# POLICY MEMORANDUM

***Student Policy Institute At Berkeley***

**Subject:** The Nuances of Fan Art Creation and Copyright Law
**Date:** 12/06/2022

## *Introduction*

Fan Art, original art, and all of the creativity that runs in between can be a world of beauty, self-expression, and admiration, but it can also become a legal nightmare. In this policy memo, RNB aims to not only explain past legal cases in which fan art was deemed plagiarism, but also propose new policies so we can prevent this miscommunication and protect the fan and the original creator. The current policies regarding fan art overall though, derive from the concept of "fair use". The fair use doctrine is under copyright law and allows a case by case basis of which art is analyzed and determined whether the art is "legally sound", (whether harm was done through direct plagiarism, etc.) Through the lens of copyright law, we will be looking at the Harry Potter Lexicon and the Barlow and Bear v Netflix cases, analyzing where a large brand sued a fan creator, by analyzing the basis on which the plaintiffs claimed harm, we can learn how fan creators can protect themselves against potential lawsuits. In amalgamation, we provide possible solutions such as an aggregate patent. We hope this policy memo can give you an insight into the legal world of fan art and hopefully provide clarity to those who just want to express themselves without fear of legal action.

***Case Studies:***

Many artists create artwork based on their favorite movies, songs, books and shows. This has come to be known as "fan art", which celebrates, caricatures or advances a different take on the story. Artists often sell their derivative works at conventions or on social media. While this is widespread all over the world, it is not necessarily legal. However, understanding the confusing landscape of copyright law is ridiculously difficult. That is why we will start this policy memo by analyzing the case studies, in which spur nuances within fan art and copyright law. In this section, we will look at two cases where a large brand sued a fan creator. These case studies help us see the point at which companies draw the line between celebrated fanart and a copyright infringement. By exploring the grounds on which the plaintiffs claimed harm, we can learn how fan creators can protect themselves against potential lawsuits.

The first case study is the case of the Harry Potter Lexicon. Author JK Rowling has traditionally supported the creation of Harry Potter inspired fanart, and the internet is full of Harry Potter fanfiction, unofficial plays, funny YouTube videos, and countless other fan made pieces of the Harry Potter universe, each of which contributes to its expansive lore. When Rowling sued the creator of the Harry Potter Lexicon, Mr. Vander Ark, his website (of the same name) had been long loved and active with no legal contest. It was only when he published the lexicon as a book that Rowling brought suit, claiming it was theft of her work. Harm was found on the basis that she planned to publish a similar Harry Potter encyclopedia that would face competition from the lexicon. Vander Ark's lawyer praised this case as at least "a decision that's a very useful guide to show people what they can do in the future as far as creating companion guides" (NYT). While Mr. Vander Ark lost this case, he continued to work on other Harry Potter

inspired projects, including a travel guide of Harry Potter locations. This book, which did not compete with Rowling, was not contested in court.

Our second case study looks at Netflix's lawsuit against musical duo Barlow and Bear. In 2022, the Grammy for Best Musical Broadway Album went to newcomers Barlow and Bear for their musical rendition of Netflix's hit show Bridgerton. The viral sensation had been created and performed entirely on Tik Tok (and eventually released to Spotify) and earned the praise of fans, the music industry, and Netflix itself. The musical draws its plot and much of its dialogue directly from the Netflix TV show. Netflix continued to support this unaffiliated fan made work and was in communication with Barlow and Bear's team as they rose to fame with their Bridgerton musical. As highlighted in the eventual lawsuit brought by Netflix, they supported the fan made work as long as no live performances occurred without their consent. Barlow and Bear were offered a chance to negotiate a license that would make live performances possible, but turned it down. The lawsuit came after Barlow and Bear planned a live performance of their album at the Kennedy center, charging upwards of $129 per ticket, without the consent of Netflix. Netflix objected to this performance and claimed that it did irreparable damage to the Bridgerton brand, creating confusion between the musical and Netflix's official Bridgerton experience, an event Netflix hosted in various cities, including dancing, and other immersive activities. Barlow and Bear did not halt their plans for the performance at Netflix's request, and Netfliz sued the duo. The day after response was required and not received from Barlow and Bear, Netflix dropped the lawsuit and appeared to reach a settlement.

Creators have little incentive to sue fan artists up until the point where the new work detracts from their own profits. Thus, fans can avoid being sued by ensuring they make it clear that their work is unofficial and does not interfere with any ongoing projects from the original

creator. This means being responsive to requests from the creators and avoiding using official trademarks. While a transformative or satirical work that may be inspired by another creation can exist and profit without interference from the original creator, a derivative work (that clearly copies source material) which generates profit may be subject to a lawsuit. The interesting question that then exists is at what point a work is no longer a derivative work.

***Current Policies***

According to copyright law, copyright holders have the sole right to distribute derivative works based on an original creation. This includes sequels and any other work that includes copyrighted elements from the original creation. However, the concept of "fair use" grants fans the ability to create derivative works, which are handled on a case by case basis. The fair use doctrine under copyright law involves a complex analysis of many different factors which are then used to determine whether the fan art is legally sound. According to a study by Stanford university, the system currently grants judges a great deal of power when deciding on whether a particular use is fair use. The four factors most commonly considered are:

1) the purpose and character of your use "THE TRANSFORMATIVE FACTOR"
2) the nature of the copyrighted work "FICTION/NON FICTION"
3) the amount and substantiality of the portion taken, and
4) the effect of the use upon the potential market.

One must first consider the effect of a derivative work on the market. If the kind you create competes with the market involving that franchise or fan base, it might weigh against the fan artist's favor – that is, it is more likely to be deemed "unfair use". In sum, monetizing increases risk. Next, the nature of the copyrighted work matters – if the work is fictional, that

weighs against fair use, but if it is factual, fair use might be more likely. The purpose and character of the transformative work is also important - this is quite nuanced and where most of the confusion lies in the legality. Finally, the amount of the original work sampled in order to create the derivative work matters here too.

Fan art is not innately harmful – some feel these fan communities actually provide a valuable service by upholding a thriving community of fans, keeping them entertained between releases, and giving the brand free promotion.

Nevertheless, current policies are vague and confusing, sometimes excessively restricting to creators. The outcomes of cases are subjective to the judges who decide the case and their interpretations, and most of them are settled out of court.

***Solutions***

Firstly, we want our brief to provide a guide for fan artists to be able to navigate basic copyright laws so that they can avoid any conflict with the copyright holder (CH). A fan work is vulnerable to prosecution if it explicitly uses copyrighted elements, which almost always take the form of proper nouns invented by the original creator for the original work. Additionally, if the fan work could reasonably be mistaken as a part of the original canon by the audience, it violates the CH's claim. If a work does contain these elements, as many fan works tend to, it is good for the fan authors to know in what circumstances they are most likely to face pushback from the copyright holder. If the product is being explicitly monetized, then the CH most likely has a claim that the profits of the original work are being impacted by the fan work, or that the work is serving as a replacement product in the market. However, even if the fan work has not been monetized, the CH could still claim that the fan creators are profiting from it reputationally, as an

affiliation with the brand could give them exposure that could boost future career prospects. There are many ways that CHs can exert power over their work, which often fundamentally conflict with the ethos of fan works, so fan creators must be careful if they are dealing with a particularly litigious CH.

Fan creators can use copyrighted works if their work meets the guidelines of fair use, i.e. if it is transformative of the original product in some way. In order to be transformative, the fan work must be critical of the original in some way. This can take the form of an argument about the work, whether that be analytical, satirical, or negative critique. If more fans engaged with this, it could lead to an environment of fan works that inherently provide more depth to the source material, as new perspectives and ideas about the original work can be fleshed out and explored, while still being able to use the original copyrighted material.

In addition to guidelines for fans, we have recommendations on how both CHs and the legal system should deal with these kinds of cases. We encourage CHs whose works have a history of fan authorship to release guidelines for making fan works, as Paramount has done regarding Star Trek. This will allow fan creators to more easily navigate this process. However, if a particular work has a history of unprosecuted fan works, we believe that this should be taken into account when courts are deciding copyright cases. Such a history of fan engagement should be seen as bringing exposure to the brand, expanding its impact and, it can be reasonably surmised, acting as a boon to the profit margins of the CH. In cases that fit this description, if the CH has chosen not to stop this action in the past, current claims should be put under more scrutiny. If the potential impact of a fan work as a replacement in the market is given weight when making these decisions, a metric that is inherently non-specific and requires some

conjecture, then the theoretical profit boost due to brand exposure from the fan work should also be taken into account.

In terms of firm policy, we believe that an aggregate patent would allow fans more freedom while still protecting the rights of CHs. Instead of a large, one-time payment to use the copyrighted materials, we propose that there could be a baseline of $100 that a fan creator can pay to have access to the copyrighted material. Should the fan work become more successful, the CH would receive an increasingly larger share of the profits, until it reaches the levels of the standards set today. This would allow fan creators to actually profit from their works, while also giving CHs access to the ground floor of any potential derivative work that could be profitable to them. It also provides a new revenue stream to CHs, who could possibly be allowed to lower the price of that initial patent if they wish in order to increase demand for it (though the ceiling of $100 would still be in place). Through this arrangement, both fan authors and CHs are given agency to utilize and profit from copyrighted works without stripping the CHs of their rights to a given work.

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