

**COPYRIGHT OBSERVANCE IN THE DIGITAL AGE:  
NORMS AND PRACTICES IN ONLINE  
FANFICTION COMMUNITIES**

**By**

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## **ABSTRACT**

Within online communities, social norms that set behavioural standards play a crucial role in the overall survival and core values of the community – particularly in the context of being at risk of litigation. For communities where the members actively participate in creative activities and therefore, have to make decisions about copyright every day, it is very important to understand what these norms are, how community members construct and enforce them effectively. In this PhD research, I study the online fanfiction communities, a creative community dedicated to producing and promoting fanfiction – fictional writing written by fans based on their favourite canon work. Facing the risk of being sued by copyright holders despite their innocent intent, and the absence of applicable law, these communities have developed and enforced several strong, well-established copyright norms to maintain their “sanctuary.” Through ten fanfiction sites’ terms and conditions, and online copyright discussions between the members from four online fanfiction communities, I examine social norms that have been sufficiently effective at protecting the communities from copyright holders’ unwanted attention. Using content analysis and corpus linguistics, I identify the disconnect between what is prescribed by law and what is understood and adhered to by online users. From that, the research highlights the intersection of social norms with law, and suggest how copyright law should change to accommodate better new generations of artistic creation.

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# CHAPTER 1

## INTRODUCTION

“Good artists copy. Great artists steal.”

(Pablo Picasso)

### 1.1. RESEARCH CONTEXT

When William Shakespeare wrote his masterpiece *The Two Gentlemen of Verona* approximately 430 years ago, his plotline was an adaptation from the novel *Los Siete Libros de la Diana* (The Seven Books of the Diana) by the Portuguese writer Jorge de Montemayor.<sup>1</sup> The theme of the intimate friendship between the two men in Shakespeare’s work was believed to derive from Thomas Elyot’s story *The Boke Named The Governor* in 1531.<sup>2</sup> The national poet of England was also believed to have borrowed the materials from other two sources: John Lyly’s play *The Anatomy of Wit* from 1578,<sup>3</sup> and Arthur Brooke’s poem *The Tragical History of Romeus and Juliet* published in 1562.<sup>4</sup> Even though the early plays by Shakespeare were mainly parodies,<sup>5</sup> nobody ever questioned him for using someone else’s work. Few people cared, which is unsurprising because it is natural to reuse materials to produce new work.<sup>6</sup> For thousands of years, before the Elizabethan era when Shakespeare lived, storytelling was always the iteration of the oldest of human impulses: tribe’s members sitting in the dark, taking turns to tell different parts of a story around a fire. The narrative tradition of every culture is a combination of myths, epics, legends, folktales...rewritten atop one another. “Nothing is original in the sense of being *sui generis*.”<sup>7</sup>

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<sup>1</sup> Diana was first published in Spanish in 1559. French translation was made by Nicholas Collin in 1578. Twenty years later, Bartholomew Young translated it to English. This book was adapted to an English play named *The History of Felix and Philomena*. See WILLIAM SHAKESPEARE, *THE TWO GENTLEMEN OF VERONA* (Kurt Schlueter ed., 2018).

<sup>2</sup> WILLIAM SHAKESPEARE, *THE TWO GENTLEMEN OF VERONA: THE OXFORD SHAKESPEARE* (Roger Warren ed., 2008).

<sup>3</sup> *Id.*

<sup>4</sup> WILLIAM SHAKESPEARE, *THE WORKS OF SHAKESPEARE: THE TWO GENTLEMEN OF VERONA* (Arthur Quiller-Couch & John Dover Wilson eds., 1921).

<sup>5</sup> Hans Walter Gabler, *Experiment and parody in Shakespeare’s early plays*, 46 *STUD. NEOPHILOL.* 159–171, 161 (2008).

<sup>6</sup> Uma Suthersanen & Graham Dutfield, *The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity*, 4 *INTELLECT. PROP. Q.* 379–421 (2004).

<sup>7</sup> COPYRIGHT LAW, DIGITAL CONTENT, AND THE INTERNET IN THE ASIA - PACIFIC, (Brian Fitzgerald et al. eds., 2008).



However, the rules of copyright have muscled their way into everyday life over the past generations. A host of daily human activities – composing a new song, creating a new video, writing a story – now potentially constitute copyright infringement. Generally, copyright is the set of exclusive rights that are granted to authors the ability to control the use of their works by others.<sup>8</sup> Back to the time when Shakespeare wrote his plays, copyright was not a concern because mass production of literary work was not widely possible back then. Back in the medieval period, it was a slow and time-consuming task to make copies of a book. Monk copyists in the monastery, for example, used scribes to make books for their religious education. Since Johannes Gutenberg invented the printing press in the 15<sup>th</sup> century, the arrival of movable type started a new chapter in the printing industry.<sup>9</sup> The printing press technology significantly reduced the time needed for book reproduction.<sup>10</sup> With the practical barriers lifted, copying easily occurred without copyright holders' permission. Therefore, the publishers had to take action to stop the unauthorised reproduction and distribution of books. In April 1710, the Parliament of Great Britain enacted the world's first copyright statute – the Statute of Anne (also known as the Copyright Act 1710).<sup>11</sup> It was the first legislative instrument to award copyright holders a monopoly right over their contents.

Advance in technology often challenge the scope and reach of existing law, and in recent years, digital technology has done just that with copyright. The fact that the law has to manage the difficult task of keeping up with scientific progress has occurred on several occasions such as radio, cable television, photocopying, home video cassettes recorders,<sup>12</sup> the peer-to-peer sharing network and streaming technology.<sup>13</sup> Sometimes the advent of new technology may disrupt existing copyright regimes. For example, the video-sharing

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<sup>8</sup> What is Copyright?, COPYRIGHTALLIANCE, [https://copyrightalliance.org/ca\\_faq\\_post/what-is-copyright/](https://copyrightalliance.org/ca_faq_post/what-is-copyright/) (last visited Jul 5, 2020) (“The primary objective of copyright is to induce and reward authors, through the provision of property rights, to create new works and to make those works available to the public to enjoy.”).

<sup>9</sup> DIANA CHILDRESS, JOHANNES GUTENBERG AND THE PRINTING PRESS (2008).

<sup>10</sup> The history of copyright, AUSTRALIAN LIBRARIES COPYRIGHT COMMITTEE, <https://libcopyright.org.au/the-history-of-copyright> (last visited Jul 8, 2020).

<sup>11</sup> The full title of The Statute of Anne was “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned” (cited either as 8 Ann. c. 21 or as 8 Ann. c. 19). Passed in 1710 by the Parliament of Great Britain, it was the first ever statute in the world to provide copyright protection.

<sup>12</sup> Mike Masnick, *Copyright Finally Getting Around To Destroying Player Piano Music... One Century Late*, TECHDIRT. (2010), <https://www.techdirt.com/articles/20100712/18325210185.shtml> (last visited Sep 14, 2020).

<sup>13</sup> George Thuronyi, *Copyright Law and New Technologies: A Long and Complex Relationship* | *Copyright: Creativity at Work* (2017), <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/> (last visited Jul 5, 2020).

website YouTube, which provides the possibility for self-broadcast, has also been used somewhat problematically as a tool for uploading infringing materials. As new technologies that assist the quick and high-quality reproduction of content are developed, copyright law “must adapt to the continually shifting technological landscape in order to stay abreast.”<sup>14</sup>

Moreover, the media and the Internet have effortlessly made creative materials available to the public in ways that encourage new interpretations and remixing. What we have now, as described by Jane Becker, is telling stories around “the digital campfire:” reusing existing stories to share them online.<sup>15</sup> In our increasingly digitalised age, user-generated content (UGC) eventually became a worldwide phenomenon. For example, the website deviantart.com – an online community featuring artwork, videography, and photography – hosts millions of creative works uploaded by its 48 million registered members and has 45 million unique visitors every month.<sup>16</sup> Websites and platforms like deviantart.com play the roles of mediums for the participatory culture. As American media scholar Henry Jenkins explains “(it is) a culture in which private individuals (the public) do not act as consumers only, but also as contributors or producers;”<sup>17</sup> members of this culture believe that their contribution is the only content that matters. They strongly support the creating and sharing of one’s creation with others.<sup>18</sup> Copyright issues, however, become more apparent when not all of these practices are legal. With the widespread of unauthorised copying and distributing of creative work, Professor Lawrence Lessig comments that there is a whole generation “born and raised to become criminals.”<sup>19</sup>

As “user-generated content is at the heart of the web 2.0’s era,”<sup>20</sup> copyright has become an urgent concern. On one hand, there has been increasing awareness amongst copyright holders as well as consumers about reusing copyrighted materials: When is rewriting and retelling a story permissible? Is it acceptable to make an adaptation that might mislead readers about the original? Should making derivative work be illegal or a creative activity

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<sup>14</sup> Gachago Roger, *The Effect of Technology on Copyright*, 2011.

<sup>15</sup> Jane M. Becker, *Stories around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet Notes*, 14 CONN. PUBLIC INTEREST LAW J. 133–156 (2014).

<sup>16</sup> About DeviantArt, DEVIANTART, <https://about.deviantart.com/> (last visited Jul 8, 2020).

<sup>17</sup> HENRY JENKINS, *CONFRONTING THE CHALLENGES OF PARTICIPATORY CULTURE: MEDIA EDUCATION FOR THE 21ST CENTURY* (2009).

<sup>18</sup> *Id.* at 7.

<sup>19</sup> LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

<sup>20</sup> Anna Vamialis, *Online Defamation: Confronting Anonymity*, 21 INT. J. LAW INF. TECHNOL. 31–65, 35 (2013).

that the law should respect?'.<sup>21</sup> On the other hand, digital technologies and the Internet have posed a special challenge to governments in enforcing copyright. It has been a struggle for policymakers to keep up with developing technology and practices.<sup>22</sup> For instance, copyright is by nature territorially limited, meanwhile online copyright infringement can be a “trans-sovereign” issue. Tying an online copyright infringement to a particular applicable law and jurisdiction sometimes is an impossible task. An Australian court may struggle to prosecute someone for their online copyright violation when that person does not reside or have any assets on Australian territory. Moreover, there have also been challenges for governments in seeking the balance between rewarding the authors’ labours and the right to access literature and art of the public. The line between free creativity and copyright infringement has always been blurred. In most debates about copyright, people have fought over how we should live and collaborate, how we get access to knowledge, how we benefit from our creativity, how we promote the innovation of useful arts and science, but also how to make those works available to the public to enjoy.

From the online users’ perspectives, the broad relevance of copyright to online users does not make copyright law any less complex or inaccessible. The first problem originates from the complexity of legal writing, including legal instruments and judicial decisions. Many studies have confirmed that legal instruments are highly complex and are “in many cases practically incomprehensible to people.”<sup>23</sup> Sometimes even legal experts like judges have different reasonings when handling the same facts of a case. Secondly, the problem is not simply that using copyrighted materials always constitutes copyright infringement, although that is part of it. Copyright law, in fact, allows some uses of copyrighted materials that may cover some creative works such as fanfiction. The broader difficulty is that whereas a layperson can easily notice that unauthorised copying and downloading copyrighted books is copyright infringement, the question of reusing

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<sup>21</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common law*, 17 LOYOLA LOS ANGEL. ENTERTAIN. LAW REV. 651, 653 (1997).

<sup>22</sup> Casey Fiesley, Jessica L. Feuston & Amy S. Bruckmand, *Understanding Copyright Law in Online Creative Communities*, in PROCEEDINGS OF THE 18TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 116–129 (2015).

<sup>23</sup> Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, in PROCEEDINGS OF THE 19TH ACM CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1450–1461 (2016); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INF. COMMUN. SOC. 123 (2020); Madeleine Patton, *How To Protect Users’ Copyright Rights in the Age of Social Media Platforms and Their Unread Terms of Service*, 53 UNIV. SAN FRANC. LAW REV. 463 (2019).

fictional characters or settings is more difficult to answer. Lastly, the inconsistency in national copyright laws also challenges creators to know what is available to them and what is not. For example, many countries give authors an inalienable power to rescind a license which makes their works free to the public whenever they want. There is always doubt that the offered creative work to them is revocable.<sup>24</sup>

“The lack of bright-line rules for some copyright concepts”<sup>25</sup> does not stop members of online creative communities from what they are doing, yet urges them to find a way to continue without triggering unwanted attention from copyright holders. Given all the above problems, it is not surprising that fanfiction sites’ terms and conditions, as well as discussions between the community members, are the prioritised places for online users to come get answers to keep their communities pleasant and safe. The copyright norms that are embodied in communities’ terms of service and members’ discussions serve as behavioural standards to regulate or provide guidance to community members without necessarily scripting specific copyright regulations and harsh sentences.<sup>26</sup> This research proves that online fanfiction communities’ copyright practices are particularly valuable in understanding a very distinctive premise where rules imitate copyright regulations but enforceable in a different way.

## 1.2. LITERATURE REVIEWS

Using norms to regulate human behaviour is not entirely a novel scholarship. From an early age, people start learning rules and disciplinary actions to live their lives efficiently and effectively. In general, social norms are informal understandings that monitor the behaviour of members of a group (e.g. a team, an office, a community, a society). The approach to social norms used in this study is that social norms are means of social control which can be applied to both the physical and digital worlds and therefore, more attention needs to be paid to social norms’ roles in regulating online users’ behaviours. This study

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<sup>24</sup> Jacob Rogers, *International Inconsistencies In Copyright: Why It's Hard To Know What's Really Available To The Public*, TECHDIRT.COM (2018), <https://www.techdirt.com/articles/20180201/16491339137/international-inconsistencies-copyright-why-hard-to-know-whats-really-available-to-public.shtml> (last visited Dec 10, 2020).

<sup>25</sup> Fiesley, Feuston, and Bruckmand, *supra* note 22 at 118.

<sup>26</sup> Robert B. Cialdini & Melanie R. Trost, *Social influence: Social norms, conformity, and compliance*, 1 in THE HANDBOOK OF SOCIAL PSYCHOLOGY 151–192 (1998).

aims to be a contribution to this field, situating the theory and related research within a broader theoretical and empirical context.

The section is divided into three main parts. In the first part, the central theoretical framework for regulating community members' behaviours in the absence of central authorities is elaborated based on the research of Robert Ellickson, Richard Posner, Peter Fitzpatrick, and Roger Cotterrell. In the second part, the "theory of dots," developed by Harvard law professor Lawrence Lessig about the four modalities of Internet regulation, is discussed. Finally, relevant research about social norms in regulating online creative communities is evaluated. The section concludes with a brief summation of main research themes that will shape and define the research questions as well as contributions by this study.

### **1.2.1. Social norms as a mean of social control**

Even though human society is regulated from above by the law, its structure is established on social settings (e.g. norms, customs).<sup>27</sup> Scholars, especially legal practitioners (e.g. Jerome Frank, Oliver W. Holmes, Roscoe Pound),<sup>28</sup> have claimed that legal rules are not always the decisive factors of case outcome, and judges must account for the influences of informal social practices, personality, economic and political factors.<sup>29</sup> However, many jurisprudential works have neglected the roles of norms and customs, focusing solely on that of individuals and governments.<sup>30</sup> While individuals are described to be "the locus of moral responsibility and rational decision making,"<sup>31</sup> governments are presented as the primary source of rules that governing moral and rational behaviours. Norms and customs – as "the mid-sized objects of the social world"<sup>32</sup> – have been overlooked.

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<sup>27</sup> STEVEN HETCHER, *NORMS IN A WIRED WORLD* (2004) (arguing norms and customs are foundation of social order. He focuses on the implication of norms and customs in tort law and Internet privacy laws).

<sup>28</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (1963); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. LAW REV. 457 (1897); ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* (1997).

<sup>29</sup> A. V. HORWITZ, *THE LOGIC OF SOCIAL CONTROL* (1990).

<sup>30</sup> LAWRENCE MEIR FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* (1977); Talcott Parsons, *The law and social control*, in *THE SOCIOLOGY OF LAW* 334–338 (2017); POUND, *supra* note 28; HORWITZ, *supra* note 29; WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, *LAW, ORDER, AND POWER* (1971); ÁGOST PULSZKY, *THE THEORY OF LAW AND CIVIL SOCIETY* (1888); XIN REN, *TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA* (1997).

<sup>31</sup> HETCHER, *supra* note 27 at 2.

<sup>32</sup> *Id.* at 2.

Legal scholars have recently paid more attention to social norms as sufficient tools for social control. The current literature includes important work emanating from mainly social science, moral and political philosophy. These works suggest that there are normative orders which do not stem from the state but may have equal or even greater influence than the law.<sup>33</sup> Besides, these non-state norms appear in a variety of units of society: small social groups, university, corporation, universities, business network, community, etc.<sup>34</sup> The first study of social norms by a legal theorist appears in the works of prestigious Yale law professor Robert Ellickson, suggesting that norms are capable of accommodating the formal law.<sup>35</sup> In his famous book *Order Without Law: How Neighbours Settle Disputes*, Professor Ellickson examines the evidence in which cattle ranchers' norms and norms developed by the whaling industry in the seventeenth and eighteenth centuries promoted welfare.<sup>36</sup> He concludes that "the regulatory structure of society is constructed from the bottom up."<sup>37</sup> Norms do not only tailor human society in an informal manner, but norms and laws affect each other and work together to regulate behaviour. In the absence of an effective law, norms "will tend to fill in the gaps."<sup>38</sup> Professor Ellickson's richly rewarding work in the interplay between law and norms has been followed by several studies conducted by scholars such as Richard Posner, Lisa Bernstein (merchant court), Robert Cooter (trading groups), Edward Rock (employment relationship), Mark D. West (Japanese sumo groups), Ann Bartow (non-profit libraries), and Michael Vandenbergh (the environmental compliance decision-making of corporate manager).<sup>39</sup> However, there were not many case studies investigating the intersection of social norms to the law in an online context.

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<sup>33</sup> Swenson Geoffrey, *Legal Pluralism in theory and practice*, 20 INT. STUD. REV. 342, 3 (2018).

<sup>34</sup> Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. LAW SOC. 296, 298 (2000).

<sup>35</sup> Robert C. Ellickson, *Bringing culture and human frailty to rational actors: A critique of classical law and economics*, 65 CHI-KENT REV 23 (1989); Robert C. Ellickson, *Law and economics discovers social norms*, 27 J. LEG. STUD. 537–552 (1998).

<sup>36</sup> ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 137–142 (1994) (rejecting the tradition framework "which positions the state as the sole source of social control, and refuse the role of substantive norms in governing behaviours.").

<sup>37</sup> *Id.* at 141, 142 (discussing the important role of norms in regulating property entitlements in the Old West in the absence of applicable law).

<sup>38</sup> *Id.* at 4, 5 (suggesting that the absence of law in some scenarios does not lead to disorder of society (or a particular community). It results in an order established by suitable social norms).

<sup>39</sup> Richard A. Posner, *Social norms and the law: An economic approach*, 87 AM. ECON. REV. 365–369 (1997); Eric A. Posner, *Standards, Rules, and Social Norms Law and Economics and the Rule of Law--Symposium on Law and Public Policy-1997*, 21 HARV. J. LAW PUBLIC POLICY 101–118 (1997); Richard A. Posner, *Social norms, social meaning, and economic analysis of law: A comment*, 27 J. LEG. STUD. 553–556 (1998); Lisa Bernstein, *Merchant law in a merchant court: Rethinking the code's search for immanent business norms*, 144 UNIV. PA. LAW REV. 1765–1821 (1996); Robert Cooter & Janet T. Landa, *Personal versus impersonal trade: The size of trading groups and contract law*, 4 INT. REV. LAW ECON. 15–22

Nowadays social norms have greatly influenced Internet users' behaviours. Several scholars have taken the next step in the evolution of norms. These studies do not purport to offer a universal theory of norms, but rather to improve the predictive capacity of social norms theory in a specific setting: cyberspace. The most famous work on social norms in this Web 2.0 era is Professor Lawrence Lessig's "theory of dots." Professor Lessig is a distinguished academic, attorney and political activist and he has worked restlessly for an effective Internet regulating system.<sup>40</sup> In his prestigious works – *Code* and *Code version 2.0*,<sup>41</sup> Lessig argues that although the Internet cannot be regulated in its present form, it is inevitable that the form will change, and fairly quickly, due to a combination of all four modalities as follows:

#### **a. Market mechanism**

By referring to "market mechanism," Professor Lessig suggests using market forces as a regulatory or disciplinary device. In essence, if the business terms and conditions offered by one merchant are not favourable, consumers may find another who has better terms. Therefore, the market can play the role of a disciplining force if a firm violating the rules is exposed to the public. The fear of losing reputation and profits prevents the sellers from becoming monopolies in the market.<sup>42</sup> As a result, the seller publishes information about his goods and services and hopes to differentiate himself from the rest in the field.<sup>43</sup> The rest depends on customers to decide if the information is important enough. In this case, the market would prevail over the government's orders.<sup>44</sup> For example, shopping websites are required to provide Internet users with information about service providers and consurights mers', the price for the service, privacy issues, copyright terms. Consequently, the market mechanism has indirectly changed service providers' behaviours in the way that it requires the latter to inform visitors about their services. The

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(1984); Edward Rock & Michael Wachter, *The Enforceability of Norms and the Employment Relationship*, FAC. SCHOLARSH. PENN LAW 144 (1996); Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEG. STUD. 165–201 (1997); ANN BARTOW, *Electrifying Copyright Norms and Making Cyberspace More Like a Book* (2003), <https://papers.ssrn.com/abstract=368180> (last visited Jul 12, 2020); Michael Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STANF. ENVIRON. LAW J. 55 (2003).

<sup>40</sup> Harvard Law School, *Lawrence Lessig* | Harvard Law School, <https://hls.harvard.edu/faculty/directory/10519/Lessig/> (last visited Jun 30, 2020).

<sup>41</sup> LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0* (2006); LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (2000).

<sup>42</sup> ASIAN MEDIA INFORMATION AND COMMUNICATION CENTRE, *THE INTERNET AND GOVERNANCE IN ASIA: A CRITICAL READER* 328 (2007).

<sup>43</sup> *Id.*

<sup>44</sup> LESSIG, *supra* note 41 at 66.

more transparent their information, the more competitive their business becomes. The rest depends on how online users navigate this information and make their decisions. Using market mechanisms as a disciplinary device often puts more weight on the service providers (the sellers) than on online users (the buyers).

#### **b. Social norms**

Professor Lessig addresses the existence of social norms as “other sorts of laws in real space as well [...] Our language is a norm; norms are collectively determined.”<sup>45</sup> He concluded that norms can constrain individuals’ behaviours in both real and virtual spaces. Indeed, social norms play a very important role in regulating online users’ activities when they engage in close-knit groups like online communities, group chats, message boards, etc. If individuals fail to obey a norm, they would be maybe viewed as deviant by other group members. The group may increase pressure on a norm-breaker, then try to engage him or her into a conversation that aims to persuade such person to correct his or her behaviour. If the member still does not behave properly, they may publicly criticise or expel the deviant out of the group as a punishment.

#### **c. Architectures**

Professor Lessig always sees the Internet as a product of design (known as *architecture*), which makes it likely to have some errors. He believes that such design stops any attempt to regulate online users’ activities; because it is unlikely to identify who they are, what activities they are engaging in, and where they are living. Consequently, it would be a daunting task to enforce laws upon individuals in cyberspace.<sup>46</sup> Therefore, he suggests that governments should embrace new technologies to develop an architecture that makes end-users’ behaviours more manageable.<sup>47</sup>

The best illustration of using technologies to regulate the Internet is data retention. As mentioned above, the most challenging problem for policing online users’ behaviours is that law enforcement cannot trace the real identities of Internet users, their places of residence, and what they are engaging in. Therefore, the more data authorities gather from online activities, the easier it will be to track wrongdoers. By recognising the benefit of data gathering, governments are beginning to update technologies to retain specified

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<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 59.

<sup>47</sup> *Id.* at 4.



information to better enable law enforcement. When browsing the Internet, online users leave digital traces behind that websites can legally use to keep track of their activities (i.e. data associated with the servers, time, and facilities used in an online transaction). A variety of tracking methods (e.g. IP address,<sup>48</sup> HTTP referrer,<sup>49</sup> cookies<sup>50</sup> and tracking scripts,<sup>51</sup> mouse tracking<sup>52</sup>) allow authorities to prevent any attempt of online crime or confront the deviants and bring their behaviours back in line.

#### **d. Law**

The most used means of social control is that of formal rules which come from a code of law. The advantage of government legislation is that these rules are very clear and heavily enforced by applying punishment to violators. However, the major drawback of using the law to regulate the Internet is that the latter is still in its developmental stage, while the former tends to be rigid and slow to change. Indeed, it is not always bad when the law lacks flexibility because that is how it should be for the sake of certainty. The Internet has changed very quickly, and the law has fallen far behind technology. Moreover, the compliance cost can be very high which can cause a lack of co-operation from involved parties.

Professor Lessig suggests that these four modalities are broad modes, which means that they are not mutually exclusive and in fact can overlap each other. A combination of them may be more effective to address a problem. For example, online harassment can be stopped by employing a mix of market (e.g. internet service providers provide users with transparent Terms of Use), social norms (e.g. harassment is not tolerated by members of an online community), technology (e.g. a machine learning algorithm is trained to spot specific words and phrases associated with an abusive speech on social media sites, then

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<sup>48</sup> Every online user has a unique IP address that may be used to identify them. An IP address can provide the primary pieces of data about users, including what they do online, what pages they visit, or determine their location.

<sup>49</sup> When an online user visits a website, the browser sends specific information to the websites' owners. This information may reveal where such person comes from. If he or she visits one website and click on any link which is attached to this site, the corresponding site may know that they come from the original website by using HTTP referrer.

<sup>50</sup> When you visit a website and accept that it remembers you the next time you visit, the website places a cookie on your hard drive. Using cookies help online users enhance their experience in specific websites (e.g. they do not need to sign in again, they also do not need to search once they got the answer from their last visits). However, cookies can be used to track users because it remembers their online browsing histories.

<sup>51</sup> Most websites use third-party tracking scripts for their advertisement. This technology allows websites to run the same advertisement once you have looked for a certain product on one of the associated websites.

<sup>52</sup> Mouse movement helps websites' owners to distinguish real users from bots (an application that used to automate certain tasks). This gives them a list of IP addresses that they know connect to a real person.

block inappropriate comments), and law (e.g. people can be prosecuted for malicious communications, threats or inciting racial hatred). Therefore, it is possible to regulate some online aggressions (e.g. online harassment, online scam, copyright infringement) by combining these four modalities.

Secondly, these constraints can be very different, but they are also fairly interdependent. Each can support or oppose the other, depending on to what extent they are available. For example, technologies can prevail over norms and the law; they can also strengthen them. These modalities function differently and make distinctive impacts on human behaviour in cyberspace. As Lessig explains, “Norms constrain through the stigma that a community imposes; markets constrain through the price that they exact; architectures constrain through the physical burdens they impose; law constrains through the punishment it threatens.”<sup>53</sup> Each modality has a complex nature, and it is very interesting to observe and describe the interaction amongst these four.

In summary, Professor Lessig proposes that government is not the only agency that can constraint human behaviour, especially in the digital age. Technology, cultural norms, and the market are all capable of doing this as well. It is the fact that Lessig’s research interest, illustrated by the way he names both his prominent books – *Code* and *Code version 2.0*, is about technologies rather than other modalities. However, his theory of dots has laid out the ground for Internet regulations.

### **1.2.2. Social norms and online fanfiction communities**

Following on from Lawrence Lessig’s research, other scholars have worked on the roles of social norms as a response to the explosive growth of the Internet. What Lessig drafted is a general framework for Internet regulations, but meanwhile, digital technologies have drastically advanced and the cyber world has attracted more actors engaging in online activities. As many scholars have described, some aspects of the cyber world have now become a “legal vacuum,” where the existence of a specific applicable law and jurisdiction remains unsolved.<sup>54</sup> The landmark case *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001), for example, raised a challenging question about whether

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<sup>53</sup> LESSIG, *supra* note 41 at 124.

<sup>54</sup> HETCHER, *supra* note 27 at 243.

authorities can effectively impose a sanction on millions of end-users around the world.<sup>55</sup> As a result, informal rules like social norms stand a chance to become a significant discipline in regulating the Internet. Members construct their norms to fill the gaps left by the law. Moreover, in close-knit communities (either online or offline), where members develop strong bonds based on shared interest and experiences, there is a high possibility of enforcing these norms. Prior academic works have taken a detailed look at the role of social norms in online communities like role-playing game communities (e.g. video game series *The Sims*),<sup>56</sup> students' social networks,<sup>57</sup> and file-sharing communities<sup>58</sup> to look for a sufficient self-enforcing online norm, mostly by public shaming and norm internalisation.<sup>59</sup> Their studies have shown that community-based norms can prevail over formal rules in regulating members' behaviours.

Fanfiction (also known as *fan fiction*), as Harvard law professor Rebecca Tushnet defines, "is any kind of written creativity based on an identifiable segment of popular culture, such as a television show, and is not produced as professional' writing."<sup>60</sup> To put it simply, fanfiction is a story written by fans, using characters or settings of the original work. Scholars believe that the history of fanfiction and the communities who practise it originated in the 1960s when NBC released the second season of *Star Trek*. Since then, fans of this famous series began "an independent, interactive, saturated fandom culture."<sup>61</sup>

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<sup>55</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001) (The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Northern District of California, holding that the defendant Napster, Inc – a peer-to-peer file sharing service - could be held liable for contributory infringement and vicarious infringement of the plaintiff's copyright).

<sup>56</sup> Rosa Mikeal Martey & Jennifer Stromer-Galley, *The digital dollhouse: Context and social norms in The Sims Online*, 2 GAMES CULT. 314–334 (2007); Nick Yee et al., *The unbearable likeness of being digital: The persistence of nonverbal social norms in online virtual environments*, 10 CYBERPSYCHOL. BEHAV. 115–121 (2007).

<sup>57</sup> Sumeet Jain et al., *Impact of group norms in eliciting response in a goal driven virtual community* (2013); Yu Zhang & Mihaela van der Schaar, *User adaptation and long-run evolution in online communities*, in 2011 50TH IEEE CONFERENCE ON DECISION AND CONTROL AND EUROPEAN CONTROL CONFERENCE 337–342 (2011); Christy MK Cheung, Pui-Yee Chiu & Matthew KO Lee, *Online social networks: Why do students use facebook?*, 27 COMPUT. HUM. BEHAV. 1337–1343 (2011).

<sup>58</sup> Stefan Larsson et al., *Law, norms, piracy and online anonymity: Practices of de-identification in the global file sharing community*, 6 J. RES. INTERACT. MARK. 260–280 (2012).

<sup>59</sup> Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age Focus on Cyberlaw*, 75 MD. LAW REV. 1029–1065 (2015); Michal Lavi, *The Good, the Bad, and the Ugly Behavior*, 40 CARDOZO LAW REV. 2597–2684 (2018); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELLECT. PROP. LAW 39–74 (2004); Ari Ezra Waldman, *Durkheim's Internet: Social and Political Theory in Online Society*, 7 N. Y. UNIV. J. LAW LIB. 345–430 (2013).

<sup>60</sup> Rebecca Tushnet, *supra* note 21.

<sup>61</sup> FIC: WHY FANFICTION IS TAKING OVER THE WORLD, (Anne Jamison ed., 2013); @ofhouseadama.tumblr.com, TUMBLR, *A brief story of fandom, for those on here who somehow think Tumblr invented fandom, THE STORY BREAKS FREE HERE*, <https://ofhouseadama.tumblr.com/post/86424015604> (last visited Jul 7, 2020).

Under existing copyright law, fanfiction can be categorised as derivative works – where creators modify the original works but do not copy them verbatim. By “non-professional writing,” Professor Tushnet means that fanfiction is not commissioned, unauthorised work, and rarely professionally published. The non-commercial characteristic of fanfiction, which is a very important copyright defence, will be discussed further in Chapter 4.

Even though fanfiction has been an essential part of the fan community’s history, the development of the Internet has expanded its reach. Fanfiction, which has successfully survived by “flying below the radar,”<sup>62</sup> has begun to attract more attention from academia. However, it is safe to say that the implication of social norms in online fanfiction communities has not been a major research topic. Instead, scholars seem to adopt similar approaches: the legal position of fanfiction,<sup>63</sup> copyright exception and limitation,<sup>64</sup> legal issues arising from fandom practice,<sup>65</sup> fanfiction practice from different perspectives (i.e. non-fan readers, original authors),<sup>66</sup> and fanfiction in the digital age.<sup>67</sup> Whether fanfiction fits into the Fair Use doctrine is the most common theme of existing research in the field.<sup>68</sup>

It is worth noticing that online fanfiction communities provide opportunities to practise community-based norms. This is because these communities have significant characteristics that, as Yu Zhang and his colleagues describe, allow members to construct

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<sup>62</sup> Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW CONTEMP. PROBL. 135–174, 142 (2007) (stating that so far there has been no litigated case from the fanfiction community).

<sup>63</sup> AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION (2011); Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 FORDHAM INTELLECT. PROP. MEDIA ENTERTAIN. LAW J. 951–996 (2013); Rebecca Tushnet, *supra* note 21; Ernest Chua, *Fan Fiction and Copyright: Mutually Exclusive, Coexist-able or Something Else - Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright*, 14 ELAW J. 215–232 (2007).

<sup>64</sup> Rachel L. Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use Comment*, 14 MARQUETTE INTELLECT. PROP. LAW REV. 191–214 (2010); Pamela Kalinowski, *The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine Note*, 20 WILLIAM MARY J. WOMEN LAW 655–684 (2013).

<sup>65</sup> Steven D. Jamar & Christen B’anca Glenn, *When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction 2013 Fall Intellectual Property Symposium: Essay*, 1 TEX. AM LAW REV. 959–978 (2013).

<sup>66</sup> Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss Note*, 9 BOSTON UNIV. J. SCI. TECHNOL. LAW 433–470 (2003); Viktor Mayer-Schonberger & Lena Wong, *Fan or Foe: Fan Fiction, Authorship, and the Fight for Control*, 54 IDEA INTELLECT. PROP. LAW REV. 1–22 (2013); Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction Comment*, 58 SMU LAW REV. 1551–1584 (2005).

<sup>67</sup> Becker, *supra* note 15.

<sup>68</sup> Jane M. Becker, *Stories around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet Notes*, 14 CONN. PUBLIC INTEREST LAW J. 133–156 (2014).

and enforce norms effectively.<sup>69</sup> Their article suggests that community characteristics (e.g. the population of the community, the social reciprocation, reputation, individuals' motivation in participating community) significantly help community members educate each other about desired behaviours. For example, a group of people with shared interests seems to construct their standards "through naturalistic patterns of interaction," whilst social media users tend to transfer norms from offline interactions to online settings.<sup>70</sup> Online fanfiction communities fall into the first categories, which are communities built over a shared interest.

Online fanfiction communities – as subcultures – do not have many members. They have been built around a specific element of popular culture, such as a particular canon work, a fictional character, a couple of characters (known as *one-true-pairing*), or sometimes a certain genre of fanfiction.<sup>71</sup> Members from these communities maintain a close-knit relationship,<sup>72</sup> and therefore it is easier to impose sanctions or pass on messages between them. This evidence strongly asserts that social norms may become a major discipline to regulate the behaviour of fanfiction community members. The only obstacle is that sometimes online disinhibition can be a negative factor for online interactions. An anonymous person, especially when he or she goes online, cannot easily be traced. It is not unlikely that community members will be able to know each other and to establish sustained cooperation which is normally seen in the offline world.

Although online fanfiction communities provide a sufficient medium for practising community-based norms, there have not been many studies involving this subject.

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<sup>69</sup> Yu Zhang, Jaeok Park & Mihaela van der Schaar, *Social Norms for Online Communities*, in 2011 50TH IEEE CONFERENCE ON DECISION AND CONTROL AND EUROPEAN CONTROL CONFERENCE.

<sup>70</sup> Caitlin McLaughlin & Jessica Vitak, *Norm evolution and violation on Facebook*, NEW MEDIA SOC. (2011), <https://journals.sagepub.com/doi/10.1177/1461444811412712> (last visited Jul 13, 2020); Gary Burnett & Laurie Bonnici, *Beyond the FAQ: Explicit and implicit norms in Usenet newsgroups*, 25 LIBR. INF. SCI. RES. 333 (2003); Kimberley Allison, *Social Norms in Online Communities: Formation, Evolution and Relation to Cyber-Aggression*, in CHI 2018 DOCTORAL CONSORTIUM (2018).

<sup>71</sup> Fandom is a subculture, which is a small community of fans enjoying one particular original work (e.g. Harry Potter series fandom, Grey's anatomy series fandom) or any element associated with that work such as characters (Sherlock Holmes character fandom, Superman fandom) or a couple (Harry Potter and Hermione Granger of Harry Potter series, Sherlock Holmes and Doctor Watson of The Adventure of Sherlock Holmes series). The development of fandom originated from the early days of fan communities where followers mainly had connection with the original set, rather than with each other. Another type of fandom is fan communities built from a specific type of artistic work (i.e. genre). Some examples of this type of fandom are science fiction fandom, fantasy fandom, yaoi fandom (works which describe homosexual relationship), furry fandom (anthropomorphic animal characters with human personalities and characteristics).

<sup>72</sup> Casey Fiesley & Amy Bruckman, *Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement* (2019).

Meanwhile, the role of formal rules is a prioritised topic in an academic forum. More recent attention has focused on the role of community norms in regulating members' online behaviours.<sup>73</sup> These studies suggest that in circumstances where the law is notoriously grey, members of the fanfiction community prefer community norms over formal rules in making copyright decisions.<sup>74</sup>

Professor Steven Hetcher from Vanderbilt University Law School has shown a major research interest in the recognition of social norms' role in cyberspace.<sup>75</sup> In particular, he adopts a norms-based jurisprudence of intellectual property by examining how fanfiction and remix receive support from informal social norms.<sup>76</sup> On his account, fanfiction has grown in close-knit communities that nurture cooperative behaviour, which allows the communities to self-regulate. This is a crucial feature, especially in the policy-making aspect. Because the better a group can create and effectively enforce its "domestic norms," the less there will be a need for imposing the law. Hetcher's findings seem to be opposite to Lessig's ground when the latter emphasises how amateur creators may be scared away by the prospect of criminal penalties, cease-and-desist letters, or copyright litigation.<sup>77</sup> Instead, what he finds is an explosion of fanworks and remixes. Hetcher himself writes, "[...] clearly, then, there is something bigger going on that must be better understood if we are to develop a policy regime that is capable of comprehensively accounting for this explosion in amateur creativity." Identifying "this something bigger is the role played by social norms,"<sup>78</sup> his paper argues that social norms are important parts of why we recently got more creative endeavours. Lastly, he finds the three norms that dominantly control activities of fan communities: the ownership norm, the attribution norm, and the non-commercial norms.<sup>79</sup>

In her paper about digital publishing, law professor Jacqueline Lipton observed that the existing copyright system has failed to address issues in relation to the control of

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<sup>73</sup> Fiesley, Feuston, and Bruckmand, *supra* note 22 at 117.

<sup>74</sup> Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 UNIV. PA. LAW REV. 1869 (2009); Lipton, *supra* note 63; Yin Harn Lee, *Fan Communities and the Self-Regulation of Digital Creative Space*, 10 SCRIPTED J. LAW TECHNOL. SOC. 364–388 (2013).

<sup>75</sup> Steven Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECHNOL. LAW J. 877 (2001).

<sup>76</sup> Steven A. Hetcher, *supra* note 74 at 1872.

<sup>77</sup> LESSIG, *supra* note 41.

<sup>78</sup> Steven A. Hetcher, *supra* note 74 at 1935.

<sup>79</sup> *Id.* at 1869.

copyrighted works in the self-publishing industry.<sup>80</sup> As a result, the online writing communities have constructed and adhered to their norms instead of referring to what is prescribed in copyright regulations. She asserts that social norms, not legal norms, have the leading role in tailoring fans' behaviours.

Most articles of law professor Rebecca Tushnet about fanfiction derive from years of actively participating and supporting the communities.<sup>81</sup> In one study about the relationship between copyright and social norms, she emphasises the importance of non-legal norms such as using copyright disclaimers.<sup>82</sup> Her research shows that although many fanfiction writers are aware that these disclaimers do not hold any weight in a court of law, they consistently use them to affirm their subordinate status – they are just “reusing” the characters. By using these disclaimers, they wish to escape attention from copyright holders. Therefore, putting authorship disclaimers is a longstanding norm of the fanfiction community.

Dr Yin Harn Lee, in her work on fan communities' self-regulation, suggests that fan communities have constructed four specific norms to deal with the absence of any firm legal principles regulating their activities.<sup>83</sup> These norms include the norm of transformation, the attribution norm, the non-commercial norm, and the norm of integrity. From that, she believes that the similarities between these norms and the US and the UK copyright regulations show possibilities of using them as a basis for legal reform. Consequently, the Fair Use and Fair Dealing defence can be modified so as “copyright law can accommodate transformative works in general and fan works in particular.”<sup>84</sup>

The common theme of the above studies is that they are advocates of the priority of the public interest over the excessive copyright protection that the government and mainstream media are pressing. They suggest that such protection should be less restricted in order to allow non-professional artists and authors to continue to create works in the digital arena. Each research individually illuminates how social norms

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<sup>80</sup> Jacqueline D. Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 585 (2014).

<sup>81</sup> About Rebecca Tushnet, REBECCA TUSHNET (2013), <https://tushnet.com/about/> (last visited Dec 10, 2020). (“I have advised and represented several fan fiction websites in disputes with copyright and trademark owners. I am a member of the legal team of the Organisation for Transformative Works, a nonprofit dedicated to supporting and promoting fanworks.”).

<sup>82</sup> Rebecca Tushnet, *supra* note 21.

<sup>83</sup> Lee, *supra* note 74.

<sup>84</sup> *Id.* at 388.

function in fan communities and occasionally hints at a more hopeful future of promoting social norms as an alternative to copyright law. In term of methodology, the researchers have a tendency of adopting a participant observation approach, in which they summarise from their experiences as insiders. This method is appropriate given that most of them are loyal members of fanfiction communities. Years in the world of fanatics offer them an opportunity to witness the history of the way in which community repeats itself and what the members strive to accomplish over time and permit a thorough and insightful perception. However, the shortcoming lies in the disadvantage of the method itself. The findings theoretically seem to be acquired from two perspectives – responders and researchers; yet they come from one standpoint, resulting in a less objective and accurate outcome. Additionally, their work appears to be more descriptive than prescriptive, and lack the critical perspective of empirical evidence. The author's description of norms is incomplete because they overlook the origin of them, how they are put in their recent places and how they are enforced.

### **1.2.3. Casey Fiesler's contribution to the field**

In her impressive studies, which centre around the topic of using social norms to regulate online creative communities, Professor Casey Fiesler uses an empirical approach to search for evidence in the implication of copyright shared norms. Her choice of method – the interview – offers a clear understanding of how community norms function on a large scale. Moreover, she discovers that the core of norm enforcement is not simply a consensus between community members about proper and acceptable behaviours, but rather the result of a strong sense of community identity. Members feel the needs to be rewarded in some way for their rule-abiding behaviours and that wrongdoers need to be punished. She suggests if the authorities want to promote this self-regulating mechanism, they need to understand the members' needs. The following section discusses, in greater depth, her contributions to the literature on the implication of social norms in online fan communities.



**Table 1. Overview of the research conducted by Casey Fiesler**

Research	Subjects	Data	Findings
Understanding Copyright Law in Online Creative Communities. <sup>85</sup>	Public forum postings.	A content analysis of online users' copyright discussion in eight online creative forums. Looking for a set of keywords to search for main topics about copyright.	Copyright is a frequent topic on these forums. The lack of knowledge about copyright regulation cause challenges to the communities.
Everything I Need To Know I Learned From Fandom: How Existing Social Norms Can Help Shape The Next Generation Of User-Generated Content. <sup>86</sup>	User-generated content communities.	Finding norms that have been established within these communities that specifically handle copyright issues, such as non-commercial norm and attribution norm.	Proposing copyright holders to consider these community-based norms to distinguish piracy, and making derivative work.
Remixers' Understanding of Fair Use Online. <sup>87</sup>	Remix creators.	Interviews with eleven content creators who engage in remix and fan creation activities online. The interviews focus on their understanding and	There are some inconsistencies between what is written in the law and what content creators' think the law says.

<sup>85</sup> Fiesley, Feuston, and Bruckmand, *supra* note 22.

<sup>86</sup> Casey Fiesley, *Everything I Need To Know I Learned From Fandom: How Existing Social Norms Can Help Shape teh Next Generation of User-Generated Content*, 10 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 729 (2008).

<sup>87</sup> Casey Fiesler & Amy S. Bruckman, *Remixers' understandings of fair use online*, in PROCEEDINGS OF THE 17TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1023–1032 (2014).

		attitude toward copyright.	
Reality And Perception Of Copyright Terms Of Service For Online Content Creation. <sup>88</sup>	User-generated content websites' Terms of Service.	An analysis of the copyright licenses provided in 30 websites hosting user-generated contents. A survey to compare online users' understandings of copyright terms to the Terms of Services.	Licensing terms vary from website to website. Online users' understanding of the copyright terms differs by licence and type of website.
Creativity, Copyright And Close-Knit Communities: A Case Study Of Social Norm Formation And Enforcement. <sup>89</sup>	Transformative fandom.	Interviews with fan creators about some copyright-related norms.	Identifying norms that have been applied within the community, how they have been constructed and enforced.
"I Am Not a Lawyer": Copyright Q&A in Online Creative Communities. <sup>90</sup>	Public forum discussions.	A content analysis of online discussions in eight online creative communities. Investigating the communities members' concern of copyright.	Answers are provided with strong confidence but no authority. Their perception also shows many misconceptions.

<sup>88</sup> Fiesler, Lampe, and Bruckman, *supra* note 23.

<sup>89</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

<sup>90</sup> Casey Fiesler, Jessica Feuston & Amy S. Bruckman, "I Am Not a Lawyer": Copyright Q&A in Online Creative Communities, in PROCEEDINGS OF THE 18TH INTERNATIONAL CONFERENCE ON SUPPORTING GROUP WORK 291–294 (2014).

It is necessary to say my PhD thesis is motivated by Professor Fiesler's tireless passion for fan communities, as well as her remarkable academic contribution to fan studies.<sup>91</sup> The theoretical insights that she described ten years ago, about norm enforcing in fan communities, are the foundation for the work I have developed today.

As noted in the description of her websites<sup>92</sup> – #computing#ethics#law#feminism#geek” – Professor Fiesler is interested in the activities of fan communities and how technologies, as well as law, are involved in them. As we can see in Table 1, her work centres around the implication of copyright law, social norms, and technologies in online creative communities. Three of her research publications are from her doctoral dissertation on social norms and creative communities. Her research topics range from the understandings of fan creators about copyright, the roles of social norms in regulating fans' behaviours, and the content of websites' copyright terms. She finds a strong link between the complexity of existing copyright law and social norms which online communities have constructed as their response to the absence of effective formal rules. Her studies also provide insightful views on how these communities convert formal rules into informal rules, and how they enforce these norms.

Most of Professor Fiesler's work is framed in the aspect of human-computing interaction, which “studies the design and use of computer technologies, focused on the interfaces between people and computers.”<sup>93</sup> Therefore, even though she employs Lawrence Lessig's “theory of dots” as the legal framework for her dissertation, she pays more attention to the role of the third factor of the dots - “Architecture” - in regulating the Internet. In terms of methodology, this American law professor mostly uses interview and content analysis to conduct her research. Her studies of online fan communities use interview, which plays a highly useful role in identifying what the members of creative members think about copyright.

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<sup>91</sup> Casey Fiesley, *About*, CASEYFIESLER.COM, <https://caseyfiesler.com/about/> (last visited Jul 3, 2020). She many times addresses herself as a loyal supporter of fanfiction communities and a distinguished member of the Legal Committee of Organisation of Transformative Work.

<sup>92</sup> *Id.*

<sup>93</sup> Human-computer interaction, WIKIPEDIA (2020), [https://en.wikipedia.org/w/index.php?title=Human%E2%80%93computer\\_interaction&oldid=962797818](https://en.wikipedia.org/w/index.php?title=Human%E2%80%93computer_interaction&oldid=962797818) (last visited Jul 15, 2020).

### 1.3. CONTRIBUTION TO THE KNOWLEDGE

The research of scholars like Rebecca Tushnet, Casey Fiesler, Jacqueline Lipton provides rich resources for anyone who has the same research interests, especially fans of fanfiction who wish this subculture to continuously develop without the shadow of copyright. They have worked tirelessly to bring readers – people who may have a sceptical attitude towards fanfiction – an insight on how this subculture of pop culture should be encouraged. Inspired by their studies, my research focuses on examining how social norms can fill the gaps left by existing copyright rules within a specific informal interaction like online fanfiction communities. In doing so, there are three major contributions to the knowledge which this research aims to achieve.

#### - *Methodological contribution*

The first original contribution of my research is that I introduce a rarely-used method to socio-legal studies, namely corpus linguistics. Socio-legal is an area of scholarship that investigates “the gaps between law on the book and law in action”<sup>94</sup> to find out “how the is made, interpreted, enforced and experienced by those on whom law acts.”<sup>95</sup> Socio-legal studies have been compared as a “magpie discipline” that has gathered ideas from many other disciplines to achieve its research objectives.<sup>96</sup> Prominent interdisciplinary relationships in this field include those labelled as “law and...,” such as sociology, anthropology, economics, social psychology and international development. Different disciplinary traditions have also brought different methodological approaches to apply to the study of law. Irene van Oorschot, Peter Mascini and Don Weenink, for example, work on ethnographic data gathered in a Dutch criminal court to examine how defendant demonstrate their remorse in court settings.<sup>97</sup> Tehseen Noorani and colleagues use the participatory method and a small-scale survey to find the obstacles researchers have when securing ethical approval in their universities.<sup>98</sup> McGlynn and Westmarland undertook workshops and follow-up interviews to investigate sexual violence victim and survivors’

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<sup>94</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. LAW REV. 12–36 (1910).

<sup>95</sup> ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS, 10 (Naomi Creutzfeldt, Marc Mason, & Kirsten McConnachie eds., 2019).

<sup>96</sup> Pound, *supra* note 94.

<sup>97</sup> Irene van Oorschot, Peter Mascini & Don Weenink, *Remorse in Context(s): A Qualitative Exploration of the Negotiation of Remorse and Its Consequences*, 26 SOC. LEG. STUD. 359–377 (2017).

<sup>98</sup> Tehseen Noorani et al., *Participatory Research and the Medicalization of Research Ethics Processes*, 26 SOC. LEG. STUD. 378–400 (2017).

perceptions of justice.<sup>99</sup> McConnachie use ethnographic methods to discuss the impacts of anthropology in legal research, focusing on the understanding of law in everyday life.<sup>100</sup> Maayan Ravid and Alice Schneider conduct discourse analysis to explore the changes in legal meaning in the amendments Prevention of Infiltration law between 2010 and 2015.<sup>101</sup> As can be seen, socio-legal studies may involve various social-scientific research methods. And researchers' choice of method mainly depends on the nature and pertinence of their research questions. In this study, I use corpus linguistics as a particularly applicable method for the investigation of questions concerned with fan's perception of copyright law and their communal copyright norms.

Moreover, fans' discussions about copyright can be found anywhere on the Internet, resulting in data sets that are either too large or too complex to be processed by traditional methods. Corpus linguistics, assisted by concordance software, allows me to work with a large volume of data in a short time and discover key topics within online discussions without selecting the analysed texts manually. It also provides an objective interpretation of available data, without the risk of biased interpretation. The advantages and the implication of corpus linguistics in this study later are presented in greater detail in Chapter 6.

- ***Conceptual contribution***

Though this work focuses on a subset of the law (copyright) and a particular subset of fan communities (fanfiction communities), there is at its heart a larger research question about the role of community-created norms in regulating members' behaviours. In doing so, I apply more diverse but inclusive criteria to recruit data sites:

On one hand, it must be emphasised that copyright law without effective enforcement is not helpful to those it seeks to protect – in this case, copyright holders and people who practise fan activities. For a law to be effective, there have to be corresponding enforcement mechanisms that involve different stakeholders. Opinions and behaviours of involved parties, despite playing decisive roles, have been missed out in existing scholarships. Previous researchers' focus is on the creators' perception rather than that of

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<sup>99</sup> Clare McGlynn & Nicole Westmarland, *Kaleidoscopic justice: sexual violence and victim-survivors' perceptions of justice.*, 28 SOC. LEG. STUD. 179–201 (2019).

<sup>100</sup> Kirsten McConnachie, *Law and anthropology*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (2019).

<sup>101</sup> Maayan Ravid & Alice Schneider, *Legal concepts in flux: The social construction of legal meaning*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (2019).

the consumers. Additionally, it takes time for a social norm to be developed and set in a community. The norms we have nowadays are standards crystallised from many generations' discussions about what is right and what is wrong. The data should be collected to reflect this rich history of traditions and beliefs. This objective requires a significantly broader data set, which explains the existing scholars' hesitancy in choosing larger sample sizes. However, as presented above, this obstacle can be resolved by corpus linguistics.

On the other hand, this study delivers a reflection of norms practised exclusively in online fanfiction communities. Professor Fiesler's work mainly investigates a wide range of fan practise (e.g. fan art, fan video, fanfiction, fan film, etc.) both post and pre-internet. Meanwhile, this study works on a much narrower scope: fanfiction communities that operate in virtual settings. The first reason is that perspectives about norms may vary in communities. For example, fan art communities may have more caution over copyright issues, considering their infringements are more visual and obvious than word-portrait ones like fanfictions. If a fan draws a character with a blue costume, red gloves, boots, mask and the ability to cling to most surfaces; it is obvious what character it is – Spiderman. Fanfiction communities, however, may have a more relaxed attitude, considering that there is only a very small possibility that copyright holders take legal actions against millions of them. In general, these research objectives cannot be accomplished by small sample sizes.

- ***Empirical contribution***

Lastly, this research aims to suggest what should be changed in copyright law to respond to challenges posed by the Internet and technologies. At one level, a large and growing body of literature has focused on the intersection of fanfiction and copyright. The risk of copyright litigation to fan works, which have existed for decades, suggests that it is a continuing issue within the fanfiction communities. In a broader sense, the same situation which online fanfiction communities are in can be found in any type of user-generated content. The advent of technologies and the Internet fosters the birth of many new types of creative work and it is not always easy to determine what is legal and what is not. This thesis, therefore, brings together the issues of different disciplines for the first time, thus suggesting what should be done so existing copyright regulations can accommodate the new generation of digital creative work.

## **1.4. RESEARCH QUESTIONS AND METHODOLOGIES**

The subject matter of this research is the intersection of online fanfiction communities' norms and copyright regulations. The influence of social norms, which are developed by the communities, in regulating online users' copyright decisions is poorly understood. They are known as one of four pillars of moderation of the Internet, an alternative to law when the former is absent, but what, if anything, motivates their establishment, how they are enforced, and what copyright lawmakers can learn from such informal practice, remains unresolved. Accordingly, this PhD thesis aims to answer the three following questions:

- RQ1: What are the challenges to existing international copyright law posed by the development of technology and the Internet?
- RQ2: How do online fanfiction communities regulate their members' behaviours?
- RQ3: How should copyright law adapt to the continually shifting technological landscape in the digital age?

To answer these research questions, I have conducted three independent studies. First, I analysed the existing international copyright law, focusing on the minimum standards of copyright protection which are outlined in some international copyright treaties, to look for challenges caused by technological advancement. Next, I examined how these standards have been adopted within informal interactions like online fanfiction communities, especially in the context where the law is not clear. In the third part of this study, I used corpus linguistics to investigate online discussions between online community members about copyright, focusing on how they translate their understanding of copyright to something they can respond to. The methodologies are discussed in greater detail in Chapter 6 of the thesis.

## **1.5. OVERVIEW OF CHAPTERS**

This PhD thesis is divided into 7 chapters.

The first chapter delivers the context of the study. It describes the challenges caused by technological advancements to copyright, explaining how this study finds an approach to solve these challenges by considering the roles of social norms. This is followed by an

analysis of the literature of means of social control in cyberspace, centring around the role of social norms in regulating community members' behaviours.

Chapter 2 analyses the current legal framework of copyright, focusing on the minimum standards for copyright protection set up by the Berne Convention for the Protection of Literary and Artistic Works (e.g. protected works, duration of copyright, author's rights, copyright limitations and exceptions). While Chapter 1 significantly consists of a literature review and empirical observations of the nature of fanfiction practices on the Internet, the methodology of the research in Chapter 2 mainly involves introducing minimum standards outlined in major international treaties, regional agreements as well as national copyright laws (e.g. the Berne Convention, the TRIPS agreement, as well as the US, the UK and Japan's copyright regulations).

Chapter 3 examines the challenges posed to existing copyright law in the digital age. I investigate why enforcing copyright in cyberspace appears to be more challenging than before, focusing on the confusion over applicable law and jurisdiction. While the prevailing topic of this chapter is that copyright is in desperate need of updating, it fails to consider the other means of social controls which people who participate in online activities have developed organically during the years of great change which have occurred as a direct result of the digital shift. It is from this approach that the dissertation questions emerge – it seeks to investigate how the players of online creative communities have adapted to digital advancements.

Next, I investigate the informal self-regulating mechanisms which have been developed by online fanfiction communities. Chapter 4 portrays the historical background of fanfiction and the communities that have been built surrounding it. Also, copyright provisions concerning protected works and exceptions are unpacked to discover the legal status of fanfiction. The first section of this chapter aims to explain why members of fanfiction communities have to develop their norms as alternatives to copyright law. In the second section, I trace back to the history of fanfiction communities to find evidence that communities are capable of nurturing social norms practice.

Chapter 5 focuses on examining different norms with which the members of online fanfiction communities interact when engaging in fan activities. These norms include legal norms, contractual obligations, and community-based norms. The analysis suggests



that the informal mechanisms which enforce community-based norms are possibly more effective than the formal mechanisms which impose rules from external sources.

From here, I use content analysis and corpus linguistics to investigate the informal practice of copyright norms within online fanfiction communities. Chapter 6 firstly addresses which aspects of copyright are most concerning to the members of online fanfiction communities. Then the identification of community-based norms is presented, as well as how they are shaped and enforced. The proposals for changes to copyright regulations are evaluated in Chapter 7.

In general, there has been a lack of detailed, consistently-reported evidence concerning the roles of social norms in regulating fanfiction communities, and especially about online communities that have been highly exposed to the unwanted attention of copyright holders and the public. This PhD thesis aims to collate more in-depth, practice-based illustrations, with a text-based method. It is also expected to be the first study to consider the interplay of different norms in the context of online fanfiction communities. It also employs a method that is comparatively rare in legal studies to draw conclusions from a large number of fans' online discussions. The study aims to extend the available findings to support the practice of informal norms in regulating online users' behaviours and to formulate recommendations for best practice guidelines for enforcing copyright on the Internet.

## CHAPTER 2

### AN OVERVIEW OF INTERNATIONAL COPYRIGHT LAW

Copyright law is territorial and national in scope, which means that “there is no general, *suis generis* copyright between countries.”<sup>102</sup> International copyright law is not an exclusive legal document, but rather a collection of bilateral, multilateral agreements and treaties which recognise minimum standards for participating nations to adopt into their national laws. Therefore, principal rules such as subject matters of copyright, copyright duration, author rights can be found in most copyright systems around the world, based upon and compliant with the obligations of international treaties.

This chapter describes copyright norms that animate international copyright and the principles that underlie it. Starting from introducing the main actors of the international copyright system, this chapter then explains the minimum standards that are recognised in the major copyright international treaties, following by the implementation of these standards in national laws.

#### 2.1. MAJOR INSTITUTIONS AND ACTORS OF INTERNATIONAL COPYRIGHT

At the international level, the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) play the roles of the two main multilateral intergovernmental institutions in the field of intellectual property.<sup>103</sup> Working alongside many other intergovernmental institutions and hundreds of non-governmental organisations that are also very active in the field,<sup>104</sup> these two administer the most important international treaties in the area of intellectual property, particularly copyright and related rights.

##### 2.1.1. The World Intellectual Property Organisation

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<sup>102</sup> Charles Meyer, *National and International Copyright Liability for Electronic System Operators*, 22 INDIANA J. GLOB. LEG. STUD. 497 1995 497–528, 512 (1995).

<sup>103</sup> SUSY FRANKEL & DANIEL J. GERVAIS, *ADVANCED INTRODUCTION TO INTERNATIONAL INTELLECTUAL PROPERTY* (2016).

<sup>104</sup> WIPO, *Accredited Observers*, WIPO.INT, <https://www.wipo.int/members/en/organizations.jsp?type=NGO> (last visited Dec 13, 2020) (As of December 2020, there are 373 non-governmental organisations that are listed as accredited observer by WIPO).

The World Intellectual Property Organisation (WIPO) is one of the specialised agencies of the United Nations (UN) system of organisation. Founded in 1967, the “Convention Establishing the World Intellectual Property Organisation” entered into force in 1970. The mission of WIPO is “to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind.”<sup>105</sup> WIPO was established to meet the need for an intergovernmental intellectual property organisation. It also aims to establish a uniform system of standards and mutual recognition of rights and duties among participating countries. As of July 2020, WIPO has 193 member states.<sup>106</sup>

### **2.1.2. The World Trade Organisation**

On 1<sup>st</sup> January 1995, the World Trade Organization (WTO) was founded to replace the General Agreement on Tariff and Trade (GATT).<sup>107</sup> With 164 members (as of July 2020), the WTO is the largest international economic organisation in the world.<sup>108</sup>

Generally, the WTO provides navigational guides (i.e. the agreements) on different aspects of the trade and settles disputes between the Member States. The WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights, which is greatly discussed later in Section 2.2.1.b, introduced the principles of intellectual property into the international trading network for the first time.<sup>109</sup> The agreement outlines the minimum standards for copyright protection that each country has to grant to owners of intellectual property, including citizens of other WTO members.

An important part of the WTO is the Dispute Settlement Body (DSB), which consists of all WTO members. When the Member States have a dispute, they can settle it by going through a procedure operated by the WTO. At all stages, countries in dispute are encouraged to consult each other to “settle out of court.”<sup>110</sup> The DSB has the exclusive authority to establish “Panels” of experts to examine, review, and issue a report to the

<sup>105</sup> Inside WIPO, WIPO, <https://www.wipo.int/about-wipo/en/index.html> (last visited Jul 26, 2020).

<sup>106</sup> Member States, WIPO, <https://www.wipo.int/members/en/index.jsp> (last visited Jul 24, 2020).

<sup>107</sup> Functions and structure of the WTO are recognised in the Agreement Establishing The World Trade Organisation – one of six main parts of the Marrakesh Agreement [hereafter the WTO Agreement].

<sup>108</sup> WTO Members and Observers, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jul 26, 2020).

<sup>109</sup> WTO | Understanding the WTO - Intellectual property: protection and enforcement, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Jul 26, 2020).

<sup>110</sup> The WTO Agreement, *supra* note 107, at art.4.

involving parties.<sup>111</sup> During the review, WTO Panels have to consider all legal instruments related to the field. Therefore, reports of the WTO's Panels are also valuable interpretations of provisions as set out in international copyright treaties.

## **2.2. INTERNATIONAL FRAMEWORK OF COPYRIGHT LAW**

### **2.2.1. Major instruments of international copyright law**

Each country has its national copyright laws. However, the copyright protections afforded by countries is limited by international treaties and agreements of which they are the members. There are two rationales behind the need for these international copyright instruments. First, nations may enact legislation in favour of their citizens, leaving foreigners vulnerable. The development of international trade has increased copyright holders' interest in worldwide protection for their works. Therefore, mutual recognition of copyright standards across countries became a major concern. Secondly, it is a controversial topic that without a standardised and legally enforceable international framework, developing countries would not adopt adequate copyright protections.<sup>112</sup>

So far there has been no specific treaty that governs all national copyright laws. Instead, there are six major multilateral agreements, each with a different set of Member States and administered by an international organisation. These treaties are the Berne Convention for the Protection of Literary and Artistic Works (1886); the Universal Copyright Convention (1952); the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (1961); the World Intellectual Property Organisation Copyright Treaty (1996); the WIPO Performances and Phonograms Treaty (1996); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (1995). The establishment and implementation of these agreements are similar in which representatives of countries meet to negotiate international standards governing specific issues. After negotiations, which can last several years, participating countries reach their consensus and sign the treaties. Thereafter, the governments of signatories adopt the treaties through a procedure called ratification. Countries that did not sign during the negotiations can join later by accession.

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<sup>111</sup> *Id.* at art.12 and 15.

<sup>112</sup> Petroula Vantsiouri, *Module 2: The International Framework - Copyright for Librarians*, CYBER.HARVARD.EDU, [https://cyber.harvard.edu/copyrightforlibrarians/Module\\_2:\\_The\\_International\\_Framework#The\\_Rationale\\_for\\_the\\_International\\_System](https://cyber.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#The_Rationale_for_the_International_System) (last visited Dec 17, 2020).

There are two approaches that the Member States take to enforce international standards. In many countries – especially those who are heavily influenced by civil law tradition – treaties are “self-executing.” It means once the government ratifies a treaty, it may be directly applied in the courts without the need for further action. Meanwhile, in legal systems, which follow the British and Scandinavian constitutional traditions, treaties are treated as non-executing. For a treaty to enter into force, the government must adopt statutes to implement it. Thus, private parties adhere to the terms provided by the implementing instruments, rather than the provisions of the treaty.

It is noted that none of the six international copyright treaties above provides an inclusive set of rules for all aspects. Instead of asking contracting parties to deal with particular topics in certain ways, each of these treaties leaves considerable discretion to the member countries in deciding how it implements the required standards. The majority of copyright standards are outlined in the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights as well as some regional and bilateral agreements.

#### **a. The Berne Convention for the Protection of Literary and Artistic Works**

Copyright protection on the international level started in the middle of the nineteenth century, mainly set forth on bilateral treaties.<sup>113</sup> However, because these treaties were only mutual recognition of duties and rights between two parties, they were not comprehensive enough to be global standards.<sup>114</sup> The call for a uniform system led to the establishment of the Berne Convention for the Protection of Literary and Artistic Work on 9 September 1886.<sup>115</sup> As of July 2020, the Berne Convention has a total of 179 signatories, which makes it the most widely accepted international treaty dealing with copyright.<sup>116</sup>

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<sup>113</sup> PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* (2001).

<sup>114</sup> Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J. LAW TECHNOL. 1–70 (1988); PAUL GOLDSTEIN, *supra* note 113.

<sup>115</sup> Berne Convention for the Protection of Artistic and Literary Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986), [hereinafter Berne Convention]. The Convention was revised quite regularly, approximately every 20 years, until the last revision in Paris in 1971. The Berne Convention has revised five times in Revision Conferences in Berlin (1908), Rome (1929), Brussels (1948), Stockholm (1967), and Paris (1971). See also Ndene Ndiaye, *The Berne Convention and Developing Countries*, 11 Colum. VLA J. L & ARTS 47 48 (1986).

<sup>116</sup> WIPO-Administered Treaties, *Contracting Parties - Berne Convention*, WIPO.INT, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited Jul 24, 2020).

As stated in its Preamble, the Berne Convention is recognised “to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”<sup>117</sup> To achieve these goals, the Berne Convention establishes three fundamental principles of international copyright law. The first and the most crucial - the principle of “national treatment” - requires governments to grant citizens of other members the same copyright protection as their own nationals.<sup>118</sup> Secondly, the principle of “independence” of protection prohibits the discrimination between foreign work and domestic work, even when the former “would not be shield under the laws of the countries where they originated.”<sup>119</sup> The last principle is the “automatic protection,” addressing that registration of copyright protection (or any type of formality) is not mandatory.<sup>120</sup> The Convention also requires its Member States to recognise and enforce a set of exclusive rights and adopt exceptions and limitations to mandate copyright protections.

#### **b. The Agreement on Trade-Related Aspects of Intellectual Property Rights**

During the negotiations of WTO which were taking place in Marrakesh, Morocco on 15 April 1994, intellectual property was discussed for the first time within the context of international trade. The results of these negotiations were recognised in Annex 1C of the WTO Agreement, named the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>121</sup> The WTO Agreement, including the TRIPs Agreement, entered into force on 1 January 1995. This instrument outlines compulsive minimum standards for a multitude of intellectual property rights (e.g. copyright rights, geographical indications, industrial designs, patents). It also covers other main features: enforcement, remedies, and dispute settlement.<sup>122</sup>

Members of the TRIPS agreement are obliged to Article 1 through 21 of the Berne Convention and its Appendix, except the rights and obligations in respect of Article 6bis of the Berne Convention (i.e. moral rights).<sup>123</sup> Moreover, it is also suggested that

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<sup>117</sup> The Berne Convention, *supra* note 115, pmbl.

<sup>118</sup> *Id.* art. 5(3).

<sup>119</sup> *Id.* art. 5(1).

<sup>120</sup> *Id.* art. 5(2).

<sup>121</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter the TRIPS Agreement].

<sup>122</sup> Overview of TRIPS Agreement, WTO, [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Jul 27, 2020).

<sup>123</sup> The TRIPS Agreement, *supra* note 121, art.9.

“Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”<sup>124</sup>

### **c. Regional and bilateral agreements**

On a regional level, some countries also have obligations to comply with the regional agreements that they are part of. For example, since its establishment in 1992, the European Union (the EU) has passed several copyright directives that contain deadlines by which Member State must implement them into their national laws, but leave to their discretion as to how to achieve the result.<sup>125</sup> For example, the Directive 2006/116/EC requires the Member States to extend the duration of copyright to the life of the author plus 70 years.<sup>126</sup> Another example of regional agreements is the North American Free Trade Agreement (NAFTA), which was signed by Canada, the United States, and Mexico in 1994. However, NAFTA significantly resembles the provisions of the TRIPS Agreement.

However, recent years have witnessed the rise in bilateral Free Trade Agreements (FTA) and Bilateral Investment Treaties (BITs). These agreements typically limit the flexibilities that developing countries granted under the TRIPS agreement or impose stricter copyright standards. The Australia-United States Free Trade Agreement, for example, obliges the parties to provide a copyright term equal to the life of the author plus 70 years, which is twenty years longer than the standard set by the TRIPS Agreement.<sup>127</sup> Considering that FTAs and BITs are “abuses of power of the developed countries,” they are “criticised by many experts and representatives of developing countries.”<sup>128</sup>

In summary, all these above international treaties were established to create an international system of copyright protection. Moreover, they also show the continuous effort of the international copyright community in improving this system when

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<sup>124</sup> *Id.* art 2.2.

<sup>125</sup> Petroula Vantsiouri, *supra* note 112.

<sup>126</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006 O.J. (L 372), 12–18, art 1(1).

<sup>127</sup> The US-Australia Free Trade Agreement, art 17.4.4(a).

<sup>128</sup> Petroula Vantsiouri, *supra* note 112.

responding to problems caused by the explosion of new technologies. Treaties like the Berne Convention and the TRIPS agreement can offer robust protection for copyright holders all over the world because they establish minimum standards that are binding on a large number of countries. For a better understanding of these standards, the following section examines the existing norms of international copyright. It also seeks to demonstrate the distinction between the two legal systems: the Anglo-American and the Continental.

### **2.2.2. Existing norms of international copyright law**

Copyright laws vary from country to country, resulting in copyright rules can be stricter in some places than in others. More specifically, authors have been offered a more powerful legal position in Continental Europe than in the Anglophone countries. Under the US and the UK copyright systems, when authors transfer their rights to another party (e.g. publishers, producers), they lose the entire control over their creations. Meanwhile, Continental Europe has recognised the personal connection between the author and his or her work even after economic rights have been surrendered (i.e. moral rights). Authors still retain aesthetic control over their works, ensuring that the fruits of their labour are not modified against their wishes. Peter Baldwin writes himself, “Two quite different approaches – Anglo American copyright and Continental European author’s rights – has voiced divergent views of copyright.”<sup>129</sup> The clash of copyright and author’s rights, starting in the late eighteenth century, has escalated into a “Trans-Atlantic Copyright Battle.”<sup>130</sup>

The first part of this section sets forth the minimum standards outlined in the Berne Convention, summarising the most salient characteristics of each of them. Then it dives deeply into the practical implications of each standard, reflecting the gaps between these two legal systems. Due to their strong connections with fanfiction, the United States, the United Kingdom, and Japanese copyright laws are discussed in greater detail.<sup>131</sup> This section serves as the legal background for what is discussed in the fourth chapter – the implications of copyright in fanfiction.

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<sup>129</sup> PETER BALDWIN, *THE COPYRIGHT WARS* 9 (2014).

<sup>130</sup> BALDWIN, *supra* note 129.

<sup>131</sup> These countries whose popular media production form the nuclear much of fan activities.



### a. Works protected by copyright

Copyright protection extends only to expressions of ideas (e.g. song lyrics and musical notes, colours, sculptures), not the ideas themselves. Article 2 of the Berne Convention states that the subjects of copyright protection are every original “production in the literary, scientific and artistic domain.” The ideas in the work do not need to be completely novel, but the form of expression must contain sufficient original and creative inputs of the authors. The list of protected work includes “books, lectures, addresses, sermons, dramatic or dramatico-musical works, choreographic works, musical compositions, etc.”<sup>132</sup> Moreover, protection for some categories (e.g. designs) is optional.<sup>133</sup> It is a matter of Member States to determine the protection to be granted to other forms of expression of literary and artistic works.<sup>134</sup> For instance, computer programmes are not covered in the Berne Convention’s protected list but qualify as a protected work under the WIPO Copyright Treaty and some domestic laws.<sup>135</sup>

It is noted that the list of copyrightable work is non-exhaustive. The United States’ 1976 Copyright Act,<sup>136</sup> for example, grants copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>137</sup> The scope of material protected by Japan’s 1970 Copyright Act is limited to “works” (*chosakubutsu*), including the original (*genchosakybutsu*) and derivative work (*nijiteki chosakubutsu*).<sup>138</sup> *Chosakubutsu* is defined as “productions in which thoughts or sentiments are expressed creatively and which fall within the literary, scientific, artistic or musical domain.”<sup>139</sup>

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<sup>132</sup> The Berne Convention, *supra* note 115, art.2(1).

<sup>133</sup> *Id.* art.2(7).

<sup>134</sup> WIPO, UNDERSTANDING COPYRIGHT AND RELATED RIGHTS 8 (2016).

<sup>135</sup> The Berne Convention, *supra* note 115, art.2(2); WCT art. 4 (“Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.”).

<sup>136</sup> Copyright Act of 1976 § 101, 17 U.S.C. § 107 (2012) [hereafter the 1976 Copyright Act] (“The Copyright Act of 1976 was enacted on October 19, 1976, as Pub. L. No. 94-553, 90 Stat. 2541. The 1976 Act was a comprehensive revision of the copyright law in Title 17 of the United States Code.”).

<sup>137</sup> 17 U.S.C. § 102(a).

<sup>138</sup> Copyright Act of Japan (as known as Act No. 48 of 1970, last amended by Act No. 30 of 2018). Full text can be found at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ia=03&ja=04&ky=copyright&page=14> (last visited Dec 20, 2020) [hereafter the Copyright Act of 1970].

<sup>139</sup> *Id.* § 1, art. 10(1).

As a Member State of the European Union, the UK adopted the EU's definition of work into its domestic legislation.<sup>140</sup> However, there is no concrete definition of "work" in EU copyright directives, including the most recent Directive 2001/29/EC (as known as the InfoSoc Directive).<sup>141</sup> Recently, the Court of Justice of the European Union (CJEU), in its judgement regarding *Levola Hengelo BV v Smilde Foods BV* (2018), emphasised that the creative work must be original and "expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form."<sup>142</sup> Section 1.1.1(a) of the Copyright, Designs and Patents Act 1988 (CDPA) specifies eight categories of work that are protected by copyright law.<sup>143</sup>

### **b. Duration of copyright protection**

Copyright protection is time-dependent, which means the exclusive rights of creators only exist and can be exploited in a restricted period of time.<sup>144</sup> Under the principle of "automatic protection" recognised by the Berne Convention, literary and artistic work is considered protected from the moment it is expressed and fixed in a tangible form. And no registering or formalities for protection are required of authors of the work.<sup>145</sup>

In general, copyright protection continues until after the death of the author. As moral rights are distinct from any economic rights derived from copyrighted works, they may continue after the latter ends. Under the Berne Convention and TRIPS Agreement, the general duration of copyright is the life of the author plus not less than 50 years after the author's death.<sup>146</sup> The United States and Japan, as signatories of the Berne Convention, follow this approach. In some countries, copyright protection can last longer. It is Life

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<sup>140</sup> The departure of the UK of the European Union finalised on 31<sup>st</sup> January 2020. This thesis is concluded before the end of the transition period, which was decided in the Withdrawal Agreement ended on 31<sup>st</sup> December 2020. After this point, changes in EU law no longer apply automatically be incorporated into UK law.

<sup>141</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001 O.J. (L 167) 10–19.

<sup>142</sup> C-310/17 - *Levola Hengelo*. <http://curia.europa.eu/juris/liste.jsf?num=C-310/17>. For the standard of originality, see *Infopaq International A/S v Danske Dagblades Forening* C-5/08.

<sup>143</sup> Copyright, Designs and Patents Act 1988 1988 c. 48 [hereafter CDPA].

<sup>144</sup> The primary goals of copyright is not only to reward the labour of creators but also to encourage the innovations and creativity. To do that, copyright grants authors the exclusive rights to exploit their creative work for a certain period of time. At the same it enables others to reuse the ideas and values of such work. Therefore, copyright protection is supposed to be limited so as copyrighted works will eventually enter the public domain.

<sup>145</sup> The Berne Convention, *supra* note 115, art 5(2).

<sup>146</sup> *Id.* art.7; The TRIPS Agreement, *supra* note 121, art.12.

+70 in Russia, Australia, Brazil, the EU's countries (including the United Kingdom);<sup>147</sup> Life +99 in the Ivory Coast and Life + 120 in Mexico.<sup>148</sup> Works that are no longer protected by copyright law (e.g. original copyright is expired; authors donate their works to open sources) may fall into the public domain; then they may be used without any restriction whatsoever.<sup>149</sup> Some works are in the public domain because they do not fall into the categories of protected work, including facts and ideas.

The length of protection has always been a controversial copyright issue. As shown above, copyright protection is increasing significantly at both international and national levels. For example, when the US adopted its very first copyright act in 1790, the term was set at 14 years (with the possibility of another 14-year renewal). Eventually, copyright duration has extended to a minimum term of life of the author plus 50 years after his death, which is enshrined in the Berne Convention. Nowadays the copyright term is already at plus 70 years after the author's death,<sup>150</sup> which copyright scholar Jamie Boyle calls a "cultural disaster."<sup>151</sup> The attempt to extend copyright duration in the US has led to changes in bilateral treaties with other countries. As a result of entering into their FTAs with the US, Morocco, Bahrain, Chile, and Singapore had to consent to the life-plus-seventy term.<sup>152</sup>

Economists and law scholars – especially those who advocate for the public interest – have argued that the optimal length of copyright should be much restricted, "to encourage the best balance of incentive to create new work and social welfare that comes from having work enter the public domain."<sup>153</sup> Moreover, a shorter copyright term would allow an author to renegotiate a contract with publishers after a short time. Extending the

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<sup>147</sup> Directive 2006/116/EC, *supra* note 126, art.1.

<sup>148</sup> Jonathan Bailey, *Which Country Has the Longest Copyright Term?*, PLAGIARISM TODAY (2015), <https://www.plagiarismtoday.com/2015/09/23/which-country-has-the-longest-copyright-term/> (last visited Jul 27, 2020).

<sup>149</sup> The Berne Convention, *supra* note 115, art.18.

<sup>150</sup> The duration of copyright in the US was expanded in 1998 with the Sonny Bono Copyright Term Extension Act (also known as the "Mickey Mouse Act" due to its involvement with Disney's heavy lobby campaign).

<sup>151</sup> JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008), [https://scholarship.law.duke.edu/faculty\\_scholarship/2708/](https://scholarship.law.duke.edu/faculty_scholarship/2708/) (last visited Jul 27, 2020).

<sup>152</sup> The US-Morocco Free Trade Agreement, art 15.5.5(a); The US-Bahrain Free Trade Agreement, art 14.4.4.(b); The US-Singapore Free Trade Agreement, art 16.6.4(a); The US-Chile Free Trade Agreement, art 17.5.4.(a).

<sup>153</sup> Nate Anderson, *Researcher: Optimal copyright term is 14 years*, ARS TECHNICA (2007), <https://arstechnica.com/uncategorized/2007/07/research-optimal-copyright-term-is-14-years/> (last visited Jul 26, 2020); RUFUS POLLOCK, *Forever Minus a Day? Theory and Empirics of Optimal Copyright Term* (2008), <https://econpapers.repec.org/paper/pramprapa/8887.htm> (last visited Feb 26, 2021); Kiho Yoon, *The optimal level of copyright protection*, 14 INF. ECON. POLICY 327–348 (2002)..

duration of copyright only benefits mainstream media companies. The famous “Mickey Mouse case” is an excellent illustration of how big companies like Walt Disney try to extend copyright terms to boost their profits.<sup>154</sup>

### **c. Author’s exclusive rights**

It is safe to say that the author of creative work is at the heart of the copyright system. By virtue of Article 1, the Berne Convention recognises that the rights protected through copyright law are the rights of authors. Copyright grants the author of a book exclusive rights which protect him or her from any unauthorised exploitation of his work, as well as from any distortion or mutilation which may negatively affect their reputation.

#### **(i) Economic rights**

In essence, economic rights “help author to commercially exploit his creation.”<sup>155</sup> With any kind of property, it is the right of the owner to decide how to exploit their work or authorise others to do so (normally in the form of a licence). As opposed to moral rights, economic rights are generally recognised in most states. The reason originated from the history of copyright when the principle of authorship was established largely on the ground of the economic interest of the booksellers. Most countries grant authors or other copyright holders exclusive rights to authorise or prohibit certain acts in relation to their work, including the following acts:

#### **- *Rights relating to reproduction and distribution of a work***

The right to make reproduction in any manner or form is protected under Article 9 of the Berne Convention. Under this right, copyright owners have an exclusive right to make any reproductions or copies of their work. Meanwhile, the distribution right allows them to make a work available to the public (i.e. sale, rental, lease, or lending) as well as prevent the distribution of unauthorized copies of their creations. Both rights have been adopted into most national laws.<sup>156</sup>

#### **- *Translation and adaptation rights***

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<sup>154</sup> MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 97–112 (2008), <https://www.cambridge.org/core/books/against-intellectual-monopoly/B4548895B72959727FB0971B519EB2BA> (last visited Jul 26, 2020).

<sup>155</sup> Arathi Ashok, *Economic Rights of Authors Under Copyright Law: Some Emerging Judicial Trends*, 15 J. INTELLECT. PROP. RIGHTS 46–54 (2010).

<sup>156</sup> Copyright Act of 1976, *supra* note 136, §106.

Technically, “translation means the expression of a work in a language other than that of the original version.”<sup>157</sup> Meanwhile, adapting is altering a copyrighted work to create another work. The drama series *Bridgerton* of Netflix, for example, is an adaptation of Julia Quinn’s romance novels. In some countries, these two concepts “adaptation” and “translation” are treated as one because they both involve making derivative versions of the original work. Under the Berne Convention, the rights to translate and make adaptations and other alterations of the work are recognised in Article 8 and Article 12, respectively. Authors of adaptations and translations are also granted author rights over their works. If a third party wants to publish a translation or adaptation, they must have permission from the copyright holder of the original work as well as the translators/adaptation writers.

The right of adaptation is practically found in all national copyright laws.<sup>158</sup> Since the US, the UK and Japan are contracting parties of the Berne Convention, they are obliged to provide copyright protection to works that fall within the protected list. However, they implement translation and adaptation rights in different ways:

- In the UK, the right to make an adaptation of the work is restricted to “literary, dramatic or musical work.”<sup>159</sup> Moreover, the term “adaptation” is defined differently depending on the types of the original work.<sup>160</sup> For example, adaptation can be understood as a translation of the work, a movie adaptation of a book, or an arrangement or altered version of an original program.
- The US copyright law uses the term “derivative work,” in general, to refer to all creative works which are built on pre-existing materials (i.e. translation, adaption, or other types of alteration).<sup>161</sup> Under section 106(2) of the 1976 Copyright Act, the copyright owner has the exclusive right to create and authorise others to create derivative works based on his or her work.
- Japan’s 1970 Copyright Act uses the term *nijiteki chosakubutsu* (in English: derivative work) in both Article 11 (Derivative works) and Article 28 (Rights

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<sup>157</sup> WIPO, *Roundtable on intellectual property and indigenous people: Basic notions of copyright and neighboring rights* para. 32 (1998).

<sup>158</sup> J. T. Westemeier, *Understanding the Importance of Derivative Works*, FINNEGAN (2009), <https://www.finnegan.com/en/insights/articles/understanding-the-importance-of-derivative-works.html> (last visited Dec 18, 2020).

<sup>159</sup> CDPA, *supra* note 143, c.48, p. I, ch. II, § 21(1).

<sup>160</sup> *Id.*, p. I, ch. II, § 21(3).

<sup>161</sup> Copyright Act of 1976, *supra* note 136, §101.

of the Original Author in Connection with the Exploitation of a Derivative Work).<sup>162</sup> However, Article 27 specifically grants authors the translation right, adaptation rights, and other rights, depending on how the derivative work is made: “The author of a work has the exclusive right to translate that work, compose a musical arrangement of it, reformulate it, dramatise it, make a cinematographic adaptation of it, or otherwise adapt the work.”

Although these three countries adopted different derivative rights, they all give authors exclusive control over different markets to the one that the original work occupies.<sup>163</sup> As Professor Goldstein addresses, “motion pictures, translations and comic strips based on [a] novel with all infringe the derivative right because they add new expressive elements and serve markets that differ from the market in which the original was first introduced.”<sup>164</sup> Derivative rights are different from the right of reproduction, which is potentially harmed when the infringing work enters into the same market as the one that the original work appears.

- *Right of public performance, broadcasting, communication to the public and making available to the public*

Under the Berne Convention, authors have the exclusive right to authorise the public performance (Article 11), broadcasting (Article 11*bis*) and communication of their works to the public (Article 11*ter*). There is a possibility that a Contracting State may provide for “a mere right to equitable remuneration” instead of “a right of public performance, broadcasting, communication to the public and making available to the public.”<sup>165</sup> The right to equitable remuneration is in effect a compulsory license that must be paid when recorded music is played on a publicly accessible location.

The right of broadcasting covers the transmission for public reception of sounds, or of images and sounds, by wireless means, whether by radio, television or satellite. When a work is communicated to the public, a signal is distributed by wire or wireless means for reception only by persons who possess the equipment necessary to decode the signal. Satellite television is an illustration of this technology which requires the viewers to use

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<sup>162</sup> Copyright Act of 1970, *supra* note 138, arts. 27-28.

<sup>163</sup> Patrick Goold, *Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right*, 92 NEB. LAW REV., 877 (2014).

<sup>164</sup> Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYR. SOC. USA 209, 217 (1982).

<sup>165</sup> CDPA, *supra* note 143, §182D.

a set-top box or satellite-enabled television to decode the signals which are picked up from a set of geostationary satellites by the satellite dish.<sup>166</sup>

Due to the developments in technology, there have been debates about interactive communications that allow users to choose the contents to be delivered to their devices. Article 8 of the WIPO Copyright Treaty extends this right to the author's right to authorise "any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."<sup>167</sup> States adopt this right in two different approaches. They implement it either as part of the right of communication to the public or as part of the right of distribution.<sup>168</sup>

## (ii) Moral rights

It is natural for authors to develop a special bond with their creations. Writers describe this relationship in various ways, including "personal," "spiritual," and "natural."<sup>169</sup> Some scholars even compare an author's work as his or her "spiritual child," "a fruit of their hard labour." Given this special relationship, an author's invested emotion and harbour in his or her work "may transcend the motive of monetary gain" and need to be protected by law.<sup>170</sup>

It is widely acknowledged that moral rights originated in France<sup>171</sup> and eventually adopted into the legal systems of Continental Europe.<sup>172</sup> This doctrine was derived in large part from a concept of natural rights developed by two of the most influential Enlightenment thinkers, Immanuel Kant and Georg Wilhelm Friedrich Hegel. They believed because authors create the books, the ideas belonged to them and originated from them. Therefore, copyright should be designed in a way that both the economic rights and the personal interests of authors are protected. These are natural rights, which are granted to a person in the virtue of being an author. In general, the Continental ideology considered natural

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<sup>166</sup> BBC.CO.UK, *What is satellite television? | Help receiving TV and radio*, <https://www.bbc.co.uk/reception/help-guides/satellite/what-is-satellite-television> (last visited Jul 22, 2020).

<sup>167</sup> WIPO Copyright Treaty, art.8.

<sup>168</sup> Burger, *supra* note 114.

<sup>169</sup> *Id.* at 24 (Law professor Roberta Rosenthal Kwall explains her words of choice as: "Perhaps the best analogy to the type of relationship I am proposing is that of a parent and child. The parenting experience, perhaps one of the most humbling of all, requires the same delicate balance as that needed to produce highly creative works of authorship.").

<sup>170</sup> MIRA T. SUNDARA RAJAN, *MORAL RIGHTS* (2011).

<sup>171</sup> *Id.* at 49.

<sup>172</sup> RAJAN, *supra* note 170.

law as the basis of the author's right, and these rights should be unlimited as much as possible.<sup>173</sup> Countries that follow the natural rights approach, largely from Continental Europe, allowed authors to retain their personal or moral rights, which are eternal, non-transferable, and inalienable.<sup>174</sup> The moral rights doctrine was deeply reflected in German,<sup>175</sup> French<sup>176</sup> and Italian copyright systems.<sup>177</sup>

However, this position appears to contradict that of the Anglo-Americans,<sup>178</sup> which is remarked by European jurists as “the regulation of the entertainment industry's affair”<sup>179</sup> and only “a simple protection of commercial and technical interests”.<sup>180</sup> The national copyright laws of these countries did not codify natural law; instead, they granted authors exclusive rights that mainly protects their economic interests.<sup>181</sup> After the works are sold, the author's rights will be transferred in whole to the publishers or broadcasters. The division between these two legal systems caused many debates during the Berne revision conferences.<sup>182</sup>

The presence of moral rights in the international copyright arena was established with the codification of *right of attribution* (i.e. right to claim authorship of the work) and *right of integrity* (i.e. right to object to any distortion or mutilation) in Article 6*bis* of the Berne Convention.<sup>183</sup> It is also provided that these moral rights last after the authors' economic rights are expired and will be exercisable by the persons or institutions who are successors

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<sup>173</sup> IMMANUEL KANT, ON THE WRONGFULNESS OF UNAUTHORIZED PUBLICATION OF BOOKS (Mary J. Gregor ed., 1996); GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (1820).

<sup>174</sup> STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 8–9 (1938).

<sup>175</sup> Act on Copyright and Related Rights (in Germany: *Urheberrechtsgesetz*), art. 12, 13 and 14.

<sup>176</sup> The French Intellectual Property Code (in French: *Code de la propriété intellectuelle*), Title 2, Chapter 1 Moral rights, art L121-1 to art L121-9.

<sup>177</sup> Italian or the Protection of Copyright and Neighboring Rights (as amended up to Decree-law No. 64 of April 30, 2010), art. 20, 22, 23.

<sup>178</sup> SERGE REGOURD, L'EXCEPTION CULTURELLE 17–18 (2004).

<sup>179</sup> JULES-MARC BAUDEL, LA LEGISLATION DES ETATS UNIS SUR LE DROIT D'AUTEUR 104 (1984).

<sup>180</sup> Thomas Oppermann, *Geistiges Eigentum: Ein 'Basic Human Right' des Allgemeinen Völkerrechts*, in WÄHRUNG UND WIRTSCHAFT: DAS GELD IM RECHT 458, 463 (Albrecht Weber ed., 1997).

<sup>181</sup> RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 24–26, 35–36 (2014).

<sup>182</sup> LADAS, *supra* note 171 at 8–9.

<sup>183</sup> Burger, *supra* note 114 at 23. (“The Rome conferees created two new rights, the most significant of which was the *droit moral* or the moral right.”The moral right granted authors the right to claim “paternity” of their works as well as “the right to object to any deformation, mutilation or other modification” of the work which would be “prejudicial” to the author's honour or reputation”).



of the deceased author.<sup>184</sup> Beyond these three rights, some countries extend to other rights, including *repenting* (the right of withdrawal).<sup>185</sup>

The United States enacted the Berne Convention Implementation Act of 1988, which recognises that “self-executing in that existing law satisfied the US’ obligations in adhering to the Convention,” to avoid adopting moral rights into its copyright systems.<sup>186</sup> Although the TRIPS Agreement incorporates the Berne Convention and provides sanction for non-compliance, the US ensured that Article 6*bis* about moral rights was excluded from the TRIPs content.

Instead of pursuing the moral rights doctrine, the US courts exhaust other available arguments such as unfair competition, breach of privacy, libel, and breach of contract to cover issues derived from the moral aspects of questioned infringement.<sup>187</sup> For example, American law allows copyright holders to bring the defamation claim to the court for damages if someone caused or is likely to cause serious harm to their reputation. At the level of state law, authors may be granted moral rights protection in California and New York, whose provisions resemble those of the Visual Artists Rights Act of 1990 (VARA).<sup>188</sup> However, this instrument applies only to a restricted category of visual artworks.

In the UK, the CDPA protects four moral rights: right of attribution (right of paternity, right to be identified), right to object to derogatory treatment of work (also known as the right of integrity), right to object to false attribution (being named as the author of a work which he or she has not created), and the right to privacy in private films and photographs.<sup>189</sup> Even though copyright is an automatic right – which applies from the moment a creative work is formed without the need for registration – it is enforced under very specific conditions and exceptions.<sup>190</sup> Moreover, the right of attribution must be asserted to be enforceable. Section 78(1) of the CDPA requires a specific act or description of acts, which is a common statement or disclaimer, to let others know that

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<sup>184</sup> The Berne Convention, *supra* note 115, art. 6*bis* (2).

<sup>185</sup> The French law of 2012 on digitizing out-of- print works specifically permits authors to block the reappearance of works that harm their honour or reputation.

<sup>186</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (citing S. Rep. No. 100-352, at 9-10 (1988)).

<sup>187</sup> Scott F. Uhler & Phillippe R. Weiss, *Liability Issues and the Internet part 3: Defamation, Invasion of Privacy, and Copyright*, NORTHERN ILLINOIS UNIVERSITY LIBRARIES (1996).

<sup>188</sup> 17 U.S.C. § 106A (1990).

<sup>189</sup> CDPA, *supra* note 143, § 77, 80, 84, 85 respectively.

<sup>190</sup> *Id.* §79 (Works made to report current events, such as periodicals, newspapers or encyclopaedias of work are not protected by the right of paternity).

the right holder wishes to exercise the right. Finally, the UK's copyright law set a limited duration for moral rights. For example, the right to object to false attribution lasts for twenty years after the author's death.<sup>191</sup> The integrity and attribution rights, however, are limited for seventy years post-mortem.<sup>192</sup>

Meanwhile, Japan adopted the same doctrine as Continental Europe, particularly French law. Moral rights are not transferable and comprised of (i) the right to make a work public, (ii) the right of attribution (i.e. the right to require that the author's name be shown), and (iii) the right to integrity (i.e. the right not to have a work modified against the author's will).<sup>193</sup> For example, in delivering the Supreme Court's decision on *Case No. 2018 (Ju) 1412*, Judge Tokura addresses that, "Twitter users infringed a photographer's attribution right when they retweeted an automatically trimmed version of his picture that had been originally posted on Twitter by another user without his authorisation."<sup>194</sup>

In summary, despite the obligations under the Berne Convention and its role as a "vocal global champion of intellectual property rights,"<sup>195</sup> copyright protections remain inconsistent between countries, addressing the century-long debate between the two legal systems – the Continental and the Anglo-American. The United States' rejection of moral rights is the best illustration of how each system sees the author's rights differently.

#### **d. Copyright limitations and exceptions**

While exclusive rights in copyright have been the centrepieces of most copyright debates, limitation and exceptions (L&Es) have become the major principle to decide the subject of copyright protection.<sup>196</sup> The implementation of L&Es does not aim to fine-tune the copyright protections but to balance the author's rights and public interests. Especially in the rapid development of the technology era, a deep knowledge of L&Es is significantly important when nowadays people are not passively consuming creative materials as they

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<sup>191</sup> *Id.* § 86 (2)

<sup>192</sup> *Id.* § 86 (1)

<sup>193</sup> Copyright Act of 1970, *supra* note 138, § 2, art. 18, 19, 20.

<sup>194</sup> Case No. 2018 (Ju) 1412—Presiding Judge TOKURA. Full text can be found here Kei Iida, *Decision of the Supreme Court, 3rd Petty Bench, July 21, 2020 (Case No. 2018 (Ju) 1412—Presiding Judge TOKURA)*, NAKAMURA & PARTNERS (2020), [http://www.nakapat.gr.jp/legal\\_updates\\_eng/](http://www.nakapat.gr.jp/legal_updates_eng/) 【copyright-act- a-case-in-which-with-respect-to-a-tweet-posted-on-twitter-using-as-an-profile-image-a-photographic-image-which-was-an-unauthorized-copy-o/ (last visited Dec 18, 2020).

<sup>195</sup> Peter Yu, *Moral Rights 2.0*, 1 TEX. AM LAW REV. 873–900, 875 (2014).

<sup>196</sup> Thomas Dreier, *Limitations: The Centerpiece of Copyright in Distress - An Introduction*, 1 J. INTELLECT. PROP. INF. TECHNOL. ELECTRON. COMMER. LAW 50, 50 (2010).

did before, but constantly participating in practices of extracting, regrouping, repacking, and interpreting these materials.

(i) The foundation of limitations and exceptions

There are three main rationales used in explaining the foundation of L&Es in copyright systems

- *The Locke Proviso*

The idea of “leaving as much and as good for others” was first addressed by English philosopher John Locke. The significance of Locke’s theory (often referred to as the Lockean Proviso) is that he believes humans can convert common property to their own property<sup>197</sup> and only do that “enough and as good.”<sup>198</sup> Applying the Lockean Proviso in the field of copyright, what can be learned is that authors only create their works on the condition that they leave out substantial creative materials for the others.

- *From the economic perspective*

Discussing the balance of social costs and benefits, many scholars – especially those from law and economics – use the framework of Paretian welfare.<sup>199</sup> They believe social welfare “is maximised in the sense that no resources can be reallocated to make one individual better off without making at least one individual worse off.”<sup>200</sup> Therefore, to maximise social welfare, the economy should be arranged in such a way as to maximise the distributions of wealth, income, and production across individuals and markets. In term of copyright, L&Es are put in place to achieve maximum net welfare gains.

- *Reusing existing materials as part of human history*

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<sup>197</sup> In chapter V of the Second Treatise of Government, John Locke explains that the external resources are gifts from God. However, humans must convert them into their own private property by exerting labour upon them (i.e. mixing their “self-own powers” with natural resources concerned).

<sup>198</sup> JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE, AND THE MINIMAL STATE (1991) (“Although every appropriation of property is a diminution of another’s right to do it, it is acceptable as long as it does not make anyone worse off than they would have been without any property.”).

<sup>199</sup> Ruth Towse, Christian Handke & Paul Stepan, *The economics of copyright law: a stocktake of the literature*, 5 REV. ECON. RES. COPYR. ISSUES 1–22, 4; Jim Chappelow, *Welfare Economics Definition*, INVESTOPEDIA.COM, [https://www.investopedia.com/terms/w/welfare\\_economics.asp](https://www.investopedia.com/terms/w/welfare_economics.asp) (last visited Jul 23, 2020).

<sup>200</sup> *Id.*

It is said that like “dwarfs standing on the shoulders of giants” (in Latin: *nanos gigantum humeris insidentes*), human discover new things by learning from people who have gone before.<sup>201</sup> Traditionally, humans reuse existing materials to create new literary and artistic works, in a way they can master older generations’ wisdom and move beyond. Therefore, for the benefits of the future of human beings, it seems to be unfair if substantial creative resources are monopolised by individuals or organisations.<sup>202</sup> As Victor Hugo states “a book belongs to its author, but the ideas belong to humankind,”<sup>203</sup> the public interest always is the priority and must be put on top of everything else. Copyright is expected not to only protect the rights of authors, but also to make sure these materials are passed to younger generations by setting out some limitations and exceptions to copyright.

For all the reasons above, copyright law has traditionally sought to balance the interests of authors, right holders, and the public in the copyright system. Departure from a traditional view of copyright should be designed to provide as much protection as possible; the question of tribute to “the public” in the new digital age has been more apparent. There have always been efforts of legislators in setting specific situations where people can be permitted to reuse copyrighted materials without the copyright owner’s authorisation. These can be found in both international copyright treaties (largely from the Berne Convention) and national copyright laws.<sup>204</sup>

#### (ii) The “Three-step test”

The majority of multilateral, regional, and bilateral agreements adopt a clause that has come to be known as the “three-step test” to restricts the ability of the participating nations to recognise the limitations and exceptions to copyright. The three-step test was first introduced in Article 9(2) of the 1967 revision of the Berne Convention.<sup>205</sup> The test has subsequently been incorporated into different international treaties such as the TRIPS Agreement (Article 13), the WCT (Article 10), several EU copyright directives and several bilateral trade agreements. The coverage of the test also varies from treaties to

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<sup>201</sup> Gary Martin, “*Standing on the shoulders of giants*” - the meaning and origin of this phrase, PHRASEFINDER, <https://www.phrases.org.uk/meanings/268025.html> (last visited Jul 23, 2020).

<sup>202</sup> Gervais, *supra* note 103 at 500.

<sup>203</sup> VICTOR HUGO, DISCOURS D’OUVERTURE DE CONGRÈS LITTÉRAIRE INTERNATIONAL: LE DOMAINE PUBLIC PAYANT (1878).

<sup>204</sup> Dreier, *supra* note 196 at 50.

<sup>205</sup> Before the last clause was adopted in Stockholm Revision Conference in 1967, proposed versions were considered and rejected after a pro-long debate. After that, Article 9 of the Berne Convention has never been subsequently amended.

treaties. For instance, while the Berne Convention recognises that the three-step test only applies to exceptions and limitations to the right of reproduction, the TRIPS agreement extends the test to any of the exclusive rights associated with copyright, leaving it open to cover copyright more broadly. Another example is the subjects protected in both these international copyright instruments. Whereas the Berne Convention requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the author,” the TRIPS Agreement indicates that such exception or limitation must “not unreasonably prejudice the legitimate interests of the right holders.”<sup>206</sup> This difference shows copyright treaties after the Berne Convention seem to adopt a more flexible application of the test, as well as increase the copyright standards over time.

It is noted that the test itself has never been officially interpreted.<sup>207</sup> Instead, it has only been analysed three times in a legal process and only once in the context of copyright.<sup>208</sup> Therefore, it is necessary to elaborate on different sources to understand the structure and application, as well as the goals of the three-step test. Each of these steps is discussed in greater detail as follows.

- *Step one: “Certain special cases”*

The first step of the test provides that the L&Es only operate in “certain special cases.”<sup>209</sup> However, Article 30 of the TRIPS Agreement does not contain this restriction, but requires that the exception should be “limited.” The question of whether the use of different terminology in these two versions can lead to different outcomes was discussed by the WTO Panel in the Canada-Patent case,<sup>210</sup> concerning the difference in wording

<sup>206</sup> The TRIPS Agreement, *supra* note 121, art. 26(2), 30.

<sup>207</sup> Neil Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VANDERBILT LAW REV. 217–329, 235 (1998); Frederick Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT. COMP. LAW REV. 661, 664 (1997). The Paris, Berne, and Rome Conventions provide that the International Court of Justice (ICJ) is the only agency has power to issue a definitive interpretation. However, so far no party has ever brought a case involving the three-step test before this agency, hence such dispute settlement procedure has never been undertaken. See also International Bureau of WIPO, Committee of Experts on the Settlement of Intellectual Property Disputes Between States, 7th Sess., May 29-June 2, 1995, *WIPO Doc. SD/CE/VIII*, para. 50, at 13.

<sup>208</sup> Jason Iuliano, *Is Legal File Sharing Legal: An Analysis of the Berne Three-Step Test*, 16 VA. J. LAW TECHNOL. 464–501, 471 (2011) (“So far the three-steps test has been analysed in three Panel reports, which are: Panel Report, Canada-Patent Protection of Pharmaceutical Products, WT/DS14/R (Mar. 17, 2000); Panel Report, United States-Section 110(5) of the US’s 1976 Copyright Act, WT/DS160/R (June 15, 2000), Panel Report, European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R (Mar. 15, 2005).”).

<sup>209</sup> *Id.*

<sup>210</sup> World Trade Organisation, Canada- Patent Protection of Pharmaceutical Products, Report of the Panel, WT/DS114/R, 17 March 2000 [hereafter Canada-Patent].

between Article 13 (origins from Article 9(2) of the Berne Convention) and Article 20 of the TRIPS agreement.<sup>211</sup> In the Canada-Patent case, the Panel concluded that the words “limited exception” in Article 30 require that the exception be “a narrow exception – one which makes only a small diminution of the rights in question.” Meanwhile, in the US-Copyright case,<sup>212</sup> the Panel stated that the words “certain special cases” in Article 13 of the TRIPS agreement require that the exception and limitation “should be clearly defined and should be narrow in its scope and reach.”<sup>213</sup> From these two WTO Panels’ interpretations, these two terms appear to have the same meaning.

To put it simply, “certain special cases” refers to cases in which copyright holders are aware of their rights, and potential copyright violators have the capability to comprehend whether their acts are legal. Such cases pass the first test. However, this legal certainty does not require that every applicable situation must be written down with an exact description.<sup>214</sup> Instead, this requirement mainly indicates that any unspecified, indeterminate, abstract limitation or exception is not allowed.

- *Step two: “No conflict with normal exploitation”*

The second step is to ensure the L&Es would not prevent the author or right holders from exploiting their works. The WTO Panel in the US-Copyright case held that a use of copyrighted materials violates this step “if uses, that in principle are covered by [copyright] but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains.”<sup>215</sup> The Panel clearly defined the scope of “normal exploitation” to cover both current and potential (a certain degree of likelihood) sources of significant income.

It can be seen that the Panel came to a useful standard of the condition of “conflict with normal exploitation.” However, regarding one challenge posed by the digital

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<sup>211</sup> Canada- Patent, *supra* note 210, at para.7.29.

<sup>212</sup> World Trade Organisation, United States – Section 110(5) of the US’ 1976 Copyright Act, Report of the Panel, WT/DS160/R, 15 June 2000 [hereafter US-Copyright].

<sup>213</sup> US-Copyright, *supra* note 212, para. 6.112.

<sup>214</sup> *Id.* para. 6.108 (“[T]here is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised.”).

<sup>215</sup> *Id.* para. 6.183.

advancements and accompanying decline in transaction costs, “it seems feasible that authors could profit by charging people who use their works in traditionally privileged manners.”<sup>216</sup> The WTO Panel addresses this issue in its report, “If normal exploitation were equated with full use of all exclusive rights offered by copyrights, the exception clause of Article 13 of the TRIPS Agreement would be left devoid of meaning.”<sup>217</sup> Therefore, normal exploitation should be understood as “something less than full use of an exclusive right.”<sup>218</sup> Otherwise, exemptions such as education, research, criticism could be void. To avoid this unwanted consequence and to retain the spirit of the test, the Panel asserted that unless the reproduction reduces copyright holders’ “considerable,” “significant,” or “tangible” profits, they should be deemed not to cause harm to the normal exploitation of a work.<sup>219</sup>

- *Step three: “Not unreasonably prejudice to the legitimate interests of the author”*

To pass the final step, the secondary use of copyrighted materials must “not unreasonably prejudice the legitimate interests of the author.”<sup>220</sup> In essence, this step is constructed to balance the author’s rights and the public interest. In the US-Copyright case, the WTO Panel explained further, “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owners.”<sup>221</sup>

In short, the three-step test has shown the international copyright community’s effort on a broad description of limitations and exceptions to copyright protection. As authors Claude Masouye and Mihály Ficsor comment in their WIPO guidebooks, “the function of the three-step ... is to be flexible and technologically neutral, but overall, to narrow and limit the nature and scope of permissible exceptions to the rights of authors and owners.”<sup>222</sup> Members of the Berne Convention reserve their rights to construct their copyright laws based on the standards that are suggested in the three-step test.

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<sup>216</sup> Iuliano, *supra* note 264 at 481.

<sup>217</sup> US-Copyright, *supra* note 212, para. 6.188.

<sup>218</sup> *Id.* para. 6.180.

<sup>219</sup> *Id.*

<sup>220</sup> The Berne Convention, *supra* note 115, art. 9(2).

<sup>221</sup> US-Copyright, *supra* note 212, para. 6.229.

<sup>222</sup> CLAUDE MASOUE, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) (1978),

Countries codified the three-step test into their copyright systems in two forms. The first approach identifies specific permissible activities. A good example of this approach is Section 34 of the EU's InfoSoc Directive which requires the Member States to provide for some specific exceptions such as public institutions, press reviews, news reporting, quotations for criticism or review, use by people with disabilities, etc. The second approach, on the other hand, starts with a list of general criteria for permissible uses. Courts then have responsibility for considering each of those factors in particular cases. A notable example of this approach is the fair use doctrine which is enshrined in section 107 of the 1976 Copyright Act. The following part unpacks how the United States, the United Kingdom and Japan's copyright laws comply with the exception and limitation provisions which are outlined in the Berne Convention.

- (iii) Copyright limitations and exceptions in national laws
  - *Fair Use doctrine*

The Fair Use doctrine – a defence to copyright infringement – was first introduced in Justice Story's holding in *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).<sup>223</sup> The doctrine is now embodied in 17 U.S.C. §107, providing an open-ended list of purposes that may be fair use such as “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use).”<sup>224</sup> This section also calls for courts to take into account all the facts of a case to decide if unauthorised copying is fair. So far the law has not precisely specified how to apply Fair Use. To determine an unauthorised reproduction is fair, courts seek a balanced application of the four following factors:

First, the purpose and character of the use are considered. Precisely, courts examine two elements of the use: (1) whether the new work is created for commercial purposes and (2) whether it should be deemed transformative. “The defendant's good faith has been considered as a material sub-factor.”<sup>225</sup> On one hand, non-commercial purposes (e.g. criticism, comment, news reporting, teaching) is likely fair. This does not mean, however,

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<https://www.wipo.int/publications/en/details.jsp?id=3172&plang=HU> (last visited Jul 25, 2020); MIHÁLY FICSOR, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS (2003).

<sup>223</sup> *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

<sup>224</sup> 17 U.S.C. §107 (“for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).

<sup>225</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).



that all free, educational uses are automatically classified as fair and all commercial uses are not fair. A claim of fair use is evaluated based on an application of all four factors. On the other hand, courts also favour transformative use and emphasise the public's perspective by asking whether the derivative work is merely a reproduction of the original works, "or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>226</sup> The Supreme Court, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), explained that a "transformative use" means the materials have been used to create something new, as opposed to a verbatim copy of the original works.<sup>227</sup> And "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."<sup>228</sup>

The second factor - the nature of the copyrighted work – is determined via two small tests. Courts look at whether the original work is fact-based or fictional, and whether it was published yet.<sup>229</sup> This factor examines to what extent the work was used relates to copyright's purpose of encouraging creative expression. In the landmark case *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (the *Betamax* case), Justice Stevens delivered that "copying a news broadcast may have a stronger claim to fair use than copying a motion picture."<sup>230</sup> He explained that making derivative works from informational works (e.g. scientific papers) requires more creative input, providing more substantial benefits to the public.<sup>231</sup> Thus, reusing a more creative or imaginative work is less likely to support a claim of fair use than reusing factual work.

Additionally, unauthorised uses of unpublished works are less likely to be considered fair. In *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), the Supreme Court reasoned that authors should be able to "control over the initial dissemination of their

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<sup>226</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. LAW REV. 1105, 1111 (1990) (Coining the term "transformative use" and defining it as a productive use of the material for a different purpose).

<sup>227</sup> *Campbell*, 510 U.S.

<sup>228</sup> *Id.*

<sup>229</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

<sup>230</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>231</sup> *Id.*, para. 31 ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good").

work, and thus, unauthorised uses of unpublished works are less likely to be deemed fair.”<sup>232</sup>

The third factor looks at the amount and substantiality of the work that is being used. Courts consider the amount of materials was taken from the original work, not how much of the defendant’s work is comprised of copied material. This should follow as the greater the amount of copying materials, the more a fair use claim weights against the defendant. However, under certain circumstances, reusing the entire work can be considered “fair” (e.g. works in the public domain). And in other contexts, borrowing a small amount of a copyrighted work was determined not to be fair if such material occupies a substantial part of the work (i.e. the “heart” of the work).<sup>233</sup>

The last factor focuses on how the use would affect the potential market of the original work. Here, courts review whether, and to what extent, there is any potential commercial impact on the original works’ market as a result of the unauthorised use. If the use undermines authors’ economic incentive to create by “sufficiently reducing” the copyright owner’s ability to profit from the work, it will be viewed as unfair.<sup>234</sup> For instance, a music composer cannot copy a large part of a song from another creator and sell it to a record label.

This test has been described as the most important factor of the Fair Use test. However, some court outcomes show that this factor is neutral and only moderately in favour of the infringers. This is especially important where the work in question merely has a market. Thus, even though the most important factor can weigh in the defendant’s favour, he or she can still be found ineligible to benefit from the defence.

In summary, the Fair Use doctrine itself does not explain how to rank these four factors in individual cases, leaving this job to the courts. Additionally, the Supreme Court has never defined an order among the factors. Therefore, the Fair Use test remains “an equitable rule of reason”<sup>235</sup> whose application looks at the specific facts of the actual

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<sup>232</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 553 (1985).

<sup>233</sup> *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122-23 (9th Cir. 1997); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925-26 (2d Cir. 1994)

<sup>234</sup> Michael W. Carroll, *Fixing Fair Use*, 85 N. C. LAW REV. 1087–1154, 1104 (2006).

<sup>235</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 448 & n.31 (1984) (referring to fair use as an “equitable rule of reason”).

case.<sup>236</sup> It might not be a matter if judges have the same interpretation of fair use. Unfortunately, as Judge Pierre Leval has admitted, they do not.<sup>237</sup> Experts have commented that the doctrine “is impervious to generalisation and that attempts to derive its meaning from careful analysis of specific cases are futile.”<sup>238</sup>

This doctrine leaves room for interpretation, which is a flexible approach to adapt to changing technologies and to encourage creativity. It is also considered a reliable framework to tackle copyright issues. In reviewing the history of fair use cases, the four factors have been focused on answering the crucial question of whether the new creations can cause damage to copyright holders’ pecuniary interests. However, it is not always an easy task to justify a secondary use of copyrighted material as fair use when technical advancements pose many challenges to the fair use application. This is especially true for aspects of creativity like fan works.

- *Fair Dealing doctrine*

Section 29 and 30 of the CDPA provides a finite list of specific categories that an authorised use must fit within one of those to be considered “fair” by the courts. These categories include “research and private study, text and data analysis for non-commercial research, criticism, review, quotation and news reporting, caricature, parody or pastiche.”<sup>239</sup> Additionally, the source of the material must have “sufficient acknowledgement” in the new work so that the author’s moral rights are maintained.<sup>240</sup>

According to the UK’s Intellectual Property Office, there has been no statutory definition of “fair dealing.”<sup>241</sup> In the landmark case *Hubbard v. Vosper* (1972),<sup>242</sup> Lord Denning himself delivered “It is impossible to define what fair dealing. It must be a question of degree.”<sup>243</sup> He first cited Section 6(2) of the Copyright Act 1956 to apply the defence of

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<sup>236</sup> *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 552 (1985) (“[F]air use analysis must always be tailored to the individual case.”).

<sup>237</sup> Leval, *supra* note 226 at 1990 (stating that judges have not agreed on the definition of fair use).

<sup>238</sup> Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. LAW REV. 1137–1161, 1138 (1990). (expressing doubt that “the results in concrete cases can be made predictably responsive to a limited set of definite principles--certainly not large, general principles and not very often even more specific, intermediate ones.”).

<sup>239</sup> CDPA, *supra* note 143, §29, 29A, 30, 30A.

<sup>240</sup> *Id.* art. 30(2).

<sup>241</sup> Exceptions to copyright, GOV.UK, <https://www.gov.uk/guidance/exceptions-to-copyright> (last visited Jul 27, 2020).

<sup>242</sup> *Hubbard v Vosper*, [1972] 2 QB 84.

<sup>243</sup> *Id.* at 94.

fair dealing, which said: “No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or another work and is accompanied by a sufficient acknowledgement.”<sup>244</sup>

Then he proposed a legal test that determines what would be classified as a valid use of defence. The first step is evaluating the amount and extent of the quotation and extract. In the next step, judges examine the purpose of the use to justify the potential market harm to the original work. If the new work acts as a substitute for the original work and consequently cause the right holders to lost commercial interests, then the fair dealing defence is likely rejected. Finally, courts consider the proportion of borrowing to the original as a whole. Was it necessary to use the amount that taken? Normally, the less amount of the original work is reused, the higher chance the use is considered fair.

It is also noted that all the Fair Dealing tests should not be undertaken separately. In other words, judges would look at all the facts of a particular case to make an assessment. This is the common theme between Fair Dealing and Fair Use doctrines.

- *Japan’s copyright limitations and exceptions*

Not having an explicit Fair Use doctrine like the United State, but Japan copyright law offers a list of permitted use of copyrighted materials in section 5 of Japan’s 1970 Copyright Act (from Article 30 to Article 50). For instance, because non-profit uses are listed in Article 38,<sup>245</sup> Japanese courts may find a free posting of unauthorised derivative work is a copyright exception. This strategy resembles the United Kingdom’s Fair Dealing exhaustive list which was discussed previously.

At the most basic level, both the US and the UK-Japan’s approaches aim to accomplish the same goal, which is limiting the monopolies of the creator over their works by allowing the public to reuse them in specific circumstances. However, there are notable differences between them. As explained earlier, the UK and Japan’s strategies give more certainty to copyright holders and users, considering that an exhaustive list of permissible use of copyrighted materials has been provided. Meanwhile, the Fair Use test is an open-norm model and the decision-making process is mainly based on a balancing of the four

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<sup>244</sup> Copyright Act of 1956, §6(2).

<sup>245</sup> Copyright Act of 1970, *supra* note 138, art. 30, 38.

factors. Therefore, this doctrine can cause confusions among both copyright holders and users. Such uncertainty possibly calls forth expensive litigations, which discourages users to take advantage of fair use provision due to the risk of litigation. Additionally, the American courts also find it a challenge when the decision-making can be ambiguous and more subjective. Paintings, for instance, are often reproduced in their entirety so the “amount used” test may be less meaningful. It is also not always easy for judges to determine conclusively whether and to which level the market value for artistic work is harmed.

Unfortunately, the copyright exceptions recognised in the UK and Japan copyright laws “are exhaustive rather than suggestive.”<sup>246</sup> The Fair Dealing defence, in particular, is criticised as “weak and overly restrictive.”<sup>247</sup> This limitation becomes more apparent in the digital age where there are more and more new creative secondary uses of pre-existing materials. And these uses are not covered in the UK or Japan’s lists. As a result, the number of cases that were determined on these defences has been very limited. For example, quotation was first recognised as a copyright exception in the UK copyright law in 2004. However, so far there has been no confirmed case in which quoting a literary work was deemed “fair.” On the one hand, the Fair Use doctrine could apply to a variety of circumstances, which means that the judges are allowed to expand the exception to suit the nature of creative work, technology and social practices. Even though there have been challenges in evaluating whether a use is fair, both doctrines still play important roles in copyright, as New York University professor Thomas Dreier names his article, “limitation is the centrepiece of copyright in distress.”<sup>248</sup>

## 2.3. CONCLUSION

The existing international copyright law has faced some challenges posed by the rapid development of technologies. However, it is unsurprising because the latest revision of the Berne Convention was adopted in 1971, way before the advent of technology and the widespread of the Internet. For example, there has been an explosive growth in reusing copyrighted materials to make creative works and sharing them on the Internet. This phenomenon raises questions about the implementation of copyright standards provided

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<sup>246</sup> Steven O’Heany, *Fair Is Fair: Fair Dealing, Derivative Rights and the Internet*, 12 ASPER REV. INT. BUS. TRADE LAW 75–98, 84 (2012).

<sup>247</sup> *Id.* at 84.

<sup>248</sup> Dreier, *supra* note 196.

in the Berne Convention and its subsequent instruments in the digital age: Whether user-generated content is copyright infringement? Do they pass the Fair Use or Fair Dealing tests? How to enforce copyright on the infringers when there is no actual “border,” or “territory” in cyberspace? This is exactly the aim of the contents discussed in the subsequent chapters.

## **CHAPTER 3**

### **CHALLENGES TO COPYRIGHT ENFORCEMENT IN THE DIGITAL AGE**

Technology changes economics and economics affect regulations. This is basically how the world operates. The law often falls behind technologies, and sometimes they can become outdated. The distribution of new forms of creative works via the Internet has raised many questions concerning copyright, challenging lawmakers around the world to make a law that keeps up with the constant changes in technology.

This chapter demonstrates how the Internet and technologies make copyright enforcement difficult to achieve.<sup>249</sup> To facilitate this investigation, I present this chapter in two sections. Section 3.1 investigates the challenges presented by technologies and the Internet to online copyright enforcement. First, it focuses on the challenges concerning the place of infringement and the related principles about applicable laws. Secondly, it examines the challenges related to choosing the right forum to hear an online copyright case, considering the legal aspects of jurisdiction and its consequences. Section 3.2 considers the copyright liability of internet service providers and how they control contents that are uploaded to their servers. This part also explains how content-censorship strategies would fail to stop the spreading of user-generated contents, as well as set back the participatory culture which originally fosters human creativity. The whole chapter aims to give an account of how similar failure is to be avoided by incorporating informal norms into copyright enforcement.

#### **3.1. CHALLENGES POSED BY THE INTERNET AND DIGITAL TECHNOLOGIES TO COPYRIGHT ENFORCEMENT**

The answer to the simple but important question of whether a state or local authorities can enforce remedies to a copyright infringement that occurs on the Internet turns out to be frustratingly complex in the digital age. This section describes the impacts of the Internet and digital technologies on regulating online users' activities.

##### **3.1.1. The impacts of the Internet and digital technologies on copyright**

###### **a. A world without boundaries**

Since the 1990s, the Internet and the popularity of personal computers have presented many challenges to copyright law.<sup>250</sup> National boundaries, which are physically determined in bilateral agreements between neighbouring countries, became less important due to the emergence of digital technologies.<sup>251</sup> The Internet becomes a borderless world where people “traffic” freely without passports, jumping between destinations “at a click of a button.”<sup>252</sup> As a result, the concept of geographical location is now remarkably devoid of all meaning. Moreover, when an Internet user accesses and browses the Internet, they do not realise at which point they are crossing state boundaries. It is also impossible to stop end-users from abroad from accessing a site. The Internet now becomes a “no man’s land” where no country or authority has exclusive control.

Additionally, the absence of physical borders of the Internet poses challenges to identify and stop intellectual property fraud. Copyright enforcement is initiated when copyright holders find out about the infringements. But detecting an infringement in the virtual world is always a daunting task. The Internet appears to be an immense world of data where online users can share and receive signals from virtually any country in the world as long as they have access to the Internet. Any online user can infringe copyright because it is nearly impossible for copyright holders to control what others do with their works online. And when the latter finds out about the infringement, it is also a challenge for them to identify the infringers and stop their activities.

#### b. Digital technologies facilitate copyright infringement

Online copyright infringement, at all levels, is no different from traditional offline infringement. It still involves making and distributing unauthorised copies of protected works. Compared to traditional media, copyright holders who live in the digital era must handle the rapid increase in illegal copying, unauthorised adaptation, and privacy. First, anyone who has access to the Internet can become a copyright infringer. Decades ago, consumers had to visit stores to purchase books, games, CDs, but nowadays anyone can

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<sup>249</sup> Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUMBIA-VLA J. LAW ARTS 1, 3 (1999).

<sup>250</sup> Marybeth Peters, *The Challenge of Copyright in the Digital Age*, 9 REV. PROP. INMATER. 59–68, 59 (2006).

<sup>251</sup> Nerina Boschiero, *Intellectual Property in the light of the European conflict of laws*, LAW INT. BUS. TRANS. GLOB. PERSPECT. CONFERENCE 10–12 (2013).

<sup>252</sup> N. Hitsevich, *Intellectual property rights infringement on the internet: an analysis of the private international law implications*, 2015, <https://openaccess.city.ac.uk/id/eprint/17914/> (last visited Aug 7, 2020).



surf the Internet and download the same content with the click of a button. These transactions can be performed from any electronic devices (e.g. laptops, smartphones, tablets, and smartwatch) anytime and anywhere in the world.<sup>253</sup> Secondly, current technologies allow all data – whether text, images, audio, or video – to be produced in digital forms, which are easier to store and more affordable than traditional forms.<sup>254</sup> Thus, media consumption across the globe is increasingly happening in digital forms. Besides, the fact that digital files can be transmitted so efficiently on the Internet is also a key driver for this trend.<sup>255</sup> The most intriguing thing about digital technologies, however, is that copying becomes an extremely easy task. And once work is digitalised, it can be duplicated perfectly and instantly without any loss of quality.<sup>256</sup> For example, although it is still a labour-intensive job nowadays to scan a whole book, once the digital version is finalised, it can be distributed and downloaded in seconds by millions of people around the world. Unsurprisingly, there may be only a slight difference in quality between the original and the copies.<sup>257</sup>

For all the above reasons, technologies and the Internet “are greatly expanding opportunities for confusion, fraud and infringement of intellectual property rights.”<sup>258</sup> For example, the UK government’s Intellectual Property Office estimates that as of 2020 17% of e-books are consumed illegally through piracy sites.<sup>259</sup> In the United States, a survey in 2017 showed that 50 per cent of respondents admitted to using 4shared.com to access e-books illegally. Many popular sites such as 4shared.com, uploaded.net, bookos.org, and book4you.com have been launched for this purpose.<sup>260</sup> As computational neuroscientist

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<sup>253</sup> Annual IP crime report: 2012 to 2013, GOV.UK, <https://www.gov.uk/government/publications/annual-ip-crime-report-2012-to-2013> (last visited Aug 8, 2020).

<sup>254</sup> Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 ST. CLARA HIGH TECHNOL. LAW J. 97, 103 (1996).

<sup>255</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES (2002).

<sup>256</sup> Michael D. McCoy & Needham J. II Boddie, *Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway*, 30 WAKE FOR. LAW REV. 169–196, 174 (1995).

<sup>257</sup> TERENCE P. ROSS, INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES (2000).

<sup>258</sup> WIPO, *Primer on electronic commerce and intellectual property issues*, E Health Strategies, [http://www.ehealthstrategies.com/files/WIPO\\_primer.pdf](http://www.ehealthstrategies.com/files/WIPO_primer.pdf).

<sup>259</sup> Online copyright infringement tracker survey (8th Wave), GOV.UK, <https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-8th-wave> (last visited Aug 8, 2020).

<sup>260</sup> Sites for downloading illegal e-books 2017, STATISTA, <https://www.statista.com/statistics/688411/book-piracy-sites/> (last visited Aug 9, 2020).

Sandberg explained, “The nature of intellectual property makes it hard to maintain the social and empathic constraints that keep us from taking each other’s things.”<sup>261</sup>

### 3.1.2. Conflicts of law

Generally, a national court has jurisdiction over a defendant who resides in its territory.<sup>262</sup> However, if the infringement occurred in a different country, the court may be required, or simply find it more convenient, to apply foreign law. With an extraordinary growth in online copyright infringement over the last couple of decades, there have been more cases where courts in more than one jurisdiction are relevant to a dispute, for example, where a song is illegally downloaded over peer-to-peer networks, or the damage of an alleged infringement of a copyright may be suffered in more than one country. In such cases, conflicts of applicable law and jurisdiction easily occur. This situation is governed by private international law or simply “conflicts of law.” As Professor Lipstein explains, “Private International Law or the Conflicts of Laws comprises that body of rules which determines whether local or foreign law is to be applied and, if so, which system of foreign law,”<sup>263</sup> this branch of law does not offer any instant solution for a particular conflict. It rather provides principles that determine which national laws is applied and which court has jurisdiction to hear the case.

#### a. Choice-of-law in the Internet

##### - *Choice-of-law principles*

Traditionally, there has been a lack of attention to choice-of-law principles in the aspect of copyright, mostly because legislators and scholars thought them irrelevant.<sup>264</sup> As copyright has a territorial nature, copyright infringement has been considered “a matter

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<sup>261</sup> Anders Sandberg, *Intuitive pirates: why do we accept file sharing so much?*, PATHETIC ETHICS - ETHICS IN THE NEWS, <http://blog.practicaethics.ox.ac.uk/2009/04/intuitive-pirates-why-do-we-accept-file-sharing-so-much/> (last visited Aug 9, 2020).

<sup>262</sup> Westel Woodbury Willoughby, *Personal Jurisdiction Part Two: Fundamental Concepts Applied: Chapter XIX*, 1 *FUNDAM. CONCEPTS PUBLIC LAW* 354–369, 356 (1924). (dividing individuals who owe obedience to a State into three classes. The first class is called Citizenship, Resident Aliens, Double Citizenship. In this Chapter, the concept of out-of-state defendant refers to a person who does not obtain citizenship of a State, as well as does not reside within its territory. Put it simply, they do not owe any obedience to the State in question, thus not a subject matter of the court’s personal jurisdiction).

<sup>263</sup> K. LIPSTEIN, *PRINCIPLES OF THE CONFLICT OF LAWS NATIONAL AND INTERNATIONAL* 1 (1981).

<sup>264</sup> WIPO, *Intellectual property: Principles governing jurisdiction, choice of law, and judgements in transnational disputes* (2008).

of national law, rather than international law.”<sup>265</sup> So far there have been a few recognised principles applicable to copyright disputes, including the law of the forum where the dispute is litigated (*lex fori*), the law of the place of infringement (*lex loci delicti*), the law of the forum where protection is sought (*lex loci protectionis*), and the law of the country of origin of the work (*lex originis*).

When an infringement occurs, the first step that copyright holders need to take to claim protection is to identify the country where protection is claimed, which the Berne Convention mandates in Article 5(2): “[...]. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”<sup>266</sup> The law of the “country where protection is claimed” is mentioned on several other occasions in the Convention.<sup>267</sup> It is also referred to in the 1961 Rome Convention (Article 7.2) and the recent Beijing Treaty on Audio-visual Performances (Article 5.3).

However, choosing a specific country’s protection itself is a challenge since this choice is made based on the law of all the possible countries where protection is sought. With approximately 180 signatories of the Berne Convention, 164 members of the TRIPS Agreement, and many other bilateral and multilateral agreements,<sup>268</sup> it is likely that such protection can be found in most parts of the world. Therefore, after the country where protection is sought has been decided, the next step is to discover the national law of the country where the alleged infringing act occurred (*lex loci delicti*).<sup>269</sup> For example, if a copyright infringement occurs in the United States, the protecting country will be the United States, and its national copyright law is the applicable law, regardless of where the case is heard (i.e. the forum country).

In cases involving a transmission (such as via satellite), the applicable law would be either the law of the country from which the signal is emitted to the satellite (uplink) or the

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<sup>265</sup> FRANKEL AND GERVAIS, *supra* note 103 at 42.

<sup>266</sup> The Berne Convention, *supra* note 115, art. 5(2).

<sup>267</sup> *Id.* art. 6bis (2) and (3), art. 7(8), art. 10bis (1), art. 14bis(2)(a) and (b), 14ter (2) and 18(2).

<sup>268</sup> WTO Members and Observers, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jul 26, 2020).

<sup>269</sup> PAUL EDWARD GELLER & MELVILLE B NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (2009).

country where the signal is received (downlink).<sup>270</sup> WIPO experts have proposed that the law of emission would apply unless that law is inadequate, in which case the law of the country (or countries) of reception would be used.<sup>271</sup>

The principle that the law of the place where the infringement occurred will be applied is strongly supported by courts and copyright experts for several reasons.<sup>272</sup> First, this rule reflects the territorial principle of copyright law.<sup>273</sup> Furthermore, it is created to comply with the principle of national treatment embodied in international copyright treaties such as the Berne Convention. According to the principle of territoriality, copyright protection granted by countries is only effective within the boundaries of their territories. Global protection can be recognised only by international treaties with the highest possible number of contracting nations. However, by the time these instruments were concluded, the nature and scope of protection granted to nationals of other Member States were an issue that had yet to be concluded.

It is, however, not simple to apply this rule in any case which involves foreign works. For example, the US courts may take different approaches when determining the applicable law of cases involving acts committed abroad. Following the *lex loci delicti* rule, the US' 1976 Copyright Act instructs its courts to not apply the extension of extraterritoriality, unless "there is a clear congressional indication otherwise."<sup>274</sup> By contrast, some courts are in favour of deciding applicable law based on the extension of territory.<sup>275</sup> For example, in *Update Art, Inc. v. Modiin Publishing, Ltd.* 843 F.2d. 67, 73 (2d.

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<sup>270</sup> S. M. Rezaul Karim et al., *A Review of Communications Satellite by Focusing on 'Bangabandhu Satellite-1', the First GEO, Communications Satellite of Bangladesh*, 8 INT. J. NETW. COMMUN. 123, 123 (2018). ("The communications satellite is primarily used to redirect communication data from one earth-based communication station to another station, which are called uplink and downlink section respectively. Generally, a communications satellite works when it receives data from terrestrial stations in the form of electromagnetic waves (radio frequency). The data is usually sent via large satellite antennas from uplink section. Based on the intended destination, the communications satellite retransmits the waves to the corresponding downlink station.").

<sup>271</sup> MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 172–179 (2002).

<sup>272</sup> GELLER AND NIMMER, *supra* note 21; ROGER SCHECHTER & JOHN THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* (2003); Jane Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA J INTL L 587 (1997).

<sup>273</sup> PAUL GOLDSTEIN, *supra* note 113 at 99–100.

<sup>274</sup> *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citing the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006)). See also, e.g. *Los Angeles News Serv. v. Conus Communications Co.*, 969 F. Supp. 579 (C.D. Cal. 1997); *De Bardossy v. Puski*, 763 F. Supp. 1239 (S.D.N.Y. 1991); *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

<sup>275</sup> In *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260 (1907) (Justice Holmes delivered the opinion of the Supreme Court: "the Court held that a requirement under U.S. Copyright law that a notice of copyright is inserted "in the several copies of every edition published" did not extend to publications

Cir, 1998) (the *Modiin* case),<sup>276</sup> the United States Court of Appeals for the Second Circuit granted an Israeli newspaper damage awards for copyright infringement occurring in Israel caused by the American publishers and distributors. The Court held that because an initial infringing copy has been produced within the United States, then it was able to reach profits following from further infringements in Israel that were made possible by the original unauthorised copy. In this case, the court applied the law of the forum extraterritorially.

The challenge in deciding one specific place of infringement has urged the “extraterritorial application” of the US intellectual property laws, which was set out in the *Modiin* case. The territorial presumption that “federal statutes are not to be construed to apply to conduct abroad absent a clear indication that Congress intended that effect” has been questioned in light of changes in international law, choice-of-law principles, and the interest of the US.<sup>277</sup> Indeed, when American companies have widened their business abroad more than ever before, and new technologies have facilitated the transmission and duplication of intellectual property around the world, insisting strictly on the territorial character of intellectual property will likely cause damage to their business.<sup>278</sup> Due to the gaps between the presumption against extraterritoriality and changes in the reach of intellectual property in the digital era, there have been attempts to harmonise these two scholarships. One of them is the “nerve centre for foreign distributions” rule proposed by American attorney and law professor Jane Ginsburg:

“If it is possible to localise in the United States the point from which the communication of the infringing work (whether or not in a material form) becomes available to the public (wherever that public is located), then U.S. courts should apply U.S. law to all unauthorised copies, wherever communicated. Similarly, where the United States is the “nerve centre” for foreign distributions, the domestic

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outside the United States. In a similar case - *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), he also reaffirmed “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”).

<sup>276</sup> *Update Art, Inc. v. Modiin Publishing, Ltd.* 843 F.2d. 67, 73 (2d. Cir, 1998).

<sup>277</sup> Curtis A. Bradley, *Territorial Intellectual Property in an Age of Globalism*, 37 VA. J. INT. LAW 505, 507 (1997) (Using the term “extraterritorial” to refer to the application of a nation’s laws to conduct occurring outside of the nation’s territory).

<sup>278</sup> *Id.* at 508 (However, US courts generally do not impose the same requirement for the application of trademark law as for the copyright and patent law).

acts of planning and intellectually implementing the offshore acts should suffice to justify the application of U.S. law to the full series of acts.”<sup>279</sup>

Professor Ginsburg has observed that approaches for localising foreign copyright infringement and exercising US copyright law sometimes can lead to inconsistent results. Therefore, the law of the country which plays the role of the “nerve centre” (wherever the first unauthorised work becomes available to the public) should prevail.<sup>280</sup> It is clear that her proposal resembles the principles developed by the Second Circuit in *Molii*,<sup>281</sup> but challenges those of the Ninth Circuit. However, it seems to be ideally suited to the digital environment in which technologies facilitate instant and limitless transmission of copyright materials throughout the world. It is also easier to localise the “initial place” of the infringement than to determine between the locations of the transmitted stages and the residences of the end-users. It is likely that Ginsburg’s approach “has the considerable attraction of sweeping away some of the anomalies generated by tensions caused by the traditional choice-of-law rule.”<sup>282</sup>

However, as Professor Ginsburg includes activities such as “planning and intellectual implementing the offshore acts” in the scope of a series of acts of copyright infringement, her proposal may lead to a change in the definition of infringement.<sup>283</sup> The problem is that “planning of an infringement” is unlikely to be considered an actual infringement.<sup>284</sup> When a copyright holder has to provide evidence of his or her authorship and damages caused by infringement, as required by courts, it is not likely to be possible for him or her to prove an infringement which is just at the stage of preparation.

Alternatively, courts can localise the infringement in the country where the infringement was accomplished.<sup>285</sup> This approach is called “the target market” principle. The distinction between this principle and Professor Ginsburg’s “nerve centre” proposal is that the latter may cover the implementation of the law of the country where foreign infringements started. For example, in *Allarcom Pay Television, Ltd. v. Gen. Instrument*

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<sup>279</sup> Ginsburg, *supra* note 272 at 600.

<sup>280</sup> *Id.*

<sup>281</sup> *Update Art, Inc.*, *supra* note 70.

<sup>282</sup> Austin, *supra* note 249 at 13.

<sup>283</sup> Roberto Garza Barbosa, *International Copyright Law and Litigation: A Mechanism for Improvement*, 11 MARQUETTE INTELLECT. PROP. LAW REV. 77, 93 (2007).

<sup>284</sup> *Id.* at 94.

<sup>285</sup> *Id.* at 96.

*Corp.*, 69 F.3d 381 (1995), the law of the targeted market was applied by the Ninth Circuit because it was the law of the country where the signal reached the ground.<sup>286</sup> However, this approach was refused by the Second Circuit, which took the view that the defendant's transmission of the signals captured in the United States is "a step in the process by which a protected work wends its way to its audience" and therefore infringes the performance right or transmission right protected by the US copyright law.<sup>287</sup> The Second Circuit reasoned: "the act of communication to the public occurs in the country where the signal is up-linked to the satellites, even if the audiences reside abroad and the transmission was not yet completed."

The emission rule is also adopted in the European Commission's Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission.<sup>288</sup> Article 1(2)(b) establishes that the act of communication to the public takes place in the Member State where the signal is sent to the satellite. Later in the Commission's Green Paper on Copyright and Neighbouring Rights in the Information Society, it was suggested that this principle should be extended to the Internet context.<sup>289</sup>

One possible alternative for the *lex loci protectionis* principle in Article 5(2) of the Berne Convention can be found in the choice-of-law rules for contractual obligations, which are codified in the Rome Convention (1980).<sup>290</sup> Under Article 3(1), the law that governs the contract is selected by the parties. If they fail to designate the applicable law, then "the law of the country that the contract is most closely connected to will be applied."<sup>291</sup>

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<sup>286</sup> *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995).

<sup>287</sup> *Nat'l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458 461 (S.D.N.Y. 2001). ("Judge McKenna found that the Copyright Act did apply because "PrimeTime's transmission of the signals captured in the United States is a step in the process by which a protected work wends its way to its audience,..., and an infringement, even though it takes one or more further steps for the work to reach the public.").

<sup>288</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248) 15–21.

<sup>289</sup> Green Paper on Copyright and Related Rights in the Information Society, COM (96) 568 final, Brussels, 20 Nov. 1996.

<sup>290</sup> Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, 1980 O.J. (L 266) 1–19 (This Convention was later implemented in the UK by the Contracts (Applicable Law) Act 1990).

<sup>291</sup> *Id.*, art 3(1).

However, these principles are hardly sufficient as they are only applied to the contractual matters contained in the contract.<sup>292</sup>

- *Choosing applicable law in cyberspace*

In essence, strictly applying the territorial choice-of-law rule to the Internet can lead to the daunting task of defining which national laws' copyright may have been infringed. It is impossible for content providers to control who accesses the materials uploaded to their servers. And end-users can hardly identify the place where the materials she or he browsed and downloaded comes from.

Back in the early days when hard copies were the only form of duplication, it was simple to locate the place of infringement, and then the applicable law. Even in cases where copies were distributed across borders, a limited number of national laws were involved. Nowadays, anyone with a computer and Internet access can upload and distribute protected works without the copyright holders' permission. And millions of people can access such materials. Take Wattpad, a platform for readers to share and enjoy stories, as an example. Stories uploaded to Wattpad's server can be read by more than 80 million people from approximately 250 countries.<sup>293</sup> As a result, the same number of countries' laws are involved if someone uploads illegal materials on this platform.

Moreover, an online infringement might include the following acts: initiating acts (i.e. making unauthorised copies and uploading to the servers), intermediate acts (i.e. distributing or relaying the copies), and consummating acts (i.e. downloading or reselling the copies).<sup>294</sup> The trouble is that those acts may take place in many countries. The popularity of peer-to-peer sites<sup>295</sup> is an excellent illustration of such complex cases. An

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<sup>292</sup> Raquel Xalabarder, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 ANNU. SURV. INT. COMP. LAW 79–96, 84 (2002).

<sup>293</sup> Wattpad Announces 80 Million Monthly User Milestone, WATTPAD HQ, <https://company.wattpad.com/blog/2019/8/15/wattpad-announces-80-million-monthly-user-milestone> (last visited Aug 17, 2020); Wattpad.com Analytics - Market Share Stats & Traffic Ranking, WWW.SIMILARWEB.COM, <https://www.similarweb.com/website/wattpad.com/> (last visited Aug 9, 2020).

<sup>294</sup> Barbosa, *supra* note 283 at 90.

<sup>295</sup> P2P (Peer To Peer) Definition, WWW.TECHTERMS.COM, <https://techterms.com/definition/p2p> (last visited Jul 31, 2020). (“In a P2P network, the “peers” are computer systems which are connected to each other via the Internet. Files can be shared directly between systems on the network without the need of a central server. In other words, each computer on a P2P network becomes a file server as well as a client.”).



unauthorised copy of a protected song is created in country A, then uploaded to servers that are based in country B, and transmitted and downloaded in many other countries.

Although this chain of acts is conducted by different people in different countries, they constitute only one infringement. In this kind of case, the interpretation of what can be considered as an infringement is the key for a court to decide where the infringement started, to what extent such infringement happened in a particular place, and where its law can apply to the whole case, even if parts of infringement occurred in other countries.

Additionally, since there has been no agreement in the conflict of applicable law between countries, the ambition of a future convention to determine the place of the infringement and choose the applicable law is impractical. The Berne Convention – which is normally referred to as the accomplishment of countries' efforts in solving conflicts of law – does not provide an immediate solution to the case where an applicable foreign copyright law differs significantly from the forum's copyright regulations. Meanwhile, the country may be hesitated to apply a foreign copyright law that conflicts with its domestic law. Besides, as technologies have been more innovative than ever, the set of rules for determining applicable law could become out of date by the time it is concluded.

#### b. Jurisdiction on the Internet

##### - *Jurisdiction principles*

A court does not have power over every individual and organisation in the world. Before making any decision over a case, the court must determine whether it has jurisdiction over the involved parties. Because the Berne Convention does not provide any rule of jurisdiction in relation to copyright, courts rely on international private law instruments to decide which national court has jurisdiction to hear a copyright infringement. This part briefly presents some important aspects of the jurisdiction in the EU Member States and the US. Although these two copyright systems are remarkably different, there are some common principles over jurisdiction.

In 1968, the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters was passed to regulate which courts have jurisdiction in legal disputes between individuals residents in different member states of the European and

the European Free Trade Association (EFTA).<sup>296</sup> The European Union, in 1988, enacted the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, extending the recognition regime to EFTA member states who are not eligible to sign the Brussels Convention.<sup>297</sup> This Convention was fully superseded by a 2007 version.<sup>298</sup>

(i) *In the European Union*

The most recent instrument which set out the principles of the allocation of jurisdiction of the European Union is Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), which entered into force in 2015.<sup>299</sup> Applying to jurisdiction regarding non-EU residents,<sup>300</sup> the Recast Brussels Regulation does not require any formality for recognition of judgements and clarifies the procedure in which parties can choose a court to start proceedings.<sup>301</sup>

- “The domicile of defendant” rule

The Recast Brussels Convention provides that if the defendant is domiciled in an EU Member State, they “must be sued in the courts of that Member State.”<sup>302</sup> However, the test of the defendant’s domicile is left to the national court’s interpretation. For example, in the *Bestolov v. Povarenkin* [2017] EWHC 1968 (Comm) case,<sup>303</sup> the defendant, Mr Povarenkin, is a Russian but living in both Russia (primarily) and England. The question here is whether a Russian can be sued in a country that is not his primary domicile.

In the UK, the principle to determine someone’s domicile is outlined in the Civil Jurisdiction and Judgements Order 2001.<sup>304</sup> According to this document, the residency of

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<sup>296</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1972 O.J. (L 299), 32–42 [hereafter the Brussels Convention].

<sup>297</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988 O.J. (L 319), 9–48 [hereafter the Lugano Convention].

<sup>298</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 O.J. (L 339), 3–41.

<sup>299</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1–32. This Regulation replaced the 1968 Brussels Convention and the 2007 Lugano Convention [hereafter the Recast Brussels Regulation].

<sup>300</sup> *Id.* art. 56.

<sup>301</sup> *Id.* art. 45(b), 97.

<sup>302</sup> *Id.* art. 2(1).

<sup>303</sup> *Bestolov v. Povarenkin* [2017] EWHC 1968 (Comm).

<sup>304</sup> SI 2001/3929.

a defendant is determined as the UK if he or she (1) is a “resident” in the UK, and (2) has a “substantial connection” to the UK. In the *Povarenkin* case, the United Kingdom’s High Court held that the defendant resided in England even though his primary work and home address are both in Russia, and he is unlikely to have any assets or property in England.<sup>305</sup> This case clarified the misconception that a person can avoid being the subject of a country’s jurisdiction by limiting the time they spend or the assets they own in its territory.

- “The place where the harmful effect occurred or may occur” rule

As an exception, Article 7(2) of the Recast Brussels Regulation permits the Member States to prosecute an alien from another Member State “in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.”<sup>306</sup> This rule is often referred to as *specific jurisdiction*. In a broad sense, the term “the place where the harmful effect occurred” can be understood as either the place where the damage was caused or the place where damages were suffered.<sup>307</sup> However, applying this rule may lead to the issue where the defendant’s domicile may award damages in that country and foreign countries, while courts having jurisdiction under Article 7(2) can only grant for a harmful effect that occurred in the forum country.<sup>308</sup>

- The “one of many defendants” rule

Another jurisdiction rule is embodied by Article 8(1) of the Recast Brussels Regulation, which recognises that an out-of-state defendant may become the subject matter of a court’s jurisdiction if he or she is “one of many defendants for actions closely connected” and “it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.”<sup>309</sup> This provision is reflected in the English Commercial Court’s decision in *Sabbagh v Khoury & Ors* [2018] EWHC 1330 (Comm).<sup>310</sup> In this case, Lord Richards held that even though England is not the natural

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<sup>305</sup> The defendant - Mr Povarenkin - travelled regularly to the UK to visit his wife and children who were living there. Additionally, the court decided that “the property in England in Mrs Povarenkin’s name was “the or a family home,” not a property of his own.

<sup>306</sup> The Recast Brussels Regulation, *supra* note 299, art. 7(2).

<sup>307</sup> GELLER AND NIMMER, *supra* note 269.

<sup>308</sup> Case C-68/93, *Shevill and Others v Presse Alliance SA*: HL 26 Jul 1996, European Court reports I-00415 (holding that “the harm caused by a defamatory publication... occurs in the places where the publication is distributed, when the victim is known in those places.”).

<sup>309</sup> The Recast Brussels Regulation, *supra* note 299, art. 8(1).

<sup>310</sup> [2019] EWHC 3004 (Comm).

forum for the dispute (defendants are residents of the EU and Lugano Convention states), it still has jurisdiction to grant an injunction against non-UK arbitrations because the litigation had been commenced in the English court.

- The exclusive jurisdiction

Furthermore, the Recast Brussels Regulation also provides an important provision, Article 24(4), which grants exclusive jurisdiction for the courts “where the deposit or registration has been applied in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights, required to be deposited or registered.”<sup>311</sup> However, as explained in Section 2.2.2, Article 5(2) of the Berne Convention does not require any formality so a literary or artistic work can enjoy copyright protection. Therefore, Article 24(4) cannot be applied to copyright cases.<sup>312</sup>

Though a court may have jurisdiction in a case, it may decline to exercise such jurisdiction or dismiss a case under principles based on *comity* or doctrines mandating a more convenient forum (*forum non conveniens*).<sup>313</sup> In such cases, a court may voluntarily “cede” jurisdiction to another court if the latter is much better suited to hear the cases. There are only a few exceptions, including “matters of public policy for enforcing country, default judgements for lack of appearance, etc.”<sup>314</sup> This rule avoids multiple, possibly conflicting, resolutions to the same dispute.

(ii) *In the US*

Federal courts in the US have personal jurisdiction over copyright infringement cases occurring abroad under a condition that “(...) if, along with proper service, there are contacts sufficient under constitutional and statutory criteria; they have subject matter jurisdiction in cases that include, most relevantly for our purposes, parties of diverse citizenship or actions arising under the Copyright Act or US treaties.”<sup>315</sup> According to

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<sup>311</sup> The Recast Brussels Regulation, *supra* note 299, art. 24(4).

<sup>312</sup> The Berne Convention, *supra* note 115, art. 5(2).

<sup>313</sup> *Id.* art. 33.

<sup>314</sup> *Id.* art. 45(1).

<sup>315</sup> GELLER AND NIMMER, *supra* note 269. ch INT §6[1][b].

this, a court's personal jurisdiction can be exercised over acts of aliens which are committed abroad but have "sufficient connection" with the forum.<sup>316</sup>

Besides, a court may assert personal jurisdiction over foreign defendants if such defendants fit into the long-arm statute,<sup>317</sup> and the state's jurisdiction must satisfy the Due Process Clause of the Fourteenth Amendment.<sup>318</sup> The Supreme Court set the standard for the constitutional exercise of jurisdiction in the landmark case *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).<sup>319</sup> A district court may exercise its personal jurisdiction over a non-resident defendant if the latter has "minimum contacts" with the state where the lawsuit is brought and the requirements of fair play and substantial justice are met.<sup>320</sup> Precisely, the defendant must have enough contact with the state (e.g. living long term in the state, doing business with residents of the state, conducting business in the state)<sup>321</sup> that it would fair for the court to assert its jurisdiction over them. Secondly, it is noted that the US courts also widely apply the principle of *forum non conveniens*, which is not present in civil law tradition countries and the Recast Brussels Regulations do not recognise. This rule allows a court to reject a case that it has jurisdiction over for certain reasons that were outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947) by the US Supreme Court.<sup>322</sup>

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<sup>316</sup> *Bristol-Myers Squibb Co. v. Superior Court of California* 137 S. Ct. 1773 (2017) ("For specific, or case-linked, jurisdiction, the suit had to arise out of the defendant's contacts with the forum state. Therefore, there must be a connection between the controversy at issue and the state seeking to exercise specific jurisdiction.").

<sup>317</sup> Symposium, *Copyright's Long Arm: Enforcing U.S. Copyrights Abroad*, 24 LOYOLA LOS ANGEL. ENTERTAIN. LAW REV. 45 (2004).

<sup>318</sup> U.S. Const. amend. XIV, §1 ("...nor shall any State deprive any person of life, liberty, or property, without due process of law.").

<sup>319</sup> *International Shoe Co. v. Washington*, 326 US 310, 316, (1945) ("either the defendant engages in continuous and systematic conduct within the forum state (known as general jurisdiction) or the suit arises out of, or is related to, the defendant's contacts with the forum state (known as specific jurisdiction); and the court's exercise of personal jurisdiction over the non-resident defendant is reasonable.").

<sup>320</sup> *Id.*

<sup>321</sup> What constitutes sufficient "minimal contacts" has been set forth in numerous cases which followed the *International Shoe* decision. For example, in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court of Florida proclaimed: "the unilateral activity of those who claim some relationship with a non-resident cannot satisfy the requirement of contact with the forum State. In this case, the Delaware-based trust company had no substantial business with Florida and no offices in Florida. The only contact with Florida was the fact that the trustor Dora Donner moved there, which was ruled insufficient to support jurisdiction." Another example is *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)- Dist. Court, SD New York (1996) where the District Court for the Southern District of New York held that the defendant failed to meet the "minimum contact" required by the New York court. The purchase of tickets based on the information provided on the web page would not constitute a tortious act in New York, which is provided by the NY CPLR § 302 (a)(2).

<sup>322</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 508-09, 512 (1947).

In the cases involving online copyright infringement, American courts apply the same basic principles and jurisprudential precedents as offline violations. For instance, in *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F.Supp.2d 824 (N.D. Ill. 2000),<sup>323</sup> the court applied a traditional constitutional analysis before taking into consideration Internet-related factors.

(iii) *Harmonising principles of jurisdiction*

It is noted that though there is no comprehensive formal set of rules, efforts have been made to harmonise state practices in this area.<sup>324</sup> These efforts include the Hague Conference on Private International Law which has been negotiating a convention on jurisdiction and foreign judgements in civil and commercial issues that might address intellectual property in various ways;<sup>325</sup> the American Law Institute;<sup>326</sup> and the International Law Association, which established a Committee called Intellectual Property and Private International Law in November 2010.<sup>327</sup> The principle of substantial connection is referred to in many of the documents produced by these organisations.

Taken in combination, the rules regulating jurisdiction claims are largely location-based. For example, the court might question where the copyright infringement occurred, where the damage was suffered, where the business is located, and where the defendant is located, domiciled, or habitually residing. However, it is very difficult to apply these grounds for jurisdiction in the online environment.<sup>328</sup>

- **Challenges to applying principles of jurisdiction on the Internet**

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<sup>323</sup> *Euromarket Designs, Inc. v. Crate & Barrel, Ltd.*, 5 ILR (P&F) 440, 96 F Supp 2d 824 (ND Ill 2000).

<sup>324</sup> FRANKEL AND GERVAIS, *supra* note 103 at 119.

<sup>325</sup> Barbosa, *supra* note 283 at 109. (“There were several difficulties in completing the Hague Draft Convention project. Consensus among the parties was difficult because of several differences in their respective legal systems. The first is that the European Union had previously held the Brussels Convention, the Lugano Convention, and developed the EC Regulation. There is also a fear of U.S. monetary damages awards like, for example, the highly publicised multi-million dollar judgements for injuries suffered due to hot coffee. (...) In addition, there are several principles that came from the Brussels Convention, now included in the EC Regulation, that would be unconstitutional under the U.S. Constitution.”).

<sup>326</sup> AMERICAN LAW INSTITUTE, *INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW AND JUDGEMENTS IN TRANSNATIONAL DISPUTES* (2008).

<sup>327</sup> International Law Association, *Committees*, ILA-HQ.ORG, <https://www.ila-hq.org/index.php/committees> (last visited Aug 8, 2020). The Committee was established on November 2010, chaired by Professor Toshiyuki Kono.

<sup>328</sup> Dan Jerker B. Svantesson, *Jurisdictional issues and the internet – a brief overview 2.0*, 34 COMPUT. LAW SECUR. REV. 715–722, 718 (2018).

The Recast Brussels Regulation does not contain any jurisdictional rule about online copyright infringement. This section analyses the main problems concerning the application of jurisdiction rules in the cases of online copyright infringements.

First, Article 4 of the Recast Brussels Regulation, headed “general jurisdiction,” provides that defendants residing in a Member State shall, regardless of their nationalities, be subject to the jurisdiction of that Member State. Consequently, an online user who commits copyright infringement on the Internet can always be sued in his or her domicile.

However, the application of this principle over cyberspace is difficult. Copyright holders and law enforcement may struggle to locate the domicile of the infringers, considering all the communications are taking place on the Internet. In pre-technological society, as mentioned in Section 3.1.1, the allocation of jurisdiction based on someone’s domicile was a much simple task. In the cyber world, an online user’s “address” is associated with the domain names of the website they browse, email addresses that they use, and their Internet protocol address (IP address). However, all this information does not necessarily reveal the real residency of the infringers. Anyone can register a domain name or use a hosting service offered by foreign companies. For example, in Vietnam, people who are living abroad (Vietnamese citizens and foreigners) can purchase websites with a domain name that contains a national identifier such as “.vn.”<sup>329</sup> Furthermore, using an IP address to trace back to the residency of an individual can be inaccurate, even with the help of internet service providers (ISPs). Technically, because ISPs retain detailed records about their visitors, they can pin a subscriber’s name and residency to a particular IP address.<sup>330</sup> However, infringers can easily use an offshore server (e.g. proxy server, virtual private network, The Onion Router) to cover their histories, thereby circumventing jurisdiction. Additionally, an IP address may not be used for all online interactions and transactions.<sup>331</sup>

Even when the domicile of the alleged infringer is pinpointed and the question of jurisdiction is solved, there is no guarantee that a particular online address can correctly

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<sup>329</sup> Circular No. 24/2015/TT-BTTTT of August 18, 2015 on the management and use of internet resources. art. 10(3)(a) and (b).

<sup>330</sup> *EMI v. UPC* [2010] IEHC 377; [2011] E.C.C. 8 para 58. (“It is definitively established by the evidence that, without the assistance of an ISP, the recording companies cannot discover the identity of those who are infringing their copyright.”).

<sup>331</sup> JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 22 (2009), <https://www.cambridge.org/core/books/crossborder-internet-dispute-resolution/CDA11E35A1711F6A6E318723FDCE63F0> (last visited Aug 6, 2020).

trace back to the actual infringers to charge them in a court of law. As long as infringers stay anonymous in all their online activities, there is no way to verify with absolute certainty the identity of cyber infringers. Digital technologies have drastically facilitated people's ability and desires for staying anonymous. On the bright side, anonymity is useful for people to protect themselves from negative judgement and harassment. However, online anonymity has also allowed cybercrime to thrive. For example, illegal file-sharers can use pseudonyms to hide their identities.

The second issue is the uncertain balance between the right of intellectual property owners and the Internet users' rights concerning data protection. The Recast Brussels Regulation allows the Member States to disclose and process online users' personal information in civil proceedings.<sup>332</sup> Consequently, as long as their national laws permit the disclosure of personal information, law enforcement can request ISPs to unseal their subscribers' data.<sup>333</sup> The CJEU only requires national courts to elaborate on the interests of the involved parties using appropriate measures, but not give any internal hierarchy.<sup>334</sup> Instead, the CJEU recognises both intellectual property rights and data protection right are all fundamental rights which deserve the same treatment.<sup>335</sup> Furthermore, national courts have shown divergence in balancing these rights. For instance, when weighing the interest of IP owners against the privacy of online users, the UK and French courts may find intellectual property rights preferable, whereas other national courts (e.g. Sweden, Germany) are in favour of the privacy of subscribers.

Finally, as mentioned in Section 3.1.2(b), the meaning of the phrase "the place where the harmful event occurred" in Article 7(2) of the Regulation appears to be ambiguous where there is one infringement, but the place of origin of the damage and the place where the damage is suffered are different. This situation is very common on the Internet due to the digital nature of protected works (i.e. infringing materials can be produced, shared, and downloaded in different countries). Consequently, many questions arise: Can copyright holders take legal actions in every state where their works are accessible? How can online

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<sup>332</sup> Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECR I-271.

<sup>333</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 157) 45–86, art. 8(1).

<sup>334</sup> Hitsevich, *supra* note 252 at 253.

<sup>335</sup> *Productores de Música de España (Promusicae)*, *supra* note 322; Case C-461/10 *Bonnier Audio v. Perfect Communication* [2012] ECR 219.



users who post copyrighted materials on an interactive website be controlled? Can they be sued by every state's court of law?

From all the analysis above, it seems that traditional rules over jurisdiction are inadequate for accommodating online copyright infringement in their current frameworks. There are no national borders or territories to cross, and cyberspace seems to be unlimited. Therefore, governments have struggled to assert their jurisdiction and national laws over online copyright infringers, especially when their residencies are unclear.

### **3.2. IMPORTANT ROLES OF INTERNET SERVICE PROVIDERS IN COPYRIGHT ENFORCEMENT**

As a general rule of thumb, making work available on an online platform (e.g. a social network, a website, a forum) for viewing and downloading anywhere in the world without the authorisation from copyright holders might give rise to a potential claim of infringement in most jurisdictions around the world. The digital age has created new challenges to courts in determining applicable law and jurisdiction over online copyright infringement. Rather than chasing individual liability, authorities now enforce secondary copyright liability on internet service providers. However, instead of requesting ISPs to disclose their subscribers' information after infringements have occurred (which may not be accurate), law enforcements now ask ISPs to filter infringing contents before they are uploaded to their servers. This section explores the emerging focus on internet service provider liability in different countries and regulations regarding "safe harbour" under international treaties. Later in this section, I explain that the liability standards concerning user-generated content have become stricter against both ISPs and end-users in recent years.

#### **3.2.1. Secondary liability of Internet Service Providers**

Secondary liability refers to the provision of liability based on acts committed by another.<sup>336</sup> For example, in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (1996),

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<sup>336</sup> Nayomi Goonesekere, *A Critical Analysis of secondary liability under Copyright Laws in the United States and in India*, 5 WESTMINST. LAW REV., 1 (The US' 1976 Copyright Act in fact provided no assistance in understanding the limits and scope of secondary liability. Until now, most cases related to secondary infringers were held by extensive principles on secondary liability developed by the U.S. courts in the four landmark decisions of Sony, Napster, Aimster and Grokster. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, et al., 464 U.S. 417, 435 (1984); *MGM Studios Inc., et al. v. Grokster, Ltd.*, et al., 545

the United States Court of Appeals for the Ninth Circuit held the owners of a flea market secondarily liable for sales of counterfeit music recordings made by individual vendors who had rented booths at the market.<sup>337</sup> In *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the United States Supreme Court addressed the fact that although the 1976 Copyright Act did not expressly make anyone responsible for another's violation, judges still applied the liability doctrines to the case.<sup>338</sup> As Justice Souter reasoned, companies that distributed and promoted software to infringers were liable for the consequences of the latter's acts. The software, in this case, was so widely used in online copyright infringements that it would have been impossible to deal with each infringer individually.

Secondary copyright liability has two types, which are *contributory liability* and *vicarious liability*.<sup>339</sup> Contributory liability arises where one is aware of another party's infringing activities and materially contributes to them, while vicarious liability occurs "when one profits from another's infringement while declining to exercise a right to control or prevent the infringement."<sup>340</sup> The liability of an ISP for a copyright infringement occurring on its network depends on the level of involvement of such ISP in the alleged infringement. For example, in *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (1993), although the defendant – the owner of a subscription computer bulletin board service named Techs Warehouse BBS – argued that he had no knowledge of the violation, never uploaded the photographs himself and deleted them upon notice from the copyright holder, the United States District Court for the Middle District of Florida held that it did not matter that Frena was not the one that initially made authorised copies.<sup>341</sup> He provided a product containing unauthorised copies; thus he violated Playboy's exclusive rights.

ISPs have played significant roles in the development of the Internet. They provide their consumers with the Internet connection service and other related services (e.g. domain name registration, hosting, telephone service) so the latter can connect to the global

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U.S. 913, 921 (2005); *A&M Records, Inc. et al. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001); *In re Aimster Copyright Litig.* F.3d 643, 643 (7th Cir. 2003)).

<sup>337</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

<sup>338</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>339</sup> Connie Davis Powell, *The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions*, 3 AKRON INTELLECT. PROP. J. 189–210, 190 (2016).

<sup>340</sup> MARGO E. K. REDER ET AL., *CYBERLAW: MANAGEMENT AND ENTREPRENEURSHIP* 191–192 (2015).

<sup>341</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (1993).

Internet network.<sup>342</sup> Unfortunately, ISPs have faced many disputes involving IPR violations because no copyright infringement takes place without the services provided by ISPs. There is little chance that ISPs are completely ignorant of the activities carried out on their platforms. Additionally, it is difficult to pinpoint the violators among perhaps millions of end-users and take legal action against every single one of them. The focus of copyright infringement has recently shifted from individual violators to ISPs. To avoid the risk of secondary liability, ISPs have exercised different strategies to prevent their consumers from using their services to distribute and download illegal materials. The most common methods are content censorship and the notice-and-takedown mechanism. While the former is applied before infringing materials are displayed online, the latter is used to remove infringing materials from the networks. It should be noted that both these mechanisms are performed by ISPs as a requirement of “safe harbour” provisions requested by both international copyright treaties and national laws.

### **3.2.1. “Safe harbour” provisions**

Copyright law provides certain conditions (also known as “safe harbour” provisions) under which ISPs can be exempt from second liability in cases where illegal contents or activities are posted online using their services. Note that in legal texts, “safe harbour” provisions are applied to “information society service” rather than ISPs only.<sup>343</sup> To be deemed a safe harbour, ISPs can choose one or both of the following routes: a notice-and-takedown procedure and content censorship.

#### **a. Notice-and-takedown procedure**

In the US, the corresponding “safe harbour” provisions are outlined in Section 512 of the 1976 Copyright Act. This section provides certain conditions which online service providers (OSPs) must meet to be treated as innocent parties in copyright infringement if their services were used to upload illegal materials.<sup>344</sup> To meet requirements set in Section

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<sup>342</sup> Elga A. Goodman, Kristina Pappa 1552 (M.D.Fla. 1993). & Brent A. Olson, *Internet Service Provider Liability - Background*, 49-50A in BUSINESS LAW DESKBOOK (2019).

<sup>343</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, 2015 O.J. (L 241), 1-15, art 1(a) (defining an information society service is “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” This definitions captures the services provided by many online service providers, such as radio broadcasting, television broadcasting services, and internet service providers.).

<sup>344</sup> Copyright Act of 1976, *supra* note 136, § 512 (a) to (d).

512, OSPs must (i) not know about the infringement,<sup>345</sup> (ii) have an agent in charge of a copyright claim,<sup>346</sup> (iii) design and publish a “repeat infringer policy,”<sup>347</sup> and most importantly, (iv) expeditiously remove the infringing materials.<sup>348</sup>

The notice-and-takedown process, which is described in Section 512(c)(3), includes two steps. First, after receiving a compliant notice of copyright infringement, OSPs must “expeditiously” remove or block access to the allegedly infringing materials. Otherwise, they should have liability if the copyright claim is ultimately upheld. In the next step, the service providers must (1) send a copy of the counter-notice to the complainant, (2) inform them that the claim is expected to be handled in ten business days, and (3) restore the removed materials in ten to fourteen business days unless the copyright holder decides to proceed to copyright litigation.

It is noted that OSPs can only remove or block access to infringing materials after the alleged infringer receives an appropriate notice. Otherwise, they may face claims by the posters challenging that their content was falsely removed or blocked. However, this “shield” has limited impact because the service provider can likely protect itself sufficiently through its terms and conditions that allow it to terminate users’ accounts and/or takedown infringing submissions.

Many national laws adopt procedures that resemble the US notice-and-takedown regime. For example, the Directive 2000/31/EC of the European Parliament and the Council exempts intermediaries from liability for the content they manage if they fulfil certain conditions: “(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”<sup>349</sup> However, Article 15 of this Directive provides a general principle of “no monitoring” whereby authorities cannot force any general content monitoring

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<sup>345</sup> *Id.* §512(c)(1)(A).

<sup>346</sup> *Id.* §512(c)(2).

<sup>347</sup> *Id.* §512 (i)(1)(A).

<sup>348</sup> *Id.* §512(c)(3).

<sup>349</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1–16, art 14.

obligation on service providers. In other words, it is the ISPs' exclusive right to supervise their end users' online activities.

In the UK, ISPs are responsible to prevent users from accessing copyright infringing websites. However, there is no equivalent of filing a DMCA takedown notice for websites that host infringing content. Article 14 of DPCA has adopted protections for hosting that are reminiscent of those in the US copyright law but they work differently. Rather than a detailed notice-and-takedown procedure, the hosting service must "act expeditiously to remove or to disable the access" to the illegal content immediately after they "have actual knowledge" that it violates someone's copyright.<sup>350</sup> Otherwise, the High Court can grant an injunction against an ISP if "that service provider has actual knowledge of another person using their service to infringe copyright."<sup>351</sup> It should follow that if someone wants a hosting company or platform to remove any infringing materials from their servers, he or she has to provide them with such sufficient information. It means that a link leading to the illegal content and the authorship, which are widely accepted in the US, maybe not be enough to be justified as "sufficient" in the UK. Therefore, the UK's takedown regime seems to be less clear-cut than that of the US, but more flexible.

The 1970 Copyright Act of Japan does not contain an explicit provision that allows a copyright holder to file for an injunction against the intermediaries.<sup>352</sup> In 2001, the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers 2001 (also known as the Provider Liability Law) was enacted to regulate the online infringement of third party rights, including copyright violations. Article 3(1) grants telecommunication service providers the exception of damage caused by the infringement if they promptly disable the alleged communications. Within 7 days after receiving complaints from copyright holders, if there is no counter-notice from the sender, providers have a responsibility to implement blocking measures.

However, this instrument does not fully explain the liability of internet service providers regarding copyright infringement.<sup>353</sup> The term "specified telecommunications service

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<sup>350</sup> CDPA, *supra* note 143, art.14.1(a)(b).

<sup>351</sup> *Id.* § 97(A).

<sup>352</sup> However, Article 112 of Japanese Copyright Act allows right holders to file an injunction against infringers who directly reproduce or distribute his or her works without permission.

<sup>353</sup> DANIEL SENG, *COMPARATIVE ANALYSIS OF THE NATIONAL APPROACHES TO THE LIABILITY OF INTERNET INTERMEDIARIES* 132 (2010).

providers” provided in Article 2(i) of the Provider Liability Law only includes hosting service providers and referral service providers, but internet service providers.<sup>354</sup> It should follow that ISPs do not have obligation to take measures to remove infringing materials. Additionally, the Provider Liability Law does not require telecommunication service providers to implement content-filtering measures before contents are sent using their services.

In the debate surrounding “safe harbour” provisions, it is argued that the takedown notices can be abused by fraudulent copyright complaints. For example, it has been reported that in January 2019 two British YouTubers, Kenzo and ObbyRaidz received “messages demanding payment ranging from \$75 to \$400 in exchange for dropping two claims against them.”<sup>355</sup> Because YouTube’s notice-and-takedown complaint can be filed by anyone, it is easy to terminate someone’s YouTube channel by filing copyright claims. This problem highlights that the notice-and-takedown process is flawed and open to abuse.

To keep their material online, upon receipt of copyright claims, the end-users must send counter-notice with evidence showing that the challenged materials are their original works. However, a layperson may find this procedure challenging, particularly when end-users may not have the exact answers for the legal status of their works.<sup>356</sup> For example, a remixed version of a copyrighted song can be classified as a copyright exception if it satisfies the Fair Use test, yet the test is complicated for a person without legal knowledge. As a result, the counter-notice procedure is likely to be a “dead end” for most Internet users.<sup>357</sup> They must choose either to send a counter-notice to challenge the copyright claims or to simply remove alleged materials, and possibly repost them elsewhere. Without any doubt, the second choice is easier. The result is that sometimes the notice-and-takedown mechanism is not capable of stopping copyright infringements

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<sup>354</sup> The term “specific telecommunication service” refers to transmission that is conducted by providers “with the aim of reception thereof by unspecified persons.” Meanwhile ISPs operate “direct reception” of communications from sender to recipient. See

<sup>355</sup> Tom Gerken, *How YouTube copyright extortion works*, BBC NEWS, February 14, 2019, <https://www.bbc.com/news/technology-47227937> (last visited Aug 10, 2020).

<sup>356</sup> Qualify for Content ID, YouTube, <https://support.google.com/youtube/answer/1311402> (last visited Aug 18, 2020) (Under YouTube’s copyright policies, authors of “mash-ups, best ofs, compilations and remixes of other works” do not have exclusive rights over their works like the canon authors).

<sup>357</sup> Engelberg Center on Innovation Law and Policy, *How Explaining Copyright Broke the YouTube Copyright System*, NEW YORK UNIVERSITY, <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> (last visited Aug 9, 2020).

because infringers can keep reposting illegal materials on other platforms (e.g. websites, forums, social networks).

## **b. Content censorship**

The second strategy which ISPs can use to combat copyright infringement is content censorship. If the takedown-and-notice procedure is only implemented after a copyright infringement is detected, this content moderation method enables ISPs to examine all materials before they are displayed to their servers.

Some ISPs provide copyright owners' systems to easily identify and manage their contents on the ISPs' networks. When an Internet user uploads content to a site, such content is put in the pending mode for copyright check before it can be displayed in their network. Mostly using algorithms, the ISPs check the uploading video against their database and flag it as a copyright violation if a match is found. An excellent example of this filtering technology is YouTube's Content ID, developed by Google. Copyright holders can register their works with YouTube if they meet specific criteria<sup>358</sup> and Content ID will compare their reference content to every video uploaded to YouTube's servers.

Some other ISPs use algorithms to filter words or images which they believe are not safe for the public (e.g. graphic violence, pornography, hate speech). For example, in December 2018, social network Tumblr announced what is referred to as "a heavily contested decision" that all sensitive contents (also known as "non-safe for work" or NSFW content) are banned from this platform.<sup>359</sup> Using Artificial Intelligence (AI) algorithms to flag the explicit content, Tumblr makes infringing content private so it will not appear in the search and other users could not see it. TikTok, a social network video application, also uses algorithms to suppress the reach of content created by users assumed to be "vulnerable to cyberbullying."<sup>360</sup> Twitter also launches the same censorship plan applying to adult content. The problem is that these NSFW materials

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<sup>358</sup> Qualify for Content ID, *supra* note 344.

<sup>359</sup> Nicolle, *The New Tumblr Algorithm, and the Relationship between Platforms, Adult Content and Fandom*, NICOLLE LAMERICHES (2018), <https://nicolletlamerichs.com/2018/12/05/on-the-new-tumblr-algorithm-and-the-relationship-between-platforms-adult-content-and-fandom/> (last visited Aug 10, 2020).

<sup>360</sup> Casey Newton, *TikTok's secret censorship guidelines*, WWW.GETREVUE.CO, <https://www.getrevue.co/profile/caseynewton/issues/tiktok-s-secret-censorship-guidelines-201252> (last visited Aug 9, 2020).

constitute major parts of user-generated content.<sup>361</sup> An aggressive filtering algorithm can automatically “wipe out” all user-generated content that contains sensitive words.

It is also worth noting that content censorship can be carried out at both network and national levels. Countries may adopt technologies of Internet censorship to block Internet users within certain territories from access to sensitive materials, including foreign news sites, sites with dissident political views and content deemed harmful (e.g. pornography, copyright infringed materials, violence or abuse content, etc.). This Internet censorship can be built by using many techniques, including DNS poisoning, IP address blocking, analysing and filtering URLs, inspecting filter packets, and resetting connections. China’s Internet censorship, commonly known as the “Great Firewall of China,” is an excellent illustration of how ISPs are involved in banning political, religious, or any other category of content.<sup>362</sup> Internet censorship in China is not conducted by the government, but ISPs are obligated to control the Internet gateways where traffic travels between China to the rest of the world as part of legislative orders and political regime. Otherwise, these companies may be shut down their businesses or fined for not complying with the government’s order.<sup>363</sup>

It is a trend in recent years that authorities and ISPs employ a stricter filtering strategy to combat copyright infringement. On March 26, 2019, the European Parliament passed the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market.<sup>364</sup> After the European ministers approve the new directive, it will then be transposed into national legislation by EU countries, at which point it will become law.<sup>365</sup> This Directive aims to introduce “an ambitious modernization of the EU copyright framework” and “to make EU copyright

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<sup>361</sup> Carlisle George & Jackie Scerri, *Web 2.0 and User-Generated Content: legal challenges in the new frontiers*, J. INF. LAW TECHNOL., 7 (2007).

<sup>362</sup> Chris Hoffman, *How the “Great Firewall of China” Works to Censor China’s Internet*, HOWTOGEEK.COM (2017), <https://www.howtogeek.com/162092/htg-explains-how-the-great-firewall-of-china-works/> (last visited Aug 9, 2020).

<sup>363</sup> HUMAN RIGHTS WATCH, *“Race to the Bottom” Corporate Complicity in Chinese Internet Censorship*. (“Physical access to the Internet is provided by nine state-licensed Internet Access Providers (IAP), each of which has at least one connection to a foreign Internet backbone, and it is through these connections that Chinese Internet users access Internet websites hosted outside of China. The individual Chinese Internet user buys Internet access from one of several thousand Internet Service Providers (ISPs), who are in effect retail sellers of Internet access that is in turn purchased wholesale from the nine IAPs.”).

<sup>364</sup> Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92–125.

<sup>365</sup> The deadline for Member States to incorporate this Directive into their national laws is 7 June 2021.



rules fit the digital age.”<sup>366</sup> Paragraph 10 of Article 17 requires the EU Commission to cooperate with the Member States, to organise an arena to discuss how to regulate online activities. New plans will no doubt centre around ISPs’ liability in the battle with copyright infringement. Consequently, service providers must adopt expensive filtering technologies to screen all materials that are uploaded to their servers. Some ISPs and online platform such as YouTube, Facebook already have their filtering technologies in place to handle copyright infringement. However, to comply with Paragraph 4 of Article 17, they have no choice but to install more advanced technology with more sophisticated algorithms.<sup>367</sup>

The issue is that using algorithms to filter infringing materials can be highly problematic. First, AI is always artificial, meaning it can be imperfect. Thus, algorithms may flag things as “sensitive”, which possibly are not, leading to situations where content is removed mistakenly.<sup>368</sup> This leads to the increasing number of complaints ISPs have received concerning removed materials.<sup>369</sup>

Secondly, the AI algorithm can only detect certain keywords which are categorised as unsafe to users and remove the whole content, rather than the messages which the authors want to deliver. As mentioned above, explicit content makes up a major part of what we share on the Internet nowadays. Automatic filtering may leave nothing to online users, so “the banning of adult content (of Tumblr) is an extreme decision that truly affects the platform and its culture.”<sup>370</sup> Removing content describing violent or aggressive acts also can lead to silencing the inspirational stories of victims. For instance, recently TikTok – a video-sharing social networking service – has been accused of using algorithms to filter content associated with the “Black Lives Matter” movement.<sup>371</sup> In summary, aggressive

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<sup>366</sup> Esteana, *Copyright*, SHAPING EUROPE’S DIGITAL FUTURE - EUROPEAN COMMISSION (2014), <https://ec.europa.eu/digital-single-market/en/copyright> (last visited Aug 9, 2020).

<sup>367</sup> Rebecca Pakenham-Walsh, *It’s official! New Copyright Directive 2019/790...*, FIELDFISHER (2019), <https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/its-official-new-copyright-directive-2019790> (last visited Aug 10, 2020).

<sup>368</sup> Karen Hao, *This is how AI bias really happens—and why it’s so hard to fix*, 02/04/2019, <https://www.technologyreview.com/2019/02/04/137602/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/> (last visited Aug 10, 2020).

<sup>369</sup> Nicolle, *supra* note 359.

<sup>370</sup> *Id.*

<sup>371</sup> The “Bubble Effect” Means You May Not See That Much Protest Content On TikTok, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/laurenstrapagiel/black-lives-matter-tiktok-protests> (last visited Aug 10, 2020).

content censorship, which is intended to enforce copyright effectively in the digital age, may go against the primary goals of copyright – encouraging creativity and innovation.

### **3.3. CONCLUSION**

One of the merits of the Internet over other means of communication is that it allows authors to reach a much wider, even a worldwide, audience. In the early days, “people could not easily communicate across distances, and coercive power to enforce legal rules was limited by the physical location of the law enforcer.”<sup>372</sup> However, during the last decades, geographical distance or national borders have been irrelevant to the activities of Internet users. In the online world, an Internet user can be everywhere in the world, all at once. Consequently, the conflicts of jurisdiction and applicable law concerning online copyright become problematic to the point of redundancy.

To sum up, in light of the points addressed above, existing copyright enforcement is inadequate for accommodating online copyright infringement in their current frameworks. The gaps between copyright and the advent of technologies may require a new approach including the utilisation of informal and formal practices to handle online copyright issues.

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<sup>372</sup> Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 1169, <https://core.ac.uk/reader/216909346> (last visited Aug 5, 2020).

## CHAPTER 4

### COPYRIGHT IMPLICATIONS IN FANFICTION

*“Stories are like swords...We didn’t borrow the sword. We remade it because we saw in it the potential for something better. And we did that together, all of us.”*<sup>373</sup>

This chapter examines the legality of literary works created by fans, known as fanfiction, distributed over the Internet, with special considerations given to scope and exceptions of copyright protection. As concluded in the previous chapter, technologies related to the distribution of user-generated content has grown rapidly compared to the law governing them. As “one of the most unique phenomena of the popular culture of the last three decades,”<sup>374</sup> fanfictions are stories written by fans of popular books, television shows, films, and movies. Fanfiction, which was mainly a hobby before the advent of the Internet, has exploded through online channels (e.g. fan websites, forums, blogs, etc.). However, because fan writers reuse copyrighted materials such as characters and settings without permission from the right holders, it may prompt the question of copyright infringement. Additionally, the persistent growth of fanfiction has made it more available to the public, unfortunately including copyright holders. So far, most copyright holders have not pursued legal action beyond warning messages or “cease-and-desist” letters sent to fanfiction writers and websites uploading fan works. However, changes in the international copyright regime may make them stop tolerating this practice.

This chapter starts with an introduction of fanfiction, explaining what fanfiction is and how it became one of the representative phenomena of pop culture. Section 4.2 further explores the deficiency of the existing copyright law in its application to fanfiction. This part revisits the scope of copyright protection and copyright holders’ exclusive rights to justify the legality of fanfiction as well as to answer whether the current copyright regulations are sufficient enough to regulate untraditional forms of media. The next section analyses the current transformative use tests in several national laws and their applications to fanfiction, focusing on the US’ Fair Use doctrine, the UK’s Fair Dealing doctrine, and the Japanese copyright L&E provisions. The last section ultimately

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<sup>373</sup> @wrangletangle, TUMBLR, *On Fanfiction*, Tumblr, SHADES OF MAUVE, <https://shadesofmauve.tumblr.com/post/78692418841/on-fanfiction> (last visited Aug 19, 2020).

<sup>374</sup> Stendell, *supra* note 66 at 1551.

concludes that under the current copyright law, fanfiction and the communities that practise it are not protected.

#### 4.1. BACKGROUND OF FANFICTION

There is no official definition of fanfiction (also written as *fan fiction*, *fan fic*, or *fic*). It is often described as “written extensions of popular works of fiction created by their fans,”<sup>375</sup> or “creative works that highlight characters from books, movies, television shows, comic books, video games, or other popular culture sources.”<sup>376</sup> Among these definitions, the one suggested by Professor Tushnet in Chapter 1 most appropriately outlines the nature of fanfiction, how it is created and its impacts on culture.<sup>377</sup>

Fanfiction can be categorised by genres, the reference to length, the level of alteration of canon materials (e.g. Alternate Universe fiction, non-alternate universe fiction, crossover fiction), the significance of stories (e.g. man-pregnancy fiction, out-of-character fiction), or perspectives of fanfiction writers.<sup>378</sup> The exponential growth of media means some untraditional forms of creative work could also be considered fanfiction, including fiction podcasts (also known as audio fiction, sound-storytelling). However, the written form is still taken as the most common expression of fanfiction.

It is essential to address that fanfiction is mainly built upon a certain fandom. Fandom has been defined as “the world of fans and enthusiasts, especially of fans of science fiction magazines and convention.” In short, it is “the universe” or “the world” from which fanfiction derives. Fandom may be built on certain canon works (e.g. Star Trek fandom, Star Wars fandom), characters (e.g. Harry Potter fandom, Voldemort fandom), or taking two well-known characters and developing them into a romantic relationship (e.g. Sherlock Holmes/ Doctor Watson fandom from Sherlock Holme series, Katsuki Yuuri/Victor Nikiforov from Yuri on Ice – a famous Japanese animation). Cross-over fiction is the only exception where the story spans multiple fandoms.<sup>379</sup> Members of

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<sup>375</sup> Mayer-Schonberger and Wong, *supra* note 66 at 3.

<sup>376</sup> Stendell, *supra* note 66 at 1552.

<sup>377</sup> Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* 61, 64–65 (Kristina Busse ed., 2014).

<sup>378</sup> @WeAreFallen, *Writer’s Guide - Fanfiction Terms*, WATTPAD.COM, <https://www.wattpad.com/249008270-writer%27s-guide-fanfiction-terms/page/2> (last visited Aug 19, 2020).

<sup>379</sup> FRANCESCA COPPA, *THE FANFICTION READER: FOLK TALES FOR THE DIGITAL AGE* 11–12 (2017) (In crossover fanfiction, original characters (or settings, plots) are placed in a single story. A good example

fandoms are generally loyal, devoted and passionate about their beloved canon works and characters. Such intense desire and enthusiasm are described by reporter Bailey Gribben: “Every major television, book and webcomic series has a strong and devoted fanbase that eats, sleeps, and breathes the series and the characters in it.”<sup>380</sup> On the website archiveofourown.org, there are approximately one million fanfictions written by the Marvel fandom (including 425,759 stories about the comics of Marvel and 348,873 stories about the movies of Marvel).<sup>381</sup> The ultimate famous series, Harry Potter by J. K. Rowling, is the source for 281,835 fanfictions that are displayed on the same site.<sup>382</sup>

Fanfiction has several significant characteristics which distinguish it from other forms of media. First, the foundation of fanfiction is enthusiasm for an entertaining product, whether that is a film, TV show, book, etc.<sup>383</sup> This intense emotional bond can be compared to the relationship a child may have with his favourite toy, which professor Henry Jenkins explains “comes not from its intrinsic merits or economic value but rather from the significance the child bestows upon the commodity through its use.”<sup>384</sup> Due to this emotional involvement, fans do not passively consume the works by just watching or reading them; they nurture their relationship with their favourite works through different fan practices such as writing stories, making videos, painting, and dressing as their favourite characters.<sup>385</sup> Writing fanfiction is just one of these activities, albeit possibly the most well-known.

Secondly, fanfiction is created based on existing materials.<sup>386</sup> When writing fanfictions, fans pick up their favourite segments (i.e. characters, storylines, dialogues) from original works and “play” with them.<sup>387</sup> Fan writers start their fiction with the assumption that their readers already understand the “world” described in their stories. For example, a

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would be a fanfiction which brings together the elements of Sherlock Holmes and Harry Potter. Crossover also can be found in many comics, games, TV shows, or films).

<sup>380</sup> Bailey Gribben, *Fanfiction: A Legal Battle of Creativity*, REPORTER (2016), <https://reporter.rit.edu/views/fanfiction-legal-battle-creativity> (last visited Aug 21, 2020).

<sup>381</sup> Fandom, ARCHIVE OF OUR OWN, [https://archiveofourown.org/media/Caroons%20\\*a%20Comics%20\\*a%20Graphic%20Novels/fandoms#letter-M](https://archiveofourown.org/media/Caroons%20*a%20Comics%20*a%20Graphic%20Novels/fandoms#letter-M).

<sup>382</sup> Harry Potter - J. K. Rowling - Works, ARCHIVEOFOUROWN, [https://archiveofourown.org/tags/Harry%20Potter%20-%20J\\*d%20K\\*d%20Rowling/works](https://archiveofourown.org/tags/Harry%20Potter%20-%20J*d%20K*d%20Rowling/works) (last visited Feb 6, 2021).

<sup>383</sup> Mayer-Schonberger and Wong, *supra* note 66 at 5.

<sup>384</sup> HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 51 (2013).

<sup>385</sup> Mayer-Schonberger and Wong, *supra* note 66 at 5.

<sup>386</sup> *Id.* at 6.

<sup>387</sup> Elizabeth Burns & Carlie Webber, *When Harry Met Bella: Fanfiction is All the Rage. But is it Plagiarism? Or the Perfect Thing to Encourage Young Writers?*, 55 SCH. LIBR. J. 26–29, 26 (2009).

Sherlock Holmes fanfiction would not explain at length who Sherlock Holmes and Doctor Watson are, or how the stories involve resolving many criminal cases. However, it is notable that fanfiction stories have never been verbatim copies of existing stories, but reinterpretations or extensions of the source materials.<sup>388</sup> Fanfiction writers reuse canon work in different degrees, whether to create new plots (e.g. the character Sherlock Holmes investigates new crimes which have never appeared in the original series), new characters in original settings (e.g. Miss Enola Holmes is Sherlock Holmes' younger sister) or completely new settings (e.g. Sherlock Holmes time-travels to the 21<sup>st</sup> century).

Thirdly, fanfiction is communal by nature.<sup>389</sup> Since the early days, fans have joined communities because they wanted to share their interests with a large group of people.<sup>390</sup> And they have engaged in fan activities with “the values of their community in mind - values of respect, positivity, and inclusiveness.”<sup>391</sup> Nowadays, the Internet may help fanfiction communities to extend practices that were previously bounded by time and space, but the nature of such communities has never changed. They are always the places for people to share, learn and connect. Furthermore, communities play another role for the members: serving as self-governed regulatory bodies.<sup>392</sup> Because most fanfiction communities are tight-knit, the other's attitudes are essential to each member. The fear of being exposed and expelled from the community requires fans to follow norms that are developed and enforced by the communities.<sup>393</sup> The identification of community-based norms and the way in which they are enforced is the central theme of this research which has employed the methodology of corpus linguistics to analyse online fanfiction community conversations concerning copyright norms. The design, results and conclusions of this research are fully developed in Chapter 6.

Lastly, stories are multidimensional by nature.<sup>394</sup> Audiences have different interpretations of a story based on their experiences, cultures, and personalities. A middle-aged English

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<sup>388</sup> Lipton, *supra* note 63 at 980.

<sup>389</sup> Mayer-Schonberger and Wong, *supra* note 66 at 7.

<sup>390</sup> McCardle, *supra* note 66 at 441–442.

<sup>391</sup> Casey Fiesler, *The “secret garden” of the internet: How fanfiction transforms lives*, MEDIUM (2019), <https://medium.com/@cfiesler/the-secret-garden-of-the-internet-how-fanfiction-transforms-lives-12cfa5881cd5> (last visited Aug 20, 2020).

<sup>392</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

<sup>393</sup> Fiesley, *supra* note 86 at 734.

<sup>394</sup> Marguerite Christine, *The Multidimensional Nature of a Story, and the Value of One Truth.*, MARGUERITE CHRISTINE (2021), <https://margueritechristine.wordpress.com/2021/01/11/the-multidimensional-nature-of-a-story-and-the-value-of-one-truth/> (last visited Feb 6, 2021).

literature expert's interpretation of the story can be very different from that of a teenager. When a person reads a work, he or she may imagine stories that can be very remote from those of the canon. A work may belong to someone, but the idea never.<sup>395</sup> As a fan comments on a topic about fanfiction in Tumblr, "There is no such thing as the lone genius on a mountaintop. Ideas are passed around, handed back and forth, growing all the time."<sup>396</sup> Fandom practices, thus, can be considered as a manifestation of what human creativity looks like.

Consequently, the problems attached to this practice are not entirely new. Retellings of literary works "have long prompted legal, cultural, and social backlash."<sup>397</sup> It can be argued that fanfiction writers are either lazy or lack talent as their works are primarily based on existing plots and characters. Alternatively, fanfiction can never be good and should not be taken seriously when authors are mostly teenagers who may be immature, obsess over worthless things, and do everything for fun. Another view is that fanfiction is all about poorly written pornography and therefore should never be seen as "fine art" in the public's perception.<sup>398</sup> In general, the fanfiction practice has existed outside of the professional channels, so it has been marked as "plebeian and unrefined."<sup>399</sup> However, the biggest concern of fanfiction communities have never been the public's rejection, but the challenges that come from the unclear legal status of fanfiction. The risk of being sued by copyright holders becomes more apparent when fanfiction is widely shared via online platforms.

As the amount of fanfiction has increased, the desire for fans to publish their stories more easily as well as access to fanfictions around the world has led to the growth of fanfiction websites. However, due to the popularity of fanfiction, authors started to take notice of the fact that someone else could exploit and modify their works. Sometimes the "fruits of their labour" can be modified in the ways that they are not comfortable with (e.g. erotic stories involving characters of the same genders, referred to as *slash*). Responses among

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<sup>395</sup> See section 2.2.2(a) (Idea is not a subject of copyright protection).

<sup>396</sup> @kyraneko, TUMBLR, post to *On Fanfiction*, Tumblr, Shades of Mauve, <https://shadesofmauve.tumblr.com/post/78692418841/on-fanfiction> (last visited Aug 19, 2020).

<sup>397</sup> Viva R. Moffat, *Borrowed Fiction and the Rightful Copyright Position*, 32 CARDOZO ARTS ENTERTAIN. LAW J. 839–890, 839 (2013).

<sup>398</sup> @AdmiralAkbar1, REDDIT, *Why do people seem to hate fanfiction so much?*, Reddit.com (2019), [https://www.reddit.com/r/FanFiction/comments/ahim9c/why\\_do\\_people\\_seem\\_to\\_hate\\_fanfiction\\_so\\_much/](https://www.reddit.com/r/FanFiction/comments/ahim9c/why_do_people_seem_to_hate_fanfiction_so_much/) (last visited Aug 19, 2020).

<sup>399</sup> *Id.*

creators are mixed. Some authors appreciate their fans' great interest and welcome fanfictions. Harry Potter series author J. K. Rowling is known for her friendly and supportive attitude towards fanfiction.<sup>400</sup> By contrast, some authors strongly show their objections to this practice. For example, American novelist George R. R. Martin – author of the Game of Thrones series – answered in one interview that “It (fanfiction) is not for me. I don’t want to read it and I would not encourage people to write it.”<sup>401</sup> Anne McCaffrey prohibited all fanfictions based on her series Dragonriders of Pern from 1992 to 2004 until she released a statement that she now can “relax some of those restrictions.”<sup>402</sup> In May 2000, the author of The Vampire Chronicles (TVC) – Anne Rice – posted to her website a message banning all fanfictions associated with her works. “I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters.”<sup>403</sup> Her statement was followed up with warning emails sent by her lawyers to several fanfiction websites, asking them to remove all fanfiction based on her works. As a result, TVC fanfictions were removed wholesale from most fanfiction platforms, including the largest website fanfiction.net.<sup>404</sup> Although neither Rice nor these authors go beyond the cease-and-desist messages, there has been always an assumption that fan writers may be sued because fanfiction is copyright infringement.

It may be the case that authors tolerate a certain level of unauthorised derivative work; however, fan writers may also face challenges from publishers who are not always consumer-friendly. Instead of being central to the copyright system, authors' interests “have counted for little.”<sup>405</sup> Currently, large corporations in the printing industry tend to boost a stricter copyright standard to protect their benefits (mainly via lobbying and political funding). This tension leads to conflicting interests between publishers and

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<sup>400</sup> The spokesman for the Christopher Little literary agency said: “JK Rowling's reaction is that she is very flattered by the fact there is such great interest in her Harry Potter series and that people take the time to write their own stories.”

<sup>401</sup> Dan Selcke, *George R.R. Martin: “I’m not a fan of fanfiction.”*, WINTER IS COMING (2019), <https://winteriscoming.net/2019/11/10/george-rr-martin-fanfiction-explanation/> (last visited Aug 21, 2020).

<sup>402</sup> Anne McCaffrey, *Fan Fiction Rules – The Worlds of Anne McCaffrey*, THE WORLDS OF ANNE MCCAFFREY (2004), <http://pernhome.com/aim/anne-mccaffrey/fans/fan-fiction-rules/> (last visited Aug 21, 2020).

<sup>403</sup> Gita Jackson, *It Used To Be Perilous To Write Fanfiction*, KOTAKU (2018), <https://kotaku.com/it-used-to-be-perilous-to-write-fanfiction-1826083509> (last visited Aug 21, 2020).

<sup>404</sup> *Id.*

<sup>405</sup> LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 45–46 (1991).



media consumers, particularly those who actively reuse media products to create new works. Furthermore, as mentioned in Chapter 3, digital technologies have raised significant concerns for authors and publishers that did not exist at the beginning of the printing press.<sup>406</sup> In the digital age, the threats to the publishing industry from unauthorised copying and distribution have arguably intensified because publishers have extremely limited revenue streams outside of selling books.<sup>407</sup> Widespread user-generated content such as fanfiction, therefore, causes tensions between professionally published work and the creations of fan writers.

The following section investigates the issue of copyright litigations by discussing the legal position of fanfiction as it stands today.

## **4.2. THE IMPLICATIONS OF COPYRIGHT IN FANFICTION**

Because they originate from the works of others, fanfictions are “always haunted by the spectre of copyright.”<sup>408</sup> To analyse the legality of fanfiction, this part aims to answer the three questions:

- Question 1: Are fictional characters protected by copyright law?
- Question 2: If fictional characters are copyrightable, does fanfiction violate the exclusive rights of the copyright holders?
- Question 3: Is fanfiction eligible for copyright exception and limitation?

This section takes into consideration the national laws of the US, the UK and Japan. Considering that most of the biggest media companies in the world site their operations in these three countries, they have the greatest influence on the global media industry.<sup>409</sup>

### **4.2.1. The first question: Are fictional characters protected by copyright law?**

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<sup>406</sup> Jacqueline Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 585–627 (2014).

<sup>407</sup> *Id.* at 595. (For example, the movie and music industries can benefit from a variety of tie-in markets such as streaming and distributing channels, merchandising, concert tours and album sales).

<sup>408</sup> Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 UNIV. PITTSBURGH LAW REV. 387–434, 395 (2008).

<sup>409</sup> WebFX Team, *The 6 Companies That Own (Almost) All Media [INFOGRAPHIC]*, WEBFX BLOG (2017), <https://www.webfx.com/blog/internet/the-6-companies-that-own-almost-all-media-infographic/> (last visited Sep 1, 2020).

Although fan writers may borrow settings and plot devices; fanfiction's central issue is the secondary use of existing characters.<sup>410</sup> Therefore, the crucial inquiry concerning the legality of fanfiction is whether fictional characters can be copyrightable.

Many scholars have expressed views as to what constitutes a protectable fictional character.<sup>411</sup> As law professor Leslie Kurtz states, fiction is “variable and elusive.”<sup>412</sup> There are many expressions of fictional characters, including visual manifestation (e.g. cartoon, Japanese animation), word portraits (e.g. books, novels), or performances (e.g. movies, TV shows). A fictional character consists of many elements, including name, physical appearance, personality, attitudes, background, and attire.<sup>413</sup> In the “universe” which is shaped by the authors, fictional characters have their tangible existences.<sup>414</sup> These existences may leave “footprints” in the mind of readers or viewers, which can be memorising, lively and more vivid than the real people. These imaginary appearances help readers to recognise a character in new settings. Fictional characters, therefore, are decisive elements in any literary and artistic works. Characters can be considered as the signatures of canon authors because two minds can't come up with such distinctive expressions in the same way. Because of the unique nature of fictional characters, most fanfictions are based on existing characters.

Traditionally, the subject matter of copyright protection is “literary and artistic works.”<sup>415</sup> No matter how well-established and valuable a fictional character is, it has never been classified as a complete “work.” Together with settings, plot devices, dialogues, fictional characters are elements of a literary work that is protected against copyright infringement

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<sup>410</sup> Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss Note*, 9 BOSTON UNIV. J. SCI. TECHNOL. LAW 433–470, 445 (2003).

<sup>411</sup> Stephen Richard Donnelly, *The Legal Protection of Fictional Characters in Intellectual Property: Protecting Creativity, Property Rights or a Monopoly*, 2 KINGS INNS STUD. LAW REV. 21–48 (2012); Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide Note*, 41 CONN. LAW REV. 921–962 (2008); Leon Kellman, *Legal Protection of Fictional Characters*, 25 BROOKLYN LAW REV. 3–19 (1958); Kenneth Raskin, *Copyright Protection for Fictional Characters*, 2 PERFORM. ARTS REV. 587–620 (1971); Jasmina Zecevic, *Distinctly Delineated Fictional Characters That Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection*, 8 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 365–398 (2005).

<sup>412</sup> Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. LAW REV. 429–526, 430 (1986).

<sup>413</sup> William H. Gass, *The Concept of Character in Fiction*, in ESSENTIALS OF THE THEORY OF FICTION 113–120 (Michael J. Hoffman & Patrick D. Murphy eds., 2005), <https://read.dukeupress.edu/books/book/959/chapter/146468/the-concept-of-character-in-fiction> (last visited Aug 21, 2020).

<sup>414</sup> Kurtz, *supra* note 412 at 430.

<sup>415</sup> See section 2.2.2(a).

by copyright provisions. Therefore, it can be assumed that fictional characters are only protected within the context of the stories in which they appear. Moreover, it is not always clear from the text of the laws that fictional characters should be protected separately from the story.

Countries have different opinions about granting copyright protection to fictional characters. The UK courts have shown their reluctance to recognise this consideration. In *Kelly v Cinema Houses, Ltd.*,<sup>416</sup> the court referred to Sherlock Holmes as an example of a well-recognisable fictional character that would probably not be protected separately from the work he is in. In handing down the court's decision, Maugham, J. explained:

“If, for instance, we found a modern playwright creating a character as distinctive and remarkable...as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion.”<sup>417</sup>

His comment can be interpreted that copyright protection probably is not granted for fictional characters outside of the texts in which they appear. The character Sherlock Holmes is remarkably distinctive and his name is representative of the modern mastermind detectives. However, he is only a character by virtue of the storyline in which he appears, because “Every creature of fantasy and art, in order to exist, must have his drama, that is, a drama in which he may be a character and for which he is a character.”<sup>418</sup> Tarzan may reside in the city of New York, but “he is not Tarzan if he was not previously raised by apes in the tropical jungle.”<sup>419</sup> Each character is inseparable from the context in which it appears, therefore “It is impossible to extricate a character cleanly from a plot which contains elements of its life history, and from the people, events and surroundings that have formed it.”<sup>420</sup>

In contrast, some countries do give copyright protection to fictional characters. In the United States, for example, fictional characters are protected both in the original work

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<sup>416</sup> *Kelly v. Cinema House, Ltd.* (1928-1935) MCC 326 367.

<sup>417</sup> *Id.*

<sup>418</sup> LUIGI PIRANDELLO & EDWARD STORER, *SIX CHARACTERS IN SEARCH OF AN AUTHOR* Preface (1997).

<sup>419</sup> Kurtz, *supra* note 412 at 431.

<sup>420</sup> *Id.* at 430.

and independently of that original work. The US courts have applied two tests to determine whether a fictional character is protected.<sup>421</sup> The first test (also known as the Nichols test), which is more widely used, indicates that only characters that are “sufficiently delineated” are covered by copyright. The second test, applied by the Ninth Circuit Court, requires characters to “constitute the story being told.” Each of these tests is broken down as follows:

- *The Nichols test*

The idea that fictional characters can enjoy independent copyright protection in the US departed from the decision of the United States Court of Appeals for the Second Circuit in *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (1930),<sup>422</sup> where the author of the play *Abie’s Irish Rose* sued the producers of the movie *The Cohens and the Kellys* for copyright infringement. Both those works are about feuding Irish and Jewish fathers whose children fallen in love and married. The court was in favour of the defendant because the plot was not new and what the defendant borrowed is no more than “prototypes have contained for many decades.”<sup>423</sup> Additionally, the main characters (Jewish boy, Irish Catholic girl, and their fathers) were “so faintly indicated,” making them stage properties of the story. The court asserted the division between idea and expression in the context of characters and plots, by addressing that a character that is poorly portrayed is not protectable (i.e. they are nothing more than ideas, which are not qualified for copyright protection).<sup>424</sup> In the court’s opinion, Justice Learned Hand delivered:

“Nor need we hold that the same may not be true as to the characters, quite independently of the “plot” proper, though, as far as we know, such a case has never arisen...It follows that the less developed the characters, the less they can be

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<sup>421</sup> Kenneth L. Port, *Copyright Protection of Fictional Characters in Japan: The Popeye Case - It’s Not Just a Mickey Mouse Affair*, 7 WIS. INT. LAW J. 205 (1988); Christine Nickles, *The Conflicts Between Intellectual Property Protections when a Character Enters the Public Domain*, 7 UCLA ENTERTAIN. LAW REV. (1999), <https://escholarship.org/uc/item/03z7d1h2> (last visited Feb 7, 2021); JANI MCCUTCHEON, *Works of Fiction: The Misconception of Literary Characters as Copyright Works* (2018), <https://papers.ssrn.com/abstract=3263155> (last visited Feb 7, 2021).

<sup>422</sup> *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930).

<sup>423</sup> *Id.*, at 122.

<sup>424</sup> *Id.*, at 121. (“copyright protection “cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”).

copyrighted; that is the penalty an author must bear for making them too indistinctly.”<sup>425</sup>

Judge Learned Hand’s reasoning has been known as the “sufficient delineation test,” requiring that characters can only be protected if the alleged infringement meets the following requirements.<sup>426</sup> First, the character as “originally conceived and presented must be sufficiently developed to command protection.”<sup>427</sup> Second, the alleged infringer must have copied “a specific development of a character and not merely a broader and abstract outline of that character.”<sup>428</sup> In short, this test can be interpreted as copyrightability of a fictional character is determined by how well-developed it is.

- *The “story being told” test*

The next major case proposed an even more restrictive test, which mandates that the characters constitute the “story being told” to be copyrightable. In *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (1954)<sup>429</sup> (also known as the “Sam Spade” case), instead of determining whether the character Sam Spade was sufficiently developed as the Second Circuit has done in *Nichols*, the United States Court of Appeals for the Ninth Circuit grants protection to a fictional character if it is the centre of the story. Judge Stephen reasoned:

“It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright.”<sup>430</sup>

The court did not find that detective Sam Spade significantly constituted the “story being told” because characters are “vehicles for the story told, and the vehicles did not go with the sale of the story.”<sup>431</sup> Because Sam Spade is a “typical protagonist,”<sup>432</sup> which means he is a stock character, he was not the subject to copyright protection.

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<sup>425</sup> *Nichols*, 45 F.2d at 121.

<sup>426</sup> *Id.* at 119.

<sup>427</sup> *Id.* at 121.

<sup>428</sup> *Id.*

<sup>429</sup> *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> Lawrence L. Davidow Davidow, *Copyright Protection for Fictional Character: A Trademark-Based Approach to Replace Nichols*, 8 COLUMBIA J. LAW ARTS 513, 544 (1984).

However, the “story being told” test has been often criticised.<sup>433</sup> First, despite the Ninth Circuit’s best intentions, there have been doubts about how to apply this test. It is not easy to determine whether “the character is only the chessman in the game of telling the story.”<sup>434</sup> The court’s decision in the Sam Spade case should follow as if a character is central to the story (e.g. main characters), then it will be copyrightable. However, the significance of a fictional character is not precisely evaluated by how many scenes it appears, or how many lines it carries in dialogues. Sometimes a simple thematic representation (e.g. characters’ choice, thoughts, words, actions) contributes significantly to the underlying story. These types of character should never be seen as the “mere vehicle for carrying the story forward.”<sup>435</sup> Therefore, if a character’s copyrightability is justified by its involvement in the story (i.e. how much of the story it tells), the outcome can be inaccurate.

Secondly, the Ninth Circuit prioritises the importance of plots (i.e. the overall story told by the scenes in the work)<sup>436</sup> over characters (i.e. name and the personality traits)<sup>437</sup> in literary or visual work. Law professor Nimmer describes this test as “much too restrictive...seeming to envisage a story devoid of plot, wherein character constitutes all or substantially of the work.”<sup>438</sup> In fashioning this “story being told” test, the court seems to miss the fact that it was the detective character- Sam Spade, not “a story of a chase or a jewelled statuette” that attracts the public’s interest.<sup>439</sup> Characters such as Sherlock Holmes, Tarzan, James Bond may be widely recognised and worthier than the storylines in which they appear.<sup>440</sup> Additionally, it is not always the case that characters are plot devices. For example, character-driven stories are focused more on the development of the characters (e.g. the inner transformation or interpersonal struggle of the characters)

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<sup>433</sup> Foley, *supra* note 411 at 929.

<sup>434</sup> E. Fulton Brylawski, *Protection of Characters - Sam Spade Revisited Part I*, 22 BULL. COPYR. SOC. USA 77–103, 87 (1974).

<sup>435</sup> *Warner Bros. Pictures v. Columbia Broadcasting System*, 216 F 2d 945 (13457).

<sup>436</sup> Plot and character analysis – VISION – Video School Online, VISION, [https://vision.wettintv.de/?page\\_id=210](https://vision.wettintv.de/?page_id=210) (last visited Aug 23, 2020).

<sup>437</sup> Brylawski, *supra* note 434 at 78. (“Much of the confusion surrounding the protectability of a character stems from a failure or unwillingness to recognize that a character actually consists of two separable and legally dissimilar parts.. The first is the character name, and the second a set of physical attributes and personality traits sometimes called a characterization or personality portrait.”).

<sup>438</sup> MELVILLE B NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 9.12 (2 ed. 2009).

<sup>439</sup> E. Fulton Brylawski, *Protection of Characters - Sam Spade Revisited Part I*, 22 BULL. COPYR. SOC. USA 77–103, 92 (1974); See also Cathy J. Lalor, *Copyrightability of Cartoon Characters*, 35 IDEA J. LAW TECHNOL. 497–532 (1994); Andrew J. Thomas & J. D. Weiss, *Evolving Standards in Copyright Protection for Dynamic Fictional Characters*, 29 COMMUN. LAWYER 9–15 (2012).

<sup>440</sup> Brylawski, *supra* note 436 at 77 (“Visual nature of certain cartoon characters has made those characters specific enough to be protected under copyright.”).

than the stories they make up.<sup>441</sup> In these works, the plots normally are very simple and need the protagonists to move forward.

Thirdly, it is noted that there are different treatments granted to two categories of fictional characters, which are literary characters (i.e. characters in the books, novels) and pictorial characters (i.e. cartoon characters). Because pictorial characters are created with graphic works, providing precise descriptions of their visual appearances, personalities and manner of movement; copying is easily detected by the graphic images alone. Meanwhile, literary characters are less concrete, given that their “appearances” are more abstract.<sup>442</sup> Therefore, courts have preferred to protect characters that have a visual manifestation than to protect characters that are purely word-portrayed, residing in the reader’s imagination.<sup>443</sup> It is ironic that literary characters, some of which are the oldest and greatest accomplishment of human civilisation, have received less copyright protection than cartoon characters, which Judge Hand dismissed as “silly pictures.”<sup>444</sup>

Japan’s copyright law also grants copyright protection to fictional characters. *Hasegawa v. Tachikawa Bus K.K., I Chosakuken Hanreishu* (as known as the *Sazae-san* case) was the first case where fictional characters are granted independent protection from the story they make up.<sup>445</sup> Adopting a similar approach to the US’s in *Warner Bros* case, the Tokyo court determined: “if a person were to look at the defendant’s buses and in his/her mind immediately connect those figures on the bus with the plaintiff’s copyrighted figures, that would sufficiently establish copyright infringement.”<sup>446</sup> Both American and Japanese copyright law share a key feature that a fictional character should be protected outside the context it is in if it is “sufficient enough.” However, the corresponding question which is how “sufficient” a fictional character should be to make it a subject matter of copyright has remained unanswered. It is evident that within the domestic copyright framework,

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<sup>441</sup> Character-Driven Vs. Plot Driven: Which is Best, NY BOOK EDITORS, <https://nybookeditors.com/2017/02/character-driven-vs-plot-driven-best/> (last visited Aug 23, 2020).

<sup>442</sup> Kurtz, *supra* note 412 at 451.

<sup>443</sup> Brylawski, *supra* note 434 at 84.

<sup>444</sup> *National Comics Publications v. Fawcett Publications*, 191 F 2d 594 (1951), at para. 630 (“In the case of these silly pictures nobody cares who is the producer – least of all, children who are the chief readers –; the “strips” sell because they amuse and please, and they amuse and please because they are what they are, not because they come from “detective.”).

<sup>445</sup> *Hasegawa v. Tachikawa Bus K.K., I Chosakuken Hanreishu* 721 Tokyo District Court (1976) (An official English translation of this case does not exist. Therefore, I refers to translation provided by author in Port, *supra* note 423).

<sup>446</sup> *Id.* at 215.

the legal doctrines for the protection of fictional characters “are rather inconsistent, unclear and quixotic.”<sup>447</sup>

In summary, the tests for copyright protection of fictional characters are undertaken on a case-to-case basis in what Doctor McCardle describes as “something of an irregular guessing game.”<sup>448</sup> However, although the tests have remained uncertain, fictional characters do still receive copyright protection, at least in the most influential countries in the field of media – the US, the UK, and Japan. Therefore, fanfiction authors need to take into account the precise copyright holders’ exclusive rights upon which their works infringe. Most fanfictions contain elements from copyrighted movies, television shows and novels, which are the subject matter for protection under the letter of law.<sup>449</sup> The next question should be if fictional characters are copyright protected, whether fanfiction writers violate copyright holders’ rights?

#### **4.2.2. The second question: If fictional characters are copyrightable, does fanfiction violate the exclusive rights of the copyright holders?**

To file a claim of copyright infringement in the US, a copyright holder must present to the court the two elements: “(1) ownership of a valid copyright, and (2) infringement of that copyright.”<sup>450</sup> In the UK, right holders can file legal proceedings through the courts with (1) the registration certificate and (2) evidence of the infringement that occurred (e.g. a copy of the infringing work, a copy of the original work, relevant documents referring to the work before the date of infringement).<sup>451</sup> Meanwhile, copyright holders in Japan must prove (1) that they own the copyright to the work at issue, and (2) that the defendant reproduced or otherwise utilised the copyrighted work to claim copyright protection.<sup>452</sup>

On one note, the first element is rarely challenged in the case of fanfiction. A fanfiction writer never pretends that the borrowed materials (mostly fictional characters) are his or hers, and therefore mislead readers about the real owners of the canon work. Therefore,

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<sup>447</sup> Brylawski, *supra* note 434 at 87.

<sup>448</sup> McCardle, *supra* note 410 at 448.

<sup>449</sup> *Id.* at 448.

<sup>450</sup> Copyright Act of 1976, *supra* note 136, § 503.

<sup>451</sup> In the UK, copyright holders can opt to mediation to resolve the issue before starting court proceeding. The mediator's job is to help both parties work out possible solutions and come to an agreement.

<sup>452</sup> Copyright Act of 1970, *supra* note 138, art. 114(3).



courts apply the majority of their reasonings to determine whether fanfiction writers infringe a particular right (economic rights or moral right) of the copyright owner.<sup>453</sup>

#### **a. Economic rights**

Because fictional characters are assumedly warranted copyright protection separated from the story they are in, reusing copyrighted materials (e.g. names, dialogues, personality traits) can lead to a copyright infringement based upon reproduction.<sup>454</sup> Besides, when a fanfiction author distributes his or her story on the Internet and allows the public to access it, he or she has violated the rightsholder's exclusive right in the distribution of their works. Finally, fan authors also typically commit infringement upon the owners' right to authorise either derivative works (in the US and Japan) or adaptation (in the UK).<sup>455</sup> Fanfiction generally can be classified as derivative work (or adaptation, depending on the national laws). And it is the exclusive right of copyright owners to translate/adapt or authorise someone to do so.

Because the three activities fall into the category of exclusive rights of copyright holders, fan authors are obligated to obtain consent from the rightful owners. However, it is unlikely that fans have reached out to canon authors to get their permission.<sup>456</sup> Consequently, fanfiction authors may find themselves on the opposite side of the law. Implied consent sometimes can be made if the copyright owners are aware of the fanfiction writing and have either showed their encouragement or simply ignorance to let fans continue. For example, S. E. Hinton – the legendary author of “The Outsiders” – admitted on her Twitter to be a Supernatural fanfiction author herself and claimed to enjoy some of the fanfictions based on her work: “I’ve written three or four stories for Supernatural, which is my favourite TV show” and “Two of the best stories I’ve ever read in my life, published or not, were fanfiction. One was actually an Outsiders story. The writing was gorgeous. Really beautiful — the way the writer conveyed the

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<sup>453</sup> See section 2.2.2(c).

<sup>454</sup> Samantha S. Peaslee, *Is There a Place for Us: Protecting Fan Fiction in the United States and Japan*, 43 DENVER J. INT. LAW POLICY 199–228, 210 (2014).

<sup>455</sup> See section 2.2.2(c).

<sup>456</sup> Peaslee, *supra* note 454 at 211.

characters. (...) Fanfiction can make me cry as easily as any other story.”<sup>457</sup> Without such consent, writing fanfiction may constitute copyright infringement.

## **b. Moral rights**

As explained in section 2.2.2(c), fanfiction also can be considered to be copyright infringement due to a violation of authors’ moral rights in Japan and the UK, but not in the US. An author cannot claim copyright infringement under the umbrella of moral rights when they are in the US. However, it is granted by the UK and Japan copyright laws that an author has the right to integrity to their work. In this sense, authors are capable of having the entire control of their works, including how readers interpret them. However, the level of modification courts uses to justify alleged acts are different in the US and Japan.

- Article 20 of the Copyright law of Japan awards authors the right to integrity, which allows the author of a work to “preserve the integrity of that work and its title, and is not to be made to suffer any alteration, cut, or other modification thereto that is contrary to the author's intention.”<sup>458</sup> It means that any type of unauthorised change of original work, regardless of the level of transformation or non-commercial aspect of it, would infringe the author’s right to integrity. Fanfiction constitutes copyright infringement under Japanese copyright law.
- However, in the UK, fanfiction writers only violate the author’s moral rights if their fanfiction is “amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.”<sup>459</sup> This consideration only applies to fanfiction with explicit contents (e.g. pornography, violence, hate speech). Merely writing their own stories by using existing characters does not infringe on the right of integrity in the UK. So, the answer to whether fanfiction writers violate authors’ moral rights depends on the content of their work.

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<sup>457</sup> Emma Whitford, *Lev Grossman, S.E. Hinton, and Other Authors on the Freedom of Writing Fanfiction*, VULTURE.COM (2015), <https://www.vulture.com/2015/03/6-famous-authors-whove-written-fanfiction.html> (last visited Feb 7, 2021).

<sup>458</sup> Copyright Act of 1970, *supra* note 138, art. 20(1).

<sup>459</sup> CDPA, *supra* note 143, § 80.2.(b).

However, aggressive copyright claims from copyright holders might look like a fight over authorship. To support their argument, authors may proclaim that they are the only and true creators of the work. Therefore, they deserve to have the entire control over “the universe” they have invented, including the characters. However, this argument has three major problems.

First, retelling a story is a tradition of human beings.<sup>460</sup> It is impossible to stop someone from thinking, imagining, and explaining existing things in different ways. What resides in someone’s imagination (i.e. idea) cannot be controlled and is not the subject of copyright protection. However, if the audience put their interpretation in a form (e.g. write them down), then he or she is creating a derivative version based on the original work. This act can potentially infringe the author’s rights if the fan’s writing is sufficiently similar to the existing work. But if fan creators truly explain the message that the canon authors give in their works in completely different ways then this would fall outside of the canon authors’ expression. In this case, they significantly transform the original work into a new work, which is not copyright infringement.

Secondly, a literary or artistic work always delivers a message from its author to readers. And every word of a novel may create images in the reader’s mind. In this sense, authors cannot control what happens in someone’s mind in the same way that they could not protect their ideas. Even when that audiences’ perceptions of the works may not align with the canon authors’ intents.

Furthermore, when an author first conceives the idea for his or her book, he or she might have believed writing it would help to fulfil a sense of personal purpose, which is telling his or her personal story. And such work promises that readers many learn and understand such stories. Otherwise, he or she should have kept the book for him or herself rather than releasing it to the public. As Jacqueline Lai Chung remarks, “a character may represent one person to one reader and another person to another reader. Therefore, although the author has in a sense given birth to her character, she alone will not be able to capture the entire significance of that which she has created.”<sup>461</sup>

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<sup>460</sup> See section 1.1 (retelling story is one of the earliest practice of human being).

<sup>461</sup> Jacqueline Chung, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WILLIAM MARY LAW REV. 903, 905 (2007).

It is noted that such misconception is mainly because of their perceptions, not because the law is unclear. Copyright encourages innovations and creativity for the benefit of society by limiting the rights of authors.<sup>462</sup> However, some authors seem to mistake what is defined in the law (the authorship) to what they actually own by virtue of the author of the work (the ownership). In other words, they believe authors have entire control over others' perceptions of their works. This misconception is shown by the "incident" where American novelist Anne Rice publicly criticised all the negative reviews for her book - *Blood Canticle* - on Amazon. In her response, Rice said that readers who negatively commented on her work were "interrogating this text from the wrong perspectives" and using Amazon as a platform to spread "falsehood and lies."<sup>463</sup> By associating constructive reviews with lies, she believed there could be only one correct interpretation of her work. The same message was also sent by Laurell K. Hamilton (the author of *Anita Blake: Vampire Hunter*), in which she asked her readers to simply give up on her books instead of criticising her way of developing characters and plots. She emphasised the bond between her work and herself; "The character aren't real to you. They are real to me, and to a lot of other people."<sup>464</sup>

In essence, even though the laws protect authors' moral rights, it is very difficult to justify whether fanfiction infringes upon the copyright owner's moral rights. Moreover, it is always complicated to measure the author's hurt feelings or lost reputation caused by an alteration to his or her work. It seems to be unfair to police audience interpretation of the works they have read.

#### **4.2.3. The third question: Is fanfiction eligible for copyright exception and limitation?**

In most cases, fans will want to raise a defence to immunise themselves from liability for copyright infringement. Because Chapter 2 of this dissertation already presents contents of copyright protection exception and limitation in the US, the UK and Japan's copyright

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<sup>462</sup> See section 2.2.2(c).

<sup>463</sup> Interrogating the text from the wrong perspective - Fanlore, FANLORE, [https://fanlore.org/wiki/Interrogating\\_the\\_text\\_from\\_the\\_wrong\\_perspective#cite\\_note-7](https://fanlore.org/wiki/Interrogating_the_text_from_the_wrong_perspective#cite_note-7) (last visited Feb 17, 2021).

<sup>464</sup> Dear Negative Reader - Fanlore, FANLORE, [https://fanlore.org/wiki/Dear\\_Negative\\_Reader](https://fanlore.org/wiki/Dear_Negative_Reader) (last visited Feb 17, 2021).

systems, this part only focuses on the implications of the US' Fair Use, the UK's Fair Dealing doctrines and Japanese' copyright provision on fanfiction cases.

**a. The Fair Use test**

When determining a particular use as “fair,” courts have to weigh the four factors of the Fair Use test which were described in section 2.2.2(d). However, in the case of fanfiction, this test illustrates that copyright holders may have “a very thin justification” to stop fans from writing and sharing fanfiction.<sup>465</sup>

Firstly, there is not the slightest doubt that fanfiction is non-commercial by nature. As explained in section 4.1, fans write fanfiction for entertainment purposes, as an activity of popular culture. Fanfiction writers' ultimate purpose of writing fanfiction is “to satisfy innate desires,”<sup>466</sup> not to make a living of what they write. Fanfictions can be easily found online and viewers don't need to pay any fee to access them. Besides, there has been also no clear-cut answer for calculating damages if copyright holders decide to take further legal actions upon fanfiction. It is unlikely that a fan will stop buying canon works just because they find fanfiction is worth reading. By contrast, it is believed that fanfiction is an effective promoting channel for original work.<sup>467</sup> Fanfiction keeps fans attached and interested in the original works when waiting for the next part to be released.<sup>468</sup> By taking legal action against fanfiction writers, copyright holders face the risk of alienating some of their most loyal fans and wiping out an entire community that supports their works.

Another mean of protection potentially available to fanfiction writers under the first factor of Fair Use is “parody,” set forth by the Supreme Court in *Campbell*. In its opinion delivered by Mr Justice Souter, the court defined that parody as “a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way to make them appear ridiculous.”<sup>469</sup> In general, unauthorised secondary use of existing materials can be

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<sup>465</sup> Michelle Chatelain, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine Comment*, 15 TULANE J. TECHNOL. INTELLECT. PROP. 199–218, 206 (2012).

<sup>466</sup> McCardle, *supra* note 410 at 451.

<sup>467</sup> Mayer-Schonberger and Wong, *supra* note 66 at 11.

<sup>468</sup> *Id.* at 8.

<sup>469</sup> *Campbell*, 510 U.S. at 588 (“We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under §107”).

recognised as a parody if it creates a new work that delivers social commentary within a humorous framework.<sup>470</sup> As presented in section 2.1, fanfiction can be very diverse in terms of length, alteration, genre, and content. However, evaluating whether a work is parodic is a “highly subjective” task,<sup>471</sup> because the artistic or creative nature of literary and artistic work can be very abstract to justify. In *Tanya* case, Russian author Yemets argued that his novel – Tanya Grotter – does not constitute piracy. It is actually a parody of J. K. Rowling’s work because he incorporated much material from Russian culture into the iconic series.<sup>472</sup> However, this argument was rejected by the Dutch court, reasoning that the Tanya Grotter series is copyright infringement. Therefore, the parodic nature of fanfiction again stays as a matter of each court’s discussion.<sup>473</sup>

Applying the second factor in the fanfiction context, most original works are creative and well-known. On one hand, canon authors may argue that their works are creative and thus, the second factor should weigh in their favour. On the other hand, fan authors may defend that because canon work has been published, it should receive less protection than unpublished ones.

The third factor considers the amount and substantiality of the portion of the borrowing materials in the infringed work. In the literary sense, fanfiction is derivative work; otherwise, it would have very little value. Fanfiction provides new interpretations and insights to the canon work, and this purpose would never be achieved if fanfiction writers “were unable to appropriate distinctive elements of the original works, such as setting, characters, and plots.”<sup>474</sup> However, fan writers would have to prove that their fanfictions do not contain more copyrighted materials than it is necessary to distinguish them from the original works.<sup>475</sup> For example, blatant copying of exact texts from a book “to get

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<sup>470</sup> Alvin Deutsch, *The Piracy of Parody*, 12 ENTERTAIN. SPORTS LAWYER 17–20, 17 (1994).

<sup>471</sup> McCardle, *supra* note 410 at 455.

<sup>472</sup> Tanya Grotter i Magicheskii Kontrabas (Tanya Grotter and the Magic Double-Bass) is a series of Russian writer Dmitri Yemets. Published in Moscow, the story about orphaned girl with magic powers is deemed as a fanfiction of Harry Potter series. J.R. Rowling and Time Warner – the copyright holders of Harry Potter – successfully sued Yemets in the Netherlands (a targeted publication of the claimants). However, Tanya is legally published in Russia after Rowling and Time Warner failed to obtain a cease and desist order in this country.

<sup>473</sup> See e.g. Ian Dooley, *Harry Potter Duels Tanya Grotter: The Magic of International Copyright*, COTSEN CHILDREN’S LIBRARY (2018), <https://blogs.princeton.edu/cotsen/2018/06/tanya-grotter-and-the-magic-of-international-copyright/> (last visited Aug 27, 2020); Lousie Jury, *Russia’s Tanya Grotter “copies Potter’s magic”*, THE INDEPENDENT (2002), <http://www.independent.co.uk/news/world/europe/russias-tanya-grotter-copies-potters-magic-133266.html> (last visited Aug 27, 2020).

<sup>474</sup> Chatelain, *supra* note 465 at 210.

<sup>475</sup> *Campbell*, 510 U.S. at 598. See also *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 at 253; *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) at 438-439.

attention or to avoid the drudgery in working up something fresh” would favour the original writers.<sup>476</sup> If the borrowed texts are significant to the context to which the fanfiction writer wants to refer, then the borrowing would be deemed as necessary to the purpose of the fanfiction.<sup>477</sup> For instance, quoting the famous line of conversation between Sherlock Holmes and Doctor Watson in *The Sign of the Four* episodes: “When you have eliminated the impossible, whatever remains, however improbable, must be the truth”<sup>478</sup> would not constitute significant copying. Even though the line is specific and widely known (also known as the “Holmesian fallacy”), the character Sherlock Holmes uses this phrase numerous times in the original work so that it constitutes a personal trait of the character.

Lastly, the court determines whether a derivative work is a fair use by looking at whether fanfiction could take over the market of the original by serving as a substitute for the original work.<sup>479</sup> As mentioned above, fanfiction is written to maintain fans’ interest in the canon work and keep them waiting for the new release. And it is highly doubtful that someone will stop buying canon works if he or she finds fanfiction is extremely good.<sup>480</sup> Compare to the other types of fanworks like fan subtitled or fan video, fanfiction does not stand a chance of substituting canon work, regardless of how well-written and fascinating it is. Copyright holders that attempt to sue fan writers may find themselves up against the uncomfortable reality that “fanfiction can actually help their work remain popular and relevant.”<sup>481</sup> Instead of taking legal actions, they may settle in a friendly relationship with their fans. Again, this issue is very much subject to the attitude of copyright holders which are discussed in section 4.1.

#### **b. Fair Dealing doctrine**

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<sup>476</sup> *Id.* at 580.

<sup>477</sup> *Id.* at 579.

<sup>478</sup> Arthur Conan Doyle, *The Sign of the Four*, in *THE WORKS OF ARTHUR CONAN DOYLE INCLUDING: ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES, A STUDY IN SCARLET, THE SIGN OF THE FOUR, THE REFUGEES, ROUND THE RED LAMP, TRAGEDY OF THE KOROSKO, AND THE WHITE COMPANY*. 111, 111 (1890).

<sup>479</sup> Chatelain, *supra* note 465 at 211.

<sup>480</sup> Even though there were cases where copyright infringement rises relating to secondary authors of sequels or spinoffs, it was mostly that the original work were picked up by the producers with the copyright holders’ permissions. The concern with respect to potential lawsuits is to do with the unauthorised sequels, parodies, or even fanfiction of the original works.

<sup>481</sup> Peaslee, *supra* note 454 at 213.

Under the U.K copyright law, fanfiction may fall into the category of parody, which has itself been called a recognised part of English culture.<sup>482</sup> As presented in Chapter 2, the key point of parody exception in relation to copyright is that any secondary use must: (1) be fair dealing, (2) be a parody, pastiche or caricature (including evoking the original work while being different and, in respect of a parody, be funny), and (3) balance the rights of rights holders with the right to freedom of expression.<sup>483</sup>

First, fanfiction is technically written for the purposes of criticism or review because it contains readers' interpretation of the work. If fans do not agree with the original ending, they can change it in their fanfiction. Or fans can rewrite the plots or settings that they believe the characters are supposed to act or feel.

Secondly, fanfiction has to satisfy certain characteristics to be considered a parody.<sup>484</sup> Fan authors write fanfiction as an attempt to change the ending or the entirety of the canon work. However, it is not easy to associate fanfictions with works that are "funny, mock[ing], or witty."<sup>485</sup> There is not the slightest doubt that fanfictions are entertaining reads. But fanfiction is rarely deemed to ridicule the canon work, as the former is inspired by the latter. Even in the cases where canon authors may find themselves uncomfortable with fanfictions' content, fanfiction authors have never meant to shame or denigrate their favourite works and authors. From this point of view, it is uncertain that works of fanfiction can be classified as parodies.

Finally, the parody exception requires a good balance between the interests of rights holders and the freedom of expression of the public. This is also the primary goal of any national copyright law, not limited to the UK's Fair Dealing doctrine. Broadly speaking, there is no explicit criterion to justify a secondary use as "balanced," which leaves the definition of such balance to national laws. It is for national courts to determine whether such balance has been achieved. It is the fan creators' responsibility to demonstrate that they have acted fairly in order to rely on the parody exception. In other words, they must show that their works are created for entertaining purposes, not commercial interest. The rest of the case depends on the judges' decisions. And again, fanfiction presents itself as

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<sup>482</sup> Iona Silverman, *The Parody Exception Analysed United Kingdom: Parody*, 254 MANAG. INTELLECT. PROP. 26–30, 26 (2015).

<sup>483</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, § 30A.

<sup>484</sup> C-201/13 - *Deckmyn and Vrijheidsfonds*.

<sup>485</sup> Silverman, *supra* note 482 at 28.



a subject of “hit or miss” protection where judges apply the parody exception on a case-by-case basis.

### c. Japan’s copyright law

In Japan, the impact of copyright in relation to fanfiction is significantly different from that of the other two countries. As a practical matter, it has been very rare for copyright holders to challenge fan creators for unauthorised copying of their materials (e.g. fanfiction, fan arts, fan videos, etc.).<sup>486</sup> There are two reasons behind the right owners’ tolerance to fan activities. First, most Japanese creators run on “tight budgets,” which do not allow them to pursue costly lawsuits. For example, comic artists – which are called *mangaka* in Japanese – reportedly have been paid very little. A background artist only earns approximately \$1,000 a month, which makes living in the world’s most expensive cities a real struggle.<sup>487</sup> Meanwhile, publishers do not see fanbases and any associated activities as threats to their sales. Instead, fanworks in Japan offer “an enormous and visible industry that has matured alongside the industry of original content production.”<sup>488</sup> Consequently, instead of being condemned, fanworks are encouraged, celebrated and enjoyed publicly in Japan. We can take *doujinshi*, a self-published fan artwork, as an example. The existence of *doujinshi* in other countries would fuel copyright infringements. However, in Japan, they are widely recognised as legal.<sup>489</sup> Japanese Prime Minister Shinzo Abe even made a statement during one of the Trans-Pacific Partnership trade agreement negotiations that *doujinshi* should be treated as parodies in a legal sense. Fanfiction, in his word, “does not compete in the same market as the original works they based on” and do not harm copyright holders’ benefits.<sup>490</sup>

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<sup>486</sup> Peaslee, *supra* note 454 at 214.

<sup>487</sup> Jeffrey Hays, *Manga Industry in Japan: Artists, Schools and Amateur Manga*, *FACTS AND DETAILS*, <http://factsanddetails.com/japan/cat20/sub135/item2891.html> (last visited Aug 28, 2020).

<sup>488</sup> Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing can Teach Us about the Use of Strategic Selective Copyright Enforcement Comment*, 21 *TEMPLE ENVIRON. LAW TECHNOL. J.* 131–154, 146–147 (2002).

<sup>489</sup> Maxwell Freedman, *Doujinshi: How Fan Fiction Became the Lifeblood of the Manga Industry*, CBR (2020), <https://www.cbr.com/doujinshi-fan-fiction-became-lifeblood-of-manga-industry/> (last visited Aug 29, 2020).

<sup>490</sup> spartanchef, *Japanese Prime Minister Shinzo Abe: Doujinshi safe under TPP*, *SGCAFE* (2016), <https://sgcafe.com/2016/04/japanese-prime-minister-shinzo-abe-doujinshi-safe-tpp/> (last visited Aug 29, 2020). However, Prime Minister Abe’s statement above is necessarily understood as: doujinshi should be treated as an exception to copyright infringement, rather than a parody. As mentioned in Section 2.2.2.(d), neither parody nor satire is included in Japanese law’s L&E provisions. Consequently, there is no expressed provision to allow parody in Japanese Copyright law.

Foreigners who attempt to press charges in Japan may find themselves in a situation where there are not many defences available to them to prohibit fanfiction. Not having an explicit Fair Use doctrine like the United States, Japan's 1970 Copyright Act offers a "laundry list" of permitted use of copyrighted materials (Section 2.2.2(d)). This strategy makes Japanese law similar to the United Kingdom's Fair Dealing exhaustive list. For instance, non-profit uses are included in this list.<sup>491</sup> Japanese courts may decide that free fanfiction on the Internet fits these exceptions.

In summary, the copyright implications raised by fanfiction vary from country to country. As mentioned above, when infringement actions are brought in the United States or the United Kingdom, the Fair Use and Fair Dealing defences would probably impede a court finding of infringement. While no such explicit defence exists in Japanese copyright law, it seems that Japanese courts and the public take a more relaxed approach toward fan works, including fanfiction. Moreover, the scope and exception of copyright protection have been left to each court's interpretation. In the US this was made explicit by the Supreme Court in *Campbell*, the Court explaining that fair use factors must be applied to each situation on a "case-to-case basis." So, there is a possibility that this test is applied inconsistently by courts. For example, while the United States Court of Appeals for the Sixth Circuit in *Campbell* held that the second factor of the Fair Use test should disfavour the defendant because "their song incorporated the best-known pieces of the canon work," the Supreme Court explicitly dismissed this argument.<sup>492</sup> The court stated, "If the defendant has copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through."<sup>493</sup> Or the UK courts may find it extremely complicated when associating a fanfiction with a particular category of fair dealing list. In other words, fanfiction is not precisely either parody, pastiche, or caricature.

#### 4.3. CONCLUSION

This chapter has considered the copyright implications that have followed the ability to distribute fanfiction all over the world with an explosive speed and brought unwanted attention from copyright holders. Although fanfiction appeared well before the Internet,

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<sup>491</sup> Copyright Act of 1970, *supra* note 138, arts. 30, 38.

<sup>492</sup> *Campbell*, 510 U.S. at 588.

<sup>493</sup> *Id.* at 588-89.

copyright holders today see fanfiction as a potential threat to their economic position and reputation. In this circumstance, members of fanfiction communities – especially fanfiction writers – should ask themselves how to avoid the risk of copyright litigation. As discussed in the next chapter, fans have developed certain community-based norms, intended to guide members in keeping their activities from copyright infringement claims.

On the other hand, copyright experts and scholars have shown that existing copyright enforcement has fallen behind the development of new forms of media.<sup>494</sup> Nowadays fanfiction is written and shared by many online fanfiction communities, which involves millions of Internet users all around the world. It has not mattered whether fanfiction is legal. The ultimate question should be how to enforce courts' decisions. If fanfiction constitutes copyright infringement, would it be possible to enforce copyright against millions of fanfiction writers and readers? The answer is no. The practical matter is that, as long as members of fanfiction communities are not trying to commercialise fanfiction or making claims for authorship, copyright holders likely will not take legal action. In other words, community-based norms may dissuade copyright holders from litigation, meaning fans can continue to write, share, and enjoy fanfiction. Should copyright law be stricter than it is now? The answer, in my opinion, would be “no;” fanfiction and similar fan works “are only increasing and it would be best for the law to move with them rather than fight against them.”<sup>495</sup> To do this, legislators should incorporate informal rules developed by fanfiction communities into the existing formal legal framework. This approach is examined in the next two chapters. Chapter 5 presents the interplay between different norms which members of online fanfiction communities have to navigate when participating in online activities. Chapter 6 then conducts empirical research on specific norms developed and enforced by community members, and how these norms can support fans to elaborate on the characters they love without hurting the exclusive rights of copyright holders.

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<sup>494</sup> See section 3.1.

<sup>495</sup> Peaslee, *supra* note 454 at 227.

## CHAPTER 5

### INTERPLAY OF DIFFERENT NORMS IN ONLINE FANFICTION COMMUNITIES

Chapters 3 and 4 addressed the fact that existing copyright enforcement mechanisms, which are prescribed by the law, fall behind the evolution of technologies. Alternatively, online fanfiction communities rely on informal enforcement mechanisms to channel their members' behaviours as well as to protect the communities' survival and central values.

The first part of this chapter introduces different norms, which members of online fanfiction communities have to navigate when participating in online activities. The second part summarises the informal norm enforcing mechanism, which has been addressed in a large volume of published studies, focusing on the two most common elements: sanctions and internalisation. This chapter aims to reveal the possibility of using community-created norms as alternatives to legal norms in contexts when the legal status of fanfiction occupies a "legal grey area" of copyright law. And the informal mechanisms enforcing community-based norms are possibly more effective than the formal mechanisms imposing rules from external sources.

#### 5.1. SOCIAL NORMS IN ONLINE FANFICTION COMMUNITIES

One of the obstacles that online communities must face is the necessity of effective regulations that govern members' activities.<sup>496</sup> Regulations are behavioural standards designed by communities to limit inappropriate behaviour and its effects, as well as to encourage voluntary compliance.<sup>497</sup>

There are different types of regulations in tailoring online users' behaviour. Professor Lessig's "theory of dot", as presented in section 1.2.1, suggests four pillars of regulation of the Internet (*Market, Architecture, Law, and Norms*). Applying this theory in the context of online fanfiction communities, fans may find themselves in situations where a variety of norms are applicable. For example, LiveJournal users have to comply with different norms: legal norms (i.e. rule from a law), contractual obligations which come from different sources (e.g. internet service contracts, LiveJournal's Terms of Service),

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<sup>496</sup> Sara Kiesler et al., *Regulating Behavior in Online Communities*, in BUILDING SUCCESSFUL ONLINE COMMUNITIES EVIDENCE-BASED SOCIAL DESIGN 179 (Robert E. Kraut & Paul Resnick eds., 2012).

<sup>497</sup> *Id.*

and possibly social norms, which have been created by the online community they participate in. Understanding the interplay between these norms in regulating the members of online fanfiction communities is critical to study the informal copyright enforcement mechanisms.

It is also necessary to emphasise that the term “online fanfiction communities” used in this thesis refers to any online community that is dedicated to creating and distributing fanfiction, regardless of the online spaces they use. The members interact with each other via websites (e.g. the website [www.harrypotterfanfiction.com](http://www.harrypotterfanfiction.com)), platforms (e.g. Harry Potter blogs on Livejournal.com), social media networks (e.g. Facebook groups about Harry Potter), or mailing lists (mainly in small groups of fans). The following sections break down in greater detail the layers of norms with which a member of online fanfiction communities must comply, regardless of the platform they operate on.

#### 5.1.1. Legal norms

Legal norms are recognised in three primary sources of law: statutory law (i.e. “formulated general rules enacted by the authorities”), case law (i.e. rules embodied in the judicial precedents), and international treaties.<sup>498</sup> Statutory and case law belong to state-based legal systems applicable to individuals who reside in particular territories, whereas international law applies to all nations. For example, making derivative works without the permission of copyright holders may constitute copyright infringement if the national laws indicate so. In Vietnam, if a person modifies, mutilates, or distorts canon work in whatever form prejudicial to the canon authors’ honour and reputation, that person is liable for their actions.<sup>499</sup>

Section 3.1.1 showed that the borderless Internet has brought online activities to a new level. A copyright infringement now is not only the subject matter of a particular national law but also of the international copyright treaties like the Berne Convention and the TRIPS Agreement. When a fan intends to borrow or reuse copyrighted materials and share his or her work online, there are different legal norms to be considered before doing so.

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<sup>498</sup> Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law versus Statute Law: An Evolutionary Comparison*, 37 J. LEG. STUD. 379–430, 379–380 (2008).

<sup>499</sup> Law on Intellectual Property of Vietnam (No. 50/2005/QH11), art 19.4.

First, copyright owners are given protection in their home countries and any violators are liable for breaking the copyright law regulations of such territories. For example, Vietnamese organisations and individuals have the right to bring a case to any court in Vietnam if their canon works are modified, mutilated or distorted in “whatever form prejudicial to their honour and reputation”.<sup>500</sup> So if a fan recreates a canon work in a way that the copyright holder finds offensive, the latter may take legal action.

Second, the global nature of modern society and the rise of the Internet – which transcends national borders – have now made it critical to protect copyrights in foreign states. As a result, an international system of copyright enforcement exists, established by international copyright treaties. With the principle of national treatment,<sup>501</sup> a fan creator who resides in the United States may be sued if he or she borrows and reuses copyrighted materials without the authorisation of a foreign canon author.

However, as previously addressed in Chapter 3, the enforcement of copyright law in the digital era is extremely complicated. The reason is that sometimes it can be impossible to connect the alleged infringement to a specific jurisdiction or applicable law.

### 5.1.2. Contractual obligations

After the spread of the Internet and personal computers, fanfiction communities around the world have practised their activities on many online platforms: AOL, LiveJournal, Myspace, Facebook, Tumblr, etc. To create an online fanfiction community, fans have to select a platform. There are two types of community platform which are owned and free platform. The former involves many steps from buying a host, setting up the site (e.g. designing, coding, testing), posting the content, recruiting community members, to developing rules to monitor all their activities. This approach can be particularly challenging if the owners have no prior experience in web development. Whilst the latter only requires the community founders to use sub-grouping functions that are available on some platforms (e.g. Facebook, Reddit, Tumblr, LiveJournal). For example, Facebook

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<sup>500</sup> *Id.*

<sup>501</sup> The obligation of national treatment makes an appearance in all five of the major active multilateral treaties concerning copyright and related rights, including the Bern Convention (Article 5(1), 5(3)), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Article 2, 4, 5, 6), the Agreement on Trade-Related Aspects of Intellectual Property Rights (Article 3), the WIPO Copyright Treaty (Article 3) and the WIPO Performances and Phonogram Treaty (Article 4).

has the “Page” and “Group” features allowing users to form a group, have real-time chats and discussions, etc. In this case, community founders look for a platform, which is suitable to their needs, recruit the members and police members’ activities based on what is described in the Terms of Service and community’s rules.

Depending on the type of community platform, the community founders and members are legally bound to certain obligations derived from the contracts between them and the service providers (ISPs, OSPs). Even though these obligations may not directly govern community members’ rights and duties, they still have a strong influence on the development of the community. Each of them is demonstrated in the following sections.

- *Contractual obligations between site owners and hosting companies*

In the case of owned community platform, a site owner first purchases a server from a hosting company, which results in a hosting contract.<sup>502</sup> Web hosting contracts vary from host to host, but there are several key provisions of a web hosting agreement: the service maintenance, the right to store and process customer-supplied data, warranties regarding the legality of such data, and some optional clauses.<sup>503</sup> Because these terms mainly set out hosting companies and customers’ obligations around the range and nature of hosting services, they apply to the service users (in this case, the site owner), rather than the community members.

- *Contractual obligations between site owners and software companies*

Once the hosting is situated, site creators can decide on the layout of their sites. Some free software such as Muut, phpBB, vBulletin, or Vanilla is well-known tools to build a website. Again, by using a software package provided by a certain company, the site owner must agree to the obligations set out in the contract.

Alternatively, site owners can use open sources which allow them to build the website without coding. Some web hosting companies provide a full-packaged service for users that covers all relevant services such as internet service, hosting, website and more. A good example of this type of service provider is Wix, which offers users the chance to

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<sup>502</sup> What is Web Hosting?, WEBSITE.COM, <https://www.website.com/beginnerguides/webhosting/6/1/what-is-web-hosting?.ws> (last visited Dec 4, 2020).

<sup>503</sup> Web hosting agreement, WEBSITE CONTRACTS, <https://www.website-contracts.co.uk/web-hosting-agreement.html> (last visited Dec 4, 2020).

create websites by simply selecting from designer-made templates and uploading content. When signing up for a website, creators also have to agree to certain Terms of service. Wix requires users to click to agree to their TOS and Privacy Policy. Wix addresses the legal enforcement of their terms:

“The Wix Terms constitute a binding and enforceable legal contract between Wix.com Ltd. and its affiliated companies and subsidiaries worldwide (“Wix”, “us” or “we”) and you in relation to the use of any Wix Services - so please read them carefully”.<sup>504</sup>

Though Wix’s TOS uses the word “user”, this word more likely refers to the community founders rather than community members as end-users. It is noted that the person who uses Wix service has obligations to ensure that any content uploaded into their forums is legal (e.g. not violating third party’s right, without abusive content).<sup>505</sup> Failure to comply with copyright terms may lead to the cancellation of the service user’s subscription. Therefore, community founders – as clients of Wix – bear the direct responsibility of controlling the contents, which their members upload to the platform.

If online communities exist on pre-made platforms, software contracts would not exist. The community is more like a sub-site or sub-forum, and the community founders are treated as ordinary end users. For example, *r/FanFiction* is a subforum of Reddit, which is a social networking service.<sup>506</sup> Members of this subforum do not have any connection to the companies that developed and designed Reddit.

It is noticeable that community members, in either owned platforms or free platforms, are not legally bound by any service contract. Instead, obligations only involve two parties: community founders and the companies that provide hosting, platform, or software services. On the one hand, it is the former’s responsibility to act on their own initiative to stop spreading illegal material on their platforms, including copyright infringement. On the other hand, mentioned in section 3.2, to avoid secondary liability of copyright

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<sup>504</sup> Wix, Terms of use, WWW.WIX.COM, <https://www.wix.com/about/terms-of-use> (last visited May 16, 2020).

<sup>505</sup> *Id.* Article 2.1.(7).

<sup>506</sup> [r/FanFiction - Fanart and fanfiction., REDDIT, https://www.reddit.com/r/FanFiction/comments/8dpi7z/fanart\\_and\\_fanfiction/](https://www.reddit.com/r/FanFiction/comments/8dpi7z/fanart_and_fanfiction/) (last visited 22 Feb, 2021). This subforum was founded on 25 August, 2009, and has approximately 120,000 members by February 2021.



infringement, ISPs may terminate service agreements with their subscribers if the latter violate their terms and conditions.

However, these terms also have a strong impact on the behaviour of community members. By sharing any illegal material, they draw attention from copyright holders and ISPs to their activities, which is also their least desirable thing. Consequently, they may cause serious problems not only for the site owners but also for the survival of their communities.

- *Contractual obligations between Internet users and Internet Service Providers*

To access the Internet, any online user must enter into the contract with their ISPs. This agreement, which is legally binding, covering a wide range of terms, including copyright policy. Users are responsible for the content they shared, whereas the ISPs reserve their rights to investigate, remove infringing materials, or terminate user's access to the service for serious violations. ISPs may either undertake a notice-and-takedown process to detect and remove illegal material or use content censorship to control what is displayed on their servers.<sup>507</sup>

As an example, Virgin Media<sup>508</sup> provides broadband service to its users with an agreement called "Acceptable Use Policy".<sup>509</sup> Article 6.1 of this policy makes a list of materials that are not allowed on Virgin Media's network:

**"6 Your responsibilities – content/material**

- 6.1.2. material that infringes or breaches any third party's intellectual property rights (which shall include, but not be limited to the copyright, trademarks, design rights, trade secrets, patents, moral rights, paternity rights, and performance rights)
- this includes the use, distribution and/or copying of any material without the express consent of the owner".

It is noted that ISPs like Virgin Media do not control content by screening or censoring every single item before it is displayed on its network. Instead, it relies on reporting

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<sup>507</sup> See Section 3.2.1.

<sup>508</sup> Virgin Media Limited is a British company that provides telephone, television, and internet services in the United Kingdom. Its headquarters are at Green Park in Reading, Berkshire.

<sup>509</sup> Virginmedia, *Acceptable Use Policy*, VIRGIN MEDIA, <https://www.virginmedia.com/shop/the-legal-stuff/acceptable-use-policy/acceptable-use-explained> (last visited Feb 22, 2021).

mechanisms to locate and remove infringing materials. Once Virgin Media receives copyright complaints, they will carry out a course of action such as sending a warning letter, investigating, removing alleged materials from their servers, or even terminating the service. Virgin Media indicates clearly in its AUP:

“6.3. At our sole discretion (and without prejudice to any of our other rights pursuant to this AUP and our terms and conditions), we reserve the right to remove any material from any server under our control. In addition to any other action we may take, we reserve the right to notify relevant authorities, regulators and/or other third parties of the use, storage, distribution, transmission, retransmission or publication of prohibited material (and/or any other materials the dealing with or use of which may constitute unlawful conduct by Users).”

- *Online communities' policies*

Scholars have identified two primary types of policies among online communities, formal and informal.<sup>510</sup> The first type includes terms and conditions that are legal and binding, namely Terms of Service (TOS), privacy policies, cookies policies, and acceptable use policies. Violating these policies can result in serious litigation.

It is requested by the law that to make the policies legally enforceable, users must receive sufficient notice from service providers about what behavioural standards they have to follow and agree to them. Therefore, the terms and conditions of a website are normally posted in a noticeable location to notify a user that they are entering into a binding agreement. Online users may accept the terms by checking a box, the “Agree” button, or any other affirmative action. TOS tab is a good example of the manifestation of these policies on fanfiction websites.

Meanwhile, informal policy provisions are non-legal and include common understandings such as community guidelines, safety guides, and other group behavioural standards. These informal rules are very common in online communities that are based on pre-existing platforms, where community members adhere to both platform-specific

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<sup>510</sup> Casey Fiesler, Cliff Lamp, Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, PROC. 19TH ACM CONF. COMPUT.-SUPPORT. COOP. WORK SOC. COMPUT. 1450 (2016); Jessica A. Pater et al., *Characterizations of Online Harassment: Comparing Policies Across Social Media Platforms*, in PROCEEDINGS OF THE 19TH INTERNATIONAL CONFERENCE ON SUPPORTING GROUP WORK 369–374 (2016), <https://doi.org/10.1145/2957276.2957297> (last visited Feb 23, 2021).

terms and their sub-group rules. For example, the subforum *r/HPfanfiction* of the social network Reddit.com has its own rules displayed in a separate section. These rules are very specific to make the community a safe and welcoming space for Harry Potter fanfiction enthusiasts, namely “no personal information, no hate speech, no harassment, no stealing contents, no request bashing.”<sup>511</sup> The sub-forum *r/fanfiction* of the social platform Reddit has ten lines on rules, covering from “do not spoil” to “do not be a jerk” principles. In terms of enforcement, members who violate the community’s informal rules will have their contents removed from the site, or be expelled from the community, but not face any legal action.

However, it is worthy to note that not all fanfiction communities’ informal policies are written regulations. Some “unwritten norms” are mainly circulated within online conversations between community members (e.g. dialogues, chat text, or comments). These norms function in the same way as written rules: providing order and predictability in a group. Although not being publicly voiced or written down on fanfiction sites’ main page or portable, they are widely accepted by community members as the consequences of logical argument or tacit assumptions.

The below are extracts from a LiveJournal thread where new fans learn about “don’t sell fanfiction” rules from their discussions with other senior members:<sup>512</sup>

“[original post] YOU DO NOT MAKE MONEY OFF OF FANFIC. EVER.

Do you realise the trouble you could bring down on the fanfic 'industry', such as it is, if you did? No, of course you don't, 'cause you're special and copyright laws apparently don't apply to you, or something.

[senior member 1] Luckily most of the fandom, particularly other fanfic writers, went "WTF? HELL, NO" about it. Even though it doesn't technically make fanfic legal, we know that the main thing keeping us safe from C&D letters and legal action is that we're not making any money.

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<sup>511</sup> *r/Harry Potter Fanfiction*, REDDIT, <https://www.reddit.com/r/HPfanfiction/> (last visited 23 Feb, 2021).

<sup>512</sup> The thread “YOU DO NOT MAKE MONEY OFF OF FANFIC. EVER” was posted by an account name yuuu on the Fandom Wank group – a LiveJournal fan group dedicated to fanfiction enthusiasts. The original post was uploaded on 24 September 2006 and there were 405 comments replying to this post. All the corresponding comments are accessible from the address <<https://archive.is/7XL54>>.

[senior member 2] I bring forth an icon to commemorate the stupid that burns, and to say 'WTF - are peoples' memories so short that they forget fanficc-ers-who-try-to-sell-their-fans\*\*\* generally go down in flames and risk bringing the rest of us with them?'

[senior member 3] My god \*brain has now broken\* That could spell serious trouble for the rest of us if the right (or wrong) people get a hold of this little gem \*shudders\* Man, how dumb can you get? If she ruins the rest of us, I swear, I will hunt her down and use her ovaries as chew toys. I mean it. You do not sell fanfiction for money! Right now, us fanficc-ers are standing on a very precarious edge. If the law system decides to disallow fanfic because of that, we're sunk, and we take a huge fucking tumble \*shudders\*.'"

When exploring the multilayers of norms online fanfiction communities' members interact with, I was interested in how fans navigate different applicable norms. It is a fact that there are differences between how outsiders and insiders of online fanfiction communities impose the hierarchy of norms, depending on the context of their interaction. According to a layperson who does not engage in any fan activities, this hierarchical structure would be in top-down order. Legal norms would be put at the top because they are prescribed and enforced by authorities, followed by contractual obligations in the service contracts and fanfiction sites' formal policies. Informal policies that community members construct and enforce between themselves would receive the least attention. However, from the perception of one insider – a fan – these norms are put in reserve order.<sup>513</sup> As Professor Fiesler puts in her research of using social norms to govern online creative communities, "Sometimes the most important regulation is invisible, occurring at the level of informal social norms."<sup>514</sup> The rationales behind this hierarchy of norms were explained as follows.

### 5.1.3. Hierarchy of norms

The effects of legal norms or platform-specific policies in monitoring individual behaviour are undeniable, explaining why they are always put at the top of the hierarchy of norms. However, there are some challenges to implicate these formal rules into an

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<sup>513</sup> Fiesley, *supra* note 86; Tushnet, *supra* note 62.

<sup>514</sup> Casey Fiesley and Amy Bruckman, *supra* note 72 at 2.

informal interaction, like online fanfiction communities. Most problems lie in the nature of these rules.

First, it is impossible for legislators to lay down clear rules in sufficient detail to cover all eventualities of human life. Hypothetically, agents in society are law-abiding.<sup>515</sup> Whatever the law prescribes, they follow. However, there are certain circumstances where the law can be very ambiguous – that there is no legal norm that specifically indicates what people should do or should not do. It is the same in fanfiction communities when existing copyright law does not specify whether writing fanfiction is either legal or illegal.<sup>516</sup> Therefore, fans must rely on their common sense to figure out what they should do to protect themselves from copyright holders and their lawyer teams.<sup>517</sup>

Secondly, online communities' formal policies appear to be very complicated and confusing. In one of their research about copyright licences in thirty user-generated content sites' TOS, Professor Fiesler and colleagues found that most of the sites had policies that climbed past 5,000 words, and nearly all of them were written at the college level (with two that required PhD's).<sup>518</sup> Another project from Carlos Jensen and Colin Potts confirms that content creators found that privacy policies of some social media platforms such as YouTube, Twitter, and Tumblr "appear to be confusing."<sup>519</sup> In a more recent paper from Carnegie Mellon, he concluded that it would take the average Internet user about 76 days to read through all the privacy policies.<sup>520</sup> And the average length of a privacy policy is 2,514 words. They also estimated that "reading privacy policies costs in a time of approximately 201 hours a year, worth about \$3.543 annually per American Internet user."<sup>521</sup> This makes it likely impossible for Internet users to read through all the terms "without spending 8 hours a day on it."<sup>522</sup>

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<sup>515</sup> Frances Brazier et al., *Law-abiding and integrity on the Internet: A case for agents*, 12 ARTIF. INTELL. LAW 5 (2014).

<sup>516</sup> See section 4.2 (discussing the undetermined legal position of fanfiction).

<sup>517</sup> Rebecca Tushnet, *supra* note 21.

<sup>518</sup> Fiesler, Lampe, and Bruckman, *supra* note 23.

<sup>519</sup> Carlos Jensen, Colin Potts, *Privacy Policies as Decision-Making Tools: An Evaluation of Online Privacy Notices*, in IN PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 471 (2014).

<sup>520</sup> Aleecia McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 J. LAW POLICY INF. SOC. 543 (2008).

<sup>521</sup> *Id.* at 565.

<sup>522</sup> *Id.*

As a result, it is unsurprising that most online users choose to skip sites' formal policies. In an experiment conducted by professors Jonathan Obar and Anne Oeldorf-Hirsch, 543 students clicked the big green "Join" button to become members of a stimulated social network named NameDrop.<sup>523</sup> The first finding is that there was only a quarter of the 543 students read all the terms and conditions before clicking the button. And all of them spent approximately one minute going through NameDrop's thousands-of-words terms and conditions. But the most surprising finding is that all these students, including the participants who claim to read the terms and conditions, clicked the "Join" button without recognising that NameDrop's terms contain *paragraph 2.3.1* which requires members to agree to give the network their future first-born children. There is a large gap between how people "read" and how they "understand" the terms provided by the websites. And whatever the terms are, Internet users tend to skip the terms they are even required to parse. As the paper authors conclude, millions of obedient clicks "I have read and agree to the Terms" in their study is "the biggest lie on the internet."<sup>524</sup> All of these scenarios likely occur in online fanfiction communities. Statistics demonstrate that most fanfiction fans are at a young age,<sup>525</sup> and not many of them have a background in law. Unsurprisingly, they may struggle to comprehend what is written in the formal policies.

Although online users hardly understand what the sites' TOS is about, it is a sad truth that they can get into trouble by ignoring it. Online fanfiction communities, like other fan communities, practically are exposed to copyrighted materials all the time. Given that the major part of their practice involves making copyright decisions, they need to understand the rules to ensure that they do not breach the law or contractual obligations. The community members, therefore, decide to interpret law and copyright terms in the language that they can perceive and respond to.<sup>526</sup> Arguably, content parallels between legal norms and social norms, which are developed by a given community, are a possibility.<sup>527</sup>

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<sup>523</sup> Obar and Oeldorf-Hirsch, *supra* note 23.

<sup>524</sup> *Id.*

<sup>525</sup> In a research about the website Fanfiction.net's demographics in 2010 conducted by a blogger on Blogspot, the result showed that 80% of the users are between 13 and 17 years old, while the average age is 15.8. See Fan Fiction Statistics - FFN Research, , <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html>. (last visited Feb 27, 2021).

<sup>526</sup> Joel R. Reidenberg, Travis Breau, Lorrie Faith Carnor, Brian French, *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 39 (2015).

<sup>527</sup> This norm is more presentable in fan-subtitle communities where fans translate, make subtitles for their favourite foreign-language books or movies, then share with each other. Because making subtitles clearly

Another point to mention is that the bonding which the members of the online fanfiction communities have can foster an environment for adopting such “domestic norms.” As explained on page 88, as fanfiction is naturally communal, the communities practising it can serve as self-governed regulatory bodies. Compared to legal norms and platform-specific policies, their informal policies are autonomous and fairly self-enforcing.<sup>528</sup>

In conclusion, the fact that when a fan takes part in an online fanfiction community, he or she has to interact with many applicable norms. However, the focal point is that in many communities – especially in the cases where effective legal norms are uncertain – informal norms prevail over legal norms. As S. Macaulay pointed out: “social pressure and reputation are perhaps more widely used than formal contracts and filing suits.”<sup>529</sup> In other words, the threat of being sued by copyright holders mostly can’t overshadow the fear of facing the community’s sanctions. Therefore, there is a necessity to study the informal copyright enforcement mechanism of these communities to answer the question of how these norms are enforced.

## 5.2. INFORMAL NORM ENFORCING MECHANISM

In a companion to constructing informal policies, online fanfiction communities also developed a particular mechanism to enforce these norms. Informal enforcement mechanisms, referring to those not prescribed by formal rules, are divided into two categories: (1) personal enforcement and (2) community enforcement.<sup>530</sup> When the first connects to the retaliations by the victim, the second involves sanctions taken by other members of the community against inappropriate behaviours. This study significantly discusses the second mechanism.

### - *Dynamics of social media users*

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violates copyright law, fans who belong to these communities have very strict rules on how to fit their activities within the framework of copyright law. For example, no one is allowed to download or store materials for more than 24 hours since it is uploaded on the network. Or the ownership disclaimers are put everywhere on the translated version of a book or video.

<sup>528</sup> Jonny Anomaly, Geoffrey Brennan, *Social Norms, The Invisible Hand, and the Law*, 33 UNIV. QLD. LAW J. (2014).

<sup>529</sup> Steward Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOG. ASSOC. 55 (1963).

<sup>530</sup> Michihiro Kandori, *Social norms and community enforcement*, 59 REV. ECON. STUD. 63, 63 (1992).

Research has shown that participation is the fundamental mechanism of online communities for both new and senior members.<sup>531</sup> Most online fanfiction communities provide users with powerful means and platforms for sharing, finding content and connecting. In this ‘small world’, community members participate in these activities with different levels of involvement.

Many studies have examined the identification of various user types in online communities. Risser and Bottoms, for instance, identified newbies, inbound participants, full participants, celebrities and peripheral participants in a teachers’ online network by examining users’ behavioural and structural characteristics.<sup>532</sup> Using both qualitative and quantitative approaches to analyse an innovation contest community, a study by Fuller and colleagues identified six types of community members, including socialisers, idea generators, masters, efficient contributors and passive idea generators.<sup>533</sup> In another study, led by Lorenzo-Romero, researchers pointed out three types of users: embryonic, amateur and experts.<sup>534</sup> Çiçek and Eren-Erdogmus highlighted five different user categories including inactive, sporadic, entertainment users, debaters and advanced users.<sup>535</sup> A common theme of these studies is that there are two main categories of community members: prominent and new members. The first group (i.e., masters, expert, and advanced users) refers to people who have long experience in the communities and mostly play the role of answer-person. New members (e.g., amateur, passive idea generators, inactive, newbies) are people who have only recently joined the communities.

Individuals who are active or popular among the members often play the role of the leader or hub in the network.<sup>536</sup> Inexperienced newcomers tend to contact these senior members to clarify the communal rules they must follow and act appropriately. Therefore, long-time members play a vital role in providing wisdom and advice to new members and the

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<sup>531</sup> Sergio Toral, Rocio Martinez-Torres & Federico Barrero, *An Empirical Study of the Driving Forces Behind Online Communities*, 19 INTERNET RES. 378–392 (2009).

<sup>532</sup> H. Smith Risser & SueAnn Bottoms, ‘Newbies’ and ‘Celebrities’: *Detecting Social Roles in an Online Network of Teachers via Participation Patterns*, 9 INT. J. COMPUT. SUPPORT. COLLAB. LEARN. 433–450 (2014).

<sup>533</sup> Johann Füller et al., *User Roles and Contributions in Innovation-Contest Communities*, 31 J. MANAG. INF. SYST. 273–308 (2014).

<sup>534</sup> Carlota Lorenzo, Efthymios Constantinides & María-del-Carmen Alarcón-del-Amo, *Segmenting the Social Networking Sites Users: An Empirical Study*, 7 INT. J. INTERNET. MARK. ADVERT. 136–156 (2012).

<sup>535</sup> Mesut Çiçek & Irem Erdogmus, *Social media marketing: Exploring the user typology in Turkey*, 8 INT. J. TECHNOL. MARK. 254–271 (2013).

<sup>536</sup> Seung Ik Baek & Young Min Kim, *Longitudinal analysis of online community dynamics*, 115 IND. MANAG. DATA SYST. 661–677 (2015).



community as a whole. Forum veterans have a strong influence in enforcing these shared norms as they can motivate other members to abide by the rules or punish the wrongdoers. Their powerful influence is debunked in the following part where I discuss the leading role of the website Fanfiction.net's administrators and moderators in enforcing copyright norms within their community.

- *Community enforcement*

Community enforcement has strong connections to two different perceived norms: injunctive norms and descriptive norms.<sup>537</sup> Injunctive norms describe individual or community perceptions of the behaviour expected by others.<sup>538</sup> Descriptive norms, on the other hand, associate with individuals' beliefs about what are the other members of their groups' actual behaviours.<sup>539</sup> To put it simply, injunctive norms guide people on how they are supposed to act, and descriptive norms tell them how others around them act.

In the context of online fanfiction communities, the injunction norms tailor members' behaviours by providing standards (e.g. be nice to each other, support each other by commenting, check for typos and grammatical errors before posting your story). Whilst descriptive norms guide community members via their observing and learning process of what has been performed by the majority of their group. Then they follow these standards because of the mentality of: "They were not in trouble, then I won't." Both types of norms have a strong influence on monitoring group members' behaviours. It is also noticeable that injunctive norms are driven by the fear of being sanctioned by the community, while descriptive norms are hardly involved. Instead, descriptive norms encourage community members to observe and internalise others' behaviour into individuals' practices. The co-existence of these two norms are mirrored in online fanfiction communities in terms of how their enforcement mechanism takes place: (1) sanction and (2) internalisation.

### 5.2.1. **Sanctions**

A common path that community-based norms are enforced is through sanction – punishing norm-breaking members. Each community has distinctive measurements of

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<sup>537</sup> Reno Raymond, Cialdini Robert & Carl Kallgren, *The Transsituational Influence of Social Norms*, 64 J. PERS. SOC. PSYCHOL. 104.

<sup>538</sup> Maria Lapinski & Rajiv Rimal, *An Explication of Social Norms*, 15 COMMUN. THEORY 127 (2005).

<sup>539</sup> *Id.*

sanction. Instead of a formal enforcement mechanism, which involves litigations and penalties (e.g. fines, imprisonment), community-based sanctions refer to behavioural correction using social pressure.<sup>540</sup> A close-knit group like online fanfiction communities, where the members share and do things together, has made the community-based norms heavily enforced. The mentioned social pressure can be easily implicated in such communities.

It is a widespread misconception that it is just a phase when young people get too involved in fandom activities. All these frivolities eventually pass, then they will be proper grow-ups. This account does not appropriately value the bonding and experiences fans develop through their practices, even long before the Internet became popular. The history of the fanfiction community can be traced back to the 1930s when fans mainly used printed-based media (e.g. fan convention, fan magazines).<sup>541</sup> With the advent of the Internet, fanfiction communities have transformed many of their communication and interaction to online platforms, which they also use to archive detailed information pertinent to their given fanbase. However, it seems that no change has been made in terms of the relationship and mutual influence between the members. They always maintain close relationships, especially when there is no boundary preventing them from connecting and establishing their bonding. In some circumstances, individuals still face the threat of effective sanctions from others.<sup>542</sup> In this respect, these binding directives are backed by social pressures and non-legal penalties. In some situations, a feeling of shame or guilt for violating social norms may correct actions that deviate from acceptable behaviour.<sup>543</sup> For example, a survey conducted by Charles Tittle shows that the fear of loss of respect from others was the second-best predictor of the eight considered among people who are over 15 years of age in New Jersey, Iowa, and Oregon.<sup>544</sup>

In some situations, norm violators can become the victims of the community's outrage. The history of fanfiction communities shows that fans may fiercely condemn any person publicly for violating communities' norms. A good example of how fanfiction communities' members put pressure on individuals to discipline the latter's behaviours

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<sup>540</sup> UNIVERSITY OF CAMBRIDGE INSTITUTE OF CRIMINOLOGY, *COMMUNITY PENALTIES: CHANGE AND CHALLENGES* (2001).

<sup>541</sup> *FIC: WHY FANFICTION IS TAKING OVER THE WORLD*, (Anne Jamison ed., 2013).

<sup>542</sup> Peter Koller, *On the Nature of Norms*, 27 *RATIO JURIS* 155 (2014).

<sup>543</sup> Jonny Anomaly, Geoffrey Brennan, *supra* note 528.

<sup>544</sup> Charles R. Tittle, *Sanction Fear and the Maintenance of Social Order\**, 55 *SOC. FORCES* 579–596 (1977).

is the Lori Jareo case. In 2006, Lori Jareo wrote her Star War fanfiction *Another Hope* and printed the book through her WordTech Communication company. Then she put the work for sale on different platforms including Amazon.com, Barnes & Noble, and Powell's City of Books. Although Jareo claimed she wrote the book for herself and it is not a commercial book, the author had to face a fierce attack from the fanfiction community.<sup>545</sup>

In return, Fandom Wank – one of the most notable mocking sites dedicated to the fanfiction community on the LiveJournal platform<sup>546</sup> – dedicated one thread for criticising Lori Jareo. This thread has over 700 comments full of insults and cursing.<sup>547</sup> She was name-calling in many blogs with derogatory headlines: “*The Stupid Is Strong With This One*,” “*Behold: The Greatest Story of Stupidity Ever Told*,” “*I Bet She Finds Our Lack of Faith Disturbing*,” “*Feel The Stupid*,” “*The World's Stupidest Human*,” “*Soooo Amazingly Stupid*,” “*Good Lord, How Stupid Can A Person Be?*,” and “*FacePalm, Head Desk, and a Generous Smattering of WTF?*.”<sup>548</sup> Science-fiction author Lee Goldberg wrote in his blog: “What a moron. She even had the chutzpah to *copyright* her novel (...) the stupidity of the author and her publisher (which is herself) is mind-boggling.”<sup>549</sup> Being the target of a personal attack is a painful and damaging experience to anyone, not only Jareo. As a result, *Another Hope* was taken down by all the publishing houses.

This traumatic experience is believed to bring more mental breakdowns to the victims than any legal action.<sup>550</sup> It appears to be a cruel public crucifixion to the infringer, who is treated as a sinner. As mentioned above, social norms are formed and enforced differently compared to formal norms. Instead of civil suits – criminal sentences or damages – deviations from norms can cause trauma for the violators such as public ridicule,

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<sup>545</sup> Another Hope is a Star Wars novel written by Lori Jareo. She first published this story as fanfiction on her website. Then it was sold at Barnes & Noble and Amazon. This sale was conducted without the authorisation from TPTB – Star War series' copyright holders. On 26 April 2006, the book was removed from Amazon.com.

<sup>546</sup> Fandom Wank is an online community based on Journalfen platform, which was founded to discuss drama caused by fans on the Internet. The community was shut down after Journalfen went down in April 2015. Parts of the content is archived at Website crawl of the “Fandom Wank” community for 01 March 2015.

<sup>547</sup> Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 421 (2006).

<sup>548</sup> Lee Goldberg, *No Hope For This Fanficer, A WRITER'S LIFE*, [https://web.archive.org/web/20090215114903/http://leegoldberg.typepad.com/a\\_writers\\_life/2006/04/no\\_hope\\_for\\_thi.html](https://web.archive.org/web/20090215114903/http://leegoldberg.typepad.com/a_writers_life/2006/04/no_hope_for_thi.html) (last visited Feb 8, 2021).

<sup>549</sup> *Id.*

<sup>550</sup> Fiesley, *supra* note 86.

condemnation, and even personal attack.<sup>551</sup> The fear of being shamed online by whole communities stops individuals from deviant acts. The *Lori Jareo* case prove that social norms are more powerful than formal law in asking community members to obey the rules.<sup>552</sup> In recent years, such public shaming can be seen more commonly in fan communities. Instead of the old platforms such as Usenet, Yahoo Groups, Geocities, or mailing lists, most online fanfiction communities nowadays operate on blogging sites such as LiveJournal, Reddit and Tumblr.<sup>553</sup> Fandom has been more self-reflective than ever. On some platforms, especially in Fandom Wank, any member can become the target of “harpooned and lampooned and humiliated.”<sup>554</sup> Other members may not accuse the offender of copyright infringement because it may be a matter of copyright law. But name-calling and online shaming are all close to impossible to endure. Perhaps these sanctions are strong enough to force someone to leave the community or even give up writing.

### 5.2.2. Norm internalisation

On one hand, the threats of sanctioning can influence the way the community members behave. On the other hand, community members can learn about appropriate behaviours by observing and imitating what others do. The process that changes norm preferences is called norm internalisation. As Cooter observes, “internalisation of norms changes preferences and decisively affects behaviours.”<sup>555</sup>

To put it simply, internalisation is the process in which an individual “learns to follow rules of behaviour in situations that arouse impulses to transgress and there is no external surveillance or sanctions.”<sup>556</sup> Discussing the advantages of tailoring human behaviour via norm internalisation, Spanish scholar Daniel Villatoro and his colleagues addressed: “Compliance with a norm is generally more robust when this norm has been internalised by the members of the group than when their compliance is solely motivated by external

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<sup>551</sup> Christina Z. Ranon, *supra* note 547.

<sup>552</sup> Fiesley, *supra* note 86 at 150.

<sup>553</sup> Fanlore, *The three generations of fanfic* - Fanlore, FANLORE, [https://fanlore.org/wiki/The\\_three\\_generations\\_of\\_fanfic](https://fanlore.org/wiki/The_three_generations_of_fanfic) (last visited Feb 8, 2021).

<sup>554</sup> Fandom Wank Wiki, *The Difference Between Fandom Wank and Groups Like Badficsupport*, WWW.FANDOMWANK.COM, [http://wiki.fandomwank.com/index.php/The\\_difference\\_betweenfandom\\_wank-and-and-groupslikebadficsupport](http://wiki.fandomwank.com/index.php/The_difference_betweenfandom_wank-and-and-groupslikebadficsupport) (last visited 11 April, 2020).

<sup>555</sup> Robert Cooter, *Law and Unified Social Theory*, 22 J. LAW SOC. 61 (1995).

<sup>556</sup> Lawrence Kohlberg, *Moral Development*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (David L. Sills ed., 2 ed. 1968).

factors (i.e. punishment).”<sup>557</sup> Professor Lessig also agreed that internalisation plays a crucial role in generating compliance with norms.<sup>558</sup>

In the context of online fanfiction communities, internalisation has a significantly crucial role. Different from how sanction works (prescribed for a specific community and co-exists with this community), internalisation (considered as the deepest level of conformity by experts) may change the long-term fan’s public behaviour. Even if the community does no longer exist, that person continues practising the norms because he or she has already internalised the norm. The history of fanfiction communities has addressed the fact that many norms have existed and developed over time regardless of the specific communities that created them. Some unwritten rules such as “respect the canon” or “don’t like don’t bash” (i.e. if you don’t like the story, you don’t need to read and criticise) have existed for a long time as the fanfiction communities appear.<sup>559</sup>

Professor of sociology John Finley Scott describes the process of internalisation as “starting with learning what the norms are, and then the individual goes through a process of understanding why they are of value or why they make sense until they accept the norms as their viewpoint.”<sup>560</sup> The members of online fanfiction communities may learn about accepted behaviours by observing how the other members practise specific norms. For example, a new member of fanfiction.net may eventually discover that all the stories displayed on the website have ownership disclaimers at the top of them. Then that member learns from others that using these disclaimers may help them to avoid copyright complaints. Finally, he or she starts doing it when uploading his or her fanfiction.

In this process, the group’s role models also play an important part in motivating the speed of internalisation. Individuals tend to accept and internalise a specific norm if someone he or she respects supports it.<sup>561</sup> In online fanfiction communities, the role models can be popular fanfiction writers, senior members, or moderators of websites.

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<sup>557</sup> Daniel Villatoro et al., *Self-Policing Through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks*, 18 J. ARTIF. SOC. SOC. SIMUL. 2 (2015).

<sup>558</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 UNIV. CHIC. LAW REV. 943, 977 (1995).

<sup>559</sup> @GhostoftehTreeHugger, REDDIT, *What is your “Golden Rule” for writing Fanfiction, AFTER “write what you enjoy”*, REDDIT.COM/ (2020), [https://www.reddit.com/r/FanFiction/comments/kbniau/what\\_is\\_your\\_golden\\_rule\\_for\\_writing\\_fanfiction/](https://www.reddit.com/r/FanFiction/comments/kbniau/what_is_your_golden_rule_for_writing_fanfiction/) (last visited Dec 4, 2020).

<sup>560</sup> JOHN FINLEY SCOTT, *INTERNALIZATION OF NORMS: A SOCIOLOGICAL THEORY OF MORAL COMMITMENT* (1972).

<sup>561</sup> Thekla Morgenroth, Kim Peters & Michelle K. Ryan, *The Motivational Theory of Role Modeling: How Role Models Influence Role Aspirants’ Goals*, 19 REV. GEN. PSYCHOL. (2015).

Junior members tend to reach these people when they need help. For example, in Casey Fiesler's research about close-knit communities' norms, a respondent commented, "There was a really interesting discussion about moderator power. What it pretty much boiled down to is, look, these are the guys that are running the show."<sup>562</sup> Senior members also play a key role in the way that they can introduce long-established norms to newcomers. Most fanfiction websites provide FAQs threads, "Must read" threads where new fans can raise questions and expect the answers from their predecessors.

### 5.3. CONCLUSION

What we learn from this chapter is the intersection of different norms within online fanfiction communities. These norms include legal norms, contractual obligations, and community-based norms. While the first two are the result of law and legally enforceable, the third one is constructed and enforced by the communities they derived from. Existing research has suggested the parallels between copyright regulations and online fanfiction communities' norms. However, there is no empirical research showing the existence of copyright norms, which are constructed by the communities and how they are enforced.

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<sup>562</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

## **CHAPTER 6**

### **USING NORMS TO REGULATE ONLINE FANFICTION COMMUNITIES**

Chapter 5 breaks down the challenges members of online fanfiction communities have to face when navigating different norms. This chapter discusses that in contexts when legal norms are absent or not effective, fanfiction communities translate their understanding of copyright into specific community-based norms to self-police.

This chapter aims to provide empirical research to examine the process that fanfiction community members use to translate their knowledge of copyright law into something they can manage and comply with. I employ content analysis and corpus analysis to look for highly- consistent copyright norms that have been effective in governing the community members' behaviour. In examining how these norms have been constructed over time and enforced, I conclude that though fans may have some misconceptions of copyright, there are some advantages of embracing informal norms to regulate online fanfiction members' behaviours. This study also confirms the role of community-based norms in supplementing formal rules to handle copyright issues.

#### **6.1. METHODOLOGY**

In the light of the previous chapters that established the important roles of community-created norms in tailoring online fanfiction communities' members, I designed three studies to focus explicitly on those norms – including what they are, how they form, and how they are enforced within communities. This chapter aims to answer the following questions:

- (1) What copyright norms are employed in online fanfiction communities?
- (2) How do online fanfiction communities enforce their norms?

I approached these questions through content analysis and corpus linguistics because these methods allow me to not only identify the norms but also examine the meaning and processes behind each of them.

##### **6.1.1. Content Analysis**

I used content analysis as the research method in the first and second studies. Content analysis, which is a form of discourse analysis, “comprehensively and systematically

analyses the content of a sample of documents and records consistent or inconsistent features.”<sup>563</sup> Using this method, a scholar collects texts, systematically reads them, and examine the consistent or different features of the data.<sup>564</sup> Content analysis has many advantages, such as: allowing researchers to work directly on a variety of data (e.g. words, sounds, images), can be applied for both quantitative and qualitative operations, providing insights into complex human thought and behaviour via their language use. It is also relatively cheap.<sup>565</sup>

Given the benefits of content analysis, it is not surprising that its use in legal studies has increasingly grown in the past years. Law experts, with the help of this method, can handle any kind of text (e.g. legal documents, trial courts record, statutes, and regulations). For example, political scientist Fred Kort analysed all the U.S. Supreme Court opinions about the implementation of constitutional rights in criminal cases.<sup>566</sup> Yale law professor Peter H. Schuck and staff attorney Theodore Hsien Wang examine the changes in immigration litigation during the 1980s by analysing the characteristics of the immigration caseload of the federal court in four years: 1979, 1985, 1989, and 1990.<sup>567</sup> Professor Robert A. Hillman explores how courts apply the theory of promissory estoppel by analysing all of the reported decisions in the US in which this theory was applied from 1 July 1994 to 30 June 1996.<sup>568</sup> Basma and colleagues conducted an in-depth analysis of a variety of alcohol-related policies in Iran.<sup>569</sup> The research topics may vary but they all employ one of the most common uses of content analysis in legal scholarship: examining significant content features in a legal text.

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<sup>563</sup> Richard Kirkham & Elizabeth O’Loughlin, *A Content Analysis of Judicial Decision-Making*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 329, 330 (Naomi Creutzfeldt, Marc Mason, & Kirsten McConnachie eds., 2020).

<sup>564</sup> KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (3 ed. 2012). (defining content analysis as “a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their uses”).

<sup>565</sup> Mike Allen, *Content Analysis: Advantages and Disadvantages*, in THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS (2017).

<sup>566</sup> Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the “Right to counsel” case*, 51 AMERICAN POLIT. SCI. REV. 1–12 (1957).

<sup>567</sup> Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990 Procedural, Administrative, Judicial and Legislative Aspects*, 14 IMMIGR. NATLY. LAW REV. 395–466 (1992).

<sup>568</sup> Robert A. Hillman, Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study, 98 COLUM. L. REV. 580 (1998).

<sup>569</sup> Basma Al-Ansari et al, *Alcohol policy in Iran: Policy content analysis*, 73 INT. J. DRUG POLICY 185–198 (2019).



In this chapter, the method was employed to identify the significant terms constructed to regulate copyright issues within fanfiction communities (Section 6.3.1) and explore how these norms are enforced in an informal interaction (Section 6.3.2).

#### **a. Copyright norms in fanfiction sites' terms and conditions**

Drawing from previous methods of online communities' policy document analysis,<sup>570</sup> I used a directed approach to qualitative coding to find significant copyright norms that are covered in the ten most-visited fanfiction websites' formal policies.<sup>571</sup> Also named as a deductive approach by Potter and Levine-Donnerstein, the goal of a directed approach to content analysis is to confirm or extend conceptually an existing theory or framework.<sup>572</sup>

As presented in section 5.1.2(d), fanfiction sites' formal policies (e.g. Terms of Use, Terms of Service) are designed to guide their users to behave appropriately. Because copyright is an important issue, especially for platforms whose activities revolve around creative products like fanfiction, these sites mostly incorporate copyright regulations into their formal policies. Therefore, despite the differences in websites' terms design (i.e. the number of terms and conditions, the language used in designing), some copyright norms may be consistent across the sites.<sup>573</sup> The content analysis in this study aims to validate this assumption, through four steps as described below:

#### **- Collect data**

Based on the common fanfiction websites reported in the previous study about online fanfiction communities,<sup>574</sup> I identified that the three most popular types of online platforms where fans can post, comment on discussions, collaborate and share fanfiction are: digital libraries (also known as "archive"), social networking sites, chat rooms and

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<sup>570</sup> Fiesler, Lampe, and Bruckman, *supra* note 23; Pater et al., *supra* note 510.

<sup>571</sup> Hsiu-Fang Hsieh & Sarah E. Shannon, *Three approaches to qualitative content analysis*, 15 QUAL. HEALTH RES. 1277–1288, 1279 (2005).

<sup>572</sup> W. James Potter & Deborah Levine-Donnerstein, *Rethinking validity and reliability in content analysis*, 27 J. APPL. COMMUN. RES. 258–284 (1999).

<sup>573</sup> Kirkham and O'Loughlin, *supra* note 563.

<sup>574</sup> Fiesley, Feuston, and Bruckmand, *supra* note 22; Tiffany Lee, *Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations Note*, 14 TEX. REV. ENTERTAIN. SPORTS LAW 181–198 (2012); Casey Fiesley and Amy Bruckman, *supra* note 72; Anna Rogozinska, *Virtual Fan Communities: The Case of Harry Potter Slash Fans Sociology and Philosophy of Cyberspace*, 1 MASARYK UNIV. J. LAW TECHNOL. 33–42 (2007); Lee, *supra* note 74.

online forums (or sub-forums).<sup>575</sup> In determining which websites to study, I first used Alexa search engine rankings as a proxy for popularity, choosing “fanfiction” as a category to select the Top Sites. I also included the most popular fanfiction-related content websites found using Google with “fanfiction websites” and “fan fiction websites” as the search terms.<sup>576</sup> The names and URL addresses of the selected websites are presented in Table 2.

**Table 2. Lists name of selected data sites and their policies**

Number	Website	Terms and conditions
1	Asianfanfics.com	Terms of use Content Guidelines
2	Fanfiction.net	Terms of Service Community Guidelines
3	Archiveofourown.org	Diversity Statement Terms of Service DMCA Policy
4	Harrypotterfanfiction.com	Terms and Rules
5	Quotev.com	Terms of Service
6	Fictionpad.com	Etiquette Terms of Service
7	Reddit.com/r/fanfiction	Subreddit Rules for <i>r/FanFiction</i> Reddit User Agreement

<sup>575</sup> **Digital library** or **archive** (e.g. archiveofourown.org) provides free public access to collections of digitised materials. In this case, fanfiction archives are only used to save stories uploaded by fans and therefore, there is no interaction between members except for feedback; **Fanfiction websites** (e.g. fanfiction.net, harrypotterfanfiction.com) are websites dedicated to upload and discuss fanfiction. These websites often have the “forum” function so registered members can post threads and discuss any content; **Online forums** (e.g. reddit.com) refers to online discussion sites where fanfiction enthusiasts can create posts and respond to each other.

<sup>576</sup> Joanna Smith, *The Ultimate Guide To Fanfiction and Fanfiction Sites*, MEDIUM (2019), <https://medium.com/@joannasmith008/fanfiction-428029544a12> (last visited Sep 25, 2020); admin, *Fanfiction Websites: The Definitive List (to Explore in 2020)*, STIEG LARSSON (2016), <https://stieglarsson.com/fanfiction-websites/> (last visited Sep 25, 2020); Andrew Po, *Fanfiction Site List*, HOBBYLARK - GAMES AND HOBBIES (2020), <https://hobbylark.com/fandoms/fanfiction/sites> (last visited Sep 25, 2020); Raegan Stanley, *What are some good fanfiction sites?* - Quora, QUORA.COM (2017), <https://www.quora.com/What-are-some-good-fanfiction-sites> (last visited Sep 25, 2020); Scott Lorenz, *Best FanFiction Websites 2019 Archives*, THE BOOK PUBLICIST (2019), <https://book-publicist.com/tag/best-fanfiction-websites-2019/> (last visited Sep 25, 2020); ebookfriendly.com, *15 most popular fanfiction websites to explore*, PINTEREST (2019), [https://www.pinterest.com/pin/244179611022329098/?autologin=true&nic\\_v2=1av7IcPdh](https://www.pinterest.com/pin/244179611022329098/?autologin=true&nic_v2=1av7IcPdh) (last visited Sep 25, 2020).

8	Ficwad.com	Our Philosophy Terms of Service
9	Thefanfictionforum.net	Terms and rules
10	Wattpad.com	Terms of Service

Because websites' formal policies cover a variety of aspects (e.g. age restriction, use of service, use of the content, guarantee disclaimer), the next step of this research involved extracting the terms relating to copyright. Websites and forums often have a separate section in their policies to highlight accepted behaviour regarding copyright (e.g. the website fanfiction.net has Article 8 in its Terms of Service about Copyright Policy). Otherwise, I manually selected the terms relevant to the research topic. All the data was converted to text files and stored in my OneDrive account at Birmingham City University.

#### - Develop a coding scheme

First, I screened throughout and familiarised myself with the data, having the whole version of what may be significant in them. The next phase involved qualitative coding to identify and simplify the specific characteristics of the data.<sup>577</sup> Because this study relied on the existing theory that online fanfiction sites have constructed specific terms to prevent copyright infringement, and these terms have to comply with minimum standards that are recognised in international treaties as well as national laws (the US and Canada copyright laws),<sup>578</sup> so the data assumedly contained key concepts relevant to copyright holders' exclusive rights (i.e. moral rights and economic rights).

Therefore, after reading the texts word by word, I highlighted the information that appears to represent copyright holders' exclusive rights, containing the following words: *reproduce, distribute, publish, plagiarism, copying, stealing, money, licence, disclaimer...* I chose these words as the initial codes. Due to the small size of the data and the lack of complexity of the coding scheme that I recruited, there was no need to use qualitative data analysis software such as NVivo and ATLAS.ti. Moreover, processing

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<sup>577</sup> Jan Savage, *One voice, different tunes: issues raised by dual analysis of a segment of qualitative data*, 31 J. ADV. NURS. 1493–1500 (2000).

<sup>578</sup> See Section 4.2.

the data manually can help me understand the meaning of the data and how they relate to each other.<sup>579</sup> Lincoln and Guba found that in this way, the codes become more trustworthy and speed up the later step where the data is analysed in-depth.<sup>580</sup>

- **Sort texts into categories**

The next step involves coding the highlighted texts using the pre-determined codes wherever possible, based on how they are related and connected. Data that could not be coded into one of the categories will be re-examined to put in new categories that capture the copyright-related content. To make data more presentable, I organised the text and their corresponding categories in Table 3 in the Appendix.

- **Discussion**

In this step, the description of each category (i.e. what the terms are about), as well as the manifestations of the terms (i.e. how they are formed), were investigated. The directed approach to content analysis aims to validate the assumption that fanfiction sites incorporated copyright regulations into their copyright terms by using their own narratives.

### **b. Fanfiction sites' copyright enforcement mechanisms**

Chapter 3 addresses many challenges in enforcing copyright law in cyberspace. In the absence of an effective formal enforcement mechanism (those prescribed by law or other formal rules), online fanfiction communities have adopted an informal enforcement strategy.<sup>581</sup> This section aims to answer the question of how online fanfiction communities' copyright norms are enforced. I explored the two main aspects of enforcement mechanisms: (1) punishing norm-breaking individuals and (2) internalising norms to change behaviour. The first step of this study involves choosing online fanfiction communities for further investigation. I chose the website fanfiction.net as the research target for various reasons.

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<sup>579</sup> John R. Cutcliffe & Hugh P. McKenna, *Establishing the credibility of qualitative research findings: the plot thickens*, 30 J. ADV. NURS. 374–380 (1999); JANICE M. MORSE & LYN RICHARDS, README FIRST FOR A USER'S GUIDE TO QUALITATIVE METHODS (2002); Helene Starks & Susan Brown Trinidad, *Choose Your Method: A Comparison of Phenomenology, Discourse Analysis, and Grounded Theory*, 17 QUAL. HEALTH RES. 1372–1380 (2007).

<sup>580</sup> YVONNA S. LINCOLN & EGON G. GUBA, NATURALISTIC INQUIRY (1985).

<sup>581</sup> See Chapter 5.

First, because the research topic is about enforcing copyright norms within fanfiction communities, it would be wise to select online fanfiction communities with a long history of operating informal copyright strategies effectively. The website Fanfiction.net, as described on its homepage, “is the world’s largest fanfiction archive and forum where fanfic writers and readers around the world share their passion.”<sup>582</sup> First launched in 1998, fanfiction.net so far has over 12 million registered users and hosts millions of stories in over forty languages. Stories uploaded on FF.net are divided into different sub-forums such as “Anime” (Japanese animation), “TV show”, or “Gameshow”. Due to its popularity, this website is representative of other fanfiction sites.

Secondly, it is also useful to select a community that offers various ways of enforcing the norms. Fanfiction.net has a very well-designed copyright enforcing mechanism, which includes a clear instruction of copyright issues and specific threads dedicated to reporting infringements on the site. Furthermore, their copyright strategy is tailored particularly for the practice of the fanfiction community. Therefore, my genuine interest is to comprehend this mechanism. In light of these reasons, I chose the contents of fanfiction.net copyright policies for analysis.

For content analysis, I first selected threads assigned specifically for handling copyright issues. Drawing from the conclusions in Chapter 4, related threads were sorted into two categories: (1) *Sanction* and (2) *Norm internalisation*. In the next step, I examined the significance of the sanctions used by members to punish infringers and the process in which members incorporate the site’s copyright norms into their own behaviour. The conclusion was to confirm that “unofficial mechanisms often exert more normative pressure on community members than these more explicit norms”.<sup>583</sup>

### 6.1.2. Corpus Linguistics

#### a. Introduction to corpus linguistics

##### - *Introducing corpus*

Chapter 1 discusses what can be understood as the “traditional” approach to discovering fan community-based norms, and then demonstrates the use of one particular

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<sup>582</sup> Fanfiction.net, <https://www.fanfiction.net/> (last visited April 20, 2020).

<sup>583</sup> Burnett and Bonnici, *supra* note 70.

methodology – interview – recruited by law professor Casey Fiesler to identify social norms used in user-generated content communities. From this, it was found that qualitative methodologies such as doctrinal legal research methodology (or “black letter” methodology), interview or content analysis can be used to reveal valuable information about how members of fanfiction communities construct and enforce their domestic norms. However, there has been concern about the over-interpretation using these methods as well as whether the findings can be considered representative of fanfiction communities if the researchers employ such a small sample of the community members’ opinions.<sup>584</sup> As an alternative, I chose the field of corpus linguistics, in which software is used to assist the analysis of digital collections of text.

Generally speaking, the term “corpus” refers to a collection of texts. John Sinclair – one of the founding fathers of corpus linguistics – defines a corpus as a “collection of written text or transcription of speech, saved as files on a computer system and designed for automatic extraction of the language examples that the corpus contains by one or more computer programs.”<sup>585</sup> Since computers can process a large volume of data in a short time, the utility of corpus linguistics in the present study is to increase both coverage and objectivity over manual methods.

There are many types of corpus, depending on the purposes it was compiled to serve. These include:<sup>586</sup>

- “specialist corpora”: corpora are designed to investigate a specific issue.
- “reference corpora”: corpora contain a large amount of text from different sources, authors, and genres, to create “a database which represents the language as broadly as possible.”<sup>587</sup>

In order to research online fanfiction community discussion regarding copyright, I have built a specialist corpus consisting of forum posts about copyright from popular fanfiction discussion sites.

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<sup>584</sup> See section 1.2.2.

<sup>585</sup> JOHN SINCLAIR & LES SINCLAIR, *CORPUS, CONCORDANCE, COLLOCATION* (1991).

<sup>586</sup> DAVID EVANS, *Corpus building an investigation for Humanities*, <https://www.birmingham.ac.uk/Documents/college-artslaw/corpus/Intro/Unit1.pdf>.

<sup>587</sup> SINCLAIR AND SINCLAIR, *supra* note 585 at 23–26.

As Yale professor Brenda Danet explains, “words are obviously of paramount importance in the law” and “the law would not exist without language.”<sup>588</sup> To practice law, it is important to work with what is written in the letter of law and how people interpret and respond to it. Professor Trosborg divides legal language into five groups: “(1) the language of law; (2) the language of the courtroom; (3) the language in law textbooks; 4) lawyers’ communication, and (5) people talking about the law (in a formal or informal setting).”<sup>589</sup> In the last group, the language varies depending on the purpose of the communication. For example, when a copyright lawyer addressing an issue with his or her clients, the language used will differ from the language used by the clients among themselves, considering that the latter are laymen who have no legal training.

In law practice, the language of communication between people about the law is equally important as the language of the legal document (e.g. contracts, regulations). Certain terms and concepts in the law might be based on archaic terminology and therefore, beyond the usage of everyday vocabulary.<sup>590</sup> The “legalese,” or jargon likely cause troubles for laypersons in comprehending legal language. Therefore, linguistic choices made by a person are not only a technical exercise that involves simply choosing words that express his or her opinion about a particular topic, but also the manifestation of the speaker or writer’ gender, age, education, culture, or the context that surrounds him or her.<sup>591</sup> Therefore, there has been the interest of scholars in exploring the intersection of law to language, to understand how a layman interprets and follows the law by analysing their linguistics choices.

“Linguistics is the scientific study of language,”<sup>592</sup> which involves analysing linguistics data (e.g. patterns of language use, features of the contexts in which the languages are

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<sup>588</sup> Brenda Danet, *Legal discourse*, in HANDBOOK OF DISCOURSE ANALYSIS 273–291, 273 (T. Van Dijk ed., 1985).

<sup>589</sup> ANNA TROSBORG, RHETORICAL STRATEGIES IN LEGAL LANGUAGE: DISCOURSE ANALYSIS OF STATUTES AND CONTRACTS (1997).

<sup>590</sup> Danet, *supra* note 569 at 279–280 (“characteristic of the legal register include: technical terms; common terms with uncommon meanings; archaic expressions; doublets; formal items; unusual prepositional phrases; a high frequency of any”).

<sup>591</sup> Yolanda Reinoso Barzallo, *Factors That Influence Choice of Language Variation - Video & Lesson Transcript*, WWW.STUDY.COM, <https://study.com/academy/lesson/factors-that-influence-choice-of-language-variation.html> (last visited Nov 16, 2020).

<sup>592</sup> M. A. K. HALLIDAY, ON LANGUAGE AND LINGUISTICS vii (2003).

used, and social characteristics of speakers).<sup>593</sup> When research involves a large volume of such data, which is unlikely processed manually, corpus linguistics is employed.

Corpus linguistics, a methodology that may be used in linguistics,<sup>594</sup> is “the study of language based on examples of real-life language use stored in corpora- computerised databases created for language research.”<sup>595</sup> The corpus linguistics approach is widely used to investigate language features in texts. Additionally, by using analytical tools, researchers can “discover not only the patterns of language use, but the extent to which they are used, and the contextual factors that influence variability.”<sup>596</sup> For example, Orpin studies a group of words semantically associated with *corruption* in which corpus analysis tools were employed to provide semantic profiles of words, and conational differences were discussed.<sup>597</sup> Baker and McEnery analyse discourses of *refugees* and *asylum seekers* in the British media and documents from a United Nations website by studying observing lexical choices utilised to maintain certain discourses.<sup>598</sup> Garzone and Santulli study how the events of 9/11 were portrayed in the British press by studying wordlists and keywords in addition to analysing sample texts.<sup>599</sup> These research studies have shown corpus linguistics is an appropriate method to analyse language-specific contexts on a large amount of data.

Widely used methods in socio-legal studies, including critical disclosure analysis, interviews and participant observations, have been evaluated for the subjective selection of texts or participants. When data is primarily chosen to suit the particular notions of the researchers, it can be argued to be unrepresentative.<sup>600</sup> Furthermore, an analysis of a small

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<sup>593</sup> Brenda Danet, *Language in the Legal Process*, 14 LAW SOC. REV. 445–564, 453 (1980).

<sup>594</sup> Charlotte Taylor, *What is corpus linguistics? What the data says*, 32 ICAME J. 179–200, 180 (2008) (“In terms of what corpus linguistics ‘is’, not only have various definitions been offered, but alternatives have been explicitly addressed and rejected. These include *corpus linguistics is a tool, a method, a methodology, a methodological approach, a discipline, a theory, a theoretical approach, a paradigm* (theoretical or methodological), or a combination of these.”).

<sup>595</sup> Blanka Frydrychova Klimova, *Using Corpus Linguistics in the Development of Writing*, 141 PROCEDIA - SOC. BEHAV. SCI. 124, 124 (2014).

<sup>596</sup> Corpus Linguistics: What It Is and How It Can Be Applied to Teaching, WWW.TEACHNEW.COM, <https://www.teachnews.gr/glwssologia-didaktikh/item/904-corpus-linguistics-what-it-is-and-how-it-can-be-applied-to-teaching> (last visited Feb 25, 2021).

<sup>597</sup> Debbie Orpin, *Corpus Linguistics and Critical Discourse Analysis: Examining the ideology of sleaze*, 10 INT. J. CORPUS LINGUIST. 37 (2005).

<sup>598</sup> Paul Baker, Tony McEnery, *A corpus-based approach to discourses of refugees and asylum seekers in UN and newspaper texts.*, 4 J. LANG. POLIT. 197 (2005).

<sup>599</sup> FRANCESCA SANTULLI, GIULIANA ELENA GARZONE & MARA LOGALDO EDS., *INVESTIGATING CONFLICT DISCOURSES IN THE PERIODICAL PRESS (LINGUISTIC INSIGHTS)* (2019).

<sup>600</sup> Henry Widdowson, *Discourse Analysis: A Critical View*, 4 LANG. LIT. 157–172 (1995).



number of texts may not reveal helpful patterns or insights into their frequency or distribution. In summary, using data shaped to fit the researchers' desired outcome and biases can lead to "questions about representativeness, selectivity, partiality, prejudice and voice."<sup>601</sup>

In this thesis, fans' discussions about copyright can be found everywhere on the Internet, which may consist of a great number of texts and millions of words. Therefore, conducting an in-depth study of contextual aspects of every single text would be impractical and unfeasible. Corpus linguistic analysis aided by a computer can process data with speed in significant amounts. Moreover, researchers do not have to rely on their own or other native speakers' interpretations or upon selective examples. In summary, corpus linguistics can help me to consistently and accurately process data without human bias. Hence, the coverage and reliability of the results are ensured.

It can be argued that corpora contain a text-only format that limits information about the context in which a particular word is communicated, which would assist in understanding its real meaning. However, I can overcome this disadvantage by building a specialised corpus (namely the Fandom corpus), in which all the collected texts are screened thoroughly to make sure they were centred on the same topic – copyright. By doing so, the contexts in which the data are situated will not be missed as they are positioned in a large, publicly available, representative corpus. Moreover, by considering keyword lists and collocates, the corpus techniques will highlight patterns in the texts. These aspects can then be analysed in more qualitative ways (e.g., via concordances) to reveal the context of the community members' conversations. As the study progresses, I can examine a larger picture of the implications of copyright law around fanfiction communities and their impact on fan behaviour.

#### - *Concepts in corpus linguistics*

As with any discipline, corpus linguistics has a variety of tools and terminology which are recruited for research purposes. This section explains some of them so that readers have a better understanding of what these tools are and how they are applied within the analysis in the next section.

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<sup>601</sup> JAN BLOMMAERT, DISCOURSE: A CRITICAL INTRODUCTION 31 (2005).

- **Types and tokens**

Since the beginning of corpus linguistics, a word was recognised as the basic unit of meaning in language.<sup>602</sup> However, defining what is *word* can be quite challenging. As Sinclair explains, the word *word* in English “can have both the meaning of individual occurrences” (e.g. there are four words in the sentence “How do you do?” even though one of them occurs twice) or “a distinct word-form” (e.g. the word “do” occurs two times, so there are three distinct word-forms).<sup>603</sup> To avoid such confusion, corpus linguists use the term “type” when referring to distinct word-forms and “token” for each occurrence of a word. This study adopts this usage.

- **Keywords**

In many studies, researchers compare multiple corpora to look for **keywords** – which “are those types which occur statistically significantly more (or less) frequently in one corpus than in another.”<sup>604</sup> This method is called “keywords” or “keyness” analysis within corpus linguistics. Because “Keywords are ‘those whose frequency is unusually high in comparison with some norm ... The aim is to find out which words characterise the text you're most interested in,’”<sup>605</sup> a list of keywords can reveal the main topic of the text.<sup>606</sup>

The mentioned topic is generally termed “aboutness.”<sup>607</sup> In general, the term aboutness describes “the relationship between a word and the subject areas associated with it.”<sup>608</sup> Words with high aboutness are strongly associated with the subject, thus reveals the main topics of the texts. On the contrary, words with low aboutness have a weaker association. These words are often treated as “stop words” in corpus analysis because they are the most common words in a language and can be safely omitted without jeopardising the

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<sup>602</sup> lumnecandela, *Introduction to Language | Boundless Psychology*, LUMEN LEARNING, <https://courses.lumenlearning.com/boundless-psychology/chapter/introduction-to-language/> (last visited Oct 11, 2020).

<sup>603</sup> John Sinclair, *Corpus and Text - Basic Principles*, in *DEVELOPING LINGUISTIC CORPORA: A GUIDE TO GOOD PRACTICE 1* (Martin Wynne ed., 2005).

<sup>604</sup> Mike Scott, *WordSmith Tools*, OXFORD: OUP (2004), [https://lexically.net/downloads/version4/html/index.html?keyness\\_definition.htm](https://lexically.net/downloads/version4/html/index.html?keyness_definition.htm) (last visited Oct 12, 2020).

<sup>605</sup> SCOTT MIKE, *WORDSMITH TOOLS* (1996).

<sup>606</sup> Mike Scott, *PC analysis of key words — And key key words*, 25 *SYSTEM* 233–245 (1997).

<sup>607</sup> MARTIN PHILLIPS, *LEXICAL STRUCTURE OF TEXT* (1989).

<sup>608</sup> Edward T. O'Neill, Kerre A. Kammerer & Rick Bennett, *The aboutness of words*, 68 *J. ASSOC. INF. SCI. TECHNOL.* 2471–2483, 2471 (2017).

meaning of the sentence.”<sup>609</sup> Therefore, the keywords technique can be used to determine the aboutness of a text (or corpus) and identify the important topics within it. For example, it may be expected that a text about stealing someone’s content online contains types such as *copyright*, *content*, *infringement*, *stolen* and *dmca*. Indeed, research conducted by Andrew Kehoe and Matt Gee showed the keywords methodology to be effective in extracting such topic-related words in a study of online blogs. They compared the word frequency list derived from a blog post about Content Theft to one derived from a reference corpus of blog posts and found the five words above within the top twenty keywords list.<sup>610</sup>

This part of this chapter aims to quantify the aboutness relationship for words occurring in the community members’ online discussions to reveal the most concerned issues among copyright topics. To find keywords across a corpus, a specific corpus is matched to a reference corpus using some statistical measure (e.g. log-likelihood, MI score, chi-square), “subject to a certain probability level (normally, as is conventional in humanities subjects,  $p < 0.05$ ).”<sup>611</sup>

### • Collocation

First, the keyword list only shows the individual words which stand out from the texts. A single word is not enough to explain why it is conventional (i.e. the rationale behind the usage of such a particular word) and the context in which this word is used. Second, it is clear that a word may have different meanings. Thus, readers and listeners would have to disambiguate these potential senses.<sup>612</sup> Put simply, to understand what a word means, it is necessary to take into consideration the specific situation where this word is used.

In corpus linguistics, to summarise the context in which words are used, researchers use a method called collocation. As defined by Susan Hunston, “Collocation is the tendency

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<sup>609</sup> Sai Teja, *What are Stop Words*. How to remove stop words, MEDIUM.COM (2020), <https://medium.com/@saitejaponugoti/stop-words-in-nlp-5b248dadad47> (last visited Nov 17, 2020). (“For some search engines, these are some of the most common, short function words, such as the, is, at, which, and on. In this case, stop words can cause problems when searching for phrases that include them, particularly in names such as “The Who” or “Take That”.”).

<sup>610</sup> Andrew Kehoe & Matt Gee, *Reader comments as an aboutness indicator in online texts: introducing the Birmingham Blog Corpus*, 12 STUD. VAR. CONTACTS CHANGE ENGL. (2012), [http://www.helsinki.fi/varieng/series/volumes/12/kehoe\\_gee/](http://www.helsinki.fi/varieng/series/volumes/12/kehoe_gee/) (last visited Sep 26, 2020).

<sup>611</sup> Dominic Neil Ashley Smith, *A corpus-driven discourse analysis of transcripts of Hugo Chavez’s television programme “Alo Presidente,”* 2010.

<sup>612</sup> Dominic Neil Ashley Smith, *A Diachronic Corpus Analysis of the Concept of Work*, 2006.

of words to be biased in the way they co-occur.”<sup>613</sup> In other words, collocation is the frequent appearance of a word either near or next to another word, demonstrating a relationship between the two words.<sup>614</sup> In an example delivered by Hunston, the word *toys* co-occurs with *children* more frequently than with either *women* or *men*. These two words can be associated with each other manually, given that there is a logical explanation for it (i.e. toys mostly are played by children, not adults). However, such informal observation does not always occur,<sup>615</sup> so it is more reliable to measure it statistically.

To calculate collocation, software “selects a node word and counts the instances of all words occurring within a particular span (e.g. five words to the left of the node word and five words to the right).”<sup>616</sup> To give an idea of what this means, the following Figure 1 illustrates how the word “copyright” is presented in AntConc – a corpus analysis software.

Rank	Freq	Freq(L)	Freq(R)	Stat	Collocate
1	965	621	344	3256.512	the
2	236	14	222	2432.240	infringement
3	236	35	201	2056.351	law
4	495	360	135	1592.663	of
5	417	187	230	1570.168	is
6	503	275	228	1411.889	to
7	470	169	301	1394.582	and
8	399	247	152	1080.509	a
9	98	13	85	1037.421	holder
10	291	126	165	941.822	in
11	87	2	85	931.743	holders
12	331	178	153	910.756	that
13	331	158	173	860.737	it
14	221	124	97	794.182	not

**Figure 1. The collocation of the word *plagiarism***

When only word frequency is taken into account, it can be predicted immediately that the words at the top of the list are all grammatical words (e.g. the, a, an, his, her, our, their) as the investigated word is a noun. However, these results do not show how the figures are significant. For example, is it significant that the word *the* in Figure 1 occurs at the top, or might this word occur with any noun? It is, therefore, necessary to calculate the

<sup>613</sup> SUSAN HUNSTON, *CORPORA IN APPLIED LINGUISTICS* 68 (2002).

<sup>614</sup> J.R. Firth, *Applications of General Linguistics*, 56 *TRANS. PHILOGICAL SOC.* 1 (1957).

<sup>615</sup> HUNSTON, *supra* note 592 at 69 (addressing the collocation of *toys* and *children* is connected. However, other collocations, such as *strong tea* and *powerful care*, appear to be unmotivated); See also MICHAEL ALEXANDER KIRKWOOD HALLIDAY, *LEARNING HOW TO MEAN: EXPLORATIONS IN THE DEVELOPMENT OF LANGUAGE* 73 (1977).

<sup>616</sup> HUNSTON, *supra* note 613 at 69.

significance of each occurrence. In other words, quantifying “the degree of relatedness of words that occur near a particular node word.”<sup>617</sup>

On one note, there are different measures of significance such as mutual score (MI score), t-score, and log-likelihood. All these measures are based on two calculations, which are “how many instances of the co-occurring word are found in the specified span of the node word (observed frequency), and how many instances might be predicted in that span, given the frequency of the co-occurring word in the corpus as a whole (expected frequency).”<sup>618</sup> The result shows how strongly two particular words seem to associate in a corpus. In other words, it helps to “measure the strength of the collocations.”<sup>619</sup> In this study, I only use log-likelihood which is a measure implemented in AntConc to calculate the collocation.

On another note, a key consideration for collocation is “how far away from the node researchers should look for collocates.”<sup>620</sup> Many corpus analysis tools including Antconc default to a span of five words to the left and right of the node. In this study, a five-word span will be adopted.

- **Concordance lines**

It is common to align sentences upon the node when presenting examples from a corpus.<sup>621</sup> The resulting layout is known as concordance lines. To illustrate the collocational tendencies of the node, concordance lines “are often sorted alphabetically by some word in a given position relative to that node (two words to the left, for instance).”<sup>622</sup>

Concordance lines are useful in discovering patterns in the usage of collocates around a specific word, or for finding repeated patterns for word use. Figure 2 shows the presentation of the concordance lines associated with the word *plagiarism* is presented in

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<sup>617</sup> MARTIN WEISSER, PRACTICAL CORPUS LINGUISTICS: AN INTRODUCTION TO CORPUS-BASED LANGUAGE ANALYSIS 34 (2015).

<sup>618</sup> HUNSTON, *supra* note 613 at 72; Tony McEnery & Andrew Hardie, *Corpus Linguistics: Method, theory and practice*, LANCASTER UNIVERSITY (2011), <http://corpora.lancs.ac.uk/clmtp/2-stat.php> (last visited Nov 18, 2020).

<sup>619</sup> HUNSTON, *supra* note 613 at 74. See also McEnery and Hardie, *supra* note 618.

<sup>620</sup> Smith, *supra* note 611 at 88.

<sup>621</sup> *Id.* at 89.

<sup>622</sup> *Id.* at 89.

the AntConc software. The word under investigation (known as the “node”) is written in blue colour.

Concordance Hits 276	
Hit	KWIC
1	the original author, then it's plagiarism. Adding a disclaimer that
2	o figured out how to write a plagiarism AI that can scan hundred
3	someone selling fanfiction is plagiarism and against their rules fo
4	slly include prohibiting both plagiarism and anyone making mon
5	s the main character", is still plagiarism, and boy haven't I used p
6	ry directly as that would be plagiarism and Bradbury was agains
7	of the oh-so-many cases of plagiarism and C.I. --- Off topic (sort
8	raise some questions about plagiarism and continuity and, and, a
9	o explains to her about both plagiarism and copyrght. So, proof t
10	tters-of-opinion/fan-fiction-plagiarism-and-copyright/ I wasn't a
11	N encourages the crutch of plagiarism and copyright infringeme
12	ics? I'd say combination of plagiarism and copyright infringeme

**Figure 2. Concordance lines of the word *plagiarism***

However, using concordance lines requires researchers to count the extracts themselves, which is very time-consuming. Additionally, concordance lines do not select themselves, which means the researchers must select which extracts are relevant to the research objectives manually. Therefore, some important features may be missed. Moreover, only a few words appearing next to the node can be displayed on the screen, which can be problematic when the investigated sentence is long. For the second and third reasons, I read beyond the concordance lines and select them carefully to be able to interpret the data.

#### - *Corpus design and investigation*

This section first describes the methodology used in this research, which will result in the keywords list, collocates, and sets of concordance lines which are then analysed manually. The rest of this section presents the software which is required to adopt this method and the design of the research corpus used as the data-set for my study. Some ethical issues of this research also are addressed in the final part.

#### • **Corpus analysis tool**

There are many corpus software that supports the analyses, such as AntConc, CorpKit, Leipzig Corpus Miner, Sketchengine, etc. Some high-level programming languages like

Python, R also provide the tools to conduct research using corpus linguistics. In this thesis, I choose AntConc to conduct the corpus linguistics method. Developed by Professor Laurence Anthony from Waseda University (Japan),<sup>623</sup> AntConc is free and widely used software in the field of corpus linguistics.<sup>624</sup>

- **The process**

### **Step 1: Compile the corpus**

It is important to decide the particular type of corpus before starting the data collection and compiling the corpus. The corpus used in this study is a specialised corpus that contains texts with a specific focus: online fanfiction community discussion of copyright.<sup>625</sup> This type of corpus was created to complete a specific research task – identifying significant copyright norms and the rationales behind the construction of these norms. This corpus used in this study is named *Fandom* corpus.

The data used in this study is the content of forum threads where members of fanfiction communities discuss copyright. To collect the data, I first choose the sites where fanfiction communities maintain an active online discussion. The choice of data sites is first based on existing research<sup>626</sup> and my personal experience in joining online fanfiction communities. It is also worth noting that the term “online fanfiction communities” used in this study refers to any online platform where fans can get together and communicate regularly on an individual basis.<sup>627</sup> Under this sense, online fanfiction communities can be built on either free platforms (e.g. social networks, messaging apps, blogs) or owned platforms (e.g. websites).

The criteria by which the sites were selected were: (1) English-spoken website/social networking platform, (2) having high traffic of fanfiction writers and readers, (3) available to the public – i.e. does not require signing up or validation to access, and (4)

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<sup>623</sup> Laurence Anthony’s AntConc, <https://www.laurenceanthony.net/software/antconc/> (last visited Sep 26, 2020).

<sup>624</sup> Heather Froehlich, Corpus Analysis with AntConc, THE PROGRAMMING HISTORIAN (2019), <https://programminghistorian.org/en/lessons/corpus-analysis-with-AntConc>.

<sup>625</sup> EVANS, *supra* note 586.

<sup>626</sup> Fiesler and Bruckman, *supra* note 87; Stroude, *supra* note 64; Lee, *supra* note 574; Lee, *supra* note 74; Rogozinska, *supra* note 574.

<sup>627</sup> Justina Fenberg, 7 Steps for Building an Online Community + 5 Examples, THE BIGCOMMERCE BLOG (2020), <https://www.bigcommerce.com/blog/online-communities/> (last visited Sep 26, 2020); Chris Beer, *The Rise of Online Communities - GlobalWebIndex*, GWI (2020), <https://blog.globalwebindex.com/chart-of-the-week/online-communities/> (last visited Sep 26, 2020).

includes an active community discussion/forum feature. The last criterion eliminates all online archives such as the largest fanfiction collection – archiveofourown.org – because this website does not provide message systems or community tools for member discussion. The sites selected are fanfiction.net, LiveJournal.com, Wattpad.com and reddit.com/r/fanfiction.

**Table 4. List of data sites**

Number	Data sites	Address
1	Fanfiction.net	www.fanfiction.net
2	Livejournal.com	www.livejournal .com
3	Wattpad.com	www.wattpad.com
4	Reddit.com/r/fanfiction	www.reddit.com/r/fanfiction

In the next step, I used the search features of these sites to select forum threads in which “copyright” is explicitly mentioned. However, it is noticeable that the search engines work differently from site to site. Any thread that has the word *copyright* in its either title or content can be shown in the search result. Therefore, the search results were screened carefully to make sure they had copyright as the central topic. This ensures that irrelevant threads (e.g. stories that have the word *copyright* in the dialogue) could be removed from the results.

The collected data included the original posts and all the corresponding comments. Because several websites do not allow the use of bots (programs run automated tasks, including collecting data<sup>628</sup>), data was collected manually and saved in plain text files (the format required by corpus analysis tools). To satisfy research ethics that the data cannot be traced back, the collected data does not contain any identifier (i.e. the data can be used to trace back to the real identities of the posters, such as account/username, profile’s information, or avatar).

As the websites have different designs, the data collection required different processes for each site:

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<sup>628</sup> Ofer Gayer, *What is an Internet Bot | How Bots Can Hurt Your Business*, IMPERVA.COM (2016), <https://www.imperva.com/blog/understanding-bots-and-your-business/> (last visited Feb 27, 2021).



### **Fanfiction.net**

As introduced in section 6.1.1(b), fanfiction.net is one of the largest fanfiction archive sites. Fanfiction.net has a sub-forum, named “Forum”, which is dedicated to discussing matters around fanfiction. I used the search term “copyright” to screen the data on this sub-forum. Six threads contained the word “copyright” either in their titles or contents, but mostly these threads are for reporting suspected infringing work. Only threads discussing copyright matters were transferred to the corpus.

### **LiveJournal.com**

Founded in 1999, the social media platform LiveJournal attracted many fanfiction communities. In contrast to fanfiction websites like FF.net, LiveJournal has millions of accounts that vary in terms of content: music, art, politics, religions, etc. Therefore, at the starting point, the search word “fanfiction” was used to filter relevant topics. Then I proceeded to use the second search word “copyright” to narrow down the threads where users discuss fanfiction and copyright. 42 posts were found to be relevant to both fanfiction and copyright issues.

### **Wattpad.com**

Wattpad is an Internet community for readers and writers to publish work of fiction in different genres, including classics, general fiction, historical fiction, fanfiction, etc. As of 2019, Wattpad has 80 million users and hosts stories in more than 50 languages. Just like FF.net, Wattpad has “community features” which specialises in sharing and discussing all the matters around writing and reading fictions (including fanfiction and normal fictions). The search term “fanfiction” was used to filter the relevant threads. Then the second search term “copyright” was applied to select only threads that had copyright as the central topic. 72 posts have either copyright or fanfiction as the central topic. 22 threads met the requirements.

### **Subforum r/fanfiction of Reddit.com**

Founded in 2005, Reddit is an American network of communities based on users’ interests. Reddit has a fanfiction subforum (r/FanFiction) which is devoted to discussing

anything related to fanfiction. This subforum has approximately 48,900 active members. After using the search term “copyright”, 69 relevant threads were selected.

Table 5 presents the list of websites that were chosen to collect the data, the number of threads as well as the number of collected tokens corresponding to each website.

**Table 5. The list of chosen websites and the number of collected threads and tokens**

<b>Forum</b>	<b>Number of relevant threads</b>	<b>Size in tokens</b>
LiveJournal.com	42	452,9126
Wattpad.com	22	163,807
Fanfiction.net	3	63,491
Reddit.com/r/fanfiction	69	161,908
<b>Total</b>	<b>136</b>	<b>842,122</b>

Note that the representativeness of the corpus was established via the above-mentioned criteria for choosing data sites. The size of the corpus was mainly determined by the availability of relevant discussions within the wide course of time (from 2004 to 2020). I looked at a large picture of the perceptions of fans about copyright by using the sample more broadly, that is, examining various types of fanfiction sites and different types of members (i.e., senior members and new members).

Interactions between online users reveal that some members, especially those who have joined the community for a while, are more active in exchanging opinions than others. Senior members’ views may arguably occupy a large proportion of the corpus, meaning that the representativeness of the data is potentially biased. To limit this undesirable impact, the data extracted from copyright threads are manually screened to ensure that discussions have centred around the copyright topic. Although the balance in user types might not be ideal, the relevance of the data was considered to be a more important criterion. Also, the size of the corpus (842,122 words) that were collected from 136 threads makes it difficult to analyse this data manually. Hence, corpus linguistics is a valuable approach.

## **Step 2: Generate the keyword list**

The next step in the methodology is to obtain the word list that covers all the types from the *Fandom* corpus. A stoplist is also employed to remove all the grammatical (i.e. closed-class) words, which are less valuable for determining aboutness. This word list is presented along with the number of times each of the types occurs across all texts of the corpus (i.e. frequency of word). Then AntConc uses this word frequency data to generate the keyness statistics for every type in the corpus.

The reference corpus used in this section is the British National Corpus (BNC). The BNC comprises “a 100-million-word collection of samples of written and spoken British English from the late twentieth century.”<sup>629</sup> Besides, log-likelihood was used to calculate the keyness statistic.<sup>630</sup> Next, these keywords are categorised to different aspects of copyright, corresponding to the main concerns of community members regarding copyright.

### **Step 3: Investigate the contexts in which the keywords occur using concordances and, for high-frequency words, collocation.**

Having followed the procedure above, I believed that I would now possess a list of the most significant words of the *Fandom* corpus. It allowed me to look for the collocation of them to explore the specific contexts in which these words are used. In this study, the collocation tool in AntConc software was used to extract the words (i.e. the collocates) co-occurring in a span of 5-words left and right of each of the keywords). This is also the default setting of many corpus analysis software, grounded on the proposal of Sinclair. Next, I picked up the concordance lines generated by AntConc to discover which meanings a keyword has in a text. The context in which a particular keyword is used is significant to examine fans’ understanding of copyright when compiling their comments.

## **6.2. ETHICAL CONSIDERATIONS**

Forum conversations can be freely accessible in the public domain without the use of a registered account. However, public accessibility does not justify studying user-generated content without consent. Similarly, Meyer states that authors’ permission ought

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<sup>629</sup> Firth, *supra* note 614.

<sup>630</sup> Ted Dunning, *Accurate Methods for the Statistics of Surprise and Coincidence*, 19 COMPUT. LINGUIST. 61–74, 65 (1993) (“For text analysis and similar problems, the use of likelihood ratios leads to very much improved statistical results.”); Weisser, *supra* note 40, at 54.

to be gained before data is used to compile a corpus<sup>631</sup> because online users generally do not intend for their content to be used for research.

Also, the expectation of privacy varies from person to person.<sup>632</sup> Online users – mostly young people – have been actively sharing information in online platforms that amount to a public or quasi-public network (i.e., the platform is password and login protected). However, users often assumed that their conversations were somehow kept private – either between contributors or in particular groups or communities they join.<sup>633</sup>

In this study, consensus approval was not done due to its impracticality. As mentioned above, the data is collected from approximately 200,000 threads. The number of commenters is enormous, making it infeasible to gain the informed consent of all data subjects. Furthermore, I continuously reviewed the Terms and Conditions of the data sites to ensure that collecting public data is not a violation of their Terms. Finally, I established a risk mitigation process, including anonymising users and collecting only necessary data rather than excessive user data. Specifically, the collected texts do not include identifiers such as usernames, avatars, ages, or email addresses, which aims to limit tracing the real identities of the posters. When compiling the corpus, only content that can be accessed without signing up was collected. Moreover, only threads that centred around the topic of copyright were collected to comprise the corpus.

Another concern raised by Baker is that an analysis of texts may portray texts or text writers negatively, thereby potentially jeopardising permission to use the data, which in turn would restrict a great deal of social research being made public.<sup>634</sup> It is a fact that discussions in fanfiction communities may contain explicit languages or embarrassing contents. Although online users might have different expectations about privacy, the writers are supposed to be aware of privacy concerns when discussing content on public

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<sup>631</sup> CHARLES F. MEYER, *INTRODUCING ENGLISH LINGUISTICS* (2009).

<sup>632</sup> James M. Hudson & Amy Bruckman, 'Go Away': *Participant Objections to Being Studied and the Ethics of Chatroom Research*, 20 *INF. SOC.* 127–139 (2004); Kelsey Beninger et al., *Research using Social Media; Users' Views* (2014); A. Branthwaite & S. Patterson, *The Power of Qualitative Research in the Era of Social Media* (2011).

<sup>633</sup> ALINE SHAKTI FRANZKE, ANJA BECHMANN, MICHAEL ZIMMER & CHARLES ESS, CHARLES AND THE ASSOCIATION OF INTERNET RESEARCHERS, *Internet Research: Ethical Guidelines 3.0* (2020), <https://aoir.org/reports/ethics3.pdf> (last visited Aug 3, 2021).

<sup>634</sup> Paul Baker, Tony McEnery, *supra* note 598.

platforms.<sup>635</sup> They are asked by the forums to consider carefully before placing comments on the sites (i.e. the website [www.archiveofourown.org](http://www.archiveofourown.org)'s rules). Links to the comments are put in the Appendix.

It is also noted that a further ethical concern may arise from this thesis related to the nature of the data. In some cases, if the text can express significant aggressive behaviour or contain sensitive content such as hate speech, pornography, or sexual abuse; the research can be considered as a forum to publicise or encourage such ideologies. However, the objectives of this thesis do not cover any sensitive topics or negative behaviours. Instead, by analysing the terms employed by fanfiction community members, the study aims to compare the informal and formal practices and point out how the latter can accommodate the former in a better way. This study supports the development of fanfiction communities in particular and amateur creations in general. In summary, the use of data in this thesis meets the requirements for scientific research both ethically and legally.

## **6.3.RESULTS**

### **6.3.1. Copyright norms in the formal policies of online fanfiction communities**

#### **a. The content of copyright norm**

On the one hand, the formal policies of online fanfiction communities (e.g. Terms of Service, Community Guideline, Content Guideline) must comply with the copyright laws of the countries where their servers are based.<sup>636</sup> On the other hand, the copyright laws of the Berne Convention's Member States are required to meet the minimum copyright standards. Because all investigated fanfiction sites are based in the United States - a contracting member of the Berne Convention,<sup>637</sup> it is reasonable to assume that they must cover similar copyright terms.

It is also noted that all the collected terms of service are written in English. This is likely because it is the most common language in fanfiction communities. The archive [archiveofourown.org](http://archiveofourown.org), for instance, hosts fanfictions written in more than 30 languages.

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<sup>635</sup> Rebekah Abigail Pure, *Privacy Expectations in Online Contexts*, 2013; Katharine Sarikakis & Lisa Winter, *Social Media Users' Legal Consciousness About Privacy*, 3 SOC. MEDIA SOC. 2056305117695325 (2017); Theodore Patkos et al., *Privacy-by-Norms Privacy Expectations in Online Interactions* 1–6 (2015).

<sup>636</sup> See section 5.1.2.

<sup>637</sup> To locate the servers of these fanfiction sites, I used tools provided by the website at the address <https://tools.tracemypip.org/lookup/harrypotterfanfiction.com> (last visited Sep 25, 2020).

However, as of September 2020, English is the most used language with 5779282 stories written in this language. Copyright terms found in the selected fanfiction sites' policies are presented in Table 3 (Appendix 1).

Furthermore, because most of the websites and forums I studied are based in the United States (except Wattpad's headquarter is in Canada), the legal discussions focus on the US copyright law. In this data set, only two out of 10 research sites made any specific reference to the laws of other countries. Archiveofourown.org states: "As a general matter, the Archive follows US law."<sup>638</sup> And the website Wattpad.com chooses "the laws of the Province of Ontario and the laws of Canada that apply in Ontario in the unfortunate situation where legal action does arise."<sup>639</sup> While certain principal copyright concepts discussed are governed by the Berne Convention,<sup>640</sup> it is noteworthy that copyright norms can differ from country to country.

Additionally, these websites and forums represent different internal copyright policies and related terms (e.g. Terms of Service, User Agreement, Content Policy).<sup>641</sup> For example, fanfiction.net has Terms of Service and Community Guidelines which cover pages of copyright term explanations, whereas the subforum r/fanfiction of Reddit has few rules.<sup>642</sup> Because these sites are quite varied in terms of copyright norms and enforcement, I only discuss the terms which appear for at least two of the sites. The focal point of this study is to compare the copyright literacy among these sites.

#### - *Copyright licence term*

Copyright licence terms – i.e. the rights the online user grants in their work – is the most common term among these sites' policies. All ten research sites contain this term. As can be seen from Table 4, the typical format of this term is "We do not own the content uploaded to this site" or "You grant this website a non-exclusive, permanent, irrevocable, unlimited licence to use, publish, or re-publish your Content in connection with the

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<sup>638</sup> Terms of Service, ARCHIVE OF OUR OWN (2018), <https://archiveofourown.org/tos>.

<sup>639</sup> Wattpad Policies, WATTPAD.COM, <https://policies.wattpad.com/terms> (last visited Oct 8, 2020).

<sup>640</sup> See section 2.2.1(a).

<sup>641</sup> See section 5.1.3.

<sup>642</sup> r/FanFiction - NEWBIES START HERE! Sub Rules & Events, REDDIT (2019), [https://www.reddit.com/r/FanFiction/comments/c7oy79/newbies\\_start\\_here\\_sub\\_rules\\_events/](https://www.reddit.com/r/FanFiction/comments/c7oy79/newbies_start_here_sub_rules_events/) (last visited Oct 8, 2020).

Service.” It is also noted that the format of these licensing terms is consistent throughout the data set.

Copyright licence is a common concept in copyright law and refers to a contractual agreement between the copyright holders of a work (e.g. a film, movie, photo, book) and the person who wants to use such materials, often in exchange for money.<sup>643</sup> In the context of online platforms, when an Internet user submits content to a site, he or she is licensing his or her work for use by the site. Otherwise, the site has no authorisation to display the user’s work to the public.

Fanfiction websites tend to licence content rather than make an agreement to transfer copyright. For example, the website [harrypotterfanfiction.com](http://harrypotterfanfiction.com) states: “This is the grant of a licence, not a transfer of title.”<sup>644</sup> All the selected sites explicitly address that the copyright is held by fanfiction writers. Another example is [archiveofourown.org](http://archiveofourown.org) which highlights the statement “Repeat: we do not own your Content” to reaffirm that the website does not claim any ownership over its users’ content.

It can be seen from Table 3 that the following types of licences are covered in most sites: *limited, nonexclusive, paid, royalty-free, sublicensable, transferable, unrestricted, and worldwide*. The most common types include *nonexclusive, worldwide* and *royalty-free*, which appear in nine out of ten sites (the only exception is [fictionpad.com](http://fictionpad.com)). A non-exclusive licence gives users the right to use the content as they desire, even licencing it to others. For example, a fanfiction writer can post his or her fanfiction to any sites he or she likes. Worldwide means the licence is valid around the world. Finally, a royalty-free licence ensures that the websites have no obligation to pay the users for their fanfiction.

Licence term often covers a list of the specific uses that the sites can exploit the work uploaded to their servers. For example, when posting a fanfiction to [fanfiction.net](http://fanfiction.net), the poster is giving the website a licence to “use, reproduce, distribute, display, and perform their submissions in connection with the service.”<sup>645</sup> The following usage rights are found across the data: *use, reproduce, transmit, display, compile, perform, exhibit, distribute,*

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<sup>643</sup> Licence, sell or market your copyright material, GOV.UK, <https://www.gov.uk/guidance/licence-sell-or-market-your-copyright-material> (last visited Oct 8, 2020).

<sup>644</sup> Terms & Conditions, FANFIC RECS (2017), <https://fanfictionrecommendations.com/terms-conditions/> (last visited Oct 9, 2020).

<sup>645</sup> [fanfiction.net](http://fanfiction.net), *Terms of Service*, FANFICTION.NET (2019), <https://www.fanfiction.net/tos/>.

*adapt, modify, index, comment on, modify, prepare derivative works of, perform and otherwise exploit, publish, or re-publish.*

The most common rights are associated with the display of the work on the websites and forums: to reproduce (4 instances),<sup>646</sup> distribute (5 instances),<sup>647</sup> publish and republish (6 instances)<sup>648</sup> and display (4 instances),<sup>649</sup> use (4 instances)<sup>650</sup> and perform (3 instances).<sup>651</sup> Furthermore, some sites require users to allow them to change the submitted work – i.e. the right to modify, adapt or transform (4 instances).<sup>652</sup> For example, asianfanfics.com is licenced to make derivative work with submitted materials.<sup>653</sup> In summary, all types of licence which are described above are consistent with the exclusive rights of copyright holders.

- *Distributing and reproducing non-authorised work*

It should be noted that these websites and forums take the view that fanfiction is not copyright infringement, because they allow users to post this type of fan creation to their servers. Only one website – archiveofourown.org – releases a formal statement regarding its position on fanwork legality. This archive clearly defines fanfiction (fan works in general) as transformative works, hence satisfying the fair use doctrine.<sup>654</sup>

All the research websites and forums prohibit unauthorised use of copyrighted materials, which is essential to avoid any risk of copyright infringement. Any work copied directly from copyrighted sources is removed from the sites. “Plagiarism” and “copyrighted materials” are two common concepts found in the terms. It can be seen that all the sites generally prohibit users from submitting materials that may infringe on someone else’s copyright. However, there are only three out of ten websites and forums that include the

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<sup>646</sup> These websites are archiveofourown.org, fanfiction.net, fictionpad.com, Quotev.com.

<sup>647</sup> These websites are archiveofourown.org, Asianfanfics.com, fanfiction.net, Quotev.com, Reddit.com.

<sup>648</sup> These websites are Harrypotterfanfiction.com, Quotev.com, fictionpad.com, wattpad.com, ficwad.com, Thefanfictionforum.net.

<sup>649</sup> These websites are archiveofourown.org, Asianfanfics.com, Quotev.com, Reddit.com.

<sup>650</sup> These websites are Asianfanfics.com, Harrypotterfanfiction.com, fanfiction.net, Thefanfictionforum.net.

<sup>651</sup> These websites are archiveofourown.org, fanfiction.net, Reddit.com.

<sup>652</sup> These websites are archiveofourown.org, Asianfanfics.com, Quotev.com, Reddit.com.

<sup>653</sup> Terms of Use - Asianfanfics, ASIANFANFICS.COM, <https://www.asianfanfics.com/page/rules> (last visited Jul 5, 2020).

<sup>654</sup> Frequently Asked Questions, TRANSFORMATIVEWORKS.ORG, <https://www.transformativeworks.org/faq/>.



concept of “plagiarism” in their Terms of Service.<sup>655</sup> Whereas ficwad.com shortly states that plagiarism is not tolerated by the site, the other two deliver detailed explanations of plagiarism. For example, asianfanfics.com gives two examples of situations where the user’s submission is considered plagiarism, including changing names of the canon characters and verbatim copies of published work. Archiveofourown.org, on the contrary, provides a detailed and comprehensive explanation of plagiarism and how to identify the infringement. The absence of plagiarism in most sites reaffirms the misconception of the community members that copyright infringement and plagiarism are the same.

- *Commercialising submitted content*

As presented in chapter 4, fanfiction may constitute copyright infringement. Additionally, copyright holders may find it easy to sue the websites or forums hosting the fan works, instead of chasing after the infringers. Fanfiction sites are terrified of being sued by copyright holders, as is apparent when someone attempts to use their services mainly to make a profit. Eight of the selected sites (except thefanfictionforum.net and quotev.com) apply general bans on using their services for commercial uses in any form. The prohibited acts include advertising, subscription, offers to sale, and solicitations, with gaining advertising and subscription royalty being the most common. Five sites specifically prohibit users from submitting materials that contain an advertisement or business-related information.<sup>656</sup> Many websites, especially those offering free information or content like fanfiction websites, rely on advertising to keep their websites up and running. Advertisements run by users on their web pages may interfere with the websites’ advertising campaigns.

Moreover, some sites allow writers to promote their works (e.g. featuring the direct link to their blogs in their stories, promoting other works at the end of one of their stories), but there are always restrictions on what can be shown in such advertisements. The most common restriction is about commercialising their work. For example, if a fanfiction writer attaches the link to their subscription account (e.g. Patreon, Kofi, Buy Me A Coffee) to their posts as an attempt to monetise their audiences, this may set off copyright infringement complaints, particularly if the legality of fanfiction has not been determined by any court of law. Therefore, allowing such alternatives to gain revenues can bring

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<sup>655</sup> These websites are asianfanfics.com, archiveofourown.org, and ficwad.com.

<sup>656</sup> These websites are fanfiction.net, ficpad.com, asianfanfics.com, ficwad.com, and archiveofourown.org.

financial and legal issues to the websites and forums. Even though these sites' policies do not specify selling fanfiction as prohibited behaviour, they do not allow any commercial use of user submission, including fanfiction.

- *Attribution to the original work*

While fanfiction writers do not aim to mislead readers about the original creators of the works, fanfiction communities have implemented strategies to cover authors' moral rights, as can be seen in the websites' terms and conditions. Some websites may require their users to follow a specific format of submission, which includes attribution information before their stories can be displayed on the platform. There are various forms of attribution disclaimer, including *authorship disclaimer* (i.e. statement of fanfiction writers about the source materials)<sup>657</sup> or *tagging system*, in which fan writers are required to provide detailed descriptions of their stores (i.e. name of the fandom, content rating, relationships/pairings, and content warnings). All the selected sites apply the tagging system to improve readers' experiences in reading and searching, as well as giving credit to the sources.

As previously mentioned in the literature reviews, Professor Tushnet found that one of the most common understandings of the Fair Use doctrine is that it involves an attribution element— i.e. fanfiction writers think their work is more likely to be a fair use of appropriated materials if they give proper credit to the sources.<sup>658</sup> In this study, the fact that websites require users to add attribution disclaimers to their submissions, though they do not carry any legal weight, is an example of this misconception. This is an example of a norm that is heavily enforced so that it is often mistaken for a legal rule.

- *Respecting canon authors' wish*

It is a fact that some well-known authors have publicly expressed intolerance towards fanfiction based on their work. As a result, some fanfiction archives such as fanfiction.net and Twisting the Hellmouth state that they will remove any fanfiction based on the work

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<sup>657</sup> For example, this is a disclaimer of fanfiction writer in fanfiction.net: "The Hunger Game trilogy and the characters are owned by Suzanne Collins. My compliments and thanks to her for writing the books, and I admit to using the book background and the characters in this story. Any errors I make by not describing the characters as well and properly as in the books are mine alone." See also <https://www.fanfiction.net/s/13511502/1/Finding-comfort-in-the-baker-s-son> (last visited October 11, 2020).

<sup>658</sup> Rebecca Tushnet, *supra* note 21.

of these authors (they maintain lists of such authors).<sup>659</sup> The others, including the largest fanfiction archive – archiveofourown.org – do not adopt this policy, maintaining their belief that fanfiction constitutes fair use. However, it can be seen from all the selected sites that they don't host any fanfiction based on the work of authors who state that they don't tolerate fanfiction. Fanfiction websites and forums incline to respect the canon authors' wishes, for fear of legal consequences.

## **b. Norm formation**

Six out of ten selected sites use plain language explanation of their terms. In some situations, the language used in their terms and conditions can be very informal in tone and grammar. Using simple language is a method for translating formal rules to informal settings that the vast majority of members can understand. For example, archiveofourown.org highlights the copyright licensing term as "Repeat: We do not own your content." Or fictionpad.com warns their members "Be Honest. Don't pretend to be someone you're not. Don't steal someone else's stories or ideas. That's just not cool."<sup>660</sup> Site owners tend to use simplistic narratives to present specific copyright regulations.

It is also noted that the selected sites have many similar regulations. For example, all the sites recommend users to be nice to each other, give constructive criticism, not to plagiarise someone else's work, etc. Archiveofourown.org specifically states that their terms and conditions "have been drawn from Slashcity, NearlyFreeSpeech.Net, Vox Populi, imeem."<sup>661</sup> Among them, slashcity.com is a long-established web host which is dedicated to *slash* – a type of fanfiction that describes romantic or sexual relationships between same-sex characters.<sup>662</sup> This shows that the founders and moderators of archiveofourown.org have made use of the norms which were already constructed by the other communities. Besides, thefanfictionforum.net and harrypotterfanfiction.com have similarly written terms and conditions, which again suggests that fanfiction websites borrow from one another when drafting their terms and conditions.

Furthermore, it was noted that fanfiction.net states in its Terms of Use that fanfiction based on certain canon authors would not be displayed. This rule did not derive from a

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<sup>659</sup> See section 4.2.

<sup>660</sup> Terms of Use - Asianfanfics, *supra* note 653.

<sup>661</sup> Terms of Service, *supra* note 638.

<sup>662</sup> SlashCity - Fanlore, FANLORE, <https://fanlore.org/wiki/SlashCity> (last visited Oct 11, 2020).

formal rule or migrate from the other communities; instead, it arose out of a specific event that threatened the community's survival. The story of Anne Rice, as presented in section 4.1, is an example of such incidents.

Additionally, these terms and conditions also reveal the difference between the letter of law and what community members think the law says and how they adapt this to their policies. For example, one factor of fair use doctrine is whether the purpose of the use is non-commercial. This doctrine is translated into, for example, harrypotterfanfiction.com's TOS by permitting readers to keep a copy for personal reading. Fans think what the law says is: it is always illegal to make money from fanfiction. Therefore, the owners of the website (also the fans) decide to prohibit users from making profits from submitted content.

### **6.3.2. Informal copyright enforcement mechanism**

Section 5.1.4 shows that most of the norms with which the members of online fanfiction communities interact are informal norms, rather than law. Furthermore, most mechanisms adopted to enforce these norms are community-based as well. This section explores the informal enforcement mechanism of the online fanfiction community Fanfiction.net to see how the enforcement takes place.

According to its Terms of Service, "Fanfiction.net service is deemed solely based in California (the U.S.)" and "the service is deemed as a passive internet service that does not give rise to personal jurisdiction over fanfiction.net, either specific or general, in jurisdictions other than California."<sup>663</sup> Hence, this site adopts the DMCA notice and takedown procedure to enforce copyright. Internet users can submit a copyright infringement notification to the website, using a format provided by the website. The submission then is transferred to fanfiction.net's copyright agency for further investigation. All the necessary information is described in Section 8. Copyright Policy in its Terms of service.<sup>664</sup> The website also notifies online users to "be aware that there may be adverse legal consequences in your country if you make a false or bad faith allegation of copyright infringement by using this process".

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<sup>663</sup> fanfiction.net, *supra* note 645.

<sup>664</sup> Fanfiction, *Terms of service*, WWW.FANFICTION.NET, <https://www.fanfiction.net/tos/> (last visited May 20, 2020).

An alternative approach is reporting copyright infringement to two sub-forums: **The Anti-Plagiarism Investigation Reports (TAPIR)**<sup>665</sup> and **the Copyright Infringement Reports (CIR)**.<sup>666</sup> Since 2004, the number of cases handled by TAPIR and CIR was 2010 and 1950 respectively. To submit a copyright infringement or plagiarism report, members can reply on the Reporting thread (a thread started by administrators for reporting), providing the suspected plagiarised (or infringing) part and the original work. They also need to provide a link to the suspected uploaded story. Then the moderators will take the following actions: (1) start a new thread and assign a case number, (2) move the suspected story to the new thread, (3) investigate the case, and (4) make a decision, enforce the punishment (if there is any) and close the case by editing the thread title as [resolved]. Members of the website are recommended to use this informal reporting mechanism first, considering that the moderators will respond very quickly and it is less stressful for the complainers compared to the DMCA takedown procedures. Below I investigate some of the key aspects of the informal enforcement mechanism adopted by the website.

#### a. Public shaming

The most common type of sanction noted in the data was public humiliation (known as “bashing”). The clearest example of this form of punishment was found on fanfiction.net with a thread dedicated to publishing names of plagiarists, notable plagiarism cases and some shaming poems.<sup>667</sup> The thread’s title is *[Hall of Shame and Infamy]*. The forum’s moderators described three main purposes of the thread, including public shaming:

“1. Sharing examples of outrageous messages, insane excuses and angry gibberish outed plagiarists and their friends feel fit to send to us. Other than entertainment value, samples of communications provide valuable insight into mind of people who feel entitled to steal other people's work.”

Also, the administrators have highlighted some special cases which the website has successfully resolved. The noticeable point is that they summarise each case with a short

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<sup>665</sup> Fanfiction, *The Anti Plagiarism Investigation Reports*, FANFICTION.NET, <https://www.fanfiction.net/forum/The-Anti-Plagiarism-Investigation-Reports/124913/> (last visited May 20, 2020).

<sup>666</sup> Fanfiction, *Copyright Infringement Reports*, FANFICTION.NET, <https://www.fanfiction.net/forum/Copyright-Infringement-Reports/145811/> (last visited May 20, 2020).

<sup>667</sup> Fanfiction, *Hall of Shame and Infamy List of Deleted Accounts*, FANFICTION.NET, <https://www.fanfiction.net/topic/124913/80575309/1/Hall-of-Shame-and-Infamy-List-of-Deleted-Accounts-Notable-Cases-and-Messages-From-Plagiarists-Co> (last visited May 20, 2020).

description in which the plagiarists were referred to as thieves (e.g. “an identified thief”, “a thief is banned”, “a thief tries”). Moreover, these descriptions may have sarcastic and humiliating undertones. For example, once discussing the case where a user copied someone’s fanfiction, the administrators commented: “A blatant plagiarist drives the original author off FFN in despair. Preventing tragedy was not possible. Avenging them was.”<sup>668</sup> Or another case, where the user copies multiple fanfictions, is illustrated as “Why plagiarise one story when you can plagiarise Over One Hundred?”<sup>669</sup>

Another example of being “called out” publicly by the community is that the administrators of the TAPIR forum have allowed fans to compose and post what they call a “spontaneous poem.” These poems are written in tribute to particular plagiarists, with a mocking undertone, and put on public mode so everyone can read. An Internet user has to register to comment in the threads, but both registered and non-registered members can see what is discussed.

The following lines were cited from a poem named *Untitled*:<sup>670</sup>

“Hear me now the tale of a bitter girl,  
Who let friending get too personal,  
Turned to stealing; and all it took?  
Someone not friending her on Facebook.  
She stalked her victim and stole her fic,  
Taunted with PMs to make everyone sick,  
"B\*tch, I'll do what I want, get over it.  
You can't stop me trolls!" said that little.”

## **b. Access termination**

Another severe consequence of infringing copyright is being expelled from the community. So far, the administrators have published 771 account names that were

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<sup>668</sup> *Id.*

<sup>669</sup> *Id.*

<sup>670</sup> *Id.*

deleted for plagiarism and blatant copying.<sup>671</sup> Each account is linked to a post with a report of the investigation. The list serves as a record as well as “a deterrent to those who plagiarise.”<sup>672</sup> Not only the infringing materials were removed from the website, but the infringers’ accounts were terminated permanently. The violators may never access the website’ service if their IP addresses were banned by the website.

It is worth noting that people who play leading roles in the website have a very significant social influence in shaping and enforcing norms. For example, when listing names of infringers, the administrators sent out a very strong message: “The admins of FFN are real, and they do act on reports.” Their promise of quick response encourages people to take action to combat the infringers. The poem - “*TAPIR theme song*” - was created to pass this message further on:<sup>673</sup>

“TAPIR! That's our name!  
Reporting plagiarism is our game.  
We proudly exclaim,  
that story theft is a fraudulent route to fame.”

In conclusion, both the website’ moderators and users are entitled to post and comment about infringers. Once an infringer is exposed, the other members are welcomed to humiliate such a person. Therefore, not only the moderators but also the community members are active in keeping the community a friendly and safe place. In this sense, public shaming is a type of “vigilantism” – community members administer their own form of justice which do not depend upon the law and legal frameworks.

### **c. Challenges**

Punishing violators by public shaming presents a challenge; there is a fine line between warning and harassment. It is evidenced in the data that members rarely keep a neutral tone when they criticise norm-breaking individuals. For example, calling someone “thief,” or claiming that they are “having mental and emotional disabilities” can make that person feel intimidated or humiliated. Consequently, the humiliated person may fight back and then disagreement can escalate to the point that, instead of changing behaviours

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<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

of infringers, this sanction becomes harassment which contravenes the website's terms and conditions.

Particularly in the context of fanfiction communities where most members are at a young age, this method of sanctioning can cause unnecessary trauma. In one topic where the infringer turned out to be a fourteen-year-old girl, it was reported that her mother sent an email to the moderators, fiercely defending her daughter's behaviour. As can be seen above, the moderators show little effort in creating boundaries between criticism and personal attack or keeping comments at the edge of constructive criticism. Moreover, the exposed information may cause risks to the targeted person. For example, when discussing the hostile messages received from an infringer, the moderators exposed the content of the private exchange, thereby accidentally revealing that the infringer was suffering from depression. A link to the infringer's profile also was attached to the topic (as required to report a copyright infringement), making their identity likely be disclosed and potentially making them vulnerable to further attack.

#### **d. Internalisation**

The previous chapter addressed the fact that educating community members about moral reasons for compliance may be more effective than threatening them with sanctions. My analysis of the informal enforcement mechanism of fanfiction.net shows that the "gentle approach" to channelling members' behaviours is also used.

First, the website encourages members to actively take part in keeping their community friendly and safe. The community publishes three different guidelines (i.e. terms of service, community guidelines, content guidelines) to explain clearly what kinds of behaviours are expected in the platform. These guidelines provide very detailed copyright standards which newcomers can learn to avoid copyright infringement as well as what course of actions they should take to report a copyright infringement (or plagiarism).

Similar to approaches seen in other online messaging systems,<sup>674</sup> the fanfiction.net website includes specific threads to answer the questions of newcomers or anyone who feel unfamiliar with the rules. For example, the TAPIR forum has three threads guiding people in need:

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<sup>674</sup> Burnett and Bonnici, *supra* note 70.



- **[You are welcome!]:**<sup>675</sup> the moderators upload grateful messages which they've got from canon authors whose work is infringed. The messages are very positive, which encourage people to carry their tasks and protect the canon writers.
- **[Unfamiliar fandom? Need a translator? Ask the Consultants for help! (volunteer to be one here too)]:**<sup>676</sup> Sometimes plagiarism will occur in fandoms that members are not familiar with. For example, a writer posted a fanfiction of the book Percy Jackson and the Olympians but he/she used the entire lyric of the song "For the first time in forever" from Frozen by Idina Menzel and Kristen Bell.<sup>677</sup> In this case, it is better to have some supports from people who is familiar with that certain fandom. They also offer help for infringing work in different languages other than English.
- **[READ FIRST: how to file a plagiarism report – also contain FAQs and forum rules (UPDATED)]:**<sup>678</sup> This important thread provides necessary information about the concept of plagiarism, how to file of report, and a very detailed frequent questions and answers section. All newcomers are encouraged to read this thread first.

This variety of norms illustrates a more "gentle approach" of online fanfiction communities in tailoring members' behaviours. Instead of threatening and spreading the fears of being publicly shamed and personally attacked, the communities show newcomers how helpful and supportive their members can be when navigating the norms and expectations of the website. In light of these goals, communities work to "internalising belief"<sup>679</sup> rather than changing behaviours through threats and fears. The internalisation of norms here refers to a process where individuals (normally newcomers) interact with other members, observe, and learn about expected behaviours by the majority of members, and they are eventually guided into an appropriate pattern of

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<sup>675</sup> Fanfiction, *You are welcome*, FANFICTION.NET, <https://www.fanfiction.net/topic/124913/85603859/1/You-re-welcome> (last visited May 20, 2020).

<sup>676</sup> Fanfiction, *Unfamiliar fandom need a translator - Ask the Consultants for help – Volunteer to be one here too*, FANFICTION.NET, <https://www.fanfiction.net/topic/124913/92397721/1/Unfamiliar-fandom-Need-a-Translator-Ask-the-Consultants-for-help-volunteer-to-be-one-here-too> (last visited May 20, 2020).

<sup>677</sup> FFNID 5602485 - extremist [active] [Resolved: Story deleted] - Copyright Infringement Reports Forum | FanFiction, FANFICTION.NET, <https://www.fanfiction.net/topic/145811/117064384/1/FFNID-5602485-extremist-active> (last visited Feb 8, 2021).

<sup>678</sup> READ FIRST: How To File A Plagiarism Report - Also contains FAQ and forum rules. (UPDATED) - The Anti-Plagiarism Investigation Reports Forum | FanFiction, FANFICTION.NET, <https://www.fanfiction.net/topic/124913/78263205/READ-FIRST-How-To-File-A-Plagiarism-Report-Also-contains-FAQ-and-forum-rules-UPDATED> (last visited Feb 26, 2021).

<sup>679</sup> Casey Fiesley and Amy Bruckman, *supra* note 72 at 18.

behaviour. In the context of fanfiction communities, internalisation of community norms can take place wherever socialisation happens such as online discussion, message boards, private messages, etc. The next section will explore the most common type of online socialisation on fanfiction websites - online discussion - to show how members of online fanfiction communities learn the norms and values of their community (the internalisation of norms).

### 6.3.3. Using corpus linguistics to examine community-based norms

#### a. Keyword analysis: What are features of copyright are reported to be important by fan members?

As mentioned in section 6.1.2, it is assumed that keywords emerging from the comparison of the *Fandom* corpus to the reference corpus will help to identify the words used to provide members' opinions. This will then reveal what topics are discussed in relation to copyright. Analysing these in detail can provide a comprehensive picture of the commenters' beliefs and knowledge.

I started with a keyword analysis (as described in Section 6.1.2 above). In this case, the word frequencies from the Fandom corpus are compared against those from a reference corpus (the British National Corpus). This was performed in the AntConc software using the log-likelihood keyness statistic. The top 50 keyword list is presented in Table 6.

**Table 6. Top 50 keywords in Fandom corpus**

	<b>Keyword</b>	<b>Keyness</b>	<b>Frequency</b>
1	Fanfiction	4571.38	3493
2	fanfic	4060.7	3104
3	original	2541.53	1957
4	copyright	2482.66	1912
5	write	2402.87	1851
6	characters	2329.64	1795
7	author	2094.3	1615
8	stories	1932.24	1491
9	own	1930.93	1490
10	money	1433.35	1109

11	fandom	1250.66	969
12	legal	1161.96	901
13	different	991.14	770
14	idea	869.94	677
15	law	789.17	615
16	published	768.33	599
17	bad	684.99	535
18	paid	626.42	490
19	fair	617.31	483
20	readers	543.13	426
21	material	534.06	419
22	art	517.15	406
23	wrong	497.65	391
24	community	496.35	390
25	issue	496.35	390
26	infringement	444.36	350
27	permission	443.06	349
28	canon	435.27	343
29	problem	428.77	338
30	profit	422.28	333
31	illegal	413.18	326
32	property	405.39	320
33	derivative	396.3	313
34	creative	392.4	310
35	terms	375.53	297
36	plagiarism	348.27	276
37	issues	334	265
38	copy	332.7	264
39	court	324.92	258
40	copyrighted	317.14	252
41	transformative	245.87	197
42	sued	243.28	195

43	ip	240.69	193
44	patreon	229.57	176
45	rules	226.46	182
46	inspired	216.11	174
47	fanart	212.61	163
48	lawyer	212.23	171
49	commercial	210.94	170
50	parody	208.35	168

It can be seen from Table 6 that some keywords are occurring with significantly higher frequencies in the corpus: *fanfiction(s)*, *fanfic(s)*, *stories*, *write*, *authors*, *copyright*. This is because they are either used as the search word to filter the threads (e.g. fanfiction, copyright) or associated with the majority of the content uploaded to the sites. Therefore, the fact that these words have high frequencies is unsurprising. The remaining words include aspects of copyright that fanfiction community members discussed the most in the threads. These can be divided into three categories as follows:

- **Legality:** plagiarism, infringement, legal, illegal, permission, sued, fair, disclaimer, public.
- **Commerciality:** Patreon, money, fanart.
- **Creativity:** derivative, transformative.

#### **b. Collocation and concordance analysis: the significant copyright norms in the Fandom corpus**

In this section, I examine the topics discovered via the keyness analysis in greater detail using collocation and concordances.

#### **Category 1: Legality**

##### **6.3.4. *plagiarism***

**Table 7. Collocations of *plagiarism* ordered by log-likelihood**

	<b>Collocates</b>	<b>Log-likelihood</b>	<b>Co-occurrence</b>
1	infringement	134.89744	20
2	copyright	79.32849	22

3	synonym	52.53498	4
4	accusing	49.90236	4
5	community	44.42032	9
6	stop	41.33877	8
7	fan	41.02261	15
8	blatant	38.00357	4
9	theft	37.93703	5
10	fanfic	34.57951	16

Table 7 shows that *plagiarism* and *copyright infringement* are strong collocations. This is significant because the two notions of plagiarism and copyright infringement traditionally have been associated with one another. Fans’ understandings of these two concepts result in the way they reuse existing materials. The following examples show fans’ distinction of plagiarism from copyright infringement.

1	“I wasn’t accusing someone of <b>plagiarism</b> . I was accusing them of <u>copyright infringement</u> .”
2	“There’s a difference between <u>copyright infringement</u> and <b>plagiarism</b> . This person crossed a line.”
3	“Is it will be considered as <u>copyright infringement</u> or <b>plagiarism</b> ? Because the new author didn’t lie or didn’t said that he wrote it.”
4	“Those stories mentioned above were either harmless parodies or novelised versions of the original! I mention what belongs to who in the author’s note. I understand that <b>plagiarism</b> is against the law, but trying to get me in trouble for <u>copyright infringement</u> is absolutely ridiculous.”

The third and fourth lines delivered an interesting point: as long as the “the new author didn’t lie or didn’t say that he wrote it” or “mentioned what belongs to whom in the authors’ note”, then it is not considered to be plagiarism. This statement addressed the fact that plagiarism “involves passing something off as your own.”<sup>680</sup> Meanwhile, the majority of fanfiction writers don’t claim to have created the characters or the universe

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<sup>680</sup> *Id.* at 7.

(i.e. the world that these characters live in). They may claim their plots, characters, or embellishments as their intellectual property. It is evident across the corpus that community members don't associate fanfiction with plagiarism:

5	"Just bc her plagiarism wasn't in published work doesn't make it less shitty and also pls read a wikipedia article on copyright law if (general) you think all <u>fanfic</u> is <b>plagiarism</b> ."
6	"It reinforces erroneous belief that "all fanfiction is plagiarism" and other dumb shit ppl who have no idea how copyright law works like to spout (full disclosure: I'm no copyright law expert, but even I know that unless you're copying words for word from the source, <u>fanfic</u> ≠ <b>plagiarism</b> )."
7	"I also hate when ppl downplay the plagiarism like "oh it's just fanfic" "all <u>fanfic</u> is <b>plagiarism</b> " like what is this shit."

What can be seen from these lines is that fanfiction communities have a strong opinion regarding plagiarism, i.e. they find it very offensive when someone accuses fanfiction writers of being plagiarists (line 5, line 6, line 7).

Additionally, the data shows that community members rarely provide actual legal sources when discussing copyright. Instead, they either simply make statements without sources or cite a non-definitive source such as Wikipedia. The person in line 6 addresses: "full disclosure: I'm no copyright law expert, but..." Similar disclaimers occur several times across the corpus, considering the fact is most fanfiction lovers are not legal professionals:

"Again, not a legal expert, just my perception."

"I'm not an expert on copyright law but it seems like..."

"I'm not an expert on the case-law of copyright by any measure, but I'm a little surprised that an author can claim copyright infringement against additional stories in a fictional universe, provided all the writing is original."

"Disclaimer: Obviously I'm not a legal expert, so definitely contact one if any of you ever get into a legal dispute."

“Many fanfic writers in English are from the USA and argue that fanfic should fall under transformative works exceptions (iirc? Not a legal expert).”

The interesting point is that the person in line 5 credits Wikipedia as the source they use for learning about copyright law (in this case, the distinction between fanfiction and plagiarism). Even though Wikipedia is not a definitive source, many community members credit this online encyclopaedia when discussing legal issues:

“(...) according to both my recollection and Wikipedia,”

“as Wikipedia calls it”

“As to the Wikipedia definition...”

“Here is an interesting Wikipedia entry about the difference between idea and expression...”

“Disclaimer: Everything I know about the law comes from the Wikipedia.”

The use of Wikipedia to support their opinions is understandable, considering that it provides online users with an easily assessable source about anything they want to know.<sup>681</sup> Thus, many fans reach to Wikipedia when they have questions regarding copyright law.

## (ii) *infringement*

Another keyword that occurred numerous times across the corpus is *infringement*. Table 8 shows the collocates which have a significant relationship to the word *infringement*.

**Table 8. Collocations of *infringement* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	copyright	1858.90490	236
2	plagiarism	135.20168	20
3	trademark	94.71844	13
4	defend	63.08025	9
5	wilful	58.96732	5

<sup>681</sup> Brian Feldman, *Why Wikipedia Works*, INTELLIGENCER (2018), <https://nymag.com/intelligencer/2018/03/why-wikipedia-works.html> (last visited Sep 28, 2020).

6	aware	53.12351	8
7	committing	52.23878	5
8	claim	41.77690	8
9	notified	38.90498	4
10	required	37.99820	5

It is not surprising that the word *copyright* has the highest frequency and log-likelihood statistics, considering that it is a part of a very common noun phrase *copyright infringement*. In contrast to fans' strong objection to plagiarism, there is an element of confusion about whether fanfiction is copyright infringement. The corpus shows that the community members' interpretation of copyright law is divided. On the one hand, some agree that fanfiction is not copyright infringement for several reasons:

8	I don't know it what the world you live in, but fanfiction, in its true nature IS NOT <u>copyright</u> <b>infringement</b> .
9	And of course, I cannot reply to explain the difference between <u>copyright</u> <b>infringement</b> and transformative fanfiction because If I could, then the "reviewer" would understand they are an idiot and admitting to idiocy is always painful.
10	People here have quoted multiple times that fanfiction does not fall under <u>copyright</u> <b>infringement</b> and I'm inclined to trust them.
11	I fully believe that fanfic could and should qualify as transformative "fair use" and therefore is not illegal <u>copyright</u> <b>infringement</b> and more than parody is.
12	I'm not an expert on the case law of copyright by any measure, but I'm a little surprised that an author can claim <u>copyright</u> <b>infringement</b> against additional stories in a fictional universe, provided all the writing is original.
13	But if you make a story that is fundamentally the same as the original only different then it still belongs to the original author, and anyone who makes profit out of that is <u>copyright</u> <b>infringement</b> and could be sued.



The common explanation (line 9, 10, 11, 12, 13) is that because fanfiction is transformative (i.e. the writing is authentic and creative) it does not constitute copyright infringement. Again, most comments are provided with complete confidence but no authority: “I don’t know what the world you live in”, “the ‘reviewer’ would understand they are an idiot and admitting to idiocy is always painful”, “I’m a little surprised that,” or “I fully believe that.” It is noticeable that the commenter in line 10 goes along with the majority when justifying the legitimacy of fanfiction: “I’m inclined to trust them.” In other words, he or she picked up on the behaviours and mindsets of other individuals.

For some forum members, fanfiction becomes copyright infringement when a profit is sought, as shown in the following examples.

14	When they made the low budget Voldemort movie and they put it out there, Warner bros was going to sue them for copyright infringement, in the end they didn’t because the film makers made it free and available for everyone. So you see, if you make money on something that doesn’t belong to you then it’s <u>copyright infringement</u> : fanfiction, fan art, fan film etc.
15	No kind of fanfiction is <u>copyright infringement</u> unless you make money from it.
16	Yes, it’s <u>copyright infringement</u> (unless the original story is old enough to be out of copyright). No, you won’t get sued for posting it unless you try to make money from it, or the copyright owner has specifically said they don’t want people writing fanfiction of their work.
17	In both cases, you are taking someone else’s original concepts and making money from it and it’s just not right. Hello, <u>copyright infringement</u> .

On the other hand, some argue that writing and sharing fanfiction always constitute copyright infringement, regardless of not making profits.

18	I only want people to know that it IS <u>copyright infringement</u> and if an IP owner gets pissy they CAN sue.
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19	Fanfic is already walking the line of <u>copyright</u> <b>infringement</b> at best due to its very nature.
20	Strictly speaking, a lot of fanfic (and fan art) is <u>copyright</u> <b>infringement</b> and therefore illegal to make or possess.
21	While any form of fanfiction is technically <u>copyright</u> <b>infringement</b> , most larger companies have taken a more laissez-faire approach to fanworks, seeing them as free advertising.

Besides, fans show their different opinions on whether a secondary use of existing materials constitutes copyright infringement:

22	I would say it depends on how reliant the story is on the source material. If you have had a star wars fanfic that just takes place on spaceships and doesn't heavily involve the Skywalkers, lightsabres or the Jedi you can probably get away with it. But if you suddenly have Kedi who fight with brightly coloured laser swords and a bad guy who looks very much like Darth Vader, I'd say you have a problem. It's not really matter of dishonour, it's a matter of <u>copyright</u> <b>infringement</b> .
23	It's why Rainbow Rowell made "carry on" it was basically what if Harry and Draco were gay and loved each other but she changed all names, location enough that there was no <u>copyright</u> <b>infringement</b> claim.
24	This can mean that a similar plot or setting may not constitute <u>copyright</u> <b>infringement</b> , but a story where characters have very similar traits or do very similar things to original works may be infringing.
25	I've said repeatedly that someone can change the names and file the identifiers off a fic enough to make it legally pass any <u>copyright</u> <b>infringement</b> test.

The poster in line 22 defines fanfiction as copyright infringement when the materials are borrowed heavily from the canon. They believe that if fan writers only use characters or plots that are not significant in the original work (e.g. the setting is spaceships), then they will not be targeted by copyright holders. Otherwise, changing names but still keeping the personality traits and sufficiently distinctive looks of the canon characters cannot help

fan writers to avoid copyright infringement claims. As the commenter points out, fanfiction authors may use a slightly different name (Jedi to Kedi) for the same original characters (“the person who fight with brightly coloured laser swords, a bad guy who looks very much like Darth Vader”).

Following the same logic, fans suggest that fanfiction writers should change the original characters’ personality traits or appearances to make them entirely different from the source material. The commenters in line 23, 24 and 25 believe fanfiction writers should alter these elements dramatically (e.g. changing characters’ names, sexual orientation, locations). This point of view perfectly portrayed how fans figure out the criteria for copyright exceptions. They believe that the more changes made to the source materials, the higher the possibility fanfiction merits copyright exception. However, this suggestion can be particularly complex within fanfiction communities because there are still “unclear lines about how much of something needs to be changed before it constitutes a new work.”<sup>682</sup> In other words, there is an element of confusion about to what extent source materials need to be altered so the secondary use does not constitute copyright infringement.

Precisely, fan writers may find themselves uncertain of how to handle borrowed material. The simplest way is removing any trace of the original work, except the names of the characters. An illustration of this tactic is the Alternate Universe (AU) – a specific genre of fanfiction. While preparing this type of fanfiction, the authors either transpose the characters from the original work into an entirely different setting or make pivotal changes to the canon characters to explore their lives in a different narrative context. However, this type of fanfiction brings up the debate where fans may object to authors who insist on labelling their work as “fanfic” when there are few references to the original work remaining. In a thread on Reddit’s subforum r/Fanfiction named “AU tropes - love them or hate them?”<sup>683</sup> a user comments: “I tend to prefer canon divergence AUs to the ones that take the characters and throw them in a completely different set of circumstances, because at that point it kind of feels like, why not just switch the names and publish it as original fic?” Moreover, as discussed in Section 4.2, fictional characters

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<sup>682</sup> Casey Fiesley and Amy Bruckman, *supra* note 72 at 8.

<sup>683</sup> Reddit, *AU Tropes Love Them or Hate Them?*, REDDIT.COM, [https://www.reddit.com/r/FanFiction/comments/4jmcar/au\\_tropes\\_love\\_them\\_or\\_hate\\_them/](https://www.reddit.com/r/FanFiction/comments/4jmcar/au_tropes_love_them_or_hate_them/) (last visited May 20, 2020).

may not merit copyright protection in some national copyright laws, regardless of how distinctive and well-defined they are (e.g. the UK copyright law). Altering characters does not change the fact that they may be still liable for copyright infringement.

(iii) *legal*

The word *legal* emerged as a keyword with LL score of 2220.71. Table 9 below provides collocation of the word *legal*.

**Table 9. Collocations of *legal* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	action	313.62824	41
2	issues	300.49241	45
3	advice	194.66299	24
4	area	144.33385	21
5	fees	125.65482	14
6	copyright	101.82428	40
7	alliances	100.74820	8
8	trouble	98.85183	16
9	reasons	93.74685	18
10	battle	89.84965	12

The collocations show in what ways the community members pay attention to the legitimacy of fanfiction. Some specific noun phrases connected to the legal procedure were employed by the commenters in their discussions such as *legal action*, *legal issues*, *legal trouble*, *legal battle*. The forum members may use these words to refer to concerns about copyright issues.

• *legal action*

The noun phrase *legal action* occurred 41 times across the corpus, which mainly refers to action taken by copyright holders against fanfiction writers. The circumstances where fans take legal action against canon authors have never occurred (e.g. canon authors use fans' idea to write sequels).

It is a strong belief held by community members that copyright holders never take legal action against them for writing fanfiction. As many evaluate, bringing fanfiction writers to court is a “self-destructive move” and completely “money and time-wasting”, which leads to “massive decline in popularity” (of the copyright holders).

26	Taking <u>legal action</u> against writers of fanfiction would probably be a horribly self-destructive move, in any case.
27	But the thought of taking <u>legal action</u> against every fanfic writer to defend your copyright seems very wrong to me.
28	They'll get massive decline in popularity from their fanbase. Hence they refrained from taking <u>legal action</u> so far.
29	We probably don't seem more <u>legal action</u> against fanfiction because people aren't making money off it and it isn't worth the IP owners money/time to take legal actions

What can be seen from this set of concordance lines is that fans are confident that what they contribute to copyright holders' popularity will outweigh the issue of copyright infringement (Line 26, line 28). Even though fans are aware that their practices constitute copyright infringements, they believe that taking legal action against fanfiction writers seems morally “wrong.” (Line 27). Moreover, suing fans will not be worth the time, expense and energy involved (Line 29).

- ***legal gray area***

Note that in both American and British orthography the spellings *gray* and *grey* occur in the Fandom corpus. However, as the reference corpus used in this research is the British National Corpus, the word “gray” has a higher keyness statistic and appears on the collocation list of the word *legal*. Consequently, this section only analyses the term “legal gray area.”

The legal status of fanfiction has been noted to occupy a “gray area” of copyright law where it is unclear that fanfiction is legal or illegal.<sup>684</sup> The phrase “gray area”, was mentioned numerous times across the corpus:

30	The fact remains though, that we do not own any of the copyrighted material that we are using for our work, which puts us in a <u>legal gray area</u> .
31	Unsold fan fiction is in a <u>gray area legally</u> , because it is not clear (and perhaps must be judged on a case-by-case basis) whether it impacts the original author’s copyright and the market for those works.
32	In any case, my understanding is that noncommercial derivate work does currently fall into the <u>gray area</u> of fair use.
33	And a bit nerve-wracking—do we want fanfiction’s <u>legal gray area</u> exposed to close scrutiny by a site dedicated to doing the one thing we’re told we can never do – make a profit?
34	Fanfiction lies in a <u>legal gray area</u> where it is largely protected because it is non-profit, since it is harder to prove harm where no money has changed hands.
35	I mean, by taking a profit and certainly by asking for payment, doesn’t that just blow right past the legal lines or at least hit the edge of the legal gray area fanfiction often lives in?
36	We are in a <u>legal gray area</u> , which protects us to a certain degree. But that protection is NOT guaranteed. All we need is one copyright holder to sit up, take notice, and go “Hey, the hell do you think you’re doing??” for the whole house of cards to come tumbling down.

What is most seen from this set of concordance line is that there is a strong belief held by the community members that monetising fanfiction makes it illegal. The answer to the question of whether fanfiction is legal or illegal remains unclear because it depends on whether fanfiction affects the copyright holders’ revenue. As long as there is no money involved, fanfiction communities are safe relying on such “legal grey area” (Line 36). The poster in line 36 warns others that when a copyright holder decides to take legal

<sup>684</sup> FIC: WHY FANFICTION IS TAKING OVER THE WORLD, *supra* note 541; Rebecca Tushnet, *supra* note 21.

action, it can set a bad precedent to others, as “the whole house of cards [can] come tumbling down.” As a result, a whole community can be put in danger.

(iv) *illegal*

**Table 10. Collocations of *illegal* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	technically	210.54236	23
2	fanfiction	106.73818	35
3	copyright	83.00342	24
4	legal	78.07097	18
5	fanfic	70.78233	26
6	mean	53.06396	12
7	charging	50.37468	6
8	permission	50.37468	10
9	law	45.35143	11
10	immoral	42.56811	5

The word *illegal* appeared 326 times across the corpus, addressing fans’ attitude towards wrongdoing regarding copyright law. Table 10 shows the collocations of the word *illegal*. The first finding is that *technically* has the highest prominent log likeness statistics. And the phrase “be technically illegal” appears to be a pattern in fans’ online discussion about copyright. The below are extracted from the corpus.

37	Tolerated, sometimes even promoted by IP holders as a form of free publicity, but yes, <u>technically</u> <b>illegal</b> .
38	Fanfiction on sites like Wattpad, although <u>technically</u> <b>illegal</b> , are tolerated simply because it’d be impossible to go after the thousands of people writing them.
39	However, let’s take for granted that fanfic is <u>technically</u> <b>illegal</b> , but in most cases it’s the sort of illegal that doing 65mph in a 60 zone is illegal; no one, even the cops, really gives a crap, and probably never will.
40	It probably <b>technically</b> illegal but the dollar amounts are insignificant so no one cares.

41	Fun, prolific, sometimes better than the real thing, but yes, <u>technically</u> <b>illegal</b> .
42	That's one of those " <u>technically</u> <b>illegal</b> , but not worth the trouble and cheaper to ignore as long as it doesn't get out of hand" kind of things.
43	Fanfiction is, after all, <u>technically</u> <b>illegal</b> . True, most people turn a blind eye on it, but still.

It is apparent that community members see fanfiction as "*technically illegal*." In general, something "technically illegal" is clearly, undeniable illegal but it may not be the way people think about it. Writing fanfiction may be technically illegal – according to what is written in the law. However, what the community members believe is that if fanfiction falls into the following circumstances, then it is more acceptable:

- First, it is non-commercial which guarantees no monetary gain of copyright holders is significantly harmed. (Line 40, 42).
- Secondly, fanfiction benefits copyright holders' reputation and sales. (Line 37).
- Thirdly, it is impossible to enforce copyright online. The idea of pressing charges against thousands of fanfiction writers around the world is impractical. (Line 38)
- Fourthly it doesn't worth taking legal action against fanfiction. Many people believe that the level of risk (if there is any) caused by fanfiction is not a serious concern to care about, let alone legal action. Consequently, it is a common perception that people should ignore it. (Line 39, 40, 42, 43)
- Fifthly, fanfiction may have many advantages such as entertaining, creative and high-quality. (Line 41).

The posters downplay the illegal side of fanfiction by saying if fanfiction is "technically illegal," then one of those reasons can make it "less illegal." This mindset traces back to the "legal grey area" where the legality of fanfiction is not precisely determined. There are many exceptions, as the community members point out, which fanfiction can fit into. For example, if fanfiction writers stay within the borderline of non-financial rewards, fanfiction is legal. The use of strong collocation *charging* also shows the same rationale:



44	<i>Charging</i> for it is also <b>illegal</b> .
45	If you mean <i>charging</i> money – that’s <b>illegal</b> .
46	That’s <b>illegal</b> if he’s <i>charging</i> for fanfic, that I.P doesn’t belong to him.

Concerning the permission from copyright holders, several community members mentioned creating unauthorised derivative work is illegal.

47	Derivative works, without the copyright holder’s permission, are <b>illegal</b> .
48	Any work derivative of someone else’s work without their permission is <b>illegal</b> .
49	If it’s making money off other people’s work without their permission, then yes, it’s <b>illegal</b> .
50	Also <b>illegal</b> unless they have expressed permission to do so.

It is accurate that making derivative work is one of the exclusive rights granted to copyright holders by the law.<sup>685</sup> The fact that most fanfictions are unauthorised raises questions about the legitimacy of the work. Because *permission* is also a keyword, this issue is discussed in greater detail in the following section.

(v) *permission*

**Table 11. Collocations of *permission* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	ask	310.59302	38
2	author	152.87793	35
3	use	134.64415	29
4	get	122.77589	31
5	express	101.98919	11
6	given	101.32851	16
7	holder	95.78323	13
8	creator	91.52387	14
9	asking	84.97817	12

<sup>685</sup> See section 2.2.2(c).

10	immoral	69.75593	22
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First, the fact that the word *ask* has the highest score of LL stats (310.59302) is reasonable, given that *ask permission* is a common verb phrase.

51	In terms of using OCs, I think the same courtesy should be given to the creator of that OC as we give to the creators of the universe: acknowledge the owner of the OC, and because we have access to that owner more than we do with the owners of the universes we play in, I would also <u>ask</u> them for <b>permission</b> because we're only one degree of separation as opposed to the six degrees of separation with the original creators of the universes we play in (if that makes sense).
52	Now, Wattpad is unique because you should <u>ask</u> for <b>permission</b> before posting fanfiction of any stories.
53	You have to <u>ask</u> the writer for <b>permission</b> ! If fanfic falls under fair use, we most certainly do not.
54	<u>Ask</u> for the creator for <b>permission</b> . Mention it in authors note/give credit where it due – ESPECIALLY if I never heard from the creator for whatever reason.
55	You have to <u>ask</u> the writer for <b>permission</b> : no, you don't, it is nice to ask but not necessary. If the owner categorically says no fanfic then usually fanfic writers don't write fanfic about those characters.
56	In more active fandoms, there are thousands of fans worldwide engaged in the writing of fanfiction and the creation of other transformative works. If each of us contacted the original author to <u>ask</u> for <b>permission</b> , she/he would be overwhelmed and unable to process all the requests.
57	All fanfiction is based on something, and I say 99.9% of the time, writers don't go and <u>ask</u> creators for <b>permission</b> , so you even asking was very nice.

As content creators, fanfiction writers often make decisions about what is permissible and what is not. The multiple sources of rules which they must negotiate, including letter of the law, website's terms of use, community guidelines, or ethical standards are discussed in Chapter 5. It is therefore unsurprising that copyright holders' authorisation as a requirement of copyright law is discussed in the online fanfiction communities.

I found generally that there is an inconsistency in the community members' opinion regarding copyright holders' permission. Although they could not articulate fair use or copyright limitations and exceptions with precision, they have correct intuitions about the need for asking permission from the original creator required by the law (line 51, 53, 54, 56, 57). Furthermore, they are not willing to obey the law. For some, asking for copyright holder's authorisation is something that they do just for showing politeness and consideration – “a courtesy,” “a very nice thing” (line 51, 55, 57); for others, it is unnecessary and impractical (line 51, 55, 56, 57). Or they do only when the platforms require to do so (line 52). For example, the poster in line 51 explains the impracticality of reaching to original creators for their permission as: “we're only one degree of separation as opposed to the six degrees of separation with the original creators of the universes we play in.” Or the person in line 56 addresses that asking permission only makes copyright holders inundated. The rationales behind their non-compliance often appear to be based on ethical standards or common sense.

Additionally, these platforms are not always great places to find legal advice. The poster in line 57 strongly states that “99.9% of the time” fanfiction authors don't go to copyright holders to ask. Although it may contain some elements of the truth (i.e. it may be difficult to contact authors), it is not quite right, since it suggests that writing fanfiction without permission is tolerated. Or the member in line 54 advises his or her fellows to “Mention it (the permission) in authors note/give credit where its due,” which is not required by the law. Authors of derivative works don't have to show evidence of the authorisation once they obtained it (e.g. giving credit or stating in the descriptions of their stories).

(vi) *sued*

**Table 12. Collocations of *sued* ordered by log-likelihood**

	<b>Collocates</b>	<b>Log-likelihood</b>	<b>Co-occurrence</b>
1	get	349.85496	56
2	minuscule	128.15344	8
3	risk	76.87338	9
4	lowers	60.31669	4
5	court	49.58455	8
6	chances	47.03252	5

7	author	46.57587	13
8	incredibly	42.13180	5
9	getting	41.46446	8
10	authors	31.95317	9

The collocate *get* appears 56 times with *sued*, having the highest LL stats in Table 12. This is unsurprising because it is a part of the common verb phrase “get sued,” which refers to the risk of being sued by copyright holders.

58	It’s like using photos from the web without owning them. The chances of being <b>sued</b> are incredibly minuscule. But if you are sued, you will lose.
59	It is very unlikely that anyone would be prosecuted or <b>sued</b> for something like that because of the private nature of it.
60	Fanfiction can be <b>sued</b> and the reason it doesn’t happen is because most authors and companies realise it’s free marketing.
61	I heard an original author <b>sued</b> a fanfiction writer or sth and everyone got paranoid.
62	I’m from the old days of fanfic writers getting <b>sued</b> by authors. I’ve seen the heyday of DMCA lawsuits for illegally downloaded music. I cannot explain the fear and trepidation that everyone felt because of potential legal problems. Everyone felt it.
63	Sites that host fanfiction are the ones who get <b>sued</b> , along with the author of said fic, and have to defend themselves in court.
64	Legally aside, this growing trend is going to get someone <b>sued</b> eventually.
65	Authors have <b>sued</b> for fanfiction that is free before, and you know what? They’re fully within their rights to do so.
66	And I think P2P erodes that protection, and just because it’s been done time and time again doesn’t mean that the next person who does it won’t get <b>sued</b> .
67	I can remember the days when even writing fanfic could get you <b>sued</b> by certain authors.
68	Remember folks, just because it’s easy to steal and a lot of people do it, that doesn’t mean you won’t get <b>sued</b> if the artist finds out.

69	Otherwise, unless you are claiming the work to be yours (the phone, places, plot, or universe) and publishing it to make money off it, then it's illegal and should be taken down or other things may happen: you get <b>sued</b> or have to pay the owner a percentage of your revenue.
70	Try it and see how far you <u>get</u> before you are <b>sued</b> .

First, I found generally that the community members are fully aware that they may face legal actions from copyright holders because of the activities they are engaging in. Strong statements such as “Fanfiction can be sued” (line 60), “They (canon authors) are fully within their rights to do so” (line 65), “Remember folks,(...) does not mean it won't get sued” (line 68), “Everyone felt it” (line 62), or “Try it and see how far you get before you are sued” (line 70) can be found in members' conversations. While it may be true that many authors have ignored the fact that someone's writing fanfiction on their works, fans cannot fully guarantee that another author would never try to sue them. And the most terrifying part is that they have full rights to do so and may win the cases.

Interestingly, even though community members are scared about getting sued by copyright holders, some are confident about their online activities. Some think that the chance of an actual trial for writing fanfiction is low. For example, they genuinely think the risk of being sued “is incredibly minuscule” (line 58), “very unlikely (line 59), “does not happen” (line 60). Some reasons for these beliefs are revealed in the concordances, such as a feeling that copyright holders do not see fanfiction as a risk, but rather a channel through which to promote their works (line 59). Some forum members insist that as long as they don't make profits off of fanfiction, copyright holders have no actual reason to sue them (Line 60).

Additionally, what draws my attention is the fact that community members learn about copyright issues by interacting with the members of their communities. Senior members may mention either “the paranoid” (line 61), “the scare” (line 62), “the trepidation” (line 62) that the communities experienced in the past or share examples where fanfiction writers were sued (e.g. “I heard” (line 61) “I'm from the old days of fanfic writers getting sued by authors,”(line 62) “I can remember” (line 67)). Examples delivered by senior members reinforce the risk of being sued by copyright holders within the communities

and can arguably be very effective in educating new members. Therefore, learning about how to behave appropriately will not change the law but can reduce the risk of being sued by copyright holders.

(vii) *fair*

**Table 13. Collocations of *fair* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	use	3471.00892	371
2	fair	343.08127	50
3	dealing	179.83359	17
4	parody	143.06117	20
5	copyright	114.91158	34
6	doctrine	108.96055	9
7	protected	104.36099	14
8	transformative	77.14752	13
9	fall	77.08495	11
10	legal	75.85700	20

The collocate *use* has significant high LL stats (3471.00892) and appears 371 times in the *Fandom* corpus. It is easy to understand, given that *fair use* is a legal term that is widely used in the US copyright law.<sup>686</sup>

71	The problem with <b>fair use</b> is that it doesn't stop you from being sued. It is a defense in the court room, and it's decided on a case-by-case basis.
72	Seriously, I do totally think that authors of the original source should be able to defend their copyrights and their livelihoods. I just don't think this goal is in any way incompatible with classifying fanfic as <b>fair use</b> .
73	Legally classifying fanfiction as a derivative work grants fans who write fanfiction the right to do so, as long as their work abides by the copyright laws of the original

<sup>686</sup> See section 2.2.2(d)(iii).

	work and does not breach the doctrine of <b>fair use</b> (allows authors to use verbatim quotes from a work without the need for permission).
74	<b>Fair use</b> is a kind of a fuzzy concept, and AFAIK the courts have never determined its exact boundaries.
75	Also, just because a work is determined to be transformative doesn't mean it isn't infringement – it still has to pass the other prongs of <b>fair use</b> analysis.
76	<b>Fair use</b> is a concept in the US that enables and perpetuates creativeness, including Fanart, Fanfic, Memes, Criticism, etc, etc.
77	I agree that fanfiction shouldn't be for-profit, because I believe that nfp fanfiction is generally <b>fair use</b> and legal.
78	Lirc fanfic is iffy because they rely on <b>fair use</b> and other similar laws.
79	<b>Fair Use</b> isn't a defense that will keep you out of court; it's an argument you can use IN court.
80	It seems to me that the sanest approach would be to consider fanfic legal <b>fair use</b> so as long as it is not being sold for profit (at which point, I think you are looking at a more reasonable likelihood of confusion) or in some outlandish way being passed off as the work of the original author or authorised in some way.
81	It may fall within <b>fair use</b> , at least in some cases – we just don't have legal precedent on it at this point.
82	As you mentioned it has never been tested but there are a few things that weigh heavily against in favour of it being <b>fair use</b> . The main argument is what is more important use of characters or the fact that isn't intended to make money.
83	Following this trend, most fanfiction would be transformative and more likely to be considered a <b>fair use</b> .
84	But fanfiction for profit is well outside the scope of <b>fair use</b> .

Because copyright laws extend to derivative works, and because there has been no conclusive definition of derivative works,<sup>687</sup> the legal status of fanfiction boils down to the question: does fanfiction constitutes fair use?<sup>688</sup> Therefore, many conversations within

<sup>687</sup> F. E. Guerra-Pujol, *Of Coase and Copyrights: The Law and Economics of Literary Fan Art*, 9 N. Y. UNIV. J. INTELLECT. PROP. ENTERTAIN. LAW JIPEL 91–106, 101 (2019).

<sup>688</sup> See Chapter 5.

online fanfiction communities revolve around fair use and how this doctrine relates to their practice.

First, there is evidence of the belief held by most fans that fanfiction may fall into the category of fair use (line 73, 74, 77, 78, 79, 80, 81). Most fans express the view that non-commercial use is the sole factor in determining whether a use is fair (line 73, 78, 81, 83, 84). This supports the previous analysis that has illustrated the deeply rooted practice of non-commercial norms within the communities.<sup>689</sup> Thoughts such as “if you aren’t making money from fanfiction, then it is always fair use” appear very consistent and strong within these communities.

Incorrect information contributing to this misunderstanding can be seen, as some members consider the transformativeness of fanfiction as the main factor in the fair use test (line 77, 84). However, as presented in Section 2.2.2(d), courts have to consider all four factors to determine a particular use is indeed fair, rather than only the non-commercial and transformativeness factors.<sup>690</sup> These posters here note how judges apply different factors in the Fair Use test:

“Also, just because a work is determined to be transformative doesn’t mean it isn’t infringement – it still has to pass the other prongs of fair use analysis.”

Secondly, the fair use doctrine is left open to interpretation, which contributes further to members’ confusion about copyright. Many fans express their confusion over the fair use doctrine. For example, this legal term is defined as a “fuzzy” (line 74), “iffy” (line 78) concept, which provides no bright line to dictate the legal status of fanfiction (i.e. “the courts have never determined its exact boundaries”). Also, some suggest that the lack of precedents make it difficult for them to learn about how the law is practised in reality: “we just don’t have legal precedent on it at this point” (line 81), and “it has never been tested” (line 82). It is also worth noting that it is a strong belief held by fanfiction communities that a fair use defence may shield them from legal actions. In other words, if they assume that fanfiction is fair use, then they believe permission from copyright holders is not required and they will never be sued. Consequently, some fans move to correct the others’ understanding of fair use: “The problem with fair use is that it doesn’t

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<sup>689</sup> See section (i), where the word *money* is discussed.

<sup>690</sup> See section (g), where the word *transformative* is discussed.



stop you from being sued” (line 71), or “Fair Use isn’t a defence that will keep you out of court” (line 79). It is true that authorised secondary use of copyrighted work is either legal or not would be determined in arbitration. That is the reason why fair use is decided on a case-to-case basis.

(viii) *disclaimer*

**Table 14. Collocations of *disclaimer* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	put	215.37640	22
2	op	157.18155	13
3	copyright	111.68519	17
4	post	105.71366	14
5	saying	75.02690	9
6	legal	70.04396	10
7	disclaimer	69.43417	7
8	fics	58.37496	7
9	just	58.28955	12
10	use	56.66509	9

The word *disclaimer* has high log-likelihood stats (1229.05) and frequency (148) in the keyword list (Table 14). I chose this word for further investigation because it presents the attribution norm which asks fanfiction writers to give credit to copyright holders. In fanfiction communities, putting disclaimers such as “I don’t own [name of canon work/characters]” or “all rights belong to [canon author]” at the beginning of each story is a well-established rule.

85	I <b>put a disclaimer</b> at the beginning, not for legality or anything, but for credit’s sake and to add that my work may have spoilers if you are not caught up on the series (since I do some fics from unfinished and longer series).
86	By “obvious” we mean that even if a fan writer didn’t <b>put a disclaimer</b> on her story, readers know that she did not invent Wonder Woman or Voldemort, or the phrase “Use the Force, Luke”.

87	Also, the <b>copyright disclaimer</b> is such a goofy habit to be in. Yes, we know you don't own [fandom]. Putting that wouldn't stop the original creators from suing you if they really wanted to – and realistically, they won't.
88	Even if I did polite thing in crediting this person, she would probably be upset. Just like how some original creators, don't care if you <b>put a disclaimer</b> on your fic and they'll see you as infringing the copyright.
89	When I first started writing it was a requirement to <b>put in a disclaimer</b> saying you weren't making money from it.
90	Some early sites made it a requirement for any posted fanfic, although most of them these days <b>have a disclaimer</b> as part of their ToU and it became one of those things you just did.
91	If you read the FFN and AO3 find prints, they <b>put those disclaimers</b> in there, so the authors no longer have to put it on every single story.
92	A lot of time it's a hang on from the early days. It used to be that a lot of sites demanded that authors include some kind of <b>disclaimer</b> at the start of a fic – some still do.

The data shows some degree of implicit attribution in community members' perception of copyright law – the idea that attribution is not necessary given that the source materials are apparent. For example, the person in line 86 states that no one will mistake characters like Wonder Woman or Voldemort as fanfiction writers' creations. Additionally, they also think these disclaimers typically carry no legal weight in a court of law.<sup>691</sup> They also do not change the attitude of copyright holders toward fanfiction. According to some members, copyright holders will not care if fans put a disclaimer or not; they will still see them as copyright infringers and can still sue if they really want to (line 87, 88).

However, fanfiction writers continue to use ownership disclaimers for several reasons which are presented in the above concordance lines:

- First, fan authors may find attaching disclaimers is an expression of good faith. For them, it is more an ethical duty than a legal one. For instance, they either do it “for credit's sake” (line 85) or as “a polite thing” (line 88).

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<sup>691</sup> Tushnet, *supra* note 62.

- Second, the importance of attribution seems to be related to how the platform operates. Fanfiction websites such as Fanfiction.net and archiveofourown.org (AO3) require fanfiction writers to put copyright disclaimers on their work before it is displayed (line 89, 90, 91, 92).
- Third, these disclaimers have existed as a tradition in fanfiction communities. Starting from the “early days” of these online sites, this requirement eventually becomes a deep-rooted rule of fanfiction communities. For example, some see it as “a goofy habit” (line 87) or “one of those things you just did” (line 90).
- Fourth, this norm also reveals how rules, even though they do not hold any legal weight in the court of law, are persistent. As one member states: “Everyone did it in the past, and everyone does it today. It is more a tradition now than anything else.”<sup>692</sup> Members of fanfiction communities pick up behaviour from the other. The example below highlights how senior fans educate newcomers about the necessity of putting copyright disclaimers in their fanfiction.<sup>693</sup>

“[new user] So I’m on AO3 and I see a lot of people who put “I don’t own [insert fandom here]” before their story.

Like, I came on this site to read FAN fiction. This is a FAN fiction site. I’m fully aware that you don’t own the fandom or the characters. That’s why it’s called FANFICTION.

[senior member 1] Oh you youngins...how quickly they forget.

Back in the day, before fan fiction was mainstream and even encouraged by creators...This was your “please don’t sue me, I’m poor and just here for a good time” plea.

[senior member 2] how soon they forget Anne Rice’s lawyer.

[senior member 3] Put simple: we all lived in fear of her team of highly paid lawyers descending from heavens and taking us to court over a slashfic less than 500 words long.”

This post has 161,475 notes on Tumblr and explains in detail to anyone new to the world of fanfiction why they should put disclaimers on anything they write. Senior members 2

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<sup>692</sup> Posting to Tumblr *fandomlife-universe*. As of February 2019, the post had over 140,600 notes. [https://fanlore.org/wiki/So\\_I%E2%80%99m\\_on\\_AO3...\(the\\_forbidden\\_history\\_of\\_disclaimers\)](https://fanlore.org/wiki/So_I%E2%80%99m_on_AO3...(the_forbidden_history_of_disclaimers)) (Last visited May 20, 2020).

<sup>693</sup> *Id.*

and 3 mentioned even bring up the “Anne Rice lesson” as an example of potential litigation threats.<sup>694</sup> Such litigation threats from canon authors urge fans to make such “authorship statements” to indicate the sources from which they got the materials. This “golden principle” becomes a norm in fanfiction online forums. The senior members ensure new members of the communities understand the rationales behind the story of disclaimers and continue to carry on this traditional norm. This process again confirmed the internalisation norms which I previously discussed in Section 5.2.2.

(xi) *public*

In this section, the keyword *public* is investigated. Although this keyword does not appear on the highest log-likelihood word list, its study is valuable because it facilitates the understanding of the construction of community members’ identity. The analysis seeks to explain why the members of online fanfiction communities prefer to keep their activities away from the public eye. The concordance list for *public* is studied.

93	The protections fans are looking for mostly have to do with legal footing, not <b>public</b> acceptance.
94	My experience, at least as far as ASolaF goes, is that when you point to GRRM’s many statements regarding his disapproval of fanfiction generally, and his strong disapproval of it in relation to his own work, the fanfic comms lock themselves up to avoid <b>public</b> attention. They don’t stop, however, despite the wishes of the author being clear.
95	Monetising ff is a big no no – it will open up a whole can of worms no-one wants in their hobby (potentially exposing everyone to public scrutiny/legal crackdown).
96	So, ummm... Yeah we need to raise <b>public</b> awareness, which is not quite the same as needing to achieve public social legitimacy.
97	As long as most people are either hostile to fanfic, or at least different, then the legal system has little incentive to protect it. And if you think <b>public</b> opinion has no bearing on law, take a look at the cases the Supreme Court chooses to hear.
98	I’m not sure <b>public</b> opinion greatly matters for that issue – IP law is complex, and it gets more complex when any obvious profits are removed (because it is hard to figure out what’s being “protected” if not money).

<sup>694</sup> See page 85 (Anne Rice’s lawyers sent warning letter to fanfiction.net, asking the website to remove all fanfictions that are based on her works).

99	Those sites make a tremendous amount of money from advertising, so they have the pockets to make a lawsuit worth the cost. But then there will be the <b>public</b> outcry.
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When discussing the words “sued,” “permission,” and “infringement,” it is clear from the findings that fanfiction communities fear inviting unwanted attention from copyright holders toward their online activities. They are aware of the risk of being sued by copyright holders and realise that if there is an actual case, they will lose. American scholar Freund mentions in her article that when user-generated content became more visible on the LiveJournal platform and copyright issues arose, video-makers were highly concerned with privacy and tend to “lock” their post and avoid posting on popular websites like YouTube. She sees this change as an example of a “culture of fear” – the fear of inviting legal actions.<sup>695</sup> Professor Fiesler also confirms the existence of what she calls the “secrecy norm” when interviewing fan creators.<sup>696</sup> Indeed, the fact that fan communities stay outside of the formulaic or commercially driven paths also gives them “a degree of creative freedom that they might have not otherwise.”<sup>697</sup>

In this set of concordance lines, community members express their obedience to norms about not drawing too much attention to their activities. First, in lines 93, 96, and 98 the posters confirm that fans have never expected the public validation or frame from their works. It is not the “public acceptance,” “public opinion,” or “public social legitimacy” that greatly matters to their practices. This mindset is consistent with the main purpose of fanfiction – it is a pure hobby. Whether or not fanfiction writers need to step out from training stages to accomplish all the fruits of labour as the other “real” authors could take (i.e. commercialisation of creative expression, high reputation) generates a heated debate within fanfiction communities. Many fans have argued that fanfiction should be valued and enhanced “within the terms of the community which produces and reads it.”<sup>698</sup>

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<sup>695</sup> Katharina Freund, “Fair use is legal use”: Copyright negotiations and strategies in the fan-vidding community, NEW MEDIA SOC. (2014), <https://www.growkudos.com/publications/10.1177%252F1461444814555952> (last visited Sep 25, 2020).

<sup>696</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

<sup>697</sup> Henry Jenkins, *Transforming Fan Culture into User-Generated Content: The Case of FanLib* (2007), [http://www.henryjenkins.org/2007/05/transforming-fan\\_cultureinto.html](http://www.henryjenkins.org/2007/05/transforming-fan_cultureinto.html).

<sup>698</sup> *Id.*

Staying inside such a close-knit and small-scale community may ensure that fanfiction could receive all the respect and support it deserves.

Secondly, some members mention the damages of inappropriate behaviours (e.g. monetising fanfiction) to the whole community, such as “public scrutiny,” “legal crackdown,” or “public outcry.” A highly publicised and commercial driven venture may leave fanfiction writers more exposed to copyright holders than they have been before. In the worst scenario, such exposure can lead to legal actions from copyright holders. The member in line 94 makes the valid point that staying outside the public forums is a strategy for avoiding confrontation with copyright holders. He or she points out that when novelist George R.R. Martin bans all his fans from writing fanfiction based on his work “A Song of Ice and Fire” series,<sup>699</sup> fans do not stop their activities but “lock themselves up to avoid public attention.” So, copyright holders’ warnings may not stop their fans from doing what they enjoy.

Moreover, the poster in line 97 explains further that the public’s hostile attitude towards fanfiction may disincentivise the legal system (e.g. the Supreme Court) to protect it. Fans hope to receive support from judges if they, unfortunately, are sued by copyright holders.

Having a tradition of facing stigma from outsiders, fan communities feel the need to maintain borders between insiders and outsiders. Indeed, amateur creative activities which are taken outside the conventional arenas are not rare. For example, underground music also has a long history of avoiding the mainstream commercial music industry due to its involvement with unauthorised remixed music and the artist freedom movement.<sup>700</sup> Or public responses to graffiti (a form of street art) are not always favourable and can often be negative.<sup>701</sup> Therefore, even though most fanfictions are accessible to the public (i.e. uploading to public websites), fans try to minimise behaviours that increase public scrutiny.

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<sup>699</sup> See section 4.2. (discussing the uncertainty of the legal status of fanfiction).

<sup>700</sup> FRANCESCA GAVIN, *STREET RENEGADES: NEW UNDERGROUND ART* (01 Edition ed. 2007).

<sup>701</sup> Meghan Daum, *Obama as an art form - Los Angeles Times*, LOS ANGELES TIMES (2008), <https://web.archive.org/web/20080613080430/http://www.latimes.com/news/opinion/sunday/la-oe-daum12apr12,0,5834055.column> (last visited Oct 3, 2020).

In line with these rationales, fanfiction community members find that the “secrecy norm” may protect them to some extent. Thus, they may keep their practices within their own communities to avoid “the scrutiny” of copyright holders.

## **Category 2: Commerciality**

### **(i) *patreon***

Patreon is a membership platform that offers members tools for subscription service. Creators and artists can earn monthly income by providing exclusive content (e.g. fictions, songs, videos) to their subscribers (patron). By signing up for a membership in Patreon, fanfiction writers can receive subscription fees from their supporters without selling their works. For example, a user account that is described as “creating a fanfiction website” has 573 patrons. As of May 2020, there were approximately 1000 Patreon accounts for the *fanfiction* category.<sup>702</sup>

The word *patreon* appear 176 times across the corpus with a LL score of 1692.71. It is the first commerciality-related word that appears on the list.

**Table 15. Collocations of *patreon* ordered by log-likelihood**

	<b>Collocates</b>	<b>Log-likelihood</b>	<b>Co-occurrence</b>
1	fanart	77.80038	10
2	link	71.08099	11
3	accounts	52.54097	6
4	money	52.03417	12
5	donations	51.74397	6
6	jar	41.13642	4
7	use	39.02327	10
8	paypal	30.85225	3
9	tips	24.27592	3
10	goodwill	23.84120	2

<sup>702</sup> Patreon, <https://www.patreon.com/search?q=fanfiction&p=50> (last visited May 20, 2020).

In general, what can be seen from the collocations of *patreon* is that fans are aware of the relationship between using Patreon platform and receiving financial sources from what they're created. A wide range of financial terms involved during their discussions: *money*, *donations*, *(tip) jar*, *commission*, *PayPal*, *dollars*, *charge*... However, it is apparent that the members of fanfiction communities hardly associate getting money via Patreon account with monetising fanfiction. From a fans' perception, this practice is rather an ethical matter than a legal one. Only fanfiction writers and their supporters decide whether it is morally reprehensible or not.

100	I do know writers who use <b>patreon</b> as a tip jar. If people like your writing, they can leave a tip, no strings attached.
101	Tipping itself may not be used often, but if readers could subscribe to donate a set amount per month to Wattpad authors using a Wattpad system as a replacement for <b>Patreon</b> , I don't see why they wouldn't. I would.
102	I think it is mostly artists who use <b>Patreon</b> . It probably technically illegal but the dollar amounts are insignificant so no one cares.
103	I feel much the same in regard to tipping. I support several authors on <b>Patreon</b> , whether or not they can currently work. They deserve the support either way.
104	I would say this sort of thing ranges from "definitely not legal" to "grey area but still probably not legal". Because with <b>Patreon</b> , you're just paying the author to "exist" and might get some goodies out of it, not exactly the same as purchasing an e-book.
105	So, should people have to pay for fanfics? Oh hell no, obviously. But if they set up a <b>patreon</b> , and just drop a link, sayin "donate if you want", then I have no absolutely no qualms with it.

These concordance lines portrayed fanfiction readers' opinion of an appropriate way to operate Patreon service. First, the community members referred to subscribe Patreon accounts as gratuity (i.e. tip jar). Fanfiction readers may give writers an insignificant amount of money for the "services" the latter performed. Money here is presented as a



“token of enjoyment,”<sup>703</sup> a compliment rather than a payment. Furthermore, fans support the idea of setting up a Patreon account as long as the writers do not keep their contents behind a paywall. Therefore, they may find it offensive if someone makes their work only available on Patreon, eventually demanding compensation for their works. In this manner, fanfiction writers attempt to sell off their work. A commenter delivered an example of how upset the community is when a fanfiction author charged her readers via Patreon service.

“A very popular author decided that because of reposts she would only post the rest of her story (one of the most read in the fandom) on **Patreon**, charging a couple of dollars a month for unlimited access and weekly posts, as far as I know. So, when she announced this is how she’d continue to post, most people reacted with outrage.”<sup>704</sup>

## (ii) *money*

The word *money* plays an important role in the corpus analysis because it has a significant link to the exclusive rights of copyright holders granted by the law. This word has 1109 hits across the corpus, ranking 63 in the keyword list.

**Table 16. Collocations of *money* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	making	1228.35038	164
2	made	212.93507	48
3	fanfiction	163.81233	74
4	people	149.16720	66
5	want	146.75614	49
6	spend	120.51828	17
7	try	109.69699	26
8	earn	92.75959	12
9	makes	90.62199	25

<sup>703</sup> Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 CINE. J. 113, 115 (2009).

<sup>704</sup> @worldbuilding enthusiast, REDDIT, *On monetizing your fandom works: FanFiction*, [https://www.reddit.com/r/FanFiction/comments/dga2rg/on\\_monetizing\\_your\\_fandom\\_works/](https://www.reddit.com/r/FanFiction/comments/dga2rg/on_monetizing_your_fandom_works/) (last visited Feb 8, 2021).

10	involved	82.91396	16
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The collocational *making/make/earn money* patterns are significant ones with very high frequencies and log-likelihood stats. This addressed the fact that significant attention is paid to the issue of monetising fanfiction. The vast majority of community members believe that commercialising fanfiction is legal wrongdoing. In other words, if there is no money involved, then it is not possible for copyright holders to take legal actions because they retain their exclusive rights to exploit their intellectual properties.

106	I would have thought that this idea, <b>making money off</b> fanfiction in any shape or form, would set off a host of legal issues which have been in debate for as long as fanfic has existed.”
107	To my mind, the only reason we have reached a point where online fanfiction communities can thrive and people can post fanfic without needing to use ISP scramblers to avoid lawsuits is precisely because no one is <b>making any money</b> from it.
108	I think that people have forgotten that fanfic is on shaky ground in regard to copyright law and that the only reason it gets a pass is because nobody is <b>making money from</b> it.
109	If you are not <b>making money</b> , no one mind.
110	The main thing that protects fanfic writers from being sued is that nobody’s <b>making money off</b> it.
111	There are other exemptions from copyright, of course, but for fanfiction, the main one is that it’s not <b>making any money</b> .

It is a common misunderstanding of community members about copyright exceptions that they justify them solely based on the non-commercial factor. This thought, as shown in Section 2.2.2(d), is completely a misconception. Insignificant impact on the potential market of the canon work cannot guarantee fanfiction writers “a free pass” to copyright infringement complaints.

Keeping fanfiction free can make a fair use defence much easier to make, but this norm has been one of the pitfalls of fanfiction communities' self-regulating system before the copyright law became apparent.<sup>705</sup> It derived from the “free-sharing” norm that has been embraced by which Karen Helleckson described as the “online fan gift culture.” She wrote: “fan communities as they currently comprised, require exchanges of gifts: you do not pay to read fanfiction or watch a fan-made music vid.”<sup>706</sup> She believes that fan culture has been constructed voluntarily based on shared interest, then all fanworks should be offered for free. Even when there is commerciality involved, which is legal (e.g. Amazon Kindle Worlds programme, Wattpad premium programme), fans find it difficult to tolerate this commercial-based strategy.

At the heart of the anti-commercial ideology, many community members state that making profits from fanfiction is not only unfair for other members (who paid money to read fanfiction), but also for copyright holders.

112	Just taking someone else's idea and using it to make money is <u>wrong</u> .
113	Maybe that's kind of high-minded or whatever, but to me the entire point is that it's creativity for creativity's sake, not for making-money sake, and to manipulate it like they did and change a few things around so that it's just this side of legal so they can <b>profit</b> from it is <b>gross</b> to me.
114	And for that matter, I would feel <u>scummy</u> making <b>money</b> off of fanfiction. I do it for fun, because I love the fandoms and those worlds and characters. Making money off of it is such a <u>betrayal</u> to the person who actually created them”.
115	If plain old pervy fanfiction written to be fap material is bad, then pervy fanfiction written to make <b>money</b> should be <u>punishable by DEATH</u> .
116	Making <b>money</b> from somebody else's work is completely <u>wrong in every level</u> .

As can be seen from this set of concordance lines, the commenter aggressively criticises violators as *unethical*, *gross*, *wrong*, *wrong in every level*, *scummy*, *betrayal*, *punishable by DEATH*. From the ethical perspective, fans rely on what is assumedly common sense to derive appropriate behaviours. In this case, the practical judgement is that you only

<sup>705</sup> Steven A. Hetcher, *supra* note 74; Rebecca Tushnet, *supra* note 21; Fiesley, Feuston, and Bruckmand, *supra* note 22.

<sup>706</sup> Hellekson, *supra* note 703 at 114.

earn the rewards for your labour. Consequently, “stealing” someone else’s hard work is unethical. This norm doesn’t result from a rule of law but the community perception of normative behaviours. In this interpretation, commercialising fanfiction is an ethical matter, rather than a legal one.

The non-commercial norm has been firmly embedded in thought, the behaviour of fans, and has a persistent influence on how fanfiction communities channel members’ activities. As Professor Casey Fiesler commented: “When it comes to fanfiction, this norm is consistent, strong, and unambiguous.”<sup>707</sup> There is evidence in the corpus where fans reassure each other that the non-commercial norm is a deep-rooted rule which they must abide by:

“Fandom has – carefully – not been making any money for 40 years. Why fix something that ain’t broken?”

“Fandom has been mass-distributed at the levels it is currently for at least 10 years, by the most conservative estimates. Attempts by corporations to monetise fandom product – including attempts to create paid fanfiction archives – have been rejected by fans, and with extreme prejudice.”

“However, that community is very self-policing. The phrase “we eat you own” is often tossed around and you have at least once instance quoted to you above. It is very true. A lot of fandom policies itself and lives by the strict code “Play all you want but never do it for money.”

“There is a serious danger in turning your hobby and community into yet another facet of the gig economy.”

### (iii) *fanart*

**Table 17. Collocations of *fanart* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	commissions	128.36988	13
2	fanfiction	81.67927	23

<sup>707</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

3	patreon	77.75461	10
4	draw	71.35337	9
5	fanfic	64.84615	19
6	people	50.24002	16
7	memes	45.71059	4
8	fanart	41.37046	6
9	art	37.70881	7
10	artist	33.81810	5

As we can see from Table 17, the most common discussions surrounding *fanart* are about its relationship with *fanfiction* in term of *commissions*. Fanart is an artwork made by fans, featuring elements from a copyrighted work. Sometimes, the creators of fanart can receive commissions or endorsements. Like other types of fanworks, fan art has had strong communities where members create, share, and discussed it.

117	Both <b>fanart</b> and fanfiction are categorised as fan works.
118	This is now my stance on fanfiction commissions too, to be in line with <b>fanart</b> commission. And the fact that every now and then, I take plushie commissions that are based on intellectual property – the customer is paying for the materials I use, the time needed to make the thing, and the cost of shipping it to them.
119	People treat making money from fanfiction like it's a cardinal sin, but most do not have the same view of <b>fanart</b> commissions, which to me, is literally the same exact thing.
120	Now, commissions. For <b>fanart</b> , these are super normal and good, don't get me wrong.
121	People take commissions to create <b>fanart</b> all the time, and it is drawing the characters/people that already exist in the way you imagine them, so isn't fanfiction just writing about them in the way you imagine them and thus you can make money off of this just like making money off of fanart?
122	Even if artists don't use Patreon, they do commissions on <b>fanart</b> . Both fanfiction and fanart use the same intellectual property. What's different of commissioning your OTP in fanart from and commissioning your OTP in a one-shot?

123	I don't really see a difference between <b>fanfiction</b> and fanart, so I don't see why fanfiction is held to different standards.
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This set of concordance lines shows that the fanfiction community members are drawing on examples from another community, that of fanart. Some express the view that the similarity between fanfiction and fanart is due to the fact that they are both creations of fans (line 117) and created based on someone else's intellectual property (line 121, 122). They may be different in the forms of expression (i.e. drawing and writing) but technically are the same according to copyright law (line 121, 122, 123).

However, it appears to be the case that there is more tolerance for selling fan art than fanfiction within the fan communities. Across the *Fandom* corpus, though admitting that "not making profits" is a norm that has been articulated within their communities, the community members cannot precisely explain why this rule exists (e.g. "What's different?" (line 122), "I don't see why" (line 123)). The only member who regularly takes commissions to make fan art explains that she or he receives a commission to cover the material, the work, and the shipping expenses (line 118). This reason seems to make sense given that fanfiction authors spend less on their creative processes. Moreover, there is no difference in the quality of their stories as an online post or a printed version, whilst some fan arts only can be enjoyed in their physical forms (e.g. painting, sculpture, or watercolour).

Consequently, fanfiction communities accept the fact that gaining income from fanart is normal. They are aware of this difference of standards, but abide by the "non-commercial norm" because maybe it is "what most people do." Norms may emerge as members pick up on the behaviours of the majority. Furthermore, members belonging to one community may observe and migrate norms from other communities, especially if these communities are tied to the same interests. However, fanfiction communities do not – they don't display the same level of tolerance to commercialisation that is found in fan art communities. It is maybe the case that members of a specific community adapt only norms that benefit their community's central values and survival.

It is also noted that this norm - it is acceptable to sell fanart, but not fanfiction - is not consistent with the letter of law. If fanart and fanfiction are closely examined, they are

both created based on existing material. It is maybe the case that one rule would be interpreted differently from another when it comes to different objects. In other words, the community members' understanding of copyright law is not entirely consistent with what is written in the law.

### **Category 3: Creativity**

#### **(i) *derivative***

As mentioned in Chapter 4, fanfiction can be classified as derivative work. The data may imply how fans comprehend this term and associate it with what they are practising.

**Table 18. Collocations of *derivative* ordered by log-likelihood**

	Collocates	Log-likelihood	Co-occurrence
1	works	908.36561	116
2	work	702.15260	116
3	transformative	277.74584	32
4	unauthorised	109.18959	12
5	fanfiction	94.71817	32
6	fiction	73.01675	21
7	copyright	63.89515	20
8	fall	48.50806	7
9	written	41.60120	11
10	commercial	40.84772	7

It is clear from Table 18 that *derivative* and *works/work* are strong collocations, which have 232 hits across the *Fandom* corpus. It is reasonable because they constitute the common noun phrase *derivative works*. The below are extracts from the concordance lines of *works*.

124	Can I just create a site and starting adding <b>derivative</b> <u>works</u> AKA fanfiction? I read about Fair Use a little bit, but it was pretty vague about what exactly falls under that.
125	Fanfic in the USA are “ <b>derivative</b> <u>works</u> ” and against copyright law, whether characters are trademarked or not.

126	By the letter of the law: You are not allowed to make derivative works at all without the copyright holders say-so.
127	Whereas before the fanfic might be published in obscure fanzines with a circulation of a hundred, now tens of thousands, many hundreds of thousands, can read these...well, let's just call them "unauthorised <b>derivative work</b> " (except in cases where the writer has authorised 2em, which I suppose would be "authorised derivative work.")
128	To the best of my knowledge, GRRM, your statement about losing control of your copyright when you fail to act against someone else producing derivative works is flatly false.
129	I believe that all derivative works do in fact fall under the category of fanfiction but that there are different types of fanfiction – saleable and unsaleable.
130	All in that, the fact remains, as much as many would try to deny it, that copyright is meant to protect creativity and originality on the part of the original author, not on the part of the creator of derivative works.

A common problem expressed by many members is that they worry over whether something they want to do might be copyright infringement. For instance, the person in line 124 asks whether creating a website to upload fanfiction constitute a copyright violation and he or she finds the law is "vague." The question-and-answer posts are prevalent across the *Fandom* corpus and they show that fans normally do research first ("I read about Fair Use a little bit" (line 124)) and reach out to their communities for more answers. This supports the findings above that the community members tend to use inconclusive sources like Wikipedia to learn about law, as can be seen in their conversations:

"From the search, I found that whether the court determines a work infringing the copyright, or in line with the fair use, is a very complicated process."

"I admit I've did a lot of personal research myself."

"I think you should do a little research to answer the questions 7 and 8."

Furthermore, both correct and incorrect explanations of the law are revealed in the concordances. Some posters are knowledgeable about copyright law and appear to



articulate exact legal terms and regulations. First, many fanfictions are derivative works by nature; and making them without authorisation from copyright holders is illegal by the letter of law (line 126, 127). Secondly, indeed, copyright holders don't need to diligently protect their works from all infringements (line 128). Trademark holders have the responsibility to take action for unauthorised use of the marks; otherwise, they may lose the right to exploit or defend them.<sup>708</sup> On the contrary, copyright holders can decide to ignore the infringement and it does not influence their ability to sue future infringers.

Some responses show that online platforms might be not the best places to trust legal advice. Some members can give answers that do not represent completely correct interpretations of the law. For example, the poster in line 125 asserts that all fanfiction is against copyright, which is not correct for all cases. If the copyright holder authorises someone to make derivative work based on his or her work, then the secondary work is not a copyright infringement. Another example is the response of the poster in line 129. He or she thinks the valid part of the defining of fanfiction is that it has to be written for entertainment purposes. It is true that some fanfiction authors write because they are commissioned or paid. However, referring to non-commercial use to categorise fanfiction (i.e. saleable or unsaleable) may potentially spread misinformation that the purpose and character of the use (the first factor of Fair Use doctrine) is the only factor to determine the legal standing of fanfiction. Additionally, fanfiction falls into the category of derivative work, but not all derivative works are fanfiction.

In a more troubling example, the poster in line 130 strongly expresses the view that “copyright is meant to protect creativity and originality on the part of the original author.” Indeed, the primary goal of copyright is “to promote the progress of science and useful arts,”<sup>709</sup> not to protect originality and creativity. When a particular creative work is sufficiently original, it always stays original. Making derivative works doesn't change or make canon works less original than it is now.

## **(ii) *transformative***

**Table 19. Collocations of *transformative* ordered by log-likelihood**

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<sup>708</sup> Enforcing your trademark, NIBUSINESSINFO.CO.UK, <https://www.nibusinessinfo.co.uk/content/enforcing-your-trade-mark> (last visited Sep 29, 2020).  
<sup>709</sup> U.S. CONST. art1, §8, cl.8.

	Collocates	Log-likelihood	Co-occurrence
1	works	568.55335	73
2	derivative	275.67064	32
3	work	249.95624	48
4	organisation	206.22573	17
5	use	121.82361	23
6	commercial	94.13159	12
7	otw	81.08078	9
8	fair	76.66357	13
9	fanworks	65.49599	8
10	legal	41.68656	10

As can be seen from Table 19, the collocation *work(s)* has significant high log-likelihood statistics and frequency. The data shows that there is a tendency to define fanfiction as transformative work.

131	If you're having difficulty with the term fanfiction, you might like to try "derivative work" or " <b>transformative <u>work</u></b> " instead – because that's what we're talking about.
132	It's called a <b>transformative <u>work</u></b> , and it is allowed by law, if money isn't being made of it.
133	The reason fanfic is okay is because it's <b>transformative <u>work</u></b> .

Transformative purposes are one of the decisive factors that tip the balance in favour of fair use.<sup>710</sup> Fans discussed the transformativeness of fanfiction in many discussions. The central theme is that fans mostly define "being transformative" as "being different":

134	On the other end, there are stories that are <b>transformative</b> . They can use the canon events, but in a different way.
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<sup>710</sup> See section 2.2.2.(d)(iii).

135	If you wanted to protect it under parody or <b>transformative</b> you could either; change some details, like creating a new monster, changing the boys to girls and showing how they could handle the situation if something were changed.
136	When a fanfiction writer uses a character but puts the character in a different setting, having completely different adventures from the original work, then this can be considered <b>transformative</b> .
137	Oddly, it's the *worst* fanfic that's generally acknowledged as the most acceptable, the most <b>transformative</b> . Nobody has a problem with "kids play with Star Wars figures and tell their own stories about them", not even if they write those down
138	Melding these factors together reveals two big deciding question on whether fanfiction is legal a) is it <b>transformative</b> rather than derivative (i.e. are you telling a new story or just retelling someone else's? and b) what is the effect on the original work's value?

This ideological norm of canon materials alteration was first addressed in subsection (b) above where I discussed the word "infringement." A transformative use is one that, in the words of the U.S. Supreme Court, "adds something new, with a further purpose or different character, altering the (source) with new expression, meaning, or message."<sup>711</sup> These concordance lines above suggest that it is the latter, rather than the first, that matters for community members. Fans justify the transformativeness of fanfiction solely based on the amount of source materials incorporated into fanfiction. The "new expression, meaning, message" is rarely a part of their justification. A member concluded that fanfiction can be less coherent and poorly written (e.g. a Star Wars story made up by children, or changing genders of the characters, adding new background characters) but still meet the requirements of being transformative (line 137). In summary, it is a belief held by many community members that the more different fanfiction is, the more likely it is to be judged fair use.

This norm, again, bounces back to the question of to what extent a change made does not constitute a copyright infringement. The fact is that there is a misconception on the part of fans about what transformativeness requires. The purpose of the alteration carries more

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<sup>711</sup> *Campbell*, 510 U.S. at 579.

legal weight than the number of changes. American law professor Anthony Reese explains: “But transformativeness, at least as considered by the court, includes another aspect: the use of a work for a completely different purpose than the purpose for which the copyright owner produced or used in the original work.”<sup>712</sup> The United States Court of Appeals for the Ninth Circuit in *Campbell* holds that: “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”<sup>713</sup> Therefore, changing a significant part of the original work does not always guarantee fair use. Instead, a fanfiction writer needs to show that he or she wrote fanfiction for a transformative purposes so judges could find that the transformativeness inquire in favour of copyright exception. Fans’ interpretation of transformative plays a decisive role in this study because it explains how fans translate their understanding of copyright exception to their informal standards (i.e. changing source materials, the more different the better).

## 6.4.DISCUSSION

### 6.4.1.Norm identification

Across the corpus, there is strong evidence of some norms that the members of online fanfiction communities developed to self-govern their behaviour. First, the non-commercial norm is a very crucial and heavily enforced norm that prohibits fan writers from making income from their fictions. Fanfiction communities have adopted this norm through two main approaches. The norm is either written in the website’s terms and conditions (i.e. no advertisement, no endorsement) or circulated among members of the communities in the discussion forums. The norm does not only derive from the gift culture of fanfiction communities<sup>714</sup> but also protects the communities from unwanted attention from copyright holders.

Another norm that is important to the fanfiction community is the attribution norm. Fans strongly oppose plagiarism because it misleads readers about the source of the material. It is also an etiquette in fanfiction communities that fan authors should put ownership

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<sup>712</sup> R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUMBIA J. LAW ARTS, 119 (2008).

<sup>713</sup> Perfect 10, 508 F.3d at 1165. See, e.g., Matthew D. Bunker, Transforming the News: Copyright and Fair Use in News-Related Contexts, 52 J. COPYRIGHT SOC’Y U.S.A. 309, 325 (2005) (discussing “concept of ‘transformative purpose,’ which seems to consist of a different functional use of the original work than that intended by its creator, rather than some sort of reconfiguration of the work itself”).

<sup>714</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

disclaimers at the beginning of their stories, or using a tagging system to distinguish what they have done from what belongs to the canon. Even though this norm is not always legally enforceable, fans feel the need to abide by it because canon materials represent an unassailable element of their creative paths – something that is above the rest and deserves to be credited. This ideological norm, however, appears to be confusing concerning the extent to which source materials need to be changed to constitute a new work. Fans expressed the vagueness of copyright law when it comes to the transformativeness of derivative work. For example, when discussing the Fair Use doctrine, the community members seem to focus on the alterations made to the characters' traits (e.g. gender, name, outlook) or plot (e.g. locations, events), yet forget about the purpose and the character of the copying. However, as evidenced by the American courts' main approach to fair use doctrine, the latter is what matters.<sup>715</sup>

Through the community members' online discussions, many commented on why they believed canon authors would never take legal actions against fanfiction authors. There is a variety of rationales behind this belief. First, fans firmly believe in the mutual relationship between authors and their readers, in which the latter are the biggest supporters of the former. Pressing charges for copyright infringement against fans brings little to no benefit to copyright holders. Second, it is unlikely that copyright holders sue individuals considering the anonymity of and absence of boundaries to online communication. And finally, this norm has close ties with the “non-commercial norm” in the way that all legal troubles come from profits. As long as fanfiction writers stay in the boundary of no income gaining, the possibility of lawsuits is minuscule.

The secrecy of fan community activities may offer writing opportunities that fans can't find anywhere else. This is particularly in the scenario where the mainstream media does not appear to be an appropriate platform to share taboo or explicit content (e.g. LGBTQ materials, pornography). A spread in popularity of fanfiction also brings with it concerns of being exposed and condemned for such transgressive material. Therefore, community members may prefer to keep their “underground” status to remain the boundary between the insiders and outsiders. This is also the reason why fans construct their secrecy norm and insist on staying in the “legal grey area” of copyright law.

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<sup>715</sup> See page 199.

All the above norms are closely-tied to the “free-sharing” norm which has been a part of the history of fan culture. Fanfiction communities are built on a shared interest as a matter of pure joy. A fanfiction writer should share his or her stories freely in exchange for values he or she receives from others. If someone gives you a present, it is poor manners to offer them back but with a price. As Hellekson expressed in her work: “attempts to encroach on the meaning of the gift and to perform a new kind of a (commerce-based) transaction with fan-created items will not be tolerated”.<sup>716</sup> Besides, because community members align non-profit fanfiction with promoting and supporting their favourites’ original work, they see it as unfair for canon authors then to take legal action against fanfiction writers.

However, it is also seen from the data that fans have practised these norms inconsistently. For example, many fans are against selling fanfiction but support making payments to fanart creators. They also voluntarily subscribe to fanfiction writers’ Patreon accounts as a way of supporting amateur artists. There are also misconceptions by fans about the letter of the law. For instance, fans think non-commercial is the only factor to justify the Fair Use doctrine or the US-based fiction writers still use ownership disclaimers, regardless of the national laws not granting copyright holders moral rights of attribution. The rationale behind these misconceptions is centred in the process of norm formation where fans interpret and convert their understanding of copyright into something upon which they can act.

#### **6.4.2. Norm formation**

As noted with respect to the non-commercial norm and attribution norm, it was apparent that communities may abide by norms without actually knowing their sources. This study shows that there are two common themes related to the formation of the norm, including creating new norms and converting existing legal rules to informal rules.

##### **a. Creating new norms**

It can be seen from the previous chapter that close-knit communities sometimes construct new norms as alternatives to effective rules. When the issue is new and there is no corresponding formal rule, communities have to develop low-level norms to fill the gaps.

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<sup>716</sup> Hellekson, *supra* note 703.

It can be seen from the terms and conditions that there are behavioural standards designed to meet the particular needs of communities, rather than to present a formal rule. For example, the website [fanfiction.net](http://www.fanfiction.net) specifies fanfiction writers' responsibilities to ensure the quality of their work that can be displayed on the platform.<sup>717</sup>

“Spell check all story and poetry. There is no excuse for not performing this duty. If you do not have a word processor that has spell-checking feature, use a search engine such as Google.com to find one.”

Proofreading and spell checking your work carefully are not required by any law. However, the community founders designed these norms to remind writers to produce a good piece of literary work. It also shows respect to the platform as well as the readers. The forum [asianfanfics.com](http://asianfanfics.com) uses a very simple narrative to warn its members about inappropriate behaviours.<sup>718</sup>

“Don't be a jerk. If a ton of people are complaining about you, we'll notice.”

In terms of copyright, the secrecy norm of fanfiction communities is an illustration of new norms. There is no part of the law that requires fanfiction enthusiasts to keep their activities low key. However, in the absence of a specific law, which indicates clearly whether fanfiction is legal or illegal, fans can figure out how to react by using their common sense. Potential litigations reinforce a need to maintain the distance between fan activities and copyright holders. Therefore, fanfiction writers construct the norm of keeping their practices subtle.

Moreover, community-based norms can be established due to a critical event in the community's history. For example, the website [fanfiction.net](http://www.fanfiction.net)'s Community Guidelines does not allow fan writers to post fanfiction based on works of certain canon authors (e.g. Anne Rice, Archie comics, Dennis L. McKiernan, etc.). After the lawyers of American author Anne Rice sent a letter to [fanfiction.net](http://www.fanfiction.net), the site immediately removed all fanfictions based on her works from its site. They also published the list of canon works which the website reject to display fanfictions based on, and continues to keep the list

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<sup>717</sup> Fanfiction, *Terms of service*, WWW.FANFICTION.NET, <https://www.fanfiction.net/tos/> (last visited May 20, 2020).

<sup>718</sup> Asian Fanfics, *Service Agreement*, WWW.ASIANFANFICS.COM, [https://www.asianfanfics.com/page/service\\_agreement](https://www.asianfanfics.com/page/service_agreement) (last visited May 20, 2020).

updated. This rule does not derive from the law, but it is established after an event occurs in the community. Not only fanfiction.net but many fanfiction websites and forums adopt this rule to protect the survival of their communities.

#### **b. Using a simplistic narrative**

Copyright law is a very complex set of rules, in terms of content and language. It is unreasonable that fans from artistic communities, like fanfiction, have a nuanced understanding of copyright.<sup>719</sup> This situation suggests that the community need to convert these complex copyright regulations to something that they can respond to.

As presented in Section 6.3.1(b) - Norm formation, the websites use simple language when designing their terms regarding the prohibition of commercial purposes. This norm, again, was reworded to “not making money off of fanfiction,” which has circulated within the communities. Consequently, this copyright norm becomes simple and easy to understand. Another illustration of this norm formation is the attribution norm. The moral rights of attribution have been adopted into fanfiction communities’ informal interaction as requiring fanfiction writers to put disclaimers at the beginning of their stories. By providing members with a very straightforward guide, fanfiction communities reassure them that giving credit to canon authors can minimise threatening copyright complaints. Fans have tried to merge formal rules into their informal interaction by choosing norms that protect the community’s survival and central values, and expressing them in plain language so that everyone can understand the first time they hear or read them.

#### **c. Codifying formal policies based on community norms**

The community norms discussed here are norms that emerged through the interactions of the members. These norms are specifically constructed to serve the purpose of governing the community itself. Meanwhile, contractual obligations, codified in legal documents, are explicit norms. It is “noted that implicit norms can become explicit through a process of formalisation.”<sup>720</sup> In other words, the host of the website can merge their community norms to the websites’ terms and conditions (i.e. codified rules). For example, the website fanfiction.net relied on community-based norms that aim to protect the central values of the community (i.e. creating a high-quality archive of fanfiction and safe forum for all

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<sup>719</sup> Glenn Otis Brown, *Culture’s Open Sources*, 77 ANTHROPOLOGICAL QUARTERLY (2004).

<sup>720</sup> Burnett and Bonnici, *supra* note 70 at 340.



fans) to codify its formal policies. Rules on the sub-forum of Reddit are fascinating examples of norms that have been developed over time:<sup>721</sup>

**“No Bashing:** If a topic is not to your taste please remain civil when discussing it and use language that makes clear that a specific dislike is your opinion, not a fact.

**No Selling Goods or Services:** Includes fics, editing services, links to Patreon and the like. Blanket, sub-wide ban of links to promoted products.”

However, community-based norms can be very complex in the way that the community members may have different interpretations of the law “without actual knowledge to back it up.”<sup>722</sup> In Professor Ellickson’s research of how cattle ranchers settle trespass disputes, he addresses that policies are based on the assumption that people in society have perfect understandings of what is written in the letter of law.<sup>723</sup> Meanwhile, in reality, people’s legal knowledge is not always flawless. In the context of an amateur creative community like fanfiction, fans may interpret the norm differently based on their knowledge. Showing that there is no commercial purpose is indeed useful to prove an authorised secondary use of copyrighted work is a copyright exception, but it is not all that the court will look into. Similarly, changing the names or personal traits of characters doesn’t automatically create a new work. Therefore, community members need to be careful when making their copyright decisions.

Metadiscussions is a very common type of discussion in online communities, addressing issues “such as the style, context, participants, and rules of the discussion, and well as its relationship to other discussions.”<sup>724</sup> Metadiscussion on fanfiction communities does not include threads or topics where fans discuss the canon work, characters or the fan works. Instead, they address issues such as the way participant’s language is used in discussion, how their conversation should be carried on, or the context of the topic. For example, a conversation may start upon a thread about a fanfiction, with forum members discussing

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<sup>721</sup> Reddit, *About Us*, WWW.REDDIT.COM , <https://www.reddit.com/r/FanFiction/> (last visited May 10, 2020).

<sup>722</sup> Jill P. Dimon et al., *Qualitative data collection technologies: a comparison of instant messaging, email, and phone*, in 17TH ACM INTERNATIONAL CONFERENCE ON SUPPORTING GROUP WORK 277 (2012).

<sup>723</sup> ROBERT C. ELICKSON, *supra* note 36.

<sup>724</sup> Definition of Meta-discussion in Writing., BOUNDLESS.COM, <http://kolibri.teacherinabox.org.au/modules/en-boundless/www.boundless.com/definition/meta-discussion/index.html> (last visited Nov 26, 2020).

what they think of this new work. Someone may criticise in a way that the others find rude. They may respond by saying that it is better not to use such an aggressive tone and words. The last comment is metadiscussion, and once it starts, it can change how the conversation carries on. As people begin to discuss how to behave appropriately, where they learn that behavioural standards from, and the punishment for being that disrespectful. Metadiscussion, as Burnett and Bonnici describe, can be considered as a type of norm formalisation in that “there is a primary mechanism for a community to discuss dynamics of their interaction and the acceptability of behaviour.”<sup>725</sup> In creative communities like fanfiction communities, online discussions about copyright may lead to explicit rules being stated by moderators and creators. For example, in the website fanfiction.net, the moderators of the *Copyright Infringement Report* forum dedicated the three following threads to copyright issues<sup>726</sup>:

- **[CIR Tip Thread: Got a Copyright infringement case to report or other useful info? Post details here!]**
- **[How to submit copyright infringement reports (Rules and Review Templates here)]**
- **[CI and You: A guide to understanding copyright infringement]**
- **[The All Purpose Chat and Enquiries Thread – Talk and Ask Questions here]**

Each thread starts with a post from moderators which provides necessary norms, and registered members can respond to these norms by replying to the original post. The creation of these guidelines was based on the discussion between moderators and fans about how to identify copyright infringement and the course of actions that should be taken to stop it. Moderators may include community norms in their explanation and ask members to follow. Community norms can be made explicit via the community’s leaders’ statements.

Furthermore, the forum’s policies (i.e. Terms of Service, Community Guidelines, Etiquette Guidelines) could be seen as a type of institutional norms. These norms, as mentioned in the previous chapter, are actual contractual obligations between an institution and its members about acceptable behavioural standards. Different from

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<sup>725</sup> Burnett and Bonnici, *supra* note 70 at 345.

<sup>726</sup> Fanfiction, *Copyright Infringement Reports*, WWW.FANFICTION.NET, <https://www.fanfiction.net/forum/Copyright-Infringement-Reports/145811/> (last visited May 20, 2020).

community norms, which are not backed by authorities' order, these contractual obligations are legally enforceable. Because these policies are designed specifically for the community, the obligations normally reflect the community's central values and visions.

The analysis in Section 6.1.1(a) addressed the fact that fans incorporate what they understand about copyright to copyright terms when drafting their policies. As Professor Fiesler comments: "the policies of a site can have an influence on norms as well, in the same way, that the actual letter of the law has some effect on how people think about intellectual property".<sup>727</sup> We can learn from the attitude of Fanfiction.net's Copyright Infringement Report forum's moderators that all copyright infringements will be condemned fiercely. And if you don't want to be expelled from the community, you are responsible for abiding by what is written in the policies.

#### **d. Migration**

The history of fan culture shows that many fanfiction communities have existed before the advent of the Internet and social media. As a result, the copyright norms of these communities appeared before the digital era and have traditionally been passed on from generation to generation. Any changes are made to keep communities updated with the advent of technologies and the amendment of the law. These scenarios suggest the idea that community norms may be first introduced very similar, but then begin to diverge due to technical migration. It is noted that big communities like Archiveofourown.org incorporate the DMCA takedown notices into their copyright enforcement mechanism. This consideration was made in response to the change in the US copyright law regarding the responsibility of American platform providers. The corpus analysis also shows the different perceptions of commercialising fan works between two communities – fanart and fanfiction. Though many of them think it is normal to make profits off of fanart, fanfiction communities' members do not accept monetising fanfiction and adapt the "non-commerciality" norm to their activities.

In summary, I observed that there are some differences in the community members' perception of copyright norms. Concerning non-commercial norms, or even more specifically, those related to the fair use doctrine, I found that one rule can be understood

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<sup>727</sup> Casey Fiesley and Amy Bruckman, *supra* note 72.

and manifested in different ways. What is originally written in the US copyright law is that judges need to weigh four factors, including the non-commercial purpose of the use, to determine whether unauthorised copying is fair use. However, this rule is understood by the fanfiction community members to the effect that monetising fanfiction makes it illegal. Therefore, they convert this norm into their practice that as long as fanfiction writers make their work available free of charge, then there is no risk of being sued by copyright holders. To ensure this norm is enforced, the communities heavily sanction any fanfiction writers who attempt to sell their work. This norm-translating process shows that what the community members abide by may be significantly different from what is prescribed in the letter of law. It is reasonable because evidence found in the corpus shows that fans mostly make decisions about copyright law based on the following main sources: (1) non-definitive sources such as Wikipedia, (2) websites and forums' terms and conditions (which can be difficult to understand), (3) senior members' experiences, and (4) their ethical judgement.

#### 6.4.3. Norm enforcement

In the light of sources of norms, fans may not have the answer for where the norms come from. When discussing the word *sued* and *infringement*, I conclude that fans learn about behavioural standards by interacting with senior members. Newcomers discuss with others; observe how senior members behave and follow exactly that lesson when a similar context appears. In close-knit groups like fanfiction communities, senior members to act as instructors or mentors for the more junior members. The mentality of “they are not in trouble, then I won’t” is the clearest illustration of internalisation in small-scale and tight-knit groups.<sup>728</sup> It shows the influence of the majority on the way an individual feels, believes and behaves. It also explains why community norms backed by social pressure prevail over formal rules.

It is also noted that fanfiction communities have adopted a wide range of sanctions to punish noncompliance. This informal enforcement strategy involves either personal enforcement or community enforcement. The community imposes sanctions on the violator that encourage public criticism by the whole community for his or her deviant

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<sup>728</sup> *Id.*

behaviours. The infringers can get their content removed from the websites, or their access to the website will be terminated permanently.

What I found interesting is that communities may practice norms inconsistently. For example, moderators of fanfiction.net allow members (and themselves) to personally attack copyright infringers (e.g. mocking, using profanity), which is against the websites' "be nice" rule. Another example is how fans normalise commercialising fanart but not fanfiction, though they are both unauthorised derivative work. Or that the communities strongly criticise fan writers who attempt to sell their work, but many members are comfortable with Patreon and other endorsement forms, seeing them as a means to support amateur artists.

## **6.5.CONCLUSION**

This chapter employed corpus linguistics and content analysis to explore particular norms adopted by online fanfiction communities and how they are created and enforced. The study delivers empirical research on the process in which community members merge formal copyright rules into their informal interaction. The findings emphasise the advantages of embracing informal norms (i.e. contractual obligations, community-based norms) to regulate online fanfiction the behaviour of members. They also confirm the role of implicit norms in supplementing explicit norms to handle copyright issues. The lessons here support the theory surrounding the role of social norms as alternatives to legal rules in the absence of applicable law.

## CHAPTER 7

### CONCLUSION

This thesis explored the parallels between existing copyright regulations and online fanfiction communities' copyright norms, using content analysis and corpus linguistics as methodologies. The efficacy of the research methods, which were tested in three studies, are reported in this chapter. The chapter first summarises the results obtained, answering the research questions set in Section 1.2. This part also serves as the reference point to evaluate the methodologies employed. The second part presents a broader review of the methodologies.

#### 7.1. CONCLUSION ON THE RESEARCH QUESTIONS

The following research questions were addressed in Section 1.3:

**RQ1: What are the challenges to existing international copyright law posed by the development of technology and the Internet?**

The major finding from chapters 2 and 3 is that the existing international copyright law has faced some serious challenges posed by the rapid development of technologies and the Internet. The fact that copyrighted materials are copied and transferred across the globe leads to conflicts of applicable law and jurisdiction, especially when enforcement of foreign copyrights remains primarily a matter of private international law. As a result, the standards that were set out in the Berne Convention and the other copyright-related treaties have fallen behind the Internet and new technologies, resulting in an urgent need for countries to change the ways they deal with online copyright infringement. One possible solution is the promotion of social norms as alternatives to the law in regulating human behaviours and filling the gaps left by the aforementioned conflicts of law and jurisdiction. With their own set of rules, online fanfiction communities are fascinating experiments in the use of norms to enforce copyright within close-knit communities.

**RQ2: How do online fanfiction communities regulate their members' behaviours?**

The most striking pattern across chapters 5 and 6 is the parallels between copyright regulations (column 1) and the community-based norms (column 3), which are summarised in the table below:

**Table 20. The emergence of copyright regulations in online fanfiction communities**

	<b>Copyright regulations</b>	<b>What fans think the law means</b>	<b>Corresponding community norms</b>	<b>How this norm is imposed</b>
1	Unauthorised derivative works may be classified as copyright exceptions if the use of existing materials is considered “fair”, including the non-commerciality of the work.	Gaining direct profits from fanfiction makes them illegal.	Do not sell fanfiction (the non-commercial norm).	Selling fanfiction is heavily criticised by fanfiction community members.
2	One of the factors in favour of finding fair use is when the use of the original material is “transformative”.	Fanfiction writers need to change original materials’ appearances or natures to such a high degree that their use is no longer classified as infringing.	The more works of fanfiction differ from the canon works, the higher the possibility that they will not constitute copyright infringement.	Alternative universe (AU) is a very popular genre of fanfiction.
3	In some national laws, the author of a literary or artistic work is granted the right to attribution as a part of moral rights. They can assert their right to be	It is required by the law that canon authors are always recognised as the owner of	Putting authorship disclaimers at the beginning of fanfiction.	Fanfiction websites require their users to include disclaimers so their works can be

	identified as the author of a specific work.	the borrowed materials.  If fanfiction writers do not mislead readers about the source of borrowed materials, canon authors will not feel offended (the attribution norm).		displayed on the servers.
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A significant finding is that there are differences between what is prescribed by the law and what fans think it says (columns 1 and 2 of Table 20 above). These misconceptions do capture important weaknesses of copyright law.

First, previous studies reveal that online creative communities develop shared norms to fill the gaps of existing copyright law mostly because current copyright law lacks certainty regarding the legal status of transformative works such as fanfiction. This ambiguity makes it more difficult for fans to understand where to draw appropriate legal and ethical lines about permitted and unpermitted borrowing of copyrighted material. Therefore, it is doubtful whether copyright holders, including canon authors and publishers, are entitled to control all uses of source material that fans borrow to make their works. It also remains unclear whether writing and sharing fanfiction amount to copyright infringement. Meanwhile, there is a possibility that the secondary use of copyrighted materials may satisfy copyright defences (e.g., the Fair Use and Fair Dealing doctrines) and consequently does not constitute infringement.

Second, findings show some difficulties in interpreting copyright regulations. As can be seen in row 2 of Table 3, fans have misunderstood when assessing the “amount of substantiality of the portion used in relation to the copyrighted work.” Fans strongly believe that writing fanfiction does not constitute a copyright infringement as long as



there is no extensive borrowing from the canon work. This statement has proven to be inaccurate considering that the transformative nature of fanfiction is hard to define. In addition, the “authorship disclaimer” norm, which is derived from the moral rights of attribution, is heavily enforced among fan communities but does not carry any legal weight in a court of law. The disconnect between copyright law and fans’ intuition confirms that existing copyright law appears to be unclear and confusing.

Third, as addressed in Chapter 3, existing copyright systems have been criticised for being outdated. Fanfiction is part of a new generation of derivative work that faces legal challenges in a copyright system that has not changed since the 1970s. It is not always easy to define the legal status of these new forms of media. Works produced and circulated among fan communities, such as fanfiction, fan video, fan film and fan subtitles, have created confusion among lawmakers, canon authors and fan creators. Fan films, for example, can pass the four-prong Fair Use test if fan filmmakers do not draw heavily from the underlying works (e.g., the use of original characters is minor, new plots and settings are added or “impressive production values and strong performances” are brought to audiences).<sup>729</sup> Remixing and sampling music also might not constitute copyright infringement if the artists add multiple original and creative elements to the source materials.<sup>730</sup>

In sum, new media formats invented in modern times may not fit well under current copyright law. Although fanfiction writers rarely face lawsuits from original authors and their publishers,<sup>731</sup> it is possible that other creators such as fan filmmakers or mashup artists would be targets for lawsuits due to the obvious nature of material borrowing.

### **RQ3: How should copyright law adapt to the continually shifting technological landscape to adapt to the digital age?**

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<sup>729</sup> Jane Graham, *The New Wave of Fan Films*, THE GUARDIAN (2010), <http://www.theguardian.com/film/2010/may/13/fan-films-wes-anderson-spiderman> (last visited Jul 30, 2021). See also Jyme Mariani, *Lights! Camera! Infringement? Exploring the Boundaries of Whether Fan Films Violate Copyrights*, 8 AKRON INTELLECT. PROP. J. 117 (2016); JON GARON, *Fandom and Creativity, Including Fan Art, Fan Fiction, And Cosplay* (2017), <https://papers.ssrn.com/abstract=3007404> (last visited Jul 30, 2021).

<sup>730</sup> Kerri Eble, *This Is a Remix: Remixing Music Copyright To Better Protect Mashup Artists*, 2013 ILL. LAW REV. 661, 680 (2013).

<sup>731</sup> Leslie Bennets, *Pirating of ‘The Pirates of Penzance’*, THE NEW YORK TIMES (1982), <https://www.nytimes.com/1982/08/18/movies/pirating-of-the-pirates-of-penzance.html> (last visited Jul 29, 2021). (‘The copyright law merely gives you the right to sue...But lawsuits are enormously expensive. You can’t necessarily afford to recover the money; it would cost more to get it than you would get’).

Note that there has been friction between the abstraction of existing law and what rules are practised in online communities. On the one hand, as academics in the field have addressed, copyright regulations fail to show ordinary people what they should do. Online users, therefore, have to produce another narrative of formal rules to make them more understandable. On the other hand, the history of fanfiction communities might seem like a collection of facts suggesting that their “domestic norms” can sufficiently replace the formal rules and regulate the community members’ behaviours. Furthermore, because the primary goal of copyright law is to promote creativity and the public’s access to knowledge, laws should be amended to achieve these purposes in the digital age by permitting online users to reuse copyrighted materials to create new works. This approach is practical when currently everyone with a device and knowledge of audio, texts or visuals can become a content creator.

Copyright law must be changed to establish more certainty regarding user-generated content and increase protections for creative works of non-professional creators. A new right to accommodate derivative works should explicitly be introduced rather than attempting to fit new forms of media into the current copyright exception, which has already been deemed to be a “gray” legal framework. Moreover, stretching the list of current subjects of copyright protection to match works such as fanfiction is not an adequate solution.

**a. Introducing a new right: The right to recreate existing works**

As we know, the closest concept of fanfiction and other types of fan work is “derivative work,” which is originally an American legal concept.<sup>732</sup> Meanwhile, the Berne Convention stipulates that derivative works shall be protected but it does not use this terminology.<sup>733</sup> Additionally, a broad copyright limitation and exception framework, such as we have nowadays (Section 2.3), leaves courts to make decisions on a case-to-case basis and confounds users when they have to navigate many applicable copyright norms (Chapter 5). The inconsistencies in terminology, as well as copyright limitations and exceptions, suggest that copyright law should recognise a right to use existing works to

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<sup>732</sup> An extensive definition of the term is recognised in the US’ 1976 Copyright Act § 101. French law, for example, prefers the term “œuvre composite” (“composite work”). In Vietnam, all types of alteration of an existing work are classified as adaption.

<sup>733</sup> The Berne Convention, *supra* note 115, art 2(3).

make a creative recreation of such works.<sup>734</sup> As long as the use meets certain requirements, the work should be treated as a non-copyright infringement and the creator of the new work can attain limited rights associated with his or her product.

First, the right to reuse copyrighted materials should be established outside the umbrella of the existing copyright limitations and exceptions (L&E). The conclusion drawn from Chapter 4 is that works such as fanfiction do not fit into the body of L&E. Furthermore, L&E is a defence, so the act is a copyright infringement.

Secondly, the right to reuse copyrighted materials is only available if the use satisfies specific requirements:

- (i) The new work must be original and creative.
- (ii) The source and the name of the canon authors are reasonably recognised.
- (iii) The recreation does not cause any harm to the canon work's market benefit;  
and
- (iv) No direct profit is gained from the new work.

Taking fanfiction as an example, each of these criteria is broken down as follows:

- *The new work must be creative*

The test for creativity in the recreations includes two distinct factors. First, new work must involve “some independent and original element” to the existing work that makes it sufficiently different from a replica.<sup>735</sup> Second, the creations must be a “modicum of creativity.” New works must show what the original contribution of sufficient creativity was made by the author of the new work. It does not need to be completely new,<sup>736</sup> “innovative”<sup>737</sup> or “surprising”<sup>738</sup> to meet the requirement for copyright protection, but it must be an expression of personality reflecting some level of sophistication and aesthetic merit.

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<sup>734</sup> The recreation term used in this thesis has close meaning to the term “remix” used by Lawrence Lessig in his book LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

<sup>735</sup> Howard Abrams, *Originality and Creativity in Copyright Law*, 55 LAW CONTEMP. PROBL. 3–44, 42 (1992).

<sup>736</sup> *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) at 1294.

<sup>737</sup> *Id.* at 1296.

<sup>738</sup> *Id.*

- *The source and the name of the canon authors are reasonably recognised*

This requirement is already in line with the online fanfiction communities' attribution norm, in which members use the names of characters or include authorship disclaimers at the beginning of their stories. The findings in Chapter 6 show no evidence of fanfiction writers wishing to replace the work of the original authors or misleading readers about the source materials or the authorship. A fanfiction site that offers new fiction based on the original characters would be treated as a non-copyright infringement. As law professor Deborah Tussey suggests, "Such a site should be immune from threats and litigation by right holders based on copyright, trademark, or publicity rights claims."<sup>739</sup>

- *The recreation does not cause any harm to the canon work's market benefit*

According to Chapter 2, especially the part where the three-step test enshrined in the Berne Convention was discussed, fanfiction never serves as a market substitute for the canon work.<sup>740</sup> As Professor Liebler states: "By using multiple properties, the fan creator is more and more likely to have at least one of the copyright owners object, but the multitude of different influences is more likely to make the work transformative and less likely to serve as a market substitution for any of the starting works."<sup>741</sup> Other types of fan labours such as fan subtitles, fandubs, and fan scanlation likely do not meet this requirement.<sup>742</sup>

- *No direct profit is gained from the new work*

Again, this requirement is coherent with the non-commercial norm of the online fanfiction communities. It is reasonable because the recreation involves someone else's

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<sup>739</sup> Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. LAW REV. 1129–1194, 1190 (2000).

<sup>740</sup> Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUMBIA J. LAW ARTS 101–120, 110 (2008).

<sup>741</sup> Raizel Liebler, *Copyright and Ownership of Fan Created Works: Fanfiction and Beyond*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 391–403, 396 (Matthew David & Debora Halbert eds., 2015).

<sup>742</sup> Fan-subtitle is subtitle made by fans in languages other than the original language used in the canon movies or films. Fandubs is a fan-made dub or redub of a live-action or animated production. Fanscanlation covers a process in which fans scan, translate, and edit comics from one language into another language. These fan works directly involve the consumption of original works. See more at Fan labour, WIKIPEDIA (2020), [https://en.wikipedia.org/w/index.php?title=Fan\\_labor&oldid=995934387](https://en.wikipedia.org/w/index.php?title=Fan_labor&oldid=995934387) (last visited Jan 11, 2021).

original work without their authorisation. Therefore, the creators of the recreations should not be granted any economic rights directly from their works.

In summary, these requirements are coherent with the long-established “domestic norms” practised by the community (i.e. non-commercial norm and attribution norm), which strongly support the practicality of this approach. An independent and simplified concept of the recreate right would be more sufficient by combining what is described in law and what occurs in reality.

#### **b. Decentralised online platforms as a solution to enforce copyright norms sufficiently**

I am convinced that even though the Internet and new technologies have changed many things, people still commit copyright infringement for largely the same reasons as they did when all these advances did not exist.<sup>743</sup> However, nowadays copyright cannot be enforced sufficiently without the support of technology. Returning to the theory of dot of Professor Lawrence Lessig (Section 1.2), technology is one of the four modalities in regulating cyberspace. However, it can be argued that excessive content censorship run by algorithms is never an ideal copyright scheme. What I learned from my studies of online fanfiction communities is that it would be wise to take advantage of the infrastructure and norms systems that are already available. However, the question that persists is how to create the right conditions for these systems to work at their best.

From a broader perspective, this thesis encourages alternative approaches to handling legal dilemmas caused by users of online platforms in the future. The Internet helps communities grow with explosive speed but it does not strengthen members’ relationships. The larger the community, the more difficult it is to control it. Monitoring an online community with millions of users is a big task compared to those with only hundreds of members, especially when the domestic norms are mostly enforced by public pressure and through interactions between the community members (Section 6.4.1). Moreover, communities that operate on platforms that are governed by one set of macro rules like livejournal.com or reddit.com only make things complicated. For example, “selling fanfiction” is against the rule of a fanfiction community, but not necessarily the

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<sup>743</sup> Karl Forgel, *The Surprising History of Copyright and The Promise of a Post-Copyright World – Question Copyright*, QUESTIONCOPYRIGHT.ORG (2006), <https://questioncopyright.org/promise> (last visited Jan 12, 2021).

blogging platform livejournal.com's TOS. The answer, which I learned from small fanfiction sites, is simply that a virtual community does not need to be huge.

I observed that communities that are dedicated to only fanfiction such as fanfiction.net and archiveofourown.org have more sufficient and well-tailored copyright enforcement than others that host all types of fiction (e.g. livejournal.com, wattpad.com). It is reasonable because the former's terms are specifically designed for fanfiction. People are also more willing to cooperate with others when they share the same value systems and have reason to trust others, which usually only occurs in close-knit groups.<sup>744</sup> Therefore, we should encourage the promotion of smaller communities with their own standards, driven by what the members think are core values. This approach recommends a new generation of virtual community – decentralised platforms.<sup>745</sup> Instead of big centralised cyberspace which is dominated and governed by a few big companies (e.g. Facebook, Amazon, Apple, Netflix, and Google), decentralised platforms which are based on blockchain technology allows communities around them to suggest changes to the code and rules of the platform as well as decide which of these changes will be implemented through the communities' structures (e.g. forums, discussion groups).<sup>746</sup>

Mastodon, a fast-growing Twitter-like social network, is an example of different communities with different rules that operate on the same network.<sup>747</sup> Mastodon (joinmastodon.org), a free and open-source self-hosted networking service,<sup>748</sup> allows online users to host their own servers in the network and develop a community of their own. Even though members of different servers can interact with each other seamlessly, each of them is a member of a specific, independently operated server. In other words, Mastodon is not a single compacted website that regulates all its members' behaviours.

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<sup>744</sup> Elizabeth Hoffman, Kevin McCabe & Vernon L. Smith, *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653–660 (1996) (showing the less isolated people are, the more likely they are to treat others benevolently); Casey Fiesley and Amy Bruckman, *supra* note 72 at 19.

<sup>745</sup> Yan Chen, Igor Pereira & Pankaj C. Patel, *Decentralized Governance of Digital Platforms*, J. MANAG. 1–32 (2020).

<sup>746</sup> Joana Pereira, M. Mahdi Tavalaei & Hakan Ozalp, *Blockchain-based platforms: Decentralized infrastructures and its boundary conditions*, 146 TECHNOL. FORECAST. SOC. CHANGE 94–102, 111 (2019).

<sup>747</sup> Adi Robertson, *How the biggest decentralized social network is dealing with its Nazi problem*, THE VERGE (2019), <https://www.theverge.com/2019/7/12/20691957/mastodon-decentralized-social-network-gab-migration-fediverse-app-blocking> (last visited Jan 10, 2021); Megan Farokhmanesh, *A beginner's guide to Mastodon, the hot new open-source Twitter clone*, THE VERGE (2017), <https://www.theverge.com/2017/4/7/15183128/mastodon-open-source-twitter-clone-how-to-use> (last visited Jan 10, 2021).

<sup>748</sup> Mastodon, JOINMASTODON, <https://joinmastodon.org/> (last visited Jan 9, 2021).

Therefore, Mastodon allows members not only to construct communities with rules tailored specifically for them but also to connect with other communities.

## 7.2. REVIEW OF THE METHODOLOGY

In Chapter 1, I presented a review of existing literature in the field, focusing on specific methods that were employed to investigate fanfiction communities' norms. Later in Chapter 6, an explanation was introduced to highlight why content analysis and corpus linguistics could help me to answer the research questions that are set in Chapter 1. In this section, I recapped what was achieved by using research methods and I offer a review of my suggestions to the research field.

### 7.2.1. Content Analysis

The content analysis, more precisely, the thematic analysis method that was applied in the first and the second studies of this PhD thesis, aimed to identify the theme in the primary data. What I concluded from using this method is as follows:

First, content analysis is a very flexible research method.<sup>749</sup> The analysis in this study does not require complicated coding techniques or the use of software to simulate the models. There were only a few steps in the procedure: collecting data, developing a coding scheme, sorting data into categories, and validating the assumption.

Secondly, because the explicit theoretical framework necessary to identify categories had been set in previous chapters (chapters 2, 4, and 5), generating the coding paradigm was a simple task. The codes were primarily extracted from copyright-related terms. Even though ten fanfiction sites' terms and conditions constitute a comparatively large dataset, it was not difficult to find the key features of the data (Section 6.2.1).

However, there are some disadvantages which are important to acknowledge:

The most apparent challenge of this method was that it made me unsure of how to sort and collate all the data into categories after the codes were located. In this thesis, the data - fanfiction sites' terms and conditions - tend to be very long and repeated at some points (Section 5.3.2). For example, one provision can cover a 50-line paragraph. A simple

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<sup>749</sup> Hsieh and Shannon, *supra* note 571.

analysis - extracting only several main lines of the term - can result in a superficial understanding, as it does not allow researchers to investigate the narration of the terms (i.e. the structure of the term, the rationales behind the site owners' choices of words). On the other hand, a flexible analysis – taking all texts into considerations – may lead to a distraction in the data. The data that were distributed to the same category were not necessarily relevant to each other. Besides, showing all the terms also can make readers overwhelmed by a large amount of data. And this approach also requires a greater time investment.

Both cases can affect the credibility and confirmability of the research results. To deal with these issues, I carefully checked my markers such as the theoretical background (i.e. existing literature and legal instruments) and tested for referential adequacy by returning to the raw data throughout the entire study.<sup>750</sup> Thus the readers can understand how and why these patterns were made.

### **7.2.2. Corpus Linguistics**

In Section 6.4.1, I briefly set out a series of deficiencies in research methods that other scholars have used (e.g. interview, participant observation) to explore fanfiction communities' social norms. These disadvantages were:

- (i) The reliance on conclusions when they were mostly drawn from personal experience without empirical evidence.
- (ii) The risk of over-interpretation of a small data sample or the risk of the data being manipulated by researchers (e.g. data collected from several interviewees).
- (iii) Some important features might be missed.

Corpus linguistics, I believe, alleviated the problems that I outlined above. At the end of my research, I observed that:

First, in respect of the methodology, I used a mixed approach which involves both validating measuring instruments (measuring frequency, keywords, and concordances)

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<sup>750</sup> Lorelli S. Nowell et al., *Thematic Analysis: Striving to Meet the Trustworthiness Criteria*, 16 INT. J. QUAL. METHODS 1609406917733847, 8 (2017).



and qualitative analysis. As a practical tool to “make sense of empirical reality,”<sup>751</sup> corpus linguistics makes findings straightforward and less open to error and subjectivity. Moreover, the conclusions were backed up by empirical evidence, which is more accurate than using only non-numerical data.

Second, even though Fandom corpus is a specialised corpus (its size is restricted to the other types of corpora), the volume of data used in this study was still significantly larger than those of existing research. Large data sets often require high-performance software because determining features of a volume of a million texts manually is a daunting task. However, corpus-based analysis with the aid of a computer has saved researchers from this task. Research can be conducted within a short time span and the result is less biased.

Third, corpus software can work on millions of texts, covering most aspects of language used by commenters. The risk of missing some important features of data is minimised. Moreover, the research questions were re-evaluated continuously to guarantee that all collected data were relevant to the research topics. And I chose a research topic and data sites in which I have participated for a long time. These approaches helped to maximise the findings.

However, it is necessary to acknowledge that the fandom corpus has some limitations. The last problem (missing out on important features) persists. Although I suggested that using software that increases the speed and accuracy of the data processing would help to lessen this, several limitations should be recognised:

- *Limitation in the fandom corpus*

Building the Fandom corpus formed a significant part of my PhD thesis. Although each of the steps (described in Section 6.2.1) was conducted carefully, I must admit that the studied corpus can never be perfect. A corpus, however representative, large, and statistically complete, “can never account for the infinite potential varieties of use of a language”<sup>752</sup> as people use language in different contexts, circumstances, and times to meet different needs of communication. Therefore, a corpus cannot cover every aspect of

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<sup>751</sup> GABRIELA SALDANHA & SHARON O'BRIEN, RESEARCH METHODOLOGIES IN TRANSLATION STUDIES 13 (2013).

<sup>752</sup> Niladri Sekhar Dash, *Some limitations of corpus-based language study*, LANGUAGEININDIA.COM (2006), <http://www.languageinindia.com/march2006/corpusniladri1.html> (last visited Jan 8, 2021).

language use in diverse ways. In my case, the members of online fanfiction communities come from numerous backgrounds, cultures, and levels of education. As the earliest discussion can be traced back to 2004, language used by different generations of online users may have changed drastically. In essence, the fandom corpus can be compared to a galaxy of millions of online users' language uses. It can never properly represent every individual's uses in English. It is meant to supply valuable information and evidence about the condition of the language used by specific community members about a specific topic (i.e. copyright).

I first recognised this limitation when issues were raised from English orthography. The words “gray” (American English) and “grey” (British English) both exist in the Fandom corpus, despite the fact they have the same meaning. However, only the American alternative (“gray”) was analysed because it had a higher frequency in Section 6.4.3. (f). This example showed that corpus-based analysis sometimes fails to pick up the discrepancy in spelling standardisations. However, I do not believe that this issue jeopardised my research findings; rather, it shows that my methodology can support the research in online interactions by working effectively with different forms of orthography. It only requires the researchers to take into account all potential issues in terms of spelling. My suggestion is that researchers while working with the data, need to (1) understand their data in terms of the language used and orthography (i.e. what language is used in the text and available spelling systems associated with it), (2) be aware of any potential discrepancy in spelling, and (3) be cautious with the results obtained.

The issue can again be seen in my choice of the reference corpus (the British National Corpus). I chose the BNC as a reference corpus over other corpora such as the American National Corpus, the Brown Corpus, and the Corpus of Contemporary American English. It is worth mentioning that the data processing can be done quite successfully if the reference corpus is built up with the necessary linguistic items (e.g. words, phrases, terms, and idiom). Even though words and sentences in the dataset were mostly correct, I did not have the facility to discern the spelling disparities. However, the fact that this issue only occurred once across a 370,000-word corpus can justify my approach, in that I would arrive at a similar conclusion to one obtained through an American English reference corpus.

Secondly, due to a feature of online forums that users are quoting one another, there may be repetition in the corpus. The repetition, as I observed, mostly occurred in the question-answer threads. The questions may be collected more than once during the process. Although the data was checked throughout the study, there is still a case that will affect the frequency of words.

It is impossible to capture some unnoticeable changes in the linguistic elements of a living language, “even if the researchers want to make them properly diachronic and universal.”<sup>753</sup> In this research, such unexpected changes were language adaptations (i.e. techspeak), and the community members used them randomly. For example, the use of homophone and omission, such as 2 for too, “sup” for “what is up?” can be seen repeatedly across the data. There were also problems with spelling and grammar, for instance, typing “Thissssss” instead of “This.” Although the use of such plausible terms was not surprising among young Internet users,<sup>754</sup> spelling variation can cause considerable problems for corpus linguistic techniques. For example, frequencies of words can be calculated incorrectly due to a word’s potential frequency being divided between its spelling forms.

I suspect that this might indicate that my methodology will be more successful when applied to formal texts, where there is no significant change in terms of grammar and vocabulary over time (e.g. texts obtained from news, books, and legal documents). Some experts in the aspect of language linguistics have suggested the use of software to assist users in dealing with spelling variation such as VARD 2 (Variant Detector).<sup>755</sup> However, this software often requires analysts to manually input all possible spelling forms.

- *Some valuable features can be missed out*

One of the disadvantages of using corpora is that sometimes the word is not displayed but it does not mean that it does not exist.<sup>756</sup> In my case, the list of keywords contained 2,310 words. This large amount of data required me to select only significant data that fit

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<sup>753</sup> *Id.*

<sup>754</sup> Chandra M. Hayslett, *No LOL matter: Cyber lingo shows up in academia*, THE SEATTLE TIMES (2006), <https://www.seattletimes.com/nation-world/no-lol-matter-cyber-lingo-shows-up-in-academia/> (last visited Jan 6, 2021).

<sup>755</sup> ALISTAIR BARON & PAUL RAYSON, VARD 2: A TOOL FOR DEALING WITH SPELLING VARIATION IN HISTORICAL CORPORA.

<sup>756</sup> HANS LINDQUIST, CORPUS LINGUISTICS AND THE DESCRIPTION OF ENGLISH 10 (2009), <https://www.jstor.org/stable/10.3366/j.ctt1g09xkf> (last visited Jan 8, 2021).

the theoretical background set in Section 1.2. As a result, only twelve of them were picked for in-depth analysis. Some valuable information might have been missed during this stage.

Another challenge was incorrectly assuming a collocate had a particular function when in reality it was just used abnormally. For example, when investigating the node “money,” the collocate “ao” appeared. A careful review then confirmed “ao” is part of the term “ao3” – the way fans refer to the website [archiveofourown.org](http://archiveofourown.org). To fully account for this term, I had to carefully read expanded concordance lines for every single case to comprehend the context in which it was used. I also recognised that investigating concordance lines in this way might also help in my interpretation of each line. For instance, the word “money” appears in 271 concordance lines, I read through all of them to find the significance of the word usage.

Additionally, if the centre of collocates and other patterns are solely based on the frequencies of words, it may result in a purely descriptive analysis. Such an analysis does not provide interpretation, review, or explanation for the results. Therefore, I conducted a deep analysis of collocation to avoid this shortcoming of the corpus-based approach.

### **7.3. CONCLUSION**

In terms of methodology, the thesis introduced a new research method – corpus linguistics – to tackle legal issues. Testing on online fanfiction communities, this method showed its significant advantage in processing and analysing a large volume of data, which is unlikely to be achieved by other methods.

The thesis proposes a new concept to be added to the existing copyright system: the right to re-create existing work. As long as the reuse of borrowed materials satisfies the following criteria, then it should be treated as a non-copyright infringement: (1) the work has to be creative, (2) the source and the name of the canon authors are reasonably recognised; (3) the recreation does not cause any harm to the canon work’s market benefit, and (4) no direct profit is gained from the new work. Because the copyright problems regarding the new generation of user-generated content like fanfiction are global, the approach to the implementation of a new right is not specifically intended for a particular jurisdiction. To achieve a balance between the interests of the right holders, fan creators, and the public interest, this proposal should be seen as a general

recommendation of the best approach. Any country may, to the best of its jurisdiction, adopt and adapt this proposal as applicable to its national laws. The criteria of this recreation right can thus be seen as guidance for all countries.

Furthermore, it is necessary to say lawmakers should abandon the idea of developing a universal, centralised, “all in one” legal framework, which likely never happens. It is also a fact that national-oriented copyright systems have not kept pace with the advent of the Internet and new technologies. Instead, they should aim for what is suggested by Doctor Janet Sternberg “a multiplicity of decentralised locally-oriented strategies” to govern online users’ behaviours.<sup>757</sup> It would be more practical in the long run to promote and stimulate smaller decentralised regulatory frameworks that support diverse standards and strategies for regulating the online environment. The copyright systems developed by the online fanfiction communities, which are carefully investigated in this study, are fascinating examples of these systems. The findings in this thesis suggest that a new structure of moderation – decentralised virtual communities where social norms are enforced heavily – can better accommodate creative activities.

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<sup>757</sup> JANET STERNBERG, MISBEHAVIOR IN CYBER PLACES: THE REGULATION OF ONLINE CONDUCT IN VIRTUAL COMMUNITIES ON THE INTERNET 177 (2012).

## BIBLIOGRAPHY

### Journal Articles

- Al-Ansari, Basma et al, *Alcohol policy in Iran: Policy content analysis*, 73 INTERNATIONAL JOURNAL OF DRUG POLICY (2019).
- Becker, Jane M. *Stories around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet Notes*, 14 CONN. PUB. INT. L.J. (2014).
- Burger, Peter. *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. (1988).
- Chander, Anupam & Sunder, Madhavi. *Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use Essay*, 95 CALIF. L. REV. (2007).
- Chatelain, Michelle. *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine Comment*, 15 TUL. J. TECH. & INTELL. PROP. (2012).
- Chua, Ernest. *Fan Fiction and Copyright; Mutually Exclusive, Coexist-able or Something Else - Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright*, 14 ELAW J. (2007).
- Depoorter, Ben. *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. (2019).
- Deutsch, Alvin. *The Piracy of Parody*, 12 ENT. & SPORTS LAW. (1994).
- Dunning, Ted *Accurate Methods for the Statistics of Surprise and Coincidence*, 19 COMPUTATIONAL LINGUISTICS (1993).
- E. Muscar, Jaime *A Winner Is Who - Fair Use and the Online Distribution of Manga and Video Game Fan Translations Note*, 9 VAND. J. ENT. & TECH. L. (2006).
- Ellickson, Robert C. *Bringing culture and human frailty to rational actors: A critique of classical law and economics*, 65 CHI.-KENT L. REV. (1989).
- Ficsor, Mihaly. *Copyright for the Digital Era: The WIPO Internet Treaties The Spring 1997 Horace S. Manges Lecture*, 21 COLUM.-VLA J.L. & ARTS (1996).
- Firth, J.R., *Applications of General Linguistics*, 56 TRANSACTIONS OF THE PHILOLOGICAL SOCIETY (1957).
- Foley, Kathryn M. *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide Note*, 41 CONN. L. REV. (2008).
- Gervais, Daniel. *Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright Part I*, 57 J. COPYRIGHT SOC'Y U.S.A. (2009).

Ginsburg, Jane C. *Copyright without Borders - Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace The Fourth Annual Herbert Tenzer Distinguished Lecture in Intellectual Property*, 15 CARDOZO ARTS & ENT. L.J. (1997).

Ginsburg, Jane C. *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L. L. (1997).

Goonesekere, Nayomi *A Critical Analysis of secondary liability under Copyright Laws in the United States and in India*, 5 WESTMINSTER LAW REVIEW (2003).

Hayes, David L. *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L. J. (1998).

Hetcher, Steven. *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2009).

J. II Boddie, Needham et al., *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. (1997).

Jansen, Marlize. *Protecting Copyright on the Internet*, 12 JUTA'S BUS. L. (2004).

Kandori, Michihiro. *Social norms and community enforcement*, 59 REVIEW OF ECONOMIC STUDIES (1992).

Kramarsky, Stephen M. *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L. (2001).

Kurtz, Leslie A. *Copyright and the Internet - World without Borders Symposium: The Internet-Law without Borders in the Information Age*, 43 WAYNE L. REV. (1996).

Leaffer, Marshall A. *The Betamax Case: Another Compulsory License in Copyright Law*, 13 U. TOL. L. REV. (1981).

Lee, Tiffany. *Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations Note*, 14 TEX. REV. ENT. & SPORTS L. (2012).

Lee, Y H. *Fan Communities and the Self-Regulation of Digital Creative Space*, 10 SCRIPTED (2013).

Leonard, Sean. *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. (2004).

Lessig, Lawrence. *Social Meaning and Social Norms*, 144 U. PA. L. REV. (1995).

Lipton, Jacqueline D. *A Taxonomy of Borrowing*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (2013).

- Lipton, Jacqueline D. *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW (2014).
- Matulionyte, Rita. *Copyright on the Internet: Does a User Still Have Any Rights at All* *International Law*, 1 HANSE L. REV. (2005).
- Mayer-Schonberger, Viktor & Wong, Lena. *Fan or Foe: Fan Fiction, Authorship, and the Fight for Control*, 54 IDEA (2013).
- McCardle, Meredith. *Fan Fiction, Fandom, and Fanfare: What's All the Fuss Note*, 9 B.U. J. SCI. & TECH. L. (2003).
- McKay, Patrick. *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century Note*, 24 REGENT U. L. REV. (2011).
- Moffat, Viva R. *Borrowed Fiction and the Rightful Copyright Position*, 32 CARDOZO ARTS & ENT. L.J. (2013).
- Netanel, Neil. *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. (1992).
- O'Brien, Damien & Fitzgerald, Brian. *Mashups, Remixes and Copyright Law*, 9 INTERNET LAW BULLETIN (2006).
- O'Heany, Steven. *Fair Is Fair: Fair Dealing, Derivative Rights and the Internet*, 12 ASPER REV. INT'L BUS. & TRADE L. (2012).
- Ostrom, Elinor. *Collective Action and the Evolution of Social Norms*, 14 THE JOURNAL OF ECONOMIC PERSPECTIVES (2000).
- Parchomovsky, Gideon & Weiser, Philip J., *Beyond Fair Use*, 96 CORNELL L. REV. (2010).
- Patry, William. *Choice of Law and International Copyright*, 48 AM. J. COMP. L. (2000).
- Patterson, L. Ray. *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. (1992).
- Peaslee, Samantha S. *Is There a Place for Us: Protecting Fan Fiction in the United States and Japan*, 43 DENV. J. INT'L L. & POL'Y (2014).
- Pereira, Joana, Tavalaei, M. Mahdi & Ozalp, Hakan, *Blockchain-based platforms: Decentralized infrastructures and its boundary conditions*, 146 TECHNOLOGICAL FORECASTING AND SOCIAL CHANGE (2019).
- Peters, Marybeth. *The Challenge of Copyright in the Digital Age*, 9 REV. PROP. INMATERIAL (2006).
- Posner, Richard A. *Social norms and the law: An economic approach*, 87 THE AMERICAN ECONOMIC REVIEW (1997).



- Ranon, Christina Z. *Honor among Thieves: Copyright Infringement in Internet Fandom Note*, 8 VAND. J. ENT. & TECH. L. (2005).
- Raskin, Kenneth. *Copyright Protection for Fictional Characters*, 2 PERFORMING ARTS REV. (1971).
- Schwabach, Aaron. *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. (2008).
- Scruers, Matthew. *The History and Economics of ISP Liability for Third Party Content Note*, 88 VA. L. REV. (2002).
- Stroude, Rachel L. *Complimentary Creation: Protecting Fan Fiction as Fair Use Comment*, 14 MARQ. INTELL. PROP. L. REV. (2010).
- Tamanaha, Brian Z. *A Non-Essentialist Version of Legal Pluralism*, 27 JOURNAL OF LAW AND SOCIETY (2000).
- Tushnet, Rebecca. *Legal Fictions: Copyright, Fan Fiction, and a New Common Law Symposium - Using Law and Identity to Script Cultural Production*, 17 LOY. L.A. ENT. L.J. (1996).
- Visser, Coenraad. *Choice of Law in Internet Copyright Disputes*, 11 S. AFR. MERCANTILE L.J. (1999).
- Xalabarder, Raquel. *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 ANN. SURV. INT'L & COMP. L. (2002).

## **Books**

- Baker, Paul Using Corpora in Discourse Analysis (2006).
- Baldwin, Peter. The Copyright Wars (2014).
- Bowker, Richard Rogers. Copyright: Its History And Its Law (2014).
- Chambliss, William J. & Seidman, Robert B. Law, Order, and Power (1971).
- Drobak, John N. Norms and the Law (2006).
- Ellickson, Robert C. Order without Law: How Neighbors Settle Disputes (1994).
- Ficsor, Mihály. Guide to the copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms (2003).
- Ficsor, Mihály. The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation (2002).
- Frankel, Susy & Gervais, Daniel J. Advanced Introduction to International Intellectual Property (2016).
- Goldstein, Paul & Hugenholtz, P. B. International Copyright: Principles, Law, and Practice (2010).

Guibault, Lucie. Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright (2002).

Hetcher, Steven. Norms in a Wired World (2004).

Hörnle, Julia. Cross-border Internet Dispute Resolution (2009),

Hunston, Susan. Corpora in Applied Linguistics (2002).

Jamison, Anne. Fic: Why Fanfiction Is Taking Over the World (2013).

Jenkins, Henry. Confronting the Challenges of Participatory Culture: Media Education for the 21st Century (2009).

Krippendorff, Klaus. Content Analysis: An Introduction To Its Methodology (3 ed. 2012).

Lessig, Lawrence. Code: and Other Laws of Cyberspace (2000).

Lessig, Lawrence. Remix: Making Art and Commerce Thrive in the Hybrid Economy (2008).

Lindquist, Hans. Corpus Linguistics and the Description of English (2009).

Lipstein, K. Principles of the conflict of laws national and international (1981).

McEnery, Tony & Wilson, Andrew. Corpus Linguistics: An Introduction (2011).

Ploman, Edward W. & Hamilton, L. Clark. Copyright: intellectual property in the information age (1980).

Rheingold, Howard. The Virtual Community: Finding Connection in a Computerized World (1993).

Schwabach, Aaron. Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection (2011).

Schwabach, Aaron. Internet and the Law: Technology, Society, and Compromises, 2nd Edition: Technology, Society, and Compromises (2014).

Seltzer, Leon. Exemptions and Fair Use in Copyright - The Exclusive Rights Tensions in the 1976 Copyright Act (1978).

Senfleben, Martin. Copyright, Limitations and the Three-Step Test: An Analysis of the Three-step Test in International and EC Copyright Law: Vol 13 (2004).

Sinclair, John. Corpus, Concordance, Collocation (1991).

Sternberg, Janet. Misbehavior in Cyber Places: The Regulation of Online Conduct in Virtual Communities on the Internet (2012).

WIPO, Berne Convention Centenary 1986 (1986).

### **Book sections**

- Allen, Mike. Content Analysis: Advantages and Disadvantages, in *The SAGE Encyclopedia of Communication Research Methods* (2017)
- Liebler, Raizel. Copyright and Ownership of Fan Created Works: Fanfiction and Beyond, in *The SAGE Handbook of Intellectual Property* 391–403 (Matthew David & Debora Halbert eds., 2015)
- Sinclair, John. Corpus and Text - Basic Principles, in *Developing Linguistic Corpora: a Guide to Good Practice 1* (Martin Wynne ed., 2005)
- Jensen, Thessa. Designing for relationship: Fan fiction sites on the Internet, in *Theoretical and Applied Ethics* 241–255 (2013)
- Goodman, Elga A., Pappa, Kristina & Olson, Brent A. Internet Service Provider Liability - Background, 49-50A in *Business Law Deskbook* (2019)
- Cialdini, Robert B. & Trost, Melanie R. Social influence: Social norms, conformity and compliance, 1 in *The handbook of social psychology* 151–192 (1998)
- Dinwoodie, Graeme. The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* 61–114 (2007)
- Leech, Geoffrey. The state of the art in corpus linguistics, in *English Corpus Linguistics* (Karin Aijmer & Bengt Altenberg eds., 1991)

### **Conference Paper**

- Fiesler, Casey, Morrison, Shannon & Bruckman, Amy S. *An Archive of Their Own: A Case Study of Feminist HCI and Values in Design*, in *Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems* 2574–2585 (2016)
- Fiesley, Casey & Bruckman, Amy. *Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement* (2019).
- Fiesler, Casey, Feuston, Jessica & Bruckman, Amy S. “*I Am Not a Lawyer*”: *Copyright Q&A in Online Creative Communities*, in *Proceedings of the 18th International Conference on Supporting Group Work* 291–294 (2014).
- Fiesler, Casey, Lamp, Cliff Lamp & Bruckman, Amy S. *Reality and Perception of Copyright Terms of Service for Online Content Creation*, in *Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing* 1450–1461 (2016)

Fiesler, Casey & Bruckman, Amy S. *Remixers' understandings of fair use online*, in Proceedings of the 17th ACM conference on Computer supported cooperative work & social computing 1023–1032 (2014).

Fiesler, Casey, Feuston, Jessica & Bruckman, Amy S. *Understanding Copyright Law in Online Creative Communities*, in CSCW '15 (2015).

### **Cases**

A&M Records, Inc. et al. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001)

Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381 (9th Cir. 1995)

Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)

Bestolov v. Povarenkin [2017] EWHC 1968 (Comm)

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)

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

Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995)

De Bardossy v. Puski, 763 F. Supp. 1239 (S.D.N.Y. 1991)

EMI v UPC [2010] IEHC 377

Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)

Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 5 ILR (P&F) 440, 96 F Supp 2d 824 (ND Ill 2000)

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

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

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996)

Harper & Row v. Nation Enterprises, 471 U.S. 539, 553 (1985)

Hasegawa v. Tachikawa Bus K.K., I Chosakuken Hanreishu 721 Tokyo District Court (1976)

In re Aimster Copyright Litig. F.3d 643, 643 (7th Cir. 2003)

International Shoe Co. v. Washington, 326 US 310, 316, (1945)

L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122-23 (9th Cir. 1997)

Los Angeles News Serv. v. Conus Communications Co., 969 F. Supp.579 (C.D.Cal.1997)

Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010)

National Comics Publications v. Fawcett Publications, 191 F 2d 594 (1951)

Nat'l Football League v. PrimeTime 24 Joint Venture, 131 F. Supp. 2d 458 461 (S.D.N.Y. 2001)

Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930)

Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (1993)

Productores de Música de España (Promusicae) v. Telefónica de España SAU [2008] ECR I-271

Sabbagh v Khoury & Ors [2019] EWHC 3004 (Comm) (14 November 2019)

Shevill and Others v Presse Alliance SA: HL 26 Jul 1996

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

United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260 (1907)

Update Art, Inc. v. Modiin Publishing, Ltd. 843 F.2d. 67, 73 (2d. Cir, 1998)

Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954)

### **Legal instruments**

The Berne Convention for the Protection of Literary and Artistic Works (1886)

The Universal Copyright Convention (1952)

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)

The World Intellectual Property Organisation Copyright Treaty (1996)

The WIPO Performances and Phonograms Treaty (1996)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (1995)

Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1972

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988

Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights 2004

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market 2000

Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993

The Copyright Act of 1976 17 U.S.C.

Copyright, Designs and Patents Act 1988 1988 c. 48

1970 Copyright Act of Japan, Act No. 48 of 1970, last amended by Act No. 30 of 2018

### **Dissertations**

Smith, Dominic Neil Ashley. *A corpus-driven discourse analysis of transcripts of Hugo Chavez's television programme "Alo Presidente,"* 2010.

Smith, Dominic Neil Ashley. *A Diachronic Corpus Analysis of the Concept of Work,* 2006.

Roger, Gachago. *The Effect of Technology on Copyright,* 2011.

### **Online Sources**

Barzallo, Yolanda Reinoso. *Factors That Influence Choice of Language Variation - Video & Lesson Transcript*, Study.com, <https://study.com/academy/lesson/factors-that-influence-choice-of-language-variation.html>

Burt, Stephanie. *The promise and potential of fanfiction*, The New Yorker (2017), <https://www.newyorker.com/books/page-turner/the-promise-and-potential-of-fan-fiction>.

Casal, Nicole & Cherry, Gabe. *"Extremely aggressive" internet censorship spreads in the world's democracies*, University of Michigan News (2020), <https://news.umich.edu/extremely-aggressive-internet-censorship-spreads-in-the-worlds-democracies/>

Corbyn, Zoe. *Decentralisation: the next big step for the world wide web*, the Guardian (2018), <http://www.theguardian.com/technology/2018/sep/08/decentralisation-next-big-step-for-the-world-wide-web-dweb-data-internet-censorship-brewster-kahle>

Dooley, Ian. *Harry Potter Duels Tanya Grotter: The Magic of International Copyright*, Cotsen Children's Library (2018), <https://blogs.princeton.edu/cotsen/2018/06/tanya-grotter-and-the-magic-of-international-copyright/>

Farokhmanesh, Megan. *A beginner's guide to Mastodon, the hot new open-source Twitter clone*, The Verge (2017), <https://www.theverge.com/2017/4/7/15183128/mastodon-open-source-twitter-clone-how-to-use>

Fenberg, Justina. *7 Steps for Building an Online Community + 5 Examples*, The BigCommerce Blog (2020), <https://www.bigcommerce.com/blog/online-communities/>

Freedman, Maxwell. *Doujinshi: How Fan Fiction Became the Lifeblood of the Manga Industry*, CBR (2020), <https://www.cbr.com/doujinshi-fan-fiction-became-lifeblood-of-manga-industry/>

Froehlich, Heather. *Corpus Analysis with Antconc*, The Programming Historian (2019), <https://programminghistorian.org/en/lessons/corpus-analysis-with-antconc>.

Gribben, Bailey. *Fanfiction: A Legal Battle of Creativity*, Reporter (2016), <https://reporter.rit.edu/views/fanfiction-legal-battle-creativity>

Howe, Walt. *A Brief History of the Internet*, Walthowe.com (2016), <https://www.walthowe.com/navnet/history.html>

Hughes, Matthew. *Can Law Enforcement Really Track Someone Down with an IP Address?*, How-To Geek, <https://www.howtogeek.com/676872/can-law-enforcement-really-track-someone-down-with-an-ip-address/>

Kehoe, Andrew & Gee, M. "*Thanks for the dons*": *A corpus linguistic analysis of topic-based communities in the comment section of The Guardian*, undefined (2019), </paper/%E2%80%9CThanks-for-the-donds%E2%80%9D%3A-A-corpus-linguistic-of-in-Kehoe-Gee/bed6c8e2ef17a29bffdfe3b52e0277ae927907a>

Masnick, Mike. *Copyright Finally Getting Around To Destroying Player Piano Music... One Century Late*, Techdirt. (2010), <https://www.techdirt.com/articles/20100712/18325210185.shtml>

McCaffrey, Anne. *Fan Fiction Rules – The Worlds of Anne McCaffrey*, The Worlds of Anne McCaffrey (2004), <http://pernhome.com/aim/anne-mccaffrey/fans/fan-fiction-rules/>

McEnery, Tony & Hardie, Andrew. *Corpus Linguistics: Method, theory and practice*, Lancaster University (2011), <http://corpora.lancs.ac.uk/clmtp/2-stat.php>

Non-Contractual Relations in Business: A Preliminary Study on JSTOR, , <https://www.jstor.org/stable/2090458> (last visited Jun 7, 2020).

Pakenham-Walsh, Rebecca. *It's official! New Copyright Directive 2019/790....*, Fieldfisher (2019), <https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/its-official-new-copyright-directive-2019790>

Rosenblatt, Betsy. *Moral Rights Basics*, cyber.harvard.edu (1998), <https://cyber.harvard.edu/property/library/moralprimer.html>

Thuronyi, George. *Copyright Law and New Technologies: A Long and Complex Relationship* | *Copyright: Creativity at Work* (2017), <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/>

Uhler, Scott F. & Weiss, Phillippe R. *Liability Issues and the Internet part 3: Defamation, Invasion of Privacy, and Copyright*, Northern Illinois University Libraries (1996), <https://www.lib.niu.edu/1996/il9604207.html>

Univeristy of Lancaster, *Unit 2 Representativeness, balance and sampling*, <https://www.lancaster.ac.uk/fass/projects/corpus/ZJU/xCBLS/chapters/A02.pdf>.

Westermeyer, J. T. *Understanding the Importance of Derivative Works*, Finnegan | Leading Intellectual Property Law Firm (2009), <https://www.finnegan.com/en/insights/articles/understanding-the-importance-of-derivative-works.html>

Winder, Davey. *Can you really be traced from your IP address?*, alphr.com (2011), <https://www.alphr.com/features/366349/can-you-really-be-traced-from-your-ip-address/>



## APPENDIX

### I.

**Table 3. Copyright terms found in the research sites' TOS**

Copyright standards provided by the Berne Convention	Corresponding copyright terms in the research sites	The source websites
Copyright licensing term	<p><b>G. What we do with Content:</b></p> <p>The OTW does not claim any ownership or copyright in your Content. <b>Repeat: we do not own your Content.</b> Nothing in this agreement changes that in any way. Running the Archive, however, requires us to make copies, and backup copies, on servers that may be located anywhere around the world.</p> <ol style="list-style-type: none"> <li>1. You agree that we can make those copies and show your Content to other people, subject to your privacy settings. Specifically, by submitting Content, you grant the OTW a world-wide, royalty-free, nonexclusive license to make your Content available. "Making available" includes distributing, reproducing, performing, displaying, compiling, and modifying or adapting.</li> </ol>	<p>Archiveofourown.org</p> <p>Asianfanfics.com</p>



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64	<a href="https://www.reddit.com/r/FanFiction/comments/dga2rg/on_monetizing_your_fandom_works/">https://www.reddit.com/r/FanFiction/comments/dga2rg/on_monetizing_your_fandom_works/</a>
65	<a href="https://www.reddit.com/r/FanFiction/comments/9k6qdd/legality_of_selling_fan_fic/">https://www.reddit.com/r/FanFiction/comments/9k6qdd/legality_of_selling_fan_fic/</a>
66	<a href="https://www.wattpadwriters.com/t/dont-be-a-copycat/66832/10">https://www.wattpadwriters.com/t/dont-be-a-copycat/66832/10</a>
67	<a href="https://jimhines.livejournal.com/509725.html">https://jimhines.livejournal.com/509725.html</a>
68	<a href="https://www.wattpadwriters.com/t/dont-be-a-copycat/66832/10">https://www.wattpadwriters.com/t/dont-be-a-copycat/66832/10</a>
69	<a href="https://www.wattpadwriters.com/t/i-want-to-write-a-fic-but-im-afraid-i-might-get-targeted/25751">https://www.wattpadwriters.com/t/i-want-to-write-a-fic-but-im-afraid-i-might-get-targeted/25751</a>
70	<a href="https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38">https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38</a>
71	<a href="https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38">https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38</a>
72	<a href="https://kradical.livejournal.com/868712.html?page=4">https://kradical.livejournal.com/868712.html?page=4</a>
73	<a href="https://www.wattpadwriters.com/t/where-do-you-draw-the-line-between-inspired-by-and-fanfiction/64833">https://www.wattpadwriters.com/t/where-do-you-draw-the-line-between-inspired-by-and-fanfiction/64833</a>
74	<a href="https://grrm.livejournal.com/151914.html">https://grrm.livejournal.com/151914.html</a>
75	<a href="https://www.reddit.com/r/FanFiction/comments/82ximu/can_i_write_any_fan_fiction_as_long_as_i_dont_take/">https://www.reddit.com/r/FanFiction/comments/82ximu/can_i_write_any_fan_fiction_as_long_as_i_dont_take/</a>
76	<a href="https://www.reddit.com/r/FanFiction/comments/9f0jkr/anyone_else_here_concerned_about_the_new/">https://www.reddit.com/r/FanFiction/comments/9f0jkr/anyone_else_here_concerned_about_the_new/</a>
77	<a href="https://cupidsbow.livejournal.com/239587.html">https://cupidsbow.livejournal.com/239587.html</a>
78	<a href="https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38">https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38</a>
79	<a href="https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38">https://www.wattpadwriters.com/t/is-fanfiction-copyright-infringement/7210/38</a>
80	<a href="https://kradical.livejournal.com/868712.html?page=4">https://kradical.livejournal.com/868712.html?page=4</a>
81	<a href="https://kradical.livejournal.com/868712.html?page=2">https://kradical.livejournal.com/868712.html?page=2</a>
82	<a href="https://grrm.livejournal.com/151914.html">https://grrm.livejournal.com/151914.html</a>
83	<a href="https://www.fanfiction.net/topic/145811/104960710/3/The-All-Purpose-Chat-and-Enquiries-Thread-Talk-and-Ask-Questions-here">https://www.fanfiction.net/topic/145811/104960710/3/The-All-Purpose-Chat-and-Enquiries-Thread-Talk-and-Ask-Questions-here</a>
84	<a href="https://elfwreck.livejournal.com/230475.html">https://elfwreck.livejournal.com/230475.html</a>
85	<a href="https://www.reddit.com/r/FanFiction/comments/46fejm/dae_get_super_annoyed_when_people_write_i_dont/">https://www.reddit.com/r/FanFiction/comments/46fejm/dae_get_super_annoyed_when_people_write_i_dont/</a>
86	<a href="https://www.reddit.com/r/FanFiction/comments/9f0jkr/anyone_else_here_concerned_about_the_new/">https://www.reddit.com/r/FanFiction/comments/9f0jkr/anyone_else_here_concerned_about_the_new/</a>

87	<a href="https://www.reddit.com/r/FanFiction/comments/d9kck2/thoughts_on_routine_a_uthor_rambling/">https://www.reddit.com/r/FanFiction/comments/d9kck2/thoughts_on_routine_a_uthor_rambling/</a>
88	<a href="https://www.reddit.com/r/FanFiction/comments/b6yqrb/serious_question_as_fanfic_authors_do_we_actually/">https://www.reddit.com/r/FanFiction/comments/b6yqrb/serious_question_as_fanfic_authors_do_we_actually/</a>
89	<a href="https://www.reddit.com/r/FanFiction/comments/c0wikf/fic_writers_who_ask_for_money/">https://www.reddit.com/r/FanFiction/comments/c0wikf/fic_writers_who_ask_for_money/</a>
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93	<a href="https://elfwreck.livejournal.com/230475.html">https://elfwreck.livejournal.com/230475.html</a>
94	<a href="https://catvalente.livejournal.com/582169.html">https://catvalente.livejournal.com/582169.html</a>
95	<a href="https://www.reddit.com/r/FanFiction/comments/8x8lm9/noob_here_a_few_ethical_question_of_fanfiction/">https://www.reddit.com/r/FanFiction/comments/8x8lm9/noob_here_a_few_ethical_question_of_fanfiction/</a>
96	<a href="https://elfwreck.livejournal.com/230475.html">https://elfwreck.livejournal.com/230475.html</a>
97	<a href="https://elfwreck.livejournal.com/230475.html">https://elfwreck.livejournal.com/230475.html</a>
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99	<a href="https://grrm.livejournal.com/151914.html">https://grrm.livejournal.com/151914.html</a>
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101	<a href="https://www.wattpadwriters.com/t/paid-stories-update-ft-nick/83690/148">https://www.wattpadwriters.com/t/paid-stories-update-ft-nick/83690/148</a>
102	<a href="https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/">https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/</a>
103	<a href="https://www.wattpadwriters.com/t/paid-stories-update-ft-nick/83690/148">https://www.wattpadwriters.com/t/paid-stories-update-ft-nick/83690/148</a>
104	<a href="https://www.reddit.com/r/FanFiction/comments/9k6qdd/legality_of_selling_fanfic/">https://www.reddit.com/r/FanFiction/comments/9k6qdd/legality_of_selling_fanfic/</a>
105	<a href="https://www.reddit.com/r/FanFiction/comments/c0wikf/fic_writers_who_ask_for_money/">https://www.reddit.com/r/FanFiction/comments/c0wikf/fic_writers_who_ask_for_money/</a>
106	<a href="https://icarusancalion.livejournal.com/626928.html">https://icarusancalion.livejournal.com/626928.html</a>
107	<a href="https://www.reddit.com/r/FanFiction/comments/90nruh/fanfic_commissions_yea_or_nay/">https://www.reddit.com/r/FanFiction/comments/90nruh/fanfic_commissions_yea_or_nay/</a>
108	<a href="https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/">https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/</a>

109	<a href="https://www.reddit.com/r/FanFiction/comments/b6yqrb/serious_question_as_fanfic_authors_do_we_actually/">https://www.reddit.com/r/FanFiction/comments/b6yqrb/serious_question_as_fanfic_authors_do_we_actually/</a>
110	<a href="https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/">https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/</a>
111	<a href="https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/">https://www.reddit.com/r/FanFiction/comments/bh6yxm/what_are_your_thoughts_on_turning_your_old/</a>
112	<a href="https://www.reddit.com/r/FanFiction/comments/dga2rg/on_monetizing_your_fandom_works/">https://www.reddit.com/r/FanFiction/comments/dga2rg/on_monetizing_your_fandom_works/</a>
113	<a href="https://ohnotheydidnt.livejournal.com/100319340.html">https://ohnotheydidnt.livejournal.com/100319340.html</a>
114	<a href="https://www.reddit.com/r/FanFiction/comments/c15g53/fanfiction_is_free_and_should_remain_that_way/">https://www.reddit.com/r/FanFiction/comments/c15g53/fanfiction_is_free_and_should_remain_that_way/</a>
115	<a href="https://elfwreck.livejournal.com/230475.html">https://elfwreck.livejournal.com/230475.html</a>
116	<a href="https://www.reddit.com/r/FanFiction/comments/aoeyik/someone_is_selling_my_fanfiction/">https://www.reddit.com/r/FanFiction/comments/aoeyik/someone_is_selling_my_fanfiction/</a>
117	<a href="https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/">https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/</a>
118	<a href="https://www.reddit.com/r/FanFiction/comments/90nruh/fanfic_commissions_yeah_or_nay/">https://www.reddit.com/r/FanFiction/comments/90nruh/fanfic_commissions_yeah_or_nay/</a>
119	<a href="https://www.reddit.com/r/FanFiction/comments/dwhcfq/is_it_legal_to_make_money_off_of_fanfiction/">https://www.reddit.com/r/FanFiction/comments/dwhcfq/is_it_legal_to_make_money_off_of_fanfiction/</a>
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121	<a href="https://www.reddit.com/r/FanFiction/comments/dwhcfq/is_it_legal_to_make_money_off_of_fanfiction/">https://www.reddit.com/r/FanFiction/comments/dwhcfq/is_it_legal_to_make_money_off_of_fanfiction/</a>
122	<a href="https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/">https://www.reddit.com/r/FanFiction/comments/6jhix6/thoughts_on_patreon/</a>
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124	<a href="https://www.reddit.com/r/FanFiction/comments/251dpc/legal_issues_with_creating_a_fanfiction_website/">https://www.reddit.com/r/FanFiction/comments/251dpc/legal_issues_with_creating_a_fanfiction_website/</a>