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FAN COMMUNITIES AND THE SELF-REGULATION OF DIGITAL CREATIVE SPACE

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Abstract

The expansion of the Internet and the rapid advancement of media technologies have resulted in the democratisation of cultural production. Fans of popular media properties have taken advantage of this, using the tools available to them to create a wide range of works based on their favourite books, television shows, films, and videogames. A major obstacle faced by these fan-creators is the absence of any firm legal principles that deal explicitly with the production of fan works, relegating their activities to something of a legal grey area. Various fan communities have responded to this by developing their own set of norms for regulating the production of fan works. This article elaborates upon these norms, and highlights the way in which they are capable of alleviating creators' and rightholders' concerns regarding the potential negative consequences of fan works. It also suggests that these norms may be profitably incorporated into the business practices of the creative sector, and also considers how these norms may inform the future development of copyright law.

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1. Introduction

This article is concerned with the norms, or informal practices and expectations, surrounding the creative activities of media fans. ‘Fan’ is defined broadly here to mean an enthusiast of any form of popular mass media, including written fiction, television shows, films, videogames, and so forth. A defining characteristic of any given fan community is productivity: fans, spurred on by their enthusiasm, frequently produce and circulate among themselves creations that are based on their favourite media properties.¹ The number, type, and circulation of such creations has expanded tremendously in recent years due to advances in the technologies used for their production and distribution.² Prior to the rapid expansion of the Internet, fan works consisted predominantly of text-based fiction and hand-drawn graphic art, and were distributed in the form of print – sometimes handwritten – ‘fanzines’. In the present day, given the prevalence and ease-of-use of media production technologies, fan works may take the form of recorded music, videos, and videogames in addition to written text and graphic art.³ The vast majority of fan works are now shared online, making them accessible to any person with an Internet connection.⁴

Notwithstanding their increased visibility, fan works have occupied, and continue to occupy, something of a legal grey area.⁵ As fan works generally contain material taken from the popular cultural works on which they are based, they raise issues under copyright law which have, however, remained unresolved thus far. The copyright statutes of the US⁶ and the UK⁷ – two jurisdictions whose popular media productions form the nucleus of much fan activity – contain no provisions which deal explicitly with fan works, and there is a paucity of judicial decisions on this issue. This lack of legal certainty is also exacerbated by the lack of uniformity in the attitudes taken by the individual creators or other rightholders of the books, television shows, films and other media on which fan works are based. It is against this background that various fan communities have developed their own norms for regulating the production of fan works.

This article identifies and elaborates upon these norms, assesses the extent to which each norm corresponds to concepts inherent in existing copyright laws, and considers

¹ J Fiske, *Understanding Popular Culture* (London: Routledge, 2010), at 116. See also J Fiske, ‘The Cultural Economy of Fandom’ in L Lewis (ed), *The Adoring Audience: Fan Culture and Popular Media* (London: Routledge, 1992) 30–49, at 37.

² P McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011–2012) 24 *Regent University Law Review* 117–146, at 121.

³ R Tushnet, ‘User-Generated Discontent: Transformation in Practice’ (2007–2008) 31 *Columbia Journal of Law & Arts* 497–516, at 503.

⁴ M McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 *Boston University Journal of Science & Technology Law* 433–470, at 441.

⁵ P McKay, see note 2 above, at 121–122; R Tushnet, ‘Legal Fictions: Copyright, Fan Fiction and a New Common Law’ (1996–1997) 17 *Loyola of Los Angeles Entertainment Law Journal* 651–686, at 684.

⁶ *Copyright Act 1976*.

⁷ *Copyright, Designs and Patents Act 1988*.

the extent to which they are capable of alleviating the concerns of creators and other rightholders relating to fan works. It also provides an overview of the manner in which these norms have been incorporated into the business models of certain creative sectors which seek to harness the benefits of fan creativity, using the example of the videogame industry. It concludes by considering how these norms may inform the development of copyright law, recognising their potential to shape existing legal standards so as to take into account the practices and expectations of fans as well as the interests of creators and rightholders.

Given the global reach of popular cultural works that originate from the US and – albeit to a lesser extent – the UK, the laws of both jurisdictions will be discussed. For the purposes of this article, the term ‘fan works’ will be confined to those that have not been explicitly or formally authorised by the rightholders of the works on which they are based. It thus excludes authorised derivative works, such as tie-in novelisations of films, television shows, and videogames. Authorised derivative works do not pose the same difficulties as unauthorised fan works, as their legal status is clear, and they are not regulated by the norms of fan communities.

2. Fan Works and Copyright Law

2.1 Unresolved Legal Questions Raised by Fan Works

As a general rule, the books, television shows, films, and other media which attract fan engagement are works that are entitled to copyright protection.⁸ Fan works, by definition, invariably contain one or more elements taken from these copyright works, and it is possible that such taking might amount to copyright infringement. Much academic ink has already been spilled on the question of whether, and the circumstances under which, the copyright in a work will be infringed by the production of fan works based on it.⁹ The picture that emerges from the existing literature is one fraught with legal uncertainty.

First, the extent to which copyright protects certain key elements of popular cultural works, including those that are most frequently copied by fan-creators, is unclear. For example, writers of fan fiction routinely borrow established characters from their favourite fictional worlds in order to tell new stories, but the law relating to copyright

⁸ *Copyright Act 1976*, s 102(a) (conferring protection on ‘original works of authorship’); *Copyright, Designs and Patents Act 1988*, s 1(1) (conferring protection on original literary, dramatic, musical, and artistic works; sound recordings, films, and broadcasts; and the typographical arrangement of published editions).

⁹ See e.g. A Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Surrey: Ashgate, 2011); P McKay, see note 2 above; J Lipton, ‘Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere’ (2010–2011) 70 *Maryland Law Review* 1–61; R Stroude, ‘Complimentary Creation: Protecting Fan Fiction as Fair Use’ (2010) 14 *Marquette Intellectual Property Law Review* 191–213; C Reid, ‘Fair Game: The Application of Fair Use Doctrine to Machinima’ (2008–2009) 19 *Fordham Intellectual Property, Media & Entertainment Law Journal* 831–876; S Trombley, ‘Visions and Revisions: Fanvids and Fair Use’ (2007–2008) 25 *Cardozo Arts & Entertainment Law Journal* 647–685; A Chander and M Sunder, ‘Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use’ (2007) 95 *California Law Review* 597–626; C Ranon, ‘Honor Among Thieves: Copyright Infringement in Internet Fandom’ (2005–2006) 8 *Vanderbilt Journal of Entertainment & Technology Law* 421–452; M Nolan, ‘Search for Original Expression: Fan Fiction and the Fair Use Defense’ (2005–2006) 30 *Southern Illinois University Law Journal* 533–571; M McCardle, see note 4 above; R Tushnet, see note 5 above.

protection for fictional characters remains unsettled. Under the copyright law of the US, it is at least clear that fictional characters may be protected by copyright independently of the work in which they appear. The courts, however, have formulated two different tests for determining when a character may benefit from such protection: the first asks whether the character in question is ‘distinctly delineated’,¹⁰ while the second considers whether the character constitutes ‘the story being told’.¹¹ The existence of two separate tests, each of which could lead to a very different outcome even when applied to the same sets of facts, does little to clarify the legal position on this issue.¹² The position under the copyright law of the UK is even less clear. While the issue was raised explicitly in the early cases of *Kelly v Cinema Houses Ltd*¹³ and *Bolton v British International Pictures Inc.*,¹⁴ both of these cases were decided on the basis that the fictional characters in question were stock characters and thus too unoriginal to be protected by copyright, leaving open the question of whether a sufficiently original character would have been entitled to copyright protection. There has been a certain amount of academic commentary, at least some of which supports the view that fictional characters should not be protected independently of the works in which they are found.¹⁵ However, there has yet to be a judicial decision which deals conclusively with this issue.

Second, even where the copyright status of the material taken from the original work is not in issue, it is still unclear whether and when the uses made by fan-creators of such material will amount to infringement. This analysis is complicated by the fact that the amount and nature of the material taken, as well as the use to which the material is put, will necessarily vary from case to case. In some cases, it will be obvious that the protected material is being used in an infringing manner. An example is where the entirety of a pop song has been used as the soundtrack for a fan-made music video, or ‘fanvid’.¹⁶ As the whole of the song has been copied, and the song itself has not been altered or transformed in any way, it may be quite uncontroversially regarded as infringement.¹⁷ However, other uses are less easy to classify. For instance, a fanvid typically consists of clips taken from the fan’s chosen film or television show, each of which lasts no more than a few seconds a time. Does the copying of such short clips from an hour-long episode of a television show or a two-hour long film constitute infringement? To take another example, this time from the realm of fan fiction, does the appearance of the boy wizard Harry Potter in one

¹⁰ *Nichols v Universal Pictures Corporation et al* (1930) 45 F.2d 119 (2nd Circuit).

¹¹ *Warner Bros Pictures v Columbia Broadcasting System* (1954) 216 F.2d 945 (9th Circuit).

¹² A Schwabach, see note 9 above, at 31; M McCardle, see note 4 above, at 445–448.

¹³ [1914] MacG CC 168.

¹⁴ [1936] MacG CC 20.

¹⁵ I Eagles, ‘Copyright and the Sequel: What Happens Next?’ in F Macmillan (ed), *New Directions in Copyright Law, Volume 6* (Cheltenham: Edward Elgar, 2007) 35–65; U Klement, ‘Copyright Protection of Unauthorised Sequels under the Copyright, Designs and Patents Act 1988’ (2007) 18(1) *Entertainment Law Review* 13–19. Cf A McGee and G Scanlan, ‘Copyright in Character, Intellectual Property Rights and the Internet: Part 1’ (2005) 16(8) *Entertainment Law Review* 209–214; T Martino, ‘“Popeye the Sailor”: Man of Letters—the Copyright Protection of Literary Characters’ (1988) 10(3) *European Intellectual Property Review* 76–78.

¹⁶ See S Trombley, see note 9 above, at 650–651 (describing fanvids).

¹⁷ A Schwabach, see note 9 above, at 88–91; S Trombley, see note 9 above, at 676.

paragraph of an otherwise unrelated story constitute an infringement of the copyright in the eponymous books? What happens if, within that paragraph, he behaves in a way that is completely at odds with his characterisation in the books?¹⁸

A third issue which arises is whether fan works are entitled to the benefit of any defences under copyright law, though this is rather less pronounced in the UK than it is in the US. The most significant defence available under UK copyright law is that of fair dealing, which is confined to the statutorily enumerated purposes of research or private study, criticism or review, or the reporting of current events.¹⁹ It does not extend to uses of copyright works that are made for other purposes, even if these uses are ‘fair’ in some general sense.²⁰ While some fan works do comment on or criticise the source material in some way, potentially bringing them within the scope of fair dealing for the purposes of criticism or review,²¹ the vast majority do not. It is difficult to see how the defence of fair dealing can be applied to fan works that are straightforward homages or uncritical reworkings of the source material.²² In contrast, US copyright law provides for a defence of fair use, which is not restricted to specified purposes.²³ Instead, it looks generally at whether a particular use made of a copyright work is fair, taking into account the four factors set out in the statutory provision codifying the defence, namely: (i) the purpose and character of the use; (ii) the nature of the copyright work; (iii) the amount and substantiality of the portion used; and (iv) the effect of the use upon the potential market for or the value of the copyright work. Theoretically at least, the doctrine of fair use is sufficiently flexible to accommodate fan works, and most of the academic literature on the subject agrees that fan works should be regarded as fair use.²⁴ However, given the lack of judicial precedent on this issue and the inherent vagueness of the scope of fair use itself, it remains difficult to predict with any certainty which side of the debate the US courts will favour if asked to rule on such a case.

¹⁸ J McCutcheon, ‘Property in Literary Characters – Protection under Australian Copyright Law’ (2007) 29(4) *European Intellectual Property Review* 140–151, at 144 (suggesting that an unskilled appropriator who has ‘butchered’ a distinctive character may be able avoid liability for copyright infringement).

¹⁹ *Copyright, Designs and Patents Act*, ss 29–30.

²⁰ L Bently and B Sherman, *Intellectual Property Law*, 3rd ed (Oxford: OUP, 2009), at 202.

²¹ S Trombley, see note 9 above, at 651 (noting that fanvids may comment on or critique the source material in some way).

²² C Doctorow, *Context: Further Selected Essays on Productivity, Creativity, Parenting, and Politics in the 21st Century* (San Francisco: Tachyon, 2011), at 33–34 (arguing that copyright law gives more protection to critics than to fans of creative works).

²³ *Copyright Act 1976*, s 107.

²⁴ M Chatelain, ‘Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine’ (2012) 15 *Tulane Journal of Technology & Intellectual Property* 199–217; P McKay, see note 2 above; R Stroude, see note 9 above; S Siskind, ‘Crossing the Fair Use Line: The Demise and Revival of the Harry Potter Lexicon and Its Implications for the Fair Use Doctrine in the Real World and On the Internet’ (2009–2010) 27 *Cardozo Arts & Entertainment Law Journal* 291–311; S Trombley, see note 9 above; A Chander and M Sunder, see note 9 above; L Stendell, ‘Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction’ (2005) 58 *SMU Law Review* 1551–1581; C Ranon, see note 9 above; R Tushnet, see note 5 above.

2.2 Lack of Legal Precedent

The ambiguities surrounding the legal status of fan works under copyright law have been exacerbated by the lack of any case law dealing with fan works in their most typical form.²⁵ In the UK, no case comes close to doing so, and the most relevant – and still distant – parallels have to be drawn from those that deal generally with the non-textual copying of literary works²⁶ and with artistic works that share the same concepts as graphical representations of popular fictional characters.²⁷ Thus, while there is some case law dealing with issues roughly analogous to those raised by fan works, it does not go far enough to enable a reasonably certain assessment of how fan works would be treated under the copyright law of the UK.

In the US, the case of *Warner Bros Entertainment Ltd v RDR Books* ('*Warner Bros*')²⁸ does at least address the copyright issues posed by an actual fan work.²⁹ The fan work in question was the *Harry Potter Lexicon* ("the *Lexicon*"), a website dedicated to collecting and organising information from the *Harry Potter* series of books with the aim of functioning as a central source of reference for fans. The website had been created by a fan named Steven Vander Ark, and access to it was free and unrestricted. A dispute arose when Vander Ark and RDR Books sought to publish a print version of certain portions of the website as a book. J.K. Rowling, the author of the *Harry Potter* books, and Warner Brothers, holder of the exclusive film rights to the books, arguing that the proposed print version of the *Lexicon* constituted copyright infringement and that the defence of fair use did not apply. A District Court was thus given the rare opportunity of pronouncing on both these issues. It found in favour of the plaintiffs, holding that there had been infringement as the *Lexicon* contained significant amounts either of direct quotation from the books themselves or close paraphrase of the language used in them. It further held that the *Lexicon* did not constitute fair use, notwithstanding its largely transformative nature, given the amount of protected material that had been taken, the creative nature of the original books themselves, and its potential harm to the market for companion reference works produced by Rowling herself.

The decision in *Warner Bros* thus gives some guidance as to how the principles of copyright law will, in future, be applied to fan works that are non-fictional reference guides to fictional worlds.³⁰ However, this is a fairly narrow category,³¹ and the conclusions of the court in *Warner Bros* are not easily generalisable to other types of

²⁵ The paucity of relevant case law has been noted by commentators at various points in time: P McKay, see note 2 above, at 122; M Nolan, see note 9 above, at 556; L Stendell, see note 24 above, at 1554; M McCardle, see note 4 above, at 441.

²⁶ E.g. *Baigent v Random House Group Ltd* [2007] EWCA Civ 247 (CA).

²⁷ E.g. *Mirage Studios and Others v Counter-Feat Clothing Company Limited and Another* [1991] FSR 145 (Ch).

²⁸ (2008) 575 F.Supp.2d 513 (New York District Court).

²⁹ Other analogous cases dealing with the unauthorised reuse of established fictional characters in subsequent works, though not with fan works as such, include *Suntrust v Houghton Mifflin Co* (2001) 252 F.3d 1165 (11th Circuit) and *Anderson v Stallone* (1989) 11 U.S.P.Q.2d 1161 (California District Court).

³⁰ S Siskind, see note 24 above, at 308.

³¹ This was noted by the court itself: see *Warner Bros* 575 F.Supp.2d 513, at 526.

fan works. Many of these may contain significant creative input from the fan-creator, and may neither copy extensive quotations from the works on which they are based nor function as effective substitutes for those works. It should also be noted that the catalyst for legal action in *Warner Bros* was the proposed commercialisation of the Lexicon by Vander Ark and RDR Books; prior to this, the website itself, which operated on a non-commercial basis, had been received positively by Rowling herself, her publishers, and Warner Brothers. For this reason, the facts of *Warner Bros* represent a substantial deviation from a typical case involving fan works, which are usually created and distributed on a non-commercial basis. Again, the existing case law does not enable a reasonably accurate prediction of the outcome of any future copyright cases involving more typical fan works.

2.3 *Varying Approaches of Creators and Rightholders*

The situation is not ameliorated by the range of different attitudes which the creators and rightholders of popular media properties have adopted towards fan works. A few of these may openly encourage the production of fan works,³² while some tolerate fan works provided that they are not exploited for commercial purposes.³³ Still others are strongly opposed to fan works,³⁴ while many remain silent, giving no indication as to their views. Some creators and rightholders may approve of fan works in general, but may prohibit certain types of fan works based on their content. For instance, while J.K. Rowling has stated that she is ‘flattered by genuine [*Harry Potter*] fan fiction’, she has however been ‘alarmed’ by stories about her characters that are ‘pornographic and sexually explicit’, and has, as a result, issued cease-and-desist letters to websites that publish adult-themed *Harry Potter* fan fiction.³⁵

The fact that the creator of a particular work and the party who owns the copyright in said work may well be different entities with completely opposing stances towards fan works only adds to the confusion. In 1999, a fan of *Buffy the Vampire Slayer* received a cease-and-desist letter from Twentieth Century Fox (the producer, distributor and owner of the copyright in the television series) requiring him to remove transcripts of episodes of the show from his website. This was in stark contrast to the attitude of Joss Whedon, the show’s creator, who had previously praised the fan’s work and had

³² E.g. G Rodenberry, ‘Foreword’ in S Marshak and M Culbreath (eds), *Star Trek: The New Voyages* (London: Corgi, 1978); C Doctorow, ‘In Praise of Fanfic’ (2007) available at <http://www.locusmag.com/Features/2007/05/cory-doctorow-in-praise-of-fanfic.html> (accessed 8 August 2013); C Valente, ‘On Fandom’ (2007) available at <http://catvalente.livejournal.com/349359.html> (accessed 8 August 2013).

³³ E.g. C Stross, ‘FAQ: Fanfic’ (2010) available at <http://www.antipope.org/charlie/blog-static/2010/05/faq-fanfic.html> (accessed 31 May 2013); N Gaiman, “‘I Am Prepared to Offer You a Deal if the Book Does Sell’” (2008) available at <http://journal.neilgaiman.com/2008/12/i-am-prepared-to-offer-you-deal-if-book.html> (accessed 31 May 2013); J Scalzi, ‘My Policy on Fanfic and Other Adaptations of My Work’ (2007) available at <http://whatever.scalzi.com/2007/05/25/my-policy-on-fanfic-and-other-adaptations-of-my-work/> (accessed 31 May 2013).

³⁴ E.g. G Martin, ‘Someone Is Angry on the Internet’ (2010) <http://grrm.livejournal.com/151914.html> (accessed 31 May 2013); M Nolan, see note 9 above, at 556–557 (noting Anne Rice’s strong opposition to fan fiction).

³⁵ ‘Harry Potter in the RestrictedSection’ (2002) available at <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522> (accessed 8 August 2013).

even gone so far as to autograph one of the transcripts.³⁶ Another difficulty arises when rightholders who object to fan works or certain types of fan works do not enforce their copyrights consistently, leaving fans uncertain as to the nature of their policies towards fan works.³⁷

From the fans' perspective, these varying approaches have resulted in a grey area where they are permitted to engage in some forms of creativity based on some popular cultural works, but not others.³⁸ Moreover, any such activity remains at the complete sufferance of the rightholders, whose permission is liable to be withdrawn at any time, giving fans little sense of security.

3. Norms Regulating the Production of Fan Works

It is against this background of legal uncertainty, exacerbated by the divergent attitudes of creators and rightholders, that the fan community has developed a set of norms which help to regulate the production of fan works.³⁹ In the absence of any established legal principles, these norms function as guidelines which enable fan-creators to distinguish between permissible and impermissible uses of copyright works. They may also serve to alleviate some of the concerns which creators and rightholders have expressed about the potentially negative consequences of fan works. These objections fall into three general categories. The first relates to the negative economic impact which fan works may have on the market for the original work and any authorised derivative works; the second arises from the possibility that the audience for the original work may become confused as to the identity of its creator, or may be misled into believing that the fan work originates from the same source as the original work; and the third relates to concerns that fan-creators may make use of the original work in a way that its creators and rightholders find objectionable.

Four norms can be identified as having an important role in the regulation of fan works. These are: (i) the norm of transformation; (ii) the norm of attribution; (iii) the norm against commercialisation; and (iv) the norm of integrity, or respect for the source material. The first three of these are fairly well-established in the literature, while the existence of the fourth is a matter of some debate, as we will see shortly. Although these norms have been discussed most frequently in the specific context of fan fiction, they are broadly applicable to fan works in other mediums.

³⁶ M Nolan, see note 9 above, at 557.

³⁷ C Ogbu, 'I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners' (2002–2003) 12 *Southern California Interdisciplinary Law Journal* 279–317, at 304–305 (noting Twentieth Century Fox's inconsistent issuance of cease-and-desist notices to administrators of *The Simpsons* fan websites in the mid-1990s).

³⁸ P McKay, see note 2 above, at 124.

³⁹ For commentary on the role of informal norms in regulating the production of fan works and other user-generated content, see S Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2008–2009) 157 *University of Pennsylvania Law Review* 1869–1935; E Lee, 'Warming Up to User-Generated Content' (2008) *University of Illinois Law Review* 1459–1548; C Fiesler, 'Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content' (2007–2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 729–762. See also J Rothman, 'The Questionable Use of Custom in Intellectual Property' (2007) 83 *Virginia Law Review* 1899–1982.

3.1 *The norm of transformation*

The norm of transformation perhaps best encapsulates the essential characteristic of a fan work. A fan work, by definition, cannot be a direct, unaltered copy of the original work; instead, it must be transformed in some way by the fan-creator. In other words, it must contain some element of the fan-creator's own creative input, which can be combined with material taken from the original work in order to produce something different and new.⁴⁰ A typical writer of fan fiction, for instance, does not engage in wholesale copying from her favourite books; instead, she borrows some elements from the books – usually the characters and setting – and weaves them into a plot of her own creation. It is this aspect of fan works that sets them apart from online activities that do not involve any creative input, such as file-sharing.⁴¹

For this reason, the norm of transformation corresponds closely to the first fair use factor set out in the US copyright statute, namely 'the purpose and character of the use'. This factor has been held to encompass considerations of whether a particular use of a copyright work is mere direct copying, or instead 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'.⁴² In *Campbell v Acuff-Rose Music, Inc.*,⁴³ a key case on the fair use doctrine, the Supreme Court noted that a transformative use is more likely to be regarded as a fair use, though it also acknowledged that a use need not necessarily be transformative in order to be fair.

Perhaps less obviously, the norm of transformation also corresponds to one of the factors to be taken into account when evaluating whether the use made of a work is fair for the purposes of the defence of fair dealing under the UK copyright statute. A stronger case can be made for the application of the defence if the dealing with the protected work was transformative in some way, such as where the defendant has added to or recontextualised the material taken. This is especially the case where the dealing in question is carried out for the purpose of criticism or review. An illustrative case is *Hubbard v Vosper*,⁴⁴ where the defendant had written a book that was very critical of the Church of Scientology and contained substantial quotations and extracts from the writings of its founder. In assessing whether the defendant could make out a good case for fair dealing, Lord Denning stated that:

It is impossible to define what is "fair dealing". It must be a question of degree...you must consider the use made of [the quotations and extracts]. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair.⁴⁵

⁴⁰ S Hetcher, see note 39 above, at 1881–1882; S Trombley, see note 9 above, at 665–666; R Tushnet, 'Payment in Credit: Copyright Law and Subcultural Creativity' (2007) 70 *Law & Contemporary Problems* 135–174, at 143–145; R Tushnet, see note 5 above, at 665.

⁴¹ S Hetcher, see note 39 above, at 1881.

⁴² *Campbell v Acuff-Rose Music, Inc* (1994) 510 U.S. 569 (Supreme Court), at 579.

⁴³ *Ibid.*

⁴⁴ [1972] 2 QB 84 (QB).

⁴⁵ [1972] 2 QB 84 (QB), at 94.

The transformative nature of fan works means that they are unable to serve as effective market substitutes for the works on which they are based.⁴⁶ On the contrary, fan works are often complementary to the original works, in that they cannot be fully appreciated without prior knowledge or experience of the original works themselves. Fan fiction may be set ‘in between’ the major events depicted in the original work,⁴⁷ or may take place after its official conclusion;⁴⁸ the impact of these works would be lost on readers who are unaware of the original work’s overarching structure and how these fan works are situated within that framework. Similarly, a fanvid which highlights recurring narrative themes from a film or television show is much more meaningful to a viewer who is familiar with the original work.⁴⁹

It has sometimes been argued that, although fan works may not harm the market for the original work, they may still have a negative effect on the market for any authorised derivative works, as fan works themselves are derivative in nature.⁵⁰ Fan works, however, do not necessarily fill the same market niche as that occupied by authorised derivative works, and may engage with themes and ideas that the rightholders of the original work have little interest in developing.⁵¹ For instance, slash fiction, which focuses on romantic and sexual themes, has long been a feature of the fan fiction landscape.⁵² Given its popularity, it clearly satisfies some innate desire

⁴⁶ J Lipton, see note 9 above, at 30–31; S Hetcher, see note 39 above, at 1911; S Trombley, see note 9 above, at 669–670. L Stendell, see note 24 above, at 1571.

⁴⁷ E.g. DarkyDearest, ‘Parallels’ (2007) available at <http://www.fanfiction.net/s/3664016/1/Parallels> (accessed 8 August 2013) (takes place between the fifth and sixth books in the *Harry Potter* series); Sith Lord Darth Revan, ‘The Trouble with Crystals’ (2007) available at <http://www.fanfiction.net/s/3459424/1/The-Trouble-With-Crystals> (accessed 8 August 2013) (takes place between the first and second games in the *Star Wars: Knights of the Old Republic* videogame series); analogarhythmic, ‘Calafia’ (2013) available at <http://www.fanfiction.net/s/9225750/1/Calafia> (accessed 8 August 2013) (takes place between the seventh and eighth episodes of the television series *Firefly*).

⁴⁸ E.g. Christina-Potter-09, ‘Harry Potter and the Greatest Truth’ (2007) available at <http://www.fanfiction.net/s/3678327/1/Harry-Potter-and-the-Greatest-Truth> (accessed 8 August 2013) (takes place after the last chapter, but before the epilogue, of the last book in the *Harry Potter* series); harpandsword, ‘After the End’ (2009) available at <http://www.fanfiction.net/s/4669193/1/After-The-End> (accessed 8 August 2013) (takes place after the ending of the videogame *Mass Effect*).

⁴⁹ E.g. seduffproductions, ‘The Doctor & Rose’ (2009) available at <http://www.youtube.com/watch?v=gaTGEMQ6HIQ> (accessed 8 August 2013) (*Doctor Who* fanvid highlighting the relationship between the Doctor and his companion Rose Tyler, set to Evanescence’s ‘My Immortal’); thedothatgirl, ‘If It Gives You Joy’ (2010) available at <http://www.youtube.com/watch?v=Slu2xramq6E> (accessed 8 August 2013) (fanvid celebrating the work of Joss Whedon, featuring clips taken from his various television shows, set to the titular song by David Poe).

⁵⁰ S Hetcher, see note 39 above, at 1911; R Tushnet, see note 4 above, at 670.

⁵¹ R Tushnet, see note 3 above, at 510; S Hetcher, see note 39 above, at 1911–1912; C Ranon, see note 9 above, at 425. See *Sony Corp of Amer v Universal City Studios, Inc* (1984) 464 U.S. 417 (Supreme Court), at 592 (holding that the market for potential derivative uses includes only those that the creators of the original works would in general develop or license others to develop).

⁵² For the many academic studies on slash fiction and its significance, see e.g. H Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (London: Routledge, 1992); S Green, C Jenkins and H Jenkins, ‘“Normal Female Interest in Men Bonking”: Selections from the Terra Nostra Underground and Strange Bedfellows’ in C Harris and A Alexander (eds), *Theorizing Fandom: Fans, Subculture, and Identity* (Cresskill, New Jersey: Hampton Press, 1998); M Cicioni, ‘Male Pair Bonds and Female Desire in Slash Writing’ in C Harris and A Alexander (eds), *Theorizing Fandom: Fans,*

of the fans who read and write it. Yet there have been no efforts by rightholders of mainstream media properties to tap into this market by authorising the production of derivative works featuring slash fiction.⁵³

The effect that a potentially infringing use of a copyright work may have on the market for the work is a relevant factor in evaluating whether the use is fair both under the US doctrine of fair use and the defence of fair dealing in UK copyright law: indeed, some judges and commentators have treated this as the most important factor.⁵⁴ Where a defendant's use of a copyright work does not serve as an economic substitute for the original work, this will weigh in favour of a finding of fair use or fair dealing.

3.2 *The norm of attribution*

The norm of attribution is most clearly manifested in the disclaimers routinely placed by fan-creators on their works.⁵⁵ These disclaimers take into account the interests of three parties: that of the creator or rightholder of the original work; that of the fan-creator herself; and those of other fan-creators whose works she has borrowed from. The following 'example disclaimer' for writers of fan fiction, provided by the administrators of a fan website for Disney's animated series *Gargoyles*, serves as an excellent illustration:

All the characters appearing in *Gargoyles* and *Gargoyles: The Goliath Chronicles* are copyright Buena Vista Television/The Walt Disney Company. No infringement of these copyrights is intended, and is not authorized by the copyright holder. All original characters are the property of [Enter your name here].

Subculture, and Identity (Cresskill, New Jersey: Hampton Press, 1998); C Scodari, 'Resistance Re-Examined: Gender, Fan Practices, and Science Fiction Television' (2003) 1(2) *Popular Communication: The International Journal of Media and Culture* 111; S Katyal, 'Performance, Property, and the Slashing of Gender in Fan Fiction' (2006) 14(3) *Journal of Gender, Social Policy & the Law* 461; C Tosenberger, 'Homosexuality at the Online Hogwarts: *Harry Potter* Slash Fanfiction' (2008) 36 *Children's Literature* 185.

⁵³ J Gran, 'Fan Fiction and Copyright' (1999) available at <http://www.alternateuniverses.com/judygran/copyright.html> (accessed 8 August 2013) (explaining the unlikelihood of Paramount Pictures, rightholders of the *Star Trek* series, entering into the slash business).

⁵⁴ For US cases focusing on the market effect of the use, see *Narell v Freeman* (1989) 872 F.2d 907 (9th Circuit); *Sony Corp of Amer v Universal City Studios, Inc* (1984) 464 U.S. 417 (Supreme Court). See also M Anderson, P Brown and A Cores, 'Market Substitution and Copyrights: Predicting Fair Use Case Law' (1993) 10 *University of Miami Entertainment & Sports Law Review* 33–49 (arguing that this factor accounts for most outcomes under the fair use doctrine). For a similar UK case, see *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 (CA). See also M Vitoria et al, *Laddie, Prescott and Vitoria on the Modern Law of Copyright and Designs* (London: LexisNexis Butterworths, 2011), at [21.47] (describing this as 'by far the most important factor').

⁵⁵ J Rothman, see note 39 above, at 1926; C Fiesler, see note 39 above, at 752–753; L Stendell, see note 9 above, at 1573; M Nolan, see note 9 above, at 565; R Tushnet, see note 40 above, at 154; R Tushnet, see note 5 above, at 680.

Don't forget to add other authors to the list if you're using their characters (ask for permission first).⁵⁶

The disclaimer begins with the acknowledgement that The Walt Disney Company and its subsidiary Buena Vista Television are the owners of the copyright in the original characters featured in the television series. The fan-creator thereby makes it clear that she does not assert any rights over these characters. Moreover, she also states expressly that her use of these characters is not authorised by the rightholders. After that, however, the fan-creator goes on to assert a positive claim over the new elements which she herself has added, in this case new characters not present in the original work. The disclaimer also contains a reminder to the fan-creator to give positive attribution to other fans whose creations have been used in her work.

Other disclaimers may be worded in less formal and comprehensive language than the one set out above, but their intent is the same. The use of disclaimers is not confined to fan fiction; they are also found in the context of other fan works, including fanvids,⁵⁷ fan art,⁵⁸ and videogame modifications.⁵⁹

At first glance, disclaimers appear to be of greater relevance to the laws of passing off and trade marks than copyright. Where a defendant sells goods using a sign, word, or packaging in which another trader has goodwill or which has been registered as a trade mark by another trader, it is possible for the defendant to alleviate any resulting consumer confusion through the use of a disclaimer, which may in turn allow the defendant to avoid liability for passing off⁶⁰ or trade mark infringement,⁶¹ though the mere presence of a disclaimer is by no means conclusive of such claims.⁶² The question of whether the titles, characters, and other features of popular cultural works can be protected under the laws of passing off and trade mark is an important one, as is the consequential question of whether the use of these features in a fan work would infringe upon such protection.⁶³ Given the focus of this article on copyright, however,

⁵⁶ The *Gargoyles* Fan Website, 'The Disclaimer' available at <http://fanfic.gargoyles-fans.org/rules/disclaimer.php> (accessed 31 May 2013).

⁵⁷ E.g. PalletTownChampions, 'Pokémon: The Abridged Series' (2011) available at <https://www.youtube.com/watch?v=21JpoiEHw4A&list=PL8333EC62FBD67EE7&index=1> (accessed 8 August 2013) (stating that 'the following is a non-profit fan-based parody' and that '*Pokémon* is the property of Nintendo, Game Freak, Creatures Inc, Pokemon USA, Satoshi Tajiri, and Shogakukan Productions Co).

⁵⁸ E.g. DeXmeX010, 'King's Landing – Game of Thrones (The Red Keep) (2012) available at <http://dexmex010.deviantart.com/art/King-s-Landing-Game-of-Thrones-The-Red-Keep-328234067> (accessed 8 August 2013) (stating that 'I don't own any rights to the *Game of Thrones* or the *Song of Ice and Fire* franchise and stuff').

⁵⁹ E.g. Domi, 'Kivan and Deheriana Companions for BG2 Readme' (2001) available at <http://www.gibberlings3.net/readmes/readme-kivan-new.html> (accessed 8 August 2013) (stating that 'This mod was authored by Dominique Sotto ... Kivan and Deheriana Companions for BG2 is not developed, supported, or endorsed by BioWare or Interplay/Black Isle').

⁶⁰ E.g. *Consorzio del Prosciutto di Parma v Marks & Spencer Plc and others* [1991] RPC 351 (CA).

⁶¹ E.g. *Calvin Klein Cosmetics Corp v Lenox Laboratories, Inc* (1987) 815 F.2d 500 (8th Circuit).

⁶² E.g. *Edge v Nicholls* [1911] AC 693; *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 (HL); *Arsenal Football Club Plc v Reed (No 2)* [2003] EWCA Civ 696 (CA); *Toho Co v William Morrow & Co* (1998) 33 F.Supp.2d 1206 (California District Court).

⁶³ A Schwabach, see note 9 above, at 73–74; M McCardle, see note 9 above, at 464–467.

the scope for addressing these issues is limited. For the purposes of the present discussion, it is sufficient to note that, regardless of whether the use of disclaimers would, in law, be capable of absolving a fan-creator from liability in a claim for either passing off or trade mark infringement, they do, in practice, serve to clarify any confusion which may arise in relation to the source of the original work and of any fan works.⁶⁴ Where such a disclaimer has been placed on a fan work, it is highly unlikely that its audience will be misled into believing that the fan-creator is the author of the original work on which it is based, or that the creator of the original work is responsible for the fan work.

Beyond the alleviation of confusion, insofar as these disclaimers are concerned with correctly identifying the creator of each element of a fan work, they also bear a close relation to the moral right of attribution conferred on creators of copyright works. Under the copyright statutes of the UK and the US, the moral right of attribution has both a positive and a negative dimension.⁶⁵ The creator of a copyright work is entitled to be identified as the author of that work, and, conversely, is also entitled not to be identified as the author of any work that he or she did not create. The kind of disclaimer typically placed on fan works takes into account both of these aspects. It should be noted that the availability of this right under the US copyright statute is very narrow, being confined only to creators of works of visual art. The UK copyright statute, in contrast, confers this right on all creators of literary, dramatic, musical and artistic works, and all directors of films.

Attribution is also a key element in the analysis of fair dealing under the UK copyright statute, which requires that most dealings with protected works be accompanied by 'sufficient acknowledgement' for the defence to apply.⁶⁶ 'Sufficient acknowledgement' is defined as an acknowledgement that identifies the work in question by its title or other description, and that identifies the author of the work.⁶⁷ The chosen method of acknowledgement must be capable of conveying 'to a reasonably alert member of the relevant audience that the identified person is the author'.⁶⁸ Attribution is, however, much less significant in the context of the US doctrine of fair use, as it does not fall within the scope of any of the four statutorily enumerated factors, though occasional calls have been made for its incorporation as a fifth statutory factor.⁶⁹

3.3 *The norm against commercialisation*

Within the fan community, there has traditionally been a very strong norm against fan-creators seeking to profit commercially from their works. Recently, however, the development of media platforms such as YouTube and the increasing ease of carrying

⁶⁴ R Tushnet, see note 5 above, at 680.

⁶⁵ *Copyright Act 1976*, s 106A; *Copyright, Designs and Patents Act 1988*, ss 77 and 84.

⁶⁶ *Copyright, Designs and Patents Act 1988*, ss 29(1), 30(1) and (2).

⁶⁷ *Copyright, Designs and Patents Act 1988*, s 178.

⁶⁸ *Pro Sieben Media AG v Carlton UK Television Limited* [1997] EMLR 509, at 522.

⁶⁹ G Lastowka, 'Digital Attribution: Copyright and the Right to Credit' (2007) 87 *Boston University Law Review* 41–90. Cf R Tushnet, 'Naming Rights: Attribution and Law' (2007) *Utah Law Review* 789–822.

out financial transactions online have led to greater and more diverse opportunities for fan-creators to gain some economic benefit. The extent to which individual fan-creators are able to do so without attracting censure from their respective communities appears to depend partly on the type of fan works they produce and partly on the manner in which the commercial benefit is obtained. For instance, producers of gameplay videos who obtain advertising revenue from their works by participating in YouTube's Partner Program are rarely derided for doing so. It should be noted, however, that many videogame companies have given blanket permission for players to 'monetise' their gameplay videos in this way, potentially taking such actions outside the scope of regulation by fan community norms.⁷⁰ It seems likely, however, that any profit-making activities that go beyond these boundaries, such as attempts to charge other fans directly for access to fan works, will be met with harsh criticism.

For writers of fan fiction, the norm against deriving any sort of profit from their works remains especially strong.⁷¹ For a cautionary tale, one need look no further than *Another Hope*, a *Star Wars* fan novel written, published, and released for commercial sale by fan-writer Lori Jareo without the express consent of Lucasfilm, owner of the copyright in the *Star Wars* films.⁷² This incident drew an overwhelmingly negative reaction from the fan community in general, and inspired post after derisive post on a large number of popular blogs.⁷³ A more recent controversy concerns the *Fifty Shades of Grey* trilogy of erotic romance novels by E.L. James, which began life as fan fiction based on Stephanie Meyer's *Twilight* series of novels. James' choice to publish her works commercially – after some suitable modifications to remove any obvious references to the *Twilight* series – has been criticised by a number of fans as unethical.⁷⁴

There is a pragmatic dimension to the norm against non-commercialisation. Many fan-creators believe, perhaps with some justification,⁷⁵ that the creators and

⁷⁰ For a list of these videogame producers, see 'Companies that Allow Monetization of Videos' available at <https://docs.google.com/spreadsheet/ccc?key=0Aoj0LDmpWOb0dHdQSIRFTEpPTWtPNlh2MWE2MDBDWnc#gid=0> (accessed 8 August 2013); 'Individual Games that Allow Monetization of Videos' available at <https://docs.google.com/spreadsheet/ccc?key=0Aoj0LDmpWOb0dEM3eld5TGp1WUdZNEVrYWICWF9tUmc#gid=0> (accessed 8 August 2013).

⁷¹ See also S Trombley, see note 9 above, at 661–662 (noting that creators of fanvids tend not to sell them on a commercial basis).

⁷² C Fiesler, see note 39 above, at 731.

⁷³ See e.g. J Scalzi, 'The 2006 Stupidest FanFic Writer Award Gets Retired Early' (2006) available at <http://www.scalzi.com/whatever/004162.html> (accessed 31 May 2013); R Hogan, 'I Bet She Finds Our Lack of Faith Disturbing' (2006) available at http://www.mediabistro.com/galleycat/i-bet-she-finds-our-lack-of-faith-disturbing_b1994 (accessed 31 May 2013); T Nielsen Hayden, 'Annals of Short-Lived Phenomena: *Star Wars* Fanfic on Amazon' (2006) available at <http://nielsenhayden.com/makinglight/archives/007459.html> (accessed 31 May 2013).

⁷⁴ See e.g. J Gold, 'When Does Fan Fiction Cross an Ethical Line?' (2012) available at <http://jamigold.com/2012/03/when-does-fan-fiction-cross-an-ethical-line/> (accessed 31 May 2013); S Wanenchak, 'Fifty Shades of Grey and the Ethics of Fannish Prosumption' (2012) available at <http://thesocietypages.org/cyborgology/2012/06/06/fifty-shades-of-grey-and-the-ethics-of-fannish-prosumption/> (accessed 31 May 2013).

⁷⁵ It should be noted that in the *Warner Bros* case, no legal action was taken against the creator of the *Harry Potter Lexicon* until he attempted to commercialise it.

rightholders of the original works will not take action against them provided that they do not attempt to profit commercially from their works.⁷⁶ Because of this, these deviations from the norm against non-commercialisation have been severely condemned, with some fan-creators fearing that they may draw negative attention from creators and rightholders.⁷⁷ Fan-creators may seek to emphasise the non-profit nature of their activities by prefacing their works with statements to that effect; such statements are often combined with the kind of disclaimers discussed under the previous heading.⁷⁸ A typical example from a piece *Star Wars* fan fiction reads: ‘The universe in which this story takes place was created by George Lucas. I don’t own any of the characters from *Star Wars* and am not seeking any money from this work’.⁷⁹

Whether the use made of a copyright work is for a commercial purpose is an important consideration under both the US doctrine of fair use and the defence of fair dealing in UK copyright law. In relation to fair use, commerciality is taken into account under the first statutory factor, namely ‘the purpose and character of the use’; the absence of a commercial motive on the part of the defendant may weigh significantly in favour of a finding of fair use.⁸⁰ The same reasoning is applicable in the case of fair dealing: any commercial or financial motive which a defendant may have in making use of a copyright work militates against a finding that the dealing in question is fair.⁸¹

The fact that fan works are usually created and distributed on a non-commercial basis can serve to give creators and rightholders of popular media properties additional reassurance that fan works are unlikely to have a negative economic impact on the market for their own works. Because fan works are available at no monetary cost, they do not consume any financial resources which a fan may have set aside for the purchase of popular cultural works.⁸²

3.4 *The norm of integrity*

It is submitted here that a possible fourth norm regulating the production of fan works is that of integrity, or respect for the source material. As the typical fan-creator borrows familiar elements from their favourite media properties and combines them in unfamiliar ways in order to produce a new work, this suggestion may appear to be counter-intuitive; indeed, it is acknowledged that this possible fourth norm is nowhere

⁷⁶ S Hetcher, see note 39 above, at 1885.

⁷⁷ R Stroude, see note 9 above, at 198; S Hetcher, see note 39 above, at 1885; C Fiesler, see note 39 above, at 749; R Tushnet, see note 40 above, at 142–143.

⁷⁸ M McCardle, see note 4 above, at 452.

⁷⁹ C Conway, ‘Embracing Vengeance’ available at <http://galactic-voyage.com/Fan%20Fiction/Colin%20Conway-Embracing%20Vengeance.htm> (accessed 31 May 2013).

⁸⁰ *Sony Corp of Amer v Universal City Studios, Inc* (1984) 464 U.S. 417 (Supreme Court holding that home videotaping for personal use was fair due in part to its nature as a non-commercial, non-profit activity).

⁸¹ *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch 257 (CA) (Court of Appeal finding that the copying of newspaper cuttings was not fair as it had been carried out for the defendant’s internal commercial purposes).

⁸² R Tushnet, see note 5 above, 671.

as strong or as salient as the three previously discussed. Notwithstanding this, it is still worth pointing out that, for a not insignificant segment of fan-creators and consumers of fan works, a certain degree of consistency between the fan work and the original work is seen to be an indicator of quality. In the particular context of fan fiction, a number of fans have emphasised the importance of ensuring that the personalities of established characters remain consistent with their depictions in the original work. For example, writers are advised to '[k]eep your character's traits in mind when you decide to write ... it can be a bit of a stretch for your reader, otherwise, and undermine the integrity of the story',⁸³ reminded to 'keep your characters in character',⁸⁴ and told to '[b]ase your characterizations and dialogue on the show'.⁸⁵ One reader lists 'realistic characterization neglect' as one of her 'pet peeves' about fan fiction,⁸⁶ while another reader describes the phenomenon of a character being made to act against his or her established personality as '[o]ne of the things that drives me nuts about fanfiction'.⁸⁷

To a certain extent, the norm of integrity can be linked to the same kind of concerns as those addressed by the moral right of integrity, which is conferred on creators of copyright works. The right of integrity has been defined as the right to object to any distortion, modification of, or other derogatory action in relation to the work in question, which would be prejudicial to the author's honour or reputation,⁸⁸ and is present in some form under the copyright statutes of the UK⁸⁹ and the US,⁹⁰ though in the case of the latter, it is once again confined to creators of works of visual art.

The norm of integrity takes on particular significance in light of creators' and rightholders' concerns that fan-creators may make use of the original source material in a way that is objectionable to the author, or otherwise inconsistent with his or her original vision. For some authors, this may be the strongest reason for their opposition to fan works. One example is J.K. Rowling who, as noted above, objects to *Harry Potter* fan fiction that is 'x-rated'.⁹¹ Can the norm of integrity reassure these authors that fan-creators will not use their works in ways that they find objectionable and distasteful? The answer, perhaps unfortunately, appears to be in the negative. First, as stated previously, the norm of integrity is not a strong one. Many fans continue to

⁸³ L Constantine, 'Tips for Writing Better Fan Fiction' (2009) available at <http://www.ljconstantine.com/column3.htm> (accessed 7 August 2013).

⁸⁴ S Mlawski, 'Why I'm Not Going to Read Your Fanfic' (2008) available at <http://www.overthinkingit.com/2008/09/22/why-im-not-going-to-read-your-fanfic/> (accessed 7 August 2013).

⁸⁵ J Leavell, 'How to Write Marginally Readable Fan Fiction' (2006) available at <http://littlecalamity.tripod.com/HowTo2.html> (accessed 7 August 2013).

⁸⁶ T Costa, 'Tasha's Fanfiction Pet Peeves' available at http://www.genesisawards.net/?page_id=127 (accessed 7 August 2013).

⁸⁷ Y Hikari, 'OoC: Out of Character' (2010) available at <http://www.fictionpress.com/s/2865201/1/OoC-Out-of-Character> (accessed 7 August 2013).

⁸⁸ *Berne Convention for the Protection of Literary and Artistic Works*, art 6bis.

⁸⁹ *Copyright, Designs and Patents Act*, s 80.

⁹⁰ *Copyright Act 1976*, s 106A.

⁹¹ D Waters, 'Rowling Backs Potter Fan Fiction' (2004) available at <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm> (accessed 7 August 2013).

read and write fan fiction in which characters are shown behaving in ways that fall well outside the parameters of their established characterisation. In the context of the *Harry Potter* series, this is illustrated by the existence of not one, but two, websites dedicated to adult-themed fan fiction,⁹² notwithstanding J.K. Rowling's objections and the conspicuous absence of any sexual or adult situations in the original books themselves.

Creators and rightholders, therefore, will not be able to rely solely on fan community norms to prevent fan-creators from producing works that they consider to be disrespectful of the original source material. It is not altogether clear, however, whether they would be entitled to much stronger protection under the moral rights provisions of formal copyright law. As stated previously, under the copyright law of the US, the right of integrity is afforded only to creators of works of visual art; creators of other types of works – including the literary and audiovisual works that attract the greatest fan engagement – are entitled to no such protection. While UK copyright law extends the right of integrity to authors of literary, dramatic, musical and artistic works, as well as directors of films protected by copyright, the precise scope of this right remains relatively underdeveloped. What little case law there is inclines towards a narrow interpretation of the right. For one, the language of the relevant statutory provision has been interpreted to mean that the mere fact that a work has been distorted or mutilated is not in itself actionable; a claim arises only where the distortion or mutilation prejudices the author's honour or reputation.⁹³ For another, courts have preferred to use an objective test of whether an author's work has been treated in a manner which is prejudicial to his or her honour or reputation, rather than relying on the author's own subjective view or judgment.⁹⁴ Furthermore, in at least one case, the court was unwilling to infer any prejudice to the claimant's honour or reputation, as the claimant had failed to provide evidence of either honour or reputation; in doing so, the court appears to have been influenced, at least in part, by the fact that the claimant himself – a composer of a piece of garage music – had utilised the imagery of gangsters to promote his own work.⁹⁵

Further research into the scope of the right to integrity under UK copyright law is clearly indicated, and a better understanding of the nature of the right, its aims, and its place in copyright law needs to be developed. For the purposes of the present paper, however, it is sufficient to observe that many creators may have difficulty fulfilling the current requirements for a successful claim. This is especially the case for creators who are less well-known, or whose works contain mature and sexual themes. They may be unable to provide evidence of their honour or reputation, or to show that fan

⁹² 'Restricted Section' available at <http://restrictedsection.org/> (accessed 8 August 2013); 'Restricted Section 2' available at <http://www.restrictedsection2.org/> (accessed 8 August 2013). See generally C Tosenberger, see note 52 above.

⁹³ *Pasterfield v Denham* [1999] FSR 168; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch).

⁹⁴ *Tidy v Trustees of the Natural History Museum* (unreported, 1995); *Pasterfield v Denham* [1999] FSR 168. Cf the approach taken by the Ontario High Court in *Snow v The Eaton Centre Ltd* 70 CPR 105. See also S Teilmann, 'Framing the Law: The Right of Integrity in Britain' (2005) 27(1) *European Intellectual Property Review* 19, 22 (noting the British courts' unwillingness to follow the Canadian approach in *Snow* and to find in favour of the claimants' rights of integrity).

⁹⁵ *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch).

works that deal with similar themes are in fact prejudicial. Thus, while J.K. Rowling, as a famous author of books written mainly for children and teenagers, may be able to claim that sexually explicit fan fiction infringes her right to integrity, it is difficult to see how an author like Joe Abercrombie, who has a much smaller following and who is best known for so-called ‘grimdark’⁹⁶ fantasy, in which characters are routinely subjected to various abuses, sexual and otherwise, could plausibly claim the same.⁹⁷ Creators and rightholders who wish to set express limits on the manner in which their original material can be used in fan works may need to have recourse to contractual or licence terms – an option which will be explored in the next section.

4. Fan Community Norms and the Shaping of Business Practices Within the Creative Industries

It is clear from the previous section that the norms which the fan community has developed in order to regulate its own creative practices do go a long way towards alleviating concerns which creators and rightholders may have about the negative impact of fan works. In particular, it has been explained that fan works that have been produced and distributed in accordance with these norms will rarely have a negative effect on the market for the original work and any authorised derivative works. It has also been noted that the routine use of disclaimers on fan works serves to dispel most confusion that may arise regarding the identity of the respective creators of the original work and of the fan works. However, it is conceded that these norms may not be sufficient to reassure creators and rightholders that fan-creators will not use their material in ways that they find objectionable.

Notwithstanding this last point, it is submitted that the creators and rightholders of popular media properties will be able to develop more open and participatory business models by using these norms as a basis for distinguishing between permissible and impermissible uses of their works by fan-creators. By implementing policies that explicitly allow and encourage the production of fan works within the parameters of these norms – which, it should be noted, have already been accepted by most fan-creators as being fair – creators and rightholders would be in a position to cultivate a more positive relationship with their fan base. The benefits flowing from such a relationship are substantial. Highly engaged fans are keen to introduce other members of their social circle to their favourite books, television shows, films, and so forth, thereby enlarging the audience for those works.⁹⁸ Fan works also play an important role, as they keep the original work at the forefront of the public consciousness and

⁹⁶ The term is derived from the tagline of the *Warhammer 40,000* tabletop strategy game: ‘... in the grim darkness of the far future, there is only war’.

⁹⁷ For views on ‘grimdark’ fantasy in general and the work of Joe Abercrombie in particular, see e.g. L Grin, ‘The Bankrupt Nihilism of Our Fallen Fantasists’ (2011) available at <http://www.breitbart.com/Big-Hollywood/2011/02/12/The-Bankrupt-Nihilism-of-Our-Fallen-Fantasists> (accessed 8 August 2013); The G, ‘Grimmy Grimmy Dark Dark’ (2013) available at <http://www.nerds-feather.com/2013/02/grimmy-grimmy-dark-dark.html> (accessed 8 August 2013); J Abercrombie, ‘The Value of Grit’ (2013) available at <http://www.joeabercrombie.com/2013/02/25/the-value-of-grit/> (accessed 8 August 2013); C Buhlert, ‘It’s That Time of the Year Again: Grimdark Fantasy’ (2013) available at <http://corabuhlert.com/2013/03/03/its-that-time-of-the-year-again-grimdark-fantasy/> (accessed 8 August 2013); F Meadows, ‘On Grittiness and Grimdark’ (2013) available at <http://fozmeadows.wordpress.com/2013/03/03/on-grittiness-grimdark/> (accessed 8 August 2013).

⁹⁸ L Stendell, see note 24 above, at 1561.

help to maintain interest in the work between releases of new instalments – and often even after the ‘official’ conclusion of the work.⁹⁹ Given that the promotional costs associated with building up a new media property frequently outweigh other related costs,¹⁰⁰ the proselytising activities of fans may confer a significant advantage on creators and rightholders. This strategy of encouraging fan participation would allow creators and rightholders to avoid the pitfalls commonly associated with the aggressive policing of copyrights: the risk of alienating the most devoted members of their audience, and the corresponding loss of their most lucrative market. Two such strategies that are currently being employed by different corporations, and the extent to which they have been influenced by fan community norms, will be examined in the following sections.

4.1 Videogame Producers and Player-Created Modifications

The approach taken by certain videogame developers and publishers towards player-created modifications illustrates how such fan-friendly business policies can be implemented in practice. These modifications alter or add to the content of an existing videogame, either in terms of its underlying computer code, its plotline and characters, its audiovisual assets, or any combination of these elements. Examples of videogame producers which expressly permit players to create such modifications range from independent developer Mojang (creator of *Minecraft*, a game which allows players to build structures and objects out of textured 3D cubes) to major developers and publishers such as Valve Corporation (which also operates the widely-used software distribution platform Steam), id Software, Bethesda Game Studios, Blizzard Entertainment, and Electronic Arts. In the absence of a comprehensive empirical study on the matter, it is, of course, not possible to conclude that the attitudes taken by these developers are representative of the industry as a whole. Nevertheless, it remains significant that at least several major videogame producers have seen fit to allow the creation of fan works on terms which, to a certain degree, reflect fan community norms.

In the case of videogames produced by the five major corporations identified above, the terms on which modifications can be created are set out in the end-user licence agreement (‘EULA’) which governs the use of either the relevant videogame or the software provided by the producer for modifying the videogame. While the exact terms differ from producer to producer – and occasionally from game to game – a number of common conditions can be identified. The first (and most common) stipulation is that the modification must not be distributed or otherwise used commercially. The second is the requirement that the modification carry a disclaimer which states that it is not made, endorsed, or supported by the developer or publisher of the videogame. The third is the requirement that the modification contain no obscene, abusive, hateful, racist or otherwise objectionable material.

Clear links can be traced between the first two conditions and the norm against non-commercialisation and the norm of attribution respectively. In relation to the latter,

⁹⁹ E Chua, ‘Fan Fiction and Copyright: Mutually Exclusive, Co-Existable or Something Else? Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright’ (2007) 14 *eLaw Journal* 215–230, at 227–228.

¹⁰⁰ C Ranon, see note 9 above, at 442.

these videogame producers appear to be primarily concerned with avoiding misattribution, rather than asserting any positive rights of attribution. The third condition addresses the gap between the videogame producers' perception of what constitutes appropriate, respectful use of its copyright material and players' perception of the same. Recognising that the norm of integrity does not operate to prevent players from creating modifications that are sexually explicit – indeed, it has been observed that the availability of editing tools for a videogame invariably gives rise to modifications that render its in-game characters nude¹⁰¹ – or that are offensive in some other way, these videogame producers have taken care to spell out a prohibition against such content. While the norm of transformation is not directly referred to in any of these conditions, it is reflected in the very nature of player-created modifications themselves. These modifications rework the content of an existing videogame in some way, altering and adding to it, and do not simply duplicate the videogame in question.

These videogame producers' readiness to permit player-created modifications may stem, at least in part, from their greater familiarity with the philosophies underlying open source software development; as such, their practices may not be directly translatable to other cultural industries. Nevertheless, these practices can still function as a useful guideline for other media corporations seeking to develop a more open and participatory business model without compromising their intellectual property rights.

4.2 Amazon.com's Kindle Worlds programme

The most recent initiative to legitimise and monetise the production of fan fiction was launched in June 2013, not by a media corporation as such, but by the online retailer Amazon. The programme, known as Kindle Worlds, enables fan-writers to publish works based on several existing media properties for which Amazon has obtained the relevant licences. At present, the list of media properties is still fairly limited. It includes the popular television shows *Gossip Girl*, *Pretty Little Liars* and *The Vampire Diaries*, various comic book series published by Valiant Entertainment, and, perhaps somewhat bizarrely, the works of Kurt Vonnegut; Amazon has stated that it is continuing to negotiate with other rightholders for similar licences.¹⁰² Fan fiction published through this programme is sold – currently in electronic format only – via newly-established Amazon.com Kindle Worlds store, as well as the various Kindle apps and devices. While it is as yet too early to make any sort of pronouncement on the success or failure of this initiative, it is instructive to consider the extent to which fan community norms have shaped its overall framework.

Of the four norms discussed above, an examination of the Kindle Worlds standard publishing agreement for fan-writers reveals that it is most concerned with the norm of integrity. In this case, it reinforces what has been acknowledged to be a rather weak norm with express contractual provisions requiring the fan-writer to comply with the content guidelines imposed by the rightholder of the relevant media property.¹⁰³ In all

¹⁰¹ TV Tropes, 'Video Game Perversity Potential' available at <http://tvtropes.org/pmwiki/pmwiki.php/Main/VideoGamePerversityPotential> (accessed 31 May 2013).

¹⁰² Amazon.com, 'Kindle Worlds is Growing' (2013) available at <http://phx.corporate-ir.net/phoenix.zhtml?ID=1831621&c=176060&p=irol-newsArticle> (accessed 8 August 2013).

¹⁰³ Amazon.com 'Kindle Worlds Publishing Agreement' (2013) available at <https://kindleworlds.amazon.com/faqs?topicId=A1MMH2I71OJWTR> (accessed 8 August 2013).

cases, ‘pornography or offensive depictions of graphic sexual acts’ is prohibited, as is ‘offensive content, including but not limited to racial slurs, excessively graphic or violent material, or excessive use of foul language’.¹⁰⁴ Valiant Entertainment’s content guidelines also stipulate, additionally, that the fan work ‘must present the protagonist(s), supporting character(s), and antagonist(s) in-character’.¹⁰⁵

The norm of attribution, too, can be discerned from the Kindle Worlds framework. While the standard publishing agreement does not contain any express reference to attribution, a survey of the Kindle Worlds storefront shows that, in each case, it is the writer of the fan work, and not the creator or rightholder of the original work, who is credited as its author. In addition, the ‘cover image’ of each fan work is labelled conspicuously both with the words ‘Kindle Worlds’ and the title of the media property on which it is based, indicating that it is a fan work – rather than one produced by the original creator – set in that particular fictional universe. However, fan-writers who make use of elements from works contributed by other participating fan-writers are merely ‘encouraged’ to include an acknowledgement in their work, rather than being required to do so. In this respect, it falls short of the norm of attribution as established by the fan community.

In relation to the norm of transformation, transformativeness is inherent in the very concept of fan fiction itself, as discussed above. Furthermore, Amazon.com has made it clear that it will review each story being considered for publication to ensure that it does originate from the fan-writer and has not been copied from some other source.¹⁰⁶

The norm against non-commercialisation, however, has been omitted completely. As stated previously, fan fiction published under the Kindle Worlds programme is sold commercially, and the standard publishing agreement provides that the fan-writer will receive 20% or 35% - depending on the length of the work – of the net revenue from each copy sold or licensed.¹⁰⁷ It is this departure from the norms of the fan community that various commentators, including academics, professional authors, and readers and writers of fan fiction, have cited as being the most contentious aspect of the Kindle Worlds programme. Some are concerned that the commercialisation of fan fiction might disrupt fan communities’ established gift economy;¹⁰⁸ others look askance at the extensive rights granted by the standard publishing agreement to both Amazon and the rightholders of the licensed media properties, which includes an exclusive licence to make unrestricted use of any new elements in the published fan-work without additional compensation to the author.¹⁰⁹ Comparisons have also been

¹⁰⁴ Amazon.com, ‘Kindle Worlds for Authors’ (2013) available at <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1001197431> (accessed 8 August 2013).

¹⁰⁵ Amazon.com, see note 104 above.

¹⁰⁶ Amazon.com, ‘Content Guidelines and Review Process’ (2013) available at <https://kindleworlds.amazon.com/faqs?topicId=A2W2IF5J2WZDKT> (accessed 8 August 2013).

¹⁰⁷ Amazon.com, see note 103 above.

¹⁰⁸ A Robertson, ‘How Amazon’s Commercial Fan Fiction Misses the Point’ (2013) available at <http://www.theverge.com/2013/6/4/4392572/does-amazon-kindle-worlds-miss-the-point-of-fanfiction> (accessed 8 August 2013). Cf Inverarity, ‘Money for Nothing and Your Fics for Free’ (2013) available at <http://inverarity.livejournal.com/203028.html?thread=1379604> (accessed 8 August 2013).

¹⁰⁹ M Lo, ‘Amazon Tries to Monetize Fan Fiction; I Freak Out’ (2013) available at http://www.huffingtonpost.com/malinda-lo/post_4849_b_3320780.html (accessed 8 August 2013); J Scalzi, ‘Amazon’s Kindle Worlds: Instant Thoughts’ (2013) available at

drawn between Kindle Worlds and FanLib, a short-lived, for-profit fan fiction archive that was launched in 2007, although it has also been pointed out that the Kindle Worlds programme avoids the worst of FanLib's missteps.¹¹⁰

5. Fan Community Norms and the Shaping of Legal Principles

The growth of the Internet and advances in media production technologies have led to the democratisation of cultural production. The dramatic expansion in the number and reach of fan works is part of this phenomenon. Increasing numbers of internet and technology users are able to produce and publish a wide range of creative works even without recourse to the traditional avenues of media production. This appears to be generally regarded by commentators as a desirable state of affairs. It increases the number and diversity of voices and viewpoints present in the cultural marketplace, and affords much wider opportunities for individual self-expression. From a copyright law perspective, this is a positive outcome, as one of copyright's oft-cited aims is to incentivise the production of creative works.

This being the case, simply leaving it up to individual media corporations or even entire sectors of the creative industries to implement fan-friendly business practices may not be sufficient to guarantee an environment where fans' ability to engage in the production of creative works is not inhibited or stifled. Notwithstanding the benefits of adopting such business practices, some corporations may still refuse to do so, leaving their fan base in the same plight. Even corporations that have implemented fan-friendly policies are still entitled to withdraw them at any point, meaning that fan-creators, as before, remain completely in their power. Furthermore, it is doubtful whether creators and rightholders are, as a matter of copyright law, entitled to control *all* uses which fan-creators seek to make of the source material. As stated in section 2, it remains unclear whether, and under what circumstances, fan works will amount to infringement. It is very possible that at least *some* uses of copyright material for the purpose of creating fan works may not be infringement at all, such as where the part used is very small, or where it has been reworked extensively. If this is the case, a framework which allows creators and rightholders to impose conditions on the production and distribution of all fan works, including those that might not be infringing in the first place, would appear to be unjustified. If a fan work does not infringe the copyright in its source material, there is surely no good ground upon which the creator or rightholder of that source material can insist on dictating the terms upon which the fan work is to be distributed.

To ensure the freedom of fan-creators to act without being haunted by the spectre of legal action, therefore, some degree of legal reform may be necessary. As with the implementation of fan-friendly business models, the norms which the fan community has developed in order to regulate the production of fan works provide a useful

<http://whatever.scalzi.com/2013/05/22/amazons-kindle-worlds-instant-thoughts/> (accessed 8 August 2013).

¹¹⁰ L Rothman, 'Amazon Steps into the Cloistered World of Super-Fandom' (2013) available at <http://entertainment.time.com/2013/06/27/amazon-steps-into-the-cloistered-world-of-super-fandom/> (accessed 8 August 2013) (quoting Kristen Murphy, president of the Organization for Transformative Works, and Henry Jenkins, media scholar).

starting point for such reform, especially as these norms already reflect certain values and principles that are present in the copyright laws of both the US and the UK.¹¹¹

5.1 Accommodating Fan Works under the US Fair Use Doctrine

In the US, suggestions for copyright reform to accommodate fan works have, unsurprisingly, revolved around the doctrine of fair use. One suggestion that has been made is the creation of a categorical fair use exception for all fan works that have been produced and distributed in accordance with the norms of the fan community.¹¹² This has the obvious benefit of affording certainty to fan-creators, as their activities would be expressly recognised as permitted fair uses. It has also been suggested that ‘non-commercial, transformative use’ should be added to the preamble of the fair use provision, which lists examples of works that Congress intends to be fair use.¹¹³ This would have the similar effect of clarifying the legal position in relation to such works.

Other commentators have argued for a reinterpretation of the four statutory fair use factors, with the weight given to each factor to be adjusted so as to accommodate the vast majority of fan works.¹¹⁴ As the analysis in section 3 indicates, the first and fourth factors, namely ‘the purpose and character of the use’ and ‘the effect of the use upon the potential market for or value of the copyrighted work’ respectively, are likely to weigh in favour of fan-creators who abide by their community norms. The second and third factors, however, present some difficulty in the context of fan works. The second statutory factor looks at ‘the nature of the copyrighted work’, with more protection – and a correspondingly lower likelihood of finding fair use – being accorded to works that go to the core of copyright law, such as works of fiction or fantasy, compared to factual works.¹¹⁵ Given the nature of the popular media properties that tend to inspire the production of fan works, this factor will almost always weigh in favour of the creators and rightholders.¹¹⁶ It has therefore been suggested that this factor should be given relatively little weight in a fair use analysis, where the subject of that analysis is a fan work.¹¹⁷

The third fair use factor looks at ‘the amount and substantiality of the portion used in relation to the copyrighted work’. This factor is difficult to apply to a category as broad as fan works in general: some may borrow extensively from the original work, while others may use very little of it. Given the indeterminate nature of this factor in the context of fan works, it has been suggested that the third factor, too, should be

¹¹¹ Cf J Rothman, see note 39 above (expressing skepticism about the merit of using norms as a way of generating substantive intellectual property law).

¹¹² C Ranon, see note 9 above, at 422–423.

¹¹³ P McKay, see note 2 above, at 139–140.

¹¹⁴ L Stendell, see note 24 above, at 1566–1572.

¹¹⁵ *Harper & Row, Publishers, Inc v Nation Enterprises* (1985) 471 U.S. 539 (Supreme Court), at 563.

¹¹⁶ L Stendell, see note 25 above, at 1568–1569.

¹¹⁷ R Tushnet, see note 5 above, at 676–677.

given relatively little weight in an analysis of fair use,¹¹⁸ particularly where the first and fourth factors already weigh heavily in favour of a finding of fair use.¹¹⁹

To alleviate creators' and rightholders' concerns regarding potential consumer confusion, as well as the possibility that their works may be used by fan-creators in ways that they find objectionable, it may be necessary to counterbalance the greater freedom given to fan-creators by enlarging the scope of the moral rights of attribution and integrity, so as to make them available to all creators of original works of authorship and not only creators of works of visual art. Creators would then be entitled to identification as the authors of their respective original works, and would have a safeguard against being mis-identified as the authors of any associated fan works.¹²⁰ In addition, creators whose works have genuinely been distorted, mutilated or modified in ways that would be prejudicial to their honour or reputation – and not merely reworked in ways that they find distasteful – would also have recourse to legal remedies pursuant to the moral right of integrity.

5.2 Accommodating Fan Works under the UK Defence of Fair Dealing

Similar proposals for reform can be made in relation to the defence of fair dealing under UK copyright law. As described in section 3, several of the key factors that are considered in determining whether a particular dealing of a copyright work is 'fair' are likely to weigh in favour of fan-creators whose works have been produced and distributed in accordance with fan community norms. These factors include, most notably, the use made of the protected work – in particular the extent to which the use is transformative – the non-commercial nature of the use, and the impact of the use on the market for the work. Furthermore, fan-creators' routine use of disclaimers on their works, which is a prominent manifestation of the norm of attribution, is largely compliant with the requirement that 'sufficient acknowledgement' be given to the copyright work used and its author for the defence of fair dealing to apply in most cases.

In view of this, the best solution would be to introduce into the copyright statute, with minimum disruption to its overall structure, a new fair dealing exception – namely, the use of a copyright work for the purpose of creating transformative works. This was one of the recommendations put forward in the *Gowers Review of Intellectual Property*,¹²¹ which highlighted the fact that transformative works can create new value and new markets without compromising the commercial interests of the creators and rightholders of the original works.¹²² However, this recommendation was not taken forward into the subsequent consultation carried out by the Intellectual Property Office, and appears unlikely to be implemented in the near future. A related recommendation, which the government has stated its intention to implement, is a

¹¹⁸ L Stendell, see note 24 above, at 1569.

¹¹⁹ R Tushnet, see note 5 above, at 678.

¹²⁰ L Stendell, see note 24 above, at 1578 (suggesting that a requirement to include disclaimers on fan works could help eliminate any possible confusion between authorised derivative works and fan works).

¹²¹ A Gowers, "Gowers Review of Intellectual Property" (2006) available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (accessed 12 August 2013).

¹²² *Ibid.*, 67–68.

new fair dealing exception for parody, caricature and pastiche. It is unclear, however, whether such an exception would cover all or even most types of fan works. As previously observed, many fan-creations may be uncritical homages or reworkings of the source material rather than parodies, and it is difficult to see how these could fall within the definition of ‘parody’ as the term is commonly understood.¹²³

6. Conclusion

In the absence of firm legal principles regulating the production of fan works, fan communities have come to rely on informal norms to help them navigate the theoretically boundless creative space resulting from the advancement of digital technologies. In the main, these norms are capable of alleviating most of the concerns expressed by creators and rightholders of popular media properties regarding the potentially negative effects of fan works. For this reason, it has been suggested that these norms be adopted by creators and rightholders as the baseline for a more open and participatory business model that encourages fan creativity. Furthermore, as these norms already reflect many of the values and principles inherent in the copyright laws of both the UK and the US, they could also serve as a basis for legal reform, allowing the doctrine of fair use and the defence of fair dealing to be modified so as to be capable of accommodating transformative works in general and fan works in particular. This would, in turn, lead to a greater diversity of voices and viewpoints in the cultural marketplace, enriching it immeasurably, and providing individuals with greater opportunities for creative self-expression.

¹²³ D Mendis and M Kretschmer, “The Treatment of Parodies under Copyright Law in Several Jurisdictions: A Comparative Review of the Underlying Principles” (2013) available at <http://www.ipo.gov.uk/ipresearch-parody-report2-150313.pdf> (accessed 12 August 2013), 47 (identifying ‘humorous or critical intent’ as one of the criteria developed by legislators and courts for assessing whether parodic uses of copyright are permitted).