Copyright and ownership of fan created works: fanfiction and beyond

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INTRODUCTION

What do one of the first novels ever published, the second most popular book series of all time, and the latest music videos for a big Korean pop star have in common? They are influenced by the communities of fandom that both consume and produce additional stories and media related to their interests. The use of existing stories, creative works and ideas as the basis of new works is a centuries-old practice employed by writers, storytellers and others. Within the law, this practice has ranged in acceptance – with original authors and copyright owners sometimes encouraging and sometimes suing creators of fan works.

Fan works are works of creativity that build upon the works of others, usually within the context of a larger fan community. As exemplified by Japanese fan-made comics (called doujinshi), one definition of whether a work may be categorized as fan-based is if it is ‘(1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the author’s economic and creative interests’ (Noda 2010: 139). The creation of these fan works is usually done as an expression of belongingness, as part of a larger fan community, regardless of whether they have been granted permission to use the original work. The majority of legal scholarship on fan works have focused on fanfiction, starting with Rebecca Tushnet’s pioneering article where fanfiction (also called fanfic) was described as ‘any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as “professional” writing’ (Tushnet 1997: 655). Another way to refer to these works is as user-generated content; however because user-generated content can also include works whose creation is prompted by the copyright owner (such as in a contest), and this chapter focuses on works created by fans, including works based on being part of a larger fan community, the term fan works will be used throughout.

This chapter will discuss issues of how fan works may be simultaneously original and imitative, engage in sharing as well as control, and of course raise intellectual property concerns, such as possible copyright infringement. Overall, in the United States, fan-fiction and fan work creators have more legal leeway and flexibility than in other countries. However, Japan’s flexibility for fan
works outside of the legal system provides for a very loose and permissive environment for transformative works, even for fan works that earn money for their creators. Generally, countries that have ‘moral rights’ protecting the rights of authors without accompanying ‘fair use’ or ‘fair dealing’ provisions put the creation of fan works at greatest risk.

**THE TENSION BETWEEN FANS, AUTHORS AND OWNERS**

There is a natural tension between fans, the authors of creative works, and the media owners/copyright holders. This tension is based on the differing sets of perceived value placed on said creative work by the stakeholders in question. Fans often value a work based on intangible motivations: a sense of community through fandom, a personal connection to the story, a creative or emotional outlet through the work itself. Rebecca Tushnet says fans view themselves as ‘guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters’ (Tushnet 1997: 657). Jenkins, Ford and Green (2013: 294) state how important it is to not see audiences as passive, but instead ‘they transform the material through active production processes or through their own critiques and commentary, so that it better serves their own social and expressive needs’. What this means is that content ‘does not remain in fixed borders but rather circulates in unpredicted and often unpredictable directions, not the product of top-down design but rather the result of a multitude of local decisions made by autonomous agents negotiating their way through diverse cultural spaces’ (2013: 294).

Most fan work creation, and specifically fanfiction writing, rather than being considered the work of individual writers attempting to assume authorship of another author’s original text, or to claim a piece of someone else’s intellectual property, is more accurately described as a collective, a creative community in which the original source medium exists as shared, communal property, which is modified and distributed not for profit, but for enjoyment. The non-commercial use of this property is the standard practice, and writers do not claim to own particular characters or ideas exclusively, nor do they claim to have created the source medium themselves. The longer the time that the creative community is allowed to grow, the larger this collective becomes, and the possible interpretations and revisions of this communal property are more varied.

Creating fan works provides a legitimate creative outlet for novice and professional writers and other types of creators to experiment with the craft. There are a number of reasons why fans and writers engage in the creation of fan works and these reasons vary based on the motivation of the audience. Some fan works are created as a commentary on, parody of, or response to an original author’s work, at other times it is as an extension of the original work of the media creator. Traditionally, fans see their role as the stewards of a media text, and they create fan works in an attempt to maintain fidelity to a story that may be unduly influenced by commercial considerations (Lichtenberg 2013: 94–95).

Fans often view their re-workings as part of an overall cultural experience, meaning that once a mainstream work is released to the public, it is too late for the author or owner to hold it back from use by others. As Jane Gaines in *Contested Culture: The Image, the Voice, and the Law* points out, ‘The owners of popular forms, which constitute our most widely shared culture … are in the contradictory position of encouraging the widespread uses of Batman, Superman, and Snow White. But when those forms are used spontaneously … the owners want to take them back’ (Gaines 1991: 228).

Media owners predictably, and many would say rightfully, base a creative work’s value on its commercial viability. Fox cultivated a popular online fandom from 2003 through
2006 for the TV show *Firefly* and follow-up movie *Serenity* and encouraged the creation of fan works, not out of an altruistic desire to spread the word about Joss Whedon’s characters and fictional universe but to market their product in order to create a hit. When *Firefly* was cancelled and the marketing campaign for the movie ended, these fan works lost value for the media owner (Fox) but increased in value for the fans, as they were now the only outlet to keep Whedon’s universe and characters alive, and they formed a platform for fans to connect around the text.

As Jenkins, Ford and Green (2013) note in one specific example involving fan created *Mad Men* Twitter feeds, owners/authors frequently want to limit fan works whether or not the fans are specifically monetizing their work. In this example, fans created Twitter accounts from the perspective of their favorite characters, ‘speaking’ in their voices. For a time, these fan created accounts were shut down, due to the efforts of the owners of *Mad Men*. This conflict exemplifies two different narratives for interaction with copyright works by fans. The traditional interaction model is one where ‘fan-created material off official *Mad Men* channels is in competition with the show, and any traffic those outlets receive dilutes the reach of the show’s official response. This approach assigns no value to how fan-created-and-circulated content might drive awareness and engagement … because it cannot be easily quantified’ (Jenkins et al. 2013: 34). On the other hand, a more permissive model also exists that shows that ‘content often gains traction when people are given the latitude to use “official” media texts to communicate something about themselves’ (2013: 34). In this model, owners giving up exclusive control benefit more in the long-term because they create strong fan ties to their work that help spread the work widely.

At the same time, mainstream authors and media creators often exist in the grey area between the oft-conflicting motivating factors of commerce and creativity. Authors create an original work with the hope of finding an appreciative audience and earning an income from said work. They may personally encourage fan interaction with their work, while at the same time keeping a close eye on their own legal representation and economic benefit as the primary creator of that work.

Acknowledging the symbiotic relationship between media creators and fan communities, and between fan works and copyrighted properties, can allow for greater acceptance of fan works, based on an acknowledgement that fan works would not exist but for the original work. As a result, generally, distribution for free is acceptable, but payment requires the permission of both fanfic and original writers.

While fan works are generally viewed as non-commercial within the communities that create them, the lines between commercial and not are becoming increasingly blurred. Rebecca Tushnet states that:

1) commercial and noncommercial spaces interpenetrate, and cannot readily be disentangled. Fans generally don’t make money from fandom; particularly in female-dominated media fandoms, there is a strong norm against anything that smacks of commercialization. This is thought to be both legally and ethically protective: fans argue that they are good consumers and that their fandom encourages them to buy more of the official product. This position, however, entails that other people and entities – professionals, convention organizers, Google – regularly do make money from fans. (Tushnet 2010: 3–4)

Therefore, because fans are focused on the object of their fandom, offering up their fan activities, such as creating fan works, their creative activities generally are considered to be part of a gift economy, rather than an economic economy. Considering that one of the major justifications for copyright protection is that creativity will be diminished without a system built around compensation, the creators of fan works belie that argument.

As stewards of texts, fans see their interests as sometimes superseding the interests of authors and owners to keep works alive. Authors and owners do decide to permanently or temporarily end works, usually for reasons of commercial viability; fan works help to
keep interest going for official releases that often have pauses – either temporary or permanent. At least as far back as the ‘death’ of Sherlock Holmes in ‘The Final Problem’ in 1893, fans have written fanfiction to keep characters ‘alive’ (Doyle, 1894). While Holmes returned from the dead ten years later in 1903, the tradition of writing additional stories moving forward continued (Doyle, 1905). More recently, fan communities have kept subcultural interest in Star Trek, Doctor Who and other properties alive long enough for their owners to return to making money on years of official mainstream releases, often through the creation of fan works.

Despite fan works being in existence for quite some time, the present platforms help to throw into sharp relief the differential between those who create content and those who are able to benefit monetarily from it. The conflict between fans and owners is inherent in many of the platforms fans use to create and share their fan works. As Jenkins, Ford and Green demonstrate throughout their book Spreadable Media, too much control can lead to fans disconnecting from the original work due to the unstable relationship between the parties, where only owners have the right to pull the plug. They state (2013: 83):

2) Web 2.0 discourse assumes that fan participation is highly generative – yielding new insights, creating new value, reaching new audiences – but the business model often isolates the resulting texts from the social contexts within which they were produced and circulated, thus devaluing notions of reciprocity. Many Web 2.0 companies have sought to assert total ownership over content generation by the fans, even after having sought to strengthen participants’ sense of personal interests in order to placate the contested assertion of intellectual property claims posed by other commercial interests.

De Kosnik (2013) has therefore asked whether fan culture’s insistence on non-commerciality is lining the pockets of everyone but fans. Tushnet states that ‘fans are only non-commercial in a particular sense, and that sense is that if there is any money on the table, it certainly won’t be flowing towards the fans’ (Tushnet 2010: 4). As De Kosnik puts it (2013: 105):

3) because fans generally conceive of their activities as ‘resistive’ to consumerism, they refuse to consider that their works might constitute either promotional materials or ancillary products that increase the value of the objects of fandom and therefore might be deserving of compensation, either from official producers or from other consumers.

Fan works do have value – but determining the impact of each individual work is nigh on impossible:

4) Fan-made videos, websites, commentary, posters and other artworks, stories, songs, and reviews merge with the stream of official advertising and promotion that surrounds any given product – fan labor can ramp up the buzz and reputation of the product, and it can reinforce the pull or allure that the product exerts on would-be consumers, but it would be impossible to tell what percentage of sales of the product had resulted from fans’ efforts versus those of the paid corporate marketers. (De Kosnik 2013: 109)

Adjusting the present formula where authors and owners hold the legal right to attempt to shut down fan works without much legal pushback from fans, will take changes from all sides. It would take ‘both fans and corporations acknowledging that fandom is a form of labor that adds value to mass-produced commodities and is worthy of compensation’ (De Kosnik 2013: 110).

There have been attempts to pay fans in small ways. In 2013, Amazon launched Kindle Worlds, a platform for fanfiction writers to publish and make money from their works, mostly through royalty payments for copies sold to other fans. Many fandom communities had a skeptical approach, partially because there are a limited selection of titles and fandoms, and there are content limitations on the works authorized through this platform. Another concern was the loss of

WHO GETS PAID? FANDOM AS FREE LABOR

One of the most important elements regarding fan works is the continued principle that fans are not to be paid for their efforts. Abigail
control fan work creators would face when signing away their rights in order to use this platform. The only real advantage most fans saw to the Amazon effort was the ability to create in a sandbox where they would not be sued for creating fan works, due to the terms of license.

THE STATE OF THE LAW IN THE UNITED STATES

Is the main question regarding the status of fan works one of law or of practice? Some legal experts view it as primarily an issue of the interpretation of copyright, while others have a more interdisciplinary view: an issue of balancing the law with a widespread cultural practice that is only now being brought to the forefront by the Internet. More traditional legal experts tend to view fan fiction as a copyright concern: ‘It is still an open question whether much fan fiction is an infringement of the derivative work right under copyright law or rather may be excused as a fair use’ (Lipton 2011: 579). Media studies experts view the concern with fan works as an issue now bubbling to the surface, even though many of the qualities in the creation of fan works have existed for quite some time. With increased access online, these works become more visible, placing previously hidden and private activities in the public eye. Within the United States:

5) some people describe these shifts as a crisis in copyright and others a crisis in fair use. Fans defend perceived rights and practices that have been taken for granted for many years. ... Corporations, on the other hand, want to constrain behaviors they see as damaging and having a much larger impact in the digital era. Both sides accuse the other of exploiting the instability created by shifts in technology and media infrastructure. (Jenkins et al. 2013: 54)

United States copyright law allows for copyright owners to control the creation of derivative works. However, additionally within United States law, the use of the works of others is acceptable within specific limits. The fair use doctrine, a flexible four-factor test, allows non-licensed use of copyrighted materials, to avoid ‘stif[ling] the very creativity which that law is designed to foster’ (Campbell 1994 577). The factors must be used together in each individual case and no one factor can make the determination, codified in the Copyright Act of 1976:

(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.

As the Supreme Court in Campbell v. Acuff-Rose Music (1994: 577) has warned, ‘[t]he task is not to be simplified with bright-line rules’, and courts must always keep in mind ‘the purposes of copyright’.

Fan works are an example of secondary creativity. Generally used within the context of the ‘fair use’ copyright doctrine, the concept of secondary creativity is a useful way to distinguish between an original work – primary creativity – and secondary creativity, which allows creators to build on the prior creativity of others. Some examples of secondary creativity include timeless ones such as folk tales and folk songs. There are also more recent types of fan creation such as musical ‘mash-ups’ (when the vocals or instrumentals of two or more original songs are combined into a new song). As the Supreme Court stated in Campbell the important question when dealing with the value of secondary creativity is ‘whether the new work merely supersede[s] the objects of the original creation … or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative”’ (Campbell v. Acuff-Rose Music 1994: 578).
Generally, the idea of thinking about and speculating on what could happen to characters is still within the realm of rights copyright owners possess for in-copyright works. In its discussion of J.D. California’s 60 Years Later, an unauthorized sequel to J.D. Salinger’s The Catcher in the Rye (Salinger, 1951), for example, the District Court acknowledged the importance of audience speculation, ‘what ifs’ about characters’ potential futures, but left the control for anything beyond a discussion between fans in the hands of the copyright owner. The court found that fair use should not protect the ability to publish unauthorized sequels:

6) [B]ecause some artists may be further incentivized to create original works due to the availability of the right not to produce any sequels. This might be the case if, for instance, an author’s artistic vision includes leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently. (Salinger v. Colting 2009: 268)

Depending on one’s viewpoint, this can mean that fan works are protected by fair use if they are transformative enough – or if they do not affect the marketplace. But because each fan work requires an individualized determination through the fair use factors, uncertainty persists. And especially now, whether a work is parody (versus satire) or of high quality matters more than ever before.

WHY SATIRE, PARODY, AND QUALITY MATTER, YET ACCEPTANCE BY THE COPYRIGHT OWNER USUALLY DOESN’T

Within the context of United States copyright law, the distinction between satire and parody causes differences in how fan works are treated. Parody copies from the object it mocks, while satire uses recognizables elements from the original work to mock something else or society in general. Parody is ‘fair use’ and thus protected, it is much more difficult to prove that satire is fair use.

This definition seems very straightforward, but real world examples show how difficult it is to work within the distinction between parody and satire. For example, with many mash-up videos created by fans, there can be two or more fandoms and original works at issue. What happens to the analysis when a fan work is a parody of one work, a satire of two more, using elements from a couple more, and uses the music from yet another? For example, Yu-gi-oh: The Abridged Series overdubs episodes of the Japanese children’s card game show Yu-gi-oh with multiple elements, leading to a series that is a pastiche of many different copyrighted works. All episodes include elements that are a parody of the original show (such as making fun of the concept of a children’s card game being the focus of the lives of the characters, with incongruities added into the English original dub, and developing the rich inner lives of the characters) and satirize other parts of popular culture, such as memes and gaming culture, while at the same time generally using elements of popular culture in ways that are outside of both satire and parody. The show also serves as a meta-commentary about itself – the fair use issues the show has faced through its use of clips, sounds and more during the now over six years of this show’s running. Without the satirical elements, the show would not be as interesting to those that watch it. Only by combining these varied elements can this web series retain its humor (Little Kuriboh 2006–2013). By using multiple properties, the fan creator is more and more likely to have at least one of the copyright owners object, but the multitude of different influences is more likely to make the work transformative and less likely to serve as a market substitution for any of the starting works.

The importance of whether a work is satire in determining whether fair use exists was used in Salinger v. Colting (2009, 2010) a
Copyright and ownership of fan created works

One of the important lessons from the Harry Potter Lexicon case is that walking the line between high and low quality is an important one for creators of fan works to make – at least within the context of fair use determinations in the United States. (Warner Bros. 2008). Overall, the decision in favor of the copyright owner gives a distinct impression that if one is to base a work on that of another, it should be of high quality – and that means not too much direct copying:

7) The Lexicon’s verbatim copying of such highly aesthetic expression raises a significant question as to whether it was reasonably necessary for the purpose of creating a useful and complete reference guide. … Verbatim copying of this nature demonstrates Vander Ark’s lack of restraint due to an enthusiastic admiration of Rowling’s artistic expression, or perhaps haste and laziness as Rowling suggested … in composing the Lexicon entries. (Warner Bros. 2008: 547–548)

Regardless of the quality, however, the copyright owner/author always has the ability to attempt to shut down the use of their owned property at any moment, even if direct acceptance have occurred. Acceptance by the original author doesn’t prevent lawsuits by the copyright owner, frequently leaving fans in a precarious position. Also, authors or copyright owners can pull their tacit or stated acceptance of fan works at any time, meaning that any fan work could lead to litigation even if originally created within a different, and more accepting context.

As stated by Ann Bartow, Twilight series author Stephenie Meyer generally allows for fan works, however:

8) Meyer can make content-based decisions about which actionable, unauthorized uses she will tolerate and which she will smite … Perhaps Meyer simply ignores the reader-driven choices her characters make that she would never permit them. But, she could attempt to control Bella’s fan-based sexuality selectively based on her own moral, social, or political views. The statutory bulwark that could constrain this – facilitating freer expression
by her fans, critics, or emulators and less control by Meyer – is fair use. (Bartow 2010: 78–79)

However, courts could potentially rule in favor of either Meyer or the fans. Furthermore, except in rare instances, the fans have fewer means to fight for their fair use rights than authors or owners have in attempting to minimize such use. The issue of having to walk the line of acceptance by the work’s owner is part of what has led to most fan communities remaining subcultural in most countries. However, Japan has a unique model for fan works that benefits all – fans, original creators and copyright owners.

**INTERNATIONAL INFLUENCES: DOUJINSHI**

Japan’s fan culture is different from other countries in its acceptance of fan works. At the same time, these works are technically illegal. Doujinshi (sometimes written as dōjinshi or dojinshi) are fan-made comics, ‘written by authors using the well-known characters of another, more famous, author’ commonly deriving elements from manga (comics), anime (animation) or video game sources (Mehra 2002: 156). Doujinshi creators create and distribute their works under two very different conditions than most creators of fan works – first, many create with the purpose of making money, and second, their work tends to be supported by the copyright owners. Japanese copyright law (chosakuken) has not been changed to allow for these doujinshi markets – these creations still technically infringe Japanese copyright law. These works are frequently called parody, but such a description minimizes the breadth of possibilities contained in the new works.

As described by Lawrence Lessig in *Free Culture*, doujinshi require an important creative difference from the original to be accepted:

9) It is not doujinshi if it is just a copy; the artist must make a contribution to the art he copies, by transforming it either subtly or significantly. ... There is no formula for what makes the doujinshi sufficiently ‘different.’ But they must be different if they are to be considered true doujinshi. (2004: 25–27)

While the default is to allow doujinshi to flourish without interference from the copyright owner, there have been at least two well-publicized incidents of copyright owners challenging doujinshi – both where the specific doujinshi had the potential to impact the market. An ‘adult’ version of Pokémon and an imagined ‘final’ episode of Doraemon with the artistic quality to compete with the original were both challenged as copyright violations (Ingulsrud and Allen 2009: 49). These cases were settled out of court, and the creator of the Doraemon ‘ending’ issued a public apology and shared profits with the copyright owners. However, generally, large mainstream media owners participate and support many of the doujinshi markets, like Comiket, the world’s largest doujinshi fair, held twice a year, with attendance figures of around half a million people. The reasons for the acceptance of these unauthorized works are quite complex. Generally, it is seen as anmoku no ryokai, meaning an unspoken, implicit agreement, because ‘the dojinshi are creating a market base, and that market base is naturally drawn to the original work’ (Pink 2007).

One notable aspect of this acceptance of fan works in Japan is how the line between what is an official author or creation and what is an unofficial work is drawn. Doujinshi can cover anything that is not released by the official publisher, officially. In addition to being created by fans, amateurs and others, doujinshi is frequently used as the same way ‘spec scripts’ are used in the entertainment industry – allowing aspiring official manga creators to show their talents to potential employers and to also allow official manga artists to release manga outside of official publishing channels, due to publishing regulations or schedules. Additionally, as seen within Western fan creator communities, doujinshi can help keep interest alive in completed or slumbering properties – and help to keep up fan interest in active media properties.
Generally, the creation of these fan works is seen as highly positive, with most academics viewing these markets as parallel to, or supportive of, rather than competing with, the official copyright market. As Foster emphasizes:

10) of particular note, doujinshi do not necessarily steal profits from the original, but enhance the market for the original by causing customers and fans that enjoy the parodies to seek out the original. It is perhaps for this reason that copyright holders and the authors of the original works have generally let doujinshi authors continue with their art. (Foster 2013: 315–316)

Others view the acceptance of doujinshi as a result of its being of direct benefit to the mainstream industry, through increasing loyalty in a way that supports the most intense fans, and creating market data that cannot be duplicated at any cost by highlighting which properties create the most popular, long tail or upswell in doujinshi (Pink 2007).

As Pink (2007) states, balancing the interests of owners and fans is extralegal:

11) instead of rewriting a national statute or hashing out separate individual contracts or crafting special licenses, it leaves everything unsaid ... It takes the situation out of the realm of law... It places the established publishers and the dojinshi creators in something resembling the prisoners’ dilemma: If they cooperate – that is, if they honor the terms of annoku no ryokai – they both gain. But if one overreaches – if publishers crack down aggressively or if dojinshi creators go too far – they both suffer.

Either everyone wins or everyone loses.

INTERNATIONAL INFLUENCES: MORAL RIGHTS

Moral rights are additional rights that creators receive for investing themselves in authorial and artistic expressions. They attach to copyrighted works separate from the copyright in the work itself. These rights are generally recognized in civil law jurisdictions, having originated in France and Germany. Generally, these rights are considered to be so important in European civil law jurisdictions that they cannot be assigned, meaning that even if the author of a work sells the copyright to another, the author still has moral rights in the work. There are some limited moral rights in common law jurisdictions, including in the United Kingdom, Canada and other jurisdictions formerly under the British crown. In the United States, moral rights are smaller than in other common law jurisdictions, restricted only to a very limited set of visual art.

There are two moral rights that are the most popular. The right of attribution (droit à la paternité) is the author’s right to be recognized as the author of the work and the right of integrity (droit au respect de l’oeuvre) is the author’s power to prevent any tampering with the work as a whole. Moral rights are different than the rights given under traditional copyright law because they focus on a continued connection between the creator and the work – rather than economic incentives. The right of attribution and integrity are contained in Article 6bis(1) of the Berne Convention, obligating signatory countries to protect an author’s rights of attribution and rights of integrity:

12) Independently of the author’s economic rights, and even after the transfer of the 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 honor or reputation. (Berne Convention 1979: Article 6bis(1))

It is possible that the creation of fan works is pre-emptively forbidden within a strict moral rights system, considering that fan works do not keep the original work as a whole. Instead, fan works purposely reinterpret and change the work’s meaning, giving it greater cultural resonance as it departs from the integrity of the original. How would a fan work creator in a jurisdiction with strong moral rights protection ensure that they do not possibly create ‘a false impression about the [original] author’s intended meaning or
message' so as to protect themselves from the possibility of litigation (Lipton 2011: 578–579)? While copyright has a theoretical endpoint of approximately the life of the author plus some number of years, moral rights – or at least raising them, does not seem to have an ending. After all, despite the fact that the copyright term had long since expired worldwide, the descendants of Victor Hugo attempted to protect his reputation from unauthorized works such as sequels to Les Misérables using a moral rights framework. These attempts failed overall, because the right of adaptation did not survive the copyright term (Les Misérables 2007).

DON QUIXOTE, HARRY POTTER AND G-DRAGON

To illustrate the complications inherent in works created as fan works, this section will focus on a few examples that blur the lines of ownership and creativity. Starting in 1615 and moving to the present, these examples span three different cultures – Spain in the 1600s, the worldwide reinterpretation of the British Harry Potter book series over the past decade, and a South Korean official music video with footage by fans.

Don Quixote, written by Miguel de Cervantes Saavedra in 1605 and 1615 is viewed as the first modern novel and deals with the issue of unauthorized sequels within the text of the novel itself. The second half of the book, written ten years after the first half, specifically responds to the unauthorized, not parody, sequel written by the pseudonymous author, Alonso Fernández de Avellaneda. The characters are ‘aware’ of the first authorized book – and how wrong the unauthorized sequel gets their characters.

While there was no copyright lawsuit, considering that Don Quixote predates the first copyright law, the Statute of Anne, by a hundred years, there is a legal-ish solution built into the novel. Don Quixote ‘meets’ one of the unauthorized characters Don Alvaro Tarfe, and convinces Tarfe to swear an affidavit, confirmed with a notary that he has never previously encountered the real Don Quixote or Sancho Pancha. (Cervantes 1615: Chapter 72). Therefore, Cervantes has managed to co-opt a character from another’s unwanted sequel into his own work. In a moral rights regime, both the unauthorized sequel and Cervantes’ response would not be allowed. Because the fake sequel’s author also has moral rights regarding his storytelling elements, Cervantes would be unable to turn his moment of humiliation – having his characters ‘stolen’ by another – into an opportunity to turn the critique back on itself.

The next two examples of fan works are from within a time when copyright not only exists, but where copyright protection is strong. Since the publication of the Harry Potter books and the release of the licensed movies, several fan communities have built up around the Potterverse. These communities include those who write fanfiction, those who play a non-magical version of Quidditch (the sport created by Rowling), those who write and perform songs (generally called wizard rock) related to the Potterverse, as well as many other fan-related activities. Generally, J.K. Rowling is accepting of those who write fan works, but there are exceptions. Fan works that are ‘adult’ in nature or compete with actual or potential authorized works are deemed highly problematic. An additional wrinkle is that the trademarks in Harry Potter are not owned by J.K. Rowling, but by Warner Brothers.

The line between acceptable and non-acceptable fan works has led to several lawsuits. For example, a Harry Potter reference book, created as an online encyclopedia with a large number of fans helping to make the entries accurate, was enjoined from publication. In Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books, the court stated, 13) In striking the balance between the property rights of original authors and the freedom of expression of secondary authors, reference guides to works of literature should generally be encouraged by copyright law as they provide a benefit [for] readers and students; but ... they should not
be permitted to ‘plunder’ the works of original authors … ‘without paying the customary price’ … lest original authors lose incentive to create new works that will also benefit the public interest. (Warner Bros. 2008: 551)

When Vander Ark, the author of the Lexicon, signed his book deal there was no consideration of any compensation to the countless fans that contributed and made the website a success. So the lawsuit was a fight between the author and the compiler/host of a fan-created work. But the fans that have contributed to the Lexicon got neither money nor recognition for their contributions.

The Lexicon case was mostly conceived as a struggle between the competing interests of an author trying to protect her copyrighted work (the derivative works right) and the interests of a sole author creating a new work (fair use). During the Lexicon trial, the larger fan community and their input adding to the Lexicon or their interest generally in making fan works wasn’t directly considered because fans were not party to the case. The exclusion of any mention of fan labor and fan contributions is unfortunate. However, there are helpful nuggets for those who are engaged in fan works in the District Court’s ruling finding for Warner Brothers and Rowling.

The key to the determination that the Lexicon was not protected by fair use was that the Lexicon copied too much of the original text – and did a poor job in creating a reference work. Somewhat snarkily, the court held that:

14) Perhaps because Vander Ark is such a Harry Potter enthusiast, the Lexicon often lacks restraint in using Rowling’s original expression for its inherent entertainment and aesthetic value … Although the Lexicon is generally useful, it cannot claim consistency in serving its purpose of pointing readers to information in the Harry Potter works. Some of the longest entries contain few or no citations to the Harry Potter works from which the material is taken. (Warner Bros. 2008: 544)

The poor quality of the Lexicon continues to be an issue in the courts analysis, leading to the conclusion that ‘the Lexicon disturbs the balance’ between using copyrighted material of others and imparting useful information, by using too much the original Harry Potter books, through verbatim copying (Warner Bros. 2008: 548). Fan works rarely copy verbatim as the Lexicon did, focusing instead on characters, settings and plots, so by stepping further away from the original, most fan works are sufficiently transformative.

The final example uses the work of multiple fans to help build a music video. So what happens when the copyright owner directs the fans to generate content for him? While not a fan work in a more traditional sense, this last example investigates what happens when the work of multiple fans is then used in a way that only supports the economic interests of the copyright owner/author. What becomes clear is that for many fans, the loss of ‘ownership’ in their work is less important than being included within the larger fan culture and sometimes being acknowledged by the object of their fandom.

For his latest video in 2013, a major K-pop (a South Korean popular music genre) star, G-Dragon relied on his fans to provide footage for his music video, 니가 뭔데 (WHO YOU?). This is not an original idea for musical acts with intense fandoms – both Metallica and the Beastie Boys released long-form concert videos taken from fan-recorded videos. However, what makes this music video unique is two-fold – the acknowledgement of fan contributions is the first text that appears on the screen in both Korean and English – ‘This video was made by G-Dragon and the personal recordings of 1,000 of [his] fans’. Additionally, the fans are actively included within the video as fans – they are participants in the process, appearing in the snippets recorded by other fans. The end of the video includes the names of all of the fans that contributed. Thinking about the fan recording in a solely copyright context (assuming that their entrance to the recording studio allowed each fan recording), each fan has a copyright in the portion of the video in which they appear, but the sound recording is still copyrighted by whomever owns that copyright.
However, what these fans are looking for more than copyright in their own recordings is the ability to participate in fan culture, which they are able to do here, and specifically to have their contribution acknowledged. This example is one that works for both the original artists and the fans – they share in the credit, though not the money.

CONCLUSION

Thinking about fan works solely as the production of individual fans or even as the cultural production of fan communities is too limiting to the contributions of fans; yet fans are not on one side with authors and owners on the other. However, at present, the contributions of fans in making the intellectual property of others valuable is not fully understood or appreciated by copyright owners. Our present legal regimes honor the sanctity of original works, their owners and creators, without appreciating the impact fans have in making those properties valuable. The ability of fans and fan fiction to keep the works of others alive should not be minimized, especially considering the long tail of copyright and of works that are no longer being ‘exploited’. Fans also allow for multiple streams of interest for works in the public domain. There are separate fandoms for all of the recent Sherlock Holmes properties, for example – including the American and UK television shows, the Hollywood movies, as well as more niche programs based on Sherlock Holmes. Jenkins, Ford, and Green (2013: 297) state that fans ‘act as “multipliers” who attach new meaning to existing properties, as “appraisers” who evaluate the worth of different bids on our attention, as “lead users” who anticipate new markets for newly released content, as “retro curators” who discover forgotten content which may still hold cultural and economic value, as “pop cosmopolitans” who seek cultural difference and help to educate others about content they’ve discovered from other parts of the world.’

There are plenty of opportunities to balance the needs of fans with those who currently have more control. In writing about the Kindle World platform for ‘authorized’ fan works, Chaney (2013) suggests a potential market that could benefit a number of parties:

15) I recently had a thought about where there might be a happy medium between profit motive and fan inspiration, in a way that is (less) exploitative for fans and perhaps beneficial for all: copyright holders, production companies and fan creators alike. What if Kindle Worlds (or a similar licensed fan works publisher) specialized exclusively in fan works for dormant or dead fandoms? Cancelled shows, older films, etc. Working with the license holder for said show and coming up with a partnership to create ‘semi-cannonical’ fan works for sale. It keeps interest in a fandom alive for fans but also keeps interest in a media franchise alive for media owners. It would be America’s equivalent to Japan’s (mostly) live-and-let-live approach to dōjinshi.

Everyone has something to gain – and alternatively to lose – in our present legal regime, assuming the proper balance is struck around creative works. To make the system of sharing creative works not grind to a halt, all parties need to make it work because ‘any party can block or slow the spread of texts: if creators [or content owners] construct legal or technical blocks, if third-party platform owners choose to restrict the ways in which material can circulate, or if audiences refuse to circulate content which fails to serve their own interests’ (Jenkins et al. 2013: 294). The creation of fan works is only one part of the creative system, but it is an essential one, as another example of the continued diffusion of culture.

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