

**Harry Potter and Experimental Use of Copyrighted Material:
A Proposed Exception for Fan Works**

Rachael Vaughn*

I. Introduction.....	3
II. Background.....	10
A. The Concept and History of Fandom.....	10
B. Overview of the Harry Potter Fandom.....	12
III. Is Fan Activity Copyright Infringement?.....	18
A. Overview of Exclusive Rights in Copyright Law.....	19
B. Elements of a Prima Facie Claim for Infringement.....	22
C. Fair Use and Implied License.....	23
IV. Copyright Enforcement In Fandom.....	25
A. Lawsuits Against Fans.....	26
B. Cease and Desist Letters.....	27
C. Endorsement from Copyright Holders.....	29
V. Patent Law & Experimental Use.....	30
A. Common Law Experimental Use.....	32
B. Statutory Experimental Use: The Hatch-Waxman Act.....	34
VI. The Creative Laboratory of Fandom.....	36
A. The Experimental Nature of Fandom.....	37
B. Fans as the Generic Manufacturers of Ideas.....	42
VII. Proposed Statutory Exception for Fandom Activity.....	44

VIII. The Effects of Implementing a Copyright Experimental Use
Exception..... 46

- A. Isn't Fandom Activity Already Covered by Fair Use?..... 47
- B. Commercial Use and the Tanya Grotter Distinction..... 50
- C. Moral Rights and International Obligations..... 54
- D. Trademark Rights Fans Should Never Have..... 58

IX. Conclusion..... 60

*We are at the beginning of the age of citizen media, where corporations can own vast, billion-dollar media outlets yet fail to control the flow and content of information. It's quite hard to be a media gatekeeper when everyone becomes media, and that's what we're seeing happen in the age of blogs, wikis, social networking sites, podcasting, vlogging, message boards, and email groups and whatever wonderful communication technologies emerge tomorrow.*¹

*Intellectual Property Attorney for Shell International BV in the Netherlands and Harry Potter fan. The author would like to thank Professor Craig Joyce from the University of Houston Law Center for his help bringing this article to life. Additionally the author would like to extend a warm thank you to Dr. Henry Jenkins, the head of the Comparative Media Studies Department at MIT, for continuing to inspire new ways to think about the role of the fan in modern society.

¹ Markos Mouililas Zuniga, *21st Century Media War*, ADBUSTERS, Jan/Feb 2007.

I. Introduction

The summer of 2007 was known “The Summer of Harry Potter.”² Fans of the phenomenally popular series about the now iconic boy wizard were treated to both the debut of the fifth film on July 11 and the release of *Harry Potter and the Deathly Hallows*, the final installment in the series of seven books, on July 21.³ In central London, Potter fans from all over the world lined up for days at Waterstones waiting for their copy of the book.⁴ Bloomsbury sponsored a special event for several thousand lucky fans selected from a lottery to hear JK Rowling read a portion of the first chapter at the Natural History Museum.⁵ Across town hundreds of other hardcore Potter lovers gathered at the Camden Center to hear Steve Vander Ark, the dedicated fan behind the

² Harry Potter fans enjoy a magical summer, USA TODAY, June 20, 2007 available at http://www.usatoday.com/life/books/news/2007-06-20-potter-summer_N.htm.

³ *Id.*

⁴ Fans lining up for Harry Potter book, USA TODAY, July 20, 2007 available at http://www.usatoday.com/money/economy/2007-07-20-4100934818_x.htm.

⁵ Bloomsbury web site available at <http://www.bloomsbury.com/harrypotter/default.asp?sec=3>.

impressively detailed Harry Potter Lexicon web site,⁶ speak about his love and admiration for a series which has captivated him and so many others for over a decade.⁷

Today Mr. Vander Ark finds himself in the middle of a controversy about intellectual property and the role of fans in modern media. Three months after the London speech, JK Rowling and Warner Bros. initiated a lawsuit against RDR Books, the small publishing company who agreed to publish Mr. Vander Ark's

⁶ See The Harry Potter Lexicon *available at* <http://www.hp-lexicon.org> (compiling an impressive list of Harry Potter related facts and resources). The Harry Potter Lexicon is a virtual library of Harry Potter information which is visited by over 25 million people. Rowling, Warner Bros, sue over Potter book, *REUTERS*, October 31, 2007, *available at* <http://www.reuters.com/article/peopleNews/idUSN3133972420071031>.

⁷ Sectus 2007 announces Steve Vander Ark as guest speaker, *THE LEAKY CAULDRON*, August 13, 2006 *available at* <http://www.the-leaky-cauldron.org/2006/8/13/sectus-2007-announces-steve-vander-ark-as-guest-speaker>; Sectus 2007 web page <http://www.sectus.org/sectus2007.php>.

book version of The Harry Potter Lexicon.⁸ The complaint which was filed on October 31, 2007, alleges that RDR Books (Mr. Vander Ark's publishing company) is acting violation of several state and federal laws; however, the main issue in the case is copyright infringement.⁹

As the legal battle between fan and author begins, many fans are left wondering if they will be the next targets.¹⁰ In

⁸ Rowling, Warner Bros, sue over Potter book, REUTERS, October 31, 2007, *available at*
<http://www.reuters.com/article/peopleNews/idUSN3133972420071031>.

⁹ See Warner Bros Entertainment Inc. et al v. RDR Books et al Original Complaint *available at*
<http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv09667/315790/1/> (alleging copyright infringement, federal trademark infringement, unfair competition and false declaration of origin, false advertising, violations of New York deceptive trade practice law, and unfair competition).

¹⁰ See Rowling deeply troubled by unauthorized book, IRELAND ON-LINE, February 29, 2008 *available at*
<http://breakingnews.iol.ie/entertainment/story.asp?j=247866716&p=z478674zz&n=247867476> (emphasizing the impact the Lexicon case will have on the fans).

addition to the typical fan who may not profit from their infringing drawings or stories which feature characters they do not own, there are a number of profitable businesses which have an interest in the legality of fanmade works. Emerson Spartz, the 20-year old creator of Mugglenet, a site that draws over one million visitors a day, takes home a six figure salary as the result of the activities of his site which include unauthorized podcasts, fan art, and other activities.¹¹ In 2006, Mugglenet published a Harry Potter companion book which compiled a series of theories about the seventh book.¹² The Leaky Cauldron (or TLC) is another fandom powerhouse which produces a popular podcast and draws hundreds of thousands of visitors.¹³ The main

¹¹ Wild About Harry, BUSINESS WEEK, June 22, 2007, available at http://www.businessweek.com/bwdaily/dnflash/content/jun2007/db20070622_592856.htm?campaign_id=rss_tech.

¹² Mugglenet.com's *What Will Happen in Harry Potter 7*, THE NEW YORK TIMES, February 11, 2007 available at <http://www.nytimes.com/2007/02/11/books/chapters/0211-1st-schoen.html>.

¹³ The Leaky Cauldron Site Info available at <http://www.the-leaky-cauldron.org/info/siteinfo>.

figurehead behind TLC, Melissa Anelli, has plans to write her own Potter book in 2008.¹⁴

Although not all fan activity is equal in terms of its likelihood to enable to copyright owner to bring a successful claim, this most recent suit raises significant issues about the role of fans and fanmade works in modern media. The basic framework of copyright law is continually criticized and the call for reform is not new.¹⁵ The aim of the article is to focus on a specific area for copyright reform: fanmade derivative works which are non-commercial. The scope of the article is limited to non-commercial works because fans who are not profiting from their activity arguably need special protection in light of lawsuits against their fellow fans who choose to make their activities commercial.

¹⁴ The Leaky Cauldron About Us *available at* <http://www.the-leaky-cauldron.org/info/aboutus>.

¹⁵ See Copyright Reform for the US *available at* <http://www.copyrightreform.us/> (offering an open platform for discussion of copyright reform); see The Center for the Public Domain *available at* <http://www.law.duke.edu/cspd/> (promoting debate about the balance needed in the modern intellectual property system); VAIDHYANATHAN, SIVA COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001).

This article is a bit of an experiment, mixing two seemingly unrelated areas of intellectual property in an effort to see if a theory used in one context applies in another. The experiment begins with Part II, which provides an introduction to fandom culture with specific emphasis on the Harry Potter fandom. Part III hypothesizes about whether fandom activity is copyright infringement. Part IV presents non-scientific data about the degree to which copyright owners enforce their rights against fans. Part V gives a brief overview of the experimental use exception in patent law, highlighting the importance of viewing copyright issues within the framework of the entire American intellectual property system. Part VI draws a parallel between technological experimental use and creative experimental use, concluding that fandom is a type of creative experimentation. Based on this conclusion, Part VII proposes a statutory exception for fandom experimental use. Finally, Part VIII speculates about the practical effects of implementing such an exception, taking into account issues such as the redundancy of this type of exception in light of fair use, potential abuses, concerns about moral rights, and role of trademarks in the context of modern entertainment. Although this article is written with a focus on the Harry Potter fandom, the principles are intended to apply to fans of any book series, television, show, movie, or other cultural phenomenon. It is simply

convenient to apply this theory in the realm of Harry Potter fans because the community is so large and the activities so diverse.

II. Background

Before jumping into the application of the current copyright law to fan works and analyzing its shortcomings, it is useful to establish a general definition for fandom, the term used to describe the community in which most fan activity takes place. To fully appreciate the scope of the intellectual property issues raised in this article, it is essential to peer into the world of fandom, a world that is becoming more mainstream as cultural interactions between fans become increasingly digitized.¹⁶

A. The Concept and History of Fandom

The term "fandom" is broadly used to refer to a group of individuals who together form a creative subculture based on a

¹⁶ See Posting of Henry Jenkins to http://www.henryjenkins.org/2006/12/the_magic_of_back_story_further.html (Nov. 26, 2006, 12:00 EST) (commenting on the trend of fan culture becoming mainstream).

common interest.¹⁷ Originally rooted in the appreciation of science fiction, the concept has evolved over the years to cover all facets of popular culture including broader categories of fiction, television series, movies, and video games.¹⁸ Some of the largest fandoms at the time this article was written include: *Star Trek*, *Lord of the Rings*, *Buffy the Vampire Slayer*, *The X-Files anime* ("otaku"), and *Harry Potter*.¹⁹

Members of fandom interact with one another by gathering for meetings (e.g. conventions) and exchanging creative works inspired by the chosen fandom's universe, characters, or ideas. Within the last decade, advances in technology and the evolution

¹⁷ See JENKINS, HENRY, *TEXTUAL POACHERS* 1 (1992) (describing and defining "media fandom") [hereinafter *TEXTUAL POACHERS*]; see Wikipedia, *Fandom*, <http://en.wikipedia.org/wiki/Fandom> (last visited November 26, 2006) (providing a more general definition of fandom).

¹⁸ See posting of Rich Brown, to <http://trufen.net/article.pl?sid=05/01/03/0915255&mode=nested> (January 3, 2005, 5:15 EST) (attributing the origins of fandom to pulp magazines exchanged in the 1920's and 1930's among readers of HP Lovecraft and other fiction).

¹⁹ See *Fandom*, *supra* note 17 (providing a listing of major fandoms).

of participatory web culture have enabled more sophisticated and prolific communication.²⁰ The number of fandoms with a substantial internet presence is staggering, and the time, energy, and resources individuals invest in fandom activities are substantial.

B. Overview of the Harry Potter Fandom

Centered around author J.K Rowling's series of novels and the associated Warner Brothers blockbuster films, the *Harry Potter* fandom illustrates the growing significance of fan activity in popular culture. Due to the universal appeal of the series and vast communication network facilitated by the internet, the *Harry Potter* fandom is unprecedented in its size and degree of fan devotion.²¹ The adventures of The Boy Who Lived

²⁰ Interview by Emma Grant with Henry Jenkins, DeFlorz Professor of Humanities and the Founder of the Comparative Media Studies Program at Massachusetts Institute of Technology on Slashcast Episode 11 (November 5, 2006).

²¹ See Wikipedia, Harry Potter fandom, http://en.wikipedia.org/wiki/Harry_Potter_fandom (last visited November 26, 2006) (emphasizing the broad appeal of Harry Potter and the size of the fan community). Harry Potter represents the one of the largest categories in a number of sites hosting fan

have attracted fans from all walks of life, spanning a diverse range of ages, cultures, backgrounds, and geographic locations.²²

fiction and fan art. See FanFiction.net

<http://www.fanfiction.net> (last visited February 29, 2008)

(featuring more than 250,000 Harry Potter fan stories, the largest category on the site); see DeviantArt

<http://www.deviantart.com> (last visited February 29, 2008)

(returning nearly 100,000 results when the search term "Harry Potter" is entered).

²² See *Harry Potter has the world in his thrall*, DECCAN HERALD, July 17, 2005 available at

<http://www.deccanherald.com/deccanherald/jul172005/foreign185412005716.asp> (covering the release of *Harry Potter and the Half*

Blood Prince with emphasis on the international draw of the

series); see also Multi-faceted Harry Potter FanFiction Awards,

<http://multifaceted.creative-musings.com> (last visited November 26, 2006) (describing the Harry Potter fandom as "too diverse");

but see Cadwalladr, Carole, *Harry Potter and the Mystery of An Academic Obsession*, THE OBSERVER, August 6, 2006 available at

<http://observer.guardian.co.uk/review/story/0,,1837941,00.html>

(noting that the majority of the delegates at a 2006 Harry Potter convention in Las Vegas were female).

Interaction between members of the *Harry Potter* fandom ranges from what can be described as classic fandom activity practiced before the widespread growth of the internet to new wave fandom activity that has recently been enabled by advances in the technology available to consumers. The largest categories of classic fandom activity are fan fiction, fan art, and filking (folk music written and recorded by fans). Although these activities still remain at the core of fandom, digital culture has reshaped their availability and appeal.²³ Early fandom participants communicated primarily by mail through fan zines, newsletters, and hand distribution²⁴, but online fan communities allow *Harry Potter* enthusiasts all over the world to interact

²³ See Jennifer Smith, *Fan Fiction Cybercommunities: Celebrity Appropriation on the Internet* (June 19, 2000)

<http://www.csulb.edu/~jsmith10/fanfict.html> (focusing on the growth of the cyber community in fan fiction); see also Chris Adams, Goldfarb Consultants, *The 1996 Internet Counterrevolution: Power, Information, and the Mass Media*

http://www.isoc.org/inet96/proceedings/e3/e3_1.htm (last visited November 26, 2006) (recognizing the role the internet plays in building fan communities and encouraging commercialism).

²⁴ See *TEXTUAL POACHERS*, *supra* note 17 at 158-162 (describing the cottage industry of fan zine publishing and its role in fandom).

without having to buy a plane ticket or find out about a fan mailing list. Archiving sites host enormous collections of fan fiction ranging from one hundred word snippets (“drabbles”) to novel length epic stories set in JK Rowling’s imaginary world. Art-centric sites serve as online galleries for drawings, painting, photography, and craftwork inspired by *Harry Potter*.

An illustrative example of digital culture’s ability to increase exposure of fan culture is a trilogy of three novel length works of fan fiction written about Draco Malfoy, a character who plays a minor role in the Harry Potter series, but is immensely popular in fan fiction.²⁵ Although the author of the work is not JK Rowling, she does have a loyal and devoted online fan base who have closely followed the development of the story over a period of six years.²⁶ Another example of digital culture’s effect on fan culture is phenomenon of Wizard Rock.

²⁵ See Jennifer Granick, *Harry Potter Loves Malfoy*, WIRED NEWS, August 16, 2006 available at http://www.wired.com/news/columns/0,71597-1.html?tw=wn_story_page_next1 (highlighting the popularity of Draco Malfoy in the fan community); see generally *The Draco Trilogy Archive*, <http://www.geocities.com/dracotrilogyarchives>.

²⁶ *Id*; Pure Adventure the official fan listing for The Draco Series, by Cassandra Claire, <http://draco.fanatique.net>.

The ability to share music files and post tour schedules has helped filking evolve into a genre of Harry Potter-themed music featuring bands like Harry and the Potters and Draco and the Malfoys who are able to sell CDs and draw substantial crowds on their tours.²⁷ A coalition of Wizard Rock bands recently begun holding an annual Wizard Rock festival called Wrockstock.²⁸

In addition to classic fan activities, the *Harry Potter* fandom also ventures into the realm of new wave fan activities that have only recently been enabled by technological advances. Any kind of technology that provides the consumer with a way to download, manipulate, or share digital media also creates new opportunities for fans to make creative works. Advanced video editing software gives consumers the tools to remix movie clips into high quality music videos (“vidding”). Other fandom activities enhanced by recent technological developments include filking (rewriting and recording songs about a fandom universe)

²⁷ See Lacey Rose, *Wizard Rock*, Forbes.com (July 13, 2005)

http://www.forbes.com/services/2005/07/13/rowling-potter-band-cx_lr_0713harryband.html (reporting on the growing popularity of Wizard Rock).

²⁸ *Wrockstock 2008 available at*

<http://www.stlouisareawizards.com/wrock/index.php>.

and podcasting (a system for distributing multi media files over the internet via syndication feeds).

As mentioned briefly in the introduction of this article, the phenomenon of podcasting in the *Harry Potter* fandom deserves particular attention as it has grown significantly since 2005 with two podcasts rising to an unprecedented level of popularity. Pottercast²⁹ and Mugglecast³⁰ are consistently ranked among the top five most popular podcasts at directory sites like Podcast Alley.³¹ The shows' creators regularly host live podcasting events which have been known to attract close to a thousand spectators, all eager to watch a recording, meet the hosts, and even request autographs.³² The core personalities of Pottercast and Mugglecast have risen to near celebrity status, inspiring the formation of online fan clubs³³ and even other podcasts about

²⁹ Pottercast, <http://www.pottercast.com>.

³⁰ Mugglecast, <http://www.mugglecast.com>.

³¹ Podcast Alley, <http://www.podcastalley.com/index.php>.

³² See The Leaky Mug, <http://www.leakymug.com/default/previousshows> (providing a record of live podcasts from Pottercast and Mugglecast).

³³ Pottercast Fans, <http://www.pottercastfans.com>; Mugglecast Fans, <http://www.mugglecastfan.net>.

the podcasters themselves.³⁴ Within the last year, a number of smaller *Harry Potter*-inspired podcasts have set up shop on iTunes, taking advantage of the accessibility of podcasting technology and the market of enthusiastic listeners stimulated by Pottercast and Mugglecast.³⁵ In early 2006, Warner Brothers even capitalized on the podcasting phenomenon by releasing an official *Harry Potter and the Goblet of Fire* podcast featuring audio interviews with the cast of the film.³⁶

III. Is Fan Activity Copyright Infringement?

Because of the immense popularity of fan fiction, fan art, podcasts, and other creative works inspired by the *Harry Potter* series, the question of whether or not this activity constitutes infringement of the original author's work is particularly interesting. A corporate copyright owner might turn a blind eye

³⁴ iMuggle, <http://www.imuggle.net>; Leaky Fan Cast, <http://www.leakyfancast.pottercastfans.com>.

³⁵ See Podcast Alley, <http://www.podcastalley.com/index.php> (returning over a hundred results for the search term "Harry Potter").

³⁶ Harry Potter Automatic News Aggregator, Official Goblet of Fire podcast on iTunes, <http://www.hpana.com/news.19307.html> (February 29, 2008).

to a small number of individuals exchanging fiction and art, but when thousands of people are gathering at conventions paying \$200-300 per person to watch public broadcasts of the films, listen to live podcasts, and auction fanmade art,³⁷ infringement of intellectual property suddenly becomes an issue worth examining.

A. Overview of Exclusive Rights in Copyright Law

American copyright law is rooted in Article I Section 8 Clause 8 of the US Constitution ("the Copyright Clause") which stipulates: "Congress shall have Power...To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."³⁸ The first federal copyright act was passed in 1790 when folklore and legend were probably the only

³⁷ Lumos 2006, <http://lumos2006.org>; Phoenix Rising 2007, <http://www.thephoenixrises.org>; Sectus 2007, <http://www.sectus.org/index.php>; Prophecy 2007 <http://hp2007.org/>; Portus 2008 <http://hp2008.org/>.

³⁸ U.S. CONST. art I, §8, cl. 8.

type of cultural movement remotely resembling fandom.³⁹ In response to a call for modernization, Congress enacted the Copyright Act of 1909⁴⁰, which was later replaced by the Copyright Act of 1976.⁴¹ The 1976 Act and subsequent incarnations grant the author of a work five exclusive rights: the rights to reproduce and adapt the copyrighted work, and the right to distribute, display, and perform the work publicly.⁴² The copyright owner may bring an action for infringement against an individual who exercises one of these exclusive rights without a license to do so.

It is often difficult to determine which exclusive right a fan is potentially infringing when the broad range of activities in fandom are considered. Fan fiction and fan art have traditionally been seen as derivative works, which potentially

³⁹ See Tushnet, Rebecca, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.REV. 651, 652-3 (1997) (comparing fandom to folklore) [*hereinafter* Legal Fictions].

⁴⁰ JOYCE, CRAIG, LEAFFER, MARSHALL, JASZI, PETER, AND OCHOA, TYLER, COPYRIGHT LAW 21-22 (6th edition) (2003) [*hereinafter* JOYCE].

⁴¹ *Id.* at 22-24.

⁴² *Id.* at 24-26

violate the adaptation right.⁴³ A derivative work is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁴⁴ A *Harry Potter* themed convention is not in and of itself a “work,” but exclusive rights are violated at such events when a large audience watches a movie on a big screen or fans engage in roleplay, exchange crafts, and display art.

New wave fandom activities like vidding, filking, and podcasting present additional challenges about which exclusive right is involved in an infringement claim. When a filk uses Hedwig’s theme music, a podcast features a segment from one of the *Harry Potter* audio books, or a fan video mixes together different clips from the movies, the reproduction right also becomes an issue. Thus, it isn’t always clear which exclusive

⁴³ See Leanne Stendell, *Fanfic and Fanfact: How Current Copyright Law Ignores the Reality of the Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1553–54 (presents the case for fan fiction as an unauthorized derivative work).

⁴⁴ 17 USC § 101.

right is involved and fandom activity often concerns more than a single right.

B. Elements of a Prima Facie Claim for Infringement

Regardless of which of the exclusive rights is being exercised, all fandom activity is essentially built on content that is not owned by the fans and is therefore potential copyright infringement. To bring a prima facie case of infringement, a plaintiff must show (1) ownership of a valid copyright and (2) impermissible copying of the copyrighted work.⁴⁵ The first element is rarely an issue with respect to fandom activity because such activity is always based on an area of popular culture that is so marketable and widely consumed that valid copyrights usually exist and are frequently owned by or licensed to corporate entities. Although courts vary in their approach with respect to the second element, the plaintiff must generally prove two sub elements: (1) the defendant copied the work, and (2) the copying amounted to improper misappropriation.⁴⁶

⁴⁵ See JOYCE, *supra* note 40 at 667-89 (formulating a general test for infringement through a survey of case law).

⁴⁶ *Id.*

C. Fair Use and Implied License

Analysis of these elements will inevitably vary based on the type of fandom activity, the exclusive right at issue, the jurisdiction and the specific facts in the case. If infringement is found, the defendant may avoid liability by claiming that the copyright owner granted a license to exercise the right in question (express or implied) or asserting a defense to infringement.⁴⁷ There have been very few cases in this area of copyright law and there is no clear legal standard for determining whether or not an implied license exists and if so, what the terms of the license would be.⁴⁸

An equally elusive standard concerns the defense of fair use, a concept that fans frequently rely on to justify their activity. Codified in 17 USC §107, the doctrine justifies certain uses of the plaintiff's work based on the benefit the

⁴⁷ See Stendell *supra* note 43 at 1574-76 (explaining the implied consent defense in the context of fan fiction).

⁴⁸ See *id.* at 1553 (stating that not a single copyright infringement case in the area of fan fiction has ever gone to trial); see also Christopher Norgaard and Sandra J. Garcia, *The Creation, Interpretation and Assignment of Copyright Licenses Under State and Federal Law*, 33 SWULR 347, 359 (presenting case law on implied licenses in copyright).

defendant's added material provides to the public. Courts use four factors enumerated in Section 107 of the Copyright Act to determine whether an infringement constitutes fair use: (1) the purpose and character of the use; (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.⁴⁹ Fair use is generally used to justify infringement of copyrighted material that falls into the realm of criticism, comment, news reporting, teaching, and research.⁵⁰ Many fans assert that their infringement constitutes fair use; however, the practical application of the four factors is fuzzy and fair use as reputation as "a game of blind man's bluff."⁵¹

⁴⁹ 17 U.S.C. §107.

⁵⁰ See Shiri Rosenthal, *Copyright Infringement: Producers of Seinfeld Overcome Publisher's Fair Use Defense Using the Show's Strongest Weapon—Nothing: Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.* 73 ST. JOHN'S L. REV. 1239, 1241 (1999) (listing criticism, comment, news, reporting, teaching, scholarship, and research as areas traditionally considered to be fair use).

⁵¹ See Keith Aoki, James Boyle, and Jennifer Jenkins, Duke Center for Study of the Public Domain, *Bound By Law*, at 12 available at

IV. Copyright Enforcement in Fandom

The issue of whether or not fan use constitutes copyright infringement would be largely irrelevant if copyrights were never enforced against fans. Throughout the history of fandom, copyright owners have responded to fan fiction, fan art, fan videos, and other activity with varying levels of support, tolerance, ambivalence, and outrage. At one end of the spectrum, copyright owners actively promote fan activity with appreciation for its ability to deepen interest in the original work. On the other end, big studios or publishing companies have been known drag an individual fan to court over an infringement issue. One author of a 2006 article arguing for a categorical fair use exception for fan fiction described the situation well from the perspective of the average fan: “[a]t best, a fan can only cross her fingers and hope that her site does not catch the eye of someone with deep pockets.”⁵²

<http://www.law.duke.edu/cspd/comics> (presenting the difficulties of applying the fair use doctrine in filmmaking via the comic adventure of Day A. Filmmaker).

⁵² See generally Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. L. & PRAC. ; see generally Cecilia Ogbu, *I Put Up a Website About My*

A. Lawsuits Against Fans

One of the reasons it is difficult to reconcile fandom activity with modern copyright law is that fans have little guidance in terms of legal precedent. There has yet to be a case in which a big name copyright owner has brought an action against fans for infringement based on fan activity and actually litigated the issue.⁵³ Most authors recognize that fans who are dedicated enough to spend their time and energy creating potentially infringing works are probably a vital force in the market for the original work. Economically, a lawsuit usually isn't worth the risk of looking like a bully in a David-and-Goliath-esque battle for creative control.

Because of the lack of legal precedent, most scholars analyze potential fan-related litigation using cases like *Castle*

Favorite Show and All I Got was this Lousy Cease and Desist Letter, 12 S. CAL. INTERDISC. L.J. 279.

⁵³ Henry Jenkins, *Digital Land Grab*, April 2000 available at <http://www.whoosh.org/jenkins.txt> [*hereinafter* Digital Land Grab].

Rock Entertainment Inc. v. Carol Publishing Group, Inc.,⁵⁴ or *Campbell v. Acuff-Rose Music*.⁵⁵ Although there are factual parallels, these cases and their progeny involve the defendant making money from the alleged infringement or using the work in some sort of commercial manner. It is a common myth in fandom that “this isn’t infringement if I don’t make money.” Although this statement is legally inaccurate, it is not insignificant. Because fan activity is motivated by appreciation for the work and not monetary gain, something about suing fans who aren’t making a profit seems contrary to freedom of speech, expression, and other democratic values. As one author noted “Copyright myths have as much power as copyright laws.”⁵⁶

B. Cease and Desist Letters

Although copyright owners are generally hesitant about suing their fans for infringement, many studios, publishing outfits, and authors don’t have a problem sending out

⁵⁴ *Castle Rock Entertainment Inc. v. Carol Publishing Group, Inc.* 150 F.3d 132 (1998) (holding the fair use defense did not apply in the case of the *Seinfeld* Aptitude Test).

⁵⁵ *Campbell v. Acuff-Rose, Inc.* 510 U.S. 569 (1994).

⁵⁶ VAIDHYANATHAN, SIVA *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

threatening cease and desist letters. Currently, Chilling Effects (a joint project between the Electronic Frontier Foundation and various law school clinics across the country) maintains a searchable database of cease and desist letters sent to fans.⁵⁷ The terms of such letters vary, sometimes demanding that a fan remove a site from the internet,⁵⁸ alter the content of their work in a way to avoid copyright infringement, or pay royalty fees.

Many lawyers believe that fandom activity is not a big concern in the realm of copyright law because no fans are being sued. This perspective ignores the censoring effect that a cease and desist letter from a large corporation has on the average fan site operator, fan fic author, or artist.⁵⁹ Most fans lack the financial and legal resources to challenge corporate attorneys; therefore, they usually respond to such a letter by shutting down their sites or stopping their creative work.⁶⁰ As

⁵⁷ Chilling Effects <http://www.chillingeffects.org>.

⁵⁸ *Id.*

⁵⁹ See VAIDHYANATHAN *supra* note 56 at 184 (categorizing copyright law as a potential instrument of censorship when constructed recklessly).

⁶⁰ Meredith McCardle. *Fan Fiction, Fandom, and Fanfare: What's all the Fuss?* 9 B.U. J. SCI. & TECH. L. 433, 437 (2003); see Ranon

one noteworthy fan commentator explained, “[i]f you are a housewife in Nebraska and you receive a letter from Viacom's attorneys telling you to remove your Web site or they will take away your house and your kid's college fund, you don't think twice about your alternatives. You fold.”⁶¹

C. Endorsement from Copyright Holders

While some copyright owners threaten infringing fans with lawsuits and threatening letters written in legalese on expensive stationery, others actually support fandom activity. Although there may be some circumstances under which authors explicitly approve of activity within fandom, the majority of fans would have to rely on the argument that the copyright owner granted them an implied free license to use the work by having knowledge of the infringing activity and failing to do anything about it. Because of the diversity of fandom-related work, even if a fan is able to prove the existence of such a license, its terms are virtually impossible to determine.

Although JK Rowling is involved in the suit discussed in the introduction, she also provides links to several fan-related sites on her own web page⁶² and has made statements that have

⁶¹ Digital Land Grab, *supra* note 53.

⁶² JKRowling.com, <http://www.jkrowling.com>.

been interpreted to support fan fiction;⁶³ however, the terms under which she approves of fans using her work are unclear. Her recent statements about author-written sequels, coupled with the onset of the Lexicon lawsuit, have muddied the waters even more.⁶⁴ There is no definitive way for a fan to know the boundaries within which they may engage in fandom activity without offending the author or provoking legal actions or threats.

V. Patent Law & Experimental Use

In order to appreciate the full scope of an intellectual property issue associated with fandom activity, one must view

⁶³ See Harry Potter in the Restricted Section *available at* <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522> (providing an example of a cease and desist letter which states that JK Rowling makes no complaints about “innocent” Harry Potter fan fiction).

⁶⁴ See Interview with JK Rowling on Richard and Judy transcript *available at* <http://www.mugglenet.com/mnnews/06262006/transcriptrandjudy.shtml> (last visited February 29, 2008) (expressing her understanding “the mentality of an author who thinks I'm going to kill [Harry] off because then there can be no non-author-written sequels”).

the issue in light of the entire American system for intellectual property. This includes four main categories of federally protected intellectual property rights: copyright, patent, trademark, and trade secret. Most issues in fandom involve trademark and copyright law; however, copyright arguably has more in common with patent law than the other categories of intellectual property.⁶⁵

Rooted in the same provision of the Constitution as copyright law, patent law grants exclusive rights to a creator of intellectual property. A patent is essentially a contract between an inventor and the government under which the inventor is granted a right to exclude others from making, using, or selling the invention covered by the patent for a set period of time.⁶⁶ In consideration for this right, the inventor discloses his invention to the public to promote the progress of science and technology.⁶⁷ Although there are key differences between

⁶⁵ See Steven J. Grossman, Experimental Use or Fair Use as a Defense to Patent Infringement, *IDEA: THE JOURNAL OF LAW AND TECHNOLOGY* (1990) (comparing experimental use and fair use considering the constitutional purpose of both patent and copyright law).

⁶⁶ Hildreth, Ronald B. *Patent Law: A Practitioner's Guide* (1988).

⁶⁷ *Id.*

patents and copyright,⁶⁸ both concepts aim to give a creator (inventor or author) the right to exclude others from doing certain things their creations (invention or original work). Because of this core similarity, it is useful to think about fandom activity in the context of an exception to infringement that has been well-recognized in patent law since the mid 1980's: the experimental use exception.⁶⁹

A. Common Law Experimental Use

Although critics disagree about the former or current existence of a common law experimental use exception in patent law, the topic is worthy of brief mention because the lack of clarity around the common law experimental use exception arguably prompted the drafting a statutory exception. The case commonly credited with creating the doctrine was *Whitmorre v. Cutter* in which Justice Story stated "it could never have been the intention of the legislature to punish a man, who constructed such a [patented] machine merely for philosophical

⁶⁸ See Grossman, *supra* note 65 (pointing out the fact that for copyright protection, an idea need not be novel).

⁶⁹ Drug Price and Patent Term Restoration Act (Hatch-Waxman) Act of 1984, Pub. L. No. 98-417, 98 Stat 1585 (1984) [*hereinafter* Hatch-Waxman].

experiments, or for the purpose of ascertaining the sufficiency of the machine to produce its described effects."⁷⁰

Later nineteenth century cases narrowed the exception by applying it only when the experiments were performed for the sole purpose of "mere amusement" and idle "curiosity."⁷¹ In the mid-twentieth century, the exception was reserved for situations in which the experimenters were not using the patented subject matter "for purposes related to a legitimate business."⁷²

The common law experimental use exception was dealt a potentially lethal blow in 1984 with the decision of *Roche v. Bolar*, a pharmaceutical case involving a generic drug manufacturer (Bolar) using a patented drug compound for bioequivalency tests necessary to obtain FDA approval.⁷³ Although the federal district court determined the use to be *de minimis* and experimental, the Court of Appeals for the Federal Circuit reversed holding that Bolar's experimentation was done solely

⁷⁰ Ted Hagelin, *The Experimental Use Exemption to Patent Infringement: Information on Ice, Competition on Hold*, 58 FLA. L. REV. 483 (2006).

⁷¹ Hagelin, *supra* note 70; *Poppenhusen v. Falke*, 19 F. Cas. 1048, 1049 (C.C.S.D.N.Y. 1861).

⁷² Hagelin, *supra* note 70.

⁷³ *Roche v. Bolar*, 733 F.2d 858 (1984).

for business purposes and that sale or manufacturing was not required for the plaintiff to bring a claim for infringement.⁷⁴ Many saw this decision as a departure from the spirit of Justice Story's concept of experimental use, and this case might have marked the death of the experimental use exception in patent law...if Congress had decided to remain silent on the issue.

B. Statutory Experimental Use: The Hatch-Waxman Act

The reversal of the *Bolar* decision and drafting the Hatch-Waxman Act, the legislative embodiment of the experimental use exception, was motivated by two main hurdles generic drug manufacturers faced in getting their products to market. First, generic firms were required to conduct the same lengthy clinical trials and investigations as their big name counterparts.⁷⁵ Additionally, these firms could be sued for using patented material to do the work to get FDA approval.⁷⁶

Arguably, forbidding generic manufacturers from experimenting with patented compounds was directly at odds with

⁷⁴ *Id.*

⁷⁵ John R. Thomas, *Scientific Research and the Experimental Use Privilege in Patent Law*, CRS Report for Congress (October 28, 2004).

⁷⁶ *Id.*

the objective of patent law: promoting progress of science and the useful arts. Thus, the Hatch-Waxman Act carved out an experimental use exception that permitted generic manufacturers to use patented material in experiments reasonably related to obtaining FDA approval.⁷⁷ The exception was codified in an amendment to 35 U.S.C. §271(e), and later congressional actions expanded the scope to other products such as veterinary drugs, biological products, and medical devices.⁷⁸ To compensate brand name manufacturers for time and resources spent obtaining FDA approval, Congress authorized an extension of up to five years of the original patent term with further amendments to the Food Drug and Cosmetic Act (FDCA). The Hatch-Waxman Act and the associated amendments spawned a complex array of cases, but the final message from the courts upheld this exception to patent infringement.⁷⁹ Although patent law scholars disagree about the role and existence of the common law experimental use exception in light of the Hatch-Waxman Act, there is agreement about the existence of a statutory exception and acceptance of the principle that in some very limited circumstances, one can use

⁷⁷ Hatch-Waxman, *supra* note 69.

⁷⁸ 35 U.S.C. §271(e).

⁷⁹ Hagelin, *supra* note 70.

patented subject matter for experimental purposes without being liable for infringement.

VI. The Creative Laboratory of Fandom

At first glance, there seem to be few similarities between scientists who do experiments to discover lifesaving drugs and obsessive lovers of a series of books who insist on writing, drawing, and talking about a fictional world they didn't create. Surely constructing a tale about Harry Potter's life post Hogwarts doesn't further the goals of intellectual property in the same way legitimate scientific research does. Ripping footage from a DVD and rearranging these snippets of stolen footage certainly can't be considered to be an experiment.

Although fandom is becoming increasingly mainstream, few have studied its contribution to society as a whole. Those who do have been pleasantly surprised by ability of this cultural phenomenon to contribute to the pool of creative work and progress of artistic expression particularly in recent years. In an article focused on the role of internet fans in mass media, one online commentator described the internet community as "a hotbed of creativity, new technologies, radical thinking, and social empowerment."⁸⁰ In essence, fandom is very much like a

⁸⁰ Adam, *supra* note 23.

laboratory in which popular culture is examined under a microscope, characters are subjected to experiments testing various hypotheses, new technologies are beta tested in a consumer context, and ideas are reworked and redesigned to satisfy creative curiosity.

A. The Experimental Nature of Fandom

Merriam-Webster's dictionary defines the term "experiment" as "an operation or procedure carried out under controlled conditions in order to discover an unknown effect or law, to test or establish a hypothesis, or to illustrate a known law" or to "try out a new procedure, idea, or activity."⁸¹ Most fandom activity is arguably motivated by curiosity. Harry Potter fans wonder what might have happened if Harry's parents had survived Lord Voldemort's attack or speculate about Severus Snape's loyalty. Instead of just thinking about these questions, fans decide to write a story illustrating their version of events, draw a picture portraying a character as they see him/her, or discuss their theories with other fans on a podcast. In essence, fans are performing experiments testing the laws of a fictional world and accessing whether or not other fans agree with their

⁸¹ Merriam-Webster Online available at <http://www.m-w.com/dictionary/experiment>.

perspective about the how characters, plot, and other elements of the story fit together.

Because of the analytical nature of this type of activity, copyright owners are unlikely to bring suits against fans who engage in this breed of infringement. Even if they did, commentary that is arguably scholarly in nature frequently looks like the type of infringement fair use was designed to permit. The infringement analysis changes, however, when fans start experimenting in areas that are outside the normal realm of dominant culture. These more controversial uses of copyrighted material in fandom are more likely to be the cases in which enforcement becomes an issue.

Originating in the 1970's, the "slash" genre has recently attained a substantial amount of mainstream media attention.⁸² Although the definition is arguably more complex, slash generally refers to fandom activity involving fictional homoerotic pairings between male characters in mainstream television programs, movies, and literature.⁸³ Slash began as fan

⁸² See Cadwalladr, *supra* note 6 (portraying slashers at a 2006 convention in Vegas in a very negative light).

⁸³ Sonia K. Katyal, Performance Property, and the Slashing of Gender in Fan Fiction, 14 GENDER, SOCIAL POLICY, AND THE LAW 463, 470 (2006).

fiction that explored the relationship between Kirk and Spock in the *Star Trek* fandom, and the genre has since evolved to reach other fandoms and utilize various media including art, video editing, and photo manipulation.⁸⁴ There is even a popular podcast that focuses solely on slash in the *Harry Potter* fandom.⁸⁵ Just as slash varies in form, it is also very diverse in terms of content. As fan writer Joan Martin explains: "Slash includes anything from soft romance to varying amounts of explicit sex. Sometimes it includes very little but sex."⁸⁶

Fans who participate in "slashy" fandom activity are almost exclusively female.⁸⁷ A frequently stated explanation for the existence of the genre is the desire for women to express "what

⁸⁴ See TEXTUAL POACHERS, *supra* note 17 at 187 (summarizing the origin of slash in the Star Trek fandom and arguing its value to society).

⁸⁵ Slashcast, <http://community.livejournal.com/slashcast>.

⁸⁶ TEXTUAL POACHERS, *supra* note 17 at 188.

⁸⁷ Susan Young, *Queering Popular Culture: Female Spectators and the Appeal of Writing Slash Fan Fiction*, (August 2004) *available at* <http://www.genderforum.uni-koeln.de/queer/jung.html> - 1
<http://www.genderforum.uni-koeln.de/queer/jung.html>

[they] want male sexuality to look like.”⁸⁸ By writing about widely known male characters engaging in homosexual relationships, female fans can experiment with different ways of looking at issues like male heterosexual hegemony, homosocial desire, alternatives to traditional masculinity, homophobia, and sexuality in a larger social context.

Additionally, a lot of slash is arguably motivated by pure curiosity that is not unlike the sort of curiosity that motivates scientific discovery. Fan culture is defined by complete immersion in a fictional world so when fans make intense connections to a character they wonder about what the character might do in a situation beyond the boundaries of the original work. Speculating about Severus Snape’s sexuality isn’t unlike speculating about his loyalty; it’s just more controversial.

One might ask why such speculation has to be done in the realm of intellectual property that isn’t owned by the fans. If an individual wants to explore a particular social issue or theory why not write an original essay or create an original

⁸⁸ See Lakshmi Chaudry Hey Spock, *Lookin’ Good...* (September 5, 2000) *available at* <http://www.wired.com/news/culture/0,1284,38484,00.html> (quoting Henry Jenkins on the appeal of slash).

fictional world to illustrate the point? The problem with this argument is that the benefit fan activity provides is directly related to the experimentation being done with mainstream characters who already have a place in social consciousness.⁸⁹ The average consumer has an established view of who the character of Harry Potter is, what he thinks, and how he works. Writing a story about Harry lusting after Draco Malfoy, drawing a picture of Harry as cross dresser, or making a video depicting a Harry/Ron/Hermione romantic triangle, encourages the fan work consumer to question their basic assumptions about the characteristics of a socially acceptable hero. This logic applies to all fan fiction--not just slash--highlighting the need for an outlet for creative expression of minority groups.⁹⁰ If these voices are suppressed, consumers are forced to accept a single narrow interpretation of who Harry and other characters

⁸⁹ See Katyal, *supra* note 83 at 466-7 (stating that "proportizing expression benefits some authors and artists, often within the mainstream, sometimes at the cost of chilling other types of artistic expression and commentary, often from 'outsider' groups like women, people of color, and sexual minorities" and pointing out that in the entertainment industry women are "grossly underrepresented")

⁹⁰ *Id.*

in the Potterverse are and that interpretation is controlled completely by the copyright holder.⁹¹

B. Fans as the Generic Manufacturers of Ideas

The mere fact that fandom is experimental in nature doesn't justify a statutory exception similar to the one that exists in patent law. The primary driver behind passing the Hatch-Waxman Act was the notable inequality between the small drug companies and large corporations with established portfolios of patents and substantial research and development budgets.⁹² A similar inequality exists between fandom artists and corporate producers of films, books, and other cultural expressions.⁹³

Fandom producers of creative works usually don't make a career out of copyright infringement. They work regular jobs and spend their free time using fandom as an outlet for creativity and refinement of their chosen craft. The average fan fiction

⁹¹ *Id.* at 468 (arguing that the freedom of cyberspace presents an opportunity to let alternative viewpoints be heard).

⁹² See *infra* Part V (summarizing the drivers behind the patent law experimental use exception).

⁹³ See Katyal, *supra* note 83 at 467 (highlighting the inequality between mainstream owners of copyrights and minority groups with respect to market access).

author does not have access to the editing, publishing, and monetary resources that JK Rowling does. The average fan artist does not have a corporate sponsor to purchase materials or host an opening showcasing their work. The average vidder does not have access to the equipment required to shoot quality original footage or perform studio quality editing.

Additionally, an amateur artist who creates original work must spend an enormous amount of time attracting an audience to review the work and provide constructive feedback. The feedback loop involving constructive criticism from the audience and refinement by the artist is the primary process by which an artist develops her skill. By borrowing well-known characters, plots, and ideas the fandom artist has a readymade training ground.⁹⁴ The few fan fic authors who go on to create their own original fiction credit their experience in fandom for enabling them to develop the skills they needed to make original work.⁹⁵ Without access to pre-existing characters with a readily available fan base, a budding artist may never be able to begin

⁹⁴ Interview by Emma Grant with Cassandra Claire, Draco Trilogy fan fiction author, (July 15, 2006).

⁹⁵ See *id.* (sharing the fandom experiences of Cassandra Claire who became a published author of original fiction after spending a significant training period in fandom).

this process. Just as the generic drug company has limited resources for research and development and must avoid infringing patents of big pharma, the fan has limited creative resources and must develop their craft while navigating the minefield of copyrights created by mainstream authors, studios, and publishing giants.

VII. Proposed Statutory Exception for Fandom Activity

Based on the above discussion, I propose the following amendment to 17 USC, which would carve out a fandom experimental use exception for copyright infringement:

Notwithstanding the provisions of section 106 and 106A, it shall not be an act of infringement to reproduce a copyrighted work or prepare a derivative work based on a copyrighted work when the reproduction or derivative work is made solely for fan activity. To be made solely for fan activity, the reproduction or derivative work must

- a. Be created to further appreciate or analyze the copyrighted work; or
- b. Be created for the purpose of enabling a fan artist to develop or refine a creative craft; and

- c. Not generate a substantial profit for anyone other than the author of the copyrighted work;
- d. Refrain from attributing authorship of the copyrighted work to anyone except the author of the copyrighted work; and
- e. In the case of a derivative work, refrain from attributing authorship of the added material to the author of the original copyrighted work.

As worded, the exception applies to reproductions and derivative works because these are the exclusive rights usually involved in fandom activity.⁹⁶ To qualify under the exception a reproduction or derivative work would have to be created for one of four purposes: (1) to further appreciate the copyrighted work; (2) to analyze the copyrighted work; (3) to enable a fan artist to develop a creative craft; or (4) to enable a fan artist to refine a creative craft. A creative craft is understood to include forms of creative expression such as writing, painting, drawing, video editing, or music recording. Fan artists seeking exemption from liability under this provision would be barred from generating a substantial profit for anyone other than the

⁹⁶ See *infra* Part II (summarizing the copyright law's exclusive rights).

author of the copyrighted work. Additionally the fan artist would not be able to claim authorship for the original work and in the case of a derivative work, would not be able to attribute authorship of the added material to the author of the copyrighted work.

VIII. The Effects of Implementing a Copyright Experimental Use Exception

Even if one accepts the premise that fans are experimenters in culture and recognizes the value of permitting them to engage in infringement, the proposed exception must still endure analysis within the framework of the entire intellectual property system, considering its practical application and long term effects. The following section explores some of the issues that may arise if this exception for fandom experimental use were integrated into modern copyright law. Clearly such an exception is not the key to transforming copyright into a completely modern body of law that evolves with every changing aspect of technology. Such an exception would, however, protect free speech, encourage creativity, and preserve a culture that may be the equivalent of folklore and legend in the digital age. Most importantly perhaps, such an exception would also urge the copyright law to consider the changing roles of producer and consumer in the digital age, thus promoting its ability to

evolve and remain relevant in light of changing modes of artistic expression.

A. *Isn't Fandom Activity Already Covered by Fair Use?*

When I initially state my opinion that fan infringement of copyrights is akin to experimental use and advocate the need for a statutory exception, most people well-versed in intellectual property law kindly explain to me that such an amendment is unnecessary and that all my concerns are addressed by the doctrine of fair use. Many articles and opinions argue that certain types of fandom activity should categorically be considered fair use.⁹⁷ The fact that such editorials exist is evidence of the current state of legal uncertainty and general perception that fair use does not unequivocally apply to all fan activity.

Certain types of fan activity have a very strong fair use argument. The doctrine applies particularly well to fan fiction, which typically incorporates a substantial amount of added new material and is easily seen as “transformative” in nature, an important distinction for the third factor. Fan fiction

⁹⁷ See generally Ranon, *supra* note 52; Legal Fictions, *supra* note 39 (arguing that fan fiction should always be considered fair use).

generally fulfills the requirements of the fourth factor because publication of fan written fiction rarely interferes with demand for the copyrighted work or potential derivative works the author might produce. Additionally, it is easy to be convinced of the argument that allowing amateur artists to write fan fiction encourages the development of artistic abilities that will ultimately help further the goals of intellectual property law.⁹⁸

Although no court has decided whether fan fiction constitutes for fair use, the issue is even more unclear when the alleged infringement involves new wave fandom activity such as vidding or podcasting. It is much more difficult to assert a fair use defense when a music video is made entirely from clips of *Harry Potter and the Prisoner of Azkaban* or a fanmade podcast has such a large fan following that it rivals the popularity of the podcast made by the copyright owner. One might conclude that because these new wave uses don't fit within the current statutory framework, they should be infringement; however, this viewpoint disregards the relevance of recent technological

⁹⁸ See Kaytal *supra* note 89 at 466 (viewing copyright law as having the ability to empower or disable free speech and arguing that including minority viewpoints is key to having a creative marketplace).

advances and the nature of digital culture. A fan video that is constructed entirely of “stolen” clips from a film may include very much original thought in the way it was compiled, the story it tells, and the timing with the selected music. A free fan podcast that invades the potential market of a copyright holder may still have potential societal benefits that would justify any incremental harm done to the copyright holder.

Perhaps the most compelling reason fans need another form of statutory protection in addition to fair use is the fact that very few cases of fandom infringement make it to the stage in which the fair use analysis is applied. Because most fans don't have the resources necessary to be a defendant in a lawsuit against a multi-million dollar corporation, a copyright owner has immense power to shut down fandom activity immediately with a single threatening letter. If abused, this power could easily be a form of censorship.⁹⁹ If there was a clear statutory exception outlining the legal boundaries for fandom use, perhaps copyright holders would be less likely to abuse this power and would exercise conservative discretion in deciding where and when to send cease and desist letters. In a country that values

⁹⁹ *Supra* note 56 at 184.

freedom of speech as one of its primary values, this is a legitimate concern in shaping intellectual property policy.¹⁰⁰

B. Commercial Use and the Tanya Grotter Distinction

A fear that arises when implementing a new exception to a rule is that a group other than the one for which the exception was intended will abuse the provision and apply it in an unforeseen context. The risk that immediately comes to mind in this case is that all copyright infringers will attempt to justify their infringement by claiming it is “solely for fandom activity.” Arguably if such an exception did exist, one could envision RDR Publishing using it as a defense for Mr. Vander Ark. This risk can be mitigated by clearly defining this term in such a way that does not enable infringers who will truly harm the copyright owner’s interests to do this. In the context of a

¹⁰⁰ See generally Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (arguing that there is a “first amendment value of copying); John M. Olin, “Recoding” and the Derivative Works Entitlement: Addressing the First Amendment Challenge, 119 *HARV. L. REV.* 1488 (2006) (arguing that the foundations of copyright law encourage recoding to some extent).

major global cultural phenomenon that generates a fandom, the interests of the copyright owner are primarily economic.

Recent events involving the Harry Potter franchise help illustrate a clear distinction between fandom experimental use and commercial use that threatens the interests of the copyright holder. Harry Potter has become a major cultural icon of the twenty first century, and in some parts of the world, the demand for translations or additional adventures tailored to better relate the story to local culture have led to the production and publication of unauthorized "Potter-esque" tales.¹⁰¹ In China, a work entitled *Harry Potter and Leopard-Walk-Up-to-Dragon* sold millions of copies and in India, *Harry Potter in Calcutta* provided buyers a storyline in which Harry meets up with classic characters in Bengali literature.¹⁰² One can undoubtedly see undertones of experimentation in this type of activity; however

¹⁰¹ See Dennis S. Karjal, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17 (2006) (viewing Harry Potter as a global cultural icon and stressing the demand for Harry Potter translations and adventures in non-English speaking countries).

¹⁰² See *id.* at 17-18 (listing various Potter-inspired works in non-English speaking countries).

the difference between these unauthorized works and works generated within fandom is that most fans don't sell their work.

The market for unauthorized Harry Potter takeoffs gained international attention when JK Rowling won an injunction in a Dutch court prohibiting Russian author Dmitri Yemets from publishing *Tanya Grotter and the Double Bass*, the first in a series of books he describes as "Russia's answer to Harry Potter."¹⁰³ Although some commentators argued that Yemets should be free to publish and profit from his work because it is a form of parody, this is clearly not the type of infringement a fandom experimental use exception would protect. Because Yemets made a profit from the publication of *Tanya Grotter*, he would be barred from asserting that his infringement was justifiable fandom use. Additionally Mr. Yemets would have difficulty meeting the requirements under proposed sub section (d) because he represented the books to be solely his own work. If Mr. Yemets were a fan who distributed the work for free to help improve his writing style with clear disclaimers that JK Rowling is the author of the original material, then the exception might apply.

Limiting the statutory exception to situations in which the infringer does not generate a substantial profit for themselves and attributes authorship as required by the proposed exception

¹⁰³ Id. at 18.

is strong protection against abuse. It is highly unlikely that a true fan is violating copyright law to make a profit because fan culture is motivated by respect for the original work and fans genuinely don't want to direct money away from the creator.¹⁰⁴ Likewise, most fan works and web sites feature disclaimers which explicitly state that the original copyrighted work does not belong to the fan.¹⁰⁵ Although some fan groups do sell merchandise and engage in other fundraising endeavors, this money is used almost exclusively used to cover operating expenses such as web hosting, supplies, etc. The courts would ultimately have the task of deciding when fundraising activities cross the line and become profit generation; however, if one maintains that outlook that fandom is essentially a hobby and not a primary source of income, this should not be a difficult task.

¹⁰⁴ See generally *TEXTUAL POACHERS*, *supra* note 17 (deconstructing the fan stereotypes and representing the fan as an intelligent individuals who respect the creators and property of their chosen fandom).

¹⁰⁵ See e.g. *FanFicton.Net*, *supra* note 21 (showcasing the wide variety of disclaimers fan fiction authors chose to put on their work).

C. Moral Rights and International Obligations

It is useful to examine a potential experimental use exception in the context of the Harry Potter phenomenon because the fandom is global in nature and copyright law across the planet is not completely harmonized. An apparent difference exists between the common law system (England, United States) and the civil law system (continental Europe and former colonies in Latin America, Africa, and Asia).¹⁰⁶ The rationale for copyright protection in the common law world is based on creating incentives—which today are largely economic—for producing a wide variety of works that benefit society.¹⁰⁷ In contrast, some civil systems have adopted a different philosophical approach, viewing the relationship between author and work as an unalienable natural right. Countries subscribing to this view adopt moral rights legislation which give authors additional rights to their works including the right of integrity, the right of attribution, and the right of disclosure.

¹⁰⁶ DINWOODIE, GRAEME B., HENNESSEY WILLIAM O., AND PERLMUTTER SHIRA, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY, 2001, 513; see generally Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America* in OF AUTHORS AND ORIGINS IN COPYRIGHT LAW 131 (Sherman and Strowel eds., 1994).

¹⁰⁷ DINWOODIE, *supra* note 106.

Moral rights are recognized in the Berne Convention for the Protection of Literary and Artistic Works, which is the chief multinational agreement governing the subject of global copyright and neighboring rights.¹⁰⁸

Although the US is a signatory of Berne, they have adopted a “minimalist” approach to moral rights, enacting legislation only in the area of visual works.¹⁰⁹ Despite the US’s subtle rejection of a broad application of the doctrine of moral rights, critics of a statutory exception similar to the one proposed in this article may argue that adoption would cause the US to violate their duties under Berne. Because the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) incorporates the substantive obligations of Berne concerning moral rights, a potential violation could lead to a dispute governed by the World Trade Organization as the amendment to the Copyright Act concerning the “homestyle exception” did.¹¹⁰

The fandom experimental use exception has a strong retort to this concern because Article 13 of TRIPS provides a three

¹⁰⁸ *Id.*; Article 6bis Berne Convention.

¹⁰⁹ See VARA (enforcing moral rights only in the case of visual works); Joyce, *supra* note 40 at 607-8.

¹¹⁰ See DINWOODIE, *supra* note 106 at 563; Report of the Panel (WTO DSB June 15, 2000), WT/DS160/R.

element test for permissible limitations and exceptions to exclusive rights required under the treaty. A signatory country is allowed to make minor exceptions in deciding local law when the exception (1) is confined to certain special cases, (2) does not conflict with normal exploitation of the work, and (3) does not unreasonably prejudice the legitimate interests of the right holder.¹¹¹ Regarding the first factor, a fandom experimental use exception is certainly limited in the application and scope with a clear application to fans engaging in infringement that does not generate profit. Because the normal exploitation of work with a fandom following is primarily economic and fan activity arguably stimulates the market for the original work, the exception also seems acceptable under the second factor. If one views the third factor to concern more than just economic rights, critics may argue that it poses a problem because fans may engage in infringement that damages the legitimate interests of the copyright owner; however this concern dissolves in the context of corporate-controlled entertainment with a large public fan base. In this scenario, the legitimate interests of the right holder (the author, the studio, the publishing company) are almost entirely economic and fan activity is so contained

¹¹¹ Report of the Panel (WTO DSB June 15, 2000), WT/DS160/R, *supra* note 111.

that it would be difficult for it to rise to the level that it “unreasonably prejudices” these interests.¹¹²

Additionally one has to wonder if certain aspects intellectual property can be so engrained in popular culture that they become public property. When television characters invade living rooms and have the potential become just as familiar as friends and family members, it seems counter intuitive to restrict the ability to experiment with these cultural icons for the sake of maintaining artistic integrity. Countries recognizing moral rights frequently justify this approach based on the notion that doing so encourages more sophisticated creative contributions to society and promotes a high brow artistic culture that isn't overly concerned with economic interests. This justification completely falls apart in the context of corporate-controlled intellectual property, mass media, and a consumer-driven fan culture who lifeblood is purely economic.

¹¹² Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851, 862 (2006) (stating that “[e]conomic interests are the principle concern of copyright, insofar as authors are concerned”).

D. Trademark Rights Fans Should Never Have

As stated in Part V, it is essential to examine copyright issues within the scope of the entire American intellectual property system. Although copyright law is inherently similar to patent law in some ways, trademark and copyright issues often become intertwined. It is important to be able to separate these two areas of intellectual property protection to ensure that a particular intangible asset does not receive redundant or overly broad protection.

Whereas patents protect technological innovations and copyright protects creative expressions, trademark law protects the association of a mark with a particular good or service. When a movie audience sees the Warner Brothers logo appear on the theater screen or a shot of Harry Potter's famous lightning bolt scar, they have a certain expectation about the experience they are going to have and that expectation drives them to return to the theater or buy Warner Brother products. Trademark law prevents others from capitalizing on this association by granting the Harry Potter franchise a monopoly over certain marks as long as they meet the necessary legal criteria.

One argument for permitting fans to infringe copyrights in the context of fandom activity is that the primary intangible asset concerning a fandom is already adequately protected by trademark law. Nearly every book, television series, or movie

that is popular enough to generate a substantial fan following is also associated with a major corporation. Because the primary objectives in a corporate setting are economic, most corporations have an inclination to treat the copyrighted work more like a product and less like a work of art or creative expression. Corporations are more concerned with enticing consumers to buy a movie ticket, a special edition book collection, or an official t-shirt. Their interests have little to do with promoting the creation of a diverse body of artistic expression or maintaining the integrity of work. Corporations become concerned about infringement of intellectual property when it is interfering with their stream of revenue and trademark law provides them with adequate tools to stop this kind of activity.

It is redundant and overprotective to permit additional rights under copyright law in a situation where the consumers providing corporate profits are creating additional fan-made works on the side. Many fan-made works already include disclaimers which explicitly state that the work did not originate with the copyright owner.¹¹³ As long as it is clear

¹¹³ See Artists Don't Get No Respect: Panel on Attribution and Integrity, 28 COLUMN. J.L. & ART 435, 442 (2005) (stating that many

that the fan-made works originated from the fans and consumers don't become confused about the source of the original good, there is very little risk in allowing fans to play in the outskirts of small plots of corporate-owned intangible property.

IX. Conclusion

In contrast to the opinions of some critics, this article does not advocate that copyright law will or should become irrelevant in the digital age.¹¹⁴ Alternatively, it suggests reform a narrow area which is slowly becoming more and more significant in modern media. In a world where mass communication is governed by blogs, wikis, podcasts, and other new technologies, the consumer has an unprecedented amount of control over information. Although it was once considered "underground," fan culture has become relatively mainstream in recent years and is challenging the copyright system to evolve. Currently fair use does not adequately protect fans from writing, drawing, and viding; and corporate copyrights owners can block

fan-made works feature disclaimers about the source of the work and fair use).

¹¹⁴ See Robert Wright Rock and Roll Haven, Slate (July 31, 2000) available at <http://www.slate.com/id/87251/> (contemplating a world without copyright laws).

the creative pipeline too easily with a threatening cease and desist letter. If copyright law is going to be respected by the generation who is watching YouTube today, but will be making laws tomorrow, it will have to be sensible.

In addition, one cannot forget that copyright law is part of a larger intellectual property framework. Patent law conclusively incorporates a narrow exception that permits small researchers with limited resources to experiment with the property of big name corporations in the interest of scientific progress. If big name studios are the large R&D machine of the entertainment world, fans are clearly the generic manufacturers. Copyright law should consider such a narrow exception for fandom "experimental use" in the interest of creative and artistic progress. Until it does so, fans will continue to stop creating when they receive a cease and desist letter. Lawsuits against fans such as the current Lexicon suit will add to the fear and stifle creativity. In the worst case scenario, some fans may even choose not to create a piece of fan work in fear of being named as the defendant in a lawsuit where the big company who owns the idea they so adore is the plaintiff.