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# Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms

Rebecca Katz\*

## ABSTRACT

*Amateur, non-commercial writing based on contemporary copyrighted works — “fan fiction” — is a practice that is worth defending despite its unclear status vis a vis copyright law. In this article, I assess how Canadian fan authors may defend their works using Canadian copyright law. I argue that the recent copyright reforms are promising for fan and other second generation creators. The new fair dealing categories of parody and satire are positive steps, though the broad and technologically neutral non-commercial user-generated content provision may be the most promising reform of all. I begin with an exploration of the benefits of fan fiction writing before going on to assess how fan fiction may have fared under the Copyright Act prior to the reforms. Subsequently, I argue that the new users' rights embedded in the Copyright Act, including the new fair dealing exemption for parody and satire and, especially, the non-commercial user-generated content (“UGC”) provision, may finally articulate a needed legal breathing space for fan fiction. While the UGC exemption appears tailored to YouTube and other audiovisual content, it may actually be the most important development yet for fan writers in Canada.*

## INTRODUCTION

Fan fiction, a genre of amateur derivative writing, is often assumed to infringe copyright law.<sup>1</sup> At best, fan fiction's position *vis a vis* copyright law in jurisdictions such as the United States and Canada is unclear. This lack of clarity stems partly from the fact that copyright owners often ignore amateur fan fiction writers, who

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<sup>1</sup> See e.g. Patrick McKay, “Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century” (2011) 24 Regent University L Rev 117 at 121 (SSRN); see also Rebecca Tushnet, “Copyright Law, Fan Practices and the Rights of the Author” in Jon Grey et al, eds, *Fandom: Identities and Communities in a Mediated World* (New York: NYU Press, 2007) 60 at 60, on some of the contradictory views of fan fiction's legality [Tushnet, “Copyright Law, Fan Practices”].

may not seem like serious “threats” to rights owners’ economic interests. Perhaps more significantly, amateur fan authors are unlikely to have the resources to defend their hobbies in a protracted legal battle should rights holders take a dimmer view of their work and issue a “cease and desist” notice.<sup>2</sup> These factors have led to a striking dearth of case law on the subject,<sup>3</sup> which is surprising, given the fact that the Internet is home to millions of fan stories inspired by countless novels, movies, television shows and other media.<sup>4</sup>

In this article, I argue that recent changes to Canada’s *Copyright Act*, including new fair dealing categories and, especially, the user-generated content provision, may help to articulate a much-needed legal breathing space for fan writing. I begin by advocating a permissive approach to fan fiction, a practice that has much to recommend it. Second, I attempt to assess how fan fiction may have fared under Canadian law prior to the recent copyright reforms, and conclude that a new approach to non-profit, amateur-created content was necessary. While the new fair dealing category of parody and satire is a positive step, I suggest that this category may nevertheless be inadequate to address all the needs of the Canadian fan fiction community. In my third and final section, I look at the new user-generated content exemption, dubbed the “mash-up” or “Youtube” exemption, in section 29.21 of the reformed *Copyright Act*. I assess the provision’s applicability to fan fiction, and argue that it may be another advantageous development for Canadian fan writers — perhaps the most advantageous innovation yet.

## I. THE CASE FOR FAN FICTION

A novelist retells *Jane Eyre* from the perspective of Mr. Rochester’s “mad wife”, and uses this retelling to challenge *Jane Eyre*’s sexist, classist, and colonialist implications.<sup>5</sup> A Sherlock Holmes fan writes a short story positing a homoerotic relationship between Holmes and Watson, and publishes this short story in an on-line fan archive and then, subsequently, in a professional anthology of Holmes pas-

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<sup>2</sup> See, for example, Sonia K. Katyal, “Performance, Property, and the Slashing of Gender in Fan Fiction” (2006) 14 Am UJ Gender Soc Pol’y & L 461 at 469-470.

<sup>3</sup> See e.g. McKay, *supra* note 1 at 122.

<sup>4</sup> As of April 5, 2013, the Literature section of the archive [www.fanfiction.net](http://www.fanfiction.net) hosted more than 600 000 *Harry Potter* fan stories, more than 200 000 *Twilight* stories and approximately 48 000 works based on the *Lord of the Rings* series; the site’s Television section was home to more than 92 000 stories based on the popular show *Glee*, more than 75 000 *Supernatural* fan works, and more than 46 000 stories set in the fictional *Doctor Who* universe. These popular categories are merely a small sample of the dozens of original novels, television shows, movies, video games, and other media that have [fanfiction.net](http://fanfiction.net) pages devoted to them, and which have inspired fan fiction stories on that site. Furthermore, [fanfiction.net](http://fanfiction.net) is only one site among many that host fan fiction. Rebecca Tushnet, writing in 2007, found over 1.2 million results for a Google search of the phrase “fan fiction”: see Tushnet, “Copyright Law, Fan Practices”, *supra* note 1 at 63.

<sup>5</sup> Jean Rhys, *Wide Sargasso Sea* (New York: W W Norton and Company, 1992).

tiches.<sup>6</sup> A high school senior writes a lengthy, detailed sex scene involving a male and female character from a popular television series, while a classmate writes similar amateur erotica featuring two male — and canonically heterosexual — characters from the same franchise. What do these works have in common?

All of these works are derivative in some way. All borrow characters, settings, or situations created by earlier authors in order to tell stories or explore ideas that may be absent (or merely implied) in the original, or “canon”, texts. Moreover, all of these works are part of a longstanding tradition in which stories written by a first generation creator are rewritten or reworked by subsequent generations.<sup>7</sup> However, not all of these works are subject to equally favourable legal regimes.<sup>8</sup> While the practice of rewriting texts predates modern statutory copyright law,<sup>9</sup> copyright statutes make it difficult for next generation creators to create derivative works based on books, TV shows, movies, or other media that are currently under copyright protection.<sup>10</sup>

This copyright protection means that “fan fiction”, or amateur derivative works written by fans of a pre-existing (typically copyrighted) text, exists in a legal grey area.<sup>11</sup> Fan writers may be accused of violating copyright or trademark law; additionally, in countries that protect the moral rights of authors as Canada does, fan writers may be accused of infringing upon the original authors’ moral rights,

<sup>6</sup> Naomi Novik, “Commonplaces” in *The Improbable Adventures of Sherlock Holmes* (San Francisco: Night Shade Books, 2009). This short story was originally made available on the Yuletide web site, a holiday fan fiction exchange archive, online: <<http://yuletidetreasure.org/archive/75/commonplaces.html>>.

<sup>7</sup> Graham Reynolds, “The Impact of the *Canadian Copyright Act* on the Voices of Marginalized Groups” (2010) 48 *Alta L Rev* 35 at 35-36 [Reynolds, “Impact”].

<sup>8</sup> Works that are in the public domain, such as those by the Brönte sisters, Dickens, Shakespeare, and other classic authors are no longer under copyright protection and may thus be reworked (by amateur or professional writers) with relative impunity: see e.g. Reynolds “Impact”, *supra* note 7 at 41.

<sup>9</sup> Reynolds, “Impact”, *supra* note 7. Any number of classic literary texts, from Greek tragedies to Shakespearian drama, draw upon and adapt earlier stories; this tradition has continued in more recent novels and movies that adapt classic literature to new contexts and eras.

<sup>10</sup> It is difficult to draw a bright line between fan fiction and other derivative writings. Context is important: writers can readily rewrite texts, such as ancient myths or classic literary works, that are no longer under copyright, and can publish these rewrites in professional contexts for commercial gain. However, fans of more current works frequently develop rewrites of contemporary, copyrighted texts and distribute these works in non-commercial venues such as Internet fan sites. I use the term fan fiction to mean amateur derivative works that draw on pre-existing, often copyrighted texts. Other derivative works — such as those based on classic public domain texts or myths, legends, and folklore which may never have been copyrighted in the first place — fall into the broader category of rewrites or second generation works, of which the fan fiction genre is a particular subset.

<sup>11</sup> McKay, *supra* note 1 at 121-122, on the legal ambiguity that overhangs fan fiction as well as other fan-made media.

i.e., the right to attribution and, especially, the right to the integrity of their work.<sup>12</sup> I note, however, that the scope of this article prevents me from addressing the challenges artists' moral rights may pose to fan fiction writers, fascinating though these issues may be. Likewise, while some fan fiction writers may try to publish their rewrites or parodies commercially,<sup>13</sup> or attempt to use their fan fiction for other income-producing purposes, the scope of this article compels me to focus on amateur fan writers exclusively. I therefore use the term fan fiction to mean derivative fiction that is written as a hobby and published in forums such as Internet web sites from which the writers do not derive a profit.

These fan fiction works may seem at first to infringe on copyright owners' economic rights and, arguably, on artists' moral rights — even if the fan writers make no profit from their stories. However, there are compelling arguments one could make in defense of fan fiction. First, one could argue that most fan fiction works would constitute fair use or fair dealing with copyrighted materials: fan fiction is typically written without intent to profit or to replace first generation texts, but merely comments on, reinterprets, or celebrates popular works.<sup>14</sup> It has been

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<sup>12</sup> See e.g. Reynolds, "Impact", *supra* note 7 at 48-49.

<sup>13</sup> It's not unheard-of for fan writers to attempt to publish fan fiction stories (or reworked stories which began as fan fiction) as original works that are merely inspired by the writer's initial "fandom". Famously, this was the case with the bestselling erotica series *Fifty Shades of Grey*, which began its life as a work of adult fan fiction based on the adolescent romance series *Twilight*: see e.g. Rachel Deahl, "E.L. James and the Case of Fan Fiction" *Publishers Weekly* (13 January 2012), online: PWXYZ LLC, <<http://www.publishersweekly.com/pw/by-topic/industry-news/page-to-screen/article/50188-e-l-james-and-the-case-of-fan-fiction.html>>. Further, Amazon.com has recently pioneered a licensing scheme by which it will obtain permission from the owners of several copyrighted franchises to distribute fan-written works through its Kindle Worlds program. Under the new Amazon scheme, the original rights holders and the second generation fan fiction writers will receive royalties: see Olga Kharif, "Amazon Wants to Sell Your Fan Fiction Through Kindle Worlds" *Bloomberg Business Week* (13 June 2013), online: Bloomberg L.P. <<http://www.businessweek.com/articles/2013-06-13/amazon-wants-to-sell-your-fan-fiction-through-kindle-worlds>>. However, while these scenarios raise novel legal questions, it is impossible for me to address all of them in this paper.

<sup>14</sup> See Rebecca Tushnet, "Legal Fictions: Fan Fiction, Copyright and a New Common Law" (1997) 17:3 *Loyola of Los Angeles Entertainment L J* 651 at 664-678 [Tushnet, "Legal Fictions"]. Tushnet analyses how fan fiction may fare on the American fair use factors. To assess whether a work is fair use under the *United States Code*, courts must consider four factors. These are the purpose and character of the use, including whether the use is commercial or non-commercial, the nature of the copyrighted work, the amount used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work: see 17 USC §107. The second American fair use factor looks at the commerciality of the use and finds that non-commercial uses are more likely to be fair: see *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (U.S. Sup. Ct., 1984). This second factor also looks at whether the use is transformative, and treats transformative uses (which cannot serve as substitutes for the original copyrighted works) as more likely to be fair: see *Campbell v. Acuff-Rose Music Ltd.*, 510 U.S. 569 (U.S. Sup. Ct., 1994). Non-profit, transforma-

argued that fan fiction typically has little adverse impact (if any) on the market for the original work;<sup>15</sup> in fact, fans who enjoy a franchise enough to write their own unauthorized interpretations or sequels are often the most devoted followers and consumers of the original franchises.<sup>16</sup> Indeed, fan fiction communities, like other online fan communities, may even benefit rights holders because they can enhance or maintain audience interest in original franchises or texts.<sup>17</sup> Fan fiction is also transformative in at least some respects:<sup>18</sup> at a minimum, it adds the interpretations or insights of the fan writers and transposes existing characters into new situations of the (fan) author's design.<sup>19</sup> These changes ensure that most fan fiction stories cannot serve as direct substitutes for the canon texts they draw upon. In the words of one commentator, "fan fiction is not an accepted substitute to canon in the same way that a pirated DVD is an accepted substitute to a legal DVD."<sup>20</sup> These aspects of fan fiction suggest that it could meet the threshold for fair use or fair dealing in the United States and Canada, though as noted, neither jurisdiction currently has any jurisprudence on the subject.<sup>21</sup> I revisit these arguments in greater detail below.

As well, fan fiction may have compelling public benefits. Graham Reynolds explores some of the ways in which transformative second generation works can promote the values that underlie Canada's constitutional right to freedom of expression; namely, the search for political, artistic, and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.<sup>22</sup> Transformative works can comment on topics ranging from political issues to artistic genres. These works also allow consumers-turned-creators to empower themselves and to rewrite culturally significant texts in ways that speak to their own values or experiences.<sup>23</sup>

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tive fan stories which do not impact the market for the original copyrighted texts may therefore qualify as fair use under the American fair use factors. The Canadian situation may be somewhat more complex; my own analysis of fan fiction's status under Canada's fair dealing regime follows later in this article.

15 Tushnet, "Legal Fictions", *supra* note 14.

16 *Ibid.* at 669–674; see also Ernest Chua, "Fan Fiction and Copyright: Mutually Exclusive, Coexistent or Something Else? Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright" (2007) 14:2 Murdoch University E L J 215 at 223, citing one fan fiction author's commitment to buying canon materials for "research purposes".

17 Tushnet, "Legal Fictions", *supra* note 14 at 670–674.

18 *Ibid.* at 665.

19 *Ibid.*

20 Chua, *supra* note 16.

21 See e.g. McKay, *supra* note 1 at 122, on the dearth of litigation addressing fan-made content.

22 *RJR-Macdonald Inc. v. Canada (Procureur général)*, 1995 CarswellQue 119, 1995 CarswellQue 119F, [1995] 3 S.C.R. 199 (S.C.C.), cited in Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist, ed, *From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010) 396 at 399 [Reynolds, "Towards a Right"].

23 Reynolds, "Towards a Right", *supra* note 22 at 399–402.

Likewise, fan fiction can add or explore new perspectives that are absent in original works by, for example, retelling a white male dominated narrative from the perspective of an underdeveloped female love interest or a minority “comic relief” character.<sup>24</sup> Similarly, the “slash” fan fiction genre explores possible homoerotic subtext in existing works and pairs characters into gay or lesbian relationships.<sup>25</sup> A work of slash fan fiction exploring the struggles of a gay Hogwarts professor or Jedi knight may offer interesting commentary on sexuality and homophobia in our own schools and militaries. Conversely, a work positing a wizarding world or a galaxy far, far away in which homophobia and heterosexism are absent could raise equally challenging questions about gender and sexuality on Earth.<sup>26</sup>

Likewise, studies of fandom demographics suggest that most fan writers are women.<sup>27</sup> Fan literature thus gives women and girls the opportunity to “write back” to an often male-dominated media industry,<sup>28</sup> and to challenge deeply ingrained narratives of masculinity and femininity.<sup>29</sup> Fan fiction may allow writers to explore the relationships of beloved characters in a way that resonates more powerfully with women’s experiences, or to sexualize attractive male characters in a way that appeals to female desires — even where original works authored, produced, and edited by men are only interested in sexualizing female characters.<sup>30</sup> Consequently, fan fiction sometimes provides a means by which people whose voices are under-represented in media may engage with cherished narratives in a way that is more meaningful to them. Copyright owners demanding that fan writers or web sites “cease and desist” their activities can have the troubling effect of silencing already marginalized voices and reinforcing gendered control of media narratives.

Moreover, even fan fiction works that do not necessarily delve into the concerns of “outsider” groups can nevertheless contribute in novel, useful, and transformative ways to artistic and cultural discourse. Some scholars, such as Patrick McKay, argue that the Internet has facilitated the return to a pre-twentieth century mindset in which popular participation in (and creation of) culture has once again become a reality.<sup>31</sup> While twentieth century technologies made it difficult for persons other than corporations to develop or distribute major creative works, the twenty-first century’s return to widespread amateur creativity should be celebrated and legally protected.<sup>32</sup> “Blockbuster” franchises such as the *Star Wars* movies and

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<sup>24</sup> See e.g. Graham Reynolds, “Impact”, *supra* note 7 at 38–44, on the utility of fan and professional rewrites for marginalized communities.

<sup>25</sup> Katyal, *supra* note 2 at 468–469.

<sup>26</sup> See e.g. Katyal, *supra* note 2 at 492–494.

<sup>27</sup> Katyal, *supra* note 2 at 465–466 and 468–469.

<sup>28</sup> *Ibid.* at 465–466.

<sup>29</sup> *Ibid.* at 485–487, 496–497.

<sup>30</sup> See e.g. Meredith McCardle, “Fan Fiction, Fandom and Fanfare: What’s all the Fuss?” (2003) 9 BU J Sci & Tech L 433 at 442–444.

<sup>31</sup> McKay, *supra* note 1 at 122–123; see also Katyal, *supra* note 2, citing Jenkins, at 482–483. Graham Reynolds makes a similar argument to the effect that digital technologies have democratized citizen participation in culture: see Reynolds, “Towards a Right”, *supra* note 22 at 396–397 and 402.

<sup>32</sup> McKay, *supra* note 1 at 122–123.

bestselling book series like *Harry Potter*, *Twilight*, or *The Lord of the Rings* can take on a status in our generation that is similar to ancient myths and folk tales. Copyright law must recognize that audiences sometimes wish to engage, critique, or reinterpret these popular myths without fear of legal action.

Finally, fan fiction can nurture creativity among members of the public. Online fan fiction communities often serve as social forums in which writings are not only posted, but can also be actively critiqued. Amateur writers writing completely original works — i.e., novel stories without the existing and enthusiastic fan bases of franchises such as *Harry Potter* or *Star Wars* — cannot benefit from the networks of peers, reviewers, mentors, and collaborators available in online fan communities.<sup>33</sup> Meanwhile, the young amateurs swapping *Harry Potter* fan stories online today — even those whose early writings seem uninspired — may be developing the skills that will help them write tomorrow’s bestsellers. Fan creativity, as McKay notes, can actually serve American copyright law’s goal of promoting the useful arts, rather than detracting from them.<sup>34</sup> The Canadian *Copyright Act*’s balance between ensuring just compensation for creators and promoting the public interest<sup>35</sup> could be equally well-served by the presence of a thriving, creative, and non-commercial fan fiction discourse.

Fan fiction is, therefore, not merely a “harmless” activity (economically speaking). Instead, it can actually serve several important functions. Fan fiction stories allow for more in-depth exploration of marginalized perspectives — such as queer themes or women’s voices — than mainstream media narratives typically do.<sup>36</sup> The genre also empowers members of the public to engage creatively and meaningfully with contemporary myths.<sup>37</sup> Finally, the community-oriented nature of fan fiction websites can foster creativity and allow future authors to hone their skills. Fan fiction writing is therefore, on the whole, a practice that is worth defending in the face of potential copyright challenges.

Naturally, the prospect of making legal space for fan fiction begs the question of how, practically, we may achieve this goal. Prior to the copyright reforms proposed in Bill C-11 and enacted in the *Copyright Modernization Act*,<sup>38</sup> Canada’s fair dealing structure seemed to force fan fiction into a legal grey area at best. In the next sections, I explore how fan fiction may have fared under the previous copyright regime, and how it may fare today given some of the new exemptions introduced in the latest batch of copyright amendments.

<sup>33</sup> For a discussion of the community-oriented nature of fandom, see Tushnet, “Legal Fictions”, *supra* note 14 at 656-657.

<sup>34</sup> McKay, *supra* note 1 at 119.

<sup>35</sup> *Galerie d’Art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307, [2002] 2 S.C.R. 336 (S.C.C.) at para 30; see also *Public Performance of Musical Works, Re*, 2012 SCC 36, 2012 CarswellNat 2380, 2012 CarswellNat 2381 (S.C.C.) at paras 8 (reviewing *Theberge*) and 11 (re-affirming the importance of balancing users’ and creators’ rights, as stated in *CCH*).

<sup>36</sup> Reynolds, “Impact”, *supra* note 7.

<sup>37</sup> See McKay, *supra* note 1 at 119–121; see also Katyal, *supra* note 2 at 482.

<sup>38</sup> *Copyright Modernization Act*, SC 2012, c 20.

## II. FAN FICTION IN CANADIAN COPYRIGHT LAW

### (a) Do fan fiction stories necessarily infringe copyright?

Before setting out a defense of fan fiction, it is important to ask whether these stories *necessarily* infringe Canadian copyright law in the first place. Canadian copyright law protects the exclusive rights of owners to “produce or reproduce the work or any substantial part thereof in any material form whatever”.<sup>39</sup> This exclusive right to reproduce a work or a substantial part thereof is a central plank of copyright in Canada.<sup>40</sup> The *Copyright Act* also protects other rights, such as the right to exhibit works to the public, to produce or publish works in translation, or to adapt works to different mediums.<sup>41</sup> The *Act*, however, is silent as to which discrete elements of works, such as characters or settings, can be protected independently.<sup>42</sup>

These questions are pertinent to fan fiction because most fan fiction stories are not mere reproductions of the source texts.<sup>43</sup> However, almost by definition, fan fiction uses characters and other elements of existing works, generally in situations of the fan authors’ creation. Do these portrayals “reproduce” characters and other substantial parts of the original works in a way that infringes copyright? Consider the fan who writes about a retired Harry Potter battling a new evil wizard. Is Harry the character subject to independent copyright protection? Similarly, if a *Star Wars* fan writes an original story with new characters set in the fictional *Star Wars* galaxy, are elements such as “the Force” and planets or other settings from the movies independently copyrighted? Some works of fan fiction use established fictional universes to explore novel ideas. In such cases, do fan authors “produce or reproduce [. . .] any substantial part” of the original text?

There is relatively little case law on this subject in the United States and Canada. Moreover, the few American and Canadian cases that have been litigated deal with the protection of fictional characters. Although fan fiction stories often use established characters, it is equally plausible for them to explore settings, refer to technologies and, in general, utilize other canon elements *besides* pre-existing characters. It is difficult to conjecture, from the jurisprudence on copyrighting characters, whether or how the same principles would apply to — for example — “the Force” from the *Star Wars* series, the magic spells used in *Harry Potter*, or the Hogwarts school. Nevertheless, it is helpful to look at the case law on whether characters alone are substantial parts of a work for copyright purposes.

American jurisprudence has two distinct tests for assessing whether characters are subject to copyright protection.<sup>44</sup> The Learned Hand test, articulated by

<sup>39</sup> *Copyright Act*, RSC 1985, c C-42 s 3(1).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> See e.g. Daniel J Gervais & Elizabeth Judge, *Intellectual Property: The Law in Canada*, 2<sup>nd</sup> ed (Toronto: Carswell, 2011) at 1128-1129.

<sup>43</sup> Tushnet, “Legal Fictions”, *supra* note 14 at 658.

<sup>44</sup> Jacqueline Lai Chung, “Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters” (2007) 49:3 *William & Mary L Rev* 903 at 906-907, 918-921.

Learned Hand J. in *Nichols v. Universal Pictures Corp.*,<sup>45</sup> suggests that characters may be copyrightable in some circumstances. To benefit from copyright protection, however, characters must be sufficiently delineated and not simply ideas or composites of ideas drawn from the public domain.<sup>46</sup> While this standard may sound like an elusive test for judges to apply, it aims to protect characters that are well-drawn enough to constitute “expression” (and not mere “ideas”)<sup>47</sup> and that are recognizable enough for other authors to avoid copying.<sup>48</sup> American jurisprudence has further adapted the *Nichols* test to ask, first, “whether the character is sufficiently delineated or developed to constitute [...] expression” and, second, whether the characters of the allegedly infringing work “significantly [resemble] the original protected character to the extent where a finding of infringement is warranted.”<sup>49</sup> This adaptation of the *Nichols* test may be particularly relevant to fan fiction, in which authors can transform, develop, or merely mischaracterize characters from original works such that they are no longer identical to the characters in the parent text. The *Nichols* test may also be criticized for potentially offering creators of certain types of works — such as pictorial or animated works and realist or character-driven writings — greater protection than authors writing in genres where characters need not or cannot be drawn as fully and may not qualify as readily for protection under this test.<sup>50</sup>

The US Ninth Circuit developed its own test for assessing whether characters can be copyrighted in *Warner Brothers v. Columbia Broadcasting*.<sup>51</sup> In this case, the Court stated that fictional characters may receive independent copyright protection if they are significant enough to constitute “the story being told”,<sup>52</sup> rather than mere “vehicles”<sup>53</sup> for the story. This standard has been criticized as setting a very high bar for authors to protect their characters in copyright.<sup>54</sup> After all, even in works where characters’ development, actions, or journeys are highly significant, most characters do not themselves “constitute” the stories in which they figure. As well, this standard seems inapplicable to other elements of works, such as settings, in all but extremely rare cases.

<sup>45</sup> See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (U.S. C.A. 2nd Cir., 1930) [*Nichols*]; see also Gervais & Judge, *supra* note 42 at 1129; see also Lai Chung, *supra* note 44, at 906-907, 918-921.

<sup>46</sup> *Nichols*, *supra* note 45 at para 7; see also Gervais & Judge, *supra* note 42 at 1129.

<sup>47</sup> *Nichols*, *supra* note 45.

<sup>48</sup> *Ibid.* This, however, still begs the question of second generation authors who wish to transform, parody, or critique existing characters.

<sup>49</sup> See e.g. *Giangrasso v. CBS Inc.*, 534 F. Supp. 472 (E.D.N.Y., 1982); *Lone Ranger Inc. v. Cox*, 124 F. 650 (U.S. C.A. 4th Cir., 1942); *Lewys v. O’Neil*, 49 F. 2d 603 (1931); *Burtis v. Universal Pictures Company Inc.*, 40 Cal. 2d 823 (1953); see also Lai Chung, *supra* note 44 at 919-920, summarizing these subsequent trends in the jurisprudence.

<sup>50</sup> See e.g. Gervais & Judge, *supra* note 42 at 1129-1130.

<sup>51</sup> *Warner Brothers v. Columbia Broadcasting*, 216 F.2d 945 (9th Cir., 1954) [*Warner Brothers*]; for a discussion of this case, see also Lai Chung, *supra* note 44 at 921-924.

<sup>52</sup> *Warner Brothers*, *supra* note 51.

<sup>53</sup> *Ibid.*

<sup>54</sup> Lai Chung, *supra* note 44 at 922.

Canadian jurisprudence has likewise contemplated the independent copyright protection of fictional characters.<sup>55</sup> In *Preston v. 20<sup>th</sup> Century Fox Canada Ltd.*,<sup>56</sup> the Federal Court considered whether George Lucas and Lucasfilm infringed the copyright of author Preston. Preston had developed a script, *Space Pets*, about a war on a distant planet involving a species of primitive teddy bear-like aliens called Ewoks.<sup>57</sup> Preston alleged that the use of a similar alien species, also called Ewoks, in *Star Wars: Return of the Jedi* infringed his copyright in his script *Space Pets* by substantially reproducing it. Among other issues, the case considered whether the Ewok characters were “a matter for copyright”.<sup>58</sup> The Court applied the *Nichols* test and stated that

[. . .] the character must be sufficiently clearly delineated in the work subject to copyright that it becomes widely known and recognized. [. . .] In the words of Learned Hand J. [. . .] “. . . the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly”.<sup>59</sup>

Ultimately, Preston’s Ewoks were not sufficiently delineated to warrant distinct copyright protection.<sup>60</sup> However, the Court’s approval of Learned Hand’s test suggests that characters meeting its criteria can be independently copyrighted in Canada.<sup>61</sup>

The *Preston* test, however, does little to clarify the status of fan fiction in Canadian copyright law. Are fan fiction works focusing on undeveloped background characters or “extras” less likely to infringe copyright, such that a story about a minor Hogwarts student is less likely to run afoul of the law than one dealing with Harry Potter himself? And what might a court make of a second generation work that uses well-delineated and distinctive settings or other elements from the first generation text? These tests seem to entail a troubling level of arbitrariness when applied to fan fiction, leading to situations where different fan works may merit different treatment depending on the characters or scenarios they focus on.

The Quebec Court of Appeal’s judgment in *Robinson c. Films Cinar inc.*<sup>62</sup> leads to similar uncertainty. In this case, TV writer Robinson successfully sued the television corporation Cinar for infringing Robinson’s copyright in a children’s program he had attempted to develop.<sup>63</sup> The trial court found that Cinar’s series *Robinson Sucroe* infringed the copyright in Robinson’s planned but ultimately un-

<sup>55</sup> Gervais & Judge, *supra* note 42 at 1128–1130.

<sup>56</sup> *Preston v. 20<sup>th</sup> Century Fox Canada Ltd.*, 1990 CarswellNat 205, 38 F.T.R. 183 (Fed. T.D.); affirmed 1993 CarswellNat 2391 (Fed. C.A.) [*Preston*].

<sup>57</sup> *Preston*, *supra* note 56 at para. 7.

<sup>58</sup> *Ibid.*, at paras. 70–76.

<sup>59</sup> *Ibid.* at para. 72.

<sup>60</sup> *Ibid.* at paras. 70–76.

<sup>61</sup> Gervais & Judge, *supra* note 44 at 1129.

<sup>62</sup> *Robinson c. Films Cinar inc.*, 2011 CarswellQue 7652, 2011 QCCA 1361, [2011] Q.J. No. 9469 (C.A. Que.); reversed in part 2013 CarswellQue 12345, 2013 CarswellQue 12346 (S.C.C.) [*France Animation*].

<sup>63</sup> *Ibid.* at paras. 4–9.

developed series *Robinson Curiosité*.<sup>64</sup> This case is interesting because the premise of the show — a group of explorers living on an island à la *Robinson Crusoe* — was not in issue.<sup>65</sup> Rather, Robinson successfully alleged that the cast of characters used in the later series substantially reproduced the characters in his own planned show.<sup>66</sup> The Quebec Court of Appeal upheld the trial court ruling that the similarities between the casts of the two series constituted substantial reproduction.<sup>67</sup> However, it should be noted that the characters in issue here are animated or pictorial: cartoon characters. In addition to having similar personalities and cast dynamics, the heroes of *Robinson Sucroe* bore striking visual resemblance to Robinson's sketches for *Robinson Curiosité*.<sup>68</sup> The ease with which visual similarities can be identified may make it easier for animated characters to receive copyright protection than literary or dramatic characters.<sup>69</sup>

Finally, other dicta in *France Animation* are also worth noting. The Court states that to infringe copyright a work need not be a “slavish or exact imitation” of the original,<sup>70</sup> but may be a “colourable imitation [as long as it] reproduces a substantial part of the [original]”.<sup>71</sup> Both similarities and differences must be taken into account.<sup>72</sup> However, the presence of differences between the two works at issue may not offset the presence of even one or more substantial similarities — “the use of a known important character from a comic strip may be enough [to constitute infringement]”.<sup>73</sup> Later, however, the Court states that differences can outweigh substantial similarities, and contemplates the “original and novel work [that is] simply inspired by the first”.<sup>74</sup> Exactly how these principles may apply to individual fan fiction works is a matter for speculation.

American and Canadian case law thus allow for the independent copyright protection of some, though not all, fictional characters. Furthermore, while it is not clear in advance *which* characters will merit this protection, it seems that distinctively drawn central characters and, perhaps, characters in animated media are more likely to receive independent protection than indistinct peripheral characters, or characters in non-visual media, such as literature.<sup>75</sup> Copyright protection for fic-

<sup>64</sup> *Ibid.* at paras. 14–19.

<sup>65</sup> *Ibid.* at para. 87.

<sup>66</sup> *Ibid.*

<sup>67</sup> See *ibid.* at para. 101; see also paras. 54–70.

<sup>68</sup> *France Animation*, *supra* note 62 at paras. 90–93.

<sup>69</sup> Gervais & Judge, *supra* note 44 at 1129–1130.

<sup>70</sup> *France Animation*, *supra* note 62 at para. 57.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.* at para. 61.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at para. 66.

<sup>75</sup> See e.g. *Preston*, *supra* note 56; see also *France Animation*, *supra* note 62 at paras. 90–93. I note in passing that authors can also protect characters, setting names, and other aspects of their works in trademark, though the scope of this article prevents me from discussing that intellectual property regime. For a detailed discussion of potential concurrent copyright and trademark protection for fictional characters, see Andrea

tional characters in turn makes it likely that some fan fiction stories, i.e., those focusing on major, well-delineated pre-existing characters, could indeed run afoul of Canadian copyright law. However, there is something troubling about the apparent effects of the Learned Hand test approved in *Preston* on fan fiction. Why should amateur authors who focus on minor or “insufficiently delineated” characters be granted an apparently privileged position? And how can fans predict how any given character will fare on this test? Fan writers could allege that these directions lead to arbitrariness and uncertainty, which may impair the creation of worthwhile second generation texts.

There is a counterargument that it is appropriate for copyright to be more lenient with second generation creators who focus on undeveloped characters or aspects of first generation works. Minor or background characters may fall on the “idea” side of the idea/expression continuum, while developed ones presumably fall within the “expression” category or side. Perhaps this setup is intended to bring “more” expression to the public by making it somewhat easier for second generation creators to flesh out undeveloped aspects of source texts rather than rehash or plagiarize stories that have already been told. However, fan fiction, parodies, or other derivative works that deal with well-developed central characters may nevertheless bring novel perspectives to the original texts. In fact, it may sometimes be necessary to rewrite or incorporate central characters and elements — rather than undeveloped extras — in order to critique or reinterpret a work successfully. Finally, these arguments do little to clarify in advance how particular characters may fare on these tests, or to offer fan writers any *ex ante* certainty about what activities they may engage in without infringing copyright law.

It is therefore necessary to consider how fan fiction advocates can defend those stories that do infringe copyright. I turn now to an analysis of what Canadian fair dealing might have to say about fan fiction.

### **(b) Fan fiction and Canadian fair dealing before the Copyright Modernization Act**

In recent years, Canada’s fair dealing regime has undergone significant shifts.<sup>76</sup> The seminal 2004 Supreme Court of Canada decision *CCH Canadian Ltd. v. Law Society of Upper Canada* held that Canada’s fair dealing defenses are user rights and an integral part of the *Copyright Act* and should be interpreted broadly.<sup>77</sup> This ruling profoundly altered the prevailing — and more limited — understanding of fair dealing in Canada.<sup>78</sup> The holding that fair dealing categories must be inter-

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Slane, “Guarding a Cultural Icon: Concurrent Intellectual Property Regimes and the Perpetual Protection of Anne of Green Gables in Canada” (2011) 56:4 McGill LJ 1011.

<sup>76</sup> See Parveen Esmail, “CCH Canadian Ltd. v. Law Society of Upper Canada Case Comment on a Landmark Copyright Case” (2005) 10 Appeal 13 at 13-14; see also Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008) 53 McGill L.J. 309 at 323-327; see also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447 (S.C.C.).

<sup>77</sup> *CCH*, *supra* note 76 at paras. 48-49.

<sup>78</sup> See Esmail, *supra* note 76 at 20-21.

preted broadly, as well as the guidance the Supreme Court provided as to appropriate (though non-exhaustive) fairness factors,<sup>79</sup> has since been followed up with several other changes to Canada's fair dealing regime. Bill C-11, the *Copyright Modernization Act*,<sup>80</sup> introduced several new fair dealing exemptions which are discussed below. The new exemptions for education, parody and satire,<sup>81</sup> and non-commercial user-generated content<sup>82</sup> supplement the pre-existing fair dealing categories of research or private study,<sup>83</sup> criticism or review,<sup>84</sup> and news reporting<sup>85</sup> which were at issue in *CCH*. Further, in July 2012, the Supreme Court of Canada decided five copyright cases in a sequence of decisions dubbed the "copyright pentalogy".<sup>86</sup> The pentalogy strongly affirmed the importance of balancing users' rights and creators' rights in Canadian copyright law.<sup>87</sup> These decisions also endorsed the principle of technological neutrality.<sup>88</sup>

Given Canada's fair dealing structure, it seems the categories that existed prior to Bill C-11 may have been inadequate as a defense for fan writers. Although Canada's fair dealing regime was quite flexible even before the recent reforms,<sup>89</sup> and although *CCH* emphasized the importance of balancing creators' and users' rights,<sup>90</sup> the first step of the fair dealing analysis nevertheless requires that dealings be for an exempted purpose enumerated in the *Act*.<sup>91</sup> In other words, in order to have a *chance* of being fair, dealings with copyrighted works must first "fit" within one of the exempted categories or purposes.<sup>92</sup> Although the Court in *CCH* held that

<sup>79</sup> *CCH*, *supra* note 76 at paras. 53–60.

<sup>80</sup> *Copyright Modernization Act*, *supra* note 38.

<sup>81</sup> *Copyright Act*, *supra* note 39 at s. 29.

<sup>82</sup> *Ibid.* at s. 29.21.

<sup>83</sup> *Ibid.* at s. 29.

<sup>84</sup> *Ibid.* at s. 29.1.

<sup>85</sup> *Ibid.* at s. 29.2.

<sup>86</sup> The copyright pentalogy consists of: *Public Performance of Musical Works, Re*, 2012 SCC 34, 2012 CarswellNat 2376, 2012 CarswellNat 2377 (S.C.C.) [ESA], *Public Performance of Musical Works, Re*, 2012 SCC 35, 2012 CarswellNat 2378, 2012 CarswellNat 2379 (S.C.C.) [Rogers], *Public Performance of Sound Recordings, Re*, 2012 SCC 38, 2012 CarswellNat 2383, 2012 CarswellNat 2382 (S.C.C.) [Re:Sound], *Public Performance of Musical Works, Re*, 2012 SCC 36, 2012 CarswellNat 2380, 2012 CarswellNat 2381 (S.C.C.) [SOCAN], and *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37, 2012 CarswellNat 2419, 2012 CarswellNat 2420 (S.C.C.) [Alberta (Education)].

<sup>87</sup> See e.g. Michael Geist, ed, "Introduction", in *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) at iii.

<sup>88</sup> *Ibid.* at iv.

<sup>89</sup> D'Agostino, *supra* note 76 at 326 and 332.

<sup>90</sup> *CCH*, *supra* note 76 at paras. 48–49.

<sup>91</sup> Reynolds, "Impact", *supra* note 7 at 42–43.

<sup>92</sup> See Esmail, *supra* note 76 at 18; see also Reynolds, *ibid.*

these categories should be given a liberal rather than a restrictive interpretation,<sup>93</sup> it is unlikely that much (perhaps most) fan fiction could fall within the ambit of the original categories. As Reynolds concludes,<sup>94</sup> fan fiction works that are distributed in public settings (e.g. online fan sites) are unlikely to qualify as private study, even if fan fiction that is not distributed publicly might.<sup>95</sup> Reynolds also notes that news reports sometimes discuss and may even excerpt or include rewrites or fan fiction, but it is unlikely that many fan fiction works are written for the purpose of news reporting.<sup>96</sup>

Similarly, although “research” need not be private,<sup>97</sup> it could be difficult to classify at least some fan fiction as research. Perhaps writers who use fan fiction to learn writing skills could successfully argue that they write these works for research purposes. However, this argument may not apply to all fan fiction works. Reynolds concludes that “it is unlikely [. . .] that the majority of rewrites are created for the purpose of research”.<sup>98</sup>

At first, the criticism and review category appears more promising. As Reynolds notes, some rewrites — including fan fiction works — are critical of source texts.<sup>99</sup> However, Reynolds argues that those works that criticize earlier texts may be effectively termed parodies,<sup>100</sup> which some jurisprudence suggests are beyond the scope of the original criticism exemption.<sup>101</sup> It is difficult to determine whether the criticism category would still exclude parodies in light of the broad approach to users’ rights endorsed in *CCH*.<sup>102</sup> Further, the *Copyright Modernization Act*’s addition of a distinct parody and satire category may suggest that the original criticism exemption did not in fact include parodies or satires, and that Parliament intended to correct that omission by protecting parodic and satirical works as fair dealing in future.<sup>103</sup> However, even if the old criticism category could include some parodic works, not all fan fiction stories are critical or parodic.<sup>104</sup> Non-critical fan works

<sup>93</sup> *CCH*, *supra* note 76 at paras. 48-49, 50-51 and 54; see also Reynolds, “Impact”, *supra* note 7 at 42-44.

<sup>94</sup> Reynolds, *ibid.*

<sup>95</sup> Reynolds, *ibid.*, at 43; see also *Hager v. ECW Press Ltd.* (1998), 1998 CarswellNat 2568, 1998 CarswellNat 3031, [1999] 2 F.C. 287 (Fed. T.D.) at para 55, holding that “research” and “private study” should not be communicated to the public. I note, however, that this case was decided several years before *CCH* and that its directions may no longer apply to private study or research.

<sup>96</sup> Reynolds, “Impact”, *supra* note 7 at 44.

<sup>97</sup> See *CCH*, *supra* note 76 at para. 51; see also *SOCAN*, *supra* note 86 at paras. 34-36.

<sup>98</sup> Reynolds, “Impact” *supra* note 7, at 43.

<sup>99</sup> *Ibid.* at 44-45.

<sup>100</sup> *Ibid.* at 44.

<sup>101</sup> See *Cie générale des établissements Michelin — Michelin & Cie v. CAW-Canada* (1996), [1997] 2 F.C. 306, 1996 CarswellNat 2297, 1996 CarswellNat 2711 (Fed. T.D.), cited in Reynolds, “Impact”, *supra* at 44-45 [*Michelin*]; see also Graham Reynolds, “Towards a Right”, *supra* note 22 at 406.

<sup>102</sup> Reynolds, “Impact”, *supra* note 7 at 45.

<sup>103</sup> *Copyright Act*, *supra* note 39 at s. 29.

<sup>104</sup> Reynolds, “Impact”, *supra* note 7 at 45.

(for example, fan fiction stories that celebrate and/or continue a popular saga with no critical intent) may fall outside even a liberal interpretation of the criticism category.

It is likewise difficult to determine how useful the “review” category would be for fan fiction writers. Jurisprudence suggests that the term review entails some commentary or value judgment on the original copyrighted work.<sup>105</sup> Some fan stories may comment or offer value judgments on source texts, but it is unclear whether a court would be — or would have been — willing to include such critical or parodic second generation texts in the review category. Furthermore, not all fan fiction works necessarily comment or offer any value judgments on the parent texts; the review category may be inapplicable to these non-critical works.

In conclusion, even when given a liberal interpretation, the original fair dealing categories may not encompass all fan fiction works. Many fan fiction works are posted to public online forums, and probably would not qualify as private study. Further, fan writers may or may not be able to fit their writing into the category of research. That defense may apply to writers who use fan fiction as a means of learning writing skills; however, it is possible that more advanced writers write fan fiction for other purposes. The category of news reporting seems equally inapplicable to most fan fiction works. Finally, the criticism and review categories may not encompass non-critical fan stories, even if the exemption could apply to critical/parodic works. Canada’s original fair dealing categories therefore appear inadequate for many fan fiction writers. Happily, recent additions to the *Copyright Act* seem more hospitable to fan narratives.

### (c) New fair dealing factors and exemptions and fan fiction

Before examining the relevant new fair dealing provisions, it is worth looking at the fair dealing factors upheld in *CCH*.<sup>106</sup> These factors may be more helpful and more readily applicable to fan fiction works than the fair dealing categories. While it may be difficult for fan fiction writers to fit their works into the original fair dealing categories, an analysis of the fair dealing factors could be more favourable to fan fiction, provided a court were to reach this stage of the test. This discrepancy highlights one key difference between Canadian fair dealing and American fair use. In the US, works need not be for a specific purpose in order to be fair.<sup>107</sup> Instead, courts must apply the US fair use factors in order to determine whether a given use is fair, regardless of the potentially infringing work’s purpose.<sup>108</sup> Rebecca Tushnet has analyzed fan fiction’s status as per the American fair use factors.<sup>109</sup> She argues that fan fiction is generally fair use, highlighting in particular the transformative and non-commercial nature of fan works<sup>110</sup> and the fact

<sup>105</sup> *Canada v. James Lorimer & Co.* (April 30, 1982), Doc. T-2216-81, [1982] F.C.J. No. 229 (Fed. T.D.) at para. 15.

<sup>106</sup> *CCH*, *supra* note 76 at para. 53.

<sup>107</sup> 17 USC §107; see also D’Agostino, *supra* note 76 at 337.

<sup>108</sup> 17 USC §107; see also D’Agostino, *ibid.*

<sup>109</sup> Tushnet, “Legal Fictions”, *supra* note 14.

<sup>110</sup> *Ibid.* at 664-665.

that fan works typically do not threaten the markets for the original texts they draw on.<sup>111</sup> Canada's fair dealing factors are similar though not identical to their American counterparts. I believe that Canada's fair dealing factors would be equally favourable to fan fiction, now that new fair dealing categories such as parody might finally allow a court to reach this stage of the analysis. Additionally, while the fair dealing factors upheld in *CCH* are not exhaustive,<sup>112</sup> they provide a helpful framework for analyzing a potential defense of fan fiction writing. I therefore set down some speculation as to how fan fiction might fare under the *CCH* factors.

The *CCH* fair dealing factors are as follows:<sup>113</sup> "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work."<sup>114</sup> Some of these factors have been discussed further in jurisprudence after *CCH*, such as the pentalogy, which I mention where appropriate.<sup>115</sup>

Per *CCH*, the first factor, the purpose of the dealing (i.e., whether the dealing is for an enumerated purpose),<sup>116</sup> should be given a liberal interpretation, as noted above.<sup>117</sup> It is under this factor that courts must consider whether the dealing is for commercial or non-commercial ends;<sup>118</sup> non-commercial dealings are more likely to be fair, though the defense does not exclude commercial dealings.<sup>119</sup> Courts must consider the purpose and perspective of the end user of the materials.<sup>120</sup> While fan fiction may be difficult to fit into the original purposes, a liberal interpretation of the new exemptions for parody and satire could encompass at least some fan fiction writers, as I suggest below. Moreover, it is also important to consider the non-commercial purposes of fan fiction writers. Fan fiction's (typically) amateur and non-profit nature could suggest fair dealing.

The second factor is the character of the dealing. Under this factor, the Supreme Court in *CCH* stated that courts must consider how the original work is dealt with.<sup>121</sup> In *CCH*, the Court gives the example of a user making and redistributing multiple copies of a work as a factor that would suggest unfair dealing;<sup>122</sup> destroying copies of an original after use, by contrast, would suggest fair dealing,<sup>123</sup> as would using a single copy of a work for legitimate purposes.<sup>124</sup> These particular

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111 *Ibid.* at 669-670.

112 See e.g. Esmail, *supra* note 76 at 18-19; *CCH*, *supra* note 76 at para. 53.

113 *Ibid.*

114 *Ibid.*

115 See, for example, *Alberta (Education)*, *supra* note 86, and *SOCAN*, *supra* note 86.

116 *CCH*, *supra* note 76 at para. 54.

117 *Ibid.* at para. 51; see also D'Agostino, *supra* note 76 at 320-321.

118 *CCH*, *supra* note 76.

119 *Ibid.* at para. 54.

120 *Alberta (Education)*, *supra* note 86 at para. 22-23; see also *SOCAN*, *supra* note 86 at para. 34.

121 *CCH*, *supra* note 76 at para. 55.

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

examples do not seem to contemplate fan fiction or other fan-made media. While fan fiction may be publically distributed, and some stories may even be widely read, the practice normally does not involve or require redistributing copies of the *original* media on which such stories are based, nor do fan fiction stories seek to substitute their content for that of the canon works.<sup>125</sup> The fact that fan fiction authors seem to consume media — books, movies, or television shows — legitimately<sup>126</sup> and produce new stories that are unlikely to usurp the originals could support a finding of fairness.

The “character” factor also contemplates the “custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair”.<sup>127</sup> This factor could privilege certain voices in litigation.<sup>128</sup> Copyright owners who oppose fan fiction may feel that the practice is inherently unfair dealing. However, a court relying on the perspectives and practices of fan communities themselves might conclude that fan fiction is fair.<sup>129</sup> It is unclear whether this factor, like the dealing’s purpose, must be assessed from the perspective of the end users and their customs. Neither *Alberta (Education)* nor *Society of Authors, Composers and Music Publishers of Canada v. Bell* explicitly imports the “end user’s perspective” language into the second factor or gives much guidance on this factor at all. However, if this analysis took into account fan practices, then fan customs such as using fan fiction to celebrate works, explicitly attributing works to their creators and rights holders,<sup>130</sup> and emphasizing non-commerciality could lead to a finding of fairness.

The third factor, the amount of the dealing, requires an analysis of the quantity as well as the importance of the material taken from the original work.<sup>131</sup> The Supreme Court reiterates that “if the amount taken [. . .] is trivial, then the fair dealing analysis need not be undertaken at all” because the trivial taking will not infringe copyright.<sup>132</sup> This statement may be encouraging for fan writers who draw only a trivial amount, such as a single background character, from source texts.<sup>133</sup> Moreover, while the quantity taken can indicate fairness, the Court contemplates that dealings involving entire works may nevertheless be fair.<sup>134</sup> Later jurisprudence has clarified that the amount of the dealing must be considered in proportion to the

<sup>125</sup> See Chua, *supra* note 16; see also Tushnet, “Legal Fictions”, *supra* note 14 at 669–674.

<sup>126</sup> Chua, *supra* note 16.

<sup>127</sup> *CCH*, *supra* note 76 at para. 55.

<sup>128</sup> D’Agostino, *supra* note 76 at 321.

<sup>129</sup> *Ibid.*

<sup>130</sup> Online fan communities often acknowledge the authors of the original works that have inspired fan stories or fan sites. Rebecca Tushnet has argued that this practice or custom is an appeal to common sense notions of justice in the application of copyright law; see Tushnet, “Legal Fictions”, *supra* note 14.

<sup>131</sup> *CCH*, *supra* note 76 at para. 56.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

whole of the original work.<sup>135</sup> This factor, like the others, is highly sensitive to the facts and context of each alleged infringement. However, as I have noted, fan fiction stories seldom reproduce source texts wholesale. While some stories may essentially plagiarize the original narrative while adding very little of the fan author's creation, most such works borrow characters and settings in order to tell new stories, add the fan author's insights or perspectives, or challenge the parent text. Would fan fiction stories telling new adventures of a beloved character such as Harry Potter be fair, given that Harry the character is only one aspect of the lengthy *Harry Potter* saga? Would considering the length of the new fan fiction story be appropriate as well, such that using only a few pre-existing elements to write a longer fan story might be "more" fair? It is very difficult to determine how particular fan fiction works might fare on this factor. Each individual story would be subject to a different legal analysis and, potentially, different treatment.

The fourth factor, alternatives to the dealing, is another factor where fairness may be in the eye of the beholder. As in the character of the dealing, courts privileging different perspectives may reach different conclusions. Copyright holders might allege that fan authors always have alternatives to dealing with copyrighted works; namely, they could write completely original stories and share those, rather than drawing characters or settings from existing texts. A court that accepted this contention might conclude that all fan fiction writers have this alternative, and may be less likely to view fan fiction as fair dealing. However, fan writers would ask whether there really are practical alternatives to the dealing in question. One can hardly celebrate, expand, or critique a specific well-loved and well-known work without referencing it.

Case law in the wake of *CCH* suggests that alternatives that are impractical or that do not allow users to achieve a specific purpose, but only a broadly similar purpose, do not lead to a finding of unfairness.<sup>136</sup> Both *Alberta (Education)* and *Society of Composers, Authors and Music Publishers Canada (SOCAN)* apply the alternatives factor in a liberal way that respects the specific needs of end users and that is in keeping with *CCH*'s broad approach to user rights. In *Alberta (Education)*, the Supreme Court found it unreasonable to expect schools to distribute copies of multiple textbooks to all students when teachers wanted only to assign short excerpts from supplementary materials.<sup>137</sup> This approach suggests that users need not avail themselves of impractical alternatives to the dealing in question in order to benefit from the fair dealing defense. Similarly, in *SOCAN*, the Supreme Court rejected *SOCAN*'s contention that service providers and consumers avail themselves of impractical alternatives to previewing songs.<sup>138</sup> Alternatives such as offering customer reviews, album art, or store return policies did not allow users to achieve the specific purpose of previewing songs before purchasing them. Allowing users to listen to short clips of songs was therefore held to be fair dealing for the purpose of research, even though (inferior) alternative options were available to consumers. This user-centric and liberal approach which permits end users to

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<sup>135</sup> *SOCAN*, *supra* note 86 at paras. 40-41.

<sup>136</sup> *Ibid.* at paras. 44-46; *Alberta (Education)* at paras. 31-32.

<sup>137</sup> *Ibid.*

<sup>138</sup> *SOCAN*, *supra* note 86 at paras. 44-46.

pursue specific goals — such as, perhaps, paying homage to or parodying specific copyrighted works — could be favourable to fan writers.

The fifth factor is the nature of the work.<sup>139</sup> Per *CCH*, disseminating an unknown and unpublished work with proper attribution is *more* likely to be fair because this dealing promotes wider public dissemination of works.<sup>140</sup> It is unclear, however, how this direction might affect fan fiction. Fan fiction writers are unlikely to write about unpublished or unheard of works. On the contrary, most fan fiction focuses on popular media with broad fan bases, such as *Harry Potter* or *Twilight*. While the Internet is also home to fan fiction based on more obscure source texts or “fandoms”, these works have clearly been published and are not completely unknown.<sup>141</sup> Would the nature of the work require making a distinction between these two scenarios? Should the fan who has written her own sequel to an obscure but cherished independent film be treated differently than one who has written an eighth *Harry Potter* novel? This may seem an unfair and arbitrary distinction to fans. Furthermore, fan fiction, like other forms of online fan discourse, may pique or enhance interest in original works.<sup>142</sup> While *Twilight*, *Star Wars*, or *Harry Potter* may “need” this publicity less than more obscure works do, fan fiction can enhance public knowledge of the original work in either case. The Court’s statement that dealings which enhance public knowledge of works are more likely to be fair could thus apply to — and argue in favour of — many fan fiction stories, regardless of their source texts.

The final fair dealing factor is the effect of the dealing on the copyrighted work and its market.<sup>143</sup> This factor was described as an important one, though it is “neither the only factor nor the most important” in assessing whether a dealing is fair.<sup>144</sup> A finding that a dealing is likely to compete with the market for the original work suggests that the dealing is unfair.<sup>145</sup> This, however, is not typically true of fan fiction. Potential *Harry Potter* readers are unlikely to mistake online fan stories featuring Harry for the *Harry Potter* books, or to content themselves with reading fan fiction instead of reading (or completing) the original series. It seems equally unlikely that a rights holder critical of fan fiction would be able to produce evidence showing that his or her market was directly and adversely affected by fan

<sup>139</sup> *CCH*, *supra* note 86 at para. 53.

<sup>140</sup> *Ibid.* at para. 58. D’Agostino notes that this approach is a departure from previous Canadian practices, and contrasts with practices in the United States and the United Kingdom: see D’Agostino, *supra* note 76 at 322.

<sup>141</sup> Tushnet, “Copyright Law, Fan Practices”, *supra* note 1 at 63.

<sup>142</sup> See e.g. Tushnet, “Legal Fictions”, *supra* note 14 at 669-670. McKay also examines the ways in which some copyright owners, such as Lucasfilm Ltd., have recognized the promotional benefits of fan creativity and experimented with hosting (carefully selected and controlled) fan works on official web sites and forums; see McKay, *supra* note 1 at 123-124; see also Henry Jenkins, *Convergence Culture* (New York: New York University Press, 2006) at 152-157.

<sup>143</sup> *CCH*, *supra* note 76 at para. 59.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

fiction.<sup>146</sup> If anything, fan fiction communities may serve as an additional form of publicity and thus make readers more likely to remain excited about the parent franchises, or to explore other, similar published works that seem equally popular in fan circles.

Furthermore, even if the opposite effect might apply in some cases — theoretically, some individuals may confuse fan works with original texts or develop distaste for the originals through exposure to fan works which they dislike — these situations are likely to be rare and minor. Although the Supreme Court of Canada has not addressed this question, American jurisprudence has considered the issues of non-commercial use, market substitution, and market suppression in relation to fair use and, especially, parodies.<sup>147</sup> The fourth American fair use factor looks at

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<sup>146</sup> *CCH* and subsequent decisions seem to require that rights holders demonstrate direct market harm; see *CCH* cited in *Alberta (Education)*, *supra* note 86 at paras. 35–37. In *Alberta (Education)* in particular, the Court suggests that the rights holder must show that the dealing in question caused a reduction in sales (and not simply that sales or revenues diminished). As of this writing, it seems that there is no existing research specifically focusing on the economic effects — harmful or otherwise — of Western fan fiction. This may make it difficult for rights holders to discharge their burden and produce evidence that fan fiction results in economic harms. However, it also makes it difficult to cite academic evidence that demonstrates that fan fiction is an economically neutral or beneficial practice for rights owners. Nevertheless, some researchers have examined the economic effects of closely related phenomena. Lawrence Lessig, in his book *Free Culture* (New York: The Penguin Press, 2004), discusses the phenomenon of Japanese *doujinshi*. *Doujinshi* are commercial derivative or second generation texts based on first generation comic books or *manga*; see Lessig, pp. 27–28. Although *doujinshi* technically infringe Japanese copyright law, they are broadly tolerated and constitute an important part of the total comics market. *Doujinshi* are analogous to fan fiction in that they are written by second generation creators who draw upon — but transform — first generation *manga* works. The markets for derivative *doujinshi* and original *manga* flourish in parallel with one another, largely because *doujinshi*, like fan fiction works, must of necessity offer some novel perspective on or addition to the first generation texts and thus do not serve as mere substitutes. Similarly, Ernest Chua, *supra* note 16, canvassed what seems to be a small sample of fan fiction writers, who remain devoted to following and purchasing canon texts despite the fact that they read and write fan adaptations as well. Other researchers have likewise looked at fan communities' commitment to non-commerciality and "gift culture"; see e.g. Karen Hellekson, "A Fannish Field of Value: Online Fan Gift Culture" (2009) 48:4 *Cinema Journal* 113; see also Abigail De Kosnick, "Should Fan Fiction Be Free?" (2009) 48:4 *Cinema Journal* 118. Finally, the United Kingdom's Intellectual Property Office commissioned a study on the economic effects of music video parodies; see Kris Erickson et al., "Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options", online: Intellectual Property Office, <<http://www.ipo.gov.uk/>>. Although this study explicitly notes that it does not include other forms of fan-created content such as fan fiction — phenomena which could benefit from further research — the study found that fan-made music video parodies did no economic harm to copyright holders.

<sup>147</sup> See e.g. *Campbell v. Acuff-Rose Music*, *supra* note 14; see also Tushnet, "Legal Fictions", *supra* note 14 at 663.

the commercial nature of a use and its effects on the market for the original.<sup>148</sup> In the US context, commercial use creates a presumption of market effect, while non-commercial use “shifts the burden to the plaintiff” to demonstrate that economic harm is likely.<sup>149</sup> Transformative uses create a similar presumption against market harm, “because transformation precludes simple market substitution”.<sup>150</sup> American law recognizes that some fair uses, such as negative reviews and critical parodies, may suppress demand for a work, but that such a market reduction is not the same as market substitution.<sup>151</sup> Rare instances in which fan fiction may dampen rather than enhance consumers’ enthusiasm for the source material should be considered analogous to these reviews or parodies, and should not be considered evidence that fan fiction as a whole is harmful to the markets for copyrighted works, or is an unfair dealing.

Canada’s fair dealing factors could, therefore, support a finding that fan fiction is fair dealing. While the original fair dealing categories — research and private study, criticism or review, and news reporting — may not have readily encompassed fan fiction, new categories seem more promising, with certain caveats. The *Copyright Modernization Act* added “education, parody or satire” to the general fair dealing exception in section 29 of the *Copyright Act*,<sup>152</sup> which previously included only research and private study. It is difficult to speculate as to whether fan fiction writers may bring their work into the education category — for example, by arguing that their amateur writing allows them to learn writing skills. Further, the scope of this article makes it difficult to delve into the viability of this argument, which may be as much a “stretch” as applying the research and private study category to (at least some) fan fiction would be. I therefore turn instead to a brief discussion of the parody and satire exemption, which appears more applicable to second generation creative works and more relevant to fan writers.

Given the novelty of the parody and satire provision, it is not easy at present to gauge what the provision’s parameters will be and what sorts of works it will ultimately protect. On its face, this new fair dealing category appears to encompass at least some fan works, i.e., those that “parody” or “satirize” the canon texts. But these terms are not self-explanatory, nor do they provide much guidance as to which second generation works fall within their ambit. Graham Reynolds notes that the term “parody” can have several meanings.<sup>153</sup> US and Canadian courts have sometimes defined parodies as generally humorous works that mimic particular

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* at 670. I note that the concept of transformativeness is an American notion, and not an aspect of Canadian fair dealing. However, the final Canadian fair dealing factor does suggest that it is appropriate to consider whether or not a second work may substitute for the first. As transformation makes direct substitution less likely, it may be worthwhile to look at American guidance and to import the American terminology.

<sup>151</sup> See e.g. Tushnet, “Legal Fictions”, *supra* note 14 at 663.

<sup>152</sup> *Copyright Act*, *supra* note 39 at s. 29.

<sup>153</sup> Graham Reynolds, “Necessarily Critical? The Adoption of a Parody Defense to Copyright Infringement in Canada” (2009) 33:2 *Man LJ* 243 at 244-245 [Reynolds, “Necessarily Critical”].

texts, authors, genres, or styles in order to mock them.<sup>154</sup> The Quebec Court of Appeal, for example, considered several definitions of parody in *Productions Avanti Ciné-Vidéo Inc. v. Favreau*.<sup>155</sup> All the definitions cited in that case resemble the *Oxford Dictionary of Literary Terms*'s definition in that they conceive of parody as "a mocking imitation of the style of a literary work or works, ridiculing the stylistic habits of an author or school by exaggerated mimicry."<sup>156</sup> However, as I note below, the elements of these definitions are not present in all fan fiction works. Further, as Reynolds argues, they are not even necessarily true of all parodies, which may not always be critical, humorous, or mocking.<sup>157</sup>

The *Avanti* decision is unique in that it seemed open to accepting (some) parodies as a form of criticism, even prior to *CCH* and to the addition of a distinct fair dealing category of parody and satire.<sup>158</sup> In *Avanti*, a copyright owner sued an adult film producer for infringing its copyright in a popular Quebec sitcom, *La Petite Vie*. The defendant film producer was found to have reproduced a substantial part of the original television show, including its setting, set design, costumes, musical score and characters.<sup>159</sup> The defendant alleged that his film was a parody of *La Petite Vie* and thus fair use for the purpose of criticism.<sup>160</sup> While the Court did not outright reject the notion that criticism could encompass parody,<sup>161</sup> it found that the defendant's film did not qualify. Per the Court, the film lacked the requisite intent to criticize *La Petite Vie*. Its creators were held to have reproduced aspects of the original show simply to cash in on the original's popularity<sup>162</sup> and/or to avoid the intellectual work of inventing their own creative elements.<sup>163</sup>

As I note above, *Avanti* pre-dates *CCH*, the 2012 pentology of decisions (which affirmed *CCH*'s large and liberal approach to fair dealing) and the *Copyright Modernization Act*. The directions in this case may therefore be only minimally relevant to future Canadian parody decisions. However, the decision is somewhat troubling for defenders of fan fiction. Indeed, any definition of parody that insists on a critical and mocking intent and an exaggerated or humorous tone may limit the exemption's utility for fan writers. Some fan works may have a clearly critical bent that will satisfy a court, but this is unlikely to be true of all fan fiction stories. For example, some *Twilight* fans may wish to "write back" to that franchise

<sup>154</sup> *Ibid.* at 244.

<sup>155</sup> *Productions Avanti Ciné-Vidéo Inc. c. Favreau*, [1999] R.J.Q. 1939, 177 D.L.R. (4th) 568, 1999 CarswellQue 2742, 1999 CarswellQue 4718 (C.A. Que.); leave to appeal refused 2000 CarswellQue 947, 2000 CarswellQue 946 (S.C.C.) at para. 75 [*Avanti*].

<sup>156</sup> Chris Baldick, *The Oxford Dictionary of Literary Terms*, 3d ed (Oxford: Oxford University Press, 2008), *sv* "parody".

<sup>157</sup> Reynolds, "Necessarily Critical", *supra* note 153 at 244-245.

<sup>158</sup> *Ibid.* at 250.

<sup>159</sup> *Avanti*, *supra* note 155 at para. 54.

<sup>160</sup> *Ibid.* at para. 19.

<sup>161</sup> In this respect, this decision contrasts with other pre-*CCH* and pre-*Copyright Modernization Act* decisions such as *Michelin*, *supra* note 101, cited in Reynolds, "Necessarily Critical", *supra* note 153 at 248-249.

<sup>162</sup> *Avanti*, *supra* note 155 at para. 20.

<sup>163</sup> *Ibid.* at para. 61.

by mocking the heroine's slavish devotion to her vampire boyfriend. Other fans, however, might wish to write further — and completely uncritical — adventures for these characters or other cherished figures from popular media. A judge who looked to *Avanti* or who drew closely upon a dictionary definition of parody might be unwilling to consider fan sequels, homages, poetry, and other fan fiction works to be parodies. Further, courts looking to *Avanti* could accuse fan writers of reproducing substantial parts of canon texts to avoid creating their own worlds or to benefit from the source texts' popularity, and not for the purpose of criticizing the original texts. The broad and liberal interpretation urged in *CCH* and the pentalogy could argue against such restrictive readings, but it is too early to know if this will be the case. The parody exception, though a positive step, may not adequately address the needs of all fan writers in Canada. I note, further, that while parody (though an imperfect defense) seems most relevant to fan fiction, similar considerations apply to the satire exemption. Satire may be defined as a “mode of writing that exposes the failings of individuals, institutions or societies to ridicule and scorn.”<sup>164</sup> While some fan fiction stories may use aspects of popular culture and copyrighted texts to ridicule social institutions, it is unlikely that all or even most fan stories would fit this definition.

Finally, the new fair dealing category of parody and satire suffers the perennial drawbacks of fair dealing and fair use in that it is a reactive, uncertain, and highly contextualized defense. Procedurally, fair dealing, like American fair use, must be raised as a defense to an infringement complaint;<sup>165</sup> fans cannot state in advance that their dealings with source texts are meant to be fair,<sup>166</sup> or proactively comply with specific conditions in order to ensure that their works constitute fair dealing or fair use. Furthermore, the fair dealing factors require such a deeply contextual analysis that it is almost impossible to know if a given dealing is “fair” until the issue has gone to trial and a judgment has been handed down. While I believe the *CCH* factors support a finding that most non-commercial fan fiction is fair dealing, this analysis is nevertheless speculative, given the fair dealing regime's lack of *ex ante* certainty. With these drawbacks in mind, I turn to a possible “unlikely hero” for fan authors in Canada — the new user-generated content exemption, section 29.21 of the *Copyright Act*.<sup>167</sup>

### III. BRINGING FAN FICTION WITHIN THE NEW USER-GENERATED CONTENT EXEMPTION

The non-commercial user-generated content (“UGC”) provision enacted in the *Copyright Modernization Act* strongly resembles the UGC clause in Bill C-11's immediate predecessor, Bill C-32, *An Act to Amend the Copyright Act*, which died

<sup>164</sup> *The Oxford Dictionary of Literary Terms*, *supra* note 156, *sv* “satire”.

<sup>165</sup> See *CCH*, *supra* note 76 at para. 48; for the American fair use context, see Jacqueline D Lipton, “Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere” (2011) 70 *Md L Rev* 1 at 25-26.

<sup>166</sup> See e.g. *ibid.* at 22-23 on the legal ineffectiveness of fan “disclaimers”.

<sup>167</sup> *Copyright Act*, *supra* note 89 at s. 29.21.

on the Order Paper.<sup>168</sup> In the following section, I will draw on the debates on Bill C-32 as well as Bill C-11 when referring to the Parliamentary discourse surrounding the “UGC” exemption. Taken together, the new parody and satire exemptions and the user-generated content provision have the potential to make Canada a leader in protecting non-commercial second generation creative works. Moreover, as I suggest above, the UGC provision may be particularly interesting and advantageous in this regard. It is therefore worth examining whether and how fan fiction may come within its ambit. To do so, I attempt to interpret the provision as it could be applied to fan fiction. I draw, in a general sense, on Driedger’s “modern” principle of statutory interpretation as invoked in *CCH* and other Canadian decisions.<sup>169</sup> The modern principle entails reading “the words of an Act [. . .] in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.<sup>170</sup> Given the Supreme Court of Canada’s move towards accepting Parliamentary and legislative materials as aids to interpretation,<sup>171</sup> and given the lively and highly public Parliamentary discourse on copyright reform, I also draw on a variety of legislative materials in arguing that the UGC provision ought to encompass fan fiction. The following analysis focuses primarily on analysing the language of section 29.21 before moving on to assess its context, intentions and objects, and the principles that underlie it.

**(a) Can the language of section 29.21 extend to fan fiction?**

The user-generated content exemption reads as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or

<sup>168</sup> Bill C-32, *An Act to amend the Copyright Act*, 3<sup>rd</sup> Sess, 40<sup>th</sup> Parl, 2010. Bill C-11 was the last, and C-32 the second-to-last, of several copyright reforms proposed in Parliament since 2005: see also Bill C-61, *An Act to amend the Copyright Act*, 2<sup>nd</sup> Sess, 39<sup>th</sup> Parl, 2008 (first reading 12 June 2008) and Bill C-60, *An Act to amend the Copyright Act*, 1<sup>st</sup> Sess, 38<sup>th</sup> Parl, 2005 (first reading 20 June 2005).

<sup>169</sup> *CCH*, *supra* note 76 at para. 9; see also Ruth Sullivan, *Statutory Interpretation*, 2<sup>nd</sup> ed (Toronto: Irwin Law, 2007) at 41.

<sup>170</sup> *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, [2002] 2 S.C.R. 559 (S.C.C.), at para 26, cited in *CCH*, *supra* note 76 at para. 9.

<sup>171</sup> Sullivan, *supra* note 169 at 280–283.

other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

[. . .]

(2) The following definitions apply in subsection (1).

[. . .] “intermediary” means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

[. . .] “use” means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.<sup>172</sup>

This provision has been referred to as the “YouTube” or “mash-up exception” in Parliament<sup>173</sup> and in the public discourse surrounding the copyright reforms.<sup>174</sup> In debates in Parliament,<sup>175</sup> for example, the bill’s sponsor invoked the wholesome example of parents who upload a video of their children dancing to popular music when discussing the UGC provision’s aims and scope.<sup>176</sup> Sponsor Christian Paradis also contemplated the creation of “original mixes of songs and videos”<sup>177</sup> as another type of content which the UGC provision will protect;<sup>178</sup> importantly, Minister Paradis suggested in his comments that copyright holders may actually benefit from this sort of non-commercial online exposure.<sup>179</sup>

However, while the debates in Parliament generally assumed that the UGC provision protects amateur videos posted to YouTube or similar sites, the provision does not specify or limit the types of content or media that it will encompass. This

<sup>172</sup> *Copyright Act*, *supra* note 39 at s. 29.21.

<sup>173</sup> See e.g. *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 51 (22 November 2011) at 1714 (Elizabeth May).

<sup>174</sup> See e.g. Michael Geist, “What the New Copyright Law Means For You” (13 November 2012) (blog post), online: MichaelGeist.ca, <<http://www.michaelgeist.ca/content/view/6695/135>>; see also Daniel Gervais, “User-Generated Content and Music File Sharing: A Look at Some of the More Interesting Aspects of Bill C-32” in *From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010) at 448[User-Generated Content and Music File-Sharing].

<sup>175</sup> See, for example, sponsor Christian Paradis’ comments when moving that Bill C-11 be read a second time, *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 31 (18 October 2011) at 1030 (Hon Christian Paradis).

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

is an important step for creators of fan fiction and other forms of amateur derivative content besides mash-up videos. The words of section 29.21, given their ordinary and grammatical meaning and read in the context of the *Act*, appear to accommodate fan fiction quite readily. Section 29.21(1) speaks of any individual who uses “an existing work or subject-matter or copy of one” in the creation of “a new work” in which copyright could subsist.<sup>180</sup> The definition of “use” in s. 29.21(2) encompasses “[doing] anything [. . .] that the owner of the copyright has the sole right to do”,<sup>181</sup> other than authorizing anything. Although not all fan fiction stories would necessarily infringe copyright, many may reproduce substantial parts of existing works<sup>182</sup> by drawing characters, plots, background events, settings, and other significant aspects from first generation texts. Fan fiction writers who reproduce substantial parts of existing works could therefore be said to “use” those copyrighted works per the definition in section 29.21(2).

Similarly, the phrase “the creation of a new work” as used in 29.21(1), when given its ordinary and grammatical sense, seems to encompass the creation of many possible types of work, in different media; it is in no way limited to audiovisual content. “An existing work or other subject-matter or copy of one”<sup>183</sup> would also appear to encompass a wide range of original copyrighted works, rather than the audiovisual media which video makers typically draw upon. A fan fiction story based on a novel, film, or television show is as much a “new work” drawing on an “existing work [. . .] which has been published” as a YouTube mash-up video incorporating previously released video footage and/or music would be.

Furthermore, while it may be strange to think of copyright subsisting in fan fiction stories — works which can, themselves, be accused of infringing the copyright of others — fan fiction may indeed qualify for copyright protection. Canadian law has a relatively low threshold for finding that copyright subsists in a work.<sup>184</sup> Many fan fiction stories could meet the criteria for copyright protection as established in *CCH*.<sup>185</sup> *CCH* held that:

[for] a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. [. . .] The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise [. . .].<sup>186</sup>

Writing a work of fiction is an exercise of skill and judgment, even if the author borrows elements from earlier texts, as in the case of fan fiction (or other rewrites). Further, the skill and judgment seem to be non-trivial in the case of most fan fiction works, which typically engage previously published texts in order to tell

<sup>180</sup> *Copyright Act*, *supra* note 39 at s. 29.21

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.* at s 3.

<sup>183</sup> *Ibid.* at s. 29.21.

<sup>184</sup> See e.g. Gervais & Judge, *supra* note 42 at 52-53.

<sup>185</sup> *CCH*, *supra* note 76 at para. 16.

<sup>186</sup> *Ibid.*

new stories and express the fan author's ideas or insights. Fan fiction stories should therefore generally meet the skill and judgment test necessary to qualify as original — and copyrightable — works in Canada. Further, some commentators have suggested that under Canadian law, copyright may subsist even in works which are themselves infringing.<sup>187</sup> Fan fiction could therefore come within the ordinary sense of “a new work[s] or other subject-matter in which copyright subsists,”<sup>188</sup> per section 29.21(1).

A close reading of the later subsections in section 29.21 suggests that these clauses, too, can extend to fan fiction. Fan fiction stories are typically disseminated via intermediaries, such as fan web sites or online fan fiction archives; these intermediaries “[provide] space or means for works or other subject-matter to be enjoyed by the public”<sup>189</sup> on any reading of the phrase in its ordinary and grammatical sense. Moreover, online archives for written content are analogous to YouTube and other social media sites through which users share audiovisual media, and which Parliament specifically contemplated in enacting sections 29.21(1) and 29.21(1)(a).<sup>190</sup> Similarly, the dissemination of non-profit fan fiction on freely accessible sites should come within the meaning of “non-commercial purposes” as per section 29.21(1)(a).

Additionally, section 29.21(1)(b) requires that creators of user-generated content mention “the source — and [. . .] the name of the author, performer, maker or broadcaster — of the existing work” where it is appropriate to do so.<sup>191</sup> As Tushnet suggests, fan fiction writers often mention the source text on which they base their work and its author, maker, or other rights holders in “disclaimers” preceding fan works.<sup>192</sup> This fan practice would fit within the words and the condition in section 29.21(1)(b). As well, this practice is analogous to similar practices on websites geared toward the audiovisual materials which Parliament contemplated. There is little difference between a disclaimer preceding a *Harry Potter* fan story and recognizing J.K. Rowling and Warner Brothers as the creators/rights holders, on one hand, and a comparable disclaimer attributing “All My Loving” to the Beatles in a YouTube montage that uses that song. Fan writers can comply with this provision as easily as makers of other user-generated content can; in fact, it seems that they often do include these acknowledgements.<sup>193</sup> Where some fan stories may omit story-specific disclaimers, it is nevertheless likely that these works will be posted to online intermediaries that do credit the appropriate rights holders (for example, a franchise-specific fan site that mentions the franchise's creator/owner). The phrase

<sup>187</sup> Gervais & Judge, *supra* note 42 at 52-53.

<sup>188</sup> *Copyright Act*, *supra* note 39 at s. 29.21(1).

<sup>189</sup> *Ibid.* at s. 29.21(2).

<sup>190</sup> See again the sponsoring Minister's references to YouTube and other video-sharing sites, *supra* note 165; see also Elizabeth May's critiques of the so-called “YouTube” provision, *supra* note 163.

<sup>191</sup> *Copyright Act*, *supra* note 39 at s. 29.21(1)(b).

<sup>192</sup> Tushnet, “Legal Fictions”, *supra* note 14 at 664.

<sup>193</sup> *Ibid.*

“where appropriate” and its implicit recognition that attribution may, sometimes, be inappropriate or unnecessary could protect fan writers in these situations as well.<sup>194</sup>

While most of the provisions of section 29.21(1) are readily applicable to fan literature, 29.21(1)(c) seems, at first, to be somewhat less relevant. This clause requires that the user have reasonable grounds to believe the original copy of the work which he or she draws on for his/her creations is a legitimate and non-infringing copy. The wording of this particular subsection appears to contemplate audiovisual content that draws images, footage, or music from specific copies of first generation works; users must take such clips from legitimately acquired copies of the original media. It is more difficult to imagine how fan writers are to comply with this subsection. While fan literature borrows characters, settings, events, or other ideas from existing media, these borrowings are not taken directly from specific copies of works in the same way a video clip or screen capture must be made from a specific DVD. However, while this clause may betray the provision’s concern with audiovisual media, it in no way excludes written or other content. Fan writers may simply wish to ensure that they draw their inspiration from legitimate and non-infringing copies of the works that have inspired them. In practice, it is likely that fan fiction writers — serious and involved fans of a given franchise — generally own legitimate copies of the books, movies, or games on which they base their writing.<sup>195</sup> This particular clause need not make the exemption inapplicable or less applicable to written user-generated content.

The final condition or criteria in section 29.21(1)(d) looks at the potential “substantial adverse effect [. . .] financial or otherwise” on the “exploitation or potential exploitation of the existing work”.<sup>196</sup> The clause effectively requires that new user-generated works not harm the original works’ markets or potential markets, and not serve as “substitute[s] for the existing [works]”. I note here that section 29.21(1)(d) incorporates the final *CCH* fair dealing factor of market effect; the clause also raises considerations of market harm that are as applicable to fan literature as they are to the YouTube mash-ups and other audiovisual media that may have inspired the UGC exemption directly. Can fan literature come within the conditions in section 29.21(1)(d)? It appears so. As I argue above, second generation fan fiction typically does not have a substantial adverse effect on first generation works, nor do fan fiction stories serve as substitutes for the original franchises that spawn them.<sup>197</sup> The possibility that fan materials might occasionally be confused with official materials or suppress some readers’ interest in the official materials should not be considered “substantial adverse effects” on the original texts as those words read in their ordinary and grammatical sense. Nor would such a reading befit the context of Canada’s liberal approach to fair dealing.

Moreover, even where fan fiction stories may overlap with licensed sequels or tie-ins that rights holders plan to develop, it is unlikely that fans will refuse to buy the official tie-ins or sequels simply because they have encountered fan fiction ad-

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<sup>194</sup> *Copyright Act*, *supra* note 39 at s. 29.21(1)(b).

<sup>195</sup> See Chua, *supra* note 16 at 223.

<sup>196</sup> *Copyright Act*, *supra* note 39 at s. 29.21(1)(d).

<sup>197</sup> See e.g. Chua, *supra* note 16 at 223; see also Lessig, *supra* note 146, on the phenomenon of Japanese fan *doujinshi*.

dressing a similar premise.<sup>198</sup> The likely existence of *Star Wars* fan fiction exploring Anakin Skywalker's youth does not seem to have prevented fan fiction readers and writers from watching the *Star Wars* "prequels". Fans even read multiple fan fiction stories together with licensed tie-in media offering different perspectives on the same character and time period.<sup>199</sup> In fact, the devoted fans who read and write fan fiction are arguably more likely to follow treasured franchises closely than casual viewers are. I reiterate that fan fiction and other forms of fan-created content can benefit rights holders by giving their work additional exposure and/or helping to maintain interest in these works,<sup>200</sup> a benefit which was even recognized in Parliament.<sup>201</sup> Creators therefore should not fear substantial adverse impacts from fan fiction. The lack of evidence demonstrating substantial market harm could bring fan literature within the ambit of section 29.21(1)(d).

Some aspects of section 29.21(1)(d) could, nevertheless, pose challenges to fan writers. At present, it is unclear what the interpretation and the impact of the phrase "financial or otherwise" in section 29.21(1)(d) may be. Parliament does not seem to have addressed this particular term in debating either Bill C-32 or C-11. The words "or otherwise" could import consideration of possible non-financial consequences of user-generated content, including fan fiction works. For instance, rights holders may allege that certain fan stories or other user-generated content create negative or unpalatable associations with their works (for example, if a fan writer uses a popular franchise to weigh in on a controversial political issue, or writes erotic works involving characters from a series originally aimed at younger demographics). This phrase may allow rights holders to allege that fan works can have adverse non-financial consequences such as interfering with the rights holder's creative control of a franchise or creating negative or controversial associations with the original text. The phrase "or otherwise" could therefore limit the UGC provision's utility to some fan creators, depending on how it will ultimately be interpreted, what tests courts may develop, and where the burden of proof may lie in litigation.<sup>202</sup> A narrow reading of the UGC provision would probably not be in keeping with the liberal approach to user rights articulated in *CCH* and upheld in the *pentology*, but it remains to be seen how courts may address the possible non-financial consequences of fan fiction and other fan created content.

To summarize, fan fiction is — fundamentally — user-generated content, in that it is created by amateurs who use, reproduce, or borrow some elements of existing works to create new content of their own. While Parliament may have primarily contemplated video content, and not fan fiction, in drafting the new UGC pro-

<sup>198</sup> See, for example, Lai Chung on the ease with which audiences can consume and explore multiple visions or versions of a character; Lai Chung, *supra* note 44 at 930-931.

<sup>199</sup> See e.g. Anupam Chander & Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use" (2007) 95 California L Rev 597 at 624.

<sup>200</sup> See e.g. Tushnet, "Legal Fictions", *supra* note 14 at 664; see also McKay, *supra* note 1; Jenkins, *supra* note 142.

<sup>201</sup> See Minister Paradis' comments at second reading, *supra* note 175.

<sup>202</sup> For a further discussion of how burdens of proof may affect the availability of the UGC provision to content creators, see Daniel Gervais, "User-Generated Content and Music File-Sharing", *supra* note 174 at 466.

vision, the foregoing analysis should demonstrate that bringing fan fiction within the context and the grammatical and ordinary meaning of section 29.21 requires no significant stretch of the imagination or of the section's wording. However, it is not only the language of the new provision that seems to support including and insulating fan fiction along with other forms of user-generated content. The principles that underlie this exemption are also highly relevant to fan fiction as one of many forms of amateur, non-commercial derivative content that can be published online. In the following section, I examine some of the apparent objectives and intentions of the provision by looking at justifications for its inclusion, and argue that these principles would be ill-served by excluding written content.

**(b) Principles, objectives and intentions: linking written fan fiction with other user-generated content**

In the Parliamentary debates on both C-11 and C-32, a number of Members cited the importance of insulating amateur, non-commercial content users/creators from copyright complaints by rights holders.<sup>203</sup> Some Members implied that copyright law ought where possible to legitimize harmless activities which ordinary Canadians engage in every day;<sup>204</sup> others suggested that “kids”<sup>205</sup> should not be subject to legal actions by more powerful rights-holding actors.<sup>206</sup> These statements, from Government as well as Opposition Members, seem to recognize the power imbalance that exists between non-commercial amateur content users on one hand, and professional rights holders on the other. The ultimate inclusion of the UGC exemption despite criticism from some stakeholders<sup>207</sup> implies a commitment to remedying this power imbalance and to protecting non-commercial second generation creators who meet certain conditions. These laudable goals, however, should not be restricted to creators of only *some* content. Writers of fan fiction, like other amateur creators, are subject to the same power imbalances which may threaten their hobby and their finances, should rights holders object to their non-commercial writing. The family member who uploads a YouTube video of a child dancing to pop music, for example, and the fan fiction writer who posts a short, non-profit *Harry Potter* (or other) story online ought to be treated alike. To do less would be arbitrary and unfair. The UGC provision is therefore commendable be-

<sup>203</sup> See e.g. House of Commons, *Legislative Committee on Bill C-32 (Evidence)*, 40th Parl, 3rd Sess (6 December 2010) at 1715 (Charlie Angus).

<sup>204</sup> *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 123 (14 May 2012) at 1355 (Robert Goguen).

<sup>205</sup> *Legislative Committee on Bill C-32 (Evidence)*, *supra* note 203.

<sup>206</sup> *Ibid.*

<sup>207</sup> See, for example, Senate, *Proceedings of the Standing Senate Committee on Banking, Trade and Finance*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, Issue 23 (22 June 2012), in which Véronique Roy, legal counsel for the Union des écrivaines et des écrivains québécois criticized the practice for ignoring artists' moral rights — and effectively legalizing all fan fiction; see also House of Commons, *Legislative Committee on Bill C-11 (Evidence)*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess (29 February 2012) at 1545, for a similar criticism from the Canadian Artists Representation Copyright Collective Inc.

cause it has the capacity to address and to protect all of these equally vulnerable users — one of Parliament’s apparent intentions.

Further, interpreting the UGC provision so as to encompass fan fiction alongside other types of content may be in keeping with the broad principle of technological neutrality endorsed in several of the Supreme Court’s pentalogy decisions.<sup>208</sup> The phrase technological neutrality entails several different considerations;<sup>209</sup> however, the core concept holds that in the absence of legislative intent to the contrary, laws should neither favour nor discriminate against particular technologies.<sup>210</sup> In *SOCAN*, Abella J noted that the principle of technological neutrality “seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication.”<sup>211</sup> The Supreme Court in *ESA* held that the *Act* should apply equally between traditional and more technologically advanced forms of the same media in keeping with the principle of technological neutrality.<sup>212</sup> The Court in *ESA* also suggested that technological neutrality may be important in preserving the balance between owners’ and users’ rights in digital environments.<sup>213</sup>

The Supreme Court decisions invoking this principle have so far compared traditional media and traditional forms of content dissemination with online forms (for example, comparing the sale of physical copies of musical works in *SOCAN* or video games in *ESA* to online sales of the same media). However, this principle could also suggest that somewhat different forms of digital media should be treated alike, barring explicit legislative language to the contrary.<sup>214</sup> Arguably, written fiction published on text-based archive sites and audiovisual content hosted on video-sharing sites are different “technologies”, or at least different forms of media. Nothing in the language of the UGC provision distinguishes between audiovisual, written, or other user-generated content. A technologically neutral reading of the legislation could argue for including various fan made content of differing forms within the provision’s ambit. This reading of section 29.21 appears more in keeping with the Supreme Court of Canada’s endorsement of technological neutrality as a value that copyright law should strive for than a more restrictive interpretation would be.<sup>215</sup>

<sup>208</sup> See e.g. *ESA*, *supra* note 86 at para. 5; *SOCAN*, *supra* note 86 at para. 43; *Rogers* at paras. 37-38.

<sup>209</sup> For a discussion of these different aspects of technological neutrality, see Carys J. Craig, “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law” in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) [*The Copyright Pentalogy*].

<sup>210</sup> See *ESA*, *supra* note 86 at para. 9; see also Craig, *supra* note 209 at 272; see also Gregory R. Hagen, “Technological Neutrality in Canadian Copyright Law”, in Michael Geist, ed, *The Copyright Pentalogy* at 307.

<sup>211</sup> *SOCAN*, *supra* note 86 at para. 43.

<sup>212</sup> *ESA*, *supra* note 86 at para. 5.

<sup>213</sup> See *ESA*, *supra* note 86 at para. 8; see also Craig, *supra* note 209 at 284.

<sup>214</sup> See e.g. *ESA*, *supra* note 86 at para. 9.

<sup>215</sup> See e.g. *ESA*, *ibid.* at paras. 4–6 and para. 9.

As well, fan fiction and other forms of user-generated content fulfill similar functions or goals. Mash-up videos can celebrate the original music or videos from which they draw clips, songs, and images; they may seek to continue a story by “splicing” together existing moments to depict something new or different, and they may even parody or critique aspects of the original works.<sup>216</sup> As Rebecca Tushnet argues, well-conceived mash-up videos can offer insight or commentary on troubling aspects of mainstream media,<sup>217</sup> just as certain works of fan fiction can “write back” to or challenge popular texts.<sup>218</sup> The possibilities for videos, fan fiction, and other forms of user-created content are as varied as the ideas, opinions, and skills of their creators or writers. From this perspective, copyright without appropriate exemptions (such as parody or UGC, or both) threatens the creation of second generation texts which criticize first generation works; this, in turn, undermines the public’s ability to engage with and debate popular culture. It would make little sense to protect this amateur and often critical discourse *only* when it is expressed through certain forms of media.

Moreover, even where fan works — including fiction and audiovisual media — do not necessarily challenge or critique first generation works, second generation creativity is nevertheless a worthwhile form of creativity. The Parliamentary debates surrounding Bill C-11 and Bill C-32 demonstrate that at least some Members recognized the value of the widespread, amateur public creativity which finds expression in user-generated content, and wished to protect this creative output.<sup>219</sup> Even amateur works of fairly limited skill or creativity can have some public benefit, for example, by allowing hobbyists to develop talents in a given field, or by promoting and celebrating the original works on which they comment (however skillfully or poorly). The inclusion of the UGC provision suggests a commitment on the part of policy-makers to protect and to encourage amateur, user-driven creative content development, when such content does not adversely impact rights holders. As the debates in Parliament recognized, user-generated content may even promote original works and indirectly benefit rights holders.<sup>220</sup> It is illogical to distinguish between fan fiction and audiovisual mash-ups, or to determine that this protection should apply only to users who work with certain media, when nothing in the section’s wording suggests such a distinction, and when the Supreme Court has recently endorsed technological neutrality as an important copyright principle (albeit in a different factual context).<sup>221</sup> Such a restrictive reading would not give effect to the apparent objectives of the UGC provision, the intention of Parliament,

<sup>216</sup> Rebecca Tushnet, “Scary Monsters: Hybrids, Mashups and Other Illegitimate Children” (2011) 86 *Notre Dame L Rev* 2133 at 2135; see also Lipton, *supra* note 165 at 21-22 [“Scary Monsters”].

<sup>217</sup> Tushnet, “Scary Monsters”, *supra* note 216.

<sup>218</sup> Reynolds, “Impact”, *supra* note 7 at 38-41.

<sup>219</sup> See e.g. *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 124 (15 May 2012) at 1200 (Andrew Saxton).

<sup>220</sup> See, again, Minister Paradis’ comments, *supra* note 175; see also McKay, *supra* note 1; Jenkins, *supra* note 142.

<sup>221</sup> *ESA*, *supra* note 86 at paras. 4-6 and 8-9.

or the liberal approach to user rights that was articulated in *CCH* and that is now an integral part of Canada's fair dealing context.

In conclusion, although fan literature received little discussion in the debates surrounding Bill C-32 and C-11,<sup>222</sup> the language of section 29.21 read in context and given its ordinary and grammatical meaning can readily encompass written fan content. The relatively low threshold for finding that copyright subsists in a work should be to the advantage of most fan fiction stories, and should serve to bring them within the ambit of section 29.21(1). As well, common fan practices such as attributing original works to their creators/owners and publishing stories through non-commercial online intermediaries already often conform to the situations and conditions contemplated in the UGC exemption. While our legislators may have been primarily concerned with audiovisual materials distributed on YouTube or similar sites,<sup>223</sup> the practices of fan writers and video makers are analogous in many ways. Furthermore, the principles and objectives that seem to underlie the UGC exemption are equally applicable to written work and to other forms of user-generated content. Writing and/or reading fan fiction is a common, non-commercial practice that Canadian fans engage in every day, just as making or viewing videos is for YouTube fans. Like amateur video makers, amateur writers are likely to have weak positions relative to copyright holders, and are as deserving of some insulation from costly infringement claims. Finally, fan writers contribute creatively to public discourse about popular works just as creators of other user-generated content do. The text of the exemption and its apparent purposes can easily accommodate fan literature along with other forms of non-commercial user-generated content — an interpretation that would give effect to the liberal approach to users' rights endorsed in *CCH* and the pentalogy and, arguably, to the principle of technological neutrality endorsed in *Entertainment Software Association* as well.<sup>224</sup>

### (c) Possible advantages of s. 29.21 for fan literature

The likely inclusion of fan fiction within section 29.21 should come as a relief to fan writers. While the parody and satire exemptions in section 29 of the *Copyright Act* may also benefit (some) fan authors, the UGC exemption could offer several unique advantages over and above other fair dealing categories. In particular, the placement of the UGC exemption within a separate section of the *Act*, after section 29's fair dealing categories and before the subsequent provisions clarifying the legality of reproductions for private purposes or for later use,<sup>225</sup> could suggest that the UGC exception is to be treated as an *ex ante* category of non-infringing uses. If this is indeed the case, then the UGC exemption could provide an important pre-emptive statement that non-commercial user-generated content which meets the

<sup>222</sup> See, for example, Véronique Roy, legal counsel for the Union des écrivaines et des écrivains québécois on the provision's application to written fan fiction, *supra* note 207.

<sup>223</sup> See e.g. Minister Paradis, *supra* note 175, referring to the mixes of musical and video content at which the provision is primarily aimed; see also e.g. Elizabeth May on the "YouTube" exemption, *supra* note 173.

<sup>224</sup> *ESA*, *supra* note 86 at paras. 4–6 and para. 9.

<sup>225</sup> *Copyright Act*, *supra* note 39 at ss. 29.22–29.23.

provision's conditions does not infringe copyright. Such a proactive statement could offer greater stability and certainty to amateur content creators (whether they write fan fiction, create videos, or publish other forms of UGC) than the more contextualized and *ex post facto* determinations of fair dealing.<sup>226</sup> Jacqueline Lipton, writing about the American context, has commented that this lack of *ex ante* certainty about whether a given use is fair disadvantages potential users.<sup>227</sup> Canada's UGC exemption could mitigate this problem by stating, in an *ex ante* manner, that uses of copyrighted works falling within the provision's ambit and conforming to its criteria are non-infringing. Several aspects of the new UGC provision seem to support this interpretation.

First, the placement of the UGC exemption in a distinct section, rather than within sections 29–29.2, could suggest that the provision was intended as a distinct exemption apart from the *ex post facto* fair dealing categories, which must undergo the reactive and highly contextualized fair dealing analysis. Second, the wording and format of section 29.21 strongly resemble the new backup copy and time shifting exemptions in section 29.22 and section 29.23, by stating that “it is not an infringement of copyright” to use copyrighted works for specified purposes, which are further developed and limited in those sections. It seems likely, based on statements by Government Members, that the backup copy and time shifting provisions were intended as a proactive licence to Canadians to engage in these uses within certain parameters;<sup>228</sup> the same could be true of section 29.21, which follows a very similar format. As well, the UGC exemption explicitly incorporates some of the *CCH* factors, especially the final factor, which examines the effect of the dealing on the work. The inclusion of this factor could, in turn, imply that section 29.21 is intended to stand on its own and need not undergo a fair dealing analysis akin to the section 29 categories, provided the user-generated content meets the 29.21 conditions.

This interpretation may be the most beneficial to fan fiction writers. This reading of section 29.21 offers a greater degree of *ex ante* certainty about which non-commercial uses of copyrighted content do not infringe copyright, and which conditions users must comply with in order to benefit from the exemption. This more proactive form of legal guidance (as opposed to a reactive fair dealing analysis requiring the use of elusive and potentially arbitrary tests) is yet another promising feature of the UGC provision.

#### IV. CONCLUSIONS

The fan fiction genre has much to recommend it. Fan narratives may explore perspectives that are absent or underrepresented in mainstream media, challenge or celebrate popular works in a varied, democratic online discourse, and allow amateur writers to develop their skills. Protecting fan fiction — and other forms of second generation creativity inspired by copyrighted works — is therefore a laudable

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<sup>226</sup> Lipton, *supra* note 165 at 22-23.

<sup>227</sup> *Ibid.*

<sup>228</sup> See e.g. *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 31 (18 October 2011) at 1050 (Hon. James Moore), articulating the government's intent to legalize format shifting, time shifting and backup copies.

goal for copyright reform. Canada's recent amendments to the *Copyright Act* have taken important steps in this regard. Prior to these reforms, Canada's copyright landscape seemed inhospitable to fan fiction, given the apparent inapplicability of the original fair dealing categories to much fan writing. Now, the new fair dealing categories of parody and satire, and, especially, the non-commercial user-generated content provision should give fan writers significant hope. While it remains to be seen how far these provisions will be extended, or how they will be interpreted if and when litigation regarding fan fiction arises, the provisions coupled with the liberal approach to copyright which the Supreme Court has articulated are promising for second generation creators. The non-commercial user-generated content provision may be a particularly advantageous innovation, as its language does not limit its scope to any particular media or technologies, and as it may offer a level of proactive legal guidance that a reactive and highly contextualized fair dealing analysis — even a liberal one — cannot. The legal future of fan fiction in Canada seems brighter than ever before.

