

EXPOUNDING THE RELATIONSHIP BETWEEN FAN-FICTION AND COPYRIGHT LAWS: A STUDY

Dissertation submitted to National Law University and Judicial Academy, Assam
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CERTIFICATE

This is to certify that **SAHARSH DUBEY** has completed his dissertation titled
**“EXPOUNDING THE RELATIONSHIP BETWEEN FAN-FICTION AND
COPYRIGHT LAWS: A STUDY”** under my supervision for the award of the
degree of **MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME** of
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DECLARATION

I, **SAHARSH DUBEY**, do hereby declare that the dissertation titled “**EXPOUNDING THE RELATIONSHIP BETWEEN FAN-FICTION AND COPYRIGHT LAWS: A STUDY**” submitted by me for the award of the degree of **MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME** of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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2	1994	TRIPS Agreement
3	1921	The Copyright Act of Canada
4	1957	The Copyright Act of India
5	1957	The Copyright Act of South Korea
6	1976	The Copyright Act of The United States of America
7	1988	The Copyright, Designs and Patents Act, (United Kingdom)
8	2012	The Copyright Modernization Act of Canada

TABLE OF ABBREVIATIONS

ACRONYMS	ABBREVIATIONS
&	And
§	Hieroglyph
AIR	All India Review
Anr	Another
CA	Copyright Act
CDPA	Copyright, Designs and Patents Act
CJEU	Court of Justice of the European Union
CMT	Copyright Modernization Act
ECR	European Court Reports
Edn.	Edition
Ed.	Editor
EU	Europe Union
HC	High Court
Ibid	Ibidem
IPAB	Intellectual Property Appellate Board
JIPR	Journal of Intellectual Property Rights
LDMA	Authentic Literary, Dramatic, Musical, or Artistic Works
Ltd	Limited

Mfg	Manufacturer
No	Number
SC	Supreme Court
SCC	Supreme Court Cases
Sec	Section
SOCAN	Society of Composers, Authors and Music Publishers Canada
Supp	Supplementary
Tr	Translator
TRIPS	Trade-Related Aspects of Intellectual Property Rights
U.S.C	United State Code
UGC	User-Generated Content
UK	United Kingdom
USA	United States of America
v/ v.	Versus
VARA	Visual Artists Rights Act
Vol	Volume

CHAPTER 1

INTRODUCTION

The realm of fanfiction is frequently misconstrued and disregarded, despite its capacity for imaginative articulation that surpasses its superficial description. This article aims to delve into the authentic interpretation of fanfiction, its cultural relevance, and the significant influence it exerts on both creators and enthusiasts. Fundamentally, fanfiction constitutes a commemoration of fandom. This platform enables enthusiasts to deeply engage with cherished tales and personas, while also extending pre-existing storylines. Fanfiction enables enthusiasts to actively engage with their favorite fictional universes by creating original stories and delving into unexplored realms.

The act of creating fanfiction provides a means for fans to exercise their creative abilities and express themselves in a unique way. The platform facilitates experimentation, fosters skill development, and enables the expression of distinct interpretations. This allows enthusiasts to assume the position of creators, infusing vitality into their personal storylines while demonstrating reverence towards the primary source.

The creation of fanfiction within a nurturing community fosters a feeling of possession and authorial agency. The practice of fanfiction fosters an inclination towards exploration and facilitates the expansion of the boundaries of established fictional universes. The work explores the backstories of characters, previously untold adventures, and themes that have yet to be explored. Fan writers provide novel viewpoints, explore intricate sentiments, and emphasize varied encounters that strike a chord with a global audience. Fanfiction cultivates dynamic communities in which authors and readers convene to exchange their literary creations, provide constructive criticism, and participate in cooperative endeavors. These communities offer a secure environment for artistic manifestation, reciprocal admiration, and the establishment of enduring relationships.

The act of creating fanfiction can be considered a transformative process, as it involves the reimagining and revitalization of pre-existing literary or media works. The phenomenon highlights the persistent influence of narrative as enthusiasts reinterpret

plotlines spanning various categories, historical eras, and even amalgamate disparate fictional realms. Fanfiction allows for the exploration of familiar characters in unconventional scenarios, presenting them with distinctive obstacles and opportunities for growth that may not have been previously considered. The creation of fanfiction is subject to multifaceted copyright considerations. The exclusive rights to their works are possessed by copyright holders, however, the ownership lines are blurred by the transformative nature of fanfiction. The issue of reconciling copyright protection and creative liberty gives rise to inquiries concerning equitable use, adaptations, and feasible partnerships between copyright proprietors and enthusiasts who create derivative works.

Copyright laws provide creators with exclusive rights over their works, affording them the ability to regulate their usage and dissemination. The genre of fanfiction inherently entails the utilisation of copyrighted material without explicit authorization, thereby prompting apprehensions regarding possible copyright infringement and the intricate equilibrium between creative expression and safeguarding intellectual property rights. The legal notion of fair-use permits the restricted utilisation of copyrighted material without obtaining explicit consent. This principle is applicable to fanfiction as well.

The creators of fanfiction contend that their literary productions are protected under the doctrine of fair-use, on account of their transformative nature, which involves the reimagining of characters or the provision of critical commentary. The implementation of fair-use concerning fanfiction exhibits inconsistencies across different legal jurisdictions, rendering it a convoluted legal terrain to manoeuvre. Legal precedents indicate that in certain jurisdictions, courts have ruled in favour of creators of fanfiction, citing the presence of transformative elements and non-commercial nature as significant considerations and have recognized fanfiction as a form of protected expression within the bounds of fair-use.

The commercialization of fanfiction, wherein it generates revenue or competes with the market of the original work, may be subject to increased scrutiny and legal ramifications. The creation of fanfiction is inherently derivative, which prompts inquiries into the degree to which it violates the rights of copyright holders. In jurisdictions where moral

rights are recognized, the act of significantly altering characters in fanfiction may be perceived as a transgression against the original creators' integrity rights. Distinguishing the legal Ramifications of fanfiction on non-commercial platforms as opposed to commercial platforms presents a complex task. Thus, the research study at hand focuses on the existing conundrum between fanfiction and the copyright laws of different jurisdictions. Firstly, the research study examines the copyrightable components of fictional works and the potential infringement of an author's rights in the context of fanfiction. This is done through an examination of copyright legislation in three countries, specifically the United Kingdom, the United States, and Canada and by analyzing the pertinent legal judgements relating to fanfiction under these three jurisdictions. Further, the research study delves into the potential legal defences that may be utilised by fanfiction authors in the aforementioned countries to counter allegations of copyright infringement. The fair-use and fair-dealing doctrines that are in place in these countries have been given significant attention under the research study.

The research study then delves into the legal quandary of whether fanfiction, which is classified as a derivative work under various legal systems, can be deemed as a transformative work, thus circumventing the legal disputes that typically ensue. Finally, the current study centres on the legal landscape in India pertaining to fanfiction and proposes potential solutions to tackle these concerns and the author proposes several perspectives derived from the legal frameworks of various nations pertaining to fanfiction, which may be applicable to the corresponding legal system in India.

1.1 Statement of Problem

The present research centres on the correlation between fanfiction and copyright legislation. The proliferation of fanfiction has experienced a significant surge in popularity in the contemporary era of technological advancements. There exist a plethora of online platforms that serve as a host for fan-written fictional works, thereby offering a forum for enthusiasts to engage in discourse and contemplation regarding their preferred television programmes, films, or comics. Therefore, it presents a chance for enthusiasts to exhibit their imaginative abilities in formulating fan theories. While the popularity of

fanfiction has grown over time, little progress has been made in the rules governing the claim of copyright over these fan arts. There remains a degree of uncertainty regarding the appropriate legal remedy for addressing instances of copyright violation in the context of fan fiction. The goal of the current research study is to understand what aspects of a fanfiction are copyrightable and how much information may be reused while creating fanfiction. To do this, it considers the copyright laws of three countries across the world, namely the UK, USA, and Canada. Additionally, it underscores the available defences that fanfiction writers may utilise. Subsequently, the text delves into the inquiry of whether fanfiction can be classified as a transformative work, as opposed to a derivative work, in order to exempt it from the scope of copyright infringement on a permanent basis. The study ultimately examines the legal implications of fanfiction within the Indian context and proposes potential strategies for addressing these challenges in the future.

1.2 Aims

The aim of this research study is to scrutinise diverse facets of fanfiction and the legal framework governing copyright. The main purpose is to discern the particular components of a work of fiction that are protected under copyright laws and examine the legal ramifications that ensue when fanfiction intersects with copyright violation. The research endeavours to investigate the legal remedies accessible to authors of fanfiction within the framework of copyright law. The study will concentrate on strategies that can be utilised to protect themselves from accusations of copyright violation. The third objective of this study is to ascertain the extent to which fanfiction can be deemed transformative, with the aim of evaluating its capacity to forestall legal disputes arising from derivative works that are rightfully owned by the original author. Finally, the research aims to assess the existing legal status of fanfiction in India and suggest viable approaches that can be utilized to manage and resolve the legal intricacies associated with fanfiction in the Indian context.

1.3 Objectives

1. To analyze the elements of a fictional work protected under copyright legislation and examine the legal implications of fanfiction in terms of copyright infringement.
2. To identify and evaluate the legal recourses available to fanfiction authors under copyright law, focusing on strategies to safeguard against allegations of copyright infringement.
3. To explore the concept of universality in fanfiction, assessing its transformative nature and its potential impact on preventing infringement lawsuits arising from derivative works.
4. To assess the present legal standing of fanfiction in India, considering the existing laws and regulations, and propose strategies to effectively navigate and address the legalities concerning fanfiction in the Indian context.

1.4 Scope and Limitations

The main focus of the study is to investigate the legal system governing copyright and the elements of fanfiction. The scope is to comprehend the constituent components of a work of fiction that are protected under the copyright regime and to investigate the legal consequences that arise when fan-created narratives intersect with copyright violation. The research endeavor additionally seeks to investigate the potential legal remedies accessible to authors of fanfiction to counter the accusations of copyright violation. Furthermore, the study aims to assess the transformative qualities of fanfiction and its capacity to mitigate legal conflicts that may arise from derivative works. The study's objective is to evaluate the present legal status of fanfiction in India and suggest viable strategies for managing the legal intricacies within the Indian milieu.

It is imperative to acknowledge that the research study is subject to specific limitations. The primary focus of this work centers on the legal facets of fanfiction and does not explore the wider cultural, social, or economic ramifications of this phenomenon. The present study's analysis and recommendations are grounded in the existing literature, relevant legal provisions, and pertinent case law up to the temporal scope of the research. Furthermore, it should be noted that the scope of the research paper may not encompass

all potential jurisdictions or legal intricacies, as its emphasis is predominantly on the fundamental principles and considerations associated with fanfiction and copyright legislations.

1.5 Research Questions

1. What elements of a fictional work are protected under the copyright legislations and what are the legal implications of fanfiction in terms of copyright infringement?
2. Whether there are any legal recourses available to fanfiction authors under copyright law to safeguard themselves against allegations of copyright infringement?
3. Whether fanfiction can be regarded as universally transformative in order to prevent any potential infringement lawsuits arising from a derivative work, which is legally the property of the original author?
4. What is the present legal standing of fanfiction in India, and what strategies could be employed to effectively deal with the legalities concerning fanfiction?

1.6 Research Hypothesis

“The conflict arising from the interaction of copyright laws and fanfiction arises due to the disparity between the legal structure designed to safeguard the financial interests of copyright holders and the transformative and non-commercial characteristics of fanfiction”.

The aforementioned hypothesis ponders upon the discrepancy that has eventually given rise to scholarly discussions regarding the limits of fair use, the potential violation of copyright, and the necessity for more explicit legal principles to strike a balance between the rights of creators and copyright holders in the era of digital media.

1.7 Research Methodology

The methodology used in this study was a doctrinal research technique. The study undertaken in this work exhibits both descriptive and analytical qualities. The present investigation endeavours to furnish a thorough and meticulous depiction of the topic being examined, chiefly by means of scrutinising the copyright legislations of nations such as the United Kingdom, the United States, and Canada. This study employs a library-based research methodology, utilising both offline and online resources available within the library. The present research employs a combination of primary and secondary sources of data, including but not limited to National and International statutes, International agreements or treaties, and court decisions. These sources are considered primary due to their direct relevance to the research topic. Conversely, the utilisation of books, reports, journals, and online articles has expedited this inquiry as supplementary reservoirs of information.

The 'OSCOLA 4th Edition' citation method has been employed in this research study to appropriately acknowledge the authors of any words or ideas that have been incorporated into the research.

1.8 Research Design

The first chapter, titled 'Introduction' provides a thorough overview of the research study. The introductory section of this research paper offers a comprehensive outline of the background and context of the study. It specifies the research problem, sets forth the research objectives and questions, discusses the significance of the research, and determines the scope and limitations of the study. The research methodology has been further elucidated.

The second chapter titled: 'Copyright Protection and Fanfiction: Navigating the Legal Landscape and Implications for Fictional Elements' aims to investigate the constituent components of a work of fiction that are safeguarded by copyright laws. This study aims to analyse the extent of copyright safeguarding for diverse components, including characters, plotlines, settings, and other imaginative facets. The forthcoming analysis will

entail an examination of pertinent copyright statutes and legal precedents in order to ascertain the scope of safeguarding granted to said components.

The third chapter titled ‘Protecting Fanfiction Authors: Exploring Legal Remedies in Copyright Law against Claims of Infringement’ explores the legal remedies that are accessible to authors of fanfiction under copyright law, in order to protect themselves from potential accusations of copyright violation. The present study aims to explore the various provisions of copyright law that could potentially function as defences for authors of fanfiction. These provisions include fair-use, fair-dealing, non-commercial use, and transformative nature. This study aims to analyse pertinent legal precedents and academic discourse to ascertain plausible legal tactics and constraints in safeguarding fanfiction writers against allegations of copyright violation.

The fourth chapter titled ‘Examining Fanfiction's Transformative Potential: Balancing Derivative Works and Copyright Infringement Claims’ aims to investigate the extent to which fanfiction can be deemed universally transformative, thereby potentially mitigating the risk of infringement lawsuits that may arise from derivative works that are legally owned by the original author. The present study aims to conduct a critical analysis of the notion of transformative works in the realm of fanfiction, while taking into account the legal and practical ramifications. The proposed analysis will entail a comprehensive scrutiny of legal precedents, academic viewpoints, and discourse pertaining to the transformative essence of fanfiction.

Thereafter, the fifth chapter titled ‘Legal Standing of Fanfiction in India: Current Status and Strategies for Effective Management’ will focus on the current legal status of fanfiction within the jurisdiction of India. The study aims to assess the current legal framework in India, encompassing copyright laws, regulations, and pertinent case law, in order to ascertain the legal standing of fanfiction. This paper aims to present a comprehensive overview of the challenges and opportunities encountered by fanfiction creators in India. Furthermore, the research paper aims to suggest potential tactics that can be utilised to proficiently address the legal aspects pertaining to fanfiction within the Indian milieu, encompassing both legal and pragmatic methodologies.

The concluding chapter of this research, entitled 'Conclusion and Suggestions' provides a summary of the findings obtained from the research study. The provided analysis presents concise conclusions for individual research questions and evaluates the proposed hypotheses within the study. This chapter also endeavours to propose suggestions and recommendations following an analysis of the research problem's findings.

CHAPTER 2

COPYRIGHT PROTECTION AND FANFICTION: NAVIGATING THE LEGAL LANDSCAPE AND IMPLICATIONS FOR FICTIONAL ELEMENTS

Have Luke Skywalker and Santa Claus exerted a greater influence on your existence than the majority of tangible individuals present in this space? Similarly, Bugs Bunny, Superman, and Harry Potter can also be regarded in the same manner. They have had a transformative impact on my life, altering my behaviour and actions towards the environment. Doesn't that confer a sense of authenticity to them? Although intangible, these entities hold greater significance than the majority of individuals present. These entities are expected to persist long after our mortal existence. In a sense, those entities possess a greater degree of reality than any individual among us.¹ The significance of characters in the contemporary cultural milieu is of utmost importance. The emotional connections that individuals establish with fictional characters are often comparable to the bonds they share with their relatives.² The portrayal of moral quandaries in media has a significant impact on the manner in which enthusiasts engage with individuals in their everyday existence.

Characters play a significant role in shaping the ways in which fans engage with media, ranging from highly structured and regulated meet-and-greet events at conventions to the acquisition of officially licensed merchandise. Nevertheless, enthusiasts have consistently devised means to engage with characters (and settings, such as the TARDIS or Tatooine) beyond these designated spaces. The individuals engage in discourse through online discussion platforms and meticulously examine authoritative literary works in search of clues pertaining to the progression of characters. The promotion of copyright holders is aimed at engaging with potential consumers. Another classification of enthusiasts surpasses this level and engages with these literary works and components as a means of "play." Fans engage in creative activities such as producing fanart, fanvids, and fanfiction, utilising characters and settings from copyrighted materials. Characters are

¹ 'Imaginationland Episode III, Season 7, Episode 3, South Park', (*Comedy Central*, 2007).

² Jonathan Cohen, 'Audience Identification with Media Characters' in Jennings Bryant and Peter Vorderer (eds.), *Psychology of Entertainment*, (Routledge 2006).

significantly impacted by their experiences, particularly in their interactions with imaginary friends and foes. This interaction is deemed appropriate and justifiable.

An additional cohort of individuals engages with characters in a distinct manner, necessitating their inclusion in any discourse pertaining to copyright and literary facets, such as characters. These individuals are the creators of memes, utilising characters as a means of conveying a cultural message. For these creators, characters serve as a condensed representation of the literary or artistic works in which they are featured, or as a particular archetype of character. Memes hold significant cultural value as evidenced by their utilisation in socio-political movements such as the employment of Winnie the Pooh imagery in demonstrations against the Chinese Communist Party.³ In a broader sense, memes serve as a means to establish cultural associations among individuals who utilise the internet. The utilisation of characters and settings that have achieved global recognition is deemed necessary. However, it is these particular characters that are expected to hold the highest significance for their originators and those who possess the licence. Is it appropriate and justifiable to apply copyright protection to these categories of creative output? The present chapter (and thesis) centres on fanfiction, while memes are employed as a valuable parallel to contextualise the presented arguments. The ensuing analysis will concur that specific characters, such as Luke Skywalker, Santa Claus, Bugs Bunny, and Superman, possess a degree of "reality" in that they are depicted with a high degree of verisimilitude. The lucidity of the artistic decisions involved in their conception implies that characters that achieve this level of authenticity ought to be safeguarded as instances of innovative manifestation. Moreover, due to the increasing significance of the experience economy, characters are gaining greater prominence for the purpose of merchandising.

It can be argued that within the realm of literature, there exist limited, if any, concepts that are entirely novel and unprecedented in an abstract sense. As stated by the user, it is a widely acknowledged fact that every literary work draws upon and inevitably incorporates pre-existing ideas and concepts. Despite being a prerequisite for copyright

³ 'Hong Kong Protesters Mock Chinese Leader in Defiance of Masks Ban' (*ITV News*, 19 October 2019) <<https://www.itv.com/news/2019-10-19/hong-kong-protesters-mock-chinese-leader-in-defiance-of-masks-ban>> accessed 1 June 2023.

safeguarding, the notion of 'originality' is a complex matter. In 1845, LJ Story acknowledged the notion that literature is built upon the foundations of previous works. This section of the chapter establishes the framework for analysis regarding the permissibility of utilising intellectual property in a subsequent work without necessitating a licence. In contemporary times, where the duration of attention spans can be gauged by the consumption of singular images such as memes, gifs, and TikTok videos, as well as brief written works such as 1000-word fanfictions, it is probable that the appropriated elements consist solely of identifiable characters or settings. Is it possible to obtain copyright protection for these literary elements? In the event that this is the case, a considerable portion of the manner in which society engages in online interactions through forums and social media platforms, such as Facebook, Twitter, and Reddit, is expected to constitute de facto infringement.

For the purpose of this analysis, a precise delineation of the term 'character' is necessary. According to academic discourse in this field, it is posited that a finite number (ranging from 4 to 9) of distinct archetypes, such as protagonist, antagonist, confidante, foil, and ego, are commonly observed across various literary genres. Frequently, these "character types" are considered as standardised characters. The author's ability to manipulate archetypes and reader expectations, as well as imbue stock characters with unique traits, is a key consideration in generating tension and holding the reader's interest in a given work.⁴ The present analysis centres on the category of authentic characters exclusively, contending that they merit safeguarding as a manifestation of ingenuity, aesthetic discernment, or preference. Consequently, the ensuing analysis pertains to specific characters, as opposed to character archetypes. For instance, the analysis focuses on 'Harry Potter' instead of the general category of 'Protagonist', and 'Voldemort' rather than 'Antagonist'.

⁴ David Fishelov, "Types of Character, Characteristics of Types" (1990) 24 *Style* <<https://www.jstor.org/stable/42945871>> accessed 2 June 2023.

2.1 UK Perspective

The UK copyright legislation safeguards “*authentic literary, dramatic, musical, or artistic works and films.*”⁵ The legislative explanation of “LDMA” works is unambiguous and encompasses all works that are prone to generate the derivative use types that are the primary focus of this analysis, including but not limited to novels, television programmes, and films.⁶ Hence, it is evident that the literary pieces featuring characters and settings are initially safeguarded by copyright. The necessity of establishing a fixation for such works is a debatable issue. The discourse centres on the achievement of recognisable characters and settings. In the absence of fixation, these elements would lack the requisite level of distinctiveness and popularity to garner adequate attention for their subsequent utilisation in memes, gifs, and fan creations.

The determination of whether creators can employ copyright as a safeguard for their narratives hinges on the condition that the contributions satisfy the criteria for “*originality*”. The origins of UK copyright law can be traced back to utilitarianism⁷ and the principles espoused by Foucault regarding the interconnectedness of creative individuals.⁸ Despite this, it is noteworthy that the statute itself does not provide a comprehensive definition of the term. The legislation has been designed to enable a degree of futureproofing, ensuring that emerging forms of creativity are not excluded from protection solely on the basis of not satisfying the criteria established by the legislation. The term 'originality' can be sourced from two additional domains, namely, other legal frameworks that the United Kingdom has ratified and legal precedents established by judicial decisions in both European and UK jurisdictions. The conflict between these entities is evident as a result of their distinct historical backgrounds, namely those of the United Kingdom, Europe, and other global regions. The utilisation of the term in “Articles 2(3), 2(5), 8 and 14bis of the Berne Convention is founded on the author's creativity, which pertains to the author's ability to make creative decisions that

⁵ Copyright Designs and Patents Act 1988, s (1)(1)(a) and (b).

⁶ Copyright Designs and Patents Act 1988, s 3(1) and s 5B.

⁷ William Dibble, ‘Justifying Intellectual Property’ [1994] UCL Jurisprud. Rev. 74.

⁸ Michel Foucault, ‘Authorship: What Is an Author?’ (1979) 20 Screen 13.

are not influenced by external constraints.”⁹ The term "intellectual creation" is utilised in European legislation¹⁰, including the aforementioned, to denote that the work in question is the original product of the author's intellect. The concept has been expanded upon by the European Union's legal system through various cases.

The term now encompasses “the choice, sequence, and combination of words that allow the author to express their creativity in an original way and produce an intellectual creation.”¹¹ This refers to the manner in which the author's “personal touch”¹² is demonstrated in their work. Comparing with the definitions given by the European and Berne Convention of “originality”, the United Kingdom has traditionally mandated a “expression of thought”¹³ that is not copied from another source, emphasising the display of “skill, labour, and judgement” as outlined in the *Ladbroke*¹⁴ as well as the *Interlego*¹⁵ cases. This concept is founded upon the notion of copyright as a form of property right, as espoused by the philosopher John Locke¹⁶. The emphasis on authorial intention in this approach appears to be comparatively less stringent than the European standard, insofar as it precludes an examination of the originality of the piece. Nonetheless, the matter is not uncomplicated. The manner in which the issue of originality in derivative works was addressed by UK case law serves as an illustration that the secondary piece must have involved efforts beyond mere “skill, labour, and judgement” to “enhance the product with a distinct quality or attribute that was not inherent in the raw material, thus establishing a notable differentiation between the final product and its initial form.”¹⁷ In practical terms, it can be inferred that the author's choices hold significance in the analysis. Rahmatian posits that the utilisation of the term “judgement” in the UK examination is essentially a synonymous expression for “artistic choice”. The author is tasked with exercising her discernment in order to make decisions and choices during the process of creating the

⁹ Daniel J Gervais, ‘The Compatibility of the Skill and Labour Originality Standard with the Berne Convention and the TRIPs Agreement’ (2004) 26 EIPR 75, 80.

¹⁰ EU Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

¹¹ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR 74.

¹² Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH* [2011] ECR 798.

¹³ *University of London Press Ltd v University Tutorial Press Limited* [1916] 2 Ch 601.

¹⁴ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

¹⁵ *Interlego AG v Tyco Industries* [1989] 1 AC 217.

¹⁶ John Locke, *Two Treatises of Government* (New edn, for Whitmore and Fenn, and C Brown 1821).

¹⁷ *Macmillan v Cooper* [1924] 40 TLR 186.

work. It is through these deliberate choices that the author effectively showcases her unique creative capacity and thereby imparts her distinct personal style. By employing this approach, the outcome will manifest as an intellectual creation.¹⁸

The UK courts appear to be adhering to this established pattern, as evidenced by the *Meltwater* case¹⁹, which served to align UK jurisprudence more closely with that of Europe. It appears that the test²⁰ has been acknowledged by the UK Intellectual Property Office. From a practical standpoint, what methods can an artist employ to exhibit adequate artistic discretion that warrants safeguarding for their creation? The recurring motif derived from the aforementioned cases is that artistic selection refers to the measures undertaken by the originator to progress from a vague concept to a clarified manifestation. It is a widely recognised principle in the field of copyright law that copyright protection is not extended to mere ideas. In order to be eligible for protection as expressions, ideas necessitate formalisation and illustration, owing to the fact that copyright protection is rooted in the technology of the printing press. According to John Perry Barlow, “The rights pertaining to invention and authorship are applicable to endeavours conducted in the realm of the physical domain. Compensation is not typically granted for the mere generation of ideas, but rather for the aptitude to effectively manifest them in practical terms. In terms of practicality, the significance resided in the act of conveying rather than the content being conveyed. To clarify, it can be stated that the protective measures were applied to the bottle itself, rather than to the wine contained within it.”²¹

The physical book or film serves as a clear demonstration of the conveyance. Regarding authors, their conveyance is demonstrated through their precise word selection, while TV/film directors exhibit it through their camera type, cut length, and editing techniques.

¹⁸ Andreas Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine under Pressure’ (2013) 44 IIC Int. Rev. Intellect. Prop. Compat. Law 4, 30.

¹⁹ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890

²⁰ Intellectual Property Office, Gov.UK ‘Copyright Notice Digital Images, Photographs and the Internet’ (Intellectual Property Office 2014) <<https://www.gov.uk/government/organisations/intellectual-property-office>> accessed 22 May 2023.

²¹ John Perry Barlow, ‘Selling Wine Without Bottles: The Economy of Mind on the Global Net’ (2019) 18 *Duke Law & Technology Review* <<https://scholarship.law.duke.edu/dltr/vol18/iss1/3/>> accessed 24 May, 2023.

Therefore, the forthcoming analysis will utilise the criterion of “*artistic choices*” to argue that the use of literary characters in memes and gifs, as well as the reuse of literary characters in fanfiction, can be considered as instances of artistic choices or discernment. As a result, these practises should be protected by copyright. However, it is improbable that the majority of locations and settings would satisfy this criterion. It is evident that the comprehensive foundational material, whether it be a literary work, television production, or cinematic feature, will successfully satisfy the criteria for both novelty and permanence, and therefore, will not be subjected to further analysis in this particular segment.

2.2 Characters and Copyright in UK

The UK has had limited cases that explore the possibility of extending copyright protection to ‘*characters or locations*’, in addition to the works that feature them. One such case argued that literary components of this nature are not eligible for copyright protection, as they do not qualify as “*LDMA*” works under the specific list outlined in Section 1 of CDPA 1988.²² This approach appears to restrict any additional examination of their ingenuity and prevent the originator from asserting any safeguard for them that is distinct from the book, movie, or television show in which they are featured. In order to determine whether unauthorised reuse of a case infringes the copyright of the story in which it appears, it is necessary to consider whether the case constitutes a “substantial part” of the story, as defined by the later but closely related discussion.

The assertion that characters, as constituents of literature, are inherently ineligible for copyright protection appears to facilitate unauthorised derivative usage, as it ostensibly imposes the responsibility on the copyright possessor to demonstrate that their character or setting is an indispensable component of the narrative, and that reusing it constitutes a “substantial” portion of the foundational work. This approach appears to align with the principles of copyright law, which aim to avoid excessive restriction of the public domain and limit protection to designated categories of creative works. Alternative types of work, such as databases, are safeguarded through sui generis rights established by legislative

²² *Conan Doyle v London Mystery Magazine Ltd* [1949] 66 RPC 312; *Tyburn Productions Ltd v Conan Doyle* [1991] CH 75, [1990] 1 All ER 909.

means, as it is deemed inappropriate to grant them the same level of protection as LDMA works in accordance with policy. Nonetheless, there exists a valid justification for why this approach is not suitable for copyright management of such works. This is primarily due to the fact that they are imaginative works and, therefore, ought to be categorised as “*LDMA works*”, in contrast to other categories of works that are not as much of creative and more technical, like “*databases or sound recordings*”. The distinction between “*LDMA works*” and “*other technical and entrepreneurial works*” that are protected by copyright is evident in the varying standards of originality that apply to them. The subsequent segment will demonstrate that characters, and to a lesser degree, settings, possess a satisfactory degree of originality that warrants their classification as literary works. This is particularly relevant in light of recent legal precedents that have upheld the protection of elements such as newspaper headlines. If a literary work consisting of 11 words is eligible for protection, it stands to reason that a well-developed literary character should also be afforded the same level of protection.

2.3 Originality and Literary Elements

2.3.1 Plots

As previously mentioned, in order to determine if characters possess adequate originality to warrant copyright protection, it is necessary to examine the author's use of choices and judgement as a means of expression. For the purpose of obtaining legal safeguard distinct from the literary creation that animates them, it is necessary for the character or location to transcend a vague concept and be established in a clear and defined form of expression. The differentiation between the concepts of idea and expression, which serves to establish the criterion of novelty, has an established legal background in the United Kingdom, tracing its origins to the pivotal legal case of *University of London Press*. This concept is closely related to the previously discussed theme of artistic decision-making, which posits that in order to effectively convey a piece of art, the artist must make deliberate and distinct artistic choices.

This exemplifies the rationale behind the absence of copyright protection for a comparable literary component, namely the plot, under the legal framework of the United

Kingdom. The depiction of artistic choice in storylines and plots is often limited to the level of an abstract concept, as they fail to manifest the specific author's decision-making process. The characters in question exhibit either inadequate depiction by the author²³ or the author encounters difficulty in demonstrating substantial alterations to the plot that would elevate it beyond a conventional narrative.²⁴ This statement reflects the conventional policy that copyright law should serve as a means of motivating future creative output. Allowing creators to employ copyright protection to monopolise the expression of commonplace ideas and themes, as evidenced by numerous plotlines, would hinder this objective.

2.3.2 The notion of originality in relation to geographical locations

The assessment of originality exhibits variations based on the specific locations or settings. These elements, similar to narrative structures, are commonly considered to be conventional or fundamental, and may lack originality or clarity. A considerable number of young adult literature is situated in academic institutions, while a significant proportion of suspenseful narratives are situated within or in close proximity to governmental agencies. Consequently, in order to secure protection for their setting, an author must exhibit a high degree of specificity and employ entirely novel locations that they have conceived, rather than utilising pre-existing locales such as “MI5 or London”. In numerous instances, the significance of the location to the author is not substantial enough to give rise to concerns that could potentially result in a claim for infringement.

Notably, following the completion of seven Harry Potter novels, an analysis of the literary works would suggest that JK Rowling has provided an adequate depiction of Hogwarts, thereby exhibiting satisconsiderationary artistic decisions that would warrant copyright protection. The geographical description provided in the text is sufficiently detailed to allow readers to infer that the location in question is situated within the Scottish Highlands. It could be contended that the protection of the physical layout and appearance of Hogwarts has been established through the authorization of a cinematic rendition of the literary works, as well as the author's significant involvement in the

²³ *Baigent and Leigh v The Random House Group* [2007] EWCA Civ 247.

²⁴ *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.1986)

decision-making process regarding production. Although there may be exceptions, the majority of fictional settings are unlikely to meet the criteria for copyright protection based on the "expression of artistic choice" standard. Locations are seldom granted protection, except in cases where detailed floor plans, photographs, or precise literary descriptions are made available.

In the realm of literary works, it is plausible that the science-fantasy genre may warrant heightened safeguarding of its settings. This is due to the fact that such narratives are situated in alternate universes, wherein creative decisions pertaining to the principles of physics, biology, and chemistry are prominently showcased. Under this criterion, it is probable that all additional literary settings would be ineligible for protection. In instances where locations are recycled, such as in alternate reality (AU) fanfiction, the responsibility falls on the author to demonstrate that their reuse constitutes an infringement by establishing that they constitute a significant element of the underlying narrative. However, in actuality, this is improbable to have significant importance. In the majority of instances, when a location is being utilised, it is likely to be repurposed in conjunction with characters from the narrative. In such cases, the examination would hinge on the more distinct aspect of the capacity of said characters to garner safeguarding.

2.3.3 Characters and Originality

The legal protection of characters as a literary component has been comparatively neglected in the United Kingdom, in stark contrast to the United States. In light of the precedent set by *Meltwater*²⁵, which advocates for safeguarding distinct components of written material, it is conceivable to draw a parallel argument that posits the safeguarding of characters as a constituent of the literary work in which they are embedded. The recommended approach is to view the characters as distinct entities rather than a mere component of the narrative. This perspective aligns with the postulation posited by *Hyperion Records*²⁶, which stipulates that the maintenance of copyright in a literary work necessitates a consideration of the work in its entirety. The assertion that characters hold

²⁵ *Newspaper* (n 19).

²⁶ *Hyperion Records v Sawkins* [2005] 1 WLR 3281.

significance as fundamental constituents of literary works, rather than being mere textual segments, is substantiated by numerous distinguished literary scholars and philosophers²⁷, and aligns with the legal precedents established by UK court cases thus far.

UK addresses the matter of copyright & characters in a limited number of instances, and typically falls into one of two overarching approaches, with only one of these approaches currently recognised as legally valid. As previously mentioned in the cases of *Conan*²⁸ and *Tyburn*²⁹, the judge presiding over the case declined to confer copyright safeguarding to the persona of “*Sherlock Holmes*”. The rationale behind this decision was the judge’s inability to incorporate a fictional character within the limited category of works that are safeguarded by copyright under Section 1 of CDPA 1988. Consequently, the judge refrained from deliberating on the aspect of originality. As previously mentioned, subsequent to the decision in *Meltwater*, this legal principle is no longer valid. It is likely that the precedent established in *Kelly v Cinema Houses*³⁰, which is relatively dated, has been revived. This ruling stipulated that the determination of whether a character is eligible for copyright protection hinges on the degree to which the character has been portrayed. In other words, it depends on whether the portrayal exhibits adequate "judgement" or "artistic choices," as per contemporary terminology.

Although the judge in that particular instance determined that the characters lacked sufficient significance to warrant safeguarding, he acknowledged that he might have arrived at an alternative verdict had the characters been more faithfully depicted. For instance, if a contemporary dramatist were to fashion a character as distinctive and noteworthy as Sherlock Holmes, would it constitute a violation if another writer, one of the subservient imitators, were to appropriate the concept and employ an overt replica of the prototype? One ought to exercise a significant degree of caution prior to arriving at

²⁷ Reina Hayaki, ‘Fictional Characters as Abstract Objects: Some Questions’ (2009) 46 *American Philosophical Quarterly* 141. < <https://www.jstor.org/stable/20464446> > accessed 26 May, 2023.

²⁸ *Conan* (n 22).

²⁹ *Tyburn* (n 22).

³⁰ *Kelly v Cinema Houses* [1935] MacG CC 362.

such a deduction.³¹ The differentiation between the characters of James Bond and Jason Bourne serves to elucidate this particular point. Both individuals are characterised as unemotional and ruthless, with no qualms about taking the lives of others while carrying out their duties for a governmental or quasi-governmental organisation. Both individuals share identical initials and possess names that bear a resemblance in terms of phonetics. Both instances feature a male protagonist functioning within the context of a thriller novel.

Nonetheless, these literary genres exhibit distinct attributes and features that differentiate them from one another, as well as from the conventional male persona portrayed in such novels. There exist variations in terms of nationality, conscience, and background. The character of Bond, hailing from Britain, exhibits a limited capacity for moral discernment and instead adheres to directives issued to him, stemming from his upbringing as an orphan. The individual's disregard for authority and tendency towards womanising behaviour can be traced back to his time at Eton, where he was expelled for engaging in a romantic relationship with a maid. The individual ultimately secures employment with MI5. In contrast, Bourne's nationality is American, and his character undergoes a significant transformation in terms of his moral compass throughout the course of his narrative. Additionally, he exhibits a greater degree of integrity in his interactions with women, and overall, he places a greater emphasis on familial relationships. This is evidenced by his marriage and fatherhood at one point in the story, as well as the inclusion of his brother in the plot. The deliberate selection of character names by Ian Fleming and Robert Ludlum serves to establish clear differentiation between the characters, thereby precluding any potential interchangeability.

The differentiation between the two categories of work mentioned (namely, characters featured in memes/gifs and characters utilised in fanfiction and settings in general) is established by the challenge of achieving adequate characterization or uniqueness in comparison to previous iterations. Characters that attain popularity to the extent of being shared in memes or gifs are likely to do so because they possess distinct qualities that set

³¹'The Six Detectives' (*CopyrightUser.Org*, 23 May 2017) <<https://www.copyrightuser.org/educate/the-game-is-on/episode-2-case-file-21>> accessed 13 June 2023.

them apart from their predecessors. Additionally, they are easily recognisable and evoke a specific section of media, which is the primary objective behind their creation.

The subject matter at hand pertains to a popular internet meme featuring the character Pikachu. The Distracted Boyfriend Meme is a popular internet meme that features a photograph of a man turning his head to look at another woman. The utilisation of a well-known character, specifically Pikachu from the Pokemon franchise, is demonstrated in Example A. In contrast, Example B employs a generic image featuring anonymous models. Example A effectively employs a widely recognised character whose attributes are strategically utilised to convey a cultural message, thereby rendering the meme effective. Example B lacks identifiable characters with clearly defined traits beyond those depicted in the image. Both images are subject to copyright protection as visual works. However, it is worth noting that the “*Pikachu character*” benefits from protection offered by copyright legislations due to its established presence within the “*Pokemon franchise*”, while the characters illustrated in Example B lack similar protection. The Pikachu character exhibits a satisconsiderationy level of artistic decision-making, as evidenced by the incorporation of various elements such as distinctive character traits, vocal characteristics, coloration, and sub-typing within the broader Pokemon universe. The characters depicted in Example B exhibit limited artistic expression, with the exception of conventional traits that are commonly observed in stock characters. This is precisely why the meme has gained popularity, as the notion of a preoccupied boyfriend is a widely recognised concept.

2.4 Legal rights entailed by an author in UK

It is imperative to establish the permissible interactions with the copyrighted material, specifically the rights that may be violated by fanfiction. Regarding individuals who engage in writing fanfiction, they can be classified as follows:

The individual possesses the entitlement to reproduce the work under the provisions of “*Section 16(1) (a) and Section 17 of the CDPA of 1988*”. The right to create an adaptation is granted under “*Section 16(1) (e) and Section 21 of the CDPA 1988*”.

2.4.1 The right to reproduce the work

The holder of a copyright enjoys the right to reproduce the work, which exemplifies the standard economic theory underlying copyright safeguarding. According to the theory, the act of preventing others from copying one's work can result in creators being able to charge a monopoly price as a reward for their efforts. As per the provisions of CDPA 1988³², the aforementioned entitlement pertains to the entirety of the work or any significant portion thereof. As evidenced in prior research, it is probable that characters and settings are subject to copyright protection if they exhibit a significant degree of artistic expression. The utilisation of primary characters from copyrighted works in fanfiction is prone to infringe upon the copyright of said characters, as well as any specific copyright pertaining to the language employed in the story that characterises them. This includes the appropriation and reuse of specific language from the original story that describes distinctive features of the character, such as Harry Potter's scar or Anne of Green Gables' red hair.

In the event that the study in preceding chapter is unheeded, it remains probable that fanfiction would constitute a violation of the right to reproduce the work, as it involves the unauthorised utilisation of a significant portion of the original work. Over time, there has been a change in cases concerning copyright violations in UK with respect to the definition of 'substantiality'. The initial part of the 20th century witnessed the emergence of a “*relatively elastic*” approach³³, as demonstrated in *Glyn*³⁴ and *Joy Music*³⁵. The artistic liberty enjoyed by writers was constrained starting from the 1980s, as courts began to acknowledge progressively narrower portions of the source material as being considerable enough to constitute copyright infringement when replicated.³⁶ The preceding discourse regarding the significance of artistic discretion in copyright law is hereby continued.

³² Copyright, Designs and Patents Act 1988 s 16(3).

³³ Jonathan Griffiths, 'Fair-dealing after Deckmyn - The United Kingdom's Defence for Caricature, Parody or Pastiche' (2016) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770508> accessed on June 14, 2023.

³⁴ *Glyn v Weston Feature Film Co* [1916] 1 CH 261.

³⁵ *Joy Music Ltd v Sunday Pictorial Newspapers* [1960] 2 QB 60.

³⁶ *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210.

If a component of a piece of work possesses sufficient expressiveness to be deemed unique, it is highly probable that it will be considered significant enough to constitute plagiarism if utilised again. Following *Infopaq*³⁷, several court decisions have relied on this rationale, asserting that the protection of a work is contingent upon the author's own intellectual creation, regardless of its brevity. For instance, in *Infopaq*, an 11-word newspaper headline was deemed eligible for protection. One could posit that the principle of “*what is worth taking is worth protecting*”³⁸ applies in this context, suggesting that if a character or location garners enough user-generated content based on it, it should be considered significant.

Fanfiction writers face an additional concern when it comes to substantial borrowing from the source material, as the judiciary considers whether the unauthorised derivative work produces a comparable overall effect to the original work.³⁹ Hence, if a character is adequately depicted in a manner that enables their identification beyond the boundaries of the literary piece in which they are featured (such as being identifiable by their title or explanation), they will be deemed 'substantial' enough in relation to that work to warrant a determination of copyright infringement under the provisions of CDPA 1988⁴⁰ (pertaining to copying) if utilised in fanfiction. Consequently, in order for a writer to incorporate a character or location from a pre-existing work, they must either obtain a licence or engage in litigation to defend their work against claims of infringement.

A considerable number of fanfiction authors choose to pursue a third alternative, which involves acknowledging that they do not possess ownership of the original work and do not intend to cause any harm, thereby hoping that the rights-holders will overlook any potential infringement. This approach can be viewed as a means of demonstrating compliance with legal regulations while avoiding the need to purchase a licence or engage in legal proceedings to defend against infringement claims. Although this approach has been effective in the past, it is improbable that it will remain a considerable safeguard for authors of fanfiction due to the evolving landscape of the internet and the

³⁷ C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569; See also *Newspaper (n 19) & Institute v World Programming Limited* [2013] EWCA Civ 1482.

³⁸ *University* (n 13).

³⁹ *Ladbroke* (n 14).

⁴⁰ Copyright, Designs and Patents Act 1988 s 17.

increasing significance of the experience economy. Consequently, it will be imperative for them to place greater reliance on the fair-dealing exceptions to copyright, which are elaborated upon in subsequent sections of this chapter, since their works will contravene the right to reproduce or duplicate the work as stipulated in CDPA 1988.⁴¹

2.4.2 The right to modify the work

The adaptation right is another entitlement that may be violated by fanfiction. The significance of the right to adapt the work as stipulated in Section 21 of the CDPA of 1988 cannot be overstated, particularly in light of the prevalence of user-generated content in the digital era. Furthermore, the strictness of the provision has been such that it limits the discretion of the courts in determining the retention of specific ancillary markets by the copyright holder.⁴²

With regards to literary compositions that serve as the foundation of a significant amount of fanfiction the sole privileges preserved for the copyright proprietor under Section 21 are the entitlements to render the work into a different language or a theatrical adaptation, or to create an illustrated edition. With regards to theatrical productions (including plays, movies, and television programmes), the individual or entity who owns the copyright maintains the authority to modify the work into a form that is not dramatic in nature. The aforementioned closed list shall be interpreted in a stringent manner, owing to its historical animosity towards the notion of creators exercising dominion over the utilisation of their merchandise subsequent to its release into the market. The discussions pertaining to the Copyright Act 1956 (which was succeeded by the CDPA 1988) featured a statement that expressed scepticism towards the notion that a copyright holder could legitimately exert control over the use of their product after having sold it at a self-determined price, or even prevent its use altogether.

The application of this principle in trade on a broad scale would yield remarkable outcomes. The remarkable findings presented here could potentially shed light on the

⁴¹ Copyright, Designs and Patents Act 1988 s 17.

⁴² Patrick R Goold, 'Why the UK Adaptation Right Is Superior to the US Derivative Work Right' (2014) 92 *Nebraska Law Review* 877 <<https://digitalcommons.unl.edu/nlr/vol92/iss4/5>> accessed 15 June 2023.

rationale behind Parliament's decision to reject the proposal, made at the time⁴³, to draught the clause in question as an inclusive and indefinite list of feasible applications, as opposed to the restrictive and comprehensive list that was ultimately adopted. During the parliamentary discussion of the 1988 legislation, the aforementioned request was brought up once more and subsequently rejected. The UK legislation does not provide for an exhaustive list of prospective alterations. Rather, it relies on the adaptable nature of the ‘*substantial part*’ concept in “*Section 16(3)*” and the inclusion of “any material form” in Section 17(2) to ensure that the law remains flexible and can accommodate new forms of technology, such as those that facilitate the widespread creation of user-generated content. This flexibility is deemed essential to ensure that the law remains relevant and effective in the face of technological advancements.

The emphasis on the structure of the piece implies that although judges have demonstrated a degree of leniency in their rulings with regards to the range of works that can be classified under a particular category, it may be an overreach to contend that literary user-generated content would fall under this category of infringement. It is probable that if cases similar to leading judgement of *Castle Rock*⁴⁴ were to be presented before a court in United Kingdom, they would be ruled in a contrary manner. At this juncture of the examination, it can be contended that fanfiction is improbable to violate this entitlement, given that it is explicitly proscribed under UK legislation, which is construed restrictively and with great restraint.⁴⁵

The domain of law in question may be deemed more favourable for copyright holders under the US legislation due to its wider scope, greater adaptability, and consequently, more progressive outlook. In contrast to a delimited inventory, the derivative work right in the United States, as stipulated in section 106(2) of the Copyright Act of 1976, pertains to any alternative manifestation in which a work can be reconfigured, altered, or adapted. The increased flexibility of this list implies that a broader range of secondary works may

⁴³ Patrick R Goold, ‘Why the UK Adaptation Right Is Superior to the US Derivative Work Right’ (2014) 92 Nebraska Law Review 843
<<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1221&context=nlr>> accessed 16 June 2023.

⁴⁴ *Castle Rock Entertainment Inc v Carol Publishing Group*, 150 F3d 132 (2d Cir 1998).

⁴⁵ Mitchell Longan, ‘The Inadequacy of UK Law To Address User-Generated Content: A Comparative Analysis with the US and Canada’ (2017) Queen Mary Law Journal 109.

be considered as infringing, including trivia books and remounted art works⁴⁶, which do not fall under the category of infringement as per the UK legislation. User-generated content (hereinafter UGC), like fanfiction, may potentially violate these rights.

The significance of this lies in the reinforcement of the copyright holder's stance, as they are not obligated to depend on an evaluation of the extent to which the fundamental work has been utilised to establish the occurrence of infringement. However, it is improbable that this will yield a significant impact as the actual consequences in the real world are expected to persist unchanged. In the United Kingdom, if fanfiction were to be subjected to legal scrutiny, it would probably be classified as an act of copyright infringement. This is due to the fact that fanfiction often reproduces copyrighted characters and locations, or a significant portion of the original work in which they are featured. The secondary adaptation right stipulated in CDPA 1988⁴⁷ is not deemed necessary for copyright holders in the United Kingdom.

2.5 Moral rights

The significance of economic rights for authors is indisputable, and their incentivizing role is instrumental in elucidating conventional commercial creativity. However, this explanation is incomplete in elucidating the reasons behind numerous authors' disapproval of the utilisation of their literary creations for UGC such as fanfiction.

United Kingdom's moral rights are delineated in Sections 77-89 of the CDPA, which give effect to Article 6bis of the Berne Convention. The prioritisation of user-generated content (UGC) rights among authors centres on three key aspects: “*the integrity right, the paternity right, and the right to object to false attribution*”.

2.5.1 The concept of the Integrity Right

The provisions relating to rights under CDPA encompasses the right of integrity, which enables the author to object to any derogatory treatment of their work. This right prohibits any form of treatment that may be deemed detrimental to the author's reputation or honour. By employing this approach, a broad range of UGC such as fanfiction is

⁴⁶ *Mirage Studios and Others v Counter-Feat Clothing Ltd and Another* [1991] FSR 145.

⁴⁷ Copyright, Designs and Patents Act 1988 s 17.

encompassed. Broad scope of the term ‘treatment’ is exemplified by its definition “as encompassing the addition, deletion, alteration, or adaptation of a work”⁴⁸. This definition surpasses the limited interpretation of ‘adaptations’ as previously delineated in Section 21 of CDPA 1988. According to the provisions of Section 80(3) and Section 80(6), the entitlement to this right is extended to individuals who engage in commercial publication or public communication of a disparaging rendition of an LDMA work or a film.

The act of fanfiction writing may be deemed non-commercial if the writers choose to host their works on platforms like Fanfiction.Net, without seeking monetary gain. However, this exemption does not apply to individuals who operate fanfiction archives that generate revenue through advertising, such as Fanfiction.Net, as they are not shielded by this defence. The entitlement to safeguard their self-esteem and standing in relation to their work may encompass a multitude of grievances expressed by writers concerning fanfiction. The act of distorting or mutilating a copyrighted work serves as a preventative measure against its unauthorised reuse by third parties. The aforementioned perspective appears to encapsulate the stance adopted by authors Robin Hobb and Diana Gabaldon towards fanfiction.⁴⁹ These authors express criticism towards the alteration of their characters and narratives, and the adverse impact such modifications can have on the public perception of their literary creations.

The authors perceive an assault on their characters as an assault on their writing abilities. This is due to the fact that a written or other creative work is viewed as a manifestation of an author's innermost thoughts and has a greater potential than any other object “*to be perceived as an extension of the author*”⁵⁰. Rather than relying on property rights to safeguard their financial interests, these authors associate their creative works with their personal identities. However, the defence frequently posited by fanfiction writers is that a clear differentiation exists between a character and the author responsible for their creation.

⁴⁸ Copyright, Designs and Patents Act 1988 s 80.

⁴⁹ J. Roth and Monica Flegel, ‘Legitimacy, Validity, and Writing for Free: Fan Fiction, Gender and the Limits of (Unpaid) Creative Labor’ (2014) 47 *The Journal of Popular Culture* 1092.

⁵⁰ *ibid.*

The argument posits that fanfiction draws a clear line between canon and fanfiction, thereby preserving the integrity of the “original characters and the reputation of their creator”, despite the unauthorised nature of fanfiction. In fact, a significant amount of effort and attention is devoted within fandom to elucidating the nuances of the canon characters and distinguishing them from their fannish reinterpretations. Additionally, fanfiction writers argue that fictional characters cannot be subjected to distortion or mutilation.

The implementation of the integrity right in case law in the UK has been characterised by a cautious approach⁵¹, which could account for the limited reliance of authors on this right as a means of safeguarding their works. Despite the fact that the integrity right is more closely aligned with authors' philosophical grievances than with economic considerations, it has not been widely utilised. The legal precedent set in a significant case⁵² indicates that courts are receptive to identifying instances of distortion or mutilation of works when said works are extracted from their original context and incorporated into a new work, akin to the practise of fanfiction. “However, subsequent cases such as *Tidy v Natural History Museum Trustees*⁵³, *Pasterfield v Denham*⁵⁴, *Confetti Records v Warner Music UK Ltd*⁵⁵, and *Harrison v Harrison*⁵⁶ illustrate the arduousness of clearing the derogatory treatment test.”

The aforementioned instances demonstrate that the assessment of derogatory treatment is based on an objective standard rather than a subjective one. Mere dissatisfaction on the part of authors with the reuse of their works is insufficient. Instead, it is necessary to establish the damage caused to the goodwill and reputation of the copyright holder, which is a challenging task, particularly in cases where the works in question are non-commercial and published as works in progress. Furthermore, if the adaptations are explicitly identified as unauthorised and accompanied by disclaimers that highlight the

⁵¹ Abbe EL Brown and others, *Contemporary Intellectual Property: Law and Policy* (5th edn, Oxford University Press 2019) 210.

⁵² *Morrison Leahy Music Limited v Lightbond Limited* [1993] EMLR 144.

⁵³ *Tidy v Natural History Museum Trustees* (1995) 39 IPR 501.

⁵⁴ *Pasterfield v Denham* [1999] FSR 168.

⁵⁵ *Confetti Records v Warner Music UK Ltd* [2003] EMLR 35.

⁵⁶ *Harrison v Harrison* [2010] ECDR 12.

distinction between the fanfiction and the original characters, it becomes even more difficult to establish the injury caused to the author's repute.

2.5.2 The Right to Paternity

The significance of paternity rights was underscored in the United Kingdom in the past three to five years, when John Lewis unveiled their Christmas advertisement showcasing a blue monster residing beneath a child's bed. The creature in question exhibits notable similarities to a fictional entity known as Mr Underbed, which was conceived by Chris Riddell. Although he alleged that the department store had appropriated his character, he declared that he would not initiate legal proceedings on the grounds of copyright violation. The individual exhibited a greater emphasis on attribution, asserting that it is crucial for individuals in creative fields to receive acknowledgement for their contributions. This sentiment highlights the significance of recognition in the creative industry.⁵⁷

Numerous writers consider it of great significance to receive recognition for their creative output, in light of the emotional investment they make in their work. In order to assert a claim for infringement of an author's paternity right under section 77(7)(a) of the Copyright, Designs and Patents Act 1988, it is necessary for the author to initially assert said right in the front of the book. It is imperative for them to demonstrate that their work was utilised without proper attribution in a scenario where none of the limitations or exceptions are applicable. Essentially, it is necessary for them to demonstrate that their work is eligible for copyright protection and that the new work, such as the case of John Lewis and Chris Riddell, involves the utilisation of Mr Underbed as the basis for the creation of the John Lewis monster Moz.

Demonstrating this claim would likely pose little difficulty for numerous authors, given that nearly all books incorporate the necessary assertion of moral rights, while television programmes and films similarly include this assertion as a component of their concluding credits sequence. As previously asserted, the foundational materials utilised in fanfiction

⁵⁷ *Harrison* (n 56).

are subject to copyright protection, either as a significant component of the narrative or as independent copyright in the characters and settings.

Ultimately, fanfiction acknowledges transparently that they are utilising copyrighted characters. What is the reason behind authors refraining from asserting that fanfiction violates their rights of authorship? The primary rationale behind this assertion is that the defence of fanfiction writers against such allegations would be relatively straightforward, given the widespread use of disclaimers and attributions in fanworks, including fanfiction. As exemplified, certain disclaimers adopt a straightforward approach by simply declaring the non-ownership of characters, while others attribute credit to either individuals, such as Joss Whedon for *Firefly*, or to corporate entities like TPTB, which may possess the copyright, as is the case with *Alliance Atlantis* and *Due South*.⁵⁸ In the event that a disclaimer had been employed, the author of the original work would encounter challenges in asserting their right to paternity in the event of infringement. Legal action against a fanfiction author could only proceed if the disclaimer was overlooked entirely or if it was situated solely at the beginning or end of the work, thereby potentially eluding a site visitor.

2.5.3 False Attribution Right

The spurious attribution right can serve as a means of safeguarding the reputation of the author by preventing them from being associated with works that are incongruous with their beliefs or values. According to section 84, an individual possesses the entitlement "to refrain from being falsely credited as the author of a literary, dramatic, musical, or artistic work, or as the director of a film." The matter can hold significant importance with regards to secondary works, particularly parodies, that aim to imitate the primary work and consequently insinuate a connection between the original author and a potentially highly critical new work. In contrast to the right of integrity, the author's reputation is not a prerequisite for protection. Therefore, this approach could potentially

⁵⁸ Shelby Abayie, 'Fanfiction: The Good, The Bad, And The Thirsty' (*34th Street* February 21, 2022) <<https://www.34st.com/article/2022/02/fanfiction-fandom-bts-one-direction-got7-taboo-literature-after-movie>> accessed 16 June 2023.

serve as an effective strategy for authors to deter the creation of fanfiction derived from their literary works.

Nevertheless, based on the available case studies, it appears that fanfiction writers are more likely to be favoured. According to the legal case of *Clark v Associated Newspapers*⁵⁹, the utilisation of counter measures by a secondary work to disavow attribution to the primary author may be deemed adequate to protect against a false attribution claim, provided that such measures are lucid and persuasive. It can be argued that the customary disclaimers utilised in fanfiction, along with the explicit declaration by platforms like Fanfiction.Net that they serve as repositories of fan-created works rather than original content should suffice as evidence that there must not be any erroneous attribution to the author of the source material. Consequently, it can be inferred by readers that the writer of the fanfiction is distinct from the original author of the source material.⁶⁰

2.6 US Perspective - The legal safeguards provided which are designed to offer protection.

The creation of fan fiction does not entail a mere replication of the original work. The utilisation of characters, which are distinct personalities created to convey a particular idea, may potentially violate the copyright of the creator. In the past, copyright legislation solely safeguarded against literal replication, thereby precluding protection against both abridgment and translation. Over time, the scope of copyright law has broadened to encompass more than just replication, extending to more liberal forms of appropriation, such as the utilisation of established characters. The level of safeguarding for characters that exist separately from their respective works remains ambiguous, and the legal precedents are perplexing. Despite this, the majority of experts concur that copyright can extend to a character.

The United States possesses a comprehensive record of legal cases and scholarly viewpoints regarding the capacity of copyright holders to secure copyright protection for the characters they generate, independent of the narrative in which they are featured. This

⁵⁹ *Clark v Associated Newspapers* [1998] 1 All ER 959.

⁶⁰ *Harrison* (n 56).

observation appears to corroborate the contention that writers enjoy superior safeguarding measures. Some creators may be opposed to the use of derivatives of their works, due to the legal protection afforded to them by the courts.

Notwithstanding the permissibility of this form of safeguard in principle, the judiciary has consistently redefined its parameters, thereby diluting its efficacy due to a dearth of legal definitiveness.

There are two separate criteria in American jurisprudence that are utilised to evaluate if characters are eligible for safeguards offered under the copyright legislation. “*The Learned Hand test, as enunciated by Learned Hand J. in an important judgement*”⁶¹, posits that there may exist certain situations wherein characters could potentially be deemed eligible for copyright protection. In order to obtain copyright protection, it is imperative that characters are distinctly defined and not mere concepts or amalgamations of concepts derived from the public domain. The aforementioned criterion may appear to be a challenging benchmark for judges to implement; however, its objective is to safeguard characters that possess a sufficiently detailed portrayal to qualify as "expression" (as opposed to mere "ideas") and that are identifiable enough for other writers to refrain from imitating. The Nichols test has been modified by American jurisprudence to include two primary inquiries. The first inquiry pertains to whether the character in question is adequately delineated or developed to qualify as an expression. The subsequent inquiry pertains to the issue of the characters in the purportedly infringing work bearing a significant resemblance to the original protected character, to the extent that a finding of infringement is justified.

The modified version of the Nichols test holds significant relevance in the context of fan fiction. This is due to the fact that authors have the liberty to alter, evolve, or even distort characters from the source material, thereby rendering them distinct from their original counterparts. The Nichols test has been subject to criticism due to its potential to provide preferential treatment to creators of certain types of works, “such as pictorial or animated works and realist or character-driven writings”. This may result in greater protection

⁶¹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

being afforded to these creators compared to authors writing in genres where characters are not required or cannot be depicted as fully, and may not meet the criteria for protection under this test.

In a significant judgement, the US Ninth Circuit formulated a distinct methodology for evaluating the copyrightability of characters.⁶²

The court ruling in question established that fictional characters may be eligible for copyright protection in their own right, provided that they are deemed significant enough to be considered integral to the overall narrative, rather than simply serving as a means to advance the plot. The aforementioned standard has received criticism for imposing a significantly elevated threshold upon authors with regards to safeguarding their characters under copyright law. In literary works where the growth, behaviour, or experiences of characters hold great importance, it is noteworthy that the majority of characters do not serve as the primary driving force behind the narratives in which they appear. Moreover, it appears that this particular standard is not suitable for other components of literary works, such as the portrayal of settings, except for highly exceptional circumstances.

2.6.1 Rights entailed by an author under US Law

In order to establish a viable claim of copyright infringement, the proprietor of the copyright must initially demonstrate that their work is eligible for copyright protection. In order to obtain the aforementioned rights, it is necessary for the possessor to demonstrate that the content in question is both authentic and has been recorded in a physical form of communication, and that its inception can be attributed to a specific individual. Justice O'Connor, in a landmark case⁶³, expounded on the prerequisites for a copyright violation lawsuit concerning duplicated entries in a telephone directory. The company utilised the listings from Rural's officially published telephone book in order to compile its own telephone directory, which was subsequently disseminated to the general public. The Court ruled that the act of appropriating data was lawful, as the information extracted

⁶² *Warner Bros. Pictures v. Columbia Broadcasting* 216 F.2d 945 (9th Cir. 1954).

⁶³ *Feist Publications, Inc., v. Rural Telephone Service Co.* 499 U.S. 340, 361 (1991).

from the telephone directory constituted factual data, which is not subject to copyright protection. In summary, the absence of originality is attributed to the fact that information and facts are not derived from an intentional act of authorship, which is a prerequisite for copyright protection. In order to potentially qualify for copyright protection, any material must be “independently created by the author”. The requirement of a certain degree of creativity for copyright protection has been established by the SC. Furthermore, it has been asserted by the Court that a collection of factual information organised in a manner lacking originality does not meet the criteria for copyright protection. The SC overturned the lower court's ruling that the act of compiling uncopyrightable data into a new work is adequate for copyright protection. The Court underscored that the principal aim of copyright is to advance the advancement of scientific and practical disciplines, rather than to compensate authors for their efforts. Consequently, the mere organisation of material that is not eligible for copyright protection does not meet the criteria for legal protection under the "sweat of the brow" doctrine in copyright law. This practise guarantees that individuals have the liberty to expand upon the concepts and knowledge presented in a piece of work, while simultaneously acknowledging the authors' entitlement to their unique expression.

The fundamental conflict in copyright law is evident in various judicial decisions that followed. The authors of copyrighted works are provided with a restricted monopoly over their creations, but their entitlements are counterbalanced by the utilitarian principle of optimising the accessibility of works for public consumption. The rights of copyright holders are constrained by two legal principles. The concept of the idea/expression dichotomy allows subsequent authors to incorporate general concepts into their own works, regardless of whether those concepts have already been used by another author. Additionally, the fair-use doctrine grants legal permission for the utilisation of copyrighted material in the production of a novel, transformative piece. Notwithstanding, authors who meet “the authorship, originality, and fixation criteria of the Copyright Act are still granted primary copyright protection”, which entails a number of exclusive rights specified in Title 17 of the US Code under Section 106. As per the legal provision, the proprietor of the copyright holds the sole authority to carry out and permit the reproduction of the copyrighted material, disseminate copies to the general public, and,

significantly, create derivative works founded on the copyrighted material, which is of utmost importance in the context of fan fiction. The legal entitlement to create adaptations or derivative works serves as the foundation for authors who possess copyright to employ a legal action for copyright infringement as a mechanism for protesting against fan fiction produced by subsequent writers.⁶⁴

In a copyright litigation, the onus is on the copyright owner to demonstrate the infringement by establishing three essential elements: (1) that he owns the work which is granted protection under the Act, (2) that there has been a case of unauthorised use of his creation, and (3) that the said act resulted in inappropriate loss to the owner. A case which demonstrates these points is a noteworthy judgement⁶⁵, wherein there was an allegation of plagiarism on the part of the respondents by the petitioners regarding his musical work. The appellate court for Second Circuit in US held that the matters of unauthorized replication and inadequate appropriation are distinct constituents that the proprietor of the original creation must substantiate.

The Court initially established that in order to prove actual copying, the necessary evidence must be presented. If the defendant does not plead guilty, the opposite parties must put forward the evidences to assert its claim. This evidence will allow the jury to reasonably infer that copying occurred. Additionally, in the event that the defendant possessed the ability to obtain the plaintiff's work, it becomes incumbent upon the plaintiff to establish resemblances between the two works that indicate the defendant's illicit utilisation of the original. In the event that the plaintiff effectively establishes the defendant's act of reproducing the copyrighted material, it becomes imperative to additionally substantiate that said act of reproduction was conducted in an inappropriate manner. This case established a criterion for determining improper appropriation, which involved assessing whether the defendant had wrongfully taken a significant portion from the work of the original author.

⁶⁴ *Suntrust Bank v. Houghton Mifflin Co.* 268 F.3d 1257 (11th Cir. 2001).

⁶⁵ *Arnstein v. Porter* 154 F.2d 464, 468 (2d Cir. 1946).

This standard required the defendant to have taken from the crux of the work, a term that was subsequently adopted by the SC in a different case⁶⁶ to describe the same concept. The ruling in Nichols case by the Second Circuit provides further clarification to the Arnstein ruling, which was made 16 years earlier. Certain district courts have potentially construed the “copying” criterion in a famous judgement⁶⁷ to exclusively pertain to the verbatim replication of copyrighted content. Nevertheless, it was previously asserted by the court in the Nichols case that confining copyright protection solely to the textual content would create a loophole for plagiarists to evade liability by introducing insignificant alterations. Hence, the act of copyright infringement can be substantiated by the copyright holder through the presentation of evidence indicating that the individual who copied the work utilised overarching ideas or concepts from the original piece and integrated them into the subsequent creation. In the case of Nichols, the court underscored the importance of evaluating the significance of the portion taken, rather than solely fixating on its exact replication.

This particular case established the principle in the field of copyright law that instances of copyright infringement may arise when elements beyond literal words or passages are utilised and integrated verbatim into a fresh creation. The Nichols court, despite upholding the concept of misappropriation, determined that the extent of appropriation must be evaluated. This evaluation requires a balance between “*fair-use and the idea/expression dichotomy*”⁶⁸, which serve to safeguard against improper appropriation and protect the First Amendment rights of the defendant in such cases. Fair-use, as an example, allows individuals to lawfully utilise certain components of a copyrighted work for the purposes of critique or artistic expression. The concept of the idea/expression dichotomy ensures that copyright holders cannot monopolise basic themes, such as stock characters and generic storylines, to restrict others from employing these fundamental concepts in their own creative works. As per title 17 of US Code, under Section 106, the individual or entity who holds the copyright possesses the sole and exclusive authority to undertake certain actions. According to copyright law, the act of creating derivative

⁶⁶ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 568 (1994).

⁶⁷ *Arnstein* (n 65).

⁶⁸ *ibid.*

works without permission from the copyright owner is deemed as copyright infringement. The categorization of a work as an unauthorised derivative work renders it as material that infringes upon IPR. In an another leading case⁶⁹, the petitioner authored a comprehensive summary of thirty-one pages outlining a potential storyline for a prospective sequel to the preceding three Rocky films, known as Rocky IV. Sylvester Stallone authored the scripts and held the copyrights for the preceding films, which encompassed the portrayal of the characters featured in said productions. Stallone alleged that Anderson had violated his intellectual property rights pertaining to these particular characters. The court made an observation regarding Stallone's allegations of infringement, stating that the characters depicted in the initial three Rocky films were a meticulously defined group, with an extensive portrayal in Stallone's copyrighted works.⁷⁰ According to the court, individuals who watch films tend to associate certain character traits with the characters depicted on screen. Consequently, the court determined that the Rocky characters were so thoroughly defined that they were safeguarded from being used without permission in a sequel by another author. Anderson's utilisation of these characters transgressed Stallone's copyright, and the piece showcasing them encroached upon the safeguarded articulation in the protagonist character, thereby rendering his work an unsanctioned imitative work. The court's categorization of handling in this instance situates fan fiction unambiguously under the domain of derived works.

Authors of fanfiction often introduce original characters into the established universe of their preferred franchise. However, it is important to note that fan fiction inherently involves the utilisation of elements from the source material. Rowling. This fan fiction has gained significant attention and praise from readers, despite its deviation from the original source material. The work of fan fiction under discussion is situated in the Hogwarts setting and features characters that were originally created by Rowling. Additionally, it makes references to events that transpired in the original series. The inclusion of new characters or settings, while potentially expanding the universe of the

⁶⁹ *Anderson v. Stallone* 11 U.S.P.Q.2d 1161 (1989).

⁷⁰ *ibid.*

original work, may not necessarily attract readers of fan fiction if there is no connection to the source material.

The Organisation for Transformative Works is a website that aims to educate fan fiction writers about their legal rights in relation to copyright infringement claims. It acknowledges that fan fiction constitutes a derivative work that infringes upon the original works.⁷¹ In a leading case⁷², an “alternative” publication featured cartoons depicting Disney characters engaging in potentially controversial activities. The judicial body determined that the utilisation of Disney's recognisable visual representations amounted to a violation of copyright. The utilisation of this criterion in fan fiction remains ambiguous as the characters employed are accessible in both written and audio-visual mediums, albeit solely depicted through textual descriptions. In cases where the primary medium of a work is audiovisual and the intended use does not align with it, there may be implications regarding the authorization to create derivative works.

House Report on the CA of 1976 states that “derivative work” is considered to be an infringement, if it forms its basis on the work protected under copyright. Section 101 of the CA defines a derivative work as “*a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted*”. Hence, in order for a breach of Section 106(2) to transpire, the infringing material must contain certain elements of the copyrighted work. An example of this would be an elaborate analysis of a piece of art or a musical composition that is based on a literary work, which would generally not be deemed violations according to this provision.

2.6.2 Moral rights under USA

Despite current governmental investigation into whether to improve their extent or strength, moral rights traditions in the US remain fairly weak. Notwithstanding its ratification of the Berne Convention, the United States has a history that is marked by

⁷¹ ‘About the OTW: What We Believe’, (*Org. For Transformative Works*) <<http://transformativeworks.org/about/believe>> accessed 17 June 2023.

⁷² *Walt Disney Prods. v. Air Pirates* 581 F.2d 751 (9th Cir. 1978).

inconsistencies with respect to this particular entitlement. It is still uncertain whether the United States has completely fulfilled its obligations under this legislation. Even scholars who specialise in copyright law may encounter difficulties in advocating for more robust legislation concerning moral rights, including the right of attribution. The absence of a cohesive legal framework may confer an advantage to writers of fanfiction.

In the United States, creators are afforded certain moral rights protections under the Visual Artists Rights Act (VARA) of 1990. These protections include “*the rights of integrity, paternity, and false attribution but are limited to works of visual art, such as paintings and sculptures*”⁷³. The majority of works that would attract fanfiction are not suitable for their application. It has been contended that the disparity in copyright law between the United States and Europe can be attributed to the robust economic justification underlying the former, as opposed to the emphasis on the rights of artists in the latter. Notwithstanding the inadequacy of the moral rights framework in the US, authors from the country may still have the capacity to safeguard the authenticity of their creations, maintain the association with their personal brand, and prevent any association with works that they disapprove of. In order to achieve this objective, it is necessary to depend on economic rights rather than moral rights, as the latter are nearly equivalent in safeguarding specific facets of the author's integrity and paternity rights.⁷⁴ The derivative work right in the United States serves as a safeguard against numerous adaptations that would otherwise be safeguarded by the right of integrity. Under specific circumstances, it may be feasible to prevent false attribution by means of Section 43 of the Lanham Act, which restricts false advertising.

The court ruling in leading case⁷⁵ established that the defendants, American Broadcasting Company, were prohibited from rebroadcasting heavily edited episodes of the TV series belonging to the claimants, the Monty Python comedy group. Although legal action for breach of moral rights was deemed unwarranted in the United States, the court acknowledged that the Lanham Act could serve as a means to prohibit derogatory alterations by treating them as a form of false designation of the origin of the television

⁷³ 17 USC §106A.

⁷⁴ Marshall A Leaffer, *Understanding Copyright Law* (5th edn, LexisNexis 2010) 389.

⁷⁵ *Gilliam v American Broadcasting Company* (538 F2d 14 (2d Cir 1976)).

programme. The utilisation of the Lanham Act in such a manner has been restricted and confined, as evidenced by the *Dastar* case.⁷⁶ Consequently, it is improbable that authors seeking to impede the creation of fanfiction based on their works would prevail in a legal dispute.

The US government has identified economic rights as the primary means of safeguarding the more affective rights that authors may hold in their works, as opposed to moral rights. The adequacy of economic rights, as asserted by authors, is often deemed insufficient, particularly in the contemporary digital cultural landscape. The current copyright laws have been criticised for inadequately acknowledging the connection between an author and their work, as well as the non-economic motivations for creation. This has led to the argument that authorial concerns are not adequately safeguarded. Nonetheless, it seems unlikely that the United States will imminently establish a moral rights framework.

2.7 Rights of an author under the Canadian legal system

The Canadian legislation pertaining to copyright serves to protect the proprietors' exclusive entitlements to create or replicate the work, or a substantial portion thereof, in any tangible medium. The fundamental aspect of copyright in Canada is the exclusive right to reproduce a work or its substantial part. Furthermore, the Copyright Act provides protection for various other entitlements, such as the entitlement to publicly display works, to translate or publish works, or to modify works for alternative mediums. The legislation, however, lacks clarity regarding the specific components of creative works, such as characters or settings that are eligible for individual protection. The aforementioned inquiries hold significance in the context of fan fiction, as a considerable proportion of fan fiction narratives are not mere replicas of their source materials.

Fan fiction typically employs characters and other components from pre-existing works, often in scenarios crafted by the fan authors themselves. Do these depictions replicate characters and other significant elements of the source material in a manner that

⁷⁶ *Dastar Corp v Twentieth Century Fox Film Corp* (539 US 23 (2003)).

constitutes copyright infringement?⁷⁷ The hypothetical scenario under examination involves a fan's written work depicting a retired Harry Potter engaging in a conflict with a novel malevolent wizard. Can the character of Harry be considered eligible for copyright protection as an independent entity? In the event that a Star Wars enthusiast composes an innovative narrative featuring fresh characters within the make-believe Star Wars cosmos, is it the case that components such as “the Force” and planets or other locales from the films possess autonomous copyright protection? Certain examples of fan fiction employ pre-existing fictional universes as a means of delving into innovative concepts.

The subject in question has a dearth of legal precedents in both the United States and Canada. Furthermore, the limited number of litigated cases in America and Canada pertain to the safeguarding of imaginary personas. Whilst fan fiction narratives frequently incorporate established characters, it is equally conceivable for them to delve into settings, reference technologies, and generally employ other canon elements beyond pre-existing characters. The application of copyright principles to fictional elements such as "the Force" from Star Wars, the magical spells featured in Harry Potter, or the Hogwarts School is uncertain, given the limited guidance provided by existing case law. However, it is advantageous to examine the jurisprudence concerning whether characters in isolation constitute significant components of a piece for copyright objectives.

The protection of fictional characters under copyright law has been a subject of consideration in Canadian jurisprudence. This has been dealt in leading case⁷⁸, wherein the Federal Court deliberated on the potential infringement of author Preston's copyright by George Lucas and Lucasfilm. The individual named Preston had authored a script titled “Space Pets”, which depicted a conflict on a remote planet featuring a group of rudimentary, teddy bear-like extraterrestrial beings known as Ewoks. Preston contended that the utilisation of a comparable extraterrestrial species, also designated as Ewoks, in the film “Star Wars: Return of the Jedi” constituted an infringement of his copyright in the script “Space Pets” due to its substantial reproduction. The case in question examined various matters, including the copyrightability of the Ewok characters. The court utilised

⁷⁷ Daniel J Gervais and Elizabeth Judge, *Intellectual Property: The Law in Canada* (2nd edn, Carswell 2011).

⁷⁸ *Preston v. 20th Century Fox Canada Ltd.*, 1990 CarswellNat 205, 38 F.T.R. 183 (Fed. T.D.).

the Nichols test and asserted that in order for a character to be protected under copyright law, it is necessary for the character to possess a distinct and recognisable identity within the work. [. . .As stated by Judge Learned Hand. [. . .] “. . .According to the author, characters that are less developed are less likely to be copyrighted, which is a consequence that the author must accept if they have not clearly defined the characters. The Ewoks created by Preston did not have enough distinctive features to qualify for copyright protection. However, the court's endorsement of Learned Hand's test implies that characters that meet the criteria can be copyrighted in Canada.

The efficacy of the Preston test in elucidating the legal standing of fan fiction within the framework of Canadian copyright law is limited. Is it possible that fan fiction pieces that centre around underdeveloped background characters or "extras" are comparatively less prone to copyright infringement? For instance, could a narrative about a minor Hogwarts student be less susceptible to legal issues than one that revolves around Harry Potter himself? What would be the legal interpretation of a subsequent work that incorporates clearly defined and unique settings or other components from the original work, according to the court? The assessments appear to exhibit a disconcerting degree of capriciousness when employed in the context of fan fiction, resulting in scenarios where distinct fan productions may warrant varying degrees of consideration based on the characters or situations they emphasise.

The legal decision rendered by the Quebec Court of Appeal in the case of *Robinson v. The production of films by Cinar Inc.*⁷⁹ has resulted in comparable levels of ambiguity. The legal dispute between TV writer Robinson and television corporation Cinar resulted in a successful lawsuit by Robinson for copyright infringement of his children's programme. The court determined that Cinar's series, *Robinson Sucroe*, violated the copyright of Robinson's planned but unrealized series, *Robinson Curiosit e*. The present case is noteworthy due to the fact that the central theme of the show, which revolves around a group of explorers inhabiting an island in a manner similar to *Robinson Crusoe*, was not under dispute. Instead, Robinson was able to successfully argue that the characters featured in the subsequent series were substantially similar to those in his own

⁷⁹ *Robinson v Films Cinar Inc.*, 2011 QCCA 1361.

proposed show. The Quebec Court of Appeal affirmed the decision of the lower court, which held that the resemblances between the two casts amounted to significant reproduction.

It is important to acknowledge that the entities under consideration are of an animated or pictorial nature, specifically cartoon characters. Apart from sharing analogous personalities and cast dynamics, the protagonists of *Robinson Sucroe* exhibited a remarkable visual similarity to Robinson's illustrations for *Robinson Curiosit e*. The potential simplicity in identifying visual resemblances could potentially facilitate the attainment of copyright protection for animated characters in contrast to literary or dramatic characters. Additionally, it is noteworthy to acknowledge other dicta present in *France Animation*.⁸⁰ According to the Court, copyright infringement does not necessarily require an exact replica of the original work, but rather a "colourable imitation" that reproduces a significant portion of the original. Both similarities and differences must be considered, but even if there are differences, the presence of one or more substantial similarities may still constitute infringement. For instance, the use of a well-known character from a comic strip could be sufficient to constitute infringement.

Subsequently, the Court acknowledges that significant differences can outweigh substantial similarities and considers the possibility of a "original and novel work" that is merely influenced by the original. The specific application of these principles to individual fan fiction works remains uncertain. In accordance with American and Canadian case law, certain fictional characters are eligible for independent copyright protection, while others are not. The criteria for determining which characters are eligible for protection is not predetermined. However, it appears that central characters with unique visual features and those appearing in animated media are more prone to receiving independent protection compared to peripheral characters lacking distinct features or those in non-visual media like literature. This observation is subject to further investigation.

⁸⁰ *ibid.*

The safeguarding of fictional characters through copyright laws may result in certain fan fiction narratives, particularly those that centre on prominent and clearly defined pre-established characters, being in violation of Canadian copyright legislation. Nonetheless, there is a disconcerting aspect regarding the apparent implications of the Learned Hand test that was sanctioned in the Preston case with regards to fan fiction. What is the rationale behind granting apparently privileged status to amateur authors who concentrate on minor or insufficiently delineated characters? What methods can enthusiasts employ to anticipate the performance of a particular character on this assessment? It could be argued by fan writers that these instructions may result in arbitrary and uncertain outcomes, potentially hindering the development of valuable second-generation texts.

A counterargument exists which posits that copyright law ought to exhibit greater leniency towards second generation creators who concentrate on underdeveloped characters or facets of first generation works. It can be argued that minor or background characters are situated on the "idea" end of the idea/expression spectrum, whereas well-developed characters are likely to be categorised as falling within the "expression" side. The purpose of this arrangement may be to facilitate greater expression among the general populace, particularly among second-generation creators, by enabling them to more easily expand upon underdeveloped elements of source texts, rather than resorting to retelling or appropriating pre-existing narratives. Notwithstanding, derivative works such as fan fiction, parodies, or other creative adaptations that feature extensively developed central characters have the potential to offer fresh and innovative viewpoints to the source material. In certain instances, it may be imperative to rephrase or assimilate pivotal characters and components, as opposed to peripheral ones, to effectively scrutinise or reevaluate a piece of literature.

The aforementioned arguments lack the ability to provide a clear indication of the potential performance of specific characters on these assessments. Additionally, they do not furnish fan writers with any pre-existing assurance regarding the permissibility of their creative pursuits in relation to copyright legislation.

CHAPTER 3

PROTECTING FANFICTION AUTHORS: EXPLORING LEGAL REMEDIES IN COPYRIGHT LAW AGAINST CLAIMS OF INFRINGEMENT POSSIBLE ACADEMIC REWRITE - "STRATEGIES FOR RESPONDING TO ALLEGATIONS OF COPYRIGHT INFRINGEMENT"

3.1 UK Perspective

The focus of the analysis will now shift towards the copyright exceptions that can be utilised by user-generated content (UGC) fanfiction writers to support their case for the dissemination of their literary creations. The significance of amateur user-generated creativity is acknowledged by legislators at the highest level. They have affirmed that the emergence of digital technologies has transformed the process of creating, producing, distributing, and utilising works and other safeguarded subject matter. According to the source, there has been a proliferation of novel applications, stakeholders, and commercial strategies. Considering the significance of this mode of generation, manufacture, dissemination, and utilisation to proprietors of copyright, it is crucial to comprehend the precise manner in which copyright regulates and ought to regulate these categories of works, while keeping in mind the fundamental tension between the concepts of political economy and creativity that form the basis of this dissertation. The predominant focus in the existing body of EU and UK copyright literature pertains to the examination of UGC in the context of copyrighted musical or artistic works. Notably, this includes the analysis of remixes and parodies.⁸¹ The fair-dealing exceptions to copyright have recognised the social welfare benefits of commercial transformative works, thereby justifying their allowance and safeguarding. In order for UGC that incorporates copyrighted material, such as fanfiction, to be lawfully publishable without obtaining a licence, it must satisfy the requirements of a copyright exception.

⁸¹ Jonathan Griffiths, 'Fair-dealing after Deckmyn - The United Kingdom's Defence for Caricature, Parody or Pastiche' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 <<https://papers.ssrn.com/abstract=2770508>> accessed 17 June 2023.

The paramount copyright exception for UGC works is fair-dealing, which is encompassed within sections 28-30 of the Copyright, Designs and Patents Act 1988 (CDPA). In the event that a user can demonstrate that their work constitutes a fair-dealing with the original work, as defined by the relevant statute, the allowable acts within the scope of copyright law do not apply. Consequently, the user is at liberty to execute the dealing as they deem necessary. For instance, authors of fanfiction would be authorised to disseminate their works, despite the fact that such works would otherwise constitute a violation of copyright. The UK Government has provided a definition of fair-dealing, which involves considering how a reasonable and truthful individual would have handled the work in question.”⁸² The present analysis aims to establish that fanfiction, as a form of user-generated content, deserves legal recognition as a "fair and honest" means of engaging with underlying works, and thus should be entitled to the benefits of the fair-dealing copyright exception. According to the source, this analysis represents a rigorous assessment of fanfiction, systematically evaluating each relevant consideration. The author further suggests that this study is highly valuable in advancing the discourse surrounding fanfiction, as it moves beyond the emotional reactions of those involved.⁸³

3.1.1 Dealings

The CDPA 1988 encompasses various categories of “dealing” or “permitted acts” that are considered to be “fair”. The most pertinent exceptions for fanfiction are delineated as follows: This is an exhaustive list of exceptions and in order for a UGC work of fanfiction to be eligible for protection under these exceptions, the author must demonstrate that their work falls under one of these categories of 'dealing'. Otherwise, the assertion of fair-dealing is unsuccessful. After presenting their argument, the analysis proceeds to evaluate the fairness of the work, which encompasses considerations such as the accessibility of the original work to the general public and the adequacy of its acknowledgment. The present discourse aims to provide a comprehensive account of each category of fair-dealing, elucidating the manner in which every 'permitted act' may be relevant to UGC works. Upon completion of this task, an evaluation will be presented

⁸² *Ashdown v Telegraph Group Ltd* [2002] Ch149 [2001] EWCA Civ 1142.

⁸³ Stacey M Lantagne, 'The Better Angels of Our Fanfiction: The Need for True and Logical Precedent' (2011) 33 *Hastings Comm/Ent LJ* 159, 179.

regarding the extent to which UGC can be deemed fair in accordance with the general criterion established in *Hubbard v Vosper*.⁸⁴

3.1.2 Research

The exception necessitates that the utilisation of copyrighted material is exclusively for educational purposes, excluding any form of mass marketing, and is intended for educational settings. The piece presents the notion of distributed mentoring, elucidating how fanfiction platforms such as Fanfiction.Net function as arenas for aspiring writers to engage in practise and enhance their abilities. These platforms facilitate the creation of a digital space wherein users can share their literary works, receive constructive criticism, and engage in meaningful interactions with other writers. The aforementioned mode of engagement can be perceived as a variant of casual social creation facilitated by interconnected systems, thereby classifying it as distributed mentoring.⁸⁵

Fanfiction exemplifies the fundamental components of distributed mentoring, encompassing the collaborative contributions of reviewers, the acquisition of knowledge, non-simultaneous communication, expedited information dissemination, and the accessibility of resources.⁸⁶ Moreover, the positive and constructive characteristics of reviews distinguish this mode of mentoring from conventional instructional approaches.⁸⁷

Nevertheless, the application of the research/private study exception to fanfiction presents certain difficulties. One stipulation necessitates the exhibition of educational intent as the sole motivation for utilising copyrighted materials. While a significant number of writers prioritize enhancing their skills and reputation over financial gain, certain authors have effectively made the transition to lucrative professional paths. The inclusion of commercial elements and the pursuit of reputation enhancement may potentially weaken the rationale for maintaining a strict focus on educational objectives.

⁸⁴ *Hubbard v Vosper* [1972] 2 QB 84.

⁸⁵ Aragon, Davis and Fiesler (n 30); see also Julie Campbell and others, 'Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities' (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 14 June 2023.

⁸⁶ Barbara Townley, Philip Roscoe and Nicola Searle, *Introduction: Creating Economy*, *Creating Economy: Enterprise, Intellectual Property, and the Valuation of Goods* (Oxford University Press 2019).

⁸⁷ Sarah Evans and others, 'More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring' (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 14 June 2023.

3.1.3 Caricatures, Parodies, and Pastiche

The recent fair-dealing exceptions pertaining to caricature, parody, and pastiche are indicative of a shift in attitude towards specific types of content. It can be argued that fanfiction falls under the category of 'pastiche' and may be permitted in the UK courts, should a case arise.⁸⁸

In accordance with the Quotation and Parody Regulations of 2014, the act of creating caricatures, parodies, and pastiches was granted legal permission within the realm of copyright law in the United Kingdom, as outlined in section 30A of the Copyright, Designs and Patents Act of 1988. Although the legislation did not provide a precise definition for the terms 'caricature', 'parody', or 'pastiche', the UK government offered an illustrative example in its explanatory materials. For instance, a comedian may employ a few lines from a film or song to create a parody sketch, while a cartoonist may allude to a renowned artwork or illustration to produce a caricature. Additionally, an artist may utilise minor fragments from various films to construct a more extensive pastiche artwork.

Although a definitive legal or legislative interpretation of pastiche has not yet been established, it seems reasonable to encompass various forms of UGC such as mash-ups, fanfiction, music sampling, appropriation art, and other types of homage and compilation as commendatory and non-critical imitations.⁸⁹ The term "pastiche" refers to the act of replicating the fundamental aspects of a work, such as its style or unique characteristics, in a manner that evokes a sense of nostalgia, without resorting to satire as a means of commentary or critique (in contrast to parody). The utilisation of this form of creativity is not novel, as it has been employed by esteemed authors such as Proust. The historical pastiches differ from contemporary user-generated content in that they were produced for commercial purposes in an era when strict copyright regulations did not prohibit their creation. Similar to fanfiction, social norms were utilised to regulate them. Prominent

⁸⁸ Anupam Chander and Madhavi Sunder, 'Dancing on the Grave of Copyright?' (2019) 18 *Duke Law & Technology Review* 143, 154.

⁸⁹ Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed Up Drafting?' (2017) 4 *Intellectual Property Law Quarterly* 346, 347.

scholars of that era, including Marmontel, believed that pastiche was contrived and should not be encouraged.

Although parody and pastiche share several similarities, the absence of critique is the primary consideration that sets pastiche apart as a tribute from parody. Consequently, some legal experts contend that parody has a more robust justification for fair-dealing than pastiche.⁹⁰ Prominent academics commonly label it as a form of parody that is devoid of substance or meaning, often referred to as “blank” or “empty” parody. The inclusion of pastiche in the legislation suggests a deliberate intention to allow for the creation of such works. This assertion persists, notwithstanding the apparent adoption of the term in its entirety from the European legislation, given that there was no parliamentary deliberation on the term during the implementation of the new exemptions. The term in question has been referenced on several occasions within the House of Commons, yet has not been explicitly defined. This may suggest that Parliament regards it as a commonplace English term that does not necessitate a precise legal definition. During a debate in 2015 regarding the harmonisation of copyright and related rights, the significance of pastiche and caricatures was explicitly referenced. In the absence of the contributions made by Greek authors, it is likely that Latin writers such as Plautus and Terence would not have attained the prominent position they currently hold in the annals of literature, as they would have been susceptible to legal action for copyright infringement.⁹¹ Hence, despite the absence of legal precedents to support the notion that pastiche can serve as a justifiable fair-dealing exception to safeguard fanfiction, one can contend that it aligns with the principles of the law and would be deemed permissible in the event of litigation.

Parody has a precise definition and has been utilised in the United States to safeguard fanfiction in previous instances.⁹² Hence, it is imperative to evaluate the feasibility of employing the aforementioned defence in the United Kingdom. The concept of parody

⁹⁰ Sotiris Petridis, ‘Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche’ (2015) 32 *Quarterly Review of Film and Video* 728.

⁹¹ Ruth Elizabeth Flaherty, ‘Lexual Poaching’: A doctrinal and empirical investigation into the importance of unauthorised derivative works of fanfiction to society in the digital age and how Article 17 CDSM undervalues them’ (DPhil thesis, University of East Anglia School of Law 2020).

⁹² *Suntrust Bank v Houghton Mifflin* [2001] 268 F3d 1257.

was established in a prominent case⁹³, wherein two prerequisites were delineated. The second piece of work is required to fulfil two criteria. Firstly, it should evoke the original work while maintaining a distinct identity. Secondly, it should be characterised by a humorous or satirical expression. The initial attribute can be exemplified through pieces of art that aim to satirise either the fundamental work (known as target parodies) or the sociological aspects of the group responsible for the work or the intended audience of the original work (known as weapon parodies). UGC platforms that function as parodies are now allowed as long as they meet the criteria of being ‘fair’.

The topic of fanfiction has been previously deliberated in the United States within the context of the fair-use exception for parody. Nonetheless, significant distinctions exist between parody and fanfiction, resulting in their differential treatment in the UK. This divergence is attributed to the significance of statutory interpretation principles within the EU and UK. The primary distinction between parody and fanfiction lies in the treatment of the original work. This pertains to the functional aspect of the *Deckmyn* definition, which stipulates that parodies must incorporate some form of humour or ridicule. Although certain fanfiction pieces may deliberately function in such a manner, this is not the primary motivation behind the creation of fanfiction. The primary impetus for its creation is rooted in a deep affection and active involvement with the community, rather than being driven by comedic purposes.

A crucial distinction between fanfiction and parody pertains to the legal status of the respective works. This distinction also underscores the inapplicability of parody legislation to pastiche works, such as fanfiction. The phenomenon of parodies being made available to the public in their final form contrasts with the practise observed in fanfiction, where greater emphasis is placed on the dissemination of unfinished works, often distributed without charge. This phenomenon could potentially be attributed to the novice status of certain writers of fanfiction. A significant proportion of Fanfiction.Net's user base, specifically 62.3%, comprises individuals in their teenage years.⁹⁴ This

⁹³ C-201/13 *Deckmyn v Vandersteen* [2014] ECR 20.

⁹⁴ Kodlee Yin and others, ‘Where No One Has Gone Before: A Meta-Dataset of the World’s Largest Fanfiction Repository’ (CHI '17: CHI Conference on Human Considerations in Computing Systems, Denver, May 2017).

demographic is at a stage in their lives where they are honing their writing abilities, rendering them more receptive to the feedback and guidance offered by online communities like Fanfiction.Net. Individuals belonging to that particular age bracket exhibit a lower probability of engaging in professional composition of innovative literary works, potentially attributable to inadequate academic instruction or preparation. Engaging with an active fandom on Fanfiction.Net can be perceived as analogous to professional writers becoming members of professional organisations like the Writers' Guild of Great Britain or the Alliance of Independent Authors. Similarly, it can be argued that fanfiction serves as a means of honing one's writing skills, akin to vocational writing training. This may elucidate the rationale behind the common practise of releasing fanfiction in a serialised format, with chapters being published incrementally.

The prevalence of unfinished works in fanfiction can be attributed to the communal aspect of fandoms, particularly in fanfiction circles. Scholars have posited that individuals who engage in the creation and consumption of fanfiction establish a communal bond based on their shared enjoyment of this pastime, as well as their desire to hone their craft with the ultimate goal of pursuing a career in professional writing.⁹⁵ Significantly, fandom provides a means to legitimise and affirm the inclination to engage with artistic creations in such a manner, while simultaneously acquiring additional writing or other artistic proficiencies. The significance of the community aspect is demonstrated in the Guidelines of Fanfiction.Net. The individuals present in this setting possess a shared aspiration to become writers. It is imperative to exhibit respect towards one's peers and extend assistance when required. Consequently, the published works are presented in a preliminary format, and constructive feedback and evaluations are encouraged (Fanfiction.Net and Archive of Our Own provide designated sections for comments). This contrasts with commercial productions such as parodies, which aim to receive feedback after the work has been finalised and made available for purchase. The legal framework of copyright presupposes that any derivative works that are created without the express permission of the copyright owner are detrimental to the interests of the latter, either by serving as a replacement for the original work or by causing damage

⁹⁵ Aarathi Vadde, 'Amateur Creativity: Contemporary Literature and the Digital Publishing Scene' (2017) 48(1) *New Literary History* 27, 33 <<https://www.jstor.org/stable/44505273>> accessed 12 June 2023.

to its originality. When considering the application of this argument to parody, it becomes apparent that a valid exception is warranted. Although a parody is a derivative work, it is improbable that it would function as a replacement for the original work. This argument can be extended to a greater extent particularly in the context of fanfiction. It is probable that the authors of fanfiction have previously acquired the original work (otherwise, they would not have a basis for their creations) and are inclined to be recurrent and devoted consumers due to their fan status. It is probable that they are purchasers with high volume and cost, who opt for the 'Extended/Director's Editions' rather than the conventional version of the original work. Consequently, the fanfiction fails to meet the demand of said users.

The inquiry persists as to whether the consumers of fanfiction are experiencing fulfilment of their desire for the primary source material. The publications are predominantly disseminated through disparate channels (digital and non-profit as opposed to physical and for-profit), and as previously noted, they are primarily issued as unfinished pieces rather than finalised products.

3.1.4 The stance of the United Kingdom

After establishing the validity of permitting fanfiction as one of the protected "permitted acts" under fair-dealing, particularly for research or pastiche purposes, the subsequent step is to assess the fairness of the dealing. This judgement entails various cumulative considerations that require consideration:

1. *"The number and extent of the quotations....[a]re they altogether too many and too long to be fair?"*
2. *The use made of them; and*
3. *The proportions.*"⁹⁶

After presenting the assertion that the utilisation of the material could fall under the categories authorised by the CDPA 1988, it is incumbent upon the British writer of fanfiction to demonstrate that their creation meets the criterion of 'fairness'. The primary

⁹⁶ Hubbard (n 84).

focus of fanfiction scholarship lies in this domain, as it represents the most adaptable realm of copyright law. In the event of a claim, any work that has been deemed infringing would be allowed to be marketed without any additional copyright claims. The diverse range of fanfiction genres may result in certain works being classified as exceptions, while others may not meet the criteria.

3.1.4.1 “Number and Extent”

The initial stage of analysing UGC pertains to assessing the quantity and scope of citations, which is a crucial aspect in determining the equity of the material. The aforementioned statement posits that extensive and frequent usage of excerpts, particularly those that encompass the most significant aspects of a given work, may lead to a decrease in the anticipated profits for the proprietor of the copyright.⁹⁷ This demonstrates the correlation between the fair-dealing exemption and the utilitarianism ideology that underpins all copyright legislation in the United Kingdom.⁹⁸ Revisiting the previous assertion regarding the significance of characters in the primary piece, it is evident that if characters possess sufficient substance to warrant copyright protection, they are likely to be regarded as a crucial component of the work. Hence, in the event that characters are extracted entirely from the primary source material and incorporated into the user-generated content, such as in the case of parody videos featuring individuals cosplaying as principal characters or fanfiction that exclusively employs major characters, the user-generated content may not satisfy this particular criterion. The likelihood of this scenario increases significantly if the premise that characters possess their own copyright is acknowledged. In the event that the aforementioned scenario holds true, the entirety of said labour is being appropriated and repurposed, thereby diminishing the likelihood of the transaction being regarded as equitable. In cases where fanfiction solely employs secondary characters that lack the requisite originality to warrant copyright protection, or employs creative decisions that substantially alter the characters' identities, or introduces new characters into the same fictional universe, the resulting user-generated content may be considered fair-use. The significance of this lies in the fact that the fair-dealing exception cannot be employed to entirely circumvent the market, and

⁹⁷ Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 224.

⁹⁸ C-145/10 *Eva-Maria Painer v Standard Verlags GmbH* [2011] ECR I-12594.

it is assumed that if the user has the means to remunerate, then payment must be made.⁹⁹ The ongoing discourse regarding the CDSM Directive illustrates a prevailing stance that advocates for increased employment of licences in engagements with copyrighted materials, as a means of circumventing the perceived “value gap”.

3.1.4.2 “The use made of them”

In order to utilise the “fair-dealing exception”, it is imperative that the user-generated content being produced from the work in question is one that aligns with the standards of a reasonable and ethical individual.¹⁰⁰ This entails evaluating not only the categorization of the use under the prescribed headings in sections 28-30 of CDPA 1988, but also determining if the utilisation serves a transformative function or if it merely conveys identical information as the original author.¹⁰¹

3.1.4.3 “Transformative Purpose”

The concept of transformativeness is acknowledged by copyright law as a crucial consideration in fostering creativity, as it constitutes a fundamental aspect of the human productivity life cycle. Within this cyclical process, society assimilates each new work, utilising it as the foundation for subsequent generations' creative and innovative endeavours. “*As a result, creative works frequently serve as the primary resource for further creation.*”¹⁰² Numerous facets of copyright law have acknowledged this phenomenon, such as the absence of a necessity for novelty in the assessment of originality and the expansion of safeguarding to encompass expressions rather than concepts. These illustrate the significance that copyright accords to enabling boundless reuses of specific categories of imaginative ideas.

Robust copyright protection is crucial in safeguarding the capacity to produce and circulate forthcoming works that reflect the author's perspective. Furthermore, if unauthorised adaptations that closely resemble the original work are allowed to

⁹⁹ Alan L Durham, ‘Consumer Modification of Copyrighted Works’ (2006) 81(3) *Indiana Law Journal* 851, 871 <<https://www.repository.law.indiana.edu/ilj/vol81/iss3/2>> accessed 13 June 2023.

¹⁰⁰ *Hyde Park Residence Ltd. v Yelland & Ors.* [2000] EWCA Civ J0210-2.

¹⁰¹ *Newspaper Licensing Agency Ltd. v Marks and Spencer PLC* [2001] UKHL 38.

¹⁰² Niva Elkin-Koren, ‘Copyright in a Digital Ecosystem: A User Rights Approach’ in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017).

proliferate and gain popularity, they may impede the author's ability to explore certain themes and narratives in future works. There exists a potential hazard wherein readers may discern underlying meanings in an author's prior literary works and subsequently produce analogous narratives to those intended for forthcoming novels. The widespread sharing of fanfiction may result in allegations of plagiarism or copyright infringement against the author when they attempt to publish their own work. *"This is exemplified by the case of Marion Bradley Zimmer, whose manuscript was rejected by publishers due to a claim made by a fanfiction author that it was based on a work from a fanfiction magazine that they had edited at the time."*¹⁰³ Although fanfiction authors may not have a strong case for copyright infringement against the original author, their expression of concerns has caused publishers to exercise caution when engaging with the authorised work. It can be contended that the degree of transformation in fanfiction is inversely proportional to the level of threat it poses to the original work.

Compared to other types of pastiche, such as appropriation art, fanfiction writers have a greater likelihood of being able to assert the fairness of their work. This is due to their ability to argue that their use of source material serves a transformative purpose, whereby they have added to or recontextualized the extracted content. *"Fanfiction writers in the United Kingdom may utilise the aforementioned criteria, which include recontextualisation, refocalisation, cross-overs, character dislocation, personalisation, and emotional intensification, to support their assertion that certain types of fanfiction meet the aforementioned criteria."*¹⁰⁴ Fanfiction is a significant illustration of the "Participation Age" and "New Enlightenment" phenomena. This trend involves an increasing number of individuals who, instead of being passive recipients of culture from above, are asserting themselves as authors in their own right. This assertion is particularly important for those who have been culturally misrepresented or unrepresented.¹⁰⁵ Consequently, fanfiction writers are not only significantly altering the original works, but they are also doing so with the intention of achieving social welfare gains. The act of

¹⁰³ Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (1st Edn, Routledge 2011).

¹⁰⁴ Bently and Sherman, (n 97) 225.

¹⁰⁵ Madhavi Sunder, 'IP3' (2006) Davis Legal Studies Research Paper No., 307 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=897753> accessed 14 June 2023.

enhancing the well-being of marginalised communities, who perceive a lack of representation in conventional media, through the medium of democratising culture, could serve as a robust justification for this category of labour.

Multiple variables can be employed to evaluate if the creations are adequately transformative to satisfy such criterion. One possible argument is that altering the target market segment of the works can be considered transformative enough. This is because such a change would entail the development of distinct themes and the utilisation of varying levels of language in the works.

The age category is a crucial variable for authors and publishers, as it serves as one of the means by which publishers segment markets.¹⁰⁶ The utilisation of age segmentation, which is determined by either reading or developmental age, provides a reliable and effective structure for marketing goods, such as novels, to a global audience. This approach also enables inferences to be drawn regarding consumer behaviour within specific segments of the market. Books intended for children, specifically those aged 8 or younger, typically feature a greater proportion of illustrations relative to text. Consequently, characters within such books are often depicted more through visual means rather than textual descriptions.¹⁰⁷ These books are primarily marketed towards adults who will read them to children, and as such, employ relatively straightforward language. Hence, the back catalogue items possess a significant nostalgic appeal, thereby resulting in a sustained demand for them. The aforementioned statement implies that the adjacent brand may possess significant emotional significance for consumers, and any unauthorised derivative modifications may have a greater influence, both financially and in terms of ethical entitlements. This assertion holds particularly true in instances where characters from literature intended for children are reimagined and incorporated into adult-oriented works that may feature themes of a sexual or violent nature.

In contrast, literature targeted towards young adults represents the initial literary purchases made by pre-adolescents and adolescents themselves, and is widely regarded as

¹⁰⁶ Alison Baverstock, *How to Market Books* (5th edn, Routledge 2015).

¹⁰⁷ Susan Mitchell, *American Generations: Who They Are, How They Live, What They Think* (4th edn, New Strategists 2003).

the most economically sensitive segment of the publishing industry. The current market trend indicates a growing reliance on media for sales, potentially resulting in a greater influence of superstar personas compared to other markets. The demographic of young adults exhibits a higher propensity for online discount awareness and comparison shopping. Additionally, this group is susceptible to media influence and possesses a growing level of purchasing capability.¹⁰⁸ Authors and copyright holders in this market segment attach great significance to determining the appropriate degree of copyright protection as it enables them to exercise authority over pricing. Individuals belonging to these age cohorts exhibit a higher propensity to engage with novel formats for the consumption and interaction with fictional content. The demographic of individuals who tend to interact with non-commercial online fanfiction within this market is relatively higher, with a majority of users on Fanfiction.Net being teenagers and young adults. Hence, it is possible that copyright holders may aim to restrict transformative reuses in this particular market due to its heightened price sensitivity in comparison to other market segments, and the likelihood of consumers also engaging with unauthorised derivative works.

Character licencing holds significant importance for both children's literature and young adult literature, as it enables the creation of a lucrative secondary market, such as branded clothing. Therefore, safeguarding the copyright of such characters would be of utmost significance to copyright proprietors, with the aim of preserving their capacity to enter into these licencing arrangements. The stringent regulation of characters in fanfiction may result in a reduced burden on fanfiction writers to showcase a transformative impact in their work. The extent to which the copyright holder expends effort in elucidating their artistic decisions and imbuing their characters with authenticity directly impacts the degree of discernibility of any alterations made to the character in fanfiction. The phenomenon of race bending is not limited to fanfiction, as evidenced by the portrayal of Hermione in the original movie. The textual cues strongly suggest that the character was intended to be of Caucasian descent, and the author was directly involved in the selection of the actress for the cinematic adaptations. The depiction of a character as black in an

¹⁰⁸ Catherine Gidney, *Captive Audience: How Corporations Invaded Our Schools* (1st edn, Between the Lines Publishing 2019).

authorised derivative work, specifically the play '*Harry Potter and the Cursed Child*', caused a significant uproar among fans many years after the original publication. Hence, a modification in the target age group, such as a shift from Children's or Young Adult to Adult category, accompanied by corresponding alterations in themes and activities, could potentially exert a more pronounced influence compared to other considerations like genre or length of the literary piece.

The book industry heavily depends on market segmentation based on genres to determine which books to publish.¹⁰⁹ Therefore, genre must also be examined as a consideration to assess the level of transformation in fanfiction and determine its fairness. The utilisation of genre as a fundamental tool for publishers to anticipate sales figures and assess return on investment is a significant consideration. Additionally, it serves as a crucial marketing variable in determining the appropriate target audience for new literary works. Publishers also consider whether a particular genre is oversaturated, which may impact their decision to publish a work. Hence, it can be inferred that a modification in genre could signify a modification in a fundamental aspect of the work, thereby serving as a potent indication of transformative use. The utilisation of adequate artistic discretion in a change of genre may serve as evidence of the transformative nature of the derivative work. This is particularly significant as it reduces the likelihood of the derivative work serving as a competing economic alternative to the original work. Many authors express apprehension regarding the possibility of fanfiction based on their work being pornographic in nature. The primary transformative aspect of such fanfiction is often limited to the conversion of works from other genres into romantic narratives. The central argument of this critique asserts that fanfiction predominantly focuses on the platonic connections between characters, neglecting to explore other dimensions of the original piece of writing. This assertion is especially valid in instances where the literary composition is not overtly classified as a love story, but rather as a bildungsroman centered on a school setting, as exemplified by the Potter universe. The potential consequences of this situation extend to the economic and ethical concerns of the author, as it could potentially undermine the reputation and authenticity of the work in question. This deviates from the modus

¹⁰⁹ Giles Clark and Angus Philips, *Inside Book Publishing* (5th edn, Routledge 2014) 41.

operandi of a satire or parody. Parody is a form of literary or artistic expression that involves altering the genre of a work in order to convey a sharp and critical message. As previously mentioned in this section, fanfiction is subject to critical analysis, albeit in a more commendatory manner. Therefore, the criticism is less overtly apparent. One may raise inquiries regarding the potential unintended hindrance of the customary utilisation of a work and its interaction with the Berne Convention/TRIPs Convention obligations, as a result of highlighting the transformative nature of genre in this context.¹¹⁰

Language is a crucial consideration to consider when examining the transformative impact of fanfiction, particularly with regard to safeguarding the author's interests. According to Section 21 of the CDPA 1988, the copyright owner possesses the authority to regulate the direct translations of their works. Since these translations do not require a creative perspective, they are not considered transformative in nature to come under the ambit of exceptions.¹¹¹

An additional approach to assessing the transformativeness of fanfiction involves analysing the genre of the fan-created work in relation to the source material. The book industry heavily depends on market segmentation based on genres to determine which books to publish. Marketers argue that this is necessary due to the vast and varied nature of the market, which requires a taxonomy to manage the numerous product lines. The concept of genre is utilised as a crucial consideration in the estimation of sales data and return on investment by publishers. Consequently, it serves as a significant marketing variable in determining the appropriate target audience for new literary works. Publishers also consider whether a particular genre is oversaturated, which may lead to a decision not to publish a work in that genre.

Language is a crucial consideration to consider when examining the transformative aspects of fanfiction, particularly with regards to safeguarding the interest of the original creator. As per Section 21 of CDPA 1988, the owner of the copyright possesses the authority to regulate the direct translations of their works. This is due to the fact that the

¹¹⁰ Claire Squires, *Marketing Literature: The Making of Contemporary Writing in Britain* (1st edn, Palgrave Macmillan 2007) 71.

¹¹¹ *ibid.*

process of translating requires a certain level of expertise, effort, and discernment, yet it does not demand substantial artistic creativity. Hence, it is widely acknowledged that literal translations lack the necessary transformative elements to be deemed as novel creations and thus, cannot be assessed as a justifiable utilisation of the work in question under the fair-use doctrine. Therefore, in order for fanfiction to meet the criteria for protection as a transformative work, it must go beyond being a simple literal interpretation.

3.1.4.4 “Use Made For a Rival Purpose”

It is improbable that fanfiction would meet the criteria for the "use made" of the original work. The economic impact of the work in the UK is evaluated under this category, as per the ruling given in a leading case¹¹² which states that the utilisation of works to communicate identical information as the original author, for a competing objective, may be deemed unjust. Hence, it is imperative to inquire whether fanfiction serves as a competing objective to the primary work or if it can function in conjunction with and potentially enhance the original work. Authors must consider the significance of licencing and its related secondary markets, as previously indicated.¹¹³ Numerous works of fiction have been lucratively adapted for commercial purposes through licencing agreements. The evident triumph of the Harry Potter film franchise indicates that JK Rowling has been willing to authorise the adaptation of her literary creations. Given the circumstances, it could be deemed reasonable to anticipate that any user seeking to produce derivative works ought to remunerate for the requisite licence. Moreover, with the increased visibility and viability of secondary markets facilitated by the Internet, regulating derivatives may be equally crucial as regulating the primary markets. Children's literature is typically priced lower than adult literature.

The examination aimed at determining if the works are in competition by effectively communicating the same information as the original was initially introduced in Ashdown's publication.¹¹⁴ This evaluation considers both the financial consequences of

¹¹² *Hubbard* (n 84).

¹¹³ Paul Goldstein, ‘Derivative Rights and Derivative Works in Copyright’, (1983) 30 J Copyright Soc’y USA 209.

¹¹⁴ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142.

the usage on the party making the claim and the substantial monetary worth derived by the party being accused from their utilisation of the protected work. Therefore, if a particular use is feasible under a commercial licence, it is improbable that the use will prevail in a “*fair-dealing*” assertion. In cases where applying such process is not feasible, such as with unfinished non-commercial user-generated content, it may be deemed unfair to require non-professional users to incur licencing fees. In contrast, it is not applicable to professional cover artists as they are obligated to obtain a licence for the work they are utilising, particularly if they are creating a cover rather than a modified version, regardless of whether they are distributing the work at no cost on platforms like YouTube. The rationale behind this is that a proficient cover constitutes a comprehensive piece of work, which increases the likelihood of causing commercial harm to the original work by serving as a replacement. An additional contention opposing a rigid interpretation of this particular segment of the examination is its disregard for the comprehensive application of the exception provisions. This exception, akin to fair-use, safeguards the utilisation of works that the author would otherwise disallow.¹¹⁵ The act of preventing the publication of works that copyright holders have no intention of publishing, through the use of copyright protection, is not advisable. This approach would lead to an inefficient allocation of resources in the market and would be considered to be a form of restrictions, as it would take advantage of the copyright monopoly.

The coexistence of a licenced adaptations market and fanfiction remains ambiguous as it is uncertain how these two entities interact with each other. Although one may infer that the former's presence may impede the acceptance of the latter, this assumption lacks clarity. In the absence of quantitative analysis pertaining to the impact of unauthorised adaptations on the market, it is not viable to employ mere logic as a means to contend that fanfiction would have an adverse effect on said market, thereby rendering it unsuccessful in fulfilling the criteria of 'purpose'. Additionally, the publication of these works takes place in various formats such as online archives, works-in-progress, and other forms of short-form writing. This may cater to distinct consumer demands and

¹¹⁵ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

potentially lead to an artificial increase in demand during periods of reduced production of the original canon works.

3.1.4.5 “Proportions”

The ultimate stage of the examination pertaining to UGC, fanfiction, and fair-dealing involves the evaluation of the extent to which the new work comprises the pre-existing work. In a leading case¹¹⁶, Denning LJ expressed that the act of including extensive excerpts and brief annotations may potentially result in an unjust outcome. A significant portion of research on user-generated content focuses on practises such as remixes, sampling, and mash-ups.¹¹⁷ In the event that the majority of the content in UGC is original, the aforementioned concern is expected to be mitigated. This holds true even if a crucial element of the original work, such as a character, is extracted as a 'short extract' under the first aspect of the 'fairness' evaluation. Based on this criterion, fanfiction has a high likelihood of meeting success as it predominantly comprises of innovative content created by the fanfiction writer, albeit in the form of a transformative adaptation of the source material.¹¹⁸

3.1.4.6 “The Three Step Test”

Fair-dealing is a copyright exception that falls under the category of "special cases" within the three-step tests outlined in both the Berne Convention Article 9 and TRIPS Agreement Article 13. The test in question comprises three distinct stages, with the initial stage ('certain special cases') being satisfied through my placement of fanfiction within an established and well-defined category known as pastiche, which has already been acknowledged and accepted by both the European Union and the United Kingdom. To assert that fanfiction, a distinct form of creative expression, falls under this "special case" category, it must also meet the other two criteria of the test, which are that it does not impede the typical utilisation of the original work and that it does not unfairly harm the lawful rights of the author. This task presents additional complexities, as the numerous

¹¹⁶ *Hubbard* (n 84).

¹¹⁷ Elizabeth Adenay, 'How Much Is Too Much? The Gradual Coalescence of the Law on Sampling' (MSc. Thesis, University of Pittsburgh 2011).

¹¹⁸ Sabine Jacques, 'Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?' (2016) 27 *Entertainment Law Review* 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2893261> accessed 14 June 2023.

tests exhibit distinct phrasing and serve slightly different objectives. These assessments were formulated to enable signatory nations to incorporate their respective domestic constraints and grant them flexibility in implementing the tests. The significance of this event was particularly pronounced when the United States became a signatory to the Berne Convention in 1989, due to the notable contrast between its copyright history and that of the European nations, which placed a greater emphasis on the interests of authors.¹¹⁹ Although case law does not provide a conclusive explanation for either aspect of the test, the EU has incorporated the test into its legislation through Article 5(5) of the InfoSoc Directive.

3.1.4.7 “Conflicting with the normal exploitation of the work”

Considering the existing knowledge on how copyright law serves as a motivation for creative works, it could be contended that a comprehensive construal of this aspect of the examination is feasible. From a logical standpoint, if the purpose of copyright law is to safeguard the ability of authors to charge an exclusive price for their creations (and thereby safeguard their earnings) then it follows that the courts should provide robust protection for such exploitation.¹²⁰ Consequently, the courts should interpret this criterion expansively to encompass various digital reuses, including fanfiction. However, this line of reasoning has faced criticism for being overly general and circular in nature. Moreover, the interpretation of normal exploitation has been construed more narrowly to encompass activities that impede the economic benefits derived from the original work, such as the deprivation of licencing fees and profits resulting from sales. The demonstration of these effects is not mandatory.¹²¹ It is deemed infringement if the exploitation that is being impacted can potentially gain significant economic or practical significance with a certain degree of probability and plausibility.

The significance of this analysis lies in the fact that copyright holders contend that the authorised adaptation market is a crucial aspect that possesses substantial economic or

¹¹⁹ Ruth Okediji, ‘Toward an International Fair-use Doctrine’ (2000) 39 Colum. J. Transnat’l L. 75, 119.

¹²⁰ Paul Goldstein and PB Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, Oxford University Press 2013).

¹²¹ ‘WTO | Dispute Settlement - the Disputes - DS160’ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm> accessed 14 June 2023.

practical significance, thereby qualifying as "exploitation" within the purview of this criterion. According to the argument, the act of composing and publishing fanfiction narratives on digital platforms implies that fanfiction writers are engaging in economic rivalry with the primary authors and copyright proprietors, thereby creating a state of discord between them. The legal precedent regarding this matter has established that unauthorised derivative works are not permissible. This was affirmed in a case¹²², where it was determined that such works promote piracy, diminish the profits available to creators, and interfere with the typical exploitation of the original work. The ruling would pose a challenge for the acceptance of fanfiction, as well as various other types of user-generated content.

However, ACI Adam's assertion regarding the occurrence of a substitution effect resulting from the introduction of unauthorised derivatives into the market lacks empirical evidence. Hence, if empirical investigation were to indicate the absence of the substitution effect concerning particular types of reproductions and reuses, such as UGC and fanfiction, then it may be appropriate to make an exemption and differentiate this scenario. Additionally, proponents of fanfiction may contend that this type of reuse falls outside the parameters of the standard assessment for typical exploitation, as obtaining a licence or generating profit from such works may prove challenging in practise.¹²³ Moreover, individuals engaged in fanfiction are motivated by non-economic considerations.

3.1.4.8 "Unreasonably prejudice the rights/interests of the copyright holder/author"

According to the conservative and traditional interpretation of the Three Step Test, the third step is relevant in cases where there is a possibility of reusing content, such as fanfiction, which could result in an excessive financial loss. The aforementioned step has been contended to provide a significant degree of adaptability in the process of weighing conflicting interests. Additionally, it incorporates various filters that modify it into a

¹²² Case C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* (2014) ECR 399.

¹²³ W. Michael Schuster, 'Fair-use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of The Commercialisation of Fan Fiction' (2013) 55 S. Tex. L. Rev. 529.

revised version of the proportionality test.¹²⁴ The aforementioned mechanism operates by solely constraining exceptions and limitations that (a) intersect with the valid concerns of the copyright possessor or originator, and (b) accomplish this in an irrational manner - for instance, resulting in financial detriment. The significance of this matter lies in the fact that, in accordance with EU legal principles, exceptions must be interpreted in a manner that upholds fundamental freedoms within the EU, including freedom of expression, and aligns with the objectives of the relevant legislation. Hence, it is imperative to strike a balance between the lawful interests of the copyright proprietor and the users' rights to exercise their freedom of expression. The statement proposes an empirical inquiry into whether the utilisation of safe harbour under the Three Step Test results in economic harm, such as income loss, by citing unreasonable prejudice to the rights holder's interests. In the event that the impact is negligible, it may be contended that it is justifiable to give precedence to the liberty of expression of users in specific exceptional scenarios, such as fanfiction.

The field of copyright research is witnessing an increasing inclination towards advocating for adaptable methodologies in the Three Step Test, particularly in the context of digital surroundings. This is particularly relevant for UGC works, such as fanfiction, as it is believed that allowing for leniency in UGC creation and distribution significantly amplifies the scope of freedom of expression and information in the digital realm.¹²⁵ The scholars contend that the Three Step Test involves a delicate balance between the rights of users to express themselves freely and the entitlements of copyright owners to receive remuneration for their creative output in the context of the digital era.¹²⁶ This balance provides a strong rationale for advocating a fresh exception for fair-dealing in user-generated content.

¹²⁴ Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2013) 29 *American University International Law Review* 581 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356619> accessed 14 June 2023.

¹²⁵ *Painer* (n 98).

¹²⁶ Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair-use Legislation' (2010) 1(2) *JIPITEC* 67 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723867> accessed 14 June 2023.

3.2 US Approach

The legal principle of fair-use protection in the US permits restricted utilisation of copyrighted material without the need to acquire consent from the copyright proprietor.

The affirmative defence of fair-use, which pertains to copyright infringement, was initially established by Justice Story's opinion.¹²⁷ The aforementioned statement has been formally established and documented in the United States Code at Section 107 of Title 17 of the US Code. Upon the establishment by the plaintiff of the violation of their copyright by a derivative work or any infringing material, the defendant may invoke a defence of fair-use, thereby seeking protection under the CA.¹²⁸ When assessing assertions of fair-use, the court takes into account the different legal principles outlined in the CA in a combined manner. The aforementioned variables encompass the intention and quality of the utilisation, whether the usage is for commercial purposes or non-profit educational objectives, the essence of the copyrighted material, the extent and significance of the excerpt employed in comparison to the entirety of the copyrighted work, and the influence of the usage on the potential market or worth of the copyrighted work.

When considering fan fiction, these considerations demonstrate that copyright holders possess a limited rationale for requesting that fan fiction authors abstain from utilising their content in the production of fresh works. The SC acknowledged in a leading case,¹²⁹ the need for fair-use claims to be customised to suit the specific circumstances of each case. However, due to the diverse characteristics of infringing works, there are certain principles that govern the realm of fan fiction. Upon analysing the fair-use considerations, it can be concluded that a significant proportion of fan fiction is safeguarded by the fair-use doctrine. This assertion is supported by scholarly research.

The initial consideration of fair-use analysis indicates that the utilisation of the copyrighted material for noncommercial purposes is a significant consideration that supports a determination of fair-use. The ruling of SC¹³⁰ has established that the act of

¹²⁷ *Folsom v Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841).

¹²⁸ *Blanch v. Koons* 467 F.3d 244 (2d Cir. 2006).

¹²⁹ *Harper & Row v. Nation Enterprises* 471 U.S. 539 (1985).

¹³⁰ *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

recording videos at home for personal use was deemed as fair-use. The initial element encompasses the determination of whether the usage is a mere replication or if it is productive or transformative, as per legal interpretation. In a leading case¹³¹ pertaining to the parody of Roy Orbison's "Oh, Pretty Woman" by 2 Live Crew, the SC ruled that the law favours transformative use, even if the modified version is commercial. The primary objective of this inquiry is to examine... The inquiry pertains to whether the novel work solely supplants the objects of the initial creation or introduces novel elements with a distinct objective or character, thereby modifying the original work with fresh expression, significance, or communication. The purpose of CA, which is to advance the fields of science and the arts, is commonly advanced through the production of works that are transformative in nature. These types of works are central to the fair-use doctrine's provision of a margin of freedom within the boundaries of copyright law. The assertion made by Campbell is that copyright is not intended to solely benefit the copyright holder financially, but rather to promote creativity by striking a balance between the incentives provided by copyright and the requisite access to the materials that serve as the foundation for artistic expression.

The subsequent aspect that is given due consideration pertains to the inherent characteristics of the copyrighted material. In accordance with the second component of the fair-use doctrine, the judiciary examines whether the copyrighted content is an expressive and imaginative piece and that it has been made available to the public.¹³² The judiciary has commonly ascertained that copyright protection is more extensive for creative works in comparison to factual works, as the former are deemed to be "closer to the core of intended copyright protection."¹³³ Likewise, the purpose of CA is to provide greater protection to unpublished works, resulting in published works receiving comparatively less protection. In practice, the courts frequently determine the second consideration in favour of the party that is favoured by the remaining three considerations, irrespective of the coherence of their rationale across diverse opinions.¹³⁴ In instances where the remaining three issues are in favour of the owner of copyright, the

¹³¹ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

¹³² *Blanch* (n 128).

¹³³ *Campbell* (n 131).

¹³⁴ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

court is inclined to prioritise the determination of the original work's creative or factual nature.¹³⁵ On the contrary, in situations where the court depending upon other issues perceives that a work that infringes on copyright qualifies as fair-use, the court will prioritise the differentiation between published and unpublished works. The majority of copyrighted works in the context of fan fiction are creative works that have been published.

The author of the primary source may assert that this issue should be in their favour owing to the imaginative quality of their work. Conversely, the writer of fan fiction may contend that the work has been disseminated, thereby reducing its copyright safeguard. Notwithstanding, this particular aspect is infrequently conclusive in instances of fair-use due to the fact that, as per the observation made by the SC in *Campbell*, derivative works tend to replicate expressive works that are widely recognised.

The third consideration holds significant importance in the analysis of fair-use. When assessing the quantity and substantiality of the portion of a copyrighted work utilised in an infringing work, a court conducts an evaluation by ascertaining whether the "quantity and value of the materials used" is commensurate with the purpose of the copying. The Court in *Campbell* analysed the aforementioned consideration with respect to the "purpose and character of the use." It acknowledged that parody, which involves the utilisation of the "heart of the work," may not be detrimental to the defendant, as the "art" of parody is rooted in the interplay between an established original and its parodic counterpart. The United States Court of Appeals for the Sixth Circuit previously opined in *Campbell* that the defendant should be weighed against this consideration, as their song had utilised the most recognisable elements of the original work. However, the SC explicitly dismissed this interpretation. SC argued that if the defendant had replicated a substantially less remarkable portion of the source material, it would have been challenging to discern its parodic nature. The utilisation of the fundamental essence of the primary work is a prerequisite for a parodic creation and is typically considered as fair-use. However, the SC recommended that the courts at the local level should still scrutinise whether the derivative work utilised an excessive amount of the original

¹³⁵ *Salinger v. Colting* 607 F.3d 68, 74 (2d Cir. 2010).

material beyond what was essential for its intended purpose. In instances such as that of Campbell, wherein the taken material was accompanied by components that was significantly dissimilar to the primary work, then defendant's case is supported by this consideration.¹³⁶

Fan fiction, akin to parody, would be deemed insignificant if it were unable to elicit the essence of the primary work. Notwithstanding, the latitude afforded to the creator of the adapted work by the Campbell ruling is mitigated by its acknowledgment that the violator is precluded from appropriating the most valuable aspects of the original work without consequence. Thus, it is imperative for fan fiction writers to ensure that they refrain from appropriating excessive elements from the original work, while still being able to evoke the essence of the original piece. Utilising verbatim lines of dialogue from the source material solely to circumvent the laborious task of creating novel content would significantly bolster the case of the author of the primary work. In the event that the utilisation of dialogues or other appropriated components serves to advance the objective of the narrative, such as alluding to a particular action to showcase that definite actions were transpiring simultaneously, it would be deemed indispensable to the nature of the composition. The demarcation between fair-use and purely infringing use is delicate in the third consideration. However, if fan fiction writers abstain from gratuitously replicating particulars from the primary work that do not advance the objective of their own literary creations, then the third consideration would also incline towards their advantage.¹³⁷

Finally, SC determines its analysis of fair-use by examining the effect on the market value of the original product because of the use of the other product. This assessment considers both the harm to the original work's market and the potential harm to the market for licencing or creating derivative works. While it may seem at first glance that this consideration alone would result in a definitive judgement against a fan fiction creator, the Campbell Court highlighted the importance of considering this consideration in conjunction with the first consideration, which is the transformative nature of the

¹³⁶ *Campbell* (n 131).

¹³⁷ *Blanch* (n 128).

derivatives work. According to the Court's ruling, if the derivative work exhibits a significant level of transformation, it is deemed that the likelihood of market substitution is reduced and the inference of market harm becomes less straightforward. Regarding parody, the Court determined that the likelihood of the new work impacting the market for the work in question in a manner that is recognisable under this consideration, namely by serving as an alternative for it, is relatively low. The fourth consideration in the examination of copyright infringement entails assessing whether the violating work acts as a viable alternative to the initial author's work, given that parodies and the original typically fulfil different market roles. The primary consideration to be taken into account is whether the copied work appropriates the market share of the original work.

It is challenging to ascertain how any work of fan fiction could monopolise the market of the original content holder. The primary audience for fan fiction is composed of fervent enthusiasts of the original works who exhibit an insatiable appetite for the fictional universes they adore. This demographic constitutes a significant portion of the fan fiction readership. Even if a fan fiction work is commercially published and achieves noteworthy sales figures, the author of the source material would likely retain a robust market for their own sequels or alternate interpretations of their works. The sole plausible assertion that the primary author could make with regard to this aspect is that an unapproved fan fiction has the potential to encroach upon the market that could have been available for licencing the privilege to produce derivative works to other entities. Nonetheless, due to the fact that fan fiction does not function as a replacement for the original work of the complainant, this aspect, akin to the preceding three, inclines towards the author of the fan fiction.

3.3 Approach of the Canadian Legal System

The legal concept of defence in Canada refers to the justification or excuse for a person's actions in response to an alleged criminal offence. Prior to the implementation of the Copyright Modernization Act (CMA), the Canadian legal framework included provisions for fair-dealing.

The fair-dealing framework in Canada has experienced substantial modifications in recent times. The SC decision in a leading case¹³⁸ laid down the principle that fair-dealing defences are user rights and an essential component of the CA, and must be construed expansively. This decision marked a departure from the previous, more limited understanding of fair-dealing in Canada. The SC ruling that fair-dealing categories must be interpreted broadly, along with its guidance on appropriate fairness considerations (though non-exhaustive), has led to “several subsequent changes to Canada’s fair-dealing regime”.¹³⁹ Bill C-11, has incorporated a number of novel fair-dealing exemptions, which will be elaborated upon in the following discourse. The recently introduced exceptions for educational purposes, “parody and satire, and non-commercial UGC” serve as additional provisions to the already existing fair-dealing categories of “research or private study, criticism or review, and news reporting”¹⁴⁰, which were the subject of discussion in the CCH case. In July 2012, the Canadian SC rendered decisions on five copyright cases, collectively referred to as the ‘copyright pentalogy’. The pentalogy emphasised the significance of maintaining a balance between the rights of users and creators in Canadian copyright legislation. Additionally, “the principle of technological neutrality”¹⁴¹ was endorsed in these rulings.¹⁴²

Considering the fair-dealing framework in Canada, it appears that the pre-existing categories may have been insufficient in providing legal protection for fan writers, as per the provisions of Bill C-11. Despite the pre-existing flexibility of Canada’s fair-dealing system and the emphasis placed on balancing the rights of creators and users in the CCH case, the initial stage of fair-dealing analysis mandates that dealings must align with the exempted purposes outlined in the Act.¹⁴³ To ensure fairness, it is necessary for dealings with copyrighted works to align with one of the exempted categories or purposes. As per the ruling in CCH, a liberal interpretation should be given to these categories instead of a restrictive one. However, it is improbable that a significant portion of fan fiction would

¹³⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 (CanLII).

¹³⁹ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37.

¹⁴⁰ *ibid.*

¹⁴¹ *CCH* (n 138).

¹⁴² *Re Public Performance of Musical Works*, 2012 SCC 34.

¹⁴³ Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013).

fall under the original categories. According to Reynolds' analysis, fan fiction pieces that are publicly distributed, such as those found on online fan sites, are improbable to meet the criteria for private study.¹⁴⁴ However, it is plausible that fan fiction pieces that are not publicly distributed may qualify as private study. Reynolds also acknowledges “*news reports may occasionally reference or incorporate rewrites or fan fiction, but it is improbable that a significant number of fan fiction works are created for the purpose of news reporting*”.¹⁴⁵

Likewise, while it is not necessary for "research" to be confidential, it may pose a challenge to categorise certain fan fiction works as research. It could be contended by writers who employ fan fiction as a means of developing their writing abilities that their composition of such works serves as a form of research. Nonetheless, this contention may not be universally applicable to all fan fiction literary creations. According to Reynolds, “*it is improbable that....It has been suggested that a significant proportion of rewrites are generated with the intention of facilitating research endeavours.*”¹⁴⁶

Initially, the category of criticism and review presents itself as a more auspicious option. Reynolds observes that certain rewrites, such as fan fiction pieces, may contain critical elements directed towards the source material. Nevertheless, Reynolds contends that such works, which offer critiques of antecedent texts, could be classified as parodies. This classification may fall outside the purview of the original exemption for criticism, as some legal theories suggest.¹⁴⁷ Given the expansive interpretation of users' rights espoused in CCH, , the question of whether parodies would continue to be excluded in light of the expansive approach to users' rights supported in the CCH case remains unresolved. Moreover, the implementation of a separate categorization for parody and satire within the CMA may imply that the previous exemption for criticism did not

¹⁴⁴ Graham Reynolds, ‘The Impact of the Canadian Copyright Act on the Voices of Marginalized Groups’ (2010) 48(1) Alta L Rev 35 <<https://www.canlii.org/en/commentary/doc/2010CanLIIDocs166#!fragment/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMi oBqAQQByAYRW1SYAEbRS2ONWpA>> accessed 15 June 2023.

¹⁴⁵ *ibid.*

¹⁴⁶ *Id.*, See also *Hager v. ECW Press Ltd et al* (1998) 158 F.T.R. 44 (TD).

¹⁴⁷ *Compagnie Générale des Établissements Michelin - Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996) 124 F.T.R. 192 (TD).

encompass parodies or satires. It is plausible that the legislative body known as Parliament may have intended to remedy this particular oversight by conferring safeguarding measures upon parodic and satirical works through the fair-dealing doctrine in subsequent times.¹⁴⁸ It is important to acknowledge that fan fiction narratives do not universally fall under the categories of critical or parodic. Consequently, fan works that lack critical intent, such as those that celebrate or extend a beloved saga, may not be encompassed within the expansive scope of the criticism classification. Assessing the potential utility of the "review" classification for fanart authors is also a challenging task. According to jurisprudence, the term “*review implies the provision of commentary or a value judgement on the original copyrighted work.*”¹⁴⁹ While certain fan stories may offer commentary or value judgements on source texts, it remains uncertain whether a court would be willing to categorise such critical or parodic second-generation texts as falling within the review category. Additionally, it is important to note that certain fan fiction pieces may not necessarily provide commentary or evaluations on the original texts, rendering the classification of such non-analytical works as review-based inappropriate. Ultimately, it can be argued that the initial fair-dealing classifications may not fully encompass the scope of all fan fiction works, even when approached from a liberal perspective. A considerable number of fan fiction pieces are disseminated through publicly accessible online platforms, and are unlikely to meet the criteria for private research. Additionally, it is uncertain whether fan writers have the capacity to classify their writing as research. The aforementioned defence may be deemed applicable to those writers who employ fan fiction as a pedagogical tool to enhance their writing abilities. Nevertheless, it is plausible that proficient writers may engage in fan fiction for alternative objectives. Most fan fiction works appear to be unsuitable for classification as news reporting. The categories of criticism and review may not be inclusive of fan stories that lack critical analysis, despite the possibility of exemption for works that are critical or parodic in nature. Thus, these fair-dealing categories in Canada of the original Act may not be sufficient enough for the purpose of protecting fan-art writers.

¹⁴⁸ Reynolds (n 144).

¹⁴⁹ *Canada v. James Lorimer & Co.* (1984) 180 N.R. 351 (FCA).

3.3.1 Recent modifications in fair-dealing considerations and exemptions – The implications for creation of fan fiction.

Prior to analysing the pertinent new fair-dealing provisions, it is advisable to consider the fair-dealing considerations that were upheld in CCH. The aforementioned issues might prove to be more advantageous & easily adaptable to fan fiction pieces in comparison to the fair-dealing classifications.¹⁵⁰ Although challenging, fan fiction writers may encounter difficulties in aligning their works with the original fair-dealing categories. However, a comprehensive evaluation of the fair-dealing considerations may potentially yield a more advantageous outcome for fan fiction, contingent upon a court's progression to this phase of the assessment.¹⁵¹ The aforementioned discrepancy underscores a fundamental distinction between the fair-dealing doctrine in Canada and the fair-use doctrine in the United States. In the United States, fair-use does not require a specific purpose for the work. Instead, the American fair-use considerations must be applied by courts to determine the fairness of a particular use, regardless of the purpose of the potentially infringing work.. *“Rebecca Tushnet contends that fan fiction is generally considered fair-use, citing the transformative and non-commercial nature of fan works, as well as the lack of threat to the markets for the original texts they are based on”*.¹⁵² Canada's fair-dealing considerations are similar to those in the US, although not identical. It could be said that Canada's fair-dealing considerations could be deemed equally advantageous to fan fiction, particularly in light of the inclusion of parody under the new reforms, which may ultimately enable a court to progress to this phase of the assessment. Furthermore, it should be noted that although the fair-dealing considerations that were upheld in the CCH case are not comprehensive, they do offer a useful structure for evaluating the viability of a fan fiction writing defence. Consequently, I have formulated some conjecture regarding the potential outcome of fan fiction in light of the CCH criteria.

¹⁵⁰ Parveen Esmail, ‘CCH Canadian Ltd. v. Law Society of Upper Canada: Case Comment on a Landmark Copyright Case’ (2005) 10 APPEAL 13.

¹⁵¹ Giuseppina D’Agostino, ‘Healing Fair-dealing? A Comparative Copyright Analysis of Canada’s Fair-dealing to U.K. Fair-dealing and U.S. Fair-use’ (2008) 53(2) McGill L.J. 309 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014404> accessed 17 June 2023.

¹⁵² Rebecca Tushnet, “Legal Fictions: Fan Fiction, Copyright and a New Common Law” (1997) 17 Loy. L.A. Ent. L. Rev. 651 <<https://digitalcommons.lmu.edu/elr/vol17/iss3/8>> accessed 17 June 2023.

The fair-dealing considerations outlined in the Canadian Copyright Act (CCA) are comprised of six elements: (1) intention behind the dealing, (2) manner in which the dealing is conducted, (3) extent of the dealing, (4) availability of alternative options to the dealing, (5) characteristics of the work being used, and (6) impact of the dealing on the original work. Subsequent to the CCH decision, certain considerations, such as the pentology, have been further examined in legal cases and will be referenced as relevant.¹⁵³

According to CCH, the initial consideration to be considered is the purpose of the dealing, which involves determining whether the dealing is for a specific purpose. It is important to note that a broad interpretation should be applied to this consideration. The court is required to evaluate whether the transaction in question is conducted for commercial or non-commercial purposes, with non-commercial transactions being more inclined to be deemed fair. Nevertheless, the fair-dealing defence does not preclude commercial transactions. The intention and viewpoint of the ultimate consumer of the materials must also be considered. While fan fiction may not align with the original intentions, a broad interpretation of the recently introduced exemptions for parody and satire could conceivably encompass certain fan fiction authors, as suggested below. Furthermore, it is crucial to take into account the non-commercial objectives of authors of fan fiction. The non-profit and amateur characteristics of fan fiction may imply the application of fair-dealing.

The second variable pertains to the nature of the transaction. In the context of fair-dealing, the SC in CCH has emphasised the importance of considering the treatment of the original work. The Court has provided illustrations, such as the production and distribution of multiple copies of a work, which would indicate unfair-dealing. Conversely, the destruction of copies after use and the utilisation of a single copy for legitimate purposes would suggest fair-dealing. It is worth noting, however, that these examples do not appear to account for fan fiction or other forms of fan-generated media. Although fan fiction may be shared publicly and gain significant readership, it typically does not entail the distribution of the original media upon which the stories are based, nor

¹⁵³ *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency* 2012 SCC 37.

does it aim to replace the content of the original works. The legitimate consumption of media by fan fiction authors and their creation of new stories that do not seek to supplant the originals may indicate a fair-use of copyrighted material.¹⁵⁴

The consideration of the 'character' consideration in determining the fairness of a dealing also takes into account the customary practises within a specific trade or industry. This may result in certain parties being favoured in legal proceedings. Those who hold copyright and are against fan fiction may perceive the practise as intrinsically unfair. It remains uncertain whether the consideration of relying on the perspectives and practises of fan communities themselves would lead a court to conclude that fan fiction is fair. This consideration, akin to the purpose of dealing, requires clarification as to whether it should be evaluated from the standpoint of the end users and their customary practises. The cases in Canadian courts¹⁵⁵ do not explicitly incorporate the language of "end user's perspective" into the second issue, nor do they provide significant direction on this consideration. In the event that fan practises were considered in this analysis, it is possible that such practises, including but not limited to the creation of fan fiction as a means of honouring original works, proper attribution of content to their respective owners, and a focus on non-commerciality, may contribute to a determination of fair practices.

The next considerations pertains to the extent of the dealing, which necessitates an evaluation of both the amount and significance of the extracted content from the primary source. As emphasised by the SC, if the amount taken and the taking in question is considered trivial, then there exist no requirement to conduct a fair-dealing analysis as the act of taking will not constitute copyright infringement. This assertion may provide encouragement for content creators of fanfiction who only draw a negligible value like that of a side character from the original content. Additionally, while the quantity of material taken can serve as an indicator of fairness, the Court acknowledges that the use of entire works may still be considered fair. Subsequent legal decisions have clarified that the amount taken must be evaluated in relation to the entirety of the initial source content.

¹⁵⁴ Parveen (n 150).

¹⁵⁵ *Alberta (Education) and Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* [2012] 2 SCR 326.

This consideration, along with the rest, is extremely dependent on the specific peculiar facts of different cases. Nevertheless, it should be noted that fan fiction narratives rarely replicate the source material in its entirety. While certain narratives may appear to be derivative of the original story with minimal contribution from the fan author, the majority of such works utilise pre-existing characters and settings to construct fresh storylines, incorporate the fan author's unique viewpoints or interpretations, or question the source material. Is it justifiable to create fan fiction narratives that depict fresh escapades of a cherished character like Harry Potter, considering that the character of Harry is merely a single facet of the extensive Harry Potter chronicle? Is it appropriate to take into account the time duration of the new fanplot, such that composing a longer fan story deploying only a very little quantity of the previous work might be considered 'more' equitable? Assessing the potential success of specific fan fiction plots on this particular consideration can prove to be a challenging task. Each unique narrative would be subject to distinct legal scrutiny and, conceivably, disparate handling.

The fourth consideration, namely substitutes to the transaction, is a consideration that may be subject to varying interpretations of fairness. In the context of legal proceedings, courts that prioritise varying viewpoints may arrive at disparate determinations. It is possible for copyright holders to argue that such creators of fanart have viable substitutes of engaging with copyrighted works. Specifically, they could opt to create entirely new narratives and distribute them, rather than incorporating pre-existing characters or settings. A court that were to acknowledge this assertion could potentially infer that all writers of fan fiction possess this option, and thus may exhibit a decreased likelihood to perceive fan fiction as an act of fair-dealing. Fan writers may inquire about the feasibility of potential alternatives to the aforementioned transaction. Referencing a well-known and well-loved work is often necessary when celebrating, expanding, or critiquing it.

The legal precedents subsequent to CCH indicate that impractical alternatives or those that merely serve a similar purpose, rather than a specific one, do not constitute unfairness. Different cases¹⁵⁶ have interpreted the different considerations in a lenient manner that acknowledges the unique requirements of final users and aligns with CCH's

¹⁵⁶ *ibid.*

expansive stance on user entitlements. The Supreme Court of Alberta (Education) has determined that it is not rational to require schools to provide numerous copies of various manuals to all students, especially when educators intend to only allot the brief excerpts from additional materials. Such a perspective implies that individuals are not obligated to seek unfeasible substitutes to the specific dealing in inquiry for taking advantage of the fair-dealing exemption. The SC in the case of SOCAN, dismissed the argument put forth by SOCAN that service providers and consumers have access to unfeasible alternatives for previewing songs. SOCAN contended that options like providing feedback of the customers, policies of return in store and the art of album covers were inadequate in enabling users to accomplish the precise objective of previewing songs prior to making a purchase. Enabling users to access brief excerpts of songs was deemed to be fair-use for research purposes, despite the existence of (subpar) alternative choices for consumers. The adoption of an accommodating user friendly approach that allows consumers to pursue their specific objectives, like that of honoring or satirising particular works that come under the ambit of copyright legislation, may prove advantageous for fan writers.

The fifth consideration pertains to the character of the content. As per CCH, the act of distributing an unpublished and unknown content with appropriate credit is deemed more probable to be fair, as it facilitates broader public dissemination of such works. Nonetheless, it remains ambiguous as to how this aspect could impact fan fiction. It is improbable for fan fiction authors to produce content based on unpublished or obscure literary works.¹⁵⁷ In contrast, the majority of fan-art centres on widely widespread media with extensive fanatic followings, such as the Harry Potter or Twilight franchises. The realm of the global network encompasses fan fiction derived from relatively unknown source materials or ‘fandoms’; however, it is evident that these creations have been disseminated and are not entirely obscure. Given this circumstance, is it necessary to differentiate between these two situations based on the character of the content? Is there a distinction to be made between a fan who has authored a follow-up to a lesser-known yet beloved indie movie and one who has penned an eighth installment in the Harry Potter series? To enthusiasts, this differentiation may appear to be unjust and capricious. In

¹⁵⁷ Henry Jenkins, *Convergence Culture* (New York University Press 2006) 152.

addition, online fan discourse, including fan fiction, has the potential to stimulate or augment interest in source materials. This is applicable to popular franchises such as *Twilight*, *Star Wars*, and *Harry Potter*, which may require less publicity compared to lesser-known works. Nevertheless, fan fiction can contribute to the promotion of the original work in both scenarios. The pronouncement by the Court that transactions that augment the general understanding of literary works are more inclined to be equitable could, therefore, be relevant to and support numerous fan fiction narratives, irrespective of their original content.

The ultimate fair-dealing consideration pertains to the impact of the transaction on the content protected by copyright and its consumer base. Although this consideration holds significance, it is not the sole or primary determinant in evaluating the fairness of a dealing, as stated in source. If a transaction is expected to affect the economic market of the original work, it is deemed unfair. However, this is not usually the case with fan fiction. It is improbable that prospective readers of the *Harry Potter* series would conflate online fan narratives featuring the titular character with the authentic literary works, nor would they be satisfied with solely engaging with fan fiction as a substitute for reading or finishing the primary series. It is improbable for a rights holder who disapproves of fan fiction to provide proof that their market has been negatively impacted by it. On the contrary, fan fiction communities may act as supplementary publicity and potentially increase readers' enthusiasm for the original franchises. Additionally, fans may exhibit a tendency to engage with additional published works that enjoy comparable popularity within the communities of fans.

In addition, it is plausible that in certain instances, a contrary outcome may arise whereby certain individuals may conflate fan-generated works with the primary texts or cultivate aversion towards the primary texts due to their exposure to fan works that are not to their liking.¹⁵⁸ Nonetheless, such occurrences are expected to be infrequent and insignificant. While the SC of Canada has yet to mention this topic, US legal precedent has examined the concepts of personal utilisation, usage of the content in the market place as an alternative to the original work, and the effect upon the market under the ambit of the

¹⁵⁸ Rebecca (n 152).

principles of fair-use and, more specifically, satirical imitations.¹⁵⁹ The fourth consideration of the fair-use doctrine in American copyright law pertains to the profitable nature of the use in question and its potential impact on the business and commercial viability of the original content. Within the US framework, it is commonly presumed that commercial use of a product or service will have an effect on the market of the work. Conversely, personal use places the responsibility on the copyright holder to provide evidence that financial injury is probable. The application of transformative uses is associated with a comparable assumption that opposes market harm, as the process of transformation eliminates the possibility of straightforward market substitution. In accordance with American law, certain fair-uses, such as critical parodies and negative reviews, are acknowledged to potentially diminish demand for a particular work. However, it is important to note that such a decrease in market demand does not equate to market substitution. It is important to acknowledge that there are occasional occurrences where fan fiction may have a negative impact on the audience's interest in the original source material. However, it is crucial to view these instances in a similar light as reviews or parodies and not use them as a suggestion to support the notion that fan fiction is detrimental to the commercial viability of products protected under the copyright legislation or constitutes an unjust practise.

Due to the recent introduction of the parody and satire provision, it is currently challenging to determine the precise scope of the provision and the specific types of works that will ultimately fall under its protection. At first glance, the recently introduced fair-dealing category seems to include certain fan works, specifically those that engage in "parody" or "satire" of the original canon texts. However, these aforementioned terms lack clarity in their meaning and fail to offer substantial direction in identifying the specific second generation works that they encompass. According to Graham Reynolds¹⁶⁰, the definition of "parody" can be multifaceted. In certain instances, courts in US and Canada have characterised parodies as comical pieces that imitate specific texts, authors, genres, or styles with the intention of ridiculing them. One example of this is the

¹⁵⁹ *Campbell* (n 131).

¹⁶⁰ Reynolds (n 144).

analysis of different meanings of parody given by the Appellate Court of Quebec.¹⁶¹ The explanations referenced in the aforementioned case bear resemblance to the definition of parody as presented in the Oxford Dictionary of Literary Terms.¹⁶² This description characterizes parody as a type of imitation that satirises the mannerisms of a particular literary work or works, while also deriding the stylistic conventions employed by an author or literary movement through the use of exaggerated mimicry. It is worth noting, however, that not all fan fiction works contain the elements outlined in these definitions. According to Reynolds, it can be argued that not all parodies exhibit the characteristics of being critical, humorous, or mocking. This assertion holds true for some parodies, but not necessarily for all.

The Avanti ruling is noteworthy for its apparent willingness to recognise certain forms of parody as a means of criticism, long before the CCH decision and the establishment of a separate classification of fair-dealing for parody and satire. The present case pertains to a legal action initiated by an owner of copyright against a producer of adult films, on the grounds of purportedly violating the copyright of a well-known Quebecois sitcom, *La Petite Vie*. The accused individual who works in the film production industry was discovered to have replicated a significant portion of the initial television programme, which included its location, stage layout, outfits, soundtrack, and roles. The accused individual argued that their film was a form of satire of *La Petite Vie* and therefore constituted fair-use for the intention of critique. Although the Court did not explicitly dismiss the idea that critique could involve satire, it determined that the accused individual's film did not meet the criteria. As per the Court's ruling, the film was deemed to be lacking the necessary intention to critique *La Petite Vie*. The producers of the show were accused of replicating certain elements of the original programme with the primary intention of capitalising on its widespread appeal, and potentially to circumvent the intellectual labour involved in generating their own innovative components.

As mentioned earlier, Avanti precedes the 2012 pentology of decisions that upheld CCH's broad and generous interpretation of fair-dealing, as well as the CMA. The instructions in

¹⁶¹ *Productions Avanti Cine Video Inc. v Favreau*, 1999 R.J.Q 1939.

¹⁶² Chris Baldick, *The Oxford Dictionary of Literary Terms* (3rd edn, Oxford University Press, 2008).

this instance may have limited applicability to forthcoming Canadian parody judgements. Nonetheless, the verdict is somewhat disconcerting for advocates of fan fiction. A definition of parody that necessitates a critical and satirical purpose, coupled with an amplified or comical style, could potentially restrict the practicality of the exemption for fan authors. While certain fan works may possess a discernibly critical inclination that would be deemed acceptable by a court, it is improbable that this would be the case for all fan fiction narratives. As an illustration, certain enthusiasts of the Twilight series may aspire to engage in a form of literary response known as "writing back" by means of satirising the protagonist's subservient loyalty to her vampire romantic partner. However, some enthusiasts may desire to compose additional, entirely unprejudiced exploits for these protagonists or other beloved personas from mainstream culture. A judicial officer who sought guidance from Avanti or relied heavily on a lexicon's explication of parody may exhibit reluctance in recognising fan sequels, homages, poetry, and other forms of fan fiction as constituting parodies. Moreover, in reference to Avanti, judicial bodies may allege that fan authors are replicating significant portions of canonical literature with the intention of evading the creation of their own fictional universes or capitalising on the widespread appeal of the source material, rather than engaging in a critical analysis of the primary texts. The expansive and inclusive construal advocated in CCH and the five-part legal decision may potentially counteract such constrictive interpretations, although it remains premature to determine whether this will ultimately transpire. While the parody exception is a commendable measure, it may not effectively cater to the requirements of all fan writers in Canada. It is worth noting that the defence of parody, while not flawless, appears to be particularly applicable to fan fiction. Additionally, comparable considerations are applicable to the exemption for satire. The literary device known as satire can be characterised as a form of writing that brings to light the shortcomings of individuals, establishments, or communities, with the intention of subjecting them to ridicule and contempt. Although certain fan fiction narratives may employ elements of mainstream culture and copyrighted materials to satirise societal institutions, it is improbable that the majority of fan stories would conform to this description.

The recently introduced classification of fair-dealing pertaining to parody and satire is subject to the persistent limitations of fair-dealing and fair-use, given that it is a defensive

measure that is reactive, uncertain, and heavily dependent on the specific context in which it is invoked. In accordance with procedural requirements, fair-dealing, which is similar to the American fair-use doctrine, must be asserted as a defence against a claim of infringement.¹⁶³ It is not permissible for fans to preemptively declare that their use of source materials is fair, nor can they proactively adhere to certain conditions to guarantee that their works qualify as fair-dealing or fair-use. In addition, the fair-dealing considerations necessitate a thorough contextual examination, making it exceedingly difficult to determine the fairness of a particular dealing until a verdict has been rendered following a trial. The author's opinion is that the CCH considerations provide evidence that the majority of non-commercial fan fiction can be considered fair-dealing.

However, it should be noted that this conclusion is based on conjecture due to the fair-dealing regime's absence of predetermined certainty. Considering these limitations, the focus shifts towards a potential "unconventional protagonist" for Canadian fan writers, namely the recently implemented user-generated content exemption, as outlined in CA under Section 29.21.

¹⁶³ Jacqueline D. Lipton, 'Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere' (2011) 70(1) Maryland Law Review 25.

CHAPTER 4

EXAMINING FANFICTION'S TRANSFORMATIVE POTENTIAL: BALANCING DERIVATIVE WORKS AND COPYRIGHT INFRINGEMENT CLAIMS

Considerable literature exists on the legal status of fan fiction and its potential classification as fair-use in relation to copyright violation. Previous decisions, such as the collaboration between Warner Brothers and J.K. Rowling, have been made. The legal cases¹⁶⁴ have established that fan-created fictional works can be considered fair-use if they are not intended for commercial purposes or if they can be classified as parody.¹⁶⁵ Fan fiction, predominantly found on the internet, is susceptible to being terminated through the issuance of a cease and desist notice by the copyright proprietor. The aforementioned correspondence effectively coerces fan writers to take down their content, irrespective of the possibility of mounting a Fair-use Defence in a legal setting.

The act of retelling stories as a means to construct a cultural narrative is in conflict with the constraints and objectives of contemporary American copyright law, resulting in a noticeable tension. However, by classifying fan literary works as transformative in nature, and thus unequivocally deserving of the protection of the Fair-use Defence, a resolution is achieved that balances the requirement to safeguard the rights of original authors with the necessity to permit cultural and literary reinterpretations that are advantageous to society as a whole. Utilising the tenets of myth and literary theory, the present discourse posits that fan fiction, regardless of its degree of parody or derivation, fundamentally serves as a form of transformative critique of the primary literary work.

This study aims to examine the etymology, semantics, and significance of myth within the context of societal norms, and to explore the correlation between fan fiction and the evolution of contemporary myth. Additionally, this study will analyse fundamental literary principles concerning the concept of authorial intent and its impact on our interpretations of fan fiction. The present study aims to investigate the role of myth and

¹⁶⁴ *Rowling v. RDR* 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008).

¹⁶⁵ *Suntrust v. Houghton Mifflin* 268 F.3d 1257, 1276 (11th Cir. 2001).

literary theory in constructing compelling arguments in favour of the transformative nature of fan fiction, as opposed to its derivative nature, within the framework of copyright law. The study will further examine the societal value of fan fiction. Finally, this chapter will examine and counter prevalent contentions opposing the classification of all fan fiction works as transformative.

The issue of copyright law restricting free speech and public rights is not a novel one and has long been recognised as a potential conflict with the First Amendment.¹⁶⁶ Nathaniel Noda, in a recent publication in the *Journal of the Copyright Society of the U.S.A.*, explores the artistic aspects of fan-based activities and contends that an author's decision to introduce their creative work into the public domain may have implications for copyright protection. ..Noda argues that the public's interpretation of a work is granted certain rights, which are implicitly ceded.¹⁶⁷ This is based on the notion that the public consciousness has certain rights that enable it to appropriate elements of an original work and reinterpret them. This argument suggests that the public should have access to the stories, characters, and other aspects of original works in order to perpetuate myth.

Mythology is a multifaceted and extensive genre of narratives and human encounters that can be perceived as a “societal story that articulates dominant principles, ideologies, values, and convictions.”¹⁶⁸ Scholars of anthropology regard mythology as a crucial communal narrative that draws from archetypal figures and forms to provide exemplary models for social existence. Joseph Campbell is a prominent scholar who has extensively written about the structures and components of mythology in his renowned work, *Hero with a Thousand Faces*.¹⁶⁹

Campbell introduced the fundamental concept in *Hero* that myths are composed of characters, stories, and ideas. Nevertheless, in his work, *The Power of Myth*, he elaborates on the crucial role that myths play in human society, psychology, and general

¹⁶⁶ Nathaniel T. Noda, ‘Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities’ (2010) 57 *J. Copyright Soc'y U.S.A.* 987.

¹⁶⁷ *ibid* 995.

¹⁶⁸ Jack Luke, ‘News as Myth: Daily News and Eternal Stories’ in Eric W. Rothenbuhler & Mihai Coman (eds.) *Media Anthropology* (SAGE Publications, Inc. 2005).

¹⁶⁹ Joseph Campbell, *The Hero with a Thousand Faces* (3rd edn, New World Library 2008).

social progress. Campbell argues that myths are narratives that reflect humanity's pursuit of truth, purpose, and significance across time. It is imperative for individuals to narrate and comprehend their personal experiences. It is imperative for individuals to comprehend the concept of mortality and develop effective coping mechanisms to navigate the inevitable transition from birth to life and ultimately to death. Assistance in this process is universally required. According to the author, human beings require a sense of purpose in order to comprehend the enigmatic, to connect with the everlasting, and to establish their own identities. In his analysis of the genesis of mythology, Campbell contends that it is crucial in enabling individuals to reconcile with the actualities of each phase of their lives by conferring significance upon birth, life, and ultimately, death. The accuracy of the interpretations we attribute to these transitional events is of secondary importance; what holds greater significance is the manner in which we utilise our ascribed meanings to comprehend our own being and sense of self.

4.1 To what extent have myths influenced copyrighted works?

When analysing the significance of myth in literature, it is crucial to initially investigate the intertextual nature of numerous widely recognised narratives that are deemed to be authentic and legally protected. This process involves the utilisation of pre-existing archetypes, as established by Campbell, to restructure and reinterpret these tales. Campbell's work, *Hero*, elucidates the fundamental archetype of heroism, wherein the narrative follows a trajectory of (1) separation, (2) initiation, and (3) return.¹⁷⁰ This structure serves as a foundational framework for heroic storytelling.

In simpler language, the author characterises this cyclical expedition as follows: "A protagonist embarks on a quest from the realm of ordinary existence into a domain of extraordinary phenomena: extraordinary forces are confronted, leading to a definitive triumph." The "monomyth" proposed by Campbell is exemplified by two highly renowned and cherished fantasy series: the Potter universe and *The Lord of the Rings* trilogy. J.R.R. Tolkien's renowned literary work, *The Lord of the Rings*, was composed in the year 1954. This epic narrative centres around the protagonist, Frodo Baggins, a diminutive hobbit who experiences both physical and emotional detachment from the

¹⁷⁰ Joseph Campbell, *The Power of Myth* (1st edn, RHUS Publishing 1991).

larger societal framework. Frodo embarks on a departure from his ordinary, mundane existence in favour of a life filled with extraordinary exploits, as he becomes entangled in a grand odyssey to confront malevolence that surpasses his individual capacity. Accompanied by a group of valiant comrades, he encounters a series of progressively arduous trials, thereby marking his assimilation into the realm of enchantment. Frodo receives guidance from a venerable and idiosyncratic wizard, who selflessly gives up his life in support of Frodo's cause. This pivotal sacrifice ultimately enables Frodo to overcome the malevolent antagonist by highlighting fundamental human sentiments like love and friendship, thereby reinstating a return to core human emotions and values. In contrast to the plot curve of the Harry Potter series, initially released in 1997, consider the following. Harry Potter, a diminutive and bereaved individual who has been isolated from mainstream society, abandons his mundane existence upon the revelation of his wizarding abilities. Consequently, he immerses himself in a fantastical realm characterised by enchantment and caprice, wherein he is compelled by formidable external influences to engage in a grandiose conflict against malevolent forces.

Harry encounters a diverse group of individuals who serve to introduce and develop the Wizarding World, while also presenting him with a series of progressively more challenging obstacles, thereby fulfilling the requirements of the initiation phase. Similar to Frodo, Harry receives guidance from a sagacious, elderly, idiosyncratic sorcerer who selflessly gives up his life for Harry, enabling him to ultimately triumph over malevolence by means of fundamental human virtues such as affection and companionship (the return). It is evident that the narrative structure of Lord of the Rings significantly influences the storyline of Harry Potter. Aside from these overarching similarities, both literary works incorporate numerous identical elements, such as but not limited to, colossal arachnids, accursed jewellery, mythical creatures such as elves and goblins, enchanted swords, cultural appropriation, and a substantial reliance on supernatural entities. However, it is widely acknowledged that Harry Potter can be classified as a sequel that draws heavily from Lord of the Rings.

This instance exemplifies the utilisation of shared cultural mythology to narrate a familiar tale within an alternative framework, rather than encroaching upon Tolkien's intellectual

property rights. Notwithstanding the numerous parallels between the two literary works, the Harry Potter series incorporates noteworthy divergences that contemporize the fundamental hero archetype inherent in both narratives and reexamine certain elements of Tolkien's books. The literary work, *The Lord of the Rings*, features a mere three noteworthy female characters, whereas the Harry Potter series boasts a plethora of significant female characters who possess robust personalities, distinct identities, and unique storylines that extend beyond that of the protagonist, Harry. Additionally, the Harry Potter series deviates from the traditional hero myth as presented in *The Lord of the Rings* by exploring the theme of racism. *The Lord of the Rings* portrays a collaboration of various magical races against a malevolent antagonist, yet it is evident that a Western elitist perspective underlies the narrative, with the "good" characters originating from the West and the "evil" characters from the East.¹⁷¹ In contrast, the Harry Potter series firmly establishes the notion that any form of racial elitism is unequivocally immoral, as evidenced by the extensive critique of characters who value "pureblood" wizards over "mixed blood" wizards or "mudbloods," as some of the more vulgar language in the books suggests.¹⁷²

The Harry Potter books modify the fundamental hero monomyth by narrating it in a fresh context that alters social values and ideologies that have evolved with time. In the event that J.K. Rowling were to face a lawsuit from the Tolkien estate alleging copyright infringement, she could plausibly mount a strong defence by contending that her literary output constitutes a transformative work that substantially reimagines and reinterprets the fundamental themes of Tolkien's original *Lord of the Rings* trilogy within the context of her own cultural framework. The act of heavily borrowing inspiration in a manner that surpasses the boundaries of the fantasy genre. An instance to consider is the contemporary novel authored by Hilary Jordan, titled *When She Woke*. The novel's back cover features commendation that lauds the work as a fast-paced dystopian thriller, likening the author, Hilary Jordan, to Nathaniel Hawthorne and Margaret Atwood. It is

¹⁷¹ Christine Chism, 'Charges of Racism' in Michael D.C. Drout (ed), *JRR Tolkien Encyclopedia: Scholarship and Critical Assessment* (1st edn, Routledge 2006).

¹⁷² Elaine Ostry, 'Accepting Mudbloods: The Ambivalent Social Vision of J.K. Rowling's Fairy Tales' in Giselle Liza Anatol (ed) *Reading Harry Potter: Critical Essays (Contributions to the Study of Popular Culture)* (Praeger 2003).

noteworthy that the praise originates from a fellow author and tactfully avoids acknowledging that Jordan's work is not merely a channelling of Hawthorne or Atwood, but rather a substantial reworking of significant components of Hawthorne's *The Scarlet Letter* and Atwood's *The Handmaid's Tale*. In Jordan's literary work, offenders are subjected to a chromatic alteration of their skin that corresponds to the nature of their offence. The central character, Hannah, engages in an extramarital relationship with a prominent and esteemed clergyman, resulting in an unlawful termination of pregnancy. As a consequence, she is subjected to a process of "chroming" that renders her skin a red hue, and subsequently reintegrated into society. The aforementioned elements bear a striking resemblance to those present in *The Scarlet Letter*, a literary work wherein the protagonist, Hester Prynne, engages in an extramarital liaison with a revered and esteemed clergyman. As a consequence of her transgression, she is compelled to don a conspicuous red emblem of disgrace.

The criminalization of the protagonist in *When She Woke* due to her abortion bears resemblance to the theme explored in Margaret Atwood's renowned literary work, *The Handmaid's Tale*. The society depicted in Jordan's work bears a striking resemblance to the dystopian, theocratic, and oppressive state crafted by Atwood. However, it is important to note that Jordan's work does not constitute copyright infringement despite its significant reliance on these two renowned literary works. The novel in question is lauded for its skillful reimagining of the central themes and literary techniques employed in both *The Scarlet Letter*¹⁷³ and *The Handmaid's Tale*¹⁷⁴, resulting in a contemporary and dynamic interpretation of the source material. Jordan's reinterpretation of the badge of shame addresses contemporary societal apprehensions regarding the potential for novel forms of punishment facilitated by advancing technologies. Likewise, the author's utilisation of Atwood's portrayal of a religious and totalitarian government brings to mind the ongoing societal conflict. Atwood's novel was published in 1985 and touched on the succinct fears of feminists at the time. Jordan's literary work incorporates contemporary sensibilities by exploring uncertainties and concerns related to the fear of terrorism and

¹⁷³ Nathaniel Hawthorne, *The Scarlet Letter* (Modern Library 2000).

¹⁷⁴ Margaret Atwood, *The Handmaid's Tale* (Anchor Books 1998).

the diminishing separation between church and state. Jordan's literary work can be interpreted as a skillfully crafted fan fiction that has been successfully published.

4.2 Does fan fiction contribute to the creation of new myths?

Similar to how a renowned copyrighted piece can modify components of a preceding copyrighted work and establish a fresh cultural storyline, fan fiction can also provide commentary, reinterpretation, and reconsideration of various aspects of the primary work. Scholars in the field of literature have been prompt in recognising the potential of fan fiction to contribute to the cultural narrative. They have described fan fiction as an integral part of the fundamental human inclination towards storytelling, which has been a shared cultural tradition since ancient times, as exemplified by the works of Homer.¹⁷⁵ The prevalence of homosexual relationships between characters in Harry Potter fan fiction is noteworthy, particularly as there are no overtly homosexual characters in the original novels. This phenomenon suggests that the Harry Potter fandom is engaging in a process of reinterpreting the source material and its traditional monomyth elements, while also developing novel narrative structures that are widely embraced within the insular community of Harry Potter fan fiction writers.

The Copyright Act's language aligns with contemporary perspectives that position the author as the principal originator of a literary creation, yet it is arguable that the author ought not to be deemed the exclusive proprietor of said work. Roland Barthes, a renowned scholar of literature, examined the contemporary tendency to value individual authors over communal narratives that were owned by the public in his essay titled 'Death of the Author'. Barthes "*posited that the author's words no longer remain under their ownership but rather become part of the cultural narrative at large and further contended that the concept of authorship as ownership emerged as Western society began to appreciate the significance of the individual, leading to the attachment of importance to the author's persona. Barthes concluded that attributing authorship to a text imposes a limit on it, providing it with a final signified and closing the writing. The idea of*

¹⁷⁵ Karen Hellekson & Kristina Busse (1st eds.) *Fan Fiction and Fan Communities in the Age of the Internet: New Essays* (McFarland and Company Inc. 2006).

*originality or ownership would have been unfamiliar to ancient or mediaeval writers and storytellers, who frequently drew from collective narratives and myths.”*¹⁷⁶

According to Karen Hellekson, an academic researcher, in her scholarly paper on fan fiction and fan communities, the act of authors engaging in referential behaviour would presently draw legal scrutiny. If readers were relieved from the responsibility of considering the individual author's influence, they would have a greater capacity to contribute to the accumulation of public knowledge, thereby enriching our collective creative purpose. The phenomenon of collective teleological narrative reinterpretation arises when enthusiasts engage in the practise of modifying the conclusions of renowned narratives or constructing "alternate universes" within ongoing series, thereby deviating from the original trajectory of the narrative in order to align with their personal preferences or viewpoints. Through the act of reimagining established conclusions and storylines, fan authors engage in a process that can be seen as a form of reclamation, wherein they assert their agency over the narratives originally crafted by the primary author(s). In doing so, these fan authors actively contribute to the development of a communal narrative that is accessible to the wider public.

4.3 The intersection of copyright law, myth, and literary theory

The preceding sections have delved into the ways in which fan fiction engenders myth and contributes to the communal repository of knowledge. However, it is pertinent to inquire how these communal accomplishments align with the legal framework of copyright law. Building upon the preceding analysis that highlights the literary value of fan fiction and its potential to serve as a potent instrument for myth-making, this section will delve deeper into how fan fiction establishes an all-encompassing transformative quality. The absence of commercial intent in fan fiction positions it as a viable middle ground between upholding the legal rights of authors under copyright law and facilitating public engagement with the shared narratives of our society. The objectives of copyright law, as stated in the Constitution, are to encourage the advancement of Science and useful Arts by granting authors and inventors the exclusive right to their respective Writings and

¹⁷⁶ Roland Barthes, *The Death of the Author* (Claire Bishop ed. 2006).

Discoveries for a limited period.¹⁷⁷ In a culture that values individualism, it is logical that we seek to promote the arts by recognising the individual author through the bestowal of ownership rights.¹⁷⁸ However, the primary aim of copyright law is to motivate artists to create without fear of their works being misused by the general public.¹⁷⁹ The act of fans or critics of a work writing new endings or altering plotlines should not be regarded as misuse, especially since there is no financial compensation for such actions. Instead, the revised narratives serve as purely intellectual and emotional manifestations of the fan's response to the source material. While an author may possess the sole authority to publish and derive financial benefits from their literary creations, it is important to note that copyright regulations do not confer upon them the ownership of the responses and critiques that their works may elicit from the general populace. Fan fiction occupies a distinctive position in addressing the adverse impacts that exclusive ownership of literary works can exert on the development of shared myths. In summary, according to a certain perspective, fanfiction serves as a means for the culture to rectify the harm caused by a system where current myths are controlled by corporations rather than by the people. By characterising fanfiction as inherently transformative and exempting such works from potential legal action, we can achieve a balance between safeguarding the rights of the original author and enabling the community to create and preserve contemporary mythology. The question arises as to whether fan fiction can be considered universally transformative or if it is merely derivative. When a fan fiction adheres to the original work's narrative voice and content, it reinforces the original work's position in our popular narrative. This is because the fan author is implicitly endorsing the values that are inherent in the original work by reaffirming them. When a fan fiction modifies a crucial plot point or the personality of a main character, it can be interpreted as a commentary on the limitations imposed by the original work's predetermined structure and framework. Through modifying certain elements of the source material, fan authors offer implicit critiques of the original work, indicating their disapproval of the values or

¹⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁷⁸ R. Anthony Reese, 'Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion' (1995) 47(4) *Stanford Law Review* <<https://doi.org/10.2307/1229082>> accessed 18 June 2023.

¹⁷⁹ Alina Ng, 'Literary Property and Copyright' (2012) 10 *Northwestern Journal of Technology and Intellectual Property* 530.

assertions espoused therein, for various reasons. The fan author generates a distinct and personalised voice by crafting their own narrative perspective in the original work. The act of commenting on and transforming the original work's meaning and effect on popular culture, whether through affirmation or reconstruction, is a common practise among fan authors.

To substantiate the notion that all fan fiction possesses transformative characteristics, it would be beneficial to provide additional instances that are more precise in nature. One intriguing aspect of contemporary fan fiction is its incorporation of diverse and unconventional perspectives that are frequently absent from mainstream culture.¹⁸⁰ Sonia Katyal, in her examination of homosexual relationships in fan fiction, notes that readers have several options: they may adopt the codes presented by the author, negotiate a stance that reflects their own experiences and interests, or create an oppositional reading that challenges the dominant meaning. Regardless of the choice made, the resulting cultural dialogue contributes to the ongoing construction of meaning on the internet. Fan fiction, blogs, Tumblrs, LiveJournal pages, and other fansites exemplify the creation of modern myths, fostering connectivity and dialogue among a diverse range of participants and ideas.

The aforementioned instances embody the principle of communal sharing, which necessitates the acceptance and utilisation of divergent perspectives.¹⁸¹ As a result of this interactive process on the internet, copyrighted materials are integrated into a cultural discourse concerning our preferences for prevalent narratives and our aspirations for societal transformation. Through the articulation of these aspirations, a heterogeneous exchange takes place, resulting in the metamorphosis of the primary piece into a comprehensive evaluation of its own essence. According to the author, fan fiction is a result of the audience's engagement with the canon source material, which is interpreted through dominant cultural knowledge and established reading formulas. The fan's

¹⁸⁰ 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 <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1265&context=jgspl>> accessed 18 June 2023.

¹⁸¹ Jessica Silbey, 'Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change' (2010) 61 *Case Western Reserve Law Review* 195.

subjective demands and desires, as well as their understanding of the world, then lead to a reorientation of the source material. This process gives rise to fan fiction.¹⁸²

As Roland Barthes remarked, “According to Roland Barthes, in order to prevent these used systems from causing disruption or discomfort, the only viable approach is to immerse oneself within one of them.”¹⁸³ The concept of inhabitation as the definitive metamorphosis of copyrighted source material is demonstrated through the occurrence of the "Mary Sue" phenomenon within fan fiction culture. The term "Mary Sue" refers to a female character that is deliberately introduced into a work of fan fiction, typically possessing a combination of physical attractiveness, exceptional abilities, and an excessively flawless nature. One notable aspect is that "Mary Sues" frequently exhibit both personality and physical characteristics that closely resemble those of the fan author, thereby enabling the author to completely immerse herself within the fictional realm and reshape it according to her preferences. The significance of this trope's popularity becomes even more pronounced when considering the gender disparity among film and television writers, juxtaposed against an overwhelming proportion of fan fiction creators who are women. The inclusion of fan authors within their own narratives functions as a mechanism through which marginalised and underrepresented voices can assert agency over the prevailing narrative perspective. This practise enables them to construct an imaginary realm wherein their neglected identities are not anomalies, but rather the prevailing norm.

Fan works serve as a means to generate a more progressive and inclusive popular culture narrative by offering an alternative, minority viewpoint that comments on the dominant narrative voice present in the original copyrighted work. The structure for queer authors is analogous to that of female authors. Eve Kosofsky Sedgwick, a gender and queer theory scholar, has observed that queer authors endeavour to reveal latent possibilities and desires, to articulate implicit concepts, to surreptitiously introduce queer representation where it is necessary, and to confront head-on the impulses that seek to

¹⁸² Ika Willis, ‘Keeping Promises to Queer Children: Making Space (for Mary Sue) at Hogwarts’ [2006] *Fan Fiction and Fan Communities in the Age of the Internet: New Essays* 153.

¹⁸³ Roland Barthes, *The Pleasure Of The Text* (Richard Miller tr, Hill and Wang 1975).

eliminate queer identities, taking advantage of the greater liberty afforded by adulthood. This is evident in fan fiction.

The instances of same-sex "slash" pairings within the Harry Potter fan community, as mentioned earlier, serve as apt illustrations of queer reinterpretations. As noted earlier, the novels exhibit a conspicuous lack of homosexual relationships. However, akin to the literary device of female authors incorporating a "Mary Sue" character to represent themselves, fan fiction narratives serve to foster a more forward-thinking discourse on human relationships in general, while simultaneously altering the original novels' connotations. Crafting a narrative featuring a protagonist who identifies as gay affords the opportunity for the construction of mythic archetypes that are often precluded by mainstream cultural norms. The categorization of a story featuring a gay protagonist as a niche product by mainstream culture is a common occurrence. However, when a fan author writes a story about Harry Potter being gay, a character and story that are widely recognised and accepted, they introduce a new set of values that are unbiased and receptive. It is plausible that a juvenile reader may not have previously engaged with a novel featuring a protagonist who identifies as gay. However, they may inadvertently encounter a fan fiction narrative that portrays their preferred literary character as gay. By immersing themselves in a tale that reimagines Harry Potter with an alternative sexual orientation, the reader may internalise this new identity and incorporate the concept of a gay hero into their literary schema.

In addition to the frameworks of feminist and queer theory, the utilisation of characters or components from a copyrighted work by a fan writer inherently involves a transformative commentary or critique of the original. In the event that a fan fiction writer composes a romantic narrative involving two characters who are unlikely to form a romantic bond, the resulting fan-created relationship may serve as a commentary on the absence of such a relationship in the source material. The fan author's narrative, whether it involves the relationship between two minor characters with limited development in the source material or a reimagining of the dynamic between two primary characters (such as a same-sex relationship between two male characters initially portrayed as heterosexual), introduces novel perspectives on the original work. In the realm of literature, any act of

reinterpretation inherently serves as a form of critique towards a preceding piece of work. The transformativeness of fan fiction extends beyond the scope of copyright law. The capacity of individuals who lack professional training, as well as those from diverse age, gender, and racial backgrounds, to recontextualize conventional narratives to reflect their unique experiences represents an alternative mode of myth-making that enables underrepresented voices to emerge.

4.4 Defending the universality of Transformative Fan Fiction: Addressing counterarguments

Numerous individuals have put forth contentions that fan fiction ought not to be deemed transformative in relation to the underlying copyrighted materials. This paper will analyse three frequently encountered objections, presented without any specific sequence. Initially, it is imperative to note that a significant proportion of fan fiction is inadequately written and lacks any noteworthy value, thereby rendering it unsuitable for being regarded as transformative in nature.¹⁸⁴ Subsequently, it is recommended that fan authors seek permission from the original authors prior to creating fan works.¹⁸⁵ Lastly, it is crucial to acknowledge that the original author possesses a moral right to safeguard the authenticity of their original characters.¹⁸⁶ The initial contention that fan fiction lacks the necessary quality to be deemed transformative of the original work can be readily refuted by the observation that the standard of quality does not hold any legal significance. The Court in a leading case observed that the evaluation of whether a humorous rap rendition of the renowned song "Pretty Woman" constituted fair-use did not necessitate the work to be of high quality, as copyright law does not impose such a requirement.¹⁸⁷ The Court expeditiously cited Justice Holmes in their ruling, stating that it would be precarious for individuals with solely legal training to assume the role of ultimate evaluators of the

¹⁸⁴ Steven A. Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2009) 157 University of Pennsylvania Law Review 1870 <<https://www.jstor.org/stable/40380281>> accessed 18 June 2023.

¹⁸⁵ Stacey M. Lantagne, 'The Better Angels of Our Fanfiction: The Need for True and Logical Precedent' (2011) 33(2) HASTINGS COMM/ ENT LJ 159 <https://repository.uclawsf.edu/hastings_comm_ent_law_journal/vol33/iss2/1> accessed 18 June 2023.

¹⁸⁶ Jacqueline D. Lipton, 'Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas' (2011) Fordham Intellectual Property Law and Media Law Journal 537 <<https://ssrn.com/abstract=1802788>> accessed 18 June 2023.

¹⁸⁷ *Campbell v. Acuff-Rose Music, Inc* 510 US 569 (1994).

value of a work, beyond the most explicit and apparent boundaries. At one end of the spectrum, certain exceptional works of art are likely to be overlooked or undervalued. The novelty of the work could potentially elicit a negative response from the public until they become familiar with the author's unique style of communication. As a result, the Court in *Campbell* overturned the Court of Appeals' ruling that the explicit rap song in question did not meet the criteria for Fair-use, regardless of any artistic value it may possess.

As previously expounded upon, fan works, regardless of their quality, serve as reflections of the creator's personal desires and/or perspectives, thus constituting reimaginings of the source material. One advantage of fan fiction is that it provides a platform for less refined perspectives to be expressed. The act of reinterpreting a work inherently involves making commentary on the original piece, thus rendering it transformative, regardless of the calibre of the writing.

The second frequently cited objection pertains to the notion that fan authors ought to obtain authorization from the original author in order to produce a fan work that is based on the copyrighted material. The present contention does not make a direct attempt to deprive fan fiction of its transformative classification. However, it fails to acknowledge the Fair-use Defence, which sanctions non-commercial uses that an author may not otherwise authorise.¹⁸⁸ The Fair-use Defence affords legal safeguard to works that facilitate the public's access and utilisation of material. As previously mentioned, while the Fair-use Defence affords protection to fan authors, it is not infrequent for authors to issue cease and desist letters to web providers of fan fiction, with the aim of having any fan fiction based on their works removed. This action by the copyright owner may be beyond the ambit of copyright protection, but it is reasonable for an intellectual property provider to be apprehensive upon receipt of such notices.

The concept that seeking authorization is a prerequisite for utilising a copyrighted material for the purpose of criticism or adaptation disregards the basic principles of copyright legislation and implies the complete elimination of the Fair-use Defence. It is

¹⁸⁸ Lantagne (n 185).

imperative for copyright holders to acknowledge that enthusiasts are not obligated to obtain authorization for generating their own renditions and should conduct themselves accordingly. The issue that is frequently raised to challenge the transformative quality of fan fiction pertains to the moral rights of the author. The concept of moral rights of the original authors is based on the principle that an author should not be compelled to feel personally aggrieved by the manner in which their characters are utilised by fan authors.

According to Stacey Lantagne's scholarly article on fan fiction, the notion that fanfiction should not be allowed due to its alteration of the original authors' characters is analogous to the argument in favour of permitting fanfiction under copyright law. Transformative works are safeguarded as they enhance the body of public knowledge by evaluating, remarking on, and innovatively modifying an initial work. The assertion made by the author regarding the prohibition of a fan's ability to modify or reinterpret her characters is in direct opposition to the legal significance attributed to transformative works under copyright law. If the entirety of their stories were exclusively owned by their original authors, the public would have been denied access to several of the most widely acclaimed book and film series of the previous decade.

CHAPTER 5

LEGAL STANDING OF FANFICTION IN INDIA: CURRENT STATUS AND STRATEGIES FOR EFFECTIVE MANAGEMENT

In modern times, fanfiction has become a prevalent form of artistic expression in which devotees construct stories that draw inspiration from established works. This phenomenon has experienced a significant increase in popularity in recent years. The legal status of fanfiction in India is a topic of deliberation and ambiguity. This article aims to provide a comprehensive analysis of the legal framework surrounding fanfiction in India. It explores copyright laws, potential liabilities, fair-use, and challenges faced by creators. By gaining a thorough understanding of the legal structure, individuals who create or enjoy fanfiction can navigate this realm with skill while being aware of the potential legal consequences. The Copyright Act of 1957 is the established legal framework in India for the protection of copyright. The aforementioned statute grants copyright owners with sole entitlements, which include the rights to reproduce, alter, distribute, and publicly display their original works. The legislation in question lacks specific provisions related to the genre of fanfiction, resulting in a potential for interpretation and legal uncertainty.

The act of producing fanfiction often involves incorporating characters, settings, and plots from pre-existing copyrighted works, potentially leading to infringement of the copyright holders' exclusive rights. Whilst the Copyright Act does not provide explicit provisions for fan works, the creation of derivative works that are founded on copyrighted material raises concerns regarding potential infringements of copyright.¹⁸⁹

The Copyright Act's lack of specific clauses has resulted in ambiguity within the legal framework regarding fanfiction. The aforementioned legislation exhibits a deficiency in delineating a distinct demarcation between commercial and non-commercial utilisation, and also fails to incorporate provisions that account for the transformative attributes of

¹⁸⁹ Shivani Kundle, 'Fanfiction, Fan-Culture, Fan Art and Copyright Law' (*Mondaq* April 1 2022) <<https://www.mondaq.com/india/copyright/1178248/fanfiction-fan-culture--fan-art-and-copyright-law>> accessed 18 June 2023.

fan-generated content. Consequently, the legal status of fanfiction remains uncertain and subject to diverse interpretations. The Indian judiciary has proposed a criterion wherein a substantial part of a work is eligible for copyright protection. It is important to note that the phrase "substantial portion" should not be construed literally as a significant fraction of the work. Rather than being viewed as an optional element, it ought to be deemed an essential constituent of the work being evaluated. It can be inferred that the attribution of a character to a particular category confers copyright ownership upon said character, despite the lack of any legal precedent substantiating this claim.

The utilisation of the lay observer test has been adopted by the Indian Courts as a mechanism to ascertain potential instances of copyright infringement. This assessment is predicated upon the viewpoint of a typical observer in order to arrive at such conclusions. The Delhi High Court utilised a methodology in a legal case to ascertain the occurrence of copyright infringement with respect to fictional characters.¹⁹⁰ The court reached a determination that, although possessing a certain level of uniqueness, the aforementioned characters exhibited a remarkable similarity to each other with regards to their physical attributes, nomenclature, and personality traits. The absence of precision in the topic could potentially generate perplexity for an unskilled spectator, culminating in an incapacity to differentiate between the two, ultimately resulting in the violation of copyright by the defendants.

The attitudes of copyright holders towards fanfiction are diverse and varied. There exist varying perspectives concerning the reception of fan-generated content, with certain individuals endorsing it as a mechanism for cultivating fan involvement and generating publicity without incurring costs, whereas others perceive it as a possible violation of their intellectual property rights. Some copyright holders have adopted lenient approaches by allowing limited fan-generated content, while others have established guidelines or permissions for derivative works.¹⁹¹

The legal doctrine of fair-dealing allows for the limited use of copyrighted material for specific purposes such as critique, commentary, research, or educational pursuits.

¹⁹⁰ *Raja Pocket Books v. Radha Pocket Books* 1997 (40) DRJ 791.

¹⁹¹ *ibid.*

Transformative works refer to a category of artistic creations that involve altering or expanding upon an existing work in order to generate a novel and unique piece of art. Within the domain of copyright law, fanfiction may be deemed as fair-dealing, contingent upon its transformative nature. This involves the integration of innovative components, analysis, or viewpoints that deviate from the primary source. The assessment of fair-use is contingent upon a multitude of considerations, encompassing, albeit not restricted to, the intention, essence, quantity, and effect on the market of the primary work. The legal status of fanfiction in India is not extensively addressed in case law. However, there are copyright-related cases that provide insightful viewpoints on the legal framework concerning derivative works. There exist several notable legal cases in India that relate to the aforementioned topic, including:

The legal matter involving Mr..R.G.Anand¹⁹², which took place in 1978, is commonly considered a crucial turning point in the acknowledgment of fair-dealing and the importance of transformative works. In accordance with the decision of the court, a derivative work that is inspired by an original work may be considered fair-dealing if it substantially modifies the original work and presents new perspectives or insights.

In the legal matter of *Super Cassettes Industries Ltd. v Hamar Television Network Pvt.*¹⁹³, the following arguments were presented. According to a ruling by Ltd. in 2009, the creation of a parody or satire based on a copyrighted work does not necessarily constitute a violation of copyright law, as long as it falls under the fair-dealing provisions and does not negatively affect the market for the original work.

The case of *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v Rameshwari Photocopy Services & Ors.*¹⁹⁴ was primarily focused on the reproduction of educational materials. However, it highlighted the importance of fair treatment in achieving educational goals. The significance of providing access to copyrighted materials for purposes that are non-commercial and transformative has been duly recognised.

¹⁹² *R.G. Anand v. M/S Deluxe Films and Ors.* 1979 SCR (1) 218.

¹⁹³ *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd.* 2011 (45) PTC 70 (Del).

¹⁹⁴ *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services & Ors.* CS(OS) No.2439/2012.

While not pertaining directly to fanfiction, these occurrences provide valuable perspectives on copyright laws, fair-use, and derivative works, which can aid in the legal discussions surrounding fanfiction in India.

The creation of fanfiction entails potential legal risks, including the possibility of facing accusations of copyright infringement from the owners of the copyrighted content. In order to mitigate the probability of encountering aforementioned risks, content creators may opt to implement various measures, including but not limited to obtaining explicit consent from copyright owners, adhering to any prescribed directives, and clearly indicating that their work is a fan creation that is not intended for commercial purposes. The facilitation of legal compliance can be achieved through collaborative efforts with the copyright holder or the procurement of licences.

The Creative Commons licences function as a means for creators to define the parameters and stipulations for the usage of their works, including fanfiction and other modes of artistic manifestation. Moreover, platforms dedicated to fan-generated content have a noteworthy function in enabling the distribution and reception of said works. By employing Creative Commons licences, fanfiction authors can define the extent of their rights and facilitate the lawful distribution of their written works. The provision of specialised platforms for creators to exhibit their work, coupled with the enforcement of policies that promote compliance with copyright regulations, renders fanwork platforms indispensable.

5.1 Approaches that can be useful insights for India

The United States has a robust fair-use doctrine that allows for the transformative use of copyrighted material. The legal system in the United States has recognised the importance of fan works and has generally taken a permissive approach towards fanfiction, viewing it as a form of unbridled self-expression. The adoption of the "four-consideration test" as a means of assessing fair-use, encompassing an analysis of the purpose, nature, amount, and impact on the market, may offer a viable framework for India to establish clear-cut guidelines for user-generated content.

In Japan, there exists a cultural phenomenon known as "dōjinshi" which is characterised by the creation of fan-generated manga and novels that are derived from pre-existing works. The cultural significance and promotional potential of dōjinshi often lead copyright holders to exhibit a degree of tolerance towards it. Several copyright holders have established licencing frameworks, such as Comiket, that authorise enthusiasts to create and commercialise derivative works within pre-established parameters. India possesses the potential to explore the collaborative approach between copyright holders and fan communities, as exemplified by the Japanese model, with the aim of establishing more lucid permissions and licencing frameworks.¹⁹⁵

The Canadian copyright legislation encompasses a provision of "fair-dealing" that is distinguished by its adaptable nature. This clause allows for the utilisation of copyrighted material for purposes such as scholarly investigation, individualised learning, and critical analysis. The comprehensive exemption mentioned above could potentially incentivize India to develop fair usage guidelines for fanfiction, taking into account the transformative nature and non-commercial purpose of fan works.

The Republic of Korea has implemented a mechanism known as "webtoons," which pertains to digital platforms that facilitate the creation and dissemination of derivative content based on pre-existing comics and web-based novels by enthusiasts. Oftentimes, these platforms enter into contractual agreements with copyright holders, granting permission for the creation of fan-generated content within specific parameters and ensuring compliance with legal obligations. India possesses the potential to explore analogous collaborative platforms that provide legal frameworks for fanfiction.

The Australian copyright legislation has incorporated a legal provision commonly referred to as "fair-dealing for the purpose of parody or satire". The aforementioned provision allows for the utilisation of copyrighted material in the creation of parodies or satirical works, thereby qualifying as an example of fair-use. India may consider

¹⁹⁵ Samantha S. Peaslee, 'Is There a Place for Us: Protecting Fan Fiction in the United States and Japan' (2015) 43 *Denv. J. Int'l L. & Pol'y* 199 <<https://core.ac.uk/download/304688258.pdf>> accessed 21 June 2023.

implementing a similar provision that recognises the importance of transformative and humorous fanfiction.

When considering these illustrations, it is crucial to undertake an examination of the unique cultural, legal, and social environments of India. Adopting a particular approach must be customised to conform with the legal framework and requirements of the corresponding country, as it is of utmost importance. It is imperative to undertake this task with due regard for the concerns of both copyright proprietors and fan content producers.

5.2 Measures to tackle the legal implications surrounding fanfiction in India

It has been proposed that India consider a modification to the Copyright Act in order to incorporate specific provisions related to fanfiction and derivative works. The proposed amendment should take into account the transformative nature, non-commercial intent, and limited utilisation of copyrighted material associated with fanfiction. The inclusion of specific exemptions and protocols for fan-generated content can ensure legal lucidity and protection for originators.

The proficient involvement of stakeholders is a pivotal component of copyright administration. The process entails the active participation of multiple stakeholders, comprising copyright proprietors, fan groups, legal professionals, and scholarly researchers. Participating in deliberative procedures, such as roundtable discussions, public consultations, and meetings, can foster a thorough understanding of the perspectives and concerns of various stakeholders. The process of involvement in this activity possesses the capability to promote the development of just legal frameworks that aptly tackle the apprehensions of both copyright holders and enthusiasts who create content.

The development of clear and precise fair-use regulations specifically designed for fanfiction can provide creators with a more comprehensive understanding of the legal boundaries. The guidelines should consider multiple considerations, such as the transformative quality of the work, the lack of commercial purpose, the limited use of copyrighted material, and the minimal impact on the market of the original work. Fan

works may serve as a frame of reference for creators, copyright holders, and legal entities in order to determine the legality of said works.

The provision of educational initiatives such as workshops, awareness campaigns, and programmes can enhance the understanding of copyright law, fair-use, and the legal implications of fanfiction among creators and enthusiasts alike. These initiatives possess the capability to promote responsible manufacturing, maintain the privileges of copyright holders, and adhere to lawful restrictions, while also fostering creativity.

The creation of collaborative platforms or licencing frameworks that are exclusively designed for fanfiction can cultivate a legally compliant and supportive environment. These platforms possess the capacity to engage in collaborative efforts with copyright owners to establish guidelines, mandates, and contractual agreements concerning user-generated content created by fans. Collaborative endeavours can provide creators with a clearly defined pathway to legally produce and disseminate their works while also addressing copyright considerations.

Conducting rigorous scholarly research and collecting empirical data on fanfiction, its cultural implications, and economic outcomes can lead to valuable insights. Research endeavours can offer significant insights to policymakers, copyright proprietors, and legal experts concerning the benefits and challenges that are associated with fan works. Moreover, it possesses the capacity to enable the formulation of policies that are based on empirical data.

The adoption of international cooperation as a strategy can offer India a viable means of engaging in global dialogues and partnerships, with the objective of acquiring knowledge and adopting best practises from other nations in addressing fanfiction. The exchange of knowledge and experiences has the potential to facilitate the development of effective legal frameworks and promote international agreement on issues related to copyright and fanworks. India has the potential to establish a comprehensive legal framework that recognises and preserves fanfiction, while also protecting copyright interests. This can be achieved through a multifaceted approach that involves legal revisions, stakeholder involvement, educational programmes, and international cooperation.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

Fanfiction is a genre of literature that exhibits innovation and has not yet achieved widespread recognition. However, it retains its importance in the examination of fandom and literature, owing to its substantial contributions to the online community and its influence on the publishing industry. Fanfiction, due to its diverse reception in the field of literature, will continue to endure as a substantial influence, providing inspiration for avid fans, fandoms, and communities on a global scale. The enduring appeal of [subject] can be attributed to its ability to redefine boundaries, challenge established conventions, and prioritize originality, creativity, and the admiration it receives from devoted supporters. Irrespective of an individual's degree of familiarity with fanfiction, it is noteworthy that the fanfiction community exhibits inclusivity by extending a warm reception to individuals from diverse fandom backgrounds, on the condition that they are open to embracing and valuing this modern form of literary expression.

The increasing prevalence of fan fiction is anticipated to foster heightened tensions between fan communities and copyright holders. It is imperative for individuals who identify as enthusiasts to possess a comprehensive comprehension of their legal entitlements. This knowledge is of utmost importance as it empowers individuals to effectively respond to legal actions initiated by copyright holders, and also enables them to proactively prevent such actions from occurring. In a similar vein, it is crucial for copyright holders to ensure that their actions are authentically aligned with their highest priorities. Targeting one's most devoted supporters, particularly those highly involved in the domain of fan fiction, without a compelling justification, seems to lack sufficient rationale.

This issue becomes particularly pertinent in cases where fan fiction does not result in any financial detriment to the copyright holder, and where abstaining from intervention carries no legal consequences. Characters and settings, despite their potential fictional nature, possess a greater level of significance compared to various other literary elements, such as plots. Brands have the capacity to exert influence on consumer behavior and act

as guiding entities during periods of difficulty. Furthermore, they can serve as essential companions in moments of adversity. Many fictional characters, such as Bugs Bunny or Luke Skywalker, are often perceived to possess a reality that extends beyond their original literary or cinematic contexts, leading to their designation as "real." These characters often evoke strong emotional attachments from fans, irrespective of any contentious narrative elements within their respective storylines. Indeed, it is conceivable that the impetus for the production of fanfiction by a multitude of enthusiasts is deeply grounded in this particular sentiment. Therefore, the commercial value of characters and locations may exceed that of plots, indicating their importance.

To achieve this specific state of existence, it is crucial that the author or creator has made significant artistic choices or evaluations. Therefore, in these particular cases, it is imperative that the characters are afforded protection as separate elements, in line with the rationale established in precedents like *Infopaq*. The main challenge encountered by copyright systems in the digital age relates to their efficacy in the realm of social production. The lack of explicit legal parameters pertaining to the extent of copyright protection for characters and settings has led to a state of ambiguity surrounding the ownership rights associated with these literary elements. The presence of this ambiguity has given rise to a scenario in which individuals who possess significant legal resources, typically in the form of extensive legal teams, tend to be favored in terms of owning such property. As a result, the ability of the owners of copyright or licenced users of the work in question to assert ownership over specific aspects of the public domain, such as characters and locations, has been facilitated through the utilisation of legal interpretations. This has led to a situation where resources that ideally should be available to the general public are being restricted.

The current ambiguity surrounding the potential violation of the right to create an adaptation, as stipulated under Section 21 of the CDPA, by these works renders it unlikely. Nevertheless, there is a strong likelihood that they will violate the right to replicate or copy the content, as outlined in Section 17 of the CDPA. Given the aforementioned circumstances, if fanfiction creator aims to distribute their literary content, even in a noncommercial manner, they must either secure a copyright exemption

or acquire a license from the original author. The licensing market holds considerable significance for authors and may potentially contribute to their perception of being targeted by fanfiction. Nevertheless, authors possess emotional motivations, rather than solely economic ones, for their reluctance to incorporate user-generated content (UGC) into their literary works.

The aforementioned justifications could be more suitably associated with the moral rights framework delineated in Sections 77-80 of the CDPA. Nevertheless, it is commonly observed that a significant number of authors exhibit a tendency to prioritize their economic rights above these aforementioned considerations. One possible explanation for this phenomenon may be linked to the generally stringent interpretation of moral rights in legal proceedings, combined with the lack of a comprehensive moral rights framework in the United States.

The influence of cultural context in the United States plays a significant role in shaping the attitudes of authors towards their creative works. The present dissertation has made a substantial contribution by examining the precise research questions delineated in the introduction concerning the legal dynamics of UGC, such as fanfiction, in relation to the original work. It is evident that a considerable proportion of user-generated content UGC derivative reuses, such as memes or fanfiction, have the potential to encroach upon the author's economic rights as delineated in Section 17 of the CDPA. Nonetheless, it is highly unlikely that they would violate the right to produce an adaptation as stipulated in Section 21 of the CDPA, considering the strict wording of that particular provision. Upon comparing the two, it becomes evident that the open-ended nature of the derivative work right in the United States suggests that such derivative uses are more susceptible to infringing both the right to reproduce and the right to create derivative works within the nation. The prevalence of disclaimers in user-generated content (UGC) works, such as fanfiction, reduces the likelihood of a favourable assertion under the moral rights of integrity, paternity, or false attribution. Moreover, it is noteworthy that courts have demonstrated prudence in the application of these rights. Therefore, it is recommended that authors and publishers who wish to restrict fanfiction derived from their copyrighted works should ground their assertions on the right to copy the work under Section 17 of

legislations concerning copyright, as this presents the most feasible legal argument with a greater probability of achieving a favorable outcome.

The aforementioned recommendation is justified by the inclusion of the Section 17 right, which encompasses the essential element of reproducing the work, a crucial component in the production of fanfiction. This provides a thorough analysis of the legal ramifications associated with fanfiction, elucidating its classification as an inherent violation of the right to reproduce the original work in the United Kingdom, as well as the right to generate derivative works in the United States. Moreover, it provides a comprehensive understanding of the importance of these rights within the framework of the digital age. Furthermore, this research investigates the main non-economic complaints articulated by authors regarding fanfiction, and evaluates them in the context of moral rights frameworks in the United Kingdom and the United States. The aforementioned situation has garnered considerable scrutiny regarding the difficulties encountered when enforcing these regulations in the context of non-commercial user-generated content (UGC) that is created and disseminated in the digital domain.

While it is probable that most genres of fanfiction infringe upon copyright laws related to the original work, there exist certain scenarios in which particular forms of fanfiction may align with the acceptable parameters of fair-use, particularly in the domains of research/criticism or pastiche. The incorporation of copyrighted materials in diverse manifestations, including fanfiction, parody, and memes, confers notable cultural and social benefits, which are recognized through copyright provisions and exemptions, such as fair-dealing. These provisions enable a comprehensive analysis of the advantages linked to these reuses before deciding on their compliance with copyright laws and the necessity of their removal. The preceding observation underscores the societal significance of fair-use provisions for derivative literary works, while also emphasising the necessity for enhanced precision in this domain to safeguard the entitlement to freedom of speech.

The fan fiction genre exhibits a multitude of praiseworthy attributes. Fan narratives possess the capacity to explore viewpoints that are either absent or insufficiently portrayed in mainstream media. Moreover, online platforms have the potential to

facilitate a multifaceted and inclusive digital dialogue, wherein popular works can be critically examined and appreciated. In addition, fan narratives afford novice writers a chance to refine their abilities and evolve as creators of narratives. The commendable objective of copyright reform encompasses the preservation of fan fiction and other derivative works that derive inspiration from copyrighted materials. Canada has demonstrated notable advancements in the resolution of copyright concerns by implementing recent amendments to the Copyright Act. Prior to the enactment of these reforms, the copyright system in Canada seemed to be unfavorable towards fan fiction because the existing fair-dealing categories were perceived to be irrelevant to a substantial portion of fan-created written works. The incorporation of parody and satire within the fair-dealing categories, in addition to the provision for non-commercial user-generated content, presents encouraging opportunities for fan writers. The full scope of the expansion of these provisions and the possible interpretations in future legal disputes regarding fan fiction remain uncertain. Nevertheless, the aforementioned provisions, when coupled with the Supreme Court's permissive approach towards copyright, present encouraging opportunities for creators in future cohorts. The inclusion of the provision pertaining to non-commercial user-generated content is an innovation that holds potential benefits, as it exhibits a wide-ranging applicability across diverse forms of media and technologies. Furthermore, it has the potential to offer proactive legal counsel that goes beyond the constraints of a reactive fair-dealing assessment that heavily relies on particular circumstances, even when employing a permissive perspective. The potential legal framework pertaining to fan fiction in Canada seems to be increasingly favorable compared to previous times.

The categorization of fan fiction as universally transformative justifies its qualification for safeguarding under the Fair-use Defense in the event of any copyright infringement dispute. Fan fiction functions as the primary medium through which members of the general public participate in the collective creation of a widely embraced popular storyline and generate modern mythology. The utilization of ancient narratives and archetypal motifs is widely recognized within the realm of fiction. The act of borrowing and subsequently reinterpreting these narratives within various contexts serves to maintain the significance and liveliness of ancient myths and archetypes, effectively

catering to the preferences of modern audiences. The internet offers a medium for modern enthusiasts to consistently reinterpret their favored narratives in a manner that corresponds to their individual inclinations. This may entail modifying the linear development of a serialized plot, articulating subjective preferences, or utilizing well-liked characters in evolving situations that present an alternative viewpoint to a widely accepted narrative. When a fan fiction is created based on an original work, the resulting fan creation inherently involves a critical analysis of the underlying values of the source material. This analysis is achieved through the modification or preservation of different elements. By categorizing fan fiction as intrinsically transformative, a state of balance is attained between the goals of copyright law, which seeks to protect the rights of original authors, and the conservation of works that enable the generation of narratives that would otherwise remain dormant within the public domain.

Moreover, the dissertation centers its attention on the legal framework surrounding fanfiction in India and examines the challenges faced by creators operating within this specific context. The legal status of fanfiction remains uncertain due to the lack of explicit provisions within the Copyright Act of 1957, which creates ambiguity in its interpretation. The absence of specific details adds to the existing ambiguity surrounding the issue.

This article explores the potential ramifications of copyright infringement within the realm of fanfiction production, alongside the contrasting perspectives held by copyright owners concerning this matter. Moreover, this research investigates the concept of fair-dealing and transformative works as potential legal avenues for creators of fanfiction. The article presents a range of strategies for mitigating legal risks, such as obtaining explicit consent from copyright holders and employing Creative Commons licenses. Furthermore, the proposal recommends amendments to the Copyright Act to adequately address the unique characteristics of fanfiction and provide legal clarity and protections for its creators. The key components in the establishment of efficient legal frameworks for fanfiction are widely acknowledged to include the active involvement of relevant parties, the adoption of educational programs, the utilization of collaborative platforms, and the reliance on empirical research.

The article emphasizes the capacity of India to establish a comprehensive legal framework that recognizes and advances the practice of fanfiction, while concurrently safeguarding copyright interests in an equitable and impartial manner.

6.1 Key Findings

1. The Cultural Significance of Fanfiction:

The significance of fanfiction in the examination of fandom and literature is underscored by its noteworthy impact on the online community and its consequential influence on the publishing industry. The institution flourishes due to its commitment to fostering an inclusive and diverse community that values and recognizes contemporary literary expression.

2. The Conflict Arising from the Interplay between Fan Communities and Copyright Holders:

The escalating prominence of fanfiction has resulted in heightened tensions between fan communities and copyright holders. In order to effectively tackle this issue, it is imperative to possess a comprehensive comprehension of the legal entitlements afforded to both parties involved. This understanding is vital in order to maintain a harmonious equilibrium between the realms of creative expression and copyright interests.

3. The Economic Significance of Characters and Settings in the Entertainment Industry:

The commercial value of characters and settings from established works is considerable, as they frequently surpass their original literary or cinematic origins. Fanfiction authors and readers derive inspiration and establish emotional connections through these elements.

4. The presence of ambiguity within legal guidelines:

The lack of well-defined legal parameters pertaining to the copyright safeguarding of characters and settings has resulted in a state of ambiguity, frequently benefiting individuals or entities possessing significant legal means. This practice restricts the availability of resources that ideally should be accessible to the broader public.

5. The Variations in Jurisdictional Practices:

The legal aspects pertaining to fanfiction exhibit variability in different jurisdictions. The infringement of economic and moral rights associated with fanfiction is approached differently by countries such as the United Kingdom and the United States.

6. The concept of fair-dealing exceptions refers to the provisions within copyright law that allow for the limited use of copyrighted material without obtaining permission from the copyright:

Fanfiction frequently operates within the acceptable parameters of fair-dealing, encompassing activities such as scholarly inquiry, critical analysis, or artistic imitation. The acknowledgment of fair-dealing exceptions pertaining to derivative literary works underscores the societal importance of the principle of freedom of expression.

7. The advancements in Canada:

The recent amendments made to the Copyright Act in Canada have demonstrated encouraging advancements in the resolution of copyright concerns pertaining to fanfiction. These advancements offer optimism for forthcoming cohorts of fanfiction authors.

6.2 Suggestions

The legal status of fanfiction remains ambiguous in numerous jurisdictions, resulting in conflicts between fan communities and copyright holders. The establishment of legal frameworks for fanfiction necessitates a judicious approach that acknowledges the transformative characteristics inherent in fan-created works, safeguards copyright interests, and fosters a climate of creativity within fan communities. By implementing the recommendations delineated hereafter, policymakers have the potential to establish a more comprehensive and encouraging milieu for creators of fanfiction, all the while maintaining the prerogatives of copyright holders.

These endeavors will not solely ensure the protection of artistic manifestation but also cultivate a dynamic and multifarious literary environment.

1. Acknowledge the Transformative Essence of Fanfiction: It is imperative to recognize fanfiction as an intrinsically transformative mode of creative expression that engages in the reinterpretation and augmentation of pre-existing narratives. The recognition of fanfiction as a legitimate creative endeavor and the acknowledgment of its cultural and social value should be incorporated into legal frameworks. This acknowledgment will serve to safeguard fanfiction creators against unjustifiable legal proceedings.
2. The development and implementation of explicit and comprehensive fair-use/fair-dealing guidelines are necessary to effectively address the production and distribution of fanfiction. When formulating these guidelines, it is crucial to take into account various considerations, including the transformative nature of the work, its non-commercial characteristics, and its influence on the market for the original work. By offering clear and specific instructions, creators can enhance their comprehension of the legal parameters within which they can function.
3. Advocate for the Promotion of Voluntary Licensing Programs: In order to establish a legitimate framework for authors of fanfiction, it is imperative to encourage the implementation of voluntary licensing programs. These programs would facilitate the acquisition of licenses by fanfiction authors from copyright holders for the utilization of their original works. The accessibility, affordability, and navigability of the licensing process should be prioritized in order to cultivate a collaborative dynamic between creators and copyright holders.
4. The implementation of safe harbor provisions is necessary to safeguard online platforms hosting fanfiction, thereby fostering the growth of fanfiction communities and mitigating potential liability for copyright infringement. The aforementioned provisions ought to necessitate that platforms promptly address valid takedown notices and establish measures to prevent the monetization of content that infringes upon intellectual property rights. This approach aims to achieve a harmonious equilibrium by simultaneously fostering creativity and addressing the potential issues surrounding copyright.
5. Promote Collaborative Platforms and Communities: It is imperative to provide backing for the advancement of collaborative platforms and communities that are

specifically designed for the creation of fanfiction. These platforms can function as virtual environments where creators have the opportunity to actively participate, showcase their creations, and obtain constructive criticism from like-minded individuals. Through the cultivation of a conducive atmosphere, collaborative platforms have the capacity to facilitate the exchange of knowledge, enhance legal literacy, and promote responsible practices in creation.

6. It is imperative to offer fanfiction authors a thorough education regarding copyright law, fair-use/fair-dealing, and the rights and obligations they possess as creators. Educational resources and initiatives have the potential to provide authors with the knowledge and tools needed to make well-informed decisions and implement appropriate measures in order to adhere to copyright regulations. The enhancement of legal literacy is expected to mitigate the likelihood of inadvertent infringement.
7. The encouragement and support of empirical research on fanfiction is imperative, particularly with regards to its cultural, social, and economic implications. This study has the potential to contribute to policymaking by offering valuable insights into the needs and aspirations of fan communities. Additionally, it can aid in the development of effective legal frameworks that accurately reflect the realities associated with the creation of fanfiction. The utilization of empirical evidence facilitates the enhancement of decision-making by providing a basis for more informed choices.
8. Promotion of International Cooperation and Harmonization: It is imperative to foster international cooperation and facilitate dialogue among policymakers, copyright holders, and fan communities. This collaborative effort aims to enhance the exchange of exemplary methodologies, promote the alignment of legal frameworks, and foster the cultivation of a comprehensive global comprehension pertaining to the domain of fanfiction. Through collaborative efforts, the mitigation of legal ambiguities, facilitation of cross-border collaborations, and safeguarding the rights of all relevant parties can be achieved.

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