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Intellectual Property Issues of Fan Fiction

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Abstract

This thesis investigates fan fiction's intellectual property issues, focusing on its legal status, copyright implications, and potential regulatory frameworks. The research explores the pathways for protecting the rights of original authors and fan fiction creators while fostering creative expression. Key topics include the definition and copyrightability of fan fiction, its potential for copyright infringement, and the application of fair use and licensing schemes. The thesis also examines the role of moral rights under the Berne Convention and the impact of antitrust law on intellectual property protection. By analysing legal precedents and case studies from different jurisdictions, this research recommends establishing a balanced approach to regulating fan fiction that protects original works and encourages creative contributions.

Keywords: fan fiction, copyright, fair use, derivative works, moral rights, licensing, intellectual property, antitrust law

Abbreviations

EU	European Union
The US	The United States
The UK	The United Kingdom
WIPO	World Intellectual Property Organisation

1 Introduction

1.1 Background

The concept of fan fiction has existed for several decades, with its history tracing back to the 19th century or, even earlier, to the Shakespearean era. In Asia, fan fiction is commonly referred to as ‘doujinshi’ or ‘doujin works’. It is common knowledge in China that the term ‘doujin’ originally appeared in the ancient Chinese text *The I Ching* (Book of Changes), referring to a hexagram called ‘Tongren’, which implies ‘seeking similarity among differences and collaborating with others’.¹ In modern Chinese, during the New Culture Movement, the renowned writer Lu Xun used the term ‘tongren publication’ to describe the magazine *Yusi* founded by himself and his friends, meaning ‘non-commercial, self-written and self-published publications’.² However, the rise of doujin culture in Asia is primarily associated with anime and manga culture. In Japan, ‘doujin’ initially meant ‘like-minded individuals’, and ‘doujin works’ refer to creations shared among like-minded individuals.

Fan fiction is generally defined as content generated by users and/or fans based on existing literary works, often as non-commercial fan entertainment activities.³ Until the early 21st century, issues regarding the copyright of fan fiction began to emerge, highlighted by events such as *the Pokémon doujinshi incident*, *the Heartbeat Memories adult-oriented derivative animation incident*, and *the Doraemon final episode incident*.

The Pokémon Doujinshi Incident⁴: Nintendo received a report and subsequently sued a female doujinshi author who had distributed only around 100 copies of her work. This case, a criminal lawsuit involving police intervention, is scarce in the history of doujin culture.

The Tokimeki Memorial Adult Parody Animation Incident⁵: An entertainment magazine reported that an adult parody animation of Tokimeki Memorial circulated through doujin channels, sparking fan outrage. Konami sued the creator, leading to a civil compensation settlement.

The Doraemon Final Episode Incident⁶: A fan-created final episode of Doraemon was widely circulated online, causing many to believe it was the official ending. Shogakukan had to intervene,

¹ Baynes, C.F. et al. (1968) *The I ching: Or Book of changes*. London: Routledge & Kegan Paul.

² Xue Linrong, ‘The Origin and Development of Yusi’(Literature and history, 5 Sept. 2008), <web.archive.org/web/20100523160402/www.rmzxb.com.cn/wh/ws/t20080905_208718.htm> accessed 03 June 2024).

³ Bailey Gribben, ‘Fanfiction: A legal battle of creativity’, (Reporter, 5 Feb. 2016), <reporter.rit.edu/views/fanfiction-legal-battle-creativity> accessed 03 June 2024.

⁴ 4 Feb. 1999, simple procedure, no record, the Kyoto District Court.

⁵ Heisei10(wa)15575, the Tokyo District Court.

⁶ 5 Jun. 2007, settlement, no record.

resulting in a settlement that included returning profits, destroying remaining copies, and halting online distribution.

As a product of this grey area, fan fiction is not explicitly regulated by law, relying primarily on self-regulation within the community. However, the drawbacks of community self-regulation are evident, including opportunistic doujin sellers and monopolistic large-scale societies, which can sometimes escalate to collective vigilantism. To address these issues, it is necessary to understand the legal framework surrounding fan fiction from the perspectives of copyright, fair use, and derivative works to explore avenues for protection and avoid potential legal disputes.

1.2 Purpose and research questions

This thesis aims to explore fan fiction's intellectual property status, the pathways for protecting the rights and interests of intellectual property owners, and mechanisms for avoiding and resolving disputes. To achieve this research objective, this thesis will first examine critical components of intellectual property law relevant to fan fiction, such as copyright, fair use, and derivative works. By combining legal precedents and case studies from different jurisdictions, the thesis will investigate the rights held by fan fiction creators, how these rights interact with those of the original authors, and the responsibilities of fan fiction creators in ensuring non-infringement of the intellectual property rights of the original authors.

1.3 Delimitations

The intellectual property issues surrounding fan fiction may extend beyond copyright law to trademark law. For instance, in developing derivative works based on the *Harry Potter* series, author J.K. Rowling entered into agreements with Warner Bros., granting them permission for the film adaptation and commercialisation of the *Harry Potter* series. In 2007, Warner Bros. opened a theme park based on the *Harry Potter* franchise and licensed Electronic Arts to develop *Harry Potter*-themed games. Companies like Mattel and LEGO also acquired licensing rights for *Harry Potter*-themed toys and stationery at prices reaching tens of millions of dollars. Today, *Harry Potter* is not just a literary work but a brand encompassing a range of products, including films, games, clothing, toys, and theme parks.

However, fair use under trademark law differs significantly from that under copyright law. According to Recital (21) of Regulation (EU) 2017/2001, fair use includes using a third party's name, descriptive or non-distinctive general signs, or indications. Moreover, as long as it is following honest practices, third parties may use EU trademarks to identify or refer to the owner's goods or services for purposes such as artistic expression or to draw consumers' attention to reselling

genuine goods initially sold by the owner or with the owner's consent, which should be considered fair. Similar provisions exist in the Lanham Act in the US and trademark laws in Japan. Nominative fair use is particularly relevant to fan fiction, as fan fiction authors often use trademarked names, settings, etc., to identify characters, story backgrounds, and other original content, thus meeting the three requirements for nominative fair use. Therefore, trademark law is less likely to conflict with fan fiction, and hence, this paper will primarily focus on copyright law.

1.4 Method and materials

This thesis employs a qualitative methodology, primarily relying on doctrinal legal research. This approach involves a detailed analysis of legal texts, statutes, case law, and academic literature to understand the legal framework governing fan fiction. The research includes comparative analysis by examining different jurisdictions' legal responses to fan fiction, particularly focusing on the United States and the European Union. Case studies and judicial decisions illustrate how courts have interpreted and applied relevant laws to fan fiction.

The primary legal sources, including statutes, case law, and regulations, provide the foundational legal framework for analysing fan fiction. Statutes such as 17 USC § 106 and the Berne Convention outline the rights of copyright holders, including reproduction, distribution, and derivative works. The Directive 2001/29/EC further defines these rights within the context of the European Union. Key cases like *Castle Rock Entertainment, Inc. v. Carol Publishing Group* and *Warner Bros. Entertainment Inc. v. RDR Books* illustrate how courts interpret and enforce these laws concerning fan fiction.

Secondary sources offer critical insights and interpretations of the primary legal materials. Legal encyclopedias and journals discuss copyright law, fair use, and derivative works. Scholarly articles, such as those by Jacqueline D. Lipton and Rebecca Tushnet, offer specific analyses of fan fiction's legal challenges and propose frameworks for balancing the interests of original authors and fan fiction creators. These sources are essential for understanding fan fiction's broader legal and cultural implications.

By integrating these sources, the thesis aims to provide a comprehensive legal analysis of fan fiction, offering practical recommendations for its regulation while promoting creative expression within legal boundaries.

1.5 Outline

This thesis is divided into five parts. The first part elucidates fan fiction's historical development and cultural significance, discussing major incidents involving fan fiction and their legal consequences. The second part provides a detailed analysis of fan fiction and copyright, considering its legal definitions and standards and examining how fan fiction can lead to copyright infringement, focusing on originality, reproduction rights, derivative works, distribution rights, and fair use. The third part explores the legal status of fan fiction, discussing the potential for regulating unlicensed commercial fan fiction; it analyses the application and effectiveness of the fair use defence in fan fiction cases; it investigates the impact of Article 6bis of the Berne Convention on fan fiction, particularly concerning moral rights; and it evaluates the drawbacks of implementing licensing schemes for fan fiction. The fourth part discusses the role of antitrust law in supplementing intellectual property protection and addresses the limitations of applying antitrust law to intellectual property disputes involving fan fiction. The fifth part summarises the main findings of the analysis, emphasises the necessity of legislative clarity for properly regulating fan fiction, and offers recommendations for establishing a balance between protecting original works and promoting creative expression in fan fiction.

2 Fan fiction and copyright

2.1 Copyrightability of fan fiction

The book *A Companion to Media Fandom and Fan Studies*, edited by Paul Booth, offers a comprehensive examination of fan activities, including fan fiction, which is defined as stories created by fans using characters, settings, and plots from original works.⁷ This indicates that fan fiction often aligns with the standards of derivative works. Many countries, including the EU, the US, and China, have signed the Berne Convention for the Protection of Literary and Artistic Works. Article 2 of the Berne Convention stipulates the types of works protected by copyright law and the standards for protection:

- (1) Originality and Creativity: Works must be independently created by the author and exhibit a certain degree of creativity. They should not be copied from other sources.
- (2) Fixation: Works must be fixed in a tangible medium of expression.
- (3) Expression: Works must be expressions of ideas, not the ideas themselves. Copyright protects the specific way ideas are expressed, not the ideas, concepts, principles, or discoveries.
- (4) Minimum Creative Threshold: Works must meet a minimal level of creativity. This does not require high creativity but must include some creative expression.
- (5) While the term ‘derivative works’ is not explicitly used, the Berne Convention also sets out the standards for protecting derivative works, stating that ‘translations, adaptations, arrangements, and other alterations of literary or artistic works shall be protected as original works without prejudice to the copyright of the original work’.

Building on this, Dr. Jacqueline D. Lipton proposed five elements to determine fan fiction:

- (1) Physical or Form: The work must have a form that can be reproduced.
- (2) Recognisable Relation: There must be an existing work with which it is reasonably associated, making the connection apparent upon reading.
- (3) Non-Professional Creation: The work is not produced as a professional writing project.
- (4) Exploration and Extension: The purpose is to delve into and extend the characters and plots of the original work.

⁷ Booth, P. (2023) *A companion to Media Fandom and Fan Studies*. Chichester: Wiley Blackwell.

- (5) Original Expression: The work incorporates the author's unique expression or ideas rather than merely copying the original work.

2.2 Copyright infringement may be raised by fan fiction

2.2.1 Originality of fan fiction

The characteristics of fan fiction make it more likely to cause complex copyright disputes. Firstly, fan fiction often uses characters, settings, and plots from copyrighted works without permission, which can constitute infringement. Additionally, fan fiction is inherently derivative, and most legal systems, such as the Commission Implementing Decision (EU) 2017/863 and 17 USC § 106, require authorisation from the copyright holder to create derivative works. Directive 2001/29/EC Article 2 also mandates that member states grant exclusive rights to authorise or prohibit the reproduction of works. Furthermore, while much fan fiction is non-commercial, its commercialisation through advertising or group sales can impact the original work's market, leading to more severe copyright violations.

From different perspectives, fan fiction can be classified in various ways. Still, legally, it is best distinguished by its degree of relation to the original work, dividing fan fiction into derivative and non-derivative categories. Due to their differing reliance on the original work, the legal relationships also vary. Non-derivative fan fiction exhibits higher originality and can usually be considered a new work reflecting the fan author's unique ideas. For example, 'Fifty Shades of Grey' originally began as a fan fiction of 'Twilight', titled 'Master of the Universe'.⁸ In August 2009, E. L. James published it on Fanfiction.net under the pen name 'Snowqueens Icedragon'. To avoid copyright infringement, when planning to publish this fan fiction with The Writer's Coffee Shop, an independent Australian publisher, James removed copyrighted elements such as the original characters' names and settings from 'Twilight' and renamed it 'Fifty Shades of Grey'. Although it originated as fan fiction, the author created new cultural value by infusing her own thought processes, habits, and patterns into the details, thereby demonstrating originality. Despite overlapping characters, settings, and environments with the original work, modifications to these elements before publication did not affect the work's originality. This substantive distinction separates the work from the original, and it has achieved significant commercial success without leading to any lawsuits against E. L. James.

Furthermore, from legal norms and the aforementioned judicial practices, it can be inferred that the originality of fan fiction is generally not uniquely judged. Two points need attention:

⁸ Jennifer Kopp, 'Is Fanfiction Legal?' NYU Journal of Intellectual Property & Entertainment Law, Apr 28, 2021.

Copyright law's originality requirement differs from patent law's novelty and creativity demands. Patent law requires that the work not belong to prior art, meaning no identical invention has been publicly disclosed before the application. Copyright law does not exclude similarities between works. It does not involve specialists assessing creativity as long as the work is not a direct copy but reflects some unique creative output by the author.

The French Intellectual Property Code, based on Article 2 of the Berne Convention and Article 1 of Directive 2001/29/EC, clearly states that copyright protects all creations of the mind, regardless of their literary style, mode of expression, or academic level. Thus, a work's originality is independent of its literary value, artistic level, or social evaluation. The value of a work is not judged by its progressiveness. Legally and practically, establishing a standard for the creativity of artistic works is impractical due to differences in individual aesthetics and artistic concepts. The standard for determining copyright infringement is 'access + substantial similarity'. In the same creative field, fan fiction authors and original works are presumed to have access unless evidence to the contrary is provided, as fan fiction creators are typically enthusiasts of the original work. Consequently, the focus remains on substantial similarity. Therefore, the 'idea-expression dichotomy' is often used in practice, recognising that copyright protects the creator's expression rather than the idea itself. This provides a reference baseline for the originality requirement in judicial practice.

2.2.2 Fan fiction and reproduction right

According to the basic rules of copyright law, the exclusive rights held by the copyright owner include the right to reproduce the work, prepare derivative works based on the original, and distribute copies to the public through sale or other transfer of ownership or through rental, lease, or lending.

17 USC § 106 (United States): Grants copyright holders the exclusive right to reproduce, distribute, and create derivative works from their original creations.

Directive 2001/29/EC Article 2 (European Union): Grants authors the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.⁹

Fan fiction typically involves reproducing key elements from an original work, which can directly implicate the copyright holder's exclusive rights.

Fan fiction often directly copies characters, settings, and specific plot elements from the original work. This constitutes a reproduction of the copyrighted material, as these elements are central to the original's protected content.

⁹ Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Law and Practice* (2th ed., Oxford University Press, 2018).

As derivative works, fan fiction is based on pre-existing characters and storylines, extending and transforming the original work. However, this transformation must respect the boundaries of the original work's exclusive rights.

In *the Castle Rock Entertainment, Inc. v. Carol Publishing Group* case¹⁰, the court found that a trivia book based on 'Seinfeld' constituted infringement because it reproduced substantial parts of the original show's dialogue and plot. This case demonstrates that courts often analyse whether fan fiction has reproduced a substantial part of the original work in a recognisable form. The extent and significance of the reproduced content play a crucial role in determining infringement.

While reproduction is a key concern, fan fiction may sometimes be defended under the fair use doctrine if it sufficiently transforms the original work. Courts evaluate transformative use based on whether the new work adds new expression, meaning, or message to the original, rather than merely copying it.

Another critical factor is whether the reproduction in fan fiction affects the market for the original work. If fan fiction substitutes for or competes with the original work or its licensed derivatives, it is more likely to be deemed infringing.

Fan fiction inherently involves the reproduction of protected elements from original works, making it susceptible to claims of copyright infringement. The balance between permissible transformative use and infringement depends on factors such as the extent of reproduction, the purpose and character of the use, and its impact on the market for the original work. While legal frameworks provide guidelines, the treatment of fan fiction often hinges on judicial interpretation and the specific circumstances of each case.

2.2.3 Fan fiction as derivative works

As previously mentioned, according to the copyright laws of most countries and regions, derivative works are those based on or derived from one or more existing works. This is clearly defined in the following laws:

17 USC § 101 (United States): Defines derivative works to include translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, sound recordings, art

¹⁰ 150 F.3d 132., United States Court of Appeals for the Second Circuit.

reproductions, abridgments, condensations, or any other form in which a work may be recast, transformed, or adapted.¹¹

Berne Convention (Article 2): Stipulates that derivative works are protected as original works without prejudice to the copyright of the original work.

Fan fiction often utilises characters, settings, and plots from the original work, directly building upon the copyrighted elements of that source material. This use of pre-existing elements places fan fiction squarely within the realm of derivative works as defined by copyright law. However, for fan fiction to be considered a legitimate derivative work, it must exhibit a certain level of originality and transformation, not merely copying. While it borrows elements from the original, it must also incorporate new, creative elements that reflect the fan author's unique expression.

Although much fan fiction is non-commercial, the distinction between commercial and non-commercial use can affect the degree of legal scrutiny and the likelihood of copyright infringement claims. Non-commercial fan fiction may sometimes be tolerated by copyright holders, while commercial fan fiction is more likely to face legal challenges. This typically depends on the copyright holder's response to derivative works, which can vary. Some may issue takedown notices or pursue legal action, while others might adopt more lenient approaches, recognising the cultural and community value of fan-created works. For instance, some companies actively encourage fan fiction as a form of engagement and free promotion as long as it remains non-commercial.

Thus, fan fiction must balance paying homage to the original work and introducing sufficient originality to avoid infringement. While legal frameworks provide guidelines, fan fiction treatment often hinges on the copyright holder's policies and the cultural norms of the fan community.

2.2.4 Fan fiction and distribution right

Another exclusive right held by copyright owners is the right of distribution, which includes distributing copies of the work to the public by sale or other transfer of ownership or by rental, lease, or lending.

17 USC § 106(3) (United States): Grants the copyright owner the exclusive right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

¹¹ Authors, Attribution, and Integrity: Examining Moral Rights in the United States (A Report of the Register of Copyrights), (2019).

Directive 2001/29/EC Article 4 (European Union): Ensures that authors have the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.¹²

Fan fiction involves not only the creation but also the dissemination of new stories derived from original works, often sharing these works with others (typically via the internet), which implicates the copyright holder's distribution rights:

Posting fan fiction on websites, forums, or social media involves distributing copies of the work to the public. This can include direct downloads, viewing online, or sharing through various digital platforms. Such distribution, if unauthorised, infringes on the copyright holder's exclusive right to control how their work is disseminated.

Distributing printed copies of fan fiction at conventions or other means also infringes on the distribution rights. Even if these copies are distributed for free, the act of distribution without permission constitutes an infringement.

While much fan fiction is shared non-commercially, commercial distribution significantly heightens the likelihood of legal action. Selling fan fiction without the original author's permission directly contravenes the copyright holder's right to authorise or prohibit distribution and can lead to substantial legal consequences.

In *Warner Bros. Entertainment Inc. v. RDR Books*¹³, the court found that an unauthorised *Harry Potter* lexicon constituted copyright infringement partly because of its distribution.¹⁴ This case highlights that distribution is a critical factor in copyright disputes involving fan fiction, regardless of whether it is for profit.

Additionally, the impact of distributing fan fiction on the original work's market is a key factor. If fan fiction competes with or substitutes the original work or its licensed derivatives, it is more likely to be deemed infringing. However, some copyright holders may tolerate or even encourage non-commercial distribution as a free promotion.

Fan fiction inherently involves the distribution of works derived from original copyrighted material, raising significant legal issues. The balance between

¹² Hugenholtz, B. 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (2006) rep.

¹³ 575 F.Supp.2d 513 (SDNY 2008), United States District Court for the Southern District of New York.

¹⁴ Henry H. Perritt Jr., 'Cut in Tiny Pieces: Ensuring That Fragmented Ownership Does Not Chill Creativity', 14 Vand. J. Ent. & Tech. L. 1(2011).

permissible transformative use and infringement depends on the nature of the distribution, the purpose of the work, and its impact on the original work's market. While legal frameworks provide guidelines, the treatment of fan fiction often depends on specific circumstances and the copyright holder's stance on fan-created content.

2.2.5 Fan fiction and fair use

The fair use doctrine allows limited use of copyrighted materials without permission under specific conditions, balancing copyright owners' interests with the public's interest in freely using creative works. This principle is codified in the United States under:

- 17 USC § 106(3) (United States): (1)the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2)the nature of the copyrighted work;
- (3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4)the effect of the use upon the potential market for or value of the copyrighted work.

Fan fiction's use of original elements and its characteristics often resides in a grey area. Much fan fiction is non-commercial and could be transformative, providing new interpretations or extensions of original works. Courts tend to be more lenient with non-commercial and highly transformative uses, which could favour fan fiction under this factor. However, not all fan fiction is transformative; some closely imitate the original without adding new insights.

Fan fiction usually involves using highly creative works like novels, movies, and TV shows, which receive strong protection. This involves using characters, settings, and plots from these works, which could negatively affect fair use claims, especially when significant portions of the original work are used.

Fan fiction generally uses significant portions of the original works, including main characters and key settings. If fan fiction reproduces most of the original content, this factor impacts fair use. However, transformative fan fiction that uses minimal elements or recontextualises them might be more favoured.

In *Campbell v. Acuff-Rose Music, Inc.*¹⁵, the Supreme Court emphasised the significance of transformative use in the fair use analysis. Although this case dealt

¹⁵ *Luther R. Campbell a.k.a. Luke Skywalker, et al., Petitioners v. Acuff-Rose Music, Incorporated*, 510 U.S. 569; 114 S. Ct. 1164; 127 L. Ed. 2d 500; 1994 U.S. LEXIS 2052, Supreme Court of the United States.

with a musical parody, the principles equally apply to fan fiction, particularly in assessing the extent of new expression or meaning added.

If fan fiction competes with or diminishes the market for the original works or their licensed derivatives, it's less likely to be considered fair use. This includes potential impacts on sales, derivative works, or other licensing opportunities. Non-commercial fan fiction may be seen as less harmful to the market, but risks increase if the fan fiction becomes popular or monetised.

In *Warner Bros. Entertainment Inc. v. RDR Books*, the court found that an unauthorised *Harry Potter* lexicon infringed on copyright, partly due to its market impact and substantial use of original content. This case underscores the importance of considering market effects and the amount of original material used.

The European Union does not have an exact equivalent to the U.S. fair use doctrine, but Directive 2001/29/EC outlines specific exceptions and limitations to the rights of reproduction and communication to the public. These exceptions, more limited than the U.S. fair use doctrine, generally include uses for teaching, scientific research, parody, caricature, and quotation.

One relevant exception for fan fiction in EU law is the parody exception, which allows for the creation of works that convey humour or mockery. This can cover certain types of fan fiction that use humour or satire to comment on the original work. For more serious or analytical types of fan fiction, the quotation exception might apply, provided the source is acknowledged, the use is fair, and the extent of the use is justified by the purpose.

Compared to the U.S. fair use doctrine, the scope of permissible use under EU copyright exceptions is narrower. Each member state has discretion in implementing these exceptions, leading to variability across the EU. The U.S. fair use principle is open-ended, allowing courts to decide on a case-by-case basis, whereas EU exceptions are more rigid and predefined. Generally, commercial fan fiction is unlikely to be protected under EU exceptions, as these legal provisions typically focus on non-commercial uses.

3 Regulation of fan fiction

3.1 Unlicensed commercial fan fiction

Even though fan fiction is highly controversial, its presence does not serve as a market substitute for the original works but rather as a complement.¹⁶ Fan fiction is likely to increase consumer interest in the original works rather than diminish it.¹⁷ Therefore, legal regulation and appropriate encouragement of fan fiction can benefit cultural dissemination and creative incentives.

Regarding the legality of fan fiction, as discussed in Section Two, commercial fan fiction, like any work based on another's original work, can be either authorised or unauthorised.¹⁸ The legality of licensed works is highly relevant to applying the fair use factor and, in many cases, can be decisive in infringement litigation. However, given the wide scope and high degree of freedom in the fan market, it is necessary to consider the extent to which unlicensed fan activities might infringe on copyright before discussing the functioning and impact of a licensing system on commercial fan fiction.¹⁹

Fifty Shades of Grey is an example when discussing the legality of unauthorised commercial fan fiction.²⁰ Traditional fan fiction that uses copyrighted characters, settings, and plot points may constitute an initial infringement of the copyright owner's exclusive reproduction rights. Even if the used elements do not meet the threshold for reproduction infringement, fan fiction is likely to be considered a 'derivative work' - a work based on the original. Once fan fiction is disseminated within the fan fiction community or more publicly on the internet, the public distribution right may be infringed.²¹

The defence of fair use is the most likely means to exempt most fan fiction from infringement, particularly focusing on the purpose and character of the use and market impact. Although some copyright holders do not support this practice, as discussed in Section Two, non-commercial use with minimal adverse effects on the original work's value or potential market often constitutes fair use. However, unauthorised commercial fan fiction presents a different scenario. In cases such as *Fifty Shades of Grey*, considerations of reproduction and derivative rights (crucial for public distribution right infringement) differ because the copyright elements

¹⁶ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 450.

¹⁷ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 453.

¹⁸ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 453.

¹⁹ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 454.

²⁰ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 454.

²¹ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 454.

from the source material are less evident in the derivative work than in traditional non-commercial fan fiction.²² Authors like E.L. James, seeking commercial publication, typically change character names and possibly settings. Consequently, the final product may be less likely to constitute an initial infringement of reproduction rights compared to traditional non-commercial fan fiction, which often retains original character names and other copyrighted material.²³

Even with character name changes, derivative works can still infringe on reproduction rights. In *Suntrust Bank v. Houghton Mifflin Co.*, Judge Birch noted that despite Alice Randall changing character names in her work *The Wind Done Gone*, she initially infringed reproduction rights because the new work utilised enough protectable elements from *Gone with the Wind* - character traits, storylines, and settings - that remained substantially similar to the original. However, the work was deemed a fair use as a parody of Margaret Mitchell's original literary text.²⁴

Regardless of whether there is an initial infringement of reproduction rights in commercial fan fiction, the work might still infringe on derivative work rights.²⁵ Even when an author modifies characters, settings, and plot points to differentiate their work from the original, it is likely considered a derivative work if it pays homage to the original.²⁶ In some cases, if an author publishes under a name unassociated with their fan fiction identity and rewrites the work sufficiently to disconnect it from the original fan fiction, the commercial origin of the fan fiction might be well concealed. However, with advanced digital plagiarism detection and text comparison services, identifying similarities to the original work is not difficult.

If unauthorised commercial fan fiction infringes on the source material's reproduction or derivative work rights, its commercial distribution would likely violate the public distribution rights. In examining copyright infringement, the next step would be to assess the applicability of the fair use defence to unauthorised commercial fan fiction and how this differs from its application to non-commercial fan fiction.²⁷ However, it is important to note that, despite some unauthorised commercial fan fiction gaining significant popularity, most copyright holders rarely pursue litigation against the creators and publishers of these works. This reluctance is often because the successful commercialisation of fan fiction can attract more attention to the original works, potentially boosting their sales. Additionally, infringement litigation is costly and proving infringement can be challenging,

²² Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 455.

²³ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 455.

²⁴ 268 F.3d 1257, 136 F.Supp.2d 1357, United States Court of Appeals for the Eleventh Circuit.

²⁵ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 455.

²⁶ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 455.

²⁷ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 456.

especially when publishers ensure that the final published version of derivative works differs significantly from the original.

Moreover, some copyright holders may appreciate the tribute paid to their works or recognise that artistic creation often involves drawing inspiration from existing works. This understanding can lead them to adopt a more lenient approach and avoid strictly enforcing their rights against others using their works. When asked about *Fifty Shades of Grey*, Stephenie Meyer expressed that E.L. James, the author of *Fifty Shades of Grey*, evidently had a story to tell that would reach its conclusion regardless of its foundation. Meyer did not oppose the fact that this story was based on her work.

3.2 Fair use defence

If unauthorised commercial fan fiction were to become the subject of an infringement lawsuit, the fair use defence would likely play a central role in the case's outcome, focusing primarily on the purpose and character of the use and market impact.²⁸ The amount and substantiality of the portion used may also be significant. The nature of the copyrighted work should be given minimal weight or lessen the impact on the fair use determination because the nature of the copyrighted work remains consistent regardless of whether the fan fiction writer's activities are commercially motivated.²⁹

Compared to traditional non-commercial fan fiction, commercial fan fiction is less likely to qualify as fair use.³⁰ However, today's commercial fan fiction represents significant transformations of the original works. Therefore, in unauthorised commercial fan fiction, the commercial aspect of the derivative work would diminish the impact on fair use. At the same time, the transformative nature would depend on the specific fan fiction considered in each case.

The amount and substantiality of the portion used may pose issues in the context of unauthorised commercial fan fiction. For traditional non-commercial fan fiction, this factor might affect the fair use determination, remaining neutral due to the improbability of competition with the original work. It is nearly impossible to create traditional fan fiction without substantially borrowing from the copyrighted elements of the original work.³¹ By definition, creating fan fiction necessitates extensive use of the original content.³² For unauthorised commercial fan fiction, the situation differs. Traditional non-commercial fan fiction authors explicitly seek to

²⁸ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 457.

²⁹ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 457.

³⁰ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 457.

³¹ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 458.

³² Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 458.

align their work with the original. In contrast, commercial authors do the opposite: they strive to distance their work from the original, establishing themselves as original commercial authors despite their fan fiction origins.³³ Thus, while traditional fan fiction authors emphasise similarities with the original and deny infringement, commercial derivative work authors downplay these elements, reducing their importance in the final product. The success in achieving this may significantly influence the application of the amount and substantiality of the portion used. Similarly, like the ‘transformative’ aspect, this inquiry will be case-specific and present challenging evidentiary issues for courts and litigants.³⁴ Copyright owners are likely to focus on the extent of unauthorised profits fan fiction authors gain from the original work, which appropriately addresses the purpose and character of the use and market impact. Therefore, giving less weight to the amount and substantiality of the portion used in fan fiction cases is valuable.

Assessing the impact on the potential market or value of the work introduces complexities in the context of fan fiction. This consideration focuses on how the fan fiction writer’s use affects the market or value of the original copyrighted work. Traditionally, this factor has been associated with market substitution, evaluating to what extent the disputed use reduces potential sales, diminishes market value, or serves as an alternative that consumers might prefer over the original.³⁵ Fan fiction that qualifies under the fair use doctrine is not seen as a market substitute but rather as a complement to the original work. It is likely to increase consumer interest in the original rather than diminish it.³⁶ Nevertheless, the possibility of market harm cannot be entirely dismissed. Offering a service that the copyright owner could have licensed can undermine the fair use defence.³⁷ This rationale underpins the historical importance of licensing systems for copyrighted works, such as music lyric reprint licenses, synchronisation licenses, and academic textbook reprint licenses, which have been critical in evaluating fair use concerning market impact.³⁸

In practice, however, market impact often presents challenges because it may reserve the derivative works market for the copyright owner. Many fan fiction works do not threaten the copyright owner’s derivative works market as they explore plot possibilities that are usually rejected by copyright holders. Conversely, copyright owners can continue to thrive economically without monopolising all downstream markets. For example, despite the many unauthorised *Star Trek* fan fiction works, officially licensed *Star Trek* derivative works sell robustly. Even commercialised, unauthorised fan fiction may not significantly affect the original work’s value or potential market. As previously discussed, fan works may enhance interest in the original work rather than detract from it.³⁹ Derivative works are

³³ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 458.

³⁴ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 458.

³⁵ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 458.

³⁶ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 450.

³⁷ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 451.

³⁸ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 451.

³⁹ Jacqueline D. Lipton, ‘Copyright and the Commercialization of Fanfiction’ (2014) PL 450.

unlikely to replace the original work in the market directly. Often, derivative works may not be those the copyright owner would have licensed initially due to containing elements the copyright owner does not endorse. Therefore, the unauthorised commercialisation of fan fiction may not necessarily impact the foundational work in the traditionally considered market sense.

3.3 Article 6*bis* of the Berne Convention

While unauthorised commercial fan fiction may not have the conventional market impact, it could involve the integrity rights stipulated in the Berne Convention. This provision, proposed by members with author rights systems like France, Italy, Poland, Romania, and Czechoslovakia at the 1928 Rome Conference, states that ‘independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation’.⁴⁰ This provision’s protection scope is limited to ‘distortion, mutilation, or other modification’ and requires harm to the author’s ‘honour or reputation’. ‘Honour’ refers to the author’s subjective perception, while ‘reputation’ involves public evaluation.

During the 1948 Brussels Conference, some member countries attempted to expand the scope of integrity rights to include ‘distortion, mutilation, other modifications, and harmful actions’. However, due to the lack of consensus on specific conditions and standards for moral rights, the conference adopted Article 6*bis*(3), stating that ‘the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed’.⁴¹

Article 6*bis* of the Berne Convention results from compromise among member states, and the legislative standards adopted by different countries and regions vary. Broadly, these can be categorised into three models:

- (1) The Berne Convention Article 6*bis* Model: This model is widely adopted, including in Hong Kong (China), Taiwan (China), Italy, Portugal, the Netherlands, and Nordic countries. Common law countries like the UK, Canada, Australia, and New Zealand also follow this model. These legislative examples align with the Berne Convention, limiting the subjective link between the author and the work. For instance, Italy’s provisions on integrity rights closely mirror the Berne Convention, requiring that changes, modifications, or distortions must harm the author's honour or reputation to

⁴⁰ ASHOK, A. ‘MORAL RIGHTS – TRIPS AND BEYOND: THE INDIAN SLANT’ J. (2013).

⁴¹ Amy L. Landers, The Current State of Moral Rights Protection for Visual Artists in the United States, 15 *Hastings Comm. & Ent. L.J.* 165 (1992).

infringe the integrity right. The UK imposes restrictions on the scope and exercise of attribution and integrity rights, while the U.S., to comply with the Berne Convention, enacted the Visual Artists Rights Act (VARA) in 1998, providing limited protection for the moral rights in visual art. Overall, these legislations attempt to balance the author's rights and public interest by mitigating the author's control over moral rights.

- (2) Strong Protection Model: France exemplifies this model, along with Japan, Switzerland, and Greece. The protection scope under this model far exceeds the provisions of Article 6*bis*. For example, the French Intellectual Property Code (Article L121-1) stipulates, 'The author shall enjoy the right to respect for his name, authorship, and work'. Therefore, the author only needs to prove damage to the work's physical or moral integrity without the requirement to prove harm to honour or reputation. These legislations grant authors absolute control over changes in form, purpose, and context of use.
- (3) Intermediate Model: Germany and Spain adopt an intermediate approach. The German Copyright Act (Article 14) stipulates, 'The author shall have the right to prohibit any distortion or any other mutilation of his work which would jeopardise his legitimate intellectual or personal interests in the work'. The prevailing view in German jurisprudence is that distortion or mutilation must potentially harm the author's intellectual or personal interests, closely aligning with the Berne Convention's provisions. Spain's more recent integrity rights legislation is similar to Germany's, granting authors the right to respect their work's integrity and to object to any distortion, modification, or other actions that could harm their legitimate interests or reputation.

For fan fiction, it can significantly alter the original work's background or tone, potentially offending the original author. For instance, turning a serious work into a parody or inserting explicit content could be seen as derogatory. Suppose fan fiction negatively impacts the perception of the original work or its author. In that case, the moral right to object to derogatory treatment may be violated, especially if widely distributed and read. The enforcement and interpretation of moral rights can vary by jurisdiction. As mentioned, some countries (like France) have strong moral rights protections, while others (like the U.S.) provide limited moral rights. Consequently, fan fiction like *Fifty Shades of Grey* might struggle to achieve legal status in countries like France. Courts may need to balance the original author's moral rights with the fan fiction creator's creative freedom and expression rights. This balance is crucial when fan fiction contributes to cultural dialogue and creative exploration.

3.4 Licensing schemes

A licensing system can effectively address many of the previously mentioned issues. It offers the advantage of clarifying the terms of use for the original work and promotes derivative creation by eliminating the risk of copyright infringement. However, this approach has its drawbacks, as creativity might be limited by the license's stipulations. Furthermore, the licensing terms might require that all copyrights to fan authors' works belong to the original copyright owner or at least grant the owner an exclusive license to the content, irrespective of current legal standards.⁴² Additionally, the original copyright owner can further commercialise these rights and produce new derivative works based on fan creations without compensating the fan authors under the terms of the contract.⁴³ Thus, if E.L. James had initially published her work under such a licensing system, she would not have achieved the commercial success she later enjoyed as an independent author.⁴⁴

Furthermore, authorisation generally restricts fan authors' profits from their works. This is logical, as the cost of obtaining a license translates to a loss of royalties. However, this perspective overlooks that if fan fiction authors could successfully invoke fair use for their commercialised fan works, they might earn royalties without such limitations. Suppose it is not clear in advance to what extent unauthorised commercial fan fiction constitutes fair use. In that case, fan fiction authors are likely to opt for licensing services, significantly reducing their potential profit margins and relinquishing substantial commercial control over their works.

⁴² Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 461.

⁴³ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 461.

⁴⁴ Jacqueline D. Lipton, 'Copyright and the Commercialization of Fanfiction' (2014) PL 462.

4 Fan fiction and antitrust law

Intellectual property law, through pre-established content for the protection of rights, such as the subject and object of intellectual property, requirements, and limitations, allows rights holders to directly invoke relevant legal provisions to safeguard their legitimate interests once an infringement occurs, thus functioning as an ‘ex-ante’ standard. In contrast, antitrust law plays a passive, reactive role in protecting intellectual property interests by intervening after a dispute arises, making it an ‘ex-post’ standard. Given the uniformity and lag of law, intellectual property law’s pre-set protective measures often struggle to adapt to the ever-changing market competition and technological development. Intellectual property legislation frequently lags in time and coverage concerning new intellectual products, making it challenging to fully protect intellectual property solely through intellectual property law in judicial practice. Therefore, courts often invoke relevant antitrust law provisions to supplement the remedies for infringed intellectual property rights in many cases.

However, the application of antitrust law in intellectual property should be limited. It is generally believed that the primary scenario for extending the application of antitrust law in intellectual property is to prevent misappropriation or unfair imitation. Regarding the determination of ‘unfairness’, British intellectual property law expert Cornish stated: ‘Expanding the scope of intellectual property to address misappropriation or unfair imitation sets an intangible barrier on the road to imitation, which is inherently a controversial step. The law must retain the freedom to conduct reverse engineering unless there are compelling reasons against this freedom.’⁴⁵ Knowledge cannot be privately owned by nature, and only in the public domain can knowledge realise its maximum value. The market operation principles proposed by Adam Smith in *The Wealth of Nations* also apply to the cultural market.⁴⁶ The main bodies of the cultural market pursue private interests to amass wealth, ultimately benefiting public welfare. Free competition and the public nature of knowledge jointly determine that the fundamental concept of intellectual property should adopt the public domain as the principle, while intellectual property is the exception. Consequently, copyright law, intending to maximise the utility of knowledge achievements, protects only a portion of interests and outcomes in normative form, leaving most knowledge for public domain use.

Additionally, the concept of work protection duration in copyright law is not reflected in antitrust law. If the copyright protection period of the original work has expired, others could use, imitate, and create based on the work. However, suppose

⁴⁵ William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London: Sweet & Maxwell, 2013, 12-15.

⁴⁶ APA. Smith, A. (2012). *Wealth of Nations*. Wordsworth Editions.

the original rights holder uses the protection model of antitrust law to prohibit the publication and distribution of fan fiction in the long term. In that case, it is unfair to fan authors. In summary, the extended protection of antitrust law may conflict with the legislative intent of copyright law to encourage creation and innovation, making it difficult to implement copyright law norms and incompatible with the legislative philosophy of intellectual property.

5 Conclusion

Fan fiction plays a unique role in promoting cultural value and economic benefits. However, its dependence on original works often overshadows these contributions, making it controversial in society. Besides the authors and readers within the fan community, it struggles to gain recognition from outsiders. The originality of fan fiction is often questioned due to its perceived connection with the original works. Legislation clarifying the legal status of fan fiction is the primary solution to this issue.

Fan fiction must first be legally defined to achieve legal recognition equivalent to other types of works. This definition should delineate the boundaries between fan fiction and original works and differentiate fan fiction from adaptations and plagiarism. It should also regulate the extent of use of the original works. This clarity would allow fan fiction authors to understand the permissible use of original elements, focusing more on original expression rather than attempting to avoid plagiarism.

There is almost no legal guidance on what fan activities constitute copyright infringement, except for authorised use. The limitations of the licensing scheme are also apparent. An open copyright license agreement could be considered, wherein rights holders relinquish some rights and allow public use of their works within certain limits without needing separate authorisation. This agreement is a market-driven copyright utilisation method that meets market needs in the fast-developing internet era.

Establishing an appropriate compensation mechanism might be more beneficial for overall cultural development. Fan fiction has originality; some non-derivative fan works are highly original, even superior to original ones. However, fan fiction undeniably benefits from the positive externalities of the original works. Although fan fiction may return some benefits to the original works, this return is significantly less than the benefits gained from the original. For commercial fan fiction, compensating the original author can internalise these externalities. This mechanism could involve evaluating fan fiction and original works, considering factors like popularity and sales, and determining a reasonable compensation range, allowing parties to negotiate the final amount within this range. This mechanism considers market conditions and respects the parties' autonomy, making it practical.

As an emerging form of creation, fan fiction exemplifies the importance of freedom of speech and creation in the information age. Ignoring or neglecting fan

fiction is detrimental to cultural creation and industry development. Over-reliance on antitrust law outside intellectual property law for regulating this new cultural form can conflict with the legislative purpose of intellectual property law, restricting the public domain and stifling innovation in the cultural market. Clear legislative methods within the copyright law framework, establishing appropriate compensation mechanisms, and introducing industry norms can guide the orderly development of the fan fiction industry, benefiting both creators and the cultural industry.

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