

## **Recommendations for Studios: Increasing Good Will and Revenue via Fan Conventions**

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While the TV and film industry have been experiencing less revenue from DVD and box office sales since illegal file sharing came into prominence,<sup>1</sup> one way to recoup these losses is to focus on merchandising, especially in one often overlooked venue: fan conventions. Conventions are not just isolated events that occur sporadically throughout the year. On the contrary, many fan convention organizers have websites where they sell merchandise year-round.<sup>2</sup> However, one reason studios are not fully exploiting fan conventions probably relates to their hesitance to relinquish rights to fans. This paper discusses the diverse attitudes of rights holders toward fan works in the U.S. and Japan (another center for vibrant fan culture), rights holders' legitimate legal concerns, and recommendations to American studios with respect to fans and convention organizers. Illustrating the problem introduced in this paper, one example that demonstrates wariness about fans usurping rights is the Warner Brothers case against the publisher of a

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<sup>1</sup> See, e.g., Dan Sabbagh, Hollywood in Turmoil as DVD Sales Drop and Downloads steal the Show, *The Guardian*, <http://www.guardian.co.uk/business/2011/may/03/film-industry-turmoil-as-dvd-sales-drop>; Joel Hruska, New Study Documents Relationship between Ticket Sales, Movie Piracy, Hot Hardware, <http://hothardware.com/News/New-Study-Documents-Relationship-Between-Ticket-Sales-Movie-Piracy>.

<sup>2</sup> Creation Entertainment Store, EBAY, [http://www.ebay.com/sch/creationent/m.html?\\_nkw=&\\_armrs=1&\\_from=&\\_ipg=25](http://www.ebay.com/sch/creationent/m.html?_nkw=&_armrs=1&_from=&_ipg=25).

*Harry Potter* lexicon, the online version of which was created by fans.<sup>1</sup> The attributed author was a librarian, Steve Vander Ark, and the site was essentially an encyclopedia of spells, characters, creatures, magical items, and other elements from the franchise.<sup>2</sup> The author of the *Harry Potter* novels, J.K. Rowling, and Warner Brothers, which owns the film rights to the series, alleged copyright infringement and sought an injunction to block its publication because Rowling had intended to publish such an encyclopedia herself.<sup>3</sup> (Rowlings did not object to the lexicon when it was simply an online website; she objected to the publication of it. She did not sue Vander Ark himself, but only the publisher.)

Interestingly, the fan work in this case represented a tremendous opportunity for collaboration. The lexicon was so comprehensive and well-organized, that both Rowlings and representatives from Warner Brothers stated that they visited the lexicon when it was online.<sup>4</sup> Rowlings admitted she used it to check facts while writing, rather than refer to the actual *Harry Potter* books.<sup>5</sup> David Heyman, producer of all the *Harry Potter* films, told Vander Ark that they (Warner Brothers) used the lexicon website almost daily.<sup>6</sup> Moreover, Vander Ark had contacted Rowling's literary agent in the UK and suggested that if Rowling planned to make a physical encyclopedia, he would be a good candidate to work as an editor, given his experience with the lexicon website.<sup>7</sup> However, the literary agency dismissed him, responding that Rowling intended to work alone and did not need a

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<sup>1</sup> See *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

<sup>2</sup> *Warner Bros.*, *supra* note 3, at 520.

<sup>3</sup> *Id.* at 513, 519.

<sup>4</sup> *Id.* at 521.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

collaborator.<sup>8</sup> This was a missed opportunity to work with a talented, industrious fan rather than maintain a barrier against fans. The former would surely have been the better option for the public image of both Rowlings and Warner Brothers.

Rights holders are understandably protective of all possible ways they might profit from their works, but in some cases, it is ultimately more profitable to relinquish certain rights, as this paper will demonstrate.

### **The Rise of Participatory Fans**

Rights holders' "trouble" starts with the fact that fans are no longer passive consumers of media, as literature on fan culture increasingly demonstrates. Instead, fans are creating artwork, novels, and myriad types of merchandise that re-appropriate copyrighted characters and portray them in ways that may be at odds with how rights holders wish the characters to be portrayed. It is not surprising then that tension developed between studios and fans, especially with the rise of the internet. Fox was notorious early on for taking down fan sites revolving around its shows.<sup>9</sup> Even as late as this year (2013), Fox has proven perhaps too protective of rights that can generate revenue, earning the rancor of many fans. This spring, they've been criticized by fans of *Firefly* (a Joss Whedon sci-fi/western that was canceled after one season) for shutting down shops selling unauthorized hats based on the unlikely orange wool hat worn by the otherwise tough hired gun, Jayne, in the show.<sup>10</sup> More precisely, fan reactions were mixed, as the comments on Whedonesque illustrate. They acknowledged that Fox owns the copyright,

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<sup>8</sup> *Id.*

<sup>9</sup> Fox Seeks to Shut Down Fans Sites on the Net, ROCK OUT CENSORSHIP, <http://www.theroc.org/updates/fox.htm>.

<sup>10</sup> Fox Bans the Sale of Unlicensed Jayne Hats from *Firefly*, 109 (April 9, 2013), <http://io9.com/fox-bans-the-sale-of-unlicensed-jayne-hats-from-firefly-471820413>.

but were disappointed anyway.<sup>11</sup> Fan comments also suggested defenses, such as the generic look of the hat and the fact that Fox waited so long to object.<sup>12</sup> Lurking in the background undoubtedly were persistent, sore feelings about Fox canceling the show after just one season; If the studio did not care about the show enough to give it a second season, it seemed unfair to care about it now and police it so strictly, once fans demonstrated the show's merchandise could be profitable.

The Jayne hat also represented an opportunity for Fox to collaborate with fans. Rather than shutting down the shops, Fox might have demanded and negotiated a royalty. Such a result would allow the studio to profit from the hat creator's work while still ensuring fans could buy the hat. It appears Fox ultimately came to the same realization, since the hats are now for sale online and are advertised as "officially-licensed Firefly merchandise."<sup>13</sup> Perhaps all that was needed was better communication with fans, assuring them the cessation of hat distribution was only temporary and would resume after negotiations (if that had been their plan from the start).

Early in even the pre-internet days of fandom, fans gave rights holders who insisted on maintaining control of their characters reason to worry, not because rights holders were missing out on revenue, but because fan works were changing the characters too much. For example, early *Star Trek* fanzines, circulated by physical mail, included portrayals of Kirk and Spock in a more erotic light than the show ever allowed, and also included portrayals of the two male characters in a romantic relationship with each other.<sup>14</sup> A

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<sup>11</sup> Fox Lawyers Shut Down Etsy Shops Selling Unlicensed Jayne Hats, WHEDONESQUE (April 9, 2013), <http://whedonesque.com/comments/30764>.

<sup>12</sup> Fox Bans the Sale, *supra* note 12.

<sup>13</sup> Jayne's Hat, THINK GEEK, <http://www.thinkgeek.com/product/fl08/>.

<sup>14</sup> Catherine Salmon and Don Symons, *Slash Fiction and Human Mating Psychology*, JOURNAL OF SEX RESEARCH, 94 (2004), <http://www.tandfonline.com/doi/pdf/10.1080/00224490409552217>.

leading scholar on fan culture, Henry Jenkins describes this general threat to studios: "Fans appear to be frighteningly out of control, undisciplined and unrepentant, rogue readers. Rejecting aesthetic distance, fans passionately embrace favored texts and attempt to integrate media representations within their own social experience... Like rebellious children, fans refuse to read by the rules imposed upon them by the schoolmasters."<sup>15</sup>

It is true that supporting fan conventions and fan works involves relinquishing some control over the way copyrighted characters are depicted, but more studios in recent years are realizing the value of inviting fans to participate in their franchises.

### **A Success Story: Creation Entertainment**

Creation Entertainment started organizing local comic book conventions in the 1970s, later focusing more on sci-fi and fantasy TV shows and films.<sup>16</sup> In 1991, it became the first convention organizer to secure film still photos through a license with a studio.<sup>17</sup> Paramount Pictures, who owns all *Star Trek* rights, granted Creation permission to design and produce *Star Trek* T-shirts, mugs, hats, autographed collectibles, and photos.<sup>18</sup> Creation worked closely with Paramount and Viacom's Consumer Products division, which supervises merchandise, and also worked with Gene Rodenberry, the creator of the original show.<sup>19</sup>

Creation's *Trek* conventions demonstrated to studios that genre fans could be a valuable market for publicity and merchandise purchases, even after the show had ended, or a

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<sup>15</sup> Henry Jenkins III, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, CRITICAL STUD. MASS COMM., 85, 86 (1988).

<sup>16</sup> Company Info, CREATION ENTERTAINMENT, <http://www.creationent.com/company.htm>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

film was waiting for a sequel.<sup>20</sup> *Trek* fans, often called Trekkies or Trekkers, are stereotyped as indiscriminate collectors “who will buy anything associated with the program or its cast,”<sup>21</sup> but in general, convention-goers of any show or film are passionate about their fandom and likely to purchase merchandise at the conventions they attend. They’ve already paid for their ticket to the convention, after all.

Following its success with *Star Trek*, Creation Entertainment developed relationships with other franchises and continued producing “official fan conventions” with licensed souvenirs and authorized fan clubs.<sup>22</sup> They also continued producing their own merchandise with studios. Events and merchandise they have produced involved *Star Wars*, *Terminator*, *The X-Files*, *Xena*, *The Lord of the Rings*, *Dr. Who*, *Supernatural*, and *Twilight*, among many others.<sup>23</sup>

Creation’s merchandise is sold at the conventions, on its website, and online through distributors such as eBay. Thanks to its relationships with celebrities that attend its conventions, Creation is able to offer autographed collectibles, allowing some of its merchandise to be sold for high prices on its auction site.<sup>24</sup> Such autograph signings are often included in the contracts made with celebrities when they agree to appear at the conventions.<sup>25</sup>

At the time of this writing, Creation is publicizing its next official convention for the CW’s series *The Vampire Diaries*.<sup>26</sup> Creation made the deal with Warner Brothers in April, 2012, and the agreement licensed Creation to produce

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<sup>20</sup> *Id.*

<sup>21</sup> Henry Jenkins, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE, 10 (1992).

<sup>22</sup> Company Info, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The Vampire Diaries Official Convention, CREATION ENTERTAINMENT, [http://www.creationent.com/cal/tvd\\_orlando.html](http://www.creationent.com/cal/tvd_orlando.html).

official conventions annually for three years.<sup>27</sup> Though not all terms of the agreement are public, it seems that this offered Warner some security because regardless of what happened to the show, the studio would be able to make revenue from the franchise through these official fan conventions, since fans continue to attend conventions even after a show is off the air.

In addition to selling merchandise at conventions, Creation is also selling merchandise and autographed collectibles for *The Vampire Diaries* on their website, even in between conventions. The offerings include T-shirts, photos, bottles, coffee mugs, shot glasses, hats, purses, and posters.<sup>28</sup>

Although fan-made work is not necessarily legal, and could constitute copyright and/or trademark infringement, studios appear to consent to most fan creations when licensing companies to produce fan conventions. For example, in Warner's press release on the *Vampire Diaries* deal, the convention is presented as a place for attendees "to show off their THE VAMPIRE DIARIES-inspired artwork, costumes, filmmaking and music."<sup>29</sup> Thus, Warner does not have a problem with fans—in this context—creating derivative works such as films, songs, and artwork using their characters.

However, it is unclear whether Warner would object to fan works at conventions being sold for profit. Some limits appear in Creation's rules for vendors. Their website states: "Vendors are not allowed to sell ANY PHOTOGRAPHS or PROMOTIONAL POSTERS or PROMOTIONAL ITEMS

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<sup>27</sup> Rene Thurston, *Warner Bros. Licenses Creation Entertainment for The Vampire Diaries Conventions*, EXAMINER.COM (April 5, 2012), <http://www.examiner.com/article/warner-bros-licenses-creation-entertainment-for-the-vampire-diaries-conventions>.

<sup>28</sup>The Vampire Diaries: Buy Merchandise, CREATION ENTERTAINMENT, <http://www.creationent.com/shop.htm>.

<sup>29</sup>Press Release, Warner Bros., Warner Bros. Consumer Products Grants License to Creation Entertainment to Produce "Official The Vampire Diaries Fan Conventions" (Mar. 23, 2012) *available at* [http://creationent.com/cal/tvd\\_wbpr.html](http://creationent.com/cal/tvd_wbpr.html).

PRINTED ON ANY PAPER PRODUCT of any Supernatural, Vampire Diaries or Stargate character. That includes promotional photographs or mini-posters of the cast originally taken for PR for the series.”<sup>30</sup> It would surely harm public relations (“PR”) for Warner to object to the sale of such items, but it could also be dangerous for a studio to not police its rights. Perhaps, however, Warner and other studios may decline to enforce their rights at vendors’ tables because they would accept giving up rights to derivative works, in the particular context of conventions, in exchange for the publicity that fan conventions generate.

### **Confusion: Studio Reactions in the U.S. and Japan**

Although Creation Entertainment’s collaboration with Paramount is a success story, U.S. studios have not always welcomed participation from fans in this way. As described above in the *Harry Potter* litigation example and Fox’s initial attack against selling Jayne hats, studios are not comfortable allowing others to profit from fan-made products involving their characters. While many have no problem with non-commercial fan works, it is curious that studios do not typically contact fans with commercially successful products and collaborate with them right away. In addition to stopping the publisher in the *Harry Potter* example, Rowlings could have acknowledged the commercial success that Mr. Vander Ark’s lexicon would have if published, and she could have collaborated with him in publishing the book, rather than suing the publisher. In the *Firefly* example, Fox could have immediately contacted the fans making the Jayne hats and suggested collaborating with them and the shops, which could pay royalties on each sale. Although this outcome seems to have occurred eventually, the studio’s initial reaction created

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<sup>30</sup>Vendor Table Information, CREATION ENTERTAINMENT, <http://creationent.com/dealers.htm>.

tumult among the fan community, as it seemed once again that Fox was trying to keep fans from extending the show into their own world. In both cases, initial public reactions were important.

Although rights holders in the U.S. are generally becoming more supportive of fans in recent years, rights holders' reactions have continued to fluctuate. Jenkins points out that most entertainment corporations have tolerated fan fiction, for example, but a few have attempted to suppress such uses of their characters.<sup>31</sup> Despite their deal with Creation Entertainment, Paramount itself had attempted early on to suppress *Star Trek* fan fiction.<sup>32</sup> Even while tolerating many fan activities, Paramount adhered to a policy of aggressive action against strict copying of official images and scripts.<sup>33</sup>

Perhaps most common were early negative reactions to homosexual depictions of characters. Rebecca Tushnet points to a cease and desist letter served on a seller of *Quantum Leap* homoerotic fan fiction.<sup>34</sup> However, unlike most fanfiction, that work was commercial in nature. Similarly, LucasFilms attempted to keep relationships in *Star Wars* fan fiction heterosexual.<sup>35</sup> Jenkins notes that Lucasfilm threatened to prosecute editors publishing works concerning *Star Wars* that violated the "family values" of the films.<sup>36</sup>

Although copyright law provides rights holders with the exclusive rights to reproduce and distribute their works and produce derivative works, it does not offer complete

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<sup>31</sup> Jenkins, *supra* note 23 at 30-31 (discussing Lucasfilms' early endeavors to suppress erotic stories in *Star Wars* fanfiction).

<sup>32</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 653-54 (1997), (citing E-mail from Lori L. Bloomer to fictalk@chaos.taylored.com (Oct. 28, 1996) (on file with Loyola of Los Angeles Entertainment Law Journal)).

<sup>33</sup> *Id.* at 673.

<sup>34</sup> *Id.* at 653.

<sup>35</sup> *Id.* at 674.

<sup>36</sup> Jenkins, *supra* note 17 at 90.

control of images. Many fan works would be upheld under fair use defenses. Unlike a rights-holder in Europe, a rights-holder in the U.S. has no “moral right” to protect the moral integrity of a work, outside of visual art.<sup>37</sup> Nevertheless, some studios have shown a strong desire to protect and control their characters and relationships in fan communities.

An intriguing contrast appears in Japan, where in the *dōjinshi* (self-published manga), the unauthorized production of derivative products for profit has become a vibrant and visible industry. At *dōjinshi* conventions, fans buy and sell fan-made manga which are based on copyrighted works – most typically, other manga (comics) and anime (animated videos). However, anime and manga owners do not generally object to this large-scale, infringing industry. Some are even pleased when their works inspire the creation of fan products, even though they are sold for profit.<sup>38</sup> The *dōjinshi* market is so accepted in Japan, that it is a legitimate measure of success. According to Professor Matt Thorn in the Manga Department of Kyoto Seika University, a fan-made product that gains popularity helps draw attention to the authorized manga.<sup>39</sup> An example is the editors of Weekly Shonen Jump, who “have some of their artists design their manga specifically to become fodder for *dōjinshi*,” though they would deny consciously catering to *dōjinshi* fans.<sup>40</sup> However, not all rights holders in Japan welcome *dōjinshi*; Artists understand that creation of *dōjinshi* involving Pokemon or Doraemon is taboo.<sup>41</sup>

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<sup>37</sup> Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1990).

<sup>38</sup> Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us about the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 137 (2003).

<sup>39</sup> Ian Condry, *Cultures of Music Piracy: An Ethnographical Comparison of the US and Japan*, INTERNATIONAL JOURNAL OF CULTURAL STUDIES, 7:3, 354 (2004).

<sup>40</sup> Correspondence from Matt Thorn (May 22, 2013), on file with author.

<sup>41</sup> *Id.*

According to Thorn, PR is a factor in publishers' current reluctance to object to *dōjinshi*. When *dōjinshi* first came into prominence, "publishers tried to stamp out *dōjinshi* creators, and artists bitterly complained in media interviews. The result was that the publishers looked like bullies, and the artists looked like naive prima donnas."<sup>42</sup> They also used means other than lawsuits (which indicate very public ruptures in relationships), for example, pressuring distributors to refuse to distribute offending publishers' products, or withholding cooperation that was offered in the past.<sup>43</sup>

Although Japan has probably taken the better PR approach by embracing their fans, even anticipating and incorporating fans' ideas, some U.S. creators come closer to the Japanese example. For example, when *Buffy the Vampire Slayer* was still in production, many of the show's writers would appear in the main fan-made chat room to discuss each new episode after it aired, answer fans' questions, and discuss plot points.<sup>44</sup> Joss Whedon, the creator himself, was even known to make frequent appearances.<sup>45</sup> He and the writers were not merely appearing to explain and defend the plots, however. They were listening to the fans, gauging their reactions, and thinking about the show in a new way, based on what they heard from fans. This is apparent from episodes like "Something Blue" and "Doppelgangland," which depict alternate universes based largely on fans' speculative scenarios.<sup>46</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Sarah N. Gatson & Amanda Zweerink, *www.buffy.com: Cliques, Boundaries, and Hierarchies in an Internet Community*, in *FIGHTING THE FORCES: WHAT'S AT STAKE IN BUFFY THE VAMPIRE SLAYER*, 244 (Rhonda V. Wilcox & David Lavery eds., 2002); Justine Larbalestier, *Buffy's Mary Sue is Jonathan: Buffy Acknowledges the Fans*, in *FIGHTING THE FORCES: WHAT'S AT STAKE IN BUFFY THE VAMPIRE SLAYER*, 227 (Rhonda V. Wilcox & David Lavery eds., 2002).

<sup>45</sup> Gatson & Zweerink, *supra* note 46 at 244.

<sup>46</sup> Larbalestier, *supra* note 42 at 229, 227.

This kind of give and take between fans is not common in the U.S., and it can nourish a strong cult following, which has certainly been the case with many of Mr. Whedon's shows. In today's internet world, it is more difficult to find centralized chat rooms and forums to discuss shows in, but studio websites or Facebook pages for each show would be convenient locations to host such discussions. Writers from the show could appear and converse with the fans. This would at least give fans the sense that they are being heard and appreciated. Additionally, fans may feel they are participating in some way in the creation of episodes to come later, simply by offering their reactions and perspectives. Hosting such forums on studio-run sites would give fans the sense that not just the writers but also the studios support and appreciate the fans as well. Currently, only one half of this give and take typically occurs on shows' Facebook pages; fans write their reactions, thoughts, questions, and criticisms, but it is important for fans to receive feedback and acknowledgment from the creators of the show as well.

### *Trademark Issues*

In addition to copyright claims, studios could also have legitimate legal objections to fan works sold at fan conventions which may represent trademark infringements. Unlike fanfiction, which is largely written for no profit, merchandise at fan conventions (sometimes made by fans) is typically sold for profit. T-shirts, posters, and artwork with fans' favorite characters from shows, for example, may be made by fans and sold without the authorization of the rights holders. This practice persists unchecked at many conventions, especially at anime conventions, where the rights holders in both the U.S. and Japan are especially obliging to fans. But not all rights holders are the same, and some will object to such uses of their characters.

A well-known case in the area of fan works is *Comedy III Productions v. Saderup*.<sup>47</sup> There, the defendant was sued for an artistic but realistic rendering of the Three Stooges on a T-shirt. Comedy III alleged a violation of the right of publicity and related business torts.<sup>48</sup> Because the renderings were not sufficiently transformative, the defendants' artwork was not protected by the First Amendment.<sup>49</sup> However, as *Winter v. DC Comics* affirms, if the artwork or rendering of characters in merchandise is transformative, so that the economic value is not derived solely from the character but also by the artist's expression, the artist may be protected by the First Amendment.<sup>50</sup> Here, a right of publicity claim was brought because the characters on the shirts were actual people. Had they been fictional characters, a similar analysis might have demonstrated that the First Amendment would not defend against a trademark infringement claim where the work was not sufficiently transformative.

As described in the Lanham Act, a trademark is infringed when one uses another's mark, or confusingly similar mark, for one's product in interstate commerce.<sup>51</sup> A mark can be a well-known character if it is a source identifier, thus fan-made products featuring characters or other source identifiers may constitute using another's mark. Second, in the context of fan conventions and organizations, selling products at fan conventions might qualify as use in interstate commerce. As mentioned above, convention organizers often have their own websites where they sell and auction off merchandise to people all over the country and beyond (though they will likely be careful to ensure this type of merchandise is authorized). Vendors may also move with the convention from one state to another, selling their wares in

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<sup>47</sup> *Comedy III Productions, Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

<sup>48</sup> *Id.* at 800.

<sup>49</sup> *Id.* at 810-11.

<sup>50</sup> *See Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003).

<sup>51</sup> The Lanham Act, 15 USC § 1114 (2005).

person to person from all over the U.S. These in-person sales of fan works are less carefully policed.

The last element for trademark infringement is likelihood of confusion as to source, affiliation, or sponsorship. If a vendor is set up at a convention or sold on the organizers' website, people may well be confused as to whether the products sold are affiliated with or sponsored by the rights holders, particularly if the rights holders have given some rights to the convention organizers, or are promoting the convention in some way. Relatedly, claims of dilution and passing off could certainly be brought for fan-written novels, which unlike fanfiction online, are sold for profit. Fans may be able to evade trademark claims by having clear disclaimers on the products, denouncing any affiliation or sponsorship with the rights holders.

Trademark issues have not loomed large in the Japanese scene. As evidenced by the continuing prosperity of *dōjinshi* conventions described above, Japanese studios are not pursuing trademark claims. Although Japan is generally a less litigious society than the U.S.,<sup>52</sup> it seems that the hype generated around original works due to the highly successful amateur market and fear of negative PR, allow the sale of products with presumably trademarked characters to continue and flourish without challenge.

### **Why Focus on Merchandising**

Data suggests that studios earn more on merchandise than the movies. One example is Disney, who received \$28.6 billion from merchandise in 2010.<sup>53</sup> Toys and T-shirts were the money makers, rather than films or TV shows. Popular items were Buzz Lightyear dolls and Lightning

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<sup>52</sup> Kirkpatrick, *supra* note 40 at 148.

<sup>53</sup> Daniel Frankel, *Report: Disney Raked in \$28.6B from Licensed Merchandise in 2010*, THE WRAP (May 18, 2011, 12:42 PM), <http://www.thewrap.com/media/article/report-disney-made-286b-2010-licensed-merchandise-27526>.

McQueen toy race cars.<sup>54</sup> In contrast, as of May 2011, the Motion Picture Association of America valued the entire 2010 global box office at \$31.8 billion.<sup>55</sup> At the height of DVD sales, in 2004, studios managed to generate just \$21.8 billion from domestic sales.<sup>56</sup>

Revenue from merchandise can also fund the production of a film. An example is the *Lord of the Rings* franchise. Ten percent of the production budget for the three *Lord of the Rings* films was raised by selling rights to video game, toy, and merchandise companies.<sup>57</sup> The merchandise also helps to promote films before they are released. Typically, 40 percent of movie merchandise is sold before the release of the film.<sup>58</sup>

For studios, there is little risk involved in emphasizing merchandise. Studios rarely manufacture film-related products, instead selling the rights to licensees, who typically incur the manufacturing and distribution expenses.<sup>59</sup> The studio usually receives an advance payment for the products and royalty payments between 5 and 10 percent of the revenues, while the manufacturer is responsible for the loss if the product does not sell.<sup>60</sup>

Emphasizing merchandise is becoming more important for studios in the wake of falling DVD sales and box office revenues. While movies can be easily copied and pirated, the same cannot be said of video games and high quality toys. On the other hand, T-shirts and artwork based on

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Merchandising*, FILM REFERENCE,

<http://www.filmreference.com/encyclopedia/Independent-Film-Road-Movies/Merchandising-THE-MERCHANDISING-PROCESS.html> (last visited Oct. 11, 2013).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

films can easily be created by fans without securing the rights to make such derivative works.

While some types merchandise are difficult to pirate and thus are a good bet for studios, selling merchandise through fan conventions specifically is a way to educate fans about legal issues. When studios license rights to fan convention organizers, and place restrictions on dealers at the conventions (i.e., no fan art or fan-made T-shirts), the public has a clearer opportunity to see that there are legal implications to fan works. It is apparent to any convention-goer that there are legal and illegal ways to sell merchandise based on films and TV shows.

Merchandise for sale is a staple at fan conventions. Comic Con, for example, has drawn toy and collectibles designers who sell exclusive products, including LEGO, Hasbro, Mattel, National Entertainment Collectibles Association, and Sideshow Collectibles.<sup>61</sup> Many of the exclusives are based on characters from movies and comic books, which studios own rights to and license to the toy creators.<sup>62</sup> Since the studios have already licensed the rights to make such toys, the deals are then between the licensee toy makers and convention organizers. However, as studios will make revenues from the merchandise sold at conventions, studios should promote conventions as a way to maximize their own returns.

Data suggests merchandise may be the real bread and butter for studios in the case of Japan as well. Even small studios are aware of the value of merchandise, to the point where they have merchandise in mind even when developing

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<sup>61</sup> Jay Cochran, *TNI's 2007 San Diego Comic Con Exclusives Checklist*, TOY NEWS INTERNATIONAL (June 1, 2007), <http://toynewsi.com/news.php?catid=20&itemid=11349>.

<sup>62</sup> See *id.*; *2012 San Diego Comic Con News*, TOY NEWS INTERNATIONAL, <http://toynewsi.com/index.php?catid=316&blogid=1>; *San Diego Comic-con 2012 Exclusives*, AWESOME TOY BLOG, <http://awesometoyblog.com/san-diego-comic-con-2012-exclusives/>.

the characters and scripts of a movie or TV series.<sup>63</sup> Japanese culture expert and MIT Professor Ian Condry has studied the inner workings of anime studios, and discovered that anime creators focus on a character rather than the story when developing a TV series because the character allows them to create a long-term, valuable franchise through character-based merchandising (such as figurines, book bags, lunch boxes, bedspreads, clothing, etc.).<sup>64</sup> These products make more money than the actual anime does.<sup>65</sup> In contrast to the U.S. perhaps, the story is part of the character in Japanese studios, and character is paramount.

Japanese society is far more character-centric than the U.S. in general. In the industry, young artists aspire to be “character designers,” and there is a “Character Business Center” at Shogakukan, a major publisher.<sup>66</sup> Condry summarizes that “from a business perspective, the market for licensed merchandise based on fictional characters is ten times that of anime itself.”<sup>67</sup> In contrast to the U.S., some of the more lucrative licensing deals in Japan are for pachinko games, which is an enormous industry there.<sup>68</sup>

### Conclusion

Studios can profit by collaborating with fans and participating in fan discussions and events. Identifying skillful, industrious fans that have created profitable products and teaming up with them to sell those products is one way to do this. Another is to have writers, other creators of a show, or PR representatives from studios, chat with fans in a forum, whether on Facebook or elsewhere.

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<sup>63</sup> See Ian Condry, *Anime Creativity: Characters and Premises in the Quest for Cool Japan*, THEORY, CULTURE & SOCIETY 26:139 (2009), <http://tcs.sagepub.com/content/26/2-3/139>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 155.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 143.

Finally, the main argument of the paper is that it can be a good strategy to relinquish some rights in order to produce stellar fan conventions and then sell merchandise through the convention organizers. We can see in the case of Japan how profitable this can be for rights holders whose works are being infringed. More hype around the product leads to more demand in merchandise, and that is where anime and manga creators profit most. While the U.S. is different in terms of the products (live action movies versus anime as the main exports), studio size (American studios are generally larger and have larger budgets), and specific merchandise markets (the pachinko industry is virtually non-existent in the U.S.), in both countries, merchandise constitutes a tremendous portion of revenue, and for some studios, the data suggests it is the primary source of revenue. Emphasizing merchandise sales through conventions and relinquishing certain rights for the production of those conventions is one way to increase revenue while simultaneously showing support and appreciation to fans.