

“Please don’t sue!”: *Regulation, Control and Ownership in Fan (Fiction) Communities.*

Submitted by Sarah Alice Oakey

Discipline of Media

The University of Adelaide

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Student ID: a1120722

Supervisor(s): Assoc. Professor Mary Griffiths (Primary Supervisor) and Dr. Ros Prosser, and Dr. Sal Humphreys (Secondary Supervisors)

“Those who do not want to imitate anything, produce nothing.”

– Salvador Dali

“When we look over this terrain, we can see the economic pressures driving down the value of content are very powerful. Arguments over rights and wrongs seem little more than a disguise for self-interest.”

– James Murdoch, speech given at University College London’s new Centre for Digital Humanities.

“Language [is a] system and the aim of the movement being, romantically, a direct subversion of codes—itself moreover illusory.”

– Roland Barthes, *The Death of the Author*

“Free Cultures are cultures that leave a great deal open for others to build upon... Ours was a free culture. It is becoming less so.”

– Lawrence Lessig, *Free Culture*

“Literature is a luxury; fiction is a necessity.”

– G.K. Chesterton

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Abstract

In 2008, J.K. Rowling and her publishers instigated a lawsuit against one of her biggest fans. The *Warner Bros. et al V. RDR Books et al* lawsuit successfully enjoined the publication of a secondary work which would have competed directly with author J.K. Rowling's future project, a *Harry Potter* encyclopaedia. This incident is utilized in this thesis as an example of a larger issue. That issue is whether a society founded on an industrial economic framework of property rights should continue to strengthen a culture of corporate creative monopolies, and whether it is prudent to re-examine notions of ownership and creativity to incorporate emergent methods of information dissemination.

This thesis seeks to document modern fan practices while simultaneously identifying many of the reasons why they are under threat. This thesis will incorporate recent theory on user-generated media content and attempt to relate them to the activities of fan communities. It examines the deconstruction of notions of authorship and property in these communities in order to facilitate fans' non-market knowledge economy.

There are two very important questions which drive this research; what are the legal and social concerns surrounding intellectual property and moral authority in the process of fan creativity and publishing? How do online fan communities negotiate their enthusiasm for popular media under the threat of legal prosecution? With the aforementioned lawsuit as a case study, this thesis will address the changing roles and relationships between producer and consumer. It will argue that fan creativity is deserving of greater legal protection and acknowledges that there is an important distinction between 'derivative' and 'secondary' works.

Declaration

NAME: SARAH ALICE OAKY

PROGRAM: MASTER OF ARTS

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SIGNED: _____ DATE: _____

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1. INTRODUCTION

1.1 Property and Moral Rights

1.1.1 Harry Potter and the Digital Age

In the first twenty-four hours of the release of *Harry Potter and the Deathly Hallows*, the conclusion to author, J.K. Rowling's seven-part novel series, a record 8.3 million copies were sold in the United States and 2.65 million copies in the United Kingdom, making it the fastest selling book in history. The success of the brand has made Rowling the first billionaire author. In addition, the *Harry Potter* series has spawned the creation of video games, films, playing cards, toys, and companion books. The *Harry Potter* films, which are financed by Warner Bros. Entertainment, Inc. (hereafter known as 'Warner Bros. '), are all currently ranked in the top twenty-five of highest grossing films of all time.

The production of unauthorized *Harry Potter* fan-made works has resulted in many popular internet trends, ranging from *Harry Potter*-inspired fan fiction (http://www.fanfiction.net/book/-Harry_Potter/) to puppet shows (<http://www.potterpuppetpals.com/>). These examples have become phenomenal sub-cultural, non-canon sources of entertainment for *Harry Potter* fans. Leading *Harry Potter* fansites which receive large traffic flows of users (such as *TheLeakyCauldron.org* and *MuggleNet.com*) quickly became popular sources of *Harry Potter*-related information, for their thorough and timely coverage of the franchise's and fandom's activities in the news. These websites rely on input from the wider fan community to maintain up-to-date news reporting. Perhaps realising this, the producers of *Harry Potter* started including these webmasters as recipients of their press releases, bringing a new dynamic to the relationship between producers and consumers. With the Internet facilitating a closer connection between these previously polarised positions, producers are nurturing their relationship with fans. Warner Bros. even invited webmasters from *www.hp-lexicon.org* (*The Harry Potter Lexicon*), *TheLeakyCauldron.org* and *MuggleNet.com* to the *Harry Potter* film sets to observe the production process in action. Such intimate familiarity with fans was an uncommon practice among media producers until recent years. It indicates that fans are being allowed to come closer to, and experience media from the standpoint of co-producers. This thesis will use these examples to discuss fans' property and belief systems in relation to the media they consume.

On Halloween, October 31 2007, legal representatives for author, J.K. Rowling, and attorneys from Warner Bros. filed suit against a small publishing business, RDR Books, for attempting to publish an unauthorized companion guide to Rowling's *Harry Potter* series. The unauthorized guide, to be titled *The Harry Potter Lexicon*, was chiefly authored by renowned *Harry Potter* expert and celebrity fan, Steven

Vander Ark, webmaster of a user-generated encyclopaedic website on all things *Harry Potter*, *www.hp-lexicon.org*. Vander Ark's website had been a go-to source for fans for years. Just over three months after the publication of the final instalment in Rowling's multi-million dollar seven-part series, an embargo was brought against RDR Books and the request to halt the publishing of *The Harry Potter Lexicon* was later granted in December of that year.

Warner Bros. is one of the largest authorities in film and television media. The giant conglomerate has been operating since 1903 and owns the copyright to many franchises, including *Batman*, *Mortal Kombat* and *The Lord of the Rings* in addition to *Harry Potter*. Warner Bros. owns many large-scale production films, franchises, record companies and theme parks and has earned itself a reputation for its hard-lined pursuit of intellectual property disputes. Despite this, the dispute with RDR Books and Vander Ark is the first lawsuit between a fan and a copyright holder to be seen before a judge. The incident closest to this occurred when a would-be screenwriter submitted a script for a *Rocky* film which was subsequently rejected, only to find later that a *Rocky* sequel resembled his script 'too closely.' (Tushnet 2007, 168)¹ The presiding judge in those proceedings threw the case out, explaining that the *Rocky* franchise could not be liable for infringing his script because the screenwriter was himself an infringer.' (Herrick 2009)

Prior to the lawsuit, Vander Ark had been hailed by the *Harry Potter* fan community as an expert in his field, and as such had developed a friendly relationship with the copyright holders of *Harry Potter*, including Rowling herself. As a well-known community member, Vander Ark experienced elevated status within that community and maintained amicable relationships with *Harry Potter* producers. Vander Ark even appeared on the special features DVD for the fifth movie instalment of the series *Harry Potter and the Order of the Phoenix* to provide commentary. The Warner Bros. et al V. RDR Books et al lawsuit was unusual not just because it was the first litigated copyright infringement case between a copyright holder and a fan, but because of the very nature of fan culture, its modern attitude towards copyright, and the unique relationship which exists between authors and fans.

During the lawsuit, the plaintiffs made their complaint clear: unauthorized, commercial derivative uses of their copyrighted material are an infringement of their creative rights. Plaintiffs sought to gain creative control of *The Harry Potter Lexicon* as derivative work and reserve the right to publish *Harry*

¹ In the case of *Anderson v. Stallone*, Timothy Anderson wrote and submitted to a spec script which he hoped would become *Rocky IV*, a sequel to the successful *Rocky* movie franchise. It was rejected, but Anderson later found that the copyright holders of *Rocky* produced a sequel which mirrored events that Anderson had described in his script. The case was heard before a judge who ruled that the copyright holders of *Rocky* were not liable for copyright infringement as the spec script was an infringing work itself.

Potter-related encyclopaedias. Many questions about the extent of authorial control and the very nature of derivative uses have been raised by this lawsuit, leaving critics on the topic of copyright law and the larger *Harry Potter* fan community divided. This lawsuit deserves particular attention, not just because of the huge success of the *Harry Potter* series, but because of the impact of such a hearing on the ability of media audiences to discuss, build upon and interact with cultural products in the digital age.

The *Harry Potter* franchise provides many modern examples of significant events and concepts concerning fan culture and copyright. This is due partly to this lawsuit, and also because within the first decade of the twenty-first century, the *Harry Potter* franchise experienced its zenith of popularity and the phenomenal fan activity which followed occurred *en masse*. *Harry Potter* exposed fan culture to the public as an intriguing phenomenon and the *Harry Potter* fandom remains one of the largest fandoms in existence (this not to say that examples outside the *Harry Potter* franchise will not be utilized in this thesis). Some of the incidents of conflict between fans and copyright holders which have had the most resounding impact on fans' conduct and perceptions of property are sourced from diverse origins. However, in this thesis, I would like to emphasise the ways that the *Harry Potter* fandom in particular has had a profound impact on modern publishing and information dissemination models. This thesis will analyse the lawsuit and the implications of the trial's findings for copyright law and the wider fan community.

1.1.2 Authorship and the Origins of Property

The notion of authorship is a changing social construct. In order to understand what authorship means now, it is necessary to understand what it has once been. I therefore take a historical approach in this thesis, drawing on literary tradition, to illustrate the modern Romantic perception of the author. The author construct is valuable to us as a society because of a variety of cultural theories about the role of the literary artist.

When the Statute of Anne was established in 1710, the content of works of authorship took on new meaning as a kind of property which could be attributed to a single originating source. The term 'copyright' literally refers to the legal 'right' to 'copy' during a time in which booksellers were reproducing texts without the author's knowledge to be sold in their stores. The Statute of Anne imposed limits on the creative process and its reproduction, putting an end to book piracy, and stabilising and standardising a once unregulated manuscript culture. Authors, as opposed to book makers and sellers, were awarded greater control over the dissemination and creation of derivative works. Much of our understanding of intellectual property originates from the Statute's founding of authors' creative rights. As copyright law evolved, it has strengthened this protection of the author's control over their works. Due to recent legal

clashes over the exact extent of this control, media critics are questioning whether a legal system which favours authors and copyright holders as the gatekeepers of creativity is desirable (Rimmer 2003; See Reardon 2008; Wu 2008 'Tolerated Use'; and 2008 'Fan Feud').

In the latter part of the eighteenth century, literature experienced a period of exalted status. Taking place after the Age of Enlightenment, in which art production was culturally aligned with authority, this was known as the Romantic period. The movement encompassed art, literary and intellectual facets and came to value strong emotion in conjunction with original content and well-executed aesthetic language as the foundation of great literature (Williamson 1989, 5).

These authors conveyed tales of moral righteousness and the human condition through mimetic language, embodying a transcendent ethical and moral authority. This bestows cultural prestige upon the narrator. The author's protagonist—and vicariously, the author—becomes a moral buoy, whom the reader admires for their social conscience: 'the self-presentation of the individual speaker as a moral character was accepted as a form of proof of *ethos* in classical rhetoric' (Williamson 1989, original emphasis, 8). The author has been elevated socially as a moral and intellectual superior. Her authority is unsurpassed due to the very nature of her role as a published, and therefore socially and politically sanctioned, producer of meanings. Literary criticism at that time favoured originality in literature, and other texts were perceived as 'impoverished by an overreliance on convention' (Williamson 1989, 7). To summon emotive language and powerful narrative out of apparently nothing was perceived as nothing short of god-like.

In modern times, the author and the reader have become contentious ideological figures. The author's word was thought of as final; the meanings they produced were designed to be received and consumed unquestioningly by the audience, pacified by limited opportunity to respond critically. The second edition of *Key Concepts in Communication and Cultural Studies* defines authorship as 'a common sense concept which accounts for meaning by ascribing it to a creative, individual source' (O'Sullivan 1994, 20). It goes on; 'The activity of reading is reduced to that of a receiver more or less finely tuned to pick up the already-finished meanings sent down the channel by the author.' The author is a figure in literary criticism of significant ideological *author-ity*, while the reader occupies a position conditioned to accept established meaning unquestioningly; a mute observer of the story's proceedings. This imposition of authorial and ideological closure, often enforces an authoritarian rule over meaning-making while rejecting the voice of the critic or any critical response at all. These cultural perceptions of the author, as I will argue, have had a damaging effect of the rights of secondary creators and the application of copyright law to that process.

Roland Barthes's 'The Death of the Author' (1977) is a landmark study of authorship in the twentieth century. As literature transitioned from the Romanticist period into modernism and structuralism, the author's identity remains a significant factor in the study of their work. Barthes notes that the ideology

of the author was forged in Western political capitalist discourse dating back to the Middle Ages; merging English empiricism with French rationalism, literature came to embody 'the prestige of the individual, of as it is more nobly put, the 'human person'' (143-44). Barthes's critical reassessment of the dominant aesthetics of the Enlightenment period finds that a 'disconnection' between writer and text has emerged. Barthes's essay champions the concept of the reader as an empowered figure who also dictates the text's meaning. 'Victory to the critic', Barthes writes (147). The narrator is absent from the narrative itself; the narrator never refers to his or herself with 'I' or 'me,' hence the author's 'death.' The language used to convey meaning is distinguished from the subject of the text, the author merely a provider of words and the text itself an embodiment of aesthetic creation.

The role of the author is increasingly one of decline in social conscience. Barthes explains that it was once the case that the author was the final authority on textual meaning. One need only ask the author what they were trying to communicate in their text to have final confirmation of that text's meaning. When a work is published anonymously or under a pseudonym, every effort is made to discover the identity of the author and, therefore, the ultimate meaning of the text. Barthes challenges the control authors exercise over meaning-making. He describes the postmodernist era as that in which the reader will exert creative rights over texts. '[A] text's unity lies not in its origin but in its destination.' (147)

Michel Foucault answered Barthes' powerful essay with 'What is an Author?' The 'author-function' (as Foucault employs the term to represent the very function and position of the author) occupies an important role in the tradition of scholarly discourse. Academic pedagogy relies upon the ability to locate textual authority within singular originating source. When calling upon an author's ideas, stories, theories or philosophies, the reliability and validity of their contribution is communicated through the authoritative implications of the author's very name. 'Statements on the order of 'Hippocrates said ...' or 'Pliny tells us that...'' were not merely formulas for an argument based on authority; they marked a proved discourse.' (Foucault 1977, 126) Take the citation method in this very thesis for example: the authors cited here were published by an academic institution which lends them legitimacy and academic authority. In this way, the thesis builds upon the work of the past and relies on the expertise of other authors to strengthen its own argument. The prestige of the published author is tempered by the reality that publishers are the cultural gatekeepers who decide what to publish and who receives the sanctity which comes with being published.

Barthes challenges the notion of the author which had been historically a position of authority over the writing and meaning-making processes. Barthes believes it is the language of the text which speaks, not the author. In addition to being based on the author's past experiences, new texts frequently build upon or borrow from the successful narratives of the past to ensure the new text's success. The text itself can never be a work of pure originality, but rather all texts draw from works which preceded them. To

attribute the text's meaning to one originating source serves no purpose other than to impose limits upon the text.

Similarly, Foucault addresses the intentional fallacy and what he terms the 'author function.' The author, in this account, is less a single entity, and more a collective of voices and impressions which narrate the story and little more beyond that. The fluidity of the author function is especially evident in texts which are authored anonymously or under a pseudonym. Discovering the author's identity was thought to assist in the understanding the finished product and how best to consume it. But Foucault severs the relationship between writer and writing, disparaging the notion of interpretive authority lying solely with the original creator.

Foucault and Barthes both argue that the author is no longer a crafter of wholly original creativity, but rather, all texts build upon the culture and texts which preceded it. Barthes explains: 'Thus is revealed the total existence of writing: a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author.' (148) Barthes and Foucault's strong stance against the prestige of originality makes for an important argument in this thesis. Their work emphasises that the reader—increasingly seen as an empowered and important social position—is the final recipient and therefore, the authority on textual meaning.

1.1.3 The Gatekeepers of Culture

For the author who wants to make their writings available to a wider audience, the ability to edit, print, bind and market large volumes their own material would take time, sources and skill that not all authors possess. By entering a legal agreement with publishers, authors can exchange their reproduction rights for the use of the publisher's resources. The publisher claims a financial reimbursement from the sales of products which are produced on their printing press. The income that an author can expect to see from this arrangement is generally ten to fifteen percent of the recommended retail price in the form of royalties (Holifield 2002).²

Publication also has a significant legal context. For legal purposes, publication acts as kind of formal declaration of the ownership over a work of authorship and its content. Copyright law does not protect ideas; it only recognises claims on works formally presented on paper. The very instance of publication is the conveyance of legal and literary authority to the author. In the case of copyright

² Please note that page numbers are omitted from references made to electronic and online articles.

disputes, published works are generally afforded greater copyright protection over unpublished works as it is easier attribute the content to an originating source.

1.2 Networked Information Economies

1.2.1 Peer Production and Secondary Authors

Much of the academic discussion surrounding the Internet has centred on its democratizing properties. These ideas have risen in the work of Lawrence Lessig (1999) and William “Terry” Fisher (2004). Since the Internet’s social and democratic ‘boom’ as a popular networking and information sharing tool, the decentralization of the roles of creative and cultural production has had an unprecedented effect on the politics of property, copyright and authorship. The users of this information network require only computational equipment, as well as the costs associated with the purchase and maintenance of an Internet connection, to access, and in turn voluntarily contribute to, a rich information economy of user-generated content.

Peer-to-peer frameworks, or non-market frameworks, are rarely managed or regulated by a hierarchical force, but rather unite users who are motivated by common goals and beliefs. Free online encyclopedias such as *Wikipedia* rely heavily on voluntary co-contribution. Now one of the most popular and successful sources of encyclopedic information, *Wikipedia* is a non-market user-generated firm with no definitive originating source aside from the thousands of casual contributors. It is competing reasonably well with industrial market counterparts such as *Encarta* and *Columbia* (Benkler 2006, 71). Part of *Wikipedia*’s success lies in the fact that it enables users to update and improve pages, creating subsequent versions; a mechanism which allows the content to evolve and remain up-to-date.

In this thesis, I will be arguing that the greatest threat to peer production is a legal system which refuses to acknowledge non-market production as a powerful benefit to cultural exchange. Much of this opposition derives from a traditional definition of property and ownership which media owners rely on to enforce copyright law, and therefore, protect their creative rights and market. The limitations placed on non-market information economies, as Y. Benkler puts it, ‘squench freedom of action in non-market contexts.’ (2006, 20) When individual creativity is regimented and limited, frustration and anarchist reactions are inevitable responses. ‘Calibrating the reach of the market, then, becomes central not only to the shape of justice of welfare in a society, but also to freedom.’ (Benkler 2006, 20) At the same time that there has been an increase in individual and cooperative private action, there has been a decline of market-based economy’s dominance (Benkler 2006, 122).

1.2.2 Fans

Fan authors are believed to have been writing secondary works for over a century. From the nineteenth century onwards, it was fast becoming a common practice to publish derivative works based on famous books. For example, Lewis Carroll's *Alice in Wonderland* was revised in parodies by Frances Hodgson Burnett (1879) amongst other authors, and Arthur Conan Doyle's *Sherlock Holmes* also experienced similar revivals. In the 1920s and 1930s, fans of Jane Austen wrote and published in magazines what is believed to be the earliest recorded fan fiction (Viires 2004). During the 1960s and 1970s when franchises like *Star Trek*, *Star Wars* and *Doctor Who* were experiencing a boom in popularity, fans carried on this tradition of publishing short fan stories in magazines, and began producing non-profit 'fanzines.' Often abbreviated to 'zines,' these small-press mimeographed prints typically circulated amongst small groups of friends with shared interests. If a fanzine's content and popularity was sufficient enough to sustain a steady readership, an editor might have been appointed to review material for inclusion. Fan fiction, or 'fanfic' as it is sometimes abbreviated, has now become more widespread with the introduction of the Internet. Networking technology has made it possible for fans across the globe, not just those with access to limited-release zines or a mimeograph, to engage with each other in online activities and discussion about their favourite texts.

During the latter part of the twentieth century, the ways audiences viewed texts were beginning to evolve with the technology which supported that consumption. During the 1980s, advanced computing and the Internet were beginning to allow those with access to the technology the ability to create and publish their own creative content. The lines between consumer and producer were, and still are, becoming more blurred. Fans are shedding the stigma of passive consumerism and engaging in a rich sub-cultural creative economy where they can produce their own meanings within an established narrative. The ways fans are engaging with texts differs from those sanctioned by copyright law, and, therefore, fan authors are frequently affected by conflicts over issues of copyright.

The application of law to the method and context in which consumer creativity takes place requires constant review to accommodate its non-static nature. It has been the conjecture of digital media theorists that the law has failed to keep pace with the technology it governs. Particularly, this is true in the work of Lessig, who asserts that the way that commercial media interests are favoured over the interests of secondary authors and co-creativity is an indication that the legal system has become 'a system in which the Court gets to pick the constitutional values that it will respect.' (2004)

For many fans, fan products have become a means of developing a social identity through engagement in textual transformation with other like-minded fans, thereby appropriating texts subjectively to create meaning suitable to the individual. Follow-on creativity helps fans feel closer to the production process of their favourite texts by allowing them to fill gaps in the original narrative: for example, using fan

fiction to flesh out a minor character or plot tangent, or to continue the narrative long after the original text has ceased production. While fan authors borrow from copyrighted sources, most forms of fan product are generally non-profit and non-threatening.

Much of what fans practise and value is the free exchange of information. They are removed from an industrial-market information economy and represent an ongoing shift towards a digital knowledge economy. Fan authors recognize their favourite texts as a contribution to a larger exchange between readers and an originating source. Fans subject this contribution to secondary uses and, in exchange, the original author is compensated with accreditation. Accreditation is usually delivered through a fan author's preamble, but credit is also paid when fan readers leave reviews for authors of fan products. In this way, fans can begin to develop a reputation, elevating them to a higher rank within the fan community. The complex notion of moral ownership in fan communities will be explored in more detail in section 4.3.1.

1.3 Property Law and Copyright

1.3.1 Issue: Is Fan Fiction Risky or at Risk?

Copyright law and the ever-changing media landscape have become major issues in recent times. Copyright law has undergone drastic changes in order to accommodate technological changes. However, these changes have affected the ways in which media consumption occurs. Lessig notes, in *Free Culture*, that between 1973 and now, the average copyright duration tripled from 32.2 years to 95 years from publication or 120 years from creation (whichever is longest) for works of corporate authorship (2004). The notion of copyright itself has changed since the first copyright law in 1710; the West has shifted from understanding copyright law as publishing rights with short terms of ownership, to a society obsessed with property rights and protecting capital gains. And what is largely true for US copyright law, has become true globally. The scope of these laws has become increasingly extensive and the penalties severe to a point that fans, who range from children to middle-aged women, are being served 'Cease and Desist' notices without the capacity to defend themselves. The threat of legal action is a very real possibility given the average socio-economic position of fans. Fan writing in particular has become a strong focus of these Cease and Desist notices. While fan projects can take various forms, fan writing is far less cut-and-dried than visual media adaptations. The provision of acceptable use in written works is harder to define due to the nature of authorship in this media, though this is not to say that other forms of fan-made media have been excluded from legal conflict. Chilling Effects Clearinghouse (<http://chillingeffects.org/>) remains one of the few champions of Cease and Desist recipients, providing support and documenting intellectual property disputes between secondary creators and copyright holders.

The threat to secondary works frequently takes the form of copyright holders who disagree with the appropriation of their works by secondary creators. In 2003, the owner of a *Harry Potter*-centred adult fan fiction website was asked to take down sexually explicit material concerning copyrighted characters in order to 'protect the integrity' of the franchise for 'genuine Harry Potter fans.' (Goddard 2003) In November 2007, musical artist Prince's legal representatives demanded of the top three Prince fan-owned sites that 'all content featuring a likeness, image, identity and persona of Prince, Prince's creative work (lyrics, music, performance, album covers, etc.), and his trademarks' as well as fan photography of Prince tattoos and license plates be removed from the public domain (Ostrovski 2007). It is not uncommon for fan videos³ which feature copyrighted images and music to be removed without warning from popular self-broadcasting site YouTube due to disputes over intellectual property rights (YouTube 2010). The proponents of copyright law refuse to acknowledge the difference between contributing to established content, and stealing it to be marketed as one's own. The imposed removal of secondary works from the public domain is more than just the elimination of controversial material; it is an attempt to control the improvement and interpretation of cultural products and compromise basic social liberties.

This thesis will argue that clarification is necessary in differentiating fan practices from infringing or derivative uses. For the purpose of separating these two actions, I offer a definition of the terms 'secondary' works and 'derivative' which will serve throughout this thesis. This thesis also suggests that such clarification would be useful if incorporated into copyright law. Secondary authors produce texts which are based on material in other established works but are non-threatening to the original franchise. These works transform in order to criticize or parody the original, or sometimes just explore interesting plot tangents unexplored in the original narrative (see "StarKidPotter" 2009). All fan works are secondary works, yet not all secondary works are fan works; secondary works can be either commercial or non-commercial and either authorised or unauthorised. The production of secondary works is not usually motivated by money. Derivative works, on the other hand, borrow heavily from pre-existing original works of creativity, limited in transformative nature, and adding little in the way of comment or criticism, for example a sequel written by the original author. Derivative works are usually licensed by original authors. In the event that they are unlicensed, the original owner would have a genuine legal claim of authority over the new work. For the most part, however, secondary works are written by fans with the intent of building upon the original. The law does not acknowledge the distinction between secondary works and derivative works, and so copyright holders continue the stamp out what they consider to be piracy and

³ *The reason cited for the removal of this particular video is: 'This video contains content from WMG, who has blocked it on copyright grounds.'*

unfair competition.

These increasingly common legal conflicts are largely due to the greater ease with which law can be enforced online. Before the Internet, a buyer could purchase a product and proceed to use that product any way they saw fit and there was no way to monitor that use. However, in post-Internet society, virtual property, like software or creative data for distribution, is more difficult to apply to this simple formula of ownership; a buyer may purchase a product or software but what they own is less well-understood. The purchaser owns neither the intellectual rights, nor the exclusivity to reproduce that product or software and use it as they please. Their use is controlled and monitored through the use of Digital Rights Management (DRM) so that the individual cannot take unpermitted actions. For example, Apple Inc. encodes their iTunes software so that music which is downloaded from the iTunes website is shared among a limited number of personal computers. This 'management' of individual 'rights' online has led some critics to accuse DRM proponents of attempting to regulate the basic freedoms of its customers and contributing to an escalating surveillance culture. Regimenting the networking and information-sharing capacities of end users is a mark of a destabilised political framework.

Lessig refers to a growing culture of transformation and remix as a 'free culture', one which is threatened by an unrelenting and prejudiced legal system, and unsympathetic attitudes towards fan creativity. Little distinction is made between a pirated DVD of a film being distributed for the copier's personal gain and a transformative non-profit AMV posted on YouTube which encourages fandom growth. When restrictions are placed on how and what fans create, this impacts not only on their basic rights of freedom and justice, but also on their ability to engage critically and creatively in a dialogue with media producers. In the early part of the 20th century, cultural products were increasingly being produced inside an industrial-market economy by smaller numbers of people for a large audience of consumers preconditioned to accept information passively. Fan authors are a particularly difficult issue for copyright holders who believe that fan culture is a threat to the politically defined property law system which has ensured their financial success.

Because fans borrow so heavily from popular culture, fan creativity has come to occupy a grey area of copyright law which has compelled some copyright holders to attempt to regulate the practice. Some copyright holders of original works have been known to attempt to ban the practice of fan fiction, such as Anne Rice, Anne McCaffrey and Raymond Feist (Waters 2004). Such attitudes have, at times, placed a restriction on fans' ability to invest in community and esteem-building activities. This 'chilling effect' is a threat against which not all fans have the resources to defend themselves.

Robin Hobb, a fantasy author, wrote a scathing 'rant' about her views of fan fiction and published it online in 2005. Disappointed that her fans were not taking the time to develop their own characters in their writing, Hobb felt that instead her characters, and therefore her intellectual property, were being

'stolen' and used to create derivative fictional works (Hobb 2005). Considered ill-informed and narrow-minded about the ways fan fiction has benefited fan communities, Hobb's article was quickly rebutted by many fan fiction supporters who challenged her assumption that literary authority is implicit with commercial backing ("Justin" 2005). Hobb's article has since been withdrawn from all public forums but continues to be known as one of the most damaging rebuffs of fan fiction.

Some professional authors have embraced the enthusiasm of fans. Rowling has openly embraced fan culture, and from all outward appearances, encouraged the practice of fan writing. Most authors, however, are unaware of fan fiction's existence. Though some may take different stances on the issue, fan authors are content to keep their projects discreet to avoid conflict.

Complete copyright reform may not be viable, but serious reconsideration of the role of user-generated content in the production of information, knowledge and culture must take place or a large portion of the public and their creative rights will remain unknown. The purpose of this thesis is by no means to argue that all fan fiction at a base level should be legalized—that may serve only to further complicate the function of copyright law in relation to derivative works—but rather that the rights of secondary authors should be protected and strengthened. It is impossible to offer a perfect solution to an increasingly complicated issue. Instead, this thesis is an attempt to outline a perceived injustice with regard to the producers of nonmarket cultural products. This thesis will discuss the ways fan fiction is not protected by law and why it continues to be produced anyway. It explores the cultural, political and social ramifications of fan creativity and the complex legal issues which arise from the creative practices of secondary authors.

1.4 Methodology and Research Design

1.4.1 Research Questions and Objectives

The questions raised by my thesis engage the fields of property rights and literary studies. Identity politics and self-empowerment have become important elements in the interplay of fan and text. Fan fiction is an increasingly common practice and represents revolutionary ways of theorising property ownership. However brand or trademark dilution is a genuine objection put forth against unauthorised secondary uses by copyright holders. One of the primary concerns of this thesis is that copyright holders are misusing intellectual property laws for private interests, such as censorship of undesirable interpretations of their copyright material. I argue that many objections to unauthorized secondary uses based on brand dilution are thinly veiled attempts to police creative interpretations and claim monopoly over all related works. This thesis will analyse attempts to restrict fan creativity and the impact of these

restrictions on the shaping of the larger fan community. It does so by looking at several incidents of conflict between fans and publishers, concluding with the only conflict of this kind to ever be heard before a court of law, the Warner Bros. Entertainment et al v RDR Books et al case.

The questions which significantly drive my research are: What kinds of challenges do fan authors face and how does Internet regulation and self-moderation affect their creative processes? In the digital age, what is the new role of the fan and the author in relation to the text. Specifically, how are fans changing conventional media consumption, theorization, accessibility, and production models to meet their own needs and circumvent unjust legal regimes?

This thesis therefore canvases the often negative attitudes and perceptions of fans and their creations. It also considers the opinions of fans with regard to notions of authorship and consumerism when addressing these concepts' changing definitions. Fan culture represents a wealth of cultural knowledge, and as the boundaries between producer and consumer blur, critical attention is necessary where a significant change in the method of media consumption is taking place. This thesis seeks to question the legal responsibilities of media producers and consumers, as well as theories of the intentional fallacy and the process of meaning-making by challenging hegemonic and culturally accepted positions of epistemological power. It asks: what has the role of the author and the reader become in modern times? Specifically, how do fans negotiate relationships to popular texts? And is a creative market in which fans are restricted to non-profit and small-scale endeavours sustainable or desirable for creators everywhere?

I will argue that fan culture is not a threat to the hallowed institution of authorship but rather exists to represent an alternative to dominant cultures and incorporate a vast dispersal of voices. In this, it challenges the culturally-anchored mainstream idea of attributing creative rights to a single originating source.

1.4.2 Methodology

Anarchist and libertarianist approaches to Internet research have become a typical means of discussing the prospects of legal reform and the pervasiveness of decentralised information and content production. My approach to the issue of copyright law and creative rights is a liberal one. This thesis is founded in desktop analysis with a small empirical study element. I have long been a participant in many fan communities and my intention is to represent fan culture honestly and respectfully. My discussion about virtual community and peer production is also based on my own experiences in fan fiction and media fan circles.

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A QUESTION OF COPYRIGHT

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Welcome...

Welcome to my Website!

I built this website to document the journey that is my Masters by Research. Its main purpose is to keep all participants in my study informed and connected.

Project Title: "Please don't sue!" : Regulation, Control and Ownership in Fan (Fiction) Communities.

Thesis Abstract: With the J.K. Rowling and Warner Bros. Inc. V RDR Books lawsuit as a case study, my thesis will address the concerns surrounding issues of textual authority and ownership in literary discourse, and also the affects of law, regulation and self-moderation on fan writing. The relationship between fan fiction writers and original copyright holders is tenuous at best. What are the legal and

Links

[Survey](#)

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[-Abstract](#)

[-Research Questions](#)

[-Aims and Objectives](#)

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Where You Can Find Me

Figure 1: Project homepage

In order to gather new data concerning the demographic who form the basis for my research, an anonymous online survey was conducted in 2009 of FanFiction.Net users over the age of eighteen. FanFiction.Net is easily the largest database of fan fiction on the Internet. The aim of this research has been conducted to gain valuable insight into the types of people producing fan fiction, their understanding of copyright and the challenges they face with regard to copyright law. The ambition of this thesis has always been to represent the fan community honestly.

FanFiction.Net provides a communal platform for fans worldwide to interact and share their own amateur writings. Currently the leading fan fiction orientated website, FanFiction.Net hosts approximately 5,200 text-specific categories and an estimated 6.1 million users (FanHistoryWiki 2010). Fan authors post stories, which can be subjected to critical review on this automated site and also engage in community interaction through message boards. In addition to providing a space for self-publishing, the site also hosts 'Communities', forums and a beta service, a mentor program in which writers attempting to improve their skill have their work edited by a senior site member.

Data was collected from FanFiction.Net users who had been members for more than two years and were over the age of eighteen. A total of twenty-five volunteers participated in the survey which asked them to provide detailed reasoning and justification behind their practices. Statistical information and free form survey responses were obtained to determine fans' contemporary perceptions of intellectual property law, plagiarism and authorship. The survey allowed participants to voluntarily submit thoughts and opinions concerning issues within the fan community in the form of qualitative and quantitative data. The survey was conducted in way that allowed survey participants to be kept completely abreast of the project: a website was created as a means of informing fans of the progress and content of the research (see figure 1.1). This survey thereby provided fans with an opportunity to contribute input concerning their practices. The survey recruited 25 fan participants from a diversity of fandom backgrounds in order to obtain a broad understanding of fans perceptions of intellectual property across various community origins. The results of this survey will be discussed in section 3.2.1.

1.4.3 Design

Chapter two serves as a literature review, followed by a chapter on the reality of fandom entitled 'Fan Culture.' This chapter specifically discusses the practice of fan fiction as one of the oldest fan practices and a means of the fan author involving themselves in the production of popular cultural products. The main objective is to introduce and define fans and fan culture. Because copyright has become major concern for fans, the method and scope of fan creativity is affected. This chapter will argue that fans have collectively resisted oppressive creative monopolies as outlined in 3.1.2. Sub-cultural groups find unique ways to resist authority and it is for this reason that this thesis incorporates discussion on various methods of internet protest.

By looking at various examples of fans as pro-active consumers, the third chapter outlines the ways fans are empowered by fan culture and disempowered by social perceptions of fans. Fans form webs of community in which their texts are shared and discussed. The gift economy that fans generate allows their products to be shared freely. Benefits for fans include the joy of belonging to a community

where common interests and beliefs are shared. Fan authors whose talents result in wider dissemination of their writing enjoy higher social ranking within the community. Fans also self-designate with the delicate task of maintaining the continued enthusiasm for and moral integrity of their favourite texts, creating 'wikis' and other depositories dedicated to the original text. This, in turn, indicates that fans are, without recompense, documenting and collating culturally significant information.

The chapter titled 'Free Culture V. Permission Culture' discusses fan culture more generally in relation to current legal and political restrictions. It outlines the history of copyright law which forms the basis for our modern conceptions of property and ownership. The discussion then turns towards *doujinshi* culture in Japan and assesses the phenomenon's viability as a solution to the clashes over intellectual property in the West. This chapter also looks at some intellectual property issues which have emerged between copyright holders and secondary authors by looking at examples from actual legal clashes between fans and professional authors.

'Case Study: Warner Bros. Entertainment et al v RDR Books et al,' the next chapter, discusses the first litigated lawsuit between a fan and copyright holders. Because of its unique circumstances, this case was the first to be heard before a judge in U.S. courts. In the past, many fans have, under the threat of prosecution, stood down against corporate owners for lack of resources to defend themselves. The incident of Warner Bros. Entertainment et al v RDR Books et al represents a larger ongoing phenomenon. The case study illustrates the engaging of two polarised notions of intellectual property and represents an exemplary turning point for sub-cultural creative industries, but also describes some significant shifts in modern ideas about property rights. Following the Conclusion, a glossary has been included as Appendix A. Many terms mentioned in this thesis and used commonly amongst fans are explained further in this section. An annotated bibliography is also included.

Because copyright law and property law are two very complex notions, in order to explain them fully, this thesis now turns its attention towards the kinds culturally supported theories which affect a strict code of property ownership. The conflict between copyright holders and fans is composed of interrelated cultural and traditional elements. As such, the thesis takes an illustrative approach to the topic, and will focus on cultural and historical aspects as the argument unfolds.

2. TRADITIONS OF AUTHORSHIP

2.1 Author Effect

2.1.1 What is an Author?

In recent times, the impact of the Internet has had a delineating affect on the roles of authorship and consumerism. While there has been sustained academic discussion in the past of literary subcultures, specifically slash fiction and feminist ethnographies, there are fewer academic studies available today on the topic of modern fan culture and copyright law. This thesis seeks to fill this 'gap' in academic discussions of fan practices by first analysing what it means to be an author and what it means to be a consumer. This chapter will outline the ways this thesis will build upon theories of the origin of the notion of authorship.

The author construct is linked heavily with notions of Romanticism, authority and morality. Dugald Williamson's *Authorship and Criticism* highlights the impact of the period of Romanticism in the eighteenth century and the nineteenth on modern cultural prestige of the literary author. This thesis uses these theories as to the origins of the notion of authorship as a basis for an illustration of our modern understanding of copyright and ownership. This will be an important aspect of society to understand in order to fully appreciate the ways fans theorise their own literary production, and how prevalent beliefs in the creative powers of original authors are increasingly resulting in legal conflict between fans and copyright holders.

Not until the 20th century would critics begin the deconstruction of this notion of authorship. Largely, Roland Barthes's 'The Death of the Author' (c.1977) and Michel Foucault's 'What is an Author?' (1977) are responsible for exploring the prospect of the reader as a powerful agent in the process of defining the text's potential meaning. The works of Barthes and Foucault are important to this thesis in understanding that all cultural products are produced within a context of past works. Their significant contributions towards theories of authorship form a foundation for a discussion of the relationship between fan and text.

The cultural prestige of the author coincides with their status as published or unpublished. The published author is valorised and afforded legal protection. Every work of authorship is the product of a system which celebrates the cultural and moral superiority of the author and seeks to protect the author's and publisher's right to financial reimbursement. Increasingly, the modern state of intellectual property law protects the author's work to the point of criminalisation of subsequent rewriting. This in spite of early tenets of copyright which acknowledged the importance of allowing copyrights to lapse after a period of

time so original works could move into the public domain where reinterpretations and improvements could take place. Copyright law is the refuge of producers of commercial works who wish to increase the exclusivity of the property-based market. This results in increased criminalization for non-market producers.

It is important to distinguish the roles of 'author' and 'publisher' in order to fully understand exactly where the objections to new uses of a text originate. Being published lends legitimacy to an author's work. Publishers then serve as cultural gatekeepers: authors license their intellectual property rights to publishers who reproduce it at a profit for which the author is entitled to a small percentage. Without a publisher, it would be a difficult feat for an author to single-handedly edit, print and bind several thousand copies of their work. By way of publication, the author and their work is deemed worthy of academic, social, religious, or political notice. The publisher, also a copyright holder, stands to gain a larger percentage of profits from the publication of a text than the author themselves. And so, publishers are just as frequently the instigators of legal action to prevent copyright infringement. Objections to the practice of fan creativity tend to originate predominantly from the original author and those who are 'close to the claim of being authors.' (Ross 2006, 746) By visiting the ideas of Benkler and Lessig in relation to the powers of publishers and copyright holders, this thesis seeks to bring attention to the disproportionate creative powers afforded to these roles.

2.1.2 The Digital Age: An Invitation to a Conversation

Following World War II, a monopolistic one-to-many marketing structure has become a prominent industrial media distribution model (Benkler 2006, 179-80). Mass consumerism seeks to locate information and cultural production within a small number of agents and deliver it as finished goods to a large consumer base. The audience is conditioned through their very position as receivers not to challenge this order. The ability to respond to these final meanings at the end of the network of information exchange was considered impossible or shunted to other media in the pre-Internet communications environment. This system reached its peak in the 1980s, when urbanization and economic efficiency became the foundation of modern living.

The Internet allows individuals to abandon the idea of the public sphere as primarily constructed of finished statements uttered by a small set of actors socially understood to be 'the media' (whether state owned or commercial) and separated from society, and to move toward a set of social practices that see individuals as participating in a debate. Statements in the public sphere

can now be seen as invitations for a conversation, not as finished goods.

(Benkler 2006, 180)

As a result of the Internet's widespread adoption as a preferred means of social networking and information dissemination, individuals are capable of group-based active cooperation and are now able to respond critically and more efficiently to the information they consume (Benkler 2006, 357). Information which makes its way through social networks does not just reach individuals, it affects a community and the community can respond to the source and each other as a result. As fans respond critically and creatively, their products become the subject of legal contestation. Benkler observes that as publishing and being a creator become more democratized roles, the boundaries between producer and consumer become more 'porous.' (125) This is a principal idea for my argument about fan works and how they are, and should be, treated.

With every significant technological change of the past has come a shift in the laws which govern that technology (Lessig 2004, 74). Immediately following the integration of new technologies into everyday lives comes a period of destabilization, as users attempt to situate the new technology within a legal, social and cultural context. With time, legislative and social stabilization occurs in relation to the new technology. It seems apparent that with the Internet, and its redistribution of creative powers, a period of destabilization is occurring as copyright holders and legal authorities come to terms with the implications of these new methods of information dissemination. This is a sentiment echoed in the works of Lessig (2004) as well as Benkler (2006).

2.2 Gift Culture and Non-market Peer Production

2.2.1 Culture, Community, and Custodianship

The emergence of a non-market peer production and a subsequent gift culture has resulted in a challenge to the authorial discourses of the past. The trend is one which incorporates an 'active consumer' perspective.

Active users require and value new and different things than passive consumers did. The industrial information economy specialized in producing finished goods, like movies or music, to be consumed passively, and well-behaved appliances, like televisions, whose use was fully specified at the factory door. The emerging businesses of the networked information economy are focusing on serving the demand of active users for platforms and tools that are much more loosely designed, late-binding--that is, optimized only at the moment of use and not in

advance--variable in their uses, and oriented toward providing users with new, flexible platforms for relationships.

(Benkler 2006, 126)

These 'platforms for relationship' are populated by works which remix and re-examine the message of the original text. This secondary mode of producing cultural products and knowledge exchange exists in stark contrast to a dominant commercial-based market economy, the tenets of which perceive the works of unauthorised creators as a direct market threat to their franchise. Jenkins's *Textual Poachers* (1992), *Convergence Culture: Where Old and New Media Collide* (2006), and *Fans, Bloggers, and Gamers: Exploring Participatory Culture* (2006) have made significant academic contributions in describing fan culture as communities perfectly exemplifying the ideals of non-market participatory culture. This thesis acknowledges Jenkins's work as one of the most definitive sources on the topic of fan culture in the past two decades and attempts to build on theories introduced by his work.

Even prior to Jenkins's *Textual Poachers*, Rebecca Tushnet's 'Legal fictions: Copyright, Fan Fiction, and a new Common Law' made a strong case for fan rights based on their own moral ownership formula. Fans in this argument view texts as cultural property from which material is freely drawn in exchange for attribution. Fans view themselves as cultural custodians, charged with the protection of a text's moral integrity. In 'Payment in Credit' (2007), Tushnet described this notion of ownership as 'moral ownership'. Tushnet's article sparked a surge in academic analysis of the legal implications of fan fiction. Similar arguments have risen in works by Tim Wu (2008, 'Tolerated'), Lawrence Lessig (2004) and Elizabeth Durack (2000). These articles advocate social and political changes to accommodate new developments in fan culture and fan creativity.

Moral rights theory posits that an author of a work retains the right to attribution, to publish anonymously or pseudonymously, and to preserve the integrity of said work. As I will explore, fans also believe in moral rights theory, namely, their own moral right to partake in this tradition protecting and nurturing original texts. The term 'moral ownership' is used here to emphasize the belief that fans have a right, just as much as the original author, to participate in the growth of original texts. My usage of the term falls in line with that of Tushnet's original 'Payment in Credit' article. The legal system in the United States does not completely acknowledge the existence of moral rights for original authors; only the visual arts are protected by moral rights laws. This is important to note, as the case study on which this thesis is founded and other legal incidents to which I make reference, all occurred in the United States under the jurisdiction of the United States legal system. For this reason, and while I discuss the creative implications of copyright law quite generally in order to take a global view of the issues to be discussed, my analysis of copyright law is very much grounded in the United States legal system.

The strong connection an author may feel for their writing is easily shared by fans. 'When credit and blame are allocated, all the authors—and all their readers—deserve some of each.' (Tushnet 2007, 166) The dedication of time and energy towards cultural products leads them to create fan fiction, databases, 'wikis,' and much more without reward. Part of the fan's ability to appropriate established narratives without concern for the legal implications of their activities is facilitated by a belief in the moral claim they have to a text. Tushnet's 2007 follow-up to 'Legal Fictions,' 'Payment in credit,' is easily the most comprehensive account of fan psychology in relation to property ownership of cultural products. It brings to attention a fan tradition of borrowing copyrighted material for the purpose of remediation, acknowledging the original creator as the source but not the definitive owner. Tushnet's study of this kind of custodianship unearths important emergent attitudes towards property and its colonization in fan authors and forms a basis in this thesis for analysis of copyright law as it attempts to curtail these developments.

2.2.2 Fans as Active Social Collectives

The relationship between fans and media producers is complex. The apparent judicial bias towards large media corporations leaves the policy matters of non-market gift economies largely 'overlooked and ignored.' (Rimmer 2003, 4) Misunderstood and perceived as an unwelcome market threat, copyright law has become the foremost concern of secondary creators. It affects the context in which fan authors—who are compelled to shape the content and distribution of their work to evade legal detection or conform to rigid guidelines laid out by the Fair Use Doctrine (as will be discussed in section 4.3.4)—create. Though the law ignores the interests of secondary creators and instead depicts them as offenders, the final front fans can present against the threat of an oppressive copyright regime is the power of collectivisation. Collectivisation has many benefits for fans in addition to affording them 'exit power.'

As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.

(Benkler 2006, 9)

And so fans are more likely to seek power and safety in numbers. Collective social movement has proven productive, as this thesis will explore, in drawing wider public attention towards the concerns of

secondary authors.

2.3 Legal Handling of Fan Fiction

2.3.1 'Acceptable' and 'Unacceptable' Works

Lessig's *Free Culture* criticises a bureaucratic judicial system for failing the public in clearly defining acceptable and unacceptable secondary works. Copyright law has proceeded from regulating publishers to regulating everyone. The duration of copyright has increased and every creative act is eligible for copyright. As the reach of copyright law extends, media and culture is increasingly owned and controlled by a smaller number of companies. At turn of the century, the leading global media conglomerates were Disney, Time Warner, Viacom, News Corp, and Bertelsmann Group (McChesney 1997). This creates a one-to-many media dissemination model which affords producers disproportionate authoritative powers. Lessig documents the history and evolution of copyright law and suggests ways that the law could be modified to accommodate changing attitudes towards media consumption, such as initiating a system by which profitable 'follow-on' works would be allowed with small royalties paid to original creators. But, while Lessig advocates for change, *Free Culture* reflects an idealist vision for the future of copyright and at times fails to understand the complexity of a judicial system biased towards media corporations.

Copyright's original application was to limit the consolidation of power to a certain period of time. As it stands, copyright terms currently run for 'the author's life plus seventy years.' Some activist groups, including the estate of Sonny Bono, have actively sought to establish a permanent copyright system which could mean that authors or their legal representatives retain an indefinite creative monopoly, even in death, creating an impossible situation for new creators, remixers, and, to a lesser extent, cataloguers and librarians.

Lessig's approach to the issue of copyright's cumbersome burden on public creativity finds the repeated extension of copyright terms, such as those of the Sonny Bono Copyright Term Extension Act (CTEA), constitutionally unsound and in breach of the United States' First Amendment, particularly pertaining to that of free speech. Mathew Rimmer discusses this approach in relation to the arguments put forth by the opponents of the CTEA, and their failed attempt to overturn its ruling in *Eldred V. Ashcroft*. The United States Supreme Court found that the 'copyright clause' secured for authors the benefits of fixed terms of copyrights as a means of encouragement to continue to advance public welfare, and therefore reserved the right for congress to modify the constitution with regard to copyright terms (Rimmer 2003, 7).

2.3.2 Warner Bros. et al V. RDR Books et al

Due to the relatively short period of time between the outcomes of this lawsuit and the submission of this thesis, few secondary sources are available specifically on the topic of this lawsuit. Robert S. Want's *Harry Potter and the Order of the Court* (2008) provides a step-by-step guide to the Fair Use Doctrine (17 U.S.C. section 107) in relation to the case. Want's book is more factual than opinionative and does not provide close analysis of the parties' motivations behind the filing of the lawsuit. It presents as an impartial observation of the trial, while discussing the Judge's findings in plaintiff's favour analytically.

As part of a strictly legal analysis of the lawsuit, Rachel L. Stroude's study finds fault with the Fair Use Defence as an inadequate legal defence for commercial secondary works. Her study examines how the Fair Use Defence protects parodies as a form of comment or criticism, which in turn encourages the betterment of 'useful arts and science.' Archontic works on the other hand, such as that of fan fiction, act as an extension of a cultural product, building upon and expanding the original but not repeating it, and are not protected by law. This idea of archonticism in fan works was introduced by Abigail Derecho (2006) who suggests that fan fiction is deserving of legal protection due to its nature: encouraging cultural growth. This thesis builds upon Stroude's discussion of the Fair Use Defence as an insufficient legal protection for fans. I argue that for fans the practicalities and application of the Fair Use Defense need serious reconsideration. As Benkler states: "it is important to recognize that the theoretical availability of the fair-use doctrine does not, as a practical matter, help most productions." (2006, 440)

A similarly notable discussion of the *Warner Bros. et al V. RDR Books et al* lawsuit is that of Aaron Schwabach's *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright* (2008). Schwabach's study is one of the first to critically discuss the 'ham-handed' approach of Warner Bros. towards copyright disputes. Schwabach's paper discusses the proposed *Harry Potter Lexicon* in relation to the Fair Use Defence and finds that most fan fiction should be defended under this legislation.

2.3.3 Secondary Works V. Derivative Works

To say something further about derivative works: readers will find the term 'secondary work' and 'secondary author' repeated several time throughout this thesis. Lessig referred to them as 'follow-on works' and 'follow-on creators' in *Free Culture*. I suggest that 'secondary creators' as used in the work of Tim Wu may be a more appropriate description in conjunction with the use of 'secondary works' to

describe fans and fan writing. These terms hold a broader definition for fan works which are often difficult to locate within one single definition. One of the easiest ways to define derivative and secondary works is to remember that secondary works are largely non-profit and small-scale. This helps secondary creators avoid legal detection. Most authors of secondary works see no need to seek professional print publication as a means of dissemination, as Internet platforms already serve this purpose. Many studies, including Stroude's analysis, lump commercial and published derivative works together with non-commercial fan writing, despite a tendency in fan culture to disassociate with commercial projects as they conflict with fans' ideals of freedom of information.

Often in law, terms like 'derivative works' and 'secondary works' are interchangeable and little material is available on their scholarly classification. Tim Wu argues that secondary works should be considered a separate term from 'derivative' in order to create a legal distinction which could potentially legalise fan practices. Wu's proposal is that secondary works do not attempt to subvert or substitute the original publication and so should not be considered adaptations. 'Instead, they would simply be works falling outside the ownership of the initial creator' (Wu 2008, 'Tolerated Use', 632). Secondary works may provide a legal avenue for fans to create and interact with texts without encroaching on original authors' rights, yet at this stage it remains simply a suggested improvement to copyright law.

In the judgment issued by the courts in regards to the *Warner Bros. et al V. RDR Books et al* lawsuit, Judge Patterson made a significant ruling which defined secondary and derivative works. 'A work is not derivative, [...] simply because it is "based upon" [...] preexisting works.' (Patterson 2008, 39) He goes on to cite the *Castle Rock Entertainment Inc V. Carol Publishing Group Inc* case, and states: '[I]f the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.' The clarification of the terms 'secondary' and 'derivative' clears the ground in 'Free Culture V. Permission Culture' for discussion of a need to define fan practices from plagiarism as well identifying a possibility for secondary creativity to be culturally and legally accepted.

2.4 Academic Scope

2.4.1 Past Critical Fan Studies

The study of fan cultures was a popular topic for academic discussion throughout the 1980s and 1990s, particularly bringing to greater attention the activities of *Star Trek* and *Star Wars* fan-bases. The work which dominated this period highlighted fan activity as a postmodern sub-cultural phenomenon. Camille Bacon-Smith's *Enterprising Women: Television Fandom and the Creation of Popular Myth* (1992)

and David Bleich's 1986 study, *Gender Interests in Reading and Language*, represent an early period in critical studies of fan culture which was dominated by gender and queer theory. Fans were appropriating dominantly heterosexual male-centric media to fit their own subjective views through fanzines and email lists.

The texts which contribute most significantly to my argument, and from which I attempt to build, to form a progressive discussion of fan culture, are most typically drawn from a school of thought that the Internet is a democratising power. Through its stabilisation, a new harmonisation between emergent creative energies and governing agents is expected. These arguments are represented most commonly in the works of Fisher (2004) and Lessig (1999); that the democratising properties of the Internet have allowed users of digital and creative environments greater degrees of liberty. While the earlier works of Jenkins, and those of Hellekson and Busse feature heavily in many studies of fan cultures, they do not appear as frequently here. The works of these authors are very much anthropologically-based; aiming to highlight the cultural practises and social idiosyncrasies of subcultural fannish communities. However, I have chosen to turn the focus of my thesis towards fan culture as a legal conundrum. I therefore look predominantly to the works of Hills, Benkler, Bittig, and Lessig for their discussion of the Internet as a modern digital publishing frontier and a very striking factor in the evolution of notions of copyright and the way we generate information and culture.

The work of Benkler on the benefits of peer production to the state of information and cultural exchange marks a critical point in academic discussion of the Internet and social networking. As a result of mass consumerism, the relationship between creators and consumers is reduced to a transaction between impersonal agents where consumers are conditioned to accept the author's final meaning through the very role of being a receiver with little avenue to engage in discussion about what they have received. The heart of Benkler's argument goes to the nature of cultural production as a richer and more nuanced process than that which has resulted from the dominance of an industrial economic framework of information and cultural production. The roles of authors and readers are becoming more porous as each group takes on characteristics and influences of the other. Inspired by popular works, readers are in turn creating their own secondary works as a means of commenting on or criticising the original. User-generated content as a business model is gaining momentum as market-based industries incorporate the theory into their economic infrastructure: *eBay.com*, for example, relies on customers for input, or content, from which they then profit. Benkler believes the best products are produced in a combination of market and non-market systems. This thesis will discuss fan culture and the process of secondary creation in relation to Benkler's theories of non-market production.

In the past, successful studies of fan cultures have sometimes been reliant on the academic who undergoes the research also being a member of the fan community. The academic who forefronts their

fannishness is more likely to receive respect and support from the fan community, as well as being entrusted to represent the community fairly. This formula has guaranteed successful studies of fan culture for authors such as Jenkins. To be studied necessarily implies that one possesses an 'otherness' that is worthy of being studied. The studied half of this relationship is disempowered by the very nature of being targeted as 'other' and deprived of the ability to respond critically to the research. "Cultural studies may be keen to critique and remake the world, but it has become amazingly adept at ignoring its own power relationships, its own exclusions (of which fandom is, finally, only one) and its own moral dualism." (Hills 2002, 182) In reality, many academics are also fans as well or "aca-fans" as Matt Hills dubs them, so fan research must take into account that the study concerns critical and capable respondents. This moral dualism represents a methodological dilemma for Hills: 'Academics and fans both value their own institutionally-supported ways of reading and writing above those practices which characterise the other group.' The aca-fan can never fully be accepted as a 'serious' researcher, while the fan-turn-scholar is frequently excluded from the fan community for not being a 'real' fan.

Many academics remain wary of the term aca-fan. "The question is still occasionally raised whether the fan academic can function objectively as a scholar while concurrently in an atmosphere of deep engagement with other fans. Is it possible or even necessary to maintain critical distance from a text while simultaneously discussing it with deep affection and even love?" (Coker and Benefiel, 2010) In essence, fans and conglomerates take what fans do very seriously and yet academia does not. Early fan studies mimicked anthropological methodologies, maintaining an intellectually elitist objectivity when describing the subject of their investigation. An academic approach is necessary for an academic purpose, but this neglects to realise the importance of fans' perspective on issues which directly concern fans, instead keeping them at an objective distance. Failure to unite both academic and fannish perspectives in academic discussion of fans risks being disrespectful towards the culture which forms the subject of the work.

Failed studies concerning fan practices have often neglected the importance of respect between both researcher and subject. One such example in which the academic party experienced resistance from the fan community was that conducted by Boston University research students, Ogi Ogas and Sai Gaddam, who were challenged by members of the LiveJournal community for their questionable methodology and unprofessional conduct during a 2009 study (Macleod 2009). LiveJournal members were approached and asked to discuss their fannish enthusiasm in terms of subversive sexual desires. Fans were concerned about the researchers' methodology and found their conduct to be "creepy." For this reason, empirical studies involving surveyed fans often require the utmost respect for participants. It was therefore important for me to remain open and honest about my intentions and make my status as a fan-academic known during the implementation of my own research of fan communities.

Thus far, I have sought to highlight how corporate interests place a burden on fan-author rights. By acknowledging the arguments of Benkler and his extensive coverage of emergent non-market modes of production, I have emphasised how a dominant one-to-many system of information dissemination is beginning to be eroded by a growing and evolving culture which has been nurtured by the Internet's many-to-many framework. The book industry has maintained a heavy influence on our social understanding of authorship since its early days. There are few academic accounts available on the impact of this influence on literary sub-cultures. As such, this thesis now turns its attention directly to that topic. The following chapter will discuss what fan culture really is and how conflict has arisen between proponents of the traditional publishing framework, and the pioneers of a new creative literary tradition.

3. FAN CULTURE

3.1 What is a Real Fan?

3.1.1 From Passive to Active Consumers

This chapter serves to explore the reality of fan culture. Rather than reading the text passively, fans have become active participants in a larger, more porous narrative which envelops the original text. Because much of what they do is, in a literary context, considered unconventional, fans are often socially and politically disadvantaged. Their perspective of the text is undervalued, and their practices are incompatible with legal definitions of property and creative control. This chapter questions the extent to which fan cultures can therefore be considered empowering. While fan culture may redefine conventionally held notions of property, which has a destabilizing effect on mainstream culture, the practice of fan fiction has resulted in innumerable benefits for those involved. Fan fiction as 'free publicity' for copyright holders, as well as the development of nurturing feminist environments for budding writers, remain important elements in discussion of fan culture.

The belief and, beyond that, the expectation that fans remain passive consumers of media is not just a harmless stereotype, but a widespread assumption among media producers. Fan sites (fan-owned websites) shut down by corporate giants for 'misuse' of copyrighted terms and images (Weise 2001), mash-up and machina music composers sued for infringing copyright (Moss 2004),⁴ and copyright owners levelling accusations of copyright violation at fan fiction authors (Jenkins 1998, 2) expose a social mentality in which media consumers are expected to refrain from engaging critically and creatively with texts. Any attempt to do so—which often for fans involves producing their own secondary creative material—is perceived as a threat to the commercial gain of the original franchise and the media producers' creative power.

'Historically, the evidence is mixed as to whether the tradition of copyright law has been wholly supportive of the freedom and liberty of copyright users. There has also been a strong counter-tendency towards using copyright law for the purposes of private censorship.' (Rimmer 2003, 4) More commonly,

⁴ *The most infamous instance of a sound remixer being sued would be Brian Burton's (A.K.A Danger Mouse) music sampling of The Beatles' self titled 1968 album commonly known as 'The White Album' and Jay-Z's 'The Black Album' (2003) to create 'The Grey Album' (2004). Burton and his affiliates received several Cease and Desist notices from EMI Records, owners of the rights to The White Album. Due to overwhelming public support and protest, no charges were actually filed against Burton.*

fans have found that banding together to protect each other has been effective in preserving fans' creative rights as they define them.

In 2000, Heather Lawver—owner of a popular *Harry Potter* fan site, *The Daily Prophet* (www.dprophet.com)—received a Cease and Desist notice from Warner Bros., who owned the rights to *Harry Potter* and a penchant for sending these letters to website owners, who were usually young children. This was one of many Cease and Desist notices sent to hundreds of fan site owners around the world. Warner Bros. was concerned that these fan sites might be owned by 'cybersquatters' seeking to profit from copyrighted and trademarked material. Many recipients of these threatening letters immediately acquiesced to Warner Bros.' demands out of fear and handed over the domain names that they had purchased in good faith. In relation to one of these cases, Warner Bros. released the following statement on 22nd February 2001:

Warner Bros. genuinely admires and encourages fans to design and run their 'Harry Potter' websites. However, to protect this property and to ensure that these sites are not run for commercial gain and, equally if not more importantly, do not contain offensive or harmful material which could offend young readers, Warner Bros. has asked for the originators to transfer the registration of their domain names to the Company. This protects the property of fans while simultaneously allowing the original site creators to continue to run their websites freely and without intervention.

(Wolchak 2001)

In demanding that fans surrender their authority over their fansites, Warner Bros.' distrust of its own fans was obvious. The suggestion that a fansite which is closely monitored and whose maintenance is not the sole responsibility of its owner exists 'freely and without intervention' was considered offensive to some fans. 'I was enraged that Warner was attacking the very fans who made *Harry Potter* a success in the first place,' Heather wrote on her website (2008). Lawver was concerned that many fans did not know they were legally within their rights to create fansites. Lawver banded together with fellow *Harry Potter* fans to create a website called *PotterWar.org*. In addition, she organised a world-wide Warner Bros. boycott, a petition, and a website called 'Defense Against the Dark Arts' (www.dprophet.com/dada/) to host the organisation and support victims of this corporate 'bullying.' Members of the organisation bought out every possible domain name they could think of which contained the name '*Harry Potter*,' going directly against Warner Bros.' request. With the release of the first *Harry Potter* movie drawing close, Lawver and her organisation threatened to boycott all *Harry Potter*-related merchandise with the exception of the original book series if Warner Bros. continued to send these letters. The organisation's mission statement declares:

By closing down one, two, or three dozen fan sites, Time Warner has sent the fans a very disturbing message, to which we have a very definite response. We Harry Potter fans are a close-knit community, when you pick on one of us, you pick on all of us. That is why we have formed the Defense Against the Dark Arts. It is an alliance of fans, dedicated to sticking up for each other, standing for what is just and right.

(Lawver 2000)

Warner Bros. drew media attention in mid-2001 when one of the owners of a contested website, Claire Field, was reportedly reduced to tears over the impending legal battle (McCarthy 2000). As a result of a combination of this bad press and the efforts of fan-rights advocates like Lawver, Warner Bros. discontinued its Cease and Desist notice campaign, returning all but one domain name to their original owners. In Lawver's own words;

Within six months we had accomplished what no one else could—we established legal precedent that has brought copyright, trademark, and intellectual property law into the new millennium. Using common sense and tenacity, PotterWar merged the spirit of the law with the spirit of innovation on the Internet, ushering in an age of fearless creativity.

(Lawver 2008)

Lawver's statement about creating modern precedents for copyright law may stretch the case; however, her assertion that PotterWar has sent a strong message to copyright holders about the rights of fans is undeniable. Lawver's campaign also introduced the evolved fan to media producers; having shed the passive consumer stigma, modern fan culture is increasingly seen as informed, empowered and proactive. Lawver's orchestrated boycott of the Warner Bros. empire was not to be the last of its kind; a minority of *Harry Potter* fans attempted (unsuccessfully) to boycott Warner Bros. in 2008 when it changed the release date of the sixth *Harry Potter* movie from November 2008 to July 2009 ("gallabonga" 2008).

Warner Bros. failed to realize the fans' reasons for building and maintaining their own fan websites. Many used the outlet as an opportunity to report news and write fan fiction concerning *Harry Potter*. Jenkins covered this particular incident concerning Lawver and her supporters in his 2006 *Convergence Culture*. In it he describes the importance of using original material as a 'scaffolding' device for one's own writing, allowing amateur writers to focus on 'other aspects of the writing process.' "Many adults worry that these kids are "copying" preexisting media content rather than creating their own original works. Instead, one should think about their appropriations as a kind of apprenticeship. ...Our modern expectations about original expression are difficult burden for anyone at the start of a career." (190-91) Jenkins believes it is easier for copyright holders to view fan activities through the lens of piracy than it is to acknowledge the

complexities of fan writing (198).

Despite the obvious benefit of generating prolonged enthusiasm amongst consumers for cultural products, instances such as this demonstrate how some media producers still deny the usefulness of fan culture. By attempting to control the content of fansites, copyright holders attempt to control how their product is viewed. A similar incident occurred in 2003 when an owner of a *Harry Potter* website which contained pornographic material was sent a Cease and Desist notice by Warner Bros.' legal department who wanted to 'protect the integrity' of the *Harry Potter* franchise for 'genuine' fans (Goddard 2003). It is fair to say that because the majority of *Harry Potter* characters are under-aged, this website would have been highly controversial and inappropriate for younger readers of the *Harry Potter* series. The concerns of the copyright holders in this situation were that visitors to this fan's website could confuse its content with that which was released officially. In order to validate these concerns, their legal action would betray a belief that a sizeable portion of *Harry Potter* fans would want to read highly controversial and possibly perverse content. It also betrays an assumption that fans are unable to differentiate between original and fan products. The real concern of copyright holders is that the production of controversial fan products which could be confused with their own products could lead to trademark dilution and affects the integrity of their own products; in short, the copyright holders would simply prefer it if the sticky subject fan-made content did not exist.

3.1.2 Free Publicity V. Control

Copyright holders believe they have the right to protect their products from being associated with other harmful products. Another belief is that the production of fan works competes unfairly with official products and affects the copyright holder's desire to reserve unexploited markets. In the case where similar works attempt to debase the original work by means of defamation, also known as the 'lethal parody,' there is a potential to kill the market for the original. Copyright holders would naturally try to repress any work that they perceive is a threat to the integrity or market for the original work.

It may be fair to argue that without the original copyrighted work, all secondary works make no sense. The purchase of the original may be necessary in order to decode the secondary work's content. In this regard, secondary works, whether commercial or non commercial, promote the purchase of the official merchandise. But not all commercial economists are inclined towards this form of 'free publicity,' as it can affect the way their original product is consumed, and therefore, moves the product beyond their control.

By using copyright law to censor undesirable secondary works, copyright holders are imposing a

burden on the creative and interpretive processes beyond what is right or fair. And the law is even less forgiving to the exploratory creative nature of fans:

As criminal copyright law is currently written, many of the tens of millions using p2p networks are felons. It is one thing when the recording industry labels tens of millions of individuals in a society "pirates" in a rhetorical effort to conform social norms to its members' business model. It is quite another when the state brands them felons and fines or imprisons them.

(Benkler 2006, 442)

The law does not permit copyright holders to decide the 'whos' and 'hows' of the critical process: that would be unconstitutional. And yet these organisations are still able to use fear-mongering in the form of Cease and Desist notices to control cultural growth.

3.1.3 Cultural Custodians and Gift Culture

Fans are skilled analysts, learning through their enthusiasm to seek out subverted meanings within the text, which in turn enhances their reading experience. This knowledge implies a more intimate connection with the text. Jenkins's landmark study (1992) makes references to this intense textual proximity that fans feel. Knowing the text more intimately than the average casual consumer, fans derive pleasure from fan-fan as well as fan-text interaction, and their knowledge of the text and the accuracy of its continuity can affect this experience (Jenkins 1992, 109). Jenkins describes a time of ideological aestheticism which found 'discomfort' with excessive proximity to a text. Intellectuals were encouraged to maintain distance, a 'gap' as Pierre Bourdieu described it in 1980, from the object of their criticism. Consumers, who are perceived to lack critical distance, are conditioned through their interaction with texts to submit to textual authority, a way of consuming texts often aligned with feminine reading (Bourdieu 1980). But Jenkins describes the fan as falling somewhere in between. The fan 'trespasses' in unknown domains like a poacher and engages intimately and critically with a text, 'internali[sing] its meanings' (1992, 62). Fans create an emotional connection with the text to create a deeper connection with the text's fictional reality, and this too is often aligned with feminine reading patterns. For example, fans of the *Twilight* franchise, are invited into the text and asked to pledge allegiance to one of two leading male love-interests: 'Team Edward' or 'Team Jacob.' 'The text is drawn close not so that the fan can be possessed by it, but rather so that the fan may more fully possess it. Only by integrating media content back into their everyday lives, only by close engagement with its meanings and materials, can fans fully consume the fiction and make it an active resource.' (Jenkins 1992, 62)

The ability to create and share information online represents a redistribution of the creative powers

once reserved for small elite groups. As Jenkins says in *Fans, Bloggers and Gamers*, “If old forms of expertise operated through isolated disciplines, the new collective intelligence is a patchwork woven together from many sources as members pool what they know, creating something much more powerful than the sum of its parts.” (2006, 140) This democratisation of information production is not just demonstrated by the proponents of a free culture, but is demanded by them. Peer production is not managed by hierarchical force, but rather its agents are united and motivated by shared beliefs. This non-market information economy which fan culture has adopted has largely had the benefit of allowing fans to freely share information and bypass a system which would have their practices controlled and limited, if not eradicated. Attempts to curtail this phenomenon have led to an increase in individual as well as cooperative social action and emergent social politics. Non-market production is not a copyright free-for-all; the rules of property and attribution are still present, just in different forms.

Benkler’s *The Wealth of Networks* explores the motivation and social systems behind peer production and its widespread adoption as a chief source of information exchange and entertainment in the digital age. This world has increasingly become one in which professional authors labour for royalties instead of ‘immortality, beauty or truth.’ (Benkler 2006, 42) The peer-to-peer framework is one which is growing to supersede the market-based economy’s dominance as users choose freer outlets for creativity. Many of the legal conflicts over copyright in the past twenty years have been an attempt to force p2p networks to conform to outdated capitalist industrial market models.

The institutional ecology, the political framework (the lobbyists, the habits of legislatures), and the legal culture (the beliefs of judges, the practices of lawyers) have not changed. They are as they developed over the course of the twentieth century—centred on optimizing the conditions of those commercial firms that thrive in the presence of strong exclusive rights in information and culture.

(Benkler 2006, 57)

The fan is still often considered disempowered both culturally and academically. Individuals with social inadequacies and obsessive tendencies tend to occupy a lower rung of social hierarchies. Commonly misaligned with psychologically unsound passive consumerism, fans are considered a less reliable source of authority on culture when compared to other academic sources. Now, having the technical means to do so, fans are beginning to assert their position as cultural critics. Recent book releases by Big Name Fans (BNFs) such as Melissa Anelli (2008), Emerson Spartz and Ben Schoen (2009), and Cassandra Clare (2009) reshape fans’ image as experts on topics of media and popular culture.

For Matt Hills, being a fan does not always coincide with being a fan producer as some academics

would generalise them. While some fans are producing audio-visual content and some are writing book-length fanfics, some fans play equally important roles capturing and documenting the culture around them for others to enjoy. The maintenance of fan databases or fan communities is also a vital role in fan culture. They may not be creative in a conventional sense, but what defines fans from other forms of consumerism is that they are all knowledgeable and critical readers. The next section describes fan culture from 'inside,' by canvassing the views of a group of volunteer survey respondents. The aim of the survey was to gather qualitative data; fan views of intellectual property. The survey also provided an opportunity to be open with the fan community about my project, and an opportunity for fans to respond critically. The resounding response was supportive.

3.2 FanFiction.Net

3.2.1 Redefining Ownership and Property

In 2009, I conducted an anonymous online survey of FanFiction.Net users who had been members of the site for more than two years and were over the age of eighteen. The survey received 25 respondents who contributed demographic data, as well as opinions on authorship and their own writing practices. All but 3 respondents were female. The fan writing community has long been known to be female dominant arena (see Bleich 1986; Bacon-Smith 1992; Jenkins 1992; Larbalestier 2002; Scodari 2003), and as such, fan authors will often gear their writing towards these audiences.

The survey was a direct attempt to capture the kinds of attitudes fans hold towards intellectual property and their own creative rights. The aim was to incorporate authentic responses from survey participants into the project and to ascertain fan perceptions of issues affecting them. Only FanFiction.Net users who had been posting stories for more than two years and who were over the age of 18 were recipients of these emails. Respondents were questioned on a variety of topics ranging from the use of disclaimers in their work to their opinions of copyright holders who attempt to stop fan creativity. All respondents were accommodating and consented to having their contributions included in the project.

FanFiction.Net is a literary-based website, its layout is fundamentally minimalistic (see figure 2). The front page isn't necessary attractive because it doesn't need to be. The practise of reading and writing fan fiction has become popular enough to sustain reasonable traffic to FanFiction.Net. The main source of the website's income comes from advertising as can be seen in figure 2. A direct download link of OpenOffice software is provided on the front page. The website sorts fan fiction into categories ("Anime/Manga," "Books," etc.) so users can locate fan fiction related to certain cultural products with

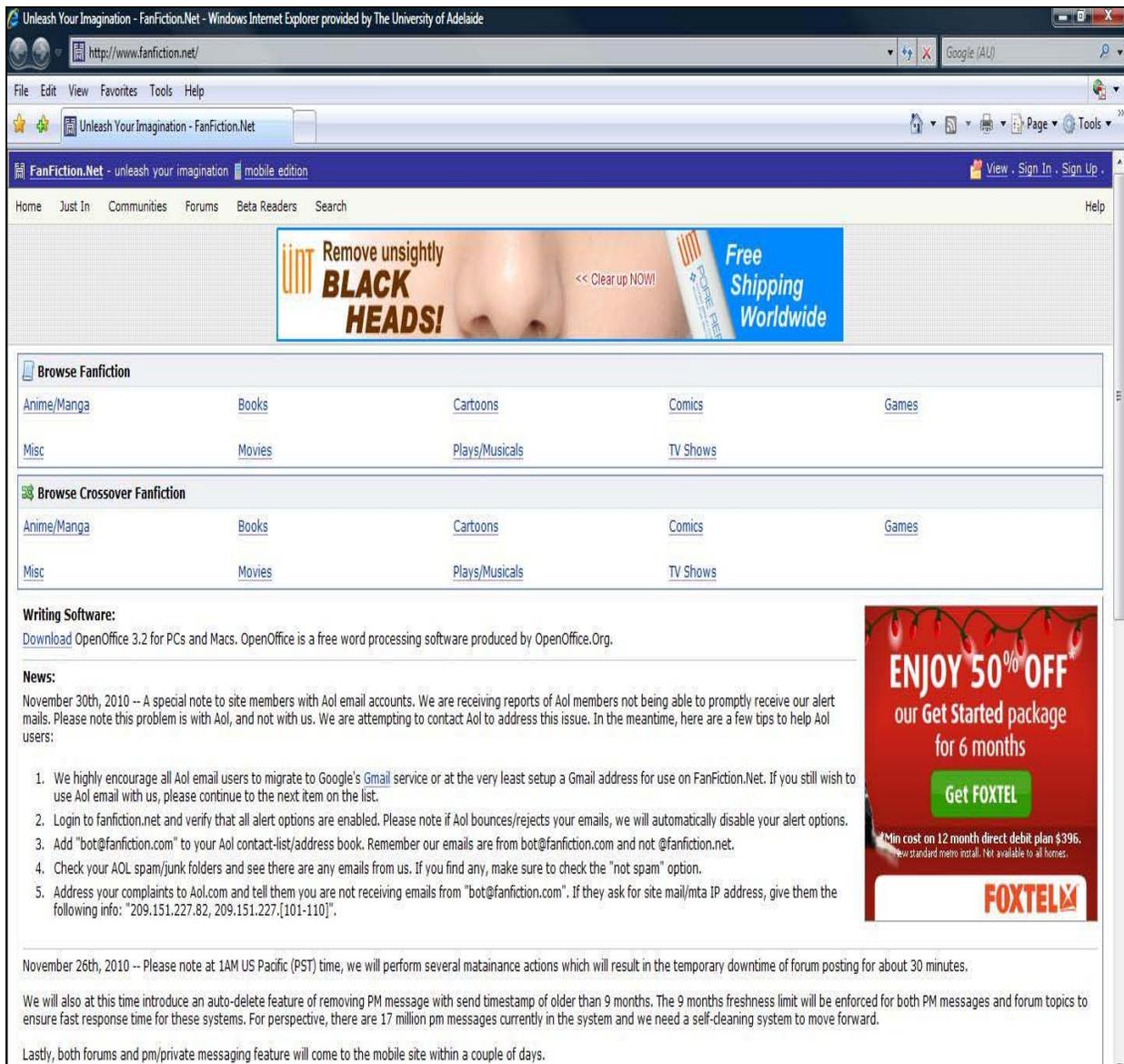


Figure 2: FanFiction.Net homepage

ease. The website has continued to expand these sections since it was launched in 1998.

Users of FanFiction.Net feel a strong connection with what they write and the original text and cite several reasons as motivation for creating fan fiction. When asked, 'What motivates you to write?' the consensus was that the authors of fan fiction believe that they are building upon and improving the original text. 'Often, I find motivation now because I want to 'fix' something or show a 'missing' scene or force characters to interact that normally do not-- things like that. [...] I have some natural talent and

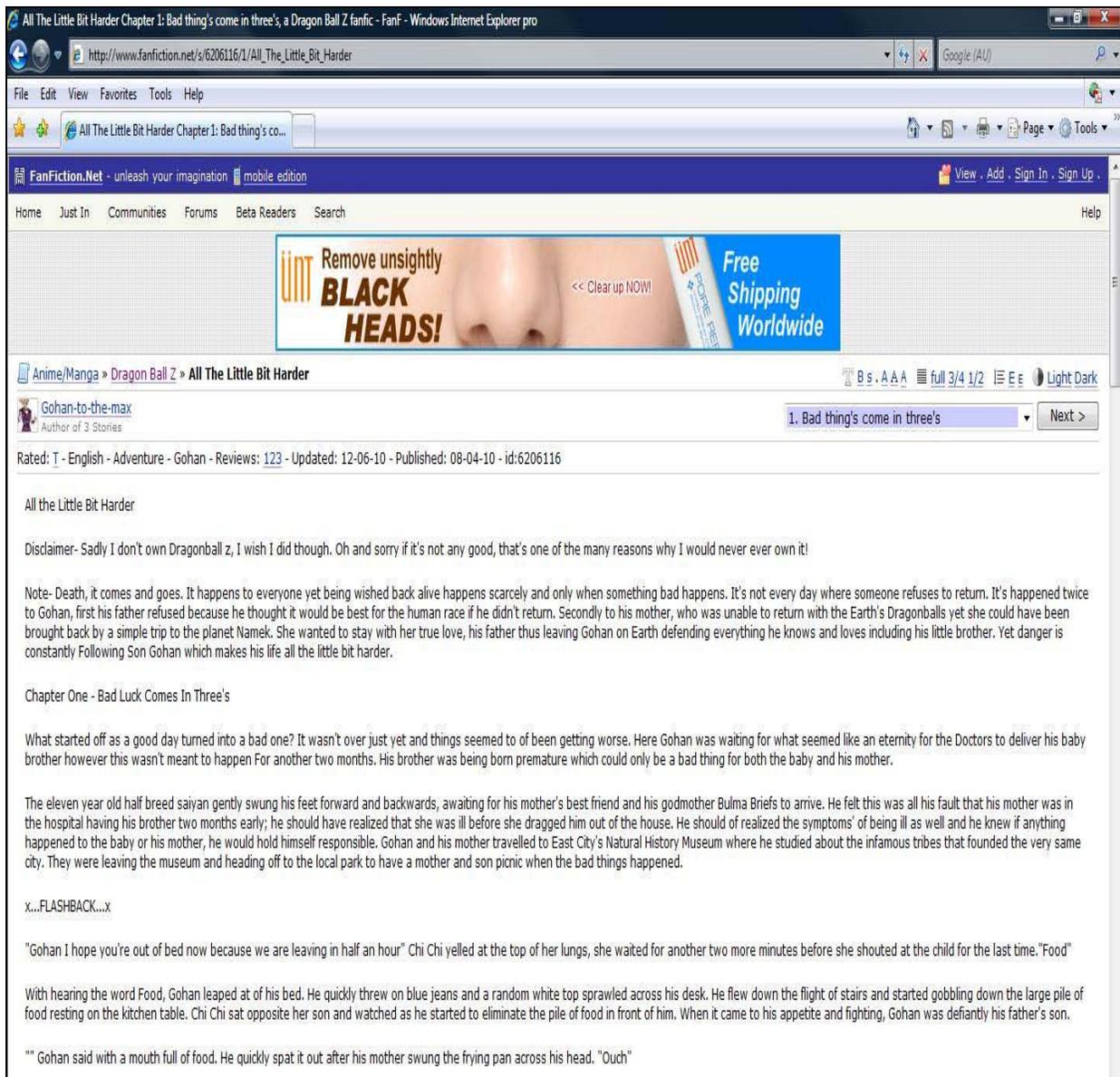


Figure 3: Example of a work of fan fiction on FanFiction.Net

some cultivated skill and it's nice to be acknowledge *[sic]* for being good at something,' says one respondent. Not only are fan authors using the medium because they feel compelled to write, but they feel they owe it to the original text to write fan fiction. One participant responded, 'I liked to write Alternate Universe stories about my fandoms (every time I see a movie/tv show or read a book that could have a different take to the story, I felt like I should really write something. And I wanted to write something unique that fitted with my own image of the fandom.)'

Fans understand that fan fiction generates interest in original texts, and, despite the fact that some copyright holders may object to fan fiction, fans know what is best for securing the success of any given fandom. 'It's funny- The authors who demand these restrictions don't appear to have any regard or appreciation towards their fans, or understand the interest by potential fans that such posted short stories could generate,' replied one respondent. Fans justify their borrowing as a form of free advertisement for the product from which they borrow, encouraging fandom growth: one survey respondent said, 'I watched the old Fox X-Men Cartoon as a kid, then as a grad student I started reading X-Men fan-fic, which referred to cannon [sic] events which sounded pretty interesting. I now have an extensive collection of Marvel Comics, which I never would have picked up if not for Fanfic.' Here, the market for the original franchise increases as a direct result of fan fiction.

3.2.2 Disclaimers

Disclaimers (see figure 3) have become a way for authors of fan fiction to outline the non-commercial nature of their work, credit original authors and explicitly announce their non-threatening motives. Disclaimers are utilized like a form of acknowledgement of debt, a payment in credit, to the original author's contribution (moral ownership will be discussed in more detail in section 4.3.1). Commonly presented as a short preamble at the beginning of a fan fiction, disclaimers allow fan authors to present at least a minimal front against legal prosecution. Survey results indicated that 88.0% of FanFiction.Net users meticulously credited their sources, while 8.0% were not concerned with attribution (4.0% declined to answer the question). The study also found that 64.0% of those surveyed always included disclaimers in their work while 24.0% included them 'most of the time' and 12.0% almost never wrote disclaimers. But most fans do not take the practice seriously. The following is taken from the disclaimer for fan fiction author Juliet Norrington's 'Shall We Dance?', a Sherlock Holmes fan fiction:

*Here a "don't," there a "sue," everywhere a "don't sue,"
Please don't sue me 'cause I'm broke, E-I-E-I-O!*

(2003)

The general consensus is that disclaimers are a 'necessary evil,' as one respondent put it, and a courtesy to copyright holders, but generally pointless. They are required by FanFiction.Net to support legal compliance, but fans hold very little regard for the practice, some ignoring it all together. The disclaimer is a reminder that fans hold little claim to content of their fan fiction and reinforces capitalist

ideologies of creativity and ownership. Therefore, disclaimers do not seek permission; the fans' right to interpret and create secondary works is implied. Fans' beliefs about ownership lie in the Lockean school of thought; 'In the Lockean tradition, property rights have retained a formal, if distant, association with the labor for which such rights are understood to be a reward.' (Ross 2006, 746) The extent of the original author's power ends with that initial contribution. The fan fiction which follows—the words, the selection and organization of its content—is produced and owned collectively. This adds a further layer of complexity to fans' understanding of ownership; in some sense, fan authors own their fan fiction, but it is also a product of the community.

Disclaimers provide very little protection against allegations of copyright infringement from copyright holders but they are strongly encouraged by FanFiction.Net. In reality, a disclaimer will not absolve an infringer of liability. It is fair to say however that the authors of secondary works who do not expressly clarify their unofficial and unauthorised nature invite trouble. But for some respondents, fan fiction writing is more of a hobby and legal action represents a very low threat: 'It's an indulgence. Not life or death, or something to go to court over,' said one respondent. When asked if they felt disclaimers were necessary or important, most survey participants vented that the obligatory preamble served little purpose. 'Anyone who believed me if I said at the top of my 'Death Note' fanfiction that I'd written the original is a dumbass,' says one respondent. For fans—who hold a very complex understanding of ownership and copyright—the very act of writing and posting on FanFiction.Net dispels any uncertainty over who holds the copyrights to certain characters and narratives. Tushnet's 'strong impression' is that disclaimers are becoming 'less common' due to the belief that 'fans are likely to expect that their readers will understand their basic premises.' (Tushnet 2007, section IV.B.2) When asked if they include disclaimers with their work, one fan wrote:

At the start of my stories I put the following: 'The Disclaimer: blah blah blah... DRAGONBALL Z... yadda yadda yadda... copyright of all characters... blah blah blah... the great, all-powerful Akira Toriyama... yadda yadda yadda... C'mon an' get me ya lousy Feds!... HAH! ' which pretty much describes my attitude towards the whole affair. If anything, I feel I'm improving on Akira Toriyama's script and paying homage to the characters by keeping them in character.

Fans' blasé attitudes towards accurate attribution reflect a belief that copyright holders are unlikely to discover a non-profit sub-cultural activity connected with their work. 'In the end, as soon as an idea hits the net, secondary works are inevitable,' one survey respondent explains. Once an author releases their product into the world, they lose some control over it. This topic will be discussed in more detail in section 4.3.1.

3.2.2 A Feminist Ethnographic Approach to Fan Writing

Fan writing has always been, invariably and female dominated pastime. In the past, this has made feminist examinations of the practice of fan fiction a popular topic for academic accounts of fan culture. And with good reason: feminism plays a very integral role in the creation of fan fiction. Fan fiction gives many fan authors the ability to substitute a popular text which was produced in a male-centric media environment with a feminist retelling. Fan authors who observe anti-feminist sentiments in male-orientated media are able to 'correct' what they see as flaws in the original narrative. As Judith Fetterley explains, 'As readers and teachers and scholars, women are taught to think as men, to identify with a male point of view and to accept as normal and legitimate a male system of values.' (1978, xx) The male perspective dominates popular media. Only here in feminist subcultures can female writers begin to correct this obvious discretion in popular texts. Undervalued female characters in the original text become the stars of fan fiction; their stories and perspective revisited and fleshed out.

David Bleich's 1986 study uncovered that a masculine reading of popular texts was dictated by an attention to accuracy and authority while distancing oneself emotionally. Feminine interpretation depended upon the ability to invest emotionally in the fictional relationships and engage reflectively upon possible subjugated meanings within the text. The male tendency to rely on accuracy and literal facts often leads to an aggressive response to adaptations and alterations of canon material. Female readers and writers are often seeking ways to adapt or translate culture into something more digestible, exploring subplots and secondary characters' motivations in texts. Fannish (feminine) responses to popular media thusly become a natural aversion for mass society (masculine).

Because fan fiction is like a testing ground, it is easy for fan authors to use the genre for self exploration. Fan fiction naturally gives many authors and readers the ability to project themselves into popular narratives and universes, familiarising and internalising the text more fully. This is done most regularly through the writing of 'Mary Sues.' By maintaining textual proximity, fans control their experience of the text. Fan fiction becomes an environment in which it is possible to think about and present the self in different ways.

Writing or editing as a professional occupation is a goal for many fan authors on FanFiction.Net: "I would one day hope to finish one of the many original novels I have begun." "I am interested in breaking into the writing industry." "I may decide to publish a book in the next few years, or later in life." "I'm working towards my MBA and an MFA in Creative Writing." "I'm hoping that I can write and then publish my own stories as books." "I'd like to edit children's books." "Some time in my life I want to publish a novel [...] I'd like to work my way to being a writer or story board artist, both including some form of writing." "I have published a book and I'm working to be a book critic while writing on the side."

Writing fan fictions give many amateur writers the ability to practice, without the necessity of building character or setting.

What fan fiction offers to these young writers is a great, existing storyline; interesting, three-dimensional characters that have already been developed; and a wealth of back-story to both pull from and write about. The inexperienced author doesn't have to spend all his or her time developing something original, but instead can focus on the actual skill of writing. [...] As they build their 'writing muscles', their writing improves and they tend to stray farther and farther from the source material.

(Lewis 2004, 3)

The context in which fan fiction is created is not a highly sexual one. Although, the content of fan fiction is sometimes known for its highly sexualised narratives and this has prompted academic discussion (see MacDonald), for fan fiction authors the importance of sex is less about pornography than the affordances it makes to characterisation. Romance writers clash with FanFiction.Net restrictions on highly sexualized narratives claiming the sex scenes are imperative to character development. Because FanFiction.Net is a public website which is not password protected, children are able to access highly sexualised content. This prompted FanFiction.Net in 2002 to delete any fan fiction with a NC-17 rating (which is equivalent to an X rating). FanFiction.Net relied on users to enforce this new policy. Fan fiction authors of NC-17 fan fiction either had to edit out the sexual content in order for their stories to be re-categorized as rated 'M' or move their fan fiction elsewhere. One fan author wrote in the disclaimer of her fan fiction:

This fanfic is an NC-17 fanfic. There is simply no way to make it anything else. I tried to remove the lemon from some of the earlier chapters, and found that it simply destroyed the storyline and characterization. It's impossible to understand the passions and drives of the characters without it, and I won't destroy the integrity of this story just to lower my rating.

("Mia Skywalker" 2002)

The fan author position is a 'becoming' position. Many fan fiction authors consider the practise to be a stepping stone between amateur and professional roles, a place where they can develop their skill. Feminist ideals of empowerment play an important nurturing role here for new writers; encouraging new authors to review male-dominant media in a new light, correcting continuity errors and anti-feminist sentiment. Because fan fiction is published under pseudonym on FanFiction.Net, it is easy for fan authors to control the image they present to the community and use the practise of fan fiction as a means of testing the limits of their own skill.

3.3 Conclusion

3.3.1 Destabilization

Fan culture requires a rethinking of the notion of authorship. Jenkins said in his *Fans, Bloggers and Gamers* that, “Rather than talking about interactive technologies, we should document the interactions that occur among media consumers, between media consumers and media texts, and between media consumers and media producers.” (2006, 135) Jenkins means that in exploring these relationships between fan, producer and text, there are answers to the rising conflict over intellectual property rights. Moral ownership is a theory of ownership devised by fans which justifies their creative interaction with texts. This theory dictates that fans have just as much right to be creative with copyright materials because they are just as emotionally invested as the original author and have a vested interest in protecting the integrity and longevity of texts. What some believe is ‘stealing’ or ‘piracy,’ is actually an emergent and vibrant information economy. The Internet has largely facilitating this economy through social networking and peer-to-peer transfer which has democratized cultural production. The unfortunate drawback is that this medium also makes the detection of fan products much easier. Benkler has noticed that with significant technological change has followed a period of social and political destabilization as the law re-orientates itself in relation to the new technology. ‘In each case, the period of perturbation offered more opportunities and greater risks than the periods of relative stability. During periods of perturbation, more of the ways in which society organizes itself are up for grabs; more can be renegotiated, as the various other components of human stability adjust to the changes.’ (Benkler 2006, 27) What we are experiencing is a prolonged period of destabilization as the Internet and its revolutionary methods of generating and exchanging information challenge legal authorities to adapt the law in order to remain relevant to the people it governs. During these periods of instability, some of the greatest feats of human creativity and transformation have taken place.

Lessig, in *Free Culture*, points out that the mainstays of modern media—such as radio, television and records—were originally pirated technologies (2004, 53). For example, in the late nineteenth century, Thomas Edison developed a patent for the ‘kinetograph’ or motion picture camera. Edison attempted to control all aspects of film production including what could be filmed and who could use the technology. Early filmmakers in Hollywood bootlegged the technology and started making films in direct disobedience to the original creator’s wishes. Despite Edison’s lobbying, the law ruled in favour of new innovation and the Hollywood filmmaking industry was born (Lessig 2004, 54). This is not an unfamiliar tale in the history of many modern technologies. Even early post-copyright society was heavily regulated and monitored by State and church, but changes to laws which governed print culture was necessary in order to protect social liberties like free speech. If not for the protection of new derivative uses and technologies, society would never have advanced.

When the first copyright laws were devised, the founding fathers decided the copyright terms should be limited to protect 'the progress of science and useful arts.' (Congress 1787, Article 1, Section 8) It was felt that the free proliferation of ideas should not be inhibited. By allowing the lawful use of copyrighted texts for the purposes of comment and criticism without first seeking permission from the original author, copyright law was designed to promote the betterment of cultural products through transformation and interaction. One of the greatest benefits of fan culture is the way it promotes prolonged enthusiasm and interest in cultural products without seeking recompense. But this obvious benefit is being overlooked so some copyright holders can eliminate competition and maximize profit.

In the digital age, property is becoming less tangible and more collectively owned. The law must reconsider its stance on non-market information economies and secondary creativity or risk becoming a tax on the very people it was designed to serve. The free proliferation of information and ideas has been undoubtedly advantageous for the development of our society. This sentiment is echoed in fan culture; information is shared freely for the benefit of all. U.S. patriot Thomas Jefferson first iterated the concept in 1813:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

(Jefferson 1905)

The aim of this chapter has been to elaborate on the reality of fan culture. I have tried to provide evidence to suggest that fan culture has a very integral role to play in media consumption and dissemination. Though the phenomenon continues to be misunderstood as a threatening illegal practice, fan culture is worth preserving most importantly because it benefits both producers and consumers. The next chapter will elaborate on the impact of a struggling free culture and a burgeoning permission culture on cultural production. By examining how deeply rooted modern ideas about intellectual property have effected current modes of creativity, the following chapter will examine how two competing cultures are interacting in the field of media production.

4. FREE CULTURE V. PERMISSION CULTURE

4.1 Intellectual Property

4.1.1 The Origins of Intellectual Property

The focus of this chapter is the burgeoning threat of legal dogma and creative monopolies to creative freedoms. Increasingly, we are seeing the dominant creative powers being eroding by emerging creative powers. This struggle for dominance is leading to increased legal action against fans and a narrowing scope in opportunity for consumers to be creative and critical. The following chapter will discuss the ways intellectual property has been historically and socially constructed, and how fans—building their own notions of property and ownership—are beginning to push back.

Prior to the invention of the printing press, the reproduction of literature largely took place in medieval monasteries and universities. The monks who transposed and translated the works of the past were free to correct and alter the text as they worked. This period was predisposed towards collective thought and expression, and less concerned with the individual origins of texts. Bettig attributes this to the following reasons: the mode and organization of textual production at the time, an oral culture as a dominant mode of communication, and 'the role of culture in society.' (1992, 135)

When the printing press came to Venice in 1469, the process of literary production became highly commoditized. Printers transformed folklore, oral heritage and classic texts into physical, mass-produced commodities. With the new technology, came new laws as to its application; the Venetian government granted exclusivity to printers to encourage industrial and economic growth in the city. As competition between printers emerged over the rights to copy certain texts, a literary 'land-grab' took place. Printers were granted copying rights long before authors, inventors and individual creators ever were. As literacy spread, there was a demand for a wider range of different and original works. Despite this, authors were still frowned upon for seeking writing as a main occupation and a profitable source of income rather than writing for social and personal betterment. But as author's services came into greater demand during the eighteenth century, market competition lead to a possessive individualist attitude amongst authors towards the products of their labour. This marks a significant change in cultural attitudes towards authorship and literary production.

John Locke's *Two Treaties on Civil Government*, published in 1690 in Britain, encapsulated the notion of property as a natural right as opposed to a statutory right. Locke worked as a professional writer and wrote frequently on the issue of property and writing. His work campaigned against the dangers of

author and publisher monopolies and is often attributed as the foundation of the notion of intellectual property. Locke's argument was based on an understanding that 'the author has a natural right in his work since he had expended his own labour in creating it.' (Office of Technology Assessment 1986, 36) A growing contention between proponents of a perpetual copyright system and those who spoke out against creative monopolies such as Locke and John Milton led the British Government to form the first copyright act, the Statute of Queen Anne in 1710. The Statute granted individual authors the right to register copyrights for the first time, giving them equal rights to publishers. The Statute, shortly followed by two lawsuits which set the precedent, cemented the notion of the author's creative right as a natural right with limited terms so as to prevent long-term monopolies (Bettig 1992, 144-45). This aspect of the legislation was imperative for securing both profit for original authors, but also ensuring that new innovation and technological advancement was not inhibited by perpetual copyrights. In short, by allowing copyright protection on texts and patents to eventually lapse, the law permitted works to be adapted and altered in order to improve those works. By allowing these works to move into the public domain, public access to cultural products led to individual and cultural betterment. The Statute also outlined the length of terms of copyright: twenty-one years for works already in print and fourteen years for those published subsequently, at the end of which the copyright either passed into the public domain or could be renewed for a further fourteen years.

In 1978, principal provisions from the 1976 revision of the United States Copyright Act were enacted to secure the duration of copyright for works created after this date as the term of the author's life plus an additional fifty years. This came after several revisions during the 1960s and 1970s which secured the expiration until 1976 of many copyrights due to conclude between 1962 and 1976. In 1998, the controversial Sonny Bono Copyright Term Extension Act extended copyright duration to life of the author plus seventy years. Mary Bono, Sonny Bonno's widow who had made it her life's work to fulfil her husband's various life ambitions, made the following statement before the United States House of Representatives nine months after his death:

Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [then MPAA president] Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.

(Congressional Record 1998, 7 October, H9952)

One of the most pressing issues for modern artists, authors and innovators is the repeated extension of copyright terms, inhibiting any kind of commercial secondary uses of past texts. Lessig references a specific occasion when a documentary about the works of Clint Eastwood never got off the

ground due to licensing issues and expensive royalties (2004, 100-106). Lessig explains: 'Even if the creators wanted to be legal,' the cost of complying with the law is impossibly high. Therefore, for the law-abiding sorts, a wealth of creativity is never made. And for that part that is made, if it doesn't follow the clearance rules, it doesn't get released.' (106) As notions of copyright and intellectual property have evolved, the law has long attempted to balance the interests of producers and consumers by regulating incentive to create and securing public access to texts. Copyright law was not designed to condone market monopoly, yet somehow it is increasingly being used to preserve copyright terms and isolate creative control within a singular originating source.

4.1.2 Struggle for Dominance

Due to dramatic changes that have occurred in the field of copyright law over the last few decades, there is a noticeable difference between the state of our creative rights twenty years ago and that of the present day. Now, Digital Rights Management (or DRM), surveillance technology and fiercer enforcement of copyright law has placed a strangle-hold on our creative powers and threatens to stifle development of new innovative technologies. As media ownership is now becoming increasingly accredited to fewer organizations, the creative public has been forced to find new ways to circumvent government and industrial control over media consumption and liberate their online experiences. This form of activism—or 'hack-tivism' as is it sometimes known—has created free open source software programs which allow users to create freely without the same restrictions placed on other commercial word-processing software. Open Office software (<http://www.openoffice.org/>) is one such example which is recommended by leading fan fiction archive, FanFiction.Net. '[C]orporate Internet service providers are outraged by this anticapitalist development, and [seek] government legislation favouring prosecution of this mode of gift economy activism' (Kellner and Kahn 2004). Internet activists and copyright legislation advocates are therefore constantly locked in a struggle for dominance over the virtual frontier.

4.2 Free Culture v. Permission Culture

4.2.1 *Doujinshi*

The reason *doujinshi* represents an interesting topic for discussion here, it that this understanding between producers of *doujinshi* and copyright holders is a significant step towards resolution that has not yet been completely replicated in the West. *Doujinshi* originates from Japan and is much like fan fiction, but its graphic-novel counterpart. The difference between this art form and fan fiction is that *doujinshi* is

far more accepted and recognized in Japanese mainstream culture than its Western counterpart. The term derives from *doujin*, literally meaning 'same person' or 'like-minded persons', and *-shi*, which is a contraction of *zasshi*, meaning 'magazine'. It serves a similar purpose to fan fiction; it is a comic that fills the gaps in an established narrative or provides alternative narratives and storylines to a popular original comic or *manga*. *Doujinshi* represents an alternative to passive consumerism and satisfies what seems to be the fan's desire for involvement in the production of canon texts. It is not the wholesale reproduction of copyrighted narratives for resale, but rather, a transformation of existing material to create additional and complementary narratives. Lessig claims that a successful *doujinshi* artist 'must make a contribution to the art he copies, by transforming it either subtly or significantly.' (2004, 25-26)

Many different kinds of publication fall under the banner of '*doujinshi*'—sometimes the product is completely original material and not dependent upon a pre-existing text at all—and so a better definition may be that which is produced from small-press publishing. In Japan, the practice of creating these subsidiary comics is very common; there are conventions dedicated to *doujinshi* and fan publications are sold in book stores alongside their canon counterparts. Fans purchase *doujinshi* to better understand the original series to which it is dedicated. *Doujinshi* also provides fans with a source of entertainment between the publications of canon series installments. The artist's attention to accuracy and detail is valued by readers.

Contrary to common belief, *doujin* do not profit grandly from their sales, if at all. In Japan, *doujinshi* costs roughly between AUD\$5 and AUD\$20. Costs need to be kept low to avoid liability, yet cover the cost of production and maintenance of the *doujin* group or club. Some *doujinshi* resellers import and controversially resell second-hand *doujinshi* for up to AUD\$130. By limiting the commercial nature of their projects, *doujin* avoid any legal ramifications. It is usually the high profile *doujin* projects which attract attention and Cease and Desist Notices.

Interestingly, despite the fact that *doujinshi* violates Japanese copyright law by attempting to divert the market for canon materials, copyright holders are not interested in shutting down this outlet for fan creativity. There are various reasons for this; *doujinshi* culture provides and sustains interest in the canon *manga*. This is especially true of very poorly produced *doujinshi*, which, for all its inaccuracies, encourages readers to seek out the truth in canon counterparts. It helps generate professional artists and allows them to hone their skills, fuelling the *manga* industry. *Doujin* (*doujinshi* producers) have been known to be sourced and invited to join the production process of the canon material. Known best for *Card Captor Sakura* and *XXXHolic*, the hugely popular *anime* and *manga* producer CLAMP once originated as a small-scale *doujinshi* group. Many *mangaka* (professional *manga* or comic artists) careers were born of this sub-industry. But the reason this aspect of fan culture is allowed to exist, in breach of Japanese copyright laws, is partly because the monetary and legal resources necessary for prosecuting

every individual case would be at too high a cost. The phenomenon has become so large that to litigate every single case of infringement would be near impossible, and could potentially invoke the potent fury of thousands of *manga* fans (Lessig 2004, 27). 'It is precisely because it exists that Japanese *manga* flourish,' Lessig explains (2004, 26). Japanese fans and copyright holders have a mutual understanding that *doujinshi* ultimately benefits both parties by sustaining interest in the original work. Mostly, the benefits of ensuring fans remain engaged with the canon outweigh the repercussions of banning the practice of *doujinshi*.

The relaxed attitudes towards *doujinshi* and fan culture in Japan are not exactly replicated in the West. *Doujinshi* in Japan has developed a huge following. However, in the West, too much attention can draw threats of litigation against fan producers. It is the small-scale underground nature of Western fan culture which ensures its survival. For this reason, fans are motivated to keep their projects low-key and non-profit to avoid legal ramifications. The ways in which Eastern *doujinshi* culture exists and is allowed to exist could demonstrate a possible resolution to the conflict between copyright law and fan creativity. As fan culture continues to expand here, one can only hope that producers in the West realize, as those in the East have, that litigating against every individual secondary creator would be an impossible and damaging move.

4.2.2 Protecting an Image

When the producers of fan-made parody, *Harry Potter: The Musical*, released their project on YouTube in 2009, it was a resounding success. Not long after the release, the video was taken down on request of the copyright holders and an edited version, *A Very Potter Musical*, was posted in its stead in which much of the sexually inappropriate humour was removed as well as dialogues that resembled Rowling's prose. The producers posted a video on their YouTube channel explaining that they had removed the musical because "we don't wanna be sued... we can't fight the man so we're playin' it safe and takin' our whole show down." (StarKid Productions 2009) In order to avoid legal conflict with copyright holders, many fans are similarly modifying their secondary works in order to conform to guidelines established by the copyright holder. This is a kind of censorship which cannot hope to eliminate the derivative work—parody is a protected form of transformative use—but it can help to control the way *Harry Potter* is consumed. By protecting *Harry Potter's* wholesome image, Warner Bros. can protect interest in *Harry Potter* and the market for *Harry Potter* products. Such actions belie the nature of the copyright holder's belief in their own creative monopoly and a disturbing desire to use copyright law as a means to suppress fan creativity.

From intellectual property's fledgling days up until the present, authors and publishers have

enjoyed the benefits of a legal system of property which favoured their interests and afforded them exclusivity to their work. Throughout history, copyright law has struggled to balance the interests of public good with the interests of private incentives to create. The increasing severity of these laws has restricted the potential of secondary creativity. Standing at the cusp of the legislative change which inherently follows a significant technological change, copyright holders are beginning to see that the system which they had largely benefitted from is at risk. By attempting to secure perpetual copyright terms, and therefore a creative market monopoly, copyright holders are digging in their heels so to speak against an inevitable and natural change in how we share and produce culture and information. By tightly controlling how their readers consume their products, copyright holders can police undesirable interpretations of their work. As in the past, with the use of Cease and Desist notices, copyright holders can dissuade secondary creators from producing transformative works which could either be controversial interpretations which threaten the original product's image, or remove the possibility for the original author to create a similar work in the future. In this way, copyright holders are desperately attempting to reserve the market for future yet-unpublished products, but this is not a legally recognised creative right. In the next chapter, this thesis will begin to explore the ways copyright holders are attempting to exercise this control.

4.2.3 Free Culture V. Permission Culture

The concept of the public domain is changing. The producers of transformative use and remix culture are beginning to find that media is not only liberating, but also facilitates a burgeoning surveillance culture. In early 2009, YouTube gave users the option to silence the audio on their uploaded videos in an attempt to limit use of copyrighted songs without express permission. Part of the reason for this preventative measure was that YouTube had agreements with four of the major recording labels in the U.S. for the unofficial use of their music, but a deal with Warner Music fell through.' (McCarthy 2009) While many copyrighted music-videos are reproduced illegally on YouTube, creating confusion over creative origins, many authors of other videos containing transformative uses of copyrighted music have been removed. Audio for AMVs and entire fan-made videos have been pulled from YouTube without notice. Legally, fans are well within their rights to use and post this material, but few pursue any legal action, choosing to turn away from YouTube to post their creations elsewhere. YouTube, easily one of the largest and most frequented websites online, has long been the unquestionable home of video on the Internet. Therefore, many potential viewers will miss out on a world of creativity as more video artists turn away. The removal of transformative, non-commercial fan-made videos, often parodies, constitutes a violation of constitutional and first amendment rights while threatening a growing sub-cultural phenomenon which allows an outlet for fan creativity and criticism. Warner Music has been heavily criticized for these incidents, most commonly for not realizing that to limit the public's access to material,

limits interest in that material. Whether transformative or not, it is not uncommon for videos on YouTube to revive interest in music, movies and television shows with previously only a small following: for example, the music of Rick Astley and Daryl Hall and John Oates has experienced a resurgence in interest in recent years (McCarthy 2009). Despite the attempts to limit their creativity, the producers behind user-generated content always manage to regroup and find the means necessary to divert the course of injustice, restoring access to their content.

Complaints from copyright holders over 'plagiarism' of their work mask an uneasiness with fans' creative reinvention and reinterpretation of popular cultural products. Rimmer fears that copyright holders are 'using copyright law for the purposes of private censorship' instead of any legitimate infringement claim (Rimmer 2003, 4). Now, the law is struggling to resolve the competing interests of two very different cultures. On one side the user-generated non-market labour and on the other side the commercial industrialists. The likelihood that there is resolution to be had between these groups does not seem promising without complete legal reform.

4.2.4 Solutions

Many proposals have been put forward by academics that could possibly provide a solution to the increasingly complex contest over intellectual property rights. Most of which suggest improvements to what I have established to be a flawed system, such as the Chicago School of Law's suggestion of a renewable copyright term system (Rimmer 2003, 19). But Rimmer warns that 'there are dangers in turning copyright into a registration system – such as trademark or patent law.' Such systems risk becoming overly bureaucratic and allow wealthy media corporations to take advantage of perpetual copyright by paying for repeated renewals (2003, 19).

Lessig's various projects such as his foundation of Stanford's Centre for Internet and Society (SCIS) at the Stanford Law School and his championing of the Creative Commons project have become some of his best-known endeavours. The use of SCIS's Creative Commons Licenses allow copyright holders to voluntarily relinquish some or all of their intellectual property rights and contribute to unburdening copyright restrictions suggests changes to copyright law which would democratize intellectual property powers to the public. Lessig suggests it may be possible for 'follow-on creators' to legally and freely create by paying low royalties, such as a flat rate of one percent of profits, to original copyright holders. 'Under this rule, the copyright owner could benefit from some royalty, but he would not have the benefit of a full property right (meaning the right to name his own price) unless he registers the work.' (Lessig 2004, 106) Lessig's suggestion still promotes a system which places authors in an authoritative position by default unless they actively relinquish their rights. And if current industry attitudes

toward fan creativity are any indication, the successful adoption of such a system does not seem likely.

While many copyright owners will balk at Lessig's proposal, it has the potential to benefit both producers of secondary works, and copyright owners. Follow-on creators may find that a world of creativity will be open to them; access to countless art and media resources, and all for exchange of a small percentage of profits. Not only will copyright holders possibly start to see renewed interest in and profit from original works, they may find that this new system of attribution will bestow new respect on them and their role as author. The legal system would be unburdened; authors would find they no longer have to closely monitor their fans' activities.

4.3 Copyright Law and Fan Products

4.3.1 Moral Ownership

Tushnet's *Legal Fictions: Copyright, Fan Fiction, and a New Common Law* (1997), is a much-cited article on the legal and cultural politics behind fan fiction production. The article concluded that 'most fan fiction, particularly that disseminated on the internet would be classified as fair use under U.S. copyright law,' though this has yet to be proven true (Tushnet 2007, 142). Since *Legal Fictions*, Tushnet has written further on fan fiction: *Copy This Essay* (2004), and most recently *Payment in Credit: Copyright Law and Subcultural Creativity* (2007), in which Tushnet introduces the notion of 'moral ownership.' The term describes a redefinition of property rights in fan writing culture in which the canon text is believed to be public cultural property, collectively owned by not only the original author and copyright holders, but also the fan community. This ownership is implicit with fans' intimate knowledge of the original text. They are often better informed about the details of the characters' lives and settings than are many decision makers responsible for making new authorized works ... this is moral ownership.' (Tushnet 2007, 166) The philosophy affords fan authors certain creative powers and in exchange, the original source is acknowledged for their contribution with byline credit.

This fan theory of ownership completely flies in the face of moral rights for original authors as it's is general upheld by legal authorities around the world, which affords original authors the right to protect their works from the defamation and mutilation of derivative adaptations. Fans' belief in their at least partial ownership of cultural products dictates that they are also charged with the responsibility of loyally protecting the original work's integrity by only creating high-quality secondary works. 'Because fan fiction on the Internet is noncommercial, fans do not believe that they are taking unfair advantage of the copyright owner.' (Tushnet 2007, 144)

Despite the necessity to limit the for-profit nature of their works to avoid legal ramifications, commercial income is not a primary motivator for engaging in fan culture. Credit and respect are the chief means of compensation for fan artists. Credit here works, among other ways, as a financial metaphor. Creators are paid not in cash, but in credit. The value of their works comes from circulation, dissemination, motion: credit benefits the creator only when some third party sees the new use.' (Tushnet 2007, 153) Fans therefore invest time and energy in creating high-quality products in order to earn that respect.

Fan knowledge plays an important role in supporting their respect systems. With superior knowledge, fans can create superior secondary works. *Harry Potter* fans are so good at it, they have made a habit of pointing out inaccuracies in the canon text—what they have dubbed 'flints'—and by doing so demonstrate their knowledge of the series. Fans are compelled to seek out flints and continuity flaws to demonstrate their knowledge and passion. This knowledge, when exchanged and utilized between members of the fan community, encourages both a sense of group unity and enhances the community's experience of the original text. Websites have been dedicated to the search for errors in canon material: www.MovieMistakes.com lists some of the worst offenders in a top thirty list. Some of the top thirty movies with most mistakes also have the largest fanbases, including the *Harry Potter*, *The Lord of the Rings* and *Star Wars*.

Survey results from FanFiction.Net users seem to indicate that fans theorize moral rights theory in ways which differ from how they are legally upheld and more appropriate to fans' needs. Borrowing elements of copyrighted narratives for transformative use is acceptable, but open verbatim copying is abhorred as it derives the source of the respect and acknowledgement they have earned. For fans, attribution systems are set in place to make sure that credit is given where due, and this forms an important part of an exchange between producers and consumers. Taking credit for another's work is the height of disrespect. It comes at some surprise for fans then that despite the respect fans have for media producers, the sentiment is not mutual. 'The deep, personal connection that some authors feel to their creations, some fans feel towards them too. Fans' claims may be even stronger than those of authors' heirs, or, in the case of works for hire, claims made by corporations.' (Tushnet 2007, 167) It can be easy for fans to become distressed or frustrated when a text it not done justice in subsequent adaptations. This seems to be the case when loyal fans of the original *Dragonball Z manga* and *anime* franchise were disappointed by a low-budget, poorly made, live-action adaptation of the series produced by Hollywood. Some fans responded by reproducing the script as they thought it should have been in the form of fan fiction (see "S-Shield" 2009).

When a professional artist or author releases their product into the world, that product ceases to be owned by a singular source because readers have had the opportunity to invest emotionally and

intellectually in the text and that at least entitles them to certain property rights in relation to the text in their eyes. The author ultimately loses control over the way their text is interpreted and reused. Texts invite interpretation, and making a text available to the public necessarily cedes some control over it.' (Tushnet 2007, 162) The original creator who 'cedes' control is often considered displaced from the community as they, while part of an exchange of information, belong to a different economic system. Moral ownership does not equate individual exclusive control of the creative process, but rather a collective ownership by the fan community. This is not to say that fan authors are free to do as they please creatively, fans tend to adhere to (in the case of fan fiction) collectively held writing conventions and plagiarists are usually evicted from the community. The groundwork laid out by the original author, such as characterization and the limits of the fictional reality are respected guidelines for fan fiction, but fan writing is not limited by these rules either. With moral ownership comes responsibility and fan authors are entrusted with the careful maintenance of the franchise's integrity and longevity.

4.3.2 Fan Labour

'Fan labour' has become an increasingly contested issue for academics over the past decade as it represents what appears to be an unpaid and, at times, exploited free labour. The term indicates a process of producing secondary works within a non-commercial context. Certain groups and media corporations are in a position to benefit from this free 'labour,' such as enhanced publicity and promotion of their product. For example, websites like Facebook rely almost entirely on free user-generated content to ensure its success. This has led some media theorists to speculate that users and fans are, in fact, 'duped' out of their rightfully earned rewards (see Garite 2003; Kücklich 2005).

Non-market modes of production and traditional commercial economies are not necessarily set in opposition to one another, but there tends to be an emerging phenomenon of hybrid market configurations which borrow from both concepts. Game producers are now creating products in which players create and define their own experiences. Similarly, Open Source software and Wikipedia rely on voluntary peer-to-peer frameworks to generate content for their products. Due to the democratising nature of the Internet, nonmarket collaborative products seem set to revolutionize current economic and business models. Many fansites, including MuggleNet.com and www.hp-lexicon.org, invite submissions from many contributors, becoming a fan-made information repository dependent on content submitted by its users. This system of informational exchange rouses questions as to how these kinds of websites' profits, if any, should be redistributed amongst many contributors.

Why exactly are users motivated to contribute freely? It is admittedly problematic to conceive that organisations which benefit from user-generated content deprive those free workers of their, at the very

least, credit or 'moral dessert[s].' (Ross 2006, 747) But for fans, their motivation to create comes not from the promise of financial reimbursement, but out of sense of shared community obligation. The social benefit of freely contributing to a knowledge economy greatly outweighs the complication of commercialisation. Fans do not compromise their relationships with other fans by requesting monetary compensation for their efforts. Tushnet understands that being an author is such an empowering experience for fans that they are 'willing to forego payment as long as they get to be authors.' (2007, 172) Maintaining a non-commercial status also helps protect the fan and their project from attracting the attention of copyright holders and legal authorities. Fans' respect economies play a vital role in fan artists' sense of self-satisfaction and incentive to continue to be creative. Users' reasons for contributing are often born of the promise of elevated social status and belonging in the community (Benkler 2006, 96). Fans are also developing professional creative and technological skills which will be advantageous in their future careers. The high production values of some of these works rival even that of the original work on which the secondary work is based. For fans and *doujin*, there is a chance that showcasing artistic abilities can, on rare occasions, lead to professional job opportunities in the publishing industry. By ensuring the producers' success, fans secure quality as well as longevity for the object of their enthusiasm. For fans, fan culture provides an outlet for creative energies and a community in which to form webs of connectivity. By removing money from the equation and transacting in respect systems, creative equity is established between fans and copyright holders.

4.3.3 Plagiarism

I have established that there is a difference between fans' creative practices and plagiarism; fans consider claiming to the creative source of something copied verbatim from another to be a serious trespass against fan morals. That said, fans do not consider their own works to be infringing; instead they consider verbatim copying a crime of the highest order. This may seem ironic to some readers, but it is important to remember that fans do not consider their own practices to be plagiaristic, only the practices of those who attempt to claim credit for work copied verbatim. Plagiarism also potentially invites negative perceptions of fans and the wrath of copyright holders. Fan fiction authors therefore seek to make a clear distinction between their own writing practices and wholesale theft of another's work. This can necessitate systematic ostracism of offenders from fan fiction communities in order to extricate such practices which could be associated with their own. Often the fan fiction community responds aggressively to plagiarists with hate mail, an activity born of the frustration experienced by community members at the inability to control community size and membership. LiveJournal communities like 'Stop Plagiarism' (http://community.livejournal.com/stop_plagiarism/) and other websites have been erected in order to combat this phenomenon within fan communities, providing support and advice for victims of plagiarists.

Complaints from respondents about FanFiction.Net's services seem to centre on a lack of justice or response at all from its moderators with regard to conflict within the community. Complaints about onsite plagiarism often go ignored and accounts can be deleted, without notice and without any review of alleged wrong-doing. Without any support from the FanFiction.Net administration team, site users often feel the need to take matters into their own hands with regard to plagiarists, trolls and cyber-bullies (see Gripling 2005). Plagiarists are often publicly condemned and excluded from the community as a result of this internal policing.

In 2000, fan fiction author Cassandra Claire joined FanFiction.Net and became notorious within the *Harry Potter* fandom for her work on an extensive three-part character study series of the character Draco Malfoy. This series was known as *The Draco Trilogy*. The trilogy was made up of three installments: 'Draco Dormiens,' 'Draco Sinister' and 'Draco Veritas.' Claire's fan fiction quickly became a must-read for *Harry Potter* fans. They were often littered with direct quotes from popular television series such as *Buffy the Vampire Slayer* and *Blackadder* which supposedly was a means of engaging readers in a guessing game about the origins of these quotes. The only citation Claire provides are lists at the end of each chapter indicating the program from which she had sourced the quotes. For example:

'Standard procedure,' said Draco, 'is to leap fifty feet into the air and scatter yourself over a wide area while screaming at the top of your lungs.' - *Blackadder*.

(Claire 2000, 'Dormiens,' 135)

Clare obviously did not take accurate citation seriously, as no season or episode numbers are recorded and many citations are left out altogether. This is a common method of reference throughout Claire's series. In 2001, one of her readers noticed that Claire had borrowed heavily from published author Pamela Dean for chapter nine of *Draco Sinister*, specifically the notion of Dean's invented afterlife. At the end of that chapter, Claire offers only the following attribution: 'Credit for the inspiration for this conception of the wizarding afterlife goes to a book called *The Secret Country*, alas, I no longer recall who wrote it' ("Principessa" 2008). Also, the concept of 'nightmare grass' had been lifted from Dean's work and inserted into Claire's eleventh chapter of 'Draco Sinister.' The reader noticed that the afterlife concept was actually taken from Dean's *The Hidden Land* and that the concept of Nightmare Grass had been taken from Dean's *The Secret Country*, and notified FanFiction.Net moderators. It also became apparent that, in chapter eleven of *Draco Sinister*, the lines 'She seemed to be involved in a battle with her own hair, shrieking and flailing with her arms at nothing' and 'You're all right?' she said, in a quavering voice. 'Your bones aren't coming out?' appeared. Claire's readers noticed that they bore resemblances to similar lines from *The Secret Country*: 'Laura was engaged in a vicious battle with her own hair.' and 'It's you?' said Laura. 'Your bones aren't coming out?'" ("Principessa" 2008). This was one of many instances of plagiarised lines in Claire's fan fiction.

The moderators at FanFiction.Net made several failed attempts to contact Claire and finally deleted her account on the 22nd June 2001. It was felt that Claire's method of citation was insufficient, to which Claire responded with indignation, saying that her work was 'clearly cited' ("Principessa" 2008). Claire may not have realised that mere acknowledgement of sources does not justify an act of verbatim plagiarism. In a later edition of Claire's *Draco Sinister*, the line 'You're all right?' she said, in a quavering voice. 'Your bones aren't coming out?' was changed to, "You're all right?" she said, in a quavering voice. 'You're not dead?' Claire also corrected the citation at the end of chapter nine to incorporate the correct title, chapter and page numbers of Dean's book, with the names of other books from which she had drawn inspiration (Claire 2000, 'Sinister', 495).

The deletion of Claire's account caused a schism in the *Harry Potter* fan fiction community, who either sided with the anti-plagiarists or were loyal to Claire. The conflict went unresolved. Claire was criticized for echoing too much of the works of (in addition to Dean's materials) Roger Zelazny, Tanith Lee, and Gene Wolfe in her various works, and her quote guessing games pushed the boundaries of transformative use too far. Claire had walked the razor's edge between respectable fan fiction author and open plagiarist with her heavy borrowing of dialogue from television programs. In the end, Claire's readers decided with devastating finality that the credibility of Claire's fan fiction was not up to par, leaving Claire with a somewhat tarnished reputation. In spite of this, Claire now writes professionally under the penname 'Cassandra Clare,' experiencing success with her series *The Mortal Instruments*. As Claire's writing career took off, all traces of Claire's accounts and writings were removed from various fan fiction websites for reasons unclear. Claire's recent professional publications do borrow from her past fan fictions, and so the removal appears to be to avoid self-plagiarism. *The Draco Trilogy* had been available through the *Wayback Machine* for a short period after this removal took place. Now all copies of Claire's fan fiction are completely unlocatable, though PDF versions still circulate amongst fans via email.

4.3.4 Copyfight

While disclaimers are compulsory in some fan fiction communities in order to define the fan's lack of direct ownership, there are no measures in place to protect what parts do belong to the fans. Though there have been few clear-cut examples of copyright holders and media organizations mining fan fiction websites for lucrative plot lines, there have been a few close-calls; one media fan and nostalgia critic, Doug Walker was surprised to find a very specific joke he had used to criticize the *Star Trek* film had reappeared a short time later in an episode of *Family Guy* (Walker 2010). As there is no legal precedent for such a situation, it is difficult to predict what kind of cultural and political ramifications such a contestation of creative rights would have.

Novelist Eric Flint and *Star Wars* creator George Lucas, who had previously actively banned fan fiction, have both made recent attempts to be more open to the concept of fan creativity. Both have created forums where fans are invited to submit material, which has the potential to become canon. In 2000, the staff at Starwars.com offered fans of the franchise the opportunity to create their own sub-domain website, fan.starwars.com. In addition to the official URL, Starwars.com offered fans sixteen megabytes of storage and unlimited accounts per user. The offer was too good to be true for many fans, but struck a chord of suspicion in others. 'How much easier would life be for Lucasfilm's licensing folks if all they had to do to shut down an infringing website was pull the plug, without even having to explain?' Elizabeth Durack wrote in an essay on this subject (2000). It became apparent in the fine print that upon creation of a sub-domain website, all materials fans posted there were technically the rightful property of the *Star Wars* franchise. This would mean that should a fan post some *Star Wars* fan fiction on their sub-domain website, the content of that posting may appear in a future *Star Wars* production, their intellectual property rights over the text lost. Starwars.com's ploy to attract fans and deprive them of their rights with seductive offers of canonical status exposes some suspicious attitudes of corporate copyright owners towards fan labour as an exploitable resource.

Eric Flint, author of the *1632* series, established *The Grantville Gazettes*, a multi-volume, collaboratively-composed collection of essays and fictional stories by fans of his series. The contributions were considered fan fiction in that they were written within the universe created by Flint for low profit by authors other than Flint. The contributors were paid a semi-pro rate, with additional remunerations paid later, depending on the success of the publication. The volumes were edited by a few others besides Flint, and the only name which appears on the cover is Flint's. These are examples of popular media franchises incorporating fan-made materials into the canon which can potentially have negative outcomes for fans. Fans' rights over their intellectual property become unclear in these situations. How disputes over ownership would be resolved by the Courts is not immediately obvious. The seductiveness of canonship can mean many secondary authors are exploited for their free or low-paid labour and the original authors and publishers' creative monopoly is reinforced. The situation is compounded by the fans' devotion—which blinds them to the legal hazards of intellectual property rights—and an inability to command any significant position of authority in the producer-consumer relationship.

4.3.5 Fan Products and Copyright Law

Just how legal are fan practices considered to be by law? Copyright exists to provide professional authors with incentive to create, the right to control derivative uses and duplication of their work, and the rights to commercial gain. The Copyright Act of 1976 was established in the United States to protect tangible and original 'works of authorship.' (1976, §102a) But the tenets of copyright law believed that the

terms of these copyrights should be limited in duration to allow cultural products to move into the public domain and serve a public good. Under Article 1, Section 8 of the United States Constitution, copyright promotes ‘the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’ (1787) Certain attempts to extend copyright terms indefinitely, such as those of the proponents of the CTEA, contradict this progress and seek to preserve a commercial publishing stronghold.

Copyright infringement cases are assessed on a case-by-case basis. This makes it difficult to establish a legal precedent with regard to the legality of secondary works. However, secondary works stand a chance against censorship under a narrow avenue of legal protection. The Fair Use Doctrine as defined by the U.S. Copyright Act of 1976 allows limited uses of copyright material for the purposes of criticism or parody without the original author’s permission. Four factors are considered in relation to one another when determining whether a derivative work falls under the protection of the Fair Use Doctrine:

- 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.*

(U.S. Copyright Act of 1976, §107)

In regards to the first factor, transformative works and academic research, whether produced commercially or not, are permissible under the Fair Use doctrine. These types of derivative works necessitate the borrowing of significant amounts of copyright material, appropriately attributed, for the purposes of criticism such as a critical essay or a book review. The second factor takes into account whether the infringing work is fictional or fact-based, published or unpublished, and whether the copying was necessary for its purposes. The third factor refers to the quantity and quality of the copyright material used. Obviously, wholesale copying is not allowed even if it is non-profit. The last factor refers to the impact on the original text’s commercial market. Those works which are considered non-profit, unless explicitly proven to affect the market of the original are generally considered fair use. Even in the case of a lethal parody, in which the derivative work in its handling of the original material eliminates the market for the original, it would still be considered fair use.

The Fair Use defense is only applicable if there is evidence of infringement. This means that in the

event of a lawsuit, the defendant must admit to infringing copyright material but claim the infringement was fair use. This leaves even those who utilize the Fair Use Doctrine with a negative association. There is a very low success rate for those who employ the Fair Use defense to justify their secondary use of copyright material.

Fan writing is targeted more frequently by infringement lawsuits than other products of fan creativity. It is easily the largest facet of fan creativity, being the easiest to produce and share, and also the most difficult to moderate. Even though fan fiction is non-profit, that still does not mean it is a legally protected form of writing. Due to the fact that fan fiction authors create works which often make use of copyrighted characters and/or settings, technically fan fiction is a copyright violation. Some might argue that fan fiction is protected under the fourth factor of the Fair Use doctrine. However, these four factors are considered in relation to one another when determining a text's fair use, and therefore fan fiction is not sufficiently protected by the Fair Use Defence. Due to the large quantity of fan fiction, and the culture which supports it, prosecution of every individual fan fiction author would be near impossible. Often, the quality of most fan fiction is not sufficient to supersede the original copyright material from which it is derived, and so most copyright holders disregard it. Most copyright holders are unaware or turn a blind eye to fan fiction while others actively pursue the complete prohibition of any line of work which remotely resembles theirs. As this chapter has explored, this can have varying results amongst one's fanbase. Ultimately, prosecuting fan fiction authors would be pointless and more costly than profitable. Given the non-commercial nature of fans' works, fan fiction does not exist to substitute any copyright material, but rather complements it.

Few instances of alleged copyright infringement involving fans and copyright holders actually reach the point of litigation. Most website owners and fan fiction writers prefer to concede defeat rather than face a major media corporation's legal department in court. This is usually for one of two reasons; first, because most corporate bodies can afford the best legal representation, and second, because fans realize that the legal system does not give preferential treatment to cultural practices which occupies a legal grey area.

4.4 Conclusion

4.4.1 Power Struggle

The conflict between copyright holders and fans exists largely because these two groups have very different values. Copyright holders are compelled to protect their product from derivative works which they believe to be a market threat and potentially damaging to the image of the original product by association.

For fans though, exclusive property rights are less important than a culture of collective ownership: it is not so much who produced the work, as the actual work itself that is deserving of greater consideration. The desire to be closer to the production process of their favourite texts is a natural desire for fans, one which is enabled by fans' creative practices. There are varying grades of fans; some take their work very seriously, some are just playing with their favourite popular media. As such, not all fan creators are concerned with the threat of legal action or removing their content from public view when asked. But this does not mean that those fans who *are* concerned should not have their basic rights to free speech protected.

There are grey areas emerging between consumers and producers; fans are able to produce their own content when dissatisfied with the canon material. Producers are responding to this phenomenon and incorporating user-generated content into their own projects and business models. However, this can have a detrimental effect on the clarity of the product's ownership. The seductiveness of canonship is beguiling enough to disarm many fans and leave them and their labour open to exploitation. Instead of being 'enabled' by the copyright holder in exchange for their free labour, non-market fan creators are more likely to be 'exploited' if not suppressed and controlled.

Because the balance between incentive to create and preventing perpetual monopolies is tipping dangerously in favour of certain groups, copyright law has ceased to be relevant. We have shaped our copyright legal systems to privilege published authors and media corporations while disadvantaging amateur and secondary artists. The kind of resulting legal conflict which I have described in the preceding chapters is inevitable. Because copyright holders enjoy the advantages of a system which favours their rights over secondary authors, they are in a position to control or eliminate creative interpretations of the original text. This is neither fair nor logical, as it deprives fans of their creative rights and forces on them an undervalued and disadvantaged legal and social standing. Such a system fails to acknowledge how sustaining fan communities and enthusiasm within those communities for cultural products is a practice which ultimately benefits the copyright holder.

4.4.2 A Need for Change

The law continues to enable copyright holders to police what is an acceptable secondary use of another's work. Although the law does not technically acknowledge the copyright holder's right to control *secondary* works, the law does not provide sufficient legal protection of secondary authors either, and so it is in the fan's best interest to comply when threatened with legal action. Warner Bros. in particular have demonstrated their political might in attempting to control the wholesome public image of *Harry Potter* by disassociating the brand with controversial secondary works. By way of eliminating or compromising the

integrity of the secondary work, fans are succumbing to the will of the authoritative copyright holders. In order to preserve their creative practices, fans disassociate with any fan works which are considered controversial and threatening to the fan community's existence. As was the case with Claire's poorly-cited fan fiction: her borrowing of copyright material was viewed as infringing by some fans, yet others supported Claire's work for its positive impact on the *Harry Potter* community.

Fans make a very important distinction between 'borrowing' and plagiarism. Even when the original author objects, fans permit themselves to 'borrow' material from copyrighted works such as settings and characters for the purposes of creating fan works; this is their moral right. Fans believe their borrowing is justifiable for the largely beneficial nature of fan culture and the way they define their relationship to the original text. On the other hand, verbatim copying is a particularly abhorred practice. Fans seek to disassociate their own practices from plagiarism, something which is obviously negative and incriminating. It is important to understand how fans consider their own practices to be acceptable use in order to understand why fan culture deserves protection. It is important to acknowledge that fan culture is not a culture of piracy; this change in social perceptions needs to occur on both a social level, and a legislative level.

It is my conjecture that secondary creators are entitled to basic rights of free speech, and while copyright holders may disagree with what is being said, it is the responsibility of the law to secure for all the right to say it. Fans are demonstrating how authorship can take on new hybrid, communal and moral connotations. This emergent ideology challenges the culturally-rooted and industrialized publishing industry's commercial and authoritative stronghold, inciting strong reactions from copyright holders who are empowered by copyright law in its current state. Currently, fans are seeking alternative methods of producing creative works which are not interfered with by the constraints of copyright law, usually by employing the use of open source software and moving their activities underground. The repeated and deliberate refusal to cooperate with unjust laws is a method of protest becoming more and more common to fan producers.

As our cultural perceptions of authorship change, where copyright and fan activity intersect will become more and more a site worthy of our attention academically. The purpose of this chapter has been to highlight the conflicting nature of two very different competing cultures; each with very different economic, social and political beliefs. I have proposed that it may be impossible to reach a resolution, but rather that by making compromises, both cultures may learn to coexist. With a better understanding of the context in which it took place, it is at this point that we turn our attention to a milestone event in fan history, where a fan faced a major media organization: Warner Bros. Entertainment et al v. RDR books et al. Most conflicts between copyright holders and fans never see the inside of a courtroom, but this case had the potential to redefine copyright and fan rights worldwide.

5. CASE STUDY: WARNER BROS. ENTERTAINMENT ET AL V. RDR BOOKS ET AL

'There have been a huge number of companion books that have been published. Ninety-nine percent have come to speak to us. In every case they have made changes to ensure compliance. They fall in line.'

-Neil Blair,

Christopher Little Literary Agency (Nocera 2008)

5.1 Background

5.1.1 Lexicon Website Development

When the webmaster of a *Harry Potter* fansite attempted in 2007 to publish a book version of his successful website, the resulting lawsuit brought into question the reach of copyright and the creative rights of authors and secondary creators alike. This particular lawsuit is noteworthy because of its emotive context. As fans become more active participants in the creation and consumption of cultural products, fan activity is increasingly perceived to be a threat, leading copyright holders to strengthen their creative monopolies. The purpose of this chapter is to utilize this highly significant lawsuit as an example of ongoing issues with a flawed legal system and the challenges that fan creators face. This chapter will explore how certain notions of authority which are prevalent in society conflict with fan beliefs, and how a once amicable relationship became a convoluted feud of competing interests and betrayed trust.

In 1997, Rowling published *Harry Potter and the Philosopher's Stone* in the United Kingdom. The book was to be the first in a series of seven books about a boy wizard named Harry Potter. It was also released in the United States in 1998 under a slightly different title: *Harry Potter and the Sorcerer's Stone*. The second and third installments were released in 1998 and 1999 respectively and the series quickly gained widespread popularity. Based on the exceeding popularity of the books, Warner Bros. acquired the film rights to the *Harry Potter* books from Rowling. To date, seven films have been made based on the *Harry Potter* series, most recently *Harry Potter and the Deathly Hallows Part 1* (2010), and all have enjoyed box office success.

Vander Ark was a librarian, a media student and a *Harry Potter* fan, who had decided to keep some

research notes on the *Harry Potter* books as he read them, later deciding to turn his research notes into a website. In 2000, Vander Ark launched 'The Harry Potter Lexicon' (<http://www.hp-lexicon.org/>; hereafter known as 'the Lexicon website'), a website compendium which organized the many characters, props and settings in the *Harry Potter* universe into comprehensive encyclopedic entries. Vander Ark drew on many sources to provide accurate, canonical facts about the *Harry Potter* series such as Rowling's books, companion books, interviews, newspaper articles, games and movies to ensure as closely as possible the accuracy of his website. He also drew information from a set of wizard trading cards, and two companion guides Rowling had written entitled *Fantastic Beasts and Where to Find Them* (2001) and *Quidditch Through the Ages* (2001), which were based on fictional schoolbooks quoted in the *Harry Potter* series. Rowling's writing style included returning to characters or situations mentioned earlier in the series in a more significant context, which could prove difficult for younger readers to keep track of, and so the Lexicon website provided clarification and categorization of *Harry Potter*-related facts. The Lexicon website quickly became a popular reference tool amongst *Harry Potter* fans who sought to better understand the rich vastness of Rowling's invented universe.

Fans began to voluntarily contribute fan art and essays to Vander Ark's website, as well as participating in the forums. 'Because many fans consider the website to be the standard *Harry Potter* reference source, they take a personal interest in making sure that the information on the site is correct and up-to-date' (Vander Ark 2008, 'Main Document'). The Lexicon website continues to be valuable, especially to fan fiction writers, amongst others, as a quick reference tool. Currently the website attracts over twenty-five million visitors a year (Falzone 2008).

As the Lexicon website grew, Vander Ark attained BNF status: he keynoted several fan and academic conferences and in 2004, the Lexicon website received a 'fansite award' from Rowling for its outstanding documentation and organisation of the *Harry Potter* world. Rowling was quoted on her website as saying, 'This is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing). A website for the dangerously obsessive; my natural home.' (Rowling 2004) Vander Ark also received praise from Cheryl Klein at Scholastic in 2005 who referred to the Lexicon website during the editing process of the American editions of the books (see Vander Ark 2008, 'Exhibit 1').

In 2006, Vander Ark was invited to the set of *Harry Potter and the Order of the Phoenix* during filming. While there, he met with director David Heyman and was informed that the Lexicon website was used daily (Vander Ark 2008, 'Main Document' 12). Later, in 2007, Vander Ark would visit EA Games, where the *Harry Potter* video games are made and observed hard-copy pages printed from his website pinned to the walls (Vander Ark 2008, 'Main Document'). Vander Ark participated as one of three *Harry Potter* experts in an interview for a cable television documentary *The Hidden Secrets of Harry Potter*

which was included on the special features disk of the *Harry Potter and the Order of the Phoenix* (2007) DVD.

5.1.2 Warner Bros. Launches Lawsuit

On July 21st 2007, the final instalment of the *Harry Potter* series was published. In the build up to the July release, there had been speculation and rumours amongst fans that Rowling intended to write an encyclopaedic companion guide to her immensely successful series. In an interview broadcasted on an American television network a few days after the release, Rowling officially announced her intention to write a *Harry Potter* encyclopaedia and donate the proceeds to charity.

In September, Rowling's literary agent noticed an advertisement for 'The Harry Potter Lexicon' on www.publishersmarketplace.com, a website where publishers can advertise upcoming publications to foreign retailers. It became apparent that publishing house, RDR Books, and Vander Ark were going to publish a book based on Vander Ark's successful website. The advertisement utilized Rowling's praise of the Lexicon website to promote the soon to be published book. Rowling and her agent became 'concerned' that this publication was 'designed to unilaterally misappropriate Ms. Rowling's intellectual property rights for financial gain' (Cendali 2008, 'Complaint'). On September 18th an email was sent to Vander Ark and his collaborator, Roger Rapoport appealing to Vander Ark's friendly relationship with Rowling and producers of the *Harry Potter* films and games. The email requested the publication be halted until Warner Bros.' concerns could be resolved. Rowling's counsel explained that she had 'sought to reserve her exclusive right' to publish her own *Harry Potter* guide (Cendali 2008, 'Complaint').

Three more letters and a Cease and Desist order were sent to RDR Books by Rowling's lawyers during October but received little response. In these letters, a copy of the manuscript (hereafter known as the 'proposed Lexicon') was repeatedly requested for inspection. Finally, on October 31st 2007, an inauspicious day to say the least for a supernaturally themed book series, Rowling and Warner Bros. officially filed a complaint with the New York Southern District Court after a lack of cooperation from RDR Books. As a result of the impending lawsuit, both 'Barnes and Noble' and 'Borders' book chains pulled out their book orders for the proposed Lexicon. Rowling released a public statement on her website stating:

It is not reasonable, or legal, for anybody, fan or otherwise, to take an author's hard work, re-organize their characters and plots, and sell them for their own commercial gain. However much an individual claims to love somebody else's work, it does not become theirs to sell.

(Rowling 2007, 'Section: News:')

5.2 The Trial

5.2.1 Day One

In this hearing, RDR Books was represented by David Hammer from the Law Office of David S. Hammer, Anthony Falzone (head of the Fair Use Project at Stanford, founded by Lawrence Lessig) and Lizabeth Hasse from the Creative Industry Law Group. Long known for defending the 'little guys' against the aggressive creative restrictions of corporate publishing titans, the staff at Stanford Law were eager to involve themselves in the defense of the most recent victims of Warner Bros.' campaign for creative dominance.

The three-day trial began on April 14th, 2008. In opening arguments, plaintiffs argued that the proposed *Lexicon* took substantial amounts of copyright material from Rowling's successful *Harry Potter* series, un-cited, and created a derivative work which violated their copyright. Fears were expressed that if a publication like the proposed *Lexicon* were allowed to go ahead, the market would be flooded with inferior quality *Harry Potter* knock-offs. The law stipulates that while transformative uses of copyright material is permissible for the creation of new and different works, when a work is 'based upon' another so that it has simply 'recast, transformed, or adapted' the original to a new medium, the adaptation is considered a derivative work, falling under the creative control of the copyright holder (U.S. Copyright Act of 1976, §101).

Rowling travelled from her home in the United Kingdom to attend the trial in New York and testify. 'This is very personal to me. This is not ... something that I felt at all comfortable happening [at] arm's length or with my representatives speaking on my behalf,' she said (SDR 2008, '14th April' 96). She expressed concern that permitting such a publication would discourage her from publishing her own encyclopedia. To do so could invite accusations of copyright infringement from authors of secondary works who would claim similarities between their works and Rowling's. 'If the [proposed] *Lexicon* is published, and I then produce my encyclopaedia, ... I do wonder, and I think with good cause, whether Mr. Vander Ark will not seek to sue me because my paraphrase ran a little too close to his paraphrasing,' she stated (SDR 2008, '14th April' 96).

Upon learning of Vander Ark's intention to publish materials which he had previously pronounced to be the subject of a hobby, she felt a 'degree of betrayal.' (SDR 2008, '14th April' 55) She testified that the proposed *Lexicon* copied material so closely from her novels that it 'constitutes wholesale theft of seventeen years of my hard work. I believe that it adds little if anything in the way of commentary, that the quality of that commentary is derisory, and that it debases what I worked so hard to create.' (SDR 2008, '14th April' 44)

Rowling presented an example of plagiarism she had observed in the proposed Lexicon's entry for 'Armor, Goblin-made' which was described as follows: 'Goblin-made armor does not require cleaning, because goblins' silver repels mundane dirt, imbibing only that which strengthens it,' the exact wording Rowling uses to describe the armour in *Harry Potter and the Deathly Hallows* (2007). Similar instances of phrases lifted wholesale verbatim were quoted from the proposed Lexicon's entry for 'Brain Room' and 'Voldemort.' Rowling noted that where there was an entry for a character, Vander Ark 'generally gives the character's appearance verbatim in my words without quotation marks and then he abridges the plots of any book in which that character appears.' (SDR 2008, '14th April' 61) The disturbing lack of quotation marks was emphasised when Rowling said that, 'if Mr. Vander Ark had put quotation marks around everything he has lifted, most of the [proposed] Lexicon would be in quotation marks.' (SDR 2008, '14th April' 64) The two companion guides—*Fantastic Beasts and Where to Find Them* (2001) and *Quidditch Through the Ages* (2001)—that Rowling had written previously for charity already contained entries in a brief, encyclopaedic format. Rowling described them as having been 'plundered.' The copyright act protects unique and original artistic expression. Even though the proposed Lexicon borrowed substantially in order to create a work which was comprehensive and accurate, the material lifted wholesale verbatim from Rowling's works, uncited, was highly incriminating.

5.2.2 Day Two

On the second day of trial, the plaintiffs' lawyers paid particular attention to a statement Vander Ark had made about the end of the *Harry Potter* series at a fan convention called 'Prophecy 2007.' Vander Ark had keynoted the conference and during a panel announced to a crowded room that 'Jo has quit. She's done ... we're taking over now.' ("lindygr123" 2007) When questioned about this, Vander Ark explained that he meant the comment to be encouraging to fans to continue being creative. He said, '[J]ust because the books are done does not mean that you have to stop being a *Harry Potter* fan. There's so much more to do, so much more to create in that wonderful world' (SDR 2008, '15th April' 319). During the same presentation, Vander Ark led the crowd in casting a spell that would obliterate Rowling's epilogue ('Expelli-Expilogus!'). *Harry Potter* fans have believed that the epilogue⁵ Rowling wrote at the end

⁵ Andrew Sims of *MuggleNet.com*'s *MuggleCast Podcast* series said of Rowling's epilogue: 'I think it was what it was supposed to be. It was just supposed to screw up any future fan fiction.' Co-host Elysa Montfort agreed: 'I think the only reason that maybe I didn't like it as much at the time is because of the fan fiction aspect, because it really ruined it. And for those who don't know, I'm one of the head moderators on *MuggleNet Fan Fiction*, so I have to deal with this a lot, so now everything is alternate universe these days because of the epilogue.'

of her seventh book was a thinly veiled attempt to discourage fan activity (MuggleCast 2008, '153 Transcript'). It summed up exactly what happened to Harry and his friends after they graduate from Hogwarts, leaving nothing to the imagination, and thereby cutting off an opportunity for fans to speculate and be creative. In Vander Ark's eyes, and indeed the eyes of many fans, the end of the *Harry Potter* series presented endless opportunities, not finality. Vander Ark believed it was up to the fans to continue where Rowling left off.

The court was adjourned with a parting plea from the judge. He appealed to both parties to settle the dispute out of court. Whether this was to lessen the burden of creating a landmark case is unclear. He said:

I'm concerned that this case is more lawyer-driven than it is client-driven ... You have the fair use people on one side... and you have a large company with a lot of money on the other side. And sometimes these things get lawyer-driven. And I think that the parties really ought to think about... seeing if there can't be a way to work this thing out ... because there are strong issues in this case, come out one way or the other. ...The Fair Use Doctrine is a doctrine that is not at all clear.

(SDR 2008, '15th April' 477)

While staging an economic versus moral argument, the judge is clearly persuaded by arguments of emotion. The 'strong issues' are at risk of becoming 'lawyer-driven.' Even the presiding legal authority in this lawsuit had to acknowledge the inferiority of the Fair Use Doctrine as a contributing factor in the build up to this conflict. Patterson's recognition of the importance of a moral rights argument and the inadequacy of the Fair Use Doctrine is exemplary of the ongoing issues facing secondary creators. But it seemed unlikely that this lawsuit was going to break any ground for the rights of secondary creators. Warner Bros. remained resolute in the face of Patterson's comments, issuing a statement following the second day of trial:

A fan's affectionate enthusiasm should not obscure acts of plagiarism. The publishers knew what they were doing. The problem remains that the [proposed] Lexicon takes an enormous amount of Ms. Rowling's work and adds virtually no original commentary of its own. ... Authors have a duty to prevent the exploitation of their works by people who contribute nothing original, creative or interpretive.

(Brown 2008)

For many fan authors, the thought of accepting the author's word as final is too depressing to comprehend. To do so leaves their prized texts at the mercy of despotism. Fans' belief in their rights and

ability to continue where author left off gives them hope that their favourite texts will evolve and continue to entertain them for years to come. But copyright holders do not always appreciate this kind of interaction with their product, especially when the secondary work has a commercial worth. Copyright holders are more likely to view this kind of interference as 'exploitation,' which adds *'nothing original, creative or interpretive'* as per Warner Bros. statement.

5.2.3 Day Three

The third and final day of the trial began with testimony from Professor Janet Sorensen, an expert in literature from the University of California at Berkeley. Sorensen testified that 'an author isn't always the final word on what a printed text that he produced might mean.' (SDR 2008, '16th April' 503-4) As such, literary guides are often valuable sources of not only commentary and criticism, but also alternative interpretations that, while deviate from the original author's final meaning, can still enhance a reader's experience of a complex text. 'That's what draws me to literary studies. I love moments when a printed text goes out into the world and people find meaning there whether the author intended it or not,' she said (SDR 2008, '16th April' 581).

When it came to discussion about organisational value, Sorensen described the proposed Lexicon as invaluable for its ability to organise the large number of characters, creatures and places in the *Harry Potter* novels. It is not the amount used, but how it is used which defendants believed warranted a finding of fair use. '[I]f you take that very complicated universe and you put it into a form that can remind a reader of who a character is really quickly, maybe give a little insight into the language that's being used, I would see that as something of a different order, a kind of synthesizing or distillation of a very lengthy sort of text, a very complicated universe.' (SDR 2008, '16th April' 538) It is this organisation, from the defendants' perspective, which sufficiently transforms the material in the proposed *Lexicon* into a valid transformative use (SDR 2008, '14th April' 32).

The plaintiffs' expert witness, Jeri Johnson, a senior tutor and fellow in English at one of the colleges of the University of Oxford, then took the stand. Statements made in her declaration accused the proposed Lexicon of doing nothing more than rearranging 'Ms. Rowling's intellectual 'furniture' ... [however,] the fact remains that the furniture still is Ms. Rowling's.' (Johnson 2008) She described the proposed Lexicon as not being a 'ready reference guide' by definition. Rather, she could not define a category which definitively suited the proposed Lexicon and its purpose (SDR 2008, '16th April' 639).

Rowling then returned to the stand for rebuttals and made a very interesting statement: 'I never, ever once wanted to stop Mr. Vander Ark doing his own guide, never. Never. All I ever said through my

representatives repeatedly, and I think beyond the point where some of this would have led to litigation, I repeatedly tried to say to Mr. Vander Ark, 'Do your book, but please change it so it does not take as much of my work.' (SDR 2008, '16th April' 658) 'That opportunity was never presented to us,' Rapoport said about Rowling's statement in an interview. 'The only thing they said [in letters and pre-trial discussions] was: 'Will you stop the book?'' (Reardon 2008)

Rowling does not make a distinction between 'take as much of my work' or 'plagiarise my work' so her meaning is unclear. While one of the factors of the Fair Use defence does take into consideration the substantiality of the amount borrowed from an originating work for the purpose of creating a secondary work, an act of significant borrowing does not necessarily disclose an act of plagiarism on its own. As such, a secondary work which borrows substantial portions of another work can be legally permissible for certain purposes, something Rowling has no power to stop. If Rowling meant that she approves of Vander Ark producing his own encyclopaedia as long as it does not plagiarise her own, or put her at risk of plagiarising *him* at a later date, then this statement seems to contradict plaintiff's official complaint about reserving the 'exclusive right' to produce a *Harry Potter* encyclopaedia (Cendali 2008, 'Complaint,' 10). To state on the final day of trial that 'I never, ever once wanted to stop Mr. Vander Ark' seems a little hard to believe and perhaps demonstrates some cowing to media criticism.

Falzone began his closing statements with: 'The question here ... [is] whether Ms. Rowling has the power to make the [proposed] Lexicon disappear.' (SDR 2008, '16th April' 680) The question which the defendants put to the judge was whether a book for which there was a useful purpose and a demand deserved to be protected and preserved over the monopolizing interests of one of the biggest creative corporate energies in the West. Falzone criticised the plaintiffs for their perception of the proposed Lexicon as being of poor quality, defending the material as being 'instrumental in building the reputation and love of the *Harry Potter* world. And if ... the [proposed] Lexicon is so lousy and it can be done so much better, the answer to that is for Ms. Rowling to write her own Lexicon.' (SDR 2008, '16th April' 688)

By the third day of trial, both parties had reached an agreement over the use of Rowling's quote for the Lexicon website in advertising materials. Both parties agreed that its use was intended only for the website and did not translate to Vander Ark's other projects. The plaintiffs emphasised their support of non-commercial free-to-public fan innovations, but denounced commercial secondary works which usurped their market. In closing statements, Cendali made a distinction between the rights of copyright holders and unauthorised writers of derivative works:

[T]he copyright owner gets to take more [of] their original work [for the purpose of a derivative work] than somebody else would be. The copyright owner gets to quote a lot... The copyright owner has things in it to make their work special; while somebody else coming to talk about their work, they can still do it, but they can't do it to the same degree.

(SDR 2008, '16th April' 677)

The plaintiffs' self-contradicting statements and back-peddling during the final day of the trial seem to indicate a desire to appear less tyrannical during a lawsuit being closely watched by law and media commentaries. Unfortunately, statements made by Warner Bros. representatives and their legal defence expose a troubling attitude towards market competition and trademark confusion. By suggesting that 'somebody else coming to talk about [an author's] work, they can still do it, but they can't do it to the same degree' as (supposedly) the author themselves would undermine a very important and protected right for others besides the original author to provide criticism and commentary on cultural products. Statements such as these are baseless and in making them, the plaintiffs demonstrate a monopolizing authoritarian belief in their own creative power, preventing any progress with securing the rights of secondary creators.

5.3 Opinion and Order

5.3.1 Fair Use

Judge Robert P. Patterson issued his judgement on September 8th, 2008. In it, he commented on the difficulty of distinguishing between the portions of the proposed Lexicon which originated from Rowling, and that which belonged to Vander Ark. He stated,

Although it is difficult to quantify how much of the language in the [proposed] Lexicon is directly lifted from the Harry Potter novels and companion books, the [proposed] Lexicon indeed contains at least a troubling amount of direct quotation or close paraphrasing of Rowling's original language. The [proposed] Lexicon occasionally uses quotation marks to indicate Rowling's language, but more often the original language is copied without quotation marks, often making it difficult to know which words are Rowling's and which are Vander Ark's.

(Patterson 2008, 19)

The judge addressed each of the Fair Use Doctrine's four factors (see section 4.3.4) and considered them in relation to one another when deciding whether Vander Ark's use was fair. The first factor, the 'purpose and character of the use,' addresses whether the transformative nature of the proposed Lexicon was significant enough to create a new work with different purpose or character (U.S. Copyright Act of 1976, §107). The judge said that Vander Ark transforms materials in the *Harry Potter* world into an accessible A to Z format, thereby creating a useful and practical companion guide for readers of the *Harry Potter* books. The first of the four factors weighs in the defendants' favour.

The 'nature of the copyrighted work' refers to the creative distinctiveness of the copyrighted work as a justifiable means of deserving greater protection from copyright law. Fictional works which contain unique expression are easier to attribute to an originating source than factual works. Vander Ark's proposed Lexicon borrowed heavily from Rowling's material and, in the court's opinion, contained little original expression. And so, the court finds that the second factor favours the plaintiffs.

The third factor also favours the plaintiffs. The 'amount and substantiality of the portion used in relation to the copyrighted work as a whole' leaves the proposed Lexicon unprotected. The court must decide, without 'policing criticism,' whether the use was proportionately reasonable (Patterson 2008, 53). The amount of materials copied, sometimes verbatim, from Rowling's *Harry Potter* books—including *Fantastic Beasts and Where to Find Them* (2001) and *Quidditch Through the Ages* (2001) which already contained information in an encyclopaedic format—was undeniably 'extensive.' 'The [proposed] 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.' (Patterson 2008, 54)

The fourth factor—'the effect of the use upon the potential market for or values of the copyrighted work'—is found to weigh in defendant's favour. The court held that it was unlikely that the proposed Lexicon would have any impact upon the *Harry Potter* series' profits based on testimony from defendant's expert witness. It was defendant's argument that without the original *Harry Potter* series, the proposed Lexicon makes no sense. As such, it encourages the market for *Harry Potter* books. '[B]ecause [this] reference guide to the *Harry Potter* works is not a derivative work; competing with Rowling's planned encyclopaedia is therefore permissible.' (Patterson 2008, 59)

Thus far, the four factors are balanced evenly between defendants and plaintiffs. Judge Patterson now had to decide his verdict based on the four factors in relation to one another, and additionally, by considering if Vander Ark's use passed the 'similarity test.' A similarity test considers the copied material as it appears in both the original work and the allegedly infringing document in terms of their qualitative and quantitative character. Naturally, the less that is copied, the less likely a finding of substantial similarity will be made. Quantitatively, the proposed Lexicon makes 2,437 entries drawn from the over 4,100 page *Harry Potter* series. Much of this material is direct quotations, close paraphrasing and plot summaries. Qualitatively, that which is taken is rearranged to retell important plot points. 'Here, the [proposed] Lexicon's rearrangement of Rowling's fictional facts does not alter the protected expression such that the [proposed] Lexicon ceases to be substantially similar to the original works.' (Patterson 2008, 36)

The Warner Bros. Entertainment et al V. RDR Books et al lawsuit may not have been successful in setting legal precedents for secondary creators, however, it did acknowledge an important distinction

between 'secondary' and 'derivative' works. The Judge's Opinion and Order defined the proposed Lexicon as a secondary work, not a derivative work, which is likely to be the first judgment to ever acknowledge such a distinction.

By condensing, synthesizing, and reorganizing the pre-existing material in an A-to-Z reference guide, the Lexicon does not recast the material in another medium to retell the story of Harry Potter, but instead gives the copyrighted material another purpose. [...] Under these circumstances, and because the Lexicon does not fall under any example of derivative works listed in the statute, Plaintiffs have failed to show that the Lexicon is a derivative work.

(Patterson 2008, 40)

The plaintiffs won their injunction against the publication of the proposed Lexicon; however, they failed to prove it was a derivative work and therefore it did not fall under the copyright holders' control. Vander Ark was able to retain his creative control of the proposed Lexicon. For fans, this is as it should be; the right to produce commercial secondary works is generally not a primary concern. Falzone made a statement on the day the verdict was released: 'We are encouraged by the fact that the court recognized that as a general matter authors do not have the right to stop the publication of reference guides and companion books about literary works.' (Want 2008)

Despite the fact that RDR Books lost this battle, this lawsuit did manage to establish that secondary works are acceptable when sufficiently transformative. The proposed Lexicon is recognized in the Opinion and Order as having a legitimate purpose because it fulfills at least some of the Fair Use Doctrine's four factors. This was a small victory for fan authors everywhere. Judge Patterson's decision is also important because it prevented Warner Bros. and Rowling from maintaining a market monopoly on *Harry Potter* encyclopedias.

5.4 Discussion

5.4.1 The Author's Monopoly

This would not be the first time Rowling's representatives had requested that another author refrain from publishing an encyclopaedia-style *Harry Potter* guide. A leading *Harry Potter* fansite, MuggleNet.com, had announced on their website a similar intention to write a *Harry Potter* compendium and was reportedly told in a letter from Rowling's lawyers to, in their words: 'Take it down. Get rid of it right now.' (MuggleCast 2008, '142') The owners of MuggleNet.com obliged out of respect but felt intimidated by Rowling and Warner Bros and their lawyers because of their 'money.' In the past,

MuggleNet.com had been forced to shut down its manufacture of t-shirts promoting their website because they featured the word 'muggle,' a term invented by Rowling. The incident in which MuggleNet was asked to discontinue their plans for a *Harry Potter* encyclopaedia was brought up during day one of the trial. MuggleNet had discontinued their book because they thought Rowling asked them personally to stop (MuggleCast 2008, '142'). Rowling claimed her representatives were acting on her behalf and had no knowledge of this MuggleNet book. 'My representatives do not consult me every time such a matter comes up,' Rowling stated (SDR 2008, '14th April' 133). One can only speculate based on this statement as to how common it is for Warner Bros. to attempt to control the publication of *Harry Potter*-related secondary works. The law is designed to encourage market competition and prevent creative monopolies. The reality is that anyone may produce a complete and transformative '*Harry Potter* Encyclopaedia' covering the entire series which competes with canon counterparts. The law makes allowances for these types of publications. But out of respect (or fear) for Rowling and Warner Bros., no one had produced such a publication, until now.

Rowling stated during trial that she felt 'a degree of betrayal.' (SDR 2008, '14th April' 55) When asked if she regretted giving Vander Ark one of her fansite awards, Rowling responded, 'Yes, bitterly.' (SDR 2008, '14th April' 120) Rowling obviously came to expect a certain kind of behaviour from her own fans. By stepping outside the boundaries of her approval, Vander Ark's behaviour equated a serious trespass against Rowling in her eyes. This speaks directly to our cultural perceptions of authorial power and property. Widely spread beliefs about the rights of authors and readers ultimately conflict with the practice of fan creativity. These notions of acceptability govern the relationship between author and fans, making this particular kind of legal dispute possible. Fans apparently stand to gain very little in terms of legally creative rights from this relationship, but fans value author approval as some kind of endorsement of their practices. The relationship between copyright holders and fans is useful only when the copyright holders are in a position to reap the benefits. Immediately following the filing of this lawsuit, many fans sided with Rowling, seemingly in order to preserve their own presence in her good graces. Fans genuinely fear that the author, if displeased, can make the source of their pleasure disappear.

The list of organisations that have had legal conflict with Warner Bros. continues to grow. In October 2007, Warner Bros. successfully sued a Kolkata-based organisation for two million rupees when they constructed a replica of *Harry Potter's* educational institution, Hogwarts, during a Hindu religious festival. Criticised for targeting a non-profit charity organisation, Rowling issued a public statement which insisted the Hogwarts replica was built for a commercial event (Rowling 2007, 'Rubbish Bin'). Other incidents involved the US Army publication '*Preventive Maintenance Monthly*' which included a comic about a character, Topper's adventures at Mogmarts (Alvarez 2005). Also, a Bollywood film company, Mirchi Movies, recently became embroiled in legal conflict with Warner Bros. concerning their film *Hari Puttar: A Comedy of Terrors*. Warner Bros was concerned the film's name may cause trademark

confusion, but the case was thrown out (Elder 2007). Most recently a Cease and Desist notice was sent to a British woman who planned to hold a non-profit *Harry Potter*-themed Halloween party in her living room in 2009 ("MsMarmite Lover" 2009). So great is Warner Bros. fear of market competition, their shoot-first-ask-questions-later mentality has resulted in a global Cease and Desist Notice campaign.

The plaintiffs criticised the proposed Lexicon for its lack of literary analysis. On day one of the trial, plaintiffs even produced a bevy of companion guides, scholarly essays and indexes that they approved of and suggested Vander Ark and RDR Books follow these examples. Defence responded that the intention of the proposed *Lexicon* was not an academic one, but more that of a memory aid. This stimulated a debate both in and out of court about the accuracy of such labels and the implications of their use. And for that matter, where do we begin to theorise terms like fan fiction, amateur publication, *doujinshi* and peer production into the debate? By suggesting defendants follow examples of approved encyclopaedias, Rowling's representatives dictate that companion guides should be written in a way that is approved *by them*. The totality of the belief in their own creative control minimizes the potential for emergent modes of writing.

5.4.2 Fans as Producers

As a Big Name Fan, Vander Ark enjoyed the benefits of an elevated social status within the fan community. Rowling admitted to using Vander Ark's online repository when editing her sixth instalment in the *Harry Potter* series. Having been blessed with one of Rowling's fan site awards, it would be easy for Vander Ark to perceive the accolade as acknowledgement of his rank and endorsement of his creativity. Given his popularity, Vander Ark represents a contemporary fan archetype; transitioning between active consumer and media producer. What motivates many fans to be creative is the possibility of becoming a part of the canon production process, and Vander Ark was as close to being a part of that process as a fan has ever been. An email sent to Rowling's representatives by Vander Ark suggesting he co-author or edit Rowling's encyclopaedia seems to support this conclusion. In it, he says, 'I am 49 years old and have proved myself to be a lot more than just some teenaged fan with a website.' (SDR 2008, '15th April' 249) When Vander Ark's request was rejected, he naturally arrived at the conclusion that he should produce his own. His knowledge of *Harry Potter* his only viable and exploitable skill, Vander Ark saw that sustaining the *Harry Potter* franchise was his best chance of securing his own livelihood. He had dedicated time and resources, received praise for his services, only his ascension to that final hallowed state—canonship—had been denied. Writing a *Harry Potter* companion guide would serve to promote continuing enthusiasm for *Harry Potter* and provide Vander Ark with reasonable income.

Expert witness for the plaintiffs said in her declaration that Rowling's intellectual 'furniture' remains

her own, but this may not be as a widely held belief as she may think (Johnson 2008). As stated previously, fans will not abandon the text to the author's despotism; they are more likely to continue to be creative long after the original author has ceased work on the text. This stems from a belief amongst fans that texts are collectively owned, not singular property. If they were, the author should just keep the text to themselves.

There is division in fan communities between supporters of anti-commercial ideologies and supporters of commodity-completist ideologies. As Matt Hills has pointed out, academia must 'tolerate' that fan culture can be contradictory at times (Hills 2002, 29). This division can cause tension between fans, especially when fans struggle to resolve a sense of entitlement with respect for the original author's wishes. This is partly because the law does not look favourably on the practice of fan creativity. Stroude attributes this to the insufficient protection the Fair Use Defense provides for fans. Stroude believes that the four factors of the Fair Use Defense will always weigh *against* fan authors because fan products will never be sufficiently transformative (Stroude 2010, 205). The law makes allowances for certain secondary uses of copyrighted texts without permission such as the parody as a form of comment or criticism. But secondary works do not always serve this purpose of criticism. Stroude believes fan products deserve similar treatment as parodies as they benefit society much the same, just in different ways (Stroude 2010, 212-13). They serve an archontic purpose by encouraging cultural growth and supporting the commercial market for the original work. While most fan products are technically an infringement, there is no water-tight argument which protects or eradicates fan activity in a court of law one way or the other. To put it another way, the law does not protect fan creativity, but it does not necessarily prevent it either. While fan works are not works of criticism, their interpretative nature is invaluable.

5.4.3 New Lexicon Format

On January 16 2009, RDR Books released a revised version of their book titled *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials* which complied with Warner Bros.' standards of approval. In the revised *Lexicon's* introduction, Vander Ark states: 'After the trial in April 2008, I worked to create a new, different book with a new focus and purpose, mindful of the guidelines of the court... One of the most important goals of this new book is to avoid giving too much away or using J.K. Rowling's own unique expressions.' (Vander Ark 2009) The original manuscript submitted to the courts was 400 pages in length. The final version totals 345 pages. The word 'Unauthorized' has been added to the title to avoid trademark confusion. Taking up one third of the cover space is an eighty-nine word disclaimer.⁶ This disclaimer effectively disassociates Vander Ark from Warner Bros., Rowling and

⁶ *The whole disclaimer reads: 'Harry Potter and the names of fictitious people and places in the Harry*

any of their affiliates. The final revision is an inoffensive and compliant version of its former self.

In the original manuscript, the entry for 'Dumbledore, Albus' was over 1,300 words and spanned several pages. It went into deep detail about the character's role in the seven-part series as well as personality, special skills and physical appearance. Much of that information was drawn from a similar entry for the same character on the Lexicon website, an over-1,700 word entry which also included fan art and screen shots from the *Harry Potter* films. The website version listed concise factual data about Dumbledore, ranging from his eye colour to etymological derivations of his name. In addition to this information, the proposed Lexicon would have given Dumbledore's entire life story at length, spoiling much of the plot for first-time readers. The revised *Lexicon's* entry for Dumbledore is a greatly condensed version of the manuscript's entry. At only 413 words, the entry removes any information which could spoil the *Harry Potter* series for future readers, such as Dumbledore's upbringing (a pivotal plot point), and many details of his role in the series.

Fans value accuracy because it affects their experience of the text. This motivated Vander Ark to create one of the first complete and accurate *Harry Potter* encyclopaedias. This motivation was greater than any promise of financial reward. It was, however, necessary to revise the Lexicon manuscript for publication due to the copious amount of text which was copied verbatim and uncited. The Lexicon website still exists and is updated by Vander Ark and his staff; though with the completion of Rowling's seven-part series there is little more to add. The revised 'unofficial' *Lexicon* for publication—newly formatted with disclaimer—is a watered-down version of the proposed Lexicon submitted to the courts. The presence of a disclaimer at all seems to mark the end of any kind of amicable relationship between author and fan. It is encouraging to see a revised version which is 'mindful of the guidelines of the court,' not mindful of the guidelines of the copyright holders. *The Lexicon* is haunted by a tainted history and lacks complete coverage of the *Harry Potter* universe as per Warner Bros.'s request. *The Lexicon* therefore cannot compete with Rowling's future planned encyclopaedia. And that is just how Warner Bros. likes it.

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5.4.4 Fall From Grace

Not only has Vander Ark's once amicable relationship with canon producers been ruined by this lawsuit, but his ties with fellow fans have also been severed. On the stand, when asked how he has been affected by the response from the fan community, Vander Ark became tearful. 'It's been difficult because there's been a lot of criticism obviously, and that was never the intention. But—and I understand where that comes from, but it's been very, very difficult. This has been like an important part of my life for the past nine or ten years.' (SDR 2008, '15th April' 385) He was then asked if he considered himself a member of the fan community, and responded, 'I did, yes.' The cross-examiner asked if he no longer considered himself a member and Vander Ark replied, 'Yeah, I do' before clarifying, 'I do consider myself a part of that community, yes.' (SDR 2008, '15th April' 384) When asked if he respected Rowling and her work, Vander Ark became too emotional to respond coherently.

During the lawsuit, a website was erected by a person known only as 'Max' who imitated Vander Ark's Lexicon website identically. Max's website, Maxicon.org, reproduced all of the Lexicon website's content, replacing any mention of 'Lexicon' with 'Maxicon'. It was only live for a few days before being removed on Vander Ark's request, but demonstrated this particular fan's protest against Vander Ark's actions. At the bottom of each page read:

HARRY POTTER, characters, names, and all related indicia are trademarks of Warner Bros. © 2001-2008.

Please copy in the name of scholastic pursuit.

Contact Max at [omitted] for information about hard copies & downloads of this site by making a donation to one of the charities below.

If you like this site please donate to the following charities: ONE PARENT FAMILIES - BOOK AID INTERNATIONAL - CHILDREN'S HIGH LEVEL GROUP

How does it feel, Steve?

("Max" 2008)

Max claimed to have reproduced nineteen versions of the Lexicon website, two in Spanish. No trace of these websites remain, however, for a short period in 2008 after its take down, in its place, a notice was left promising Max's return and encouraging Maxicon.org supporters to download and reproduce the Lexicon website themselves.

Following the announcement of the lawsuit, *Harry Potter* fans everywhere were divided on the topic

of Vander Ark's credibility as a fan. As a result, Vander Ark's reputation in the *Harry Potter* fan community plummeted. Melissa Anelli, webmistress of The Leaky Cauldron, another leading *Harry Potter* fan site, had linked her website with the Lexicon website and others to form the 'Floo Network.' Vander Ark also appeared frequently on Anelli's podcasts as a *Harry Potter* 'guru.' Following the announcement of the lawsuit, the Lexicon website was expelled from the Floo Network and all professional ties between Anelli and Vander Ark were severed. Anelli was in attendance throughout the trial 'to support Jo.' (Wu 2008) 'Melissa has done more to hurt me than Rowling,' Vander Ark said. 'I can't blame her for liking her status... [Rowling] is God and Melissa is her prophet... I am an outcast now. But I still consider myself a 'Harry Potter' fan.' (Wu 2008) Anelli's reaction was typical of the fan backlash against Vander Ark. The relationship of trust which exists between author and fan also exists between many fans and can be just as tenuous. Both Vander Ark's relationship with Rowling and his relationships with fellow fans were effectively damaged and caused him 'hurt' as a result of this emotionally laden lawsuit.

Following the lawsuit, fan blogs and forums everywhere exploded with denunciations of Vander Ark. One 'Lily Phoenix' said on her LiveJournal, 'I truly think he deserves to be the outcast in the Harry Potter community [...] because of his actions. His actions have deeply hurt the community.' ("Lily-Phoenix" 2008) The MuggleNet.com forums ran a web poll⁷ on the topic of the lawsuit: 64.18% believed that Rowling's 'rights as author should come before fan's [sic] rights.' (COSForums 2008) 'I am not for JKR particularly, I am for protection of copyright. I am a minnow in the writing field at this time as she was when she started, if her stand now protects any work that I am lucky enough to have published in the future then I will say "thank you very much" JKR,' one commenter posted on the same web poll (COSForums 2008). Repeated use of terms like 'outcast' by Vander Ark and other *Harry Potter* fans, indicate a genuine belief in a dedicated 'in-group' of *Harry Potter* fans that outsiders are not privileged to be a part of.

Vander Ark was scheduled to speak at 'Portus 2008,' one of many annual *Harry Potter* conventions in the United States, but was dropped from the convention programming in April that year for reasons unstated. At the time of writing this thesis, Vander Ark has not keynoted any fan conventions since the lawsuit. Once a mainstay on the *Harry Potter* convention circuit, Vander Ark has found himself an outcast as a result of the reaction from fans. Perhaps out of self-preservation, many fans who were associated with Vander Ark now seek to disassociate from him and his actions. Rowling stated during testimony that she would find it difficult to continue to write if such substandard rip-offs were allowed to be published

⁷ At the time of this work's publication, this particular Leaky web poll's results were as follows: 64.18% voted 'I think JKR's rights as author should come before fan's rights;' 18.41% voted 'I think the Lexicon has a right to publish but I can see JKR's point;' 13.43% voted 'I think the Lexicon has every right to publish this book;' while 3.98% expressed their views differently from the above categories.

(SDR 2008, '14th April' 96). Such statements strike a chord of fear amongst fans that if they misbehave the source of their pleasure may be disrupted. The fact that Rowling felt that she had been 'betrayed' implies that the tenuous pact between authors and fans had been violated by acting outside the copyright holder's realm of approval. For many, Warner Bros.' hasty and heavy-handed use of the legal system and the threat of exhaustive legal costs is enough to strike fear into any potential secondary creator's heart, putting a halt to any secondary work before it even commences.

5.5 Conclusion

5.5.1 Control and Ownership

In Lessig's *Free Culture* he mentions the importance of libraries, art galleries and museums for the purpose of recording and maintaining cultural history. Libraries have been collecting and cataloguing newspapers, for example, for hundreds of years.

Early in American copyright law, copyright owners were required to deposit copies of their work in libraries. These copies were intended both to facilitate the spread of knowledge and to assure that a copy of the work would be around once the copyright expired, so that others might access and copy the work.

(Lessig 2004, 111)

Vander Ark's online *Harry Potter* database served that exact purpose. His website catalogued and made readily available unique and interpretative *Harry Potter*-related information for the convenience of secondary creators like fan fiction writers. The book version had that same purpose in mind, but in a handy reference guide format. The court recognised the popularity and usefulness of the Lexicon website as demonstrating an important need for such a publication. The Fair Use defence however failed to provide sufficient protection for Vander Ark.

Rowling has always maintained an amicable relationship with her fans. In distributing fan site awards and encouraging non-profit fan fiction, Rowling has maintained her support for fan creativity. While the Lexicon website was praised by Rowling and her representatives, and used as an exploitable resource at their disposal, when Vander Ark turned his website into a source of profit, the relationship of trust between readers and author, fan and media producers was disrupted. The canon text is sacred, and for fans, its existence can be threatened if the copyright holder is displeased. This imbalance of power often means that fans can be restricted in their ability to interact with texts. A reader is not just a reader in the conventional sense anymore; but rather the modern definition includes roles of creator, decoder and

analyst. As these roles change, the relationship between reader and author becomes more contentious, especially when commercial gain is on the line.

The plaintiffs won their injunction against the publication of the proposed *Lexicon*. However, they failed to prove it was a derivative work and so it did not fall under the control of Warner Bros. or Rowling. Despite their attempt to gain hegemonic control over the proposed *Lexicon*, Rowling's statement during the third trial day that she had 'tried to say to Mr. Vander Ark, 'Do your book, but please change it so it does not take as much of my work'' seems to stand in stark contrast to their initial complaint. By the end of trial plaintiffs were back-peddling; Cendali's final words during her closing statement were, 'We respectfully ask the Court to enjoin this book, encourage [Rowling] to write, and encourage Mr. Vander Ark to write something that takes less and that does more.' (SDR 2008, '16th April' 679) This closing statement, in which Vander Ark is encouraged to write his own encyclopaedia, contrasts with plaintiff's original complaint which requested the 'exclusive right' to create a *Harry Potter* encyclopaedia be reserved for Rowling. The plaintiffs seem to hover in indecision between encouraging fan activity and barely restrained desire to seize control of it and stamp it out. Even during closing statements, Cendali demonstrated a cultural understanding of the copyright holder's authority by stating that they have the ability to 'make their work special.' Secondary creators do not get the same privilege; 'they can't do it to the same degree.' Authors who had expressed an interest in writing their own encyclopaedic *Harry Potter* companion guides were quickly quelled by the might of the *Harry Potter* copyright holders, as was the case with MuggleNet's intended publication. Even the distribution of 'fan site awards' places Rowling in a position of authority to approve or disapprove of acceptable uses of her copyrighted work.

The plaintiffs had been concerned if the judge found in the defendants' favour, copyright holders would need to maintain a tighter control over their fans. A finding was made in plaintiffs favour and Warner Bros. still maintained this tight control; Vander Ark's publication was required by Rowling's representatives to be submitted to the publishers for approval. It is unfortunate that copyright holders are still able to exercise this kind of control and request secondary works for inspection and approve or disapprove publication. Warner Bros.' tight control of the *Harry Potter* franchise makes it difficult for fans to engage creatively and dynamically with canon texts. As the digital age progresses, fan methods of creativity must be acknowledged or copyright holders run the risk of harming fan communities instead of nurturing them. Operating under the guise of protecting brand integrity, media corporations are strengthening their legal stronghold and using it to maintain creative monopolies, effectively stamping out anything with could be remotely conceived as market competition.

5.5.2 Commercial Economy V. Reputation Economy

Rowling's presence at the trial is some cause for concern. While she expressed that she did not want to leave the situation to her representatives, the fact remains that the lawsuit was titled *Warner Bros. V RDR Books*, not *J.K. Rowling V Steven Vander Ark*. During trial, Rowling expressed a concern that Vander Ark's proposed manuscript for a *Harry Potter* encyclopaedia may potentially resemble her own future planned encyclopaedia, and therefore she would be liable for infringing his work at a future date. This is the reason Rowling flew in from Scotland for the trial in New York, to preserve her untapped market. The ability to preclude works which pose a market threat is not, however, a legally recognised right.

In the digital age, the way readers interact on the site of the text is an ever-changing discourse. Fans are seeking ways to become canon producers by producing *doujinshi* and art portfolios, writing fan fiction and spec scripts, and remixing audio and video. They do this for various reasons: in the hope of elevating their status, even the possibility of earning a position as a professional canon producer. Where once the reader was expected to be satisfied with the author's final meaning, they are now producing fan fiction which expands and explores multiple meanings in texts. Most often these activities which are highly beneficial for original authors are performed for free.

The *Warner Bros. Entertainment et al v. RDR books et al* court case raised some powerful questions about the extent of copyright and whether it is ethical for fans to profit from fan productions. The knowledge economy and gift culture which are intrinsic components of fan culture present alternative motivations for artistic and literary production besides commercial gain. 'Moral-rights theory posits a deep and unique connection between author and text such that an insult to the text is an assault on the author. Moral rights thus seem inherently in conflict with fans' willingness to take liberties with source texts.' (Tushnet 2007, 135) Fans will often discontinue this mode of production out of fear or respect for original authors.

'Social network markets' as they are termed by Banks, represent a hybridity of markets which calls for new ways of theorising modes of non-market and fan labour. The issue with intellectual property is that it is founded in a capitalist framework supported by culturally valued theories of ownership and commercial worth; it is the dominant economic-based system. The only thing of value to fans besides the core text is their reputation. In fan culture, creative works are exchanged for respect and acknowledgement. In opening remarks, RDR Books' attorney Anthony Falzone noted that Vander Ark's interest has never been about money, but 'passion.' (Slater 2008) Vander Ark stated, 'it never really occurred to me to be that sort of devious about the way I wrote things, because that really wouldn't have suited the purpose of the book at all.' (SDR 2008, '15th April' 383-84) His actions may at first seem motivated by commercial gain, but Vander Ark asserted during trial that 'I was more interested in

receiving recognition.' (SDR 2008, '15th April' 329) He also pointed out that, during discussions about the contract, '[w]e didn't talk a lot about the money aspect of it.' (SDR 2008, '15th April' 253) Intellectual property exists and succeeds in a commercial economy. However, many Internet users are participating in a knowledge economy which no legal doctrine can easily apply the same rules of commercial value to.

In a digital age, texts and the written word are becoming less static and more polysemic than ever before. This case was the first of its kind and exemplifies the escalating tension between copyright holders and fans over creative rights and ownership. In a constantly evolving environment of modernized information dissemination, how do we as a society define who gets to create and what limitations should be placed on those creative rights? Clearly an act of plagiarism has taken place, and RDR Books had but a glimmer of hope for being absolved from this case. Rather, the purpose of this chapter has been to examine how a lawsuit could be exemplary of prevalent negative attitudes towards secondary creativity. This stems largely from the difficulty copyright holders have with comprehending how the creation of a text could be motivated by love, not money.

Rowling stated during the trial that 'this is a case that is about an author's right to protect their creation.' (SDR 2008, '16th April' 652) It would be easy to say such a thing, especially because the original author was shipped in to testify in court, but the fact is that Rowling's name does not appear in the official title of the hearing, and neither does Vander Ark's. What seems more likely is that a fan's commercial project was perceived to be a real market threat by Warner Bros., one which could have serious implications for future plans to publish an official *Harry Potter* encyclopaedia. Hesitance towards statements such as those made at Prophecy 2007 demonstrates how concerned Warner Bros. is with the perceived threat of fan culture to their market monopoly. As texts become more porous and readers become so involved with the text that they can even become its producers, the priority of professional creators should be to encourage the archontic growth and popularity of the canon text, and thereby encourage information and knowledge dissemination. If Rowling and Warner Bros. wanted to protect their assets, or *Harry Potter's* integrity, they are welcome to disagree with unauthorised interpretations, but they cannot prevent or control them. To do so is at expense of the fan community, the creative rights of that community and all the benefits fan creativity has for copyright holders and society at large.

6. CONCLUSION

6.1 Fans

6.1.1 Vague Roles

Since the printed word became subject to copyright law, effectively a form of property, the law has favoured the creative and legal rights of original authors despite various attempts to assert the free dissemination of ideas.

Classic criticism has never paid any attention to the reader; for it, the writer is the only person in literature. We are now beginning to let ourselves be fooled no longer by the arrogant antiphrastical recriminations of good society in favour of the very thing it sets aside, ignores, smothers, or destroys; we know that to give writing its future, it is necessary to overthrow myth: the birth of the reader must be at the cost of the death of the author.

(Barthes 1977, 148)

At fan conventions and in *manga* stores in Japan, fan-made products are sold alongside canon counterparts, sometimes at a profit for the fans who produced them, breaking down the division between professional and non-professional producers. For fans-cum-authors, entering the commercial market equates a significant change in social perceptions of fans and producers.

Fan works are neither authorized nor canonical. This break-down of authorship norms necessitates that fans in general must maintain systems of attribution in order to acknowledge original sources and legitimise their borrowing. Hybrid markets and respect systems are necessary so as to validate in the minds of fans the practice and dissemination of their own products. This system is a vague and often misunderstood method of exchanging acknowledgement and respect for creative rights, and contrasts with the commercial system sanctioned by law, professional authors and copyright holders alike. Rebecca Tushnet calls these respect systems 'payment in credit' in which fans formulate their own credit economy. This economy is facilitated by the use of disclaimers in fan fiction which acknowledge the original source while disclaiming original authority. Even then, when professional authors forbid the practice of fan fiction, fan authors number too great to be prevented from creating secondary works. Copyright law neglects to acknowledge the benefits of fan culture and continues to deny fans protection under law.

A fan author's reputation and popularity within the community depends the way their work is received and reviewed by the fan community. This is a philosophy that fans live by even when reading

professionally produced materials; the author may be the source of creativity, but readers make a text a success by sharing it and interacting with it. For fans, the reader's (as opposed to the author's) position is one of empowerment, giving them the power to rank of their peers and dictate the shape of the community.

The Romantic period valued the spontaneity and originality in works of authorship. It helped to establish the author as a respected position, and devalued unauthorised derivative uses and plagiarism. It continues to afford disproportionate authorial power to certain small groups, threatening the existence of creative sub-genres. The effect of this imbalance of rights is not just a small impact on a small number of people. It affects a large demographic so huge that exact data on the numbers and activities of these people remains vague. Fan culture has always been, fundamentally, an attempt by the disadvantaged to claim some of the control from original authors who would have them excluded from the creative process. Fans recognize that, when their existence is threatened, their power lies in numbers and forcing copyright holders to reconsider the extent of the impact they can have on a community which also serves as a source of their success.

The cultural products which fans produce and consume are less owned by a single authoritative source, but rather subject to collective ownership by the larger fan community. This fluid understanding of property ownership deconstructs much of what is commonly understood about copyright, a notion that many media corporations desperately want to protect in a state which secures their creative rights and financial gain. At times multi-authored, a single piece of fan fiction exists both in relation to the originating text and other works of fan fiction 'to which [these] works necessarily refer and from which they necessarily borrow.' (Tushnet 2007) These blurred boundaries upset an age-old creative and literary hierarchy. The Internet has had an amazing impact upon the structure of fan culture, and by the very nature of its configuration, encourages amateur and collaborative creativity. The lines between fan and professional, producer and consumer are becoming more vague, and sites where these opposing positions intersect are increasingly becoming the source of an interesting investigation into our modern understanding of creativity and property.

6.1.2 Activism

Frequently, the concerns of fans (who at least have a moral claim to the material they borrow) are disregarded over the rights of copyright holders and estate heirs. Large corporate media owners continue to restrict what they fail to see is free viral marketing of their products and an asset, not a liability. Small organizations are beginning to fight back against this oppression: namely, Creative Commons, the Electronic Frontier Foundation (www.eff.org) and Chilling Effects Clearinghouse who work tirelessly to

make sure fans and secondary authors are aware of their rights. Increased control and monitoring of fan activity is not the answer. In fact, the solution is the exact opposite. The more copyright holders work to place restrictions on fans, the more fans work to evade them and be creative in ways that are undetectable.

Heather Lawver's pioneering leadership of an uprising of fans against the oppressive control of a giant media conglomerate was one of the first incidents in which the *Harry Potter* fan community united against a common adversary. These fans were merely doing what came naturally to them; expressing their enthusiasm and encouraging enthusiasm for the *Harry Potter* franchise through the creation of fansites. Warner Bros.' demand that fans relinquish domain names into their custody demonstrated an unreasonable understanding of their own property rights. The presence of these attitudes is more than unsettling when one considers that Warner Bros. is one of the largest media owners in the world. And if the Warner Bros. Entertainment et al V. RDR Books et al lawsuit is any indication, these attitudes are still ongoing. Lawver's campaign against Warner Bros. attracted worldwide media attention, and Warner Bros. was criticized for their attempts to control the very fan culture which had ensured the success of *Harry Potter*.

While conducting research for her book, *Harry: A History*, Melissa Anelli discussed the Lawver incident in retrospect with a Warner Bros. executive in 2008. He said that 'the letter campaign was a big mistake, a matter of the law office doing what was technically its job but also not the right thing to do by fans, and had only happened because person A hadn't told person B what they intended on doing.' (Anelli 2008, 97) *Harry Potter* fans form one of the largest fanbases in history. Here, again, fans recognise the power they have in numbers. A fan boycott can have a far-reaching effect in the same way that the sheer size of the *doujinika* community prevents Japanese authorities from being able to prosecute all of them.

6.1.3 Moral Ownership

'Moral ownership' is a term which originated from the works of Jenkins but elaborated on in the works of Tushnet, whose essay entitled 'Payment in Credit' highlights fan culture as a gift culture which functions within an economy of respect in exchange for creative rights. While moral rights is recognised by most legal systems globally as the right for original authors to protect their works from unwanted adaptation, fans interpret 'moral ownership' as the right to participate in the protection of cultural products.

Fans experience frustration at their own lack of control over the happenings surrounding their favourite texts, leading them to write their own narratives. To know a text is to have consumed it fully, so fans become frustrated by inconsistencies and inaccuracies in their beloved texts. Fans actively seek out

flaws in the original work, and offer them as some kind of evidence of the level of their own devotion (see <http://www.moviemistakes.com/>). Their concerns for the events that occur within the text are often ignored, so fans are then compelled to produce their own fan-made narratives which they *do* have control over. Fans write fan fiction in order to correct inconsistencies and address anti-feminist sentiment in popular media.

Fans function as decoders within the relationship between producers and consumers. Fans exist to mine canon materials, news stories and press releases for clues, tidbits, sources for speculation, opportunities to cast the canon material in a different light, and new ways to engage with the text. One need only visit a fansite to view this process in action. Fan creativity is an act of analysis, or criticism, or decoding of original texts. Fans learn to observe the formulaic patterns and processes of producing a text, and begin to predict the movements of canon authors, and learn to anticipate publication dates and press releases. This desire for intimacy with texts and canon producers reflects a subjective desire to be more involved with the production of canon materials.

Fans build and participate in a hierarchical system which ranks fan authors according to skill and popularity. Their movements within this hierarchy depend on the quality and the dissemination of their work. This dissemination relies on the fan author's readership, which are responsible for spreading the gospel, so to speak. Eventually, some fans reach a certain level of notoriety and may have the opportunity to work with professional publishing houses. This is a dream for many fans, many of whom hone their skill in the hopes of attaining professional status. For example, Vander Ark enquired with Rowling's publishers as to the possibility of employment as an editor of her future planned encyclopaedia, demonstrating a desire to be included in the canon production process. In Claire's case, her transition to professionalism accompanied her withdrawal from the fan community. Her fan fiction was removed from all public forums, indicating some kind of cessation of her identity as a fan.

The tension between the desire to attain professionalism and maintain community longevity is an irreconcilable aspect of fan culture. For fans, once a fan work becomes commercial, there are implications for the author. Once that line is crossed, there's no option for the fan-cum-author to redeem their fan status or be viewed the same way by the fan community again.

Fan authors understand they cannot claim complete authority over what they produce no more than the copyright holder can claim authority over the fan fiction or the fan can claim authority over the original work. Fan culture represents a new hybridity of authorship norms: when you share something; you lose some control over it. Fan philosophy dictates that in the case of copyright holders who object to fan activity, those copyright holders should not make their projects public in the first place. Copyright holders who fail to understand this concept fail to understand that their work *will* be appropriated. That is the nature of fan culture.

6.2 Copyright Law

6.2.1 Copyright Law

The forefathers of copyright law were careful to ensure that the scope of copyright was limited in order to promote the freedom of ideas for society's benefit. As the digital age gains momentum and information and literature is made increasingly more accessible, gaining in scope and meaning, we must reconsider what ownership and authority means. In the virtual environment, property inevitably takes on new forms, yet copyright holders still have a very firm stance on fan products. They are tolerated, where not openly banned.

Similar to the way parodies are protected under law because they ultimately serve a purpose of encouraging artistic and scientific betterment, Stroude believes fan sites and fan fiction could be considered legal within the annals of copyright for serving the purpose of cultural expansion and knowledge exchange. Lawsuits which are instigated to protect the integrity of popular brands from association with inferior products are more often attempts to police creativity to the point of mitigating undesirable interpretations and market competition. The law does not fairly represent the interests of both copyright holders and fans, as evidenced by incidents of video removal on YouTube and Cease and Desist notices sent to fansite owners.

Copyright law, as it stands, and the modern belief in the author's total authority threatens to create a society which stifles new forms of creativity and favours conventional modes of producing texts. With every copyright term extension in the past thirty years, copyright law has increasingly become a burden on creative rights. It is a system which favours those who can afford the right to create and the legal battles that come with it. This means that fans, who generally lack the resources to protect themselves from litigation, are more likely to cower to copyright holder's requests to discontinue their projects. Even YouTube, is signing licensing deals with four of the major recording labels in exchange for the use of copyrighted music on its website. These deals allow copyright holders to detect and disable videos which contain their copyrighted music, despite the fact that these videos encourage a surge in interest for that music.

The legal conflict between fan fiction authors and copyright holders has been a proverbial battle of David and Goliath for secondary authors who struggle to find the legal resources to defend themselves. The relationship between fan and original author has changed dramatically over the past few decades, and still is changing. But the law has failed to keep pace. Some authors have tried banning fan fiction, licensing it, ignoring it; all methods seem to lead down dangerous paths. Fan fiction is not accounted for by law, but that does not mean it is just going to go away. It deserves to be accounted for.

6.2.2 Fair Use

Only under a certain kind of copyright law, is defending fan fiction as a lawful practice feasible. The Fair Use Defense provides a slim avenue of protection to secondary creators: it is designed to defend borrowing from copyrighted material in works of parody or review as fair use. These works however are nonetheless infringing for legal purposes. The use of the Fair Use defence therefore carries a stigma of piracy for those who employ it. And fan fiction, which most often is neither a parody nor a review, has little hope of protection under this legislation. Frequently in fan criticism, the terms 'secondary' and 'derivative' are used interchangeably in relation to fan fiction and lack clarification. However, a distinction is necessary if only to define uses which are obviously wrong from those which benefit society.

6.2.3 Plagiarism

Fans have complex notions about the ways different works across various media require different levels of attribution. In fan fiction, original authors and fellow fan authors must be credited as sources by way of a disclaimer. This practice is less common among fan-vidders, for whom accreditation can be an after-thought. Disclaimers and attribution are almost nonexistent in the practice of fan art. Often the visually-orientated art forms are less obliged, in the opinion of fans, to acknowledge their sources because the borrowing is immediately obvious.

Fans make use of disclaimers to pay in credit where credit is due. Disclaimers actually serve several purposes: they define the source of borrowed material, disclaim authority, and are usually intended to ward off legal threats. The desire to avoid legal conflict is so great that fans will often disassociate themselves from the illegal activities of other fans. Plagiarists are frequently ostracized and ejected from fan communities in an attempt to separate fan culture from an act of piracy. This distancing from offending practices is necessary in order to protect relations with the copyright holder. If the copyright holder is dissatisfied, it could interrupt fans' ability to continue being creative in that particular fandom.

This is why the incidents which involved Claire and Vander Ark have become notorious examples of eviction within the fan community. Their plagiarism incited a passionate response from the fan community which has been placed at risk. Even the simple act of lazy citation in secondary works can lead to a larger problem. The reason these incidents were particularly scandalous is that these two figures were highly regarded within the community. A BNF can easily experience a fall from grace through acts of controversial borrowing.

6.3 Case Study: Warner Bros. Entertainment et al V. RDR Books et al

6.3.1 The Lawsuit

For an amateur unlicensed artist to attempt to defend their creative rights in court, it can be intimidating to say the least facing a major, multi-billion-dollar media conglomerate. As a fan, Vander Ark was lucky; RDR had commercial interest in his book, justifying a full-scale defence, but how many fans have similar means to defend their interests in a court of law? In the case of Warner Bros. Entertainment et al V. RDR Books et al, the most important underlying factor was whether Warner Bros. and Rowling had the right to claim a monopoly over the publication of *Harry Potter*-related secondary works. This claim was denied. It is concerning, however, when one considers that Cease and Desist notices and legal might are being used to control the consumption and reinterpretation of cultural products. A rather poignant quote, often misattributed to Voltaire, 'I disapprove of what you say, but I will defend to the death your right to say it' were first iterated by Evelyn Beatrice Hall in 1906 and is perhaps worthy of notice. If I may be excused for being absolutist, any liberal consideration of freedom of speech rights will take into consideration that while we may disapprove of some opinions, it does not justify the violation of our basic rights to voice those opinions. This is absolutely true of fan fiction. While copyright holders may seek to disassociate their works from inferior products or eliminate market competition, the fan author's right to express themselves should be paramount to these claims.

Although Vander Ark published professionally, he remained a fan of the *Harry Potter* series and is still present in the fan community. His book was considered by the court as a professional publication, but the motivations behind its composition were fan-orientated; it was executed under an assumption of new ownership and it was (according to Vander Ark) written primarily for the benefit of the *Harry Potter* fans, not for commercial gain. Vander Ark received heavy criticism from the *Harry Potter* fan community for his part in instigating this lawsuit. Fellow *Harry Potter* fans openly and passionately denounced him for attempting to profit from his once non-profit fan project, concerned that his project had transitioned and become part of a commercial system. The outpouring of support for Rowling attempted to counteract the image of fan culture as nothing more than mass-plagiarism. It is difficult to define how much of this outpouring was genuine support for Rowling and Warner Bros., and how much was an attempt to distance the fan community from a single trouble-maker.

6.4 Final Word

6.4.1 Suggestions for Further Study

This thesis's main objective is to correct lingering misconceptions about fan culture and discuss the ways it is restricted by copyright law. For fans, authorship is not a singular fixed role anymore; it exists in hybrid forms. For this reason more in-depth studies should be made into the impact of the digital age on authorship. No one study can ever be an accurate account of something so dynamic and ever-changing.

Doujinshi is a growing phenomenon in the West and further study will be necessary to understand its impact on fan culture and copyright law. But more importantly, copyright law continues to be a major issue for fans and continuing coverage of conflict between rights holders and fans is necessary in order to analyse why we as a society place considerable importance on locating property ownership and creative rights within a single originating source.

6.4.2 Final word

Rowling made reference to Vander Ark's infringing work as being like someone rearranging the furniture in her house. Maybe we need to start thinking about texts as less of a property which people are invited to visit and more of a common space, where it is possible for people to interact, alter and experiment with narratives. This is what fans are practicing, sometimes in direct disobedience of the law and the copyright holder's wishes. Perhaps the answer lies in returning our social perceptions of intellectual property to a former state, in which the text was less formally recognised as property and copyright terms were limited. At this rate, copyright law as it currently stands is becoming increasingly severe, jeopardising fan practices and tightening the control of copyright holders over this sub-cultural creative industry

The ability to dictate the creative rights of a work of authorship is more difficult to enforce in the digital age. Where once authors had the right to control distribution, the internet has changed how and where that distribution takes place. Once a work is published, it becomes public. When something becomes accessible, it becomes widely disseminated. Fans facilitate this process. Online, fan activity can generate high levels of interest in a text, and it becomes easier for fans to access the material when made more widely available in various forms: be it fan fiction, *doujinshi*, or fan vids. Fans demand greater accessibility to texts, but copyright holders are failing to keep up with this demand.

Lessig's *Free Culture* suggests that establishing a registry of copyright holders will assist secondary creators' ability to be creative in ways that are considered legal. The risk of establishing a

registry of copyright owners is that our society could easily become a permission culture, in which secondary works must seek approval for every creative act. Lessig suggests several improvements to copyright law, such as a one percent royalty scheme and the incorporation of Creative Commons into the legal system as a means of allowing copyright holders to voluntarily forfeit some rights. Lessig's suggestion that copyright duration should be reduced to fifty years is not unattractive. But to address a significant issue, we must target the source of these laws. Without significant review of copyright legislation, secondary artists are becoming less free to create, disempowered by a prejudiced legal system and bereft of the means to create without threat of legal conflict. My argument is not that copyright law should give unreasonable creative powers to authors of fan fiction, but that it should tolerate and indemnify the practice. The likelihood that bookstores might be flooded with second-rate derivative books as a result of such a legislative change is, I believe, low. Fan culture is sub-cultural, low-key and non-commercial. When fan products become commercial, they take on new meanings, and begin to move away from the values upheld by the fan community. For this reason, commercialisation is unattractive to fans.

Fan culture deserves to be recognised as something more than piracy. Despite the fact that much of what fans do is technically illegal, the culture it owes its existence to its ability to maintain group unity and the ability to adapt in situations which might threaten its existence. Fan culture serves many purposes, but most importantly, it is for the most part non-threatening. This thesis has been an attempt to restage the arguments made about fans and their creativity. Fans only desire to have more power and control over the production of their favourite narratives. Increasing interaction between fans and producers is opening a dialogue, but even the most revered copyright holders maintain a distance from their fans. Sometimes it is easy for those who cling voraciously to their property rights to forget that a candle which is lit from another 'receives light without darkening me.' (Jefferson 1905)

7. APPENDICES

7.1 Appendix A : Glossary

Alternative Universe

Alternative Universe is a type of fan fiction that diverts from the established narrative on which it is based to a point where it completely rearranges the original history, physics or settings to accommodate a divergent story line.

(Synonyms: *AU*)

AMV

Anime Music Video.

Anime

(origin: Japan)

Anime is a Japanese term originally derived from 'animation' and is used specifically to describe animation produced in Japan. *Anime* gained popularity in the West with the successful reception of television shows like *Sailor Moon*, *Dragonball Z* and *Pokémon*. The fan culture which surrounds this form of animation has become a sub-cultural phenomenon worldwide, with followers known as 'otakus.' *Anime* fan cultures incorporate activities such as cosplay, fan fiction, fan art and fansubbing.

Beta Reader

A mentor figure who provides an editing service to fellow writers, free of charge. A beta reader will proof read a piece of writing prior to publication and provide suggestions for improvement to the author. "Beta," the name of the second letter in the Greek alphabet, indicates that the beta reader is a secondary editor.

“Beta tester” is a term used in the software industry to refer to testers of new computer software.

(Synonyms: *betareader, beta*)

Big Name Fan (BNF)

A Big Name Fan is an individual who is well-known and well-liked by fellow fans, usually for having made a significant creative contribution which has subsequently influenced the function and importance of the fan community. One cannot claim BNF status. This term is given to a singular person based on a conclusion reached by the rest of the fan community. Cassandra Clare, Melissa Anelli, Emerson Spartz, Steven Vander Ark (all *Harry Potter*), Henry Jenkins (*Star Wars*), “Waldo” (*Babylon 5*), and Steven Savage (*anime*) are all perfect examples of Big Name Fans.

Canon

This term, as it is used by fans, is derived from the definition for ‘religious canon’ in which religious texts are reviewed for inclusion into that which is officially taught and upheld by the church. It is defined by fans as any material which is official or produced by the copyright holders. A fan may use the term to differentiate between fan-made materials and official materials.

Cease and Desist Notice

Issued by the copyright holder or their legal representatives, these are official documents which request the cessation of what is believed to be illegal activity and the surrender of all offending materials.

(Synonyms: *take-down notice*)

Disclaimer

A disclaimer is a short paragraph at the beginning of a piece of fan fiction, or any work authored by a fan, that describes the source of the borrowed material, the amount of borrowing and the extent of their control over the content. They are encouraged by fan fiction hosting websites, though fans do not consider the act to be compulsory. Fans maintain this tradition of including disclaimers mostly out of habit

from bygone eras of fanzines and mailing lists.

The Chilling Effects Clearinghouse defines disclaimers thus, "Strictly speaking, disclaimers do not absolve an infringer from liability. However, disclaimers do serve an important function... [D]isclaimers help appease original authors' fear that they will lose control over their works. The acknowledgment of the original source and ownership of the original work can reinforce the communal aspects of fandom and show that the borrowing authors respect original author's rights." (2009)

Doujinshi

(origin: Japan)

Japanese fan-made comic books. These comics are popular because they commonly contain homoerotic material which the canon text does not take the opportunity to explore. '*Doujinshi*' literally translates to "same people publication," indicating that the publication is produced by a group of like-minded individuals. *Doujinshi* culture is a widespread and popular sub-culture in Japan.

The suffix "-ka" placed on the end of "doujin," to form *doujin-ka*, indicates a person who produces *doujinshi*. The suffix can also be attached to other terms such as *manga*, to form *manga-ka*, a person who produces *manga*.

Fair Use Doctrine

Also known as the 'Fair Use Defence.' The Fair Use Doctrine is a legal clause which permits certain secondary uses of copyright material by second parties without seeking permission from copyright holders. See section 4.3.5 for more information.

Fan

Short for 'fanatic.' One who feels attraction towards or obsession for movies, television shows, books, and/or video games. The term has a religious connotation, as 'fanatic' was once used to describe religious worshippers (Jenkins 1992, 12). This deep level of enthusiasm can manifest itself in various ways; including fansites, fan fiction and fan art. Considered active consumers, fans participate in an organized system of information exchange through message boards and blogging.

Consumer enthusiasts are at times separated into sub-categories, including "neofan", "trufan" or "mediafan."

(Plural: *fans* or *fen*) (Synonyms: *fanatic*, *otaku*, *geek*, *nerd*, *fanboy*, *fangirl*)

Fandom

Essentially an semi-organized anarchistic meritocracy, a fandom is a collective microcosm of consumer enthusiasts. The term's use is intended to limit fan activity within a single media franchise: for example, the *Harry Potter* fandom refers to fans and fan activity pertaining solely to *Harry Potter*. "Dom" is a suffix used in a similar way to that of 'kingdom' to indicate a unified group.

(Synonyms: *fanbase*)

Fan Fiction

Fan fiction, in all modern uses of the term, refers to a certain mode of textual production by a fan and may incorporate situations, characters or places already used in other established, often copyrighted, works, but not limited to the scope of that work. It is one of the most important aspects of fan culture; providing an outlet for social commentary and criticism of popular texts whilst also providing a common ground for community interaction. Often produced without the knowledge or consent of copyright holders, fan fiction itself occupies a legal grey area.

Fan fiction in general is non-professional and non-commercial, and while technically it would fall under the heading of derivative work, derivative works can be either commercial or non-commercial.

As in fan fiction, other outlets for fan creativity exist, such as fan art, cosplaying, audio remixing, and video production or AMVs.

(Synonyms: *fanfic*, *fanfiction*, *metafiction* (self-referential))

FanFiction.Net

The leading fan fiction-orientated website. According to Wikipedia, it hosts over 2.2 million fan authors as well as fan forums, message boards and fan 'communities.'

Fannish

Of or relating to a fan, but more commonly to fandom.

Fanon

Derived from the term 'canon' as fans use it, this term is used to refer to that which is accepted universally within the fan community as true but has not been confirmed by canon sources. For example; it is fanon within the *Star Trek: The Original Series* fandom that 'Romulans' did not have warp drive in 2266.

(Synonyms: *fan canon*)

Fan Service

Gratuitous, sexually-explicit material included in published media purely for the fans' gratification.

Fansite

A website made by a fan or fans which is dedicated to a particular subject of their obsession, such as a movie, a television show or musician.

Fansubbing

Often before an *anime* show can be aired in the West, it must be translated from the original Japanese and revoiced in English. During this intervening period of licencing the *anime* to an English-speaking country, translating and recasting the *anime*, fans become impatient and post pirated copies of *anime* shows online with their own subtitles (of varying quality). This is known as fansubbing. This activity is popular because it allows *anime* fans in the West to stay on top of trends in *anime* as soon as they become available in Japan. A similar practice occurs with untranslated *manga*, where fans scan and translate Japanese *manga* before posting them online.

Fanvid

A fan made video or music-video.

(Related: *AMV*)

Flames

Aggressive reviews or blog posts.

Flint

'Flint' is a term invented by *Harry Potter* fans which refers specifically to the presence of continuity errors in the *Harry Potter* series. It is derived from the character Marcus Flint who began his schooling at the fictional Hogwarts School of Witchcraft and Wizardry in 1986. A child would typically spend seven years studying at this school; however Flint was mentioned in the books to still be present at the school in 1994, indicating that he had been there for eight years. This consistency error went unexplained for many years and has become, for fans, exemplary of many similar errors in the series.

Lemon

A sex scene or a work of fan fiction containing a sex scene.

Manga

(origin: Japan)

Japanese comic books. In Japan, *manga* easily outsell novels and other print media. It has a growing sub-cultural following in the West. *Manga* comic books frequently become a source for *anime* producers seeking to adapt comics to television. Most *anime* originated as *manga*.

Mary Sue

This term often refers to a style of fan writing in which the female protagonist is not a canon character but is infinitely better than any other characters described in the fan fiction. Typically a Mary Sue character is exceedingly beautiful and popular. Other attributes characteristic of the role include being orphaned and/or possessing magical powers. This character is generally interpreted as being a transparent representation of the author's subjective desires about themselves. These fan fictions which contain unrealistic characters are usually written unintentionally and are generally disliked by the fandom for their egotism. The concept allegedly originates from a *Star Trek* fan fiction in which a character known as Mary Sue, a low-level cadet, "out smarted Spock, slept with Kirk, saved the Universe, etc." (Murray 2010)

(Synonyms: *self-insertion fiction*, *Mary Stu/Gary Stu/Marty Stu* (for male authors)) (Related: *Suethor*)

Meme

An internet trend. For example, see <http://www.YouTube.com/watch?v=55wzj6hhido>.

The term is also used to describe fanart in which the artist illustrates their reasons for liking a particular fandom on a comic-style template.

Metafiction

Self-referential. See 'Fan fiction.'

MPAA

Motion Picture Association of America.

Otaku

(origin: Japan)

Translates roughly to the polite form of "your house" but is similar to the Japanese word for "mania." In

Japan, this term can have a negative connotation, indicating fans with a high level of obsession which can manifest as perverted sexual desires. In the West, this term is commonly used more generally to identify fans of *anime*. See also “Fan” and “*Anime*.”

Podcast

An audio stream recorded usually by a panel of commentators and released in an mp3 or mp4 format, usually for Itunes.

(Related: *vodcast* (video podcasts))

Round Robin

A collective effort to write a fan fiction in which every collaborator writes a few paragraphs.

Slash

Often sexually explicit, the term refers to a vein of fan fiction which arose from the shorthand of fan fiction authors who, when writing a short abstract for their fan fiction, often abbreviated the romantic couple who were the subject of the fan fiction to ‘name’/‘name.’ Thus, ‘Slash’ fiction often refers to fan fiction entailing the romantic pairing of two characters, for example: “Kirk/Spock.” This sub-genre has become synonymous with homoerotic narratives and was a popular topic of research for academics who sought to align fan culture with a form of queer rights protest.

(Synonyms: *Yuri* (female/female), *Yaoi* (male/male), *Shoujo ai* (female/female romance), *Shounen ai* (male/male romance))

Spoilers

Pivotal plot points in copyrighted material which could potentially ruin the experience of reading the text for the first-time reader. This was a major concern for *Harry Potter* fans during the lead up to the release of the final book in the series when fans feared that leaked information about the events described in the book may spoil the story before they had a chance to read it themselves. The term does not just apply to

leaked information, but also applies to information that has been readily available publicly for some time but is still yet unread by a first-time reader.

Suethor

An author of Mary Sues.

Wayback Machine

A website which periodically captures and archives the history of websites which have not otherwise denied The Wayback Machine access. This website makes it possible to view a website as it appeared to the public several years ago.

Wiki

A wiki is a piece of collaborative software which allows widely dispersed people to create group projects together online. Participants are encouraged to edit and organize these products, usually informative websites, in conjunction with others. Wikipedia.org is a famous example.

8. BIBLIOGRAPHY

8.1 References

- "gallabonga" (2008). "W.B. boycott (HBP Delay) ". Retrieved 20 August, 2008, from http://www.YouTube.com/watch?v=Jm8lkjj-eig&feature=channel_page#.
- "Justin" (2005). "In Defense of Fanfiction: Guestblogger Justin Goes Robin Hobbnobbing." Swiftly, Writing. Retrieved 11 March 2008, from <http://swiftlywriting.blogspot.com/2005/11/in-defense-of-fanfiction-guestblogger.html>.
- "lindygr123" (2007). "Steve VanderArk on Fandom." Retrieved 20 August, 2009, from <http://www.YouTube.com/watch?v=0S4OiLIFqDo#t=3m11s>.
- "Max" (2008). "Maxicon.org." Retrieved 5 May, 2008, from <http://maxicon.org/>.
- "Principessa" (2008, 4 July). "Cassandra Claire's Plagiarism." Fan History Wiki. Retrieved 25 June, 2009, from http://www.fanhistory.com/wiki/Cassandra_Claire%27s_Plagiarism.
- "Juliet Norrington" (2003). "Shall We Dance?" Retrieved November 17, 2009, from http://www.FanFiction.Net/s/1642037/1/Shall_We_Dance.
- "Lily-Phoenix" (2008, 5 May). "Steve Vander Ark's Low Blow." Retrieved 17 November, 2009, from <http://lily-phoenix731.livejournal.com/15599.html>.
- "Mia Skywalker" (2002). "A Light in the Darkness." Retrieved 20 August, 2008, from http://www.FanFiction.Net/s/1000953/1/A_Light_in_the_Darkness.
- "S-Shield" (2009, 10 March). "Dragon Ball: Movie." FanFiction.Net. Retrieved 24 June, 2009, from http://www.fanfiction.net/s/4916096/1/Dragon_Ball_Movie.
- "StarKidPotter" (2009). "A Very Potter Musical Act 1 Part 1." Retrieved 21 August 2009 from http://www.YouTube.com/watch?v=wmwM_AKeMCK.
- Alvarez, L. (2005). "Arts, Briefly; Harry Potter Crosses Wands With the U.S. Army." Retrieved 20 August, 2009, from

<http://query.nytimes.com/gst/fullpage.html?res=9A07E3DE163AF93AA35751C0A9639C8B63>

Anelli, M. (2008). Harry, A History: The True Story of a Boy Wizard, His Fans and Life Inside the Harry Potter Phenomenon. London, Penguin Books.

Bacon-Smith, C. (1992). Enterprising Women: Television Fandom and the Creation of Popular Myth. Philadelphia, University of Pennsylvania P.

Barthes, R. (1977). 'The Death of the Author'. Image, Music, Text. S. Heath. London, Fontana: 142–148.

Benkler, Y. (2006). The Wealth of Networks. New Haven, Yale UP.

Bettig, R. V. (1992). "Critical Perspectives on the History and Philosophy of Copyright." Critical Studies in Mass Communication 9(2): 131-155.

Bird, S.E. (2003). 'Piecing a Cyber-Quilt: Media Fans in an Electronic Community.' *The Audience in Everyday Life: Living in a Media World*. New York and London, Routledge.

Bleich, D. (1986). 'Gender Interests in Reading and Language'. Gender and Reading. E. A. Flynn, and Patrocino P. Schweickart (editors). Baltimore and London, The Johns Hopkins UP.

Bourdieu, P. (1984). Distinction: A Social Critique of the Judgement of Taste. London, Routledge & Kegan Paul.

Bourdieu, P., and Nice, R. (1980). "The Aristocracy of Culture." Media, Culture, and Society 2(3).

Brown, K. (2008, April 16, 11:49 AM). "JKR/WB vs RDR Books Trial: Public Statement by Warner Brothers." Retrieved 9 September, 2009, from <http://www.the-leaky-cauldron.org/2008/4/16/jkr-wb-vs-rdr-books-trial-public-statement-by-warner-brothers>.

Burnett, F. H. (1879). 'Behind the White Brick.'. Alternative Alices: Visions and Revisions of Lewis Carroll's Alice Books. C. Sigler. Lexington, Kentucky UP 1997.

Cendali, D. M., Bradley, M. (2008). Plaintiff's Complaint (Amended), O'Melveny & Myers LLP. Filing 42 : October 31, 2007 (Amended January 15, 2008).

Claire, C. (2000). Draco Dormiens. The Draco Trilogy, Unpublished.

——— (2000). Draco Sinister. The Draco Trilogy, Unpublished.

——— (2009). City of Glass. New York, Margaret K. McElderry.

- Coker, C., and Candice Benefiel. (2010). "We Have Met the Fans, and They Are Us: In Defence of Aca-Fans and Scholars." Retrieved 7 July 2011, from <http://flowtv.org/2010/12/we-have-met-the-fans/>
- Congress, U. S. (1787). United States Constitution. Article 1, Section 8, United States of America.
- COSForums (2008). "The Harry Potter Lexicon - Legal Debate." Retrieved 21 August, 2010, from <http://www.cosforums.com/showthread.php?p=5020755>.
- Derecho, A. (2006). Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction. Fan fiction and Fan Communities in the Age of the Internet: New Essays. K. Hellekson, and Busse, K. Jefferson, MacFarland.
- Durack, E. (2000). "fans.starwars.con." Retrieved 29 April 2009, from <http://www.echostation.com/editorials/confans.htm>.
- Elder, G. L. (2007). "Hogwarts Castle at Center of Indian Festival Lawsuit." Retrieved 15 July, 2009, from <http://www.totallawyers.com/legal-articles-hogwarts.asp>.
- Falzone, A. (2008) "Rowling v. RDR Books." *The Center for Internet and Society*. Retrieved 21 August, 2010, from <http://cyberlaw.stanford.edu/case/rowling-v-rdr-books>.
- FanHistoryWiki (2010). "FanFiction.Net." FanHistory.com. Retrieved 17 August, 2010, from <http://www.fanhistory.com/wiki/FanFiction.Net>.
- Fetterley, J. (1978). *The Resisting Reader: a Feminist Approach to American Fiction*. New York: Indiana UP.
- Fisher, W. (2004). Promises to Keep: Technology, Law, and the Future of Entertainment. Palo Alto, Stanford UP.
- Foucault, M. (1977). 'What is an Author?'. Language, Counter-memory, Practice. Ithaca, N.Y., Cornell UP: 113-138.
- Garite, M. (2003). "The Ideology of Interactivity or, Video Games and the Taylorization of Leisure." Level Up, Digital Games Research Association Conference DiGRA. Retrieved 21 November, 2009, from <http://www.digra.org/dl/db/05150.15436>.
- Gilbert, S. (1986). The Female imagination and the modernist aesthetic. New York : Gordon and Breach Science P.

- Goddard, T. (2003). "Personal Communication: Harry Potter Adult Fan Fiction " Retrieved 6 June, 2008, from <http://chillingeffects.org/fanfic/notice.cgi?NoticeID=534>.
- Gripling, B. (2005). "Block or Ban DUO MXWELL from FanFiction.Net." Retrieved 11 October 2008, from <http://www.petitiononline.com/banmxwel/petition.html>.
- Herrick, J. (2009). "Anderson v Sylvester Stallone." Retrieved 20 January, 2010, from <http://www.casesofinterest.com/tiki/Anderson+v+Sylvester+Stallone>.
- Hills, M. (2002). Fan Cultures. London, Routledge.
- Hobb, R. (2005). "The Fan Fiction Rant." Retrieved November 19, 2008, from <http://web.archive.org/web/20050630015105/http://www.robinhobb.com/rant.html>.
- Holifield, C. (2002). "Advances and Royalties." Retrieved 24 June, 2009, from http://www.writersservices.com/res/ri_adv_royalties.htm.
- HPANA. (2003). 'Potter fans produce Potter fiction.' Retrieved 29 April 2009 from <http://www.hpana.com/news.14252.html>.
- Jefferson, T. (1905). 'Thomas Jefferson to Isaac McPherson'. The Writings of Thomas Jefferson. A. A. Lipscomb, and Albert Ellery Bergh. Washington, Thomas Jefferson Memorial Association: 333-335.
- Jenkins, H. (1992). Textual Poachers: Television Fans and Participatory Culture. New York, Routledge.
- (1998). "The Poachers and the Stormtroopers: Cultural Convergence in the Digital age." Retrieved 4 December, 2008, from <http://www.asc.upenn.edu/courses/comm334/Docs/poaching.pdf>.
- (2006). Convergence Culture: Where Old and New Media Collide. New York and London, New York UP.
- (2006). Fans, Bloggers, and Gamers: Exploring Participatory Culture. New York and London, New York UP.
- Johnson, J. (2008). DECLARATION of Jeri Johnson in Support re: 22 MOTION for Preliminary Injunction., New York Southern District Court **Filing 26, Main Document**.
- Kahn, R., and Kellner, D. (2004). 'Virtually Democratic: Online Communities and Internet Activism.'

- Community in the digital age. A. Feenberg, and D. Barney (editors). Oxford, Rowman & Littlefield.
- Kücklich, J. (2005). "Precarious Playbour: Modders and the Digital Games Industry." Fibreculture. Retrieved 21 November, 2009, from <http://journal.fibreculture.org/issue5/kucklich.html>.
- Larbalestier, J. (2002). The Battle of the Sexes in Science Fiction. Middletown, Wesleyan University Press.
- Lawver, H. (2000). "Our Mission." Retrieved 27th February 2009, from <http://www.dprophet.com/dada/mission.html>.
- (2008). "Hello, South by Southwest!". Retrieved 4th March, 2009, from http://www.heathershow.com/old/20080308/hello_south_by_southwest/.
- Lessig, L. (1999). Code and Other Laws of Cyberspace. New York, Basic Books.
- (2004). Free Culture. New York, Penguin P.
- Lewis, D. (2004). *Understanding the Power of Fan Fiction for Young Authors*. Kliatt, March.
- MacDonald, M. (2006). 'Harry Potter and the Fan Fiction Phenomenon' *Gay and Lesbian Review Worldwide*. Jan-Feb 2006.
- Macleod, A. (2009). "The Curious Case of the Game Show Neuroscientists, or How NOT to Research an Online Community." Retrieved 17 January, 2010, from <http://mackle.wordpress.com/2009/09/03/the-curious-case-of-the-game-show-neuroscientists-or-how-not-to-research-an-online-community/>.
- McCarthy, C. (2009, 15 September 2009). "YouTube Pulls Audio from Greatest Music Video Ever." Retrieved July 15, from http://news.cnet.com/8301-13577_3-10287081-36.html.
- McCarthy, K. (2000, 21st December). "Warner Brothers Bullying Ruins Field Family Xmas." The A Register. from http://www.theregister.co.uk/2000/12/21/warner_brothers_bullying_ruins_field/.
- McChesney, R. (1997). "The Global Media Giants: We are the World." Fair.org. Retrieved 17 January, 2010, from <http://www.fair.org/index.php?page=1406>.
- Moss, C. (2004, 11 March). "Grey Album Producer Danger Mouse Explains How He Did It." Retrieved 4 April, 2010, from http://www.mtv.com/news/articles/1485693/20040311/danger_mouse.jhtml?headlines=true/.

MuggleCast (2008, 19 April). "MuggleCast 142 Transcript." MuggleNet.com. Retrieved 27 August, 2009, from <http://www.mugglenet.com/mugglecast/index.php?page=transcripts/142.php>.

——— (2008, 18 July). "MuggleCast 153 Transcript." MuggleNet.com. Retrieved 23 September, 2009, from <http://www.mugglenet.com/mugglecast/index.php?page=transcripts/153.php>.

Murray, B. (2010). "RPG Glossary " Retrieved 25 February 2010, from http://rpg.geekdo.com/wiki/page/RPG_Glossary#M.

Nocera, J. (2008). "A Tight Grip Can Choke Creativity." Retrieved 20 August, 2010, from http://www.nytimes.com/2008/02/09/business/09nocera.html?_r=3&pagewant.

Ostrovski, P. (2007, 12 November). "Prince Threatens to Sue Fansites." Retrieved June 4, 2008, from <http://chillingeffects.org/weather.cgi?WeatherID=599>.

O'Sullivan, T., J. Hartley, D. Saunders, M. Montgomery, and J. Fiske (1994). "Author/ship". Key Concepts in Communication and Cultural Studies New York, Routledge.

Patterson, R. P. (2008). OPINION & ORDER, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK. **07 Civ. 9667 (RPP):** 1-68.

Reardon, P. T. (2008, 4 May). "Harry Potter and the Battle of the Lexicon." Chicago Tribune. Retrieved 5 November, 2009, from http://archives.chicagotribune.com/2008/may/04/news/chi-publisher-potter_bdmay04.

Rimmer, M. (2003). "The Dead Poets Society: The Copyright Term and the Public Doman." First Monday **8**(6).

Ross, A. (2006). "Technology and Below-the-Line Labor in the Copyfight over Intellectual Property." American Quarterly **58**(3): 743-766.

Rowling, J. K. (2004). "Section: Fan Sites: The Harry Potter Lexicon." J.K.Rowling Official Site. Retrieved 18 August, 2009, from http://www.jkrowling.com/textonly/en/fansite_view.cfm?id=14.

——— (2007). Harry Potter and the Deathly Hallows. New York, Scholastic Inc.

——— (2007, 31 October). "Section: News: Companion Books." J.K.Rowling Official Site. Retrieved 22 September, 2009, from http://www.jkrowling.co.uk/textonly/en/news_view.cfm?id=102.

——— (2007). "Section: Rubbish Bin." J.K.Rowling Official Site. Retrieved 5 November, 2009, from

- http://www.jkrowling.com/textonly/en/rubbishbin_view.cfm?id=17.
- Schwabach, A. (2008). "The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright." University of Pittsburgh Law Review. Retrieved 9 February, 2009, from <http://ssrn.com/paper=1274293>
- Scodari, C. (2003). "Resistance Re-examined: Gender, Fan Practices, and Science Fiction Television." Popular Communication 1: 111-130.
- SDR (2008). WARNER BROS. ENTERTAINMENT, INC. and J.K. ROWLING, Plaintiffs, 07 CV 9667 (RPP) RDR BOOKS, Defendant. Transcript 14th April 2008. SOUTHERN DISTRICT REPORTERS, P.C. (212) 805-0300. New York.
- WARNER BROS. ENTERTAINMENT, INC. and J.K. ROWLING, Plaintiffs, 07 CV 9667 (RPP) RDR BOOKS, Defendant. Transcript 15th April 2008. SOUTHERN DISTRICT REPORTERS, P.C. (212) 805-0300. New York.
- WARNER BROS. ENTERTAINMENT, INC. and J.K. ROWLING, Plaintiffs, 07 CV 9667 (RPP) RDR BOOKS, Defendant. Transcript 16th April 2008. SOUTHERN DISTRICT REPORTERS, P.C. (212) 805-0300. New York.
- Slater, D. (2008, 14 April). "J.K. Rowling on the Stand: 'There's a Measure of Principle at Stake'." Wall Street Journal Blogs. Retrieved 17 November 2009, from <http://blogs.wsj.com/law/2008/04/14/jk-rowling-on-the-stand-theres-a-measure-of-principle-at-stake/>.
- Smith, D. (2000). "The Times Plans a Children's Best-Seller List." The New York Times Retrieved 24 November, 2009, from <http://www.nytimes.com/2000/06/24/books/the-times-plans-a-children-s-best-seller-list.html>.
- Spartz, E., and Schoen, B. (2009). Mugglenet.com's Harry Potter Should Have Died: Controversial Views from the #1 Fan Site, Ulysses Press
- StarKid Productions. (2009) 'An Announcement from StarKidPotter - 26-6-09.' Retrieved December 18th 2009 from <http://www.YouTube.com/watch?v=2bYariSUNgl>.
- Stroude, R. L. (2010). "Complimentary Creation: Protecting Fan Fiction as Fair Use." Marquette Intellectual Property Law Review 14(1): 191-213.
- Tushnet, R. (1997). "Legal fictions: Copyright, Fan Fiction, and a new Common Law." Loyola of Los Angeles Entertainment Law Journal 17(n3): 651-686.

- (2004). "Copy This Essay." Yale Law Journal **114**: 535-590.
- (2007). "Payment in Credit: Copyright Law and Subcultural Creativity." Law and Contemporary Problems **70**(2): 135(140).
- Unknown Author (1986). Intellectual Property Rights in an Age of Electronics and Information. Office of Technology Assessment. Washington, D.C., U.S. Government Printing Office.
- Unknown Author (October 7, 1998). H9952. Congressional Record. United States Government Printing Office.
- Unknown Author. (2009). "Chilling Effects Clearinghouse." Retrieved 2 September 2009, from <http://chillingeffects.org/fanfic/faq.cgi>.
- US Copyright Act of 1976. (1976). 17 U.S.C. §§ 101-810. United States of America.
- Vander Ark, S. (2008). DECLARATION of Steven Jan Vander Ark in Opposition re: 22 MOTION for Preliminary Injunction, New York Southern District Court **Filing 52, Main Document**.
- (2008). DECLARATION of Steven Jan Vander Ark in Opposition re: 22 MOTION for Preliminary Injunction, New York Southern District Court **Filing 52, Exhibit 1**.
- (2009). The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials. Michigan, RDR Books.
- Viires, P. (2004). "Literature in Cyberspace." Retrieved 16 October, 2008, from <http://www.folklore.ee/folklore/vol29/cyberlit.pdf>.
- Walker, D. (2010, 20 February). "Family Guy Response ". Retrieved 4 April, 2010, from <http://thatguywiththeglasses.com/videolinks/thatguywiththeglasses/bum-reviews/17494-family-guy-response>.
- Want, R. S. (2008). Harry Potter and the Order of the Court: The J.K. Rowling Copyright Case and the Question of Fair Use. New York, NationsCourts.com.
- Waters, D. (2004). "Rowling Backs Potter Fan Fiction." BBC NEWS. Retrieved 14 August 2008, from <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm>.
- Weise, E. (2001). 'Potter' Web Fans Organize Boycott. USA Today. e. (editor). <http://www.usatoday.com/tech/news/2001-02-22-potter.htm>.

Williamson, D. (1989). Authorship and Criticism. Sydney, Local Consumption Publications.

Wolchak, P. (2001). Meet Heather Lawver, Internet hero. ITWorldCanada. e. (editor).

<http://www.itworldcanada.com/a/ComputerWorld/bedaab03-9599-4808-9b14-4c23016e8a29.html>.

Wu, T. (2008). "Fan Feud." The New Yorker. Retrieved May 19th, 2008, from

http://www.newyorker.com/talk/2008/05/12/080512ta_talk_wu.

——— (2008). "Tolerated Use." Columbia Journal of Law & the Arts (2007-2008). Retrieved 6 May,

2009, from http://heinonline.org/HOL/Page?handle=hein.journals/cjla31&div=28&g_sent=1#625.

YouTube (2010). "This video contains content from WMG, who has blocked it on copyright grounds."

Retrieved 17 January, 2010, from <http://www.YouTube.com/watch?v=KLMoFFVn58s>.