



Exceptional Copyright Issue of Phenomenon Called Fan Fiction

Fair Use, Fan Fiction, and a Feminist Lens

Susanna Maria Katariina Kallio

Department of Accounting and Commercial Law

Hanken School of Economics

Helsinki

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<p>Abstract: Feminist legal theory criticizes the copyright system, and the phenomenon of fan fiction is studied here as a manifestation of this issue of inequality present on many levels in today’s society. The world of fan fiction proves to be the polar opposite of what the current copyright system takes for granted the core concepts regarding authorship and creativity should be, resulting in a clash of masculine and feminine traits and the imbalance in which they are applied to law, privileging the masculine view.</p> <p>Fan fiction as a practice defies many notions integral to copyright law, from the presumed economic incentive needed for creation, all the way to the solitary, genius, Romantic figurehead of a genuine author, and instead replaces those values that can be coded as “masculine”, with the “feminine” communality and free sharing. Copyright law systemically rejects these feminine notions that the once obscure, but now mainstream, culture has embraced, rather providing tools for copyright holders of the material used by fan fiction writers, to curtail this practice. Fair use, the kind of failsafe of the system to maintain balance, has become the main concept to offer protection for fan fiction which has been identified a practice mainly of women and minorities. Transformative nature of these works proves to be the most critical aspect for protection in collective terms.</p> <p>Both the Anglo-American copyright system as a whole, and the US fair use statute providing for exceptions, is scrutinized in this paper. Through the feminist lens a new dimension to fan fiction and copyright and the relationship between them is revealed. In the end, IP law should also be held accountable in issues of gender and privilege, and endeavour towards fostering social justice. The aim of this paper is to offer a concrete example and convince the reader through the practice of fan fiction that the relationship between feminist legal theory and fan fiction is indeed strong, and see whether fair use is an effective answer for correcting the imbalances in this sphere of creativity.</p>	
Keywords: Copyright, Fair use, Feminist legal critique	

CONTENTS

1	INTRODUCTION	1
1.1	Fan Fiction Explained	5
1.2	Copyright Law Issue	8
1.3	Research Questions	11
1.4	Methodology and Structure.....	12
2	FEMINIST LEGAL CRITIQUE OF COPYRIGHT AND THE EFFECT ON FAN FICTION	18
2.1	Fan Fiction, Feminism, and Fair Use.....	21
2.2	Romantic Authorship in Copyright and Author of Romance Genre – Masculine Romantic Author v. Feminine Author of Romance.....	26
2.3	Incentive/Access Balance – Economic Incentive, Feminine Creativity and Ownership	36
3	THE US FAIR USE DOCTRINE.....	45
3.1	The Defence	47
3.2	Transformative Works?	49
3.3	Analysis of Four Factors	52
3.4	Case Law	58
4	FAN FICTION AND COPYRIGHT EXPLORED	65
4.1	Feminine Creative Expression and Fan Fiction as Feminine Craft	65
4.2	Effect in Practice.....	74
4.3	European Perspective and Moral Rights.....	79
5	CONCLUSION.....	98
	REFERENCES.....	100

1 INTRODUCTION

*“... New sculptors mold old myths,
As gowns outworn turn quilts by many hands,
And broken silver shines again by smiths,*

*Thus, we may make new wholes from these old parts—
encourage science, and the useful arts.”*

–“In Defense of Fanfiction (a sonnet to Fair Use)” by fan fiction writer Stakebait¹

To defend the practice of writing fan fiction, one such author has penned a beautiful sonnet in honour of fair use, the American concept which leaves room for important exceptions to copyright. The ending of this particular sonnet was chosen to introduce the topic of this thesis for its apt description of the justification of fan fiction writing, as new works building upon previous work is both historically accurate fact and continues to be crucial in the creative sector today², despite the prevailing Romantic view of independent authorship persisting in modern copyright legislation. Also, interestingly, the allegory to quilting in the poem is poignant in referring to both the concept of multiple authors contributing towards a single work as well as traditionally female authorship, as these issues are observed by feminist legal theory to be overlooked under the existing copyright law. This metaphor is therefore particularly fitting because quilting as a practice is, in fact, related to writing fan fiction, as it is often recognized in academic literature concerning IP and gender as an example of feminine practices that the current copyright law undervalues.³ Thus, the core themes of this thesis are bridged

¹ Stakebait, “In Defense of Fanfiction (a sonnet to Fair Use)”, available on Archive of Our Own at <https://archiveofourown.org/works/9860219> (accessed 2.3.2017).

² Evidenced, for example, most recognizably by the many recent reboots of Hollywood films and television shows, and historically, for example, Shakespeare is a known burrower/stealer (see e.g. *Copyright and Piracy: An Interdisciplinary Critique*, eds. Lionel Bently et al., 2010, p.277), and even Picasso has been (controversially) credited (“[a]s Picasso (or someone else) said”) for the comment: “Good artists borrow; great artists steal,” as noted e.g. in “Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It” by Rebecca Tushnet, 2004, p. 552.)

³ See e.g. feminist legal critique by Ann Bartow and Rebecca Tushnet, which will be featured in this thesis.

together: fan fiction, fair use, and feminism; this thesis examines the Anglo-American copyright system, and the fair use within, in connection to fan fiction and its uncertain legal status, through a feminist lens.

Rebecca Tushnet, an expert on the field of fan fiction and intellectual property, defines media fandom, where literary creation is called fan fiction, to be a generally heavily female-dominated community, “in which fans create new works of art based on existing television shows, movies, novels, and other popular works.”⁴ Fan fiction is not a new phenomenon, however, easy online access today, and its recent visibility in media⁵ have transformed the once obscure, contained practice to a new, more mainstream level.⁶ Also other forms of works made by fans have emerged along the way, such as “vids,” which Rosenblatt and Tushnet describe as “montages of images from media sources, often set to music, that tell a story or highlight particular themes or characters.”⁷

At the moment, copyright law as it is today, poses a threat to the existence of this form of creativity and self-expression. The issue underlying this phenomenon, fan fiction, is rooted to the very foundations of copyright, which feminist legal theory exposes as gendered in nature.⁸ The issue is connected to the culturally and artistically underappreciated feminine practices, under which fan fiction also falls, demonstrating the undervaluing of these practices by copyright regime as well. When the worlds of fan fiction and current copyright collide, the friction manifests in the form of infringement claims by the copyright holders.

The concept of exceptions to copyright, such as fair use, tries to tip the scales toward balance within the system, as the concept of feminism tries to do to achieve equality. However, in the case of fan fiction writers, in the face of opposition from right holders,

⁴ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 3.

⁵ See e.g. The Wall Street Journal article “The Weird World of Fan Fiction” by Alter, Alexandra, available at <www.wsj.com/articles/SB10001424052702303734204577464411825970488>.

⁶ See e.g. Johnson, Brittany, “Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law”, pp. 1646-1651.

⁷ Rosenblatt, Betsy & Tushnet, Rebecca, “Transformative Works: Young Women’s Voices on Fandom and Fair Use” in *eGirls, eCitizens*, eds. Bailey & Steeves, 2015, p. 385.

⁸ See e.g. Craig, Carys, “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”.

individuals have to possess the courage to insist upon their right to transformative creation based on fair use as a defence. This is what the sonnet above celebrates; the possibility that fair use offers in the United States of America (US).

Finally, the epigraph highlights encouraging science and arts. This is meaningful to the cause as well, since in the ruling of the *Feist Publications* case (1991) it is noted that promoting the progress of these (as in, science and the arts) is seen as the primary goal of copyright, and while recognizing that the authors have their right to original expressions, copyright should encourage outsiders to build upon ideas therein freely.⁹ Therefore, based on this ruling, exceptions should be recognized as a more essential part of the fabric of copyright regime today, affording a more firm standing to fan fiction as well.

Due to the possibility of prior negative first impressions or connotations which might make some disregard fan fiction as a silly subject for a serious study, it is imperative to start by correcting the false notion. Indeed, this is a topic with important societal impact. For one, writing fan fiction is identified as overwhelmingly female practice, as in, the participants are mostly female.¹⁰ This fact has also permeated into the general consciousness of our society, which has the unfortunate effect of also meaning that the general opinion of fan fiction is low.¹¹

Therefore, the topic of fan fiction might need further justifications on its merits, which prove to be considerable once further explored. In fact, despite the general public's sometimes derisive attitude towards the phenomenon, fan fiction has, in fact, garnered an impressive amount of academic interest in various fields of study, and its growth as a successful academic interdisciplinary sub-discipline is telling of the potential this topic hides beneath the surface.¹² The intersectionality of fan fiction is what makes it

⁹ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), pp. 349-350.

¹⁰ Rosenblatt, Betsy & Tushnet, Rebecca, "Transformative Works: Young Women's Voices on Fandom and Fair Use" in *eGirls, eCitizens*, eds. Bailey & Steeves, 2015, p. 385.

¹¹ See e.g. Jessica Bennett's *Feminist Fight Club* (2016), where this unfortunate phenomenon of association of gender and esteem is addressed in the form of female-dominated professional fields being less valued in society, such as doctors in Russia, who have as low general esteem in the eyes of the public as the profession of nurses usually suffers, evidenced by lower wages compared with the West, due to being considered so-called women's job there in Russia.

¹² Hellekson, Karen & Busse, Kristina, *The Fan Fiction Studies Reader*, 2014, p. 1.

such an interesting topic with deep meaning and also strong importance. Such diverse, and possibly unexpected, subjects as gender, sexuality and intellectual property law intersect here with popular media as the backdrop.¹³ Thus, the following examinations into the foundational nature of fan fiction are provided to shed light on how the emphasized importance of the issue – demand and fundamental need for an avenue for audience response – manifests in society.

“Movies can and do have tremendous influence in shaping young lives in the realm of entertainment towards the ideals and objectives of normal adulthood.” This quote from Walt Disney seems to be a romanticized version of the actual findings which do correlate with the sentiment, the fact that studies have shown that children up from the age of five start to learn stereotyping gender roles as they apply to occupations on the basis of what they see on television.¹⁴ Thus continues the vicious cycle of perpetuating this harmful social construct that has far-reaching consequences. One of those adversely affected being the economy itself, when the gendered perceptions of acceptable and expected career choices impact the minds of children this young and the professional fields become strongly segregated as a result. In fact, if realized to its full potential, “[t]rue gender equality, research has shown, would increase the U.S. GDP by 26 percent.”¹⁵

Therefore, the popular media’s importance and power over the society when it comes to depicting gender and also racial stereotypes is not to be downplayed, and neither should the role of fan fiction be understated in addressing those concerns. Fan fiction studies thus have both societal and business relevance. If Hollywood and its fixed, stale, and heteronormative stereotypes hold such an influential role in the audience’s formative years and beyond – and considering how its world-wide reach and dominance make sure that the global cultural hegemony of Hollywood effectively

¹³ See e.g. Schwabach, Aaron, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*, 2011, p. 1.

¹⁴ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, p. 606, citing Watson, Mark & McMahon, Mary, “Children’s Career Development: A Research Review From a Learning Perspective” (citing S.L. O’Byrant & C.R. Corder-Bolz, *The Effects of Television on Children’s Stereotyping of Women’s Work Roles*).

¹⁵ Bennett, Jessica, *Feminist Fight Club*, 2016, p. xxvi, citing McKinsey Global Institute, “How Advancing Women’s Equality Can Add \$12 Trillion to Global Growth,” 2015, <http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>.

transmits those prejudices present in Hollywood productions for all the world¹⁶ – the types of fan fiction that offer a much needed rebuttal in the form of feminist ‘Mary Sue’ characters and ‘slash’ fiction depicting homosexuality among other LGBTQIA issues are not only refreshing but a necessity. The one thing standing in the way is the threat of intellectual property enforcement. The fate of their continued existence depends largely upon interpretation of copyright exceptions.

1.1 Fan Fiction Explained

If the concept of fan fiction were to be further clarified, the most deserving definition might be how “Rebecca Tushnet's path-setting article defines fan fiction as follows: “‘Fan Fiction,’ broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”¹⁷ Forms of fan fiction vary, they include among other things imagining an alternate ending, or possibly continuation after official ending, or made-up back story for some minor character in any consumed media such as books and films along with TV series.¹⁸ Fan fiction thus offers a solution in fixing any lingering feelings of dissatisfaction left by the original work – a chance to rewrite and means to rebel.¹⁹

The fan fiction phenomenon is one of considerable dimensions: size, popularity, age, and wide variety – not to forget its multifaceted identity; intricate and complex, full of nuanced and diverse aspects. Fan fiction can also be categorized as a socio-political argument.²⁰ When the established bonds between male characters are seen through the lens of homoeroticism by the fan-creator, the fan fiction belongs to the subgenre called ‘slash’.²¹ Slash can be seen, in a quite beautifully provocative manner, as “a powerful

¹⁶ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, p. 606.

¹⁷ Hetcher, Steven A., “Using Social Norms to Regulate Fan Fiction and Remix Culture”, p. 1870, citing Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law” (1997).

¹⁸ Hellekson, Karen & Busse, Kristina, *The Fan Fiction Studies Reader*, 2014, p. 1.

¹⁹ See e.g. Dhaenens, Frederik, “Queer cuttings on YouTube: Re-editing soap operas as a form of fan-produced queer resistance”.

²⁰ Id. p. 9.

²¹ Brennan, Joseph, “Fandom is full of pearl clutching old ladies’: Nonnies in the online slash closet”, p. 364.

cultural textual tool that allows women to imagine sexual fantasies of equality.”²² This interpretation of slash becomes all the more momentous and valuable to the overall feminist theme (and dream) of this thesis when also the popularity of these slash stories within the world of fan fiction is considered and compounded with the apparent strong desire on the part of the female creators to choose to use established male characters for depicting romance so that the partners in the relationship would be easier to imagine on an equal footing – signalling the notification of the parallel unbalanced situation within society at large, translated to a medium where it is perhaps easier to process. On the other hand, another example of subversive, feminist text is fan fiction that uses a so-called ‘Mary Sue’ character, where the unease with the current unbalanced media scripts is signified by the fan-creation of a new story which in contrast to the usual strong male leads presents an equally strong and likeable female character in the absence of suitable established one, set in the pre-existing world of a popular media work into which a fan-creator would like to immerse herself as an inserted, idealized version.²³ Rather than seeing these Mary Sue stories as a the product of naïve clumsy dreams of teenage girls (who often have to bear this unfortunate attitude by the society towards their ‘obsessions’) and dismissed as mildly ridiculous as is often the case, the existence of these kind of stories should be more widely seen as a signal that the present popular media works must then lack something essential, which the current media creators seem unable to provide satisfactorily – namely depictions of realistic, likeable female characters with which women would be able to identify.

Some consider that as a whole the label ‘fan fiction’ also encompasses even the commercial corner of the activity.²⁴ However, the majority of the fan fiction practice, the phenomenon which has had fifty years to grow, has chosen to continue to be governed by a *fannish gift economy*²⁵ rather than the prevailing masculine concept of commerciality and capitalist world-order which has permeated the copyright law’s values also, as well as managed to reach some edges of the fan fiction phenomenon less sensitive to traditional roots. At its core, the traditional world of fan fiction and related fandom culture has values which are generally coded as feminine, such as

²² Hellekson, Karen & Busse, Kristina, *The Fan Fiction Studies Reader*, 2014, p. 79.

²³ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, p. 597.

²⁴ See e.g. Schwabach, Aaron, “The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright”, p. 388.

²⁵ Jones, Bethan, “Fifty shades of exploitation: Fan labor and *Fifty Shades of Grey*”

communality. This categorization of masculine and feminine traits and further characteristics of fan fiction will be explored in more detail at a later stage.

Fan fiction comes with feminist undertones as well: the popularity of slash category representing one dimension; as explained above, it has been theorized to depict women's fantasies of relationships where the partners' have equal standing. Also, another relevant example of a feminist realization within the world of fan fiction is *Archive of Our Own* (AO3), a project undertaken by the Organization for Transformative Works (OTW) offering shelter for fan-created works, as in a platform in practise and protection in general by the resources of the organization.²⁶ AO3 as a project is recognized as significant; women have taken charge of their own culture to ensure its survival – the archive represents a unique example of feminist coding at its best.²⁷ The project has been dedicated to cater to this traditional form of the fan fiction culture, and it is determined to protect and help keep it alive as a non-commercial, non-profit practice.²⁸ Attention in this thesis is drawn to these parameters of the phenomenon, the will of the fan fiction writers themselves who wanted to take control of their culture and created an archive of their own – AO3 – for its preservation, on their own terms, opting for boundaries which they felt represented the majority best.²⁹

The rationale for intellectual property protection in the US arises from the fact that authors must have economic incentive for creation, which makes fan-created content as a concept particularly 'queer' to a man of patriarchy. In fact, along with identifiable feminine and feminist features, fan fiction has many queer elements to it besides women and minorities as writers – one could say it practically revels in the queer – also in that it frequently incorporates LGBTQIA issues in the popular subgenre of slash as mentioned above, which has especially garnered attention and interest among various scholars.³⁰

²⁶ Websites of Organization for Transformative Works: <www.transformativeworks.org/>, and Archive of Our Own: <archiveofourown.org>.

²⁷ Fiesler, Casey et al., "An Archive of Their Own: A Case Study of Feminist HCI and Values in Design".

²⁸ AO3 by OTW: <www.transformativeworks.org/archive_of_our_own/>.

²⁹ See e.g. Fiesler, Casey et al., "An Archive of Their Own: A Case Study of Feminist HCI and Values in Design".

³⁰ See e.g. Katyal, Sonia, "Performance, Property, and the Slashing of Gender in Fan Fiction".

The creation and sharing of fan works online is the cultural heritage of our time where the impending threat of copyright enforcement seems ever-involved. However, not every fan fiction presents a copyright infringement suit in the making. If a fan were to write fan fiction about Jane Austen's *Pride and Prejudice* or Louisa M. Alcott's *Little Women*, there would be no issue with the source material since it is no longer in copyright.³¹ The scope of this research naturally considers situations in which the original material is still in copyright, and not yet fallen to public domain.

1.2 Copyright Law Issue

Much of the discussion around traditional non-commercial fan fiction's legality concentrates on copyright rather than trademark law. Both can be applied in case fan fiction as a phenomenon is regarded in larger terms to include also commercial, for-profit fan fiction, however, trademark litigation for the classic non-profit practice is usually not seen as a threat due to the fact that there would need to be a commercial element for trademark infringement to apply.³² For example, fan fiction posted on a platform where all commercial ties, including commercial advertising, are prohibited, such as the AO3, clearly and expressly a non-commercial undertaking by the non-profit OTW, can be seen safe from trademark claims. For the purposes of this research, copyright law is thus relevant, limiting trademark law from the scope, as the focus is on the original non-commercial fan fiction practice. The topic of copyright law is also the focal point of this thesis in terms of feminist theory application; the core concepts of Anglo-American copyright system related to fan fiction are under scrutiny through the lens of feminist legal critique.

As to the issue of limiting the scope of this thesis completely to the US copyright system, it is only partially so, as the situation in Europe is also given consideration at the end, with regard to moral rights and the coverage of possible parody exceptions. Copyright law at the European Union (EU) level is fragmented, however, and the focus is on fair use and the US system. It is apparent that concerning this matter the US copyright system alone offers ample ground for research and critique. Moreover, in

³¹ Both classics are available on Project Gutenberg's website: <www.gutenberg.org>.

³² See e.g. Schwabach, Aaron, "The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright", p. 391.

comparison with other copyright exception systems, the concept of fair use in the US offers greater room for manoeuvre in a case such as this.³³

Indeed, some have argued for the superiority of US fair use in general exactly because of its flexibility in terms of a balancing mechanism.³⁴ In particular, the American fair use – rather than the closed list of exceptions and limitations provided by the EU’s copyright legislation in Article 5 of the ‘InfoSoc’ Directive³⁵ – is considered to be advantageous in circumstances of *unforeseen uses* as Pamela Samuelson points out, and as an evidence of the prowess of fair use and its achievements, among many she mentions one policy successfully aided by fair use, which is particularly relevant here, that is furthering the autonomy of the users of copyrighted content.³⁶

Although unforeseen circumstances in the realm of copyright and fair use might generally refer to technological advances and innovation in the sector, however, this could be true in terms of confronting social change and awareness as well. For example, pertaining to the situation in the EU, Hugenholtz and Senftleben opine that “[t]he current lack of flexibility in copyright law undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to protect and advance,” which seems to concur the point of *societal interests* and how those are on the list of important matters to be taken into consideration especially within exceptions and limitations.³⁷

Thus, with respect to Samuelson’s point, although usually technical advancements are at the forefront when possible future unforeseen uses are considered, for a phenomenon such as fan fiction, it would mean advancement that is social, rather that

³³ Rebecca Tushnet, for example, notes in “Payment in Credit: Copyright Law and Subcultural Creativity” (p. 141, footnote 22) on the reasoning for why to concentrate on the American system thusly: “My focus has been on U.S. law even though media fandom is a global phenomenon because U.S. law is unusually open-ended, whereas many other countries have limited exceptions to copyright for which fan creations are less likely to qualify, and also because U.S. copyright owners, like many other U.S. entities, are relatively swift to threaten lawsuits when they perceive an interference with their rights.”

³⁴ See e.g. Samuelson, Pamela, “Unbundling Fair Uses”.

³⁵ 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 (InfoSoc Directive).

³⁶ Samuelson, Pamela, “Unbundling Fair Uses”, p. 2602.

³⁷ Hugenholtz & Senftleben, “Fair Use in Europe: In Search of Flexibilities”, p.10.

technical, at the level of society's conscience. Also, the argumentation highlighting expedience of fair use finding against the slowness of legislative proceedings at the level of government would apply at the case of social advancement. Future social advancement in this case meaning realization of feminist ideals of equality concerning arising consciousness of the gendered nature of copyright concepts and the recognition of the unfair situation of fan fiction writers in which it has led. The awareness of the underpinnings of fan fiction as a phenomenon and a female practice can be seen belonging as a part to the type of feminist social movement which demands attention to unprivileged marginalized groups and confrontation of inequality on a systemic level, which the recent social media-born #MeToo campaign, which has blossomed into a new kind of era where sexual harassment revealed by women has more serious impact, represents most visibly today.

Therefore, American fair use is in unique position to act as an active legal 'remedy' type of solution for protecting the existence of a phenomenon such as fan fiction which exudes female, feminine and feminist aspects that copyright legislation has not generally been made to take remark on or account for. The beauty of the US system is in that while the legislative entity has indeed built copyright regime that is gendered, it has also managed to build into it a tool which could correct this inadequacy as well. The drawback is that it is dependent on a judge, and human beings are notoriously unpredictable, however, general consciousness and opinion can help steer a rational individual to make a sufficiently informed decision as well.

The challenge in the American system – or opportunity, depending on the point of view – lies in that in general the legal suits are in abundance for the possible plentiful rewards. Considering the dominant position of Hollywood as the centre of copyright holders in this case, and the infamous American 'trigger-happy' mentality on lawsuits remarked upon by Tushnet in this context as well,³⁸ limiting the scope to the US copyright law seemed a fair option from this additional viewpoint as well, following the train of thought from the observation of popular media's general US-central position of power and the still quite rare case law on the topic. However, the European angle was too neglected and intriguing to overlook, and the consideration to limit the scope of this study as close to US system was broadened to allow room for some analysis of European fan fiction as well. The limitation was drawn to maintain as close to the

³⁸ Tushnet, Rebecca, "Payment in Credit: Copyright Law and Subcultural Creativity", p. 141, footnote 22.

concept of fair use as possible, which meant the EU equivalent in respect of fan fiction led to inclusion of some discussion on parody exception. Fair use of the US copyright, however, remains the focal point of this thesis.

As to the preliminary findings, in applying the US doctrine of fair use, the transformative nature seems to be the most significant characteristic to be fulfilled in the case of fan fiction, and in addition, there is indication that particularly Mary Sue and slash as subgenres seem to offer further social meaning to fan fiction, presenting them as subversive and transcending their status above the rest as serious criticism of society and the persistent inequalities within.

In the end, the three central themes of this thesis paper – fair use, fan fiction, and a feminist lens – are interrelated and tied together by the larger theme of copyright law within the sphere of intellectual property. Examined through an additional feminist lens, it becomes possible to see the value of fan fiction as a practice, and a feminist lens is also helpful in understanding the utmost importance of fair use exceptions to copyright in society in general.

1.3 Research Questions

After researching the interdisciplinary field of fan studies and immersion in fan fiction studies it was necessary, as seen, to dig deeper into social sciences and gender studies to understand the important undertones in order to better analyse the intellectual property law aspect of the phenomenon. The initial research question regarding fan fiction's legal status formed naturally around the concept of exceptions to copyright. It became clear that due to fan works being such an intersectional subject and attracting much interdisciplinary study, this thesis research would also need to include interpretation of cultural, feminist and queer theories in applying copyright law and the test of fair use, as those form an integral part of the issue at hand.

From then on, the feminist legal theory emerged as a powerful leading force to guide the formation of further research questions on fan fiction. Namely, what the connection points of the two are, and their effect on the fair use argument. The points of the feminist critique on the foundational issues in copyright simply seemed to, one after another, directly link to the status of fan fiction.

Originally, the intention was to merely investigate how the concept of exceptions within the copyright system would fit the picture; specifically whether fair use defence in the US would apply. This question is still worth examining, however, the other core question with respect to feminist legal theory revealed even deeper dimensions to the issue as it concerns the systemic imbalance present in current copyright law, and its relationship to gender issues.

Thus, the purpose of this research is to analyse the applicability of fair use defence to the traditional non-commercial, non-profit fan fiction, while dissecting the role of gender issues in the current copyright system which have led to the issue of the uncertain legal status in the first place. The purpose, in fact, is two-fold then; to achieve an analysis of fair use acknowledging the full potential of the role fan fiction plays in today's society, and furthermore, to dig deeper to the roots of the problem and scrutinize the gendered copyright regime's effect on a practice such as fan fiction from a feminist perspective. By searching for connection points to legal feminist theory in its critique of copyright law's core concepts, the results lead to reveal of how those affect fan fiction in its relationship with copyright, its fair use analysis and judgement in general. Also, the situation within EU provides an interesting counterpoint to the US fair use for final analysis, the main purpose of this thesis being the normative assertion that fan fiction as a feminine expression of a female practice is a feminist pursue well worthy of exception to copyright.

-How does fair use, the US copyright exception, apply to fan fiction? What about the situation within the EU?

-How does fan fiction connect to feminist legal critique of the copyright system?

-How can gender studies and social theories, mainly feminist legal theory, be used to further the fair use argument?

1.4 Methodology and Structure

As clarified above, within this thesis the importance of why copyright law should allow the existence of fan fiction as a form of comment and critique on the popular media's views on gender and sexuality, as well as an overall form of feminine expression, will be stressed, especially by applying feminist legal theory to highlight the underlying

patriarchal concepts hidden and deeply rooted in today's copyright law.³⁹ The imbalance in law and society in which the so-called *culturally feminine traits* – such as community, connection and emotion, for instance – continue to be systemically underappreciated has a distorting effect⁴⁰ that ends up causing the problem at hand in the first place. It applies directly to fan fiction since remix as a concept has been noted to stem out of *minority cultures*⁴¹ who feel their viewpoint in society is largely left without a voice, and try to remedy the situation through for example fan fiction and in the process carve a space for themselves with those differing values, only to find themselves on the collision course with copyright system which again privileges another set of values. At the heart of the matter is the fact that gendered practices and culture affect the whole of society and in the end copyright law is not neutral either, but reveals itself gendered as well. Therefore it is important to approach copyright from a feminist critical perspective. Gender studies and feminist viewpoint are a must in examining the phenomenon of fan fiction as well; those are inescapably interlinked.

The idea of feminist critique, however, is not to extend protection even more to cover feminine intellectual creations better, but the general encouragement to re-evaluate the current masculinist concepts. In fact, low-protectionist view is the one feminist legal scholars champion. Thus, with the current copyright regime, the reach of exceptions such as the doctrine of fair use, becomes important. Fan fiction, that seems to have the characteristics of both feminine and even feminist activity, should by this critical feminist analysis, therefore, clearly be within fair use. The current Romantic notions of copyright's central concepts have after all affected to its marginalization in the first place. The corrective measure applicable in the today's copyright law would thus be fair use in the United States, or an exception to that effect in other systems.

This thesis concentrates on the copyright law of the US with its fair use doctrine, but also the topic of the European situation, particularly the concept of moral rights, is explored briefly at the end. Within the EU, especially France, United Kingdom and

³⁹ See e.g. Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law"; Craig, Carys J., "Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self"; and Tushnet, Rebecca, "The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity."

⁴⁰ Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law," n. 23 citing Rosemarie Tong, *Feminist Ethics*, Stanford Encyclopedia of Philosophy (2003).

⁴¹ Library of Congress Rulemaking Hearing Section 1202 (Testimony of Francesca Coppa), at 0109.13.

Finland have proven interesting to research; the UK having recently passed new legislation concerning parodies under which the fan fiction can now seek shelter, and the juxtaposition of Finland having no specific legislation ensuring the legality of parodies at all, when even France, the heart of Europe's historical strong *droit d'auteur* foundation in copyright, has taken steps in noting fan works in the recent reports on the future of copyright protection. The supplementary European perspective means that there is a comparative element to the study as well, which ends up adding intensity to an already fascinating topic. In addition, the expansion to European matters means that now also the issue of moral rights of authors gets highlighted, against their practical nonexistence in the US in comparison, and thus offering some added tension to the question of fan fiction's legal status.

This topic has proven especially great for a somewhat adventurous mind in that it offers a possibility for a wide range of research methodologies with which to approach the copyright issue in fan fiction. While this thesis leans on normative argumentation, the traditional legal dogmatics will have a place in this study as well, serving as a proper foundation on which to build the research initially. Then *de lege feranda* opinions will be given consideration along with social theories. These social theories and especially feminist legal theory will hold an important place in the thesis. "The method is the message,"⁴² after all, and I want my message to be one of equality and feminism.

The combination of these methodologies can hopefully give a sufficiently rich viewpoint to the phenomenon of fan fiction. With this thesis topic, also empirical methods could be applicable and indeed offer a tempting opportunity to try alternative legal study methodologies not so often used, such as case study method, or even an ethnography. Especially ethnography could be particularly valid and valuable in fan studies due to its exceptional nature as an immersive research method that inspects the study subjects' life-worlds from the inside, and through which deeper cultural meanings along with normative bonds of the everyday social life can be better uncovered.⁴³ This description seems to fit well to the topic at hand. From the outside looking in, the sometimes perhaps mercurial world of fandom with its unwritten rules and values would seem to benefit from such study that would aim to open up and

⁴² Referring to the article by Slaughter, A. & Ratner, S., "The Method is the Message."

⁴³ Choongh, Satnam, "Doing Ethnographic Research: Lessons from a Case Study" in *Research Methods for Law*, by McConville, Mike & Chui, Wing Hong, pp. 69-70.

explain the thought-processes behind the community members consensus in an engaging manner, and the secret inner lives of fans, both creators of fan works, as well as other participants, would certainly prove interesting and their relationships enlightening for outsiders, not the least because fandom seem to operate and the fans communicate on several contemporaneous platforms on social media and elsewhere. Therefore, these empirical research methodologies would indeed represent a special, rare opportunity in the study field of intellectual property law that could be taken even further and explored on future research projects in the spirit of an experimental academic legal study, for example in the form of a diary.

The legal dogmatic research with its three goals will be necessary in answering the core question of how does fair use, the US copyright exception, apply to fan fiction. The first step of legal doctrine, description, will help answer the question of how fan fiction is seen under the law: starting from whether it constitutes merely derivative work in nature or if fair use could indeed be applied in case of transformative nature. The second aim of legal dogmatic approach, namely prescription, will attempt to find practical solutions which would fit the present structure best.⁴⁴ Undertaking this analysis leads to an outcome of the hypothetical case that might in theory have some influence in practical application. The final stage, justification, concludes the doctrinal work by “justifying a given or proposed legal solution to a problem by testing its acceptability within the system.”⁴⁵

The combination of additional methodologies merge for deeper analysis of the issue. The theoretical approaches representing normative argumentation include social, cultural, feminist and queer theories. Particularly the feminist legal theory will be featured in offering a critical approach to current copyright law system and its underlying masculine values that in turn reject the merit of feminine ones which embrace communality, collaboration and free sharing and are represented by crafts and practices such as quilting and fan fiction.⁴⁶ Generally, this thesis employs normative argumentation for fan fiction’s legal status asserting that fan fiction as a feminine

⁴⁴ Smits, Jan M., “What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research”, p. 10.

⁴⁵ Id. p. 12.

⁴⁶ See e.g. Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”; Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”; and Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity.”

expression of a female practice is a feminist pursue well worthy of exception to copyright.

With respect to sources for this thesis project, there are primary sources such as applicable legislation and cases that are naturally used as the basis of this research. Then, the thesis of course also features secondary sources in the form of literature such as academic articles – also many interdisciplinary ones due to intersectionality of the topic with gender and sexuality – and other relevant documents and online content. At minimum, half of the authors featured shall be women. This emphasis is a conscious choice in accordance with the feminist lens of this research employed throughout this thesis.

Finally, as for the further justifications for these particular methodologies chosen, they are relatively simply described. Firstly, the doctrinal method, although also criticized for being mundane, is still used as the strong foundation on which to build my case. Jan Smits also sees it as a “necessary prerequisite for undertaking any other type of analysis of law,” and defends the relevance of legal dogmatics in today’s IP research as well.⁴⁷ It is true in my case that without the doctrinal method, an essential part of the thesis would not be properly covered. It only makes sense to start with the dogmatic method to address the research question of how fair use applies to fan fiction, and then continue on later to the part of examining the copyright exceptions available in the EU. The comparative element flows naturally from this juxtaposition.

The social theories and especially feminist legal critique definitely intensify the normative argumentation in the thesis, and help answer the other research questions of how the argument for fair use in the case of fan fiction can be further supported by the viewpoints they offer. Personally, I have chosen such theories because I think they can wonderfully enrich the usual approach of legal research in intellectual property law areas by bringing possibly unexpected perspectives to the issue and show others connections that have come to represent extreme importance to me, and also because I think there is never too much feminism in the world.

⁴⁷ Smits, Jan M., “What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research”, pp. 4-5.

Rebecca Tushnet, the pioneer in the field of fan works and their relationship to law, has actually previously successfully connected the feminist legal critique to the specific matter of fan works in her article “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity.”⁴⁸ In her article Tushnet points out an especially poignant quote from the Campbell case where it is stated that apparently, “[n]o man but a blockhead ever wrote, except for money.”⁴⁹ This is particularly interesting assertion of masculine values and world-view from a critical feminist perspective. Especially, as Tushnet then reminds that non-commercial production of arts and crafts is what women like to do, and as it turns out, fan fiction, specifically even, is an area dominated by these strange, ‘blockheaded’ women writers.⁵⁰ Or perhaps it is only men that would be blockheaded to do so, and women being such quirky creatures are a given, and thus a natural consequence in its unnaturalness from the male viewpoint? Be that as it may, based on the quote, it seems that the feminine values manifesting as fannish gift economy⁵¹ present in fan fiction and related fandom culture are odd, even unimaginable, for the powerful, privileged half of the population. This proves that research such as this paying special attention to the issue is indeed needed, feminist legal critique thus earning its place at the heart of this research.

As to the structure of this thesis, the following second chapter is going to continue to further familiarize the reader with the theme of this research; the topic of feminist reading of copyright is examined to show the connection to the issue of fan fiction. The next chapter will thus address feminist legal theory and elaborate the points of critique particularly applicable to fan fiction’s status. After this, the third chapter will then move on to the question of practical application of the fair use defence to a hypothetical case of non-commercial, non-profit fan fiction and analyse the four factors of the doctrine. Finally, the fourth chapter will bring the discussion even deeper into matters fan fiction and copyright and the role that gender plays in the situation. The analysis of the practical effects of the suppression of this feminine expression and also the European perspective to this issue concentrating on moral rights are left last before the final conclusion.

⁴⁸ (2015) in *Diversity in Intellectual Property*, by Calboli, I. & Ragavan, S.

⁴⁹ *Id.*, p. 300, referring to *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994), p. 584, and 3 *Boswell's Life of Johnson* 19 (G. Hill ed. 1934).

⁵⁰ *Id.*, pp. 300-301.

⁵¹ See e.g. Jones, Bethan, "Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey" in "Fandom and/as Labor," Stanfill, M. & Condis, M. (eds.).

2 FEMINIST LEGAL CRITIQUE OF COPYRIGHT AND THE EFFECT ON FAN FICTION

At the heart of the matter here is the fact that gendered practices are deeply ingrained into our culture, affecting the whole of society, and feminist legal theory as a critical approach to law wants to remind everyone that the law with its perceived neutrality is, in fact, not immune but with further scrutiny will reveal its gendered nature as well. Margaret Davies, for example, elaborates on the relationship of feminism and law that the consequent feminist critique presented has been both theoretical but also practical in nature, found through women's ordinary experiences and interactions with the law, taking into account also the underlying policies within, and the feminist legal critique analysing "the operation of gendered patterns of thought and practice" now extends to every corner of the legal field, including "the more mundane instantiations of discriminatory thinking, such as cases of judicial sexism."⁵²

In examining the phenomenon of fan fiction, a feminist perspective is crucial. Those are inescapably interlinked, as should be the relationship between copyright and feminism as well. The central theme in this thesis is the fact that copyright system and society as a whole would benefit greatly from such a perspective. In the case of copyright law, feminist legal theory heavily critiques the scope of protection in general, and 'hidden' masculine values within.⁵³ Also, the Law and Economics based economic incentive for copyright has its share of the critique, as such rationale is seen to uphold the *patriarchal status quo* that in this case is a particularly relevant point of observation by Carys Craig.⁵⁴ In the end, we see how this patriarchal myth of the apparently 'essential' economic incentive for creation is broken by the popularity of fan fiction practice.

⁵² Davies, Margaret, "Unity and Diversity in Feminist Legal Theory".

⁵³ See e.g. Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law"; and Craig, Carys J., "Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self".

⁵⁴ Craig, Carys J., "Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self", p. 10.

Further exploration into the worlds of fan fiction and copyright reveal also other truths of their specific relationship; when it comes to copyright protection, fan fiction as a feminine craft is in an unfavourable position – in ‘subordination’, or in the unfortunate possession of a ‘subordinate status’ as such is called by legal feminists⁵⁵ – and indeed the copyright system as a whole has its failings pertaining to (online) practices exactly as fan fiction when examined from a critical feminist legal theory perspective.⁵⁶ Thus, fan fiction as a craft appears a concrete manifestation of the effect of those failings pointed out by the theoretical feminist legal critique in the current copyright system. As legal feminist scholars generally note, the main concepts of copyright protection are actually gendered, from the basic originality requirement to both the incentive/access balance and the idea-expression dichotomy, and only a myth is the aesthetic neutrality of law as well.⁵⁷ The courts have also further contributed to gendered practices within, as Tushnet points out, by deciding cases of derivative works’ transformativeness influenced by the regretful normalization of overt sexualisation of women’s bodies in society today.⁵⁸

Pertaining to general feminist critique, especially applicable to fan fiction’s status within the copyright system, is also Mari Matsuda’s concept of “looking to the bottom” which Ann Scales notes as an important methodological step in her book about Legal Feminism.⁵⁹ The ‘bottom’ in this context means that which has been systematically constrained, and this process involves application of “at least three historical, political, and moral judgments.”⁶⁰ First to consider, there is the epistemological privilege of

⁵⁵ See e.g. Scales, Ann, *Legal Feminism: Activism, Lawyering, and Legal Theory* (2006), p. 110, for ‘subordinations’ and “systematic inequalities”; Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 33, for ‘subordinate status’ of women, “and the disadvantages that flow from it”; and Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, pp. 678-679, for fan fiction authors’ acknowledgement of the ‘subordinate status’ of their fictions and of themselves as fans in relation to the texts they interpret by way of disclaimers.

⁵⁶ See Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law” for other examples of online feminine practices.

⁵⁷ See e.g. Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”; Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”; Scales, Ann, *Legal Feminism: Activism, Lawyering, and Legal Theory* (2006); and Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”.

⁵⁸ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”.

⁵⁹ Scales, Ann, *Legal Feminism: Activism, Lawyering, and Legal Theory* (2006), p. 109.

⁶⁰ Ibid.

those who got to define the reality for others (in other words, the men who created the system in this case), and secondly, what must follow for the justice to prevail, is the moral implication and imperative of relinquishing that power eventually for the viewpoint of those who have up to that point been unprivileged, and finally, how the redistribution is up to the law.⁶¹ The relevance of these points to the topic of this thesis is in that they can be interpreted to refer to confronting the false notions of the supposed gender-neutrality of copyright law from the point of view of women and their craft, and finding the solution of how best to correct the unbalanced situation, in which case fair use comes in handy. However, as fair use is an affirmative defense, it means that the perspective of a judge in trial is crucial, which presents its own set of complications due to social structures of privilege.⁶²

Sometimes, seemingly the most innocuous of issues can actually in careful inspection reveal a problem of a larger scale hiding beneath the innocent surface. The identification of systematic inequalities hidden in the system, and particularly those subordinations that continue to live silently accepted within society, is essential for the end goal of feminism – achieving true equality – whereby looking to the bottom can be of service; it helps to, first of all, recognize the problems that arise from these various different subordinations, and very importantly, make positive change possible by directing attention to confront these issues head on to correct both the cause and the harms, and it means choosing the non-privileged viewpoint as the feminist interpretation when there are realities among which the law has to choose.⁶³ Ideally, this would apply in a practical case pertaining to judges as well, which is a point that ties to the topic of fair use in the next section. As an example of theoretical, scholarly work in the field of copyright, is Craig's, in which she point out that the aesthetic

⁶¹ Ibid.

⁶² Interestingly, on the topic of privilege and perspective, Jessica Bennett points out in *Feminist Fight Club* (2016), p. 135, for example, that “white men constitute just 31 percent of the American population,” which is quite a contrast to the prevailing white male privilege (also on the judicial structures), and the percentage of the privileged must lower even further if it were to be contrasted to the white heterosexual male privilege. This must have at least some effect on perspectives; for example, on p. 134, Bennett notes a quote of Supreme Court Justice Ruth Bader Ginsburg: “People ask me sometimes, when – when do you think it will be enough? When will there be enough women on the court? And my answer is when there are nine.”

⁶³ Scales, Ann, *Legal Feminism: Activism, Lawyering, and Legal Theory* (2006), pp. 109-110.

neutrality of copyright law is indeed only a misconceived perception of the privileged, which bears an impact on the less fortunate.⁶⁴

2.1 Fan Fiction, Feminism, and Fair Use

Pertaining to fan fiction's current status, the concept of feminist jurisprudence thus offers a critical viewpoint for considering the roots of the issue. The feminist criticism of copyright is indeed directly related to the phenomenon of fan fiction. As a practice of marginalized groups, it is in an especially vulnerable position requiring attention and protection. Achieving equality is the general goal of feminism, and feminist legal critique points out the unbalanced, gendered concepts that govern copyright that lead to unfairly tip the whole system to marginalize feminine practices – such as fan fiction as a fitting example. If the values of copyright system are challenged by feminist legal theory in general, fan fiction does this specifically in practice. This stems from the fact that, as Ann Bartow states, “[c]opyright laws were written by men to embody a male vision of the ways in which creativity and commerce should intersect.”⁶⁵

However, as Bartow points out, there may be more serious repercussions to the differences of notions between the sexes than merely the issue of commercialization: the very meaning of fair use is at stake as it can come dangerously close to having an inherently gendered bias if in fact, men and women actually have a different understanding of ‘fairness’ as a concept, due to the fact that “[f]air use determinations invoke ethical and moral considerations, which many observers believe are influenced by gender.”⁶⁶ A strong point that was touched upon just in the previous section. For this reason, instead of merely relying to the possibilities that fair use offers as a general balancing tool, according to Bartow, the whole system is up for upheaval: “If the copyright laws as currently written and applied result in gendered imparity, a recalibration of the laws so that they more closely approach gender neutrality is probably the optimal solution, and feminist legal theory provides an important

⁶⁴ See Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”.

⁶⁵ Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 8.

⁶⁶ *Id.*, p. 11.

framework upon which less gendered copyright laws could be constructed.”⁶⁷ However, in the absence of that revision, fair use remains crucial.⁶⁸

Within the area of copyright law, the idea of feminist critique is not to extend protection even further to cover feminine intellectual creations better, but the general encouragement to re-evaluate the current masculinist concepts. Low-protectionist view is the one feminist legal scholars champion. Thus, with the current copyright regime, the reach of exceptions such as the doctrine of fair use, becomes important. Fan fiction, identified as both female and feminine, even feminist, activity, should by this critical feminist analysis, therefore, clearly be within fair use. The current Romantic notions of copyright’s core concepts have after all affected to its marginalization in the first place. From the feminist perspective, the corrective measure applicable in today’s US copyright law would thus be fair use. As Tushnet states, feminism should stand with fair use.⁶⁹

The approach above is indeed the view of one strand of feminism, however, others exist. The formation of thought behind differing views within feminism is explained by Ann Bartow as follows:

“[I]f one starts with an assumption that the copyright laws cannot or should not be changed, or differently applied, one must conclude that women should behave more like men and aspire to be treated more like men. Such “masculinization” might enable women to benefit more fully from copyright laws as creators and to obtain equality of access as consumers of creative works. It would also concomitantly expand the realm of copyright by increasing the commoditization of previously collaboratively taught and practiced skills and the commoditization of copyrights in creative works that had previously been functionally (if not technically) part of the public domain. The strand of feminism that views sameness, identical behavior, and identical treatment as the preferred embodiment of equality between the genders might favor this approach.”⁷⁰

However, it would not be right that men would dictate and set the bar on what this equal way of doing things would be, and indeed as Bartow further explains, there is also

⁶⁷ *Id.*, p. 16.

⁶⁸ *Id.*, p. 10.

⁶⁹ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 44.

⁷⁰ Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 22.

the kind of feminism that does not condone normative restructurings which would not preserve or advance women's position within, particularly in consideration of their unique feminine creative expressions, and the values chosen in common consensus to be respected and held in high regard within those processes.⁷¹ This is also the stance that this thesis takes on the issue of fan fiction at hand.

Bartow calls *low barriers protection* the true feminist approach to copyright,⁷² and the author of this thesis paper wholeheartedly agrees on this point, especially within this context of fan fiction and fandom, as Bartow's view of the correct application of feminist legal theory supports the ideas of this thesis. This position can be elaborated in that it adopts the belief that society and creators both would actually benefit from the freedom that the copyright protection's more conservative construction could bring when it would not be so quick to judge adaptations and rather facilitate such actions in a larger scale than at present, and this enrichment, the variety of the new works that this liberation could make possible, would be enough to rationalize the change to existing works' greater accessibility in the eyes of society, for the greater good of all, despite the loss of income for some due to reduced licencing fees and royalties.⁷³ This means that the low barriers view (if ever officially adopted) would ascertain that practices such as fan fiction would not only be deemed allowable but could flourish as a craft.

Also Tushnet advocates this proposed correct feminist approach to the issue of scope of copyright protection, counting herself among *low-protectionists* who rather champion for reputational reward for creators, instead of copyright.⁷⁴ Low barriers approach and low-protectionist view thus seem to have the same meaning, only slightly differing terminology – whichever preferred, the idea behind would be beneficial in fan fiction's case. Following from this approach, a suggestion for improvement regarding fair use doctrine in the current system is that derivative works should be allowed as fair use in more cases than just in those that strongly oppose the source material.⁷⁵

⁷¹ Ibid.

⁷² Id., p. 23.

⁷³ Id., p. 24.

⁷⁴ Tushnet, Rebecca, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright", p. 303.

⁷⁵ Id., p. 304.

This guideline would offer relief and certainty especially for what is considered ‘lighter’ fan fiction. If adopted by the courts, it would extend the fair use coverage to a wider variety of fan fiction than seen in the case of Alice Randall’s *The Wind Done Gone* critiquing *Gone with the Wind*⁷⁶ – a case that will be addressed in the next chapter of this thesis regarding case law on fair use (Chapter 3.4) – as parody may not be a simple, nor certain, categorization to achieve currently. It would then help cover and preserve other kinds of fan fiction as well, not only Mary Sue and slash, which can be interpreted as critical commentary on society’s norms, but must target the source material specifically to be ruled as parodies. A revolutionist thought – also remarked and explored by Tushnet, and covered in the next part – is that a simple romance plot should be capable of earning just as much appreciation, as a more complex, ‘masculine’ endeavour in creative writing. The truth, however, is that even though plain (heterosexual) romance novel should be able to be considered just as deserving of praise and general critical acclaim in society today, it rarely is, and rather the target of derision in high culture.⁷⁷ This attitude bleeds on to judgement of fan fiction as well. The general attitude towards romantic fan fiction is quite hostile, and not only on cases involving same-sex relationships but also ‘shipping’ more traditional male-female couples can be looked at in askance,⁷⁸ so the disregard and narrow-mindedness is not

⁷⁶ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

⁷⁷ See e.g. Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”; and also, generally, Verboord, Marc, “Female bestsellers: A cross-national study of gender inequality and the popular–highbrow culture divide in fiction book production, 1960–2009,” whereby it can be observed how the roots of the issue go even deeper, as for example, Verboord addresses “social inequalities in cultural production” in general, and notes how in literary field, there is gender inequality in terms of artistic prestige, but also remarks on the relevant problem of how “portrayal of women in cultural media products often tends to be highly traditional and stereotypical.” This point of inadequacy of course affects fan fiction in that it has led to the birth of the phenomenon for its remarked correcting, rewriting function.

⁷⁸ A case in point is, for example, in the realm of Star Wars fandom (which – incidentally? – has a long-time strong male fan-base) regarding the so-called ‘Reylo’ shipping, as in fan investment in the possibility of a romantic relationship between female character Rey and male Kylo Ren; although such a relationship even had emphatic cinematic evidence pointing to its eventual possibility after the first of the sequel trilogy films *Star Wars: Episode VII – The Force Awakens* (2015) – not to mention the recent second instalment *Star Wars: The Last Jedi* (2017) – it seems, however, that simply because it is regarded to have originated from the world of fan fiction, it has consequently been seen only as a strange female fantasy, not a real, serious possibility in future storytelling of the saga, although Reylo fans were largely born from these audio-visual cues presented in the film(s), which is discussed for example in the podcast of *Star Wars Connection*, “Reylo 101 | Reylo Fandom: The New Star Wars Rebels” published on YouTube 23 May 2017,

explained by simple homophobia, but an even larger prejudice, the social construct of female inferiority, and as it is established that both romantic literature genre and fan fiction are predominantly a female endeavour, they must face derision by society.

Feminism should then advocate fair use (and other exceptions to copyright), as copyright protection has today become synonymous with overt emphasis on the original creator's and other copyright holders rights, forsaking users' rights in the process which should be more concerned with balancing rights and not unilaterally strengthening one party's rights. As a female, feminine and feminist practice fan fiction is a manifestation of this unjust imbalance. It is as much about users' rights in copyright law in general, as it is specifically about preserving a female view, a corrective measure to balance the overall masculine perspective in a patriarchal society. Fan fiction is concerned with feminism in society in general concentrating on representation in media, as well as an empiricist example of feminist legal theory in practice in critiquing the copyright law system's faults.⁷⁹ It highlights the accountability of the law system; without legal advocacy for preserving fan fiction as a feminine craft, its subordinate status in society could mean total suppression in the face of more powerful forces. Just as, pertaining to women's rights in general, before Justice Ruth Bader Ginsburg's time, as she confirms, judges at the time did not think that (the now plainly seen) gender discrimination as a concept existed;⁸⁰ these invisible forces continue to affect even deeper, beneath the surface, waiting for discovery despite scepticism.

available at: <www.youtube.com/watch?v=LwQvQVxjSvE>. The theory is that the general reception of the thought of romance between this (heterosexual) pairing – the shipping – has been instinctively hostile just because it is perceived as inherently feminine notion, such as fan fiction.

⁷⁹ Irr, Caren, *Pink Pirates: Contemporary American Women Writers and Copyright* (2010), p. 24, mentions as a reference to this, for example, “empiricist leanings of Tushnet”; also to this effect: “Transformative Works: Young Women's Voices on Fandom and Fair Use” by Rosenblatt & Tushnet herself, in *eGirls, eCitizens*, Bailey & Steeves (eds.), p. 386: “empirical examples of the transformative impact of copyright fair use and fair dealing laws on the lives of individual fanwork creators, especially young women.”

⁸⁰ HuffingtonPost remarks Justice Ginsburg's comment on the article “‘RBG’ Documentary Trailer Is Here, And Even More Inspiring Than You Can Imagine” by Rebecca Shapiro (7 March 2018), available at: <www.huffingtonpost.com/entry/ruth-bader-ginsburg-documentary-trailer_us_5aa09fa6e4bod4f5b66d4a9e>.

2.2 Romantic Authorship in Copyright and Author of Romance Genre – Masculine Romantic Author v. Feminine Author of Romance

The originality requirement for copyright protection chooses to engage the Romantic notion of authorship originating in the eighteenth century Romanticism,⁸¹ and it is a point of contention especially in feminist jurisprudence. This affects fan fiction as a craft, and in this chapter this dynamic is further explored. This masculine authorship concept is then contrasted with the feminine notion of romance writing, both as a published author of the genre, as well as a writer of unofficial fan fiction.

Pertaining to history, before the Romantic period copying was considered normal; imitation was seen as an inspirational format – although mere superficial copying was not considered acceptable then either.⁸² Shakespeare was, in fact, a copyist, but somewhat ironically ended up being celebrated as a true original, indeed a veritable pioneer. *Classical imitation* was Shakespeare's style, however, the notion of originality in literature arose along with the authorship as a profession and its concomitant economic viability, which was a new phenomenon then, and in courts it became an issue as well due to the market effect, competition being an important point of consideration.⁸³ Subsequently, in copyright legislation, the Romanticism's individual genius was chosen to represent authorship's originality over the notion of community of classicism, and apparently, modernism's fetishism of that which is new continues this trend.⁸⁴

After this brief general look into the historical roots of the Romantic authorship in copyright's originality requirement, next the focus shifts specifically to the effects on fan fiction, and the relationship between media fandom and the feminist legal criticism toward the Romantic author. Tushnet connects these points; she discusses this point of authorship, both Romantic and romance author, specifically in the context of media fandom.⁸⁵ Tushnet addresses the conflict of Romantic and romance author and the

⁸¹ Bently, Lionel et al., *Copyright and Piracy: An Interdisciplinary Critique* (2010), p. 274.

⁸² Ibid.

⁸³ Id., p. 277.

⁸⁴ Id., p. 330.

⁸⁵ See Tushnet, Rebecca, "The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity".

gendered views of society, by pointing out the undervaluing of both female and romance authorship, her main grievance in the situation being that “[t]he “Romantic author” – the independent original genius creating out of nothing – is not the romance writer, who merely retreads well-worn paths.”⁸⁶ Conveniently, mentioned by Ann Bartow, this is also the only literary field associated with female authorship.⁸⁷

Also, related to the issue of fan fiction is of course the general aesthetic judgment angle that it necessarily invokes in terms of derivative work and fair use. Pertaining to this, Carys Craig views that stating that copyright law would be aesthetically agnostic is practically audacious.⁸⁸ She strongly states that “in fact, copyright law is dominated by a Romantic aestheticism that venerates originality and denigrates derivative expression,” and “the trope of romantic authorship and the related idea of “genius” are radically gendered—and the notion of the author-genius as rightful *owner* is fundamentally patriarchal.”⁸⁹ In addition, Tushnet comments that “[m]any, although certainly not all, of the new works created within fandom focus on romance and sexuality, which is one reason that “fandom” is often associated with female sexual desire and excess, and therefore denigrated.”⁹⁰ The position of fan fiction is thus doubly denigrated, both being a derivative feminine expression and a romantic outlet for female audience.

Tushnet further underlines the problematic nature of the originality requirement in present copyright law by noting the fault in Romantic authorship’s idealisation in that it has been proven many times over by various academics that in fact all works do derive from previous ones in the end.⁹¹ However, the current unfortunate situation continues to persist, as Tushnet also highlights by noting that even though academic discourses have discredited this Romantic notion of *author-genius*, its success has not been hindered in the least within the legal realm, in fact, on the contrary it has justified extensions to copyright, increasing the pockets of right holder corporations rather than

⁸⁶ *Id.*, p. 2.

⁸⁷ Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 35.

⁸⁸ Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”, p. 1.

⁸⁹ *Id.*, p. 15.

⁹⁰ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 3.

⁹¹ *Id.*, p. 2.

individual geniuses, to add insult to injury.⁹² Romantic authorship thus seems to also be the culprit to the troubling by-product, the rising trend of the expanding scope of copyright protection, which sets further barriers around new creative processes.

Aptly, Tushnet notes that creativity does not strike as a godlike invention from nothing but instead slowly formulates through rearrangement and insight gained from existing content.⁹³ This means that all works, at least to some degree, could actually be called some form of derivative works, as there is indeed no creation that rises out of the void without inspiration, meaning there is always outside influence. However, even as this fact of creativity is recognized, the one field that does not much benefit from this insight is, as Tushnet observes, the genre of romance; the romance author remains underappreciated either way – both officially published, as well as fan fiction writer, taking into account the general romance-heaviness of fan fiction.⁹⁴

The point above connects to both male privilege in published literary fields, and then also to fan fiction in general which usually suffers from criticism classifying it to the lower class of mere derivative work in copyright terms and the derision towards the romance plots fan fiction often portrays. Thus, the underappreciation of women as published romance writers due to unbalanced power structures leads to the double discrimination of fan fiction, which is associated both as a women's hobby and with as second-class romance-heavy content. This in turn makes it harder to recognize fan fiction as more than derivative work and crediting it as an individualistic transformative work with deeper meaning to society. If it is hard to give equal credit to published romance genre works as other literary creations, it is easy to see why there would be problems to accept non-commercial (as in, against the masculine values) fan fiction which gives centre stage to romantic relations of pre-existing characters. Everything in fan fiction seems fundamentally wrong and against masculine values, from the attitudes of sharing and caring, as in non-profit-seeking and communitarian, collaborative efforts of fandom, to generally unappreciated genre which gives importance to romantic relationships in life while possibly also using male bodies the way female bodies have long been appropriated as public, and on top of it all the

⁹² Id., p. 5.

⁹³ Id., p. 2.

⁹⁴ Id., pp. 2-3.

bodies, the characters, being used are unapologetically bent to these purposes, despite the status of copyright.

The starting point in this issue is with patriarchal values which cause friction with the fundamentally feminine, also feminist, values. When recognizing this crucial difference, the fan fiction ceases to appear so alarming, unruly phenomenon which coldly disregards copyright. It is not the wild, Wild West with dangerous sex-slinging outlaws running around sneering at law and order, but they are governed by different rules. Within the community, strong ethics exist.⁹⁵ Copyright is respected, but only to a lower standard than currently exhibited and lobbied for. This is, however, a stance that also feminist scholars stand behind, such as Ann Bartow and self-identified low-protectionist Rebecca Tushnet. The feminist fair use is assumed to cover the activities within fandom, based also on the fact that indeed all works throughout history are in some fashion influenced by other works.

Also the non-commerciality within the feminine practice of fan fiction is identified as a gift economy where comments and feedback on the stories provided by other fans in the fandom community are precious and valued in the writing process, and these communitarian values within are recognized and respected generally; they are held in high regard and expected to be so.⁹⁶ And when it comes to the romance plots, they are just ideologically identified to be as important and valuable to society and individual's growth as other more male-identified literary genres. There is actually enormous importance and even pressure put in our society for one to find another and form a family unit. Today, romance is generally even expected to be part of this process. How could it not be placed high (or at least in equal place with other genres) in hierarchy in literary pursuits, when it is certainly valued high in societal hierarchy? The marital status is after all sociologically important for both genders, even men, especially in higher positions. Even the Supreme Court Justices' familial status is deemed important

⁹⁵ According to Testimony of Francesca Coppa, Library of Congress Rulemaking Hearing Section 1202, at 0119.4-0120.4, (May 7, 2009), available at: <www.copyright.gov/1201/hearings/2009/transcripts>.

⁹⁶ There is, for example, criticism against the nonconforming E. L. James publishing *Fifty Shades of Grey* (2011), which originated as a *Twilight* fan fiction before “filing off the serial numbers” – as in “removing fan fiction from the Web and eliminating identifying markers to publish it as original fiction” – and thus reaping the benefits of fandom while not even acknowledging these efforts made by the fan community collectively, referenced here: Stanfill, Mel, “Fandom, Public, Commons”, 2013, *Transformative Works and Cultures*, no. 14. <<http://dx.doi.org/10.3983/twc.2013.0530>>.

to be showcased in their short biographies on the official website.⁹⁷ Based on this, only after contemplating these imbalances which derive from patriarchy (and the essentially corrective measures found from fandom), should the status of fan fiction's transformative nature come up for debate.

As Tushnet point out, the genre of romance often has to bear much literary sneering due to the association with feminine emotions.⁹⁸ Thus, the picture of a conflict is portrayed in terms of the masculine concept of a Romantic author versus the female romance author. Tushnet makes note of the general worthiness of romance in the eyes of the public's approval and her commentary is important from the viewpoint of a fair use judgement concerning works of romantic nature, something that a most common fan fiction story would most probably be perceived as. It is unfortunately not the most encouraging pertaining to this issue as she refers to comments made: "Even fair-use friendly academics can slip into stereotype, treating romances as meaningless commodities, more like chewing gum than literature, "wholly lacking in scholarly or research significance.""⁹⁹ Even more worryingly, Tushnet has seen evidence that the readers of romance, as well as the genre itself, are judged by some to be completely worthless, and not only that but there even exists legal commentary as well, which apparently casually disregards fantasies and romances so totally inconsequential and unrelated to real life there cannot possibly be merit to their fair use.¹⁰⁰ Furthermore, these direct demonstrations of complete disrespect are further compounded in fan fiction's case by the seemingly gendered disdain on the part of many commentators of those who would choose to spend their time on creating works solely for love without a desire to gain wealth, as that kind of activity is often seen in the eyes of society a waste of time, and possibly also money.¹⁰¹

⁹⁷ See the webpage for Supreme Court of the United States:

<www.supremecourt.gov/about/biographies.aspx>.

⁹⁸ Tushnet, Rebecca, "The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity", p. 6.

⁹⁹ Id., p. 7, Tushnet referring to Pamela Samuelson as an example of slipping.

¹⁰⁰ Id., pp. 8-9, Tushnet referring to commentary by Michael Coblenz, in "Not for Entertainment Only: Fair Use and Fiction as Social Commentary" 16 UCLA ENT. L. REV., in which the content of Harry Potter books is totally disregarded.

¹⁰¹ Id., p. 9.

Related to the remarked comments regarding the general worthiness of romance, and especially those disparaging it, Tushnet points out that fortunately, "American copyright law has taken a different approach to fair use than that advocated by the man who thinks that love, lust, and human relationships have nothing to do with the real world."¹⁰² As an evidence of this, she presents the recent fair use case law which seems to now allow improved freedom even in cases where burrowing is clearer, and especially the concept of transformative use has come to honour the traditional method of creative imitation as a form of inspiration if something novel is born through that process.¹⁰³ In this context, it is however important to note that on the eyes of the court, the notion of *creativity* is still very much above that of *copying* but as Tushnet notes, it is nonetheless a positive sort of concession to acknowledge creativity in the act of appropriation that results in something recognizably different with a new meaning.¹⁰⁴

Pertaining to transformative creativity, Tushnet then repeats how in the fair use case of *Cariou v. Prince*, by "[q]uoting an influential article by Judge Pierre Leval, the Second Circuit explained that "if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."¹⁰⁵ The goal of Tushnet referring to this precedent on transformative use, being, of course, its relation to the possibility of seeing fan fiction the same way – as fair use, due to the nuanced nature of this practice enriching society, I would assume, with a female view.

However, Tushnet cautions that the above-mentioned "raw material" trope has the potential to re-inscribe the subject/object, nature/culture, raw/cooked binaries that have often been used to position women as lesser than men.¹⁰⁶ Related to this, Tushnet has also elsewhere in detail criticized the aspect of sexualisation in transformative use findings,¹⁰⁷ and makes her observations known here, as well, by reminding how it has unfortunately come to be that often fair use is found in cases where female bodies are used as sexual objects that form the raw material which is then processed by men to a

¹⁰² Ibid.

¹⁰³ Id., pp. 9-10.

¹⁰⁴ Id., p. 10.

¹⁰⁵ Ibid.; Tushnet referring to case *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

¹⁰⁶ Ibid.

¹⁰⁷ Tushnet, Rebecca, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright".

satisfactory transformation.¹⁰⁸ Therefore, based on her account, the concept of transformative fair use might not be as straightforwardly applicable to fan fiction culture where especially popular is homoerotic slash, in which the exact opposite is true: women writers use male bodies, which is not as easy a subject as the reverse. For evidence of her observations, Tushnet points out how in *Cariou v. Prince* the court found “that Richard Prince’s juxtaposition of artistic photographs of Jamaican landscapes and men in dignified poses with soft-porn photos of naked women in sexualized poses created exactly the kind of new meaning that justified a finding of fair use.”¹⁰⁹ The very real concern then rises regarding the subordinate status of the female view in society, and the particular case of women-engaging activity such as fan fiction, as a question forms on the possibilities of fair use, wondering if it can truly rise to its full potential by protecting the unprivileged view and guaranteeing a future of diversity where feminine forms of creativity are recognized.¹¹⁰ Tushnet also remarks on how women have thus with fan-created content appropriated male bodies the way female ones have been sexualized and open for discussion for ages, and how they are confounding gender norms in this fashion – and following this train of thought, she then formulates and simplifies her argument for why fan works should be evaluated as transformative, to a call for equality, if only for formality’s sake alone, based on these observations in court practice.¹¹¹

Fan fiction is in a particularly difficult situation as a literary endeavour due to many factors, not least of which is its nature as a women’s practice and the consequent association with both femininity as well as adolescence (the teenage-girl syndrome mentioned in the introduction), and the known factor of the general popularity of romance-concentrated plots within the phenomenon, in addition to the overall judgment of fan fiction as a whole based erroneously on the worst exemplars (the works by those fan-creators who are just starting to learn writing), which facilitate its dismissal in the eyes of the public.¹¹² However, as Tushnet states, these fan fiction

¹⁰⁸ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 10.

¹⁰⁹ *Ibid.*

¹¹⁰ *Id.*, pp. 10-11.

¹¹¹ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 302.

¹¹² Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 15.

stories are not simply *interchangeable*, just because they utilize same pool of characters.¹¹³ Or, indeed, simply due to romance plots!

As to this distinguishing feature within the practice, the idea of reuse of the same existing characters over and over again in slightly (or sometimes, greatly) differing storylines that continue to excite the readers despite the number of stories, added to the premise of their free circulation, is remarkable in a sense on how these features together defy both the tragedy of the commons and the principle of exhaustion.¹¹⁴ The sheer volume of fan fiction Tushnet aptly calls intensive – and yet, it remains highly popular, both to read and write.¹¹⁵ Multiple variants of essentially the same story, sometimes with only the smallest of changes, featuring the same known characters, falling in love, for example, because romance stories are timeless, hundreds, even thousands of times, of ways and paths for your favourite characters to find each other and happiness.¹¹⁶ With these parameters, it is easy to imagine how it may be cathartic to get to read a story of the already familiar characters who for example visit your life once a week via television – a happily ever after only a few simple clicks away. What could be more satisfying, a natural consequence even, in this culture of instant gratification we live in today? Or how writing one could be just as therapeutic in airing out your frustrations by using your words and characters that you know by heart.

This point of individual variety in fan fiction stories actually extends to the general idea-expression dichotomy in copyright realm, and as Tushnet notes, it is “what formal copyright doctrine purports to recognize as well: ideas are unprotected; it’s variation in expression that we seek, not novelty of ideas.”¹¹⁷ This would seem to support the endeavours of fan fiction authors, and their intent to produce variety in their individual expressions of viewpoints running parallel to the original material. However, the matter is not as simple as that, because the present path chosen for the copyright system points towards further restrictions regarding derivative works and reproduction than simple translation to another medium or superficial copying, and actively

¹¹³ Id., p. 17.

¹¹⁴ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 301.

¹¹⁵ Id., pp. 301-302.

¹¹⁶ Id., p. 301.

¹¹⁷ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 18.

discourages reliance on pre-existing works.¹¹⁸ A contrasting stance against this trend in the world of copyright is the historical acknowledgment of the propensity of human nature to absorb the prior stories and respond by altering them through retelling process, exactly as fan fiction’s popularity shows.¹¹⁹ Related to this, Tushnet actually provides the story behind the story of *The Wind Done Gone*, a novel written by Alice Randall in response to Margaret Mitchell’s *Gone with the Wind* – a kind of fan fiction which was both a commercial work as well as successful on trial¹²⁰, also dubbed as a kind of anti-fan fiction by some commentators¹²¹:

“For example, Alice Randall’s account of how she came to write her retelling of *Gone with the Wind* offers a compelling illustration of why people rewrite stories to empower themselves. As she explains, as a young girl she loved the television series *Batman*, but “hated the fact that no one who looked like me was in the story.” Soon, she began to write new *Batman* stories, with herself as *Bat Girl*. “My *Bat Girl* wasn’t a sidekick; she was a catalyst; every time I wrote her into a story, she changed its ending. When they took *Batman* off the air, I made my first long-distance phone call. I wanted to save the show.””

This account reveals the roots of Randall’s thought-process with her published work based on *Gone with the Wind*, as well, and how it stem from fan fiction practice and fan mentality which is a delicate balance of a love-hate relationship with the source material.¹²² This proves that categorizing Randall as an anti-fan, is not exactly true. Fan fiction has complexity to its nature, as noted by Chander and Sunder in the context of *Mary Sue* and copying; it can be both “homage and subversion”¹²³ – as in, covering both fan and ‘anti-fan’ aspects.

It is interesting to note how this account by Randall is unusual only in the aspect of a successfully struck commercial publishing deal, when it is unfortunately usual for representatives of minority groups to be left without such prospects, even though they

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), a fair use case that will be covered in the next chapter under relevant case law on fair use (Chapter 3.4).

¹²¹ Hetcher, Steven A., “Using Social Norms to Regulate Fan Fiction and Remix Culture”, p. 1870.

¹²² Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 19.

¹²³ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “*Mary Sue*” Fan Fiction as Fair Use”, p. 626.

are the ones to be the most likely to actively need rewriting and correcting the perspectives in popular media texts due to lack of representation; Tushnet mentions how “women; gay, lesbian, bisexual, transgender, and queer people and racial minorities of all sexes and orientations routinely create remixes and fanworks that change the focus of popular narratives.”¹²⁴ I would only add two letters to the end of this list to make the rainbow LGBTQIA complete, as in also intersex and asexual, particularly the umbrella term asexuality which in itself contains an array of different identities, for example grey- and demisexual. Since human sexuality is such a wide, diverse concept, there are infinite possibilities of various qualities in a person that can be portrayed in a character, for example biromantic demisexual transgender as an identity. Disabilities, particularly invisible disabilities, as well, could complement the list. For example, Annie Elaine has come forward in public with regard to the issue of representation, and to underline these “invisible disabilities and how the media has made no room for spectrums.”¹²⁵

Another note-worthy fact pointed out by Tushnet regarding female authorship in general, is that apparently, “[t]he first original prose fiction by a woman in English was explicitly based on an existing work in order to respond to it, as was the first published play by a woman in English,” which in itself is interesting, but the added information confirming that the critique presented in those works was responding to the patriarchal society and its rigid rules of the time, truly signifies the historical footsteps of feminist pursuits that fan fiction follows in today.¹²⁶ Thus, it can be said that feminism and feminine creativity in literary endeavours continue to live on in the form of modern fan fiction phenomenon.

In conclusion to this conflict of copyright’s Romantic author versus the feminine creative writer of romantic fan fiction, it is important to note the viewpoints with regard to benefits of creativity and also the distribution of the benefits that are offered by and within these fandom cultures, whereby the rewriting function teaches fans to

¹²⁴ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, pp. 19-21.

¹²⁵ HuffingtonPost, “Let’s Talk About Visibility And Invisible Disabilities” (Outspeak, Contributor) 27 Feb 2017, available at: <www.huffingtonpost.com/entry/lets-talk-about-visibility-and-social-justice_us_58b4a311e4b0658fc20f990f?>.

¹²⁶ Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, p. 21.

learn to respect themselves as valuable, contributing members of society who can wield respect as to the important things they want to say, and not only that but also explore and discover the possibilities within gender and sexual relations.¹²⁷ Finally, as a result, Tushnet articulates, “increasing the visibility of women’s creative works, including explicitly transformative works based on specific copyrighted predecessors, is an important part of rejecting the fetishization of Romantic authorship and valuing diverse kinds of creativity.”¹²⁸ This statement directly relates to the general point Craig makes of the dominant Romantic aestheticism in copyright, and how only if “freed from gendered notions of authorship and genius, might evolve to better reflect the processes of intellectual creativity and the dynamic nature of the text”¹²⁹ – one example of which is the legitimacy of fan fiction and the process of how the story evolves with the aid of fandom community through comments of ideas and feedback. For this reason, Craig’s conclusive request is to focus the future efforts on feminist insights, particularly feminist aesthetics,¹³⁰ and as though in answer to this call, the academic lens is directed by Tushnet on fandom practices such as fan fiction.

2.3 Incentive/Access Balance – Economic Incentive, Feminine Creativity and Ownership

The incentive/access debate is an issue of sensitive balance within copyright legislation, in which fair use and copyright exceptions in general have an integral role to play that is sometimes overlooked – just as feminine practices such as fan fiction. The approach here is pro-access favouring fair uses as the natural feminist view promoting the one at a disadvantage at present. The rights of the author form the other party to this issue of balance, and the generally favoured economic incentive approach is dissected here from the perspective of feminist jurisprudence, as well as its relationship to fan fiction.

Carys Craig writes on the utilitarian approach to copyright which underlines the importance of economic incentive: “the positionality of the *homo economicus* (who most closely resembles the privileged white, male, heterosexual elite) suggests that

¹²⁷ Id., pp. 3-4.

¹²⁸ Ibid.

¹²⁹ Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”, p. 15.

¹³⁰ Id., p. 18.

“economic rationales are often merely a way to preserve the patriarchal status quo.”¹³¹ The fact that the description of this idealized economic man claiming space within the legal realm, as well, runs parallel with the silent white heterosexual male privilege in society, seems to fit the picture that has formulated in the course of this research concentrating on fan fiction. At the heart of the fan fiction culture, is the rebellious spirit of minorities. This kind of feminine resistance is also generally brought up by Craig in connection with historical feminine creative expression and its rejection in the formative era of copyright, and how there exists a practical distance of female practices to market that has also created a psychological one, as well, which she calls *a space of resistance* – a sort of underground rebellious attitude against commoditization of cultural creativity.¹³² Fan fiction culture seems to echo this subsonic call.

The general idea of the structural issue at hand can be framed in terms of a conflict between the pink commons and blue copyright.¹³³ The ‘Pink Pirates’ author Caren Irr highlights the two foremost issues arising from the Statute of Anne as the basis of modern copyright: the Romantic author as the originality requirement and the economic incentive as a concept in general.¹³⁴ It is interesting to see how closely those two are actually interlinked. These two, as seen, are also the main concepts on which this thesis of fan fiction concentrates.

The concept of a transformative work within the sphere of creativity is portrayed in feminist terms by the observation that, as to creative activity in general, “[i]n place of the Lockean state of nature and its vision of solitary and metaphorically agricultural labor, many feminist legal scholars depict creativity as culturally embedded, a transformative use of existing materials.”¹³⁵ Transformative works in general – and fan fiction in particular as highlighted in this thesis – offer evidence against the necessity of economic incentive, as in they support the feminist claim that belief in *exclusively pecuniary motives* is unfounded, and that writing, specifically, can easily be an activity

¹³¹ Id., p. 10, referring to Elizabeth Mayes, Private Property, the Private Subject, and Women: Can Women Truly Be Owners of Capital?, in *Feminism Confronts Homo Economicus: Gender, Law & Society* (Martha Albertson Fineman & Terence Dougherty eds., 2005), at 58.

¹³² Id., p. 16.

¹³³ Irr, Caren, *Pink Pirates: Contemporary American Women Writers and Copyright* (2010), p. 7.

¹³⁴ Id., p. 23.

¹³⁵ Ibid.

born of desire to play rather than work, for love instead of labor.¹³⁶ It could be said, then, that the members of fan fiction community thus form a ‘rebellious’ crew of ‘pink pirates’, happily ‘shipping’¹³⁷ away, sailing against the current at sea of ‘blue copyright’.

Pertaining to persisting inequalities within the system, Irr notes that Martha Nussbaum’s philosophy has had an impact on argumentation by Margaret Chon, for example, who posits “in “Intellectual Property and the Development Divide” that equitable development requires a vision of intellectual property based on substantive, rather than merely formal, equality.”¹³⁸ Substantive equality, of course, requires much more thought, as Irr continues on to explain how “[f]or Chon, substantive equality means linking copyright rules to the goals of basic education and recognizing the vital role that educated women play in the improvement of family health and welfare.”¹³⁹ At this point, with regard to the above statement, I would like to remind to keep in mind the earlier observations by Tushnet on the benefits of fan fiction as a crucial tool of self-discovery on sexual and gender relations that engages girls from adolescence, educating fan community members on the art of critical thinking, communication, and also writing.

An approach of substantive equality to copyright would see the law take a stand on combatting the still-existing inequality.¹⁴⁰ This stance has weight regarding this thesis paper’s topic as well – mere formal equality without further thought into the issues of women does not help in preserving fan fiction as one female practice which existence is on the line due to developments in copyright realm, as in the expanding protection and emphasis on right holders. The discriminative element of copyright law may not become as easily apparent as some other, clearer forms of discrimination that the activists of the past have fought to reveal, however, the effect can still be felt most acutely without intervention to the current trend. Related to this is the particular point of observation Irr makes as well, which is that “Tushnet and Bartow have argued that aggressive copyright protection reinforces, however unintentionally, gender

¹³⁶ Ibid.

¹³⁷ As in ‘relationshiping’ – promoting a (romantic) relationship between characters, through fan fiction or otherwise, which is a very prominent phenomenon in fandom culture in general.

¹³⁸ Irr, Caren, *Pink Pirates: Contemporary American Women Writers and Copyright* (2010), p. 23.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

discrimination.”¹⁴¹ It seems clear that as any other field of law, copyright law is not exempt from the duty of taking gender issues into consideration and the general responsibility of fostering social justice in society built on patriarchal values, just because it does not on the surface seem to cover matters obviously pertaining to gender. In fact, without feminist reimagining, the current Anglo-American copyright based on the Statute of Anne will only continue reproducing gender ideologies of the past.¹⁴²

The copyright protection’s effect on social inequality is one of the pertinent issues noted by Irr as well, arising from feminist analysis of copyright based on the Statute of Anne.¹⁴³ Generally, in the incentive/access debate, it is important that the access to materials should have enough weight in the balance from a social equality viewpoint as well. The access side of the balance is directly related to the interplay of creative process and the commons, where the more communal creation is seen as a feminine alternative to the stark, solitary Romantic idea of authorship in which the economic incentive’s essential role further highlights the masculine view.

Pertaining to the feminist questioning of the natural flow of creativity in the framework of copyright, fan fiction’s transformative nature in particular presents an interesting point of view. In interpreting the core question of how creativity and the commons interact from a feminist perspective, Irr articulates thusly:

“Most often, feminist critics describe creativity as a socially embedded, transformative use of a repertoire of texts available to a network of contributors. While disassembling Anglo-American copyright, in other words, feminist legal scholars have reanimated the commons that is the precondition of intellectual property. Practices of the commons are partially (if negatively) recognized by the law when they are described as piracy, but they are treated much more positively by feminist legal scholarship. This point of view encourages a rereading of the Statute of Anne as a special sort of pirate flag. Even while codifying copyright, it raises an alarm that points to the existence of a concomitant pink piracy. In a pattern that we will come to recognize as typical of pink pirate discourse, the proper name of an exceptional queenly authority (Anne) has been folded into a myth that keeps the dominant gendered ideology of writing alive. At the same

¹⁴¹ Id., p. 24.

¹⁴² Id., p. 25.

¹⁴³ Ibid.

time, in its defensive insistence on a single form of authorship, the Statute of Anne indirectly gestures toward the back channels of a nonproprietary pirate practice.”¹⁴⁴

Irr thus brings up the intriguingly close relationship of gender and piracy¹⁴⁵ – which can be observed also in the phenomenon of fan fiction – as well as the consequent, unfortunate *gendered legacy of copyright*.¹⁴⁶ This issue leads to the concept of gendered ownership and the paternity metaphors present in copyright system. Both Irr and Craig take notice of the observation by Mark Rose that such patriarchal notions should be obsolete, but still persist in law.¹⁴⁷ As a contrast to paternal rights within copyright law, and in connection with the concept of gift economy – the presence of which has been observed in the feminine fan fiction culture – Irr can be noted to remark the *maternal gift economy* among the feminist themes of author and legend Ursula K. Le Guin.¹⁴⁸

The issues of gender and feminism in copyright matters are directly related to the fact that fan fiction is predominantly female-written. Often in feminist jurisprudence the critique concerning so-called female-oriented creations, such as cooking recipes or quilting, is directed to their low valuation in terms of copyright protection. Pertaining to fan fiction, the question is not of fan-creators’ copyright to their works, but the issue is rather concentrated around their right to write. The focus is on the concept of exception to the original materials’ copyright. That is where the conflict is seen, essentially calling into question the existence of fan fiction by claiming it allegedly illegal practice from the point of view of predominant copyright law. However, on the basis of feminist legal theory, it seems that the whole concept of copyrightable subject matter is gendered and even discriminative from feminist perspective, in fact heightening the inequality between men and women.

While inside the world of fan fiction, the concept of ownership is different, in a sense that it is more relaxed and the communal setting makes it more a question of morals of

¹⁴⁴ Ibid.

¹⁴⁵ Id., p. 51.

¹⁴⁶ Id., p. 53.

¹⁴⁷ Id., p. 58; and Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”, p. 14.

¹⁴⁸ Id., p. 74.

its members. Thus, moral rights have an honorary position within the community and they are trusted to be respected among members. As mentioned, strong ethics exist within the community. This is related to the point that traditional knowledge of indigenous people and fandom share similar characteristics; as Mel Stanfill points out, “fan creative production is productively understood as what Rose calls “limited common property,” which is “property on the outside, commons on the inside.””¹⁴⁹

Craig articulates further on the relationship of copyright and the gendered ownership concepts within, starting historically with the male misappropriation of the concept of motherhood; of how the notion of giving birth became spiritually synonymous with author’s creation, which on the other hand was then naturally the domain of men, and how this evolved into what can be now observed in copyright terminology: the right of *reproduction*, and also, the right to *paternity*.¹⁵⁰ Generally, as commented in above discussions, Craig remarks on these parental metaphors favoured in copyright, and how they reflect its underlying patriarchal nature.¹⁵¹

“Authorial attribution is the right to be identified and to so protect the patrilineal line, as it were,” Craig elucidates on her remark on Mark Rose’s point of how “the analogy of authorship to procreation invokes the gendered mind/body (male/female, intellect/matter) dichotomy.”¹⁵² Also noted is for example the regret of William Patry over the metaphor of *creation-as-birth* in copyright, whereby comes the suggestion that extensive reach of control over their progeny should belong as a natural right to the author-creators.¹⁵³ Following the thread of this thought process behind copyright, Craig remarks how “copyright’s protagonist is a surviving figure of “patriarchal domesticity; the author as master of his household,”” quoting Rose at the end.¹⁵⁴ Thus, this familial bond that ties the *male author-mother* together with the *text-child* re-enacts unhealthy gender ideologies; it is far from maternal love that gently nurtures, and rather

¹⁴⁹ Stanfill, Mel, “Fandom, Public, Commons”, at [9], citing Rose, Carol M., “The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems”, 1998, *Minnesota Law Review* 83:129–82, p. 144.

¹⁵⁰ Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”, pp. 13-14.

¹⁵¹ Id., pp. 13-15.

¹⁵² Id., p. 14, referring to Mark Rose, “Mothers and Authors”.

¹⁵³ Ibid., referring to William Patry, *Moral Panics and the Copyright Wars* 69-70 (2009).

¹⁵⁴ Ibid., referring to Mark Rose, “Copyright and its Metaphors”.

resembles an all-encompassing paternal ownership which is further compounded with the market alienation power.¹⁵⁵ This is quite frankly a strangely confusing gender role mishmash. Craig elucidates that this ostensibly incompatible but somehow still commonly understood merging of property and childbirth metaphors, which sits tightly in copyright rhetoric of today, actually needs a prism of patriarchy through which it makes sense.¹⁵⁶

The above points have interesting implications toward the subject of derivative works that pertain to authors of the original material and the juxtaposition of the notions of mother's love versus patriarchal ownership – again setting up a conflict of feminine and masculine. Craig remarks the difference between maternal love, which necessarily involves *letting go*, and paternal control of *patrilineal lineage* which in contrast is emphasized in copyright. Craig further articulates on this maternal side of the notion of “letting go: the cutting of the umbilical cord, nurturing, raising and preparing the child to go out into the world, to speak on its own behalf, to interact and form relations with others, to have children of its own.”¹⁵⁷ This is an important point we will come back to in order to round this thought to include the issue of fan fiction.

In general the feminist viewpoint would call to take into account the feminine side to the concept of authorship in copyright, as Craig states through Rose: “We need a better biology of authorship.”¹⁵⁸ Following Craig's insight to the notion of letting go as the fundamental role of motherhood, this would then lead to the derivative work angle to the issue. The essence of a satisfying resolve to the conflict between these feminine and masculine notions should mirror the spirit of the saying: if you love something, set it free. Should the feminine side to the question of parenting of the authorial offspring have more weight in copyright, this would then in turn manifest on the continuing lineage, as in derivative works – the grandchildren, as it were.

Maternal love must learn to let go – to set free; encourage the child to let go of the hand that guides, to enter kindergarten, school, and ultimately, life. Such is mother's love and role in life; to be cautious to not continuously hold on too tightly – the ultimate

¹⁵⁵ Ibid.

¹⁵⁶ Id., pp. 14-15.

¹⁵⁷ Id., p. 15.

¹⁵⁸ Ibid., referring to Mark Rose, “Copyright and its Metaphors”.

sacrifice for the benefit of others. If copyright's patriarchal ownership ideals regarding lineage could internalize the significance of this sacrifice, it would mean higher autonomy of derivative works, or at least relinquishing control over the grandchildren that are quite transformative of nature – such as fan fiction.

The natural conclusion for the analogy of parental metaphor, which would better incorporate both paternal and maternal relationship to an intellectual child, should then turn out to continue in the following vein: if you are the parent of a work, fan works are thus your grandchildren, and therefore you do no longer have the same power over them as your children, nor should you. You are naturally more removed from their upbringing than this original child of yours; these grandchildren are their own independent beings. This relates to the point relayed by Craig that is recognized: maternal love would know this instinctively.

To conclude this chapter, we go back to the issue of the supposed necessity of economic incentive to creation in terms of copyright and the relationship to feminine creativity and fan fiction. Generally, as economist Richard Wolff, (“the economics professor, author and speaker”) put it: “Everything I know about human psychology tells me that many things motivate human efforts to innovate: love, fear, ambition for respect, prestige, money, pride, etc. Only capitalism [...] would reduce the complexity of motivation to one motivator, money.”¹⁵⁹ Monetary motivation, in other words economic incentive, is central to the concept of copyright, as seen in this chapter.

Also, another quote fits here, applicable again within the context of this thesis, the quote perceptively originally noted by Tushnet¹⁶⁰ from the Campbell case: “[n]o man but a blockhead ever wrote, except for money.”¹⁶¹ It heavily features throughout this thesis paper, and is repeated here with regard to gender issues in copyright's economic incentive. This quote, and its usage in the judgement of a case, is simply such a particularly interesting assertion of masculine values and world-view from a critical feminist perspective, that its repetition and examination from different angles cannot

¹⁵⁹ Paddison, Laura, “Richard Wolff Says Capitalism Drives Inequality With ‘Explosive’ Consequences For Society”, HuffingtonPost (27 Feb 2018), available at: <www.huffingtonpost.com/entry/richard-wolff-capitalism-reddit_us_5a953a59e4b0699553cc259c>.

¹⁶⁰ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 300.

¹⁶¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), p. 584, citing 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934).

be avoided in the context of fan fiction. As Tushnet reminds, “noncommercial, non-market artistic production turns out to be what women do,” and fan fiction, specifically, is an area dominated by perpetually (apparently) ‘blockheaded’ women.¹⁶²

In the end, it is a quote noted by a judge on the judgment of a fair use case, and it illustrates not only the prevalent masculinist view favouring capitalist commercialization, a previously stated fact noted by Bartow, it also illustrates its relationship with copyright law within the judicial system. It is taken for granted that no one, or at least certainly not a man who is rational, would take the time and effort to create anything of value, unless there would be an economic incentive to do so. This is the rationale on which US copyright is built. Fan fiction, in that regard would appear an anomaly as a practice. If even the driving forces behind such creation are thus impossible to understand, it would be hard to go on to judge the abstract notion of fairness of such action in the copyright context.

As to the variety of motivators listed above by Wolff, there is one in particular, the real motivator of creation, which certainly must feature in the fan fiction writers’ community that is love. Love of source material is the ‘homage’ side of fan fiction, and the ‘subversion’ lies in critical thinking. Relatedly, Tushnet describes how “fans explained how fandom had enabled them to challenge gender, racial, sexual, and disability hierarchies,” and also “how they used skills learned in fandom to succeed in other areas, including in their careers.”¹⁶³ The gift-economy benefitting all the members in this community persists, against all odds, as others would like to capitalize on this wonderfully rare corner of female activity as well. It is, as Tushnet also notes, “still under threat from forces that would like to reduce fandom to yet another source of revenue.”¹⁶⁴

Even though an economic incentive is not needed in creating fan fiction, there certainly are economic benefits to the practice which are concrete. In offering critique and response to current media content, these benefits can thus be both structural and personal, but in addition to this, there can also be very material benefits within the

¹⁶² Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, pp. 300-301.

¹⁶³ Tushnet, Rebecca, ““I’m a Lawyer, Not an Ethnographer, Jim”: Textual Poachers and Fair Use”, p. 7.

¹⁶⁴ Id., p. 9.

involvement in fandom, as explained by Tushnet.¹⁶⁵ To further illustrate this point, there is a story to relay; one woman’s journey to finding about fan-created content and the creativity and ability therein, and especially the insight on how to engage that talent exhibited by fan-creators to the tech sector.¹⁶⁶ Sacha Judd realized the extent of the technical capabilities of the women engaged in the 1D fandom¹⁶⁷ by noting how “they were absolutely immersed in technology, every day, and we weren’t paying attention, because they were doing it in service of something we don’t care about,” and most probably neither did the women fans recognize their talents as extraordinary and connect them as practical and useful in the tech field. Judd’s observations during the course of this journey of discovery illustrate the problem of how female fan talent appears invisible when it serves goals that are not acknowledged by the patriarchal values of society as something worthwhile, and as a result is ostracized and incorrectly deemed to be non-existent, or in the case of copyright, not worthy of protection.

3 THE US FAIR USE DOCTRINE

To construct the present picture of fan fiction’s legal status, a hypothetical situation is created here in which a fan fiction writer would be sued for copyright infringement and the case would succeed and proceed to a trial determining fair use in an analysis of the four factors of the doctrine. This examination is done in the footsteps of many others who advocate for fan fiction, most notably Rebecca Tushnet in the legal field, who first argued for its legality twenty years ago.¹⁶⁸

Before a court case gets to the point of fair use defence, the copyright infringement claim needs first proof of copying, and then that the appropriation in question was improper, meaning that there is substantial similarity,¹⁶⁹ which in a case of fan fiction would most probably manifest in the use of characters based on pre-existing

¹⁶⁵ *Id.*, p. 8.

¹⁶⁶ Judd, Sacha, “How The Tech Sector Could Move In One Direction”, presented at Beyond Tellerrand, Berlin, November 2016. Available at: <http://www.sachajudd.com/one-direction> (accessed 28.2.2017).

¹⁶⁷ 1D as in One Direction, the boy band.

¹⁶⁸ Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law” (1997).

¹⁶⁹ Bently, Lionel, et al. “Copyright and Piracy: An Interdisciplinary Critique”, pp. 196-198.

copyrighted media.¹⁷⁰ To this copyright infringement claim, there can be a defence in the United States: that the unauthorized use falls within fair use. The idea-expression dichotomy and the consequent issue of character protection thus have a role in the judgement of fan fiction, however, as the spotlight here is on fair use, this thesis does not concentrate on that part of the issue, and accepts that the use of characters and settings of the original material, despite the possibly dubious strength of character protection in the US, would lead to the question of fair use.

Thus, for the purposes of this analysis, we proceed with the expectation and assumption that the components of content in a fan fiction story would prove substantial similarity to the source material, and fan fiction would therefore constitute a derivative work according to the definition in the US Copyright Act of 1976¹⁷¹, as in infringement, either without proper authorization from the author of original material¹⁷², or alternatively, without finding in favour of fair use. The fair use doctrine is codified into the Copyright Act, 17 U.S.C. § 107, and allows “the fair use of a copyrighted work” to not constitute infringement, if it is done for the purposes of “criticism, comment” or other such useful function, and “[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include” the following four points:

- “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹⁷³

¹⁷⁰ (For example, in the recent (2017) case of *Axanar*, such was found to be true; the court ruled that copyrighted elements, such as the character Garth of Izar, were used in the *Axanar* film, resulting in substantial similarity to *Star Trek*.)

¹⁷¹ 17 U.S.C. § 101, which provides: “A “derivative work” is a work based upon one or more preexisting works,” in a “form in which a work may be recast, transformed, or adapted.”

¹⁷² 17 U.S.C. § 106.

¹⁷³ 17 U.S.C. § 107.

3.1 The Defence

The important question in applying the four factors of fair use to fan fiction is then to determine whether such works could have safe harbour in fair use defence through their transformative nature or other factors, or if they are seen merely as unauthorized illegal derivative works. While the derivative work angle would put fan works firmly within the author's exclusive rights under US Copyright Act to choose whether to permit the creation of any such works that would incorporate their copyrighted elements, the finding of fair use, however, would allow the work's existence as an exception to copyright, but only after careful deliberation of the four factors of purpose, nature, amount and effect of the use on the market.¹⁷⁴ It is worth a remark here that "[a]lthough fair use is a defense, it is considered to be an integral part of copyright intended to ensure that the exclusive rights that copyright provides are not overly restrictive to other creators."¹⁷⁵

The economic effect factor, of whether the use causes financial harm, has tended to weigh heavily in fair use cases in general, due to the American utilitarian rationale for copyright protection underlining the economic incentive for creation. In the case of fan fiction, this kind of significant harm seems questionable. Actually, as Tushnet points out, "the flow of money is from fan to owner"¹⁷⁶, making the transformative nature of the first factor seem more significant in this case, thus leading to the conclusion that the rough conceptualization of the main point in this issue could be articulated in the question of derivative work, or transformative use. This transformative work angle is pondered upon in the next instalment.

As clarified before, this research addresses the traditional form of fan fiction, which is non-profit. However, in analysing the applicability of fair use defence to fan fiction of non-commercial nature, it is not possible to do so without examining commercial fan fiction, along with some other forms of fan works, when it comes to case law and precedents, since no cases involving non-commercial fan fiction have emerged yet.

¹⁷⁴ Johnson, Brittany, "Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law", pp. 1646-1647; Copyright Act, 17 U.S.C. §§ 101, 106, 107.

¹⁷⁵ Marcus, Todd David, "Fostering creativity in virtual worlds: Easing the restrictiveness of copyright for user-created content", p. 491.

¹⁷⁶ Tushnet, Rebecca, "Payment in Credit: Copyright Law and Subcultural Creativity", p. 143.

The copyright holders at the entertainment industry have so far seemingly left the non-commercial practice mostly alone – or at least kept their suppression tactics relatively hidden and private. The business strategy in intellectual property enforcement has been careful of larger public conflict. Their reasons for this might be two-fold. Even though the right owners hold a position of power over individual fans, and some archive platforms where the author's wish is their command, and though the right holders even use that power for purposes such as intimidation by sending out cease-and-desist letters,¹⁷⁷ they equally might be wary of the uncertain judgement from high-visibility court case, nor do they want to attract unwanted attention, bad publicity and scorn from the very consumers of their commodities for incriminating their own fan-base. “[T]he fans who create and share it are the biggest and, for some genre works, very nearly the only, market for the owners' works,” Aaron Schwabach reminds, and continues by pointing out that “[a]ctive enforcement of intellectual property rights may alienate consumers – fans – and harm future revenues.”¹⁷⁸ In this, their cousin, the music industry, has presented them with the very scenario as the example of undesirable outcome for such actions. However, “[o]n the other horn of the dilemma, non-enforcement of those rights may result in their loss.”¹⁷⁹

The fan-authors continue their tradition of writing fan fiction in this volatile situation while the matter still remains unsolved. In fact, copyright law and especially the fair use argument seem to belong as an integral and inherent part to a fan-creator's everyday life in producing works of which legality could be called to question any day now. Clarity and certainty are lacking in this issue. It seems the only thing certain at the moment is that the one constant in the practice of creating fan works remains the constant threat of copyright infringement notices, while, however, at the same time strange aplomb within the fan community that their practice must naturally fall under fair use.¹⁸⁰ Whether this belief in the strength of the fair use defence has basis, will be examined next. Could non-commercial fan fiction, in fact, be found to constitute fair use? Especially the merits of the deeper subversive, societal and cultural underpinnings

¹⁷⁷ Johnson, Brittany, “Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law”, p. 1646.

¹⁷⁸ Schwabach, Aaron, “The Harry Potter lexicon and the world of fandom: Fan fiction, outsider works, and copyright”, p. 387.

¹⁷⁹ Ibid.

¹⁸⁰ See e.g. Freund, Katharina, “‘Fair use is legal use’: Copyright negotiations and strategies in the fan-vidding community”.

in fan fiction subgenres such as slash and Mary Sue cannot be ignored in a possible future court case determining fair use and the parameters of parody in terms of what actually benefits society. This would be a significant point for further analysis from the European perspective, as well, without the advantage of fair use defence.

However, all fan fiction might have merit as transformative works within the American framework, regardless of parody angle. Although, for example, the father-figure of all fan studies, Henry Jenkins¹⁸¹ sees most of fan fiction worthy of parody categorization, if not even all of it. As Jenkins argues: “I regard all or at least most fan fiction to involve some form of criticism of the original texts upon which it is based — criticism as in interpretation and commentary if not necessary criticism as in negative statements made about them,”¹⁸² indicating intriguingly that almost all fan fiction could be interpreted as parody of sorts. It is a statement of consequence due to the expert making it, however, another question is whether a judicial expert, as in the judge hearing the defence of a fan fiction case, would be able to see the same conclusion.

3.2 Transformative Works?

The concept of a transformative work is identified in the Campbell case, in which transformative use is defined as a notion that such work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁸³ It is further pointed out in the Castle Rock case as “the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”¹⁸⁴ In the Campbell case, the court also notes that “the more transformative the new work, the

¹⁸¹ The author of 1992 *Textual Poachers: Television Fans and Participatory Culture*, a book which for example also Rebecca Tushnet regards highly, recognizing its “formative influence” as to her work in her article “‘I’m a Lawyer, Not an Ethnographer, Jim’: Textual Poachers and Fair Use”.

¹⁸² Tushnet Rebecca, “‘I’m a Lawyer, Not an Ethnographer, Jim’: Textual Poachers and Fair Use”, citing Henry Jenkins’ blogpost “Fan Fiction as Critical Commentary” of September 27, 2006, on his blog “Confessions of an Aca-Fan”, available at:

<http://henryjenkins.org/2006/09/fan_fiction_as_critical_commen.html>.

¹⁸³ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), p. 579.

¹⁸⁴ Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2nd Cir. 1998), p. 142.

less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use” – thus highlighting its general value.¹⁸⁵

The main argument that is posited in favor of fan fiction as fair use is the transformative character it possesses, which is related to the first factor. This is the foremost position that for example the Organization for Transformative Works (OTW) takes; OTW, home for all traditional, non-commercial fan-created content, asserts that all fan works represent transformative use, which would allow them under US Copyright Act as fair use.¹⁸⁶ This is a claim of strong value considering the weight it carries.

The transformative purpose has emerged as the key factor in deciding fair use cases in recent years, for which the Campbell ruling noted above laid the foundation. This has also brought criticism upon the whole concept of fair use doctrine and debate has arisen around it on the future of fair use.¹⁸⁷ However, as this important balancing tool still stands strong today as it has already many years despite the narrow interpretation of international law’s three-step test, there is strong indication to believe in its continued existence in the future as well. Of course, there is much more to a fair use decision than simply transformative character of the work – be it emphasized in recent case law or not, and as the foremost argument in this case or not – for a thorough research and convincing reasoning, a more detailed analysis of fair use doctrine must be undertaken with the approach of as much neutrality as possible, keeping with the foremost important underpinning in a legal dogmatic approach.

To briefly address ‘transformativeness’ as a concept more internationally, it should be noted here that for example French reports on the subject of copyright exceptions recognize the existence of the notion.¹⁸⁸ Although its relative unfamiliarity to French

¹⁸⁵ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), p. 579; also noted by Rebecca Tushnet in “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, p. 663.

¹⁸⁶ OTW website <<http://www.transformativeworks.org/legal/>> (last accessed 23 Jan 2017).

¹⁸⁷ See e.g. Samuelson, Pamela, “Possible Futures of Fair Use”.

¹⁸⁸ Reports by Pierre Lescure and Valérie Laure Benabou: first Lescure Report generally on cultural exceptions, and later Benabou Report on the exact subject of transformative works (“œuvres transformatives”), addressed in more detail in the part of this thesis that examines the European perspective.

ears is noted,¹⁸⁹ this is still quite remarkable acknowledgement considering that the French are willing to condone a term originating from the English language and American jurisprudence. Thus it can be said that the concept of transformativeness of a work has reached relatively wide recognition, or at least that it is rapidly starting to do so. However, even more consequentially here, also the notion of transformative work as a concept covering specifically fan-created content is remarked on the Benabou Report, acknowledging the work of OTW in educating and protecting transformative fan works.¹⁹⁰ The significance of OTW to fan fiction's legitimacy internationally cannot thus be understated; it has had an effect to this wider recognition of fan works as an attention-worthy issue also outside the US. As even France takes notice of the organization, it is more than note-worthy not the least for it was fan-founded, and the operations are fan-run, as well. As per their statement, it was "established by fans to serve the interests of fans by providing access to and preserving the history of fanworks and fan culture in its myriad forms. We believe that fanworks are transformative and that transformative works are legitimate," also relevantly noting that "OTW represents a practice of transformative fanwork historically rooted in a primarily female culture."¹⁹¹

Certainly, if the issue of fan fiction is considered in a more collective sense, transformative work is the key element to achieving protection more widely. However, as a separate, special matter, there are also the subgenres where subversive text can be found; which have deeper meaning to them than simple entertainment. They actively challenge the messages in the original material and want to create discourse and change the direction in popular media texts. These subgenres in fan fiction include slash and Mary Sue, depicting LGBTQAI and feminist protagonists respectively. They can be argued to embody not just transformative nature, but also the role of critical commentary on the norms of society prevalent in the source media, as in parody. Also, according to the Campbell ruling, "parody has an obvious claim to transformative value."¹⁹² Comparing this statement to the Deckmyn decision of the Court of Justice of

¹⁸⁹ Benabou Report, p. 13.

¹⁹⁰ Ibid.

¹⁹¹ OTW, "What We Believe" available at: <http://www.transformativeworks.org/what_we_believe/>.

¹⁹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 579, the court also continuing on to note that "[l]ike less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107."

the European Union, which will be covered in a later part of this thesis, it is clear that the reality of the situation is that it is not as sure to get parody ruled as an exception to copyright within EU as in US due to greater concern to author's rights, even in as special of a case as parody generally presents.

3.3 Analysis of Four Factors

The test of fair use is of course more complicated than a mere determination of 'transformativeness' of the work in question. There are four factors in total that the judges are obligated to scrutinize in their decision-making: purpose, nature, amount and effect on the market. As pointed out above, the first factor, purpose of the work, and particularly the transformative usage, has emerged as a major deciding factor, but also the fourth, economic factor is another important key element that is given a considerable amount of attention in a fair use case. Indeed, it is only natural that the fair use doctrine would be inherently economical in nature as the US system is built on utilitarian, economic considerations as the philosophical foundation in contrast with the *droit d'auteur* type of thinking in the continental Europe and consequently the basis in the EU law.¹⁹³

Additionally, although these two factors, the first and fourth, are commonly categorized as the ones holding most weigh today, all of the four factors must be included into the final judgement, and theoretically any one of these factors, the second and third as well as the other two, could decide the direction the judgement will take. Also any other additional factors may be taken into consideration as the list of factors is not exhaustive. The applicability of fair use is decided on a case-by-case basis and the final ruling is left up to the discretion of the individual judges.¹⁹⁴

Although the decision on the applicability of fair use is thus criticized as unpredictable, and any outcome impossible to foresee with exact certainty, it is possible in waiting, while a case with the exact parameters is yet to go on trial, to discuss the issue of fan-created content further, and examine through analysis whether non-commercial fan fiction could constitute fair use. Non-profit fan fiction particularly offers a fascinating

¹⁹³ See e.g. Ginsburg, Jane C., "Overview of Copyright Law".

¹⁹⁴ Id. p. 25.

case for scrutiny due to the fact that a precedent does not, as of yet, exist in case law, and this analysis will be purely theoretical in nature. There are, however, some cases that present the opportunity for predictions and have merit for further examination as they concern the situations in which fan fiction, or another form of remix or fan work, has gone commercial.

How would fair use defense apply, then, in a case of non-profit fan fiction? The structure of a fair use judgment consists first and foremost of the above mentioned four factors of the fair use doctrine. First, there is the non-commercial, quite innocent purpose of the use, in this hypothetical case of fan fiction, to be considered – solely for the free enjoyment of others with no remuneration or any other financial gain to be had by the fan-creator. Sometimes this is also expressly stated in the fan-author’s note at the beginning of the story in a separate disclaimer, like a preemptive measure. Such disclaimer usually amounts to a statement of non-profit nature of the work intending no offence or copyright infringement, denouncing any ownership to the copyrighted elements belonging to another author or right holder and crediting them instead.¹⁹⁵ In essence, a declaration of fair use defense, actually incorporating all these elements showing awareness of the possible copyright issue within the fan community. The purpose of any such disclaimers seems thus to be to try to mitigate and appease; they can be even seen as kind of one-sided negotiations.¹⁹⁶ While this kind of disclaimer might not have official legal capacity for an impact in a final judgment, being beneficial only in an ethical sense of attribution, however, for the ‘distance’ they relay, acknowledged by the writers themselves as fans, toward the texts their fictions interpret,¹⁹⁷ they can therefore, according to Tushnet, be seen in a consequential light nevertheless, in a manner that they “make a persuasive case for fan fiction as fair use.”¹⁹⁸

Turning back to the essence of the first factor, the character of the use; in which the necessary involvement of creativity in drafting and writing of the fan fiction story would indicate that the use of the original copyrighted material would then consequently turn

¹⁹⁵ These disclaimers are also mentioned by Rebecca Tushnet in “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, p. 664.

¹⁹⁶ See Freund, Katharina, “Fair use is legal use’: Copyright negotiations and strategies in the fan-vidding community.”

¹⁹⁷ Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, pp. 678-679.

¹⁹⁸ *Id.*, p. 664.

out to be judged as appropriately transformative in case of fan fiction. If the creative process of fan fiction is carefully examined, it can be seen as true that every new story crafted by a different writer, even with use of older, known elements, always needs new interpretation – as in, is a ‘new expression’, which was the wording for transformative use in the Campbell ruling, where the question was whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁹⁹ In interpreting this description by the court, I would see that within the meaning of this definition for transformativeness, the act of crafting a fan fiction story, no matter even how similar the storylines and plot points within compared to each other, necessarily alters the original work when it is imbued with different, new expression of a different interpreter of the text. Examined carefully from this viewpoint of creative process, it seems then to be no wonder that others could have ended up with this same conclusion, knowing the amount of work drafting any writing project truly takes.²⁰⁰ This could therefore all prove to be of tremendous value moving forward towards the possible final ruling on the matter, considering the court’s earlier featured opinion on the weight of transformativeness in general. Thus, the transformative character of the use together with the non-commercial nature and non-profit purposes of fan fiction, puts the first factor clearly in favor of fair use.

Secondly, the court would look at the nature of the work in question that is in copyright, which in the case of fan fiction’s source material would mean fiction, not factual, but it is most probable that, in the end, this would hardly have too much effect – negative, or otherwise – in the final weighing, as the court would most probably concentrate more on the aforementioned highly transformative character of fan work, pertaining to the first factor. Tushnet sees this second factor as possibly “irrelevant” for the purposes of fan fiction as well as parody analysis.²⁰¹ All the factors have to technically be considered, but they do not all have to definitively point to a ruling of fair use one way or another. Therefore, although a factual nature of the work would mean better chances of allowing its use as fair in the end, fictional nature does not automatically assure otherwise.

¹⁹⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 579.

²⁰⁰ For example, this is the conclusion Rebecca Tushnet draws on transformative use, as well, in “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, p. 665.

²⁰¹ Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, pp. 676-677.

Next, the third factor, amount, will come into consideration. In the case of fan fiction, the amount of the copyrighted original work that ends up used in the fan's work is usually quite minimal in a sense that it does not normally copy and quote directly. The function of fan fiction is quite the opposite, actually; it is to rewrite. Fan fiction is usually written to alter the original in some way, or to supplement the canon. It may do so with the existing characters and use the original world-building, and even try to emulate the style of the original author²⁰², but it does mean to only copy. There is a deeper meaning to the practice than that. And even though this would not be the case with every fan's work, subversive text and critical commentary aside, even though some fan fiction only wants to offer lighter substance, supplementing scenes in accordance with the existing canon, it can be argued that the character of their work is as much transformational due to the creativity they anyhow put into writing and dreaming up this additional material.

In fan-vidding, the case of the amount of the material used would perhaps be a little trickier, since they can only use existing videomaterial, but the character of their work remains the same, transformational through creativity; to offer something more, additional, further meaning to the original material that they consume. Furthermore, the substantiality of the used material will not constitute a huge amount in a typical short fanvid. This means that it seems that after the third factor fan works emerge with only very minor scratches, only using some elements of the copyrighted original work.

Finally, the fourth factor comes up for consideration, the effect on the potential market. The fan works won't normally encroach upon the original work's market, quite the opposite. They are the fan base, the consumers who create the buzz around the product discussing it further. There is actually an economic argument in favor of fair use in the case of fan-created content, as it can be seen as free advertisement and promotion for the sales of the copyrighted material.²⁰³ Other like-minded individuals from other fan communities might be enticed by new, interesting fan-created works, get curious about the original popular media content and buy it themselves, and thus end up migrating to this new fandom and act to increase the popularity even more. Therefore, it may even

²⁰² Schwabach, Aaron, *Fan fiction and copyright: Outsider works and intellectual property protection*, p. 17: Example of fan fiction mimicking and parodying the style of J. K. Rowling's writing in Harry Potter books.

²⁰³ Arai, Yasuhiro & Kinukawa, Shinya, "Copyright infringement as user innovation".

be advantageous and make economic sense for the right holders to not only tolerate but openly allow fan-created content.

There is, on the other hand, one economic consideration that remains non-favorable; the aspect of the effect that the fan work might have on the value of the original work. This can become an issue if the original is still an incomplete series. Then, “the owner may object because fan fiction anticipates elements of the author's own future works, precluding the author from publishing them.”²⁰⁴ Although this scenario is possible, it is, however, perhaps a bit farfetched. Most probably, the fans’ predictions on future plot twists only create a positive atmosphere of excitement within the fan community while waiting for the next installment of the copyrighted material, and thus rather boost the sales.

If we take under scrutiny the forms of fan fiction, Mary Sues and slash, which use the function of critical commentary, it can be said on their account that “[p]arodies and, to a greater extent, critical reviews may impact sales by discouraging potential purchasers of the work, but this is not competition – it is the legitimate function of criticism.”²⁰⁵ However, there is also the point that all perceived harm on the value might not present as strictly economic in nature. Some right holders might take issue with the character depictions, for example in the case of slash fiction which sees the relations through the lens of homoeroticism, due to homophobia and imposed social construct of heteronormativity. However, the US copyright system does not recognize such a concept that could be described as a moral right of the author, so it will not be further examined in this context of the fair use test. In terms of trademark law, the case might be different, but in that context as well there would be additional stipulations for infringement and dilution to apply, namely, the use would have to be in commerce, which fan fiction usually isn’t.²⁰⁶

Thus we finally get to the end of the considerations in the fair use doctrine. It seems that the non-profit fan fiction’s economic impact on the market of the original material is quite minimal, at least in the harmful sense, and therefore can come to the

²⁰⁴ Schwabach, Aaron, “The Harry Potter lexicon and the world of fandom: Fan fiction, outsider works, and copyright”, p. 388.

²⁰⁵ Id., p. 411.

²⁰⁶ Id., pp. 406-407.

conclusion that it could be allowed as fair use. Thus, the fair use defense could indeed keep fan-creators and their works safe in the future.

The analysis undertaken here of the four factors of fair use defence is theoretical in case of non-profit fan fiction, but seeks basis on tried cases on the sort of fan fiction of commercial effect that will be given consideration in the next instalment of case law on the subject. The fact that the case concerning non-profit fan fiction is still, twenty years later from Tushnet's first legal study²⁰⁷, theoretical in nature, despite the growing mainstream stature of the phenomenon, is, in the end, hardly surprising, considering the angle that it is identified as a practise of women and minorities, as the fair use is a defence requiring immense resources, both mental and monetary, to proceed to a trial stage. This is an important element to this issue which certainly speaks to the silence remarked on the situation with the business strategies of the right holders, and is addressed by Tushnet herself in her later work²⁰⁸ and also in this thesis exploring the situation for those involved in practice. A case such as that would mean that the unprivileged could rise to the same level as the powerful and privileged in the realm of copyright, those who hold the rights and power in the relationship involving copyrights. This is an element that might be forgotten in debates that take place on an academic level, but have substantial effect in practice.

However, if such a case would come to be – and it would not be completely out of the realm of possibility, considering the tried case (explored next) involving the author of *The Wind Done Gone*, Alice Randall – it would be important that the judiciary body would have appropriate information from which to draw on, unprivileged view and all. That is where the efforts of advocates, such as OTW, strive for, and why in the end, advocacy nor normative argumentation is ever in vain. Utopia might not exist, but it is right to believe in ideals, and in this examination of a possible fair use analysis in court relies on ideals in believing that a judge would avail themselves to all the information available and achieve the ideal situation of impartiality.

²⁰⁷ Tushnet, Rebecca, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law" (1997).

²⁰⁸ Tushnet, Rebecca, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright", p. 300.

3.4 Case Law

Other indications in assessing the fairness of the use of pre-existing media in fan fiction are the prior relevant cases to the situation. The case law is always an important clue. In the absence of an exact precedent, as is the case in the area of non-profit fan fiction, there still exist some cases that can act as indicators of the direction the judges might take. One such important is the landmark case, which was already cited above as to transformative use, *Campbell v. Acuff-Rose Music, Inc.*, in which the rap version of the song ‘Oh, Pretty Woman’ was seen favorably in light of fair use as socially benefitting for its critically commenting element even though the obvious commercial nature and quite rude character of the song in question.²⁰⁹ “The Court observed that parodies like 2 Live Crew’s “Pretty Woman” transform the original, providing ‘social benefit, by shedding light on an earlier work, and, in the process, creating a new one.’”²¹⁰ This is essentially the definition for transformative character that has become so important but also controversial matter within the first factor. Despite the different nature of the work in question compared to fan fiction and the commerciality therein, this is a case of consequence to fan-created content.

In considering the defining characteristics of what constitutes a parody, and how fundamental the element of ridicule is for that purpose, the court remarked relevantly to some of the more ‘light-hearted’ fan fiction thusly: “If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”²¹¹ Even if the court seems to slightly sneer at the kind of use that does not clearly critique the original work, at the same time its view

²⁰⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 582: commenting on the aesthetic neutrality point in judgment of parodies that “[w]hether, going beyond that, parody is in good taste or bad does not and should not matter to fair use,” and p. 583: as to the song constituting parody, the court found it slightly shaky, but even so stated affirmatively: “While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree.”

²¹⁰ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, p. 613.

²¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 580.

can be seen in a positive light, as it does not completely define such use out of the realm of possibility for a finding of fair use, only that in such cases the commercial element would be under scrutiny. This would not hamper the chances for explicitly non-profit fan fiction. Therefore, this ruling seems to suggest that even though that fan fiction would not present distinct criticism in the plain, concise parameters, its interpretation as transformative parody and subsequently fair use could be a reality, thus echoing the thoughts of Henry Jenkins, the founding father of fan studies, remarked above.

This kind of transformative expansion from the more traditional interpretation of parody in the US framework of fair use is indeed beneficial for fan fiction collectively, as it would mean that not only the subgenres of slash and Mary Sue could be protected as criticism toward heteronormativity and (white) male privilege, but the umbrella of protection would reach to cover ‘lighter’ fan fiction stories as long as the non-commerciality remains undisputed. According to the wording of the court, the scrutiny of these ‘other factors’ besides the articulated point of commerciality – which can refer to both the first factor as to commercial purposes but also the fourth factor as to the economic effects – might in the case of fan fiction mean also the third factor of amount of use. However, considering the prominence of the judgment in the relatively recent Google Books case, the consequence of this factor seems significantly reduced, as the substantial use by Google – digitizing millions of copyrighted works – was found fair.²¹²

The first case concerning not only remix works, but specifically called the very first fan fiction case is *Suntrust Bank v. Houghton Mifflin Co.*²¹³ It could indeed be categorized as a fan fiction case with commercial nature and intricate content ranging from Mary Sue to slash for critique. For some, the creator, Alice Randall, seems to better fit the description of an anti-fan, rather than a fan of the original copyrighted material, which in this case happened to be Margaret Mitchell’s classic *Gone with the Wind*.²¹⁴ However, on deeper scrutiny, Randall’s work exhibits the exact complexity of being a fan and of audience engagement and response. The novel Randall authored was called *The Wind Done Gone*. It was written from the perspective of a slave in the famous plantation, bringing a whole new perspective to the story, and thus actually constituting a kind of Mary Sue fiction, as the novelist was an African-American herself, and a Mary

²¹² *Authors Guild v. Google, Inc.*, No. 13-4829-cv (2nd Cir. Oct. 16, 2015).

²¹³ 268 F.3d 1257 (11th Cir. 2001).

²¹⁴ Hetcher, Steven A., “Using Social Norms to Regulate Fan Fiction and Remix Culture”, p. 1870.

Sue character being defined as “the insertion of an idealized authorial representative” – a projection of the author’s own image to the past – into a pre-existing world of a popular media work.²¹⁵ The slash element of Randall’s work especially became a point of controversy as homosexuality was something that the right holders took an issue with, and Randall depicted one of the characters as a homosexual.²¹⁶

In the end, “[t]he case turned on a defense of criticism and parody, not specifically on the fanlike nature of the work,” comments Steven Hetcher, who also saw Alice Randall as more of an anti-fan.²¹⁷ The essence of a Mary Sue as a fan work does not thus easily open up to everyone. What was especially remarkable about this case considering the fair use outcome, is the fact that the novel *The Wind Done Gone* (TWDG) was actually commercial in nature. Therefore it is evident that “Mary Sues can be commercial and still be fair. Indeed, the history of fair use is replete with commercial uses”²¹⁸ which means that if fan fiction subgenres Mary Sue and slash could be fair use as parodies regardless of whether they would be non-commercial or not, therefore quite surely safe if also adhering to the traditional mode of this feminine culture abiding by the non-commerciality of the practice; it would then only strengthen their claim to a protected status. This could also be seen as indication of a positive outcome for fan fiction collectively, not only for the discernible critique evident in slash and Mary Sue. There seems to be signs pointing to a high possibility of a case involving non-profit fan fiction – at least those with a sort of transformative critical commentary function, which have been established above to possibly cover a great amount of fan fiction – to turn out as definitive fair use. It is certainly true that fan fiction has proved that “[t]he act of copying can be simultaneously homage and subversion.”²¹⁹

It is, however, important to keep in mind to not assume an overly positive attitude in this matter. In Alice Randall’s case, the court was willing to extend the usually cautious

²¹⁵ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, pp. 597-614.

²¹⁶ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), pp. 1270-1271, footnote 26: “Suntrust makes a practice of requiring authors of its licensed derivatives to make no references to homosexuality.”

²¹⁷ Hetcher, Steven A., “Using Social Norms to Regulate Fan Fiction and Remix Culture”, p. 1870.

²¹⁸ Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, p. 616.

²¹⁹ *Id.*, p. 626.

outlook, commenting, for example: “In light of the admonition in Campbell that courts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character, we choose to take the broader view.”²²⁰ This broader approach was in reference to the interpretation of defining qualities of parody, as in whether criticism applies, and not merely ridicule – an issue that raises questions and is pondered upon on the other side of the Atlantic as well. The ruling continued as follows:

“For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work. Under this definition, the parodic character of TWDG is clear. TWDG is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW. The fact that Randall chose to convey her criticisms of GWTW through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive TWDG of fair-use protection.”²²¹

Thus, recognized by the court as well, fan fiction can indeed be an acceptable form of parody, a fact that is apparent from the quotation above of Chander and Sunder’s article addressing *Mary Sues*, and appropriately echoed by the judgement of this case; the conclusion that fan fiction can be, at the same time, both loving homage but also critically commenting. An important distinction, however, is that parody must criticize the source material specifically to qualify.

However, as to the aspect of commerciality, in reverse, if the derivative work does not conform to the values of this feminine culture, but chooses the opposite road of the traditional feminine values, and does not inject appropriate critique, such as Alice Randall’s feminist notions, there is no protection under fair use, either. The *Salinger v. Colting* case proves this.²²² It cannot be called a case of fan fiction but is tangentially relevant to the situation. Fredrik Colting wrote a book called *60 Years Later: Coming Through the Rye* that had basis on Salinger’s successful *The Catcher in the Rye* and posed as a sort of a sequel, which the court found to constitute substantial similarity

²²⁰ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), p. 1268.

²²¹ *Id.*, pp. 1268-69.

²²² 607 F. 3d 68 (2nd Circuit 2010).

but no parody nor fair use, as it did not find appropriate discernible criticism toward the original work. The reality of the commercial purposes behind the work's creation revealed the weakness of the subsequent defense through parodic intent which the court did not buy.

This case is from the year 2010 as opposed to Alice Randall's 2001 case. Perhaps the defendant Colting saw an opportunity to try to recreate the circumstances of Randall's favorable treatment, but did not succeed on trial as the attempt proved inadequate as a convincing endeavor; the parodic intent seemed an afterthought rather than the motivation. As mentioned, the court saw through it. The more plausible motivation was to monetize and benefit from other's success. This is fundamentally different from the usual fan fiction writers. Thus, in the end, Colting appeared not able to reach the same high bar of accepted parodic purpose as Alice Randall did in her commercial endeavor. Even though, the door was opened for transformative parodies in Campbell case which allowed even commercial purpose, the court seems reluctant in admitting too much through this expansion. Only truly subversive subgenres of fan fiction such as Mary Sue and slash can be deemed parodies pure at heart to withstand commercial gain.

This was confirmed in the recent fan fiction case; the same fate befell the fan-creators of Axanar.²²³ However, as it is the latest case, it shall be left the last. Before it, there is still one more relevant case worth discussion; The Harry Potter Lexicon²²⁴ is a relatively newish case, and one of the rare specimen in the field of fan work litigation. It is not about fan fiction or fanvidding – storytelling – but nonetheless it is a fan's labor of love, a different sort of fan-created content. This online guide, maintained by a fan, was a site that indexed all the relevant content that appeared in the Harry Potter novels. J.K. Rowling, the author of the book series, herself was fine it, until this fan work was announced to be published as a book, and thus became of commercial nature. After this, the suit for copyright infringement was issued, and in the end the case was won by Rowling.²²⁵ Meaning, not all fan-created content is presumed as safe and allowed under the fair use defense, far from it. Especially those which try to turn from non-profit to the commercial dark side. The economic factor stands still strong.

²²³ Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017).

²²⁴ Warner Bros. Entertainment v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

²²⁵ Kellogg, Matt, "The problem of fictional facts: Idea, expression, and copyright's balance between author incentive and public interest", pp. 549-550.

In the Axanar fair use denial, one can observe the juxtaposition of the shifting adherence in case law as to the primary function of copyright: from recognition of importance of fair uses to emphasis on authors' rights. In the 1991 case of *Feist Publications*, copyright's *primary objective* is noted to be promotion of progress in the areas of science and arts as codified into the US constitutional law²²⁶ but also how this means the integration of fair uses to the concept of copyright in that it also "encourages others to build freely upon the ideas and information conveyed by a work," highlighting this imperative compared to author's rights,²²⁷ and the same purpose is repeated on the judgement of *Campbell*.²²⁸ However, in the new Axanar ruling, the chosen reference of *copyright's very purpose* was to *Campbell*, not *Feist*, and it was distorted to a startling effect; it was stated that the "[r]ejection of Defendants' fair use defense is consistent with copyright's very purpose because derivatives are "an important economic incentive to the creation of originals."²²⁹ This implies that the author's right to derivatives for the purpose of economic incentive (codified in 17 U.S.C. § 106) is of higher importance than the § 107 fair use. In the *Campbell* ruling, as mentioned above, *copyright's very purpose* is noted to rightfully be promotion of the progress of arts and sciences with all the meaning for fair use that it carries.²³⁰ The derivative works' importance for the economic incentive rationale through licensing is only mentioned in *Campbell* for the purpose that it might weigh against a fair use finding if significant market harm is perceived, but it should not mean automatic fair use denial, as market effect is only one factor of four, let alone be later phrased in terms that can be interpreted to mean to elevate this right of the author as the primary purpose of copyright to the detriment of fair use.

Thus, in conclusion, this final interpretation of the notion of copyright in Axanar judgement goes against the spirit of *Feist* ruling's integration of fair use; to overly emphasize the economic rationale of incentive to create the original (in order to gain from the derivative works) rather than encouraging progress in society by building

²²⁶ U.S. Const., Art. I, § 8, cl. 8.

²²⁷ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), pp. 349-350.

²²⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 575.

²²⁹ *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017), p. 13, citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 593.

²³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 575.

upon them as stated in Feist. However, the outcome of this case ended up heavily in favor of the right holder in all accounts, not just this one point; deliberation of every factor turned against finding of fair use. This is, in the end, understandable given the facts behind this case, as the Axanar was a project of massive scale involving huge amounts of money; a total of more than million dollars was raised for the funding of the production of this Star Trek fan film. The script was the fan fiction part of it, and indeed the only part resembling any amateur, ‘fannish’ spirit in a production of that scale; “going where no man has gone before in producing Star Trek fan films, Defendants sought to make “a professional production” “with a fully professional crew, many of whom have worked on Star Trek itself” and raised over a million dollars on crowdsourcing websites.”²³¹

The same issue, then, as observed in the Salinger case, is true here in the case of Axanar; mixing fan fiction to masculine commerciality does not fare well, if it lacks also discernible criticism toward the source material. While it is true that fan fiction can be homage as well as subversion and that subversive or parodic quality can be up to the interpreter and have wide transformative parameters, at the same time, benefitting monetarily without the effort of distinct critical commentary is dubious activity that can, in a worst case scenario, even endanger the reputation of fan works in general for the traditional, non-profit side of the practice and the kind of fan fiction that women want to use for play, not pay, which they should be entitled to choose to do.

Regarding this conclusive point of case law and appropriately leading to the next on the subject of feminist legal theory, one aspect that Tushnet invoked for the issue of fair use in favor of fan fiction, made reference to above, was the disclaimer angle for the distance they relayed.²³² As to the accepted subordinate status of fan fiction stories in relation to the texts their writers further interpret as fans, a thought emerges connecting the dots. Perhaps women, the most likely fan fiction authors (who add these disclaimers), are more conditioned by society to accept their own subordinate status in general, and this has the effect that can be observed in the case law on the subject; the pattern that cases such as *Salinger v. Colting* and *Axanar* have men behind their productions who are sociologically more naturally inclined to enforce, and overly

²³¹ *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017), p. 2.

²³² Tushnet, Rebecca, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law”, pp. 678-679.

confident on, what they believe are their rights due to their privileged perspective, and the only extraordinary commercial fan fiction case is the one in which Alice Randall, a woman, fought for her published Mary Sue critiquing *Gone with the Wind*, which, for that reason, was able to prevail as parody and therefore fair use.

4 FAN FICTION AND COPYRIGHT EXPLORED

4.1 Feminine Creative Expression and Fan Fiction as Feminine Craft

In connection with *collaborative, creative online endeavors*, in general, Ann Bartow brings up how unlikely it is that what would incentivize these sort of endeavours, would be a promise for possible copyright protection.²³³ Bartow's views of ideological differences between the sexes offer explanations on gendered creative processes and generally prove helpful to further exploration of fan fiction's relationship with copyright. Bartow also addresses the topic of intersectionality within the sphere of copyright; in particular, she identifies "three categories in which copyright laws and people intersect: as authors, intermediaries, and consumers."²³⁴ Women thus encounter and experience the effects of copyright on these three levels, which all have some sort of connection to the issue of fan fiction at hand. First, the issue of authors is addressed here, and the starting point in decoding this level is the remark Bartow makes with regard to copyright law in general, in assessing how it simply does not accommodate well these types of activities that honour traditional feminine values such as collaboration, which in the case of online projects happen on a mostly free platform, as well.²³⁵ Blogs, specifically, are discussed by Bartow in connection with this statement, but also fan fiction fits to this context well.

Continuing on the topic of *creative online endeavors* and undervalued feminine craft – such as fan fiction – Bartow addresses the above-mentioned free sharing and

²³³ Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law", p. 29.

²³⁴ Id., p. 24.

²³⁵ Id., p. 29.

collaboration, the traits culturally coded as feminine,²³⁶ and concomitantly excluded from values constituting copyright. As noted, “extant copyright law poorly accommodates some stereotypically feminine art forms”²³⁷ – unless involved is a convenient marketable element, as with cooking recipes, which “do not unambiguously ascend to lofty heights of copyrightability until they are collected into a cookbook.”²³⁸ Handcraft such as quilting and knitting are discussed as well, highlighting the collaborative effort and the communal setting where free advice and instructions are available, in communities both online, as well as offline.²³⁹ This same spirit can be observed in the comment sections of fan fictions posted on AO3 for example, where feedback and encouragement on writing flows from readers to writers, which could be especially valuable, one would imagine, in updating multi-chaptered fan fictions.

It is indeed very exciting to be able to see this very same phenomenon and spirit of female craft described by Bartow in the context of feminist legal theory, unfolding inside fandom and fan fiction culture, which is embodied by these low threshold feminine and feminist values. The spirit of collaborative efforts is embraced by the participants. They are collectively inspired by an existing media, and concomitantly as community members they inspire others and, in turn, are inspired by each other’s work. For example, they might also make fan art of a piece of fan fiction, or the other way around, write fan fiction based on a particularly inspirational work of fan art, or indeed compose fanvids as ‘movie trailers’ for different fan fiction stories. For these purposes, there might even exist explicit blanket permissions by fan fiction writers in their author’s notes or profile bios expressly granting free permission encouraging readers to, for example, make audio recordings of their fan fiction stories, which are called podfic.²⁴⁰

²³⁶ Id., p. 11, fn 23; Free sharing and collaborative efforts can be seen as feminine traits, derived from the classification by feminist philosopher Alison Jaggar that is noted by Bartow: “culturally feminine traits like interdependence, community, connection” etc.

²³⁷ Id., p. 27.

²³⁸ Id., pp. 29-30.

²³⁹ Id., p. 31.

²⁴⁰ Example of such explicit blanket permission can be observed e.g. in astolat’s AO3 profile bio at: <archiveofourown.org/users/astolat/profile>, and relatedly, e.g. a podfic of her Harry Potter fan fiction, “[podfic] House Proud” read by Lazulus, can be reached at: <archiveofourown.org/works/7298308?view_adult=true>.

Bartow has found that within the world of blogging, collaborative craft projects are supported and organized by female bloggers.²⁴¹ In addition to the examples detailed by Bartow, there is also fandom culture concentrating on fan-created content. The online communities for arts and crafts noted by Bartow are essentially recognized as not only feminine projects but feminist pursuits at heart, as well. This thought evolves into recognizing fan fiction as the embodiment of the characteristics of feminine craft, showing the alternative to masculine values of copyright. Related here is the remark about the differences between masculine and feminine forms of ‘doing’ fandom; masculine fan pursuits such as concentration on acquisition of collectibles as the commercially embraced form of fandom more accepted by society, rather than the feminine community of collaboration and sharing of ideas and works such as fan fiction – made by one of the community members themselves in a blogpost:

“The types of fandom that are most often considered traditional and acceptable, and which are often either male-dominated or coded as masculine, tend to be acquisitive, whether in terms of knowledge (obscure trivia) or merchandise (collectibles). Whereas, by contrast, the types of fandom most often considered insincere, non-serious or “unreal”, and which are often either female-dominated or coded as feminine, tend to be creative, such as making costumes, writing fanfic and drawing fanart.

Which is arguably an interesting expression of gender dynamics within fandom, in the sense of being a direct response to gender representation within the canon of particular franchises: namely, that because men, and particularly straight white cismen, are so ubiquitous within popular narrative(s), they have less need to create personal fan interpretations in order to see themselves represented, or to correct/ameliorate stereotypical portrayals; whereas women - and, indeed, members of any other group likely to suffer from poor representation - do.”²⁴²

The point Bartow wants to make with regard to authorship in general, according to my interpretation, seems to be that gendered differences are possibly influencing also the degree of registration and enforcement of copyright protection, if in fact women are conditioned by society to accept less also in terms of copyright-holding authorship, in contrast to men’s more forceful attitude encouraged by society at large.²⁴³ In my

²⁴¹ Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 31.

²⁴² Foz Meadows, “Fandom Thoughts” (22 Jun 2014) in “What Happens Next: A Gallimaufry”, available at: <fozmeadows.tumblr.com/post/89576778116/fandom-thoughts>.

²⁴³ Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, p. 32.

opinion, ideological differences between men and women are also what causes the clash in fan fiction's copyright issues.²⁴⁴ Thus, this could be interpreted as evidence of copyright formalism's gendered rejection,²⁴⁵ of which fan fiction is the embodiment, as well.

In the end, the copyright system was designed for the very masculine purpose of facilitation of commoditization of creative works, as well as their effective exploitation,²⁴⁶ meaning the present system was designed by men for purposes they held as central, and therein lies the problem with fan fiction as well. Interestingly, there does exist "gender-related reluctance to stake rigorous copyright claims."²⁴⁷ A sort of comparable situation can be seen to occur within fandom culture, where the mentioned consensus on fannish gift economy system usually means the complete relinquishment of property claims by the fan-creators, with the exception of the right to attribution, but which is understood to apply only within the borders of the fan community. Taking into account the fact that the community members are identified to be overwhelmingly female, this trait can be easily seen as the above-mentioned gender-related will to disregard the formalities of copyright.

The problem of the continued subordinate status of women is underlined, and the consequent classic double bind situation (in which women unfortunately often find themselves in society) is described by Bartow in the context of this situation as follows: "Female authors risk accusations of selfishness and greed if they violate perceived gender-linked social norms of sharing, caring, and selfless collaboration because they seek to procure and enforce individual authorship rights and attributive credit," while "[h]owever, women who adhere to collaborative norms and decline to rigorously anoint themselves "sole authors" or to hold and enforce the full panoply of copyright based exclusive rights forgo attribution, income, and control."²⁴⁸ This is due to the subordinate status and undervaluing of the feminine craft; again, clash of gendered philosophies and norms causes the friction. However, in the community of fan fiction authors purposely relaxed atmosphere prevails when it comes to copyright to their own

²⁴⁴ While these gendered ideologies could be caricatured as: 'Commercialization first!' and 'Sharing is caring!', respectively.

²⁴⁵ Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law", p. 32.

²⁴⁶ *Id.*, p. 33.

²⁴⁷ *Ibid.*

²⁴⁸ *Id.*, pp. 33-34.

works; they expressly do not want to commodify and commercialize, in accordance with the mentioned gift economy principles.²⁴⁹ The non-profit attitude does not depend on quality; it does not follow from subpar writing. It is intentionally intended for the good of the community. Maybe it manifests as rebellion in this aspect as well as rebellion by literary means in the content of the stories, against other norms such those prevalent in Hollywood productions and other source materials, as discussed, which include among others, heteronormativity.

On the topic of women's lives intersecting with copyright as intermediaries, as opposed to authors explored above, Bartow addresses the problem that it is rarer for women than men in creative fields to hold the powerful intermediation roles, and that "[c]reative industry sectors such as publishing, film, television, theater, art dealing, and the music business are also dominated and controlled by men."²⁵⁰ Notable here, in the context of this thesis, are especially the remarked fields of publishing, film and TV, as those are the most relevant to the issue of fan fiction as the popular source texts, and how the motive behind the phenomenon can be seen as women rebelling against the heteronormative and male-centric plots therein utilizing fan fiction stories in the form of literary rebellion.²⁵¹ Central to the issue of fan fiction's continued existence, is also the fact that "[d]ecisions about how aggressively to "protect" copyrights, such as when to bring infringement suits and how zealously to pursue them are largely made by men as well."²⁵² This point might well explain the sceptical attitude and hostile actions towards fan fiction and the general non-understanding of the fan fiction culture, especially the prevailing gift economy within and motives such as trying to correct and gender-balance the existing popular media to a more inclusive model with fan fiction.

The views of the ideological differences of the sexes presented by Bartow thus help deeper the understanding of fan fiction's situation and the reasons behind its strained relationship with copyright, especially how the male strategies and views in the intermediary positions²⁵³ put further strain on the precarious situation. Based on this theory and evidence, fan fiction seems inherently a feminist pursuit at heart with the

²⁴⁹ Of course, a few exceptions exist, such as the famous *Fifty Shades of Grey*, formerly a *Twilight* fan fiction with only the character names altered in publication, as discussed.

²⁵⁰ Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law", p. 34.

²⁵¹ See e.g. Leow, Hui Min Annabeth, "Subverting the canon in feminist fan fiction".

²⁵² Bartow, Ann, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law", p. 34.

²⁵³ *Ibid.*

social norms and values and views present at its core. It is impossible to look at fan fiction as a topic and not to see the whole community of fandom culture at play. To separate the two seems wrong; to only look at the text, the words and writing, without connecting the pieces of fiction written by individual authors to the underlying feminist values of the community at large. Community based on sharing and collaboration, these feminine attributes, must seem odd to the masculine values in corporate world of media copyright holders which concentrates to the opposite: the maximization of commercial gain and exploitation of the copyrighted works. As Bartow states, “[m]any corporate intermediaries are perfectly happy to sell to and profit from women but generally do not want to closely identify with female interests, unless it is part of a successful marketing strategy.”²⁵⁴

Moving on to the role of women as consumers in the realm of copyright, Bartow first reminds the reader of the relationship that exists between copyright ownership and consumers in general; it is that which relies on dominance, and that seems to be the case even more so in this context of women’s lives, as they seem to consume creative content more readily and in higher quantities than men do.²⁵⁵ This then directly translates to the previously remarked close relationship of fan-created works and women, where (the oppressed) women inhabit the role of those creators and other supporting fan community members, which thus seems a natural consequence of the above facts Bartow presents. However, the (underground) community of these ‘pink pirates’ refuse to be silently acquiescent to the system of dominance inserted by copyright owners.

Addressing romance novels anew, Bartow brings up the sentiment shared by this thesis, that despite often disregarded as frivolous, the genre should by all accounts be just as socially important as any other, because the truth is that actually, many of them – just as fan fiction stories of romance – are, in fact, “rich, complicated works of fiction, as intricate, sophisticated, and valuable as any other category of literature.”²⁵⁶ The existence of a certain subcategory of romance is also noted by Bartow, which consists of pulpy, formulaic novels that are often equated with the whole genre of romance and certainly associated with a particular female viewpoint, generally in terms of female

²⁵⁴ Id., pp. 34-35.

²⁵⁵ Id., p.37.

²⁵⁶ Id., p.38.

desire and readership.²⁵⁷ However, against the event that an argument would be formed that the commercial, as in legal, romance novel genre of these ‘bodice rippers’ should then serve as an appropriate substitute for the illegal option of fan fiction romance for women craving to consume that sort of stories, which are written supposedly by women to cater to the tastes of women, the argument stands that this women-to-women literary relationship is undiluted only through fan fiction. Bartow reminds that in romance novel genre, the women-to-women literary relationship may only be an illusion for the reason of the role held by men in the intermediary positions; it is suggested that the content and the formulaic plot in the ‘bodice rippers’ is dictated by the publishers (who were identified as predominantly men), and the authors of the genre are thus bound by this regulation and concomitantly without incentive to make changes.²⁵⁸ Bartow further comments on the situation:

“Both reinforcement of idealized heterosexual relationships and perceived market imperatives may drive publishers' content decisions. Serial romance novel consumers can only buy, or refrain from buying, the books that contain the content that distributors choose to provide. Copyright law seems to do a poor job of incentivizing originality in this context, and one consequence may be that a patriarchal status quo is effectively reinforced.”²⁵⁹

When the content is questionable both in terms of originality called for by copyright, but also in that it involves elements such as “stereotypical characters, repetitive plotting, and sexual contacts of borderline consensuality,” the question of the sexist dimension to the driving force of the resolutions of the publishers, becomes relevant from sociological viewpoint as well.²⁶⁰ Women as consumers of copyrighted creative content are then under the influence of men as much as copyright; men being in charge of what women can enjoy, in generalizing terms.

Fan fiction, however, offers an alternative – an anomaly; in the world of fan fiction, women are encouraged to play with these ‘tropes’ of storytelling, and they have the freedom to execute them differently if they so wish. For example, through slash these sexualized roles can be realized in a context where the partners are in a more equal footing due to both being in the privileged male position. The remarked popularity of

²⁵⁷ Id., pp. 38-39.

²⁵⁸ Id., p. 39-40.

²⁵⁹ Id., p. 40.

²⁶⁰ Id., p. 39.

the subgenre of slash, in turn, tells us the undiluted story that indeed, women do so wish.

Alexandra Herzog draws attention to author's notes in fan fiction stories which are identified as a paratextual category that has a central role in fan fiction culture, as author's notes invite dialogue with the readers, which is essential in forming a community, the conversation then developing for example in the comment section of a fan fiction story.²⁶¹ Herzog emphasizes the role of author's notes especially regarding the notion of assertion of power in their authorship – which is intriguing in that it is actually quite uncharacteristic for a female-heavy practice from a sociological viewpoint – and how these notes are used to constitute the status of their fan-authors as an authoritative entity with respect to their interpretative rights in relation to the original texts, and also how through “[f]ocusing on their own identity as writers, on the fannish community, and on their text and its position in the larger archive of the fandom, fans reconceptualize themselves as powerful producers, whose agency becomes obvious in the vast body of their texts.”²⁶² Herzog's claim on how authors' notes create a space where fan-creators can express *different models of authorship*,²⁶³ reflects the feminist legal theorists' critique in how they challenge the traditional view of the Romantic independent author, this 'masculine' concept which present copyright regime has chosen to protect. The fan fiction community's *collaborative forms of writing* as per Herzog's interpretation on authors' notes fighting for recognition of authority, on the other hand, can be characterized in line with feminist theories as the more 'feminine', ignored ways of creation. As we have seen, Bartow discusses female collaborative creation projects online, but Herzog specifically points out fan fiction's collaborative form of writing, and the underlying will for recognition therein.

Carys Craig addressed the problem of aesthetic non-neutrality of copyright law. Among Craig's points of observation was one that noted that Lockean ideas are behind the exclusion of recognition of more collaborative efforts from modern copyright law.²⁶⁴ Following this train of thought, the situation in Europe is particularly interesting, as

²⁶¹ Herzog, Alexandra, “‘But this is my story and this is how I wanted to write it’: Author's Notes as a Fannish Claim to Power in Fan Fiction Writing”, at [1.2].

²⁶² Id., at [0.1].

²⁶³ Ibid.

²⁶⁴ Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self”, pp. 8-9.

Locke's philosophy in general is identified as the foundation of intellectual property protection (instead of American utilitarianism). In the context of copyright, those ideals manifest in continental Europe's *droit d'auteur* ideology with its strong moral rights, which the EU has adopted with regard to copyright exceptions, as well, in the closed list of exceptions and limitations in the InfoSoc Directive, which does not include an exception for user-created works in spite of proposals to do so. The Lockean autonomous self is gendered, however, as both Craig and Irr point out according to Carole Pateman's argument that "for Locke, "women are excluded from the status of 'individual' in the natural condition.""²⁶⁵ Therefore, according to these sources I conclude in relation to the international debate on exceptions to copyright, that the doctrine of fair use is seen as a better corrective tool against too strong copyright protection also from feminist critical perspective than the EU's solution, and not only this, but also when it comes to Locke's philosophy of self-ownership that lead to strong moral rights of the author in Europe. Specifically, in the context of transformative derivative works, where they might lead to exclude some interpretations altogether through author's right to integrity of the work. Even though moral rights do not heavily feature in the US, a comparable situation to that scenario where such was almost the case, happened nonetheless in the trial deciding the fate of *The Wind Done Gone* novel by Alice Randall, in which homophobia featured in the general refusal of Mitchell's estate to license derivative works containing homosexuality.²⁶⁶

The strict approach adhering too tightly to the rights of original author seems fundamentally in the wrong since the core concept of a Romantic author, which copyright law currently enforces, assumes too much independence to the author and his ideas, and it ignores the community influences, thus ending up against feminine values according to feminist legal critique. This does not mean to propose that authors shouldn't have moral rights to their creations, just that they should not have the authority to reject uncomfortable interpretations of their words and works, made by others – in fan fiction's case, those for whom, and for whose commercial consumption, they were meant. It only means that copyright should not become copy-'tight' with

²⁶⁵ Id., p. 9; Irr, Caren, *Pink Pirates: Contemporary American Women Writers and Copyright* (2010), p. 23; both citing Carole Pateman, *The Sexual Contract*, p. 52.

²⁶⁶ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), pp. 1270-1271, footnote 26: "Suntrust makes a practice of requiring authors of its licensed derivatives to make no references to homosexuality."

complete authority to lock down outsider interpretations, as the feminist, low-protectionist view advocates as well.

Although, in all fairness, also the US economic incentive rationale has its fair share of criticism, as seen. In the words of Tushnet: “[c]opyright’s economic focus and the expense of litigation will systemically lead to case law undervaluing non-market production, including historically female creative practices.”²⁶⁷ This issue with the basis of copyright protection as gendered is thus universal problem. And as we know, these systemic, structural issues are the hardest to get rid of and correct since they are so deeply ingrained in the collective consciousness of the society.

4.2 Effect in Practice

If fan fiction is the practical manifestation or embodiment of the theoretical critique pointing out the failings of the existing copyright system, as this research seeks to show, then what does this mean, as in what are the effects of that in practice? Above the fair use analysis attempts to give the answer of what the fan fiction writers can expect in the current climate in the judicial sphere and what the present copyright system has to offer in answer to this stand-off of a situation. Feminist legal critique in turn gives depth by illuminating the origins of the existing – legal, and otherwise – subordinate status of fan fiction.

On the solution for more equal standing, feminism seems to be divided; ultimately, a grand overhaul project needs to happen by re-evaluating and changing the laws on a legislative level, on the other hand, fair use offers an easier tool for corrective measures. Indeed, fair use seems an adequate solution for now. As a doctrine it is built for quicker readjustment specifically for keeping the balance in the incentive/access debate within copyright. This directly affects fan fiction’s situation, and it is beneficial from the feminist perspective in general to embrace the balancing effect which can extend to gender issues as well, and specifically in fan fiction’s case. As feminist stand toward copyright protection is low-protectionist in general, fair use as a copyright exception concept is on-par with this feminist idea, as its function is to curb the ever-expanding reach of the scope of protection. In a best case scenario, its pioneering reputation and

²⁶⁷ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 304.

function as a balancing tool could extend to balancing out the inequality between genders as well.

Although, on the other hand, fair use defence has its failings due to human nature as well, from being dependent on a judge for one, to its nature as not a right but a defence invoked in a trial. This essentially means that it needs courage and resources from the defendant, and the most likely defendant, as we have come to see, is in fan fiction's case a vulnerable individual in a marginalized position, as noted by Tushnet.²⁶⁸ In theory, fair use may offer a satisfactory resolution to the situation, however, the effect of fair use in practice, as an effective protection to the marginalized groups that are the practitioners of this fan fiction culture, is unfortunately different and diminished from how it could be theorized to amount to. It is unfortunately no shield to the suppression of fan fiction writers on an individual, practical level, even if the traditional fan fiction culture would in theory seem to fit the category for an exception to copyright. Fair use as an affirmative defence might be unreachable to the marginalized people, and would most certainly be so without collective powerful efforts such as the establishment of OTW. While it is true that case law would “emphasize that copyright owners cannot suppress unwanted interpretations of their works by asserting that such interpretations create unauthorized derivative works”²⁶⁹ – such as Alice Randall's TWDG most notably – in practice, as Tushnet notes, this favourable outcome may not always reach the average fan fiction writer if they receive a frightening cease-and-desist letter²⁷⁰: “When copyright owners aggressively allege infringement, threatening fans with massive civil penalties, fans may naturally choose to shut down or hide their activities rather than stand their ground.”²⁷¹

Additionally, fans have undertaken practical measures in absence of a clear legal precedent with regard to the uncertain position of their craft, whereby they have established their own norms and concepts that define that which makes their works socially acceptable and not immoral or indeed, unfair, which perhaps not so surprisingly can be found to resemble the US fair use principles, according to Tushnet:

²⁶⁸ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 300.

²⁶⁹ Tushnet, Rebecca, “Payment in Credit: Copyright Law and Subcultural Creativity”, p. 142.

²⁷⁰ Examples of which can be found in the Lumen database, e.g. “Harry Potter Adult Fan Fiction” available at: <www.lumendatabase.org/notices/1231#>; and “Harry Potter in the RestrictedSection” available at: <www.lumendatabase.org/notices/1182>.

²⁷¹ Tushnet, Rebecca, “Payment in Credit: Copyright Law and Subcultural Creativity”, p. 142.

“As to the purpose of the use, fans emphasize that their works are not made for profit, and, on the Internet, freely distributed, without even an attempt to recoup the cost of reproduction.”²⁷² Also, *the addition of new material* is crucial in addressing the question of purpose: as Tushnet points out, “a fan writer is both fan and writer; she is a creator in her own right,” adding to this that the “Lockean theory of adding value through labor plays a role in fan concepts of their rights as artists.”²⁷³ This relates to the transformativeness by clarifying how an essential new element is added by fan authors, and the assertion of their right to the interpretation, this transformation, as consumers of the media. As to the market effect, fan-run OTW and AO3 have a special role in terms of their non-profit status, and by choosing AO3 as the platform to which post their fan fiction, the community members make a statement on their allegiance to the traditional, feminine form of the practice.

As mentioned, Tushnet remarks on the possible reason why especially non-commercial fan fiction authors and the copyright holders have not yet met at court: the simple explanation being that only commercial transformative works get litigated due to the simple reason of money.²⁷⁴ Monetary concerns on behalf of both the parties to the issue have effect; on the less privileged side of the conflict a reason with most impact might be that often defendants creating non-profit transformative works cannot afford legal advice, as Tushnet points out.²⁷⁵ It is after all, a practice of women and minorities; it is understandable if one gets scared when they receive threatening cease-and-desist letters from big corporate entities and the vast monetary resources behind their legal department’s regards. Easier solution might be to just acquiesce to the demands in silence.

There is also a remarked difference in practice that can be observed between the fan creators that are women and those who happen to be men (which is a mind-set that can be argued to have been instigated from their upbringing in the patriarchal society through gendered social construct), and it is illustrated by the following comment:

“[I]ntellectual property claims likely chill fan creativity differently for different fans, with a disproportionately chilling effect on fans who belong to

²⁷² Ibid.

²⁷³ Id., p. 143.

²⁷⁴ Tushnet, Rebecca, “My Fair Ladies: Sex, Gender, and Fair Use in Copyright”, p. 300.

²⁷⁵ Ibid.

disadvantaged populations. Rebecca Tushnet (2013) notes that "People who are most likely to create noncommercial remix are disproportionately women, disproportionately minorities of various kinds, and they already feel unwelcome in the larger system, and I can see this in my own practice. When a guy who makes a Stargate remix gets a takedown from YouTube, he writes me, even though we've never met. You know, he finds me, and he says I'm just going to counter-notice. This is fair use. Women, if they find me, then we call—I have a long conversation with them, we talk it over in great detail, and hopefully I convince them that they can counter-notify when they have a valid fair use defense, which by the way is often" (192–93). As discussed below, Sherlockian fandom's early culture of resistance may reflect the powerful socioeconomic status of those early resisters."²⁷⁶

As Betsy Rosenblatt further adds, "[a]lthough current-day generative fandom is sometimes associated with women and marginalized communities who may not have a sense of political efficacy or the financial wherewithal to stand up to threats, that was not the case for the organized Sherlockians of the 1940s," who "were almost exclusively wealthy white men, captains of letters and industry, with ample personal and political resources."²⁷⁷ This is an interesting point where this deviation in which men are the fans instead of women, proves that the subordinate status of women and female craft are real issues in society today, as in the treatment is indeed different between the sexes, and this fact extends to the differing attitudes men and women have become conditioned to adopt in general, and the expectations they assume society offers, or even owes, to them.

Rosenblatt believes that the "relatively recent educational and advocacy efforts by groups like the Organization for Transformative Works, which have educated fans to understand that the creation of noncommercial fan works is legal as a matter of US copyright law, may be a very significant factor in fueling rebellion among modern-day fans."²⁷⁸ Rosenblatt thinks it in terms of fuel for general rebellion, but perhaps the

²⁷⁶ Rosenblatt, Betsy, "The Great Game and the Copyright Villain", note 10; citing source of Tushnet's comment: Tushnet, Rebecca, "Transcript", United States Patent and Trademark Office, Department of Commerce Private Meeting: Copyright Policy, Creativity and Innovation in the Digital Economy, 2013, available at: <www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf>.

²⁷⁷ *Id.*, at [4.3].

²⁷⁸ *Id.*, at [4.2].

expression that works better in the fair use fight is shield to defend the right for existence at the moment. Rosenblatt concentrates specifically on Sherlock fandom in her article, but her statement could be applicable also to the rise of Axanar and the million dollars they weren't afraid to raise to make the fan film.²⁷⁹ In that case, it is again possible to observe how men and women's attitudes might differ in practice. It is interesting to ponder to what extent the circumstances that the gender of the Axanar film maker was male did have an effect to the massive scale of the project clearly deviating from the principles and characteristics of feminine craft. Axanar hardly seems correctly characterized as fan fiction, when this "fan fiction" is meant to be taken to the next level as a movie script with a million dollar budget. It seems fair to say that it is then no longer fan fiction, at least with the parameters this thesis has come to identify with traditional fan fiction as a literary endeavour, although in media Axanar seems to be described as a fan fiction case.

In addition, from the feminist perspective explored in this thesis, a recommendation of practice occurred for the benefit of the right holders on developing sustainable business strategies in connection with the fan fiction phenomenon in the future. An answer to the question of what would then in practice be such a marketing strategy for audience engagement that it could be successful, would be to look at the issue from female viewpoint, taking into account the ideals they hold dear, the feminine traits discussed in this thesis, and respect them and accept the boundaries they set, and continue to be sensitive to gender in dealing with the answering fan engagement that was encouraged. The heightened importance of gender-sensitive, sustainable development of marketing strategies in general today, certainly applies to television networks and Hollywood film studios marketing departments' approach to fan engagement. This kind of strategy could produce positive results, as at the moment it is recognized in fan studies that "the Hollywood studios' market strategies are not the sole, or most crucial, predictors or determinants of audience engagement."²⁸⁰ Therefore, an adjustment to acceptance of the active leading role of fan communities and subsequent sensitive response to the pairings that develop in fan-created content, be the shipping slash or not, is central in terms of continued success.

²⁷⁹ Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017), p. 2.

²⁸⁰ De Kosnik, Abigail et al., "Watching, creating, and archiving: Observations on the quantity and temporality of fannish productivity in online fan fiction archives", p. 146.

On a related side note to this trendsetting notion on a practical level, feminism seems to be responsible also for a kind of ‘fan fiction’ version of the opera *Carmen*, in which the ending has been changed. In a new portrayal of the opera performed in Italy, the female lead does not die by the male’s hand at the end, but saves herself. The ending in this almost 150-year-old opera is now, for the first time, different in response to propensity of violence against women.²⁸¹ As the opera is of considerable age in the framework of copyright there is no issue legally to it, but what makes it notable is the spirit of fan fiction’s feminist rebellion against the authority of the original material that this Italian action shares – art (and other media) should evolve for the better, for the benefit of society. And this certainly poses an encouraging practical example for the possibilities of transformative, feminist future.

4.3 European Perspective and Moral Rights

After examining the applicable concept of copyright exception for fan fiction in the US, which can be identified as the birthplace of fan fiction’s support system, the OTW, as also noted by a French scholar,²⁸² as a contrast the European point of view is presented as well. It offers an interesting counterpoint to the situation of fan fiction and fair use in the US, particularly pertaining to the matter of moral rights absent from the American copyright system.

Lacking similar open-ended copyright exception as the fair use doctrine in the US, Europe has a different starting point to the issue of fan fiction’s legal status; as mentioned, the InfoSoc Directive²⁸³ offers a much more restrictive closed list of exceptions and limitations to copyright than the previously studied US fair use. Also, what this means is that the EU legislation is much more fragmented on this matter, as the relevant law on this subject is only a directive. The situation within EU is then as follows: Member States of the EU all have their own national copyright legislation

²⁸¹ Squires, Nick, “Italy gives world-famous opera *Carmen* a defiant new ending in stand against violence to women”, *The Telegraph* (2 Jan 2018), available at: <www.telegraph.co.uk/news/2018/01/02/italy-gives-world-famous-opera-carmen-defiant-new-ending-stand/>.

²⁸² As mentioned above in the subchapter on transformative works; Benabou Report, p. 13.

²⁸³ 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.

which is only harmonized by the InfoSoc Directive at the EU level. This means that there may be differences at national level between individual Member States when it comes to allowing exceptions and limitations to copyright. Article 5(2)-(3) of the InfoSoc Directive provides the EU's best attempt at something vaguely resembling fair use. It is unfortunately quite conservative on many levels; only a closed list of allowed exceptions, such as use for the purpose of criticism, parody or incidental inclusion but nothing on transformative user-created works generally, and Member States are merely provided with this list of exceptions which they may introduce to their legislations if they so wish, with only one lone technical exception, temporary acts of reproduction, being mandatory. As a result from these solely voluntary actions the exceptions are left highly unharmonized within the EU.²⁸⁴ The individual states of UK, Finland and France have then been chosen here for closer inspection pertaining to fan fiction's status after the collective framework of the situation within EU is addressed.

In terms of the collective situation in the EU, the parody exception²⁸⁵ – noted for example in the Deckmyn²⁸⁶ decision of the Court of Justice of the European Union (CJEU) which merits its own section of examination later – can be identified to have a somewhat notable role in fan fiction's situation, if such an exception is incorporated into national copyright legislation as becomes clear from UK's example later. However, the EU-wide legislation on the subject is weak, as it is in the nature of a directive to leave the decision up to the discretion of the member states, therefore, even if possibility of such exception (for parody) exists, it is not guaranteed individually state-wise. This makes the already conservative list even more restrictive; even the listed exceptions might not be allowed, and the closed nature of the list further means that only the items disclosed are possible exceptions. For example, Finland has no specific parody exception, but the UK recently adopted such legislation which can be interpreted to offer protection covering fan fiction as well. The French legislation does recognize parody, however, the right to integrity, as in moral rights of the author, can prove problematic in a case such as fan fiction. These issues are later addressed in more detail.

²⁸⁴ MacQueen & al., *Contemporary Intellectual Property*, 2010, p. 174.

²⁸⁵ InfoSoc Directive, Article 5(3)(k).

²⁸⁶ Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others [3 Sep 2014].

The attitude towards copyright in continental Europe has a different foundation philosophically and morally than the utilitarian approach of the US, and the fact becomes quickly evident when considering that even the terminology for the notion sounds completely different; *droit d'auteur* (or *tekijänoikeus* in Finnish) literally means the polar opposite of *copyright* – right of the author, and not the right to copy. I strongly connect this distinction emphasizing author's rights to the concept of strong moral rights – the association of *droit d'auteur* and *droit moral* seem a natural consequence.

This more restrictive stand can also be observed in the actions of the CJEU in the infamous *Infopaq* case where it was considered that an excerpt of mere eleven consecutive words from the original work could be able to constitute reproduction, “if that extract contains an element of the work which, as such, expresses the author's own intellectual creation.”²⁸⁷ This decision encapsulates the will on part of the CJEU to ensure the interests of the right holders according to the customarily strong *droit d'auteur* legacy. Some might even consider this perhaps a tad over-protecting the right holders' interest. (As the *Infopaq* decision has proved, the CJEU can also create legal uncertainty, for with fair use is often accused, for common people since it can seem outlandish for an ordinary person to consider that an excerpt of only 11 words of the original work would be able to constitute infringement to copyright.)

This certainly illustrates the challenging starting point for considering the status of fan fiction in Europe, and how against this particular backdrop defending the legal standing becomes harder – a different situation altogether without the flexible and liberating fair use. The current EU legislation on copyright exceptions, the 2001 *InfoSoc Directive*, is admittedly, even by the EU Commission itself, out-of-date, and many have indeed argued for a more flexible, fair use type of solution to the dilemma, user-created works being only one of many issues which would demand an appropriate address and resolution.²⁸⁸ In fact, need for reform is inevitable and it has already been long-awaited, especially as it relates to user-created content – or more appropriately here; fan-created content – where the European legislation lags badly behind in an international context.²⁸⁹ Fan fiction along with other kinds of fan works represent only

²⁸⁷ Case C-5/08 *Infopaq Int'l A/S v. Danske Dagblades Forening* [19 July 2009], at 48.

²⁸⁸ See e.g. Hugenholtz, P.B. & Senftleben, M.R.F., “Fair Use in Europe: In Search of Flexibilities.”

²⁸⁹ See e.g. the new Canadian legislation on user-generated content as exception to copyright.

one genre of user-generated content and transformative art which forms one of the concrete examples of why, in EU, a more fair use type of flexible interpretation would be needed – because its existence is certainly put in jeopardy under the existing rules on copyright exceptions.

As ten years is a long time to wait for the once promised change, in the continued absence of an EU-wide, specific copyright exception for transformative user-created works (or ‘creative, transformative or derivative works’) called for in the Gowers Review,²⁹⁰ the UK apparently decided to try to solve the issue by itself, and opted for the route of new parody legislation, perhaps in order to offer protection to works such as fan fiction. As also briefly mentioned above, as contrast, Finland appears to have no such legislation for protection of parodies. Indeed, it seems that some do not see the need for any such special new legislation, as agreed by panellists in a recent discussion on fan fiction.²⁹¹ I find it is worrisome that in Finland the discussion around fan fiction has turned on the conviction that it does not need legislative protection but that the situation should be left up to private conversations between right holders and fans and that the tensions will eventually be resolved in such manner, even though the most crucial fan fiction depicting socio-politically hot-button issues – which is often written by minorities, for minorities even – could in this fashion be left vulnerable, as demonstrated in the US case involving *The Wind Done Gone* novel, and the contrasting CJEU decision on *Deckmyn*. This is an issue which warrants further discussion in the next instalment addressing the issue of moral rights, but first a quick look inside the situations in UK as well as Finland, and then in France, the European country of which strong legacy of *droit d’auteur* and moral rights will ease us into the subject.

Finland being the only one of the three to not have an explicit exception for parodies, means that fan-created content involving Finnish copyright is particularly vulnerable.

²⁹⁰ For example, Hugenholtz and Senftleben write: “Already in 2006 the Gowers Review in the United Kingdom recommended that an exception be created for ‘creative, transformative or derivative works’ (particularly in the context of user-generated content),” and how “[i]n 2008 the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy,” in “Fair Use in Europe: In Search of Flexibilities”, p. 4.

²⁹¹ Transcription of which (“Faniien tuottamat tekstit ja tekijänoikeus” – Fan-created texts and copyright) is available in Finnish on the website of IPR University Center Association’s IPRinfo (10 May 2016) at: <www.iprinfo.com/verkkolehti/kaikki_artikkelit/2016/2_2016/fi_FI/fanien_tuottamat_tekstit_ja_tekija_noikeus/>.

For example, in YouTube, fanvids of Moomins can go missing; perhaps especially those titled “Yksinäiset vuoret” (translating to Lonely Mountains), “Brokeback Mountain”²⁹² themed series of fanvids depicting Moomintroll and Snufkin in a homoerotic light – evolving into even more comprehensive LGBTQAI light as the story progresses in the vidseries given Snufkin’s personal transformation as a transgender individual – most of which are unfortunately no longer available due to copyright claims.²⁹³ (Although, the ironic element to this – if the primary reason for demand of deletion actually was in the unconventional romantic relationship – would be the fact that the original creator of Moomins, Tove Jansson, was decidedly non-heterosexual, and incorporated her same-sex partners innocently into her stories as characters – however she did not include explicit LGBTQAI issues into the material and the animated series certainly did not.) These missing Moomins of YouTube highlight the difference the US-specific concept of fair use can make in comparison – the real impact it could have in practice in a situation such as this if you could invoke it; by daring to make a counter-claim to YouTube, a fan can get their transformative work reinstated if the work concerns US copyright. These fanvids, in my opinion, were of such a quality that they would have fulfilled the definition of parody.

Within the EU, in the (at the moment still a Member State) UK, however, new parody addition “The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014” now gives official protection to parodies as a legally recognized exception to copyright, explicitly stating: “Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.”²⁹⁴ It can even be interpreted to extend the protection of parody to cover fan fiction as well, as noted by Susan Hall in her website.²⁹⁵ While the continental Europe’s strong perceptions of *droit d’auteur* and *droit moral* still continue to struggle with this phenomenon, this common law country in Europe adopted legislation which seems to allow the possibility of fan fiction as a legal concept since 2014. Hall’s views are presented in this thesis as she addresses this issue in her role as a practicing IP lawyer seeing (and thus confirming

²⁹² The 2005 LGBTQAI-themed film by Ang Lee (IMDb: <www.imdb.com/title/tt0388795/>).

²⁹³ See the (almost empty, save for one vid) YouTube account for “Yksinäiset Vuoret” at: <www.youtube.com/playlist?list=PLG6BhYJLreVyaVAan3xpHf1QaC4xIJGVY>.

²⁹⁴ 2014 No. 2356 Regulation 5, available at: <www.legislation.gov.uk/uksi/2014/2356/regulation/5/made>.

²⁹⁵ Hall, Susan, IP/ICT Lawyer, “Parody, Caricature and Pastiche – Copyright and Commonsense Part II” (11 Apr 2014), available at: <<http://susanhall.shoesforindustry.net/articles/caricature-and-pastiche>>.

the possibility) that this relatively new parody and fair dealing legislation could be interpreted as pro-fan fiction; she opines that based on this parody exception, “it should be possible to say that the majority of fanworks are legal in the UK,” due to her view that much of fan-created content can be categorized as such.²⁹⁶ Specifically, she comments that:

“Issues which will arise will come down to definitions; specifically what “fair dealing” means. Crucially, it does not exclude publications motivated by profit altogether, though works which take unfair advantage of the original or which affect the original's commercial viability are less likely to pass the test. Fair dealing's limits may be tested on issues such as sexually explicit material (a popular topic of fanfic) and also on differences between the political stance of an underlying work's author and those of parody creators.”²⁹⁷

Thus, the issues she raises are the same pondered upon in this thesis, namely the sexual and possibly homoerotic content in fan fiction which would go against author's rights. Hall is, nonetheless, pleased with the efforts of the UK on this sector, pointing out that “in principle the new regulation is fair, balanced and wholly welcome -- a rare statement indeed in the field of law reform,” and adds of parody thusly: “Parody is an essential human communication tool. It can subvert not merely the original work on which the parody is based, but the attitudes behind it, not necessarily for comic effect.”²⁹⁸ This feels an apt characterization of parody's nature, especially the addition of the non-necessary aspect of comic relief. It also seems to be in conflict with the interpretation the CJEU ruled true in *Deckmyn* almost at this same time, in 2014, where it seemed to underline the humorous element as well as author's rights. Implications of the *Deckmyn* decision and the question of the execution of mocking in humorous terms in parody are addressed after the next instalment regarding fan fiction in France.

However, before jumping over the canal to French territory, an interesting additional angle to this parody exception in the UK must be explored. Emily Hudson brings up the forgotten category of pastiche existing in the wording of this UK legislation, the content of which was lifted from the InfoSoc Directive offering for the possibility of such exception, and she presents pastiche as the more flexible solution to fit a broader

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

variety of works, fan fiction included, perhaps better than the now harmonized definition for parody would allow.²⁹⁹ This is an interesting assertion. However, the everyday meaning that the CJEU would search for pastiche if it come up for a decision, could bring trouble if interpreted narrowly.

The variety of definitions for pastiche are presented by Hudson, some promising from the point of view of fan fiction as well, but if the everyday meaning is considered more in line with an average dictionary meanings for pastiche, instead of the deeper analyzing ones, pastiche runs the risk of hitting a wall similar to parody. While these deeper analyzing definitions immersed into the artistic world and its practices do see the meaning of pastiche along the lines of elastic imitation (according to Richard Dyer, “a kind of imitation that you are meant to know is an imitation” as noted by Hudson³⁰⁰), on the other hand, a strict Oxford Dictionary definition refers to imitating the *style* of a work, and the definition for style then being a *manner*; a way of writing in this case.³⁰¹ This would exclude any fan fiction that would not rise to the level of the original, published author’s writing. Although some fan fiction is of high quality and even reaches for that exact goal of imitating the writing style of literary source material, there are also many young (or why not also older) writers who are just starting to learn the art of writing and cannot yet aspire to the level of practiced writers. The defining feature of fan fiction community after all being the characteristic of a safe space, a playfield for mainly amateur writers to come together and create on their own terms.

What I find especially engaging of Hudson’s account of pastiche in general, is its mainly overlooked, forgotten or invisible, status alongside the often referenced parody – this status evidenced, for example, in Hudson noting that “the Gowers Review used the word “pastiche” only three times in its 142-page final report, being in the text of the proposed reform.”³⁰² This is an image that strongly reflects the topic of this thesis; the parallel can be drawn to the subordinate status of women and fan fiction. It would thus be appropriately fitting – the words poetic justice do come to mind – if fan fiction could seek shelter in pastiche as Hudson posits.

²⁹⁹ Hudson, Emily, “The pastiche exception in copyright law: a case of mashed-up drafting?” (2017).

³⁰⁰ Id., p. 350.

³⁰¹ Oxford Dictionary on *pastiche*, available online at:

<<https://en.oxforddictionaries.com/definition/pastiche>>; and on *style*, available online at:

<<https://en.oxforddictionaries.com/definition/style>>.

³⁰² Hudson, Emily, “The pastiche exception in copyright law: a case of mashed-up drafting?”, p. 352.

However, the similarly complicated nature of the definition of pastiche and its usual simplification – for example by the IPO as noted by Hudson³⁰³ – in legal context where its place is underneath parody, could constitute an obstacle. Although Hudson claims that the ordinary meaning would indeed be broad and thus allow a range of imitation, this might not be clear to all even though Deckmyn decision does have positive influence in this context.³⁰⁴ It is still possible that the varying definition could be the downfall of this line of argumentation in favor of fan fiction’s legality as a pastiche, if the everyday understanding of pastiche is either dismissed as an insignificant variant under parody (such as the example of IPO³⁰⁵) or the literal meaning of pastiche is derived from the dictionary form implicating the imitation of a particular style of writing, to which all the fan fiction writers cannot (yet) hope, or indeed want, to aspire. Some might want to consciously depart from the style, as rewriting is the form of rebellion. However, on the other hand, some fan fiction would fit well the second dictionary definition of describing a sort of *mélange* – something that is referred to as ‘crossovers’ in the world of fan fiction, a subgenre in which for example characters of one work are placed in the universe of another work to mix the story up in a new way.

In the end, it comes down to details of definition, and the additional trouble with fan fiction is that it all won’t fit into one neat category of dimensions. If, however, the very much broader definition for imitation as pastiche could become reality as Hudson assumes, pastiche would indeed transcend the US transformativeness and even the need for an additional exception for user-created works in its elegant simplicity. The fandom culture does have a strong cohesive basis and established norms around the boundaries of their activity in engaging with the popular media texts through generally acknowledged consensus, a fact which would speak for itself if the definition of pastiche would come to cover recognized artistic imitative practices as indicated by Dyer, a belief echoed through Hudson.³⁰⁶

Moving back to the more known category of parody, the official UK report observed on the subject of parodies in other jurisdictions, how, for example, in France: “L 122-5 of

³⁰³ Id., p. 351.

³⁰⁴ Id., p. 355.

³⁰⁵ Id., p. 351.

³⁰⁶ Id., p. 363.

the French Intellectual Property Code 1992 recognises a right to parody, pastiche or caricature”, and the custom is that a “[h]umorous, and ‘substantial transformation/modification of a copyright work’ devoid of the intention to harm the legitimate author (financially or morally)” can be protected as such even if it is of a commercial nature, however, “[t]he parodied work should not exploit the fame of the original work in order to reach its audience.”³⁰⁷ The added element of a transformative alteration’s “morally” harming nature to the author of the source material being a deterrent to its exception, could essentially mean that the artistic integrity could possibly be hurt by sexually explicit and homoerotic content of fan fiction such as slash. In correspondence, CJEU’s decision in Deckmyn case concerning interpretation of parody within EU puts further restraints on parody exceptions in individual member states which seems to correlate with this *droit d’auteur*-heavy outlook emphasizing author’s rights.

It is no wonder then, how the practical effect is observed by Emmanuelle Debats who comments the situation of fan fiction in Europe and France in an interview with the OTW as she sees it in her role as a film maker-documentarist interested in the phenomenon of fan-created works.³⁰⁸ She sees that in Europe the practice is generally seen as an illegal activity through the eyes of European ideology, and feels the “huge difference” the US fair use concept can make by commenting how “[i]t allows collective intelligence to live and to produce structures like OTW.”³⁰⁹ Of the situation in France, she continues:

“In France, we are living in the most hypocritical time. If you take a French canon, only licensing would give you any right for creativity around this canon, and nothing else must exist. Fanworks are taken down from Facebook pages: for instance you cannot see “Un faux Graphiste” works on Tintin anymore. The fact that European Members of the Parliament get in contact only with right-holders is very alarming. The law should provide shelter to the weakest, the amateur, or the young, the not self-confident ones, and it does not. I hope some day transformative works are protected by our law.”³¹⁰

³⁰⁷ Mendis, Dinusha & Kretschmer, Martin, “The Treatment of Parodies under Copyright Law in Seven Jurisdictions”, p. 8.

³⁰⁸ OTW, “Guest Post: Emmanuelle Debats” (15 May 2016), available at: <www.transformativeworks.org/guest-post-emmanuelle-debats/>.

³⁰⁹ Ibid.

³¹⁰ Ibid.

The commented disappearance of French fan-created works online matches the observations made in this thesis in connection with Finnish ones, such as the mentioned example of Moomintroll/Snufkin fanvids taken down from YouTube.

The stronghold of *droit d'auteur*, France, has, however, opened the possibility of acknowledging transformative works. A kind of transformativeness, however in a fairly diminished role in comparison, is already acknowledged as a feature in their parody legislation as noted by research in the UK, but a recent commissioned report has addressed transformative work, specifically, as the concept is understood in the US to cover fan-created content, as well. There have been two relevant reports commissioned by an advisory body to the French government, first of which is a report by Pierre Lescure generally on cultural exceptions, which made no specific mention of fan fiction but did remark the precarious legal status of transformative works to be an issue of importance as their protection was weak, practically non-existent, at present under the French legislation on parodies.³¹¹ A fact that has become painfully apparent; first, as the wording remarked upon by the previous UK review does strongly indicate, and secondly, as do the effects in practice. The Lescure Report thus reaffirms Debats' observations. However, this French assertion seems to be in conflict with the assumption that fan fiction in UK could be secured by means of the new parody exception there. The difference seems to be in the simpler wording and the existence of fair dealing in the UK, which resembles fair use in the US, therefore it leads to highlighting that common law feature against the continental ethos emphasizing author in *droit d'auteur*.

The subsequent report on transformative works – ‘œuvres transformatives’ – by Valérie Laure Benabou, however, does mention fan fiction (‘la fan-fiction’) in particular.³¹² Confirmed by Benabou, a notable conflicting issue against these transformative works in French copyright law is the subject of moral rights, and particularly the author's right to integrity which protects the original work against unwanted alterations.³¹³ It is

³¹¹ Lescure, Pierre, “Contribution aux politiques culturelles à l'ère numérique – Tome 1” (Lescure Report), p. 36.

³¹² Benabou, Valérie Laure, “Rapport de la mission du CSPLA sur les ‘œuvres transformatives’” (Benabou Report), pp. 10-12. (English translation of the core content of the Benabou Report available also through the “IPKat”'s blogpost: <ipkitten.blogspot.fi/2014/10/french-ip-professor-publishes-report-on.html>.)

³¹³ Benabou Report, p. 36.

recognized that the tightly attached role of *droit moral* in these adaptation cases can prove troublesome on a practical level.³¹⁴ This is true as seen above from Debats' observations in practice the reality for French fan-creators is stark. As the debate regarding transformative works, and thus any possibility for future change, stays only on an academic level yet, at the moment the practical effect is that fan-created works such as fan fiction are in jeopardy without the support of a safety-net such as the US fair use. The consequence is that the existence of those works online is up to right holders, as acknowledged by Benabou, due to the right to integrity.³¹⁵

In general, Benabou refers to transformative works, such as the fan fiction practice, as an ancient phenomenon (re)discovered, and also points out how the philosophical notion of transformation as creation does not, however, sit well with the law.³¹⁶ This, as explored in this thesis, seems to be true of copyright in any given country, therefore making the feminist legal critique universally crucial in this aspect. This recognition of the ancient roots of the practice underlines the normalness of this disposition, and how ultimately unnatural its inhibition by means of copyright would be, as it would go against the creativity in human nature and the very character of creativity.³¹⁷ These remarks echo and support the views presented in this thesis of the problematic nature of copyright's core concepts, how they are constructed, understood, and applied, affecting negatively especially crafts that have (silent) feminine undertones.

Despite the mentioned ancient roots, according to Benabou, copyright law in France, especially, is notably clumsy in its efforts to grasp the notion of transformativeness in a creative work.³¹⁸ The English language blogpost on the subject comments that “[t]he strong French *droit moral* may be the reason why French IP law did not establish a stronger transformative works regime,” also adding that “French copyright is author-centric, and posits an intimate relationship between the author and his work.”³¹⁹ Thus possibly confirmed are the earlier suspicions, presented in connection with the

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Id., p. 2.

³¹⁷ This is a reasoning shared by many, e.g. OTW and also Susan Hall writes in her website: “fanfiction goes back arguably into prehistory (there are strong arguments that *The Aeneid* is *Iliad* fanfiction).”

³¹⁸ Benabou Report, p. 59.

³¹⁹ The “IPKat”’s blogpost “French IP Professor Publishes Report on Transformative Works” (9 Oct 2014), available at: <ipkitten.blogspot.fi/2014/10/french-ip-professor-publishes-report-on.html>.

comparison of the situation in the UK, as well as the connection between the moral rights and emphasis on author in *droit d'auteur*. Benabou herself states in the report that *droit auteur* in France is indeed characterized by this familial relationship, the right to paternity³²⁰ – the relationship that has been criticized by legal feminists such as Carys Craig for its patriarchal possessiveness and extensively addressed in this thesis. It is observed by Benabou as well how the transformative creative practices rattle the cage established by this concept of paternity, which along with the moral right of integrity, however, constitute an inalienable component of French copyright.³²¹

However, interestingly, with regard to this moral rights issue, Benabou states that the role of moral rights' chilling effect on transformative works is commonly overestimated.³²² It is apparently erroneous to surmise thus, the impression this thesis author is guilty of as well. The core doctrine imprinted upon by Benabou's report is the notion that as concepts, fair use and *droit moral* are similar in a sense that they are both a defence at nature, to be invoked at trial – admittedly, on opposite sides, but defences all the same.³²³ However, the feared suppression can indeed – in my opinion, easily – apply if the author takes issue with the content of a transformative work and proceeds to sue – or simply threatens to sue with this moral right to integrity on their side, be it strictly speaking a defence or not. The practical effect of suppression is the same, and it is likely to apply to the mentioned popular subgenres of slash and sexually explicit fan fiction favoured by the women fans for various reasons, one of which highlighted by this thesis is seeking equality, unconsciously or consciously, through these stories written by women for women, exclusively without the intermediary interference of men. And unconsciously, or consciously, the current French law is thus complicit in this suppression.

Benabou also refers to Emmanuelle (Wielinsky-)Debats' expertise on fan fiction matters within Europe, and states in her report that apparently French language fan fiction only makes about 5 % of all of the stories online.³²⁴ The remarked dominance of English language fan fiction and also the apparent majority of the popular culture source material connecting to Hollywood and US-based media in general, puts the

³²⁰ Benabou Report, p. 5.

³²¹ Ibid.

³²² Id., p. 41.

³²³ Ibid.

³²⁴ Id., p. 12.

American copyright system on centre stage at the moment, and possibly in the future as well, taking into account the internationalization aspect of the internet bringing all the people together, and the position currently held by the English language in the world and especially on the internet at large, considering the defining feature of this phenomenon of fan fiction today being the practice's online nature. Thus, Europe of course, has its share of the fan fiction issue as well, and the EU should feel the responsibility to act on its protection, but the bulk of the issue seems to lay in the US, in the hands of the American officials and the interpretation of fair use.

In a discussion comparing American and European situations, moral rights inevitably become part of the equation when a case involves transformative works such as fan fiction, and thus entering the realm of moral rights through France, it seems true that they pose an obstacle for transformative works particularly in the continental Europe. As we now know, transformative work as a concept originated in the US and rose to wide-spread use there, addressing fan-created content as well, but has since spread even internationally as an idea of an accurate description, as the aforementioned French copyright report exemplifies.

The discussion so far has mostly emphasized the Anglo-American perspective on theoretical criticism as well as practical application. What has been lacking on the prior analysis and discussion before the situation of France is the moral right angle since that part of copyright is not recognized in the US system. The European authors have a strong counter-argument in the form of their moral rights to their works against that of users' free expression that they exercise in their fan-created content such as fan fiction. In the US, however, albeit what the Berne Convention would stipulate, moral rights are not fully protected; "[t]he only moral rights-specific legislation in the U.S. is limited to a narrowly-defined class of 'works of visual art.'"³²⁵

If the authors in countries with strong moral rights recognition were not happy with the direction that fan fiction would be taking, for example in the case of slash fiction depicting their characters as homosexuals, they could rely on their moral rights in how those characters of their own creation would be portrayed over fans' free expression, and thus forbid them from using their characters in that light if they thought homosexuality somehow tarnishing, and use the argument of for example George R.R.

³²⁵ Ginsburg, Jane C., "Overview of Copyright Law", p. 14; 17 USC §§ 101, 106A.

Martin (of *A Song of Ice and Fire*) and order the outside-creators to come up with their own characters and worlds rather than using theirs.³²⁶ Against this, there is the argument of the important societal impact of how representation in the popular media matters and how it is imperative to raise discussion and visibility of feminist and LGBTQAI matters, or even important normalization of mental health issues, within the parameters of existing dominant popular media. However, pertaining to derivative and transformative works, the author's right to integrity of the work, featured at the French analysis, is particularly strong. As an example of the European situation, it is present in Finland as well, where the legislation provides for moral rights, as the Finnish copyright law (§ 3) includes the phrasing that the work should not be altered in a way that would offend the author's literary or artistic value and integrity, nor should it be available to public in those offending terms in any form or association. This means that the original author has broad basis for suppression if they so choose.

The fact that the issue of moral rights is much more central when it comes to European fan fiction, is a natural consequence due to the different ideologies as a driving force on intellectual property regimes in continental Europe and the US. An indication of the strength of the general atmosphere of *droit d'auteur*, as in emphasis on the rights of the original author, within European thinking, is provided in the EU level by the CJEU in Deckmyn decision. However, actual moral rights should not feature in CJEU's decision; the advocate general's Deckmyn opinion points out that the question of moral rights should not be addressed, as the Directive does not cover those, thus leaving "the decision as to whether or not there has been an infringement of moral rights" to national court's discretion.³²⁷ However, it is important to note here that according to the decision of CJEU, an exception or no in national legislation, parody's interpretation should be uniform within the EU.³²⁸ This means that the effect of the CJEU's decision reaches, for example, the UK and their parody legislation as well (for the moment at least), and one of parody's defining features according to "everyday language" is, apparently, "to constitute an expression of humour or mockery."³²⁹ This might pose a problem in fan fiction's case because this trait does not fit all of fan fiction, as there is

³²⁶ Johnson, Brittany, "Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law", p. 1645.

³²⁷ Case C-201/13, Opinion of Advocate General Cruz Villalon (of 22 May 2014), at 28.

³²⁸ Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others [3 Sep 2014], at 15-16.

³²⁹ *Id.*, at 20.

no distinct ridicule or humorous elements in all of the stories. This awakens variety of questions. What is the everyday meaning of mockery, then? Can it even cover a broader interpretation within its meaning, regarding serious criticism, as the US court was willing to see in the case involving Alice Randall's *The Wind Done Gone*, which ended up having parodic implications for subgenres slash and Mary Sue? However, to soothe some concerns, there are other statements made by the court pointing in favour of fan fiction; the object of possible critique does not need to be the source material, whereby some fan fiction generally critiquing social constructs seems acceptable, and even though attribution is not even required,³³⁰ fan fiction often does so.

However, worryingly, the court states that if the parody connects “a discriminatory message” to the original work,³³¹ then the right holders will have “a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.”³³² Thus, according to CJEU, author's rights should account in case of a parody as well, with moral implications taken into consideration, which puts perhaps overt emphasis on author's rights when in this case the moral rights should have been removed from the issue altogether. The court also notes before this point, that “[i]t is not disputed that parody is an appropriate way to express an opinion,”³³³ which seems in ironic contradiction to the above interpretation. This of course possibly puts further strain on the issue of fan fiction as well. Essentially, this controversial EU-level decision is not encouraging for freedom of addressing social or political issues through parodies if their content could be in conflict with author's rights or views. Additionally, this decision might also increase the cause for fear of abuse of power by the right holders.

If in Alice Randall's case³³⁴ the US court was willing for broad interpretation as to parodic qualities, the usual of which is clear ridicule, and saw the criticism present in Randall's *TWDG* as appropriate parody, also taking into consideration the homophobic attitude of the plaintiff and discarding it in favour of Randall's fair use, the situation seems the opposite in the EU according to the high court's *Deckmyn* decision. Officially, the moral rights of the author are up to national interpretation, but what CJEU in *Deckmyn* implicates, is that in EU-wide interpretation, they might still

³³⁰ *Id.*, at 21.

³³¹ *Id.*, at 29.

³³² *Id.*, at 31.

³³³ *Id.*, p. 25.

³³⁴ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

significantly complicate the situation for parodic fan fiction. (Of course, if the UK does 'brexit', for fan fiction it might mean positive separation from these particular continental ideals of the EU.)

Thus, even if national legislation would adopt the widest possible parody exception allowed by the InfoSoc Directive, there are other means that can restrict their protective reach, if any future changes do not appear at the EU level. The effect of the parody clause in the InfoSoc list is minimal in a grander scale, and in addition, the CJEU's definition of parody is binding case-law which affects the interpretation in all the member states with their possible parody exceptions, such as UK's relatively new one, in a restrictive light. Even if France would be ready to extend the scope of their parody legislation with regard to the transformative work analysis – which they do not seem keen on, in the end, as Benabou comments no need for legislative intervention pertaining to their parody exception³³⁵ – national legislation may not exceed the directions the EU appoints. With the current parameters, exception as parody may not offer adequate protection to practices such as fan fiction.

Parody in Europe has not the same legal standing as parody in the US due to fair use. It was clear from the start that possible parody exception within EU offered in InfoSoc could not be equated with the reach of the US fair use in its protective quality, but it is not only inadequate in that there is no EU-wide guarantee and security, but also on the level that author's moral rights in Europe are seemingly above, practically superior, to parodies as an exception to copyright. Even though Deckmyn decision does not address moral rights per se, but they seem to anyways be implicated in the court's emphasis on author's rights against a parody that could in a some quite vague 'discriminatory' sense offend them, which could be compared to the moral right of integrity where essentially the author retains the right to not have their work distorted by a derivative work. From a low-protectionist, feminist angle, based on the above feminist legal critique celebrating low-barriers approach to copyright and thus fair use in practice, as in exceptions to copyright in general, this direction is a dark one. If the conclusion is that France is complicit in suppression of this female practice, then so is everyone else at the EU level in their inaction towards transformative works.

³³⁵ Benabou Report p. 82.

The strong concept of moral rights of the author in Europe can indeed cause complications and conflicts. Coming back to the US case involving Randall's TWDG novel, it is a particular example of the difficulties that this issue can bring forth; in particular, this case articulates such situation where the interest of the right holder clashes with that of the society. Essentially the conflict in the case can be portrayed in terms of homophobia hiding behind copyright versus public benefit of raising awareness. Obviously, the socially benefitting function should in cases like the Suntrust case weigh more than homophobic right holder's authority. At least in cases such as this situation, the US system allows a better outcome with fair use. In Europe, authors equipped with strong moral rights seem to have the option of rejecting uncomfortable derivative works since the EU has not stepped up with new copyright legislation.

I find that the endangered status of fan fiction, slash in particular along with (other) sexually explicit fan fiction, for the various reasons previously explored, presents an issue of such magnitude, that it necessitates feminist intervention at the level of society for ensuring their protection in the name of equality. The existence of this female practice cannot be left up to private negotiations between right holders and fan fiction writers without support, as some deem fit to suggest, when it could lead to private censure of minority cultures. To conclude, what remains clear, is that both the American as well as the European jurisdictions would greatly benefit from an applied feminist perspective. The main instrument of this thesis, which was the feminist legal theory in criticizing the existing masculine values present in the copyright system enabling the current precarious situation for fan fiction as well as other such practices that are characterized by feminine traits, should also be recognized as a crucial element in future developments.

In terms of moral rights, their partial acknowledgement within the world of fan fiction should not go without remark in this chapter exploring the European perspective. Moral rights are far from being completely absent within the strong ethics of fan fiction community; in fact, the moral right of attribution has been remarked by Tushnet to have its place among fandom – indeed, it has a high ranking of importance in practice.³³⁶ Thus, respect is not at all an unfamiliar concept within fan fiction culture, as this custom of honouring moral right of attribution shows, but it is not considered to have such a high ground as to entirely overrule a fan's right to their own

³³⁶ Tushnet, Rebecca, "Payment in Credit: Copyright Law and Subcultural Creativity", p. 137.

interpretations. The concept of distortion, however, is a bit of a challenge when it comes to fandom, as noted by Tushnet: “protection against distortion conflicts with much fan creative activity.”³³⁷ Within the context of moral rights present in European copyright, this would translate to the previously mentioned author’s right for respect as to the integrity of the work.

On this subject, Tushnet points out that “attribution rights are far less disruptive to ordinary interpretive practices than other kinds of moral rights.”³³⁸ Thus, offering fan fiction writers a way of “giving authors their just due, but no more than their just due.”³³⁹ This demonstrates a different kind of integrity, this time on the part of the fan-creators, to respect the original author as best they can while also being determinate on their fandom endeavours.

Even if the ethical standard within fan fiction community would not necessitate it, crediting the original author for the source material that inspired their interpretations of said text, would be an act of respect easily afforded as a concession to soothe any (misplaced) paternal leanings of the authorial figureheads of patriarchal authority. Contrary to current practice, perhaps this formal act of attribution, as in acknowledgment of original authorship in disclaimers in fan fiction, should be considered as the extent to which it would be reasonable to honor the patriarchal ownership ideals. Could it be acceptable, so as to not go overboard with paternal protectiveness, to satisfy the authority of authors as creators with (mere) attribution, which would still allow room for consumers of the media in question to exercise their interpretative rights of further creative development for the benefit if us all, to simply acquiesce to a lesser influence in the transformative stage of the life of a work, and content oneself with a lighter version of this concept of moral rights in case of fan-created content?

As the status of fan fiction remains uncertain, the future research and advocacy on this field is critical – the fate of fan fiction hangs in the balance. Many areas would call further scrutiny, such as the issue of European fan fiction in detail. This could mean a more in-depth study of individual states’ legislation and cases on copyright exceptions

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

such as parody, and the *droit moral* conflict, and the chances for future development of EU-level action, either in the form of at least successfully including a specific exception for user-created transformative works to the directive, or introducing further harmonization of copyright legislation in the form of a regulation for exception for parodies, or even user-created content, to cover all the member states. Also, the additional trademark angle involving fan fiction with a commercial element would offer interesting further possibilities for future research. In addition, there is also much interdisciplinary critique of copyright other than feminist legal theory pertaining to fan fiction's situation which could be explored further to complement this study, as well as the idea-expression dichotomy and the complicated character protection cases that leads to in the US and its concomitant feminist legal critique.

The multifaceted nature of fan fiction causes manifold conclusive thoughts. Unfortunately it seems that a copyright exception on the basis of parody cannot guarantee protection to fan fiction collectively, only the ones with discernible socio-political critique in them, such as slash and Mary Sue, however, even those can have possibly inflammatory ingredients such as sexually explicit and homoerotic content which may put them in danger. Transformative nature in a fair use analysis in the US is what can be considered the only way to protect fan fiction in more collective terms. --- Within the borders of the EU, the situation amidst strong author's rights is dire; if the EU does nothing, the closed nature of the list of exceptions and limitations in the current directive means, that none of the member states individually can change the status quo. Although even within transformative use in the US, the possibility exists of a risk of false socially constructed norms affecting the outcome of a judgement of transformative element if the work is charged with feminist ideas of male, instead of female, sexualization. In collective terms fan fiction thus universally faces challenges from various directions. Fan fiction is indeed an extremely difficult case with its dimensions that confound the accepted norms of patriarchy which extend to govern also the realm of copyright law. Only by embracing equality in copyright through internalizing the insights of feminist legal theory and acting on them, fan fiction may thrive as a legally protected practice in the future.

5 CONCLUSION

The copyright issue in fan fiction is examined through a feminist lens in this thesis. Thanks to the efforts of feminist activists of the past, overt gender discrimination is now recognized as a real issue that plaques the society, however, the kinds of gender discrimination still present today are perhaps even more insidious, hiding silently within the structures, largely without detection due to conditioning effect. One such structure is the copyright system into which patriarchal concepts have been forgotten, so that they have taken root. These structural issues cause harm to feminine creative expressions, one of which is the fan fiction practice that balances on a knife's edge uncertain of the future. However, characterized by a rebellious spirit of minorities who yearn to rewrite popular narratives in search of proper representation, this phenomenon which is practically bursting with resilient feminist intent, is not going to be repressed too easily, despite efforts of interruption.

Feminist legal theory offered an important tool to help explain the foundations of this issue by criticizing the existing masculine values present in the copyright system which enable the current uncertain situation for fan fiction and other such practices which can be characterized as representing feminine values. These distinct features of fan fiction culture, such as collaboration and free sharing, are at odds with the defining concepts of copyright, namely Romantic authorship as the originality requirement and the utilitarian approach regarding economic incentive as essential in securing the existence of creative works. The strong patriarchal ownership ideals with respect to the metaphorically familial bond between author-parent and the work-progeny, in particular, adversely affect the acceptance of derivative works, such as highly transformational fan fiction. In the absence of a complete reform of the system, fair use is presented as a corrective measure from a feminist viewpoint, whereby the argument for fan fiction as fair use becomes a point of equality.

Fair use, in effect, should be able to protect fan fiction, however, in practice, the feminine nature of fan fiction as a craft of women and minorities, can create a situation in which fair use cannot properly protect the practice from suppression. In a world that unfortunately at the moment resembles only a dream of utopia, feminine creative practices such as fan fiction would be better considered in copyright legislative practices. However, until this utopia is within reach, fair use must act as the defensive shield against overarching protectiveness and enforcement from copyright holders'

side. In a grander scale, it seems that the US fair use can do a better job of making sure there is room still for fan-created content to flourish, than the lingering, slightly oppressive environment in Europe, where the harmonization of EU copyright legislation seems to lag behind for the detriment of fan fiction and other transformative user-created content in a level beyond state-lines. Even moral rights do not prove a complete barrier against such practices, as fan fiction culture respects the moral right of attribution in acknowledging the authorship of the original material, which inspired their interpretations of the text, if this show of attribution could be considered sufficient.

Fan fiction may be an issue that many on the outside might not consider especially important. However, once familiarizing oneself with the inside of the fan fiction culture, it quickly becomes certain that the practice is much more than a mere superficial judgement could ever reveal. The subversive purpose behind the many stories of romance, a genre which is often associated with triviality, can be noted in essence even startlingly feminist. Therefore, in addition to the values surrounding the practice, also the subversive content within the fan fiction stories echo the subsonic call for a queer, feminine rebellion in society. Immersion inside the phenomenon makes it clear why this practice, which translates the issues of the real world to a medium that is easier to process, is vital for many of the fan community members representing unprivileged minorities of the societal structures.

This thesis paper started with the end of fan fiction writer Stakebait's sonnet for fair use in the spirit of this feminine literary endeavour of fan fiction. Now it shall appropriately come to a full circle by ending with the beginning of that inspiring sonnet – in which there is a decisive note on the incentive/access debate on fan fiction's behalf, but also a hopeful, both feminine and feminist, notion of peace as the end message, instead that of war, left softly ringing in the air – whereby a fitting end to this story is with the image of the fan crew of these 'pink pirates' left happily 'shipping' away, sailing against the current at sea of 'blue copyright': "I sing of "fair" / That stands for justice, and not mere disuse; / That says that beauty's not worn out with wear, / Nor songs with singing, and doth call a truce."

REFERENCES

Legislation

Copyright Act 1961 (Finland)

Copyright, Designs and Patents Act 1988 (UK)

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 (OJ L 167, 22.6.2001, p. 10-19) (InfoSoc Directive)

Intellectual Property Code 1992 (France)

The Constitution of the United States of America

US Copyright Act 1976

Table of Cases

Court of Justice of the European Union:

Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening [19 July 2009] ECR I-6569.

Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others [3 Sep 2014].

Case C-201/13, Opinion of Advocate General Cruz Villalon (of 22 May 2014).

United States:

Authors Guild v. Google, Inc., No. 13-4829-cv (2nd Cir. Oct. 16, 2015).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

Cariou v. Prince, 714 F.3d 694, (2d Cir. 2013).

Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2d Cir. 1998).

Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).

Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017).

Salinger v. Colting, 607 F. 3d 68 (2nd Circuit 2010).

Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

Warner Bros. Entertainment v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

Literature, Articles and Reports

Arai, Yasuhiro & Kinukawa, Shinya, “Copyright infringement as user innovation”, *Journal of Cultural Economics*, 2014, Vol. 38(2), pp. 131-144.

Bartow, Ann, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law”, *American University Journal of Gender, Social Policy & the Law*, 2006. Available at: <https://ssrn.com/abstract=902632>.

Benabou, Valérie Laure, “Rapport de la mission du CSPLA sur les ‘œuvres transformatives’” (Benabou Report), Ministère de la Culture, Dec 2014, available at: www.culturecommunication.gouv.fr/content/download/107727/1258065/version/1/file/Rapport%20oeuvres%20transformatives.pdf.

Bennett, Jessica, *Feminist Fight Club*. HarperCollins Publishers, 2016.

Bently, Lionel; Davis, Jennifer & Ginsburg, Jane C., *Copyright and Piracy: An Interdisciplinary Critique*. Cambridge University Press, 2010.

Brennan, Joseph, “Fandom is full of pearl clutching old ladies’: Nonnies in the online slash closet”, *International Journal of Cultural Studies*, 2014, Vol. 17(4), pp. 363-380.

Chander, Anupam & Sunder, Madhavi, “Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use”, *California Law Review*, April 2007, Vol. 95 Issue 2, pp. 597-626.

Choongh, Satnam, “Doing Ethnographic Research: Lessons from a Case Study” in *Research Methods for Law*, Michael McConville & Wing Hong Chui (eds.), Edinburgh University Press, 2007.

Craig, Carys J., “Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self” in *Protecting and Promoting Diversity with Intellectual Property Law*, Irene Calboli & Srividhya Ragavan (eds.), Cambridge University Press, 2014; Osgoode Legal Studies Research Paper No. 42/2014. Available at: <https://ssrn.com/abstract=2464536>.

Davies, Margaret, “Unity and Diversity in Feminist Legal Theory”, *Philosophy Compass*, July 2007, Vol. 2(4), pp.650-664.

De Kosnik, Abigail; El Ghaoui, Laurent; Cuntz-Leng, Vera; Godbehere, Andrew; Horbinski, Andrea; Hutz, Adam; Pastel, Renée & Pham, Vu, “Watching, creating, and archiving: Observations on the quantity and temporality of fannish productivity in online fan fiction archives”, *Convergence*, 2015, Vol.21(1), pp.145-164.

Dhaenens, Frederik, “Queer cuttings on YouTube: Re-editing soap operas as a form of fan-produced queer resistance”, *European Journal of Cultural Studies*, 2012, Vol. 15(4), pp. 442-456.

Fiesler, Casey; Morrison, Shannon & Bruckman, Amy S., “An Archive of Their Own: A Case Study of Feminist HCI and Values in Design”, *CHI '16 – Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems*, ACM, pp. 2574–2585, doi:10.1145/2858036.2858409.

Freund, Katharina, "Fair use is legal use': Copyright negotiations and strategies in the fan-vidding community", *New Media & Society*, 2016, Vol. 18(7), pp. 1347-1363.

Ginsburg, Jane C., "Overview of Copyright Law", *Oxford Handbook of Intellectual Property*, Rochelle Dreyfuss & Justine Pila (eds.), 2016; Columbia Public Law Research Paper No. 14-518. Available at: <https://ssrn.com/abstract=2811179>.

Hellekson, Karen & Busse, Kristina (eds.), *The Fan Fiction Studies Reader*. University Of Iowa Press, 2014.

Herzog, Alexandra, "But this is my story and this is how I wanted to write it': Author's Notes as a Fannish Claim to Power in Fan Fiction Writing", *Transformative Works and Cultures*, 2012, no. 11. Available at: <http://dx.doi.org/10.3983/twc.2012.0406>.

Hetcher, Steven A., "Using Social Norms to Regulate Fan Fiction and Remix Culture", *University Of Pennsylvania Law Review*, June 2009, Vol. 157(6), pp. 1869-1935.

Hudson, Emily, "The pastiche exception in copyright law: a case of mashed-up drafting?", *Intellectual Property Quarterly*, 2017, 4, pp. 346-368.

Hugenholtz, P. Bernt & Senftleben, Martin R. F., "Fair Use in Europe: In Search of Flexibilities", 2011. Available at: <http://ssrn.com/abstract=1959554>.

Irr, Caren, *Pink Pirates: Contemporary American Women Writers and Copyright*. University of Iowa Press, 2010.

Johnson, Brittany, "Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law", *Minnesota Law Review*, April 2016, Vol. 100(4), pp. 1645-1687.

Jones, Bethan, "Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey" in *Fandom and/as Labor*, Mel Stanfill & Megan Condis (eds.), special issue, *Transformative Works and Cultures*, 2014, no. 15. Available at: <http://dx.doi.org/10.3983/twc.2014.0501>.

Katyal, Sonia, "Performance, Property, and the Slashing of Gender in Fan Fiction", *American University Journal of Gender, Social Policy & the Law*, 2006, Vol. 14, no. 3, pp. 461-518.

Kellogg, Matt, "The problem of fictional facts: Idea, expression, and copyright's balance between author incentive and public interest", *Journal of the Copyright Society of the U.S.A.*, 2011, Vol. 58, p. 549. Available at: <https://ssrn.com/abstract=2164512>.

Leow, Hui Min Annabeth, "Subverting the Canon in Feminist Fan Fiction," *Transformative Works and Cultures*, 2011, no. 7. Available at: <http://dx.doi.org/10.3983/twc.2011.0286>.

Lescure, Pierre, "Contribution aux politiques culturelles à l'ère numérique – Tome 1" (Lescure Report), *Mission Culture-Acte 2: "Acte II de l'exception culturelle"*, Ministère de la Culture, May 2013, available at: www.culturecommunication.gouv.fr/content/download/67147/514848/file/Rapport%20Lescure%20Tome%202.pdf.

MacQueen, Hector L.; Waelde, Charlotte & Laurie, Graeme, *Contemporary Intellectual Property: Law and Policy*. Oxford University Press, 2010.

Marcus, Todd David, "Fostering creativity in virtual worlds: Easing the restrictiveness of copyright for user-created content", *Journal of the Copyright Society of the U.S.A.* June 2008, Vol. 55(4), pp. 469-496.

Mendis, Dinusha & Kretschmer, Martin, "The Treatment of Parodies under Copyright Law in Seven Jurisdictions", *Intellectual Property Office*, 2013.

Rosenblatt, Betsy, "The Great Game and the Copyright Villain" in *Sherlock Holmes Fandom, Sherlockiana, and the Great Game*, Betsy Rosenblatt & Roberta Pearson (eds.), special issue, *Transformative Works and Cultures*, 2017, no. 23. Available at: <http://dx.doi.org/10.3983/twc.2017.0923>.

Rosenblatt, Betsy & Tushnet, Rebecca, "Transformative Works: Young Women's Voices on Fandom and Fair Use" in *eGirls, eCitizens*, Jane Bailey & Valerie Steeves (eds.), *University of Ottawa Press*, 2015.

Sag, M. J., "Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency", *Tulane Law Review*, 2006, Vol. 81; *Northwestern Law & Econ Research Paper No. 916603*. Available at: <http://ssrn.com/abstract=916603>.

Samuelson, Pamela, "Unbundling Fair Uses", *Fordham Law Review*, 2008, Vol. 77, pp. 2537-2621.

Scales, Ann, *Legal Feminism: Activism, Lawyering, and Legal Theory*. New York University Press cop. 2006.

Schwabach, Aaron, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*. Routledge, 2011.

Schwabach, Aaron, "The Harry Potter lexicon and the world of fandom: Fan fiction, outsider works, and copyright", *University of Pittsburgh Law Review*, March 2009, Vol. 70(3), pp.387-434.

Slaughter, Anne-Marie & Ratner, Steven R., "The Method is the Message", *American Journal of International Law*, 1999, Vol. 93, pp. 410-423.

Smits, Jan M., "What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research", M-EPLI Working Paper, No. 2015/06. Available at: <http://ssrn.com/abstract=2644088>.

Stanfill, Mel, "Fandom, Public, Commons", *Transformative Works and Cultures*, 2013, no. 14. Available at: <http://dx.doi.org/10.3983/twc.2013.0530>.

Tushnet, Rebecca, "'I'm a Lawyer, Not an Ethnographer, Jim': Textual Poachers and Fair Use", *Journal of Fandom Studies*, 2014.

Tushnet, Rebecca, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law", *Loyola of Los Angeles Entertainment Law Review*, 1997, Vol. 17, pp. 651-686.

Tushnet, Rebecca, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright", *American University Journal of Gender, Social Policy & the Law*, 2007, Vol. 15(2), p. 273.

Tushnet, Rebecca, “Payment in Credit: Copyright Law and Subcultural Creativity”, *Law and Contemporary Problems*, 2007, Vol. 70, p. 135.

Tushnet, Rebecca, “The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity”, in *Diversity In Intellectual Property*, Irene Calboli & Srividhya Ragavan (eds.), Cambridge Univ. Press, 2015.

Verboord, Marc, “Female bestsellers: A cross-national study of gender inequality and the popular–highbrow culture divide in fiction book production, 1960–2009”, *European Journal of Communication*, 2012, Vol. 27(4), pp. 395-409.

Other Sources

Alter, Alexandra, “The Weird World of Fan Fiction”, *The Wall Street Journal* (14 June 2012), available at:
<www.wsj.com/articles/SB10001424052702303734204577464411825970488>.

Archive of Our Own, website: <archiveofourown.org>.

astolat, Profile Bio at Archive of Our Own, available at:
<archiveofourown.org/users/astolat/profile>.

Foz Meadows, “Fandom Thoughts”, *What Happens Next: A Gallimaufry* (22 Jun 2014), available at: <fozmeadows.tumblr.com/post/89576778116/fandom-thoughts>.

Hall, Susan, “Parody, Caricature and Pastiche – Copyright and Commonsense Part II” (11 Apr 2014), available at: <<http://susanhall.shoesforindustry.net/articles/caricature-and-pastiche>>.

HuffingtonPost, “Let’s Talk About Visibility And Invisible Disabilities” (Outspeak, Contributor) 27 Feb 2017, available at: <www.huffingtonpost.com/entry/lets-talk-about-visibility-and-social-justice_us_58b4a311e4b0658fc20f99of?>.

IPKat, “French IP Professor Publishes Report on Transformative Works” (9 Oct 2014), available at: <ipkitten.blogspot.fi/2014/10/french-ip-professor-publishes-report-on.html>.

IPRinfo, “Fanien tuottamat tekstit ja tekijänoikeus” (Fan-created texts and copyright), IPR University Center Association’s IPRinfo (10 May 2016), available at: <www.iprinfo.com/verkkolehti/kaikki_artikkelit/2016/2_2016/fi_FI/fanien_tuottamat_tekstit_ja_tekijanoikeus/>.

Jenkins, Henry, “Fan Fiction as Critical Commentary”, Confessions of an Aca-Fan (September 27, 2006), available at: <http://henryjenkins.org/2006/09/fan_fiction_as_critical_commen.html>.

Judd, Sacha, “How The Tech Sector Could Move In One Direction”, presented at Beyond Tellerrand, Berlin, November 2016. Available at: <<http://www.sachajudd.com/one-direction>> (accessed 28.2.2017).

Lazulus, “[podfic] House Proud”, available at: <archiveofourown.org/works/7298308?view_adult=true>.

Library of Congress Rulemaking Hearing Section 1202 (Testimony of Francesca Coppa), 0109.13-0120.4, (May 7, 2009), available at: <<http://www.copyright.gov/1201/hearings/2009/transcripts>>.

Lumen database, “Harry Potter Adult Fan Fiction”, available at: <www.lumendatabase.org/notices/1231#>.

Lumen database, “Harry Potter in the RestrictedSection”, available at: <www.lumendatabase.org/notices/1182>.

Organization for Transformative Works, website: <www.transformativeworks.org/>.

Organization for Transformative Works, “Archive of Our Own”, available at: <www.transformativeworks.org/archive_of_our_own/>.

Organization for Transformative Works, “Guest Post: Emmanuelle Debats” (15 May 2016), available at: <www.transformativeworks.org/guest-post-emmanuelle-debats/>.

Organization for Transformative Works, “What We Believe”, available at: <http://www.transformativeworks.org/what_we_believe/>.

Paddison, Laura, “Richard Wolff Says Capitalism Drives Inequality With ‘Explosive’ Consequences For Society”, HuffingtonPost (27 Feb 2018), available at: <www.huffingtonpost.com/entry/richard-wolff-capitalism-reddit_us_5a953a59e4b0699553cc259c>.

Project Gutenberg, website: <www.gutenberg.org>.

Shapiro, Rebecca, “‘RBG’ Documentary Trailer Is Here, And Even More Inspiring Than You Can Imagine”, HuffingtonPost (7 March 2018), available at: <www.huffingtonpost.com/entry/ruth-bader-ginsburg-documentary-trailer_us_5aa09fa6e4bod4f5b66d4a9e>.

Squires, Nick, “Italy gives world-famous opera Carmen a defiant new ending in stand against violence to women”, The Telegraph (2 Jan 2018), available at: <www.telegraph.co.uk/news/2018/01/02/italy-gives-world-famous-opera-carmen-defiant-new-ending-stand/>.

Stakebait, “In Defense of Fanfiction (a sonnet to Fair Use)”, available on Archive of Our Own at: <www.archiveofourown.org/works/9860219> (accessed 2.3.2017).

Star Wars Connection, “Reylo 101 | Reylo Fandom: The New Star Wars Rebels”, YouTube, 23 May 2017, available at: <www.youtube.com/watch?v=LwQvQVxjSvE>.

Supreme Court of the United States, “Justices: Current Members”, available at: <www.supremecourt.gov/about/biographies.aspx>.