

Fair Dealing in a Fandemic: How Pastiche can be used to Clarify the Position of User-Generated Content

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Abstract

During the recent COVID-19 pandemic, amateur writers have increasingly been reusing characters, locations, and plotlines from commercially successful works to bring alternative viewpoints and storylines to life. This type of user-generated content is called fanfiction, produced mostly for free online on websites such as Fanfiction.Net as a method of escapism and communication. This is one of many uses of the Internet which raises issues in relation to copyright in a digital market, and how it interacts with freedom of expression. Copyright theory tells us that by protecting the author's natural rights to control their works, we also protect that author's ability to express themselves. Yet, by limiting what can be done with their work, we are limiting the freedom of expression of later authors. This article attempts to clarify the balance that is struck between these two ideals, using a case study approach of fanfiction and the fair dealing exceptions such as parody or pastiche. Clarity in this area was vital during a lockdown, when more cultural interactions were undertaken online, and standard methods of income generation were blocked to creators. This article analyses the fair dealing exceptions as they stand in UK law after the recent *Pelham/Funke Median* cases, and suggests a potential test for the pastiche exception in UK law in s30A CDPA 1988.

Keywords

Fair dealing, pastiche, fanfiction, user-generated content, parody, *Pelham*

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1. Introduction

'People want to be immersed...to get involved in a story, to carve out a role for themselves, to make it their own'.¹

Imagine a child playing with dolls. They dress them up, put them in a doll's house, and imagine all sorts of stories for them to play out.² In today's information technology age, that child could just as likely be playing with licensed Lego characters from the most recent blockbuster film franchise,³ or on a tablet or computer designing comic strips or writing stories using characters from the latest Marvel or DC blockbuster film.⁴ She could be using her tablet to film herself playing with her Lego characters.⁵ No matter what technology is used when the child is creating, they would almost certainly not be worried about the copyright law implications of their actions. Nor should they – this is the heart of the private use exception to copyright.⁶

However, what if the child uploaded the video or comic strip online? Current copyright legislation would assume that this would harm the first work as it would operate as a substitute for the original, and therefore would be an infringing copy under s17 CDPA 1988, meaning the child would be liable. After the implementation period for the Copyright in a Digital Single Market Directive⁷ expired on 7 June 2021, the site which hosts the work is also now *a priori* liable for communicating those works to the public.⁸ The only method of avoiding liability for this behaviour is to argue that the work is covered by one of the limitations and exceptions contained within the fair dealing provisions of the legislation.

This behaviour highlights the 'challenge'⁹ faced in copyright theory and jurisprudence regarding how we protect the rights of the author to control their expressions, which is deemed beneficial for society as it incentivises creativity,¹⁰ while also protecting the rights of users, such as the child in our example above, to freely engage and express opinions as permitted under Article 10 of the Human Rights Act 1998. Copyright law must therefore be clear on how limitations and exceptions such as pastiche and parody apply to online user-generated content (UGC) to ensure that any methods used to enforce the CDSM in the UK do so fairly and balance the rights of the user and the copyright holder.¹¹ These exceptions are intended to protect freedom of expression in certain ways that society deems beneficial, and thus override the right of the author to prevent the expressions taking place using their protected work.

This article focuses on this interaction copyright law and freedom of expression and highlights a clear issue with copyright law in this area – the most applicable exception (pastiche) has yet to be explored or explained in case law, despite being mentioned specifically as being applicable in Article 17(7)(b) of the CDSM Directive. As such, this article will use fanfiction as a specific form of UGC to explore the pastiche exception, using case law on related fair dealing exceptions to suggest a legal test which could be used in the application of the CDSM Directive. Fanfiction is chosen as it is highly popular, and also raises a fundamental specific point about the application of current legislation to this form of online activity.

Fanfiction is a part of a broader area of creation, with many websites such as Wattpad¹² devoted to hosting literary user-generated content (both fanfiction and original content). In December 2016, there were more than 11 million works posted by approximately 3 million users across the four largest sites devoted specifically to fanfiction.¹³ In comparison, there were approximately 590,000 new books published in Europe that year.¹⁴ The large amount of works of this type in the market means that fanfiction is a strong candidate as a case study to demonstrate how the law could apply to this form of online behaviour.

The issue of intellectual property law and UGC works of this type boils down to a simple question – 'Who controls a story – its creator or its fans?'¹⁵ In the original world of fiction, copyright theory states that the author is the one who controls and tells the story in a way they see fit. However, it has been argued that new forms of online and digital media such as word processors, affordable videographic equipment and broadband internet has created an 'authorship crisis' as it permits the audience to 'step out of the fiction and start directing events'.¹⁶ It is within this authorship crisis that this work is situated. Fanfiction creators and consumers argue their work is transformative, and thus outside the control of the author – whereas the author argues that they should still be permitted to control these

¹ Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 8.

² This scenario was first used to analyse fanfiction in 1997, using Barbie dolls: R Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 *Loyola of Los Angeles Entertainment Law Review* 651, 651.

³ For example, there are four sets relating to Marvel's Guardians of the Galaxy Vol 2, which was only released in the UK on May 1st 2017 – 'Marvel Super Heroes | 2017 | Guardians of the Galaxy Vol. 2' (*Brickset.com*) <<https://brickset.com/sets/theme-Marvel-Super-Heroes/year-2017/subtheme-Guardians-of-the-Galaxy-Vol-2>> accessed 25 August 2021.

⁴ There are many free sites and apps online devoted to comic book creation, such as Comic Life and Superhero Comic Book Maker, designed for children as young as 5.

⁵ Figures from 2014 suggest that 34% of children aged between 5 and 15 have a personal tablet, and more than ten percent of 3-4 year olds, 'One in Three Children Now Have Their Own Tablet Computer' (*Ofcom*, 14 September 2016) <<https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2014/media-lit-audit-oct2014>> accessed 25 August 2021.

⁶ s28B CDPA 1988.

⁷ Hereafter CDSM Directive.

⁸ Under s20 of the CDPA 1988.

⁹ Eugene C Lim, *On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience?* (2018) 15 *SCRIPTed* 7.

¹⁰ Alexandra Couto, *Copyright and Freedom of Expression: A Philosophical Map*, in Axel Gosseries, Alain Marciano and Alain Strowel (eds) *Intellectual Property and Theories of Justice* (Palgrave Macmillan, 2008).

¹¹ The specific methods used, such as filtering, are outside the scope of this article. See S Guzel, *Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet* (2021) *EJLT* 12(1).

¹² Wattpad - Where Stories Live' (Wattpad, 2022) <<https://www.wattpad.com/>> accessed 10 March 2022.

¹³ Fanfiction.Net <<http://www.fanfiction.net>>, Kindle Worlds (now closed, previously part of the Kindle website), Archive of Our Own (AO3) <<https://archiveofourown.org/>> and Asianfanfics <<https://www.asianfanfics.com/>>

¹⁴ 'European Book Publishing Statistics 2016' <<https://fep-fee.eu/European-Book-Publishing-920>> accessed 25 August 2021.

¹⁵ Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 75.

¹⁶ Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 83.

forms of derivative works as they are not sufficiently transformative nor are they for a sufficiently fair reason. By exploring the pastiche fair dealing exception, this idea of transformativeness will also be analysed.¹⁷

2. Copyright theory, Fair Dealing, Freedom of Expression, and User-Generated Content

There are two types of right recognised in standard copyright theory which are important to the following analysis: natural property rights and reward based rights.¹⁸ Natural property rights are follows the philosophy of John Locke regarding an individual's innate right to control what he has created.¹⁹ While this appears to make sense when discussing large works of creativity such as novels, paintings and films or TV shows, it breaks down when an attempt is made to apply it to the current trend in copyright law in the EU and the US to permit copyright protection for relatively small forms of creative expression, as seen in recent case law such as *Meltwater*²⁰, *Infopaq*²¹, and *Tixdaq*²², which provided copyright protection to such things as newspaper articles and very short clips of sporting events.

These creative expressions are potentially better supported by reward-based rights, whereby creators are rewarded for contributing to social welfare.²³ These rights recognise that the role of copyright is to incentivise the use of scarce resources to create works which benefit society, by permitting the charging of a monopoly price to recoup costs incurred.²⁴ For example, publishers incur high costs and risks when acting on the market by paying a cash advance to an author, who has potentially borne high 'costs of expression'²⁵ themselves. Without the protection of copyright allowing publishers to charge above market price, the theory states that authors and publishers would have no incentive to publish at all. This would have a detrimental effect on the allocation of resources on the fiction market meaning that many works, especially those not destined for the bestseller lists, would not be published despite their social welfare value.

These theories tend to rely on standard theories of the economics of copying,²⁶ which presume that derivative works automatically harm the underlying work (usually by acting as a substitute).²⁷ The presumption therefore made is that derivative works are not fair dealings, unless the secondary creator can prove they are transformative enough not to harm the underlying work, which should be a high bar to prove on the facts. This theory underpins much copyright case law in the UK to date, dating back to Lord Denning's judgement in *Hubbard v Vosper* that work 'used to convey the same information as the author, for a rival purpose...may be unfair'.²⁸

However, there is a growing awareness that this may not be the whole story, and that we should take a broader view of the benefits of derivative works such as fanfiction and other user-generated content. Theories on fair dealing exceptions²⁹ to copyright state that the same economic theories that can be used to argue for strong copyright protection can also be seen as inefficient. Strong copyright laws may lead to high search and transaction costs for authors,³⁰ and thus exceptions in tightly defined circumstances such as fair dealing can promote efficient allocation of resources on the market³¹ as well as promote freedom of expression (the focus of this article). From a legal philosophy perspective, it has also been argued that limitations and exceptions follow John Locke's theory that one should leave 'as much and as good...in common for others'.³²

Copyright theories interact with theories relating to freedom of expression. Free speech theories state that we should permit certain derivative reuses, since free speech allows for a free market of ideas.³³ From a literary perspective, it is known that authors 'stand on the shoulders of giants'³⁴: that inspiration and innovation come from previously published works. Freedom of expression theories state that individuals should not be restricted from using the ideas of others to create their own works.

The issues surrounding the balance of copyright between promoting and incentivising creativity through strong copyright protection, and avoiding the issues that creates both economically and in relation to freedom of expression, are shown in relation to user-

¹⁷ This behaviour also raises issues in relation to moral rights, especially the right to object to derogatory treatment of the work (s80 CDPA 1988, *Confetti Records v Warner Music UK Ltd* [2003] EMLR 35). However, this is outside of the scope of this article as authors are less likely to rely on them to protect their works, due to the perception that they are "half-hearted" and "riddled with exceptions" (Jane Ginsburg, *Moral Rights in the Common Law System* (1990) Entertainment Law Review 121, 129). This comparative lack of use by authors (compared to economic rights) means they have a much weaker effect on freedom of expression.

¹⁸ Robert M Hurt and Robert M Schuchman, 'The Economic Rationale of Copyright' (1966) 56 *The American Economic Review* 421. Hurt and Schuchman also reference personality based rights, but these deal more with moral rights than economic rights so are outside the scope of this analysis.

¹⁹ John Locke, *The Two Treatises of Government* (Awnsham Churchill, 1690).

²⁰ *Newspaper Licensing Agency v Meltwater Holding BV* [2011] EWCA Civ 890.

²¹ *Infopaq International A/S v Danske Dagblades Forening* (C-05/08).

²² *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575.

²³ Robert M Hurt and Robert M Schuchman, 'The Economic Rationale of Copyright' (1966) 56 *The American Economic Review* 421, 424.

²⁴ Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 *Economica* 167.

²⁵ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *The Journal of Legal Studies* 325.

²⁶ Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281; Ian E Novos and Michael Waldman, 'The Effects of Increased Copyright Protection: An Analytic Approach' (1984) 92 *Journal of Political Economy* 236; William R Johnson, 'The Economics of Copying' (1985) 93 *Journal of Political Economy* 158.

²⁷ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *The Journal of Legal Studies* 325, 360.

²⁸ *Hubbard v Vosper* [1972] 2 QB 84, at [94].

²⁹ Ruth Okediji, 'Toward an International Fair Use Doctrine' (2000) 39 *Columbia Journal of Transnational Law* 75; Sabine Jacques, 'Are the New "Fair Dealing" Provisions an Improvement on the Previous UK Law, and Why?' (2015) 10 *Journal of Intellectual Property Law & Practice* 699.

³⁰ Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and Its Predecessors' (1982) 82 *Columbia Law Review* 1600; Wendy J Gordon, 'Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story Part II' (2002) 50 *Journal of the Copyright Society of the U.S.A.* 149.

³¹ Pierre N Leval, 'Towards a Fair Use Standard' (1990) 103 *Harvard Law Review* 31.

³² John Locke, *Two Treatises of Government* (for Whitmore and Fenn, and C Brown 1821) Ch V paragraph 27. Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Geo LJ* 287, 297-310.

³³ John Stuart Mill, *On Liberty*, in *Collected Works of John Stuart Mill* (University of Toronto Press, 1977).

³⁴ Robert K Merton, *On the Shoulders of Giants: A Shandean Postscript* (Free Press 1965).

generated content such as memes³⁵, parody³⁶, sampling³⁷, and mash-ups and remixes.³⁸ These transformative reuses of copyright work demonstrate how UGC can be a 'disruptive' but also 'creative force', that comes from the 'creativity of individual users newly enabled as expressive agents by digital technologies'.³⁹ This innovation can lead to benefits for society as more creative works are released onto the market. These theories underpin the case law analysis to follow.

3. Fanfiction as User-Generated Content

Fanfiction is seen by many artists and lawmakers as a particularly 21st century phenomenon, as shown by most UK literature only tackling the issue around 2010.⁴⁰ Although the law has handled the issues surrounding fanfiction, it has actively avoided using the word 'fanfiction' in case law, preferring to refer to parody instead.⁴¹ The idea of borrowing from the work of others is not a new concept. Dionysius of Halicarnassus stated that 'art – at least the art of writing – was more truly a matter of imitating other good writers who'd gotten it right before you'.⁴² This concept continued through the ages, including much of Shakespeare's writings (Hamlet, and Anthony & Cleopatra as noticeable examples). Fanfiction is a continuation of this trend.

The most often quoted definition of fanfiction comes from the strong background fanfiction has within US copyright literature⁴³. According to that definition, fanfiction 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. Fan authors borrow characters and settings...for use in their own writings. Fanfiction spans genres.⁴⁴

This highlights the importance of understanding the boundaries of how fair dealing laws may apply to this type of user-generated content, as without its protection many types of fanfiction would be likely to be infringing as a substantial taking from the underlying work.⁴⁵

The law on substantial taking from the underlying work is designed to protect the right of the author to control not only the totality of their work, but any economically valuable part of it. In the UK, recent cases have held that this can include such things as newspaper headlines⁴⁶ and short clips of sports broadcasts.⁴⁷ This broadening of the sphere of copyright protection has weakened the freedom of expression rights of users in this area, as it limits the amount of the work that can be freely reused. At the same time, recent copyright jurisprudence⁴⁸ suggests that certain literary elements such as characters and locations may attract protection outside of the works in which they appear, as they operate as specific expressions of artistic choice⁴⁹. This restricts the freedom of expression of users, who may wish to interact with those characters and locations for beneficial reasons.

Fanfiction reflects the wider ability of the internet to improve the ability of people to freely express themselves⁵⁰ and freely create works such as user generated content. The importance of user-generated content as a new form of creativity is recognised at the highest level by lawmakers, who have stated that this is merely part of a new form of creation and production, which should in certain cases be permitted to allow for the emergence of new users and new business models on the market.⁵¹ Hargreaves, in his 2011 review into the application of UK copyright law in the digital age, stated his belief that a 'healthy creative economy should embrace creativity in all its aspects' and that copyright should be used to achieve this though balancing the 'divergent interests' of authors, publishers, readers and society as a whole.⁵² It should do so clearly, by defining the economic and moral rights that are protected in a copyright work, and the exceptions when they do not apply.

³⁵ Giacomo Bonetto, 'Internet Memes as Derivative Works: Copyright Issues under EU Law' (2018) 13 Journal of Intellectual Property Law & Practice 989.

³⁶ Sabine Jacques, 'Are the New "Fair Dealing" Provisions an Improvement on the Previous UK Law, and Why?' (2015) 10 Journal of Intellectual Property Law & Practice 699; Jonathan Griffiths, 'Fair Dealing after Deckmyn - The United Kingdom's Defence for Caricature, Parody or Pastiche' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 <<https://papers.ssrn.com/abstract=2770508>> accessed 2 December 2017; Graeme W Austin, 'EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire' (2016) 39 University of New South Wales Law Journal 684.

³⁷ Elizabeth Adenay, 'How Much Is Too Much? The Gradual Coalescence of the Law on Sampling' (2018) 2 Intellectual Property Quarterly 91.

³⁸ Bernd Justin Jutte, 'The EU's Trouble with Mashups - From Disabling to Enabling a Digital Art Form' (2014) 5 Journal of Intellectual Property, Information technology and Electronic Commerce 172; J Cabay and M Lambrecht, 'Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity' (2015) 10 Journal of Intellectual Property Law & Practice 359; Maxime Lambrecht and Julien Cabay, 'Remix Allowed: Avenues for Copyright Reform Inspired by Canada' (2016) 11 Journal of Intellectual Property Law & Practice 21; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

³⁹ Ramon Lobato, Julian Thomas and Dan Hunter, 'Histories of User-Generated Content: Between Formal and Informal Media Economies' in Dan Hunter and others (eds), *Amateur Media* (Routledge 2013) 3.

⁴⁰ Aaron Schwabach, *Fanfiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011); Frank Rose, *The Art of Immersion: How the Digital Generation Is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011); Tamara Bukatz, 'Amazon's Fanfiction Store: Opportunity or Fandom-Ination? The Legal Background to Commercial and Non-Commercial Creations from Canon: Part 1' (2013) 18 Communications Law 122; Khanuengnit Khaosaeng, 'Wands, Sandals and the Wind: Creativity as a Copyright Exception' (2014) 36 EIPR 238.

⁴¹ *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11th Cir 2001).

⁴² Anne Jamison, 'A Prehistory of Fanfiction', *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) 26.

⁴³ Stacey M Lantagne, 'The Better Angels of Our Fanfiction: The Need for True and Logical Precedent' (2011) 33 Hastings Comm & Ent LJ 159; Babak Zarin, 'In the Restricted Section: Harry Potter and Unauthorised Sagas' (2017) 9 Elon Law Review 459.

⁴⁴ Rebecca Tushnet, 'Legal Fictions: Copyright, Fanfiction, and a New Common Law' (1997) 17 Loyola of Los Angeles Entertainment Law Review 651, 655

⁴⁵ S16(3)(a) and s17 CDPA 1988;

⁴⁶ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* (Case C-360/13).

⁴⁷ *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch).

⁴⁸ *Infopaq International AS v Danske Dagblades Forening* (Case C-5/08); *Cofemel v G-Star Raw* [2020] ECDR 9; *Levola Hengelo v Smilde Foods* [2019] ECDR 2

⁴⁹ Ruth Flaherty, 'Characters and Locations in a Digital Age – Indistinct Ideas or Elucidated Expressions?' (2022) 44 EIPR 2 65.

⁵⁰ Jane C. Ginsburg, 'Copyright and Control Over New Technologies of Dissemination' (2001) 101 Colum. L. Rev. 1613.

⁵¹ 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (European Parliament 2016) COM/2016/0593 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>> accessed 25 August 2021.

⁵² Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) 41, 50 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 25 August 2021.

This balancing act requires the strong use of exceptions such as parody and pastiche to avoid copyright holders being able to block publication of works of a form they would never intend to publish, as this type of ringfencing of material leads to an inefficient use of materials on the market, and is an inexcusable use of the copyright monopoly as a form of censorship. Fanfiction will be shown in this paper to be non-commercial and published in short form potentially as a work-in-progress, all characteristics of works which the original author would never intend to create. Given that it will also be shown to have important social welfare benefits in relation to representation of minority interests, it is definitely a good candidate for the application of this type of exception. This article will therefore use the application of the pastiche fair dealing exception to balance the needs of the stakeholders mentioned by Hargreaves in the previous paragraph, and provide general balance between copyright and freedom of expression.

4. Fair Dealing

In the UK,⁵³ the balance between freedom of expression and the right of creators to protect their works is contained in the copyright fair dealing limitations and exceptions in s28-30A CDPA 1988. These are potential defences available to users to permit publication of works for the purposes of either criticism, review, quotation and news reporting (s30 CDPA 1988); or caricature, parody, or pastiche (s30A CDPA 1988). These exceptions prevent copyright holders from abusing their copyrights to prevent publications. If they apply, the defendant is 'entitled to publish...and the law will not intervene to suppress freedom of speech'.⁵⁴

An analysis of these types of 'dealing' will therefore be made in the coming sections, to show both how they reflect the importance of freedom of speech and how they might be argued by a fanfiction creator to apply to their work. This will lead to an examination of a potential test for 'pastiche' which is undefined in case law but is important for these types of work, and to protect freedom of expression online. There will then be a discussion made surrounding how the 'fairness' part of the fair dealing test, as originally laid out in *Hubbard v Vosper*⁵⁵ can also be used to judge whether the rights to freedom of expression of the user override the rights of creators to protect their works.

4.1. Fair dealing with a work for the purpose of criticism or review – s30(1) CDPA 1988

The first type of fair 'dealing' with the work which highlights the need of copyright protection to also permit for free speech is that for 'criticism or review', as protected in s30(1) CDPA 1988. This section permits for users to reuse protected speech so long as they are doing so to criticise either a specific work, or another specific work, which has been made available to the public, and is accompanied by sufficient acknowledgement. This has been held to be quite a broad exception, protecting the right of users to freedom of speech in relation to criticising the style of the underlying work, as well as the ideas and the morals contained within, as held in *Time Warner Entertainment Co v Channel Four Television Corporation Plc*.⁵⁶ The only restriction to this type of expression is that the criticism must be identifiable as being in relation to specific works, rather than as a general subject, meaning for example that some forms of online interaction with works, such as blog posts, could seek shelter under this heading if they can demonstrate a criticism or review of a series of works.⁵⁷ However, as will be seen in the following paragraphs, the balance being made here between copyright protection and freedom of speech is that this exception will only protect freedom of expression of factual speech, not creativity.

4.2. Fair dealing with a work for the purpose of quotation – s30(1) CDPA 1988

The exception for quotations to run alongside criticism and review in s30 CDPA 1988 was inserted by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. S30(1ZA) lays out the broad nature of the exception, explaining it can protect reuses for criticism or review, or 'otherwise'. This broad nature means that it has been at the forefront of the argument between freedom of expression and copyright protection. It has been applied to such diverse uses as publication of unauthorised excerpts of written articles⁵⁸, military reports⁵⁹, or remix.⁶⁰ In each case, the question was whether the need for freedom of speech⁶¹ should trump the need for copyright protection. For example, in *Pelham*,⁶² the CJEU held that the need for a functioning internal market for trade of creative works requires copyright law to be firmly balanced against the fundamental freedoms 'in particular freedom of artistic expression', and that this balance was found within the scheme of limitations and exceptions.⁶³

⁵³ As fair dealing is a choice at national level, historically these were minimum standards and thus led to variety across the Member States regarding which types of behaviour from the broader list in Article 5 of the InfoSoc Directive were permitted. However, recent cases such as *Pelham v Hutter and Schneider-Esleben* (C-476/17); *Spiegel Online GmbH v Volker Beck* (C-516/17); and *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17) have stated that as these are methods of protecting fundamental freedoms, there should be parity across Member States, so this may be about to change in the EU. Given the impact of Brexit, and the disavowal of the Copyright in a Digital Single Market Directive by the UK Government, it is unclear how this will apply in the UK. The European Union (Withdrawal Agreement) Act 2018 writes all pre-existing EU laws into UK legislation at the point of withdrawal, meaning that until these cases are specifically overruled in UK courts, they remain good law. However, s5 of that Act specifically states that after withdrawal, there will be no obligation on the UK to continue to legislate in line with EU case law and legislation, which highlights the confusion that occurs surrounding the way the UK government will deal with online content.

⁵⁴ *Hubbard v Vosper* [1972] 2 QB 84, at [97].

⁵⁵ [1972] 2 QB 84.

⁵⁶ [1994] EMLR 1.

⁵⁷ *Fraser-Woodward Ltd v BBC* [2005] FSR 36.

⁵⁸ *Spiegel Online GmbH v Volker Beck* (C-516/17).

⁵⁹ *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17).

⁶⁰ *Pelham GmbH v Hutter* (C-476/17).

⁶¹ Or freedom of the press, which can also be covered by the 'news reporting' exception also contained within s30 CDPA 1988 (but which is irrelevant to fanfiction).

⁶² *Pelham* at para [60].

⁶³ Martin Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test' in T Mylly and J Giffiths (eds), *The Transformation of Global Intellectual Property Protection* (Oxford University Press 2020) 14.

Clarity on the types of use permitted within this heading is therefore vital. *Pelham* clarified that the quotation must only be 'to the extent required' for that purpose,⁶⁴ and further defined quotation strictly⁶⁵ as the use, by someone else, of either a whole work or an extract, for the purposes of illustrating an assertion, or defending an opinion – or of giving a comparison between that work and the assertions of the user – such that the user is entering into a dialogue with the work. The CJEU specifically referred to the Advocate General's opinion,⁶⁶ where he stated that this dialogue could be in tribute to the underlying work. Furthermore, the CJEU in *Pelham* held that samples of work, such as music clips, could amount to quotations, so long as they remained recognisable as part of the underlying work. Characters and locations as reproduced in fanfiction would, arguably, pass this test.

The problem with situating creative forms of speech such as fanfiction within this exception is that in *Pelham* it appears that the purpose of a quotation, like for criticism and review, must be to impart information – the assertion or opinion must be non-fictional. Given the strict statement⁶⁷ that 'the use at issue for the purposes of quotation must not be extended beyond the confines of what is necessary to achieve the purpose of that particular quotation', it would be arguably likely that stretching it to cover creative speech such as fanfiction would be a step too far. Thus, this paper will move on to investigate a more relevant exception – that of caricature, parody, and pastiche.

4.3. Fair dealing with a work for the purposes of caricature, parody or pastiche – s30A CDPA 1988

The new parody and pastiche fair dealing in s30A CDPA⁶⁸ has been referred to as an improvement on previous copyright law due to its acceptance of new forms of copyright law, which it is theorised will have positive effects on society as it both incentivises the spread of cultural, copyright works⁶⁹ and provides for more opportunities for freedom of speech.⁷⁰ Before the implementation of s30A, parodists were required to seek a licence or permission, or risk infringement proceedings being brought. Given that there is a risk that those being made the subject of a parody (or their works) will not agree due to the negative connotations of parodies,⁷¹ there was a risk to freedom of expression that copyright law being used to block publication and dissemination of works that had positive social externalities and should be permitted.

Following the Quotation and Parody Regulations 2014, 'caricature, parody and pastiche' became a permitted act within UK copyright law under s30A CDPA 1988. While the exact meaning of the words 'caricature', 'parody', or 'pastiche' was not given in the legislation, the UK government gave the following example within its explanatory materials:

...a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well-known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork⁷².

Parody has been specifically defined in the leading case of *Deckmyn*,⁷³ where two requirements were laid out. The second work must (a) call to mind the underlying work but be different enough from it to be distinctive; and (b) be a humorous or mocking expressive work.⁷⁴ The first characteristic can be demonstrated by works that target either the underlying work (target parodies), or the sociology of the group behind the work or that the original work is marketed at (weapon parodies)⁷⁵. Thus, UGC works that specifically operate as a parody are now permitted, so long as they are 'fair'.

The fair dealing exception for parodic works has been used in several different jurisdictions to protect creative derivative speech. The strongest use of parody in this way is seen in the US, where in the leading case of *Suntrust Bank*⁷⁶ it was held that despite appropriation of characters, plot points and settings, a reworked story of *Gone with the Wind* from the perspective of the slaves was permissible as a parody due to the importance of the critical look at cultural issues within the original work. This was held to be such a strong argument for freedom of expression that it overcame the utilitarian argument for protecting the authors' right to ban a use they did not approve of. This has been referred to as demonstrating 'a robust culture of promoting free speech'⁷⁷. In comparison, case law in the UK such as *Ashdown*⁷⁸ have shown that while UK courts are potentially edging closer to making similar judgements in relation to this tension between free speech and copyright, they have only done so for non-creative speech so far.

While the fair dealing exception for parody may be one method users can use to protect their freedom of speech, there are important differences between parody and other important creative forms of speech such as fanfiction that mean not all creative speech will be treated the same way in the UK, due to the importance within the EU and UK of principles of statutory interpretation. The most important difference between parody and fanfiction for example is the way the underlying work has been treated. This relates to the second, 'functional' part of the *Deckmyn* definition – parodies must be made up of some form of 'humour or mockery'. While there are some works of fanfiction that operate in that way intentionally, this is not the main reason fanfiction is created – only 0.21% of works on

⁶⁴ At para [69].

⁶⁵ At para [71].

⁶⁶ Specifically para [64] of the Opinion

⁶⁷ In para [69].

⁶⁸ Contained in the Copyright and Related Rights (Caricature, Parody and Pastiche) Regulations 2014.

⁶⁹ DJ Grout, 'Seventeenth-Century Parodies of French Opera - Part I' (1941) 27 *The Music Quarterly* 211.

⁷⁰ Christophe Geiger, Jonathan Griffiths, Martin Senfleben, Lionel Bently and Raquel Xalabarder, 'Limitations and exceptions as key elements of the legal framework for copyright in the European Union: opinion of the European Copyright Society on the CJEU ruling in Case C-201/13 *Deckmyn*' (2015) *International Review of Intellectual Property and Competition Law* 46(1) 93.

⁷¹ Paul Jewell and Jennie Louise, 'It's Just a Joke: Defining and Defending (Musical) Parody' (2012) 10 *Australian Review of Public Affairs* 1, 8.

⁷² Gov.uk, Exceptions to Copyright < <https://www.gov.uk/guidance/exceptions-to-copyright#parody-caricature-and-pastiche> > accessed 10 March 2022

⁷³ *Deckmyn v Vandersteen* (C-201/13).

⁷⁴ *Deckmyn*, at [20].

⁷⁵ Opinion of Advocate General Cruz Villalón, *Deckmyn v Vandersteen* (n 42) paras 60–65.

⁷⁶ *Suntrust Bank v Houghton Mifflin* 268 F3d 1257 (11th Cir 2001).

⁷⁷ Sabine Jacques, 'How Freedom of Expression Defines the Parody Exception' in S Jacques, *The Parody Exception in Copyright Law* (1st ed, OUP, 2019).

⁷⁸ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142.

Archive of Our Own are tagged as parody,⁷⁹ and only 0.62% of works on Fanfiction.Net are tagged that way.⁸⁰ Instead, it is mostly created out of love for and engagement with the community itself, rather than humour.

Another important difference between fanfiction and parody, which also explains why the legislation for parody should not be implied to cover pastiche type works such as fanfiction, is the status of the work. While parodies are released onto the market in completed form, it has been shown that there is much more focus on the release of works-in-progress in fanfiction,⁸¹ which is potentially why much is released for free. This may be due to the amateur nature of some fanfiction writers: 62.3% of Fanfiction.Net users self-define as teenagers,⁸² who are at an age where they are developing their writing skills – and are therefore more open to the form of reviews and mentoring that communities such as Fanfiction.Net provide. Writers of that age group are also much less likely to be writing original fiction professionally⁸³ – possibly due to lack of education or training. Thus, engaging with an active fandom on Fanfiction.Net may be seen to be like professional writers joining professional organisations such as the Writers’ Guild of Great Britain or the Alliance of Independent Authors. In the same way, fanfiction may be a form of vocational writing training – which may explain why much fanfiction is released chapter by chapter. This is a point that will be discussed later in this paper regarding the transformative nature of fanfiction.

The predominance of incomplete works within fanfiction may be explained by the community nature of fandoms, and fanfiction groups specifically. It has been argued that fanfiction writers and readers form a community for pleasure (in their hobby of writing/reading of amateur works and fanfiction in general) or to develop their skills in hopes of developing a professional literary career.⁸⁴ Importantly, fandom offers the ability to normalise and validate the desire to interact with the works in this way, while acquiring further writing or other creative skills⁸⁵. The community aspect is important, as shown in Fanfiction.Net’s Guidelines: ‘Everyone here is an aspiring writer. Respect your fellow members and lend a helping hand when they need it’.⁸⁶ The works posted are therefore released in draft form and comments and criticisms are welcomed (both Fanfiction.Net and Archive of Our Own have clear spaces underneath each work for comments). This is different to parodic works that seek reviews once the work is completed and released onto the market.

These differences between parody and fanfiction are vital to the analysis as to how copyright law should balance freedom of speech and utilitarianism in its approach to each type of work. Copyright theory assumes that all unauthorised derivative works operate against the interest of the copyright holder by acting as a substitute, or by harming the integrity of the original work. When that argument is applied to parody, one can see why there is a justified exception made: while a parody is a derivative work, it is unlikely to operate as any form of substitute for the underlying work.⁸⁷ This argument can be taken even further in the case of fanfiction. The *writers* of fanfiction are likely to have already purchased the underlying work (how else would they know what to base their works on?) and are in fact likely to be repeat loyal purchasers given their status as fans. They are also likely to be high volume, high-cost purchasers who buy ‘Extended/Director’s Editions’ instead of the standard version of the underlying work. Thus, the demand from those users is not ‘satisfied’ by the fanfiction. The question remains whether the *readers* of fanfiction are having their demand for the original work satisfied. The works are mostly published differently (online in comparison to print), and as mentioned are mostly released as ‘works in progress’ rather than as completed work.

This analysis has therefore shown that many forms of creative speech using copyrighted works may be protected using the fair dealing exception for parody. However, there are requirements for parodies which restrict this from protecting several other important types of speech, including UGC and fanfiction. These forms of speech may still deserve protection, and so an investigation will now be made of the related exception for ‘pastiche’ to see whether it can be applied to these types of works. If they do not, due to the closed list nature of the fair dealing exceptions, these forms of creative speech will not be protectable in the UK, whether or not they are deemed ‘fair’ as iterations of free speech.

Pastiche as a type of fair dealing remains unclear. There is no definition in the CDPA for pastiche, and there has been no clarifying court case like *Deckmyn* to lay down a judicial example. Although it has been argued that it ‘refers to laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre’⁸⁸, this definition directly contradicts the statement of AG Villalon in *Deckmyn* who argued that parody, caricature and pastiche were indistinguishable.⁸⁹ The topic was however not discussed by the Grand Chamber as a whole, and AG Villalon’s comments have been deemed unclear by academics,⁹⁰ so doubts can be raised as to whether they are legislatively able to be defined as the same.⁹¹

While there is yet to be a clear judicial or legislative definition of pastiche,⁹² it appears logically to cover most creative forms of speech of this type, such as ‘mash-ups, fanfiction, music sampling, appropriation art and other forms of homage and compilation’ as

⁷⁹ 17,019 works out of 7,808,939 as of 21st August 2021.

⁸⁰ 42,338 works out of 6,873,646 as of 17th May 2017. While some fanfiction is written from a minority standpoint, it is not intended as a parody or a criticism of that underlying work in the same way as was argued in *Suntrust Bank*.

⁸¹ Finn Upham, ‘ToastyStats: Fanfic Completion Rates’ (ToastyStats: Fandom Statistical Analyses, 20 April 2015).

<<http://destinationtoast.tumblr.com/post/116932611769/toastystats-fanfic-completion-rates-i-discovered>> accessed 25 August 2021. This research showed that while 88% of works on Archive of Our Own (AO3) are rated as ‘complete’, only 50% on Fanfiction.Net were.

⁸² Kodlee Yin and others, ‘Where No One Has Gone Before: A Meta-Dataset of the World’s Largest Fanfiction Repository’, CHI 2017 (ACM Press 2017) <<https://faculty.washington.edu/aragon/pubs/Yin-FFData-CHI2017.pdf>> accessed 25 August 2021.

⁸³ In a recent survey, authors who write professionally were found to be mostly over the age of 45 (Kretschmer, Martin, Gavaldon, Andres Azqueta, Miettinen, Jaakko, & Singh, Sukhpreet (2019). UK Authors’ Earnings and Contracts 2018: A Survey OF 50,000 Writers. <https://doi.org/10.5281/zenodo.2649059>)

⁸⁴ Aarathi Vadde, ‘Amateur Creativity: Contemporary Literature and the Digital Publishing Scene’ (2017) 48 *New Literary History* 27, 33.

⁸⁵ Matt Hills *Fan Cultures* (Routledge, 2002).

⁸⁶ ‘Guidelines | Fanfiction’ <<https://www.fanfiction.net/guidelines/>> accessed 25 August 2021.

⁸⁷ although it may harm the size of the market for the underlying work – for more, see Sabine Jacques, *The Parody Exception in Copyright Law* (1st ed, OUP, 2019).

⁸⁸ Emily Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?’ (2017) 4 *Intellectual Property Quarterly* 346.

⁸⁹ *Deckmyn v Vandersteen* at para [42].

⁹⁰ Jonathan Griffiths, ‘Fair Dealing after *Deckmyn* - The United Kingdom’s Defence for Caricature, Parody or Pastiche’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2770508 <<https://papers.ssrn.com/abstract=2770508>> accessed 2 December 2017.

⁹¹ Emily Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?’ (2017) 4 *Intellectual Property Quarterly* 346.

⁹² In *Deckmyn*, it was merely stated to mean something very similar to parody.

'laudatory and non-critical imitation[s]'.⁹³ Pastiche has been defined as mimicking the underlying work either by imitating style or idiosyncrasies from within the original⁹⁴ in a nostalgic way, without satirising it.

The lack of criticism is what distinguishes pastiche as an homage from parody - and is why some legal scholars believe parody has a stronger claim to fair dealing than pastiche.⁹⁵ Leading scholars refer to it as 'blank' or 'empty' parody⁹⁶. Yet, pastiche was specifically included in the legislation and therefore there must have been the intention for these works to be permitted. This remains true, even though the word appears to have been lifted wholesale from the European legislation, as there was no debate on the word in Parliament at the time the new exceptions were brought in. The word has been used 24 times in the House of Commons yet never defined⁹⁷ which perhaps implies that Parliament believes it is a standard English word that does not require specific legislative definition.⁹⁸ In a 2015 debate on the topic of harmonising copyright and related rights, the importance of pastiche and caricatures were specifically mentioned. It is also specifically included in Article 17(7) Copyright in a Digital Single Market Directive. Therefore, although there is a lack of case law on which to base an argument for pastiche as a fair dealing exception to protect fanfiction, it can be argued that it is within the spirit of the legislation - and would be permitted should a case come to court.

4.4. A Suggested Legal Test for Pastiche

A case on this topic, should one be brought in the UK, would follow the recent jurisprudence in cases such as *Pelham*, *Funke Median* and *Spiegel Online* to draw analogies where possible with case law from other forms of fair dealing – specifically quotation and parody, which (as already discussed) are the closest forms of dealing to pastiche. A test for pastiche would likely cover the following characteristics:

The use of the whole or an important extract which evokes an existing work; which must be noticeably different from that first work, displaying original thought such as to clearly represent a new work; must constitute an intellectual and laudatory comment of the author on the previous work such as to be a dialogue with that work; and the underlying work must have been legitimately made available to the public.

This suggested test reflects the homage, non-critical, intertextuality nature of pastiche as distinct from parody and quotation. While it may seem a broad definition, it would permit for works whose value to society lies not in their critical nature but in their transformative nature to be analysed on that point (i.e. it would permit derivative reuses to be analysed with regard to their transformative nature and effect under the 'fairness' question, on a case-by-case basis. This suggested test permits for a precise test that can be effectively applied to a specific range of dealings with a specific purpose. By doing so, this suggested test ensures the pastiche exception, like other limitations and exceptions, operates as a balance between the need to protect the intellectual output of creators and the need to protect the fundamental rights such as freedom of expression.⁹⁹ This balance will be demonstrated regarding each part of the test in the following paragraphs.

4.4.1. The use of the whole or an important extract which evokes an existing work

This part of the test is drawn from the *Pelham* judgement¹⁰⁰ (similar themes also appear in *Deckmyn*) where it was held that for a dealing to be analysed under the fair dealing exceptions, it must be an infringing use of the underlying work – either the whole work, or an important extract – which brings the existing work to mind. As in the *Deckmyn* judgement, it must only use as much as is necessary to evoke that work. This part of the legal test is likely to be easily met by fanfiction, given the definition outlined in the introduction to this paper - that it is inspired by one or more identifiable form of copyrighted popular culture. This is not surprising and it is to be presumed that fanfiction would be utilising an important extract of the underlying work, whether that be characters or locations.¹⁰¹ Fanfiction specifically posted on fanfiction archives such as Fanfiction.Net or Archive of Our Own are specifically tagged as reusing copyright material from the underlying work. This test may therefore seem to overly protect producers such as fanfiction writers, and be an unfair imposition on the rights of the copyright holder. However, the permissibility of this part of the suggested test is balanced by the next step.

4.4.2. Be noticeably different from that first work, displaying original thought such as to clearly represent a new work

This is an important test for derivative works to meet to be judged fair dealing, as it is the first way in which UGC works such as fanfiction can be seen to diverge from works such as adaptations, which are specifically not fair dealing under UK law and would require a license to be published. Whereas adaptations do display some form of original thought, for example in the way that they frame the adapted work (taking books and adapting them for the screen, for example, may require new ideas on camera angles and editing), they are unlikely to meet the second part of this test – to clearly represent a 'new work' by being 'noticeably different'.¹⁰² In distinction, should a UGC work show sufficient originality to be a new work that could stand on its own following the *Deckmyn* jurisprudence, it will be

⁹³ Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?' (2017) 4 Intellectual Property Quarterly 346, at [347].

⁹⁴ Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press 1991) 16.

⁹⁵ Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32 Quarterly Review of Film and Video 728; Joshua Marshall, 'Balancing the Right to Integrity with Caricature, Parody and Pastiche' (2018) 13 Journal of Intellectual Property Law & Practice 955.

⁹⁶ Such as Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press 1991) and Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32 Quarterly Review of Film and Video 728.

⁹⁷ 'Find References - Pastiche' (*Hansard*) < <https://hansard.parliament.uk/search/Contributions?startDate=1800-01-01&endDate=2021-08-01&searchTerm=pastiche&house=Commons&partial=False> > accessed 25 August 2021.

⁹⁸ Using standard English usage of words when those terms are not further defined in the legislation has precedence – *Pelham* used a similar argument when using the term 'quotation'.

⁹⁹ *Pelham* at [60].

¹⁰⁰ Para [71]

¹⁰¹ However, the counterfactual is that it is possible that fanfiction may be posted that does not rely heavily on the underlying work. The Star Wars Extended Universe novels may be good examples of these works. They are intended as fanfiction, but although they take place in the same 'universe' as the copyrighted works, they do not refer to too much of the original. They would stand on their own as fictional works, if they were not specifically described as Star Wars novels.

¹⁰² Johannes Fehrle and Werner Schäfer-Zell, *Adaptation in the Age of Media Convergence* (Amsterdam University Press 2019); Linda Hutcheon and Siobhan O'Flynn, *A Theory of Adaptation* (2nd ed, Routledge 2013).

deemed to pass this section of the test. This reflects the homage nature of pastiche type works like fanfiction, but also honours the artistic choices that are made in those works. For example, in comparison to adaptation, fanfiction is 'about twisting and tweaking and undermining the source material...and in the process adding layers and dimensions of meaning to it that the original never had'.¹⁰³

This section of the suggested test protects the rights of the copyright holders on one hand, as slavish copies¹⁰⁴ of any form would specifically not be sufficiently original. This ties into underlying copyright theory regarding the prevention of substitute works taking advantage of the original work. It also protects UGC creators, as it permits for works which do demonstrate sufficient post *Infopaq*-originality and artistic choice to be examined on their own merits under the 'fairness' aspect of the fair dealing test. This is similar to much of the analysis on parody, albeit creativeness for a different purpose, as it understands that these forms of work are not substitutes, and are likely in a completely separate market which should not be ringfenced to the original creator. For example, fanfiction is honest about its derivative nature, but scholars also argue that it brings an additional level of insight into the original work that is worth protecting¹⁰⁵ and moves the work out of the market for the original.¹⁰⁶

4.4.3. Must constitute an intellectual and laudatory comment of the author on the previous work such as to be a dialogue with that work

The requirement for an intellectual comment of the author on the underlying work is drawn from *Pelham* and would permit for the protection of derivative works that have a purpose behind them beyond pure slavish adoration or copying. This section of the test is vital for much UGC work as it would permit for works such as mashups or fanfiction that are not directly critical of the work but are created in relation to the underlying work, and are intended to be a reflection on that work and act as a conversation with it. Fictional stories using these reworked characters are laudatory in that they are written as fans of the underlying work and are not intended to mock or castigate that underlying work (so cannot operate as parodies).

Fanfiction as an example of this strand of the test provides the required additional elements to the work. For example, by changing characters' gender or race, the fanfiction is adding information or operating in a somewhat academic sense by bringing in ideas of sociology or gender studies. By permitting these types of derivative works, the freedom of artistic expression is protected, and the benefit to society from permitting fanfiction as a form of writing development is reflected. Yet, by requiring there to be some form of intellectual engagement, this test would still prevent the less expressive, less scholarly, forms of UGC from being permitted.

4.4.4. The underlying work must have been legitimately made available to the public

This strand of the test is drawn from *Painer* and reflects the need for permissible works to not impinge on the right of the copyright holder to monetise their works prior to the release of the derivative work such as fanfiction. Similar tests are seen in the other fair dealing exceptions – and can be traced back to the Three Step Test requirement for limitations and exceptions to not conflict with the normal exploitation of the work. Most forms of UGC pastiche such as fanfiction would easily meet this test, due to pastiche's basis in homage and lauding of previous works. Fanfiction for example requires a pre-established fandom group to interact with – which can only exist should the underlying work have already been released onto the market (and, presumably, met with some form of success or cult popularity).

4.5. 'Fairness'

This article has so far argued that there are several types of fair dealing that can be used to protect the rights of users to protect their reuses of creative works in certain ways, such as for parody and pastiche. Having demonstrated that there are good arguments for allowing fanfiction and other homage-based derivative works to be dealt with as pastiche, the analysis must move on to whether the dealing is 'fair'. In UK copyright law, there are several cumulative factors to be considered: '...the number and extent of the quotations...[a]re they altogether too many and too long to be fair?', '...the use made of them'; and '...the proportions'.¹⁰⁷ This is where the majority of scholarship on new forms of UGC focuses,¹⁰⁸ since it is the most flexible area of copyright law. As shown below, this is the section of the fair dealing test which is used to judge specifically whether each individual use is such a strong reflection of the user's freedom of expression rights that it should be permitted.

4.5.1. 'Fair' Dealing factors and Freedom of Expression in Case Law

Freedom of expression arguments were first raised in relation to claims for fair dealings with copyrighted works in *Ashdown v Telegraph Group Ltd*¹⁰⁹, regarding the publication of leaked minutes from a political meeting. This case, argued under the s30 CDA fair dealing exception for news reporting, acknowledged the tension between freedom of expression and copyright law. This case for the first time gave the Court of Appeal the opportunity to decide how the freedom of expression rights from the Human Rights Act¹¹⁰ interacted with the fair dealing exceptions for copyright, by focusing on the 'fairness' aspect of the test.

¹⁰³ Lev Grossman, 'Foreward' in Anne Jamison (ed), *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013) xiii.

¹⁰⁴ A common criticism of fanfiction is that it does not rise above "slavish adoration" (Lev Grossman, 'Foreward' in Anne Jamison (ed), *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013), xii). While this may be true of some fanfiction, section 3.4 of this article will show how transformative much fanfiction is.

¹⁰⁵ In practice, this analysis is closely linked to the test for transformativeness within the 'fairness' analysis: J Lipton, 'Copyright and the Commercialisation of Fanfiction' (2014) 52 *Houston Law Review* 425.

¹⁰⁶ The counterfactual, however, is that many of these types of work admittedly draw heavily from the underlying work. Thus, they may remain within the same market as the original work. Yet, that analysis ought best to be contained within the analysis for 'transformative use' within the 'fairness' *Hubbard v Vosper* test as that permits for an analysis of the specific work involved, rather than merely an overall type of work. At this stage of the test, we are only questioning whether these posts may be contained within the correct type of dealing to be analysed for fairness.

¹⁰⁷ *Hubbard v Vosper* [1972] 2 QB 84, at [94].

¹⁰⁸ Dinusha Mendis, 'Back to the drawing board: pods, blogs and fair dealing – making sense of copyright exceptions in an online world' (2010) EIPR 32(11) 582

¹⁰⁹ [2002] Ch 149.

¹¹⁰ From Article 10 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998. These freedoms were protected when the United Kingdom was still part of the EU, through the application of the European Charter of Fundamental Rights s52(3) and s53. However, post-Brexit it is

Several important points were raised in *Ashdown* about freedom of expression and copyright. Firstly, the Court of Appeal reiterated that copyright protects only specific expressions, not the ideas behind them. Hence, the user is free to publish the information conveyed by a copyrighted work, so long as they do not reproduce the work itself. The Court of Appeal developed this idea further however, by for the first time positively recognising that freedom of expression could be recognised in copyright cases. It was accepted that “freedom of expression will only be fully effective where an individual is permitted to reproduce the very words spoken by another”¹¹¹, and that in certain cases the Court will be bound to ‘accommodate the right of freedom of expression’.¹¹² This judgement was accompanied by an acceptance that these cases are likely to be rare, and will always require a close investigation of the facts of each case, to try to control the impact on future copyright cases. Importantly, this was judicial acceptance that copying verbatim may, albeit in rare cases, have strong freedom of expression effects and thus be worthy of protection under fair dealing.¹¹³

By asking ‘how would a fair-minded and honest person have dealt with the work?’, *Ashdown* gave clear recognition that the public interest in free speech should be weighted strongly against the interests of copyright holders in preventing uses of their works. Developing on previous case law in this area such as *Hyde Park v Yelland*¹¹⁴, this case has allowed for freedom of expression arguments to be raised in relation to permissible derivative reuses of works. These cases provide shelter for socially permissible secondary uses of copyright works to be released (such as freedom of the press). Fanfiction as a type of UGC will be shown in the following paragraphs to be in many cases a ‘fair minded and honest’ method of interacting with the works it draws from, and should therefore be seen as a fair dealing with the work.

4.5.2. Number and extent

In relation to UGC content, the first step of the analysis, regarding the number and extent of the quotations, is a vital part of the decision regarding the fairness of the work. This is because ‘lengthy and numerous extracts, or extracts of the most important parts of a work, will reduce the expected returns to the copyright owner’.¹¹⁵ This is important because the fair dealing exception will not be used to bypass the market completely, and the presumption is that ‘if there is nothing stopping the user from paying, then the user must pay’.¹¹⁶ This can be seen in the current debate surrounding the Copyright in a Digital Single Market Directive, where the default position appears to be that licenses should be used more in interactions with copyrighted works to avoid the ‘value gap’.¹¹⁷

Fanfiction as an homage potentially may fail this section of the test on first reading, especially if it reuses primary characters or locations from the underlying work, as these will be deemed an ‘important part’ of the work. This proves the ability of the fair dealing tests to prevent direct copies or ‘slavish’ reworkings from taking advantage of the original work. However, where fanfiction only uses secondary characters that are not sufficient to attract their own copyright, or uses sufficient artistic choices to change the characters beyond recognition, or inserts original characters into a new location within the same universe, then the UGC may be deemed fair. As will be shown later in this article, much fanfiction is likely to fall in this second, permissible, group.

4.5.3. The Use Made

To rely on a fair dealing exception, the UGC use being made of the work must be one which ‘a fair minded and honest person’¹¹⁸ would have made - whether the use fits within one of the specified headings within s28-30 CDPA 1988 such as pastiche, and also whether the work has been used for a transformative purpose¹¹⁹, or whether it has instead been used to ‘convey the same information as the author’.¹²⁰ The situation of fanfiction within pastiche has been carried out above, so the coming paragraphs will look at firstly whether fanfiction is sufficiently transformative, before looking at whether it is merely a competing derivative work and thus should be barred for retransmitting the same work as the original.

Transformativeness is the most important part of this section of the fair dealing test as it promotes creativity and freedom of speech. The life cycle of human productivity requires new works to be consumed by society and used as the foundation of the next generation of innovation.¹²¹ This has been recognised by many different aspects of copyright law – for example, the lack of requirement for novelty in the test for originality, and the extension of protection to expressions rather than ideas. This illustrates the importance copyright places on permitting unlimited reuses of certain types of creative thought.

The transformative nature of permissible fair dealings is important. If close unauthorised adaptations such as fanfiction are permitted and become popular, they may ‘block off’ certain areas and stories that the author wishes to write in the future. There is a risk that fans notice subtext in previous works and end up writing similar stories to future planned novels by the author. If this fanfiction is shared widely, it may lead to accusations of plagiarism or copyright infringement when the author publishes their own work – such as was seen by Marion Bradley Zimmer, who had a book she was working on rejected by publishers because a fanfiction author claimed she based it on a work from a fanfiction magazine she edited at the time¹²². While fanfiction would struggle to make a claim for copyright infringement against the original author, merely by vocalising an issue the fanfiction writer made the publishers wary of getting involved

unclear whether these rights will remain long term, as there has been recent governmental discussion focussed on replacing the Human Rights Act (Gov.uk, ‘Plan to reform Human Rights Act’ <<https://www.gov.uk/government/news/plan-to-reform-human-rights-act>> accessed 24 March 2022.

¹¹¹ At para [39].

¹¹² At para [45].

¹¹³ Jonathan Griffiths, Copyright law after *Ashdown* – time to deal fairly with the public (2002) IPQ 3 240.

¹¹⁴ *Hyde Park Residence Ltd v Yelland* [2001] Ch 143.

¹¹⁵ Lionel Bently and Brad Sherman, Intellectual Property Law (Fourth edition, Oxford University Press 2014) 224.

¹¹⁶ Alan L Durham, ‘Consumer Modification of Copyrighted Works’ (2006) 81 Indiana Law Journal 851, 871.

¹¹⁷ Ruth Flaherty, ‘Articles 11 and 13 - Bad News for Some, or All of Us?’ <<https://ruthflaherty39.wordpress.com/articles-11-and-13-bad-news-for-some-or-all-of-us/>> accessed 24 March 2022.

¹¹⁸ *Hyde Park Residence v Yelland* [2000] EMLR 363; *Pro Sieben Media v Carlton Television* [1999] FSR 610.

¹¹⁹ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.

¹²⁰ *Hubbard v Vosper* at [94].

¹²¹ Niva Elkin-Koren, ‘Copyright in a Digital Ecosystem: A User Rights Approach’ in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 146.

¹²² Aaron Schwabach, ‘Three Interests of the Author in Conflict with Fanfic’, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate 2011).

with the authorised work. Thus, it might be arguable that the more transformative the fanfiction, the less threat it would be to the original work.

Fanfiction authors are more likely to be able to argue their work is fair than other forms of pastiche such as appropriation art, as they can argue that they have used them for a transformative purpose – i.e. if they have ‘added to or recontextualised’ the part taken.¹²³ Fanfiction is an important example of what has been referred to as the ‘Participation Age’ and ‘New Enlightenment’, whereby in increasing number ‘the culturally unrepresented (or misrepresented) are asserting themselves as authors in their own right, rather than as the passive receptors of culture from above’.¹²⁴ Thus, not only are they transforming the works more than some other forms of fair dealings – but they are also doing so for a reason that would have strong social welfare gains. Improving the lives of marginalised communities who do not feel represented by mainstream media as a form of democratising culture would be a strong defence for this type of work.¹²⁵

How, then, to judge the transformative nature of fanfiction? Several variables could be used to judge whether the works are sufficiently transformative to meet this test. For example, changing the segment of the market which the works are released in could arguably be sufficiently transformative, as it would mean that different themes are being developed in the works, and that different levels of language are being used. Two different methods of segmenting the fiction market used by publishers will be analysed to show how UGC works may be transformative – first by age category, then by genre. Should fanfiction or other pastiche UGC works move the original work out of the segment of the market in which it appears, they are less likely to be acting in competition with the original work, and thus more likely to be deemed ‘fair’.

Reading or developmental age is the first important variable to be used in relation to the transformative nature of fanfiction. Age is a stable, functional framework used by publishers to marketing products such as novels to an international market¹²⁶ and allows assumptions to be made about consumer behaviour within certain sections of the market.¹²⁷

Children’s books (i.e. books marketed at those aged 8 or younger) contain less text and more pictures, meaning characters are described more by the illustrations than the wording – and are designed to be bought by adults to be read to children and have relatively simple language. Thus, they have a high nostalgia value, and works in the back catalogue may still have high demand.¹²⁸ This means the surrounding brand may have strong emotional meaning to consumers, and unauthorised derivative transformations may have more of an impact. This is especially true if characters from children’s books are transformed and placed in adult works that may contain sexual content or violence.

Young adult works, in comparison, are the first books pre-teens and teens may purchase for themselves, and is ‘probably the most price sensitive area of the book trade’.¹²⁹ Sales in this market are increasingly media-driven, and there may be more of a superstar effect than in other markets. Young adults are more likely to be aware of online discounts and shop around; they are also more likely to be influenced by the media, and have increasing amounts of purchasing power.¹³⁰ Finding the right level of copyright protection is therefore highly important to authors and copyright holders in this segment of the market as it permits for control over pricing. Consumers in these age groups are also more likely to be using new formats to consume and interact with fiction.¹³¹ Consumers in this market are proportionately more likely to engage with online non-commercial fanfiction such as that published on Fanfiction.Net – most users on the site self-define within that age bracket. Therefore, copyright holders may wish to prevent transformative reuses in this market as it is both more price sensitive than other segments of the market, and consumers are more likely to also consume the unauthorised derivative works.

Age category is not the only strong variable for judging the transformative nature of these forms of UGC works. Genre is also a strong variable, as genre is one of the primary means by which publishers predict sales data and returns on investment – and is a key marketing variable for deciding where to pitch new works (and whether they believe the market is too crowded in a specific genre to be worth publishing at all).¹³² Thus, a change to genre may be implied to be a change to a fundamental feature of the work, and therefore be a strong indicator of transformative use. A change of genre may mean that sufficient artistic choice has been used to demonstrate the derivative work is transformative – especially as it means the work is also less likely to be acting as a rival purpose (i.e. economically compete) with the underlying work.

This raises a vital point about the transformative nature of fanfiction. Many authors fear that fanfiction of their work is purely pornographic – the only transformative feature is that it takes works of other genres and transforms them into hardcore romance works. At its heart, this criticism argues that fanfiction takes the underlying work and merely focuses on potential romances between characters, rather than on any other part of the work. This is especially true where the work is not specifically written as a romance novel, but rather a young adult school adventure such as *Harry Potter*. Permitting this form of fanfiction may harm the branding and integrity of the underlying work, and thus operate against the interests of the author of the underlying work. This is different to the way a satire or parody

¹²³ Lionel Bently and Brad Sherman, *Intellectual Property Law* (Fourth edition, Oxford University Press 2014) 225.

¹²⁴ Madhavi Sunder, ‘IP3’ (2006) 59 *Stanford Law Review* 257, 307.

¹²⁵ It is important to note however that fanfiction does not escape criticism regarding diversity. It is argued that it still skews heavily towards white culture (Mel Stanfill, *The Unbearable Whiteness of Fandom and Fan Studies*, in Paul Booth (eds) *A Companion to Media Fandom and Fan Studies*, (Wiley Blackwell, 2018)) and can be highly toxic and exclusionary (Carrielynn D. Reinhard, *Fractured Fandoms: Contentious Communication in Fan Communities (Communication Perspectives in Popular Culture)* (2018, Lexington Books)).

¹²⁶ Jan-Benedict EM Steenkamp and Frenkel Ter Hofstede, ‘International Market Segmentation: Issues and Perspectives’ (2002) 19 *International Journal of Research in Marketing* 185, 185.

¹²⁷ Susan Mitchell, *American Generations: Who They Are, How They Live, What They Think* (4th ed, New Strategists 2003).

¹²⁸ Alison Baverstock, *How to Market Books* (Fifth edition, Routledge, Taylor & Francis Group 2015) 372-374.

¹²⁹ *ibid* 375. However, this is perhaps less important than it was, given that Generation Y (those born between 1980 and 1999, deemed the first generation to engage with technology to this extent and use it in making sophisticated shopping decisions, has grown up PS Norum, ‘Examination of Generational Differences in Household Apparel Expenditures’ (2003) 32 *Family and Consumer Sciences Research Journal* 52.

¹³⁰ Catherine Gidney, ‘It’s so Pervasive, It’s Like Kleenex: Schools - the Last Frontier’, *Captive Audience: How Corporations Invaded Our Schools* (Between the Lines Publishing 2019).

¹³¹ Alison Baverstock, *How to Market Books* (Fifth edition, Routledge, Taylor & Francis Group 2015) 370.

¹³² Giles Clark and Angus Phillips, *Inside Book Publishing* (5th ed, Routledge 2014) 257.

may transform the original work. Parody often changes the genre of the work to make a biting, critical point. Fanfiction is transformative in its action as a commentary with the original work,¹³³ and it is therefore less obvious in its criticism.

Changing either the genre of the work or the age category of consumers the work is aimed at is therefore a good proxy for arguing that the work is transformative in a sufficient way to merit the application of the fair dealing exceptions for these works. A final method of judging the transformative nature of UGC pastiche works is the method of publication of those derivative works – are they published in full, and are they of similar length as the original work? These characteristics highlight a stark difference between commercially published fiction works and UGC works. One of the arguments for permitting fanfiction as a fair dealing of the underlying work is that those that create and consume these works do so as amateurs, releasing drafts and works-in-progress instead of fully edited and finalised works.¹³⁴ Fanfiction sites are seen as a place to workshop new material, and reviewers are conscious of being part of the process.¹³⁵ This point is illustrated by the high usage of the review functionality of these sites, which leads to a process of spontaneous, distributed mentoring.¹³⁶ If fanfiction can be shown to be released in mostly draft forms, or very different in length to the original works, it could be proposed that it is less likely to compete with the original works on which they are based.

The second part of the ‘use made’ fairness test focuses on whether the two works are in competition by conveying the same information, as was originally set out in *Ashdown*¹³⁷. Thus, where a use is made that would be available under a commercial licence the use is unlikely to succeed in a fair dealing claim.¹³⁸ However, where a commercial licence would be impractical – for example in relation to incomplete non-commercial UGC works, it is possibly unreasonable to expect amateur users to pay for a licence, especially if those derivative works are also mixtures of a variety of other works. Valuation of each individual part may be problematic.

A comparison to highlight how this test may apply to fanfiction can be undertaken. Professional cover artists should still have to pay to license the work they are using and should not benefit from fair dealing, even if they are releasing the work for free on platforms such as YouTube. This is because a professional ‘cover’ is a complete work, of the same or similar length to the original work, and is therefore much more likely to commercially injure the underlying work by acting as a substitute. Fanfiction, as previously demonstrated, is potentially both shorter than the original, and released as a work in progress. As such, fanfiction is a better candidate for this exception.

5. Conclusion

Returning then to the child playing with her toys, what conclusions can be drawn as to how copyright law applies to her ability to share her stories? This paper has analysed the way copyright law applies to fanfiction (as an important case study for user-generated content) in a time when the entertainment industry is facing both a highly congested market and falling sales, and new forms of online and digital media have created an ‘authorship crisis’.¹³⁹ Ownership of successful creative properties (such as characters and locations like *Harry Potter* or *Hogwarts*) is increasing in importance, and copyright holders are becoming increasingly litigious.¹⁴⁰ The paper showed that fanfiction is an important type of user-generated content, yet has important differences to other, types of UGC such as parody which have already been the subject of much research. As an example of a less critical, more homage focused dealing with the work, fanfiction permits for an analysis of the pastiche fair dealing exception, which is as yet undefined in law.

The need for legal certainty in this area is increasing as we spend more time interacting online, especially during the recent COVID-19 lockdown period. In times of stress and uncertainty, there is a need for permissible social interactions to be supported. This article has argued for a clear statement of the law in this area to provide support to users who create this content. It has attempted to provide that clear statement, in line with current EU jurisprudence in this area, as well as discussed how other forms of legislation such as the Online Harms White Paper may also impact this topic. Finally, this article has highlighted that there is a distinct need for further rigorous research on online pastiche works¹⁴¹ and their interactions with the underlying work. This would permit all users, young and old, to interact online in the clear knowledge of the legal impact of their actions.

¹³³ See above on the third strand of the suggested test for pastiche.

¹³⁴ This is an important difference between fanfiction and many other forms of derivative UGC works such as parody and remix which are released in their final form.

¹³⁵ Evans S and others, ‘More Than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring’ (ACM Press 2017) <<http://dl.acm.org/citation.cfm?doid=2998181.2998342>> accessed 25 August 2021, 3.

¹³⁶ Campbell J and others, ‘Thousands of Positive Reviews: Distributed Mentoring in Online Fan Communities’ (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2818048.2819934>> accessed 25 August 2021.

¹³⁷ *Ashdown v Telegraph Group* [2001] EWCA Civ 1142.

¹³⁸ HM Government, ‘Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying the Law’ (2012) 31.

¹³⁹ Frank Rose, *The Art of Immersion: How the Digital Generation is Remaking Hollywood, Madison Avenue, and the Way We Tell Stories* (1st ed, WW Norton & Co 2011) 83.

¹⁴⁰ as shown by the furore surrounding the new Copyright in a Digital Single Market Directive.

¹⁴¹ especially in the form of online non-commercial user-generated content.