

The Fanworks Problem in Copyright Law: A Critical Re-Assessment

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Submitted in partial fulfillment of the requirements
of the degree of Doctor of Philosophy

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This thesis is dedicated to my family, to my friends, and to fans.

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Abstract

There is no such thing as the copyright law of fanworks, and this is a thesis about it. Fanworks gained legal relevance in the internet era, when the ability to police such content first developed. Their legal status is such, three decades of study notwithstanding, that ex ante certainty as to whether a particular fanwork will infringe copyright remains the exception. This thesis re-examines the academic consensus that fanworks are a socially beneficial activity that should be permitted, but resides in a legal grey area, in an effort to determine why attempted solutions have been unavailing and find new routes forward. The thesis assesses what fanworks are and how they are used, concluding that their scope exceeds that depicted in most literature. This is followed by a black-letter analysis primarily rooted in American law, aided by insights from the law of England and other common law jurisdictions, to re-assess the extent of the problem. The black-letter analysis, which reveals multiple areas of unresolved uncertainty, is followed by an examination of the effects of uncertainty individual users and society, and reveals a wide range of significant detrimental effects. Prior proposed solutions, however, are unlikely to work, in large part because copyright law was not designed to address user rights. This strongly suggests a need for a positive law approach to user rights. Although copyright policy pays lip service to the need to balance rightholder interests against the public's interest, the public interest is not spelled out. This routinely tips the balance to the rightholders, who benefit from defined rights. Levelling the playing field will provide required clarity while ensuring that the public retains the right to engage in the kind of activities that have always been part of the usage of protected works.

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1 INTRODUCTION: THE FANWORKS PROBLEM IN COPYRIGHT LAW

There is no such thing as the fanworks problem in copyright law, and this is a thesis about it.¹

Fans of works of popular culture have been creating new works that draw upon, rework, and recontextualize the works that they admire since the dawn of history – the similarities between the biblical Noah and the Epic of Gilgamesh are well-established, while the Aeneid can be analysed as an example of Homeric fan fiction. More recently, fans of works of mass media have been creating works for their fandom – the audience of fellow fans of the work – for well over half a century, without substantial controversy for much of that period.

The hidden and uncontroversial nature of such fanworks vanished over the course of the past two decades. The expansion of the internet and the creation and development of the so-called “Web 2.0” platforms and social media facilitated an explosive growth in the number, varieties, and public exposure of fanworks. This, in turn, resulted in the legal status of fanworks becoming a more pressing question, not merely amongst academics but also in the day-to-day lives of those who create such works.

The study of the copyright issues of fanworks began in earnest over 25 years ago, with the publication of Rebecca Tushnet’s seminal

¹ This sentence is a reworking, or perhaps a mild parody (the distinction is, as Chapter 5 will show, not clear), and, in a sense, a fanwork of the introductory sentence from Steven Shapin, *The Scientific Revolution* (University of Chicago 1996) 1. (“There is no such thing as the Scientific Revolution, and this is a book about it.”)

article on fan fiction.² Since then, a considerable volume of additional literature has examined the copyright issues surrounding the use of mass media elements in fanworks. Three general conclusions have emerged from this body of work: fanworks are beneficial to society; should therefore be permissible uses of their source material; but reside in a legal grey area. These themes represent a rough consensus of the state of the law regarding fan reuse of mass media source material – one that has been remarkably stable over a period of decades. This consensus, however, reflects an undesirable state of affairs: fanworks reside in legal grey areas because there is little clarity in this area of law and no lasting solution has been found.

This alone would be problematic, but this does not capture the full extent of the copyright issues surrounding contemporary fanworks. In addition to the as-yet-uncertain nature of fanworks building upon mass-media originals, entire fandoms have sprung up which do not depend on source work provided by commercial mass media. Instead, they are focused around what can only be described as self-generated source material. Such fandoms, which have increasingly been able to produce monetizable content as a result of the continuing development of online content production and distribution platforms, have been stumbling upon additional copyright issues which can implicate matters not found in the cases that arise when fans use mass-media source works.

² Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 *Loyola of LA Ent Law J* 651.

These issues include some questions broadly similar to those that arise within the mass media fanworks context.³ However, many novel issues have also come to light. These include topics such as who owns rights to make characters that are members of a recently-invented fictional species,⁴ or the extent to which unique erotica tropes created and widely used within a specific fandom can be owned by an individual fan to the exclusion of others, or the question of the extent to which a carpet manufacturer can control the use of a distinctive carpet pattern by fans of science-fiction who want to show their loyalty to a specific convention by dressing up as a hotel carpet.⁵

These broader questions are not dissimilar from legal issues that have arisen in other areas of user-generated content, including remix and peer production. They also have clear connections to questions that arise within areas of non-traditional intellectual property, including areas as disparate as street art, clown faces, and roller derby performer names. Taken together, this combination of similarities raises additional definitional questions, with “what can or should we consider to be a fandom” not least amongst them.

³ For example, the question of when a new work is a parody or merely an infringing re-use of the original, which, as discussed later in the thesis, is a common feature of fair use cases, has also come up in the context of a case involving two politically active YouTubers. *Hughes v Benjamin* 437 F Supp 3d 382 (SDNY 2020).

⁴ Members of the Furry community who wish to portray members of an invented species called “Primagen” did so by purchasing the right at auction from the creator of the species, a practice that has been critiqued on several grounds including the question of whether the species can be protected. See ‘Primagen’ (no date) <<https://en.wikifur.com/wiki/Primagen>> accessed 15 July 2021.

⁵ The latter two examples are discussed in Chapter 4.3.5.

This thesis represents an attempt to identify the reasons that the fanworks problem has been so difficult to solve. The thesis examines both the view of fanworks that has been taken by the bulk of the existing copyright literature and the various components of the consensus. In the process, it will show that the problem is larger in scope and more in need of solution than might be obvious if the examination is limited to large traditional fandoms. It is also similar to a range of other problems seen in other kinds of creative works, and in other ordinary human uses of materials that are theoretically protected by copyright.

This approach allows an identification of, and focus on, the copyright issues of fanworks that share common elements that link a broad suite of other individual user problems that we are seeing. Identifying the thread linking the problems, in turn, permits us to shift the question from “what is the solution to this problem” to “what is the common issue which, if fixed, can solve these problems.” As will be seen, that issue is largely tied to copyright law’s origins and development as an industry-focused law that is not well-designed to reach individual conduct.

In a sense, then, the thesis is grappling with some of the questions that Judge Frank Easterbrook posed to early cyberlaw researchers in his famous *Law of the Horse* talk – but from a different direction.⁶ In his talk, Easterbrook questioned the need for what he referred to as “the law of specialized endeavours,” favouring instead more generalized approaches that would place the specialized subject in the context of general rules.⁷ “Only by putting the law of the horse in the context of

⁶ ‘Cyberspace and the Law of the Horse’ [1996] U Chicago Legal Forum 207.

⁷ *ibid* 207–08.

broader rules about commercial endeavours,” Easterbrook told his audience, “could one really understand the law about horses.”⁸ My goal is not to seek or describe a specialized copyright law of fanworks.⁹ Instead, it is to examine the specialized endeavour of fanworks and use that to better understand the issues of the underlying general rules.

There is no such thing as the fanworks problem in copyright law. The copyright uncertainties that surround fanworks exist but are not the product of any problem created by these works. Instead, they are the result of, and illuminate for us, structural problems within copyright law that are conspiring to create a situation where copyright law cannot equitably be applied to the acts of individuals.

1.1 A Tale of Two Copyrights

There is a theme that recurs, although not always explicitly, throughout this thesis: there is not *a* copyright law. There are two. There is a copyright law that regulates the creative industries, and there is copyright as understood, experienced, and lived by people.

Statutory copyright law in the common law countries descends from the Statute of Anne – a law which, at its core, was passed at the behest of the leading creative industry of the day.¹⁰ The entire trend and focus of copyright since has been one of expansion and modification of the law in response to industry needs, often in the face of new and/or disruptive technologies. During this period, laws were often passed with significant industry input, and on occasion as part of a negotiated

⁸ *ibid* 208.

⁹ Although I would not object to finding one.

¹⁰ Albeit not in the form they desired.

process. The result is a body of law, on both the national and transnational stages, designed to accommodate the regulatory needs of the creative industries. It has evolved, over a three-century period, into a flexible law that is designed to meet the needs of sophisticated actors with access to counsel.

These laws were not, for the most part, enacted with substantial user input. Why would they be? These were laws which, to the extent that they had real-world impacts on users, affected them only indirectly. Users might, for example, lose out on the opportunity to get lower-priced copies of works when copyright terms were extended, but they were not the ones who would copy and distribute the works; they were merely potential customers. Users might see a marginal increase in the cost of a pint of beer to offset the cost of their pub's ASCAP or BMI license, but they don't pay the piper directly.

This is not to say that users, including fans, made no use of works, of course. As we shall see, they did. It is just that most user conduct, including most of the production and distribution of fanworks, took place in ways that were for various reasons invisible to copyright owners, or nearly so. Disney might be able to see the superhero fanart you posted on DeviantArt today, but they could not see that same fanart on the cover of your maths notebook thirty years ago.

That has changed.

The advent of the internet and the resulting plunge in entry costs for the generation and distribution of vast quantities of copyright-protected works has sent shockwaves through most of intellectual property, and copyright has felt the impact more than most. There is no

area of copyright that has not been substantially affected, and the law has struggled to cope in every one of those areas. But perhaps no change has been larger than this: the acts of users have become visible, and subject to copyright owner policing.

Such policing has happened, openly and very publicly, in the “file sharing” arena, with thousands of individual users subjected to litigation. It has not happened as openly within the arena of secondary uses such as fanworks. This is not to say, however, that it has not happened at all; as will be discussed in Chapter 7, true noncommercial fanworks, although not often a source of litigation, are not uncommonly dealt with through extrajudicial legal mechanisms such as takedown notices and cease-and-desist letters.

This extrajudicial policing takes place, moreover, against a background of legal uncertainty. The chilling effects of such nonjudicial mechanisms can be, in many ways, more substantial than those seen in actual litigation; threats can be based on the copyright holder’s interpretation of legally uncertain areas rather than on settled law. This forces the user, who generally has substantially fewer resources available, to either yield to the threat or risk the consequences of a potential, but not definite, judicial decision. This in effect allows limits to be placed on users even if those limits are not aligned with the relevant law. Simply put, the uncertainties of copyright law are used as leverage by rightsholders, who frequently have access to resources and expertise that ordinary users lack.

At the same time, copyright uncertainty takes an additional toll on newer, fan-driven online content creation industries such as YouTube video production and Twitch livestreaming, as well as on those who are

using online content distribution to expand content in nontraditional areas within publishing. Here, the same suite of uncertainties in copyright that work to the detriment of those faced with demands from large content owners make it difficult for the small creators in these fields to clearly understand their rights under the law. This can, and has, led to unnecessary strife and dispute.

Simply put, both the creators of traditional fanworks and small creators working in newer and expanded creative arenas are being forced to make do with a copyright law ill-suited to their needs. The flexibility that meets the needs of the creative industries harms their interests, often to the benefit of participants in the traditional copyright industries.

Ultimately, all attempts to rectify copyright must deal with this fundamental disparity. Copyright law was written with the traditional creative industries in mind. It was not developed with the needs of users in mind, or indeed with the needs of creators outside the creative industries in mind. The broad application of copyright law in these areas is new, particularly on the scale that we see at present.

The central argument of this thesis is that the absence of bright-line copyright rules is, as illustrated by the problems confronting fandoms, a core copyright disparity that must be addressed if copyright is to fairly serve the interests of users and small creators.

1.2 Preliminary Definitions

There are several terms used in this thesis that appear straightforward and clear, but which may not always be understood the same way by all readers. Many of these terms – user-generated content,

fan, fandom, fanwork, and more – are critical terms for the purposes of this thesis. To ensure that there is a shared understanding of what these concepts encompass, I will discuss the definition for each key terms in some detail. In most cases, this will be done at the start of the discussion of that concept. However, there are two terms, fan and fandom, that are particularly important, and which are found throughout the thesis. Although each will be discussed in considerable detail later in the thesis, and the common understanding of the terms will be challenged, I am providing these definitions now as a starting point for the subsequent discussion.

The word fan comes from the word fanatic and was first applied to followers of forms of entertainment by sports reporters in the nineteenth century, but the use of the term soon expanded to include the followers of other forms of commercial entertainment.¹¹ The word “fan” has carried negative connotations in the past, although many of those have since been lessened as fans have become a part of mainstream culture. Nevertheless, the term continues to imply a degree of enthusiasm for the work which distinguishes the true fan from the more casual observer.¹² Although most of the focus on fans in this thesis will be on the creative activities of fans and the motivations for those activities, both of which will be discussed at length throughout, the importance (if any) of that additional enthusiasm will be discussed at greater length in Chapters 3 and 4.

¹¹ Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (20th Anniv Edn, Routledge 2013) 12.

¹² *ibid* 12–13.

A fandom is the group of fans who share a common enthusiasm for a specific form of entertainment. As Camille Bacon Smith put it in her ethnographic study *Enterprising Women*, fandoms are “related groups self-identified by their interest in written science fiction, in science fiction and action-adventure television and film, in comic books, Japanese animation, and costuming.”¹³ This definition focuses – as is not uncommon in the academic approach to this topic – on not only media fandoms, but the broader ‘geeky’ subset of interests. This focus has advantages but may be narrower than warranted. Nevertheless, the definition captures a critical element of fandoms: they are self-identified affiliations. This term does not, to put it another way, denote membership in an official organized body. Such bodies do exist within certain fandoms.¹⁴ They are not, however, the fandom itself; membership in the organized group is not required to be a part of the fandom.

Canon and canonicity are important concepts for many fandoms, particularly those that are centred on complex multi-work entertainment franchises such as Star Wars or Star Trek.¹⁵ The ‘canon’ for these franchises consists of the material that makes up the ‘official’ version of the fictional universes that the works are set in. To an extent, the question of whether or not to accept new material as canon is within

¹³ Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (University of Pennsylvania Press 1992) 308.

¹⁴ For example, The Royal Manticorian Navy is a fan club within the fandom centered on David Weber’s Honor Harrington novels. ‘The Royal Manticoran Navy – The Official Honor Harrington Fan Association’ (no date) <<http://trmn.org/>> accessed 15 July 2021.

¹⁵ Multiwork entertainment franchises tell a single story across multiple works, often using multiple types of media.

the power of the fanbase, and some resistance is sometimes exhibited.¹⁶ However, this is relatively uncommon even in the face of major revisions to a universe's canon. In a very real sense, the ability to set canon maintains the power of the rights holder to maintain a degree of control over a universe even in the face of substantial fan occupation. From an intellectual property law perspective, the relationship between the canon of a universe and the story told in the fanwork may be outcome-determinative in a copyright case, particularly in the United States, which favours parodic treatments of protected works.¹⁷

1.3 Methodological Background

This thesis examines the current state of the law of copyright as applied to fanworks. It seeks to make sense of the current legal landscape and assess its fitness as applied in the real-world. As a work of copyright scholarship, and particularly as one focused on areas involving popular culture, the methodology employed does not nearly fall into the conventional legal research bins.¹⁸ The initial intent was to pursue this project primarily through non-doctrinal means. This,

¹⁶ For example, many fans reject a revision to the original Star Wars film, which added a gunshot to a scene early in the first movie that featured, in the original, Han Solo preemptively dealing with a bounty hunter. The fan objections made the phrase “Han Shot First” something of a pop culture icon in its own right. See JC Lyden, ‘Whose Film Is It, Anyway? Canonicity and Authority in Star Wars Fandom’ (2012) 80 *Journal of the American Academy of Religion* 775, 778–81.

¹⁷ Compare *Suntrust Bank v Houghton Mifflin Co* 268 F 3d 1257 (11th Cir 2001); *Salinger v Colting* 607 F 3d 68 (2d Cir 2010).

¹⁸ For further discussion, see generally Arpan Banerjee, ‘A Primer on Intellectual Property and Popular Culture Research’ in Irene Calboli and Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021).

however, proved impossible. As has been noted, the sine qua non of non-doctrinal research is an understanding of the relevant law governing the area.¹⁹ This necessitated spending more effort on establishing the baseline than initially anticipated. The ultimate methodology in conducting this research blended black-letter legal research to establish the baseline legal environment and assess the overall state of the law in this area with the analysis of popular culture, in a manner similar to that described by Banerjee.²⁰

The initial doctrinal approach was necessary despite the considerable volume of scholarship in this area. Although there is at present a surfeit of scholarship discussing the law of copyright in the context of fanworks, the existing work largely consists of a large volume of individual articles, each of which focuses on a limited number of aspects of the greater problem. These papers often approach very concrete issues and are frequently focused on specific types of fanwork. The body of work that examines fanworks copyright problems at higher levels of abstraction is not as broad; the examination of the issue at a higher level of abstraction was central to the thesis.

A doctrinal approach has, as a result, been critical to the thesis. This portion of the approach has employed two primary prongs: an analysis of the academic literature that focused on identifying the fanworks problem as it has been examined within the literature, and a black-letter law analysis that has focused on discerning the copyright law as applied to fanworks. This doctrinal framework has then been

¹⁹ P Ishwara Bhat, *Ideas and Methods of Legal Research* (Oxford Univ Press 2019) 165.

²⁰ Banerjee (n 18).

evaluated against an understanding of fanworks that has been informed by both observation and an evaluation of the social sciences work in this area, to identify the central problems that the law in its present state is creating for a range of actors in this area.

In addition, although the thesis is not a work of critical scholarship, the policy recommendations have been informed in part by that methodology. In particular, it has been informed both by some of the strands of critical scholarship within legal scholarship in general and intellectual property scholarship in particular as well as by the scholarship within fan studies, which has often focused on the relationship between mass media, popular culture, and the disenfranchised.

Finally, the approach taken is largely atheoretical. There are many theories of intellectual property, some of which focus on its role as property; others on the role as facilitating (or inhibiting) creativity. This thesis grapples with none of them. It is more concerned with the general question of what the state of the law in this area is now, what effect that state of affairs has as a practical matter on the activities of the people affected, and what changes might result in a more equitable state of affairs. To the extent that a normative principle is needed, this thesis operates from the presumption that restrictions on creative activities that people have engaged in for extended periods of time require substantial justification and should not result from accidents of law.

1.4 Limitations

As is true of every thesis, this thesis is unable to provide an entirely comprehensive view of the landscape. In this case, there are

limitations on the subject matter, jurisdictions examined, and the timeframe covered.

1.4.1 Subject Matter

This is a study of the copyright law of fanworks, not the entire law of fanworks, or even just the intellectual property law of fanworks. This is not intended to suggest that such issues are absent or unimportant. They are neither. Fanworks rooted in mass-media works will often implicate trademark law. Other types of fanwork may implicate other areas of IP law. For example, there may be right of personality issues at stake within some of the costume-based fandoms, and within the video and streaming communities.²¹ There is simply no way to adequately, or even superficially, address all of those issues in a single thesis. Mention of these issues will be made when appropriate. In-depth discussion of these legal issues will be deferred to future work.

I have adopted an additional subject matter restriction for similar reasons: this thesis contains minimal discussion of music. This, too, is not to suggest that such issues are unimportant.²² However, the multi-layered nature of music copyright, along with the presence of mechanical licenses in most relevant jurisdictions, adds additional levels of complexity that are difficult to accommodate in a work of this length. Although the topic is not entirely ignored in this thesis, it is not covered

²¹ Discussed in Chapters 3 & 4.

²² To the contrary, music fandoms exist, focused on individual artists or bands (*eg* Beatlemania) or around genres of music (Korean pop music, or “K-Pop,” has a particularly active fandom). See, *eg*, Sam Quach, ‘YouTube, K-Pop, and the Emergence of Content Copycats’ (2018) 41 *Hastings Comm. & Ent. L.J.* 77, 77).

in as much depth as would be possible absent length restrictions. Unless music is explicitly mentioned, it should not be presumed that the discussion of existing law is fully applicable in the music context.²³

1.4.2 Jurisdictional

This thesis is restricted to a study of the Anglo-American, common-law copyright framework.²⁴ There are several reasons this is appropriate. Although the Anglo-American jurisdictions differ from each other in numerous aspects of copyright law, their copyright laws are descended from a common origin and share a common purpose. All Anglo-American copyright laws are rooted in the 1709 Statute of Anne, and still bear the residue of this origin. This origin, in turn, is from a law that came about largely to regulate a situation within the publishing industry, and to provide incentives for the publication of new works.

Other laws that are generally viewed as copyright laws, and in particular the author's rights laws of the civil law jurisdictions, do not have the same underlying purpose. Instead, these laws are oriented more toward the protection of the work as the intellectual progeny of the author, and to providing the author with protections from industry. This different foundation makes it difficult to compare these jurisdictions with the Anglo-American ones for the purposes of this study. These

²³ This is particularly true for the discussion of fair use, which has largely been ignored in the context of music sampling.

²⁴ Although copyright is not a feature of the common law, being instead a statutory construct, the copyright of the common law nations shares many features of common, including judicial interpretation of statutes. It is also conceptually distinct from the authors' rights approach of the civil law nations. The term "common law copyright" is therefore used as a term of convenience.

jurisdictions are, for the most part, not included in this thesis, although decisions of the CJEU are referenced where relevant.

Finally, it should be noted that the final thesis has proven to be far more American-centric than was initially anticipated (or desired). Ultimately, the vast bulk of both the academic work on fanworks and the case law that touches most clearly on this area have come from America. In addition, the American notice-and-takedown system and American location of key online intermediaries have led to fair use becoming something like a governing law for this area of activity. There is much less in other jurisdictions – to the extent that a true comparative approach to the problem is not readily achievable.

1.4.3 Temporal

This thesis reflects the state of the law as of 15 June 2022.

1.5 Structure of the Thesis

The remainder of this thesis is divided into three parts. The first part of the thesis explores the current landscape. Chapter 2 sets out the current legal foundation, describing the academic view of fanworks, the academic consensus that has been reached in this area, and the relationship between fanworks and other forms of UGC. In Chapter 3, fanworks are explored in more detail. The major types of fanwork are discussed, along with their treatment in the literature. In addition, I argue that the web of borderline cases and, in particular, the difficulties inherent in separating UGC and fanworks argue for a broad-based definition of fanworks. I continue this argument in Chapter 4, when I set out a brief discussion of fandoms that makes the case that the line

between fanwork and fandom is, in many cases, illusory – that it is not possible to assess the copyright law of fanworks without also considering the copyright law of fandoms. Together, these three chapters provide the foundational background knowledge supporting this thesis; Chapters 3 & 4 also provide the real-world conditions that the copyright law of fanworks must cope with, and test, adjust, and expand the academic model of fanworks.

The second part of the thesis contains the black letter law analysis of the existing law of fanworks. Chapter 5 looks at the application of specific legal doctrines, and, in particular, at the American doctrine of Fair Use, as they may be applied in this context. As this chapter reveals, whatever predictability fair use might have in other contexts is largely lost in the context of fanworks. In Chapter 6, I examine the subset of cases that have connections to fanworks. I identify four clusters of cases of increasing relevance to fanworks, as well as several ‘grey area’ cases that highlight definitional difficulties. I then derive a number of rough rules, or at least guidelines, that may provide some limited guidance in fanworks cases. As a unit, these two chapters validate the academic consensus that fanworks reside in a legal grey area.

I begin the third, and final, part of the thesis in Chapter 7 by making the case that the uncertainties in fanwork copyright are real legal problems that are producing ongoing detrimental effects for both copyright users and non-industrial creators. In addition to individual effects, there are many negative social effects, ranging from the chilling of forms of political speech, to a reduction in the ability of indigenous peoples to control their own cultural heritage, to potential harm to the ability to fully realize the potential of new genres. In Chapter 8, I argue

that although some of the solutions that have been proposed might mitigate some aspects of these harms, none provides the necessary comprehensive solutions. The existing proposals are constrained by the current copyright system, and the root causes of the observed inequities are inherent in the design of the system. Without the development of a concrete body users' rights laws, we will continue to fail to fully protect those rights, with unacceptable long-term consequences.

2 THE ACADEMIC FRAMEWORK

Determining the copyright status of frameworks has been primarily a theoretical and academic exercise. The legal status of such works is not explicitly stated in statute. Few decided cases in any common law jurisdiction – published or otherwise – squarely apply existing legislation or regulation to fanworks. Of those that do, the majority involve fanworks in the expanded sense of the definition; cases involving non-commercial secondary works based on mass media are all-but-nonexistent.²⁵

This is not to say that disputes over fanworks are absent. However, when such disputes arise, litigation is uncommon. As will be discussed subsequently, many factors militate against litigation in such cases.²⁶ In particular, the costs of litigation generally overwhelm the benefits, for both claimants and defendants. Notice and takedown often produce the removal of online fanworks, as cease and desist letters do for other content, without the need for litigation. Such disputes do not result in outcomes that clarify the law for others.

In the absence of clear legislative or judicial guidance, academic discourse has played an outsized role in our understanding of copyright law as applied to fanworks. This chapter examines the academic framework that has developed around fanworks. This examination encompasses work done on fanworks both as traditionally defined and

²⁵ Even the rare exceptions, such as the *Axanar* case discussed in Chapter 6.3.3, tend to involve conduct at the outermost margins of what is reasonably viewed as fan production, and conduct that is at least borderline commercial. See also Chapter 6.4.1.

²⁶ See generally, Chapter 7.

on related concepts, such as UGC, that encompass the broader view of fanworks.

The academic framework contains few monograph-length published works.²⁷ It is instead the cumulative product of many individual papers written over approximately the last quarter-century, beginning with the publication of Rebecca Tushnet's *Legal Fictions*.²⁸ The body of research that has been assembled since is, on the whole, broad in its coverage of fanworks, with many individual areas covered. However, the relative dearth of monographs limits the ability to assess the overall landscape.

This chapter provides a consolidated overview of this research, grouped into four key areas. The first section examines the model of fanworks that has been used for much of this research. This model, which roughly corresponds with what the thesis refers to as the traditional definition of fanworks, provides the 'experimental model' that has been the predominant focus of the work in this area. The second section

²⁷ As of the time of writing, the only monograph-length legal works exclusively focused on the law of fanworks are Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011) and Marc H Greenberg, *Fandom and the Law: A Guide to Fan Fiction, Art, Film, and Cosplay* (ABA 2021). A small number of other monographs focus on related areas, such as UGC. See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (Penguin 2004); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin 2009).

²⁸ Tushnet, 'Legal fictions' (n 2). Some earlier works mentioned fanworks in passing, see, eg, Rosemary J Coombe, 'Author/Izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders' (1992) 10 *Cardozo Arts & Entertainment Law Journal* 365, but this was the first to deal primarily with fanworks and copyright.

derives a rough consensus view of the law in this area from the existing work. The third reviews the areas of related copyright study related to the broader view of fanworks. Finally, dissenting views on fanworks are discussed.

Collectively, this work demonstrates that there is a reasonable, albeit not universal, consensus view that fanworks are socially beneficial works, and that they should generally be permitted under copyright law in most circumstances. There is also a broad consensus that this is not clearly the actual state of copyright law at present; the legal requirements are at best murky. These consensus views encompasses both the narrow and broad definitions of fanworks. The dissenting views, meanwhile, tend to be focused not so much on the questions of fan or user interests in copyright law, but predominantly on the commercial effects of commercial conduct on copyright owners. Overall, the academic landscape paints a picture of an uncertain legal environment in an area where certainty would be desirable.

2.1 The Legal-Academic Model of Fanworks

As depicted in the legal literature, fanworks tend to hew to a simple model, in which fanworks are individual, typically non-commercial, secondary works tied to works of mass culture.²⁹ This

²⁹ This model is rarely expressed explicitly. It can be seen, implicitly or explicitly, in many of the works cited in Appendix A; for specific examples, *see generally, eg*, Jane Becker, ‘Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet’ (2014) 14 Connecticut Public Interest Law Review 133; Melissa De Zwart, ‘“Someone is Angry on the Internet”: Copyright, Creativity and Control in the Context of Fan Fiction’ in *Research Handbook on Intellectual Property in Media and Entertainment* (Elgar 2017); Casey Fiesler, ‘Everything I Need to Know I

depiction corresponds well with the traditional model of fanworks. It also easily fits the common-law litigation framework, which provides for the resolution of individual disputes, not broad legal questions. It does not, however, fit as comfortably with either the broader definition of fanworks or with the practices of fandoms. This section explores and critiques this “standard model.” It also discusses and critiques a nearly always implicit additional element of the model: the assumption that fanworks are primarily a feature of the online environment.

Learned from Fandom: How Existing Social Norms Can Help Shape the next Generation of User-Generated Content’ (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 729; Katrina Monica C Gaw, ‘Restoring Balance to the Force (of Fandom): An IP Management Strategy for Walking the Fine Line between IP Protection and Fan Engagement’ (2017–18) 62 *Ateneo LJ* 1483; Steven D Jamar and Christen B’anca Glenn, ‘When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction’ (2014) 1 *Texas A&M Law Review* 959; Sonia K Katyal, ‘Performance, Property, and the Slashing of Gender in Fan Fiction’ (2006) 14 *American University Journal of Gender, Social Policy, and the Law* 461; Stacey M Lantagne, ‘The Better Angels of Our Fanfiction: The Need for True and Logical Precedent’ (2011) 33 *Hastings Communications and Entertainment Law Journal (COMM-ENT)* 159; Jacqueline D Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) 52 *Houston Law Review* 425; Meredith McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 *Boston University Journal of Science & Technology Law* 433; Mark Peterson, ‘Fan Fair Use: The Right to Participate in Culture’ (2017) 17 *U C Davis Business L J* 217; Aaron Schwabach, ‘The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright’ (2009) 70 *University of Pittsburgh Law Review* 387. There are, however, several exceptions. *See generally, eg*, Melissa Anne Agnetti, ‘When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment’s Use as a Defense to Copyright Infringement Claims in Fan-Made Works’ (2015) 45 *Southwestern Law Review* 115; Cathay YN Smith, ‘Beware the Slender Man: Intellectual Property and Internet Folklore’ (2018) 70 *Florida Law Review* 601; Jessica Voegelé, ‘Where’s the Fair Use? The Takedown of Let’s Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform’ (2017) 33 *Touro Law Review* 589.

2.1.1 Fanworks as Single Works

Academics have acknowledged the importance of reader interactions with popular culture, both in the fanworks and broader IP rights contexts.³⁰ As applied to fanworks, there has been discussion of the importance of these communicative aspects since the inception of work in this area.³¹ This understanding that fanworks are both tied with membership in a fandom and are often a form of communication within that fandom is at the heart of the consensus that fanworks serve to advance important public interests.³² It is not, however, reflected in the approach taken by most papers.

Notwithstanding the general understanding that fanworks are not created or intended to be consumed as individual works, the legal analysis of fanworks normally treats them as standalone works for the purposes of copyright law. That is, a single fanwork or type of fanwork is compared, for copyright purposes, solely with the franchise upon which it is based, without reference to its role in broader fanworks communities. This remains true even in papers that expressly acknowledge the importance of communicative aspects of fanworks.

This single-work focus is not merely understandable. It may be inevitable. The analysis of copyright infringement requires a side-by-side comparison of two works: the allegedly infringing work and the original. There is no space within this analysis, in its current form, for the

³⁰ See, eg, Coombe (n 28) 378.

³¹ See, eg, Tushnet, 'Legal fictions' (n 2) 655–58; James J Anson-Holland, 'Fan Fiction: A New Zealand Copyright Perspective' [2018] *New Zealand Law Review* 1, 20–34..

³² See Chapter 2.3.1.

comparison of a group of disparate works by disparate authors against a single original.³³ Any focus upon, or discussion of, the use of the work is relevant, at most, to the application of limitations and exceptions and does not come into play until after the infringement determination has been made.

This may seem too basic a point to warrant discussion. It is how copyright law works. However, it is worth noting if only because, as will be discussed later, this is an area where beginning from the assumption that the copyright framework should apply at all places these works at a disadvantage from the outset.³⁴ Continuing to discuss these works primarily within the standard model implicitly assumes that it is necessary and proper to do so, narrowing the list of solutions seen as plausible.

2.1.2 Fanworks as Derivative Works

The operative assumption of the bulk of the work done to date, particularly within the American literature, has taken it as a given that a fanwork is a derivative of a popular culture work. This assumption is, although widespread, not entirely safe, even within the standard model. It is largely inapplicable within the broader conception.

³³ The converse is not true. Multiple works owned by the same plaintiff within the same franchise have been combined for the purposes of assessing infringement, sometimes even where the authors of the individual works are generations removed from each other. See, eg, *DC Comics v Towle* 802 F3d 1012 (9th Cir 2015); *Paramount Pictures Corp v Axanar Productions, Inc* 121 USPQ2d 1699 (CD Cal 2017); ‘Shazam Productions Ltd v Only Fools The Dining Experience Ltd & Ors [2022] EWHC 1379 (IPEC) (08 June 2022) This is discussed further in Chapter 6.4.3.

³⁴ See Chapter 5.

Although fanworks, in the narrow conception, are always tied with individual mass media works, not all are created in ways that clearly implicate copyright. Take, for example, the Lord of the Rings fanfic “A Sweet Apple on a Sour Apple Tree.”³⁵ This is a short (~750 word) piece of fiction. It is explicitly identified by the author as Lord of the Rings fanfic, and the author also explicitly identifies the two characters that are involved in the story. However, this identification takes place solely outside the story itself, in the title, summary, and metadata.³⁶ Without that extra-textual information, there would be no way to know what characters were used or where the story was set. It is possible that the use of character names in the opening information might implicate trademark law, but a copyright infringement claim would be much more tenuous.³⁷ It is likely that there are many fanworks which fall into this category.³⁸

³⁵ OwlBird, ‘A Sweet Apple on a Sour Apple Tree’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/works/683079>> accessed 16 February 2021.

³⁶ Metadata refers to ‘tags’ that are associated with the work, and are used to enable those looking for stories involving a specific fandom or character to locate the story.

³⁷ The law surrounding the use of fictional characters is not settled even where the identity of the characters is clear within the new work. *See, eg*, Katherine Alphonso, ‘DC Comics v Towle: To the Batmobile!: Which Fictional Characters Deserve Protection Under Coypright Law’ (2017) 47 *Golden Gate U L Rev* 5, 17–18. A situation where the only reason for the reader to conjure the mental image of the character is information provided in the metadata associated with the allegedly infringing work would be even less clear. It might be arguable that the author’s statement alone, with nothing in the work itself, is somehow enough to make the story a derivative of the original. This cannot, however, be safely presumed to be true.

³⁸ *See, eg* TamfarkasAnimation, ‘Bag End Gardens’ (*DeviantArt*, no date) <<https://www.deviantart.com/tamfarkasanimation/art/Bag-End-gardens->

The derivative works presumption is problematic on two fronts. As Chapter 4 will show, reducing fanworks to a subset of derivative works fails to account for fandoms that produce entirely original content. This increases the possibility that such communities will fall through the cracks in the discourse and contribute to the understudied nature of the copyright issues that arise in these communities. The focus on this area also ignores substantial issues with the coherence of the derivative work doctrine itself. These are immediately apparent when we consider the unanswered questions surrounding the short story described above, including whether information in a title or metadata can make an otherwise anodyne short story a derivative work, but they go even deeper.

As is discussed in Chapter 5.1, there is substantial confusion in American law over the relationship between the “transformative work” portion of the fair use exception and the derivative works right. In particular, there is an outstanding lack of clarity as to where the line is between a permissible transformative work and an infringement of the derivative works right.³⁹ By assuming without analysis that fanworks are derivative, the standard model in effect ignores substantial questions regarding the coherence of the derivative works doctrine, particularly in cases where the fanwork in question seems loosely based on a mass-

920329596> accessed 27 June 2022. The work is a painting of a garden; the affiliation with *Lord of the Rings* is apparent only from the title.

³⁹ See, eg, *Andy Warhol Foundation v Goldsmith* 11 F4d 26, 37–40 (2d Cir 2020).

media work but lacks clear direct use of specific features taken from the original.⁴⁰

2.1.3 Fanworks as Noncommercial

The standard model relies heavily upon the non-commercial nature of fanworks. Fanworks are viewed as things that are created and shared freely, rather than as things that are bought and sold within the commercial marketplace. This noncommerciality is often raised within the arguments for providing protection to fanworks.

To be sure, the vast majority of fanworks are non-commercial under any definition, at least as far as the initial creator is concerned.⁴¹ The question of commerciality is also critical to the assessment of many exceptions and limitations, in multiple jurisdictions. The focus on these issues is entirely understandable.

The real-world complexities involved in this portion of the standard model will be discussed in Chapters 3 & 4. Central among them, however, is this: conduct that is not clearly non-commercial has long been critically important to fandoms. Fanzines, for example, were a

⁴⁰ One of the best examples of this is the copyright controversy over the “Tanya Grotter” books – a Russian series of books admittedly inspired by Harry Potter, but which makes no direct use of features from the series and now includes more books than the original. For further discussion, see Dennis S Karjala, ‘Harry Potter, Tanya Grotter, and the Copyright Derivative Work’ (2006) 38 Arizona State Law Journal 17.

⁴¹ This may, however, not hold true for the same works as far as the websites that serve as hubs for their distribution are concerned; hypothetical author BigFan123’s fan art of Luke Skywalker may not have any commercial benefit for BigFan, but it does provide commercial benefits to (eg) DeviantArt. These considerations do not relate directly to fanworks, and are largely beyond the scope of the thesis.

common means of circulating fan fiction decades before widespread internet access was available. Few, if any, fanzine editors did so for profit. However, fanzines were not necessarily free. Some operated on contribution models; others on a more formal subscription basis. The success of fanzines, moreover, often depended on whether they were viewed as good value for money.⁴²

Particularly in the pre-Internet era, some level of commerciality has long been a feature associated with some fanworks. Here, as in the derivative works right, failing to address these issues is likely to lead to difficulties later on.

2.1.4 Fanworks as Tied to Mass Pop Culture

With limited exceptions, the prevailing model of fanworks presumes that a fanwork is tied to a specific popular work. This places the focus on fandoms as linked to works what has been referred to as “mass culture” – “commercial culture where culture is a commodity.”⁴³ In particular, the emphasis has largely been on fandoms that have arisen from major, high-profile multimedia mass media franchises such as Star Trek, Star Wars, or Harry Potter.⁴⁴ The interests of fandoms from less

⁴² See generally, Bacon-Smith (n 13).

⁴³ Debora Halbert, ‘Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 921, 927. See also, Becker (n 29) 138–40.

⁴⁴ For example, the following copyright papers discuss, or at least mention, Star Trek fandom and fanworks: Agnetti (n 29) 121–22; Becker (n 29) 134, 153; Anupam Chander and Madhavi Sunder, ‘Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use’ (2007) 95 *California Law Review* 597, 598, 602–03, 609–10; Christina Chung, ‘Holy Fandom,

mainstream fandoms, such as those that have grown up around the Honor Harrington books, Omegaverse erotica, and Cult of the Carpet cosplay, have received substantially less attention.⁴⁵

There can be no doubt that an enormous number of fanworks conform to this aspect of the model. And the focus on these works is understandable. These are the fanworks affiliated with the works that are commercially valuable franchises. As such, they not only have the largest fandoms and receive the most public attention, but they also represent the best-resourced and most sophisticated potential copyright claimants. These claimants can pick their fights with care, pursuing only

Batman - Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure Note' (2013) 19 BU J Sci & Tech L 367, 396; Morgan Drake, 'It's Dead Jim-Fair Use in Fanworks without Precedent' (2016) 27 DePaul J Art Tech & Intell Prop L 199, passim; Fiesler, 'Everything I need to know I learned from fandom: how existing social norms can help shape the next generation of user-generated content' (n 29) 733–37; Jordan S Hatcher, 'Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law' (2005) 2 SCRIPT-ed 514, 516–17; Katyal (n 29) 483–87; Lipton (n 29) 457–58; McCardle (n 29) 440–44; Schwabach, 'The Harry Potter lexicon and the world of fandom: fan fiction, outsider works, and copyright' (n 29) 388–92; Madhavi Sunder, 'Intellectual Property in Experience' (2018) 117 Michigan Law Review 197, 230–31; Rebecca Tushnet, "'I'm a Lawyer, Not an Ethnographer, Jim": Textual Poachers and Fair Use' (2014) 2 The Journal of Fandom Studies 21, passim. This is by no means a complete listing; it has been limited for the sake of convenience.

⁴⁵ Academic treatment of the exceptions include Agnetti's work on Cult of the Carpet, Smith's work on Slender Man, and Vogele's work on reaction videos. See Melissa Anne Agnetti, 'When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment's Use as a Defense to Copyright Infringement Claims in Fan-Made Works' (2015) 45 Southwestern Law Review 115; Cathay YN Smith, 'Beware the Slender Man: Intellectual Property and Internet Folklore' (2018) 70 Florida Law Review 601; Jessica Vogele, 'Where's the Fair Use? The Takedown of Let's Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform' (2017) 33 Touro Law Review 589.

those most likely to result in successful outcomes. As a result, these fandoms are the ones most likely to result in the generation of case law in this area, as the various fanwork-adjacent Star Trek and Harry Potter cases demonstrate.⁴⁶ These fandoms are critically important to the development of the copyright law of fandoms.

Nevertheless, this focus also oversimplifies. There are many non-mass-culture fandoms.⁴⁷ The range of copyright issues those fandoms exhibit is at least as broad as that seen in the mass-media realm and is more likely broader. As important as mass-media fandoms are, it is possible that maintaining the focus on this aspect of fandom carries with it the risk of addressing only part of the entire legal picture presented by the intersection of fandoms and copyright.

2.1.5 Fanworks as an Online Phenomenon

Finally, there is one implicit element of the legal academic model: it focuses on the communication of fanworks in the online environment. There is often not an explicit statement to this effect, but the presumption that these are online works is nevertheless pervasive. In part, this is because fanworks have become widely viewed as but one of a variety of types of user-generated content and are often analysed in that context.⁴⁸

⁴⁶ See generally the *Axanar*, *Harry Potter Lexicon*, and *Joy of Trek* cases, discussed respectively in Chapters 5.2.1, 5.2.2, & 6.2.2.2.

⁴⁷ Which will be discussed further in Chapter 4.3.

⁴⁸ See, eg, Edward Lee, 'Warming up to User-Generated Content' (2008) 2008 University of Illinois Law Review 1459, 1530–33; Halbert (n 44) 945–48.

However, the focus on online fanworks is not limited to papers discussing UGC. The online aspects of fanworks are often centred in work that is specific to fanworks. Tushnet's initial fan fiction paper, for example, was written at a time when the Internet was still in the early phases of the transition from its original academic obscurity to its present ubiquity, and at a time when non-online methods of fanwork distribution were still important. Nevertheless, her conclusions were phrased in terms of the need to "recogniz[e] the legitimacy of fan fiction on the Internet."⁴⁹ A similar focus is widely seen in this genre of research.

The focus on the online aspects of fanworks can be explained by a number of factors. Temporally, the study of the copyright implications of fanworks has largely coincided with the development of the internet, and the Internet has undoubtedly been the cause of an exponential increase in the number and extent of publicly available fanworks. It has brought fanworks into wider visibility than they had in the past, and this is in large part what has made fanwork a thing that is plausibly policeable by copyright owners.

Nevertheless, and as will be discussed elsewhere in this thesis, the focus on the online omits the historical context of fanworks.⁵⁰ This has the effect of ignoring their pre-internet existence, their pre-internet acceptance, and their role within pre-internet culture. This can obscure a crucial feature of fanworks: they are part of a longstanding tradition of

⁴⁹ Tushnet, 'Legal fictions' (n 2) 683.

⁵⁰ Discussed in more detail in Chapter 3.5.

creative activity that was not, until recently, widely viewed as relevant to copyright law.⁵¹

Collectively, the standard model has provided a solid foundation for research into the copyright law of fanworks. However, this framework has been a somewhat idealized view that does not fully conform to practice. This raises the possibility that the standard model is a bit of a spherical cow – a convenient model for researchers, but one with a less-than-perfect correspondence with reality.⁵² As will be argued in Chapter 4.7, it is likely that expanding the model to accommodate more of actual practice may provide further light into the nature of the problem.

2.2 The Relationship Between Fanworks, Other Areas of UGC, and Nontraditional Works Scholarship

Fanworks are a form of user-generated content and are often discussed in that context.⁵³ And a number of creative processes exist that are broadly similar to fanworks and used in related contexts.⁵⁴ Some of these fall within the broader definition of fanworks; others do not.⁵⁵ These forms of content may not have been widely included within the

⁵¹ This is discussed further in Chapter 8.2.

⁵² See generally, John Harte, *Consider a Spherical Cow: A Course in Environmental Problem Solving* (Univ Science Books 1988) xiii.

⁵³ See, eg, Edward Lee, ‘Warming up to User-Generated Content’ (2008) 2008 *University of Illinois Law Review* 1459, 1461; Rebecca Katz, ‘Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada’s Copyright Reforms’ (2014) 12 *Canadian Journal of Law and Technology* 95–106.

⁵⁴ See Chapter 8.2.

⁵⁵ The use of memes and reaction gifs, although widespread, is not a fanwork under most conventional definitions, including the one proposed in this thesis.

definition of fanwork previously, but their copyright issues have been discussed within the broader literature on copyright and user-generated content, and have substantial overlap with the broad definition of fanworks.⁵⁶

The bulk of the discussion of UGC has been focused on three areas: fanworks, remix, and peer production. Social media represents another important area, although the discussion of the copyright-relevant aspects of social media has been more diffuse than is the case with the others. Finally, the study of nonconventional forms of creativity – which has sometimes been framed in terms of the “negative space” of IP law – has significant overlaps with both traditional and newer forms of fanworks.⁵⁷ This section provides a brief overview of each of these areas and how they relate to fanworks.

2.2.1 Remix

There has been considerable discussion of “remix culture,” which was championed by Lawrence Lessig in a series of books and papers.⁵⁸ Remix works combine and repurpose parts of other works to arrive at something that is both new and which incorporates the originals in

⁵⁶ For example, copyright issues with memes have been discussed as UGC rather than as fanworks. See, eg, Giacomo Bonetto, ‘Internet Memes as Derivative Works: Copyright Issues under EU Law’ (2018) 13 JIPLP 989; Ronak Patel, ‘First World Problems: A Fair Use Analysis of Internet Memes’ (2013) 20 UCLA Ent L Rev 235.

⁵⁷ This is discussed further in Chapter 8.2; see also Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017), and the contributions therein.

⁵⁸ Lessig, *Remix* (n 27); Lawrence Lessig, ‘Free(Ing) Culture for Remix’ [2004] Utah Law Review 961; Lessig, *Free culture* (n 27).

recognizable ways. It is a form of creativity that is broadly similar to appropriation art but involves popular culture rather than a highbrow audience.

Remix and fanworks overlap, in that both are linked to existing works, but they are distinct in two key ways. First, remix commonly makes use of existing materials from a number of sources, where fanworks are more commonly linked to a single fandom.⁵⁹ Second, where fanworks are generally linked to media franchises, mashup includes a substantially wider range of source materials,⁶⁰ in a manner analogous with appropriation art.⁶¹ In effect, while this form of UGC, like fanworks, involves recognizable use of source material, there is generally a greater degree of separation between the remix and source material, particularly in terms of the nature and purpose of the use.

⁵⁹ However, there is an entire genre of exceptions, known as ‘crossover’ works, which combine multiple media franchises. These are not uncommon in the mainstream media, see, eg, *The Muppet Show*, “The Stars of Star Wars” Season 4, Ep 17 (1980) (Muppet/Star Wars crossover). They are also common in fanworks. For examples of crossover, see, eg, Archive of Our Own, <https://archiveofourown.org/tags/Crossover/works> (accessed 9 March 2020) (link to search tag that will produce list of crossover fan fiction).

⁶⁰ Here, too, there can be some overlap; there are also examples of fan-mashups that blend a fandom with another aspect of popular culture such as a popular song. For an example of such a mashup, see *jaimedelaguilayrei*, “phoenix lisztomania brat pack mashup” (YouTube, 26 July 2009) <https://www.youtube.com/watch?v=XtE-xnPKj28> accessed 9 Mar 2020 (video mashing up scenes from the “Brat Pack” films of director John Hughes with the Phoenix song “Lisztomania.”).

⁶¹ See generally, eg, Elina Lae, ‘Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement’ (2012) 12 *Va Sports & Ent LJ* 31.

2.2.2 Peer Production

Peer production, like remix and fanworks, is a catchall that covers a wide range of activities, here, ones involving the efforts of large numbers of individuals working together, sometimes, but not always, toward a set goal. Yochai Benkler, whose seminal text *On the Wealth of Networks* is foundational to this field, defined this as production that is “radically decentralized, collaborative, and non-proprietary; based on sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other without relying on either market signals or managerial commands.”⁶² This type of work includes much of the free and open-source software movement, Wikipedia and other similar projects, and even some forms of entertainment.

From a copyright perspective, peer production is noticeably different from the other two forms of UGC previously discussed. Where remix and fanworks both involve recognizable use of original materials, peer production is largely focused on the creation of original works.⁶³ The primary concern authors here have raised involves ensuring that the work, which is typically viewed as taking place within a knowledge commons, can continue unhampered by IP claims over crucial

⁶² Yochai Benkler, *On the Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale 2006) 60.

⁶³ Even here, however, there are exceptions and there can be some overlap with fanworks or mashups, as the Harry Potter Lexicon and the Slenderman cases ably demonstrate. See Chapter 6.3.1 and Chapter 4.3.4.2, respectively.

materials.⁶⁴ In effect, the question is less how to use IP law to protect peer production and more how to protect peer production from IP law.

2.2.3 Social Media

Social media has been widely discussed as a form of UGC, with some authors even defining social media as those platforms which permit the sharing of UGC.⁶⁵ While the role of those sites as facilitating the distribution of independently creative content has been widely acknowledged, the copyright implications have received less attention. In part, this may be because this has been perceived as unlikely to be of substantial copyright interest, as the copyright status of the content when uploaded is simple to determine. If no existing copyright-protected content is implicated, and the content otherwise qualifies for protection, it is copyright-protected content.⁶⁶

This position does not capture the full scope of the issues involved. These sites, which were once widely referred to as “Web 2.0,” exist to allow users to interact with each other. As these interactions do not primarily take place in real time, they almost inevitably involve the production of some form of protected content, whether in the form of text, photographs, videos, or a combination. Virtually all of these sites not only permit, but encourage, users to share the things other users post.

⁶⁴ As the Slender Man example shows, this is can be an existential issue for fandoms. *See* Chapter 4.3.4.2.

⁶⁵ *See, eg*, Mihajlo Babovic, 'The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media' (2015) 6 *Cybaris Intell Prop L Rev* 138, 141.

⁶⁶ *See, eg*, Daniel J Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 841, 858.

The sharing of such content can lead to its own set of copyright concerns, as several of the examples discussed subsequently demonstrate.⁶⁷

2.2.4 Nontraditional Works and Negative Space

Finally, there is a growing body of research into creative fields outside the traditional creative industries. This work has highlighted the practices and norms of creative communities engaged in endeavours as diverse as stand-up comedy routines, textile crafts, cooking, street art, and pornography – to name just a few.⁶⁸ The common IP-law feature shared by these communities is simple: the communities operate in a manner primarily driven by norms, and rarely make active use of the protections intellectual property law might offer.

The reasons for this ‘low IP’ approach to creativity appears to vary from community to community. In some cases, such as the names of roller derby performers or the personas of clowns, the development of norms-based solutions may be driven in large part by these areas being a poor fit with any one body of existing law, landing in an area between trademark and personality rights. In others, such as the protection for cooking or drink mixing, it is because the creativity in question is too idea-like to be the proper subject of copyright laws. And in still others, like pornography, intellectual property protections exist, but enforcement is simply impracticable for a variety of reasons. These creative communities share a great deal in common with fanworks, and,

⁶⁷ See Ch 3.

⁶⁸ For discussion of negative space research, see Chapter 8.2.

indeed, some fanworks research has been positioned within this framework.⁶⁹

Collectively, these creative communities fall into what has become known as intellectual property law’s “negative spaces” – a term which draws its name from the related concept in art. The concept is that by gaining a better understanding of the areas of creativity where intellectual property law does not work well, we can better see the contours of IP law, and why it works the ways it does. Fanworks are likely to contribute to this discussion, as these creative communities tend to act, as the last chapter discussed, in broadly similar ways. These areas are discussed in greater detail in Chapter 8.2.

2.3 Fanworks: The Academic Discourse

In her seminal paper “Legal Fictions: Copyright, Fan Fiction, and a New Common Law,” Rebecca Tushnet introduced the legal academy to the issues surrounding fanworks and copyright law.⁷⁰ In the years since, discussion of fan fiction has continued, expanding to address the issue in many different jurisdictions. Despite the wealth of attention paid to this field, and despite the jurisdictional range of the work, the research conducted to date has not produced clarity regarding the legal status of fanworks. Instead, a consensus arose early in the study of these works, that although fanworks are socially desirable and should therefore be

⁶⁹ See, eg, Rebecca Tushnet, ‘Architecture and Morality: Transformative Works, Transforming Fans’ in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017).

⁷⁰ Tushnet, ‘Legal fictions’ (n 2).

protected, they exist within grey areas of copyright law. This view has remained essentially static since.

The core features of the consensus in this area can be traced back to *Legal Fictions*, which includes each point.⁷¹ The consensus itself remains a dominant feature of the literature in this area and is seen in numerous papers since. It is also a feature of the literature not merely in the United States, but throughout the common law jurisdictions and beyond.⁷² The treatment here is intended to establish the existence of this rough consensus, which will be examined and challenged throughout the rest of the thesis. Rather than include lengthy string citations for each point, the Appendices provide an overview of the work supporting each point.⁷³

2.3.1 Fanworks are an activity that is beneficial to society

There is broad consensus within the copyright literature that the Internet has, by expanding access to the tools used to express and distribute creativity from the exclusive realm of the professional mass media to the public at large, produced extensive benefits.⁷⁴ This work

⁷¹ See *ibid* 656, 658–60, 683–86.

⁷² See, eg, Khanuengnit Khaosaeng, ‘Wands, Sandals, and the Wind: Creativity as a Copyright Exception’ (2014) 36 *EIPR* 238 (UK); James J Anson-Holland, ‘Fan Fiction: A New Zealand Copyright Perspective’ [2018] *New Zealand Law Review* 1 (New Zealand); Gabriele Spina Ali, ‘A Bay of Pigs Crisis in Southern Europe? Fan-Dubbing and Parody in the Italian Peninsula’ (2015) 37 *EIPR: European Intellectual Property Review* 756 (Italy).

⁷³ Appendix A.

⁷⁴ Although, as previously noted, both fandoms and fanworks predate the internet by a substantial margin, and although there are some papers that

has covered a broad spectrum of online creativity, including the areas of UGC discussed above. Particular attention has been paid both to the ability to participate in civil society in ways not previously possible,⁷⁵ as well as the creative phenomenon known as “remix culture,” which has been viewed as encouraging participation in society by encouraging creativity.⁷⁶ This aspect is, as many have noted, particularly pertinent given Anglo-American copyright law’s stated goal of encouraging the creation of new works.⁷⁷

There is, however, also a consensus that fanworks produce societal benefits distinct from those produced by other areas of UGC. As Tushnet put it in *Legal Fictions*:

*The social value of hundreds of thousands of unauthorized Harry Potter-inspired stories rests not merely in the stories’ critical potential in challenging the sexual, racial, and political assumptions of the original, but also in the skills that fans learn while writing, editing, and discussing them.*⁷⁸

Similar perspectives have been advanced by a many other authors and continue to be found in the most recent literature in this area.⁷⁹

have touched on this, by and large the focus within the literature has been on the social good produced by the development of the online realm.

⁷⁵ See generally, eg, Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale 2006).

⁷⁶ See generally, eg, Lessig, *Remix* (n 27).

⁷⁷ See Benkler (n 5); Lessig, *Remix* (n 5); see also Madhavi Sunder, ‘Copyright Law for the Participation Age’ 2014 *Ohio Northern University Law Review* 359, 364 (“participatory culture lies at the center of the modern project to promote democracy and human development itself”).

⁷⁸ Rebecca Tushnet, ‘User-Generated Discontent: Transformation in Practice’ (2008) 31 *Columbia Journal of Law and the Arts* 497, 506.

⁷⁹ See, eg, Tushnet, ‘Legal fictions’ (n 2) 656; Matthew Brett Freedman, ‘Machinima and Copyright Law’ (2005) 13 *Journal of Intellectual Property*

As many have noted, encouraging fanworks advances the stated goals of Anglo-American copyright law by incentivising the creation of new works, thereby expanding the number of different works made available to the public.⁸⁰ In addition, it serves to benefit the fanwork creators by providing them with a sense of belonging within their communities.⁸¹ Fanworks are also viewed as a means of enabling the type of folk creativity that flourished prior to the development of the mass-media entertainment industry during the 20th Century.⁸² There appears to be little disagreement with this point, and it appears to represent a broad consensus in the literature.

2.3.2 Fanworks Should Be Protected

This point follows from the prior argument. If, after all, fanworks are a social good, it would seem to logically follow that they should receive some protection. Nevertheless, it can be argued that although the creation of fanworks is a social good, it should not override the interests of the copyright owner, or that there must be some form of balancing against the owner's rights. These arguments do not, to the extent they

Law 235, 241–43; Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction' (2005) 58 SMU Law Review 1551, 1559–60; Mollie E Nolan, 'Search for Original Expression: Fan Fiction and the Fair Use Defense' (2006) 30 Southern Illinois University Law Journal 533, 566–67; Chander and Sunder (n 45). Additional papers are cited in Appendix A.1.

⁸⁰ See, eg, Yin Harn Lee, 'Fan Communities and the Self-Regulation of Digital Creative Space' (2013) 10 SCRIPT-ed 364, 385.

⁸¹ See generally, Betsy Rosenblatt, 'Belonging as Intellectual Creation' (2007) 82 Missouri Law Review 91.

⁸² This perspective is particularly prevalent in the fan studies community. See, eg, Jenkins (n 11) 272–73.

have been made at all, appear to have had a substantial effect on the overall landscape, however; the consensus that fanworks should receive legal protection is also widespread.

The arguments in favour of protecting fanworks generally take two forms, one phrased more strongly than the other. The stronger argument, which is widespread in the peer production and remix literature, advances the argument that copyright law should affirmatively protect UGC.⁸³ This argument is not exclusive to these subsets, and can also be found in the work of more traditional fanworks researchers, including Sunder.⁸⁴ The less strong form of the argument is generally phrased in terms of ensuring that copyright does not disincentivize or inhibit fanworks creation.⁸⁵ In either formulation, the argument stands for the proposition that some form of legal protections should be provided, and is a second point of rough consensus.

2.3.3 Fanworks Reside in A Grey Area of Copyright Law

Notwithstanding the broad consensus that fanworks represent a social good that should be protected, there is a third point of consensus: it is unclear if fanworks are protected. This argument is found in both explicit and implicit forms.⁸⁶ The explicit argument is just that – an

⁸³ See generally, Benkler (n 75); Lessig, *Free culture* (n 27).

⁸⁴ Sunder (n 77) 360.

⁸⁵ See generally, eg, Steven A Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2009) 157 *University of Pennsylvania Law Review* 1869.

⁸⁶ Citations for the overall point are found in Appendix A.3, without distinction between implicit and explicit arguments.

argument that fanworks fall in a legal grey area.⁸⁷ The implicit argument takes the form of arguing that protection should be extended under a specific legal theory.⁸⁸ This formulation acknowledges that protection is not entirely clear; if it were, there would be no need to argue that protection could or should be extended under a different theory.

Where the first two points of the consensus have been essentially stable, this point has been subject to the most change. Early on, the implicit argument was somewhat more prominent, possibly because there was initial optimism that a solution would be found within a short period of time. Recent articles have tended to be more explicit about the need for express forms of protection, possibly because of the lack of movement since the suggestions of the earlier articles were first advanced.

This area of the consensus is re-explored in Chapters 5 & 6, which conduct a *de novo* assessment of the black letter law applicable to this complex area. As will be seen, there is more nuance than is apparent at first glance. There is little doubt that fanworks *potentially* infringe copyright. The grey areas largely involve questions of exceptions and limitations.

⁸⁷ See Fiesler, 'Everything I need to know I learned from fandom: how existing social norms can help shape the next generation of user-generated content' (n 29) 739; Lee, 'Fan Communities and the Self-Regulation of Digital Creative Space' (n 80) 364; Sunder (n 45) 227.

⁸⁸ See, eg, Tushnet, 'Legal fictions' (n 2) 664–78.

2.4 Possible Harm to Author Interests Is Unlikely but Should Not Be Entirely Ignored; Other Objections to Fanworks Likely Should Be

A common point – if not one of consensus – that is often raised in the fanworks literature is that there is a lack of conflict between non-commercial fanworks and the legitimate interests of the copyright owner.⁸⁹ It has also been argued, with good cause, that fanworks serve as complements that bring people into fandom and are incapable of substituting for the ‘canon’ works produced by the official owner of the franchise.⁹⁰ To the extent there might be any conflict, it is argued, this is restricted by the author’s ability to control depictions of features of the work such as characters, and by the copyright holder’s claim over derivative works.

In addition to the lack of clear negative impacts from non-commercial fanworks, several authors have advanced the argument that fanworks are often economically beneficial to the copyright owner. Such creativity serves, within fandom, as a means of engaging new fans with the fandom. It serves to fill the gaps and maintain interest during periods during which the primary creator is not providing new content, and it can serve as a form of marketing for the franchise.⁹¹

⁸⁹ As with the three points of consensus in the prior section, this is also found in the earliest work. See *ibid* 654.

⁹⁰ See, eg, Nathaniel Noda, ‘Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities’ (2010) 57 *Journal of the Copyright Society of the USA* 987, 1000; Rebecca Tushnet, ‘Payment in Credit: Copyright Law and Subcultural Creativity’ (2007) 70 *Law and Contemporary Problems* 135, 144.

⁹¹ Noda (n 90) 992.

This argument is controversial enough that it cannot fairly be considered a true point of consensus. As commentators have noted, many authors have been displeased by fan uses of their characters.⁹² This raises concerns – often undiscussed in the American-centric literature – that fanworks may interfere with moral rights even if they cause no economic harm. This is particularly true where fan content involves material, such as sexually explicit writing, that the author feels tarnishes the original.⁹³

Authors have also raised concerns that their own rights to use certain material might be impaired by fanworks. This has also been raised as a reason to consider fanworks to be less than entirely benign.⁹⁴ Indeed, this has resulted in at least one notable controversy that involved Marion Zimmer Bradley’s work, and a fan who felt that some of her work had been taken and incorporated into ‘official’ works.⁹⁵ It should be noted, that it is unlikely that fanworks can, as a matter of law, impair the original author’s rights even over similar material.

The issue of potential harm to the author is important under both American law and in jurisdictions where the Berne Convention has more

⁹² See, eg, Hetcher (n 85) 1891 n 84.

⁹³ One example of such an incident, involving the sexualization of a fictional species rather than a specific character, can be found in Schwabach, *Fan fiction* (n 27) 94–99; related issues, albeit involving humans rather than aliens, are also discussed in Brian Link, ‘Drawing a Line in Alternate Universes: Exposing the Inadequacies of the Current Four-Factor Fair Use Test through Chanslash’ (2010) 33 *Thomas Jefferson Law Review* 139.

⁹⁴ See, eg, De Zwart (n 29) 142–44.

⁹⁵ One account of this incident can be found in Schwabach, *Fan Fiction* (n 27) 110–16.

direct and explicit effect.⁹⁶ Under US law, judges assessing a claim of fair use must take into account the potential effect of the new use on the market for the original.⁹⁷ In other jurisdictions, author interests take on even more importance in the context of the TRIPS three-step test, which provides that:

*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*⁹⁸

There are multiple approaches to fanworks that are potentially capable of meeting the test set out above. For example, these factors could easily be met by a copyright exception covering any fanworks that do not directly compete with the market for the original, as suggested by Khaosaeng.⁹⁹

As noted in the introduction, the thesis does not consider moral rights within this evaluation. There is little explicit work on the relationship between moral rights and fanworks, in part because of the American-centric nature of this area. However, the point is noted here because it highlights a legal uncertainty that will be discussed more towards the end of the thesis: the difficulties in defining the legitimate

⁹⁶ Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886. Although the United States ratified Berne, US law provides no explicit protection for moral rights, and US courts have held that the convention does not provide an independent cause of action. See, eg, *Choe v Fordham University School of Law* 920 F Supp 44, 49 (Dist Court 1995).

⁹⁷ 17 USC §107

⁹⁸ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Article 13.

⁹⁹ Khaosaeng (n 72) 245–48.

interests of the copyright owner in the absence of a definition for the legitimate interests of the user.¹⁰⁰

Other arguments against fanworks are difficult to discuss, because they are often focused on factors that are orthogonal to those of advocates. That is, they do not focus so much on objections to fanworks, but either tend to misunderstand why fanworks are present, or simply assert that fanworks are not worthy of serious consideration. One example of the former can be found in work by Linford, which advocates for a more robust derivative works right on the grounds that this will address “attention scarcity.”¹⁰¹ An example of the latter can be found in Ginsburg’s work, and in particular in her assertion that fan fiction is simply “too trivial” in its impact to warrant a finding of infringement.¹⁰² These objections will not be confronted directly further; Chapters 3 & 4 suggest that fanworks aren’t detracting attention from their sources, but are a form of attention to their sources, and the thesis as a whole, but particularly Chapter 7, suggests that these works cannot reasonably be dismissed offhand in the manner that Ginsburg attempts.

2.5 Fanworks and the Legal Landscape: The Past, Current, and (Likely) Future State of Affairs

The legal status of fanworks is, and long has been, comprehensively muddled. There is broad general agreement that

¹⁰⁰ See Chapter 8.5.

¹⁰¹ Jake Linford, ‘Copyright and Attention Scarcity’ (2020) 42 *Cardozo L Rev* 143, 182, 260.

¹⁰² Jane Ginsburg, ‘Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity’ in Susy Frankel and Daniel J Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge 2014) 5.

fanworks are a social good that should be, but likely isn't, clearly protected by copyright law. Similar perspectives on the state of the law can be found when one examines other forms of UGC, such as remix and peer production, as well as for many forms of nontraditional creativity. This broad consensus has remained largely unshaken since the inception of this field; there is no immediate sign that resolution in the near future is likely.

At the same time, the legal perspectives in this area have been largely shaped by a standard model of fanworks which may not be as broadly applicable to actual practice as its prevalence in the literature suggests. This model is the product of the entirely understandable attention that has been given to the most high-profile and traditional fanworks; those most likely to implicate the economic interests of major actors. It has also focused on fanworks in the manner that is to be expected in intellectual property scholarship: as the individual works that are the natural subject of an infringement analysis. The advantages to this approach are clear. The question, which will be addressed in the coming chapters, is whether these disadvantages are part of the reason that the consensus has remained static.

3 FANWORKS AND THE FANWORK PROBLEM

Any discussion of the fanworks problem in copyright law requires an understanding of what fanworks are. The previous chapter discussed the understanding of fanworks that has, thus far, dominated the legal discussion.¹⁰³ That model is one in which fanworks are viewed as single works that are noncommercial derivatives of popular works of mass media, and are largely produced, distributed, and consumed in the online environment.

The next two chapters demonstrate the differences between that model and fanworks as they exist in the wild. This chapter focuses on fanworks themselves, beginning with an expanded definition of the term, which is followed by a condensed taxonomy of the variety of media that are commonly used to create fanworks. This is followed by an examination of some areas which are not classically viewed as fanworks, but which have substantial overlap, and a brief overview of the numbers of fanworks that exist and where they are found. The chapter concludes with a brief history of fanworks. The following chapter then discusses the context within which fanworks are created and shared: fans and fandoms. Together, these chapters will demonstrate that the conventional depiction of fanworks seen in copyright discussions does not fully encompass fanworks as experienced by their creators and readers.

3.1 Defining Fanworks

The terms ‘fan,’ ‘fanwork,’ and ‘fandom’ are central to this thesis. They are also terms where key definitions are either under-theorized (at least as applied to copyright law) or contested. The precise definitions

¹⁰³ See Chapter 2.1.

adopted for these terms have substantial consequences for the approach to the copyright issues taken in this thesis, so an in-depth discussion of the terms is required. At the same time, the identification of certain terms used within some of these definitions is also problematic, and warrants clarification.

3.1.1 Fanworks: An Initial Definition

Until now, this thesis has not presented a detailed definition of its own for the term ‘fanwork.’ The “legal-academic model” used in the prior chapter explicitly derived from the academic work that has been done in this area to date but is not strictly a definition. In order to assess whether the legal-academic model holds water, an independent definition is needed, one which does not rest on the prior work. The constituent parts of the word “fanworks” provide a starting point: fanworks are creative works produced by fans. This definition is not precise enough, but an examination of the component parts of the term leads to a workable definition.

The ‘works’ part of the definition, will be read in the broadest copyright-relevant sense: a ‘work’ encompasses any creation that qualifies for copyright protection, or would so qualify were it not an infringement of another existing work.¹⁰⁴ This definition, in conjunction with the extremely broad definition of ‘work’ embedded in most national

¹⁰⁴ See 17 USC §103(a)(copyright in a derivative work does not extend to any part of the work in which preexisting material has been used unlawfully).

copyright laws, will encompass much of the creative activity engaged in by fans.¹⁰⁵

“Fan” requires more attention. If a fan of Star Wars creates an unrelated Pollock-like work of abstract expressionism, that would be a creative work produced by a fan, but few would view it as a fanwork. It cannot be enough that the creator simply be a fan. There is an implicit understanding that the work must be created not merely by someone who is a fan, but who is acting as such. A fanwork must be intended, at least in part, to be shared within a fandom because it relates to the focus of the fandom.¹⁰⁶ However, a fanwork need not draw from a major mass-media work; the relevance of mass-media is a question to be examined, not a definitional component.

¹⁰⁵ It should be noted that in rare cases classification as a fanwork may be jurisdiction-specific. For example, the closed list approach to copyright may result in works that are unprotected in the UK but not under standards dictated by either American law or under EU case law. Case C-145/10 *Painer v Standard Verlags GmbH* [2011] [99]. The Star Wars stormtrooper helmet is an obvious example. *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39 (Supreme Court). Artwork painted on such a helmet would be a fanwork in the USA, *Lucasfilm Ltd v Shepperton Design Studios Ltd* No. 05-cv-3434, 2006 WL 6672241 (CD Cal 26 September 2006), but not in the UK.

¹⁰⁶ “At least in part” because fanworks may be directed both at fellow-fans and at a wider audience.

3.1.2 Fanworks: The Problem of Commerciality

The definition above accounts for much of the standard model of fanworks, as captured in a definition first offered by Tushnet and used in at least one other oft-cited paper.¹⁰⁷ There, fanworks were defined as:

*add[ing] new characters, stories, or twists to the existing versions. They are primarily noncommercial and nonprofit. And they give credit to predecessors and originators, whether implicitly or explicitly...fanworks encourage and sustain a vibrant fan community that helps authorized versions thrive –Harry Potter, CSI, Star Trek, and other successful works are at the center of enormous creative fandoms containing hundreds of thousands of fanworks.*¹⁰⁸

This definition captures the features of the standard model, plus one not yet captured in the proposed definition: noncommerciality. As noted in Chapter 2.1.3, noncommerciality is important to the standard model, and, for some authors, has played an explicit role in the conclusion that fanworks should be permitted under copyright.¹⁰⁹ Although the importance of noncommerciality has been challenged by some authors,¹¹⁰ it remains key to the standard model, in part because it is a norm that is widely practiced by fan communities.¹¹¹

¹⁰⁷ Tushnet, ‘Discontent’ (n 78) 503; definition endorsed in Hetcher (n 85) 1923.

¹⁰⁸ Tushnet, ‘Discontent’ (n 78) 503.

¹⁰⁹ See, eg, McCardle (n 29) 451; Rachel Stroude, ‘Complementary Creation: Protecting Fan Fiction as Fair Use’ (2010) 14 Marquette Intellectual Property Law Review 191, 198; Peterson (n 29) 249.

¹¹⁰ Lipton (n 29); Rachel Morgan, ‘Conventional Protections for Commercial Fan Art under the U.S. Copyright Act Note’ (2020–21) 31 Fordham Intell Prop Media & Ent LJ 514, 558–59.

¹¹¹ See, eg, Fiesler, ‘Everything I need to know I learned from fandom: how existing social norms can help shape the next generation of user-generated content’ (n 29) 754–55.

Ignoring the role and history of non-commercial fanworks would be to neglect significant, and arguably defining, features. Incorporating noncommerciality, moreover, would have the benefit of clearly excluding bootleg merchandise and counterfeits from fanworks. However, the definition of commerciality is challenging at the best of times. It is particularly challenging under American law, where the question turns not on whether the use or distribution involves a financial transaction, but on whether the new user is profiting by virtue of an exploitation that does not pay the “customary price” for the original.¹¹² The approach sometimes used in England and Wales is little better: “by far the most important factor” in fair dealing is whether the new work “is in fact commercially competing with the proprietor’s exploitation of the copyright work.”¹¹³

Under these definitions, it cannot strictly be said that all fanworks are entirely non-commercial in this judicial sense, or that this kind of noncommerciality has actually been a predominant feature of fanworks. The printed fanzines that were once the main avenue of fan fiction distribution, for example, sometimes had subscription costs; even non-commercial fanfiction may not be judicially noncommercial.¹¹⁴ Simply put, neglecting commerciality risks neglecting a potentially copyright-

¹¹² See, eg, *Hustler Magazine, Inc v Moral Majority, Inc*, 796 F. 2d 1148, 1152 (9th Cir 1986) (finding parodic use ‘presumptively unfair’ because no price was paid, although finding in favor of fair use on the factors as a whole).

¹¹³ *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch) [83] (quoting and adopting Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* (3rd edn 2000) [20.16]).

¹¹⁴ See, eg, Bacon-Smith (n 13) 27–29 (discussing apportionment of production costs for zines).

relevant feature; but focusing on commerciality risks neglecting the importance of fanworks as communicative rather than commercial.

Fortunately, an alternative is available. As will be discussed further in Chapter 8, copyright law has developed in a manner primarily fixed on the needs of the creative industries, with amendments to the law often driven by technological change and the arrival of new disruptive technologies.¹¹⁵ To the extent that fanworks have been the subject of commercial transactions, such as fanzine subscriptions or fan art sales at conventions, this has largely occurred outside the traditional creative industries. This distinction provides us with an alternative to the term “commercial” that is likely to avoid unneeded confusion.

3.1.3 Fanworks: A Final Definition

This thesis will take into account both the common definition of fanwork and the need to account for a certain amount of commerciality in fanworks, and use the following definition hereafter:

A fanwork is a work created by a fan that is intended at least in part to be shared with other members of a fandom, and which is distributed through channels that lie outside the traditional creative industries.

¹¹⁵ For a discussion of these features, see, eg, Jessica Litman, *Digital Copyright (Book, Whole, Prometheus Books 2001) 23–54*; for a discussion of the issues that have resulted in the past when attempts have been made to extend copyright into new spheres, see Paul Goldstein, *Copyright’s Highway: From the Printing Press to the Cloud* (2nd ed, Stanford 2019) 85–108.

3.2 Fanworks: A Condensed Taxonomy

This section provides a detailed overview of fanworks. The section begins with a description of the major types of fanwork. Each has been the focus of some legal scholarship, which is identified.¹¹⁶ The section then addresses the scale and scope of fanworks. Detailed numbers are difficult to come by in this area, whether for the number of fanworks available or their economic significance, but it is possible to at least get a rough sense of the scope. Finally, the chapter examines the locations where fanworks can be found, not only online but also in the broader environment.

The treatment of this area is extensive in wordcount, but still necessarily superficial when compared with the breadth and extent of fanworks. The intention is to try to strike a balance and show that the breadth of fanworks exceeds what has been captured in most academic work on copyright, but without excessive detail. The hope is to also show that the range of diversity is such that isolating fanworks from conventional works, on the one hand, and other forms of UGC, on the other, is difficult – particularly as we approach the UGC side of the spectrum.

Although many types of fanwork are documented here, the list is necessarily incomplete. If there is a tangible means of expression in which a work can be fixed, medium is almost certainly used to create

¹¹⁶ This research is identified in this chapter primarily to illustrate the piecemeal nature of the legal research into fanworks, and to show that fanworks is not an area that has escaped the academy's interest. However, the discussion and analysis of the prior research in this area is largely deferred until later in the thesis, and, due to space constraints, will largely focus on exemplars.

fanworks.¹¹⁷ Nevertheless, some forms of work have particularly strong associations with fan practices, and some raise, in addition to the issues common to fanworks as a whole, concerns unique to the medium. This section discusses the major types of fanwork, including the nature of the practice and the history of its association with fan culture. Other varieties of fanwork are also noted that, although not as well-known or thoroughly studied as the major areas, raise related issues.

3.2.1 Fan Fiction

Fan fiction is the ur-fanwork. It is arguably the oldest form of fanwork available.¹¹⁸ It is also one of the most widely known and thoroughly studied forms of fanwork, with hundreds of articles and books, including many from within the perspective of media and fan studies.¹¹⁹ The study of fan fiction has crossed disciplines, with articles

¹¹⁷ For example, fans of various franchises have engaged in knitting as a form of fanwork. See Michelle Jaworski, 'From "Doctor Who" to "Outlander": How Fans Craft Reverse Engineer Knits' (*Daily Dot*, 5 February 2021) <<https://www.dailydot.com/unclick/reverse-engineer-knits-pattern-doctor-who-outlander-star-wars/>> accessed 6 February 2021.

¹¹⁸ As some authors have argued, fan fiction dates back at least thousands of years; Virgil's epic *The Aeneid* would, if written today, be viewed as Homeric fan fiction, elevating a minor character from the original work to be the fanwork's hero. See Shannon K Farley, 'Versions of Homer: Translation, Fan Fiction, and Other Transformative Rewriting' (2016) 21 *Transformative Works and Cultures* ¶ 3.1 <<http://journal.transformativeworks.org/index.php/twc/article/view/673>> accessed 4 February 2021. It is plausible that fan creations date back further still, but it is not clear how one might tell if a Palaeolithic cave painting is a form of fan art.

¹¹⁹ See, eg, Karen Hellekson and Kristina Busse, *The Fan Fiction Studies Reader* (University of Iowa Press 2014); Kristina Busse, *Framing Fan Fiction: Literary and Social Practices in Fan Fiction Communities* (University Of Iowa Press 2017).

in a range of areas including the study and teaching of English,¹²⁰ cultural studies,¹²¹ and issues relating to gender and sexuality.¹²² And law. Fan fiction's relationship to copyright law has been studied extensively within the legal academy. The study of the legal issues surrounding fanworks began in earnest with the publication of Rebecca Tushnet's highly influential paper 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' in 1997.¹²³ Many other papers have been published since.¹²⁴

This discussion has been particularly widespread within the American literature, but it is hardly limited to that arena. The issues raised by fan fiction have also received substantial attention from

¹²⁰ See eg, Black Rebecca W., 'Online Fan Fiction, Global Identities, and Imagination' (2009) 43 *Research in the Teaching of English* 397.

¹²¹ See, eg, Natalia Samutina, 'Emotional Landscapes of Reading: Fan Fiction in the Context of Contemporary Reading Practices' (2017) 20 *International Journal of Cultural Studies* 253.

¹²² See, eg, Marie Karlsson and Christina Olin-Scheller, 'Let's Party! Harry Potter Fan Fiction Sites as Social Settings for Narrative Gender Constructions.' (2015) 9 *Gender & Language*; James Joshua Coleman, 'Writing with Impunity in a Space of Their Own: On Cultural Appropriation, Imaginative Play, and a New Ethics of Slash in Harry Potter Fan Fiction' (2019) 11 *Jeunesse: Young People, Texts, Cultures* 84.

¹²³ Tushnet, 'Legal fictions' (n 2). There was some discussion within the legal literature that predated Tushnet's work, see, eg, Coombe (n 28) 383, but Tushnet's was the first paper focused entirely on fan/copyright issues.

¹²⁴ The literature in this area was discussed in Chapter 2. Notable papers include, but not limited to: Stroude (n 109); Chander and Sunder (n 45); Stendell (n 79); Katyal (n 29); Lantagne, 'The better angels of our fanfiction: the need for true and logical precedent' (n 29); Becker (n 29); Schwabach, 'The Harry Potter lexicon and the world of fandom: fan fiction, outsider works, and copyright' (n 29).

academics operating in other common law jurisdictions.¹²⁵ They have also been discussed in the context of other legal traditions.¹²⁶ It is no exaggeration to say that much of our understanding of the copyright issues related to fanworks and fandoms comes directly from the study of fan fiction.¹²⁷

Fan fiction is not just widely studied. It is widely created. The website, Archive of Our Own, contains over 10.1 million works, the vast majority of which are fanfiction.¹²⁸ This website is far from the only source of fanfiction, or even the only dedicated website.¹²⁹ Fanfic can also be found in many other places online, including sites like DeviantArt that are primarily focused on areas other than fiction, in archives of old online content, and on private websites and forums. Calculating the volume of fanfic available even in the online environment is impossible.

¹²⁵ See, eg, Tamara Bukatz, ‘Amazon’s Fan Fiction Store: Opportunity or Fandom-Ination? The Legal Background to Commercial and Non-Commercial Creations from Canon-Part I’ (2013) 18 Communications Law 122; Tamara Bukatz, ‘Amazon’s Fan Fiction Store: Opportunity or Fandom-Ination? The Legal Background to Commercial and Non-Commercial Creations from Canon-Part II’ (2014) 19 Communications Law 20; Anson-Holland (n 31); Katz (n 53).

¹²⁶ See, eg, Ana Paula Camelo and Carlos Augusto Liguori Filho, ‘Fan Fiction e Paródia: Uma Tentativa de Viabilização Da Produção de Fãs Em Meio A Ausencia de Reforma Da Lei de Direitos Autorais’ (2018) 13 RECDUFMSM 20.

¹²⁷ This is not necessarily a good thing; the focus on fan fiction and related areas of fanworks has likely contributed to the focus on traditional fandoms and secondary creation, to the exclusion of an examination of other copyright issues related to fandoms.

¹²⁸ ‘Archive of Our Own’ (no date) <<https://www.archiveofourown.org/>> accessed 8 November 2022. When first checked in 2020, that number was 7.2 million.

¹²⁹ ‘FanFiction’ <<https://www.fanfiction.net/>> accessed 17 February 2021.

However, even if AO3 contains the majority of fanfiction – and it clearly does not – the total volume of material is noteworthy.

Because of fan fiction’s status as both the earliest and most studied fanwork, this section of the chapter will be more extensive than the corresponding sections for other fanworks. Fanfic is also used as an opportunity to discuss different subgenres that exist within fanworks, as well as the presence of competing author interests, particularly in scenarios in which moral rights may be implicated. This will permit the use of fan fiction as a baseline against which other conventional fanworks may be compared. It will also make it easier to highlight the issues that differ between conventional, secondary work fanworks and other areas of fan expression that have copyright relevance.

3.2.1.1 Types of Fan Fiction

There are numerous subgenres of fan fiction. Many of these subgenres have been extant for decades, substantially predating the rise of online fandom. Bacon-Smith, for example, explicitly discussed five subgenres of fic in her 1992 ethnographic account of Star Trek fandom, and noted several additional developing subgenres.¹³⁰ There are other, more recent lists that contain many more entries.¹³¹ Perhaps the best known and most discussed of these sub-genres is ‘slash fiction,’ which is typically erotic in nature and as such poses additional copyright-relevant issues. For that reason, slash is discussed separately. Several other

¹³⁰ Bacon-Smith (n 13) 52–55.

¹³¹ *See, eg,* ‘Category:Fanfic Genres | All The Tropes Wiki | Fandom’ <https://allthetropes.fandom.com/wiki/Category:Fanfic_Genres> accessed 17 June 2021.

subgenres also have features which are relevant to copyright, although not necessarily to the same extent; these are discussed here.¹³²

‘Basic’ or ‘vanilla’ fanfic stays largely within the bounds of the fandom’s canon, expanding or elaborating on the original story without explicitly contradicting it. Such fanfic can, for example, tell the backstory of a minor character, or involve scenes and events set in between the works of the franchise. This fanfic stays as true to the original as possible. The effort to remain true to the original may result in these works being viewed, under American law, as less transformative than works which explicitly parody the original.¹³³ Under English copyright law, these works are also most likely not parodies or caricatures; they may be pastiche, but even this is likely to be difficult – these works are, for the most part, simply unauthorized prequels and sequels.¹³⁴

Alternate universe fiction (“AU”), which has subgenres of its own, deviates more from the original than straight fanfic. These works consciously and explicitly decline to follow the canon, although the reasons for the divergence vary from work to work. For example, some AU changes are what is sometimes known as “fix fic” – fan fiction that attempts to re-write the original to deal with real or perceived problems

¹³² The presentation of a full taxonomy is, mercifully, unnecessary for the purposes of this thesis. The subtleties, for example, of the difference between “continuation” fiction that picks up where the original left off and “next gen” fiction that picks up one generation after the original left off is unlikely to be substantial for copyright purposes.

¹³³ See Chapter 5.2.2.4.

¹³⁴ See Chapter 5.3.

or inconsistencies in the original work, whether real or perceived.¹³⁵ This fiction is, at least in intent, critical of the original, and may be viewable as a form of criticism, sometimes to the extent of being an explicit parody of the original.¹³⁶

Crossover fiction is also common.¹³⁷ In a crossover work, characters are drawn from more than one existing work. Such fiction is, of course, rarely going to be strictly canonical. However, the extent to which it deviates from the canon varies substantially. This can have obvious consequences for copyright law. Not only will there be more than one copyright holder to potentially serve as a plaintiff in a court case, but the merits of the claim may be different for each potential plaintiff.¹³⁸

¹³⁵ The various subgenres of fic are, of course, not restricted to literary works. They may also be found in other forms of fanwork. One example reveals just how subjective “fix” can be in this context – the “Men’s Rights” edit of *Star Wars: The Last Jedi*. See Avi Selk, ‘Analysis | A Men’s Rights Activist Edited “The Last Jedi” to Remove the Women. It’s Bad.’, *Washington Post* (17 January 2018) <<https://www.washingtonpost.com/news/comic-riffs/wp/2018/01/17/a-mens-rights-activist-edited-the-last-jedi-to-remove-the-women-its-bad/>> accessed 18 February 2021. For an example of reaction to this edit from those heavily involved in the creation of the original, see Mark Hamill, ‘Tweet’ (*Twitter*, 5 January 2018) <<https://twitter.com/HamillHimself/status/953312313758564352>> accessed 18 February 2021.

¹³⁶ There are cases involving analogous content; some are discussed in Chapter 6.4.4.

¹³⁷ And has arguably been common for centuries; Dante’s *Divine Comedy*, which features characters from across a wide range of works, is an arguable example of this subgenre.

¹³⁸ This was likely true in the recent US case *ComixMix*, which involved a mashup that combined Dr Seuss and *Star Trek*. Seuss Enterprises successfully sued, claiming that the work was a nonparodic infringement of Dr Seuss’s “Oh The Places You’ll Go;” the same claim would be harder for

Self-insert fiction, in which one imagines oneself within the story, can also raise copyright issues. Such fiction can take a number of forms, with “Mary Sue” fiction in which the “self” that is inserted is hyper-idealized and unrealistically flawless being perhaps the best known.¹³⁹ Mary Sues can be controversial, and have been both praised and derided in nearly equal measure. The Mary Sue phenomena has had significant cultural impact, as can be seen from the fact that it not only has its own Wikipedia article, but is also now found in the Oxford English Dictionary as “a type of female character who is depicted as unrealistically lacking in flaws or weaknesses.”¹⁴⁰ From a copyright perspective, Mary Sues and other self-insert works are potentially important because they do not necessarily directly substantially alter the original, but they do allow individuals to contextualize the original work by placing themselves within it; they are, perhaps more clearly than any other form of fanwork, tied to the reading experience. The justification for protecting such works from claims of infringement – that they are in large part works of self-actualization – was definitively presented by Chander and Sunder in 2007.¹⁴¹

Paramount to sustain as to a work that places Star Trek characters in a Seussian landscape. *Dr Seuss Enterprises, LP v ComicMix LLC* 983 F3d 443 (9th Cir 2020).

¹³⁹ The “Mary Sue” character takes its name from Paula Smith’s 10-paragraph work of that name, which is readily found in many locations. See, eg, Chander and Sunder (n 45) 94–96. The full story is provided for reference in Appendix B.

¹⁴⁰ ‘Mary Sue’, *Wikipedia* (2021); ‘Mary Sue, n.’, *OED Online* (Oxford University Press).

¹⁴¹ Chander and Sunder (n 45).

3.2.1.2 Slash and Other Romantic and Erotic Fan Fiction

Erotic and romantic fan fiction require special attention both due to the sexual nature of the content and their recognized use as a means that underrepresented groups may use to create a space for themselves within culture. As such, these works sit in a position of tension between authors who may object, sometimes strenuously, to the placement of characters in sexualized contexts and those of groups who are seeking and creating places for themselves within popular culture. All erotic and romantic fic raises some concerns in this context. This discussion focuses on slash fiction, both because it has been widely studied and because it provides a clear example of the nature of the concerns.

Slash fiction is a form of romantic or erotic fan fiction. Slash derives its name from the online tradition of placing the names of the characters featured in the romantic relationship on either side of a slash character (“/”). For example, a story that is tagged with “Aragorn/Eowyn” would indicate that the story is Lord of the Rings fanfic that features a relationship involving the Aragorn and Eowyn characters. This area of creativity has received considerable attention from a range of disciplines. It has also been the subject of considerable discussion within the legal academic community.¹⁴²

Although the / is used to designate the characters paired in any fanfiction relationship, slash fiction generally refers to same-sex male noncanonical pairings. The Spock/Kirk pairing is perhaps the

¹⁴² See, eg, Sonia K Katyal, ‘Performance, Property, and the Slashing of Gender in Fan Fiction’ (2006) 14 *American University Journal of Gender, Social Policy, and the Law* 461.

quintessential example of such fiction.¹⁴³ It was certainly one of the earliest, and has on occasion been identified as a genre in its own right.¹⁴⁴ However, there has been a range of such work since, across a range of genres that spans the gamut from Clark Gable/John Wayne greeting cards to Batman/Robin artworks to a film exploring the relationship between Sesame Street characters Ernie and Bert.¹⁴⁵

Romantic and erotic fanfiction, slash and otherwise, often places characters from within a franchise in romantic relationships that differ from those that are featured within the franchise's canon. These pairings are, in many cases, ones that would be controversial if featured in mainstream works, sometimes because they place canonical enemies together, sometimes because they feature same sex pairings, and often because they do both simultaneously. For example, Harry/Draco fanfic is a common pairing within the Harry Potter community.¹⁴⁶

There has frequently been pushback from authors and creators to the erotization of their works. This pushback has historically been particularly intense in the case of works that deal with LGBTQ+ themes, but other forms of erotica have certainly not been exempt.¹⁴⁷ Authors addressing this within the copyright context have explored these issues

¹⁴³ See generally Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Updated 20th Anniversary Edition, Routledge 2013) 185–222.

¹⁴⁴ See, eg, Bacon-Smith (n 13) 53.

¹⁴⁵ See Katyal (n 29) 463–64.

¹⁴⁶ See, Aaron Schwabach, 'The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright' (2009) 70 *University of Pittsburgh Law Review* 387, 390–91.

¹⁴⁷ See Katyal (n 29) 463 n 4.

both from the perspective of those creating such works and from the author's perspective.¹⁴⁸ These competing interests are discussed in more detail later in the thesis, as part of the discussion of the “why” of fanworks in the next chapter.

3.2.2 Fan Art

Fan art is visual artwork – whether digitally or conventionally crafted – that is drawn by fans based upon the fandom. Fan art has received somewhat less attention than fan fiction in the copyright literature, with discussion of the subject more frequently found within articles on fanworks as a whole than as a stand-alone topic. This should not be taken as a sign that fan art is less important, either within fandom or as a potential source of disputes.¹⁴⁹

Although fan art does not have the same kind of dedicated repositories that were seen with fan fiction it is widely available online. Websites such as DeviantArt or the Japan-based Pixiv host large quantities of such works. Although the legal disputes that arise in this context do not often capture public attention, and although formal

¹⁴⁸ See, eg, Katyal (n 29) (taking user perspective); Link (n 93) (taking creator perspective).

¹⁴⁹ For example, see the description of the dispute over eroticized comic book characters discussed by Katyal. Katyal (n 29) 463 n 4. See also the dispute involving the use of Disney characters in the countercultural comic book *Air Pirates*.

litigation is uncommon, it is hardly unheard of for DMCA takedown notices to be filed that involve such works.¹⁵⁰

Fan art is also more commercialized – and more directly commercialized – than its literary counterpart. Conventions all over the world have long hosted areas for fan artists to display and sell their works to other fans, alongside the dealers’ rooms where other forms of merchandise are sold.¹⁵¹ In addition to sales that take place at conventions, other means for fan artists to monetize their creativity have also developed. More recently, fan artists have begun accepting compensation for their creation of fanworks via online platforms, either on a direct commission basis or on a subscription model.¹⁵²

3.2.3 Fan Films

Fan films are another common form of fanwork.¹⁵³ Although the availability of online streaming sites such as YouTube has sparked a radical expansion in the number and variety of fan films, this form of fanwork also has a lengthy pre-internet history. For the purposes of this

¹⁵⁰ See, eg, “Mary W,” ‘Fan Artists Fear Retaliation over Warner Bros Copyright Claims’ (29 Oct 2020) <<https://www.mugglenet.com/2020/10/fan-artists-fear-retaliation-over-warner-bros-copyright-claims/>> last accessed 14 November 2022.

¹⁵¹ See Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (University of Pennsylvania Press 1992) 11. (documenting this phenomenon in a work discussing fandoms prior to the Internet era).

¹⁵² See, eg, hb0m8, ‘Patreon’ <https://www.patreon.com/hb0m8>

¹⁵³ Jyme Mariani, ‘Lights! Camera! Infringement? Exploring the Boundaries of Whether Fan Films Violate Copyright’ (2015) 8 *Akron Intellectual Property Journal* 117.

thesis, a number of types of film are included in this category that might not be categorized as such by all commentators. The classical understanding of fan films is that they are primarily dramatic works in their own right – that they are works of fiction that are set within the same universe as the original and are in some way tied to the story told within the original. There are, however, other types of fan video that are widely available in the modern environment. Two, in particular, deserve special attention: the reaction video and the informational video. Both of these are often found on YouTube and other similar sites. These two forms of work are treated within the fan film category primarily as a matter of convenience; each could be considered a separate type of fanwork instead of a type of fan film.¹⁵⁴

A reaction video is a video which shows the presenter's reaction to another work. Most commonly, the work reacted to is music, video, or a game, but it is possible to have a reaction video that reacts to nearly anything, including books or even legal disputes.¹⁵⁵ Reaction videos will typically make use of the original work to at least some extent, with the

¹⁵⁴ Separate treatment is not necessarily unwarranted, as these works do different things and convey different messages. However, this is also true for some of the subtypes of fan fiction, and for other forms of fanwork as well, so the grouping remains based on the medium rather than the purpose.

¹⁵⁵ For an example of the former, see 'Into The Omegaverse: How a Fanfic Trope Landed in Federal Court' (3 September 2020) <<https://www.youtube.com/watch?v=zhWWcWtAUoY>> accessed 22 February 2021 (video reacting to romance novels and related legal dispute); for an example of the latter, see 'Lawyer Kitten Unwittingly Appears in Court' (10 February 2021) <<https://www.youtube.com/watch?v=NnFlRr2FcVQ>> accessed 22 February 2021 (reacting to court hearing in which a Zoom filter mishap resulted in lawyer appearing before the court as a kitten).

precise amount used varying greatly from video to video, often based on the type of work being discussed. These videos often contain some critique of the original work, but here, too, the precise amount and nature of the critique will vary. It should also be noted that this is an imprecisely defined genre, and that the classification of a video as a reaction may not always be clear.

As is the case with cosplay, which is discussed below, reaction videos have attracted a fandom in their own right, in addition to sometimes being connected with other fandoms.¹⁵⁶ YouTubers who specialize in reaction videos may attract substantial numbers of followers and receive substantial incomes as a result of their efforts. Perhaps unsurprisingly, this has led to the development of legal disputes when one YouTuber does a reaction video of another YouTuber's efforts. Two such disputes are discussed in Chapter 6.

Informational videos are videos which present information about the subject of a fandom, and particularly about the background knowledge contained within mass-media franchises.¹⁵⁷ They may be particularly valuable in the context of the interactive entertainment realm, where they can be used to present information for players new to a game, including advice on how to get past certain challenging sections of the game.¹⁵⁸ However, these works may also be particularly valuable to those who are new to a complex franchise with a detailed and involved

¹⁵⁶ YouTube as a fandom is discussed in Chapter 4.3.5.

¹⁵⁷ See, eg, MetalBall Studios, 'STAR WARS |Real Scale in 3D' https://www.youtube.com/watch?v=nHo_J5FtJ58

¹⁵⁸ See, eg, KackisHD, 'Destiny 2: King's Fall Raid for Dummies' <https://www.youtube.com/watch?v=6J2yxv-LpUQ>

background. Informational videos raise particular copyright concerns, given their similarity with the types of reference works that American courts have consistently found to not constitute fair use.¹⁵⁹

3.2.4 Video Game-Specific Fanworks

Fanfic, slash, fan art, and fan films are all general forms of user-generated content which are broadly based. They are also forms of content that are not tied to particular kinds of media fandom; they are connected to a very wide range of fandoms linked to an even broader set of genres.¹⁶⁰ This section, discusses three distinct, but related, forms of fanwork: machinima, video game mods, and player-created in-game content. Although there are substantial differences between the works, they share a common link: all are fanworks that will be tied to at least one video game franchise.¹⁶¹ That is to say, from a copyright perspective, it will always be clear that there is at least one form of pre-existing intellectual property that is connected with the fanwork.

Machinima, a portmanteau of the words “machine” and “cinema,” is a form of fanwork in which a video game’s graphics engine is

¹⁵⁹ This is discussed at greater length in Chapter 5.

¹⁶⁰ See, eg, SilkyinaBottle, ‘Odds and Ends’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/works/4501791>> accessed 25 February 2021 (Gilbert and Sullivan fanfic).

¹⁶¹ They may, of course, be tied to more than one; crossover works are not any more uncommon in this arena than elsewhere in the fanwork’s arena. For example, a machinima may be created using the game engine and look of one video game, but featuring the content of another. See, eg, Duren, ‘World of Cyberpunk [WoW Machinima]’ (29 November 2020) <<https://www.youtube.com/watch?v=homqyBxHwis>> accessed 25 February 2021.

commandeered in order to create original videos.¹⁶² This use of the game engine by fans allows the creation of new animated works by creators who would not generally be able to afford to acquire the technology needed to create computer generated animation from the ground up. This use, which has been referred to as ‘found technology,’ can allow the creation of entirely novel works, or it can be used to create fanworks within the game’s fandom.

This is the first form of fanwork that we have encountered that does not have a lengthy pre-internet history. Video games have, after all, developed side by side with the internet. By the time video game technology had reached the level that allows the utilization of the game’s engine for the purposes of creating animation, the internet was already functional. Machinima has developed side-by-side with both the internet and the interactive entertainment industries. A substantial amount of attention has been paid to this form of content by academics, including within the copyright realm.¹⁶³

As is the case with other varieties of fanwork, machinima content varies greatly in its fidelity to the canon of the original works. In some cases, the canon is followed relatively closely. So much so, at times, that

¹⁶² Scholarship in this area includes: Graham Reynolds, ‘All the Game’s a Stage: Machinima and Copyright in Canada’ (2010) 13 *J World Intell Prop* 729; J Remy Green, ‘All Your Works Are Belong to Us: New Frontiers for the Derivative Work Right in Video Games’ (2017–18) 19 *NC JL & Tech* 393, 417–22; Christopher Reid, ‘Fair Game: The Application of Fair Use Doctrine to Machinima’ (2008–09) 19 *Fordham Intell Prop Media & Ent LJ* 831; Freedman (n 79); Michael Choe, ‘The Problem of the Parody-Satire Distinction: Fair Use in Machinima and Other Fan Created Works Notes & Comments’ (2011) 37 *Rutgers Computer & Tech LJ* 93.

¹⁶³ See generally, eg, Freedman (n 79); Choe (n 162); Reid (n 162).

it is difficult to distinguish between true machinima and a gameplay video. These machinima works tend to be homages to the original work and are analogous to many of the more conventional varieties of fanfic. This includes Mary Sue-type productions, whether unintentional or as an explicit homage to both the original franchise and the Mary Sue archetype.¹⁶⁴

In others, the machinima is more subversive. For example, a machinima directed and produced by a World of Warcraft player recreated, with the help of many other players, Romeo and Juliet as a machinima within the game.¹⁶⁵ This production set the main characters of the drama as members of factions which the mechanics of the game do not allow to communicate with each other at all – a subversive act which, as will be discussed later, could have considerable relevance to the copyright analysis of the work, particularly in the United States.¹⁶⁶

Here, also, fanworks have been at times embraced by the owners of the original copyright. The “Red versus Blue” series is a good example of this.¹⁶⁷ The original machinima of this series, which featured a brief philosophical discussion between two characters in the game Halo, was

¹⁶⁴ See, eg The Feaster, [*Wow Machinima*] *Private Mary Sue* (2017) <<https://www.youtube.com/watch?v=W4GZn3WSWOg&t=171s>> accessed 11 February 2021.

¹⁶⁵ For a detailed description of this project and its motivations, see Henry Lowood, ‘Found Technology: Players as Innovators in the Making of Machinima’ in Tara McPherson (ed), *Digital Youth, Innovation, and the Unexpected* (MIT Press 2008) 185–92.

¹⁶⁶ See Chapter 5.

¹⁶⁷ Rooster Teeth Animation, ‘Red vs. Blue Complete Season 1’ <https://www.youtube.com/watch?v=XnsRdaZTMas>

an unofficial fan production. The popularity of the series increased rapidly, and ultimately an arrangement was reached through which the production became official.

An additional type of newer fanwork is the video game modification, or ‘mod.’¹⁶⁸ Mods are a form of fanwork that adds elements to, or otherwise alters, a video game.¹⁶⁹ This may be done for various reasons, including to simply improve, at least in the view of the modifier, the original game. Mods may be undertaken in the service of the video

¹⁶⁸ Legal scholarship touching on the specific legal issues of this form of work includes: Reid (n 162); Jason Zenor, ‘If It’s in the Game: Is There Liability for User-Generated Characters That Appropriate a Player’s Likeness’ (2016–17) 16 *J Marshall Rev Intell Prop L* 305; Zvi Rosen, ‘Mod, Man, and Law: A Reexamination of the Law of Computer Game Modifications’ (2004–05) 4 *Chi-Kent J Intell Prop* 196; Andrew F Thomas, ‘Modding the Implied License Doctrine: An Estoppel License Framework for Video Game Mods’ (2019) 47 *AIPLA Q J* 545; Ryan Wallace, ‘Modding: Amateur Authorship and How the Video Game Industry Is Actually Getting It Right Comments’ (2014) 2014 *BYU L Rev* 256; Michela Fiordo, ‘Moral Rights and Mods: Protecting Integrity Rights in Video Games’ (2013) 46 *UBC L Rev* 739; ‘Spare the Mod: In Support of Total-Conversion Modified Video Games Note’ (2011–12) 125 *Harv L Rev* 789; Green (n 162) 422–27; Zvi S Rosen, ‘Man, Mod, and Law: Revisiting the Law of Computer Game Modifications’ (2018–19) 59 *IDEA* 269; John Baldrice, ‘Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects Note’ (2007) 8 *Minn JL Sci & Tech* 681; John Baldrice, ‘Cover Songs and Donkey Kong: The Rationale behind Compulsory Licensing of Musical Compositions Can Inform a Fairer Treatment of User-Modified Videogames’ (2009–10) 11 *NC JL & Tech* 103. In addition to copyright issues, work on mods has also examined related issues of right of publicity.

¹⁶⁹ See Mark Kretschmar and Mel Stanfill, ‘Mods as Lightning Rods: A Typology of Video Game Mods, Intellectual Property, and Social Benefit/Harm’ [2018] *Social & Legal Studies* 96466391878722, 2 (defining video game modding as ‘the practice of nonprofessionals altering or adding to games’).

game's own fandom, to change the game by making it a form of fanwork for another fandom, or a combination of the two.

Mods take a wide range of forms. Some, such as adding new levels to a video game, or making minor aesthetic changes can be relatively simple.¹⁷⁰ Others, however, can be more complex, and can even include taking a video game and turning it into a fanwork of another work. For example, mods exist that allow users to modify the video game Civilization VI into one that incorporates the nations and leaders from the Lord of the Rings franchise.¹⁷¹ Mods can also, for all intents and purposes, replace the original game's narrative content in full, incorporating all new story content and graphics and making use of only the underlying software of the original game. These radical mods are referred to as "total conversion mods."¹⁷²

Video game mods have been the subject of litigation, although in the context of commercial distribution rather than as fanworks; these cases will be discussed later in the thesis.¹⁷³ Video game mods embody

¹⁷⁰ See, eg, *Micro Star v Formgen Inc*, 154 F 3d 1107 (9th Cir 1997).

¹⁷¹ See 'Steam Workshop::Civ of the Rings (LotR Mod): Civilizations' (*Steam*, no date) <<https://steamcommunity.com/sharedfiles/filedetails/?id=894221062>> accessed 18 June 2021. Similar mods allow users to play the game within a range of other franchises, including Game of Thrones and Star Wars. 'Steam Workshop::A Civ of Ice and Fire V1.1.0 Gathering Storm' (no date) <<https://steamcommunity.com/sharedfiles/filedetails/?id=964610932>> accessed 18 June 2021; Joe Robinson, 'Civilization 6 is Now the Best Star Wars Game Thanks to this Mod' (*PCGamesN*, 16 March 2021) <<https://www.pcgamesn.com/civilization-vi/star-wars-civ-mod>> accessed 18 June 2021.

¹⁷² See, eg, Rosen, 'Mod, Man, and Law' (n 168) 203.

¹⁷³ See Chapter 6.3.1.

the usual copyright challenges of fanworks. To this, they add the additional difficulties and uncertainties that attach to issues of software copyrights.¹⁷⁴ And, of course, these issues are those specific to *video* game modifications. Tabletop games, like their electronic counterparts, can also be, and have been, modified, and the status of such modifications – which can often involve the creation of new physical game parts – is also unclear.¹⁷⁵ This area continues to develop.

Finally, there are issues related to the development of player-created content for official use in games. Virtual property includes ‘items’ for use in games and other virtual environments, such as Linden Lab’s *Second Life*, that is created by players and has value within the game or online environment in which it is used. This area resides at the intersection of intellectual property rights and traditional property rights.¹⁷⁶ The legal issues raised by these objects include questions such

¹⁷⁴ In this context, it should be noted that this is yet another area where it is not yet clear how, or if, the US Supreme Court’s approach in *Google LLC v Oracle America, Inc*, 141 S Ct 1183 (2020), which leaned toward thin copyright protection for software, will ultimately change matters.

¹⁷⁵ Benjamin J Siders and Kirk A Damman, ‘Emerging Challenges in Tabletop Gaming: Player Modifications, Third-Party Parts, and Disruptive Technology Meeting of the Minds’ (2014–15) 7 *Landslide* 52. This area has also been the subject of some litigation, most notably a dispute between UK-based Games Workshop and a company marketing aftermarket parts for Games Workshop miniatures *Games Workshop Ltd v Chapterhouse Studios LLC* (1:10-cv-08103) (ND Ill) <https://www.courtlistener.com/docket/4259850/games-workshop-limited-v-chapterhouse-studios-llc/>.

¹⁷⁶ See, eg, Allen Chein, ‘A Practical Look at Virtual Property Note’ (2006) 80 *St John’s L Rev* 1059; John William Nelson, ‘A Virtual Property Solution: How Privacy Law Can Protect the Citizens of Virtual Worlds’ (2011) 36 *Oklahoma City U L Rev* 395; Kenneth W Eng, ‘Content Creators, Virtual Goods: Who Owns Virtual Property Notes’ (2016) 34 *Cardozo Arts & Ent LJ* 249; Peter

as whether the player owns any right in their creation at all, and whether (and to what extent) the owner of the underlying game or virtual world owns the user creations.

The legal implications of virtual property are fascinating, but they are also somewhat removed from most fanworks. They are not works that are auxiliary to a primary work. Rather, they are works that are created to be used within and as a part of a single primary work. By their nature, they are typically authorized by the copyright owner, and are (in most cases) an essential part of the underlying work rather than independent creations in their own right. Thus, while these works share similarities with fanworks, particularly in their creation as user-generated content, they are dissimilar enough that this thesis will not consider them further.

3.2.5 Streaming

A new industry has developed around a form of fanwork: livestreaming, or “streaming.” A livestream is a live video broadcast transmitted via the internet, generally on a site that allows for audience interaction with the streamer in real time, most often through the use of a text chat channel.¹⁷⁷ This form of fanwork is commonly associated with

Brown and Richard Raysman, ‘Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property’ (2006) 2 Indian J L & Tech 87; Joshua AT Fairfield, ‘Virtual Property’ (2005) 85 BU L Rev 1047; Ronan Kennedy, ‘Virtual Rights: Property in Online Game Objects and Characters’ (2008) 17 Info & Comm Tech L 95.

¹⁷⁷ Livestreaming, which involves realtime distribution of live content from content creators, should be distinguished from the ‘streaming’ of conventional media through online channels. Conventional media

video games, and gameplay streams make up the bulk of content on major streaming websites.¹⁷⁸ The academic study of the copyright aspects of streaming has largely focused on their relationship to interactive entertainment.¹⁷⁹ However, this is far from the only form of streaming; a wide range of topics are commonly covered, including other

streaming is internet-facilitated, but functionally equivalent to on-demand cable from the perspective of users.

¹⁷⁸ Twitch, www.twitch.tv, is dedicated almost entirely to streaming, but sites such as YouTube and Facebook also host streaming.

¹⁷⁹ See, eg, Yang Qui, ‘A Cure for Twitch: Compulsory License Promoting Video Game Live-Streaming’ (2017) 21 Marq Intell Prop L Rev 31; Michael Larkey, ‘Cooperative Play: Anticipating the Problem of Copyright Infringement in the New Business of Live Video Game Webcasts’ (2015–16) 13 Rutgers J L & Pub Pol’y 52; John Holden and Mike Schuster, ‘Copyright and Joint Authorship as a Disruption of the Video Game Streaming Industry’ (2020) 2020 Colum Bus L Rev 942; Shigenori Matsui, ‘Does It Have to Be a Copyright Infringement: Live Game Streaming and Copyright’ (2016) 24 Tex Intell Prop LJ 215; James Puddington, ‘Fair Play: Economic Justification for Applying Fair Use to the Online Streaming of Video Games Note’ (2015) 21 BU J Sci & Tech L 413; Dan Hagen, ‘Fair Use, Fair Play: Video Game Performances and Let’s Plays as Transformative Use’ (2017–18) 13 Wash J L Tech & Arts 245; Shani Shisha, ‘Fairness, Copyright, and Video Games: Hate the Game, Not the Player’ (2020–21) 31 Fordham Intell Prop Media & Ent LJ 694; Nicholas Robinson, ‘From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming’ (2018) 20 NC JL & Tech 286; Howard S Chen, ‘Gameplay Videos and Fair Use in the Age of Tricks, Glitches and Gamer Creativity 2019 Symposium Articles: Intellectual Property in a Globalized Economy: United States Extraterritoriality in International Business: Notes’ (2019) 25 BU J Sci & Tech L 675; Conrad Postel, ‘Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use Notes’ (2016–17) 68 Hastings LJ 1169; Isabel Assunta C Caguioa, ‘Recent Copyright Issues in Video Games, Esports, and Streaming Sports and Entertainment Law: Essays’ (2018–19) 63 Ateneo LJ 882; Franklin Graves and Michael Lee, ‘The Law of YouTubers: The Next Generation of Creators and the Legal Issues They Face’ (2016–17) 9 Landslide 8.

forms of fanwork such as cosplay.¹⁸⁰ This area is substantially less studied, at least at present.

As is the case with the YouTube subgenre of fan films, this has become somewhat of an industry – and fandom – in its own right. The website most well-known as a host of livestreams, Twitch, is owned by Amazon. Streamers who meet certain requirements may become either Twitch “Affiliates” or “Partners” and monetize their livestreams through advertising, subscriptions, and direct contributions.¹⁸¹ Other websites that commonly host livestreams, including YouTube and Facebook Gaming, also provide the option to monetize streamed content. This commercialisation clearly has copyright implications. Nevertheless, although as was the case with YouTube there are some high-income streamers, the bulk of are not making significant sums from streaming, while their content is clearly related to fandoms and constitutes fanworks under any reasonable definition.

Streams differ from fan videos in that the streams allow for realtime interactivity whilst films do not. This changes the nature of the work to an extent, depending of course on how much the streamer interacts with the audience during the course of the stream. Video game streams also raise issues relating to the question of joint authorship – whether the person playing a game has an authorship interest in the

¹⁸⁰ Nearly any topic can be – and likely is – the subject of streams; the author runs a lightly-viewed Twitch channel that discusses active litigation. *See The Questionable Authority* (Twitch, no date) <[twitch.tv/questauthority](https://www.twitch.tv/questauthority)>

¹⁸¹ See, eg, Twitch, ‘Twitch Partner Program,’ <https://www.twitch.tv/p/en/partners/> (last accessed 8 Nov 2022).

story being created and shown through play.¹⁸² They also often benefit from a permissive environment; because game streaming is a valuable source of publicity, streaming is widely tolerated and often explicitly permitted within video game terms of service.¹⁸³

In part, this permissive environment may stem from some uncertainties as to whether unlicensed video game streaming infringes copyright at all. The Ninth Circuit has held that playing boardgames in public does not infringe copyright.¹⁸⁴ However, one lower court has declined to apply this rule to the playing of video games in cyber-cafes that charge for play, and another has declined to reach the question of what rule applies to streaming.¹⁸⁵ This form of fanwork otherwise largely tracks the legal issues of fanworks.

3.2.6 Cosplay

Cosplay is the most complex form of fanwork to address, both from a fan activities perspective and for copyright analysis. It is also one of

¹⁸² See, eg, Holden and Schuster (n 179).

¹⁸³ See, eg, Bungie, ‘Guidelines On Fan-Created Media and Art,’ <https://help.bungie.net/hc/en-us/articles/360049201911-Intellectual-Property-and-Trademarks> (last accessed 14 Nov 2022).

¹⁸⁴ See, eg, *Allen v Academic Games League of America, Inc*, 89 F3d 614, 616 (9th Cir 1996) (holding that allowing copyright owners to control when and where games are played would be an unreasonable extension of copyright).

¹⁸⁵ See *Valve Corp v Sierra Entertainment Inc*, 431 F Supp 2d 1091, 1097 (WD Wa 2004) (play in cybercafe is potentially infringing); *Epic Games, Inc v Mendes*, 17-CV-06223-LB at *9 (ND Cal June 12, 2018) (declining to reach question).

the less studied, particularly from a copyright perspective.¹⁸⁶ Cosplay is mentioned in a number of copyright and fanworks papers.¹⁸⁷ It is discussed in depth in some.¹⁸⁸ It is, however, the primary focus of very few.¹⁸⁹

The term ‘Cosplay’ was coined in Japan to describe the practice of dressing up and acting as a character from a particular fandom.¹⁹⁰ As a term, cosplay has its origins largely within the video game and anime fandoms.¹⁹¹ However, while the term itself originated in Japan and a number of authors have discussed cosplay as originating there, the situation is not entirely that simple. Fans dressing up in costume as a form of fanwork has a history that extends much deeper. Costuming has been a regular feature at conventions since well before the modern term was coined; costumed appearances at science-fiction conventions have

¹⁸⁶ After this sentence was written, an excellent treatment of cosplay was published that provides substantial background on cosplay. Andrew Liptak, *Cosplay: A History* (Saga Press 2022). However, the book’s discussion of IP issues is limited and not directed at a legal audience. Id at 263-75.

¹⁸⁷ See, eg, Hatcher (n 45) 517, 541; Stacey M Lantagne, ‘The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright’ (2016) 32 Georgia State University Law Review 459, 501–02; Peterson (n 29) 240; Rosenblatt, ‘Belonging as Intellectual Creation’ (n 81) 118 n 158.

¹⁸⁸ See, eg, Agnetti (n 29) 123–25; Chung (n 45) 402–04; Sunder (n 45) 236.

¹⁸⁹ See, eg, Melissa De Zwart, ‘Cosplay, Creativity and Immaterial Labours of Love’ in Dan Hunter and others (eds), *Amateur Media: Social, Cultural and Legal Perspectives* (Routledge 2013); Molly Rose Madonia, ‘All’s Fair in Copyright and Costumes: Fair Use Defense to Copyright Infringement in Cosplay’ (2016) 20 Marquette Intellectual Property Law Review 177.

¹⁹⁰ The term is derived from “costume” and “play.” De Zwart (n 189) 171.

¹⁹¹ *ibid.*

been documented running at least as far back as 1936.¹⁹² Science-fiction costumes have an even longer history at private events.¹⁹³

The practice of cosplay is not presently linked to one particular fandom. Any given multi-work convention is likely to see cosplayers dressed as characters from a large number of different works, and even different genres.¹⁹⁴ Nor is any particular cosplayer necessarily restricted to recreating a character or characters from any one individual fandom. There are, of course, some cosplayers that are fandom specific. However, it is also common for a single cosplayer to engage in cosplay linked to a range of fandoms.¹⁹⁵

Further complicating the discussion of this form of work, cosplay is not merely a form of fanwork. It has become, in many ways, a fandom in its own right.¹⁹⁶ There are also publications and websites devoted entirely to cosplay as such, rather than to cosplay linked to any specific fandom, and there have long been conventions dedicated entirely to

¹⁹² See Bacon-Smith (n 13) 9.

¹⁹³ See Liptak (n 186) 12–13.

¹⁹⁴ See, eg, Myrydd Wells and Matt Walljasper, ‘What We Saw At Dragon Con 2022: Hellfire, Hotel Drama, and a Return to Form’ (Atlanta Magazine, 7 September 2022) <https://www.atlantamagazine.com/news-culture-articles/what-we-saw-at-dragon-con-2022-hellfire-hotel-drama-and-a-return-to-form/>

¹⁹⁵ See, eg, Dallas Duncan, ‘Dragon Con 2019 Descends Upon Atlanta: Gay Cosplayer Plans Five Outfits for Annual Event’ (The Georgia Voice, 28 Aug 2019) <https://thegavoice.com/culture/dragon-con-2019-descends-upon-atlanta-gay-cosplayer-plans-five-outfits-for-annual-event/> (last visited 14 November 2022) (discussing cosplayer who has performed as MASH character Corporal Klinger and as the late American Supreme Court Justice Ruth Bader Ginsburg).

¹⁹⁶ See generally Liptak (n 186).

costumes and cosplay.¹⁹⁷ As is true of many of the types of fanwork discussed here, it is possible to be as much a fan of the art form of cosplay as one is of any individual underlying work.

This is not to say that cosplay isn't also important as a more conventional fanwork. There are certain fandoms, including both the Steampunk and Furry communities, in which costume and costuming often play a critical role in the identity of members of these communities; one's costume is an extension of one's self.¹⁹⁸ There are other fandoms in which cosplay is an essential part; a viewing of *The Rocky Horror Picture Show* would not be the same experience without cosplaying fans and a live cast.¹⁹⁹ And in still other fandoms, cosplay groups can form distinct subsets of the fandom, with their own subcultures.²⁰⁰

From a purely copyright perspective, cosplay is complex. Costumes themselves are, as articles of clothing, outside the scope of copyright protection in many jurisdictions.²⁰¹ However, some types of cosplay, such

¹⁹⁷ For example, Costume-Con, which is heading into its 39th annual convention. See costume-con.org.

¹⁹⁸ See generally Emily Satinski and Denise Nicole Green, 'Negotiating Identities in the Furry Fandom Through Costuming' (2016) 3 *Critical Studies in Men's Fashion* 107; Paul Roland, *Steampunk: Back to the Future with the New Victorians* (Oldcastle 2014).

¹⁹⁹ See, eg, Stacey M Lantagne, 'Building a Better Mousetrap: Blocking Disney's Imperial Copyright Strategies' (2021) 12 *Harv J Sports & Ent L* 141, 168. On the whole, however, the copyright implications of the *Rocky Horror* fandom, and particularly those accompanying the live cast performances, are tragically understudied.

²⁰⁰ For example, the 501st Legion is a Star Wars cosplay group; similar organizations exist within other fandoms, such as Star Trek or Halo. See Liptak (n 186) 53–72.

²⁰¹ See *Star Athletica, LLC v. Varsity Brands*, 137 S. Ct. 1002, 1035 (2017)

as stormtrooper costumes from the Star Wars franchise, may be protected by copyright in some, but not all, jurisdictions.²⁰² And even in jurisdictions where there is no protection for costumes, and even where the costume in question does not include otherwise protectable elements, this may still not provide a decisive answer to the question of whether the cosplay is infringing. Rather, it will settle the matter only if the costume is viewed as the allegedly infringed work. This is not necessarily the case.

The focus might be more appropriately placed on the question of whether the cosplay duplicates not the costume but the character. This, of course, opens yet another can of worms as this area of is also less than crystal clear. The protection of fictional characters is an additional contentious area, and one that has obvious relevance across a range of fanworks. In the United States, the caselaw is clear that characters will, in many if not most instances, be protected works.²⁰³ The same is true in a number of other jurisdictions that are relevant to this thesis. However, it is not necessarily the case in the United Kingdom.²⁰⁴

3.2.7 Tangible Items

Tangible merchandise is one of the most troubling forms of fanwork from an intellectual property law perspective; it intersects not just with copyright but with trademark, and almost always involves a commercial transaction. Such fanworks are also increasingly common,

²⁰² See n 105.

²⁰³ See, eg, *DC Comics v Towle* 802 F3d 1012, 2019-23 (9th Cir 2015).

²⁰⁴ As noted in Chapter 5.3.3, this question is currently in flux following the decision in a recent case.

including through make-on-demand services such as Etsy or Redbubble that are engaged in online commerce.²⁰⁵ The range of forms for these items varies widely, and can include costumes, prop replicas, stickers, and other items that overlap with the kind of merchandise often sold by rights holders. The strength of any potentially available copyright infringement claim will vary as well. This area, however, has not been widely studied, at least as it pertains to media fandoms.²⁰⁶ Discussions of the area as it relates to media fandoms has largely been located within broad-topic papers, rather than dedicated discussions.²⁰⁷

²⁰⁵ *Eg*, the use of knitting as a form of fanwork. *See* n 117.

²⁰⁶ To the extent there has been attention paid to this area, much of it is from the perspective of sports fandoms and fandoms constructed around public figures, rather than media fandoms. *See, eg*, Scott J Shackelford, 'Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures' (2012) 49 *Am Bus LJ* 125; David Franklin, 'League Parity: Bringing Back Unlicensed Competition in the Sports Fan Apparel Market Student Note' (2011) 86 *Chi-Kent L Rev* 987; Joseph P Liu, 'Sports Merchandising, Publicity Rights, and the Missing Role of the Sports Fan The NCAA at 100: Perspectives on Its Past, Present, and Future' (2011) 52 *BC L Rev* 493.

²⁰⁷ There is one paper that is largely focused on merchandise, but even that work places a great deal of attention on other fanworks such as fan art. Chung (n 45). Other papers tend to focus on merchandise as part of a broader analysis. *See, eg*, Sunder (n 45) 213; Agnetti (n 29) 143–44, 146–49.

The case of the Firefly Hat presents one example of such a dispute.²⁰⁸ This case involved a fan of a short-lived science fiction series that has a strong fandom: Firefly. One of the characters in this series wore a characteristic wool hat, depicted below. Fans used that hat as a sign of their loyalty to the show, with some of them making hats and selling them online through sites such as Etsy. Although the show had long since been canceled, the rights holder, upon noting the phenomenon, licensed its own ‘official’ version of the hat and sent takedown notices to those who had been involved in selling the ‘unofficial’ items.

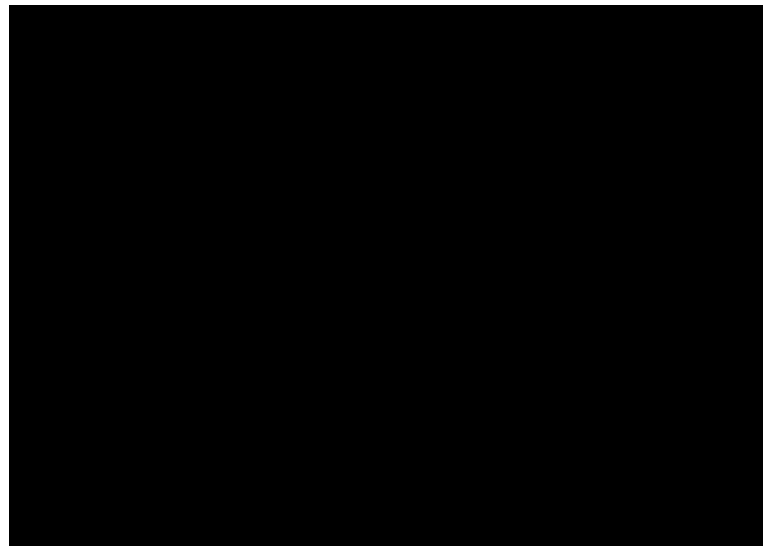


Figure 3.3.1: The Firefly Hat (source: <https://whatthecraft.com/the-jayne-cobb-hat-debacle/>)

From a copyright perspective, it is unlikely that the rights holder had a viable copyright claim. The hat itself seems unlikely to attract copyright protection, even if it was a custom creation by the studio, and even if the rights holder in the series could demonstrate a valid claim to

²⁰⁸ Unless otherwise specified, the facts in this paragraph are drawn from Agnetti (n 29) 143–44.

ownership.²⁰⁹ It is a three-color knit hat of simple design, and it is difficult to see a viable claim to ownership. Nevertheless, cease and desist letters have had the desired effect, largely clearing the field for licensed alternatives.²¹⁰ This *in terrorem* effect of threatened litigation is discussed further in Chapter 7. For now, it suffices to note that even where potential IP claims are at their weakest, fanworks involving tangible merchandise are particularly exposed to the legal uncertainties.

This case is far from the only such example, however. Agnetti points to several more examples, Sunder highlights more, and these barely scratch the surface of the phenomenon. One can go to any number of websites – Etsy, Redbubble, Zazzle, just to name a few – and find countless such items on offer. Nor is this a new phenomenon. The sale of merchandise has been a common feature of conventions for decades, and, as is so often the case with fanworks, greatly predates the internet.²¹¹

3.2.8 The Indescribable Fanworks

In addition to the works described individually, there are many other forms of fan creation, some of which that defy classification. It is difficult to think of a clearer example of this than the Great Soup

²⁰⁹ Although Agnetti stated that the rights holder “was within its rights” to serve takedown notices in this case, this conclusion does stand up well to a detailed analysis. *ibid* 144.

²¹⁰ See Jill Pantozzi, ‘UPDATED: Are You A *Firefly* Fan Who Makes Jayne Hats? Watch Out, Fox Is Coming For You’ (The Mary Sue, 9 April 2013) <https://www.themarysue.com/jayne-hats-fox/>

²¹¹ See, *eg*, Bacon-Smith (n 13) 47 (highlighting crafts as a form of fanwork).

Walk.²¹² This episode involved a group endeavour in which a substantial number of Red Dead Redemption 2 players attempted to walk across the game's entire map as a group, while carrying bowls of soup. This was an attempt that was optimistic, if not noteworthy for its success; the real-world size of the game's map has been estimated at about 29 square miles (75 square km).²¹³ The event was widely reported, and several of those who were involved posted videos of the event, which attracted some media attention.²¹⁴

Although it is possible to categorize the videos themselves as a form of fan film, this does not do justice to the extent of creativity involved in this adventure. Nor does referring to this as a fan film capture, at least potentially, all of the possible means of delivery; content such as this is as easily delivered as a livestream as a static video. Nor is this precisely a machinima; it tells no story. Nor is it the game being played in the intended manner; the soup walkers entirely avoided the game's narrative.

²¹² The facts in this section are drawn, unless otherwise specified, from Zack Zwiezen, 'A Large Group Of Red Dead Online Players Tried To Carry Bowls Of Soup Across The Entire Map' (*Kotaku*, no date) <<https://kotaku.com/a-large-group-of-red-dead-online-players-tried-to-carry-1838594087>> accessed 20 October 2020.

²¹³ See Ian Philpott-Kenny, 'Comparing Skyrim's Map Size to Red Dead Redemption 2' (Gamerant, 6 April 2020) <https://gamerant.com/skyrim-map-size-red-dead-redemption-2/> accessed 20 November 2022

²¹⁴ See, eg, Sonny Evans, 'Can You Walk a Bowl of Stew across the Map in Red Dead Redemption 2?' (8 October 2019) <<https://www.youtube.com/watch?v=eAAMJ79t8Fs>> accessed 10 June 2021.

As was the case with livestreams, this work is characterized by the interactivity, although it is a different form of interactivity than that seen where the streamer is interacting with the audience and the audience is interacting with each other. Here, the work itself is created by the actions of the group, working collaboratively within the confines of the game. There was no attempt to avoid any of the normal consequences of attempting to “play” the game in a manner not contemplated by the designers. Instead, the consequences of game characters attempting to make their way through the hazards of the game’s universe while unarmed and unable to respond in the normal in-game fashion were part of the ‘play.’ (In other words, the videos feature things like characters dying because they were hit by trains because they could not run while holding soup.)

Other areas of difficult-to categorize fanworks may include examples such as the Slender Man. This is a horror-genre fictional character that was developed through a crowdsourced process, and which eventually became the subject of copyright dispute when the alleged originator purported to sell the rights to a third party.²¹⁵ This character resides in the borderlands between fanworks and fandoms and will be discussed at greater length in Chapter 4.

3.3 Fanworks: Borderline Areas

In addition to the conventional varieties of fanwork that have already been discussed, several other types of work fall into grey areas, in part because it is not possible to make definite statements about

²¹⁵ See, eg, Smith (n 29).

whether or not they are fanworks without addressing the question of what qualifies as a fandom. They are not, to put it another way, typically used to create secondary works based on mass-media franchises.²¹⁶ Three such areas are discussed in this section: the widespread use of memes and reaction gifs, peer production, and hobbies.

3.3.1 Memes and Reaction Gifs

Two additional forms in which content from mass popular culture may be used in new ways by ordinary users deserves mention here: memes and reaction gifs. Both are in common usage on social media and other forms of communications. Both span the boundary between fanworks and other forms of user-generated content. As such, they are useful for illustrating several key points. First, they show the difficulty in defining fanworks, raising questions regarding each aspect of the definition. Second, they raise the question of the importance of original creativity. Third, they illustrate the way fanworks can be used as means of communications. Finally, they provide an example of the difficulties inherent in determining if a use of content is commercial.

The terms ‘meme’ and ‘reaction gif’ defy simple definition. Scholars see memes as the fundamental unit of cultural evolution.²¹⁷ The general public sees memes as pictures of cats with amusing catchphrases written

²¹⁶ This does not, however, mean that such works are never a form of mass-media fanwork. See, eg, ‘Middle Earth Model Railway - Introduction’ (no date) <<http://www.rickdavis.co.uk/rail/about-intro.php>> accessed 10 June 2021 (website for model railway ‘Serving East Arthedain, Rivendell and The Shire Since 1967’). But such uses are the exception, not the norm.

²¹⁷ See, eg, DC Dennett, *Darwin’s Dangerous Idea: Evolution and the Meanings of Life* (Penguin 1996) 341–70.

on them.²¹⁸ Both views are of some importance to the copyright discussion in this thesis.

The word “meme” is an invented word first used by Richard Dawkins in his 1976 book *The Selfish Gene*.²¹⁹ Dawkins, attempting to draw analogies between biological and cultural evolution, coined the word meme as a term for, “a unit of cultural transmission, or a unit of *imitation*.”²²⁰ Dawkins provides a number of examples, including “tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches.”²²¹ He also presents three key features of memes: memes, or at least successful memes, possess “longevity, fecundity, and copying-fidelity,”²²² although Dawkins recognizes that the third may not strictly hold true, with many memes displaying imperfect replication.²²³ Dawkins does not, however, provide a more specific definition than “unit of imitation.”

The term has subsequently been co-opted into online discussions and has largely come to mean still photographs or gifs,²²⁴ often with

²¹⁸ See, eg, ‘Happy Cat’ (*Know Your Meme*, no date) <<https://knowyourmeme.com/memes/happy-cat>> accessed 10 June 2021.

²¹⁹ Richard Dawkins, *The Selfish Gene* (first published 1976, 40th Anniversary Edition Oxford 2016) 249.

²²⁰ *Ibid* (emphasis in original).

²²¹ *Ibid*.

²²² *Ibid* at 251-53.

²²³ *Ibid* at 252.

²²⁴ A ‘gif’ is an image file taking its name from its format: graphics interchange format. The format was initially designed to facilitate low-speed transmission of images, but it has been used more often in recent years as a means of storing/transmitting very short (generally under 5 second) soundless video clips.

superimposed text, that is posted on the internet. Memes and gifs present an example of the uncertainties and disagreements inherent in labelling something like this a fanwork. It cannot be denied that these works have features that distinguish them from the other forms of fanwork discussed above. Their creation involves a very different sort of creativity than the creation of other sorts of fanwork. The creation of a new meme may involve no more than adding a new caption to a previously developed template. Even the creation of a meme template may involve nothing more than the selection of a frame from a film, or a photograph from some other context. The development of a new reaction gif involves the selection of a brief clip. This is not the same type of creativity that is seen in the development of fan fiction or fan art. There is not so much a reworking of original material here as there is a condensation and recontextualization.

It must also be acknowledged that it is possible that the development of a new reaction gif or meme template may not be a copyright protected work, placing them further from the definition for fanworks articulated in 3.1.3. Some meme text might meet the protectability threshold, but the text usually consists of very short phrases. It is quite possible that many, and perhaps even most, memes do not reach the threshold level of protectability required for copyright.²²⁵ Reaction gifs are used for expressive purposes, often in ways that the original creator did not intend. However, they do not add

²²⁵ They may, however be protectable through other means, such as trademark. See, eg, *Gordon v Drape Creative, Inc* 909 F3d 257 (9th Cir 2018).

new creation at all. As such, memes and reaction gifs challenge the definition of fanwork.

In addition, and as Schwabach notes, memes typically do not engage in conversation with the original source work.²²⁶ They certainly do not do so to the extent that is seen with other forms of fanwork. In fact, people who use memes are not always familiar with the source material. It is not uncommon to see people on social media, for example, upon watching a film such as *Charlie and the Chocolate Factory* or *The Princess Bride*, to make a remark along the lines of “oh, that’s where all those memes come from.”²²⁷ It is difficult to say that a use of a meme by someone who does not know the source of the original is really a use by a fan in the context of a fandom.

Nevertheless, there are reasons it may be appropriate to view these as at least akin to fanworks. These objects are used for conversational purposes. The conversation in question may not be centred on the work in question, but it is conversational nonetheless. In fact, the use of these works for communicative rather than creative industries purposes is arguably more clear here than it is for other fanworks; people often leave a meme or gif without additional comment as their contribution to a discussion. It is difficult to locate a clearer

²²⁶ Aaron Schwabach, ‘Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments’ (SSRN Scholarly Paper, 25 January 2021).

²²⁷ See, eg, Lisa Greim, ‘Tweet’ (@LisaGreim, 28 November 2020) <<https://twitter.com/LisaGreim/status/1332724444226220032>> accessed 10 June 2021.

example of a use that is for communicative purposes rather than as a form of creative competition.

Memes are also copyright relevant. In many cases, memes are copyright-relevant for the same reasons as traditional fanworks: they are secondary uses of copyright-protected works that have not generally been explicitly authorized by the rights holder. This raises issues that are clearly similar to those that are raised by conventional fan fiction and similar uses.²²⁸ In addition, and as discussed in Chapter 7, there has been at least one instance of litigation brought by a small meme creator against allegedly unauthorized uses of the meme.

Meme culture, including gif use, is also in many ways a fandom in its own right. There are entire online fora where new memes are tested, previewed, catalogued, and discussed, and from which they spread into broader society.²²⁹ Individuals within this meme subculture may view themselves primarily as meme creators or “memelords” rather than fans of any particular source work. Viewed in this context, there is engagement with the fandom of choice – that fandom simply happens to be different from the fandom that serves as the ultimate source for many of the memes and gifs. These issues will be discussed at greater length in the next chapter.

²²⁸ See generally, eg, Elena Elmerinda Scialabba, ‘A Copy of a Copy of a Copy: Internet Mimesis and the Copyrightability of Memes’ (2020) 18 Duke L & Tech Rev 332 (concluding that memes are likely protected under fair use in American law for reasons similar to those often presented for fanworks).

²²⁹ Perhaps the best known of these is the website “Know Your Meme,” <https://knowyourmeme.com/>, which serves a Wikipedia-like function for memes.

3.3.2 Peer Production as Fanwork

The term “peer production” was coined by Yochai Benkler in a 2002 article about the free and open source software (“FOSS”) movement.²³⁰ The term refers to creation through a process of “collaboration among large groups of individuals, sometimes in the order of tens or even hundreds of thousands, who cooperate effectively to provide information, knowledge or cultural goods without relying on either market pricing or managerial hierarchies to coordinate their common enterprise.”²³¹ The term has subsequently been used to refer to a wide range of creative activity beyond the FOSS movement, including both Wikipedia and a number of projects that have developed within multiplayer online games.²³²

This thesis does not argue that all peer production should be viewed as fanworks.²³³ Much of the FOSS movement focuses on the development of functional software for scientific and business applications; it would be strange to view these as the creation of fandoms.²³⁴ However, some applications of peer production can easily be viewed as fanworks.

²³⁰ Yochai Benkler, ‘Coase’s Penguin, or, Linux and The Nature of the Firm’ (2002–03) 112 Yale LJ 369.

²³¹ Yochai Benkler and Helen Nissenbaum, ‘Commons-based Peer Production and Virtue’ (2006) 14 Journal of Political Philosophy 394, 364.

²³² Benkler (n 75) 70–74.

²³³ The legal and policy arguments made in the conclusion of this thesis, however, may very well apply to most or all peer production.

²³⁴ Schwabach has called attention to the existence of a mimeograph machine fandom. Schwabach, ‘Bringing the News from Ghent to Axanar’ (n 226).

Peer production has arguably been used to develop both fictional characters and entire genres, some of which have been involved in copyright disputes. These examples, which will be discussed in the next chapter, include some of uncertain status as fanworks; their classification depends on how fandom is defined.²³⁵ They are also of unclear status as peer production; it is not clear that they are the result of any sort of plan. Instead, they developed more organically. For these types of works, the decision of whether or not to consider them within the ‘fanworks’ arena will be made after considering whether or not these are the creations of fandoms.

There are also examples of peer production that fall more clearly within the ambit of fanworks. These mostly consist of Wikipedia-type projects which collect material about the fictional universes at the center of major mass-media fandoms.²³⁶ These fall into borderline areas as fanworks in part because, unlike the major kinds of fanwork discussed above, they are not expressions of fictional or artistic creativity. They are, instead, largely factual works. As such, they have received relatively little attention in the context of fanworks and copyright.

At the same time, however, they are undoubtedly expressions of fandom-based activities. They are also, as will be discussed at more length in Chapter 6.2.2, works that are broadly similar to some that have been at issue in litigated cases. In particular, they bear a resemblance to the kind of fannish reference materials that have resulted in lawsuits

²³⁵ This is true of both the Slender Man fictional character, Chapter 4.3.4.2, and the Omegaverse subgenre of erotica, Chapter 4.3.4.3.

²³⁶ The website Fandom.com, formerly known as ‘wikia,’ incorporates many such projects.

when attempts have been made to commercially publish them as books.²³⁷ Given both the fannish nature of these works and their broad similarity to works that have been at the center of copyright disputes, treating them as fanworks seems prudent.

3.3.3 Hobbies: Are They Fanworks?

There are a wide range of activities that have generally been referred to as “hobbies” rather than fandoms. In some cases, the hobbies are forms of arts and crafts which are often shared and sometimes sold by their creators. Quilting, for example, is a hobby, a competitive pastime, and an activity that has its own community of people who are, in a sense, fans of this form of work. The line between a hobby and a fandom is difficult to draw. Moreover, these interest-based communities are, as will be discussed in the next chapter, also not entirely comfortable fits within the “fandom” arena.

There are many hobbies that are similar to fandoms in many key respects, including their nature as communities and their creation of works that are designed to appeal to other community members. Some hobbies, such as knitting, quilting, or woodworking, tend to be more heavily focused on individual creation. Others, such as painting miniature figures for Warhammer, rely more heavily on the use of preexisting content. Whether their works are ‘fanworks’ is a disputable question. Even if they are not, they bear many key similarities.

²³⁷ See generally *Paramount Pictures Corp v Carol Pub Group* 11 FSupp2d 329 (SDNY 1998) (involving ‘The Joy of Trek’ book); *Warner Bros Entertainment Inc v RDR Books* 575 FSupp2d 513 (SDNY 2008) (involving ‘The Harry Potter Cyclopedia’ book).

A good example of this is provided by those with an interest in trains and railroads. This group is very nearly as old as the existence of railroads and has often been identified in the public press as a fandom. In fact, the American term that is the equivalent of trainspotter is “railfan.” For the time being, we will assume that they are a fandom.



Figure 3.3.2: Decal advertisement (source in footnote 242)

If so, they are a fandom with many potential intellectual property law issues. Some of these are related to the real-world enterprises at the centre of the fandoms.²³⁸ For example, the picture above depicts a model train that is widely available for purchase.²³⁹ There is little doubt that the paint scheme on this locomotive is capable, at least in theory, of copyright protection. Does a manufacturer of model trains need a license to depict this train? Does an individual modeler?

²³⁸ Many of these are trademark-related and will not be considered here. See *Am General v Activision Blizzard*, 450 F Supp 3d 467 (SDNY 2020).

²³⁹ ‘News’ (*InterMountain Railway Company*, no date) <<https://irctrains.com/blogs/news>> accessed 2 July 2021.

The answer to such questions is unclear. This is true even if we set aside matters of trademark and remain entirely within copyright law.²⁴⁰ There will be significant questions under American law as to whether the inclusion of a copyright-protected logo on a miniature intended to depict reality is a fair use of the material.²⁴¹ Similarly, although there is caselaw in England to the effect that the use of features such as copyright-protected sports team logos is not an incidental use of the logos, these cases did not address fair dealing.²⁴² As will be discussed further in Chapter 5, the assessment of these questions runs into uncertain areas of law in either jurisdiction.

Nor do the potential copyright issues in model railways stop at the use of intellectual property owned by a real-world railroad. If a company manufactures items that are based on famous fictional model railways, do they need a license from the creator of that railway?²⁴³ Do issues arise when one modeler integrates another's fictional layout into their own? Still other issues can arise in the street art arena. Rail vehicles are often a canvas for street artists around the world; model railroaders in search

²⁴⁰ The trademark jurisprudence strongly suggests that use is permitted, both because the works in this area are artistic in nature, *see Rogers v. Grimaldi*, 875 F. 2d 994, 999 (2d Cir 1989); *Am General* (n 241) 477–85

²⁴¹ See Chapter 5.2.2.

²⁴² See, *The Football Association Premier League Limited and Others v Panini UK Limited* [2002] EWCA 995. Fair dealing does not appear to have been an issue, either on appeal or at first instance.

²⁴³ See, eg, 'HO SD40-2 Locomotive - Allegheny Midland' (*InterMountain Railway Company*, no date) <<https://irctrains.com/products/sd40-2-allegheny-midland>> accessed 2 July 2021 (model based on famous layout) (There is nothing available to indicate whether this is or is not a licensed use.)

of authenticity will duplicate this.²⁴⁴ The copyright status of street art is famously unclear, particularly when (as is the case with graffiti on train cars) the act of creation was illegal.²⁴⁵ To what extent would a street artist have rights against the maker of aftermarket transfers that depict work without permission? The answer is unclear.

These disputes are, thus far, largely theoretical in the context of this and similar hobbies. But the areas of uncertainty that they involve are real. These are areas, moreover, which fall into areas of copyright law uncertainty that are very similar, if not entirely identical, to those that involve other fanworks. The works are created by enthusiasts for a particular hobby. They are designed to appeal to other enthusiasts. And they are distributed through channels that are quite distinct from those used by the parent industry. There seems little reason to exclude them from consideration.

There is also little reason to suspect that such areas are necessarily permanently immune from copyright disputes. Nor have they been, at least where the rail enthusiast hobby overlaps with model trains. At least one copyright dispute has arisen in this context, involving members of a hobby community who produced software to control model

²⁴⁴ See, eg, ‘Microscale Decals: N Scale - Irish and Scottish Graffiti’ (no date) <http://www.microscale.com/Merchant2/merchant.mvc?Screen=PROD&Store_Code=MD&Product_Code=60-1536&Category_Code=GRAFFITI> accessed 2 July 2021.

²⁴⁵ See generally, eg, Enrico Bonadio, ‘Conservation of Street Art, Moral Right of Integrity, and a Maze of Conflicting Interests’ in Enrico Bonadio, ed, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge 2019); Enrico Bonadio, ‘Street Art, Graffiti and Copyright: A US Perspective’ in Enrico Bonadio, ed, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge 2019).

train movements.²⁴⁶ This case was not, to be sure, one that involved the kind of secondary creation seen in fanworks, turning instead on issues of open-source software license enforcement.²⁴⁷ Nevertheless, it illustrates that disputes can arise even in this context.

Ultimately, the question of the relationship between hobbies and fanworks may need to be resolved on a case-by-case basis; the issues that surround the train-related hobbies may not be the same as those that involve, for example, woodworking. It cannot be said, however, that there is a clear demarcation between the two.

3.4 Fanworks: How Many Exist and Where to Find Them

The volume and location of fanworks are relevant to the question of the overall importance of the fanworks problem. The need for a solution, and the solution itself, may be more modest should fanworks be found only in small numbers and a limited number of spaces than is true if fanworks exist in large quantities. Which they undoubtedly do. There are at least tens of millions of fanworks, and probably many more, under any definition of the term. Fanworks are found online, in nearly every conceivable online locale. They are also found in a very wide range of offline environs; indeed, most types of fanworks were first developed in the offline arena.

²⁴⁶ See *Jacobsen v Katzer* 535 F.3d 1373 (Fed. Cir. 2008).

²⁴⁷ For further discussion of this case, see Lawrence Rosen, 'Bad Facts Make Good Law: The Jacobsen Case and Open Source' (2009) 1 IFOSS L Rev 27; Amanda Albrecht Earl, 'Copyright Infringement and Open Source Public Licenses: *Jacobsen v. Katzer*, 535 F.3D 1373 (Fed. Cir. 2008) Case Note' (2008–09) 77 U Cin L Rev 1605.

3.4.1 The Number of Fanworks Is Enormous

It is helpful to have some sense of the volume of fanworks, if only for the sake of having a sense of the scope of the problem. This is difficult to obtain. In part, this is a result of the definitional issues – if we do not have set definitions for fans and fandoms, we cannot identify everything that might be considered a fanwork. In part, this is because, as will be discussed in the next subsection, it is virtually impossible to find all fanworks, making them impossible to count. Nevertheless, we can at least establish some minimum thresholds by making a very rough partial count of a small subset of obvious fanworks.

We can restrict a search to obvious fandoms. In this case, that would include those that involve major, corporate-controlled media franchises within science fiction, fantasy, or interactive entertainment genres. We can further restrict the search to only fan fiction and fan art with relative ease, by restricting where we search to two websites which feature (for the most part) the original work of authors and artists unaffiliated with the franchises.

For the purposes of this approach, two searches will be conducted for each of five franchises: one search at the fan fiction website An Archive of Our Own (“AO3”);²⁴⁸ the second at the digital art website DeviantArt.²⁴⁹ These two sites are not the exclusive online homes of fanfic or fan art. However, both host large numbers of such works,

²⁴⁸ ‘Archive of Our Own’ (n 128).

²⁴⁹ ‘DeviantArt - The Largest Online Art Gallery and Community’ (*DeviantArt*, no date) <<https://www.deviantart.com><https://www.deviantart.com/>> accessed 24 February 2021.

although it is not possible to be sure how many of the works present at each site are fanworks.²⁵⁰

The five franchises selected cover a range of major, and reasonably well-known fandoms. Random selection was unavailable, given the absence of a comprehensive directory, and is in any event unnecessary; the table is intended only to indicate the general minimum prevalence of fanworks, not to provide exact numbers. Holmes and Star Trek were selected because both are often discussed as sources of early fandoms. Harry Potter began from books and became a film franchise. My Hero Academia was selected because it is a popular anime franchise; Witcher because it is a popular video game franchise.

Table 1: Approximate Fanwork Counts on 7 June 2021

Franchise	AO3	DeviantArt
Sherlock Holmes	134,434	44,600
Star Trek	82,309	125,700
Harry Potter	320,673	281,400
My Hero Academia	175,218	90,400
Witcher	25,601	958,100
TOTALS	738,235	1,500,200
	GRAND TOTAL	2,238,435

²⁵⁰ As of the time of writing (7 June 2021), AO3 hosts over 7.7 million works. Not all are associated with conventional fandoms; for example, there are a considerable number (370,976 as of time of writing) of works that are identified as “real person fiction.” ‘Fandoms | Archive of Our Own’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/media>> accessed 7 June 2021.

The total number of works identified above should be viewed with caution. It likely does not represent a total number of *unique* works. Some may be duplicates. Crossover works, for example, may account for some of the total and appear twice. Nor, particularly in the case of DeviantArt, can it be guaranteed that all the works identified are fanworks rather than direct copies of works. Nevertheless, even if a generous allowance for potential misidentification and duplication is made, it seems highly unlikely that the total number of unique works represented here is less than a million.

With five franchises providing over a million examples of fanworks across just two websites, it seems clear that the total number of fanworks cannot be less than the tens of millions. These figures, after all, are partial counts for a very small number of franchises, of a small subset of the types of fanwork that these franchises inspire. This search does not reveal the number of fans that have created such works, but it is likely that that this figure, as well, is in the millions.²⁵¹

If fanworks reside in a legal grey area, it is a grey area that affects at least tens of millions of works and millions of individuals who are involved in their creation or consumption. The problem is not small in its scope.

²⁵¹ Archive of Our Own reports having over 5 million users. Not all are fan fiction authors, but even those who are not are presumably consumers o

3.4.2 Fanworks are Everywhere

As noted above, much of the reason that fanworks have become relevant to the legal community is their prevalence online.²⁵² Almost all academic work on copyright and fanworks has at least touched upon this aspect of fanworks, and many papers have exclusively focused on fanworks in the online setting.²⁵³ The online prevalence of fanworks is critically important because it has both increased the size of the available audience and the ability of copyright owners to identify potential uses of their works.

Nevertheless, it is important to note that fanworks are not exclusively a phenomenon of the online world. Prints of fanworks, for example, are readily available for direct purchase from artists' alleys at conventions, as was noted earlier.²⁵⁴ They may also be obtained from artists through other means, including, in some cases, by direct order from the fanworks site hosting the art.²⁵⁵ Other fanworks, particularly those related to tangible items, are available for purchase both through sites such as RedBubble and Etsy and directly from vendors at conventions. Nor have fanworks ever been exclusively a feature of the online world. Rather, they are a part of fan expression that, as the next section shows, substantially predates computers and the internet. The

²⁵² See Chapter 2.1.5.

²⁵³ See, eg, Hatcher (n 45); Puddington (n 179).

²⁵⁴ See Chapter 3.2.2.

²⁵⁵ See, eg, BB22Andy, 'Assassin's Creed - Nikolai Orelov' (*DeviantArt*, no date) <<https://www.deviantart.com/bb22andy/art/Assassin-s-Creed-Nikolai-Orelov-476056897>> accessed 2 July 2021 (print of fan art drawn from Assassin's Creed franchise available for purchase).

convention culture that began in the 1930s has always, for example, been a source of fanworks. So has the fanzine culture that began slightly later.

3.5 A (Very) Brief History of Fanworks

Not only are fanworks everywhere, but they have also been everywhere for a long time. This is, as was noted earlier in the chapter, a point that is not always obvious from the copyright literature, which often focuses on fanworks as a form of user-generated content. The space limits of a thesis do not permit an extended history of fanworks to be presented here, but it is important to note that most of the major forms of fanwork have been around for at least as long as conventional media fandoms have been in existence.

In her ethnography of female Star Trek fans, Bacon-Smith presented a list of “formal genres” of work that were seen in the fanzine community. These included what she termed “verbal forms” and “material art” and covered much of the spectrum of fanworks documented in this chapter.²⁵⁶ A wide range of forms roughly groupable as “fiction” are present, as are musical works, fan art, cosplay, video, and a range of physical items, such as prop replicas.²⁵⁷ Bacon-Smith’s work was published in 1992, when total online usage was very low. The fanzine culture she documented was, by that point, already decades old.

²⁵⁶ Bacon-Smith’s “verbal forms” include folksong, poetry, prose in the form of narratives, drama, conversation, prose in the form of letters and essays, indices and directories, and catalogues; “material art” includes illustrations, hanging art, costume, craft, video art, bookmaking, photographs, and ephemera collecting. Bacon-Smith (n 13) 46–47.

²⁵⁷ *ibid.*

Even if we discount the idea advanced earlier in the chapter that fanworks might be prehistoric, they clearly have a lengthy history.²⁵⁸ The distribution of fanworks, either through sharing or through sale, has been part of modern media fandom for at least as long as media fandom has existed.²⁵⁹ Fanworks and fanworks culture have also been an important component of both precursors to and offshoots from media fandom.

This history has largely been invisible to copyright law. Fanworks existed, fanworks were common within certain circles, but fanworks attracted virtually no attention either from academics or through litigation.²⁶⁰ When fanworks began to attract serious attention early in the Internet era, there was no prior history to draw from. Work was conducted, in effect, on a blank slate, and the focus was on fanworks in the online environment. Efforts to rectify the fanworks problem that do not take into account the long period of time during which fanworks existed outside the view of copyright may fail to ask a crucial question: does the mere fact that fanworks are now widely visible mean they should be treated differently than they previously had been?

²⁵⁸ See n 118.

²⁵⁹ See generally, e.g. Camille Bacon-Smith, *Science Fiction Culture* (University of Pennsylvania Press 2000) 31–62 (describing practices in early Worldcon scene).

²⁶⁰ Arguably, the Air Pirates case, which involved an underground comic book, and the resulting scholarship are an exception. *Walt Disney Productions v Air Pirates* 581 F 2d 751 (9th Cir 1978). However, although the Air Pirates comics were distributed ‘underground,’ they were a commercial product similar to ones distributed by Disney, and were printed and sold in a conventional manner that was familiar to the creative industries.

3.6 Conclusions

The standard legal-academic model of fanworks has focused on fanworks as singular, derivative works that are noncommercially created, tied to mass popular culture, and primarily an online phenomenon. This model has not, however, been consciously developed; it is simply the product of the individual work of many researchers. Nevertheless, it has been the perspective on fanworks that has dominated the research landscape to date.

As this chapter has shown, the conventional model of fanworks is clearly underinclusive. The reality of fanworks is substantially more complex than the model. Fanworks exist in literally uncountable numbers in the online environment, but they have never been restricted to online circumstances. They substantially predate the rise of the internet, and they did not relocate online so much as they expanded into that environment – they remain available offline in much the same way as they always have. Moreover, this is true not only for almost all of the types of work that are commonly viewed as fanworks, but also for areas such as hobbies and UGC that aren't clearly fanworks. The remainder of the thesis will refer to this more complex model of fanworks.

4 FANWORKS IN THE CONTEXT OF FANDOMS: A BRIEF OVERVIEW

As the previous chapter showed, fanworks are conceptually complex, span most, if not all, forms of media, and have an elaborate history. The full spectrum of fanworks is substantially more complex than the standard model accounts for. And there is an additional factor that has not yet been fully considered: fanworks are largely inseparable from fandoms. And, as noted during the discussion of the question of where hobbies end and fanworks/fandoms begin, the boundary between fanwork and fandom can be difficult to discern.

The prevalence of this boundary question is important, in small part, because of the definition that was selected, but it is also (as this chapter will discuss) because of how fanworks have traditionally been produced and shared. Fandoms bring people with common interests together, and the people who share these interests often form these bonds by sharing their own expressions related to these interests. Fanworks and fandoms are very difficult, if not impossible, to cleanly separate; it is possible that we should not try.

The chapter begins with a brief discussion of “the why of fanworks” – the reasons that fanworks are produced and shared. From there, it turns to discuss the history of fanwork-producing fandoms, demonstrating that they occur well back into the past, and that their recent copyright relevance should raise questions as to why they should be treated differently now than they were in the past. It then briefly discusses the range of fandoms, beginning with the traditional fandoms discussed in many works of copyright scholarship. This is followed by an examination of the boundary challenges that arise when one attempts to separate fanworks from fandoms, given the existence of what are

effectively fandoms linked more to genres of fanwork than to any media franchise. This, in turn, blends into the question of whether useful distinctions can be drawn between fanworks and other forms of UGC.

Ultimately, as this chapter will demonstrate, the complexity of fandoms may also be greater than might be expected from the standard model. This complexity blurs both the line between fandom and fanwork and the line between fanwork and UGC. Viewed in combination with the complexity of fanworks discussed in the prior chapter, this suggests that the standard approach to fanworks falls short of capturing the full extent of the fanworks problem.

4.1 The Why of Fanworks – A Brief Assessment

“I think that many confuse ‘applicability’ with ‘allegory; but the one resides in the freedom of the reader and the other in the purposed domination of the author.”

JRR Tolkien²⁶¹

The social-sciences literature on fanworks has focused on fanworks as a form of reading – of consumption of the works.²⁶² It has also highlighted the fundamentally communal nature of this form of consumption – fanworks are not merely a form of readership; they are a form of *shared* readership. A full treatment of this area of work is beyond the scope of this thesis or the capacity of this author. However, a very brief overview of this field of research and its conclusions is provided here.

²⁶¹ JRR Tolkien, *The Fellowship of the Ring* (Houghton Mifflin edn 2012) xv.

²⁶² This chapter uses ‘text’ and ‘reading’ to cover all forms of media and consumption; this approach is consistent with the fan studies literature. See, eg, Jenkins (n 11) 24.

The research in this area is important for copyright scholarship for two reasons: it establishes the purposes for which fanworks are created and the reasons that they are distributed. Both are relevant to the examination of the relationship between copyright law and the creators of such works. At the same time, however, it is not critical that we examine each nuance of the various associated theories. For the purposes of this thesis, what is important is that it is increasingly understood that the purposes underlying fan creation are not to compete commercially with mass market works. Fan creations are, instead, a form of cultural participation.

The social sciences research that established this is associated with the works of John Fiske and Henry Jenkins and has been expanded upon by numerous other workers.²⁶³ Fiske framed popular culture itself in explicitly participatory terms. “Popular culture,” he wrote, “is made by various formations of subordinated or disempowered people out of the resources, both discursive and material, that are provided by the social system that disempowers them.”²⁶⁴ As Fiske pointed out, even an act as subtle as the wearing of torn jeans as a fashion statement can show that consumer goods are not merely accepted passively but are often actively reworked.²⁶⁵ Jenkins expanded this into media fandoms, investigating

²⁶³ See, eg, Matt Hills, *Fan Cultures* (Routledge 2002); Paul Booth, *A Companion to Media Fandom and Fan Studies* (John Wiley & Sons 2018) (and contributions therein); Jonathan Gray and others (eds), *Fandom: Identities and Communities in a Mediated World* (New York University Press 2007) (and contributions therein); Hellekson and Busse (n 119). A discussion of these works is, sadly, not possible within the constraints of this thesis.

²⁶⁴ John Fiske, *Reading the Popular* (Routledge 2017) 1.

²⁶⁵ John Fiske, *Understanding Popular Culture* (2d ed, Routledge 2011) 9.

the uses of popular programs by fandoms and showing how fan practices such as the creation of fan fiction and vids are a form of active consumption.²⁶⁶ They can also, in addition to providing a means of enhancing the basic entertainment experience, be a form of exploration of complex cultural issues, including matters of gender and race.²⁶⁷

It should be noted that this research has not been ignored by the work done within copyright scholarship. Jenkins, in particular, has had significant influence, and has frequently been cited. Discussions about the uses and purposes of fanworks have featured within copyright discussions, particularly in the context of fan fiction.²⁶⁸ This area, although complex and fascinating, is not one that can be adequately discussed within the confines of this thesis. It is sufficient to note that fanworks are part of cultural participation and conversation and are created and consumed in that context. They are not intended or consumed as market substitutes for the creative works at the heart of mass media fandoms.

4.2 Fandoms: A Brief Historical Discussion

The question of how to best define fandom in the copyright context is not one that can be entirely separated from the origin and early history of fandom. Both the breadth of fandom and the historical extent of fanworks creation and sharing are relevant to the question of how to

²⁶⁶ See generally, Jenkins (n 11); Henry Jenkins, 'Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching' (1988) 5 *Critical Studies in Mass Communication* 85.

²⁶⁷ See, eg, Naomi W Nishi and others, 'A Fan Fiction Conversation and Critique of Derek Bell's *White Women*' (2021) 20 *Taboo* 84.

²⁶⁸ See, eg, Katyal (n 29); Chander and Sunder (n 45); Sunder (n 77).

approach copyright today. The question of how much control rights owners should have in this area may have a different answer if fanworks were narrow and rare prior to the development of the internet than is the case if fanworks have a long history and were more common.

Reading clubs and other fannish organizations date back at least into Victorian times. *Frankenstein*, which is one of the foundational works of both science fiction and horror literature, was famously written as part of a contest amongst a group of literary-oriented friends gathered together at a common location.²⁶⁹ While it might seem a stretch to label such a gathering a form of proto-convention, many early Star Trek conventions were small gatherings at private homes hosted overnight or over weekends.²⁷⁰

As ‘genre’ literature continued to develop through the end of the Victorian era and on into the early decades of the 20th Century, fan clubs and other fannish activities developed alongside them. Such groups were particularly common within the Holmsian fandom, but other fan groups also existed.²⁷¹ The early fan groups engaged in a wide range of activities, including the publication of newsletters and other fanworks. These served as the precursors for the more elaborate science-fiction fandoms that soon followed.

²⁶⁹ Mary Wollstonecraft Shelley, *Frankenstein: Or, the Modern Prometheus* (Colburn & Bentley 1831).

²⁷⁰ Bacon-Smith (n 13) 26–31.

²⁷¹ See, eg, Peter Ridgway Watt and Joseph Green, *The Alternative Sherlock Holmes: Pastiches, Parodies, and Copies* (Book, Whole, Ashgate 2017); Douglas Greene (ed), *I Believe in Sherlock Holmes*. (Dover Publications 2016).

Science fiction fandom has been extensively studied and written about, and only the most basic details are given here, beginning with the origins of conventions. Conventions, which continue to serve as hubs for fanworks consumption and distribution today, can be traced in their modern form to early science fiction fandom, and in particular to the Worldcon and related conventions that got their start in the 1930s.²⁷²

The first of these conventions, although modest, included at least one of the fanworks activities discussed in the next section: cosplay. Two members of the community, Forest Ackerman and Myrtle Douglas, arrived at the convention costumed as characters derived from illustrations taken from the pulp magazines of the day.²⁷³ Cosplay has been a constant presence at major conventions ever since, although the extent to which it was supported has varied considerably from convention to convention, and at different periods of time.

The early fandoms, and in particular the convention culture surrounding science-fiction fandom, pioneered many of the activities that remain common within fandom today. The fanzine culture and fanart documented by Bacon-Smith in her study of Star Trek fandom provides just one of many examples.²⁷⁴ The internet has, of course, had an enormous effect on fandoms, and has led to massive expansions in the

²⁷² Convention culture has been discussed extensively. Both Bob Calhoun, *Shattering Conventions: Commerce, Cosplay, and Conflict on the Expo Floor* (First Edition, Obscuria Press 2013) and Bacon-Smith (n 259) provide good starting points for modern and historic conventions respectively.

²⁷³ Dave Kyle, 'Caravan to the Stars' (*jophan.org*, no date) <<http://www.jophan.org/mimosa/m29/kyle.htm>> accessed 1 August 2021.

²⁷⁴ Bacon-Smith (n 13).

variety and quantity of fanworks.²⁷⁵ The underlying phenomenon of fandoms as an active, engaged readership that produces fanworks is anything but novel.

4.3 Fandoms: An Expanded Overview

The bulk of fanworks attention in law has, as noted in the discussion of the standard model of fanworks, been focused on conventional media fandoms.²⁷⁶ In particular, it has focused on the “geekish” set of fandoms centered on sci-fi, fantasy, comic books, and video games.²⁷⁷ Other types of fandom exist, however, and produce fanworks. Although these have, for the most part, received less attention from copyright scholars, issues also arise in these communities.²⁷⁸

The discussion here assumes the reader has a rough sense of what is involved in a major fandom such as Star Trek.²⁷⁹ These fandoms have formed the foundation for much of the existing work on fanworks and copyright. The remainder of this section expands upon that model, beginning with a look at fandoms in areas such as music, and sports, are referred to as “other conventional fandoms.”

²⁷⁵ See Chapter 3.4.

²⁷⁶ See Chapter 2.1.4.

²⁷⁷ A good example of this approach can be found in Schwabach’s excellent treatment of fan fiction. Schwabach, *Fan Fiction* (n 27).

²⁷⁸ Exceptions include Agnetti (n 29); Smith (n 29).

²⁷⁹ Unfamiliar readers are referred to Bacon-Smith as a starting point. Bacon-Smith (n 13).

4.3.1 Other Conventional Fandoms

There are many non-media conventional fandoms. Sports and music are the best known of these, but others, such as those surrounding non-sports celebrities and even politicians exist.²⁸⁰ These fandoms have received less attention within the fan studies community, which has been primarily focused on the television and film-centred “media fandoms.”²⁸¹ Although the differentiation between these fandoms and ‘media’ fandoms may be warranted within fields that directly study fan interaction, it is less clear that the differences warrant different treatment within copyright scholarship. These fandoms produce fanworks.²⁸² They do not always use copyright protected works as an initial starting point for these fanworks, although other areas of intellectual property, such as the right of publicity, may at times be implicated.²⁸³ This does not mean, however, that copyright or copyright-like disputes cannot arise.²⁸⁴

²⁸⁰ For one example, see Fiske’s discussion of Madonna fandom, which was as centered on the artist as the music. Fiske (n 265) 77–92.

²⁸¹ The use of the term “media fandom” can obviously be confusing particularly when distinguished from music and other such fandoms, which also focus on ‘media’ in a broad sense. However, the distinction is common in the field. See Jenkins (n 11) 1.

²⁸² See, eg, *girl_in_black*, ‘Steve Kornacki Takes A Break (With You)’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/works/28803591>> accessed 7 May 2021 (‘real-person’ fanfic, not entirely safe for work, featuring election pundit Steve Kornacki).

²⁸³ This thesis is, and will remain, exclusively focused on copyright, and will not focus on such issues.

²⁸⁴ See generally, eg, Narisa Bandali, ‘I Wrote This, I Swear!: Protecting the “Copyright” of Fanfiction Writers from the Thievery of Other Fanfiction Writers’ (2019–21) 101 *J Pat & Trademark Off Soc’y* 274.

Although such fandoms have, particularly outside the US, received less attention from copyright scholars, this may be driven more by the comparative lack of controversy than anything else. Certainly, the fact that the issues of sports fandom and, in particular, sports merchandise have received considerably more attention in the UK seems likely to have been driven by caselaw that has developed there, in part as licensed products displaced traditional sports merchandise.²⁸⁵ In any case, if copyright disputes arise from such fandoms, there seems no compelling reason to exclude them from consideration of the fanworks problem.

4.3.2 Smaller Media Fandoms

Fandoms are not solely focused upon major mass-media franchises. Smaller creators and works can generate fandoms, some of which can be quite substantial, if not quite on the scale of a mass franchise such as Star Wars or Star Trek. These fandoms can, and often do, produce extensive quantities of fanworks. They may not attract the same degree of attention as larger fandoms, but their use of source material is often no less extensive.

The “Honor Harrington” series of books by David Weber provide one example of such a fandom.²⁸⁶ These works have amassed a body of fanworks that includes, as is often the case, works spread across a wide range of media, including fan fic, art, vid, song, and even physical

²⁸⁵ See, eg, Ian Kilbey, ‘The Ironies of Arsenal v Reed’ (2004) 26 EIPR 479.

²⁸⁶ The first book in the series is David Weber, *On Basilisk Station* (Baen 1993). A full list of canon works is presented in Appendix C, to illustrate how extensive the intellectual property associated with even a small franchise can be.

replicas of spacecraft described in the series.²⁸⁷ In addition, this fandom has a formal, highly organized, fan club with global reach – The Royal Manticorian Navy.²⁸⁸ In addition to engaging in cosplay, conventions, and the rest of the range of activities familiar to fandoms, the TRMN has also been engaged in fan advocacy activities, including by participating as an *amicus curiae* in litigation before the United States Supreme Court.²⁸⁹

4.3.3 Genre Fandoms

Some early fandoms, such as Sherlock Holmes, were broadly similar to contemporary media fandoms. They sprang up around characters and worlds that were created by single authors, but which

²⁸⁷ See, eg, SarnakhTheSunderer, ‘Swept Away By Time and Tide’ (*Archive of Our Own*, no date) <<https://www.archiveofourown.org/works/31636931>> accessed 1 August 2021 (fiction); Rastrelly, ‘Honor Harrington’ (*DeviantArt*, no date) <<https://www.deviantart.com/rastrelly/art/Honor-Harrington-388888098>> accessed 1 August 2021 (art); Sven Hanses, ‘Honor Harrington - Fanvideo’ (*YouTube*, 14 February 2010) <<https://www.youtube.com/watch?v=LxOfwj294yU>> accessed 1 August 2021 (vid); Admiral StarNight, ‘No Quarter -An Honor Harrington Filk Song’ (*YouTube*, 28 November 2014) <<https://www.youtube.com/watch?v=aXxTB30lfv0>> accessed 1 August 2021 (song); MaxxBuNine, ‘HMS Fearless’ (*DeviantArt*, no date) <<https://www.deviantart.com/maxxbunine/art/HMS-Fearless-861396213>> accessed 1 August 2021 (physical replica).

²⁸⁸ ‘The Royal Manticoran Navy – The Official Honor Harrington Fan Association’ (n 14).

²⁸⁹ See, eg, Andy Warhol Foundation for the Visual Arts Inc v Lynn Goldsmith, et al, Brief of Amicus Curiae The Royal Manticoran Navy: The Official Honor Harrington Fan Association Inc, In Support of Petitioner. Available at: https://www.supremecourt.gov/DocketPDF/21/21-869/227996/20220615133335172_42544%20pdf%20Parker%20br.pdf. In the interests of full disclosure, the author of this thesis was a primary author of that brief.

spanned multiple books. This is, although perhaps not on the same order as a multi-billion-dollar franchise like Star Wars, recognizable as a similar type of phenomenon. Not all fandoms, and particularly not all early fandoms, fit this model.

Many early fandoms were not fandoms that were themselves rooted in individual franchises. Rather, they were what might be termed “genre” fandoms – the focus of the fandom was an entire genre, not any single author or work within the genre. This was certainly the case with science fiction, which is commonly cited as the fandom that gave rise to the modern media fandoms.²⁹⁰ Science fiction fandom is almost certainly the first with regular conventions, and the first with a convention circuit of sorts. As such, it is a plausible source for the portion of fanworks that has arisen as part of “convention culture.”²⁹¹

Genre fandoms still exist. One of the nonconventional fandoms discussed below is the expression of a fan community centred on a genre-oriented convention.²⁹² Other such fandoms include the very active anime fandom, the copyright issues of which have been the topic of some attention.²⁹³ The copyright and other intellectual property issues of

²⁹⁰ For one influential account of science fiction fandom, see Bacon-Smith (n 259).

²⁹¹ For a detailed account of con culture, including its reach into areas that might not normally be considered, such as professional wrestling, see Calhoun (n 272).

²⁹² See Chapter 4.3.5.1.

²⁹³ See, eg, Rayna Denison, ‘Anime Fandom and the Liminal Spaces between Fan Creativity and Piracy’ (2011) 14 *International Journal of Cultural Studies* 449; Joshua M Daniels, “Lost in Translation”: Anime, Moral Rights, and Market Failure’ (2008) 88 *Boston University Law Review* 709; Hatcher (n 45); Sean Leonard, ‘Progress against the Law: Anime and

genre fandoms are relevant to this thesis, as are the fanworks that come out of these scenes.

In this context, it is important to note that some forms of fanwork are also genre fandoms. Newer forms of content creation and distribution may be considered genre fandoms as well. The fandoms surrounding YouTube creators provide an example of this.²⁹⁴ Individual YouTubers have their own fandoms, but YouTubers who cover related subjects will often have fans in common, and collaborations are a common means of encouraging people to cross-subscribe.²⁹⁵ Similar situations exist on other platforms, such as Twitch, and it is helpful to view these kinds of content as genre-based fandoms, similar to the general SciFi or film fandoms.²⁹⁶

4.3.4 Unconventional and Nontraditional Fandoms

The fandoms discussed so far can be viewed as traditional fandoms. They have two features: a focus and fans. The focus can include fandoms centered on genres. It can also cover a spectrum of individual

Fandom, with the Key to the Globalization of Culture' (2005) 8 International Journal of Cultural Studies 281.

²⁹⁴ For a discussion of YouTube and its associated personalities and fandoms, see Chris Stokel-Walker, *YouTubers: How YouTube Shook up TV and Created a New Generation of Stars* (Canbury 2021).

²⁹⁵ For a recent example of a collaboration, see Mentour Pilot, 'Can I Get Tom Scott to LAND a B737MAX, ALONE?!' (YouTube, 15 Oct 2022) <<https://www.youtube.com/watch?v=YaOvtL6qYpc>> and Tom Scott Plus, 'I'm Not a Pilot. Can I Land a 737?' (YouTube, 15 Oct 2022) <<https://www.youtube.com/watch?v=AbTDzPUDxqY>> (collaboration between general-knowledge youtuber and aviation youtuber).

²⁹⁶ The copyright dispute between YouTubers discussed in 6.2.4 becomes more understandable viewed as a dispute between creators working within a single fandom.

works, from the legendary Trek fandom to the lesser known but highly organized and enthusiastic Honorverse fandom. As noted in the prior section, the boundary between fan and fandom begins to blur, particularly where there is extensive amount direct fan interaction with creators. This section highlights two examples that shatter this boundary. The first of these two examples involves a fandom that is nominally centered on a carpet pattern. The second involves one that was centered on a horror character that featured in no major media work but was instead largely the creation of its own fanbase.

4.3.4.1 The Cult of the Carpet

The fandom sparked by a costume created by prop creator Harrison Krix can in no sense be described as ‘conventional.’²⁹⁷ Cosplay

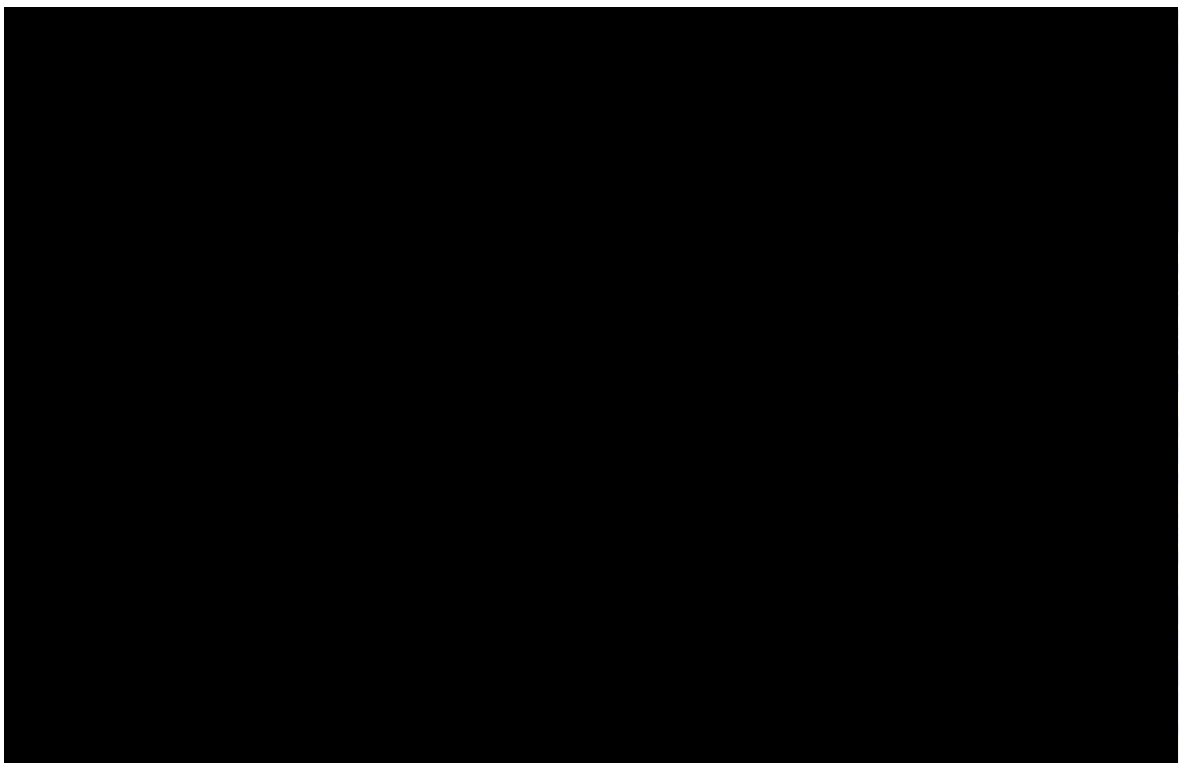


Figure 4.1: Carpet Ninjas! (source <https://knowyourmeme.com/memes/marriott-carpet>)

²⁹⁷ Unless otherwise specified, the events and facts discussed in the first two paragraphs in this section are derived from Agnetti (n 29) 116–18.

is a common feature at conventions, with most costumes connected in some way to the topic of the convention. In 2013, Krix took convention cosplay in a different direction. Instead of attending a convention dressed as a character from a franchise featured at the convention, Krix appeared dressed as the convention venue. Specifically, Krix (and some colleagues) appeared at the DragonCon convention in Atlanta dressed in custom-made camouflage outfits that were designed – effectively, as the photo above demonstrates – to blend into the convention hotel’s distinctive carpeting. The convention was always held at that hotel, so Krix had taken steps the prior year to duplicate the carpet pattern.²⁹⁸

These costumes were so popular that Krix received requests from other attendees for instructions. To accommodate those requests, Krix made the pattern available for purchase through Spoonflower, a print-on-demand website for fabric.²⁹⁹ Although the hotel did not object to the cosplay, the carpet manufacturer did. Cease-and-desist demands were sent within weeks of the convention to both the cosplayers and the print-on-demand firm they used to allow people to get the material to make their own versions of the costumes, and the fabric was removed from the site.³⁰⁰ This attracted a great deal of publicity at the time, much of it focused on the apparent absurdity of attempting to block these kind of

²⁹⁸ Figure taken from Lauren Davis, ‘Cosplayers Threatened with Legal Action for Hotel Carpet Costume’ (*Gizmodo*, 9/22/13) <<https://gizmodo.com/cosplayers-threatened-with-legal-action-for-hotel-carpet-1366152096>> accessed 6 July 2021.

²⁹⁹ ‘Spoonflower’ (no date) <<https://www.spoonflower.com/>> accessed 6 July 2021.

³⁰⁰ Timothy Geigner, ‘Cosplayer Sent Cease & Desist By Carpet Company For Hotel Carpet Camouflage’ (*Techdirt.*, 23 September 2013) <<https://www.techdirt.com/articles/20130923/04074424621/cosplayer-sued-carpet-company-because-lawyers.shtml>> accessed 7 July 2021.

uses of the pattern. Ultimately, in part because Krix continues to make a version of the carpet pattern freely available for use, the takedown of the fabric appears to have done little to stop the subsequent use of the pattern.³⁰¹ Many people have, in fact, used the carpet pattern since.

Despite, or perhaps more likely because of, the takedown of the material from the print-on-demand site, the use of the pattern in cosplay has proliferated over the years since. Examples of the use of the cosplay run from the use in small-scale props and clothing accessories to costumes based on mass-media franchises, to full-size vehicles used in what has become an annual carpet-themed parade.³⁰² So many people have been involved in this at the convention each year that it has become known as the Cult of the Marriott Carpet, and has attracted substantial media attention in its own right.³⁰³

It is difficult to avoid the conclusion that the carpet has a fandom – but it is also important, in reaching that conclusion, to accurately identify the true focus of the fandom. It has little to do with the pattern

³⁰¹ ‘DragonCon Carpet – Volpin Props’ (no date) <<https://www.volpinprops.com/product/dragoncon-carpet/>> accessed 6 July 2021.

³⁰² See, eg, Randall Golden, “Dragon Con 2021 Photos #4: More Cosplay Parade (Midlife Crisis Crossover, 7 September 2021) <<https://midlifecrisiscrossover.com/2021/09/07/dragon-con-2021-photos-4-more-cosplay-parade/>> accessed 27 November 2022

³⁰³ See, eg, Jacob Shamsian, ‘People Are so Obsessed with an Old Marriott Hotel Carpet that They’re Turning It into Outfits’ (*Insider*, 31 August 2018) <<https://www.insider.com/marriott-hotel-carpet-dragon-con-costumes-2018-8>> accessed 6 July 2021; Cameron McWhirter, “We’re Spending Our Hard-Earned Money to Dress Up Like Carpet.” *The Tight-Knit World of Rug Fans*, *Wall Street Journal* (30 August 2018) <<https://www.wsj.com/articles/were-spending-our-hard-earned-money-to-dress-up-like-carpet-the-tight-knit-world-of-rug-fans-1535642554>> accessed 6 July 2021.

itself. That pattern is distinctive, but the carpet pattern-works are not in any real way a tribute to or comment upon the carpet itself. This is not a carpet fandom. It is a DragonCon fandom.

The Cult of the Carpet is a communication of the participants' affinity for and affiliation with the con. It provides a way to communicate long-term membership in the transient, one-weekend-a-year convention community, signaling "I'm an insider" to other insiders. It shows that the participant has been around; it is not something that a first-time convention goer would be likely to be familiar with. It is more than an inside joke, perhaps more akin to a rite of initiation. This has, if anything, become more true in the last few years. The carpet was replaced with a different pattern in late 2015.³⁰⁴ The Cult of the Carpet has, nevertheless, continued to flourish, with people costumed as the old hotel carpet continuing to appear year after year.

The Cult of the Carpet is a fandom that is defined by participation. The members use of the carpet pattern within creative works serves as a badge of identity.³⁰⁵ It is both a communicative and a creative act. In that regard, the fanworks that are created within the Cult of the Marriott Carpet serve the same purposes as the fanworks created within the more traditional fan communities. However, unlike in the more

³⁰⁴ jillianmichellewilliams, 'DragonCon Revenge of the Carpet – Fans Hold a Memorial for the Beloved Marriott Carpet' (*Adventure Dragon*, 11 September 2016) <<https://www.adventuredragon.com/adventure-nerd/dragoncon-fans-hold-marriott-carpet-memorial/>> accessed 7 July 2021.

³⁰⁵ Further support for this hypothesis can be found in the existence of DragonCon "cults." See, eg, Max Caracappa, 'Dragon Con Cults: A Primer' (*Daily Dragon Online*, 5 September 2022) <<https://www.dragoncon.org/dailydragon/2022/dragon-con-cults-a-primer/>> accessed 27 November 2022.

traditional communities there is no central work, no defined canon, and the key feature of the fandom is participation in the fandom.

And, as shown, despite its nontraditional nature, this is a fandom that has copyright-relevance. The fandom was, in a real sense, born out of an intellectual property dispute. It is possible that the fandom might have been born without the publicity and controversy that the DMCA takedown notice created within the DragonCon community. But this seems unlikely. The controversy, and in particular the perception that the initial takedown notice was unreasonable, seems to have played a large role in the subsequent popularity of the fandom; the existence of the fandom is a subversive challenge to the ownership claims raised by the carpet manufacturer.

In addition to the copyright questions raised by the use of the carpet pattern, a host of other questions arise given the pattern's use on other characters and figures from popular culture.

4.3.4.2 The Slender Man

The Slender Man is a crowdsourced myth.³⁰⁶ It is a fictional character that began when Eric Knudson posted two images, each with a caption, in a thread devoted to photoshopped horror images on the internet forum "*Something Awful*."³⁰⁷ These were followed by another photo and some character backstory the following day. Within the next

³⁰⁶ Unless specified, facts in this section are drawn from Smith (n 29). Slender Man is sometimes known as Slenderman.

³⁰⁷ The post – minus the images, which were removed later – is available at 'Victor Surge,' forum post (*Something Awful* 10 Jun 2009) <<https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=3#post361861415>> accessed 9 Dec 2022.

24 hours, other many users expanded this original, created additional artworks, and began to weave an extensive story around the character. The character, by this point a result of the crowdsourced melange of works, became widely popular, appearing in a range of works. Such crowdsourced creations have a long tradition, particularly within the horror writing community, where they have become known as “creepypasta,” a portmanteau of “creepy” and “copypasta,” which is itself a variant of “copy/paste.”³⁰⁸

In the case of the Slender Man, the creepypasta came to a screeching halt when Knudson registered a copyright that purported to provide an exclusive right in the character. Knudson then sold the rights to a character to a production company, and the production company began sending out DMCA takedown notices and cease-and-desist letters. These resulted in the removal of many online films, as well as a video game that had been made available through Valve’s Steam Greenlight program.³⁰⁹ The net result of this, and of the commercial failure of the film for which the rights were acquired, has been to end, for all intents and purposes, this fandom. New content here, unlike the Cult of the Marriott Carpet, has survived neither the legal threats nor the removal of some of the online content – at least not at the scale and prominence the fandom had once attained.

³⁰⁸ See generally, eg, Jessica Balanzategui, ‘Creepypasta, “Candle Cove”, and the Digital Gothic’ (2019) 18 *Journal of Visual Culture* 187.

³⁰⁹ The video game had reportedly received approval from the original creator, but was taken down after the creator sold the rights. Smith (n 29)

As Cathay Smith has discussed at length, the claim to copyright ownership over this character is, at absolute best, weak.³¹⁰ Although there is room to argue some of the specific reasons Smith cites, the overall point is undoubtedly correct.³¹¹ Slender Man is a distinctive character, but the character was at best superficially sketched through the initial posts. The character, as a detailed and richly-textured entity, accreted over time, as the result of the work of many authors each combining to build the composite creation that is this character. Ultimately, this fandom and its central character have many of the features that Wong discussed in her treatment of user collaboration. It is a highly collaborative project, not marked by standalone works, that lacks clear beginning and end, is the product of loose collaboration, and enabled by the Internet.³¹²

This fandom is not as marked by active or ongoing creative participation as the Cult of the Marriott Carpet. It is also, at least in a sense, somewhat akin to a traditional fandom in that the fandom is focused upon media works, including both written text and video, that

³¹⁰ See Smith (n 29) 627–35.

³¹¹ In particular, it is questionable that Slender Man is unprotectable as a stock character. *ibid* 628–29. Few, if any, cases have held individual, named characters to be unprotected under this doctrine, and it seems unlikely to apply to a tall, skinny character with a fixed, distinctive appearance and extra appendages. *See generally, DC Comics v Towle*, 802 F3d 1012 (9th Cir 2015)

³¹² Wong lists a total of six characteristics; in addition to the four listed above, which are clearly present, she includes “infused with social, political, or cultural commentary,” which is arguably present, and “distributed under open source licenses,” which is not. Mary WS Wong, “‘Transformative’ User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1075, 1087–88.

are focused on a single character. In this regard, Slender Man is comparable to a traditional franchise. Unlike a traditional franchise, however, the works at the center of the fandom are not under the control of a single source. They are – or, rather, were prior to the fandom’s death by ownership – created by anyone who wanted to use the character.³¹³

4.3.4.3 The Omegaverse

The Omegaverse is a fully-fledged fandom that initially developed from works of slash fiction derived from the dark fantasy television series *Supernatural*. In these works, fan authors would place the two main characters, who are brothers, in a sexual relationship in which one would be the dominant (“Alpha”) and the other a submissive (“Omega”) capable, in some cases, of being impregnated.³¹⁴ Similar works, using similar tropes but different characters, were created by fanfiction authors working in different fandoms, and authors began to move from same-sex to opposite sex pairings. At present, in addition to the 26,550 works tagged with “omegaverse” that are hosted at AO3, there is also a considerable volume of original “omegaverse” fiction available for sale, including those discussed in this section.³¹⁵

Where the Slender Man is, or at least was, a shared character, the Omegaverse might be termed a shared universe, or possibly simply a

³¹³ Ultimately, the question of whether such works should be in the public domain or treated as jointly owned by the creative group is fascinating, but beyond the scope (and space constraints) of this thesis.

³¹⁴ See generally, eg, Alexandra Alter, ‘A Feud in Wolf-Kink Erotica Raises a Deep Legal Question’, *The New York Times* (23 May 2020) <<https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html>> accessed 12 February 2021.

³¹⁵ See Tag: Omega Verse (Archive of Our Own, search conducted 27 November 2022), <https://archiveofourown.org/tags/Omega%20Verse/works>

hyperspecialized subgenre.³¹⁶ Omegaverse works are, by and large, romance or erotica set in a universe in which the protagonists share certain canine or lupine traits.³¹⁷ In most cases, the mere inclusion of general traits in multiple works does not give rise to copyright concerns. In the Omegaverse case, the specific and unusual nature of the shared traits, which include highly specific anatomical features, sexual behaviours, and pseudo-canid pack dynamics (“Alphas,” “Betas,” and “Omegas”) creates additional complexity.³¹⁸

A dispute legal dispute spanning two separate court cases with complex procedural histories, referred to for convenience in the singular as the “Omegaverse case,” has occurred within this fandom.³¹⁹ Where the Slender Man case primarily involved the authorship and ownership of a character that was developed through a crowdsourcing-type process, the Omegaverse claims raise questions involving the ability to own

³¹⁶ The Omegaverse is difficult to categorize. It does not quite fit the usual criteria for a fictional universe as stories that are classified as “omegaverse” have been set within fictional universes as diverse as the modern-London based *Sherlock* and the classic cartoon series *Voltron*. See, eg, “BeautifulFiction,” “The Gilded Cage” <<https://archiveofourown.org/works/1103555>> (Sherlock); see also “may10baby” “Spicy Little Kitten” <<https://archiveofourown.org/works/11998587>> (Voltron). At the same time, the degree of specificity of the common elements involved in these stories is greater than one might normally expect from a genre or subgenre. This dissertation follows the approach used by the fans and refers to this as a universe. Ultimately, the legal questions at issue, which involve whether elements required to write stories that meet specific criteria are susceptible to ownership at all, and if so to what extent, remain equally important regardless of the specific terminology used.

³¹⁷ If you don’t already know, don’t ask.

³¹⁸ See, eg, Alter (n 314).

³¹⁹ The details of these cases are discussed in more depth in Chapter 6.4.

tropes within a niche subgenre, and the development of new *scenes a faire*. In both cases, however, the legal issues involved have been critical to the fandom and have involved issues that are very different from the typical derivative work/secondary content issues that characterize fanworks research.

4.3.5 Funding and Modern Fandoms

One aspect of contemporary fanworks deserves additional mention at this point: the role of crowdfunding. Several online platforms exist, including Patreon and Kofi, that provide the ability for creators, including fan creators, to set up a mechanism that allows the fans of their own work to support them on a subscription or patronage basis, rather than by paying for individual works.³²⁰ This can be seen as something akin to a crowdsourced and distributed version of the type of patronage that (for example) families such as the Medici provided to artists during the Renaissance – or, more prosaically, as a form of support that relies on personal branding concepts more than it does traditional IP such as copyright.³²¹ It should be noted that patronage compensation for content creators is not exclusive to fanworks; much of YouTube, Twitch, and related content is funded by a mix of subscriptions, patronage, and merchandise sales.³²²

³²⁰ See, eg, The Writing Doll (Patreon, no date) <<https://www.patreon.com/thewritingdoll>> (fan fiction creator's page).

³²¹ See, eg, Zach Blumenfeld, 'Selling the Artist, Not the Art: Using Personal Brand Concepts to Reform Copyright Law for the Social Media Age' (2019) 42 *The Columbia Journal of Law & the Arts* 241, 244–48.

³²² See, eg, Linus Tech Tips, 'Tweet' (*Twitter*, 27 Jan 2022) <<https://twitter.com/linustech/status/1486918784401088515>> (YouTuber publicly disclosing revenue percentages by source).

This may explain why the copyright disputes that have developed within this fandom have tended to be clashes over non-economic factors such as respect rather than traditional copyright disputes.³²³ Although this does not appear to have been an outcome-determinative factor in any case that has arisen to date, it should be noted that in the event that a dispute does arise, this form of indirect compensation, which is not linked to any one work, will likely be viewed as commercial, and relevant to the analysis of infringement, whether under a fair use, fair dealing, or bespoke approach to UGC such as that used in Canada.³²⁴ Regardless of whether these are commercial uses of content, this thesis does not view patronage as falling within the traditional industrial distribution channels used by the creative industries.

Crowdfunding of individual works is also common. Platforms like Kickstarter allow creators to generate funds by, in effect, pre-selling their products long before they create them. Supporters pledge a certain amount of funding in exchange for various future awards. The platform collects that money and releases it to the creator, with the supporters assuming some of the risk that the project will fail. The resulting products are generally commercial; this played a significant role in the outcome of the *Axanar* case discussed in Chapter 6.2.3. However, although this is commercial distribution, it is not considered to be within the conventional channels of the creative industries for the purposes of this thesis; it is too novel, particularly given the assumption of risk by backers.

³²³ See Chapter 6.2.4 for a discussion of two such disputes.

³²⁴ See generally, Chapter 5.

4.4 Fandoms and Fanworks: Boundary Challenges

Thus far in the thesis, fanworks and fandoms have been discussed separately. This permitted a clear and conventional approach to the subject, but one that was oversimplified. It was oversimplified, moreover, in ways that conceal something important: many types of fanworks – possibly even most – have their own fandoms. This should already be apparent from the discussion of the history of cosplay discussed earlier. Cosplayers were a regular feature at science fiction conventions as early as the 1930s, but they also had conventions of their own that were focused on the costuming, not the specific fandoms, within a couple of decades after that. They built, in other words, a fan community around their preferred media of fanwork. This is, as is immediately clear on further examination of other types of fanwork, the norm for types of fanwork that become popular. It is not an exception.

Fan fiction writing, for example, is celebrated in its own right, and members of the fanfiction writing fandom will sometimes create works of fan fiction around things that have no obvious connection to other fandoms. One example of this was seen when the container ship *Ever Given* became lodged in the Suez Canal in early 2021. The ship rapidly became the subject of a considerable amount of fic posted to AO3, with nearly 150 works available as of late April 2021.³²⁵ A ship grounding may seem a strange topic for fan fiction, until one considers the nature of the internet, the nature of fandoms and the fact that the ship was a

³²⁵ See 'Ever Given Container Ship (Anthropomorphic)' (*Archive of Our Own*) <[https://archiveofourown.org/tags/Ever%20Given%20Container%20Ship%20\(Anthropomorphic\)/works](https://archiveofourown.org/tags/Ever%20Given%20Container%20Ship%20(Anthropomorphic)/works)> accessed 29 April 2021.

long, rigid object that had become lodged in a narrow canal.³²⁶ These works, some of which have been viewed thousands of times and received hundreds of comments, are ostensibly related to a wide body of source works.³²⁷ Treating them as only based on the source work, however, seems inappropriate.

The a/b/o and other existing fandom fiction that features the container ship cannot be understood only by reference to the source franchises. Rather, it is something that emerged from the discussion of current events by members of the fanfic fandom at AO3. It is readily explicable within only that specific context and seems intended to be read more in conjunction with other Ever Given fiction than with source franchise fiction. These ship fictions can only reasonably be viewed as fanfic tied to a fanfic-focused fandom.

Fanworks are works of communications. But they are works that may communicate in many different ways and within and between many different groups. A single fanwork may simultaneously be a work of Star Trek fandom, a work of fanfic fandom, and a work that crosses over into other genres. The conventional model of fanworks, which addresses any one of these aspects at a time, does not sufficiently capture the range of novel purposes for which any individual fanwork is created.

³²⁶ This is in accord with Rule 34 of the Internet. See, 'Rule 34' (*TV Tropes*,) <<https://tvtropes.org/pmwiki/pmwiki.php/Main/RuleThirtyFour>> accessed 29 April 2021. The author thanks, but does not forgive, members of his Discord community for pointing the reasons for the ship shipfic out to him

³²⁷ For example, there is Ever Given fic that is associated – at least nominally – with the Omegaverse fandom discussed in Chapter 4.3.4.3. See Oniisama, 'A Ship, A Knot, A Canal - Suez!' (*Archive of Our Own*, 26 March 2021) <https://archiveofourown.org/works/30281100?view_adult=true> accessed 29 April 2021.

4.5 Fanworks: Does Restricting the Definition to the Classic Model Still Make Sense?

The discussion of fanworks and fandoms presented in this thesis covers a range of fannish activities that clearly exceed the boundaries of the conventional model of fandoms presented at the start of the chapter. The question thus arises: should the discussion of the fanworks problem in copyright law be restricted to the conventional model. This is a more difficult question than it might at first seem; there are advantages and disadvantages to both approaches.

It is possible to craft a definition of fanworks and fandoms that is limited to only those that surround mass-media franchises, and therefore fit within the conventional model.³²⁸ The discussion could, therefore, be limited to those fandoms and fanworks that fit within the conventional model. This approach has, it must be conceded, the virtue of simplicity. It would keep the overall discussion within familiar bounds and avoid radically expanding the scope of a problem that is already notorious for its insolubility. And, of course, it can be argued that solving the initial problem first might make it easier to solve the broader problem later.

There are also copyright law reasons to remain within the conventional boundaries of the fanworks problem. The conventional model is restricted to original works that share a common characteristic in their ownership: they are mass-media works. This, in turn, provides a common reason for the use of these works by secondary creators: participation within the popular culture that has been constructed from

³²⁸ One would do so by defining fandoms to limit them to those surrounding specific mass-media fandoms. The difficult, and likely contentious, part of this would involve defining “mass-media” for these purposes.

the materials provided by mass media works.³²⁹ The presence of a common set of source work characteristics and a common set of secondary use reasons lends itself to a common treatment under copyright law far more readily than is likely to be the case with a broader perspective on fandoms and fanworks.

At the same time, however, there are significant disadvantages to this approach. One of the largest, and most obvious, of these reasons is this: it would perpetuate a piecemeal approach to copyright law problems. The focus would be on a small area; the solution would be specific to a small area. This is, of course, helpful for those who are only engaged in activities within this small area, but less so for those whose activities stretch into the broader fandoms.

This approach would also neglect essentially all copyright issues within fandom other than those raised by the creation of secondary content based upon the major mass-media works. As discussed in Chapter 3, such issues represent only a subset of the copyright issues that are present. It would also minimize the issues that arise with the reworking of material from smaller, non-franchised creators, including the potential that fanworks might have a disparate effect on those who are less well-known or successful. And it obliterates the issues that arise within fandoms, including those connected with attempts to propertize content that has been developed and utilized by the broader

³²⁹ See Fiske (n 265) 1–3.

community,³³⁰ and attempts to weaponize intellectual property law as a means of addressing non-IP disputes within the community.³³¹

Ultimately, this traditional approach does not seem likely to produce broad solutions. It would largely neglect issues, such as those arising from newer and nontraditional fandoms, which are not as commonly seen in major mass-media fanworks. For example, questions such as the copyright status of a crowdsourced character such as Slender Man, which is discussed later in the thesis, would be unlikely to arise if the definition is restricted to the traditional model.³³² The use of carpet pattern as an informal sign of community involvement would likewise be ignored.³³³ This thesis will not restrict the definition; the broader definition is more likely to highlight the full scope of the problem.

4.6 Fandoms and Other UGC – Is the distinction helpful?

The trend within legal academia has been to distinguish fanworks from other forms of UGC, such as remix or peer production. To an extent and particularly when these works were new, individual attention to new forms of user generated content was warranted. Each new form did raise some novel issues and require some specific attention. It is not clear to me that this distinction is helpful now.

³³⁰ Examples of this include both the apparent attempt to claim rights in the Omegaverse and the commercialization of the Slender Man.

³³¹ Examples of this may include both the Omegaverse dispute and the YouTube copyright disputes discussed Section 4.3.

³³² See Chapter 4.3.4.

³³³ Ibid.

As has been seen, many of the characteristic examples of UGC, including both peer production and remix, are used as fanworks. There are many crowdsourced wiki-like guides to various fictional franchises, for example. Crossover productions are functionally indistinguishable from remix. This raises a second question: should UGC be considered alongside fanworks? To an extent, of course, the answer to this question depends upon the assessment of the question raised in the prior section. If fanworks are considered only in the narrow sense, other forms of UGC would only fall within the ambit of the analysis to the extent that they involve the use of primary content from mass-media franchises. The vast bulk would be irrelevant. However, under the broad view of fanworks, there seems much less reason to keep fanworks separate from the remainder of UGC; in fact, it is quite possible that there is no reason at all to do so. Or at least none that is related to the substantive law.

Nevertheless, the innate limitations of a single, book-length work suggest that it would be prudent to not explore this question in as much depth as might otherwise be possible. The remainder of the thesis will not explicitly address non-fanworks forms of UGC, although it will discuss, when appropriate, overlapping legal issues. In addition, the conclusions that are reached by this thesis are likely to apply to other areas beyond fanworks, including UGC.³³⁴

4.7 Conclusions

Taken together, Chapters 3 and 4 have provided a detailed view of the extent of fanworks and their role in society. Chapter 3 focused on fanworks themselves, and in particular on the variety of fanworks

³³⁴ See Chapters 8.5 & 8.6.

that exist; Chapter 4 examined fanworks in the broader context of fandoms – which are in many ways the *raison d'être* for fanworks. The combined overview that is provided by these two chapters allows us to draw several key conclusions.

First, Chapter 3 made it clear that the standard model of fanworks, in which fanworks are viewed as single, derivative works that are linked to mass media franchises and primarily distributed online in a non-commercial manner, is incomplete. It is accurate in that works that fit within the standard model are clearly fanworks (and likely will be under any reasonable definition). It is incomplete in that creative works that are produced by fans for consumption within fandoms are often not linked to major mass media franchises, are presented as, but not designed for, consumption as part of a creative conversation rather than on a stand-alone basis, and which are not always entirely noncommercial.

To put another way, the standard model is underinclusive. There are works, such as the fan art for smaller franchises such as the Harrington fandom, or the cosplay surrounding the convention carpet, or the attempts to carry soup across video game maps in YouTube videos, which are difficult to classify as fanworks under the standard model, yet more difficult still to refer to as anything but fanworks. Restricting the definition to the standard model carries the risk that any solution would be equally incomplete.

The broader definition, under which a fanwork is a work created by a fan that is intended at least in part to be shared with other members of a fandom, and which is distributed through channels that lie outside the traditional creative industries, is more consistent with the range of

activities that fans carry out. It is also consistent with the broader, and more nebulous definition of fandoms that is suggested by this chapter; it seems unreasonable, for example, to say that Slender Man works are not fanworks merely because the identity of the claimed authorship of the original is, from a copyright perspective, questionable. And, given that a clear copyright understanding of fanworks under the standard model has remained elusive, there seems little disadvantage to taking a wider view.

Second, the view of fanworks gained over these two chapters indicates key features which distinguish them from the sorts of works that commonly serve as the focus of copyright. They are very much not singular creative works, or even conventional derivatives. They are a means of communication and interaction with other fans, within fandom communities. As such, fanworks are not readily removed from the context of their fandoms. This is as true for a conventional work of Spock/Kirk slash fiction as it is for the fiction written about the misadventures of the container ship *Ever Given*. In both cases, the interplay with the fandom (whether *Trek* or fanfic writing and its tropes) is critical. These are not works which are readily viewed as being intended to be part of the source work's market; they are intended to be part of the communities that spring up around source works.

5 FANWORKS AND COPYRIGHT: A DOCTRINAL REVIEW

Chapter 2 demonstrated that there is a broad consensus within copyright scholarship that the legal status of fanworks is uncertain. This chapter uses doctrinal analysis to test that hypothesis. Specifically, it examines if, to what extent, and in what ways, copyright law fails to provide clear answers when applied to fanworks.

It begins with a brief discussion of a doctrinal quirk that is largely jurisdiction-independent. Although fanworks are often referred to as ‘derivative works,’ copyright cases generally do not turn on whether the derivative work or adaptation right has been infringed. Instead, the cases turn on the reproduction right. As a result, and notwithstanding the frequency with which fanworks are referred to as ‘derivative works,’ the significant doctrinal uncertainty in this area has little bearing on the fanworks debate.

The two sections that follow contain the bulk of the doctrinal analysis. Section 5.2 focuses on the doctrines that most often apply in the United States, with a particular emphasis on the unpredictability of fair use in the fanworks context. Section 5.3 then examines the situation in the United Kingdom and other common law jurisdictions, focusing first on the United Kingdom’s fair dealing approach. As will be seen, despite the perception that fair dealing provides a more bright-line approach than fair use, it is not substantially more predictable than fair use in the fanworks context. The inquiry is then extended to cover the bespoke Canadian approach to UGC and mixed approaches adopted in other common-law jurisdictions such as Singapore. Here, again, the application of doctrine may be less clear than is perceived.

Section 5.4 briefly addresses the role of private ordering. Although not strictly a matter of copyright law, contractual approaches such as video game terms of use, arrangements between industry stakeholders and online intermediaries, and extrajudicial copyright enforcement mechanisms such as notice-and-takedown all play a role in fanworks enforcement. These will be discussed in more depth when the impacts of doctrinal uncertainty are discussed in Chapter 7, but their role in magnifying and, in some cases, capitalizing upon, the legal uncertainties is briefly discussed here.

Finally, a central theme that recurs throughout the doctrinal analysis is addressed: the pervasive presence and distorting effects of commercial conduct. Although the statutes in play are drafted in ways that sweep in all creative activities, the law as shaped by judicial opinions is overwhelmingly driven by cases involving allegedly infringing works that are clearly commercial in nature. This has a profound effect on the fanworks situation as a whole.

The examination in this chapter is intended to demonstrate the state of the law as applied to fanworks at the present time. In particular, it is focused on the question of whether current law clearly addresses fanworks, or if the bulk of the academic analysis is correct, and fanworks do reside within a grey area. Questions regarding alternative approaches will largely be deferred to the final chapters of the thesis.

5.1 Most “Derivative Works” Aren’t.

It is common to refer to fanworks as ‘derivative works.’³³⁵ Yet, as Rachum-Twaig notes, courts assessing claims of infringement in cases involving fanworks-like situations rarely treat the matter as one involving creation of a derivative work.³³⁶ Instead, courts assess such cases through the lens of the reproduction right, even when they also arguably fall within the ambit of a derivative works or adaptation right.

It is unsurprising that this is the case in the United Kingdom, where the definition of ‘adaptation’ provided by Section 21(3) of the CDPA provides a closed list of works that are adaptations.³³⁷ Some fanworks might, in some circumstances, qualify as adaptations under

³³⁵ Although “derivative work” is a term of art of American copyright law, 17 USC §101, the term is in common use in legal academia even in jurisdictions that do not apply American law. *See, eg*, Bonetto (n 56).

³³⁶ Omri Rachum-Twaig, *Copyright Law and Derivative Works: Regulating Creativity* (Routledge 2019) 125–51.

³³⁷ “In this Part “adaptation”—

(a) in relation to a literary work, other than a computer program or a database, or in relation to a dramatic work, means—

(i) a translation of the work;

(ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work;

(iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;

(ab) in relation to a computer program, means an arrangement or altered version of the program or a translation of it;

(ac) in relation to a database, means an arrangement or altered version of the database or a translation of it;

(b) in relation to a musical work, means an arrangement or transcription of the work.”

this approach. For example, a fan-created graphic novel of a video game might be “a version of the work in which the story or action is conveyed wholly or mainly by means of pictures suitable for reproduction in a book.” Similarly, a video game mod might be an “arrangement or altered version” of the original. Such cases, however, would be the exception, and most fanworks fall outside the ambit of the adaptation right. In those cases, it is necessary to address alleged infringement as a matter of reproduction.

Although there are few cases in the United Kingdom involving works analogous to fanworks, the judicial preference to use a reproduction-based approach can still be seen. For example, *Baigent v Random House*, involved allegations that the novel *The DaVinci Code* was based on the work *Holy Blood, Holy Grail*, which has been marketed as nonfiction.³³⁸ Here, although the novel may have been based on the existing work, it was not ‘adaptation’ under the CDPA. The court therefore addressed only whether the novel reproduced a substantial part of the protected material in the original.

The assessment of secondary uses as infringements of the reproduction right in the United States rather than as derivative works is not as easily explicable. The statutory definition of “derivative works” is expansive, stating that a derivative work is “based upon one or more preexisting works,” with a lengthier list of examples concluding with the catchall “any other form in which a work may be recast, transformed, or

³³⁸ *Baigent & Anor v The Random House Group Ltd* [2007] EWCA Civ 247.

adapted.”³³⁹ Fanworks may, as many have noted, easily be viewed as derivative works under this definition.³⁴⁰

Nevertheless, an examination of cases demonstrates that the courts rarely address cases on the basis of the derivative works right. Instead, they most often look exclusively to the reproduction right even where the case involves a secondary work that is plausibly within the definition of a derivative work. This can be seen, for example, in the *Suntrust* case, which involved a new work based on the novel *Gone With the Wind*.³⁴¹ There, the court’s analysis of whether the plaintiff demonstrated a *prima facie* case of infringement ignores the derivative works right entirely.³⁴² Instead, the court simply found that “characters, settings, and plot [were] taken” – a finding that implicates the reproduction right.³⁴³

This is not to say that there are no cases which have addressed infringements of the derivative works right. However, relatively few such cases have touched on situations like those seen with fanworks. To the extent that cases address a derivative works or adaptation rights question, this tends to occur either where reproduction is either difficult to assess or entirely absent.³⁴⁴ The resulting case law has not, it should

³³⁹ 17 USC 106(2)

³⁴⁰ See, eg, *Anson-Holland* (n 31) 4; *Jamar and Glenn* (n 29) 970–71; *McCardle* (n 29) 448–49.

³⁴¹ *Suntrust Bank v Houghton Mifflin Co* (n 17).

³⁴² *ibid* at 1266–67.

³⁴³ *ibid* at 1267.

³⁴⁴ For an example of the former, see *Mirage Editions, Inc v Albuquerque ART Co* 856 F 2d 1341 (9th Cir 1988); for the latter, see, eg, *Lewis Galoob Toys, Inc v Nintendo of America, Inc* 964 F 2d 965 (Court of Appeals, 9th Circuit 1992).

be noted, been any more noteworthy in its production of rules that are entirely clear than cases assessing other kinds of secondary content.³⁴⁵

Ultimately, although secondary content is central to fanworks, and although there has been considerable academic focus on such uses as derivative works, it is uncommon for courts to take that approach when the use is challenged. Instead, the assessment typically focuses only on reproduction.³⁴⁶ This is unfortunate, if only because it eliminates nuance and pushes consideration of whether a new use of content is permissible or infringing into exceptions and limitations rather than considering whether the bounds of copyright should encompass these uses. However, this is the present state of the law. It is not, therefore, necessary to spend substantial time assessing the questions surrounding derivative works when examining copyright law as applied to fanworks.

³⁴⁵ For example, courts have held that one can create a derivative work without creating a work that would otherwise be protectable, and that something unfixed can therefore be a derivative work. See, eg, *Lewis Galoob Toys, Inc v Nintendo of America, Inc* (n 344) 967–68. Other efforts have resulted in different appellate courts reaching different conclusions, in cases involving identical conduct, on the question of whether placing pictures cut out of books onto ceramic tiles constitutes the creation of a derivative work. Compare *Mirage Editions, Inc v Albuquerque ART Co* (n 344) (creates derivative work) with *Lee v ART Co* 125 F 3d 580 (7th Cir 1997) (does not create derivative work).

³⁴⁶ Sometimes using a definition of “substantial” that permits findings of infringement even where there is little directly copied from the original work to the new. See, eg, *Designer Guild Limited v Russell Williams (Textiles) Limited (Trading As Washington Dc)* [2000] 1 Weekly Law Reports 2416 (House of Lords)

5.2 In the United States, the Copyright Law of Fanworks is Dominated by Fair Use

No doctrine is more important to the copyright law of fanworks than fair use. This is true not merely in the United States; it is true globally.³⁴⁷ The United States is the home of many of the companies that own the franchises that commonly serve as the focus for mass-media fandoms.³⁴⁸ More critically, it is the home of most of the major intermediaries that host fanworks and other user-generated content. As a result, a great deal of such content may be effectively under American law, regardless of its place of origin.³⁴⁹ Even where allegedly infringing conduct is not covered by American law, intermediaries typically require the use of the American notice and takedown system, which nominally mandates consideration of fair use.³⁵⁰ Fair use is, however, legendarily complex and not always consistently applied. The discussion of fair use will, therefore, occupy much of this section. However, it begins with a brief overview of the American approach to similarity and copying.

³⁴⁷ This may be seen, as noted later in the chapter, in the incorporation of fair use into the law in other common-law jurisdictions.

³⁴⁸ Most major film studios, many television studios, and a significant number of video game companies are based in the USA.

³⁴⁹ For example, the AO3 Terms of Service specify that disputes will be litigated under New York law. ‘TOS Home’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/tos>> accessed 30 April 2021. Although this would not prevent a copyright owner from bringing a cause of action elsewhere, the ability to enforce such a judgment is limited. Similar concerns are likely to arise for a number of other sites, such as DeviantArt, although perhaps not for the very largest such as YouTube.

³⁵⁰ See *Lenz v Universal Music Corp* 815 F3d 1145, 1148 (9th Cir 2016)(holding that fair use must be considered before sending takedown notice).

5.2.1 United States: Similarity and Copying are Rarely Live Issues, Even When They Should Be.

A court's analysis of copyright infringement begins, in theory, by deciding whether the defendant copied. This requires the assessment of two elements: has (1) something protected by copyright (2) been copied by the defendant.³⁵¹ Dealing with the first requires the assessment of the work that the plaintiff claims is protected. The second requires determining if there is substantial similarity between the new work and the old.³⁵² These steps, however, are not always strictly followed in cases involving secondary creativity. Instead, courts often seem to presume the presence of one or both elements before proceeding directly to an analysis of whether the copying is excused by fair use.³⁵³

This is not always a well-justified assumption. For example, in *Kienitz v Sconnie Nation*, the 7th Circuit examined the extent to which a photograph had been used in a t-shirt. After itemizing and examining the changes made to the original, the court noted that all that remained, “besides a hint of Soglin's smile, is the outline of his face, which can't be copyrighted.”³⁵⁴ Logically, this should have resulted in a finding of noninfringement. If nothing but a non-protectable feature remained, the defendant did not copy any protected content. Yet the court did not reach this conclusion. The court found instead that the defendant had

³⁵¹ See *Castle Rock Entertainment, Inc v Carol Pub Group, Inc* 150 F3d 132, 137 (2d Cir 1998).

³⁵² See *ibid* at 138–41.

³⁵³ Theoretically, other defenses, such as *de minimis* use or implied license might come into play. See, eg, *Solid Oak Sketches, LLC v 2K Games, Inc*, 449 F Supp3d 333, 343-46 (raising both). In reality, fair use is usually the next step.

³⁵⁴ *Kienitz v Sconnie Nation LLC* 766 F3d 756, 759 (7th Cir 2014).

succeeded on the affirmative defense of fair use, which excuses otherwise infringing conduct.

The willingness of American courts to independently protect sub-elements of works further reduces the importance of the putatively foundational copyright doctrine of substantial similarity for much of fanworks. Individual components of works, such as fictional characters, can be granted independent copyright protection.³⁵⁵ Such protection has been extended to other features of works than characters in a strict sense by labeling them as characters.³⁵⁶ This can effectively fragment a single work into many discreet smaller works. Sufficient similarity to justify a finding of infringement can be found based on a determination that the part of the original that was taken is protectable, even if the new work bears little overall similarity to the original work.

A case involving the *Star Trek: Axanar* fan film provides an additional example of this type of reasoning.³⁵⁷ The district court found, with minimal analysis, that the fictional character of Garth of Azar that was depicted in a *Star Trek* episode was protected by copyright. The court then went on to hold that the use of this protected character was a point of substantial similarity between the new use and the original. Yet, in reaching this conclusion, the court conducted no examination of the question of whether the character that was depicted in the fan film was

³⁵⁵ For a detailed discussion of the issues of microworks protection, see Matthew D Bunker and Clay Calvert, 'Copyright in Inanimate Characters: The Disturbing Proliferation of Microworks and the Negative Effects on Copyright and Free Expression' (2016) 21 *Communication Law and Policy* 281.

³⁵⁶ See, eg, *DC Comics* (n 33).

³⁵⁷ This work is discussed at greater length in Chapter 6.2.3.

substantially similar to the original.³⁵⁸ The similarity of the two versions is a proposition that might appear obvious at first glance. It is, however, as others have noted, is anything but clearly when one actually examines the two works.³⁵⁹ The character in the new works is much younger and the character's personality is radically different.³⁶⁰

Thus, although these concepts are theoretically central to the copyright inquiry, there seems little reason to examine similarity or protectability in greater depth. The issues are only infrequently at issue in fanworks cases. Even when they are plausibly in play, they are not always treated as such by the courts. Ultimately, the key legal question involved with fanworks in America is rarely whether there is potential infringement; it is almost always the question of whether an exception or limitation, usually fair use, applies.

5.2.2 United States: Fair Use Predominates

With copying generally taken for granted in fanworks cases, attention turns to exceptions and limitations. In the United States, this is the same as saying that attention turns to fair use. The United States has few bright-line exceptions and limitations to copyright law. There are, for example, no explicit exceptions for private copying, parody, or quotation.³⁶¹ The need to deal with all such uses is dealt with through the flexibility of fair use.

³⁵⁸ *Paramount Pictures Corp* (n 33) 1703–04.

³⁵⁹ Schwabach, 'Bringing the News from Ghent to Axanar' (n 226) *39.

³⁶⁰ One key difference: unlike the character in the original, the character depicted in the fanwork is not a homicidal megalomaniac.

³⁶¹ See generally, Title 17, Chapter 1, United States Code.

This section discusses fair use with a particular focus on its application to fanworks. The section is introduced by discussing the contentious nature of the doctrine. It then provides an overview of the doctrine, including its origins in fair dealing and the adoption of the present four-factor test. Each of those factors has its own relevance to the inquiry as applied to fanworks, as does a fifth, semi-written “good faith” factor. Several other areas not captured by the factors, but instead identified in empirical research are also noted, where relevant. The cumulative effect of these uncertainties is to create a doctrine that is both important to fanworks and extraordinarily difficult to use to assess any individual fanwork.

5.2.2.1 Fair Use as a Contentious Area

The breadth and flexibility of fair use comes at a price. The doctrine was referred to as “the most troublesome in the whole law of copyright” in 1939.³⁶² The situation has not noticeably improved since, despite the codification of the doctrine into the copyright act of 1976. This “troublesome nature” is clear when one examines the volume of academic ink spilled on the topic – according to one recent paper, between 1978 and 2019 the volume of academic work on fair use exceeded the number of judicial opinions invoking the doctrine by a ratio of at least 1.6 to 1.³⁶³

In addition to the critiques regarding the coherence – or lack thereof – of the doctrine, there are also critiques leveled at the doctrine on access to justice and fairness grounds. As one noted commentator

³⁶² *Dellar v Samuel Goldwyn* 104 F2d 661, 661 (2d Cir 1939) (per curiam; attributed to Hand, J).

³⁶³ Barton Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019’ (2020) 10 NYU J Intell Prop & Ent L 1, 3 n4.

describes it, fair use provides nothing more than “the right to hire a lawyer to defend your right to create.”³⁶⁴ This critique is largely true as applied to fanworks and UGC, regardless of any potential predictability the doctrine might have in other, more industrial areas of creative activity — with the added complication that hiring the lawyer is rarely economically rational in fanworks cases.³⁶⁵

5.2.2.2 Fair Use and Predictability

Much academic discussion centers on the question of whether the doctrine has produced, or can produce, a consistent body of jurisprudence. How one answers this question can depend on what one views as “consistent.” For example, Barton Beebe’s 2008 study found that first-instance courts seemed to consistently adhere to the principle that market effect is the most important factor long after the Supreme Court retreated from that stance, leading him to note that “our fair use doctrine has to some extent run off the rails of section 107.”³⁶⁶ Whether “trial courts consistently make the same mistake” should be viewed as true consistency is a difficult question.

Regardless, several authors have suggested that fair use is predictable, using a range of approaches.³⁶⁷ Beebe’s 2008 study and his recent update to that work conducted a statistical analysis of fair use

³⁶⁴ Lessig, *Free culture* (n 27) 187.

³⁶⁵ This issue will be discussed in Chapter 7.1.

³⁶⁶ Barton Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 596.

³⁶⁷ See, eg, Beebe (n 366); Pamela Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham L Rev* 2537; Neil Weinstock Netanel, ‘Making Sense of Fair Use’ (2011) 15 *Lewis & Clark Law Review* 715; Matthew Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio St LJ* 47.

outcomes, based on the analysis of the role of identified subfactors within each factor.³⁶⁸ Samuelson’s 2009 paper, on the other hand, identifies clusters of policy outcomes which could be used for predictive purposes.³⁶⁹ This thesis, does not challenge the overall conclusion that several authors have reached that the doctrine of fair use is, on some level, predictable. However, fanworks are largely absent from empirical fair use studies. They must be. Fanworks have been largely absent from the courts.³⁷⁰ As a result, and as this section demonstrates, to the extent that there is predictability within fair use in general, that predictability simply does not extend to fanworks.

Predictable or not, fair use is the most critical copyright doctrine for fanworks governance in the United States. For the reasons noted elsewhere, it will therefore have additional influence on copyright-relevant conduct in other jurisdictions. The following sections provide an overview of the doctrine, discuss each of the four statutory factors, and highlight the role of the extra-statutory consideration of good faith. The question of the doctrine’s overall predictability in the fanworks context is then reviewed.

5.2.2.3 Fair Use in General

The fair use doctrine has its origins in the 1841 case *Folsom v Marsh*.³⁷¹ This case was an evolution of the doctrine of fair dealing,

³⁶⁸ Beebe (n 366); Beebe (n 363).

³⁶⁹ Samuelson (n 367).

³⁷⁰ Only one of the two nontraditional fanworks cases (*Hosseinzadeh v Klein* 276 F Supp 3d 34 (Dist Court 2017)) appears in even Beebe’s updated data set.

³⁷¹ *Folsom v Marsh* 9 F Cas 342 (1841).

which developed in the English case law during approximately the same period.³⁷² Fair use continued to evolve in the United States as a judicially-crafted doctrine for over a century before being formally enacted into statute in the 1976 Copyright Act.³⁷³ Despite its enactment into positive law, fair use continues to be developed by the courts. Judges view the doctrine as providing guidelines which are subject to interpretation, elaboration, and development in the face of new technologies, rather than as a set of rules to be strictly applied.³⁷⁴

The statutory enactment of fair use states that:

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

³⁷² Justice Story, in developing the doctrine, cited a number of English cases addressing the question of fair abridgement, including *Dodsley v Kinnersley*, (1761) Amb. 403, and *Gyles v Wilcox*, (1740) 26 ER 489 (Ch), in his discussion.

³⁷³ The extent to which *Folsom v Marsh* was actually influential has been questioned, see Beebe (n 366) 560, as has the perception that *Folsom* represents the start of development for an exception to copyright, rather than a means for identifying non-infringing conduct. See generally L Ray Patterson, 'Folsom v. Marsh and Its Legacy Symposium: The Worst Intellectual Property Opinion Ever Written' (1997–98) 5 J Intell Prop L 431; see also John Tehranian, *Infringement Nation: Copyright 2.0 and You* (Book, Whole, Oxford University Press 2011) 27–35. A full examination of these issues, as well as the role of fair dealing in the development of fair use is beyond the scope of this thesis.

³⁷⁴ *Google Llc v Oracle America, Inc* 141 S Ct 1183 (2020).

(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.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.*³⁷⁵

Fair use is flexible, covering a broad range of uses, many of which are the subject of more explicit exceptions and limitations in other jurisdictions.³⁷⁶ It is also, however, notoriously fact-specific, and small differences in facts can result in different outcomes in superficially similar cases.³⁷⁷ This approach has substantial advantages and equally substantial disadvantages. New technologies, such as the search and indexing provided by the Google Books project, are readily accommodated by fair use, while jurisdictions with bright-line exceptions and limitations struggle to address similar situations.³⁷⁸ But that same flexibility leads, particularly in combination with the fact-specific

³⁷⁵ 17 USC, s 107 (US).

³⁷⁶ For example, much of the activity that is covered in the UK by the research and private study exception (CDPA 1988 s.29), the criticism, review and news reporting exception (CDPA 1988 s.30), and the time-shifting exception (CDPA 1988 s.70) would fall under fair use in the USA. *See Sony Corp of America v Universal City Studios, Inc* 464 US 417 (1984)(dealing with time shifting).

³⁷⁷ Compare *Suntrust Bank v Houghton Mifflin Co* (n 17) (finding fair use in unauthorized sequel to *Gone With the Wind* that told story from perspective of the slaves depicted in the original) with *Salinger v Colting* 641 FSupp2d 250 (SDNY 2009) (rejecting fair use in unauthorized sequel to *Catcher in the Rye* that told part of story from the perspective of a fictionalized version of the original's author).

³⁷⁸ Compare *Authors Guild v Google, Inc* 804 F3d 202 (2d Cir 2015) (holding that such uses are permitted under fair use) with Jessie Woodhead, 'Digitisation after Google Books - is Fair Use Fair Dealing?' (2014) 25 *Entertainment Law Review* 129, 130–32 (examining same technologies and arguing that they are not clearly covered by fair dealing under UK law).

inquiry, to reduced clarity and a lack of *ex ante* predictability. This unpredictability is a particular detriment to those who lack the resources to consult with legal professionals.³⁷⁹

Although the statute simply states that “fair use...is not an infringement,” courts treat fair use as an affirmative defense, with the burden of persuasion placed on the alleged infringer. Scholars have questioned whether this is appropriate as a matter of statutory interpretation or desirable as a matter of public policy.³⁸⁰ Both critiques are well-founded. Nevertheless, courts, including the United States Supreme Court, have held otherwise.³⁸¹ To the extent that fair use is ever treated as anything but a defense, this appears to be restricted to the limited context of notice and takedown.³⁸²

Although the statute specifically lists four factors, it is phrased in terms that indicate that these factors are mandatory but not necessarily exclusive; the court “shall include” these factors in the analysis.³⁸³ As

³⁷⁹ This access to justice issue will be discussed in length in Chapter 7.

³⁸⁰ See generally, eg, Lydia Pallas Loren, ‘Fair Use: An Affirmative Defense?’ (2015) 90 Washington Law Review 685.

³⁸¹ See *Campbell v Acuff-Rose Music, Inc* 510 US 569, 590 (1994) (‘Since fair use is an affirmative defense...’);

³⁸² A panel of the 9th Circuit strongly criticized the idea that fair use is a traditional affirmative defense, referred to it as being expressly authorized by copyright law, and said that referring to fair use as an affirmative defense is a “misnomer.” *Lenz* (n 350) 1152–53. Nevertheless, even the *Lenz* panel refrained from attempting a wholesale rejection of fair use as an affirmative defense, holding merely that it is “uniquely situated in copyright law so as to be different from traditional affirmative defenses.” *ibid* at 1153. Even that much of a deviation from affirmative defense orthodoxy has been treated with scepticism by subsequent 9th Circuit panels. See, eg, *Dr Seuss Enterprises, LP v ComicMix LLC* 983 F3d 443, 459 (9th Cir 2020).

³⁸³ 17 USC § 107.

both courts and commentators have noted, this strongly indicates that courts may take other factors into consideration.³⁸⁴ Nevertheless, courts generally stop short of announcing additional factors, instead framing any changes in their analysis within the existing factors.³⁸⁵ In the vast majority of cases, the four non-exclusive factors are the only ones used to frame the inquiry.

The next several sections explain how each of the four factors is assessed in practice. For each, an overview of the factor is provided, with a particular focus on the aspects most relevant to fanworks. Each factor includes multiple subfactors, and there are some differences amongst commentators as to how those are identified. This thesis adopts the subfactors described in Beebe’s empirical assessment, in part because there is some empirical data available as to the actual importance of each of these factors in reported decisions, and in part because they represent a clear taxonomy.³⁸⁶

5.2.2.4 The First “Transformative” Factor

The first statutory factor assesses “the purpose and character of the use, including whether such use is of a commercial nature or is for

³⁸⁴ See, eg, *Sony BMG Music Entertainment v Tenenbaum* 672 FSupp2d 217 (D Mass 2009)(citing good faith as a fifth factor); Greg Lastowka, ‘Digital Attribution: Copyright and the Right to Credit’ (2007) 87 BU L Rev 41 (using attribution as a fifth factor).

³⁸⁵ This can be clearly seen in the Supreme Court’s recent *Google v. Oracle* decision, in which the Court first reiterated the principle that the factors are non-exclusive, before proceeding to exclusively analyze the new work within that four-factor framework. *Google Llc v Oracle America, Inc* (n 374) 1197.

³⁸⁶ See Beebe (n 366) 594–621.

nonprofit educational purposes.”³⁸⁷ The development of clear guidelines to use when applying these 22 words has not been one of the great achievements of the last several decades of copyright law. The jurisprudence is fractured, and decisions often appear less than consistent within a single appellate circuit, let alone between circuits.

This factor has become the most elaborate and involved of the factors. Beebe identifies four separate inquiries that courts typically engage in under this factor: commercial/noncommercial character; transformative or productive use; whether the purpose of the new use falls within the purposes listed in the statute’s preamble; and the propriety of the defendant’s conduct.³⁸⁸ The discussion of this factor will largely track this division, with the following modifications: propriety is addressed later, under the fifth factor, and the discussion of preamble purposes is split into two parts, one focusing on education and the other on criticism and parody.

Commerciality

There is little to be said on the question of commercial and noncommercial uses, or at least little that is new. Prior to the Supreme Court’s decision in *Campbell*, this was the primary focus for this factor, particularly after the first three of the Supreme Court’s post-codification fair use decisions.³⁸⁹ All three contained language seen as establishing a presumption that all commercial uses of copyrighted material are

³⁸⁷ 17 USC §107.

³⁸⁸ Beebe (n 366) 595.

³⁸⁹ *Sony Corp of America* (n 376); *Harper & Row Publishers, Inc v Nation Enterprises* 471 US 539 (1985); *Stewart v Abend* 495 US 207 (1990).

presumptively unfair.³⁹⁰ This presumption was, however, walked back in the later *Campbell* decision.³⁹¹ Despite this guidance, Beebe’s updated empirical analysis demonstrates that courts sometimes continue to apply a presumption that commercial use is unfair.³⁹² At the same time, however, it must be noted that courts sometimes apply the inverse assumption, that noncommercial is presumptively fair, even more liberally – although this assumption is equally without statutory basis.³⁹³

In the case of fanworks, as a practical matter the critical question may be what constitutes ‘commercial.’ Questions such as whether raising money to cover the expenses of sharing, such as the solicitation of funds to cover the mailing costs of fanzines that was discussed in Chapter 3, have never been answered. Further complications arise from the Supreme Court’s definition of commerciality and profit. In *Nation Enterprises*, the court wrote that “the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but

³⁹⁰ *Sony Corp of America* (n 376) 449, 451 (‘every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege’); *Nation Enterprises* (n 389] 562 (quoting Sony presumption); *Stewart* (n 389] 237 (quoting Sony presumption).

³⁹¹ *Campbell* (n 381) 584 (“If...commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble...including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country. Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that “[n]o man but a blockhead ever wrote, except for money.”)(cleaned up).

³⁹² Beebe (n 363) 29–30.

³⁹³ See Beebe (n 366) 603.

whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”³⁹⁴ This leads to confusion, as uses by organizations operating for profit may be noncommercial, while uses by nonprofits can be commercial.³⁹⁵

Drawing a commercial/noncommercial distinction is often particularly difficult in the online environment. For example, courts in two cases involving fair use defenses raised by commercial enterprises sued over the use of photographs on social media sites struggled with this determination.³⁹⁶ In both, the courts noted that the use of the photograph in question on the social media pages raised no direct income for the defendant, but also noted that the social media pages themselves served to enhance the brands of the companies, and provided indirect advertising benefits. Both courts ultimately found that the question of commerciality could not be resolved as a matter of law, and required factual determinations supported by evidence.³⁹⁷

It is generally presumed that most fanworks that are not being sold are noncommercial, even when posted online.³⁹⁸ This presumption has not been tested for either otherwise uncompensated fanworks or for

³⁹⁴ *Nation Enterprises* (n 389) 562.

³⁹⁵ See, eg, *American Geophysical Union v Texaco*, 60 F2d 913, 922 (2d Cir 1994)(finding photocopying of articles by petroleum company to be noncommercial); *Lish v. Harpers Magazine Foundation*, 807 F Supp 1090, 1100-01 (SDNY 1992)(finding use by magazine run by nonprofit foundation to be commercial).

³⁹⁶ *North Jersey Media Group Inc v Pirro* 74 FSupp3d 605, 617–19 (SDNY 2015); *Bell v Moawad Group, LLC* 326 FSupp3d 918, 926–27 (D Ariz 2018).

³⁹⁷ Both cases appear to have settled before these questions were resolved by the court.

³⁹⁸ See Chapter 3.1.2.

patron-model fan creation.³⁹⁹ The blurring of the commercial/noncommercial and professional/amateur lines brought about by the rise of the “content producer” UGC platforms will continue to make the assessment of this critical factor a challenge as applied to fanworks. At present, all that can be said is that this is – still – an open question of law for fanworks as a whole.

Transformativeness

Since 1994 the first-factor inquiry has focused on whether the new use is “transformative” – on whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁴⁰⁰ This approach was the product of the Supreme Court’s adoption of a test proposed in academic work by Judge Pierre Leval, to address what Leval saw as a “lack of governing principles or values” within fair use jurisprudence.⁴⁰¹ In the decades since, the judicial examination of claimed fair use has extensively focused on this factor, and the court’s findings on transformativeness are often outcome-determinative.

Beebe’s initial empirical work suggested that the transformative nature of a work was less significant than commercial status. Sag’s later work and Beebe’s recent update, however, show that this has changed over time, with the importance of transformativeness significantly

³⁹⁹ The author is aware of, and can find no, such case. *Axanar* (Chapter 6.2.3) comes closest, but that is a single work, not ongoing patronage.

⁴⁰⁰ *Campbell* (n 381) 579.

⁴⁰¹ Pierre N Leval, ‘Toward a Fair Use Standard’ (1990) 103 *Harvard Law Review* 1105, 1105. Judge Leval’s work was extensively cited in *Campbell* (n 381).

increasing.⁴⁰² A finding of transformativeness is now, in Beebe’s terms, “nearly sufficient to trigger an overall finding of fair use” although still “far from necessary to trigger such a finding.”⁴⁰³

Unfortunately, while it may be clear that a finding that the new work is transformative is a near-certain predictor that the new work is a fair use of the old, there is less clarity when it comes to determining how a finding of transformativeness is reached.⁴⁰⁴ Courts assess fair use case-by-case, making attempts to compare a new situation to any older one, no matter how apparently similar, risky. Different judges do not necessarily have similar views of what constitutes transformativeness.

The Second Circuit’s appropriation art cases provide an excellent example of this phenomenon. The court has swung back and forth, first finding that the using a post card as the basis for a sculpture was not fair use, then finding in two cases that the modified use of photographs was fair use, then finding that the modified use of a photograph was not fair use.⁴⁰⁵ In these cases, although the extent of physical change to the original varied, it is difficult to see how the purpose and character of the new use differs in a legally significant way. In all the cases the original was used to produce a work of appropriation art. In every case, the

⁴⁰² See *Sag* (n 367) 76–77; Beebe (n 363) 25–28. This highlights a perhaps underappreciated issue with empirical work using case law: the possibility that the law has moved during the period examined.

⁴⁰³ Beebe (n 363) 27.

⁴⁰⁴ This has also been noted as a factor creating uncertainty in the context of art. See Amy Adler, ‘Fair Use and the Future of Art’ (2016) 91 *New York University Law Review* 559, 565 n23.

⁴⁰⁵ See, respectively, *Rogers v Koons* 960 F2d 301 (2d Cir 1992); *Blanch v Koons* 467 F3d 244 (2006); *Cariou v Prince* 714 F3d 694 (2013); *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* 992 F 3d 99 (2d Cir 2021).

artistic message of the original was altered. Each time, the court discussed the intent of the appropriation artist to comment on things such as the banality of mass culture. And yet even though all four cases were decided by the same court, the outcomes on this subfactor have not been consistent.

The shift between the first two cases may be explicable in part by the intervening Supreme Court decision in *Campbell*, which endorsed the use of the transformative test.⁴⁰⁶ The shift between the last two cases is not so easily explained. There was no intervening change in the law brought about by a Supreme Court decision or *en banc* ruling. And the panel's attempt to distinguish amongst the cases on factual grounds is not particularly convincing.⁴⁰⁷

To the extent that the court in these cases is attempting to establish some a rule for what constitutes transformation, the rule is unclear. The *Rogers* decision relies primarily on a requirement that the new work comment on the original.⁴⁰⁸ *Blanch* appeared to apply that rule by finding commentary-in-part was sufficient, even where the

⁴⁰⁶ But perhaps only in part. In *Rogers*, the court rejected a parody defense because it could not detect criticism of the original. *Rogers* (n 405) 310. In *Blanch*, the court detected comment on the original. *Blanch* (n 405) 257.

⁴⁰⁷ Although the “source material” in *Blanch* (a woman's legs and shoes, from an advertisement) was incorporated into a work along with other elements from elsewhere, it is difficult to see how this did not recognizably derive from and maintain “the essential elements of its source material.” *Goldsmith* (n 405) 114. Nor is it clear how the Warhol silk screens were not “in service of a “fundamentally different and new” artistic purpose and character, such that the secondary work stands apart from the “raw material” used to create it.” *ibid.*

⁴⁰⁸ *Rogers* (n 405) 309–10.

original was simply an example of the societal trend being critiqued.⁴⁰⁹ However, *Cariou* explicitly held that comment on the original was not required for transformation if the new work embodies a different aesthetic, meaning, or message.⁴¹⁰ The 2nd Circuit now appears to be attempting to limit the effect by holding that *Cariou* established a rule that in the absence of commentary on the original, fair use can be established where the old use is barely recognizable within the new work, but not where “the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.”⁴¹¹

This rule cannot provide meaningful guidance. The “recognizably deriving from, and retaining the essential elements of” test that the court articulated will inevitably result in fair use being decided by the artistic judgement of individual jurists – a “dangerous undertaking for persons trained only in the law.”⁴¹² Indeed, the 2nd Circuit’s very first attempt to apply this ‘standard,’ in this very same case in which the court is articulating the ‘standard,’ blatantly conflicts with the result in the *Kienitz* case that the court cited in crafting the rule.⁴¹³

Like *Andy Warhol Estate*, *Kienitz* involves a photo-derived silk screen. Like *Andy Warhol Estate*, recognizable portions of the *Kienitz* photo are retained. Unlike *Andy Warhol Estate*, the *Kienitz* panel

⁴⁰⁹ *Blanch* (n 405) 251–53; the “commentary on society embodied by this specific thing” portion of the analysis, however, seems inconsistent with *Rogers. Rogers* (n 405) 309–10.

⁴¹⁰ *Cariou* (n 405) 706.

⁴¹¹ *Goldsmith* (n 405) 114.

⁴¹² *Bleistein v Donaldson Lithographing Co* 188 US 239, 252 (1903).

⁴¹³ *Kienitz* (n 354).

explicitly found that the new use didn't use recognizable protectable features of the original. It is difficult, if not impossible, to look at a side-by-side comparison of the works in question in these two cases and clearly see how one somehow does recognizably derive from and retain

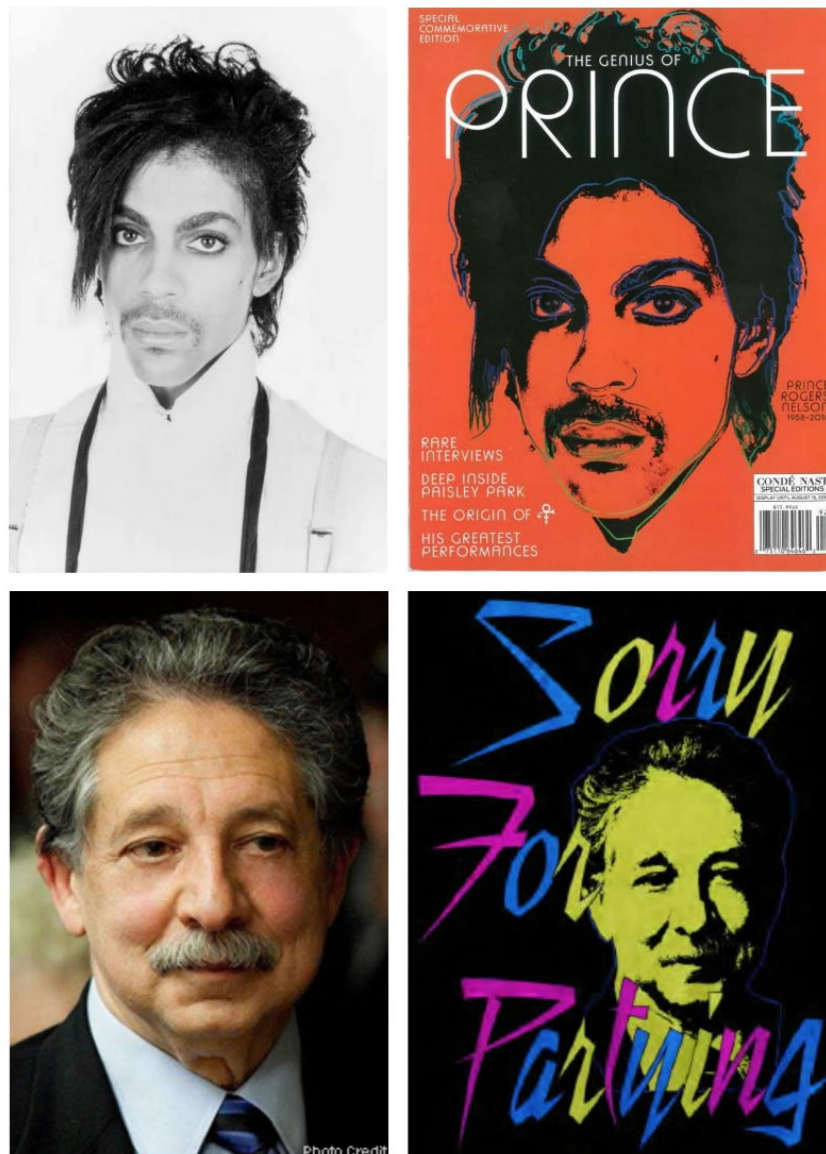


Figure 5.1: Warhol/Kienitz Comparison

the essential elements of the original whilst the other does not.⁴¹⁴

⁴¹⁴ Figure from the Amicus Brief of the Royal Manticorian navy in *Andy Warhol Foundation for the Visual Arts Inc v Lynn Goldsmith et al*, n 289;

The recent decision by the United States Supreme Court in *Google v Oracle* is likely to further churn these already-murky waters. In this case, the Court appears to suggest that changes to the purpose of the use can both exist and favour fair use even where the re-used material is being used for the same reasons in both the old work and the new.⁴¹⁵ At the same time, however, the extent to which the court’s decision is likely to apply outside the context of the use of code is not yet clear and likely to be hotly contested over the coming years.⁴¹⁶

Ultimately, there is no coherent understanding of what is required to be “transformative,” or at least none that applies in all contexts. This seems difficult to justify, even given the fact-specific nature of the inquiry. For example, it is difficult to see how an unauthorized sequel to *Catcher in the Rye* that aged the main character by sixty years and depicted that fictional character’s relationship with the author of the original work by adding a fictionalized version of the author was non-transformative.⁴¹⁷ It is equally difficult to understand how the use of a

the author thanks Ms K Tewson for her invaluable assistance in assembling the graphic.

⁴¹⁵ There, the court held that although “Google copied portions of the Sun Java API precisely, and it did so in part for the same reason that Sun created those portions,” the new work nevertheless had a new purpose, supporting a finding of fair use. *Google Llc v Oracle America, Inc* (n 374) 1203.

⁴¹⁶ See *ibid* at 1208–09 (“The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. In doing so here, we have not changed the nature of those concepts. We do not overturn or modify our earlier cases involving fair use”)(cleaned up).

⁴¹⁷ In the court’s view, the character was too similar to the original, despite the physical aging of the character and the difference in impression created by the traits of the 16 year old character in the 76 year old version, and that

photo of a man playing a guitar to illustrate the playing of that specific guitar is transformative.⁴¹⁸ It is difficult to predict whether something will be found transformative even where there are prior on-point cases; it is nearly impossible to do so where there are not.

Commentary on the Original

One area of particular disagreement within and among the appellate circuits is the question of the importance of commenting upon the original to a finding of fair use. All circuits are clear that commenting upon the original supports a finding of fair use. The circumstances under which an absence of commentary will support a finding of fair use are slightly translucent, at best. As a practical matter, this means that it is greatly to the benefit of those asserting fair use if they can convince a judge that the work comments on the original.

It is not clear what is required to convince a court that the new work comments on the original.⁴¹⁹ This issue will be discussed at greater length below, in Chapter 6.3.5. One point worth highlighting now, however, is how truly decisive a finding of parody has become. It is not clear what is required to convince the court that a new work is a parody, particularly since American law requires parody to comment on the

this did not comment upon the original. In the court's view, any commentary on the author did not comment on the original work, and was therefore also non-transformative. *Salinger* (n 377) 256–63. This is unconvincing; the claim to transformativeness here may be slightly less clear than that in *Suntrust Bank v Houghton Mifflin Co* (n 17), but the difference seems one of degree, not one of kind.

⁴¹⁸ See *Marano v Metropolitan Museum of Art* 472 FSupp3d 76, 84–85 (SDNY 2020).

⁴¹⁹ Compare, again, *Suntrust Bank v Houghton Mifflin Co* (n 17); with *Salinger v Colting* (n 17).

original.⁴²⁰ However, if the court is convinced that a work does parody the original, a finding of fair use is all but certain. In the quarter-century since *Campbell*, every work that a court has found to be a parody of the original has also been found to be fair use.⁴²¹

Educational Usage

The factors relevant to educational and other similar uses will not be relevant for the vast majority of fanworks. They are, however, occasionally pertinent. This is true, for example, where the fan wikis discussed in Chapter 3.3.2 are concerned. These uses tend to be written more for informational than entertainment purposes. That can support a finding of transformativeness, but the educational nature may also be relevant.⁴²²

Nevertheless, this may be of relatively little help. Despite the presence of educational purposes in the preamble to the fair use statute, a finding of educational purpose seems of little help in the overall inquiry. Beebe has noted that fair use is substantially less likely to be found for research and educational uses than for preambular purposes such as commentary or news reporting.⁴²³

⁴²⁰ See, eg, *Campbell* (n 381) 580–81 (Parody needs to mimic an original to make its point."). Other courts have read this as a requirement that a parody, at least in part, comment on the original. See, eg, *Dr Seuss Enterprises, LP v Penguin Books* 109 F 3d 1394, 1400–01 (Court of Appeals, 9th Circuit 1996); *Suntrust Bank v Houghton Mifflin Co* (n 17) 1268.

⁴²¹ See Beebe (n 363) 28.

⁴²² See, eg, *RDR Books* (n 237) 541–42.

⁴²³ Beebe (n 366) 548–49.

5.2.2.5 The Second “Nature of the Original” Factor

The second fair use factor considers the nature of the copyrighted work. In general, this involves two elements: whether the original work is published or unpublished, and where the original falls with respect to the “core” of creative works copyright is intended to protect. The first of these elements will not typically be in question with regard to mass-media-based fanworks and will rarely be critical in cases involving nontraditional fanworks; the second requires slightly more consideration than the first but is also rarely likely to be determinative for fanworks.

The first element that is considered in these cases is whether the original is published or unpublished.⁴²⁴ Where a work is unpublished, the scope of fair use is narrower, because “the author’s right to control the first public appearance of his expression weighs against such use of the work before its release.”⁴²⁵ In the case of mass-media fanworks, the original work will most often clearly be published.

Publication is more complex for some nontraditional fanworks, but still unlikely to be a significant issue. There is some uncertainty as to whether online-only distribution meets the definition of publication.⁴²⁶

⁴²⁴ Under American copyright law, “publication” is defined as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for the purpose of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” 17 USC §101.

⁴²⁵ *Nation Enterprises* (n 389) 564.

⁴²⁶ See, eg, *Rogers v Better Business Bureau of Metropolitan Houston, Inc* 887 FSupp2d 722, 730–31 (SD Tex 2012) (collecting cases before concluding that uploading webpages did not constitute publication for copyright purposes). For a recent academic discussion of the ongoing uncertainty, see

Nevertheless, in the cases involving YouTube videos courts either declined to address the question or found that the original work was published.⁴²⁷ This seems appropriate given the justification for considering publication in fair use.⁴²⁸ If the work has been made widely available online, the author has determined the first public appearance of the work, and a finding that the work has not been published will do nothing to protect that interest.

Ultimately, the question of publication is rarely important for fanworks. The original is either, as in mass-media fanworks, clearly published or, in the case of nontraditional fanworks, likely to be treated as such. Either way, this element either favors fair use, or be found to be neutral, in fanworks cases.

The second element in this factor recognizes that, although copyright extends to all protected works, some are nearer to the “core” of what copyright is intended to protect than others. The ‘core’ itself isn’t well-defined, but it is black-letter law that the more ‘factual’ or functional the original, the farther it is from the core; the more artistic the original, the closer to the core.⁴²⁹ Thus, the factor will favor fair use more if the original is an encyclopedia than it will if the original is a

generally Deborah R Gerhardt, ‘Copyright Publication on the Internet’ (2020) 60 IDEA 1.

⁴²⁷ See *Hosseinzadeh v Klein* (n 370) 42 (not addressing publication); *Hughes v Benjamin* 437 FSupp3d 382, 392–93 (SDNY 2020) (finding that original was published).

⁴²⁸ *Nation Enterprises* (n 389) 564.

⁴²⁹ See *Campbell* (n 381) 586.

television programme.⁴³⁰ This factor, however, is rarely given significant weight.

In fanworks cases the second factor is unlikely to “help much in separating the fair use sheep from the infringing goats.”⁴³¹ In some cases, this has resulted in the court for all intents and purposes subsuming the second factor analysis to the first factor in cases where a transformative use is found.⁴³² In others, the courts have not collapsed the inquiry, but have held that “this factor typically has not been terribly significant in the overall fair use balancing.”⁴³³ Under either approach, the factor effectively receives little attention.

5.2.2.6 The Third “Amount Used” Factor

The third fair use factor examines the amount and substantiality of the original work that has been used, in relation to the whole. This factor, like the second, is rarely viewed as the most important in the analysis. The consideration of this factor involves both quantitative and

⁴³⁰ See *Castle Rock Entertainment* (n 351) 143–44.

⁴³¹ *Campbell* (n 381) 586.

⁴³² This is particularly common in the Second Circuit, which has found the importance of the factor to vary based on whether or not transformativeness is found under factor one. See, eg, Compare *Bill Graham Archives v Dorling Kindersley Ltd* 448 F3d 605, 612–13 (2d Cir 2006) (‘the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose...the second factor has limited weight in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value’); see also *Blanch* (n 405) 257; *Cariou* (n 405) 710 (citing *Bill Graham Archives*); with *Castle Rock Entertainment* (n 351) 144 (fictional nature of the copyrighted work remains significant in the instant case, where the secondary use is at best minimally transformative)..

⁴³³ *Dr Seuss Enterprises, LP v Penguin Books USA, Inc* 109 F3d 1394, 1402 (9th Cir 1997).

qualitative concerns.⁴³⁴ Courts may consider the amount of the original that was used in absolute terms.⁴³⁵ They also, however, may consider the importance of the material that was used to the original. This qualitative assessment can outweigh the quantitative assessment, with the factor cutting against fair use even if relatively little of the original was taken.⁴³⁶ They may also occasionally consider whether the new work took more than needed to accomplish its purpose.⁴³⁷

The *Nation Enterprises* case provides an example of the role of qualitative importance. There, a magazine received and published leaked excerpts of former President Gerald Ford's memoirs. These excerpts consisted of a few hundred words taken from the full-length book – but included some of Ford's discussion of the Watergate scandal and his decision to pardon Nixon. The Supreme Court agreed that, in quantitative terms, the magazine had taken only “an insubstantial portion” of the memoir.⁴³⁸ However, the Court found that those words constituted the “heart of the book” and that as a result this factor did not favor fair use.⁴³⁹

⁴³⁴ See *New Era Publications Intl v Carol Pub Group* 904 F 2d 152, 158 (Court of Appeals, 2nd Circuit 1990).

⁴³⁵ See, eg, *New Era Publications Intern v Carol Pub Group*, 904 F2d 152, 158-59 (2d Cir 1990)(examining percentage of original book used in finding fair use); *Cambridge University Press v Becker*, 446 F Supp 3d 1145 (ND Ga, 2020)(same). It should be noted that approximately the same percentage of use was found to favour fair use in the first case but disfavour it in the second.

⁴³⁶ See *Nation Enterprises* (n 389) 564–66.

⁴³⁷ See, eg, *Supermarket of Homes, Inc v San Fernando Valley Bd of Realtors*, 786 F2d 1400, 1409 (9th Cir 1986)

⁴³⁸ *Nation Enterprises* (n 389) 564.

⁴³⁹ *ibid* at 564–65.

In fanworks cases, this “heart of the original” inquiry is likely to be the more important portion of the third factor inquiry.⁴⁴⁰ Its assessment, however, is not always coherent. Beebe reported that courts found fair use in 27% of cases in which the entirety of the original work was used, but only in about 6% of cases in which the ‘heart’ or ‘essence’ of the original work was used.⁴⁴¹ This difference in outcomes is difficult to explain as the product of clear and consistent jurisprudential reasoning. A taking of the entire work entails the taking of the heart of that work; it is unclear why it would be four times more likely that a work using the whole will be found to be fair use than one which uses only the heart of the original. This again highlights that perceived predictability – the 94% chance that a use found to take the heart of the original will be found unfair – does not equal doctrinal coherence.

Additional incoherence can be seen in the approach to the third factor adopted by the Second Circuit in *Twin Peaks*. There, the court found that the factor cuts against fair use whenever the novel work is similar enough to the original to be prima facie infringing.⁴⁴² The approach collapses the fair use inquiry back into the infringement examination, with fair use automatically disfavored if the work is prima facie infringing. This clearly cuts against the explicitly intended role of fair use as a doctrine that excuses otherwise-infringing conduct. It is not

⁴⁴⁰ This is particularly true given that it may be difficult to quantitatively assess how much of a massive, multimedia franchise has been used.

⁴⁴¹ Beebe (n 366) 616.

⁴⁴² See, eg, *Twin Peaks Productions, Inc v Publications Intern, Ltd* 996 F2d 1366, 1377 (2d Cir 1993) (holding that ‘the District Court’s determination that the Book was substantially similar to the teleplays so as to be prima facie infringing should suffice for a determination that the third fair use factor favors the plaintiff,’).

clear, however, whether the *Twin Peaks* approach is good law. The opinion is technically precedential, but other cases from this circuit have generally not adopted this approach, and indeed have explicitly criticized and rejected it.⁴⁴³ The case is likely an aberration, but it has not been expressly overruled. It remains, therefore, an additional point of incoherence within this factor in that jurisdiction.

5.2.2.7 The Fourth, “Effect on the Market” Factor

The fourth fair use factor, effect on the market for the original, is one of the most contentious and confusing in fair use. This is particularly true where the new use does not directly affect the market for the original, and the inquiry expands to consider the effect on potential derivative markets. The confusion surrounding this factor goes to issues that are part of the core of the fair use doctrine itself.

One area of confusion is central enough that it warrants discussion, before subfactors are addressed: the relative importance of this factor to the analysis as a whole. The Supreme Court has twice referred to the fourth factor as the “most important.”⁴⁴⁴ The Court, however, appeared to retreat substantially from that position in the subsequent decision in *Campbell*, which contained a broader discussion of that factor than did the prior cases.⁴⁴⁵ This retreat appears to have continued, given the amount of market harm that the court acknowledged in *Google v Oracle* whilst still finding that the factor favored fair use.

⁴⁴³ *Castle Rock Entertainment* (n 351) 144.

⁴⁴⁴ *Nation Enterprises* (n 389) 566–67; *Stewart* (n 389) 238.

⁴⁴⁵ *Campbell* (n 381) 590–94.

At the same time, to whatever extent the court retreated from that position, it did not do so explicitly. But nor was an explicit overruling likely necessary – in both *Nation Enterprises* and *Abend*, the statement regarding the relative importance was *obiter dicta*. Ultimately, it is difficult to be certain whether the Supreme Court continues to view the fourth factor as the most important, let alone whether lower courts are required to do so. This is, as commentators have noted, suboptimal.⁴⁴⁶

The resulting situation can be reasonably, and charitably, described as one of confusion. It is not necessary to look to different appellate circuits to find conflicting cases on this point.⁴⁴⁷ One can find conflict within individual circuits, and even in cases from different judges sitting on the same court.⁴⁴⁸ Nor are these conflicts limited in time.

In Beebe’s view, there are not clear subfactors that are assessed under this factor. Instead, he views the factor as having evolved into a kind of catch-all that serves as the court’s opportunity to assess the other factors in a more holistic manner.⁴⁴⁹ However, some attention should be

⁴⁴⁶ See, eg, Beebe (n 366) 594–96.

⁴⁴⁷ Although one certainly can do so. Compare *Ringgold v Black Entertainment Television, Inc* 126 F3d 70, 80–81 (2d Cir 1997) (market effect of use of poster as set decoration on potential licensing market disfavors fair use) with *Seltzer v Green Day, Inc* 725 F3d 1170, 1179 (9th Cir 2013) (no indication that use of poster in band’s video backdrop interfered with a ‘traditional, reasonable, or likely to be developed market’ so fair use not disfavored).

⁴⁴⁸ Compare *Cariou* (n 405) 708–09 (dismissing harm to derivative markets and focusing on the lack of harm to original) with *Andy Warhol Foundation v Goldsmith* (n 39) 49 (dismissing lack of harm to original and focusing on harm to derivative markets).

⁴⁴⁹ Beebe (n 366) 616–20.

focused on one particularly fanworks-pertinent area within this broad inquiry: the question of which markets are relevant.

Fanworks are not exact copies of the original, nor, for the most part are they traditional adaptations.⁴⁵⁰ As such, they do not implicate the market for direct copies of the original. Nor, in most cases, do fanworks truly implicate the market for sequels, prequels, or even for works such as authorized spinoffs. Fans distinguish, as has been discussed, between the official and the unofficial and generally do not view fanworks as authentic. With the possible exception of some tangible merchandise, fanworks simply do not typically implicate derivative markets that the rights holder is likely to participate in.⁴⁵¹

To the extent that fanworks may implicate undeveloped potential markets, the markets are often more theoretical than actual. In many cases, they involve markets, such as licensed fan fiction, that have seen less-than-successful attempts at development in the past. For example, Amazon launched its Kindle Worlds initiative, which provided a commercial marketplace for licensed fan fiction, to great fanfare and academic interest in 2013.⁴⁵² This commercial service was a failure, with

⁴⁵⁰ Fan subtitling and dubbing of anime, which unquestionably creates a derivative, is an exception. See Hatcher (n 45).

⁴⁵¹ And, of course, see 5.1 regarding the unsettled questions of what are derivatives.

⁴⁵² See generally Bukatz, 'Amazon's fan fiction store: opportunity or fandom-ination? The legal background to commercial and non-commercial creations from canon-Part I' (n 125); Bukatz, 'Amazon's fan fiction store: opportunity or fandom-ination? The legal background to commercial and non-commercial creations from canon-Part II' (n 125). See also Rebecca Tushnet, 'All of this Has Happened before and All of this Will Happen Again: Innovation in Copyright Licensing' (2014) 29 Berkeley Technology Law

fan authors preferring – despite the possibility for monetization provided by Kindle Worlds – to continue to submit their work to noncommercial alternatives.⁴⁵³ In the end, Kindle Worlds lasted only five years.⁴⁵⁴

How such failures affect the factor four analysis is unclear. It would reasonably appear to demonstrate that there is no licensing market for fan fiction to affect. However, it is possible, despite the clear preference of fan authors for publishing on nonmonetized sites, the failure of such sites may be seen as showing that the infringement of fan fiction authors leads to such failures and affects the markets.

This is another area where recent developments may substantially change the landscape. The 2nd Circuit panel in *Warhol* placed heavy emphasis on the importance of derivative markets to this analysis.⁴⁵⁵ The Supreme Court in *Google*, on the other hand, de-emphasized the importance of such markets, warning of the “danger of circularity” posed by including unrealized licensing opportunities in this calculation.⁴⁵⁶ It is too soon to know if either case will clarify the application of this factor in the fanworks context.

Journal 1447, 1468–69; Lee, ‘Warming up to user-generated content’ (n 49) 383–85.

⁴⁵³ Emma Cuteo, ‘Amazon’s Fan Fiction Site, Kindle Worlds, Is Flopping, but Why?’ (*Bustle*, no date) <<https://www.bustle.com/articles/36237-amazons-fan-fiction-site-kindle-worlds-is-flopping-but-why>> accessed 27 April 2021.

⁴⁵⁴ Jen Talty, ‘Amazon Slams the Doors to Kindle Worlds’ (*Hidden Gems Books*, 1 June 2018) <<https://www.hiddengemsbooks.com/amazon-closes-kindle-worlds/>> accessed 27 April 2021.

⁴⁵⁵ *Goldsmith* (n 405) 120–22.

⁴⁵⁶ *Google Llc v Oracle America, Inc* (n 374) 1207.

5.2.2.8 The Fifth “Semi-written” Factor: Good Faith

Commentators have often advocated for additional factors to be added to the fair use calculus. Some suggestions have been modest, such as adding explicit consideration of freedom of expression to the inquiry.⁴⁵⁷ Others have suggested more radical changes, at least under American law, including using fair use to shoehorn moral rights such as attribution or integrity into copyright law.⁴⁵⁸ Some commentators have also elected, post-*Campbell*, to treat the inquiry into transformativeness as a fifth factor.⁴⁵⁹ This section takes none of those approaches.

Instead, it focuses on the conduct of the defendant as a factor. This has received both academic and judicial attention, although only the judicial is discussed here.⁴⁶⁰ Courts occasionally examine the perceived ‘fairness’ of a party’s conduct when evaluating fair use. Although courts have occasionally included this in the first factor analysis, it has also

⁴⁵⁷ See, eg, Mel Marquis, ‘Fair Use of the First Amendment: Parody and Its Protections Comment’ (1997–98) 8 Seton Hall Const LJ 123, 135–40.

⁴⁵⁸ See, eg, Lastowka (n 384) 84–89 (arguing for a fifth factor that considers whether attribution has been provided); Link (n 93) 174–77 (suggesting fifth factor that would incorporate a form of integrity protection into copyright).

⁴⁵⁹ See, eg, E Gabriel Perle, ‘Copyright Law and the Copyright Society of the U.S.A., 1950-2000’ (2000) 47 J Copyright Soc’y USA 397, 409; Jisuk Woo, ‘Redefining the Transformative Use of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment’ (2004–05) 27 Hastings Comm & Ent LJ 51, 68. At least one published decision also treats transformativeness as a fifth factor. *Tenenbaum* (n 384) 225. Given that, as previously noted, transformativeness has been identified as driving outcomes under multiple factors, this approach is reasonable. This would be adopted here, were it not for the vast number of cases and papers that have treated the question under the first factor; the confusion from change here outweighs the benefits.

⁴⁶⁰ For examples of academic attention, see, eg, Elina Lae, ‘Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement’ (2012–13) 12 Va Sports & Ent LJ 31, 50–51.

been addressed as a separate ‘fifth’ factor.⁴⁶¹ It is considered as such here, largely because there is no comfortable place to do so within the statutory factors.⁴⁶² The inquiry has sometimes been brought up in terms other than “good faith,” but this thesis treats this pseudo-factor as encompassing any discussion of the propriety of either party.

The explicit use of good faith as a factor predates the incorporation of the fair use into the copyright statutes.⁴⁶³ It has not always been decisive, even when explicitly invoked by the court; some bad-faith uses have been found to be fair use.⁴⁶⁴ Nevertheless, it can be important, in part because of the effect it has on the analysis of other factors. This can be particularly relevant to fanworks if the court finds, as it did in *DC Comics v Unlimited Monkey Business*, that the defendant’s use, although parodic, was an attempt to trade on the plaintiff’s creativity.⁴⁶⁵

It is difficult to predict the impact of this factor for two reasons. First, there are no objective standards for determining good faith, and no consensus as to whether it is appropriate to consider good faith. It

⁴⁶¹ See, eg, *Wright v Warner Books, Inc* 748 F Supp 105, 113–14 (Dist Court 1990) (lack of bad faith examined as a factor); *Bill Graham Archives, LLC v Dorling Kindersley Ltd* 386 FSupp2d 324, 333 (2005); *Field v Google Inc* 412 FSupp2d 1106, 1122 (D Nev 2006) (taking good faith as an explicit additional factor).

⁴⁶² The first factor, where colloquial fairness is most often addressed, instructs the court to assess the “character of the *use*,” 17 USC 107. It does not call for, nor does that language clearly encompass, the conduct of the *user*. Nor, for that matter, does any other factor.

⁴⁶³ *Time Inc v Bernard Geis Associates* 293 FSupp 130, 146 (districtcourt 1968) (Fair use presupposes ‘good faith and fair dealing’).

⁴⁶⁴ *ibid*.

⁴⁶⁵ *D C Comics Inc v Unlimited Monkey Business, Inc* 598 FSupp 110, 119 (ND Ga 1984).

would be futile to spend significant time on the first. Some cases hold that using material after seeking but failing to acquire a license evinces good faith;⁴⁶⁶ others hold that proceeding after failing to acquire a license is bad faith.⁴⁶⁷ In the face of confusion of this magnitude, attempting to determine what facts will demonstrate good faith is futile, and will not be considered further. The second point, the appropriateness of including good faith at all, requires more examination.

As is true in other areas of fair use, the difficulties here start at the top. In *Nation Enterprises*, the Supreme Court seemed to make it clear that good faith is relevant, saying that “fair use presupposes good faith.”⁴⁶⁸ This has led to some courts determining that they are required to examine good faith.⁴⁶⁹ Yet in *Campbell* the Court explicitly held that being refused a license does not weigh against fair use, and strongly questioned whether good faith should play any role in fair use.⁴⁷⁰

Google v Oracle casts additional darkness on this front. The court pointed out that it had expressed skepticism about the role of good faith in *Campbell* and reiterated that it remained skeptical. The court then declined to “say whether good faith is as a general matter a helpful inquiry,” referring to it as a “factbound consideration.”⁴⁷¹ The court had

⁴⁶⁶ See, eg, *Bill Graham Archives* (n 432) 333.

⁴⁶⁷ See, eg, *Los Angeles News Service v KCAL-TV Channel 9* 108 F3d 1119, 1122 (9th Cir 1997).

⁴⁶⁸ *Nation Enterprises* (n 389) 540.

⁴⁶⁹ See *NXIVM Corp v Ross Institute* 364 F3d 471, 478–79 (2d Cir 2004). It should be noted, however, that there are any number of 2nd Circuit cases that appear to omit explicit discussion of this subfactor. See generally, eg, *Cariou* (n 405).

⁴⁷⁰ *Campbell* (n 381) 585 n 19.

⁴⁷¹ *Google Llc v Oracle America, Inc* (n 374) 1204.

also emphasized the equitable nature of fair use earlier in the opinion, and bad faith is normally relevant to determining if an equitable remedy is appropriate. It is not at all clear what all this means for the explicit treatment of good faith; the Court continues to say both yes and no. This “factor,” if a factor at all, remains substantially unclear.

The question of what role, if any, good faith should play in the analysis of fanworks is difficult. There is intuitive appeal to incorporating fairness into a fair use inquiry, particularly if one is used to exceptions and limitations such as fair dealing, which (as discussed below) rely heavily on good faith use. At the same time, however, it is difficult to see how adding the consideration of another subjective consideration would improve the predictability of the doctrine, and, as is discussed in greater detail in Chapter 7, the detrimental effects of uncertainty in this arena are already severe. Ultimately, as will be discussed, a good faith inquiry limited to whether there is an intent to commercially displace the original author is likely to be important.

5.2.2.9 The Combined Effect: The Certainty of Uncertainty

Some have argued that fair use is predictable. Others argue that any predictability does not translate into terms that provide reliable ex ante guidance on whether a work is permissible.⁴⁷² Ultimately, even if the application of the doctrine is predictable in some – or even many – cases, it is unpredictable in the fanworks context. And it remains

⁴⁷² See, eg, James Gibson, ‘Rights Accretion Redux’ (2020) 60 IDEA 45, 58 (scholar noting that, when hired as a consultant, he rarely advises proceeding without a license even when ‘pretty confident’ the use would be upheld as fair in litigation).

difficult to draw fanworks-relevant conclusions based on non-fanworks cases.

As has been alluded to above, there is substantial uncertainty as to what factual features of works will convince the court to make specific findings for many of the fair use subfactors. If we do not know, for example, if a Harry Potter fanfic that addresses issues surrounding gender identity would be viewed as commenting on the original books in the United States, we cannot guess with confidence as to whether the work will be viewed as transformative.⁴⁷³ Meanwhile, while the use of the label “transformative” has, as Liu notes, “harmonized fair use rhetoric, it falls short of ... increasing its predictability.”⁴⁷⁴ Without the ability to predict when something will be found transformative, our ability to predict whether the work is fair use is, to say the least, impaired.

Authors, including Beebe and Sag have argued, based on their empirical analysis of fair use decisions, that there is a statistically significant degree of predictability within the doctrine.⁴⁷⁵ As noted above, it is difficult to translate this to fanworks. Nevertheless, even if we accept that the doctrine is as predictable as they claim and that this predictability carries over to fanworks, it may not be predicable enough in the context of unmonetized work.

⁴⁷³ This example will be expanded upon in the next chapter. For now, it suffices to note that such fanfic would clearly comment upon the *author* of the Potter books, but not as clearly comment on the books themselves.

⁴⁷⁴ Jiarui Liu, ‘An Empirical Study of Transformative Use in Copyright Law’ (2019) 22 Stan Tech L Rev 163, 240.

⁴⁷⁵ See generally Beebe (n 366); Sag (n 367); Beebe (n 363).

Assume a fan creator is told that there is an 87% chance that their transformative work, which made partial use of the original work authored by the natural person who is suing them, will be found to be fair use.⁴⁷⁶ Does “there is only a 13% chance that you will lose the case and incur devastating financial loss” provide sufficient certainty to make it reasonable to defend against an infringement claim when there is no financial benefit to winning? The kind of empirical predictability identified by Bebee and Sag may well permit rational decision-making in the commercial context, yet it still fails to provide meaningful predictability for fanworks context.

Samuelson’s approach, which focuses more on qualitatively grouping cases into “policy-relevant clusters,” also provides guidance that might be helpful in many cases.⁴⁷⁷ However, Samuelson identified no fanworks cluster, nor could she given the lack of such cases. Some fanworks can, of course, fall into existing clusters such as reference works or political speech. For example, Samuelson places the *RDR Books* case into the reference works cluster.⁴⁷⁸ Other fanworks may fall within other clusters, such as political speech.⁴⁷⁹ However, despite the common purposive threads linking fanworks and other forms of UGC, they are not a cluster of their own.

⁴⁷⁶ See Sag (n 367) 80. This set of circumstances is the maximum degree of predictability identified in any of the empirical studies.

⁴⁷⁷ See Samuelson (n 367) 2541.

⁴⁷⁸ *ibid* 2574–74. It should be noted, however, that the treatment of fanworks arguably falling within this cluster by the courts has not been consistent. Compare *Paramount Pictures Corp* (n 237) with *RDR Books* (n 237).

⁴⁷⁹ See, eg, *Hughes* (n 427).

As the situation stands, the predictability of fair use, to the extent that it exists, does not extend to fanworks. There is too much uncertainty regarding how the factors will be assessed in fanworks cases, given the lack of fanworks case law. Even if the factors could be predicted to the same extent claimed for other types of content, the remaining uncertainty, given the financial costs of litigation, does not allow reasonable predictions. Fan creators whose work falls under American law lack the ability to make reliable *ex ante* predictions as to whether their works qualify as fair use; the academic consensus that fanworks are in a grey area is, in this jurisdiction, correct.

5.3 The United Kingdom, Other Common-Law Countries, and Bright-ish Line Exceptions and Limitations

This section briefly examines the primary copyright doctrines likely to be relevant to fanworks under English law. It begins by identifying and assessing the key areas of uncertainty that are a result of the present, early-Brexit landscape. It then discusses the assessment of infringement before exploring the key exceptions and limitations, including fair dealing, which are likely to be raised in fanworks cases.

Unlike the United States, where there are many cases that involve works broadly similar to fanworks, there are few such cases in the United Kingdom. As a result, there is little that one can say about fanworks specifically. This will, as will be discussed in the next chapter, make the assessment of fanworks under current English law even more speculative than is true in American law.

As this section will demonstrate, users in the United Kingdom, like those in the USA, face a landscape of substantial legal uncertainty

that greatly limits the ability to independently assess whether their secondary uses of content are lawful. However, it is not an identical landscape. The sources of the uncertainty are significantly different, with more uncertainty coming from the assessment of infringement and less from the application of exceptions and limitations.

5.3.1 The Stability of English Copyright Law

It is early in the post-Brexit period, and there is not yet complete clarity as to how closely English copyright law will continue to track European copyright law. Initial indications are that at least some alignment with the existing case law established by the CJEU is likely in the short term. However, this is not certain and, in any event, statutory changes in both jurisdictions may drive divergence in the long term.

It appears that English courts will continue to apply EU copyright decisions in some circumstances. In a recent copyright case, the Court of Appeal explicitly declined to depart from EU case law. In *Tunein v Warner Music*, the court acknowledged their ability to depart from CJEU jurisprudence but held that it would be inappropriate to exercise this power in that case.⁴⁸⁰ This determination, however, turned in at least part on the fact that the case involved the right of communication to the public. This right is imposed by treaty requirements and has been the subject of extensive CJEU jurisprudence; continued alignment with international jurisprudence is prudent. However, communication to the

⁴⁸⁰ *Tunein Inc v Warner Music UK Ltd & Anor* EWCA Civ 441 (Court of Appeal, Civil Division 2021). Arnold, LJ's comments on this issue are found at [73-81]; Rose, LJ's remarks are found at [183-84]; and Vos, MR's at [196-202].

public, although important to copyright law as a whole, is on the whole of uncertain import to fanworks; the author is aware of no communication to the public case that has involved a newly created secondary work.

The continued viability of the English “closed-list” system of protected works is also unclear in the post-Brexit environment. This is not a minor question for fanworks. Many items that serve as fodder for merchandise may be protectable under copyright under the EU standard, but not under the closed list approach.⁴⁸¹

As many commentators have noted, it is – or at least was – unclear if English law is in accordance with EU law on this point.⁴⁸² Although there has never been a CJEU decision explicitly holding this approach impermissible, the possibility of such a decision in the future cannot be excluded.⁴⁸³ In theory the English courts might find that such a decision has persuasive force, and that the UK is obligated to continue to track the applicable EU regulations and directives until they are replaced by

⁴⁸¹ For one noteworthy example, see *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] 4 All England Law Reports 817 (Supreme Court).

⁴⁸² See, eg, Eleonora Rosati, ‘Towards an EU-Wide Copyright?(Judicial) Pride and (Legislative) Prejudice’ (2013) 1 *Intellectual Property Quarterly* 47, 65; Richard Arnold, ‘Paintings from Photographs: A Copyright Conundrum’ (2019) 50 *IIC-International Review of Intellectual Property and Competition Law* 860; Enrico Bonadio and Nicola Lucchi, ‘How Far Can Copyright Be Stretched? Framing the Debate on Whether New and Different Forms of Creativity Can Be Protected’ (2019) 2 *Intellectual Property Quarterly* (2019) 115, 120; Caterina Sganga, ‘The Notion of Work’in EU Copyright Law After *Levola Hengelo*: One Answer Given, Three Question Marks Ahead’ (2019) 41 *EIPR* 415.

⁴⁸³ In addition to the United Kingdom, many other common law countries adopt similar approaches, including Ireland. JAL Sterling, *Sterling on World Copyright Law* (Trevor M Cook ed, Fourth edition, Thomson Reuters 2015) para 6.23.

new legislation.⁴⁸⁴ Nevertheless, this seems unlikely given the English Courts' ongoing adherence to the closed list principle.⁴⁸⁵ It is probable that the closed list system will remain in place absent new legislation.⁴⁸⁶

The continued viability of the traditional “skill, judgment, and labour” test for copyright protection is also unclear. It has been widely suggested that this, like the closed list, is incompatible with the “author’s own intellectual creation” approach to protection set out in *Infopaq* and subsequently developed in a range of other cases.⁴⁸⁷ Here, as in the case of the open list, it remains to be seen whether the courts will shift their focus.

The parody exception provides still another example of Brexit uncertainty. Although parody has been found to be an autonomous concept under European law, it has been the subject, thus far, of only a single CJEU decision, whilst the corresponding provision in English law

⁴⁸⁴ As they did in *Tunein Inc v Warner Music UK Ltd & Anor* (n 480) [91], when the recent decision in Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* was given persuasive effect.

⁴⁸⁵ See, eg, *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (Intellectual Property Enterprise Court) [15-16] (following closed list approach and determining if fabric in dispute might be either a ‘graphic work’ or ‘work of artistic craftsmanship’).

⁴⁸⁶ Although it is risky to attempt to read the tea leaves based on the non-judicial writings of a judge, Arnold, LJ’s remark that the situation would change “If it were to be held that such closed-list systems are contrary to EU law...and the UK remained in the EU” seems to also suggest this outcome. Arnold (n 482) 876 n 90.

⁴⁸⁷ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009]; subsequently developed in, among other cases, Case C-145/10 *Painer v Standard Verlags GmbH* [2011].

has also only been the subject of a single decision.⁴⁸⁸ Here, the effect of EU law may depend upon which courts are quickest in further developing the law. The likelihood of EU cases being followed as persuasive may decrease or increase depending upon the extent to which English Courts or the CJEU first have the opportunity to further elaborate upon the doctrine.

Overall, there is some Brexit-related uncertainty in fanworks-relevant areas of copyright law. It is not clear how likely such change is in either the short or medium term. Nevertheless, readers should be aware that these areas are the most likely to exhibit changes in the governing law in the near-term.

5.3.2 Similarity Under English Law

Determining whether infringement has occurred is generally simple when the allegedly infringing work and the claimed original are identical, or nearly so. The difficulty arises when only small parts of a work are taken, and it becomes particularly acute when the taking is not verbatim. In such cases, it is necessary to determine whether a partial taking is an infringement.

In the view of the English courts, “[t]he test of copyright infringement is an objective one.⁴⁸⁹ The court need not inquire into the subjective motivations of the infringer; liability is strict. The court need only determine whether a “substantial part” of the protected work has

⁴⁸⁸ Case C-201/13, *Deckmyn v. Vandersteen*, [2014] and *Shazam Productions Ltd v Only Fools The Dining Experience Ltd & Ors* [2022] EWHC 1379 (IPEC), respectively.

⁴⁸⁹ *Baigent & Anor v The Random House Group Ltd* (n 338) [106] (Rix, LJ).

been copied. If so, and if the taking is without permission, an act of infringement has occurred. This approach is objective in that it is a simple, clear test that does not require an assessment of motives or surrounding circumstances.

The objectivity breaks down, however, when it is necessary to assess whether a “substantial part” of the original has been taken. Here, the courts often struggle not only to explain the result of the assessment, but also to explain what the assessment entails. As Lloyd, LJ put it in *Baigent v Random House*:

*The 1988 Act does not define "a substantial part" or even indicate what factors are relevant to substantiality. I do not think that there is any real point in asking: what does "a substantial part" mean? That sort of question is only a path to a dictionary and to the dubious substitution or addition of other words which do not help to answer the crucial question of fact.*⁴⁹⁰

It is not merely difficult for courts to clearly define the term “substantial part.” It has also proven quite challenging for courts to adequately describe what this analysis entails. It is clear, at a minimum, that although the test “has a substantial part been taken without permission” is objective, this is not at all true of the question “what is a substantial part.”

There is no better illustration of this than the speeches delivered in the House of Lords decision in *Designer Guild v Russell Williams*.⁴⁹¹ Although the outcome of the case turned, at this level, largely on the question of whether the Court of Appeal had been correct in overruling

⁴⁹⁰ *ibid* [144].

⁴⁹¹ *Designer Guild Limited v Russell Williams (Textiles) Limited (Trading As Washington Dc)* [2000] 1 Weekly Law Reports 2416 (House of Lords).

the first instance decision, several speeches had the opportunity to discuss the matter of “substantial part.”

Lord Bingham of Cornwall's brief speech merely concluded that, as the judge had concluded that copying had occurred based on similarities between the works, “it would have been very surprising” had a substantial taking not been found.⁴⁹² This provides little guidance and appears to largely conflate the copying and substantial taking examinations. Lord Millett's speech also provided relatively little guidance, but in a different manner. In his view, the question of substantial taking “is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity.”⁴⁹³

The two more substantial speeches of Lord Hoffmann and Lord Scott of Foscote do not add clarity.⁴⁹⁴ Both adopted the view that a ‘substantial part’ is, for all intents and purposes, a use of a protected work that is, in the first instance judge's view, substantial. Neither provided a test more precise than “impression.” As Lord Hoffmann noted, “It is often difficult to give precise reasons for arriving at a conclusion one way or the other (apart from an enumeration of the relevant factors) and there are borderline cases over which reasonable minds may differ.”⁴⁹⁵ Although Lord Hoffmann did make some general remarks regarding factors that might be

⁴⁹² *ibid* at 2418.

⁴⁹³ *ibid* at 2426.

⁴⁹⁴ Lord Hope of Craighead did not write on the subject matter in this case. *ibid* at 2424.

⁴⁹⁵ *ibid* at 2420.

considered, these fall well short of a bright-line test.⁴⁹⁶ Lord Scott’s reasoning on the matter appeared to rely most heavily on the principle that substantiality must, in a case like this, follow if a substantial part of the “skill and labour” of the original creator were taken, even if the taking does not involve elements that are independently protectable.⁴⁹⁷

The speeches in *Designer Guild* do not, either separately or in combination, provide clear indication that anything but the judge’s considered view of the substantiality of the taking in light of the judge’s view of the two works would determine the outcome of the test. Nor does an examination of other caselaw in this area suggest any other view of the matter, except possibly the rough one

⁴⁹⁶ “Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author’s skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects foxes better than hedgehogs” *ibid* at 2423.

⁴⁹⁷ *ibid* at 2430–33. Lord Scott’s approach appears to suggest that the ‘substantial part’ test is caught up, in cases involving altered copying, with the question of whether the similarities between works are coincidental or if they are the result of copying; the same degree of similarity might be acceptable in the case of independent work yet unacceptable if there was copying. This seems to suggest that there might be some degree of similarity in works not copied that would support a finding of infringement, which seems at odds with the fundamental principle that copyright guards against copying, not independent creation. Nevertheless, this approach finds support elsewhere in the caselaw. See, eg, *Ravenscroft v Herbert and New English Library Limited* [1980] RPC 193 (EWHC) 204–05. But also see *JHP Ltd v BBC Worldwide Ltd & Anor* EWHC 757, para 37 (High Court, Chancery Division 2008), which found that a very small amount of copying had not been substantial.

of “what is worth copying is worth protecting.”⁴⁹⁸ This creates, to be sure, considerable flexibility for courts assessing specific takings, but precious little clarity for creators.

5.3.3 Fair Dealing and Bright-Line Exceptions

Fair use is notoriously flexible. Fair dealing, both in England and in other common law jurisdictions, is not widely viewed as such. Where the US uses fair use, these countries use narrower and more specific exceptions and limitations.⁴⁹⁹ This approach, although more rigid than its American counterpart is, as we will see, often no more certain in practice.

The key exceptions and limitations relevant to fanworks under English law include the criticism, review, quotation, and news reporting exceptions.⁵⁰⁰ Incidental inclusion may also sometimes be relevant, even if not generally a major player.⁵⁰¹ The most relevant provision, however,

⁴⁹⁸ The ‘test’ stems from *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Chancery 601 (EWHC) 610. It has been cited frequently since. See, eg, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (House of Lords) 278, 288, 294 (speeches of Lords Reid, Hodson, and Pearce, respectively). It remains, however, quite controversial.

⁴⁹⁹ In a recent book, Bentley and Aplin argue that something akin to fair use exists on a mandatory basis nearly globally by virtue of Article 10(1) of the Berne Convention’s quotation exception. This argument, although both intriguing and compelling, must however be viewed as a largely normative and forward-looking argument; the current analysis is concerned with the state of affairs confronting fanworks at present. Lionel Bentley and Tanya Frances Aplin, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge intellectual property and information law, Cambridge University Press 2020).

⁵⁰⁰ CDPA 1988 s. 30.

⁵⁰¹ CDPA 1988 s. 31.

will almost certainly be the caricature, parody, or pastiche exception introduced in 2014.⁵⁰²

Under each of these exceptions and limitations, two conditions must be met. The use of the protected material must be for an enumerated purpose, and the use must be fair dealing. Neither condition suffices on its own.⁵⁰³ The determination of whether the material falls within a specified purpose is the simpler of the two steps, and it is true that courts apply a largely objective test when considering whether a use falls within the specified purposes.⁵⁰⁴ That said, it is still not difficult to detect uncertainty even here.⁵⁰⁵

After the determination that a specific exception may apply, the court must determine whether the defendant's use dealt fairly with the original work. Fair dealing, in the view of the courts,

*is a matter of fact, degree and impression to be tested objectively. Of relevance to the question are the extent of use, the degree to which the use competes with exploitation of copyright by the copyright owner and the good faith, intention and genuineness of the article.*⁵⁰⁶

This inquiry, although also nominally objective, is not as clear-cut as the inquiry into the purpose of the new use. As Denning, LJ put it, "it is

⁵⁰² CDPA 1988 s. 30A.

⁵⁰³ See, eg, CDPA 1988 s. 30A: "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."

⁵⁰⁴ See, eg, *Pro Sieben Media AG v Carlton Television Ltd & Anor* EWCA Civ 2001 (Court of Appeal, Civil Division 1998).

⁵⁰⁵ See, eg, *ibid* ("'Criticism or review' and 'reporting current events' are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally...")

⁵⁰⁶ *Hyde Park Residence Ltd v Yelland & Ors* Chancery 143, 147 (Court of Appeal, Civil Division 2000).

impossible to define what is ‘fair dealing.’ It must be a question of degree.”⁵⁰⁷

Ultimately, the fair dealing exceptions in the United Kingdom appear no more likely to yield *ex ante* clarity for users than the fair use inquiry in the United States. In fact, it cannot. With good faith a core part of the fair dealing inquiry, it is necessary to both see the new work and know the circumstances of its creation before any final determination can be made.

Further complicating the fair dealing landscape in the fanworks arena is the dearth of applicable case law. There are many fewer cases affecting things that are similar to fanworks than is the case in the United States. In the USA, as we will see in Chapter 6, there are cases which, although not clearly involving fanworks, involve fact patterns that can be seen as being very broadly analogous. In the English case landscape, there are simply very few, if any, reported cases that involve conduct analogous enough to be of clear assistance.

The sole exception is a recently decided High Court case involving a commercial “dining experience.” In *Shazam Productions Ltd v Only Fools The Dining Experience Ltd*, Mr. John Kimbell QC, sitting as a Deputy High Court Judge, examined a claim involving the use of characters and scenes from a television programme in a commercial dining experience. The court found that the use in question was an imitation of the characters and background of the original, and as such constituted neither parody nor pastiche, and in any case was not fair

⁵⁰⁷ *Hubbard and Another v Vosper and Another* [1972] 2 QB 84 (EWCA Civ) 94.

dealing because it interfered with the normal commercial exploitation of the original work.⁵⁰⁸ This decision is, however, like most other pseudofanworks cases, largely driven by the commerciality of the enterprise, and is of dubious utility for assessing noncommercial fanworks.

5.3.4 Canada and Other Common Law Countries: Bespoke and Blended Approaches

In Canada, the copyright framework is broadly similar to the English fair dealing approach, both in terms of the infringement and the fair dealing standards.⁵⁰⁹ In the interests of required brevity, neither is discussed at length here. However, there has been one notable change to that framework which is particularly relevant to the discussion of fanworks: a bespoke exception to copyright that covers “non-commercial user-generated content.” This exception, which was enacted in 2012, renders the use of an existing work in the creation of a new work, as well as the dissemination of that new work, not an infringement so long as a list of conditions are complied with.⁵¹⁰

At least one of the conditions that is listed – the requirement that the UGC “not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work” – reduces the utility of this provision. As noted in Chapter 2, some uses of

⁵⁰⁸ The case is potentially noteworthy, however, as the first English decision to hold that fictional characters may themselves be literary works. The potential effects of this on English copyright law in the long term are, although fascinating, beyond the scope of the thesis.

⁵⁰⁹ Copyright Act (R.S.C., 1985, c. C-42).

⁵¹⁰ Canada Copyright Act s. 29.21(1)

fanworks, particularly in the context of political speech, may have negative effects on the exploitation of the original, particularly if the political speech in question is associated with the politically disfavored and unpopular. Such works, even if noncommercial, might not be protected under this UGC exception. In addition, it has been noted that the exception seems unlikely to apply to objections to UGC based on the owner's moral rights.⁵¹¹ Given the stance against UGC taken by some authors, this further reduces the utility of the exception by potentially limiting the application to only permitting UGC that the original author finds unobjectionable.

That may be part of the reason that there are very few reported cases that cite this statute.⁵¹² Only one of these explores, even briefly, the question of what constitutes user-generated content that falls within the ambit of the statute – and that case merely found that sharing links permitting the viewing of preexisting works did not fall within the statute's ambit.⁵¹³ However, this is more likely to be the result of the common factors that militate against the judicial resolution of UGC and fanworks disputes that involve truly noncommercial conduct. The stakes for the new user are simply too low in most cases to warrant making an issue of the matter; we can expect that most demands to remove content will be complied with. It is possible, of course, that a Canadian case

⁵¹¹ See generally Eugene C Lim, 'On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience' (2018) 15 SCRIPTed 70.

⁵¹² A Westlaw search in October, 2022 identified a total of seven distinct disputes citing the statute.

⁵¹³ *Proctorio, Inc v Linkletter*, [2022] BCSC 400 [116].

might arise which eventually tests the application of this statute, but at present the absence of resolved litigation is unsurprising.⁵¹⁴

There have been attempts to blend fair use and fair dealing approaches in other jurisdictions with common law-based copyright frameworks. In Singapore, for example, s 35 of their previous Copyright Act establishes a modified fair use test for cases of fair dealing that take place other than in the context of criticism or reporting of current events.⁵¹⁵ The test in Singapore utilized the same four factors that are used in the United States, and added a fifth factor which examines “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.” However, this extra factor was removed in the Copyright Act 2021, which appears to have adopted a pure fair use approach. There was limited caselaw on the old standard, and commentary on the law appears to have viewed it as insufficient to ensure that most UGC would be noninfringing.⁵¹⁶ A similar attempt to incorporate a mixed fair use/fair dealing approach in South Africa has been attempted, but has not successfully been enacted into the law; it faces at present an uncertain future.⁵¹⁷

⁵¹⁴ For reasons which will be discussed in Chapter 7.

⁵¹⁵ Singapore Copyright Act s35; the tests for fair dealing for criticism and reporting are set out in s 36 and s 37, respectively.

⁵¹⁶ See Wei Xiang Joel Loew, ‘Fair Use on Instagram: Transformative Self-Expressions Or Copyright Infringing Reproductions’ (2019) 31 SAclJ 125, 135–43.

⁵¹⁷ Neil Turkewitz, ‘South Africa: A Story of Fair Use & Unfair Dealing’ (*Copyright Clearance Center*, 8 July 2020) <<http://www.copyright.com/blog/south-africa-a-story-of-fair-use-unfair-dealing/>> accessed 28 July 2021.

Such approaches, although potentially promising, have not yet provided clarity for fanworks creators or users. This may, particularly in the case of Canada, simply be a matter of time. However, this is far from assured, given the incorporation of statutory language and provisions that have not been able to provide certainty in other jurisdictions.

5.4 The Role of Private Ordering

A number of the franchises that are the subject of fandoms have made their views on fanworks known in various ways, often through the publication of ‘rules’ or guidelines for fanworks.⁵¹⁸ Although generally these are explicitly stated to not be legally binding on the copyright owner, they can significantly influence fan behavior by creating a perceived ‘safe zone’ for fanworks – albeit one that is often significantly smaller than statutes permit. Additional questions may arise in the video games arena, however, where the inclusion of fanworks-related provisions within End-User License Agreements (“EULAs”) has become increasingly common, and users may be bound by these terms.⁵¹⁹

The specifics of these mechanisms are not discussed in detail here, as they are not a form of black-letter law. Nor are they, in most cases, contracts that have been produced by a process of arms-length negotiation. They are, rather, a means by which rights holders may set

⁵¹⁸ See, eg, Bungie, ‘Guidelines On Fan-Created Media And Art’ (no date) <<https://help.bungie.net/hc/en-us/articles/360049201911-Intellectual-Property-and-Trademarks>>; Wizards of the Coast, ‘Wizards of the Coast’s Fan Content Policy (15 November 2017) <<https://company.wizards.com/en/legal/fancontentpolicy>>

⁵¹⁹ For the sake of simplicity, “EULA” refers here to all such use, regardless of the precise title used for a specific example.

out their own opinion regarding the extent of their rights, and as a means by which rights holders may sometimes enforce their rights through coercive pressure, regardless of the actual state of the law.⁵²⁰

It is clear that private ordering serves, along with other forms of nonjudicial remedies such as DMCA takedowns and cease-and-desist letters, as a means of regulation.⁵²¹ They place extrajudicial pressure on fans, either as a form of background knowledge regarding the point at which they might risk “getting in trouble” as the result of creating and distributing fanworks, or because they directly act to remove fanworks from view. They can often be more of a factor when it comes to governing fanworks than the actual letter of the law, and often do so in ways which offer both additional rights beyond those offered by the law, at the cost of additional restrictions.⁵²² They certainly should not be ignored.

Ultimately, however, they are not so much law as a consequence of a lack of clear law. Whether such means of governance should be permitted should not depend on their current use. Nor should it depend on their pragmatic utility as a means of avoiding dispute. Rather, they should stand or fall based on their correspondence with the expressive rights of users. They will not, therefore, be further discussed here as a part of the law governing fanworks.

⁵²⁰ This is discussed at greater length as part of the discussion of chilling effects in Chapter 7 and norms-based solutions in Chapter 8.

⁵²¹ The role of the DMCA, and the numerous inequities inherent in its present form, are discussed at length in Chapter 7.1.3.

⁵²² *See, eg*, Neha Ahuja, ‘Commercial Creations: The Role of End User License Agreements in Controlling the Exploitation of User Generated Content’ (2016–17) 16 *J Marshall Rev Intell Prop L* 381, 400.

5.5 Almost All Fanworks-Relevant Cases Decided by The Courts Involve Commercial Conduct Within The Creative Industries

Most copyright cases that involve fanworks-like conduct also involve conduct that is both commercial and which is taking place within the creative industries.⁵²³ At first glance, this may not seem surprising. Cases involving commercial conduct are more likely to attract the interests of a copyright owner. They are also cases where damages will often be easier to establish than is the case with purely noncommercial material. This becomes even more true where the conduct takes place within the creative industries, if only because such conduct is more likely to come to the attention of the copyright owner.

Cases that do not involve commercial conduct within the creative industries are unlikely to be fully adjudicated. In particular, the high costs and risks associated with defending such cases, particularly in the absence of offsetting financial benefits in the event of a successful defense, will frequently counsel in favor of conceding to takedown demands rather than proceeding with litigation. These factors, and their impact, are discussed further both in Chapter 6, when the impact on fanworks-specific legal principles is explored in more detail, and in Chapter 7, as part of the discussion of the costs of the ongoing legal uncertainty in this area.

The issue is noted here because the discussion of the fair use and fair dealing defenses took place within this framework of cases. In particular, it took place in the context of cases that are overwhelmingly commercial in nature. As has been discussed, the analysis of fair use and

⁵²³ This will be discussed at greater length in Chapter 6.

fair dealing is complex and relies on a judicial balancing of many factors, with commerciality prominent amongst them. The precise balance reached in cases, however, is rarely explicit enough for it to be clear whether commerciality or conduct within the creative industries are singularly decisive factors in any individual case. In effect, the law in this area is dominated by the factor that defines fanworks by its absence: conduct that is occurring within, or at the least adjacent to, the traditional creative industries.

5.6 Conclusion

The academic consensus that fanworks reside in grey areas of copyright law appears, based on the analysis in this chapter, to be on solid ground. The black-letter law that is most relevant to fanworks is insufficiently relevant to fanworks to provide clear *ex ante* guidance to those wishing to create fanworks. This is true under the fair use approach that is applied in the United States, which has seen the vast bulk of the litigation relevant to this area. It is also true under the CDPA 1988's fair dealing approach, and in jurisdictions that apply mixed approaches.

In part, the lack of clarity is due to broader doctrinal uncertainties within copyright law, such as those surrounding the derivative works right in the United States, or the meaning of “substantial taking” in the courts of England & Wales. It also stems, however, from the flexibility of the underlying doctrines, which are very much focused on individual cases. Nevertheless, it is possible that, although uncertainties exist in the doctrines that are applied, there has been enough jurisprudence (if

only in the United States) to allow some predictability; some further testing is indicated.

In the next chapter, we will turn from the more abstract analysis of the legal doctrines to an assessment of how they function in practice. In particular, we will examine their use in cases that are, if not strictly speaking cases that involve fanworks, cases that are analogous to some degree. As we will see, this will permit the derivation of several broad legal guidelines, albeit not ones definitive enough to provide true certainty

6 FANWORKS AND COPYRIGHT – THE LAW OF FANWORKS

The previous chapter examined the broad copyright doctrines that are most likely to apply to fanworks and identified key areas of legal uncertainty. This chapter identifies the copyright cases most relevant to fanworks. Using those cases, a small number of guidelines that provide some predictive value in cases that involve fanworks are derived. These cases provide, to put it another way, the closest thing to a law of fanworks that is reasonably identifiable.

This section, even more than the bulk of this thesis, is of necessity American-centric. In the United States, these decisions, although limited in number, are sufficient to permit us to derive some rough rules of law governing this area. The situation in other relevant jurisdictions is more complex, not least because there are fewer cases available to provide the basis for deriving rules. Examining the legal doctrine in these countries, however, may still provide the basis for some broad conclusions.

The bulk of the case law in this area reflects an industry-centric approach to copyright. These cases involve incidents in which a fanwork, or at least a fanwork-like work, was marketed to the public through distribution channels associated with the creative industries. In the small number of cases not involving industry-channel distribution, there have been other factors such as scale or amount of money involved that bring the commercial aspects into immediate focus. Cases that involve truly non-commercial efforts appear largely, if not entirely, absent from the caselaw.

Thus, it is important to note at the outset that the cases discussed in this chapter are – with few exceptions – cases that involve disputes over uses of content that are either within or closely adjacent to the

traditional creative industries. Because the general copyright doctrines that are applicable to fanworks (and which were discussed in the prior chapter) all turn heavily on issues of commerciality, the general guidelines arrived at here suffer from an innate, and substantial, limitation: we simply cannot be certain that they will apply in the same way, or with the same force, in cases involving fanworks.

6.1 A True Copyright Law of Fanworks Does Not Exist

Few, if any, cases that involve allegedly infringing works that are unequivocally fanworks, even under the broad definition of fanwork adopted for the purposes of this thesis. More often, they are cases that are broadly analogous to fanworks, but display critical differences – most notably, in the nature and extent of the commercial conduct that is involved. To date, only two cases with published decisions involving unambiguous fanworks have been identified, both of which involve disputes within the community of high-profile YouTubers.⁵²⁴ The disputants in those cases came from a nontraditional fandom and are content creators with large numbers of subscribers – a group that, although operating outside the channels of the traditional creative industries, derives substantial income from their creative material.

There are, for all intents and purposes, no published cases involving clearly non-commercial fanworks.⁵²⁵ Few such cases are

⁵²⁴ *Hosseinzadeh v Klein* (n 370); *Hughes v Benjamin* (n 3).

⁵²⁵ Arguably, *Lenz* (n 350) might be viewed as such a case. However, although the “dancing baby” video case was noncommercial, it is difficult to describe the video as a fanwork – it was a home video of someone’s child, not something designed to appeal to or be consumed within a fan group. The use of existing content in *Lenz* is largely incidental, rather than the deliberate creation generally associated with fanworks.

brought to court at all; fewer still are actively contested. From the perspective of rights holders, there may often not clearly be a need to pursue such cases. There is no commercial competition, and factors such as the potential public relations pitfalls of suing fans often militate against initiating litigation.

Moreover, the need to initiate litigation may be reduced or entirely eliminated through the successful use of non-judicial approaches. In particular, the use of DMCA takedowns or cease and desist letters will often be effective. From the perspective of users, may often be difficult to justify the expenditures of time, money, and emotion required to successfully defend such a lawsuit. Given the direct and indirect costs of litigation even in jurisdictions in which the prevailing party recovers fees, let alone under the American Rule where each side is presumed to bear its own attorney's fees, the less risky and more rational approach is often to comply even in the face of a takedown demand that is unlikely to be meritorious.⁵²⁶

Thus, the rules identified in this chapter are derived almost entirely from cases involving commercial uses of protected primary materials. These uses are, in most cases, not merely commercial. They are also cases involving the distribution or attempted distribution of new works through the normal channels of the creative industries, which removes them from the definition of fanworks used in this thesis. These cases, however, make up virtually the entire body of case law that is related to the reworking and reuse of prior works of popular culture.

⁵²⁶ This situation, and its chilling effects, are discussed at greater length in the next chapter.

Although not fanworks cases, these cases are the ones in which the facts will be the closest to true fanworks cases. As such are the ones that common-law judges will most likely have recourse to, should the need arise to assess a case involving a fanwork. They may provide our best assessment of the law that may be applied to fanworks, but they do not represent a true law of fanworks.

6.2 The Copyright Law of Fanworks: An Overview

The bulk of court cases which involve fanworks or fanwork-adjacent disputes have come from the United States. This should not come as a surprise. In addition to the legendary litigiousness of Americans, many of the entertainment franchises at the center of mass-media fandoms are based in America. The web platforms that most commonly host fanworks material are also largely US-based. And, of course, the United States, with its population 328 million, has more than triple the population of the United Kingdom and Canada combined.

Determining what makes a case a “fanworks case” or even a “fanworks-relevant case” is challenging, and necessarily entails a certain amount of subjectivity. Unfortunately, we have few such cases to draw from. There are many key cases which are likely to be important to the legal analysis of fanworks, but which do not themselves involve any fanwork.⁵²⁷ These cases are part of the broader law of copyright that may be applied to fanworks, but they are not fanworks cases.

⁵²⁷ Eg *Nation Enterprises* (n 389). This case involved the fair use doctrine as applied to leaked newsworthy material. This case would be relevant, for example, where a fan site publishes leaks from video game franchise’s next release, although the underlying material in this case (political memoirs) did not involve anything particularly fanwork-like.

There are, however, some cases that are more directly fanworks-relevant. For the purposes of this thesis, a case is fanworks-relevant if it involves copyright claims, a mass-media work or a recognizable fandom, and an allegedly infringing work that is not a simple copy of the original. These cases can be grouped in four rough clusters, based on their relationships to fanworks.

The first cluster involves the publication of material that is both intended to be distributed and consumed within ordinary commercial channels, and also not intended primarily for a fan audience. These cases are included where the secondary works in the case are analogous to certain kinds of fanwork, and the underlying work involves a media franchise or similar work of fiction. For example, a case involving a television commercial that allegedly makes use of a fictional character is analogous to a fan vid;⁵²⁸ a book that borrows the style of a famous children's author is analogous to fanfic.⁵²⁹ These cases are useful for analysis and may be relied upon by courts in resolving cases involving the analogous fanworks, but they are not difficult to distinguish from fanworks.

The second cluster cases involve secondary creativity more clearly targeted toward fandoms, but still involves distribution within the traditional creative industries. For example, an unauthorized sequel to a novel can be compared to fan fic;⁵³⁰ a quiz book can be compared to

⁵²⁸ Eg *Metro-Goldwyn-Mayer v American Honda Motor Co* 900 F Supp 1287 (CD Cal 1995).

⁵²⁹ Eg *Dr Seuss Enterprises, LP v Penguin Books* (n 420).

⁵³⁰ Eg *Salinger* (n 377).

some material sold at conventions.⁵³¹ In these cases, however, as in the ones described above, the allegedly infringing material is produced and distributed within the creative industries, which also removes these from the definition of fanworks.

The third and fourth clusters involves cases which, if not representing true mass-media fandom cases, are certainly much closer than the others. Cases in the third cluster involve either attempts at subsequent commercial distribution of material that originated within fandoms, or they involve nonconventional means of publication and distribution, including the use of crowdfunding to enable the production and distribution of the content. Cases in the fourth involve both nontraditional distribution and nontraditional fandoms.

Although the criteria for placing cases in these clusters are clear in most cases, there are some edge cases. For example, the question of whether a singing telegram service falls within the traditional creative industries requires some thought, particularly given the decline of this mode of message delivery.⁵³² Such cases are placed within Cluster 2 here, but Cluster 3 might also be appropriate. Edge cases exist, but fortunately they are few in number and do not add significant complexity to the matter.

This section provides examples of the cases falling within each of these major groups. These are not the only such cases, and others will be referenced when discussing the specific legal principles that can be derived from this body of cases later in this chapter.

⁵³¹ Eg *Castle Rock Entertainment* (n 351).

⁵³² See *Unlimited Monkey* (n 465).

6.2.1 Cluster One Cases: James Bond and The Cat in the Hat

Two cases provide examples of fanworks-adjacent cases that involving the use of a mass-media franchise as the primary work and an allegedly infringing secondary work that was being distributed through conventional creative industries channels. There are two barriers to considering such works as fanworks. First, these are works that are distributed through normal commercial channels. Second, these are works that are not primarily designed for a fan audience. They are fully independent works that reference fandom source materials are targeted toward new audiences outside fandom.

6.2.1.1 Dr. Seuss Enterprises v Penguin Books USA: The Cat Not in The Hat

This 1997 case, which was decided on a request for a preliminary injunction, involved the use material taken from Dr. Seuss to create a humorous take on the OJ Simpson Murder Trial.⁵³³ The work in question, entitled “*The Cat Not In The Hat*,” used the characteristic literary and illustrative style of Dr. Seuss to create a work commenting on the OJ Simpson murder trial.⁵³⁴ The court found the secondary use infringing and not within the fair use defense, and enjoined the distribution of the work.

This case is fanworks-relevant because it involved the use of the notable mass-media Dr Seuss works. It is also one which, despite Seuss Enterprises’s reputation for litigiousness, has served as the source

⁵³³ *Dr Seuss Enterprises, LP v Penguin Books USA, Inc* 109 F3d 1394 (9th Cir 1997).

⁵³⁴ An early set of lines used in the book, “One Knife? / Two Knife? / Red Knife / Dead Wife,” is readily recognizable to any parent that has read the original Seuss work “One Fish, Two Fish, Red Fish, Blue Fish” to their child.

franchise for numerous fanworks, with both fan art and fan fiction easily located in the usual online repositories.⁵³⁵ Fan film is more difficult to locate but is not entirely absent.⁵³⁶ It is unclear how much the low number of works is driven by lack of fandom and how much by aggressive enforcement.

The secondary work in this case was not a fanwork. It was a semi-humorous work written at least in part to use the familiarity of Dr Seuss to trade on the public's ongoing fascination with OJ Simpson.⁵³⁷ The new work was intended to be distributed by a major publishing house, through conventional print media distribution channels. Over 21,000 copies had been already printed at the time that the district court enjoined publication and distribution.⁵³⁸ The audience for the book appears to be those who are interested in novelty products related to the Simpson case, or possibly those looking for bad-taste gifts for

⁵³⁵ See, eg, Cryptid-Creations, 'Daily Painting 763. #TheGrinch' (*DeviantArt*, 22 December 2014) <<https://www.deviantart.com/cryptid-creations/art/Daily-Painting-763-TheGrinch-501975567>> accessed 13 May 2021 (fan art); AramisFraino, 'The Grinch' (*DeviantArt*, 23 December 2020) <<https://www.deviantart.com/aramisfraino/art/The-Grinch-864897915>> accessed 13 May 2021 (fan art); 'DR. SEUSS - Works - Works' (*Archive of Our Own*, no date) <https://archiveofourown.org/tags/DR*d*%20SEUSS%20-%20Works/works> accessed 13 May 2021 (tag showing 363 works as of date visited).

⁵³⁶ YouTube searches for "fan film" and the name of Seuss works or characters generally reveal some videos, few if any of which have more than a few thousand views.

⁵³⁷ Semi-humorous might be generous.

⁵³⁸ *Dr Seuss Enterprises, LP v Penguin Books USA, Inc* 924 FSupp 1559, 1575 (SD Cal 1996).

acquaintances and co-workers. The book makes use of Seuss without being a fanwork.⁵³⁹

The infringing work made minimal use of a few things taken directly from Seuss works, but the majority of the new work merely used what the trial court referred to as Seuss’s “distinctive style.”⁵⁴⁰ There was little, if any, direct copying, although there was apparently a great deal of use of phrasing which evoked specific passages from Seussian works. The court found these to be infringing, based in large part on choices in style that the court found to be protected.⁵⁴¹ This possibly erroneous finding, however, was not substantively addressed on appeal; the appellate court appears to have found the work to be likely infringement based solely on the use of the striped hat made famous in Seuss’s eponymous *The Cat in the Hat*.⁵⁴²

The outcome in this case has been the subject of extensive criticism. The extent of the similarities between “The Cat Not In The Hat” and the Dr Seuss works deemed to be infringed do not appear to be

⁵³⁹ In this regard, the book in question appears broadly similar to the Dr Seuss/Star Trek mashup at issue in *ComicMix* (n 138), at least as to the use of the Dr Seuss original, although that work was arguably targeted at the Star Trek fandom. For that reason, *ComicMix* falls into the fanwork-relevant category discussed below.

⁵⁴⁰ *Dr Seuss Enterprises, LP* (n 538) 1561.

⁵⁴¹ *ibid* at 1563–64. The court’s entire analysis of textual similarities is only two paragraphs long, but found that the creative “choices as to stanza type (tercet), rhyme (masculine perfect), assonance, and accent are all protectable.” This finding appears at best questionable as a matter of law, but was not addressed one way or another by the appellate court.

⁵⁴² *Dr Seuss Enterprises, LP* (n 533) 1398–99.

substantial in the eyes of many observers.⁵⁴³ The court’s willingness to find infringement and block the distribution of a new work where the direct borrowing appears to primarily have consisted of a drawing of a hat has been viewed in some quarters as a pretext to provide protection to Dr Seuss’s distinctive but likely unprotectable literary style.⁵⁴⁴

6.2.1.2 Metro-Goldwyn-Mayer v American Honda Motor Co

This 1995 case involved a television commercial for a car.⁵⁴⁵ The commercial featured a high-tech action-adventure scene which is clearly reminiscent of a James Bond film.⁵⁴⁶ The commercial featured a car being chased by a helicopter, a villain who has metal arms (or perhaps only metal-covered arms), a male protagonist in a tuxedo, a female companion, and a high-tech solution to the villain’s attack (in this case, releasing the removable roof – the feature highlighted by the commercial).

⁵⁴³ Including me. See also, eg, Tyler T Ochoa, ‘Dr Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody’ (1998) 45 J Copyright Soc’y USA 546, 602–04.

⁵⁴⁴ As noted, the district court seems to have found that there was some protection for the literary style, the 9th Circuit’s statement that “the district court’s preliminary injunction was granted based on the back cover illustration and the Cat’s Hat, not the typeface, poetic meter, whimsical style or visual style,” *Dr Seuss Enterprises, LP* (n 533) 1399, notwithstanding. However, the 9th’s sole focus on the hat suggests that they did not consider the style protectable.

⁵⁴⁵ *Metro-Goldwyn-Mayer v American Honda Motor Co* (n 528).

⁵⁴⁶ The commercial in question can be readily located on YouTube by searching for “Honda James Bond.” See, eg ibpimin, ‘Honda Del Sol Commercial’ (27 June 2006) <<https://www.youtube.com/watch?v=gqa-b3assCA>> accessed 13 May 2021.

The case is fanworks-relevant because it involves the use of the fictional character of James Bond, and because Bond serves as the focal point of many fanworks.⁵⁴⁷ It also involves a short film that is very much in the style of a Bond movie, and which parallels in many ways the type of content one might find in a Bond fanwork. It is not a fanworks case because, as was true with the *Cat in the Hat* case, this is a use of the original that has been created and is being distributed through normal creative industry channels – in this case, as a television commercial.

Here, as in *Seuss Enterprises*, there was very little direct copying. There was no direct taking of plot elements from Bond films and no use of the character’s name. The similarities that were present, excluding similarities in the character, were almost solely those of style or theme, including the type of mood, type of dialogue, presence of a “sexual consort” and so forth. These similarities were found to be likely to support a finding of infringement.⁵⁴⁸ However, this was not the main finding. The character in the television commercial, which although unnamed does seem to share some strong similarities with 007, served as the basis for the court’s conclusion that the commercial likely

⁵⁴⁷ See, eg, oldredjalopy, ‘James Bond Montage’ (*DeviantArt*, no date) <<https://www.deviantart.com/oldredjalopy/art/James-Bond-Montage-165915423>> accessed 19 May 2021 (fan art); ‘James Bond - All Media Types’ (*Archive of Our Own*, no date) <<https://archiveofourown.org/tags/James%20Bond%20-%20All%20Media%20Types/works>> accessed 19 May 2021 (AO3 tag search).

⁵⁴⁸ *Metro-Goldwyn-Mayer v American Honda Motor Co* (n 528) 1298–300.

infringed the James Bond character as depicted in the MGM Bond films.⁵⁴⁹

6.2.2 Cluster Two: Sequels and Guidebooks.

Several cases involve unauthorized quiz books and other supplemental materials related to specific media franchises. These works are closer to fanworks than those described in the prior section, as they are more directed toward consumption within a fandom. They are still not, however, fanworks as they involve works distributed and marketed through traditional commercial channels. Nevertheless, they are more closely analogous to fanworks than the content in Cluster 1.

6.2.2.1 Unauthorized Sequels: *Salinger v Colting*

Salinger v Colting provides a good example of disputes falling within this cluster.⁵⁵⁰ This case involved the publication of an unauthorized sequel to J D Salinger's classic book *The Catcher in the Rye*. Although the book was marketed as an unauthorized sequel, it is not a conventional sequel. Instead of just taking the original forward in time, the secondary work added the original's famously reclusive author

⁵⁴⁹ The court held that, in effect, the character of James Bond as depicted in the films could be both protected and owned by MGM even if they could not show an ownership interest in the character as developed in the original Fleming novels. *ibid* at 1293.

⁵⁵⁰ There are two opinions in this case; the district court's decision and the subsequent appeal. *Salinger* (n 377); *Salinger v Colting* (n 17). However, the appeal disposed of the copyright issue in less than a page. *ibid* at 83. The discussion here based on the trial court's reasoning and not the appeal.

as a character, and a significant part of the storyline involves the author's relationship with the main character from the original.⁵⁵¹

The case is fanworks relevant in part because it involves an unauthorized sequel to a major work of literature. As discussed in Chapter 3.2.1, literary works were the source of some of the earliest recognizable fan activity, and *Catcher in the Rye* falls within this type of work. *Catcher* and Salinger may not be a substantial fandom in modern terms, but they have both been the inspiration for a considerable number of fanworks. The work in question here, a book examining the relationship between Salinger and Salinger's most famous character, is either fanfic or at least readily analogizable to fanfic. It was, however, also distributed through the normal channels of the publishing industry and is therefore not a fanwork.

The district court was sceptical of the claims that the work was parody. The court found that the new work did not comment upon the original, notwithstanding the use of Salinger as a character. This, the court found, might constitute commentary about *Salinger*, but it does not constitute commentary on *Catcher*. Because the work did not comment on the original, it was found to not constitute a parody, and therefore infringe.

This conclusion, which was upheld by the 2nd Circuit albeit with little analysis, is difficult to justify based on an examination of the

⁵⁵¹ Copies of this work are not difficult to acquire. John David California, *60 Years Later: Coming Through the Rye* (Windupbird 2009). The discussion of this book is based upon a direct review of the work, and does not align with that expressed by the court in the published opinion.

work.⁵⁵² Indeed, the findings of both courts focused substantially more attention on the marketing of the book as a ‘sequel’ as reason to reject any claim to commentary than they did on the examination of the material. In effect, the marketing material was used as reason to discredit any other statement made about the message or purpose of the new work.⁵⁵³

From a fanworks law perspective, this case is relevant in multiple ways. First, it can be seen as demonstrating judicial hostility toward marketing works in a manner that seems to unfairly exploit the work of the original author.⁵⁵⁴ Second, it can be viewed as demonstrating that works which a fan might view as commentary may not be seen as commentary by courts.⁵⁵⁵ Third, it demonstrates that fan views and judicial views of what constitutes a substitute for an original may not be entirely aligned; fans are unlikely to view an unauthorized sequel as

⁵⁵² *Salinger v Colting* (n 17) 83.

⁵⁵³ *Salinger* (n 377) 260 n 3.

⁵⁵⁴ This sort of “unfair competition” reminiscent view of copyright can arguably be seen, at least in the view of some commentators, in the response of courts to this kind of conduct in other jurisdictions. For example, the English case *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1 (England and Wales Patents County Court) found infringement in a recreation of a photograph from scratch that fell short of literal copying, notwithstanding the rejection of infringement in an earlier case that had held that there was no copyright in an assembly of objects to be photographed. See *Creation Records Ltd & Ors v News Group Newspapers Ltd* EWHC Ch 370 (High Court, Chancery Division 1997). The factual distinctions between these cases are limited; however, *Creation Records* involved a photograph being used for news purposes; *Temple Island* involved the use of a similar photograph in the marketing of similar goods.

⁵⁵⁵ This does not mean that courts are likely to be entirely insensitive to commentary; simply that it needs to be more explicit and obviously critical. See, eg, *Suntrust Bank v Houghton Mifflin Co* (n 17).

canon, and it is very unlikely that such a work would reduce demand for an authorized sequel.

As a matter of law, and given the obvious commerciality of the new use, the case may be properly decided as it pertains to published competition within the creative industries. The extent to which it is consistent with fan reality is, however, far less clear.

6.2.2.2 Unauthorised Guidebooks: Paramount Pictures v Carol Productions

This case involves the publication of a book ostensibly intended to provide a guide to the Star Trek universe for those who find themselves in relationships with Trek fans.⁵⁵⁶ This work had a claim, if only based on that superficial purpose, to be educational materials for those seeking an easy way to gain a basic understanding of the Trek canon, which, although not as elaborate as at present, was still quite detailed at the time of publication. It was also intended to present material that would explain, at least in part, the Trek fandom.⁵⁵⁷

This book is clearly relevant to fanworks. Star Trek is the quintessential mass-media fandom.⁵⁵⁸ The work in question is not labeled as one intended for a fan audience, being marketed instead as a marital aide for Trek/Nontrek pairings. Nevertheless, it is certainly intended to be purchased by those who are at least fandom-adjacent, and Trek fans are certainly part of the intended audience for the book.

⁵⁵⁶ *Paramount Pictures Corp* (n 237).

⁵⁵⁷ As was the case with *60 Years Later*, the descriptions of the contents are based on the author's firsthand evaluation of the material contained within the infringing work, not merely upon the description found within the case.

⁵⁵⁸ *See generally, eg, Jenkins* (n 11) 9 – a cornerstone fan studies work that begins with a discussion of Trek fandom.

Paramount filed suit seeking damages for copyright law after the book was published. The court, in analysing the work, found that it was not a fair use of Star Trek material. Instead, the court found that the plot summaries of episodes and descriptions of characters were both substantially similar to, and not a fair use of, the original. On a factual level, this seems difficult to square with the plot summaries in question. For example, the full plot summary for the ST:TOS episode “All Our Yesterdays” reads:

*Spock and McCoy go back five thousand years to a planet’s ice age. Spock begins to revert to the barbaric ways of his ancestors, and he gets lucky with the only woman on the planet. However, McCoy ruins it by making him come back to the present.*⁵⁵⁹

It is difficult to view this as being an infringement of the film. Indeed, in such cases, courts in the United States generally do not conduct analysis on a work-by-work basis, instead aggregating the works of a franchise into, in effect, a single work for such purposes. Doctrinal issues notwithstanding, this approach has been adopted in other cases; this is discussed further in 6.3.3.

The approach in this, and other related cases such as those dealing with works that are more explicitly guides to a show, or those that deal with other ancillary works such as quiz books, is also fanworks relevant.⁵⁶⁰ Here, in addition to the aggregation of works from a franchise into a single work for infringement analysis purposes, the

⁵⁵⁹ Sam Ramer, *The Joy of Trek: How to Enhance Your Relationship with a Star Trek Fan* (Carol Publishing Group 1997) 60.

⁵⁶⁰ Cases dealing with guides to franchises include *Twin Peaks Productions v Publications Intern* 778 F Supp 1247 (Dist Court 1991); *Twin Peaks Productions* (n 442); cases involving quiz books include *Castle Rock Entertainment v Carol Pub Group, Inc* 955 FSupp 260 (SDNY 1997); (n 351).

cases demonstrate that courts, at least in the commercial context, lean toward giving the copyright holder control over ancillary income streams generated from fandoms.

However, the commerciality here, and in particular the presence of works marketed through mainstream channels, may be a key factor. It is certainly one that, whether because of the different approach to fair use in less-commercial environments in the USA or the relative lack of damages from infringement elsewhere, is different enough from fanworks that one cannot view these cases as ironclad precedent in the fanworks context.

6.2.3 Cluster Three: Nontraditional Distribution Channels

The rise of nontraditional distribution methods of distributing works, including streamed video, print-on-demand, and other forms of direct-to-user distribution of creative works has allowed smaller creators direct access to much larger markets. This has, in many cases, been exploited by those who want to market goods directly to fans. In some cases, the marketing is very much on the kind of fan-to-fan model that is seen in, for example, artists' alleys at conventions.⁵⁶¹ In others, the marketing is similar to conventional methods of distribution. This latter category has already sparked litigation, including the *Axanar Studios* case, which involved the production of an unauthorized Star Trek spinoff.⁵⁶²

⁵⁶¹ Chapter 3.2.2.

⁵⁶² This section draws from the author's MA(Law by Research) Dissertation, which was published in part as Michael D Dunford, 'Paramount Pictures v. Axanar Productions: Identifying the Infringed Work When an

In 2014, Star Trek fan Alec Peters boldly decided to go and create a Trek fan film centred around a portion of the fictional universe's timeline where no one had gone before. The film was unremarkable in and of itself; thousands of Star Trek fan films of varying lengths and degrees of success have been made to date.⁵⁶³ What made this production remarkable was the level of professionalism at which it was made, and the method that was used to raise the funding to make it.

One of the developments made possible by the internet is crowdfunding, a method of raising capital for a project by collecting small amounts of money from people interested in the project, often in exchange for rewards such as early access to the completed project, or bonus content. Using crowdfunding platform Kickstarter, Peters first raised \$100,000 USD for a short film, titled *Prelude to Axanar*.⁵⁶⁴ This film was successfully made and released to the public via YouTube, where it remains available today.⁵⁶⁵

Peters went on to raise over \$1 million USD, which he intended to use to make a feature-length follow-on film. Kickstarter backers would receive an early digital release of the film, and a range of other merchandise depending on the level at which they contributed.

Unauthorized Production is Set in an Existing Fictional Universe' (2018) 1 Interactive Entertainment Law Review 73.

⁵⁶³ For one example, the fan-created web series, *Star Trek: Continues*, which was a fan continuation of the TOS, 'Star Trek Continues' (*IMDB*, no date) <<https://www.imdb.com/title/tt2732442/>>.

⁵⁶⁴ 'Star Trek: Prelude to Axanar' (*Kickstarter*, no date) <<https://www.kickstarter.com/projects/194429923/star-trek-prelude-to-axanar>> accessed 14 February 2021.

⁵⁶⁵ 'Prelude to Axanar' (15 August 2014) <https://www.youtube.com/watch?v=1W1_8IV8uhA> accessed 14 February 2021.

Paramount and CBS, the companies which together claim ownership of the Star Trek intellectual property portfolio, took notice of this amount and sued.⁵⁶⁶ The case was litigated through pretrial motions practice, but settled on the eve of trial.⁵⁶⁷ The full details of the settlement are unknown, but included Paramount releasing a new set of “guidelines” for fan films to give producers some guidance as to how far they can go if they wish to “avoid objections” from Paramount.⁵⁶⁸

Prior to settlement, the court rejected *Axanar*’s fair use claim. The court also overruled *Axanar*’s objection that much of the borrowed material was unprotectable. The court, following something at least akin to the aggregation approach mentioned in 6.3.3, found that the protectability of the individual elements was largely irrelevant to the infringement analysis, and that the infringed work was the Star Trek works as a whole rather than any individual work within the franchise.

The *Axanar* case clearly involves something very close to a fanwork. Whether or not it falls within the definition depends on whether this is viewed as being the type of project that is within the scope of the creative industries. Thus far, it has not been. Crowdsourcing as a means of acquiring initial start-up funds for a project, however, is

⁵⁶⁶ Paramount Pictures v. Axanar Productions, “Complaint” Case No. 15-cv-9338, Doc #1 (29 Dec 2015).

⁵⁶⁷ Paramount Pictures v. Axanar Productions, “Stipulation to Dismiss Case Pursuant to Fed. R. Civ. P. 41(a)(1)” Case No. 15-cv-9338, Doc #212 (29 Dec 2015)

⁵⁶⁸ Star Trek, “Fan Films” <<https://www.startrek.com/fan-films>>. It should be noted that these guidelines, which serve only to outline what Paramount will not sue over, are likely to be more restrictive than the actual legal limits on the making of such films. This chilling effect will be discussed at greater length in Chapter 8.1.2.

becoming more common, particularly in areas such as gaming, whether video or traditional.⁵⁶⁹ Given this, the ongoing shift from broadcast and theatrical release to streaming for video projects,⁵⁷⁰ and the large-scale commerciality of the productions that have led to the cases in this cluster, it is probably best to view these cases as adjacent to, but not precisely involving, fanworks.

Nevertheless, this cluster of cases represents the closest examples yet to cases involving genuine fanworks. These cases continue to illustrate the skepticism courts have toward marketed fanworks. They also show a continuation of the theme seen with the guidebooks and quizbooks, with courts leaning in favour of allowing copyright owners broad control over and commercial-appearing secondary uses.

6.2.4 Cluster Four: Nontraditional Distribution and Nontraditional Fandoms

Two recent cases involve both nontraditional distribution of content and nontraditional fandoms. Both cases feature conflicts between YouTube content creators related to the re-use of content. One case involves content creators operating in the pure entertainment arena; the other involves political commentators from opposite ends of the political spectrum.

⁵⁶⁹ For example,

⁵⁷⁰ See, e.g. Amazon's original series "The Lord of the Rings: The Rings of Power," which had an estimated first season budget of \$450 million USD. LaToya Ferguson, Tyler Hersko, & Samantha Bergeson, "The Lord of the Rings: Everything You Need To Know About Amazon's Big Money Adaptation" (*IndieWire*, 25 Aug 2022) <<https://www.indiewire.com/gallery/amazons-lord-of-the-rings-explained-plot-cast/>> accessed 10 December 2022.

In *Hosseinzadeh v Klein*, Matthew Hosseinzadeh, who posted video to YouTube as “Matt Hoss,” filed a copyright infringement suit challenging a reaction video by YouTube content creators Ethan and Hilla Klien, who post as H3H3, that is based on one of his original videos.⁵⁷¹ In this video, the two watch and criticize a Matt Hoss video called “Bold Guy vs Parkour Girl.” The Hoss original is a 5:24 video that is difficult to adequately describe and may be viewed as an exemplar of the “unintentionally funny film.”⁵⁷² The reaction video is approximately 13:47, and uses about 70% of the original.⁵⁷³ The additional time consists of commentary by the Kleins on the original video, which they aptly describe as “CringeTube.”

Hosseinzadeh alleged that the Kleins had infringed his copyright in the video and issued a counter-notification to Hosseinzadeh’s initial DMCA takedown in bad faith. The Kleins subsequently posted a video discussing the suit, which led Hosseinzadeh to add a defamation claim

⁵⁷¹ Although Hossinzedah’s channel remains available as of this writing, it appears that he ceased posting original content prior to the resolution of the lawsuit. ‘Matt Hoss Zone’ (*YouTube*, no date) <<https://www.youtube.com/c/MattHossZone/videos>> accessed 15 July 2021. H3H3 remains active and popular. ‘H3h3Productions’ (*YouTube*, no date) <<https://www.youtube.com/c/h3h3productions/featured>> accessed 15 July 2021.

⁵⁷² The original video is still available online; viewing is recommended only if absolutely necessary. Matthew Hosseinzadeh, ‘Bold Guy vs Parkour Girl’ (*YouTube*, 11 August 2013) <<https://www.youtube.com/watch?v=Dj4XAYhF0ok>> accessed 15 July 2021.

⁵⁷³ h3h3, ‘The Big, the BOLD, the Beautiful (Re-Upload)’ (*YouTube*, 11 August 2013) <<https://www.youtube.com/watch?v=CXUs5FOo-JE>> accessed 15 July 2021.

to the case. All claims were ultimately rejected, with the judge finding that the reaction video was fair use.⁵⁷⁴

A second YouTube case arose around the same time, involving political videos. The original video, “We Thought She Would Win,” was made by YouTuber Akilah Hughes, and featured Hughes’s reaction to Hillary Clinton’s 2016 election loss.⁵⁷⁵ British right-wing YouTuber Carl Benjamin, better known online as “Sargon of Akkad” recut the video, removing most of the content, placing scenes in a new order, and retitling the video “SJW Levels of Awareness.”⁵⁷⁶

Benjamin’s video, unusually for a reaction video, contained no content beyond that provided by Hughes. Instead of interspersing portions of Hughes’s video with his own commentary, which is the norm for the genre, Benjamin simply recut the original. Hughes filed suit; the court ultimately dismissed the case at an early state of proceedings on fair use grounds and somewhat unusually given the circumstances of the case, ordered an award of attorneys’ fees in favour of the defendant.⁵⁷⁷

These two cases provide us with examples of disputes arising that may not involve fanworks in the pure sense of the word – neither allegedly infringing work was created by a true “fan” of the original.

⁵⁷⁴ *Hosseinzadeh v Klein* (n 370).

⁵⁷⁵ The original video is available at Akilah Hughes, ‘We Thought She Would Win’ (no date) <<https://www.youtube.com/watch?v=2IY9iAlNbPE>> accessed 15 July 2021; Hughes channel is available at ‘Akilah Obviously’ (no date) <<https://www.youtube.com/>> accessed 15 July 2021.

⁵⁷⁶ Carl Benjamin, ‘SJW Levels of Awareness’ (11 August 2013) <<https://www.youtube.com/watch?v=vor1wjDSn88>> accessed 15 July 2021.

⁵⁷⁷ The dismissal is reported at *Hughes v Benjamin* (n 3); the fees award at *Hughes v Benjamin*, 2020 Copr L Dec P 31703 (SDNY 5 Aug 2020).

However, these are disputes that occurred within the ecosystem of the YouTube content distribution platform and the YouTube fandom that has arisen surrounding the more popular creators on that platform. Based on the earlier assessment of this platform as comprising a kind of genre-based fandom in which all works are effectively fanworks, these are fanworks disputes.⁵⁷⁸ The courts' willingness to find fair use in these cases stands in contrast to the cases involving more traditional works. Another aspect of these cases also deserves mention, although space considerations prohibit as extensive a discussion as the topic truly deserves: the role of the fandom in driving the litigation.

In both cases discussed above, one or more of the participants in the lawsuit used the case as a subject for additional videos.⁵⁷⁹ These videos, of course, were posted to the same channels as the originals. They were targeted toward the same fanbase as the video originally posted to the channel. And they stirred fan passions.⁵⁸⁰ They may, however, also have contributed to these cases proceeding as far – and as acrimoniously – in the litigation process as they did.

The need to keep fans happy provides one possible reason that these cases may have proceeded beyond the point that was rational given the small amounts of money at stake. If the funds expended on litigation

⁵⁷⁸ This fandom was previously discussed in Chapter 4.3.3.

⁵⁷⁹ See, eg, Carl Benjamin, 'The Akilah Hughes Lawsuit is Over' (20 November 2020) <<https://www.youtube.com/watch?v=aBleiHXXvH0>> accessed 15 July 2021; Akilah Hughes, 'Fair Use Lawsuits, Sargon Ain't H3h3' (29 August 2017) <<https://www.youtube.com/watch?v=Vd16eGCocRE>> accessed 15 July 2021.

⁵⁸⁰ This is immediately apparent upon review of the comment threads associated with any of the videos in question.

are offset through other means, including publicity for the stream and income from videos about the stream, one of the most important litigation-limiting factors is removed. The cost factor can be reduced still further through the crowdfunding of litigation expenses; participants in both of these suits made use of this means of offsetting legal expenses.⁵⁸¹

6.2.5 Atypical and Grey Area Cases

Although an effort has been made to group cases into discrete clusters, reality is messy. There are cases that are difficult to clearly position entirely within the ambit of these clusters. Some of these are worth mention, as they point to difficulties with this taxonomy. Three cases provide particularly good examples of this difficulty: *ComicMix*, *Furie*, and *Abdin*.

Comicmix involved the creation and marketing of a book that mashed-up Dr. Seuss's *Oh the Places You'll Go*, which is an eternally popular graduation gift, with the Star Trek franchise to create a new work targeted at Trek-fan graduates entitled *Oh The Places You'll Boldly Go*. The case has obvious similarities with, and less social commentary than, *The Cat Not in The Hat*, which was discussed earlier.⁵⁸² The case

⁵⁸¹ 'Help Akilah Pay an ~AlLeGeD~ White Supremacist, Organized by Akilah Hughes' ([gofundme.com](https://www.gofundme.com/f/help-akilah-pay-an-alleged-white-supremacist), no date) <<https://www.gofundme.com/f/help-akilah-pay-an-alleged-white-supremacist>> accessed 15 July 2021; 'Help for H3H3, Organized by Philip DeFranco' ([gofundme.com](https://www.gofundme.com/f/h3h3defensefund), no date) <<https://www.gofundme.com/f/h3h3defensefund>> accessed 15 July 2021. The extent to which fan pressure and crowdfunding can contribute to unwise and ill-founded litigation and serve as a basis for spreading legal misconceptions is badly understudied and extends far beyond the intellectual property arena.

⁵⁸² See Chapter 6.2.1.1.

differs from that case, however, in that the entire conception and development of the book in that case was within the normal sphere of commercial publishing, whilst *ComicMix* was not.

ComicMix funded the creation of their book not by attracting the attention of a publishing house, but by going directly to potential customers. They began raising money for the book through a campaign on the crowdfunding website Kickstarter; funders would receive copies of the book shipped directly to them, rather than having to purchase the book through a traditional retailer.⁵⁸³ It should be noted, however, both that there was an explicit plan to also distribute these books conventionally from the start, through a brick-and-mortar retailer, and that a conventional publisher saw the Kickstarter and had reached an agreement with the creators for subsequent distribution.⁵⁸⁴ As such, this case shares similarities with both the nontraditional distribution of *Axanar* and other Cluster 3 cases and with the more traditional Cluster 1 cases.

Furie v Infowars involved a dispute between a comic book artist and a right-wing news outlet.⁵⁸⁵ Matthew Furie created the character “Pepe the Frog,” and subsequently included the character in a range of comic books. The original character was described as a “chill frog dude,” and used “feels good man” as a catch phrase.⁵⁸⁶ The character was subsequently appropriated as a symbol of the “alt-right” political

⁵⁸³ *Dr Seuss Enterprises, Lp v Comixmix Llc* 256 F Supp 3d 1099, 1101–02 (Dist Court 2017).

⁵⁸⁴ *Dr Seuss Enterprises, Lp v Comixmix Llc* 372 F Supp 3d 1101, 1109 (Dist Court 2019).

⁵⁸⁵ *Furie v Infowars, Llc* 401 F Supp 3d 952 (Dist Court 2019).

⁵⁸⁶ *ibid* at 957.

movement in the United States. The appropriation was broad-based and could not effectively be countered by lawsuits. Nevertheless, Furie took action against *Infowars*, which was one of the more prolific hijackers of the character.

Infowars was an attractive target for copyright action. *Infowars* was selling products that incorporated the frog into various works designed to appeal to its audience. This, of course, substantially affects the fair use inquiry, which is the defense most likely to be in play in a case involving use of the character.⁵⁸⁷ Ultimately, the court was unable to resolve the fair use defense in preliminary proceedings, in large part because of the effect of commerciality on the first and fourth fair use factors.⁵⁸⁸ The case settled before trial.

This case is atypical in multiple ways. First, it is somewhat in a grey area as to the extent that it involves normal industry channels and participants. The claimant in the case is a professional comic book artist; the defendant is a media company engaged in the sale of merchandise. This would favour the view that this is a conventional media channels case. At the same time, however, the plaintiff was not a particularly large creator, and the use of the work was one intended to appeal to fans of the reappropriated version of the original. This would favour treating this as more of a fanworks case. Ultimately, it is unclear whether this is best placed in Cluster 1 or Cluster 3.

⁵⁸⁷ In the actual case, *Infowars* also advanced defenses that included abandonment, implied license, and *de minimis* use. These defenses ultimately fared no better than fair use, and will not be discussed further. *ibid* at 965–69.

⁵⁸⁸ *ibid* at 972–76.

The third case, *Abdin v CBS*, is particularly unusual. This case involved a small video game developer's claim that *Star Trek: Discovery* infringed a video game that he was in the process of developing, which was tentatively titled "Tardigrades."⁵⁸⁹ The developer's claim, which was based largely on the use of an organism similar to a tardigrade or "water bear" as a means of facilitating faster-than-light travel and a set of visual similarities in character appearance was, to be blunt, risible. Abdin's work was incomplete and appeared to consist of nothing more than some brief promotional videos; moreover, the timeline of the alleged infringement was, as some commentators noted, entirely unfeasible given the normal television series development timeframe.⁵⁹⁰

In addition to the temporal implausibility of the claims, additional issues were raised by the nature of the alleged infringement. The claims that characters were taken relied almost entirely on visual similarities to the rough sketches of characters that Abdin had posted; Abdin's characters had no real non-visual traits. The use of tardigrade-like organisms as transport facilitation was clearly the taking of an idea rather than an expression, and was easily explainable as stemming from a common source of inspiration. Tardigrades have been in the news in recent years in part because it has been discovered that they can survive in vacuum. It also seemed unlikely that Abdin would be able to show that CBS had access to the works he believed CBS had infringed.

⁵⁸⁹ *Abdin v Cbs Broadcasting, Inc* 405 F Supp 3d 591 (Dist Court 2019); *Abdin v CBS Broadcasting Inc* 971 F 3d 57 (Court of Appeals, 2nd Circuit 2020).

⁵⁹⁰ See, eg, Jonathan Bailey, 'An Open Letter to Anas Abdin' (*Plagiarism Today*, no date) <<https://www.plagiarismtoday.com/2019/10/15/an-open-letter-to-anas-abdin/>> accessed 16 July 2021.

Nevertheless, most likely in the interests of speeding the resolution of the claims, CBS defended (and prevailed) solely on the grounds that, even if they had access, nothing original and protectable had been copied.⁵⁹¹

To the extent that there was any surprise, it was not that CBS prevailed. It was that the case proceeded as far as it did. Despite the implausibility of the case and the expense of litigation, the claim was litigated through three amended complaints prior to its ultimate dismissal. This was followed by the additional expense of an appeal. Given the low probability of success in this case, the effort put into the litigation does not appear to be rational when viewed from an economic⁵⁹² perspective.

The litigation here appears driven less by rational assessment of likely recovery than by anger. The anger involved, moreover, was not merely Abdin's own. Rather, his lawsuit was encouraged by a number of people, including figures active on social media, who were displeased with what they viewed as an overly-solicitous sensitivity to diversity within the making of *Star Trek: Discovery*.⁵⁹³ Several of the websites that have been amongst the most vocal in their support of Abdin's case

⁵⁹¹ By conceding for the sake of their motion all the points that would have required factual findings or evidence, CBS made it possible for the court to rule on the complaint as a matter of law, obviating the need for discovery or trial.

⁵⁹² Or, indeed, any other

⁵⁹³ Allegations that *Discovery* "stole" Abdin's idea are often found within articles that are broadly critical of the show on other grounds. See, eg, Douglas Mann, 'From the Enterprise to the Discovery: The Decline and Fall of Utopian Technology and the Liberal Dream, PopMatters' (*PopMatters*, no date) <<https://www.popmatters.com/utopian-technology-television-sci-fi-2645648184.html>> accessed 19 July 2021.

are widely associated with some of the alt-right movements that have been seen in popular culture fandoms in recent years, such as the so-called ‘comicsgate’ movement.⁵⁹⁴ The support for the case was not limited to providing encouragement; when Abdin showed signs that he might not pursue an appeal, a crowdfunding campaign was set up and successfully raised the funds needed for the appeal.

This is clearly the most atypical of the fanworks cases. Indeed, although it is a copyright dispute, it is arguable that this should not be viewed as a fanworks case. The work in question is not a work that is based on the Star Trek fandom; nor, as the outcome of the case demonstrates, is the converse true. To the extent that Abdin’s Tardigrades work can be viewed as the product of *any* fandom, it is a product of the independent game development community.⁵⁹⁵ Nevertheless, it also seems perverse to exclude this from the ambit of fanworks cases, given the use of the case as a pawn in the ongoing ‘culture wars’ debates over fandom.

Ultimately, this last factor strongly suggests including the case as a fanworks dispute. It illustrates that the ability to leverage copyright disputes to discomfit a party may not be entirely restricted to the large copyright owners who most often have the resources to litigate

⁵⁹⁴ For example, the website Bounding Into Comics is associated with the alt-right Comicsgate movement. ‘Bounding Into Comics - Media Bias/Fact Check’ (no date) <<https://mediabiasfactcheck.com/bounding-into-comics/>> accessed 19 July 2021. This site has vocally promoted Abdin’s cause. See, eg, Drew Taylor, ‘Crazed Star Trek: Discovery Fans Threaten Anas Abdin’s Life’ (*Bounding Into Comics*, 21 October 2019) <<https://boundingintocomics.com/2019/10/21/crazed-star-trek-discovery-fans-threaten-anas-abdins-life/>> accessed 19 July 2021.

⁵⁹⁵ Given the noteworthy lack of actual process in the development of the game, and indeed the lack of an actual game, even this seems debatable.

disputes.⁵⁹⁶ Fans acting collectively may, in some cases, be able to afford litigation even in situations where it is not economically rational. It is to be seen whether this has long-term effects on the present balance of power.

6.2.6 Conclusions in other jurisdictions must largely be reached either from pure statutory analysis or from examining less-analogous cases.

There are far fewer fanworks-relevant cases in other common-law jurisdictions, due to the factors discussed above. There are, simply put, few if any cases of note. As discussed in the previous chapter, however, this is not so much a matter of a lack of disputes as it is the result of a combination of factors that make the extrajudicial resolution of such disputes more likely. This has resulted in a paucity of applicable cases; such cases as inform questions of copyright are distant enough from fanworks that they lend no special insight beyond their general applicability to copyright.

This should not, however, be viewed as an indication that the law of fanworks is more certain in other jurisdictions, or less subject to legal uncertainties. Rather, the uncertainties in these jurisdictions largely rest on the absence of cases interpreting exceptions and limitations to copyright that, although more generally depicted as being bright-line rules in a way fair use is not, are not always completely transparent in their application. Most of these jurisdictions simply have not seen cases

⁵⁹⁶ How effectively a case as weak as the dispute here can discomfit an entity such as CBS is, of course, a different question.

applying them that are close enough to the circumstances of fanworks so as to allow clear conclusions to be drawn.

Perhaps nothing more clearly illustrates the extent to which there is a dearth of case law outside the United States than this: the most fanworks-relevant case in the United Kingdom at present is most likely not a case that was decided by the courts of England & Wales. It is instead *Deckmyn v Vandersteen*, which is, of course, a CJEU case.⁵⁹⁷ This case established the definition for parody that most likely applies to the UK's copyright exception for caricature, parody or pastiche.⁵⁹⁸

Deckmyn involved the political use of material from a popular culture franchise. A modified cartoon was used in support of a right-wing nativist political campaign, in a manner very reminiscent of the *Furie* case discussed above.⁵⁹⁹ As in *Furie*, however, key questions remain resolved – although the questions themselves are different. In *Furie*, the uncertainty was caused by the effect of commerciality; in *Deckmyn*, the uncertainty was caused by the effect of the author's moral rights. In both cases, key uncertainty remains.⁶⁰⁰

As a result of the comparably large number of American cases, we can derive some tentative rules in the United States, particularly with regard to fair use. We do not have the same luxury elsewhere. We can say, as noted in the last chapter, that statutory innovations such as the

⁵⁹⁷ Case C-201/13 *Deckmyn v Vandersteen* [2014].

⁵⁹⁸ CDPA 1988 s30A.

⁵⁹⁹ Chapter 6.2.5.

⁶⁰⁰ As noted in Chapter 5, one parody case was recently decided. However, the court in this case applied *Deckmyn* in rejecting parody; it did not announce a new rule.

Canadian UGC exception or the UK's parody limitation appear likely to provide at least some shelter for fanworks. However, the lack of cases interpreting these relatively new doctrines leave their scope very uncertain.

6.3 Specific Rules: The United States

Elizabeth: Wait! You have to take me to shore. According to the Code of the Order of the Brethren—

Barbosa: First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirate's code to apply and you're not. And thirdly, the code is more what you'd call 'guidelines' than actual rules. Welcome aboard the Black Pearl, Miss Turner.⁶⁰¹

Very few of the cases discussed in the prior section involved actual fanworks. Nevertheless, of the cases available, they are the ones involving the conduct most analogous to the creation of fanworks. This section attempts to use this body of caselaw, supplemented by some additional fanworks-relevant cases, to derive guidelines, if not actual rules, that may be applied in fanworks disputes.

6.3.1 Rule 1: Cases Touching Upon Traditional Fandoms Tend to Involve Conduct Within The Traditional Creative Industries

There have been several copyright cases involve traditional media fandoms, in the sense that they are involve allegedly infringing works that are targeted toward, or market on the back of, mass-media franchises. These cases, even when brought in the context of recent developments in distribution technologies, such as crowdfunding campaigns, have for the most part involved what would generally be

⁶⁰¹ Gore Verbinski, 'Pirates of the Caribbean: The Curse of the Black Pearl' (Disney 2003).

considered commercial conduct. In other words, they involve an end product distributed to the public through conventional commercial channels.

This is particularly apparent in several cases challenging works that are either guide- or quiz-books based on multimedia franchises. One such case, from 1997, involved a quiz book that tested the reader's knowledge of the popular TV series *Seinfeld*.⁶⁰² An additional three fandom-relevant challenges have been brought involving guidebooks for multimedia franchises – one involving the television program *Twin Peaks*, one involving the multimedia franchise *Star Trek*, and one involving the Harry Potter film franchise.⁶⁰³ Each of these four cases involved a challenge to the commercial publication of the book in question. Most of these cases predate the widespread production of UGC, making it difficult to determine whether the challenge was primarily driven by the commerciality or to the use itself.⁶⁰⁴ However, the Harry Potter-related case, *RDR Books*, is more recent and suggests that the commerciality was the driving factor.

In that case, Warner Brothers challenged the release of a book that was to be entitled “The Harry Potter Cyclopedia.” This work, which has subsequently been released post-lawsuit after substantial editing to deal

⁶⁰² *Castle Rock Entertainment v Carol Pub Group, Inc* 955 FSupp 260 (SDNY 1997).

⁶⁰³ *Twin Peaks Productions* (n 442) (Twin Peaks); *Paramount Pictures Corp* (n 237) (Star Trek); *RDR Books* (n 237) (Harry Potter).

⁶⁰⁴ The *Twin Peaks* case from 1993 certainly arose prior to the widespread use of online communications. Internet use reached less than half the US population by the last of these three cases, the 1998 *Star Trek* dispute. Only the 2008 Harry Potter case took place after the development of Web 2.0 and widespread UGC.

with the copyright issues identified by the court, was originally based upon a fan-edited online guide to the Harry Potter universe. Yet this online project, which is broadly similar to the sort of fan-edited guides to various franchises that are found at sites like fandom.com, existed for several years prior to the development of the book at question in the suit, and remains in existence today.

The lack of action against the site was not the result of copyright holder ignorance. Author JK Rowling testified in this case that she was not only aware of the site, but had used it as a resource during the writing of some of the later books in the series.⁶⁰⁵ The status of the site went unchallenged during the court case, which only addressed the copyright status of the book. This strongly suggests that the driving force motivating the suit was the commercial nature of the book project, not the project itself.

This conclusion is reinforced when one considers the “unauthorized sequel” cases. Two appellate rulings examined the publication of unauthorized book sequels – one of JD Salinger’s *Catcher in the Rye* and one of Margaret Mitchell’s *Gone with the Wind*. Each of these two involved the commercial publication of a sequel. Although both sequels are arguably similar to fan fiction in their approach to the originals, the same authors and publishers do not appear to have taken action against creators of fan fiction. The focus is less on the *existence* of unauthorized sequels than on the *commercial publication* of unauthorized sequels.

⁶⁰⁵ *RDR Books* (n 237) 521.

Film treatment cases further reinforce this point. Although many of those cases were not brought by the owners of the intellectual property underlying the traditional fandom, but instead by others who felt that the major copyright owners had stolen from their work, they are nonetheless within the creative industries. That is to say, the conduct that they challenge is the commercial publication of the material as film or television scripts.⁶⁰⁶

There are also several video game mod cases, which were decided relatively early in video game history. These have also involved commercial distribution of content. They have not, however, established the clearest of doctrinal foundations. American courts divided on the question of whether modifications to game hardware create derivative works; no resolution of this seems imminent.⁶⁰⁷ Other changes, including the creation of new levels, have been found to be derivative works of the original, and infringing when commercially distributed.⁶⁰⁸ Academics, meanwhile, have argued that, notwithstanding the nature of new levels, total conversion mods should not be viewed as derivatives.⁶⁰⁹ Ultimately, while the cases provide further support for the rule that cases touching

⁶⁰⁶ One of the best-known examples is *Anderson v Stallone*, which involved an unsolicited script for a *Rocky* sequel; although there was clearly some access to the script on the part of the defendants, the court held that plaintiff had created an unauthorized derivative work not subject to copyright protection, and could bring no copyright claim against the owners of the franchise. *Anderson v Stallone* (CD Cal 25 April 1989).

⁶⁰⁷ Compare *Midway Mfg Co v Artic Intern, Inc* 704 F 2d 1009 (7th Circuit 1982) with *Lewis Galoob Toys, Inc v Nintendo of America, Inc* 964 F 2d 965 (9th Cir 1992). See also Chapter 5.1.

⁶⁰⁸ See, eg *Micro Star v Formgen Inc* (n 170).

⁶⁰⁹ See Rosen, 'Mod, Man, and Law' (n 168); 'Spare the Mod' (n 168).

fanworks and fandoms involve commercial conduct, they do not provide clear guidance as to likely outcomes.

The focus on works that are published in the traditional creative industries is seen across the fanworks-relevant cases. This remains true even though substantial quantities of fan fiction are available online for all of the involved franchises.⁶¹⁰ This, too, suggests attempts to commercially exploit fanwork-like products are the likely driving factor behind litigation. Pure fanworks-relevant cases involving traditional fandoms and non-traditional distribution are extreme outliers, to the extent they exist at all.

In this area, even the rare exceptions where cases can be identified that lie outside the traditional creative industries demonstrate that litigation is focused on commercially relevant areas. *Axanar* involved a fan film that was not slated for a traditional industry-channels release, and not produced using typical industry funding streams.⁶¹¹ Rather, it was produced using crowdfunding, and was to be released primarily digitally, with supporters receiving early access. These channels are difficult to describe as falling within the scope of the creative industries – at least as of now.⁶¹²

However, *Axanar* did not appear to attract attention from CBS/Paramount until quite late in the process. Not only had substantial funds been raised before litigation was commenced, but the short film *Prelude to Axanar* had been completed. It is possible that the existence

⁶¹⁰ See, eg, [repeat AO3 searches before submission of final to ensure correct figures as of date].

⁶¹¹ See Chapter 5.

⁶¹² This was discussed in Chapter 4.3.5.

of the initial crowdfunding, production of the short, and its posting and wide viewing simply escaped the attention of the rights holder. This seems less likely, however, than the initial fan film being quietly tolerated until the production reached a scale that simply could no longer be ignored. Viewed in this light, this suggests that the case does not contradict the trend.

The author is aware of only one case that stands in clear contradiction to this general rule: *Abdin v CBS Broadcasting*.⁶¹³ This recent case involved allegations that CBS had derived material for the series *Star Trek: Discovery* from an unreleased video game. The case is somewhat similar to many of the cases involving unauthorized adaptations, but those cases can be distinguished as well; they involved accusations that a complete work had been infringed. However, as noted previously, this case also has traits that are anomalous for copyright cases; it appears to have been driven in large part by fan discontent for the original franchise, and by fan funding of the litigation.⁶¹⁴

6.3.2 Rule 2: Fair Use Is Unlikely to Be Found In Disputes That Involve Conventional Types Of Work Being Funded And Widely Distributed Through Less Traditional Means.

The development of new means of raising capital and new means of distributing the resulting cultural products has featured in several cases that are fanworks relevant. These cases have, at least to an extent, challenged the definition of commerciality. This raised the question of whether cases involving such nontraditional fund raising and

⁶¹³ *Abdin v Cbs Broadcasting, Inc* (n 589); *Abdin v CBS Broadcasting Inc* (n 589).

⁶¹⁴ This was discussed in 6.2.5.

distribution might be treated differently from cases involving traditional channels. The answer, at least thus far, appears to be no, at least where the new work in question is a conventional type of work such as a film or book. This can be seen in the courts' treatment of two cases: *Axanar* and *ComicMix*. In both cases, conventional type works that were funded and distributed in nonconventional ways were found to infringe.

Axanar was discussed above as an example of nontraditional distribution.⁶¹⁵ The film in this case was intended to be distributed through online streaming, but in a way that was more similar to the Netflix streaming model than YouTube fandom distribution. The project was being run by fans who disclaimed a profit motive for their enterprise. Nevertheless, in finding that the project was not fair use, the court focused extensively on the fans efforts to produce a professional-quality production.⁶¹⁶

Dr Seuss Enterprises v ComicMix LLC is a recent case from the 9th Circuit Court of Appeals.⁶¹⁷ The plaintiff in this case elected to publish a “mash-up” work that blended Dr. Seuss’s famous book “Oh, the Places You’ll Go” with features from the Star Trek franchise to create a new work titled “Oh, the Places You’ll Boldly Go.” The intent of the creators in this case was more explicitly commercial than even the intent of the *Axanar* production team. This factored heavily into the court’s rejection of the fair use defense; the court found that the plaintiffs had

⁶¹⁵ See Chapter 6.2.3.

⁶¹⁶ See *Paramount Pictures Corp* (n 33) 1701.

⁶¹⁷ *ComicMix* (n 138).

set out to produce a product that would piggyback on, and compete with, the original.

These cases, which feature traditional fandoms and wide distribution of products, stand in contrast to the treatment of nontraditional fandoms. In both *Hosseinzadeh* and *Hughes*,⁶¹⁸ the courts were faced with fair use claims involving professional-tier YouTube content creators – individuals who make substantial money, if not an entire living, through their work as content creators.⁶¹⁹ Yet neither case gave substantial attention to the professional nature of the works in question. Instead, the court in both cases focused almost entirely on the question of criticism and commentary, rather than on the commercial effects.⁶²⁰

On the whole, it appears that courts may be providing more copyright-holder friendly treatment in cases involving wide distribution, or intended wide distribution, of the allegedly infringing work where that distribution is similar to that employed within the traditional creative industries. Cases involving popular and economically successful YouTube content creators do not seem to be treated in a manner entirely identical to cases involving the production of books or videos that will be distributed in more conventional ways.⁶²¹

⁶¹⁸ Discussed in Chapter 6.2.4.

⁶¹⁹ Discussed in Chapter 4.3.5.

⁶²⁰ See *Hosseinzadeh v Klein* (n 370) 45–46; *Hughes v Benjamin* (n 3) 390–92.

⁶²¹ Additional support for this can be seen in the treatment of the *Furie* case, discussed in Chapter 6.2.5. There, much of the court’s unwillingness to find fair use as a matter of law relied on the sale of merchandise.

6.3.3 Rule 3: For the purposes of infringement analysis, complex multi-media franchises will generally be treated as single works.

Several fanwork-related disputes have involved allegedly infringing works that have drawn from large numbers of works connected with a major multimedia franchise. In theory, these cases should present a difficult question for the courts, because it may be difficult to identify which bits of the allegedly infringing work came from which protected works within the franchise. In reality, courts faced with such disputes appear to have adopted a uniform rule that treats the fictional universes at the centre of the franchises as, for all intents and purposes, the allegedly infringing work.⁶²²

Fanworks, and particularly those that draw from numerous works within a franchise's canon to create something new, pose particular challenges for copyright law. If a Star Trek fan film uses characters drawn from at least four different works taken from within the franchise, but who do not appear together in any one work, what work has allegedly been infringed?⁶²³ It is, of course, possible to argue that each of these sources was individually infringed – and such an argument is not implausible given the low bar required for substantial similarity. The catch come when the inquiry turns from infringement to fair use. Each work might be potentially infringed by a single feature from that work, but the use of a single feature from a work is also a correspondingly

⁶²² The author's prior work discussed copyright protection for fictional universes at greater length. Dunford (n 562). This section of the paper draws from that past discussion, but also elaborates upon it.

⁶²³ This is essentially what happened in the *Axanar* case. For the full allegations regarding infringement, see *First Amended Complaint at *10-*38, Paramount Pictures Corporation v Axanar Productions, Inc* No. 15-cv-09938 (CD Cal).

smaller taking when assessed individually. And, of course, the extent of the taking from a single work should be important to the fair use analysis for three of the four statutory factors.⁶²⁴

Copyright protects individual works against copying. Even composite works, such as compilations and collective works, are single works and protected as such.⁶²⁵ From a purely doctrinal perspective, there is no justification for asserting that a work was infringed by the use of something taken from a different protected work. The borrowing of Garth of Izar from the protected work “Whom Gods Destroy” should have no bearing on whether the *ST:Enterprise* pilot “Broken Bow” was infringed; the taking of the character Soval from “Broken Bow” should have no bearing on whether “Whom Gods Destroy” was fairly used. Each individual taking should stand or fall based on whether it was a fair use of the work from which it was borrowed.

This is the approach doctrine suggests. This is not the approach courts have employed. Instead, the alleged infringement in cases involving composite borrowing from an entertainment franchise is typically treated as if it is an infringement of the aggregate of the works making up the franchise – or, to put it another way, as if it allegedly infringes the fictional universe underlying the franchise. This aggregation approach has its roots in cases involving alleged

⁶²⁴ See 6.2.3.

⁶²⁵ See 17 USC §101.

infringement of television shows, but it has subsequently been applied in other contexts.⁶²⁶

In *Twin Peaks*, the 2nd Circuit found that a book containing synopses of episodes of the television show *Twin Peaks* infringed. The trial court did not separate out alleged acts of infringement on an episode-by-episode basis, either when addressing the question of infringement or when addressing the third fair use factor.⁶²⁷ The question of which unit of assessment was used was left vague, and there is room to argue that the court at least implicitly addressed the question on an individual basis.⁶²⁸

Any ambiguity in this approach was dispelled by the decisions in *Castle Rock Entertainment*. In this case, which involved the publication of a quiz book targeted toward fans of the television show *Seinfeld*, the district court did not explicitly address whether the analysis should be conducted based on single works or cumulatively, but the analysis clearly treated *Seinfeld* as a single work.⁶²⁹ On appeal the 2nd Circuit explicitly endorsed this approach, treating the series as an explicit

⁶²⁶ For an overview of aggregation, see generally Ariel M Fox, ‘Aggregation Analysis in Copyright Infringement Claims: The Fate of Fictional Facts’ (2015) 115 Columbia Law Review 661.

⁶²⁷ *Twin Peaks Productions* (n 442) 1372–73; 1376–77.

⁶²⁸ Although the court did not explicitly address infringement on an individual basis, the court found that each of the eight episodes discussed in the infringing work were individually infringed for the purposes of assessing damages. *ibid* at 1380–81. This approach to damages is at odds with an assessment that treats the series as a singular work. Nevertheless, it was subsequently endorsed by the 2nd Circuit in *Castle Rock Entertainment* (n 351) 138.

⁶²⁹ See generally *Castle Rock Entertainment* (n 560) (Sotomayor, J).

whole. This decision was justified as putting “substance over form” because of the nature of a television series:

*Where the secondary work focuses on an entire continuous television series such as Seinfeld, there is no basis for looking in isolation at the amount copied from each separately copyrighted episode....it would elevate form over substance to conclude that The SAT’s copying of 643 fragments from 84 individually copyrighted Seinfeld episodes is indistinguishable from a case in which a 634-question trivia quiz book poses a few questions from each of 84 unrelated television programs, books, movies, or any combination of creative works that do not constitute a discrete series of works.*⁶³⁰

The coherence of this approach is questionable. Nevertheless, this aggregation principle has been extended in other cases, including some more directly connected with fanworks. In *Paramount Pictures v Carol Publishing*, the court assessed whether a work ostensibly written to help non-*Trek* fans orient to the franchise and relate to the fans in their life infringed copyright. In assessing whether plaintiffs were entitled to preliminary relief, the court simply assessed the book against the “Star Trek Properties.”⁶³¹ No effort was made to determine which properties, or how many, were infringed.⁶³² The same approach was also adopted in the *Axanar* case, with the court ignoring individual works in favour of an assessment of whether the fan film infringed the Star Trek works as a whole.⁶³³

⁶³⁰ *Castle Rock Entertainment* (n 351) 138.

⁶³¹ *Paramount Pictures Corp* (n 237) 333.

⁶³² Admittedly, given the willingness to apportion radically large statutory damages in such cases, this may have been to Defendant’s advantage.

⁶³³ (*IN CHAMBERS*) *Order Re: Motions for Summary Judgment, Paramount Pictures Corporation v Axanar Productions, Inc* No. 15-cv-09938 (CD Cal 3 January 2017).

RDR Books may be arguable as a counterexample, but the extent to which this is valid is unclear. The *RDR* court, particularly in its assessment of the third fair use factor, expressly treated the borrowing from two companion books separately from the bulk of the borrowing from the series.⁶³⁴ This would seem to suggest that the court was not proceeding using the aggregation approach. Nevertheless, earlier in the same opinion the court explicitly stated that it was following the aggregation approach.⁶³⁵ Moreover, the bulk of the assessment appeared to treat the mainline works in the series as a unitary work for the purposes of fair use assessment.

Only one fandom-relevant case seems to stand for the premise that it is necessary to address each copyright separately. In *Klinger v Conan Doyle Estate*, the court held that copyright in the character of Sherlock Holmes would lapse in a piecemeal fashion, with specific features of the character becoming available for public use when the stories in which they were first related entered the public domain.⁶³⁶ This seems to point to a work-by-work assessment (at least in the 7th Circuit) for an allegedly infringed composite of works – here, a character rather than a franchise or universe, but the basic premise remains the same.

However, there are special circumstances in *Klinger* that complicate the assessment. The works that comprise the Holmes canon are in the process of entering the public domain, and the ruling in the case may be more appropriately viewed as splitting the character into a public domain version and a protected version, and roughly delineating

⁶³⁴ *RDR Books* (n 237) 546–49.

⁶³⁵ *ibid* at 535 n14.

⁶³⁶ *Klinger v Conan Doyle Estate, Ltd* 755 F3d 496, 503–04 (7th Cir 2014).

what character aspects fell into which part, than as one that strictly approaches the question on a work-by-work basis. In effect, the determination may have been driven by the court's desire to ensure that fictional characters will eventually enter the public domain.

The general rule is that franchises will be treated as a single work for the purposes of infringement and fair use purposes, although not necessarily for damages. This is true regardless of the nature of the allegedly infringing work. It applies both to the cases of clearly complementary works such as quiz books and reference materials as well as to cases such as *Axanar* that involve new creative works. This rule, it should be noted, will not favor most traditional fanworks, which tend to draw material from across the corpus of a franchise.

6.3.4 Rule 4: In fanworks-relevant cases, fair use is unlikely to be found absent a finding of commentary on the original.

Two major US cases involve unauthorized sequels to major works of literature. The first involves a secondary work entitled *The Wind Done Gone*;⁶³⁷ the second a work entitled *60 Years Later: Coming Through the Rye*.⁶³⁸ As the titles suggest, the source work for the first is *Gone With the Wind*;⁶³⁹ for the second, *Catcher in the Rye*.⁶⁴⁰ Each was the subject of a lawsuit by representatives of the original author, and the results in

⁶³⁷ Alice Randall, *The Wind Done Gone* (Mariner Books 2002).

⁶³⁸ California (n 551).

⁶³⁹ Margaret Mitchell, *Gone with the Wind*. (2017).

⁶⁴⁰ Jerome D Salinger, *The Catcher in the Rye* (Little, Brown and Company 2014).

the two cases differed because there was a finding of commentary in the first and a finding of a lack of commentary in the second.⁶⁴¹

Salinger v Colting, the case involving *60 Years Later*, has already been discussed at length.⁶⁴² As noted, the argument that the new work did not comment on the old seems to have been driven in that case in part by the marketing of the book as a sequel. The court did not substantively engage with the text of *60 Years Later*, and seemed to be of the view that commenting on something in a way that comports with the original treatment isn't truly comment.⁶⁴³ Even the most obvious critical commentary that was present in the original was largely glossed over by the court.⁶⁴⁴ Based in large part on the finding that there was at best limited comment on the original, the fair use defence in the case was rejected.

The Wind Done Gone is a part retelling of, and part sequel to, *Gone with the Wind*, depicting events from the perspective of the slaves in the original novel.⁶⁴⁵ This depiction was, as is to be expected, anything but complementary to the source work. It also incorporated plot elements, including miscegenation and homosexuality, not present in *GWTW*. The inclusion of such features, moreover, ran counter to the original author's

⁶⁴¹ The question of *why* only one of these two works was found to comment on the original is dealt with, in part, in Chapter 6.2.2.1.

⁶⁴² See Chapter 6.2.2.1.

⁶⁴³ See *Salinger* (n 377) 258–60.

⁶⁴⁴ Compare California (n 551) 222–35 with *Salinger* (n 377) 262–63.

⁶⁴⁵ There was some reworking of names in the new work, with Prissy becoming Miss Priss, Tara becoming Tata, etc. However, there was no attempt to claim that the original work was not *Gone With the Wind*. *Suntrust Bank v Houghton Mifflin Co* (n 17) 1267.

wishes (and those of her estate). They were, in fact, features expressly banned from being present in authorized, licensed derivative works that make use of GWTW.⁶⁴⁶

The court found that *The Wind Done Gone* was a fair use of GWTW, in large part because the new work so obviously commented on the original. Commentary, the court noted, is often critical of the original work. Such commentary, even where it harms the market for the original, will typically be fair use – to the extent that there is harm to the rights holder’s interests, it is not the sort of harm that copyright is designed to prevent.⁶⁴⁷

The finding of fair use in *Suntrust* was driven by the finding that there was comment on the original. Such findings are uncommon, and *Colting* does not stand as a rare example of a case where a commentary argument was made and rejected. There are many other fanworks-relevant cases where a lack of commentary on the original has driven, at least to an extent, a finding that an allegedly infringing work does not make fair use of the original.⁶⁴⁸ This de facto commentary requirement is more difficult to understand when one considers the wealth of cases in which fair use has been found even in the face of a finding that there was no commentary on the original work, and even where the new work has been within the same broad medium of art as the original. This rule of

⁶⁴⁶ See *ibid* at 1282 (Marcus, CJ, concurring).

⁶⁴⁷ In common law jurisdictions, anyway. The issue is, of course, more complex in jurisdictions with strong moral rights regimes.

⁶⁴⁸ See, eg, *Castle Rock Entertainment* (n 560); *Paramount Pictures Corp* (n 237); *Twin Peaks Productions v Publications Intern* (n 560); *DC Comics* (n 33); *ComicMix* (n 138); *Dr Seuss Enterprises, LP v Penguin Books* (n 420).

law is, at present, commonly associated with appropriation art cases, and most notably with *Cariou v Prince*.⁶⁴⁹

There have been other, non-appropriation art, cases involving works of a kind that one might associate with fandom, such as guidebooks to entertainment franchises, where fair use has been found absent comment upon the original, and even in the context of use of whole works. For example, in *Bill Graham Archives v Dorling Kindersley*, the alleged infringement involved the use of reduced-size versions of concert posters, which were used in a book that provided an illustrated history of the noted rock band Grateful Dead. There, the court found that the new use, although it did not change the posters in any manner other than size, was a transformative fair use because it displayed them to commemorate historic events as part of a biography of the band.⁶⁵⁰ Although the finding in *Bill Graham Archives* case appears to be in tension with the same appellate court's findings in the guidebook cases, the court has not ever elaborated upon the apparent disconnect.

The importance of commentary can also be seen in *TCA Television v McCollum*. Although not a fanworks case, this case involved the reuse of material (here, the famous Abbott and Costello "Who's on First" routine) in a new work. The district court in that case found that there was fair use, despite a lack of comment on the original.⁶⁵¹ Although the 2nd Circuit upheld a finding of non-infringement on alternative grounds,

⁶⁴⁹ *Cariou* (n 405).

⁶⁵⁰ *Bill Graham Archives v Dorling Kindersley Ltd* 448 F3d 605, 608–11 (2d Cir 2006).

⁶⁵¹ *TCA Television Corp v McCollum* 151 F Supp 3d 419 (Dist Court 2015).

they overruled the fair use finding, in part because of the lack of comment.⁶⁵²

The importance of a finding of commentary can also be seen in the cases involving nontraditional fanworks. In both the cases involving YouTube fanworks, fair use defences succeeded on the grounds that the new works commented on the originals.⁶⁵³ In *Furie*, by contrast, a fair use defence went unresolved at the summary judgment stage. There, although there were claims that the new work commented on politics, there was no claim or finding that there was comment on the original.

On the whole, and notwithstanding the approach to fair use in non-fanworks cases, the general rule is that a finding of comment on the original is generally required for a finding of fair use.

6.3.5 Rule 4a: It can be difficult to determine ex ante what will be found to comment on the original.

The unauthorized sequel cases show that although a *finding* of comment upon the original is a likely a prerequisite for a finding of fair use in fanworks-relevant cases, it is unclear what *constitutes* a commentary on the original work. The difficulty in anticipating whether something will be considered commentary, and, if so, what it will be viewed as commenting upon, is hardly restricted to fanworks.⁶⁵⁴ Nevertheless, they are particularly apparent in the fanworks context, and especially where the These issues were touched upon briefly earlier,

⁶⁵² *TCA Television Corp v McCollum* 839 F 3d 168 (Court of Appeals, 2nd Circuit 2016).

⁶⁵³ See *Hosseinzadeh v Klein* (n 370); *Hughes v Benjamin* (n 3).

⁶⁵⁴ This is apparent from the appropriation art cases. See Chapter 5.2.2.4.

No case makes this point as clearly as *Salinger v Colting*.⁶⁵⁵ Aging the central character of *Catcher in the Rye* by sixty years without changing the character’s fundamental traits, leaving what the court referred to as the character’s “disconnectedness, absurdity, and ridiculousness” intact did not – despite showing how different the same traits look in a more adult character – constitute a comment upon *Catcher*.⁶⁵⁶ Instead, it merely “satisf[ied] Holden's fans' passion for Holden Caulfield's disconnectedness, absurdity, and ridiculousness.”⁶⁵⁷

Nor did this work’s incorporation of JD Salinger as a character in the sequel – a character who tries and fails to kill his own creation – result in a finding of comment upon the original.⁶⁵⁸ This was viewed, instead, as at most a commentary upon the author that had, at most, limited transformative value for the purposes of fair use.⁶⁵⁹ The district court did not explain how one could comment *only* upon the author yet not upon the work when examining the interaction between the author and the author’s creation. Nevertheless, the district court’s view was endorsed by the court of appeal.⁶⁶⁰

Additional evidence for the difficulty in determining *ex ante* whether a particular use will be viewed as commenting on the original can be found when one looks at the substantial number of cases where the trial and appellate courts reach differing conclusions on whether a

⁶⁵⁵ Which was discussed in more detail in Chapter 6.2.2.1.

⁶⁵⁶ *Salinger* (n 377) 260.

⁶⁵⁷ *ibid*.

⁶⁵⁸ *California* (n 551) 222–35.

⁶⁵⁹ *Salinger* (n 377) 262.

⁶⁶⁰ *Salinger v Colting* (n 17) 83.

particular work comments on the original. Although there are certainly some cases, including *Salinger v Colting*, where the trial and appellate courts are in agreement, there are many others in which they do not agree.⁶⁶¹ Ultimately, while it is likely that a finding of parody will be important in fanworks cases, the requisite conditions for such a finding are, at best, murky.

6.3.6 Rule 5: Fanworks creators find themselves at the mercy of not merely the court's legal judgment, but also the court's artistic judgment.

Justice Oliver Wendell Holmes Jr famously warned courts to avoid making determinations of artistic merit:

*It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.*⁶⁶²

⁶⁶¹ Although not, strictly speaking, a fandom-relevant case or one in which comment on the original was clearly the key issue prior to the final ruling, *Campbell* (n 381) is instructive. Prior to the United States Supreme Court's decision in this case, the other two courts to examine the works at issue in the dispute had reached opposite conclusions as to whether a fair use defense had been successfully made out. Compare *Acuff-Rose Music, Inc v Campbell* 754 FSupp 1150 (MD Tenn 1991) (district court finding fair use); with 972 F2d 1429 (6th Cir 1992) (Court of Appeal finding same use unfair). This is hardly the only such case.

⁶⁶² *Bleistein v Donaldson Lithographing Co* (n 412) 251–52.

This admonition has been disregarded, in the context of fair use – to whatever extent it was ever followed to begin with.⁶⁶³ Judge Pierre Leval made this abundantly clear in his influential article advocating for a new fair use standard:

*Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work.*⁶⁶⁴

Leval attempted to rectify matters by emphasizing the importance of ‘transformative use,’ and the Supreme Court explicitly endorsed this approach in *Campbell*. Nevertheless, the position of those who make use of originals has not noticeably improved in the subsequent years. The frontiers of the uncertainty may have shifted. It is perhaps true that, as Judge Leval subsequently argued, the prior focus on questions such as the commercial status of the work or whether the work was previously published or unpublished has been superseded by a focus on whether the new work transforms or merely replaces the original.⁶⁶⁵ Even if this is so, however, we seem to have merely substituted one set of uncertainties for another.

⁶⁶³ There were warnings that the transformative test in fair use might lead to artistic judgment issues. See, eg, Tushnet, ‘Legal fictions’ (n 2) 666.

⁶⁶⁴ Leval (n 401) 1132.

⁶⁶⁵ Pierre N Leval, ‘Nimmer Lecture: Fair Use Rescued’ (1997) 44 *UCLA Law Review* 1449, 1464–66. *But see, eg, Disney Enterprises, Inc v VidAngel, Inc* 869 F3d 848, 861 (9th Cir 2017) (continuing to apply presumption of unfairness to commercial works). *But also see, eg, Oracle America, Inc v Google LLC* 886 F3d 1179, 1207–08 (Fed Cir 2018) (declining to apply 9th Circuit’s presumption of harm given ‘clear Supreme Court precedent’ holding that the presumption is incorrect).

The new uncertainties, moreover, tend to be in areas that are more subject to the foibles of the individual judge’s creative sensibilities. The question of whether a particular work is published or unpublished is, absent the occasional edge case, generally not difficult to resolve. The commercial or non-commercial nature of a work can be challenging to resolve, but the criteria do not depend upon the creativity injected into the new work.⁶⁶⁶ Transformation, and particularly the question of whether a work has imposed a new meaning or message upon the original, is inherently subjective in ways that force the court to make artistic determinations. In addition, there are very few objective standards for determining whether a “new message” has been incorporated into a work – particularly when courts can and do make such determinations irrespective of the artist’s own declaration.⁶⁶⁷

This is often done, in ways that place the judges as the decision makers on the issue, relying upon their own judgment without the need to refer to expert testimony. The matter is seen as one of law, not fact, and therefore within the judge’s competence – a far cry indeed from the approach advocated in *Bleistein*. And whilst it may be relatively clear that – for example – the near-exact copies of pages of a Dr Seuss book used in a claimed parody are simply an attempt to profit from the work done by Seuss rather than an attempt to make serious comment upon Seuss, it seems strange to declare that this use is, as a matter of law, not transformative.⁶⁶⁸

⁶⁶⁶ See Chapter 5.2.2.4.

⁶⁶⁷ See, eg, *Paramount Pictures Corp* (n 237); *Salinger* (n 377).

⁶⁶⁸ At the same time, this approach may actually be better as a pragmatic matter for small creators who are forced to rely upon fair use. As fair use is

Here, again, *Salinger v Colting* provides a paradigmatic example. The alleged commentary in the work consisted largely of the work’s depiction of the lack of change in the Holden character, and in particular on how differently the character traits are perceived when they are placed in an aged version of the character. The court’s rejection of this claim focused on the court’s assessment of Holden’s traits, and on the judge’s view that those traits had been present in the original work and were well-known to the original audience and author.⁶⁶⁹ This is, as has not escaped the attention of other authors, a fundamentally artistic judgment.⁶⁷⁰

Artistic judgment is a core part of any determination that requires an assessment of factors such as whether a work “comments” through its artistic use of another work. Such judgment, although expressly cautioned against by some courts, is now central to the fair use determinations that are critical for fanworks-relevant cases. Fanworks creators will, therefore, find themselves at the mercy of the artistic judgment of the court – particularly given the tendency for cases to be resolved prior to trial which is discussed in the next section.

deemed an affirmative defense it is up to the user to prove the fairness to the court. Findings of fact are, in American law, typically matters for the jury; requiring such cases to go to a full trial before a conclusion could be reached on fair use would be ruinously expensive for even more litigants than is already the case.

⁶⁶⁹ *Salinger* (n 377) 258–60.

⁶⁷⁰ See, eg, Schwabach, *Fan Fiction* (n 27) 55.

6.3.7 Rule 6: Cases, including those that have resulted in published, precedential opinions, are rarely fully litigated.

The process of civil litigation in the United States provides many opportunities for dispositive rulings prior to a full trial. Cases may end through the filing of either of two dispositive motions: motions to dismiss, and motions for summary judgment. In addition, cases may be heard on motions for preliminary relief.⁶⁷¹ In such cases, the ultimate determination in the case is based upon a limited record.

In the case of a motion for summary judgment, the record is generally complete, and the judge has access to all the testimony that would be offered in the case. Although the judge does not act formally as a factfinder, as a pragmatic matter the major difference is simply the lack of a jury.⁶⁷² Here, the technically preliminary nature of the determination may be of relatively little practical consequence. This is not necessarily true for the other points where preliminary determinations are made.

Motions to dismiss test the adequacy of the pleadings in the case.⁶⁷³ Cases which do not adequately set forth the factual basis for infringement are subject to being discarded, without the submission or

⁶⁷¹ The details of the specific procedural vehicles in question, preliminary injunction and temporary restraining orders, are not important for the purposes of this thesis.

⁶⁷² Cases at this stage are decided based on undisputed facts; factual disputes must still, under American constitutional law, be submitted to the jury. See United States Constitution, Amendment 7; Federal Rules of Civil Procedure R. 56

⁶⁷³ Federal Rules of Civil Procedure R. 12(b)

evaluation of evidence.⁶⁷⁴ In some cases, courts have found that it is possible to dismiss copyright cases on this basis because fair use is clear on the facts as pled in the complaint.⁶⁷⁵ However, there have also been cases where a determination against fair use has been made at the same point.⁶⁷⁶ It is more common, however, for a court to find that the defence cannot be proven or disproven at this stage, and order proceedings to continue.⁶⁷⁷

A matter may also come before the court on a motion for a restraining order or preliminary injunction, both of which are forms of interim relief.⁶⁷⁸ In such cases, some evidence is taken, but normally on a condensed timeframe. The parties, and particularly the defendant, who rarely has the benefit of knowing when a suit will be brought, may not have time to assemble a body of evidence comparable to that which would be presented if full discovery was available. Likewise, the judicial decision-making process proceeds without the benefit of that complete

⁶⁷⁴ For the purposes of such a motion, the facts as pled in the complaint are taken as true; the complaint is subject to dismissal if, even if those facts were proven, judgment in favour of the defendant would be required. The facts pled in the complaint must be plausible and adequately state a claim. See generally *Bell Atlantic Corp v Twombly* 550 US 544 (2006); *Ashcroft v Iqbal* 556 US 662 (2008).

⁶⁷⁵ See, eg, *Faulkner Literary Rights, LLC v Sony Pictures Classics* 953 F Supp 2d 701 (Dist Court 2013); *TCA Television Corp v McCollum* (n 651); *Oyewole v Ora* 291 F Supp 3d 422 (Dist Court 2018). (All dismissing copyright claims on Rule 12 motions in whole or in part based on a fair use defense.)

⁶⁷⁶ See, eg, *LaChapelle v Fenty* 812 F Supp 2d 434, 448 (Dist Court 2011).

⁶⁷⁷ See, eg, *May v Sony Music Entertainment* 399 F Supp 3d 169 (Dist Court 2019).

⁶⁷⁸ See, eg, *Disney Enterprises, Inc v VidAngel, Inc* 224 F Supp 3d 957 (Dist Court 2016); *VidAngel* (n 665).

record. An adverse ruling at this stage – particularly if it prevents a commercial defendant from marketing the work pending the full proceedings – can easily result in the effective end of proceedings, by spurring the parties to settle. As is the case on a motion to dismiss, resolutions here take place without the development of comprehensive factual records.

Resolution on limited records also affects those cases that have seen published appellate rulings, because many of the rulings that end a case prior to full adjudication are subject to appeal. Any motion to dismiss or motion for summary judgment that is dispositive of the case may be appealed. So may virtually any ruling, whether favourable or adverse, on a motion for preliminary relief.⁶⁷⁹ Appeals, in the United States, do not allow for the development of new evidence; the court of appeal is restricted to the evidence that was before the trial court.

The prevalence of cases decided at preliminary stages means that the overall body of law that has developed in this area is based in large part on cases where there was not a full opportunity to litigate on the merits. This can, particularly in the fair use context, exacerbate some of the issues already discussed. In particular, the resolution of cases without a full factual record will often mean that issues of artistic merit are not only settled by the judge, but that they are settled by a judge acting without benefit of expert testimony on the issues.⁶⁸⁰

⁶⁷⁹ 28 USC §1292(a)(1).

⁶⁸⁰ The tendency of fanworks-relevant cases to settle after preliminary rulings and without the creation of a full factual record or trial on the merits is likely a product in large part of the costs of litigation discussed in the next chapter.

6.4 Conclusions

The total volume of fanworks-related cases that have resulted in written opinions is quite low. It is, moreover, a body of law that primarily relies upon the application of exceptions and limitations to copyright law such as fair use. As was shown in Chapter 5, this legal foundation is every bit as uncertain as the academic consensus outlined in Chapter 2 maintains. Under these circumstances, it is no surprise that it is not possible to derive a black-letter law of fanworks.

However, as this chapter demonstrated, there are several groups of cases involving allegedly infringing works of increasing similarity to fanworks. These cases, though few in number, are sufficient to permit us to derive, if not a law of fanworks, a handful of rough guidelines. These guidelines, unfortunately, do not provide anything close to clear guidance to fanworks creators who might wish to know if their work is lawful or infringing. At most, they give a bit of definition to the legal uncertainties.

Taken as a unit, Chapters 5 & 6 provide an overview of the black-letter law surrounding fanworks, to the extent that it differs from copyright law as a whole. In much of the common-law world, it either does not differ substantially from common-law, or it differs in way that are, at present, unknowable due to a lack of relevant cases testing the relationship between fanworks and copyright. In the United States, where there is extensive caselaw law that is reasonably adjacent to fanworks, the law applicable to fanworks is defined by its uncertainty. The cases are either different enough from fanworks in potentially decisive factual areas so as to not be readily applicable to fanworks, or simply not consistent enough in result when similar facts have been

assessed, to say that there exists a law of fanworks sufficiently clear to provide *ex ante* guidance to those wishing to avoid disputes.

Put another way, these two chapters make it possible both to say that there has been some development of a body of caselaw relevant to fanworks in at least the United States, to identify the areas where the law is particularly uncertain and to highlight a small number of guidelines that may reduce the uncertainties. They have not, however, demonstrated that there is a clear black-letter law of fanworks. Instead, they have largely confirmed the academic consensus that most fanworks reside in legal grey areas.

Collectively, Chapters 3 & 4 have demonstrated that the standard model of fanworks is incomplete, focusing on an important subset of fanworks, but one that is a subset, nonetheless. In so doing, it does not fully accommodate smaller and nontraditional fandoms, and it struggles with the commercial features of fanworks. Chapters 5 & 6 have shown that the black letter law surrounding fanworks is defined by its uncertainties and provides limited *ex ante* guidance to fans. The next chapter addresses the consequences of these uncertainties.

7 THE EFFECTS OF UNCERTAINTY – AND THE STAKES

The preceding two chapters showed that the academic consensus that fanworks exist within a copyright grey area is well-warranted, and that fanworks creators often have little ability to know *ex ante* if their works infringe. Yet, as noted, few court cases involve fanworks. And while some removal of fanworks through mechanisms such as a DMCA takedown has been documented, countless numbers of fanworks remain available without rightsholder challenge.

This raises obvious questions. The status quo is one in which fanworks are only rarely interfered with. If this has been the status quo for at least the last quarter-century, is legal change really necessary? Or should we view the status quo as not broken enough to require immediate fixing? This chapter argues that we should not.

It might seem possible to dispose of the idea that the status quo is functional by pointing out that even if the present landscape is currently workable, there's no guarantee this will last. The current situation is the product of a lack of enforcement attempts. There is no guarantee that this congenial state of affairs will persist in the future. We can, if anything, expect that if rights holders believe that it is in their interest to begin to attempt enforcement, they will do so.

These arguments presume that the lack of litigation indicates a lack of contention. This presumption, however, ignores the litigation cost-driven chilling effect of nonjudicial means of copyright enforcement such as cease and desist letters and DMCA takedowns. Even if these presumptions were accurate, however, they fail as arguments for continuing to leave matters as they currently stand because they presume that the present state of affairs is acceptable.

It is not.

The present situation produces many harms. Some of these harms are individual. Others are broader, more societal in nature. These harms radiate beyond fanworks, into other areas of individual creative production. They are harms that are likely to increase if new revisions to copyright law are made in a business-as-it-has-always-been manner.

The first section of the chapter discusses the individual effects of uncertainty. It begins by providing examples of situations where fanworks have been suppressed by rights holders, often based on legally dubious arguments. Although there is at most limited direct information available to explain why suppression seems so easy in these cases, it is reasonable to infer that costs play a considerable role. The second section discusses the cumulative effects this has on not only pure creativity but also other forms of speech. Political speech is chilled. The development of new genres is restricted. Indigenous IP spaces are more readily occupied in ways that can restrict the right of members of the host culture to continue to make unrestricted use of their cultural heritage. The public domain, as a result of all these factors, continues to erode. These societal effects are substantial and damaging.

These issues are, as argued in the third section, not restricted to conventional fanworks. They spill over into not merely the newer and less traditional fanworks, but also to other areas of user-generated content. The meme space, which resides in a blurry boundary between fanworks and UGC, is one such example. However, the effects can also be seen in many other areas.

7.1 The Individual Effects of Uncertainty

Legal uncertainty leads to the suppression of secondary creative works that may be noninfringing. As a result, people who potentially have a right to create – and to publicize such works – may see their creations removed from public view as a result of a takedown notice or cease and desist letter. The recipient of such litigation threats faces a stark choice: proceed with litigation and face the possibility of ruinous expense regardless of outcome, or accede to the threat and remove the work from view.⁶⁸¹

It is not unusual for any litigation threat to have an *in terrorem* effect, to be sure. That is part of the intent; to induce someone to stop by threatening them with legal consequences if they do not. But that effect is magnified when the legal fundamentals are uncertain, as is the case with noncommercial uses. When the application of the law is more certain and predictions are possible, the recipient of a threat can know if the threat is likely to succeed; when the recipient must guess, it is difficult to know if it is safe for a work to remain public.

7.1.1 The Cost-Related Chilling Effects of Uncertainty Can Be Seen in Cases Where Litigation Has Proceeded

Two recent cases illustrate the financial costs of attempting to vindicate rights in the face of ill-founded copyright claims. One involves the allegedly unauthorized use of a viral meme. The other involves an attempt by one author to suppress the works of another within the same literary subgenre. In both cases, the defendant was in the right legally,

⁶⁸¹ A number of authors have discussed aspects of these issues. *See, eg*, Christopher Buccafusco and David Fagundes, ‘The Moral Psychology of Copyright Infringement’ (2016) 100 *Minnesota Law Review* 2433, 2453–56.

but the financial strain of the litigation still led to substantial hardship for the involved authors.

In *Bradley v Analytical Grammar*, the creator of a viral photo sued a small business that copied the meme on a Facebook page.⁶⁸² The infringement claim Bradley raised was weak on so many levels.

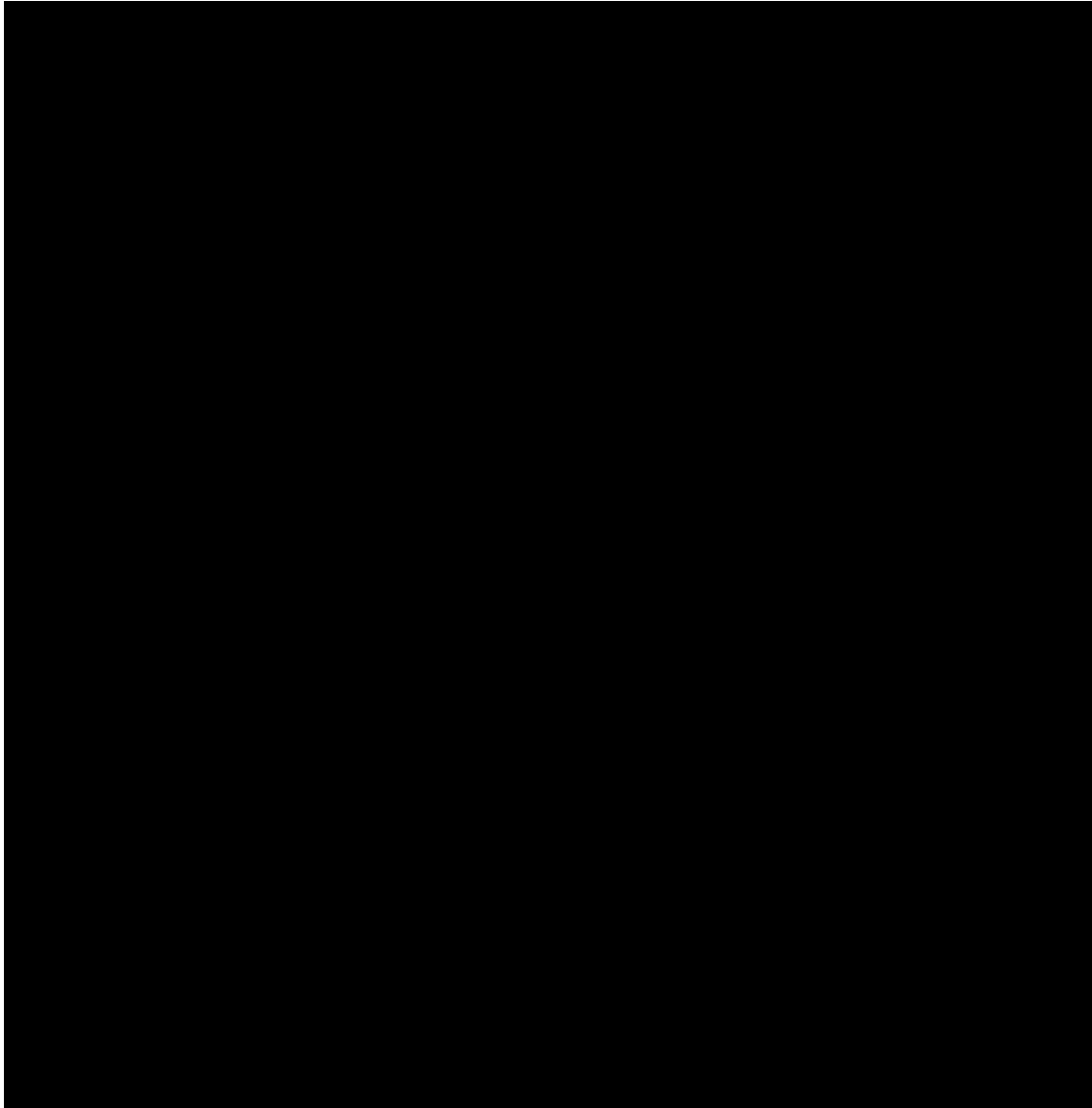


Figure 7.1: Meme at issue in Bradley v Analytical Grammar. Source in fn 682

⁶⁸² *Complaint, Bradley v Analytical Grammar* No. 19-cv-00249 (EDNC).

The photo was posted on Facebook on December 8, 2017.⁶⁸³ The wordplay in the photo is amusing (if a bit obvious), and the photo rapidly became a viral meme, to the plaintiff's publicly expressed delight. The photo was shared more than 10,000 times within a week, and rapidly became available on other websites.⁶⁸⁴ Many of the people who commented on the original post stated that they were going to "steal" the meme; Bradley at least once responded to such a remark with, 'go ahead.' Erin Karl, the owner of Analytical Grammar, a small company producing and selling educational materials, posted a copy of the meme on the company's Facebook page on December 17, 2017, about a week after the initial posting of the meme.

This situation remained unchanged for over a year before Bradley attempted to capitalize on the photo's success. He changed the Facebook post to reflect that the image was copyright-protected, made demands of \$50 for payment from several websites, and engaged the services of controversial copyright attorney Richard Liebowitz on a contingency basis.⁶⁸⁵ Liebowitz's firm found and immediately sued Analytical in June 2019.

⁶⁸³ All the facts in this account are drawn from the Defendant's motion for summary judgment in the case. *Memorandum in Support regarding MOTION for Summary Judgment, Bradley v Analytical Grammar* No. 19-cv-00249 (EDNC).

⁶⁸⁴ The meme in question remains very widely available today. See, eg, 'Imgflip' (*Imgflip*, no date) <<https://i.imgflip.com/4iqg3y.jpg>> accessed 16 June 2021; dakdow, 'R/Memes - Wrong on so Many Levels' (*reddit*, 27 July 2019) <https://www.reddit.com/r/memes/comments/cisvgf/wrong_on_so_many_levels/> accessed 16 June 2021.

⁶⁸⁵ The full saga of attorney Liebowitz is beyond the scope of this thesis. Relevant here include: he has been described by judges as a "copyright

This case is unusual in two regards. First, the lawsuit, which sought to recover a minimum of \$2,500 in damages, was filed without an attempt to first contact the defendant and settle the matter.⁶⁸⁶ Second, the defendant elected to aggressively defend the case and refused to settle with the plaintiff. The case was resolved in favor of the defendant, but only after more than a year of acrimonious litigation.⁶⁸⁷ The court found that the language of the Facebook terms and conditions that were in effect at the time that the photo was originally posted conveyed a license, and that the defendant's use of the meme was noninfringing.

As of 2021, Erin Karl, the original owner of the company, has incurred legal fees in excess of \$177,000.⁶⁸⁸ A fraction of this total has been covered through a crowdfunding campaign; Ms Karl continues to make payments to cover the balance.⁶⁸⁹ She no longer owns the company, which was sold as a consequence of the litigation.⁶⁹⁰ Although Ms Karl was awarded attorney's fees, in part because the case was pursued in a vexatious manner, the total awarded was reduced by the judge to half

troll," has been repeatedly penalized for professional failings, and is no longer practicing law. See, eg, *Mondragon v Nosrak LLC* 500 FSupp3d 1175 (D Colo 2020); *Matter of Liebowitz* 503 FSupp3d 116 (SDNY 2020).

⁶⁸⁶ The damages demand here is greatly in excess of the \$50 that Bradley unsuccessfully demanded from other websites.

⁶⁸⁷ *ORDER granting Motion for Summary Judgment, Bradley v Analytical Grammar* No. 19-cv-00249 (EDNC).

⁶⁸⁸ *Bradley v Analytical Grammar, Inc*, 5:19-CV-249-FL, 2022 WL 2678887, at *2 (EDNC July 11, 2022).

⁶⁸⁹ Erin Karl, 'Vet-Owned Small Biz SUED for Sharing a Viral Meme', (*gofundme.com*, no date) <<https://www.gofundme.com/f/vetowned-small-biz-sued-for-sharing-a-viral-meme>> accessed 16 June 2021.

⁶⁹⁰ See Leonard French, 'Liebowitz Victim WINS, Speaks Out (Bradley v. Analytical Grammar)' (12 March 2021) <<https://www.youtube.com/watch?v=9sSYJ-HL7ds>> accessed 16 June 2021.

the charges incurred, in part because in the judge's view the claims were too frivolous to have truly warranted so vigorous a defence.⁶⁹¹ Ultimately, Ms Karl may never recoup her full costs, and in any event she has lost the business as a result of the case. These were the consequences of the *successful* defense of a nearly meritless copyright case.

It is true that this case was marked by some unusual features, Ms Karl's determination to stand up to the bullying of a copyright troll not least among them. The filing of the lawsuit as a means of leveraging a settlement prior to making any demand for payment is also, although not entirely unknown, not the norm. And, of course, the additional chaos caused by the plaintiff's attorney's quixotic litigation strategies may have contributed to the costs of pursuing this case.⁶⁹² As we will see, however, the costs of the case do not appear likely to be abnormal.

The second litigated case that illustrates the costs of proceeding through copyright litigation is the *Omegaverse* case involving the dispute between two authors within the subgenre.⁶⁹³ This case arose when one author, Addison Cain, encouraged her publisher to send DMCA takedown notices to ebooks outlets that carrying the work of a second author, Zoey Ellis. Ellis's UK-based publisher, Quill Ink, sued both the Cain's publisher and Cain, seeking a declaration of non-infringement and

⁶⁹¹ *Bradley v Analytical Grammar, Inc*, 5:19-CV-249-FL, 2022 WL 2678887, at *10 (EDNC July 11, 2022).

⁶⁹² See *Mondragon* (n 685).

⁶⁹³ This case and the associated fandom were discussed in section 4.3.5.3.

financial damages.⁶⁹⁴ After the court where the action was initially filed determined that it lacked jurisdiction over Cain, the case was split into two components, with the action against the publisher and the action against Cain proceeding independently in separate courts.⁶⁹⁵

Both components were litigated acrimoniously. There was extensive motions practice, and there were misconduct allegations from both sides. The defendant, Cain, was upset that Zoey Ellis was litigating the case in a manner that was calculated to preserve her anonymity, including by remaining in England beyond the reach of the court and Cain's subpoenas.⁶⁹⁶ The plaintiff, Ellis, sought a declaration that Cain had lied under oath in the declaration that secured the decision that split the case.⁶⁹⁷

The manner of litigation undoubtedly caused extra expense, but cost effects may have determined the outcome of this case. The litigation

⁶⁹⁴ *Quill Ink Books Limited v. Soto* (1:19-cv-00476), District Court, E.D. Virginia, <https://www.courtlistener.com/docket/16399422/quill-ink-books-limited-v-soto/>; *Quill Ink Books Limited v. ABCD Graphics and Design Inc* (5:18-cv-00920) District Court, W.D. Oklahoma <https://www.courtlistener.com/docket/7898839/quill-ink-books-limited-v-abcd-graphics-and-design-inc/>

⁶⁹⁵ See generally, *Quill Ink Books Ltd. v ABCD Graphics & Design, Inc*, 361 F Supp 3d 1153, 1157 (W.D. Okla. 2019)

⁶⁹⁶ *Quill Ink v Soto*, Doc No 44, Memorandum in Support of Defendant's Motion to Compel (26 Mar 2020) <https://storage.courtlistener.com/recap/gov.uscourts.vaed.408387/gov.uscourts.vaed.408387.44.0.pdf>

⁶⁹⁷ *Quill Ink v ABCD Graphics & Design*, Doc No 88, Plaintiff's Motion For Order Commanding Former Defendant Rachelle Soto A/K/A Addison Cain to Show Cause Why She Should Not Be Adjudged in Civil Contempt and Sanctioned for Perjury (6 Sept 2019) https://storage.courtlistener.com/recap/gov.uscourts.okwd.104624/gov.uscourts.okwd.104624.88.0_1_1.pdf

against the publishing company concluded in Ellis’s favour, when the company capitulated.⁶⁹⁸ However, the litigation against Cain personally concluded when Quill Ink went into liquidation in the United Kingdom and ceased prosecuting the claim.⁶⁹⁹ It is, to be sure, not clear that the litigation was the only reason that the company became insolvent, but it is difficult to think that litigation expenses played absolutely no role in the process.

Both cases mentioned involved some unusual factors beyond their mere existence. In both cases, the person accused of infringement actively litigated the case, either by pursuing counterclaims against their accuser, or as the plaintiff in the action. This undoubtedly added to the costs, above and beyond what a mere defense might have cost. At the same time, however, it does not appear that the litigation costs or their effects were out of line with expectations. We do not know the exact costs incurred in the Omegaverse case. We do know, however, that Karl is incurred about \$180,000 in attorneys’ fees. Given available data on litigation costs in this area, these do not appear to be unreasonable.

The 2017 Economic Survey of the American Intellectual Property Law Association reflected that the median cost of initial case management in a copyright action with less than \$1,000,000 at stake was \$15,000; the median cost of proceeding through summary judgment

⁶⁹⁸ *Quill Ink v ABCD Graphics & Design*, Doc No 89, Defendant’s Offer of Judgment (9 Sept 2019) <https://storage.courtlistener.com/recap/gov.uscourts.okwd.104624/gov.uscourts.okwd.104624.90.0.pdf>

⁶⁹⁹ *Quill Ink v Soto*, Doc No 95, Order (1 July 2020) Case No. 1:19-cv-00476-LO-MSN <https://storage.courtlistener.com/recap/gov.uscourts.vaed.408387/gov.uscourts.vaed.408387.95.0.pdf>

(the point at which the Analytical Grammar case was resolved) was indicated to be \$100,000.⁷⁰⁰ These costs are, moreover, asymmetrical. The plaintiff in the Analytical Grammar case retained an attorney on a contingent fee basis, incurring no out of pocket costs through the point when the case was resolved.⁷⁰¹ Even where the plaintiff incurs expenses, it is generally substantially more expensive to defend a copyright case than it is to pursue one as the plaintiff.⁷⁰²

The litigation costs incurred in the Analytical Grammar case suggest, particularly in light of the reported cost survey suggesting that these costs are not abnormally high, that few defendants will elect to litigate if they have little economic stake in the case. As we will see in the next section, even just the small number of examples we know of where works have been removed suggest that the *in terrorem* effect of costs can often successfully chill creative works.

It must, of course, be noted that this effect might at first glance appear to be greater in the United States than the United Kingdom. Unlike much of the world, the American Rule creates an assumption that, absent a statutory or judicially created exception, each side in litigation will bear its own litigation costs. The Copyright Act in the United States provides such a provision, allowing for an award of fees in favour of the prevailing party.⁷⁰³ However, an award of fees is not

⁷⁰⁰ American Intellectual Property Law Association, *Report of the Economic Survey 2017* (2018) I–183.

⁷⁰¹ The plaintiff subsequently began to incur costs following the court's disqualification of Liebowitz from the case.

⁷⁰² American Intellectual Property Law Association (n 700) I–196.

⁷⁰³ 17 USC §505

mandatory, but is instead committed to the “equitable discretion” of the trial court.⁷⁰⁴

The “British Rule” is different; there is a strong presumption that the prevailing party will be awarded fees. This likely acts to reduce the chance that lawsuits such as *Bradley* will be filed in the first place, and acts to reduce the risk that lawsuits that are unlikely to be meritorious will be filed in the first place. To this extent, the effect is reduced. This does not, however, mean that costs are not still an effect.

For example, an order touching on the costs of litigation was issued in the *Shazam Productions* case discussed in Chapter 5.⁷⁰⁵ The defendants in this case were engaged in running dinner theatre themed on plaintiff’s television programmes; this is a fanworks-related case.⁷⁰⁶ There are significant unresolved legal questions at issue in this case. These include the extent to which the claimant might have a copyright in the characters and world created for the series, suggesting that a colourable defence was available.

However, the defendants are small businesses and individuals who do not have substantial means; one who was previously represented by solicitors is now appearing in person. This is impairing their ability to litigate the case. It has already been established that these defendants lack the resources to defend the case in the High Court. The defendants were successful in petitioning to have the matter heard in the

⁷⁰⁴ *Fogerty v Fantasy, Inc* 510 US 517, 534 (1993).

⁷⁰⁵ All facts in this paragraph are drawn from Master Teverson’s judgment in *Shazam Productions Ltd v Only Fools the Dining Experience Ltd & Ors* EWHC 2799 (High Court, Chancery Division 2020).

⁷⁰⁶ See Chapter 5.3.3.

Intellectual Property Enterprise Court. However, as a result they are now under an obligation to “tailor their case so as to ensure that all the issue in the case can be tried in at most 3 days.”⁷⁰⁷ The defendants applied to recover the costs incurred as a result of their effort to have the case retained in the court where they could afford to defend at all; they recovered only 50% of what the Master viewed as the fair costs of that application.⁷⁰⁸

As was the case with the American examples, the costs of litigation in this case are driven at least in part by the uncertainties in the underlying black-letter law.⁷⁰⁹ These costs are such that even in a case like this where the defendants have business interests that face an existential threat from the litigation, they are limited in their ability to defend. The cost-shifting in the United Kingdom is – even if the possibility that the defendants might eventually have to absorb the claimant’s costs is ignored – insufficient to fully compensate the defendants. The *in terrorem* effects of threatened litigation may perhaps be mitigated to an extent by the availability of cost shifting. They have clearly not been entirely removed.

Ultimately, regardless of where the defendant is located, in instances where a threat of litigation is issued, the risk-calculation must still be made. Is even the risk of unlikely litigation worth keeping a work

⁷⁰⁷ *Shazam Productions Ltd v Only Fools the Dining Experience Ltd & Ors* (n 705) para 34.

⁷⁰⁸ *Shazam Productions v Only Fools the Dining Experience & Ors (Costs)* EWHC 3363 (High Court, Chancery Division 2020). Interestingly, the 50% figure is similar to that awarded in *Bradley*, as noted above.

⁷⁰⁹ Here, the applicability of fair dealing and the question of protection for characters. See Chapter 5.3.

available that brings in no income? As we have just seen, these costs can have, and have had, ruinous effects on even successful defendants. It will, even where it is likely that much of the cost of litigation may eventually be offset, still be necessary to decide how much emotional and financial cost can be borne when only the intangible “principle of the thing” is at stake.

7.1.2 The Litigation Cost-Related Chilling Effects of Uncertainty Can Be Inferred from Cases That Have Not Been Litigated

It is easy to see the potential *in terrorem* effects of threatened litigation in the cases discussed above. There, litigation has occurred and there the full costs, or at least their effect, are visible. It is also known that the costs we see in these cases are not atypical for copyright defense. With this in mind, the decisions to not challenge borderline copyright claims do not seem as difficult to understand.

We have seen many such claims that went unchallenged just in the course of this thesis. The situation with the privatization of the Slender Man is one such example. As noted, when this fandom was discussed earlier in the thesis, there can be no doubt that the claim to ownership of the character that underpinned the claims was, at absolute best, weak.⁷¹⁰ Nevertheless, there were many takedown notices and cease and desist letters sent on the basis of Sony’s claim to ownership. Only one of the recipients challenged Sony in court.⁷¹¹ That challenger

⁷¹⁰ See Chapter 4.3.4.2.

⁷¹¹ See *Phame Factory LLC v. Sony Pictures Entertainment Inc* (1:18-cv-00621) (WD Tex) <https://www.courtlistener.com/docket/7524125/phame-factory-llc-v-sony-pictures-entertainment-inc/>

was, like Sony, in the business of making films.⁷¹² Those who did not have investments that were as substantial did not challenge Sony's dubious demands.

The situation with the Marriott hotel carpet provides another similar example.⁷¹³ As noted previously, that situation involved a use which had a strong, although not certain, claim to fair use. No attempt was made, however, to litigate that claim in the face of the carpet manufacturer's claim. Instead, the material was removed from convenient online access. Here, as in most of the claims involving the Slender Man, a dubious takedown demand yielded the desired result without the inconvenience of having to defend the questionable merits of the claim.

The situation with the Firefly Hat provides one of the clearest examples of this effect. This case involved, as noted previously, a hat related to the television series *Firefly* – a short lived science fiction franchise that developed an enthusiastic cult following.⁷¹⁴ The show's fandom remained active well after the cancellation of the series. One fan made and sold hats that were based on one worn by one of the characters in the show.⁷¹⁵

These hats, it should be noted, are a basic item of clothing. The design on the hat, which was pictured in Chapter 3.2.7, is very simple,

⁷¹² The case settled on unknown terms. Granted, the filmmaking here was on a much smaller scale than Sony's; this was not by any stretch of the imagination a battle between equally-matched competitors.

⁷¹³ See Chapter 4.3.4.1.

⁷¹⁴ See Chapter 3.2.7.

⁷¹⁵ See Chapter 3.2.7.

consisting of nothing more than horizontal stripes. Even in the wake of the *Star Athletica* case, which held that some simple clothing surface designs could be protected by copyright if the pattern can be conceptually lifted from the clothing, it is far from clear that this hat is capable of protection through copyright.⁷¹⁶ This did not prevent the owner of the copyright in the series from asserting that the hat violated copyright.

The result of this claim was, yet again, to remove the allegedly infringing work from view. In this case, the person who was making the hats was unable to continue to sell the articles. However, as her success had proven that there was a market for such hats, the copyright owner turned around and “licensed” the production of official hats on the strength of their extremely dubious copyright claim. In other words, not only was the maker of the fanwork unable to continue to make their fanwork available to others, but the copyright owner was then in effect able to seize and monetize the fan creation, without recompense for the fans who had done the work that showed that a market for merchandise for the long-cancelled show continued to exist.⁷¹⁷

7.1.3 The Chilling Effects of Uncertainty are Magnified by the Inherent Inequities Within the DMCA’s Notice-and-Takedown Regime

As noted earlier in the thesis, much of the online fanworks regime is governed for all intents and purposes, and regardless of the actual location of the relevant actors, by the notice-and-takedown regime

⁷¹⁶ *Star Athletica, LLC v Varsity Brands* 137 S Ct 1002 (2016).

⁷¹⁷ See, eg, Elisabeth S Aultman, ‘Authorship Atomized: Modeling Ownership in Participatory Media Productions’ (2014) 36 *Hastings Communications and Entertainment Law Journal (COMM-ENT)* 383, 393–94.

provided under American law through the Digital Millennium Copyright Act.⁷¹⁸ The provisions of 17 USC § 512 are clear, simple, and (relatively) easy to follow. They are, by intent, navigable without legal assistance. Moreover, most of the large multinational websites have online forms that simplify the submission of DMCA takedown notices, and do not generally limit their treatment of DMCA claims based on the national origins of either the work or the alleged infringement.⁷¹⁹ The DMCA acts effectively as a transnational copyright enforcement mechanism, albeit one that only governs online content.

From the perspective of copyright owners, DMCA is convenient if not perfectly effective. From the perspective of users, and particularly from the perspective of fanworks creators, this process contains substantial inequities that are built into the process.⁷²⁰ These have the result in imposing, without the need for any form of judicial review and with very little opportunity to redress any harms that might result from wrongful takedowns, substantial restrictions on any expression accused of infringement. Some of these issues are the result of the structure of the statute. Others are the result of the judicial interpretation of the statute's provisions.

⁷¹⁸ See Chapter 1.4.2.

⁷¹⁹ See, eg Twitter's DMCA form. <https://help.twitter.com/en/forms/ipi/dmca>

⁷²⁰ The treatment of the DMCA issues here is necessarily brief and focused on the effects on fanworks. More detailed critiques are available. See generally, eg, Joel D Matteson, 'Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It' (2018) 35 Santa Clara High Technology Law Journal 1; Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 Harvard Journal of Law & Technology 171. Many of these critiques also touch (or focus) upon other areas of the DMCA, including its anticircumvention provisions.

Structurally, the DMCA functions in a simple manner. A copyright owner that locates an infringing work online submits a takedown notice to the internet provider that is hosting the work at the direction of a user.⁷²¹ This notice must contain a number of specific items which are specified in the statute in order to permit the identification of the allegedly infringing work, and a statement expressly made under penalty of perjury that the information in the notification is accurate and the person submitting the notice is authorized to do so.⁷²² Upon receipt, the service provider must ‘respond expeditiously’ and remove access to the material that is claimed to be infringing.

The DMCA does not function in as simple a manner from the perspective of those affected by takedown notices. The material in question will not be restored unless the person submits a counter-notification.⁷²³ This must be signed by the recipient of the takedown, include a statement signed under penalty of perjury that the person who submitted the counter-notice has a good faith belief that the material was disabled as a result of mistake or misidentification, and a statement consenting to litigation. The content cannot, however, be restored immediately upon receipt of the counter-notification. The service

⁷²¹ 17 USC §512(c)(3).

⁷²² The precise requirements are a physical or electronic signature of the person submitting the notice; identification of the work allegedly infringed; identification of the material claimed to be infringing, including its online location; contact information ‘sufficient to permit the service provider to contact the complaining party’; a statement that the complaining party has a good faith belief that the material is used without authorization; and the statement that the information is accurate and submitted by someone acting with authorization. *Ibid.*

⁷²³ 17 USC §512(g)(3).

provider must wait a minimum of 10 business days before restoring access to the content.⁷²⁴

Compliance with DMCA is, at least in theory, optional for online service providers. The reality is, however, that few online providers opt out of the law's provisions. This is unsurprising. Compliance with the law places service providers within a 'safe harbor' that drastically reduces their potential liability for the third-party content. Noncompliance opens them up to liability for infringement under various third-party liability theories. Few providers will choose to forgo this protection.⁷²⁵

The DMCA process, then, contains at least two important asymmetries that are built into the statute. First, content must be removed expeditiously upon receipt of a claim, but it must not be restored expeditiously upon receipt of a counter-notification. Second, the recipient of a takedown notice must submit to the jurisdiction of the American courts, but the sender of the takedown is under no corresponding obligation to do so. An additional asymmetry is found in the interpretation of the statute by the courts. If the matter is litigated, the recipient of a takedown is subject to liability if the work is found to be infringing; this remains true, as is normal in copyright litigation, even if

⁷²⁴ 17 USC §512(g)(2).

⁷²⁵ There have been some occasions in which a provider has declined to honor a particularly egregious DMCA notice; these are by all accounts rare. See, eg, Lindsay Ellis, 'Addison Cain's Lawyer e-Mailed Me, and It Only Got Worse from There' (23 October 2020) <<https://www.youtube.com/watch?v=K3v5wFMQRqs>> accessed 29 June 2021. (documenting example where YouTube declined to honor frivolous DMCA takedown associated with Omegaverse incident discussed in section 7.1.1 of this thesis).

the recipient had a subjective but erroneous belief that the new use was noninfringing.⁷²⁶ The converse is not true. Even if an erroneous takedown damages the recipient, the sender is not liable for an erroneous belief that the work was infringing so long as the notification was sent with subjective good faith.⁷²⁷

DMCA requires that material be “expeditiously” removed following receipt of a takedown but require a minimum 10 business day period before material covered by a counter-notification is restored.⁷²⁸ This has effects that are functionally identical to those produced by an *ex parte* judicial order for preliminary relief. However, these effects are achieved not only without the need for the expense and inconvenience of judicial process, but they are also achieved without the protections that a defendant receives in such proceedings. Judicial restraining orders may only issue, in the United States, upon a showing that there is a likelihood of success on the merits of the claim, a likelihood that irreparable harm will result without the relief, that the balance of equities favors the restraining order, and that the order is in the public interest.⁷²⁹ Notice and takedown requires none of that; copyright owners may obtain from DMCA with ease a thing that is very difficult to obtain through judicial process.⁷³⁰

⁷²⁶ See, eg, *Bell v. Wilmott Storage Servs LLC*, 12 F.4th 1065, 1081 (9th Cir. 2021).

⁷²⁷ See *Lenz* (n 350) 1154.

⁷²⁸ Compare 17 USC §512(c)(1)(A) with 17 USC §512(g)(2)(C).

⁷²⁹ See *Winter v. Natural Resources Defense Council Inc*, 555 US 7, 20, (2008)

⁷³⁰ The relationship between DMCA processes and judicial orders has been noted by others. See, eg, Matteson (n 720) 6; Ira Nathenson, ‘Looking for

An additional asymmetry is found in the statute's treatment of consent to litigate. Anyone who seeks to have content restored must agree to defend any copyright action over the content in question in the American courts.⁷³¹ This may present a significant additional *in terrorem* effect for non-Americans who are considering whether to contest a takedown; not only will they potentially have to defend, they will have to do so in an unfamiliar country and under unfamiliar law. These additional risks must be considered as part of the "submit or fight the takedown" calculus.

The converse is not true. Although the statute contains a provision allowing the recipient of a takedown notice to recover damages when the takedown was sent in bad faith, the sender of such a takedown is not required to consent to the jurisdiction of any court as a condition for sending the takedown notice.⁷³² As a result, anyone seeking to vindicate their rights in the face of a bad-faith takedown must be careful to pursue a case only in a court where jurisdiction over the defendant is otherwise proper.⁷³³

This can be challenging, particularly where the sender of the takedown is not located within the United States. Courts addressing such situations have reached conflicting conclusions on the question of

Fair Use in the DMCA's Safety Dance' (2009) 3 Akron Intellectual Property Journal 121, 144; Seltzer (n 720) 192.

⁷³¹ It is theoretically possible that the consent to litigate required by the counternotification, 17 USC §512(g), might specify a non-US jurisdiction, but the author is unaware of any case where this has happened.

⁷³² 17 USC 512(c)(3) (specifying contents of notification; consent to litigate is not present).

⁷³³ See, eg, *Quill Ink*, 361 F.Supp.3d at 1158 (DMCA notice insufficient contacts to create jurisdiction).

when jurisdiction over non-Americans can be found in such cases.⁷³⁴ The situation becomes even more difficult in cases where neither the sender nor the recipient of the takedown are American entities; American courts are reluctant to accept such cases.⁷³⁵ The asymmetrical requirements here create barriers for the recipients of takedown notices.

Finally, there is the additional asymmetry that has been created by the judicial interpretation of the “good faith” requirement. It is axiomatic that there is no “good faith belief” exception to liability for copyright infringement. A judgment may be – and some famously have been – rendered against an alleged infringer even in a case where the court accepts that the copying that took place was “unconscious.”⁷³⁶ The act of copying alone suffices to create liability, even where the defendant was not aware that they were actually copying. The defendant’s good faith belief that the work was non-infringing is largely, but not entirely, irrelevant.⁷³⁷

The same is not true when it comes to potential liability for mistaken takedowns. Although a plaintiff seeking a restraining order from a court would generally be required, in the United States, to provide security to cover any costs or damages incurred in the event the order

⁷³⁴ Compare *Tuteur v Crosley-Corcoran* 961 F Supp 2d 333 (Dist Court 2013); *Automattic Inc v Steiner* 82 F Supp 3d 1011 (Dist Court 2015) (finding jurisdiction over non-American defendant) with *Doe v Geller* 533 F Supp 2d 996 (Dist Court 2008) (finding an absence of jurisdiction).

⁷³⁵ *Marcel v Embassy of Sound and Media GmbH* (SDNY 8 April 2021).

⁷³⁶ The most famous example of the application of this doctrine is undoubtedly *Bright Tunes Music Corp v Harrisongs Music, Ltd* 420 F Supp 177 (Dist Court 1976). However, this is far from the only such case.

⁷³⁷ Such good faith might suffice to negate an enhanced award for willful infringement; it will not reduce actual damages.

was wrongfully issued, this does not apply to the extrajudicial DMCA takedown process.⁷³⁸ Not only is security not required, but it is substantially more difficult for someone wrongfully subjected to a takedown to recover damages even where actual harm has occurred.

The statute only allows for recovery in the event that the sender of the takedown notice “materially misrepresented” that the material in question was infringing. As this representation requires a legal judgment on the part of the sender, the statute does not, however, actually require that the sender represent that the material was in fact infringing when sending the takedown.⁷³⁹ Instead, the sender need only certify that they have a “good faith belief” that the material is infringing.

This “good faith belief,” in the view of the courts that have addressed the question, need only be subjective.⁷⁴⁰ A takedown notice that is objectively unreasonable will not, if the court views it as having been sent in subjective good faith, support an award of damages even if actual damages are provable. This is an additional factor that tilts the playing field heavily in favor of copyright owners, and which further leads to chilling by making it difficult to combat poorly founded takedown requests.

⁷³⁸ Fed R Civ P 65(c)

⁷³⁹ The difficulty in such an approach is clear; although it has been suggested that there is, eg, sufficient clarity in the first fair use factor to enable it to be used for screening purposes, see Asha Velay, ‘Using the First Fair Use Factor to Screen DMCA Takedowns’ (2017–18) 17 Va Sports & Ent LJ 54, 80, this would appear optimistic at best. See Chapter 5.2.2.4.

⁷⁴⁰ *Lenz* (n 350) 1153–54; *Hosseinzadeh v Klein* (n 370) 44; *Stern v Lavender* 319 F Supp 3d 650, 683–84 (Dist Court 2018).

Ultimately, then, the recipient of a DMCA takedown faces the following situation: in order to contest the takedown, they must consent to the sender suing them in American courts if the sender so chooses. They must confront the possibility that they will face liability if they were mistaken about their right to use the original, but the sender will not face liability absent a finding of subjective bad faith. And they will, in any event, not see their work restored for a matter of weeks. Collectively, these asymmetries militate against the sending of counternotifications, and permit the effective expansion of copyright protection into areas where there is uncertainty. They have served, as others have noted, to suppress fan creations.⁷⁴¹

These uncertainties are, to be sure, unlikely to be the result of the statute's design. As Yu has noted, "it is blatantly clear that Congress did not intend [§ 512] to cover *alleged* infringers."⁷⁴² Nevertheless, the uncertainties persist. Given the sharp divide between the copyright holders who do not feel that notice-and-takedown goes far enough and those who seek to have the weaknesses in the counternotice system rectified, near-term change seems relatively unlikely.⁷⁴³

⁷⁴¹ See, eg, 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, 128–38.

⁷⁴² Peter K Yu, 'The Graduated Response Copyright USA - A Collection: The Surging Influence of Copyright Law in American Life' (2010) 62 Fla L Rev 1373, 1409.

⁷⁴³ See, eg, United States Copyright Office, 'Section 512 of Title 17: A Report of the Register of Copyrights' (May 2020) (recommending no change).

7.2 The Societal Effects of Uncertainty

The effect of uncertainty-induced suppression on each individual fan creator or fanwork described in the prior section may be relatively small, particularly given the lack of financial gain in fanworks. There are, as noted much earlier in the chapter, tens of millions of individual fanworks; the loss of a relative handful does not substantially reduce the quantity of work that is available. Nor, in many cases, does a dispute or takedown involving a single work necessarily result in the removal of the entire body of a single fan creator's work.

The cumulative effects, on the other hand, are not small. As will be discussed in this section, the cumulative effects of the chilling caused by uncertainty act in many ways that create effects that are likely to work social detriments. Although to these effects are referred to here as driven by the lack of clarity in the law, this should be taken as shorthand; the cost-related chilling effects of potential litigation discussed in the prior section also undoubtedly play a substantial role.⁷⁴⁴

7.2.1 The Lack of Clarity in the Law of Fanworks Inhibits Political Speech

Fanworks, like all other forms of communication, may be used to convey political messages. This is true not merely for memes, short videos, and other such works. It also holds for forms of fanworks that one might not necessarily associate with political speech, including cosplay. The use of fanworks in political speech is widespread, and although there

⁷⁴⁴ These cost-related effects, however, are, as noted previously, driven in part by the complexities and uncertainties in copyright; even simple cases can be, because of these, quite pricey to resolve.

has been at most very limited related litigation,⁷⁴⁵ there have been a number of cases where political speech in the form of fanworks has been removed from view permanently through the use of notice-and-takedown procedures – a chilling of speech is already taking place.

The use of mass culture as a means of facilitating political speech is, of course, not new.⁷⁴⁶ The cartoon below is from the 1980s, during a time when a proposed space-based American missile defense initiative had been branded as “Star Wars” in the popular press – much to the dismay of Lucasfilm.⁷⁴⁷ This cartoon makes use of imagery from the Star Wars franchise for the purposes of political expression.⁷⁴⁸ It is not the

⁷⁴⁵ Arguably, the Benjamin case discussed in Chapter 6.2.4 is an example of litigation over the use of fanworks as political speech.

⁷⁴⁶ Fair use is complex and uncertain enough that the use of this cartoon provides an example of uncertainty. For example, does the existence of other such cartoons weigh against fair use on the grounds that use of this particular one as an exemplar is not necessary? This is particularly true given that this thesis comments on the cartoons as a group, not the features of this particular example. Such a discussion would, however, be too meta for even this thesis.

⁷⁴⁷ See *Lucasfilm Ltd v High Frontier* 622 F Supp 931 (Dist Court 1985).

⁷⁴⁸ Image source: ‘Political Cartoons of SDI’ (*Strategic Defence Initiative*, no date) <<http://sdistarwars2015.weebly.com/political-cartoons-of-sdi.html>> accessed 22 July 2021.

only example of editorial cartoons making express use of imagery from the franchise in the service of political expression.⁷⁴⁹

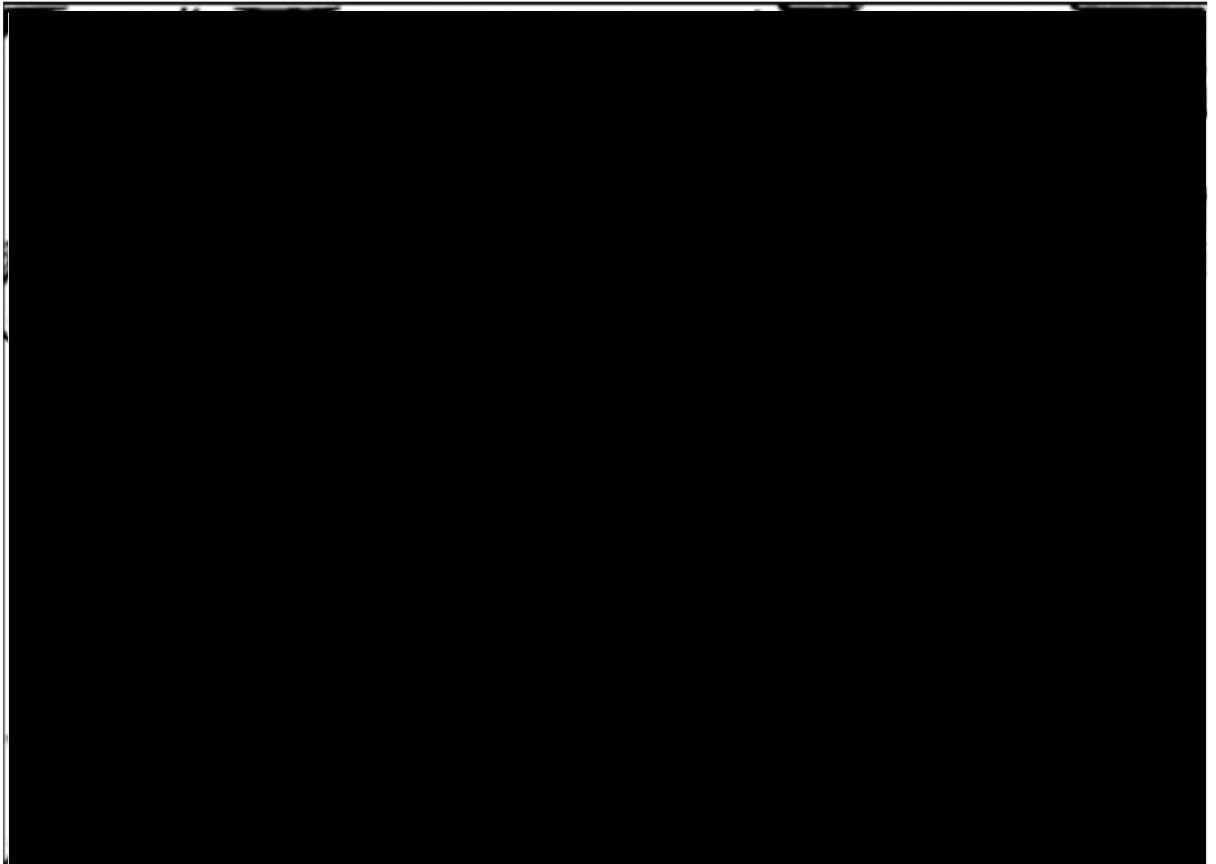


Figure 7.2: "Star Wars"/SDI Policial Cartoon (source in n. 749)

The use of recognizable elements taken from works of mass culture has grown, both online and, particularly in the range of expressions that are utilized, in the offline realm. Memes, many rooted in mass culture or other fanworks, proliferate across all forms of social media. These memes take a wide range of forms, including still images, gifs, and even short videos. Offline, an even broader range of fanworks media have been utilized in the service of political speech. This section takes three examples of the use of fanworks in political speech and explains how the

⁷⁴⁹ For additional examples, see Tom Ellis, '@Tomsomol' (*Twitter*, 4 May 2020) <<https://twitter.com/Tomsomol/status/1257279188274479107>> accessed 22 July 2021.

uncertainties in the protection of fanworks can be (and in two of the three cases were) used in attempts to shut down the political speech in question.

7.2.1.1 Speech Through Dress

It is well-established law in the United States that dress can be a form of speech. This is true for clothes that bear words or slogans.⁷⁵⁰ It is true for accessories as simple as a plain black armband.⁷⁵¹ And, in the case of recent protests to the confirmation of a new Associate Justice of the United States Supreme Court, it can be true of cosplay that makes use of characters from a successful and popular media franchise.

In 2018, during the contentious confirmation hearings in the United States Senate, women appeared in the United States Capitol dressed in white bonnets and red capes.⁷⁵² This garb is the characteristic attire of the “handmaids” made famous by Hulu’s successful adaptation of Margaret Atwood’s book *The Handmaid’s Tale*. This franchise depicts a dystopian future in which women are property without the right to walk unaccompanied or read, and only permitted to bear names reflecting the identity of the man who runs their household.

⁷⁵⁰ See, eg, *Cohen v California* 403 US 15 (1971) (finding that jacket with ‘Fuck the Draft’ painted on the back was protected political expression).

⁷⁵¹ See, eg, *Tinker v Des Moines Independent Community School Dist* 393 US 503 (1968) (holding that black armbands worn in protest of Vietnam War were protected political speech).

⁷⁵² Lydia Wheeler, ‘Protesters Dress as “handmaids” for Kavanaugh Hearings’ (*The Hill*, no date) <<https://thehill.com/regulation/404889-protesters-dress-as-handmaids-for-kavanaugh-hearings>> accessed 29 March 2021.

The appearance of these cosplayers in this context was intended purely as a means of sending a political message. In this case, the message was that the confirmation of Justice Kavanaugh would be a step toward the United States of Atwood’s dystopian future, and a step away from gender equity. The message was sent clearly, at least to those familiar with the franchise, and it was readily explainable to those who were unfamiliar with the franchise. It was also an extremely effective form of expression. Because the visually arresting nature of the protest attracted considerable attention, allowing the message to spread further and more effectively than would otherwise have been possible. In every regard, these Handmaid cosplayers provide a classic example of political speech.

This means of protest is, moreover, one of the only ones that is available at the location where the protests were taking place. The availability of forms of protest is restricted within the buildings of the United States Capitol in order to ensure the operation of Congress. Interrupting proceedings through the use of loud speech or other disruptive conduct is prohibited by law and punishable as a felony.⁷⁵³ The carrying of flags, banners, and other such devices is also prohibited both in the building and on the grounds.⁷⁵⁴ Wardrobe is, however, less restricted.⁷⁵⁵ By dressing as characters from a well-known mass-media

⁷⁵³ “Parading, demonstrating, and picketing” are all activities that are banned in the Capitol building itself. DC ST § 10-50316 (US DC) (b) (7). Violations of this section can be punished by up to 5 years in prison. DC ST § 10-50318 (US DC).

⁷⁵⁴ DC ST § 10-50317 (US DC). This is also punishable under 503.18 as above.

⁷⁵⁵ Public health and decency regulations requiring that shirt, shoes, and other such articles of clothing be worn excepted.

franchise, the protestors were able to convey their message despite the substantial restrictions on more active forms of protest.

These protestors are hardly the only ones to make use of dress as protest. Ian Madrigal has appeared at several Congressional hearings, seated in the gallery so that they appear in camera shot behind specific witnesses.⁷⁵⁶ Madrigal dresses as “Rich Uncle Pennybags,” the fictional character who serves as the mascot for the popular board game Monopoly.⁷⁵⁷ They appear in costume to highlight what they view as Google’s monopolistic tendencies and inability to effectively self-regulate.⁷⁵⁸ As was the case with the Handmaid protestors, this method of protest was effective, the message was clear to all those familiar with the board game character, and it was within the very narrow boundaries of what is allowed under the applicable laws governing conduct within the building.

What is not clear is whether the owners of the franchises invoked through the cosplay would have a right to sue to stop future protests using these specific expressions. As noted previously, the use of cosplay does not merely involve the use of costumes made famous by mass-media franchises.⁷⁵⁹ It involves the depiction of the characters who are associated with the costumes. This is particularly true with regard to this specific situation. The message that is sent through either of these

⁷⁵⁶ Madrigal uses they/them pronouns.

⁷⁵⁷ Charles Darrow, Monopoly, Parker Brothers 1934 board game.

⁷⁵⁸ Lauren Feiner, ‘A Person Dressed up like the Guy from Monopoly Sat behind Google’s CEO as He Testified before Congress’ (*CNBC*, 11 December 2018) <<https://www.cnn.com/2018/12/11/monopoly-man-returns-to-congress-for-google-ceo-pichais-hearing.html>> accessed 30 March 2021.

⁷⁵⁹ See Chapter 3.2.6.

examples of political cosplay is entirely dependent upon the viewer's ability to associate the key traits of the relevant mass media character with the political situation in which the cosplay is being used. The Handmaid dress invokes the universe of that franchise and the plight of those characters; the Monopoly Man highlights the anti-trust issues raised by certain oversized companies. The political commentary is conveyed by the character, not the costume, and characters are protected.

Thus far there appears to have been no widely publicized attempt by a rights holder to stop political cosplay. Such an effort would be difficult, since advance notice might not be available, and a post-hoc effort would be ineffective. The possibility of fanbase blowback would also have to be taken into consideration, along with the possibility of inadvertently stirring up additional negative publicity. Nevertheless, it is not difficult to conceive of the possibility that such an attempt might occur, particularly in the highly charged context of social media, which lends itself particularly well to campaigns to influence businesses to take steps to disassociate their brands from politically unpopular causes.

It is not clear how a court would rule in such cases. The possibility of a fair use or fair dealing finding in such circumstances is a complex question, and the use of the work as a form of political speech raises concerns not found in ordinary cosplay. That analysis is not itself, as noted in Chapter 3.2.6, particularly simple. It does, however, thoroughly demonstrate the perplexities that can arise when the question of whether a secondary work is permissible turns on the question of

whether there is “new purpose or meaning,”⁷⁶⁰ or whether it might be a use that the initial author finds morally objectionable.⁷⁶¹

In the case of cosplay in the United States, for example, the fair use analysis would break with what would ordinarily be expected, with the fourth factor shifting from the copyright holder to the user, but the first from the user to the copyright holder, at least under the more prevalent lines of analysis. Analysis under the fourth factor shifts the use from one that is arguably within a licensed derivative market into a market – political commentary – which is arguably both distinct from the market for the original and not a derivative market likely to be exploited by the copyright owners. This is a strong argument for fair use under an analysis that places the fourth factor at the centre of the analysis.⁷⁶²

However, the analysis under the first factor shifts in the opposite direction. Where cosplay may be a form of comment – albeit one that is not critical of the original – on the original work and the original character when performed as a form of fan tribute to the characters, that is not the purpose of the use of cosplay here. Instead, the use here is a classic ‘weapon parody’ that uses the known traits of the character in the originally dictated form to comment upon something else. Under the

⁷⁶⁰ See *Campbell* (n 381) 579; *Google Llc v Oracle America, Inc* (n 374) 1202.

⁷⁶¹ *Deckmyn v Vandersteen* (n 597).

⁷⁶² This is the approach to fair use that the Second Circuit, at least at present, seems to be adopting. See, eg, *TCA Television Corp v McCollum* 839 F 3d 168 (Court of Appeals, 2nd Circuit 2016); *Goldsmith* (n 405).

reasoning in many cases, this would shift the result away from fair use under current United States law.⁷⁶³

We gain little additional clarity under the *Deckmyn* framework.⁷⁶⁴ In addition to the obvious moral rights concerns stemming from the use of the characters to make possibly unpopular political statements, the characters are used in ways that would not clearly qualify as parody. The question of whether simply removing the character from the context of the original work and its accompanying fictional universe is sufficient to render the use “noticeably different” from the original is unresolved. Nor is it entirely clear that the use will qualify, in all cases, as humour or mockery – while the Monopoly Man cosplay had a clear humorous effect, the Handmaids seemed to evoke anger and perhaps fear far more clearly than they did humour.⁷⁶⁵

In any hypothetical case involving such cosplay, only one thing is clear: any non-commercial user of the content who is threatened with litigation will not be able to know with certainty how the court will rule. At best, it can be said that the person creating these fanworks will be better off if the case were to be litigated in Europe, but even there certainty is absent. And absent certainty, proceeding in a case where there is a possibility of financial loss but none of financial gain is a difficult decision.

⁷⁶³ See Chapter 6.3.5.

⁷⁶⁴ See Chapter 5.3.1 for the description of this framework.

⁷⁶⁵ *Deckmyn v Vandersteen* (n 597).

7.2.1.2 Speech Through Memes

The use of memes provides another avenue for political speech via fanworks, or fanwork-like creations. Unlike the cosplay examples presented above, which demonstrate an opportunity for interference with speech that has not yet been fully realized, there have been actual instances where copyright law has been used to chill the use of existing works for political purposes. This chilling is likely to have more substantial effects than with cosplay; memes are much more prevalent, as is their use in political contexts. Thus, despite the uncertain status of memes and meme culture within the fanworks continuum, these examples provide a clear illustration of the societal effects of copyright uncertainty.⁷⁶⁶

A controversy surrounding Donald Trump's use of a popular meme by the band Nickelback demonstrates these issues. The meme in question is drawn from the music video from the band's song "Photograph." In the original video, the lead singer holds up a framed photo while singing "look at this photograph/every time I do it makes me laugh." In the meme, which can take the form of either a single-frame image macro or short video, the photograph originally in the frame is replaced by one of the user's choice.⁷⁶⁷

⁷⁶⁶ Memes and meme culture remain in a position of uncertainty when it comes to fanworks. On the one hand, they are not fully fanworks of the original works they utilize; on the other, meme culture is very much something that is either a fandom or quite similar to one.

⁷⁶⁷ 'Nickelback's "Photograph"' (*Know Your Meme*, no date) <<https://knowyourmeme.com/memes/nickelbacks-photograph>> accessed 1 July 2021.

On 2 October 2019, then-American President Donald Trump posted a version of the meme on Twitter.⁷⁶⁸ In Trump's version of the meme, the new photo was one with now-American President Joe Biden, his son Hunter, and a third person who was labeled as "Ukrainian energy exec."⁷⁶⁹ The label was somewhat misleading; the person was subsequently identified as an American who had served with Hunter on the board of a Ukrainian company.⁷⁷⁰ Trump's version of the meme was integrated into a 20-second video that began with a clip of Biden at a campaign event. In that clip, Biden is asked about, and denies, speaking with Hunter regarding Hunter's business dealings. That denial is immediately followed by the Nickleback meme, which is clearly intended to suggest that if Biden golfed with Hunter and one of Hunter's colleagues, he must be lying about not talking about business.

Trump's use of the meme was immediately controversial. Many Twitter users, as well as numerous Nickleback fans, were displeased by

⁷⁶⁸ The original tweet remained available, albeit without the meme content, until Trump was permanently suspended from Twitter in the aftermath of the 6 January 2021 insurrection at the United States Capitol. It is no longer available at the original link. Donald J Trump, 'Tweet, @realDonaldTrump' (*Twitter*, 2 October 2019) <<https://twitter.com/realdonaldtrump/status/1179502966606352386>> accessed 1 July 2021. The original tweet, including the video, is preserved at the Internet Archive. 'Donald J. Trump on Twitter' (*archive.org*, no date) <<https://web.archive.org/web/20191002210639/https://twitter.com/realdonaldtrump/status/1179502966606352386>> accessed 1 July 2021.

⁷⁶⁹ Alex Hern, 'Trump's Video Taken off Twitter after Band Nickelback Complains' (*the Guardian*, 3 October 2019) <<http://www.theguardian.com/us-news/2019/oct/03/donald-trump-video-taken-off-twitter-copyright-nickelback>> accessed 1 July 2021.

⁷⁷⁰ Jacey Fortin, 'Even Trump Can't Turn Down a Nickelback Joke (but Twitter Did) (Published 2019)', *The New York Times* (3 October 2019) <<https://www.nytimes.com/2019/10/03/us/nickelback-trump.html>> accessed 1 July 2021.

the use of the meme.⁷⁷¹ The band, either in response to fan wishes, because they were also displeased by the use of the meme, or both, sent a DMCA takedown notice to Twitter. The work was removed from the tweet as a result. Given that the meme did not return to the Tweet in the period between the takedown and the suspension of Trump’s account, it can reasonably be inferred that no counter-notification was submitted. Given the mandatory two-week period between the receipt of the counter-notification and the restoration of the challenged work, this should not be a surprise.⁷⁷² Campaigns and campaign communications happen in short timespans, even compared with the normal fast pace of social media. It is likely that the work would be largely irrelevant (and gain little additional attention) if it reappeared weeks later. As is often the case, the unassailable nature of the de facto restraining order provided by the DMCA serves to effect a final outcome.

It is possible, despite the widespread use of the meme – a use which has continued since the Trump takedown – for the band to both consider the possibility that the meme was a fair use of the original video and yet issue a takedown notice in good faith. To be sure, there is a very strong argument for fair use in this particular case. The political use is likely to be transformative under the first factor; “Joe Biden is dishonest”

⁷⁷¹ Poppy Noor, “‘How Dare You’: Diehard Nickelback Fans Respond to Trump’s Surprising Meme’ (*the Guardian*, 3 October 2019) <<http://www.theguardian.com/us-news/2019/oct/03/nickelback-photograph-trump-meme-tweet-response-fans>> accessed 1 July 2021.

⁷⁷² The mechanics of DMCA takedowns were discussed above. See Chapter 7.1.3.

is a very different message and purpose from the original work.⁷⁷³ The work may be creative, disfavoring fair use under the second factor, but little (10 seconds) of the original video was used and, although popular amongst meme artists, there is little that would indicate that these 10 seconds are the “heart” of the original song.⁷⁷⁴ With three factors favoring fair use, the argument in favor is strong.

Nevertheless, there is also an argument against fair use that would be sufficient to support a good faith belief that the song was infringing. The use in the meme, at least arguably, does not comment on the original, and can be argued on that basis to not be transformative. Given the importance of this factor, this is enough to support a belief in infringement and a DMCA takedown notice.

Here, as in the cosplay example provided earlier, the lack of clarity in the law is enough to permit the rights holder to leverage copyright in order to have a work that displeases the original copyright holder removed from view. In such cases, the lack of clarity inherent in the law acts to inhibit the use of fanworks as a means of political speech, even if there are strong arguments that the use does not infringe copyright.

It should be noted that these uncertainties do not disappear under the copyright regimes of other common law nations. In the United Kingdom, presuming that the *Deckmyn* standard will be used to assess the largely untested parody exception, care will have to be given to the

⁷⁷³ The legal background and tests employed in assessing the fair use factors were discussed at length in Chapter 5.2; they will not be reviewed further here.

⁷⁷⁴ Assuming *arguendo* that any Nickleback work may be said to have heart or soul.

author's interest in not being associated with the fanwork.⁷⁷⁵ This interest may be strong in political speech cases, particularly where the group's fans are displeased by the new work. The situation is no better under the UGC exception in Canada. There, there will likely be questions as to whether a use by a campaign is noncommercial in nature. In all key jurisdictions, then, the uncertainties in fanworks create opportunities for the suppression of political speech.⁷⁷⁶

7.2.2 The Lack of Clarity in the Law of Fanworks Can Inhibit Criticism and Support Copyright Misuse

In addition to the effects on political speech, the areas of uncertainty related to copyright law can act to inhibit other types of criticism. The harms here – suppression of discussion – are clearly connected with the political speech-related harms discussed in the immediate section. They are also largely identical in cause. However, they are worth mention both to make clear the extent to which the harms run beyond the political and into broader areas of expression and the extent to which censorious rights holders can use copyright claims that are at best borderline to suppress speech.

Stacey Lantagne provides us with one such example of criticism suppression in a recent paper. Disney has been accused of using DMCA takedown notices to suppress criticism of one of their superhero films,

⁷⁷⁵ As noted in Chapter 5.3, there is insufficient case law on this point to assess the extent to which such authorial concerns might outbalance the expressive concerns of political speakers.

⁷⁷⁶ A detailed discussion of these issues, which covers fair use issues in political speech that go beyond this context, was recently published. See Cathay Y. N. Smith, 'Political Fair Use' (2021) 62 Wm & Mary L Rev 2003.

Captain Marvel.⁷⁷⁷ The accusations in this case are supported by some circumstantial evidence; the takedowns focused on videos that commented on a particular deleted scene. However, at least one video that contained the deleted scene but lacked commentary was not initially targeted, raising suspicion that the targeting was related to the commentary on the content more than the use of the content itself.⁷⁷⁸

This suggests significant copyright misuse. Criticism is not an area where copyright uncertainty is at its apex. The use of excerpts from a work for the purposes of criticism is one of the most common exceptions and limitations to copyright globally; in the United States, it is the quintessential example of a fair use. In these cases, the ability to make a good faith argument against fair use is limited and would have to focus primarily on the length of the excerpt. However, as noted earlier in this chapter, this is likely to be sufficient uncertainty to accomplish suppression, given the lack of teeth in the misuse provisions of the DMCA takedown regime.

Uncertainty in copyright also played a role in what was, at least in the eyes of the judge, a form of copyright misuse in *Hughes v Benjamin*.⁷⁷⁹ The judge found, in awarding attorneys' fees to the prevailing defendant, that the plaintiff had litigated with an improper motivation, in part because of extrajudicial statements that the plaintiff made about intending to "bankrupt" the defendant, a political

⁷⁷⁷ See Lantagne, 'Building a Better Mousetrap' (n 199) 165.

⁷⁷⁸ Didi Rankovic, 'Disney "Copyright Strikes" YouTube Channels that Criticize Captain Marvel' (*Reclaim The Net*, 31 May 2019) <<https://reclaimthenet.org/disney-copyright-claims-youtube-channels-that-criticize-captain-marvel/>> accessed 5 July 2021.

⁷⁷⁹ This case is discussed at length in Chapter 6.2.4.

opponent.⁷⁸⁰ The judge found that these remarks, as well as the use of the lawsuit as part of the creation of new content on YouTube, “reveal[ed] an intent to abuse the legal system in order to further a personal agenda that had little to do with the Copyright Act.”⁷⁸¹

Although it can be argued that this case ended as it did because there was, in reality, a *lack* of a lack of clarity in this area – certainly that was the judge’s view – it should be emphasized that this is not entirely clear. The challenged video, although clearly intended to mock the original, added no original content of its own. This took it outside the norm for fair use cases. As a result, there has been some skepticism expressed on social media, including by copyright scholars, as to whether Hughes’s complaint was truly objectively unreasonable.⁷⁸²

Copyright uncertainties and costs can clearly lead to chilling; that such chilling can and has been employed to improper effect should come as no surprise. It should also be noted that, although not strictly related to fanworks, there is not a shortage of copyright cases outside fanworks, including some related to other forms of social media, where copyright has been misused to suppress speech that the copyright owner

⁷⁸⁰ See *Hughes v Benjamin* No. 17-cv-6493 (RJS) (Dist Court 4 August 2020).

⁷⁸¹ *ibid.*

⁷⁸² See, eg, Pamela Samuelson, ‘@PamelaSamuelson’ (*Twitter*, 10 August 2020)

<<https://twitter.com/PamelaSamuelson/status/1293014653291728902>> accessed 22 July 2021. (expressing skepticism)

disapproves of.⁷⁸³ This problem area is certainly applicable to fanworks, but also extends much more broadly, across UGC as a whole.

7.2.3 The Lack of Clarity in the Law of Fanworks Can Inhibit the Development of New Genres

Every genre starts somewhere. Some start in fanworks.⁷⁸⁴ The Omegaverse, which was discussed in Chapter 4.3.4.3, is one such example; the Slender Man is another.⁷⁸⁵ They are hardly the only examples. The existence of “current events fan fic,” for example, such as the Ever Given “boat stuck in a canal” fic that was briefly mentioned in Chapter 4.4 provides an example of what might perhaps be considered a microgenre, or part of a broader genre of current events-driven anthropomorFIC, or both. In most of these cases, an initial starting point for the fiction is identifiable, and in at least the case of the Slender Man has been identified. The question becomes whether the first comer in a new genre can become the keeper of a toll gate, demanding payment from

⁷⁸³ For example, in one case the manufacturer of voting machines attempted to misuse copyright to suppress criticism of its device security. *Online Policy Group v Diebold, Inc* 337 F Supp 2d 1195 (Dist Court 2004).

⁷⁸⁴ This section is a development of ideas first discussed in the author’s MA(Res) dissertation, and draws from part of that dissertation for background material. The concern then was the protection of fictional universes and the issues that might arise from overprotection in that area, which were viewed as primarily a problem tied to the creative industries. Upon consideration of the disputes that have arisen involving Slender Man and the Omegaverse, it is clear that copyright interference with the development of new genres is also relevant to fanworks.

⁷⁸⁵ The situation with Slender Man is slightly complex as this genre involves a fictional character that might otherwise be protectable. Length considerations prevent me from presenting detailed arguments to support the proposition that it is nevertheless a genre. For such arguments, see, eg, Elizabeth L Rosenblatt, ‘Who Will Speak for the Slender Man: Dialogism and Dilemmas in Character Copyright’ (2018) 70 Fla L Rev Forum 69.

those who wish to create within the genre – or even block access altogether.

To understand the reasons that the lack of clarity in copyright could lead to such an outcome, it might be helpful to look at the origins of the cyberpunk subgenre of science fiction. William Gibson's novel *Neuromancer* and Ridley Scott's film *Blade Runner* are key features in the pantheon of foundational works in this genre.⁷⁸⁶ Both works are set in dystopian near-futures dominated by corporate interests. Both involve mercenaries, detached from loyalty to the mostly irrelevant political entities of the day. Both invoke the kind of imagery that Gibson evoked with the phrase "the colour of television, tuned to a dead channel."⁷⁸⁷ The similarities between the two were such that Gibson admits that he was concerned that people would think he had 'lifted' his visual textures from Scott.⁷⁸⁸

The reason for the similarities was simple; both Gibson and Scott shared common influences from outside the new genre that they were unknowingly drawing from while creating what would come to be the roots of a new genre.⁷⁸⁹ This is hardly the first example where common influences resulted in new subgenres within science fiction. Prior to space flight and our first close-up looks at our neighbouring planets, it was common for science fiction stories to feature a habitable but hellish

⁷⁸⁶ William Gibson, *Neuromancer* (2017); Ridley Scott, 'Blade Runner' (Cyberpunk, Warner Bros 1982).

⁷⁸⁷ Gibson, *Neuromancer* (n 786) 1.

⁷⁸⁸ William Gibson, (*William Gibson Blog*, 17 January 2003) <https://web.archive.org/web/20160512200150/http://www.williamgibsonbooks.com/archive/2003_01_17_archive.asp> accessed 23 July 2021.

⁷⁸⁹ *ibid.*

Venus that was a swamp world reminiscent of Earth’s Mesozoic Period – right down to the inclusion of dinosaurs.⁷⁹⁰ Stories from the same period featured a dead or dying Mars, an ancient planet populated by waning peoples.⁷⁹¹ These features were inspired by the scientific knowledge of the day; they were authors drawing common inspiration from common sources.

The incorporation of a public domain element, such as a dying Mars, into a story does not render that element protected. There are doctrines in copyright law, including both the idea-expression dichotomy and the American *scenes a faire* doctrine, which should prevent the common elements of a genre from being owned by any one person. These doctrines are helpful. But perhaps less so in cases involving new genres than established ones.

At the time that *Neuromancer* was published, cyberpunk was not yet a recognized genre or subgenre. The elements that it shared with *Blade Runner* were not yet “so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”⁷⁹² If there is no established genre, can there be *scenes a faire*? In the absence of such a doctrine, it is possible that a

⁷⁹⁰ Gardner Dozois, ‘Introduction: Return to Venusport’, in George RR Martin & Gardner Dozois (eds), *Old Venus* (Titan 2016) 2-4.

⁷⁹¹ George RR Martin, ‘Introduction: Red Planet Blues’ in George RR Martin and Gardner Dozois (eds), *Old Mars* (Titan 2015) 3-6.

⁷⁹² *Gaiman v McFarlane* 360 F 3d 644, 659 (Court of Appeals, 7th Circuit 2004).

collection of abstract elements might be considered protectable, and found infringed even in the absence of the taking of plot or characters.⁷⁹³

As was discussed previously when these cases were analyzed in prior chapters, the legal uncertainties surrounding the protection of characters and universes, in particular, have the potential to lead to overprotection that can inhibit the development of new genres. This was particularly clear as applied to the Slender Man case. Although Slender Man became popular because it was the focus of a genre fandom, that fandom was greatly inhibited, and arguably eliminated, by the assertion of copyright in the character itself.

As we saw, it was difficult to say that the initial work involved was unprotected, at least if the “initial work” is viewed as comprising only the visual appearance of the character.⁷⁹⁴ At the same time, while it might have been difficult to say that the visual appearance was unprotected, it was impossible to say that the character as a whole was susceptible to individual ownership. The use of this character, moreover, was very much in line with what one would expect from a genre. That is to say, the character did not have a single life history, or function as much as a character as it functioned as the identifying element of a genre.

This genre was effectively suppressed by the assertion of a copyright ownership claim of dubious validity.⁷⁹⁵ Something similar,

⁷⁹³ This is certainly the case if, as previously argued, a fictional universe is a copyright-protected work. Dunford (n 562).

⁷⁹⁴ See Chapter 4.3.4.2.

⁷⁹⁵ See Chapter 4.3.4.2.

although not as radical in its reach, was seen in the Omegaverse case.⁷⁹⁶ There, the claim did not span the entirety of a/b/o fiction. However, it did seem to cover at least all of a set of heterosexual stories that incorporated a set of common tropes. There, the claims were ultimately rejected by the community – something which was undoubtedly aided by the antagonist’s lack of resources for a prolonged legal fight, particularly when compared with the resources Sony could devote to the monopolization of Slender Man.

In both the Slender Man and Omegaverse cases, the ability of the purported copyright owner to take legal action was, in large part, enabled by persistent areas where copyright lacks clarity. Here, those areas were less the result of confusion regarding fair use, and more the product of confusion regarding the circumstances under which characters and universes will be viewed as works. Nevertheless, the lack of clarity was still sufficient to inhibit one genre, and it must be viewed as a threat to the development of others.

7.2.4 The Lack of Clarity in the Law of Fanworks Enables the Occupation of Indigenous Intellectual Property Spaces

The demigod Maui is a central figure in Polynesian culture, and as such has substantial religious and spiritual importance. The demigod Maui is also a central figure in a successful Disney film, and as such has substantial commercial importance.⁷⁹⁷ Disney’s version of the character, however, differs substantially from the Polynesian original, particularly in its visual depictions.

⁷⁹⁶ See Chapter 4.3.4.3.

⁷⁹⁷ Ron Clements and John Musker, ‘Moana’ (Disney 2016).

Despite being a fictional character in a mass-market animated film, Maui remains, at least in theory, in the public domain.⁷⁹⁸ Disney retains a copyright in the character to the extent that their version of the public domain character differs from the public domain original, but other depictions of the character are still permitted. The reality, however, is not as simple as theory suggests. The Disney version of the character, because of Disney’s outsized reach and influence compared with the cultures from which Maui was appropriated, tends to

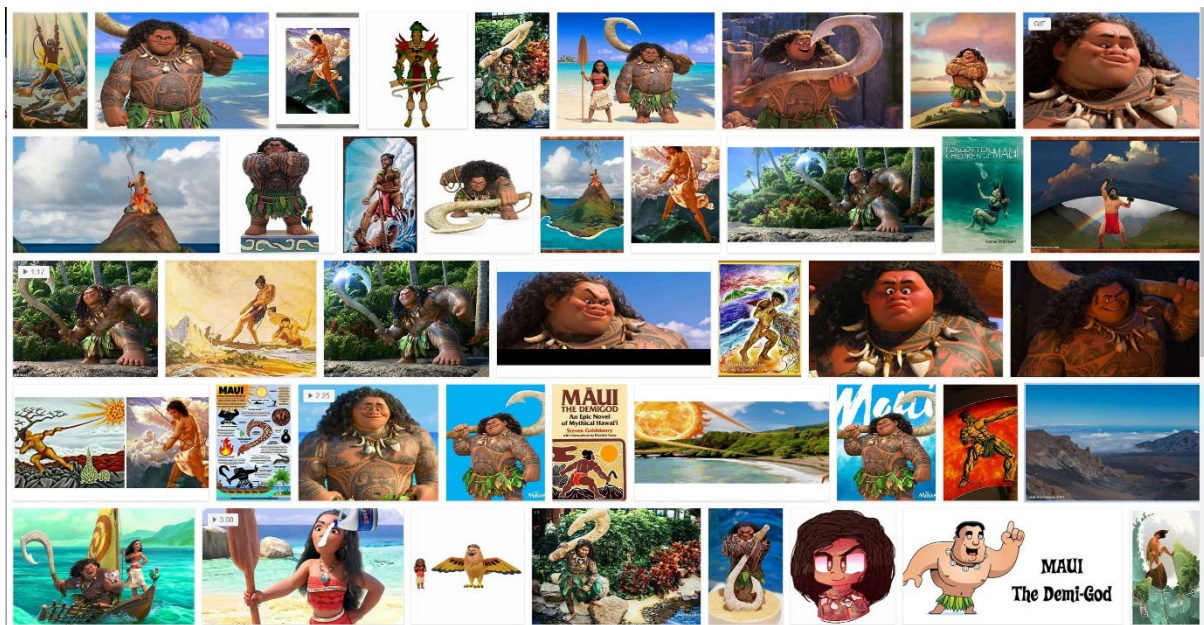


Figure 7.3: Search Results Screenshot

overwhelm other depictions in search results, as the figure below demonstrates.

This figure, which is a screenshot of the first page of results from a Bing.com image search for “maui demigod” conducted on 1 June 2021, contains 43 images. The results of this search, which took place five years after the film’s release and did not directly reference the film, include 16

⁷⁹⁸ This is the standard approach where public domain material is used.

images – barely more than a third of the total – that depict Polynesian versions of Maui. One photo is a photo of a book cover. One is a photo of the island of Maui. The rest relate to the Disney version. Disney’s lasting influence on the public perception of Maui is clear.

Fanworks provide one potential method for reclaiming – or perhaps reappropriating – the deity. For example, one could, as a form of criticism, attempt to redraw some of the work to show a version of Maui more in line with the Polynesian original. Whether such an approach would stand up to a copyright challenge, even if defending one in the face of Disney’s resources could be economically feasible, is another question. Here, also, the lack of clarity in this area of copyright law presents difficulties for those who might wish to go down this route. Works that take an explicit and highly critical approach, as was the case with TWDG, might have a reasonable chance of success under fair use and *Deckmyn* parody.⁷⁹⁹

Moana is not the only example of such a problem. Recently, dispute erupted when on-demand merchandise seller Redbubble removed merchandise relating to the Norse deity Loki based on ‘guidance’ sent by Disney.⁸⁰⁰ The takedowns did not, however, merely affect those selling unlicensed merchandise related to the Disney production featuring the Norse demigod. Neopagans selling their own merchandise based on the traditional deity were also affected by the

⁷⁹⁹ See generally, Chapter 5.

⁸⁰⁰ Heather Greene, ‘Disney Trademarked Loki, the Marvel Movie Character. Some Fans of the Norse God Were Not Happy.’ (*Washington Post*, 2 July 2021) <https://www.washingtonpost.com/religion/disney-loki-redbubble-trademark/2021/07/02/d59908ec-d9c0-11eb-8fb8-aea56b785b00_story.html> accessed 22 July 2021.

strikes. Although it appears that this case was driven in part by trademark, and was the result of Redbubble's own efforts to proactively appease Disney rather than by direct action on Disney's part, the effect remains the same. Individuals who want to put forward their own version of the traditional figure are impeded from doing so by the copyright that subsists in the distorted version that was taken from the public domain.

7.2.5 The Lack of Clarity in the Law of Fanworks and Related UGC Disproportionately Harms Readers and Small Creators

*"But if you ask Mr. Slant he'll say 'This is a very interesting case,' which as you know is lawyer-talk for One Thousand dollars a day plus expenses and it'll take months."*⁸⁰¹

One practical consequence of the uncertainty is difficult to miss: the presence of major areas of uncertainty within the fanworks arena creates a veritable wonderland of possibility for litigators. Litigation – and lawyers, in general – are expensive.⁸⁰² As we saw earlier this chapter, the median cost of even a simple case with relatively little money at stake is likely to result in legal bills that are in the tens of thousands or more. These are not costs that are within the resources of many small creators.

The consequences of this, as we have seen in this chapter, are wide-reaching. Obviously, they are a substantial factor whenever a commercial rights-holder issues a threat or initiates litigation in a case involving conventional fanworks and fandoms. They do not stop there.

⁸⁰¹ Terry Pratchett, *Jingo* (2013) 219–20.

⁸⁰² The law firm that employs the author bills his time, at present, at \$375/hr, or \$6.25/minute.

As we have seen in numerous cases, the lack of clear lines and corresponding legal expenses have been outcome-determinative in some cases involving small creators, have harmed the ability of others to fully litigate issues that are literally central to their ability to exist as going enterprises, and have almost certainly led to still others retreating in the face of legal demands of dubious validity.

Things only get worse when we move beyond the mass-media fandom context. Disputes between individual small creators, such as the two YouTuber copyright disputes discussed in Chapter 6.2.4 and the litigation over the Omegaverse dispute, discussed in 7.1.1, have come to pass in large part because these grey areas exist. Neither the small creator who makes the first production nor the later-in-time small creator who uses (or is accused of having used) material really has a clear sense of the legal rights at play. This can, particularly when combined with the effects of fanbase controversy in magnifying controversy, lead to disputes between creators.⁸⁰³ Litigation is a tremendously inefficient means of resolving this.

7.3 Neither the Lack of Clarity nor the Consequences Are Unique to Fanworks; Both Extend Through UGC and Beyond

Thus far, the legal analysis in this thesis has focused on the legal issues surrounding fanworks – although admittedly for a quite broad definition of ‘fanworks.’ However, it is clear that this analysis applies far more broadly than simply in the online fanworks context. This is clear even from the fanworks analysis itself; for the most part, there is little

⁸⁰³ See Chapter 6.2.4.

reason to think, in most cases, that the analysis would substantially differ where the same mass-media fanwork moves from online to offline distribution.

The analysis also applies, however, well beyond the fanworks context. In particular, much of this analysis – and particularly the portions that relate to the inability of small creators to reasonably know what the boundaries of their rights are where copyright is concerned – will apply to a wide range of other forms of online content. We can see this in all the major areas of UGC that were discussed in Chapter 2. Peer production, remix, and social media have all seen copyright disputes that have involved the same areas of uncertainty that have been highlighted in this thesis.

Peer production-related disputes have arisen within fandoms. For example, the model railroad dispute that was mentioned in Chapter 3.3.3 was a dispute within a fandom, but it was also primarily an open-source software dispute, placing it also within the peer production arena. In *Jacobson v Katzer*, the manager of an open-source software project that makes software used in the operation of model railways brought suit against a company that used the software in ways that exceeded the scope of the applicable open-source license.⁸⁰⁴ Such disputes are, of course, not uncommon within the FOSS community, and there is no reason to think that the resolution of such disputes should turn on the question of whether there is a fandom involved.

In the remix context, no case illustrates the overlap in areas of uncertainty more clearly than one brought by remix advocate and legal

⁸⁰⁴ *Jacobson v Katzer* (n 246).

scholar Lawrence Lessig. This dispute involved Lessig’s use of a music video that was a video mashup of musical scenes from the so-called “brat pack” movies of the 1980s with Phoenix’s song *Lisztomania*.⁸⁰⁵ This sort of remix falls into many of the known fanworks grey areas – the fair use analysis is uncertain on multiple factors, including whether the new video is a transformative use of the original song.⁸⁰⁶ Nevertheless, before the band noticed the video, it became the inspiration of a meme; other creators recreated their own versions of the meme, re-enacting from scratch the movie scenes with the same music as a backdrop.⁸⁰⁷

This briefly became the subject of litigation. Lessig incorporated the *Lisztomania* remix example into a talk on fair use that was then posted on YouTube. The record label issued DMCA takedowns and threatened suit; Lessig responded by filing suit seeking a declaration of

⁸⁰⁵ Somewhat ironically, *Lisztomania* was the name given to a fan frenzy surrounding the composer in the 19th Century. See Alan Walker, *Franz Liszt, The Virtuoso Years (1811–1847)* (Cornell 1987) 371-72.

⁸⁰⁶ It also falls into the “is it a fanwork” grey area; the remix in question could also, because it featured ‘brat pack’ content, be viewed as a fanwork of that set of coming-of-age films, if not of any of the individual films.

⁸⁰⁷ The original burst of attention to this meme came in 2009/2010, around the time that the original song was released and the original remix meme occurred. A secondary burst of attention came in 2019, after the band included a video featuring recently-elected Representative Alexandria Ocasio-Cortez’s performance in one of the original remixes as part of a tweet congratulating her on her victory. @Phoenix, ‘Phoenix on Twitter’ (*Twitter*, no date) <<https://twitter.com/wearephoenix/status/1081317366984855557>> accessed 2 July 2021. See also Braudie Blais-Billie, ‘Phoenix’s “Lisztomania” Sees Huge Streaming Increase After Alexandria Ocasio-Cortez Video’ (*Pitchfork*, 15 January 2019) <<https://pitchfork.com/news/phoenixs-lisztomania-sees-huge-streaming-increase-after-alexandria-ocasio-cortez-video/>> accessed 2 July 2021.

non-infringement and damages for DMCA misuse.⁸⁰⁸ The case rapidly settled, although not until after the band itself expressed support for Lessig's use.⁸⁰⁹ The litigation in this case, although unusual,⁸¹⁰ indicates that many of the copyright issues discussed in the previous two chapters are not unique to fanworks.

In fact, the concerns described in this chapter are applicable across the full range of UGC. This is predictable. The common element that links each of the chilling effects that were identified is the same: the individuals who have become the targets of copyright law in recent years are not those the law was written to govern. A law that is designed primarily for the use of those who work within the creative industries, with the built-in flexibility of a body of law primarily developed to regulate the interactions of sophisticated professionals who have

⁸⁰⁸ See Eriq Gardner, 'Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song' (*The Hollywood Reporter*, 23 August 2013) <<https://www.hollywoodreporter.com/business/business-news/lawrence-lessig-sues-takedown-youtube-613549/>>. The docket for this suit can be found at *Lessig v Liberation Music Pty Ltd* (1:13-cv-12028) (D Mass) <https://www.courtlistener.com/docket/4275247/lessig-v-liberation-music-pty-ltd/>.

⁸⁰⁹ Chris Deville, 'Phoenix Side With Lawrence Lessig On "Lisztomania" Fair Use Lawsuit' (*Stereogum*, 28 February 2014) <https://www.stereogum.com/1667378/phoenix-side-with-lawrence-lessig-on-lisztomania-fair-use-lawsuit/news/>

⁸¹⁰ The filing of this lawsuit is an exception to the general rule discussed above, but one that is understandable. Lessig, as a lawyer, professor, and successful author, was well-positioned to obtain counsel, could afford counsel even if unable to locate such on a pro-bono basis, and, as a well-known advocate for fair use in the remix context, had strong non-economic motivations for litigation (including, as both the articles cited in the prior two footnotes show, boosting his profile on these issues).

reasonable access to legal advice, does not serve the needs of those who lack that level of sophistication or advice.

7.4 Conclusions

Prior to this chapter, this thesis established several key points: that the legal academy's understanding of fanworks rapidly reached the consensus that fanworks are socially beneficial works that should be permitted under copyright law, but which reside within a grey area of copyright; that the standard model of fanworks does not fully account for the current range of fanworks, newer creative industries, or the uses of fanworks in society; that there is substantial uncertainty in the application of copyright law to fanworks; and that several rough guidelines can be used to make some predictions about how courts will approach fanworks, but that these guidelines lack *ex ante* predictive power.

In this chapter, we examined the real-world impacts of these uncertainties, on both individual fan creators and on society. On the individual level, the uncertainties in copyright law create a situation where it will virtually never be to an individual fan creator's advantage to litigate a challenge to their works. The costs of litigation are far too high, there is no corresponding economic advantage from the fanwork to offset these costs, and the risks arising from the legal uncertainties make the outcome far too uncertain. Some of the few cases which have advanced through litigation, notwithstanding the economic irrationality, make this clear: in multiple cases, even successful defenses of fanworks or fanwork-like content have led to business failures.

These individual effects result in effects that are felt across society, because of the wide range of uses for fanworks. Because individual fans can be easily induced to remove their works from view, and because, as discussed earlier in the thesis, fanworks serve functions that are communicative as well as creative, the lack of legal clarity and corresponding effect on the ability to litigate even clearly meritorious copyright defenses, can lead to the suppression of political speech, inhibit criticism and promote copyright misuse, restrict the development of new genres, and promote the colonization of culturally significant indigenous icons. These effects are, moreover, felt more acutely by smaller creators than they are by larger companies, which can more readily absorb the related costs.

These conclusions both validate the current consensus that legal protection for the right to create fanworks is desirable and demonstrate the undesirability of continuing along in the present, and uncertain, environment. And yet, decades into the internet revolution, the uncertainties are no closer to resolution than they were when fanworks first became relevant to copyright law and policy. This leaves us with three questions going forward: why have previously proposed solutions failed; what changes in approach might lead us to better solutions; and what a more certain approach might resemble. The next chapter addresses these points.

8 FANWORKS: THE INADEQUACIES OF PROPOSED SOLUTIONS, THE NEED FOR A BROADER DEFINITION OF THE PROBLEM, AND A POSSIBLE PATH FORWARD

As the thesis has demonstrated, the academic consensus that fanworks are socially beneficial works that should be permitted under copyright law but reside in a legal grey area has stood up well. In fact, if anything it understates the full extent of the problem, as it takes an incomplete view of the extent of fanworks. Nevertheless, despite a quarter-century of work on the problem, a lasting solution remains elusive. This penultimate chapter examines the reasons for the perpetual uncertainty.

The first section of the chapter looks at the previously suggested solutions, and identifies the issues that prevented them from resolving the problems. The second places fanworks within a broader group of practices that sit uncomfortably within the conventional intellectual property law framework. The third identifies a key commonality that is shared by these practices, and which explains many of the difficulties with prior solutions: a copyright system that was not designed for the subjects and circumstances to which it is being applied.

As a result, and as the fourth section discusses, it is unlikely that changes to the existing copyright structures will solve the fanworks problem. More systemic changes are needed – ones that place the needs and interests of users on a more even footing, at least in terms of the specificity of their rights, with those of copyright owners. Although such a solution may seem superficially radical, it is in fact the simplest possible – and is long overdue. Copyright law was designed to handle primarily industrial disputes and is poorly suited to the regulation of individual conduct outside that context. Suggesting the specifics of such

a system is beyond the abilities of any single author, and will not be attempted. However, in the final section of the chapter, an outline of what will be needed to craft such a solution is provided.

8.1 A Wide Range of Solutions to UGC and Fanworks Problems Have Been Proposed; Most Are Inadequate

As is traditional to the genre, most papers on copyright and fanworks propose some solution to the fanworks problem. Most are relatively modest, suggesting comparably minor changes within the legal framework of the researcher's home jurisdiction. These proposals usually take the form of rules to be employed in the judicial resolution of cases, such as changes to fair use. Other proposals have been somewhat more ambitious, seeking explicit changes to the statutory framework to provide additional protections for fanworks and related UGC.

Although many of the proposed solutions have some merit, and may prove to be (if consistently and clearly applied) partial solutions to parts of the broader problem, they have inadequacies. In particular, not only is no one such solution likely to be an answer to the entire problem, but they are also unlikely to provide a full solution when taken as a bundle. They lack a unifying premise.

8.1.1 Tolerance is Uncertain and Impermanent

One solution that has been suggested is 'tolerance.' In practice, these proposals range from advocating for explicit tolerance of works that would otherwise be prohibited, to a description of what has been referred to as "norms of nonenforcement" that cover a range of situations,

particularly in the online environment.⁸¹¹ For the purposes of this section, ‘tolerance’ refers to the more active forms of tolerance.⁸¹² In particular, it uses the definition provided by Wu as a starting point: a tolerated use is “an infringing use of a copyrighted work of which the copyright owner may be aware, yet does nothing about.”⁸¹³ It should be immediately apparent, however, that there is a critical issue with this definition. In the absence of clarity as to what uses are infringing, it is not clear what uses are ‘tolerated’ and which ones must be permitted.⁸¹⁴

Many authors have suggested that rights holder tolerance provides a possible solution to some or all of the issues surrounding fanworks.⁸¹⁵ Wu, in particular, suggested in part that tolerance could be, in a sense, formalized through rights holder notices that outline what the rights holder will – and will not – tolerate.⁸¹⁶ This approach has some

⁸¹¹ See, eg, Mark A Lemley, ‘IP in a World without Scarcity’ (2015) 90 *New York University Law Review* 460, 505.

⁸¹² This is not to say that norms of nonenforcement do not exist; the peaceful existence of most fanworks shows clearly that they do. However, such norms are no stronger than the willingness to follow them, and do not provide clear long-term legal solutions.

⁸¹³ Tim Wu, ‘Tolerated Use’ (2008) 31 *Columbia Journal of Law and the Arts* 617, 619.

⁸¹⁴ See generally, eg, Chapters 5 & 6.

⁸¹⁵ See generally, eg, Wu (n 813); Kylie Pappalardo and James Messe, ‘In Support of Tolerated Use: Rethinking Harms, Moral Rights and Remedies in Australian Copyright Law Thematic: Conceptions of Ownership’ (2019) 42 *UNSWLJ* 928; see also Shyamkrishna Balganes, ‘The Uneasy Case against Copyright Trolls’ (2012–13) 86 *S Cal L Rev* 723, 753.

⁸¹⁶ Wu (n 813).

clear benefits, but it fails to provide the clarity or consistency needed to truly resolve the fanworks problem.⁸¹⁷

The benefits of toleration are, from the rightsholder's perspective, clear: the copyright owner may “wait[] to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it.”⁸¹⁸ They may, in effect, wait in the shadows, allowing a secondary creator to take the risk that a particular use might be unprofitable, and swoop in to seize the profits only where there are profits to seize. This may seem equitable, and it may be equitable in some cases. However, as we saw with the situation involving the sale of the Firefly hat, copyright uncertainty and the expense of litigation permits this to happen even where the secondary use is highly unlikely to constitute infringement.⁸¹⁹

Under ‘tolerance,’ fanworks are permitted when they are tolerated; when they are not, they are removed.⁸²⁰ The decision of whether to permit any particular fanwork to stand rests in the hands of the claimed copyright owner. The decision to not tolerate a particular fanwork, often results in removal through extrajudicial means, with

⁸¹⁷ It has been proposed that certain legislative enactments be undertaken to, in effect, enshrine a mandatory tolerance into US copyright law. See David Fagundes, ‘Efficient Copyright Infringement’ (2013) 98 Iowa Law Review 1818, 1835–40. Such an approach is a hybrid of tolerance and the small scale-legislative change discussed in 8.1.4.

⁸¹⁸ *Petrella v Metro-Goldwyn-Mayer, Inc* 134 S Ct 1962, 1976 (2014).

⁸¹⁹ See Chapter 7.1.2.

⁸²⁰ It should be noted here that some appear to feel that this is within the rights of copyright owners because fanworks are presumptively infringing. See, eg, Balganes (n 815) 753. However, as should be clear by this late point in the thesis, this argument is unconvincing.

limited judicial recourse.⁸²¹ Moreover, these removals can, and do, take place even where there is a very strong argument that the fanwork in question is not an infringement of copyright.⁸²² Simply put, because copyright law is unclear and uncertain in these areas, content holders may as a practical matter decline to tolerate material that a court would almost certainly find acceptable. In such cases, ‘tolerance’ facilitates a smokescreen permitting a rights holder to stake a claim to more rights than those provided by the law.

The fanworks guidelines Paramount published in the wake of the *Axanar* case provide a good example of this.⁸²³ The “guidelines” begin with the statement that “CBS and Paramount Pictures will not object to, or take legal action against” fan productions that meet them and end with a disclaimer that they may be changed at any time and do not constitute a license.⁸²⁴ The conditions they set out, however, purport to limit fanworks beyond what copyright law permits. For example, one provision requires that a fan production “must be family friendly and suitable for public presentation,” and cannot “include profanity, nudity, obscenity, pornography, depictions of drugs, alcohol, tobacco, or any harmful or illegal activity” – amongst many other things.⁸²⁵ This removes all slash fiction, regardless of the likelihood that such works are fair use under American law or covered under the parody and pastiche

⁸²¹ See 7.1.3.

⁸²² See, eg, 3.1.7 (the *Firefly* hat saga).

⁸²³ The case was discussed in 5.1.1.

⁸²⁴ ‘Fan Films’ (*Star Trek*, no date) <<https://www.startrek.com/fan-films>> accessed 8 July 2021.

⁸²⁵ *ibid* para 7.

exceptions under UK law.⁸²⁶ It is a declaration that fans who wish to operate beyond the guidelines must, even if on reasonable legal footing, operate at their own risk.

This is hardly the only such provision. Another requires that all props and other merchandise be official merchandise, not “bootleg items or imitations of such commercially available products.”⁸²⁷ Still another bars the distribution of material in physical format.⁸²⁸ Yet another prohibits fan collaboration with any professional previously involved in an official Trek production.⁸²⁹ These declared limits to Paramount’s tolerance are almost certainly more restrictive than the law’s tolerance; Paramount is, in effect, claiming rights greater than the law provides.⁸³⁰

It is true that the “fan guidelines” do offer some limited ability to make some productions that would infringe absent of Paramount’s tolerance. In such cases, the restrictions on the fan creators’ legal rights might well be viewed as reasonable consideration for a license to use the IP.⁸³¹ However, all creation outside those guidelines, not just otherwise infringing creation, is at the creator’s risk. And whilst it is true that creation without an announcement of tolerance is likewise at the creator’s own risk, the presence of the guidelines creates an *in terrorem* effect of its own, forcing the secondary creator to either stay within

⁸²⁶ See generally Chapter 5.

⁸²⁷ ‘Fan Films’ (n 824) para 4.

⁸²⁸ *ibid* para 6.

⁸²⁹ *ibid* para 5.

⁸³⁰ It is particularly difficult to see how Paramount has a legal right – beyond anything they contracted for with the professionals involved – to restrict who fans choose to collaborate with.

⁸³¹ Although the document purports to not be a license. *Ibid*.

restrictive borders or knowingly exceed the announced limits of Paramount's tolerance.

The failure of tolerance can be further seen in two disputes discussed in the prior chapter. In *Analytical Grammar*, the creator of the meme knowingly permitted the meme to go viral.⁸³² He subsequently filed suit, without warning, against a subset of those using the meme. The failure is even more obvious in the dispute over the political use of the Nickleback "Photograph" meme.⁸³³ The use of that meme was and is widespread; it is almost always tolerated. The lapse in their tolerance extended to a use that was political expression, and very likely fair use.

Tolerance – which is one component of our present status quo – is not a reasonable solution to this problem. It is, in too many cases, a sword for the rightsholder, not a shield for the fan creator. It provides, at most, an assurance that the rights of secondary creators will be tolerated if convenient to the rightsholder. It provides convenience for rights holders, but no certainty or clarity for users and creators, and no meaningful protections for fanworks.

8.1.2 Norms-Based 'Solutions' Suffer from Vulnerabilities Similar to Those Seen With Tolerance

A second aspect of the present status quo that has attracted considerable attention is the role of norms in the governance of fanworks.⁸³⁴ It is difficult to view this, however, as a 'solution' to the

⁸³² See 7.1.1.

⁸³³ See 7.2.1.

⁸³⁴ See generally, eg, Fiesler, 'Everything I need to know I learned from fandom: how existing social norms can help shape the next generation of

fanworks problem, as it seems more a description of the present state of affairs than a proposal for a change. To the extent that it is an argument for a solution, it tends to take the form that providing broader support for norms within fan communities is desirable.

There can be no doubt that interest-based communities exist that rely, at least to an extent, on the protection of expressive material that lies beyond the scope of traditional intellectual property. Fagundes's work on roller derby names, and Fagundes and Perzanowski's work on clown makeup provide good examples of this; other examples on norms-reliant communities will be discussed later in the chapter.⁸³⁵ Within fanworks, it can be argued that several of the less-traditional fan communities discussed in this thesis have similar norms-based governance. For example, within the model train community discussed in 3.2.3, there are norms governing the acceptability of incorporating someone else's fictional railroad into your own.⁸³⁶ Norms also govern

user-generated content' (n 29); Casey Fiesler, 'Copyright and Social Norms in Communities of Content Creation' in *Proceedings of the companion publication of the 17th ACM conference on computer supported cooperative work & social computing* (ACM 2014); Hetcher (n 85).

⁸³⁵ David Fagundes, 'Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms' (2012) 90 *Texas Law Review* 1093; David Fagundes and Aaron Perzanowski, 'Clown Eggs' (2019) 94 *Notre Dame Law Review* 1313; Dotan Oliar and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94 *Virginia Law Review* 1787.

⁸³⁶ The norm in question appears to be that one may "interchange" with someone else's layout, showing a point where yours connects with theirs, but using someone else's fictional railroad as the subject of your own layout is not favored. See 'The Ettiquite of Interchange with a Famous Layout? - Model Railroader Magazine - Model Railroading, Model Trains, Reviews, Track Plans, and Forums' (no date) <<http://cs.trains.com/mrr/f/88/t/266247.aspx>> accessed 2 July 2021.

genre fandoms such as fan fiction, where it is difficult to assert copyright, if only because everything in that area might be unprotectable because it is infringing.⁸³⁷

Norms, like tolerance, are an integral part of the current copyright governance of fanworks. But they are not a solution. Notwithstanding the presence of norms, disputes continue to arise within norm-governed communities, such as those involved in the Omegaverse or Slender Man examples discussed earlier.⁸³⁸ The norms neither prevent nor resolve such disputes; they simply serve as a patch that, at least for a time, acts to minimize the likelihood that disputes will arise and the harm they will cause. Once violated, however, the harm can be severe.⁸³⁹ As was true of tolerance, they are not a reliable solution to the fanworks problem.

8.1.3 Litigation-Based Solutions Are Hampered by A Lack Of Cases, Resources, and Imbalances In Power

Many authors have suggested that the fanworks problem can be solved, or at least mitigated, through the further development of case law. This seems grossly optimistic.⁸⁴⁰ There has been significant time for such developments to occur. And, as the previous chapter showed, the *in terrorem* effects of threatened litigation are often sufficient to result in the removal of works that are likely noninfringing. There are substantial pragmatic barriers to the development of a coherent body of law in this area.

⁸³⁷ See, eg, Bandali (n 284).

⁸³⁸ See 4.5.3.

⁸³⁹ This is particularly true of Slender Man. Ibid.

⁸⁴⁰ See generally Chapters 5 & 6.

It should come as no surprise that the bulk of the material that has been written in this area has focused on fair use – the quintessential case law-based solution to secondary content. As noted at length in Chapter 5, fair use has inherent uncertainties that render it essentially useless as a means of predicting *ex ante* whether a particular fanwork will be found to infringe. This is, in theory, something that can be addressed through subsequent developments in the law. Many authors have, from the very start of the copyright academy’s interest in fanworks, argued for such an approach.

Tushnet’s seminal article argued that most fan fiction should be viewed by the courts as fair use under existing law.⁸⁴¹ Many other authors addressing fan fiction have raised similar arguments, some applied to the genre as a whole, and some applied to specific subsets of fan fiction, such as “Mary Sue” fanfic.⁸⁴² Other authors have raised similar arguments for other forms of fanwork.⁸⁴³ These arguments view the present fair use doctrine as adequate in theory, and see the main source of uncertainty in this area as arising primarily from the lack of on-point case law. Arguments have also been raised that acknowledge that the present fair use doctrine may not explicitly cover fan fiction and should be modified to do so. The primary argument raised here is that

⁸⁴¹ Tushnet, ‘Legal fictions’ (n 2) 664–78.

⁸⁴² There are far too many such articles to cite more than a small sample here. See generally, eg, Stroude (n 109); see also Jamar and Glenn (n 29) 978. For an example discussing a specific form of fan fic, see, eg, Chander and Sunder (n 45).

⁸⁴³ See, eg, Mariani (n 153) 156–65 (fan film); Reid (n 162) (machinima).

fan fiction may not be sufficiently transformative, and the test should be modified to better accommodate fanworks.⁸⁴⁴

Both sets of arguments advocate the further development of this judicial doctrine.⁸⁴⁵ The primary issue with this approach is that, as set out previously, there are substantial barriers that make it unlikely that directly applicable cases will reach the courts.⁸⁴⁶ The fanworks-adjacent cases that have made it to the courts, meanwhile, tend to be ones that either involve ‘beefs’ within fan communities, such as the Omegaverse case and the YouTube fandom cases, or ones that involve fan-like activities that are on or across the commercial border, such as the Axanar fan film.⁸⁴⁷ Such cases are ill-suited to reaching the desired outcomes; either the works are too dissimilar from most fanworks, or the circumstances of the specific case are driven more by externalities than by genuine copyright concerns.

One suggestion deserves special mention. The possibility of allowing the First Amendment to the United States Constitution to be used as a defense in copyright cases involving fanworks has been raised.⁸⁴⁸ This idea is not unique to fanworks. The idea that, under

⁸⁴⁴ See generally, eg, Nolan (n 79) 570–71; Michelle Chatelain, ‘Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine’ (2012) 15 *Tul J Tech & Intell Prop* 199, 216–17; Pamela Kalinowski, ‘The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine Note’ (2013–14) 20 *Wm & Mary J Women & L* 655, 679–80.

⁸⁴⁵ Some have also argued for legislative change to the doctrine; such modest change will be discussed at greater length in the next section.

⁸⁴⁶ Chapter 7.

⁸⁴⁷ Chapter 6.4.

⁸⁴⁸ Agnetti (n 29) 158–61.

United States law, the Constitution’s protection of speech and protection should serve as a check on the scope of copyright has often been proposed.⁸⁴⁹ Such a proposal would be similar to the balancing of interests in free expression and property protection that has been articulated by the CJEU.⁸⁵⁰ In addition to the inherent weaknesses of such an approach, however, it is foreclosed, at least for the moment, by United States Supreme Court jurisprudence.⁸⁵¹ It should also be noted that similar human rights approaches have not been endorsed by other common-law courts outside the USA.⁸⁵²

Ultimately, however, litigation-based solutions are simply not occurring. No matter how appealing such approaches might be in theory, this consideration renders this impracticable as a solution.

8.1.4 Small-Scale Legislative Change is Insufficient; Large-Scale Legislative Change is Hampered by Treaties

Legislative solutions have frequently been proposed. This has been particularly true in jurisdictions that lack avenues that would enable the development of judicial doctrine. However, this has also been

⁸⁴⁹ See generally, eg, Lawrence Lessig, ‘Copyright’s First Amendment Melville B. Nimmer Memorial Lecture’ (2000–01) 48 *UCLA L Rev* 1057; C Edwin Baker, ‘First Amendment Limits on Copyright’ (2002) 55 *Vanderbilt Law Review* 891.

⁸⁵⁰ For a discussion of the fundamental rights approach in CJEU copyright legislation, see Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019) 57–59.

⁸⁵¹ See *Eldred v Ashcroft* 537 US 186, 218–21 (2002) (referring to the idea expression dichotomy and fair use as the “First Amendment accommodations” within copyright law).

⁸⁵² See, eg, *Ashdown v Telegraph Group Ltd* Chancery 149, 693–94 (Court of Appeal, Civil Division 2001).

true of jurisdictions such as the United States, where protection through judicial doctrine seems more likely. Such proposals generally take the form of suggestions for either new exceptions and limitations to copyright law or for suggested clarifications or extensions to existing exceptions and limitations.

Within the United States, suggestions can be grouped into two categories: fixes to fair use, and fixes to other areas of copyright. Fair use proposals generally focus on either explicitly adding fanworks to the prefatory list of things that fair use should encompass, or creating an explicit exception for fanworks.⁸⁵³ A second approach would clarify other areas of copyright law, again in ways that make it more likely that fanworks would pass scrutiny. The protection of characters under copyright law receives particular attention within this area.⁸⁵⁴ However, other proposals have advanced, including reform to the American statutory damages regime.⁸⁵⁵

Outside the United States, approaches tend to involve advocating for the creation of new exceptions and limitations that would encompass fanworks, for a given definition of fanwork. For example, Khaosaeng, working in the context of pre-Brexit English copyright, proposed that a bespoke exception for ‘creativity’ be added to copyright law:

A use of a copyrighted work to create a new work which performs a different function or purpose from the original, and which is reasonably necessary for the achievement of that function or purpose, is not an infringement of copyright; provided that the new work involves creativity on the part of its author, and does not cause unjustified

⁸⁵³ See, eg, Becker (n 29) 154; Mariani (n 153) 167–68.

⁸⁵⁴ See, eg, Mariani (n 153) 165–67.

⁸⁵⁵ One particularly comprehensive proposal for damages reform is found in Tehranian (n 373) 127–67.

*economic harm to the potential market of the original work.*⁸⁵⁶

Such an exception, which is broadly similar to fair use under current American law, would clearly encompass much of fanworks. Others have proposed solutions in other jurisdictions that would more explicitly mirror fair use, both in the context of fanworks and for other reasons.⁸⁵⁷

It must be noted in evaluating the plausibility of these solutions that there are many barriers to legislative change. Opposition from large copyright holders within the creative industries is one such barrier, and certainly not the least important.⁸⁵⁸ These effects can be seen in the successful derailment of copyright legislation in South Africa that would have incorporated a version of fair use into local law.⁸⁵⁹ Such industry-driven effects are in accord with the history of the development of copyright law; as has been noted, and will be discussed subsequently, the history of copyright legislation is such that legislative change is often the

⁸⁵⁶ Khaosaeng (n 72) 245–48.

⁸⁵⁷ See, eg, Alexandra Sims, ‘The Case for Fair Use in New Zealand’ (2016) 24 *International Journal of Law and Information Technology* 176; Antony W Dnes, ‘Should the UK Move to a Fair-Use Copyright Exception?’ (2013) 44 *IIC-International Review of Intellectual Property and Competition Law* 418.

⁸⁵⁸ See Nathaniel T Noda, ‘When Holding on Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities’ (2008) 5 *U Denv Sports & Ent LJ* 64, 93.

⁸⁵⁹ Turkewitz (n 517); ‘South Africa: National Assembly Passes Copyright Amendment Bill, Adopts Expansive Fair Use Exception’ (Web page, *Library of Congress, Washington, D.C. 20540 USA*, no date) <<https://www.loc.gov/item/global-legal-monitor/2018-12-21/south-africa-national-assembly-passes-copyright-amendment-bill-adopts-expansive-fair-use-exception/>> accessed 28 July 2021. For discussion of the distortions used in the campaign to against fair use, see ‘Are Fair Use Provisions in the SA Copyright Amendment Bill Far Broader than in the US?’ (*infojustice*, no date) <<http://infojustice.org/archives/41522>> accessed 28 July 2021.

product of industry putting the laws they want into the hands of legislators for passage.⁸⁶⁰ Such barriers may be of different within different nations, and are difficult to measure. They are also far from the only difficulties that are likely to arise in this area.

Any attempt to legislatively change copyright law is, as a practical matter, constrained by the web of global copyright treaties. This is particularly true when it comes to changes that are likely to be viewed as restricting the rights of copyright holders. Exceptions and limitations to copyright law are, under the Berne Convention, limited to “certain special cases” and only if the limitation “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”⁸⁶¹ This three-step test has also been incorporated into the WIPO copyright treaty and the TRIPS agreement, both directly and through the provisions in those treaties that require compliance with the Berne Convention.⁸⁶² Although it has recently been proposed that these treaties in fact require something similar to fair use, it is fair to say that this is not, at present, a widespread view.⁸⁶³

Very few countries are not party to one or more such treaties. Any attempt to create a new exception or limitation will face global challenges, either in the legislative process or post-enactment, on the basis that the limitation is non-compliant with the three-step test. In

⁸⁶⁰ See Chapter 8.3. See also Choe (n 162) 127–29.

⁸⁶¹ Berne Convention Art 9 (2). This test is known as the “Berne three-step test.”

⁸⁶² See generally WIPO Copyright Treaty at Article 1; TRIPS Agreement at Article 9. Both require states acceding to the treaties to comply with Articles 1 through 21 of the Berne Convention.

⁸⁶³ See Bently and Aplin (n 499).

this context, given the prevalence of suggestions that other countries adopt a fair use approach, it should be noted that a not-inconsiderable number of commentators have questioned whether fair use, as it currently exists in the United States, is truly compliant with these treaties.⁸⁶⁴

Beyond the pragmatic concerns, there is reason to further question the plausibility that the proposals advanced provide real solutions.⁸⁶⁵ The small-scale solutions that have been proposed, such as minor adjustments to fair use, are unlikely to fully address the entire suite of issues that have been discussed in this thesis. An adjustment that, for example, merely adds fanworks to the preface of the fair use statute will be confronted with a fresh suite of interpretive questions. Any adjustment that limits protection of characters will cover only a subset of fanworks. And any change that relies upon protecting noncommercial works faces, in this age of advertising-driven content hosting, substantial uncertainties of its own.

The broader revisions that have been proposed fare no better. As noted in Chapters 5 and 6, the nature of fair use is, in practice, incredibly uncertain. It is not a doctrine that has led, in the United States, to a successful solution to the fanworks problem. It may provide a better ground for arguing that fanworks are noninfringing than the set of

⁸⁶⁴ *See generally, eg*, Paul Goldstein, ‘Berne in the USA’ (2008) 39 IIC - International Review of Intellectual Property and Competition Law 216.

⁸⁶⁵ Despite the difficulties in advancing legislation, the thesis’s proposed solution is legislative in nature. Despite the difficulties, a large-scale revision may be the best hope, and if such change is going to be fiercely opposed regardless of the scale, there is little to be lost by making a large attempt.

exceptions and limitations presently in place in many countries.⁸⁶⁶ It is, however, most likely an approach that will merely exchange one set of problems for another.

And, of course, the legislative solutions that have been proposed share a common feature: they are national solutions.

8.1.5 National Solutions Are Inadequate to Global Problems

Ultimately, copyright is too international for any national solution or combination of national solutions to provide a lasting solution.⁸⁶⁷ All of the fandoms discussed in this thesis are transnational in extent. Star Trek, Star Wars, Harry Potter, Sherlock – all of these major fandoms are global in their scope, with events held around the world. The same is true of the genre fandoms built up around cosplay, anime, and other such pursuits. The global scope of modern fandom is often as true for small fandoms as for large. The TRMN, for example, was one of the smaller “traditional” fandoms discussed in Chapter 4, centered as it is on a series of novels that has not as of yet significantly branched out into other media. Even this modest fandom has “ships” that are based in several nations.⁸⁶⁸

The global nature of fanworks and fandom issues is also seen in the nontraditional fandom disputes that have been discussed in the thesis. The *Hughes v Benjamin* case, for example, which was discussed

⁸⁶⁶ Chapter 5.2.

⁸⁶⁷ This has been noted by others. See Samantha S Peaslee, ‘Is There a Place for Us? Protecting Fan Fiction in the United States and Japan’ (2015) 43 *Denver Journal of International Law and Policy* 199, 226.

⁸⁶⁸ See, The Royal Manticorian Navy, ‘Chapters,’ (*TRMN*, no date) <<https://trmn.org/organization/chapters>> accessed 4 December 2022.

earlier in the thesis, involved a dispute between YouTubers.⁸⁶⁹ One was based in the United States; the second was English.⁸⁷⁰ The same is true for the Omegaverse dispute discussed in Chapter 7.1.1. There, too, some of the legal complications in the case stemmed from the transborder nature of the dispute, and the dispute ended as it did in part not because of the nature of American copyright law, but because of the operation of British insolvency law.⁸⁷¹

National solutions have one significant advantage, however: they are, as the drunk said to the constable, where the light is. That is to say, they are the only solutions that are clearly possible. Copyright law is, despite the framework of multinational copyright treaties, not a harmonized body of law. This is particularly true for the area of exceptions and limitations, which thus far governs most fanworks disputes. The copyright treaties that exist set out a “floor” of mandatory protections and a restricted set – a “ceiling” – of optional exceptions and limitations.⁸⁷² Neither are truly harmonized; it is possible to raise the floor and lower the ceiling, and many countries have. There is no

⁸⁶⁹ Chapter 5.1.3

⁸⁷⁰ Although the case was litigated in the US, it should be noted that the outcome might well have been different in the UK, where fair use is unavailable and it is not clear that fair dealing for quotation would stretch to cover an entire new version of a work made from clips. Chapter 5.2.

⁸⁷¹ Chapter 7.1.1.

⁸⁷² This is apparent within the Berne Convention. The protections granted authors are very fine-grained. Article 7bis, for example, states that countries “*shall*” calculate the term of protection for joint authorship from the death of the last surviving author. The provisions governing exceptions and limitations, set out in Articles 10 and 10bis, are not. The only mandatory exception is quotation; the rest are permitted but not mandated.

transnational uniformity, and there is, at present, no mechanism for creating such uniformity.

8.2 Fanworks In the Broader Context

In Chapter 2, it was noted that fanworks are sometimes placed within the wider context of user-generated content. The rationale for this should be, given the remainder of the thesis, clear. Fanworks share many characteristics with activities such as remix culture, including their frequent reuse and re-contextualization of content, and in their use of old content in the purpose of conveying new messages.⁸⁷³ Enough so, in fact, that there are not merely theoretical overlaps between remix and fanworks; there have been disputes, such as the one involving the Liztomania remix, that straddle the line between the two.⁸⁷⁴ The legal issues that fanworks confront are also similar to some of the issues seen within peer production communities. This is particularly clear when the Slender Man dispute is considered; the character itself was produced through something akin to peer production.⁸⁷⁵ There has also been a dispute in the fanworks-adjacent model railway community, that has involved actual peer production.⁸⁷⁶ And, of course, the intersection of social media and fanworks has been obvious throughout this thesis.

But the overlaps with other areas of creative practice are by no means limited to online, user-generated content. Fanworks have also been studied within the developing field of scholarship that has been

⁸⁷³ See Chapter 2.4.2.

⁸⁷⁴ See Chapter 7.4.

⁸⁷⁵ See Chapter 4.3.5.

⁸⁷⁶ See Chapter 3.2.3.

addressing what is sometimes referred to as intellectual property’s ‘negative space.’⁸⁷⁷ Within intellectual property law, “negative space” has been referred to as “a series of nooks, crannies and occasionally oceans – some obscure, some vast – where creation and innovation thrive in the absence of intellectual property protection.”⁸⁷⁸ This definition certainly seems to apply across a wide range of fanworks, both traditional and nontraditional.

The term ‘negative space’ was first used within the context of IP law and the fashion industry, which is well known for its somewhat idiosyncratic approach to copying.⁸⁷⁹ But the range of creativity that has served as the focus for negative space studies extends substantially beyond fashion. Street art,⁸⁸⁰ elements of creative personality such as roller-derby performer names and clown facepaint,⁸⁸¹ some traditional

⁸⁷⁷ See, eg, Tushnet, ‘Architecture and Morality: Transformative Works, Transforming Fans’ (n 69).

⁸⁷⁸ Betsy Rosenblatt, ‘A Theory of IP’s Negative Space’ (2011) 34 *Columbia Journal of Law & The Arts* 317, 319.

⁸⁷⁹ Kal Raustiala and Christopher Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92 *Virginia Law Review* 1687, 1764.

⁸⁸⁰ See, eg, Enrico Bonadio, ‘Conservation of Street Art, Moral Right of Integrity, and a Maze of Conflicting Interests’ in Enrico Bonadio, ed, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge 2019); Cathay YN Smith, ‘Street Art: An Analysis Under U.S. Intellectual Property Law And Intellectual Property’s “Negative Space” Theory’ (2014) 24 *DePaul J Art Tech & Intell Prop L* 259.

⁸⁸¹ See, eg, Fagundes (n 835); Fagundes and Perzanowski (n 835).

music practices,⁸⁸² culinary recipes,⁸⁸³ and more have been included within these conversations.

The central thesis underlying this area of study is that an increased understanding of the kinds of creativity that fall into the IP negative spaces can lead us to a better understanding of the shape of intellectual property law, much as a better understanding of the use of negative space in art can lead to an increased understanding of the work as a whole.⁸⁸⁴ Some overall conclusions about the area have been drawn, most notably that there are a wide range of reasons that areas of creativity fall into negative space. In some cases, such as the pornography industry or Nigerian cinema, the creativity falls into negative space largely because of difficulties in enforcement, either because infringement is easy or IP laws themselves are weak.⁸⁸⁵ In other cases, there is a tension in play because the creativity involved is illicit

⁸⁸² See, eg, Luke McDonagh, 'Protecting traditional music under copyright (and choosing not to do enforce it),' in E. Bonadio & N. Lucchi (eds.), *Non-conventional Copyright - Do new and atypical works deserve copyright protection?* (Edward Elgar, 2018), 151.

⁸⁸³ See, eg, Shelby Dolen, 'Chef's Canvas: Recognizing Rights as Artists Under Copyright Law' (2020) 18 Colorado Tech LJ 393.

⁸⁸⁴ See Christopher Sprigman, 'Some Positive Thoughts About IP's Negative Space' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017) 251.

⁸⁸⁵ See, eg, Olufunmilayo B Arewa, 'Nollywood: Pirates and Nigerian Cinema' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017); Kate Darling, 'IP Without IP?: A Study of the Online Adult Entertainment Industry' (2014) 17 Stanford Technology Law Review 709.

or otherwise repugnant.⁸⁸⁶ Most often, however, the industries have thrived despite either falling through the cracks of IP protection, or because creators simply choose not to seek protection, as is often the case in new creative industries such as YouTube content creation, because financial gain is not linked to a need for exclusivity.⁸⁸⁷ In these cases, areas of creativity are flourishing – and in cases have flourished for centuries – despite a limited overlap with the design of the intellectual property system.

Finally, there is a body of material that might best be referred to simply as ‘things that are nominally protected by copyright.’ These are well-illustrated by John Tehranian’s *Gedankenexperiment*, in which he calculated that a law professor with a tattoo from a comic strip who is caught on camera singing a song, after a day at work that involves replying to emails, copying news articles for students, and reciting a poem with a law and literature class, has committed dozens of infringing acts and would be subject to massive damages if all were litigated.⁸⁸⁸ To an extent, of course, Tehranian was engaging in hyperbole (and one of his examples, the singing of “Happy Birthday,” has subsequently been

⁸⁸⁶ See, eg, Eldar Haber, ‘Copyright Protection of Illegal Works,’ in E. Bonadio & N. Lucchi (eds.), *Non-conventional Copyright - Do new and atypical works deserve copyright protection?* (Edward Elgar, 2018), 401; Marc Mimler, ‘On How to Deal With Pandora’s Box – Copyright in Works of Nazi Leaders,’ in E. Bonadio & N. Lucchi (eds.), *Non-conventional Copyright - Do new and atypical works deserve copyright protection?* (Edward Elgar, 2018), 432.

⁸⁸⁷ Rosenblatt, ‘A Theory of IP’s Negative Space’ (n 878) 364.

⁸⁸⁸ John Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ (2007) 2007 Utah Law Review 537, 543–48.

definitively found non-infringing).⁸⁸⁹ Nevertheless, the thought experiment highlights one key thing: there is much that is technically protected by copyright, but generally only formally so. We do not think of much of this content as being actually protected.

This becomes particularly clear when one examines cases where attempts have been made to litigate disputes over the sort of content that is generally viewed as outside copyright. Courts in many jurisdictions have struggled, for example, to deal with attempts to use copyright to restrict access to leaked materials, particularly when the leaks have public interest components.⁸⁹⁰ In general, and particularly in the United States, such efforts have ended poorly for those seeking to enforce the copyright. This was plausibly true in the famous ‘dancing baby’ case, when a music publisher attempted to suppress someone’s home video of their child.⁸⁹¹ It may also have played a role in the outcome of the attempt to suppress the critical cut of a political adversary’s YouTube video in the *Hughes v Benjamin* case,⁸⁹² and in the attempt to suppress the facebook meme.⁸⁹³ It is difficult, reading some of these decisions, to escape the sense that the court was unimpressed with the attempt to use copyright in nontraditional ways.

⁸⁸⁹ Compare *Tehrani* (n 373) 4 (listing public singing of “Happy Birthday” as potential infringement with *Marya v Warner/Chappell Music, Inc* 131 F Supp 3d 975 (Dist Court 2015) (holding claimed copyright in “Happy Birthday” invalid).

⁸⁹⁰ Compare, eg, *Online Policy Group v Diebold, Inc* (n 783) (dealing with use of newsworthy leaked emails) with *Funke Medien NRW GmbH* No. C-469/17 (29 July 2019).

⁸⁹¹ *Lenz* (n 350).

⁸⁹² Discussed in 6.3.4.

⁸⁹³ Discussed in 7.1.1.

In each of these areas, UGC, negative space, and nominally protected stuff, a common feature presents itself: these are things that are simply not good matches for the copyright system as it stands at the present moment. An email reply chain is protected by copyright as a literary work in most jurisdictions; it is written down and exhibits a modicum of creativity. Only rarely does it make any sense to treat it as such. The facepaint design of clowns is art, and, when fixed on an eggshell, protected by copyright. Yet, again, the copyright system is simply not the place where disputes occur. And UGC and fanworks, as we have seen, implicate a wealth of copyright grey areas. These areas are poor fits with copyright law; the copyright system isn't designed to deal with them.

8.3 The Commonality: Human Practices in an Industrial Copyright Ecosystem

As the prior section demonstrated, fanworks sit, alongside many other areas of human enterprise, at best uncomfortably within the global copyright system. In light of this, it is helpful to consider what the proposals for solutions to the fanworks problem that have been discussed thus far have in common: they are proposals for change within the existing copyright framework. That is, they propose a set of changes to copyright law. The question arises, however, whether, given the purposes underlying the historical development of copyright law, it can be reasonably expected that the copyright system itself has the capacity to embrace the kind of changes that will be needed.

It is entirely plausible that it does not. As this section will discuss, copyright has historically developed as a system that is heavily

connected to a specific set of creative industries. To the extent that it has been designed at all, it has been expanded in a piecemeal manner, embracing new technologies – most linked to industrial distribution of creativity – as needed. And, in part because of this industrial-linked development, copyright law has largely been designed to in effect regulate these specific industries, rather than to protect or advance creativity writ large.

Copyright has, from its earliest roots, been a body of law that regulates the creative industries. The earliest roots here do not merely extend to the Statute of Anne and its origins in a dispute amongst the printing profession, or even to the “battle of the booksellers” that led to the development of the earliest copyright case law.⁸⁹⁴ Nor do the roots extend only to the earlier use of privileges to govern printing early during the first centuries after Guttenberg’s printing press entered widespread use.⁸⁹⁵ Both are, to be sure, examples of the use of copyright law, or at least of proto-copyright law, as a means of regulating the conduct of the (then) state-of-the-art printing industry.

Copyright as industrial regulation is older still, if we accept the accounts of the “Battle of the Book” – a copyright dispute that erupted between two monks some fourteen hundred years ago.⁸⁹⁶ There is, to be

⁸⁹⁴ See Yin Harn Lee, ‘The Persistence of the Text: The Concept of Work in Copyright Law - Part I’ (2018) 2018 *Intellectual Property Quarterly* 22, 26–27.

⁸⁹⁵ See Jane Ginsburg, ‘Proto-Property in Literary and Artistic Works: Sixteenth Century Papal Printing Privileges’ in Isabella Alexander and H Tomas Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016).

⁸⁹⁶ See Ray Corrigan, ‘Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland’ (GikII 2 Workshop on the

sure, some room to doubt whether an ‘adjudication’ that ultimately resulted in a pitched battle with thousands of fatalities should be viewed as the first legal dispute involving copyright (or at least the right to copy). It certainly does not appear to be the first *successful* adjudication of a copyright dispute. But it is one that involved the right to use and spread the Vulgate, which was at the time a new translation of the Bible.⁸⁹⁷ And the Church was, in the Dark Ages, about as close as one could come to a knowledge-based industry.

Subsequent legal developments in the UK and America have often followed changes in technology, and dealt with the needs of expansions of the creative industries as new forms of media were developed. These developments most often took place in the face of either new commercial practices that were proving disruptive within the existing industries or new technological advances that enabled the development of new forms of mass content distribution. Thus, copyright was extended to engravings, to translations, to photography, to recording, and so on.⁸⁹⁸ In some cases, the developments were the result of case law.⁸⁹⁹ In other cases, statutory change followed cases where copyright was held to not protect a work from being commercially exploited by others, as was the

Intersections Between Law, Technology, and Popular Culture, London, 2007).

⁸⁹⁷ *ibid.*

⁸⁹⁸ Space does not permit a full discussion of the history of copyright here; there are many excellent sources available. See generally, eg, Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Research handbooks in intellectual property, Edward Elgar Publishing 2016) and the contributions therein.

⁸⁹⁹ See, eg, *Bleistein v Donaldson Lithographing Co* (n 412) (holding that copyright extended to mass-produced advertising posters).

case with translations in the United States,⁹⁰⁰ or where new technologies resulted in a need for a shift in the definition of what constitutes a copy, as was true with the disruptive technology of the player piano roll.⁹⁰¹

This process of development has resulted in a body of law that is designed to regulate the creative industries. It has been developed as such over the course of centuries. And it has been developed in large part through the active input of those industries, as they have sought to have the law shaped to meet their needs. Industry groups play a substantial role not merely in lobbying for changes to copyright law, but also – particularly historically – have been heavily involved in the legislative drafting process.⁹⁰²

At times, the level of industry involvement has been ‘getting legislators to substitute the industry’s legislative drafts for their own, a process that sometimes includes not merely drafting the legislation, but also drafting the legislative reports that accompany them.’⁹⁰³ To be clear, these drafting and negotiating processes have involved many stakeholders within the industries, including publishers, distributors,

⁹⁰⁰ There, protection was extended by statute after translations were held non-infringing in *Stowe v Thomas* 23 F Cas 201 (1853).

⁹⁰¹ See, eg, Brian Sanchez, ‘The Section 115 Mechanical License and the Copyright Modernization Act: The Hardships of Legislating Music Industry Negotiations’ (2006) 17 DePaul-LCA J Art & Entertainment L 37, 37–38.

⁹⁰² This has been the subject of extensive discussion, with Jessica Litman’s work on the legislative history of the United States’s 1976 Copyright Act deserving particular mention, and cannot be treated in depth here. See, eg, Jessica D Litman, ‘Copyright, Compromise, and Legislative History’ (1987) 72 Cornell Law Review 857; Jessica Litman, ‘Copyright Legislation and Technological Change’ (1989) 68 Oregon L Rev 275.

⁹⁰³ See William Patry, ‘Copyright and the Legislative Process: A Personal Perspective’ (1996) 14 Cardozo Arts & Ent L J 139, 142.

authors, and artists; this has been true since Dickens and Twain lobbied for international copyright reform.⁹⁰⁴ However, to the extent that user rights were even raised in the drafting process, this was generally restricted to the concerns of libraries and other similar actors.⁹⁰⁵

This is not necessarily a bad thing. The result has been a body of law that is flexible in its application. As such, it can provide economic protection to authors and artists, guidance to those who wish to commercially use their works, and a set of regulations that govern the distribution of creative content for financial gain. The things that copyright was designed to do, it generally does well. It was simply never designed as a source of regulation for the everyday conduct of individual people's lives.

True end-user rights were of at most secondary concern throughout the majority of copyright history— and for good reason. The activities of readers might be technically covered by language within the copyright laws, but they were as a practical matter beyond the scope of copyright. They were not easily detected, not easily policed, not easily monetized, and for these (and other) reasons were simply not of concern to copyright law. The reader – or user - was simply invisible to the law.

This is particularly apparent when one examines the issues that sprung up around home recording technology. The creative industries were clearly not pleased by the availability of an inexpensive means of permitting widespread and inexpensive home copying. Yet the response was not – in large part because it would be impracticable to do so – to

⁹⁰⁴ See Catherine Seville, 'Authors as Copyright Campaigners: Mark Twain's Legacy' (2008) 55 J Copyright Soc'y USA 283, 349–52.

⁹⁰⁵ See, eg, Litman, *Digital copyright* (n 115) 107–08.

take action against individuals. In the United States, film studios sued the makers of the recording equipment.⁹⁰⁶ And, in much of the world, legislative solutions for inexpensive home copying were found involving levies on recording media for the benefit of artists – or at least the collecting societies serving them.⁹⁰⁷ The home activities of users were an issue, but the law did not seek to directly regulate private user conduct.

This is clearly no longer the case, as the music and film industries' well-known and extensive campaigns against individual downloaders of protected content clearly demonstrate. Individual users have been able to copy at scales previously impossible, and the ways they use copies have become far more visible. This change in the scope of copyright law's uses has been reflected in the increased public attention to, and involvement in, proposed copyright reforms, including the recent DSM Directive.⁹⁰⁸ To the extent, however, that there has been change in outcomes as a result of a shift to greater public pressure, that has been reflected more in the occasional ability of an angry public to block legislation.⁹⁰⁹ It has not, however, led to the general public becoming a significant actor in negotiating the development of new copyright law. This is no surprise; there is an infrastructure for industry involvement dating back decades, if not centuries. There is no equivalent for public involvement.

⁹⁰⁶ Sony Corp of America v Universal City Studios, Inc, 464 US 417 (1984)

⁹⁰⁷ See, eg, 17 USC §§1003, 1008; Canada Copyright Act s. 82.

⁹⁰⁸ See, eg,

⁹⁰⁹ For a discussion of notable public success in derailing proposals, see Bill D Herman, *The Fight over Digital Rights: The Politics of Copyright and Technology* (Cambridge University Press 2013).

The result has been, as Jane Ginsburg has acknowledged, that we face a challenging situation:

A statute structured to articulate broad protective principles, tempered by narrow exceptions tailored for parties present to bargain for them, responds poorly to technological change because narrowly-crafted solutions may become obsolete, and more importantly, technology may give rise to future users whose interests could not have been represented when the deal was struck.⁹¹⁰

Unfortunately, however, crafting space for the communicative uses of copyrighted works by users has been challenging, in part because the interests of such users are too easily lost in the fuss surrounding issues of direct copying on the one hand, and those surrounding the transformative use of existing works within the creative industries on the other.⁹¹¹

Ultimately, fanworks became a subject for serious legal scrutiny not when they first came into existence, but when their move to the internet brought them into public view.⁹¹² Prior to that, it was possible for copyright owners of sufficiently large properties with sufficiently vigorous and public fandoms to do a small amount of policing at larger events, but anything beyond that was simply not feasible – and that, of course, only covered a small fraction of what was available even at the time. Fanworks were then, as they are now, a relatively commonplace method of contextualizing creative works – they are much more an active

⁹¹⁰ Jane C Ginsberg, ‘Can Copyright Become User-Friendly? Review: Jessica Litman, *Digital Copyright* (2001)’ (2001) 25 *Columbia Journal of Law & The Arts* 71, 72.

⁹¹¹ See, eg, Ginsburg (n 102) 19–20 (trivializing fanworks while addressing other aspects of user rights).

⁹¹² See Chapter 2.1.5.

form of consumption of works than a means of creating things to compete with existing works within the creative industries.

As is true for the other forms of creativity discussed above in 8.2, fanworks have been forced into a copyright system that was not designed to address their works. Their practices were, like singing happy birthday at a restaurant, or sending a copy of an article to a colleague who does not have local library access, largely invisible to copyright law, and copyright law was not designed to regulate them.⁹¹³ It is not designed to do so, and it should not be a surprise that, when it is forced into that role, it is often not fit for purpose.

Perhaps the clearest example of the extent to which this is true is this: it is highly unlikely that anyone would consider a group of eight-year-old children who are creating a fanwork by re-enacting a film scene with action figures to be engaged in something that is *prima facie* copyright infringement.⁹¹⁴ And yet it is surprisingly difficult to find a doctrinally coherent explanation for this conclusion. A re-enactment of a film scene is, virtually everywhere, enough to state a *prima facie* case for infringement.⁹¹⁵ Determining why it is not an infringement would then require assessment of exceptions, limitations, and defenses – which, as

⁹¹³ It is common to request articles through social media rather than interlibrary loan. See Sara Benson, ‘Social Media Researchers and Terms of Service: Are We Complying with the Law?’ (2019) 47 *AIPLA Quarterly Journal* 191, 201–02.

⁹¹⁴ For a discussion of the question of whether fanworks should be treated differently from playing with dolls, see generally Casey Fiesler, ‘Pretending Without a License: Intellectual Property and Gender Implications in Online Games’ (2013) 9 *Buff Intell Prop LJ* 1.

⁹¹⁵ Under United States copyright law, this would create a derivative work. See 17 USC § 106. Under English copyright law, it would likely be a performance. See CDPA 1988 s.19(2)(b).

noted, are rarely clear-cut.⁹¹⁶ To the extent that it seems ludicrous to view something like this as infringement, it is not that the law in this area suggests that this is unfringing. It is that there is an innate understanding that copyright law is not – no matter how plausibly the statutes suggest otherwise – intended to regulate children who are engaged in normal childhood activities.

8.4 Where Are We, and Where Do We Go from Here?

At this point, it is worth taking a moment to review what has been discussed in this thesis to this point – to step back and take stock of the situation once again. At the start of the thesis, we noted that the study of fanworks per se has largely focused on a subset of fanworks. Specifically, the focus has been on mass-media pop culture fandoms and the individual, derivative work fanworks rooted in those fandoms that are created and distributed noncommercially, usually through online means.⁹¹⁷ Fanworks in this sense are frequently lauded by copyright workers, and there is a widespread consensus that at least most fanworks should not constitute actionable infringement.⁹¹⁸ A similar consensus is seen in work that has been done in other areas of UGC and copyright law.⁹¹⁹

We also saw, in the two chapters of the thesis that followed, that fanworks and fandoms are, on the whole, more complex than has been

⁹¹⁶ *See generally*, Chapter 5.

⁹¹⁷ *See* Chapter 2.1.

⁹¹⁸ *See* Chapter 2.3.

⁹¹⁹ *See* Chapter 2.2.

captured in much of the work that has been done to date.⁹²⁰ They are, in many cases, as much a part of the reading process as they are a form of creation – and intended to be used as such.⁹²¹ Fanworks and fandoms also span a spectrum that blurs into other areas of UGC as well as hobbies, and the copyright disputes that arise across this spectrum share many similar characteristics.⁹²²

The characteristics that are shared by these disputes generally do not involve matters of direct copying. They involve, instead, uncertainties about use of material in ways that do not constitute direct copying, and instead involve uses in new contexts and creations.⁹²³ These uncertainties crop up in many jurisdictions within the common law world and are of particular import where they exist within American law, which often acts as the default law governing online content.⁹²⁴ These uncertainties are such that although a certain number of rules can be derived from some decided cases, those rules will often be insufficient to provide *ex ante* certainty regarding whether a particular use of a work violates copyright.⁹²⁵

These uncertainties have real-world consequences that have an outsized impact on individual creators.⁹²⁶ They also have serious societal effects; effects which stretch beyond fanworks and into all other areas of

⁹²⁰ See generally Chapters 3 & 4.

⁹²¹ See Chapter 4.1.

⁹²² See Chapter 3.3.

⁹²³ See generally Chapter 6.

⁹²⁴ See Chapter 1.4.2.

⁹²⁵ See generally Chapter 6.

⁹²⁶ See Chapter 7.1.

UGC and similar offline conduct.⁹²⁷ Change is badly needed, but prior proposals have yielded limited progress, national solutions are likely inadequate to the task, and, in any event, the copyright framework itself is ill-suited to providing a solution.⁹²⁸

A recent proposal for a new international instrument spearheaded by the Max Planck Institute may provide us with some indications as to pathways forward. Their “Instrument on Permitted Uses in Copyright Law” is designed as a proposed multilateral treaty that would exist alongside the other copyright treaties, as part of the current copyright system.⁹²⁹ This proposed agreement would, if adopted, establish certain minimum permitted uses of copyright-protected works as mandatory.

Any system with required exceptions and limitations would be a substantial and welcome departure from the current norm of required protections and optional exceptions.⁹³⁰ On the whole, this proposal would therefore represent, if implemented, a substantial step forward. Nevertheless, it has several features that render it a less-than-ideal solution to the problem.

One is in the language. Although the proposal consciously avoids the “exceptions and limitations” language that is typically used in copyright law, the “permitted uses” terminology used seems little better. It is slightly more positive in its approach, but it nonetheless frames the matter as exceptions that are being given to users, and not as a means

⁹²⁷ See Chapter 7.2.

⁹²⁸ See Chapter 8.1 & 8.2.

⁹²⁹ Reto M Hilty and others, ‘International Instrument on Permitted Uses in Copyright Law’ (2021) 52 IIC 62.

⁹³⁰ See Chapter 8.1.5.

of confirming that users can, as of right, do the things that they've always done.

A second issue in in the structure of the proposal. As is often the case for such proposals, much of the language is less than concrete. This is, frustratingly, particularly true where permitted uses that involve the creation and distribution of things like fanworks are concerned. The proposed instrument makes it clear in explicit language, for example, that the resale and public lending of works legally acquired is to be permitted.⁹³¹ Fanworks fare less well under this proposal.

The proposal falls short of mandating any exception that would cover most of the creative conduct discussed in this thesis, coming no closer than a requirement that there be a permitted use for “criticism, review, parody and caricature.”⁹³² Even there, the phrasing is less than definitive – the requirement is that uses “such as” those be covered, with that as an entry in an illustrative list. The lists themselves include, with the exception of the already-mentioned parody provision, little that would address, let alone resolve, any of the areas of uncertainty discussed in this thesis.

From the fanworks perspective, then, this is a proposal that, although helpful in jurisdictions that might lack minimal exceptions, falls short. It will not cover broad swathes of conduct that have long been engaged in. It will not guarantee that protections even equivalent to those presently available in Canada or the United States will exist

⁹³¹ Hilty and others (n 929) 65 at V.2.

⁹³² *ibid* 64 at I.2.

elsewhere; the floor is set lower than it presently rests. Nor will it do anything to clarify the confusion in these areas.

Nevertheless, it shows a potential path forward.

8.5 We Need True Reader's Rights

As Cohen noted, “copyright doctrine...is characterized by the absence of the reader.”⁹³³ This absence is the unsurprising consequence of the development of a body of law that was always intended as a means of regulating creative industries, and which was largely invisible to users (and vice versa) for centuries. At present, copyright law is primarily a mercantile law that is geared toward the protection of the copyright owner's property rights. This emphasis is, as some have noted, not one that is geared toward the preservation of the liberties – or rights – of protected users.⁹³⁴

The previous sections of this chapter have examined a range of proposed solutions that, to various extents, attempt to carve a space for the reader within copyright doctrine. To date, those attempts have not been overwhelmingly successful. Copyright law is not and never has been intended to be a law of users' rights. Any attempt to make copyright a law of users' rights is an attempt to pound a square peg into a round hole. We should stop trying.

A law of users' rights is necessary. It should be developed. And it should be developed as such – as a body of law that provides concrete

⁹³³ Julie E Cohen, ‘The Place of the User in Copyright Law’ (2005) 74 *Fordham Law Review* 347, 347 (cleaned up).

⁹³⁴ See, Wong (n 312) 1095.

protections for the rights of users. Not as a supernumerary appendage grafted onto copyright.

8.5.1 Balance Requires Clarity as to What is Being Balanced

It is common for contemporary discussions of copyright to speak of the need for a balance between copyright holders and users. This can be seen, for example, in the Preamble to the WIPO Copyright Treaty, which speaks of, “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information.”⁹³⁵ This acknowledgement of the need for a balance is mirrored in judicial decisions and academic discussions of copyright, as has been discussed previously.⁹³⁶

But it is often not clear – or at least not concrete – what exactly is being balanced. The concrete rights of the copyright holder are, to be sure, clearly defined. The right to copy, the right to distribute, the right to make available, all these rights are clear and explicit. However, while the concrete rights of the copyright owner are explicitly defined in copyright law, the scope of the owner’s legitimate interests is much more nebulous – and, in particular, how those legitimate interests interact with the rights and interests of readers. And those rights and interests are not explicitly defined at all. To the extent that the rights of copyright owners have been balanced against anything, has typically been the right of freedom of expression.⁹³⁷

⁹³⁵ World Intellectual Copyright Organization, Coypright Treaty (1996) Preamble.

⁹³⁶ Discussed throughout the thesis, but particularly in Chapter 8.1.3.

⁹³⁷ See generally, eg, *Deckmyn v Vandersteen* (n 597).

Freedom of expression, however, is a broad term. It is not one that is easily defined with specificity under the best of circumstances. Matters become even more complex when one considers that the purpose of UGC and fanworks is often a very different kind of expression than the expressive rights protected by copyright in meaning, yet not in the form of the expression.⁹³⁸ Absent the same kind of concreteness about what is included within ‘freedom of expression’ that we find with the rights included within copyright, it should come as no surprise that the concrete so often is found to outweigh the abstract. It is difficult to balance without a clear understanding of concrete rights.

A users’ rights framework will provide a concrete explanation of the rights that users possess, making it easier to undertake a true balancing exercise when there are conflicts between users and rights holders.

8.5.2 Readers and Rights Holders Require Clarity as to The Rights of Readers

As the chapters providing the black letter legal analysis demonstrated, it is all-but-impossible to make firm ex-ante predictions as to whether most fanworks are legally permissible. Copyright law was not designed to provide such certainty. Yet without ex ante predictability, is it reasonable to expect people to be able to comply with the law, or to know when they have not?

Bingham, in *The Rule of Law*, argues that “the law must be accessible and so far as possible intelligible, clear and predictable.”⁹³⁹ As

⁹³⁸ See, eg, the discussion of political speech in Chapter 7.2.1.

⁹³⁹ Thomas Henry Bingham of Cornhill, *The Rule of Law* (Penguin 2011) 37.

applied to fanworks, copyright fails on all counts.⁹⁴⁰ People cannot, and for the most part do not attempt to, conform their conduct to the dictates of the law. This is, from any perspective, suboptimal.⁹⁴¹ One must question whether a law that ordinary people cannot reasonably hope to understand can be fairly applied to their conduct at all.

At present, neither readers nor rights holders have clarity as to the extent of their rights. This is true to a large extent even where the use of full copies is concerned. It is indisputably and universally true where the secondary use of content is concerned.⁹⁴² In part, and as noted throughout this thesis, this is because the law in this area is particularly vague even by copyright norms. This is an area that is in desperate need of clarity. It is also one that, particularly given the clear relationship with speech and expression in the online environment, is best addressed through a users' rights law approach.

Such an approach would, in effect, establish what uses of content must be required to ensure that the freedom of expression is protected. This would provide clarity to both users and rightsholders, and greatly

⁹⁴⁰ *See generally*, Chapters 5 & 6.

⁹⁴¹ There is considerable literature on fan norms, which are often elaborate, but which are also often only loosely connected with the strict letter of the law. See generally, eg, Fiesler, 'Everything I need to know I learned from fandom: how existing social norms can help shape the next generation of user-generated content' (n 29); Fiesler, 'Copyright and social norms in communities of content creation' (n 834); Stuart P Green, 'Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights' (2002) 54 *Hastings Law Journal* 167; Tushnet, 'Payment in credit: copyright law and subcultural creativity' (n 90).

⁹⁴² *See generally*, Chapters 5 & 6.

reduce the possibility of further conflicts like the ones discussed elsewhere in this thesis.

8.5.3 What A Users' Rights Approach Could Look Like

As a practical matter, the “Permitted Uses” proposed instrument discussed above provides us with a starting point for what a users’ rights approach might look like on a global basis. A single instrument that sets out minimum requirements would be in accord with other areas with multiparty instruments, including copyright law. Such an approach would allow users to be placed on an even footing with copyright holders.

It would be, however, inappropriate to locate such an instrument within the law of intellectual property. Rather, this would be an instrument that would be positioned within fundamental rights and freedom of expression; the purpose of the treaty would be to fully define, for the first time, the ways in which culture and knowledge can be used in the service of free expression. It would define not what can be owned, and not even what uses are permitted notwithstanding ownership. Rather, it would define the limits of ownership in this area.

Given the global nature of the issues that are involved here, and the need to balance the rights of users against the concrete rights specified under copyright law, such an instrument would need to be phrased in terms that are more concrete than the uses suggested in the proposal discussed above. They would need to be at least as concrete as the rights that are detailed in treaties such as the Berne Convention, WCT, and TRIPS – not simply saying that there is a right to use under certain circumstances or for certain purposes but specifying the components of that right in detail.

8.5.4 How to Draft the Rights

It would not be appropriate to provide, in this thesis, such concrete recommendations – and certainly not a full outline of what the instrument would contain. No attempt is made here; the author does not pretend to possess the competence to singlehandedly redesign copyright from scratch. More importantly, as this thesis has shown, even just within the arena of fanworks and related content, there are many different voices with different needs and interests. Any attempt at the design of such a system should start with a collaborative effort that involves many voices.⁹⁴³

The thesis has, however, provided a strong argument for the need for clarity in this area, and shown many of the areas where the lack of clarity is impairing expression. Nevertheless, it has only been able to scratch the surface of the issues. A detailed understanding will require far more input and understanding, from a much broader range of voices. But even if it is inappropriate to attempt specifics, some general principles that would guide the drafting process can be provided.

First, the drafting process must be rooted not merely in what people are doing now, but in the types of things that people have long done. The intent of outlining a law of users' rights is not to impair the legitimate interests of content owners. It is to clearly define the legitimate interests of users, based on reasonable expectations rooted in past and present practice, and to ensure that those rights are

⁹⁴³ It should certainly include those affected by the use of traditional culture, especially where the involved cultures were not involved in the development of copyright in the first instance. *See* Chapter 7.2.4.

protected from impingement through expansion of intellectual property rights.

Second, the drafting process must produce concrete rules, not merely general principles. As we have seen throughout this thesis, no matter how well-suited general principles might be to the needs of the creative industries, general principles to be interpreted by judges do not result in a body of law that permits users to clearly understand *ex ante* what is required of them. If this is to be rectified, the rights established in the proposal must be clear, concrete, and explicit.

Third, the drafting process must provide wronged users with means of redress. Ideally, the development of such a body of law would, in and of itself, be sufficient to ensure that most harms are mitigated. In reality, this is unlikely to be the case. The instrument should be defined to create active means of redress for wronged users, not merely defenses.⁹⁴⁴

Fourth, the drafting process for the instrument must be interactive, public, and transparent. Industry capture of the drafting process will be fatal, and a lack of transparency will result in a lack of confidence in the process. It may be best to draft the instrument using online methods, including some of the suggestion/comment methods utilized in areas such as free and open-source software.

Fifth, the drafting process must be broad-based. Although this proposal is informed by the problems that are presently seen with fanworks, it is equally clear that similar issues run throughout

⁹⁴⁴ For an example of what such an approach might look like, see generally the Intellectual Property (Unjustified Threats) Act 2017.

copyright. There are many issues involving secondary uses that are not unique to fanworks, and there are other issues, such as personal copying and first sale in the online environment, where other areas of copyright law are in conflict with the reasonable expectations of users. This process should be an opportunity to address as many of those issues as possible.

8.6 Conclusion

Many suggestions have been made for fixes to the fanworks problem, without noteworthy success. These solutions have largely consisted of changes to copyright law that would more clearly carve out a zone of protection for fanworks. Some of the solutions have focused on the potential development of new case law doctrines and have floundered due to the lack of cases that could drive such changes over the quarter-century that fanworks have been in the academic eye.⁹⁴⁵ Others have focused on legislative change, which has failed for a reasons ranging from the ordinary difficulties in achieving legislative consensus to the limits that international instruments place on national legislation in this area.

At the same time, the need for not merely *a* solution, but a solution that is broad in scope becomes even more apparent when one views fanworks within broader copyright contexts. As noted in earlier chapters, there is substantial overlap between fanworks and other forms of UGC. Fanworks, however, also fall within the ambit of intellectual property's negative space – creative activities that are not well-encompassed by existing law. Fanworks, like many other forms of

⁹⁴⁵ The dearth of law being, of course, driven by the factors discussed in Chapter 7.

commonplace activity, are simply poor fits for the copyright system as it stands.

They are, instead, activities that were largely invisible to the copyright system when the laws were drafted. Copyright was, from its start, focused on the key interactions involved in the creative industries, and not on the end customer. The drafting process for the laws historically did not include the copyright end-user, and even increased public visibility of copyright law has done little to change that. We have been given a copyright system that is intended to regulate creation and distribution, not acts that are common end-uses of works.

Ultimately, this suggests that the solution to the fanworks problem in copyright must be found outside copyright law as it exists in its current form. If the end user is to be equitably regulated by copyright law, she must be an intended subject of the law – not the focus of enforcement mechanisms that were intended to deal with competitors rather than customers. A positive law of user rights, radical though the suggestion might sound, would be a substantial step in this direction.

9 CONCLUSIONS

Twenty years ago no one could have imagined the effects the internet would have - entire relationships flourish, friendships prosper on the e-mail screen, there's a vast new intimacy and accidental poetry (from the osprey-tracking site to tours round old nuclear silos and the extraordinary aerial trip down the California coastline and a thousand others), not to mention the weirdest porn. The entire human experience seems to unveil itself like the surface of a new planet.

JG Ballard.⁹⁴⁶

This thesis started, in a sense, with a question the author's children asked nine years ago: who owns Derpy? Derpy, as it turns out, is a largely fan-created character in the *My Little Pony* franchise. Fans noted a flaw in the eyes of a non-character pony found in the background of the pilot episode. They began to speculate about the reasons for the oddity, and rapidly developed an entire backstory and set of character traits for that pony.⁹⁴⁷ The fan-created version became the focus of many fanworks, had many fans of its own within the broader fandom, and the show's creators incorporated the character into an episode – largely as depicted by the fan canon. The question was, ‘do the fans own any of the rights to the character they created.’ No answer to the question was immediately apparent.

This thesis does not provide one.

Instead, this thesis examined the reasons that an answer to that question is not immediately apparent, whether the question is asked in the United States or any other common-law jurisdiction. There has been

⁹⁴⁶ *Quoted in* Jeanette Baxter, ‘Age of Unreason’ (The Guardian, 22 June 2004)

<<https://www.theguardian.com/books/2004/jun/22/sciencefictionfantasyandhorror.jgballard>>

⁹⁴⁷ For more information, see Christopher Bell, ‘The Ballad of Derpy Hooves – Transgressive Fandom In My Little Pony: Friendship Is Magic,’ (2013) 1 Humanities Directory 5

a quarter-century of work on the fanworks problem, but a solution remains elusive. This length of time strongly suggested that a step back, in a sense, to examine the problem itself more closely might allow a reframing of the core question.

Examination of the academic consensus around fanworks reveals that most research has examined what might be referred to as a ‘standard model’ of fanworks, that views fanworks as individual creative works that are typically non-commercial derivatives of popular mass-culture works, most commonly distributed online. An examination of these works by copyright scholars has arrived at a rough consensus that the works are socially beneficial, should be a protected activity, but reside within legal grey areas. They share this trait, to a great extent, with other areas of user-generated content, including peer production, remix, and social media.

A detailed examination of the elements of the standard model of fanworks strongly suggests that the standard model significantly underestimates the complexity of fanworks. Fanworks are far more diverse and extensive, and extend into fandoms that are smaller and less traditional than those that the standard model. The situation only grows more complex when the role of fandoms within fanworks is added to the mix. Fandoms exist that are focused on types of fanworks, such as cosplay or fanfic, and both fanworks and fandoms blur into other forms of user generated content to such an extent that a firm dividing line is difficult to identify. And millions of fanworks exist, suggesting that the problems of fanworks cannot safely be ignored.

The standard model might underestimate the scope of the fanworks problem, but its assessment of the legal landscape is anything

but an underestimate. In the United States, which due to its population and its role as the home of numerous key intermediaries, carries outsized importance to the law of fanworks, there is some doctrinal uncertainty surrounding questions such as what constitutes a derivative work. There is even more uncertainty when it comes to the application of the fair use doctrine, which is arguably the copyright exception most important for fanworks. There is less superficial uncertainty in the application of core doctrines in the United Kingdom, but post-Brexit uncertainties complicate that state of affairs, and the situation surrounding exceptions and limitations is not substantially clearer than that found in the USA. Legislative innovations elsewhere in the world, meanwhile, have not resulted in their respective jurisdictions either.

Nevertheless, despite the limited caselaw that is directly on-point for fanworks issues, it is possible to group fanworks-adjacent cases into several clusters, and to develop some rough rules (or at least guidelines) for how cases will be approached. Most notably, cases are rarely litigated to conclusion, and such cases as do arise tend to involve conduct that is more commercial and more similar to that seen in the traditional creative industries. Unfortunately, the handful of rules that can be derived from the cases do little to provide fan creators with anything like *ex ante* certainty as to whether any particular fanwork will infringe. Fanworks are very much in a legal grey area.

And this uncertainty does have substantial and unwelcome consequences. The legal uncertainties surrounding fanworks combine with high litigation costs to create an environment in which large creators can use litigation threats to remove fanworks. This is a net harm to society. Fanworks serve many desirable purposes. They are used in

political speech, as well as forms of criticism. In addition to restricting these forms of speech, the uncertainties surrounding fanworks also inhibit the development of new genres, contribute to the occupation of indigenous intellectual property, and on the whole disproportionately harm those most susceptible to exposure to litigation costs: small creators and end users.

The solutions that have been proposed to the fanworks problem thus far have not been noteworthy for their success. Most proposals have focused on change within the current copyright system, either through litigation or legislation. Neither is likely to succeed. Litigation does not occur, for reasons this thesis made clear. Legislation is treaty-constrained and has largely been industry-driven. The result has been a copyright law that makes no allowances for a wide range of creative endeavours that fall outside the traditional creative industries. Without an explicit body of law that defines and protects commonplace user activities, a long-term solution is unlikely to occur.

The good news is that this should not be nearly as radical a solution as it might appear on its face. Copyright law is, at the end of the day, relatively young. The written word has existed for over 5000 years, art for millennia longer. Even if we accept the legendary (and perhaps mythical) words of King Diarmaid – “To each cow its calf; To each book its copy” as the first adjudication of a copyright dispute, copyright law has existed for barely a quarter of the history of writing.⁹⁴⁸ If we take

⁹⁴⁸ There is some room to doubt whether an ‘adjudication’ that ultimately resulted in a pitched battle with thousands of fatalities should be viewed as

the dates of the earliest written stories and modern copyright law as the relevant points, we have had copyright law for considerably less than 10% of the total time.

During the remaining 90% of that time, there were no significant legal restrictions on copying. For more than 90% of the time that we have had formal copyright laws, the reading activities discussed within this thesis were outside the scope of what could be legally enforced, at least as a practical matter. Yet we have somehow found ourselves in a position where copyright is no longer viewed as the exception to the norm. Copyright has become the norm, and we have taken to viewing all activities involving protected works through the lens of copyright law.

The rights of individuals to participate in reading-related creative activities have been relegated to “exceptions and limitations” or “permitted uses” of protected works. As Litman notes:

*Theorizing copyright primarily in terms of author incentives looks primarily at the law’s effects on authors and distributors, and relegates the readers, listeners, and viewers of the world to the ghetto of fair use.*⁹⁴⁹

A quarter century of copyright scholarship has not been able to remove fanworks from the ghetto of exceptions and limitations. As a result, fanworks remain plagued by legal uncertainty. These uncertainties persist, however, not because fanworks are unique in the problems they present for copyright law.

the first legal dispute involving copyright (or at least the right to copy). It certainly does not appear to be the first *successful* adjudication.

⁹⁴⁹ Jessica Litman, ‘Creative Reading’ (2007) 70 *Law and Contemporary Problems* 175, 177. (cleaned up)

Copyright was not intended to deal with the any of the everyday needs of the everyday user, not just those connected with fanworks. Because those who are most seriously affected by this system are as a practical matter unable to vindicate their rights through the judicial process, this situation lends itself to considerable injustices not merely for fans, but also for a wide range of other users and creators outside the creative industries.

Ultimately, there is no such thing as the fanworks problem in copyright law. Instead, the fanworks problem is both a component and good illustration of the design mismatch between copyright and what people do with things that are theoretically protected by copyright.

Solving fanworks will not be possible in the absence of a broader use rights solution, and arriving at one will not be simple. The proposal for a body of users' rights law that is independent of, and will serve as a balance on, copyright will be controversial. It will undoubtedly face serious opposition, if indeed there is ever sufficient support to move it forward in a serious way. But there is no other path forward that seems more likely to yield a result that is likely to allow users to assert their expressive rights on anything like an even footing with copyright owners.

The options are clear. Either we take steps to protect the right of people to express themselves through the use and reuse of cultural resources, including those provided by mass culture, or we continue down a path that harms expressive rights in the interests of facilitating the ownership of culture. One path leads to further McDonaldization; to a world that privileges creations distributed by industrial actors at the expense of the things that people have long done to make creativity their own. The other protects the glorious human strangeness of fanworks – it

allows people to ‘play’ video games by making YouTube videos of characters walking across a world while carrying soup, clothe themselves in carpet-patterned versions of famous fictional characters, share strange fiction about long cylindrical ships that have become lodged in canals, and otherwise continue to create their own culture from all the bits and pieces of the creative world that surrounds them.

I prefer the latter.

APPENDIX A: THE ACADEMIC CONSENSUS

The sources in this appendix are cited to support the existence of the three-element consensus discussed in Chapter 2.3. The intent is to show that there is extensive support for each claimed element. Sources are cited in bibliography format, with the addition of page numbers, and presented in alphabetical order.

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APPENDIX B: A TREKKIE'S TALE

"Gee, golly, gosh, gloriosky," thought Mary Sue as she stepped on the bridge of the Enterprise. "Here I am, the youngest lieutenant in the fleet - only fifteen and a half years old." Captain Kirk came up to her.

"Oh, Lieutenant, I love you madly. Will you come to bed with me?"

"Captain! I am not that kind of girl!"

"You're right, and I respect you for it. Here, take over the ship for a minute while I go get some coffee for us."

Mr. Spock came onto the bridge. "What are you doing in the command seat, Lieutenant?"

"The Captain told me to."

"Flawlessly logical. I admire your mind."

Captain Kirk, Mr. Spock, Dr. McCoy and Mr. Scott beamed down with Lt. Mary Sue to Rigel XXXVII. They were attacked by green androids and thrown into prison. In a moment of weakness Lt. Mary Sue revealed to Mr. Spock that she too was half Vulcan. Recovering quickly, she sprung the lock with her hairpin and they all got away back to the ship.

But back on board, Dr. McCoy and Lt. Mary Sue found out that the men who had beamed down were seriously stricken by the jumping cold robbies, Mary Sue less so. While the four officers languished in Sick Bay, Lt. Mary Sue ran the ship, and ran it so well she received the Nobel Peace Prize, the Vulcan Order of Gallantry and the Tralfamadorian Order of Good Guyhood.

However the disease finally got to her and she fell fatally ill. In the Sick Bay as she breathed her last, she was surrounded by Captain Kirk, Mr. Spock, Dr. McCoy, and Mr. Scott, all weeping unashamedly at the loss of her beautiful youth and youthful beauty, intelligence, capability and all around niceness. Even to this day her birthday is a national holiday of the Enterprise.

Source: Paula Smith, 'A Trekkie's Tale' (1973) 1 Menagerie #2, 6.

APPENDIX C: THE HONORVERSE CANON

David Weber's *Honor Harrington* franchise, often referred to simply as the Honorverse, has been mentioned at several points within the thesis. It represents, by modern standards, a relatively concise franchise, which is primarily rooted in several series of books. These are listed here, both to show what, in the modern era, a 'small' franchise can look like and to demonstrate that even smaller fandoms may rely on rich bodies of source material.

The works consist of several series of books, grouped here as 'Main Series,' 'Anthologies,' 'Side Series,' and 'Supporting Works.' The individual works set out here are not repeated in the bibliography.

'Main Series' Books

These books represent the main storyline for the franchise, and follow the main character of the series.

- Weber D, *On Basilisk Station* (Baen 1992)
- — *The Honor of the Queen* (Baen 1993)
- — *The Short Victorious War* (Baen 1994)
- — *Field of Dishonor* (Baen 1994)
- — *Flag in Exile* (Baen 1995)
- — *Honor Among Enemies* (Baen 1996)
- — *In Enemy Hands* (Baen 1997)
- — *Echos of Honor* (Baen 1998)
- — *Ashes of Victory* (Baen 2000)
- — *War of Honor* (Baen 2002)
- — *At All Costs* (Baen 2005)
- — *Mission of Honor* (Baen 2010)
- — *A Rising Thunder* (Baen 2012)
- — *Uncompromising Honor* (Baen 2018)

Anthologies

The anthologies consist of short stories and novella-length works, some of which follow the main character, but most of which are focused on minor characters. This is very much analogous to the approach that conventional, or vanilla fan fiction fan fiction takes. *See* Chapter 3.2.1.1.

- Weber D (ed), *More Than Honor* (Baen 1998)
- — *Worlds of Honor* (Baen 1999)
- — *Changer of Worlds* (Baen 2001)
- — *The Service of the Sword* (Baen 2003)
- — *In Fire Forged* (Baen 2011)
- — *Beginnings* (Baen 2013)
- — *What Price Victory* (Baen 2023) (forthcoming)

Side Series

The ‘side series’ consist of several series of novels, most of which trace stories that are occurring alongside the main series in the franchise’s fictional timeline, and feature characters that appear in supporting roles in the main series.

- Weber D, *The Shadow of Saganami* (Baen 2004)
- — *Storm from the Shadows* (Baen 2009)
- — *Shadow of Freedom* (Baen 2013)
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- — *Torch of Freedom* (Baen 2009)
- — *Cauldron of Ghosts* (Baen 2014)
- — *To End in Fire* (Baen 2021)

Weber D & Lindsfold J, *Fire Season* (Baen 2012)

— — *Treecat Wars* (Baen 2013)

— — *A New Clan* (Baen 2022)

Weber D & Zhan T, *A Call to Duty* (Baen 2014)

— — *A Call to Arms* (Baen 2015)

— — *A Call to Vengeance* (Baen 2018)

— — *A Call to Insurrection* (Baen 2022)

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17 USC § 512

17 USC §1003

17 USC §1008

28 USC §1292

Federal Rules of Civil Procedure R. 12(b)

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Federal Rules of Civil Procedure R. 65(c)

United States – District of Columbia

DC ST § 10-50316 (US DC)(b)(7)

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DC ST § 10-50318 (US DC)

United Kingdom

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