct from the science fiction community because it was “notable for its largely female composition and interest in fan-created stories and artwork focusing on the relationships between the main characters” (139). The circulation of print “zines,” which were composed of fanworks, among small groups of fan communities influenced the arise of “slash” fan fiction, which has homosexual content, popularized by fans who were convinced that there were homoerotic tendencies in *Star Trek*, namely concerning the Captain Kirk and Mister Spock. The introduction and popularization of the internet sparked the growth of fan communities on a global scale that encompassed an ever-increasing variety of subjects surrounding works of media.

The popularization of fanworks raises a number of questions. Lev Grossman, author of a *New York Times* bestseller, *The Magicians*, writes in “The Boy Who Lived Forever,” that “There’s a division...that looks small on the surface but runs deep into our culture... Is art about making up new things or about transforming raw material that’s out there? ... [Fan fiction] challenges just about everything we thought we knew about art and creativity.” Grossman’s assertion is correct because fan fiction continues to puzzle legal scholars who attempt to stamp fanworks as fair use of copyright or infringements of copyright. The question of “Is fan fiction is legal or ethical?” arises from the notion that there are effects on economic growth and competitiveness.

According to *Intellectual Property and the U.S. Economy*,

The granting and protection of intellectual property rights is vital to promoting innovation and creativity and is an essential element of our free-enterprise,

market-based system. Patents, trademarks, and copyrights are the principal means used to establish ownership of inventions and creative ideas in their various forms, providing a legal foundation to generate tangible benefits from the innovation for companies, workers, and consumers. (U.S. Commerce Department v.)

Clearly, the government is using intellectual property as a “catch-all” for creative devices, leaving the consumers without many “tangible benefits” if the copyright is “established ownership.” Thus, it gives the impression that the “free market” is not welcoming to borrowed or expanded ideas in the world of fictional stories.

The Free Market System and Fan Culture

Arguably, the goal of a free market system is to promote wealth through the development and trade of a product, resulting in its success or failure. Consumers are equally as important as the vendors and distributors in a capitalistic society. The production of a product that succeeds in a free market provides capital to the vendor; thus, it allows for employment for those who are part of the distribution process. If an author publishes a book, then the author and publisher receive a profit from sales of the book. The book, however, cannot be sold without it being distributed through a book retailer—in stores and online—and it costs money to pay the companies and their employees. If the book succeeds in the market, and a demand driven by consumption results, then the author of the book may wish to publish an additional book. This cycle of production and consumption is similar in the film industry where the number of sequels and spin-offs spur genres of movies and television programs that have an ultimate goal of maximizing profit.

Those who succeed in these industries are oftentimes embraced for their economic success and their appeal to large populations of consumers. Communities of consumers who are passionate for the products they purchase are influenced. Sometimes, in order to fulfill a desire to connect with the text they are reading, the films they are watching, or the music they listen to, fans create their own works out of inspiration, similar to that of children at play (Jamison). As a result, fan communities exchange thoughts and ideas on the subject matter, and produce fanfic, podfic, fanart, fanvid, and fan music. Currently, the internet is the dominant environment for production, distribution and consumption of fan-mediated work.

The current problem is how to determine where the lines between copyright, fair use, and creativity, end in a society that listens to music covers on *YouTube*, reblogs animated photographs (Graphics Interchange Format “GIF”) from movies on *Tumblr*, creates fan art on *DeviantART*, and reads fan fiction on numerous websites including *FanFiction.net*, *Archive of Our Own*, and *Live Journal*. A number of questions arise because of a number of “anxieties” that Julie E. Cohen, Professor of Law at Georgetown University, addresses in “Creativity and Culture in Copyright Theory.” To paraphrase Cohen, the following questions must be asked: (1) Should individual creators or broader societal patterns be the primary focus of analysis? (2) How do you measure creativity? (3) What is the relative value of abstract and concrete components of artistic and intellectual culture? (1152-53).

Tushnet cautions that a reform in copyright laws should not be over generalized in an effort to promote creativity. She reasons that “[u]sing multiple models of intersecting creative practices, including fan reworkings and partially commercialized production, would provide a better basis for evaluating copyright’s effects on creativity” (Tushnet 138). If Tushnet’s logic is

applied, then a reform in copyright law may help answer the questions that Cohen proposes are essential in measuring the efficiency of copyright law.

If an individual creator is the central focus, then “intellectual property,” a relatively new concept is often the focus of the argument. Historically, humans have built upon ideas from creation myths to the *Iliad* and the *Odyssey*. Homer is attributed with the latter two works, although it is accepted today that the basis of the works are part of oral tradition, which relies on generations of performing a piece in the absence of written text (Gill). To expand upon this idea, Lev Grossman writes, fanfiction is “trying to retake ground that was lost centuries ago. Before the modern era of copyright and intellectual property, stories were the things held in common, to be passed from hand to hand and narrator to narrator. There’s a reason Virgil was never sued by the estate of Homer for borrowing Aeneas from the *Iliad* and spinning him off in the *Aeneid*. Fictional characters were shared resources.” (*Fic Forward*).

Fic: Why fanfiction is taking over the world, written by Anne Jamison and composed of a number of contributions and articles, explores a diversity of opinions on fanwriting. In the introduction, titled “Why Fic,” the author writes, “Fanwriting communities enjoy and consume commercial culture voraciously, celebrate it, even as they challenge and transform its products for their own sometimes radical purposes” (Jamison). The author continues to explain in the introduction that “fanfiction *can* be nearly indistinguishable from commercially published books in content, style, and structure, it is usually not.” Francesca Coppa, a contributor to *Fic*, writes about the Organization for Transformative Works (OTW), a nonprofit organization established by fans whose mission is to provide access and preserve history of fanworks and fan culture. The essential idea of the organization that fanfiction is fair use of copyright material because it is

“transformative” (Coppa). This legal distinction of whether fanfiction is “transformative” or “derivative” is currently under debate by legal scholars.

According to U.S. Copyright Law,

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship is a “derivative work.”

(Copyright Law of the United States 3)

The definition of a derivative work is an integral part of legal analysis of copyright infringement. Brian Link explains in his article, “Drawing a Line in Alternate Universes: Exposing the Inadequacies of The Current Four-Factor Fair Use Test Through Chanslash,” that current copyright allows for others to “lawfully build upon the idea, concepts, and information of an original work,” but it does not allow the “exclusive right to prepare derivative works” (148). However, if a secondary work “...sufficiently transforms the expression of the original work to a point where it is no longer ‘substantially similar,’ then the secondary work is not a derivative work and does not infringe the copyright of the original work” (148). Link’s assertion is that the internet does not protect a copyright owner from immoral mutilations of their works by fans who use websites like *FanFiction.net* to post stories of characters in situations that the author may not agree with.

Sherlock Holmes and Harry Potter

Sir Arthur Conan Doyle's creation of Sherlock Holmes sparked turn-of-the-century fans to submit their own versions of adventures featuring the colorful detective in newspapers. Presently, film adaptations featuring Robert Downey, Jr. and two "modernizations," BBC's *Sherlock* and CBS's *Elementary*, clearly use the characters and case plots originally told by the 19th century author, despite the alterations that each have made to distinguish themselves as "unique." Each company was granted licenses by the Arthur Conan Doyle Estate (ACD) for permission to use the characters and ideas presented in the original works. Leslie Klinger, author of *In the Company in Sherlock Holmes*, decided to take legal action against the ACD after he refused to pay for a licensing agreement. Klinger's claim was that his publication consisted of information from stories no longer under copyright (publications predating 1923) and thus is in the public domain and not within the copyright holder's power to claim copyright. While ongoing, the legal dispute is important because it emphasizes how fair use of copyrighted material from multiple works by the same author is not clearly defined.

Similarly, J.K. Rowling's *Harry Potter* novels and the film adaptations by Warner Bros. outline the complicated relationship between fair use of characters and ideas presented in copyrighted material. In the early 2000s, Rowling, Bloomsbury and Scholastic (her publishers), and Warner Bros., were not appreciative of some of the fan practices online. Some fans received cease-and-desist letters as warnings to remove content from fan websites if it was outside of what the copyright holders deemed appropriate, including the use of character names for website domains and slash fan fictions (Jamison). However, through communication initiated by fans, certain websites were granted permission to continue because of their positive contribution to supporting the books and films (Jamison). Moreover, Rowling supports and encourages

noncommercial writings by her fans, which indicates a positive direction for copyright holders embracing noncommercial fan practices. However, Rowling has blocked the commercial publication of an unofficial “Harry Potter Encyclopedia” in an effort to regain some control of her stories from fans (Jamison).

Moral Codes

As outlined from the ongoing copyright case of Sherlock Holmes, copyright has increased in its power beyond the grave of the owner. Originally, a copyright was valid for a more limited period of time. However, copyright protected material has extended its protection for approximately one lifetime, and may be traded between parties. Furthermore, fan practices of fair use are based on moral structures, in which there is a difference between plagiarism, fanfiction, and quotation, as acknowledged by the Organization for Transformative Works. The OTW believes that plagiarism is “the unacknowledged use of someone else’s words claimed as one’s own”, while fanfiction is “the acknowledged or obvious borrowing of story elements to tell a new story in the fanfiction writer’s words,” and quotation is “the acknowledged or obvious use of small excerpts of another's work”. If these distinctions are incorporated into the determination of the legality of fanworks, notably fan writing, then it would be less tedious for any future court case to determine if a particular fan practice is fair use of copyright. The OTW further explains that “obvious” use of another’s work is that it is common knowledge to readers that the fan writer did not “invent Wonder Woman or Voldemort, or the phrase ‘Use the Force, Luke.’” This understanding is related to how fair use understands parodies. The OTW denounces plagiarism for its harm to the original author, but supports fanfiction and quotation as valid terms for fair use under the premise that it acknowledges the original author.

Fan practices include the idea of a “disclaimer” as a method for acknowledging the source of their inspiration. Fans who publish their work online, disclaim ownership of the copyrighted material, example “I do not own the *Harry Potter* series of books and films,” and disclaim their identity as the owner, “I am not J.K. Rowling and I am not affiliated with Bloomsbury Publishing, Scholastic Publishing, or Warner Bros.” The U.S. Copyright Office states under “Fair Use” that “The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.”

Thus, the confusion with how much power resides in the owner and fan is muddled. Given the popularity and nature of fanworks, and their claim as being creative works, a distinction between plagiarism and fair use of incorporating source material is ideal. If a copyright owner believes that a single fan violated the terms of fair use for a single fan work, then under current U.S. Law, the court would use the four-factor test for fair use as a guide. Currently, it assesses “1) the purpose and character of the infringing 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 infringed use on the potential market for or the value of the copyrighted work” (Link 149). Brian Link, who proposed adding a fifth-factor of “morality” to balance fan and copyright owners in a hypothetical court case, applied his method for reform to commercial and noncommercial fanworks. As previously mentioned, his goal was to protect the reputations and “emotional” state of the copyright owner. I believe that for noncommercial works, his argument is invalid because he assumes that authors of original works will be emotionally compromised if an internet browser “stumbles upon” a fan work and is

unable to determine if (1) the fan work was produced by the copyright owner or if it was not, then (2) if the author supports the message of the fan work.

While his intentions are for creating a fair and balanced method for reform, I do not believe that it will prevent noncommercial works that may be emotionally compromising to the author of the original work. Although not all fans write fan fiction that put minors in sexual situations (“chanslash”) or create homosexual pairings from preexisting characters, there are a significant numbers of fans who produce material concerning these topics. Not only are they available for a public audience, there is a demand for it by large groups of fans. According to *Fic: Why Fanfiction is Taking Over the World*, the element of diversity within the writers and readers of fanfiction compared to the diversity shown in the media concerning the topics of race, gender, and sexual orientation, is significantly larger, and the book contributors argue consistently that it is the diversity of writers and readers that enhance creativity by transforming an idea presented in copyrighted material to expand upon preexisting conditions or generate new ones.

Fans codes of morality universally acknowledge the need for ratings and warnings as a measure to prevent potential audiences from potential exposure to material that may not be suited for minors. Most fan sites use a rating system that is similar to that of film media and video games, with a ratings guideline posted on each site for specific definitions. Commonly “K” for kindergarten, “G” for general and “PG” for parental guidance do not include any major warnings such as “violence” or “sexual content” because most authors are responsible. “PG-13” or “T” for teen may include warnings of “violence” or “sexual content,” however it is usually not a major feature and not explicit for the intended age group. “R” for restricted, “M” for mature, “E” for explicit and “NC-17” for no one under 17, are heavily themed in adult content, and therefore are

usually prompted with warning before a reader can gain access to a webpage. Also, the majority of explicit fan fictions include warning labels “explicit violence” and “explicit sexual content” as well as specific warnings from the author “Do not read if X, Y, and Z are triggers.”

Legal Transformative Works

Tushnet writes in “Payment in Credit: Copyright Law and Subcultural Creativity” that media fans “...express love for the original [work] and a sense of distance and separate ownership of the fan-created supplementary works” (Tushnet 135). Thus, the majority of fans would be content if they may publish their own media-inspired works noncommercially with payment through attribution, or credit, from their peer audience (135). For fans who believe that their fan work is fair use in commercial publications, Tushnet explains that “attribution may be appropriate even when the original author is appalled by what has been done to a work” (163). This is because of a legal precedent in which the federal court of appeals upheld that Alice Randall’s parody titled *The Wind Done Gone* was fair use as an “unauthorized derivative work” because of its criticism of racism in Margaret Mitchell’s *Gone With the Wind* (142). Mitchell’s family filed suit because they were disagreed with the nature of the book, which also included the change in a character’s sexuality. However, the Eleventh Circuit Court of Appeals upheld Randal’s claim that the work was transformative because it expanded upon an original quotation of the Wilkes family as “queer” (162). This court case is the primary example of an emotionally-compromised copyright owner and a fan that was able to commercially publish a parody novel, under the notion that the work is “critically transformative” (162).

Julie E. Cohen’s assertion that “The economic stability that copyright guarantees to authors and publishers. But it should not include, and need not include, the right to forbid the stories others want to tell” (1203) is an opinion that I firmly agree with because the goal of

copyright is to *promote* creativity. If the producers at CBS and BBC are gaining revenue from their tales of Sherlock Holmes and self-declarations of creative authorities, then it would be hypocritical of them to condone their fan base for “stealing their ideas.” Granted, it would be unwise for anyone to take their scripts and recreate an entire episode for commercial use. Nevertheless, legal authorities should not avoid the acknowledgement of fanworks that build upon ideas as creative. If Hollywood is given the ethical authority, then fan practices should be granted the opportunity to constitute their own merit.

Cohen outlines one method for reform by modeling an idea that the copyright owner is granted limited power of authority. Limiting the power of the author broadens the idea that fan practices may be used in noncommercial and commercial settings both within and beyond the date of a copyright. Under Cohen’s model, in which she asserts *Harry Potter* as a hypothetical model, J.K. Rowling may publish an eighth *Harry Potter* novel, but would not have the authority to ban a secondary author from publishing a story about a new or another character (1203). Cohen does not claim that this is the ideal model for reform. However, she does give valuable insight into another way of promoting creativity. Perhaps, a method that combines the principals from Link’s “morality factor,” and Cohen’s power-limiting ideal will yield a clearer road for fair use of copyright material.

Because there is no argument against reforming “republishing” copyright material for educational purposes, the focus of reform should be specific, and only focus on the target of fan practices. The U.S. Copyright Office holds records of legal proposals concerning fan practices in relation to the music industry for “cover songs” and fan practices for extracting copyrighted film clips for fan “vidding.” Each subculture within media fan culture has its own areas in which fair use and infringement are highly specific in legal analysis. However, one step toward improving

the system would be for the acknowledgement of fan fiction to be an area of creative writing. Secondly, noncommercial publications and postings online should not be universally banned from authors who find them displeasing. If a particular piece is plagiarism, “the unacknowledged use of someone else’s words claimed as one’s own,” then the copyright owner has the right to have the content removed. The OTW outlines three factors, which in their opinion, are the factors which generally highlight the majority of fanworks as legitimate examples of fair use. These factors include the (1) noncommercial, nonprofit publication of fanworks that are (2) “transformative, adding new meaning and messages to the original; (3) are limited, not copying the entirety of the original; and (4) do not substitute for the original work” (OTW). If these contributing factors uphold for the majority of fanworks, and then fans may be able to legally produce derivative works without fear of a copyright owner removing their work from the internet.

Separately, if a fan has produced what they believe is a transformative work and wish publicize it in the commercial market, as any other “original” creator, it is possible in the present time. However, some fans may seek legal advice from attorneys who specialize in copyright. Oftentimes, a fan fiction that is published for a work still under copyright protection must change the names of characters and settings, certain character traits that make them recognizable, and remove any links to the online publication (if any) which had the original names and traits intact. One example is *Fifty Shades of Grey* by E.L. James, which was originally online as a fan fiction titled “Master of the Universe” and posted under the pseudo name Snowqueens Icedragon (Jamison). The *Fifty Shades* Trilogy quickly gained popularity (and profit) despite its criticism from the mass media and fans. Yet, the work has spurred its own franchise including a movie deal and parodies including *Fifty Shades of Earl Grey* by Fanny Merkin and *Spank! The Fifty*

Shades Parody stage production. Since the reveal of her creative source, James has posted on her website a message about her inspiration from the *Twilight* fandom and Stephanie Meyer (Jamison).

While not all writers write pornography inspired by vampire novels, the interest concerning fan publications for profit indicate a legitimate market for fan writing regardless of literary talent, genre or moral structure of the fan work. *Amazon.com* recently introduced the first commercial fan fiction domain called Kindle Worlds in which licenses may be granted easily and efficiently from the copyright holders (Haq, and Oriscoll). The article, “Amazon takes fan fiction commercial,” explains the company pays royalty to the copyright owner and to the fan fiction author, who receives a small percentage of revenue as they sacrifice the rights to their published work to *Amazon*. It is unclear whether or not the company plans on monopolizing the fanwriting subculture in an attempt to gain the rights to the next bestseller like *Fifty Shades*. Nevertheless, the company opens the possibility of fan fiction as a permanent fixture in capitalistic society.

A Future of Welcomed Opportunity

The television series *Supernatural* has a large fan database of writers. Jules Wilkinson (missyjack) writes “The Epic Love Story of *Supernatural* and Fanfic” in *Fic* that “It’s hard to estimate how many tens of thousands of *Supernatural* fanfic stories have been written. There are over 80,000 *Supernatural* stories on FanFiction.Net, and over 43,000 on the Archive of Our Own. The number on LiveJournal is impossible to estimate, but a project that catalogued all the stories posted on the “*Supernatural* Newsletter” on LiveJournal between October 2006 and March 2010 found links to nearly 40,000 fics.” Wilkinson acknowledges not only the quantity of fan fiction, but then discusses how the entire *Supernatural* team of writers, producers, cast, and crew, actively accept, support, and even *encourage* their fans practices, which oftentimes feature

social taboos. However, the show itself has incorporated fan practices into its episodes, namely in situations where the title characters discover incestuous fan fiction online during a comical scene from the episode titled “The Monster at the End of This Book,” or the returning character Becky Rosen who is a fangirl. Wilkinson writes, “TV writing, of all artistic pursuits, can be seen as most analogous to fanfic. From script to screen it’s a collective effort, in which writers, artists, crew, and actors work within a shared universe to produce a story each week. Perhaps those involved in making TV are best able to understand what we do, because it is a version of what they do themselves.”

The healthy relationship between fans and creators of *Supernatural* suggest the possibility that the mainstream media will embrace fan culture as a positive form of artistic domain. From the fan practices in the sixties following *Star Trek* to the worldwide phenomenon of *Harry Potter*, fans open the doors to creative practices and consumer marketplaces. It may be wise that a reform in copyright that is supportive of fan practices occurs in the United States’ near future. The film industries will continue to thrive from the adaptations of page to screen. Within the past decade, *Lord of the Rings*, *Harry Potter*, *The Twilight Saga*, and *The Hunger Games*, alone have encompassed fan specific products to fulfill a desire for “more” out of the original writing. Movies and merchandise are one form in which creativity may encourage capitalistic practices. Fan practices encourage community and identity. Therefore, nonprofit publications of fan works, including fan fiction, keep the fandom alive through the exchange of ideas, and thus fuel the continuation of consumerist values of buying more products that copyright holders supply. Ultimately, the fandoms support the economy because consumerist fans introduce their peers in person and online into their fandom in a form of advertising. Fans buy merchandise and showcase it to their peers, have blogs on *Tumblr* that feature fan works that

allow open doors to new audience members. Potentially, these new audience members grow to identify with a fandom and will be compelled to buy more products supplied by the franchise. If copyright ensures noncommercial fan practices are generally fair use if it is transformative and not plagiarism, then it is possible that commercial practices may be legal. Guidelines for determining if a fan work is fair use of copyright may prove beneficial to creative output and the economy.

One solution would be to reduce the period in which a work may be copyrighted, as with the case of Sherlock exemplifies how the amount of time after one of more publications by the same author raises the question “Is the character Sherlock Holmes part of the public domain?” Hence, fans and companies would be able to commercially produce their own works that incorporate characters, concepts, and other ideas with less potential for lawsuits. A second solution would be similar to *Amazon*’s approach of buying licenses from publishers and other owners of copyright so fans may earn profit from their works. This appears to be the most likely direction in which fan works will be commercialized because it benefits fans, *Amazon*, and the copyright owner. However, it has potential consequences of restricting capitalistic benefits to the fans because they would not have the rights to their own published works. A third solution would be to allow transformative works to be published commercially as in Cohen’s model, but promote trademark licensing for specific characters, example Harry Potter, if a work is presently under copyright. This may prove beneficial to fans, who would be allowed to freely publish their works, while getting permission from the copyright owner through licensing if the work is still within copyright. The third solution has the potential to be beneficial to both parties economically through granting owners and fans the opportunity to publish for, while granting book publishers and film companies greater chances of making a profit from fan works.

Fan culture and fan practices will likely challenge the legal copyright system in the United States in the near future. However, present acknowledgement of general fan works as transformative and hereby creative will determine their individual merit to the mainstream media. The franchise powers of J.K. Rowling, Warner Bros. and the creators of *Supernatural* exemplify that fan practices are positive and creative forms of expression and are beneficial for their own profits. From their attitude, there is a probability that more franchises will embrace fan practices and allow for free expression on the internet and increased fan works in the private sector.

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