CHAPTER XV

Transformative Works: Young Women's Voices on Fandom and Fair Use

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Introduction

Media fandom is a worldwide cross-cultural phenomenon. Although fandom as a concept has far-reaching and diverse historical roots, this chapter focuses on a particular variety of media fandom that includes as a significant focus the creation of "fanworks," new creative works based on existing media. These works include fanfiction, fanart, and "vids," which are montages of images from media sources, often set to music, that tell a story or highlight particular themes or characters. Outside media fandom, fanworks are often lumped in with other forms of remix culture because they mix elements of existing media, such as characters, settings, or images, with each other and with new ideas or material. This brand of fandom is a mostly online activity, and most participants are female.[1]

Much fanwork creation relies on copyright laws that authorize creators to copy, remix, and derive their creations from copyrighted works without prior permission under certain circumstances. These laws generally include among their considerations whether the new work is non-commercial and whether it transforms the purpose or meaning of the original.[2] Non-commerciality and transformativeness are central to fan remix and the creation of fan communities. Many scholars have considered the relationships between fans, fandom, and law. This chapter contributes to that scholarship by presenting

empirical examples of the transformative impact of copyright fair use and fair dealing laws on the lives of individual fanwork creators, especially young women.

This chapter draws principally on fans' responses to a call by the US-based non-profit Organization for Transformative Works (OTW) for personal accounts of how creating fanworks has influenced fans' lives.[3] The responses indicated that fandom and fanwork creation provide unique opportunities for young women and girls to develop selfhood, emotional maturity, and professional skills. Broad understandings of fair use, fair dealing, and other laws permitting the creation of non-commercial derivative works not only promote individual expression by often marginalized speakers, but also offer those speakers benefits that are not readily available through other means.

Methodology

The OTW is a non-profit organization established in 2007 with the aim of promoting the acceptance of non-commercial fanworks as legitimate creative works, to preserve the history of fan culture, and to protect and defend fanworks from commercial exploitation and legal challenge. Among other things, the OTW conducts legal advocacy and operates the Archive of Our Own (AO3), a non-profit website that hosts users' fanworks. The OTW "represents a practice of transformative fanwork historically rooted in primarily female culture," and while the organization explicitly welcomes and includes fans of all genders and sexual identities, it also values its "identity as a predominantly female community with a rich history of creativity and commentary."[4]

In the course of its legal advocacy work, the OTW reached out to its members and users for their own stories regarding why they remix and how participating in remix culture has helped them. In October 2013, the OTW distributed the call via the OTW's news blog and social media outlets, including Twitter and Tumblr:

> The OTW's Legal Advocacy project has stood up for fans' rights to create and share, helping individual fans with legal questions and making fans' collective voices heard in court cases.
>
> Recently, our Legal Committee asked for fans to help by providing either media stories or personal stories of takedown

> requests and actions that have made fans hesitant to create or share fanworks.
>
> Your help is needed again! … The Legal Committee is thus looking for stories of how fandom has helped fans in day-to-day life. We need you to share your individual stories with concrete examples. For example, perhaps being in fandom has helped you to learn a language, helped you in school, or helped you improve skills that you use elsewhere – skills such as writing, video editing, coding websites, audio editing, or anything else. We don't need personal information from you, but the more specific the story, the better.[5]

Respondents sent their personal narratives to the OTW via email. Over a one-month period, the OTW received 107 responses. The sampling described here identifies trends in those responses, relying heavily on quotations to share the voices of those who responded, since much public discussion about fans (and young women) discounts their own understandings and experiences. These quotations illustrate potential synergies between copyright law and fanwork creation in the personal development of girls and women.

We note that, because of the electronic nature of these responses, we cannot independently verify the age or gender of each respondent. Compounding this uncertainty, many fans use pseudonyms that might obscure their genders. For those reasons, we have depended on cues in the responses that indicate that the they are indeed from girls or women describing their youth, such as references to high school, entering college, living with parents, or choosing a career path. Respondents are identified herein by the names they used in their responses, many of which are likely not the names they use in non-fandom contexts.

Fandom and Self-Actualization

The responses overwhelmingly described how both fanwork creation and participation in fan communities helped girls and young women find their own voices, explore and understand themselves, and gain skills that served them later in life. As described below, fandom provides opportunities that other activities may not because fandom encourages generative discourse – that is, each fan builds on others' work while contributing her own insights. The discursive nature of

fandom permits fans to connect with others like themselves despite geographic distance.

Fanworks Help Young Women Understand Themselves

Individual fanwork creators often say that participating in fandom changed their lives. Adria, one of the respondents, wrote, "Fanfiction literally saved my life. Not only could I read and watch the stories I loved, but I could write them, get that pain and hopelessness out in characters and worlds that I knew as well as my own." This characterization of fandom as rescuer was not uncommon. For many, fanworks represent an opportunity to meet personal emotional needs through engagement with familiar, even beloved, source material. Fans reported feeling unique—able to contribute creatively to fandom—but not alone. Amanda M. explained how remix provided a path toward emotional health:

> I started drawing fanart, though I had only a vague interest in art before that point. I ended up drawing nearly every day and improving quickly, motivated to draw for and contribute to the fandom I had joined. I made friends. I got better. I no longer felt inferior in my family situation, as I had discovered something unique I could throw my all into ….
>
> Producing and consuming fan-created media has remained a constant for all of these years. I'm not saying that they've been easy ones, but the community has helped me through. On my darker days, I'm able to funnel my negativity through art rather than through violence, and it has been five years since I last took a blade to my own skin. I can't say I'm one of the people who would not be alive today without fandom, but I certainly would not be the same person.

Through fan remix, young women learn that they can be makers, and that their expression is valuable because it is their own.[6] Libitina began in fandom as a consumer of fanworks, and became a creator, and doing so allowed her to "gain … confidence in her opinions." Soon, she was "producing essays—proper collegiate essays—with ease." She explained that fandom allowed her to discover her own writing style: "letting myself have my own voice, and having the time, space, and encouragement to find that voice—is what fandom gave me."

Fandom also creates an opportunity for creators who do not see themselves and their interests represented in popular culture to create and share a version of that culture that reflects their own priorities and concerns. New technologies allow individuals with limited financial means, including youth dependent upon parents for support, to talk back to mass culture,[7] and fan communities allow individuals to find, support, and get support from others with similar interests. By rewriting and rearranging the portions of mass media that speak to them, fans explore and create a sense of themselves as autonomous individuals.

For example, a common trope in fandom is the "Mary Sue," a power fantasy in which a female character representing the author joins the main characters and proves to be the best of them all. This type of rewriting "offers a partial antidote to a media that neglects or marginalizes certain groups. Victims of prejudice often internalize its claims …. Mary Sues help the writer claim agency against a popular culture that repeatedly denies it."[8] Given the social science evidence on the importance of representations, Mary Sue remixes can help combat the toxic effects of stereotyping and underrepresentation:

> Many Mary Sues comment on or criticize the original, while at the same time creat[ing] something new. They highlight the absence of society's marginal voices in the original works, the stereotyped actions or inactions of certain characters, and the orthodoxy of social relationships in the original.[9]

Fanworks also permit young women to explore issues of gender and sexuality. Women have been the primary producers of "slash" fanworks, which take characters who are usually shown in official texts as heterosexual and portray them in same-sex relationships.[10] This practice challenges mainstream gender norms and stereotypes, allowing fans to explore alternative sexualities and gender roles. By rewriting official texts, slash writers reimagine what is possible. "In the process, they not only escape the inequalities of the real space marketplace of speech, but they create a new world—one in which the gender of the author plays a minimal role in the construction of the marketplace of expression."[11] Slash can "negate the uneven power balance afforded to women and men by simply removing 'gender as a governing and determining force in the love relationship.'"[12] As Lauren S. explained, "fanworks were and are vitally

important to my acceptance of my queer sexuality, as they provide a world where non-heterosexuality is accepted and celebrated." Lillian K. had a similar experience, encountering asexuality through fandom:

> The availability of non-heteronormative narratives in mainstream media is, rather unfortunately, slim. As I was going through puberty, I relied on fanfiction to give me these queer storylines and explore as proxy the spectrum of sexuality and gender …. It is through fanfiction that I first learned the term "asexual," which, after further research, I now identify as. It is through fanfiction that I lost that unfamiliar-idea-uneasiness regarding non-heterosexual, non-cisgender identities and people, which made me a better, more accepting person.

Because of its ability to look beneath the surface of conventional characters, remix can challenge not only conceptions of gender and sexual identity but also of race and disability. Tea F.'s experience highlights how remix creation empowers girls and young women of colour to move beyond traditional underrepresentation. Tea F. ran a fanfiction-based roleplaying site, where she encountered a fourteen-year-old girl, C:

> One day, C contacted me, very distraught, to tell me she would no longer be allowed to use my website, because she was getting Ds in English class, and had to pull her grades up. I was shocked—C was an exceptionally talented writer for her age, and wrote several hundred words a day on my website. She was exactly the kind of young woman whom I expected to be getting As in her English classes. I talked to C and her father at length about the problem.
>
> It turned out that she was getting frustrated in English class because, as a female Chinese-American immigrant, she couldn't relate to the readings in class, that were mostly written by and featuring European-American men. She much preferred writing fanfiction where she could explore other Chinese-American girl characters, rather than writing about characters and authors who had nothing in common with her and bored her to tears.

Tea F. spoke with C's teacher, and came to an agreement that allowed C to receive extra credit for writing fanfiction. C learned to love English. Now, "seven years later, C is a senior in college double-majoring in English and photography." Similarly, Medellia's story explains how *X-Men: First Class* fandom exposed her to new visions of disability that she, as a wheelchair user, could identify with, and how participation in fan community prompted her own creativity:

> There are relatively few stories in pop culture about people with disabilities, fewer where they're main characters, even fewer in genre fiction … In that little corner of the internet, I found more depictions of a wheelchair user having power, respect, love and adventures than I've ever seen in "real" entertainment. Even seeing [an *X-Men* character] as a future wheelchair user was a comfort I had been missing …. It wouldn't have worked the same for us to individually make up stories for original characters; that's lonely work and we never would have come together if not for our interest in characters we knew and loved.

The connections enabled by shared interest in a mainstream text, combined with the freedom to remix it, create spaces for diversity of all kinds. Amanda B.'s story is very different from Medellia's, but it similarly emphasizes the uniqueness of non-commercial remix culture:

> I can honestly say that fandom helped me survive my teenage years. Because fanfiction is written mostly by amateurs, it is largely based on how the writers are feeling and the kinds of experiences they are familiar with. This gives fanfiction an unparalleled amount of honesty and allows the reader to emotionally connect with the characters' situations like I have never found to be true in any other type of media—and I have been reading my entire life. I am an aromantic, asexual autistic with an anxiety disorder and I knew *none* of that throughout nearly my entire high school career …. Fanfiction truly, honestly, was the only thing that got me out of bed some days. When I was so angry I couldn't speak, I went to fanfiction. When I was so depressed I wanted to die, I went to fanfiction. When I was so ecstatically joyous that I felt like multicolored sparks of light were zipping around my insides, ricocheting off the prison of my

> skin—it was probably because of fanfiction. Fandom has allowed me to connect with three of the best friends I have ever had in my life and I absolutely believe it has made me a better person. It has given me, an autistic woman who cannot read faces or body language, cannot hold a conversation, cannot stand to be touched, a way to feel less alone.

The variety and freedom of non-commercial remix allows for these kinds of engagements, and many others, as Ashley's story demonstrates:

> I was born with a physical disability called Cerebral Palsy …. When I discovered fandom in the seventh grade, with it came, for the first time in my life, honest-to-God friends, who just wanted to be around me because we all enjoyed the same book series …. Because of our shared fandom, for once, somebody was looking at *me*, and not my *body*.
>
> As the years went by and I joined other fandoms, created work and finally get the nerve to post it where anyone could see it, I gained other friends. Friends whose only connection to me was their usernames, their own fanfiction profiles and stories, and the way we all messaged and encouraged one another to write. I learned that it wasn't okay for my family to think I was sick and wrong … just for being bisexual and not homophobic; I learned that if a dedicated writer could overcome dyslexia (like one of my friends), then it wasn't so far-fetched to try and apply that to myself and my CP; … and I learned what it felt like to be surrounded by a community that could accept me for myself.

These stories only scratch the surface of the diversity of remix cultures, and the incomparable benefits they provide to those who love them. Fanworks are often dismissed as nothing more than trivial, derivative foolishness. But this derision is often bound up with negative attitudes towards feminine pursuits and particularly negative attitudes towards young women's attempts to find their own identities. As one commenter put it:

> The teen fic writer is finding her literary voice, learning to comment on mainstream fictions, finding a way to express her sexuality that's not entirely about recreating herself as a visual

> object for others' consumption. She is rarely a very good writer, because she's usually a very new one …. She has an intellectual life, even if it's sometimes more potential than realized.[13]

As the next section details, fandom can help develop that intellectual life in ways that pay off both inside and outside fan communities.

Remix Cultures Teach Important Skills

Remix encourages young women to develop skills they will use later in life. Seeing other creators just like them—ordinary, nonprofessional—gives new creators the confidence to try making works of their own. Relatedly, remix offers participants unique access to an audience that is engaged with the subject matter, conversant in the fine details of the relevant art form, and eager to offer feedback. The skill benefits of non-commercial remix culture are widespread and powerful, and they reach across multiple media: language skills, writing, visual art, video, and other technical fields.

Rebecca Black's empirical research has revealed that young writers using online fan fiction sites can effectively learn English, as well as different cultural perspectives.[14] Love of the original source motivates people to spend hours writing and reviewing in English, and audience members, even strangers, volunteer to help creators improve linguistically because they want more commentary on their favourite sources.[15] This is borne out in the responses the OTW received. Nadja R.'s experience was typical:

> I am not a native speaker of English, yet today, at 27, I am doing my PhD in English Literature. This is largely due to the fact that I have been reading and writing in English ever since I was about 13 years old. What have I been reading and writing? Fanfiction …. Most of it, especially the high quality works, were in English, so I was highly motivated to hone my English skills until I was capable of writing in this foreign language. As a result, my grades in English were always straight As. My teachers wondered how someone with no English relatives who had never been to the US or the UK could possibly develop such a large vocabulary …. I can honestly say that without fanfiction, I wouldn't be where I am now, career-wise!

The same phenomenon works in the other direction. A number of respondents described translating non-English source material or fanworks into English for English-speaking fans, which gave them experience that allowed them to be hired as translators.

Fanwork creation also builds fans' skills in their native languages. Sarah D. explained that reading and writing fanfiction improved her storytelling skills, vocabulary, and critical thinking:

> I believe that the huge volume of well-written fics that I read was responsible for my perfect score on the reading part of the SAT. Reading fanfiction gave me more confidence in my own writing—when I read fics especially by new authors I could see how their abilities improved the longer the story went on. This impressed on me the importance of practice and learning from past mistakes. In the same vein, when I posted my first fics on fanfiction.net I was able to get a lot of constructive criticism on my writing. I would not have had access to such constructive criticism had I posted only original works. I know this because when I posted my original writing on fanfiction.net's sister site, I received one comment whereas my fic would get at least 20. The resources available to fanfiction writers are amazing—from beta readers to peer reviews. Those who participate in fandom are invested in the fics, because everyone wants good fics to read. In a way, a fic writer can get more personal attention than a student in English class.

Samantha C. emphasizes the particular value of fandom's community feedback to adolescents:

> Fanworks … are an outlet for adolescents in an unstable and shifting time in their lives when they are discovering themselves. Adolescence is generally when people reach the developmental stage where they come to question what they have learned and begin to think critically …. Fanfiction is an arena where writers can try everything, good or bad, and learn to write better. It's a self-teaching tool …. No matter what fandom I was interested in writing for, someone was there to read it and tell me they enjoyed it. I wasn't used to that sort of confidence boost. You can't walk around school offering people copies of your most recent writing and ask for opinions.

Nicky found that analytical skills developed in remix culture paid dividends in her school and career:

> One of fandom's greatest strengths is that it … has complicated, important conversations about gender, sex, race and class that equal and exceed most of the discussions I had in college. Because they are taking place online, their audience and participants are huge and hugely varied, and it was easy for a newcomer like me to catch up on the basics. When I walked into my first gender studies course in college, I was miles ahead of the curve … [which] led to an internship with one of my publishing heroes and my first post-college job.
>
> While more abstract academics are important too, fandom works more accessibly, analyzing media that 16-year-old me was invested in, and it kept records in places I didn't need college admission or a journal subscription to get to. Our culture is saturated with images, with advertising, with media of every kind, and as a young woman, having the tools to describe and deconstruct the flood was invaluable.

Tassos found in her youthful experiences with fan remix the confidence to start a new career as an adult:

> I've always loved making up stories, but I never had that kick in the pants to start really writing and *finishing* stories till I found fandom. *Farscape* was my first fandom when I was 16, and I wrote my first fic then too. Writing in fandom was both work and play. Work because writing is hard; play because I got to experiment with different ideas, different styles, got instant feedback both good and bad, write stories that failed, write stories that succeeded, learn about my own process, became part of a community where I could do all that and where my off the wall ideas and enjoyment of fandom was valued.
>
> Fast forward ten years. I'm 25, in my first job after college as a science major working in a university lab as a lab tech and manager. I hate my job …. I hear about science journalism as a possible career path, and one of the big reasons my depressed self doesn't talk myself out of this big huge change in direction is because I know I can write. I have the confidence from having

> written fic for ten years that I can make it and get paid to write for a living in a very competitive field.

Fans also gain skills in visual art and develop technological prowess through remix creation. The vidding community has been particularly valuable as a "female training ground," teaching technical skills to women: web design, coding, video and image editing, and filmmaking.[16] A school semester offers only a few opportunities to evaluate each student's creative work, while a fan community has almost limitless capacity to respond to fanworks. According to Ania, "I got more practice with video- and audio-editing doing Sherlock fanvids than I did at uni, even though my studies are related to that (telecommunication with focus on audio processing)." Isabel H's story was similar. She taught herself how to use increasingly complex video-editing programs and techniques in order to make vids: "Now, I'm at the Columbus College of Art and Design in pursuit of a degree in Cinematic Arts so I can be a professional film editor. All because that roughly 6 years ago, I got into the *Teen Titans* fandom .... I feel most myself when editing videos."[17]

Others reported gaining web-based skills through fandom. For Kristen, for example, creating her first fan site at age seventeen "led to an ongoing love of web design." She taught herself several web design programs and techniques, which she implemented on her fannish websites, and reported that "as an adult, I have used these skills in every job I've ever had." These experiences are consistent with the research literature indicating that video remix develops digital literacy – the ability to communicate persuasively with audiovisual materials.[18]

Synergies with the Law

Since remix often involves copying and transforming copyrighted materials, it relies for its legality on fair use and fair dealing doctrines. US law analyzes the legality of fanworks according to a general doctrine of fair use; Canadian law incorporates both a fair dealing doctrine and an exception to copyright infringement for non-commercial user-generated content (UGC).[19] Although the nations' laws differ from each other, both laws tend to favour non-commerciality and promote transformativeness, either of meaning, purpose, or both. In both countries, non-commerciality is a core

consideration,[20] and non-commercial remixes are especially likely to constitute fair or non-infringing use, even when the result is minimally transformative.[21]

Transformativeness is implicit in both countries' laws. Although fair use under US law does not explicitly demand transformativeness, the US Supreme Court has explained in *Campbell v. Acuff-Rose Music* that transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."[22] For that reason, even substantial copying in the service of transformation can be fair, as long as it results in a new meaning, message, or creative vision.[23] Similarly, Canada's UGC exception does not explicitly demand transformativeness but does require that the new work not be a substitute for the existing one.[24]

As fan remixes tend to be both transformative and non-commercial, the two factors work together to create space for fanworks and fan communities in ways that are particularly beneficial to fans' self-expression without causing financial harm to—and often providing financial support for—markets that copyright holders have a right to control. Likewise, the fact that these doctrines do not require advance permission for transformative, non-commercial copying is essential to their role for young women and girls, who often would not ask for permission or would be ignored if they did.

Both nations' doctrines have uncertainties that may undermine these synergies between law and creative practice. Because US law depends on a flexible set of factors to determine whether a particular use is fair, fanwork creators remain vulnerable to unpredictable legal challenges from rights holders even for fanworks that are likely to constitute fair use.[25] Canadian law provides what appears to be a more certain copyright regime by incorporating a statutory safe harbour for non-commercial remix, but may still leave fanwork creators vulnerable to challenge based on rights holders' moral rights or allegations that fanworks have a "substantial adverse effect, financial or otherwise," on exploitation of the existing work.[26] In addition, because Canada's UGC exception is a recent and relatively untested legal development, it remains to be seen how much certainty it will actually provide for fanwork creators. Notwithstanding these potential uncertainties in Canada's regime, the element-based structure of the UGC exception provides greater facial predictability than the factor-based structure of US fair use law.

Non-Commerciality

The non-commercial nature of fandom makes it particularly conducive to self-expression by young women and girls. Because fan communities create a built-in audience, fanwork creators need not cater to the commercial market in order to find an audience for their works. And because fanworks are free to consume, young women and girls can experience them and become a part of their communities despite limited resources. Nadja R. learned English through fan fiction because "fanfiction was free, it was about things that I, as a teenager, loved passionately, and most of all, it meant that I could participate and have an audience of my own." By contrast, copyright-incentivized works invariably seek to appeal to more consumers. Even when they target niche markets, they will target markets—people who can pay for something specialized.[27] Not incidentally, people who can pay are less likely to be young, female, relatively poor, or otherwise part of culturally devalued groups, since cultural and economic power are often related.[28] As Medellia, whose participation in *X-Men: First Class* fandom helped her deal with her disability, explained, she knew that stories about disability

> wouldn't sell a big-budget movie, but it doesn't have to in fanfiction, because fanfiction is a hobby and a social outlet, not a moneymaking venture …. I enjoy the participation as much as the finished project. I have friends and allies who share my interests, and we can tell the stories and make the art we want to see, for each other.

Instead of money, fans provide other fans support and feedback, which generates a culture of giving and learning.[29] As Nicky wrote, "fandom's gift based economy and penchant for sharing expertise profoundly shaped my creative process."

Non-commercial creative uses, precisely because they are not motivated by copyright's profit-based incentives, are also more likely to contain content that the market would not produce or sustain.[30] As media scholar Catherine Tosenberger argues, non-commercially generated works are often "unpublishable," which

> frees [fanwork creators] to tell the stories they want to tell. You can do things in fanfiction that would be difficult or impossible to do in fiction intended for commercial publication, such as

> experiments with form and subject matter that don't fit with prevailing tastes …. It's a way of asserting rights of interpretation over texts that may be patriarchal, heteronormative, and/or contain only adult-approved representations of children and teenagers.[31]

This is reflected in Elisa D.'s story of how fan remix helped her overcome depression: "Freed from the constraints of publication, etc., I was able to write stories again …. Most readers are not interested in traditional serial-fiction. But fan fiction lovers adore serials."

Non-commerciality also promotes community building. As sociologist Viviana Zelizer has explained, defining an activity as non-commercial, even if it takes place in spaces where other people are making money (such as YouTube), changes how people feel and reason about it. "Earmarking" – treating value differently depending on the social context in which it is exchanged – is pervasive, not just for money but for everything from "tokens and commercial paper to art objects, and even including kitchen recipes or jokes – anything, in fact, that is socially exchangeable." Earmarking is an excellent way of "[e]stablishing or maintaining individual or group identity."[32] Authors who think of themselves as creating for free – for the joy of sharing with other people – will think differently about their works than authors who hope to sell their output in the open market. And their works, as a result, will be systematically different from works produced by copyright's incentives.[33] Thus, fandom's non-commercial nature creates the close-knit, interactive fan communities that support young women's personal growth. This social benefit is one reason that copyright law should treat non-commercial remix with special solicitude.

Transformativeness

Likewise, the fact that fan remix transforms rather than supplants pre-existing media content both promotes self-expression by girls and young women who might not see themselves in more mainstream media products and encourages them to talk back to the media. Remixes demonstrate that there is no single, necessary story and that everyone has a right to offer an interpretation.[34] Thus, "rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of self-empowerment."[35] Historically, remix comes disproportionately from minority groups:

women;[36] gay, lesbian, bisexual, transgender, and queer people;[37] and racial minorities of all sexes and orientations.[38] As fan N.J.B. wrote to the OTW,

> Fanfiction is the supportive, creative space for blacks who after seeing a movie in which all the main characters are white, thinks, "I would do it differently, and here's how." Fanfiction is for the girls who read a comic book in which the heroes are all men, and imagines herself as Captain America. Fanfiction is for all those who watch/listen/read to a story and cannot empathize with the characters as they are, but see potential in tweaking, recreating, and re-imagining the story to fit and resonate with their own lives. Finally, fanfiction is for all groups of people misrepresented in our mass media, and it gives them a space to create alternatives which are as empowering for the producer as the consumer.

This process is reflected in the story of Alice Randall, whose retelling of *Gone with the Wind* from the perspective of the slaves on the estate ultimately led to an important US fair use decision.[39] Well before the internet made so much fan creativity easily findable, she began her imaginative career as a girl remixing *Batman*:

> When I was a girl of six or seven I fell in love with the television series Batman. And like many loves, there was something I hated in it too: I hated the fact that no one who looked like me was in the story. For two weeks after that awareness I was frustrated. The third week I wrote myself in. I literally began to write out Batman scripts and write a part for me into them, a Bat Girl part. My Bat Girl wasn't a sidekick; she was a catalyst; every time I wrote her into a story, she changed its ending. When they took Batman off the air, I made my first long-distance phone call. I wanted to save the show.[40]

Randall's story illustrates the way in which young people who find they have something to say about what's left out of mass media can transform themselves into creators as they transform the source works.

Benefits of Not Requiring Permission

That fair use and fair dealing doctrines do not require advance permission for transformative, non-commercial copying is essential to their role for young women and girls. First, it permits young women to use underlying media sources as they wish to, not as rights holders wish them to. Second, it is particularly valuable for those who, like young women and girls, may be conditioned not to even try to seek permission if it is required.

It is well established that licensing breeds censorship. Existing licensing options for user-generated content (other than Creative Commons) always retain the option to censor.[41] Official fan communities want fans to "celebrat[e] the story the way it is,"[42] not to explore ways in which it might be different. Nor could rights holders reasonably be expected to applaud uses of their works that transform characters and critique themes as fan remix often does. The most transformative and self-actualizing fanworks – for example, those that identify gaps and flaws in a work's representation, or challenge characters' sexualities – are the same ones that rights holders would be least likely to permit, if they were given the opportunity to approve or disapprove.[43]

Likewise, creativity is often spontaneous and unpredictable.[44] If someone has to take a license before writing five hundred words about Harry Potter, they will make other plans. This is especially true for younger (and less experienced) writers. Given the small scale and limited resources of these individuals, "anything that raises their innovation costs can … have a major deterrent effect."[45] Not only might they fear denial of permission, but even more perniciously, they might not even think to ask.

Members of marginalized groups are already likely to be nervous about expressing themselves, and barriers to expression can silence them before they even start.[46] Female vidders, for example, have historically been reluctant to step up and claim cultural legitimacy, and legal uncertainty hinders both production of transformative works and remixers' ability to achieve mainstream recognition.[47] The OTW routinely receives queries from young women who are afraid to post their fanworks online, for fear that in doing so they may draw legal action from rights holders. In contrast, the queries that the OTW receives from men more frequently request assistance in opposing challenges by rights holders to already-existing fanworks. If they have to seek permission to create, young women and

girls – who already feel unrepresented in the system, something they turn to fanworks to remedy – are less likely to seek permission. This phenomenon not only emphasizes the importance of permission-free fair use and fair dealing systems, but also strongly counsels against the sort of "take down first and ask questions later" approach permitted by the US Digital Millennium Copyright Act (DMCA),[48] since underrepresented speakers are also less likely to push back when their works are challenged.[49] Permission-free use is a crucial element of fandom's role in promoting young women's self-actualization through fan remix.

Conclusion

Together, the non-commerciality of fan communities and transformative potential of fan remix work together to create a space where young women and girls can experience the self-discovery and skill building discussed above. It is no surprise that fanwork production is a female-dominated form in North America. While female content producers are underrepresented in commercial spheres, the non-commerciality of fandom frees girls and young women to create and consume works that represent their own lives and interests.

Neither today's technologies nor the practices surrounding the use of those technologies can be fully understood without attention to the role of law. US and Canadian law both favour non-commercial remix, but differ in that US fair use law relies on a flexible set of factors, while Canadian law defines fair dealing broadly and adopts a statutory safe harbor for non-commercial remix.[50] Although non-commercial, transformative works generally fall soundly within the ambit of US fair use, the OTW still receives a steady stream of inquiries from girls and young women who are concerned that by posting their fanworks, they may run afoul of US copyright law. To the extent that legal uncertainty and risk aversion may lead girls or young women to refrain from participating in fan remix communities, Canada's UCG exception may provide a model for US copyright reform, but only if that UGC exception actually results in greater legal certainty for fanwork creators.[51] Regardless, as the responses to the OTW's call for comments demonstrate, the benefits of a system that favours non-commercial, transformative remix for those young women and girls who elect to participate in fan remix are undeniable.

Notes

1 United States, U.S. Copyright Office, *Public Hearings: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 0108.20-0111.15* (Washington, DC: Library of Congress, 2009), <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-7-09.txt>; Abigail Derecho, "Gender and Fan Culture (Round Eight, Part One): Abigail Derecho and Christian McCrea," *Confessions of an Aca-Fan*, 26 July 2007, <http://henryjenkins.org/2007/07/gender_and_fan_culture_round_e.html> ("[O]nline fanfic … was the invention of white American women [most of them were white, most of them were women, not all]"); Jaime Warburton, "Me/Her/Draco Malfoy: Fangirl Communities and Their Fictions," in *Girl Wide Web 2.0: Revisiting Girls, the Internet, and the Negotiation of Identity*, ed. Sharon R. Mazzarella (New York: Peter Lang, 2010).

2 For US fair use law, see 17 U.S.C. § 107, <http://www.law.cornell.edu/uscode/text/17/107>; for Canadian fair dealing law see *Copyright Act* (R.S.C., 1985, c. C-42), § 29.21, <http://laws-lois.justice.gc.ca/eng/acts/c-42/page-19.html#h-27>.

3 The authors both serve on the Legal Committee of the OTW.

4 "What We Believe," Organization for Transformative Works, <http://transformativeworks.org/about/believe>.

5 The OTW posted the call on its news blog and Tumblr account on 3 October 2013. For the full text of the call, see <http://transformativeworks.org/news/your-personal-fandom-stories-are-urgently-needed>; on Twitter, the OTW linked to that post with the following tweet, sent on 3 October, 2014 at 9:53 a.m.: "Our legal team needs YOUR fandom stories ASAP to help them argue for fans' rights to create & share http://bit.ly/1c9dS2Z #copyright #NTIA."

6 Francesca Coppa, "An Editing Room of One's Own: Vidding as Women's Work," *Camera Obscura* 26 (2011): 124 ("A vidder can tailor-make her media to be as she likes it, and can convey her preferred reading of a text by showing us exactly what and how she sees."); Erik Jacobson, "Music Remix in the Classroom," in *DIY Media: Creating, Sharing and Learning with New Technologies*, eds. Colin Lankshear & Michele Knobel (New York: Peter Lang, 2010), 32 ("Remix, as a particular form of [the principle that you don't have to be a virtuoso or have a band to make music], teaches people that anybody can comment on or interpret already existing music. Finally, as with punk, the expectation is not that you are remixing to secure immortality. The idea is that doing it yourself (DIY) is a worthwhile activity in and of itself.").

7 Rebecca Tushnet, "I Put You There: User-Generated Content and Anti-Circumvention," *Vanderbilt Journal of Entertainment and Technology Law* 12

(2010): 903–905, 930, n168; Marcus Boon, *In Praise of Copying* (Cambridge, MA: President and Fellows of Harvard College, 2010), 147, <http://www.soundsphenomenal.org/projects/rootmap/resources/Boon_text_final.pdf> (montage "is a poor people's art," based on limited resources).

8 Anupam Chander & Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use," *California Law Review* 95 (2007): 609, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1228&context=californialawreview>.

9 *Ibid.*, at 613.

10 Sonia K. Katyal, "Performance, Property, and the Slashing of Gender in Fan Fiction," *Journal of Gender, Social Policy, and the Law* 14 (2006): 467, <http://www.wcl.american.edu/journal/genderlaw/14/katyal3.pdf> (discussing the role of slash in making queer meanings).

11 *Ibid.*, at 489.

12 *Ibid.*, at 486 (citation omitted).

13 Comment by thesmallmachine on Laura Miller, "Middle-Earth According to Mordor," *Salon*, 15 February 2011, <http://www.salon.com/2011/02/15/last_ringbearer/#postID=2042021&page=0&comment=1986322>.

14 See, e.g., Rebecca W. Black, "Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community," *Journal of Adolescent and Adult Literacy* 49 (2005), <https://resources.oncourse.iu.edu/access/content/user/mikuleck/Filemanager_Public_Files/L750%20Electronic%20Lang%20and%20Lit/Instruction/Fanfiction%20_%20English%20Lang%20Learners.pdf>; Rebecca W. Black, "Language, Culture, and Identity in Online Fanfiction," *E-Learning* 3 (2003), <http://www.wwwords.co.uk/pdf/validate.asp?j=elea&vol=3&issue=2&year=2006&article=5_Black_ELEA_3_2_web>.

15 Black, "Access and Affiliation," *supra* note 14 at 123–124.

16 Jesse Walker, "Remixing Television," *Reason Magazine*, August/September 2008, <http://reason.com/archives/2008/07/18/remixing-television>.

17 See also Michele Knobel, Colin Lankshear & Matthew Lewis, "AMV Remix: Do-It-Yourself Anime Music Videos," in *DIY Media: Creating, Sharing and Learning with New Technologies*, eds. Colin Lankshear & Michele Knobel (New York: Peter Lang, 2010), 205 (AMV remix is a cultural practice that aids effective learning and fosters high levels of personal involvement and motivation in learning, and whose lessons can be brought into the classroom); Scully1121, "There is Hope for Vidders," *LiveJournal*, 16 November 2011, <http://vidding.livejournal.com/2751680.html> (describing how fan's youthful remix experience allowed her to build skills she later used to earn work for a television show).

18 See, e.g., Kyle D. Stedman, "Remix Literacy and Fan Compositions," *Computers and Composition* 29 (2012), doi:10.1016/j.compcom.2012.02.002.

19 US fair use law, *supra* note 2; *Copyright Act*, *supra* note 2.
20 *Ibid.*
21 *Sony Corp. v. Universal City Studios*, 44 U.S. 417 (1984): 449, <http://www.law.cornell.edu/copyright/cases/464_US_417.htm> (holding that non-commercial uses are presumptively fair); *Copyright Modernization Act*, S.C. 2012, c. 20, <http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/FullText.html>, s. 29.21 (creating exception for non-commercial user-generated content); Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression," in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*, ed. Michael Geist (Toronto: Irwin Law, 2010), 395.
22 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, <https://supreme.justia.com/cases/federal/us/510/569/case.html>, 579 (1994).
23 See generally, e.g., *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013, use of entire image in music video that gave image new, religious meaning was transformative and fair); *Cariou v. Prince*, 714 F.3d 694, at p. 705–8 (2d Cir. 2013, because an audience could readily find new meaning and message in Prince's artworks, they constituted fair use regardless of amount copied or intent toward the original).
24 *Copyright Act*, *supra* note 2.
25 Cf. Matthew Sag, "Predicting Fair Use," *Ohio St. L. J.* 73 (2012), <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/05/73.1.Sag_.pdf> (assessing the predictability of fair use outcomes in litigation); Pamela Samuelson, "Unbundling Fair Uses," *Fordham Law Review* 77 (2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834> (identifying policy-based clusters in fair use jurisprudence); Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005," *U. Pa. L. Rev.* 158 (2008), <https://www.law.upenn.edu/journals/lawreview/articles/volume156/issue3/Beebe156U.Pa.L.Rev.549(2008).pdf> (identifying predictable patterns in fair use jurisprudence).
26 *Copyright Act*, *supra* note 2, at s. 14.1, s. 28.1, s. 28.2, s. 29.21.
27 Neil Weinstock Netanel, "Copyright and a Democratic Civil Society," *Yale Law Journal* 106 (1996): 362, <http://ecohist.history.ox.ac.uk/readings/ip/netanel.htm> ("[E]xpansive copyright owner control over existing expression may exacerbate the problem of market- based hierarchy. Given authors' needs to draw on the existing images, sounds, and texts that make up our cultural milieu, conglomerate control over existing expression would continue to subvert the democratization of public discourse even in a digital age in which many authors no longer rely on conglomerates to market and distribute new works.").
28 Henry Jenkins, "Gender and Fan Studies (Round Five, Part Two): Geoffrey Long and Catherine Tosenberger," *Confessions of an Aca-Fan*, <http://henryjenkins.org/2007/06/gender_and_fan_studies_round_f_1.html>("[I]

ssues of gender, race, class, sexuality … have affected who has *access* to that institutional approval …. Fandom is a space where people who have historically been denied access to institutional narrative creation have said, 'Well, then, we'll tell this story *our way*.' … The Internet has exacerbated fandom's anarchic tendencies, and all those old cultural hierarchies – creator/consumer, male/female, straight/queer, art/crap – are getting shaken up …. In fandom, you don't have to be anointed by the Official Culture Industry to be an artist, to share your work and have it be appreciated.").

29 Two of the most popular fan fiction archives, for example, ban commercial appeals on their sites but leave opportunities for readers to comment upon a work. See "Fanfiction," last modified 5 March 2009, <https://www.fanfiction.net/tos/>; "Archive of our Own," <archiveofourown.com/tos>.

30 Rebecca Tushnet, "User-Generated Discontent: Transformation in Practice," *Columbia Journal of Law & The Arts* 31 (2008): 506, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1068&context=fwps_papers> ("by its very independence from the incentives of formal markets, non-commerciality signals the presence of expression tied to a creator's personhood "); Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions," *William and Mary Law Review* 51:513 (2009): 531–536, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1021&context=facpub> (expanding upon the relationship between non-commerciality of transformative works and their propensity to express a creator's personhood).

31 Catherine Tosenberger, "Potterotics: Harry Potter Fanfiction on the Internet," PhD diss., University of Florida, 2007, 34–35, <http://ufdc.ufl.edu/UFE0019605/00001/pdf> ("Fandom is a space where freedom to read and write whatever one wants are felt in a much more concrete way than in more 'official' spaces …. Fanfiction is, in many ways, given life by what other spaces don't allow."); Liz Gannes, "NTV Predictions: Online Video Stars," *Gigacom*, 30 December 2007, <http://gigaom.com/2007/12/30/ntv-predictions-online-video-stars/> ("Fans, operating outside of the commercial mainstream, have the freedom to do things which would be prohibited [to] those working at the heart of a media franchise – explore new stories, adopt new aesthetics, offer alternative interpretations of characters, or just be bad in whatever sense of the word you want. And much of the online video content thrives because it is unpublishable in the mainstream but has strong appeal to particular niches and subcultures." Quoting Henry Jenkins; alteration in original); Timothy B. Lee, "Ars Book Review: 'Here Comes Everybody' by Clay Shirky," review of *Here Comes Everybody* by Clay Shirky, *Ars Technica*, 3 April 2008, <http://arstechnica.com/articles/culture/book-review-2008-04-1.ars/3> (interview

with Clay Shirky discussing valuable group productions whose transaction costs mean that they can only take place voluntarily, outside the market and the firm).

32 Viviana A. Zelizer, "The Social Meaning of Money: 'Special Monies'" *The American Journal of Sociology* 95 (1994), <http://cas.umkc.edu/econ/economics/faculty/wray/631Wray/Zelizer.pdf>.

33 Mark S. Nadel, "How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing," *Berkeley Technology Law Journal* 19 (2004): 797–803, <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-nadel.pdf>.

34 See also Robert S. Rogoyski & Kenneth Basin, "The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China," *UCLA Entertainment Law Review* 16 (2009): 258 (Remix allows average citizens who lack political power under China's authoritarian regime to "appropriate and democratize their own cultural benchmarks, encouraging the kind of cultural participation that is vital to the development of 'a just and attractive society.'" Citation omitted).

35 Chander & Sunder, *supra* note 8 at 619–620.

36 Kristina Busse, "In Focus: Fandom and Feminism: Gender and the Politics of Fan Production," *Cinema Journal* 48 (2009): 105–106, <http://queergeektheory.org/InFocus48-4.pdf>; Francesca Coppa, "A Fannish Taxonomy of Hotness," *Cinema Journal* 48 (2009), <http://www.yalelawtech.org/wp-content/uploads/Coppa_In_Focus.48.4.pdf>; Micole, 29 August 2007 (11:15 EST), "Women's Art and 'Women's Work,'" *Ambling Along the Aqueduct*, <http://aqueductpress.blogspot.com/2007/08/womens-art-and-womens-work.html>.

37 Julie Levin Russo, "User-Penetrated Content: Fan Video in the Age of Convergence," *Cinema Journal* 48 (2009): 126 ("In many cases, [fan videos] render queer dimensions of these sources visible by telling stories of same-sex romance (known as 'slash') through sophisticated viewing and editing techniques." (Citation omitted); see Katyal, *supra* note 10 at 468–469 (discussing the role of slash in making queer meanings).

38 Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," *North Carolina Law Review* 84 (2006): 561, 622, <http://www.cs.northwestern.edu/~pardo/courses/eecs352/papers/sampling%20and%20copyright.pdf>; K. J. Greene, "'Copynorms,' Black Cultural Production, and the Debate over African-American Reparations," *Cardozo Arts & Entertainment Law Journal* 25 (2008): 1186, <http://www.cardozoaelj.com/wp-content/uploads/2013/03/Green.pdf>.

39 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), <http://www.yale.edu/lawweb/jbalkin/telecom/suntrustbank%28appeal%29.pdf>.

40 "A Conversation with Alice Randall," Houghton Mifflin Harcourt, <http://www.hmhbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation>.

41 YouTube's Content ID system always provides copyright owners the option to block content for any reason, as does Amazon's Kindle Worlds. "How Content ID Works," Google Support: YouTube, <https://support.google.com/youtube/answer/2797370?hl=en>; "Content Guidelines and Review Process," Kindle Worlds, <https://kindleworlds.amazon.com/faqs?topicId=A2W2IF5J2WZDKT>; *Bloodshot*, Kindle Worlds <https://kindleworlds.amazon.com/world/Bloodshot?ref_=kww_home_ug_Bloodshot> (along with standard bans on "erotica" and "offensive content," requiring characters to be "in-character," and banning "profane language," graphic violence, "references to acquiring, using, or being under the influence of illegal drugs," and "wanton disregard for scientific and historical accuracy").

42 Amy Harmon, "'Star Wars' Fan Films Come Tumbling Back to Earth," *New York Times*, 28 April 2002, B28, <http://www.nytimes.com/2002/04/28/movies/film-star-wars-fan-films-come-tumbling-back-to-earth.html>.

43 Chander & Sunder, *supra* note 8 at 623 ("While DC Comics produced an alternative strip featuring an evil Batman, it issued a cease and desist letter to an artist depicting Batman and Robin as lovers [sometimes explicitly]. An evil Batman, it seems, is more palatable than a gay one." Citation omitted).

44 Julie Cohen, "Creativity and Culture in Copyright Theory," *UC Davis Law Review* 40 (2007): 1151, <http://scholarship.law.georgetown.edu/facpub/58/>.

45 Andrew W. Torrance & Eric A. von Hippel, "Protecting the Right to Innovate: Our 'Innovation Wetlands,'" MIT Sloan Research Paper no. 5115–13, 9 October 2013: 18, <http://ssrn.com/abstract=2339132>.

46 Library of Congress Rulemaking Hearing Section 1202, Testimony of Francesca Coppa 0119.4-0120.4, 7 May 2009, <http://www.copyright.gov/1201/hearings/2009/transcripts>.

47 *Ibid.*, at 0120.5-0120.17.

48 US fair use law, *supra* note 2 (providing copyright safe harbor for internet service providers that comply with notice-and-takedown procedures).

49 United States, United States Patent and Trademark Office, *Department of Commerce Private Meeting: Copyright Policy, Creativity and Innovation in the Digital Economy* (Washington, DC: 2013), 192, <http://www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf> ("[P]eople who are most likely to create non-commercial remix are

disproportionately women, disproportionately minorities of various kinds, and they already feel unwelcome in the larger system, and I can see this in my own practice. When a guy who makes a Stargate remix gets a takedown from YouTube, he writes me, even though we've never met. You know, he finds me, and he says I'm just going to counter-notice. This is fair use. Women, if they find me, then we call—I have a long conversation with them, we talk it over in great detail, and hopefully I convince them that they can counter-notify when they have a valid fair use defense, which by the way is often.").

50 *Supra* note 2.

51 See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), 254 (arguing for exemptions for non-commercial use).

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