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## Pride, Prejudice and Zombie Fiction

If Jane Austen had attended the bicentennial celebrations of the publication of her classic work “Pride and Prejudice” last month, she would have felt at home. Fans dressed as their favorite characters, complete with Regency-era costumes and fluttering fans.

But shortly after feeling the distinct pleasure associated with her novel's continued popularity, Austen would most likely be on the phone talking to her lawyers.

Because among these costumed fans would have been other, less-welcome creatures — zombies, vampires, exotic dancers and “cozy” detectives — all characters from the “unauthorized versions” of Austen's work. Stepping into the morass of fan fiction, character-based reinventions and digital piracy, Austen would quickly find herself immersed in the nuances of global intellectual property.

“Piracy is our only option,” Austen wrote in “Sense and Sensibility.” Although her character was not talking about book piracy, British publishing during the early decades of the 19th century was bedeviled by unauthorized editions. Within months of its publication, pirated translations of “Pride and Prejudice” were circulating in Napoleonic Paris. Later months saw Austen's novel translated into German, Swedish and Danish. Unfortunately, some of these unauthorized translations were so poor, critics contend that they forever damaged future sales of her works in those countries.

There is no indication that Austen or her family ever challenged these pirated uses of her works during the short, 14-year term of copyright protection under British law at the time. But inaction does not indicate approval. Even with today's multilateral treaties like Trade-Related Aspects of Intellectual Property Rights (TRIPS), enforcement actions remain woefully inadequate. E-book piracy is on the rise and “fan fiction” — also known as unauthorized

derivative works — is everywhere.

The 19th-century Jane Austen would be staggered to discover the diversity of fan fiction and other reimaginations of her work. A 21st-century Austen would probably be upset if she had not developed such a rabid following. Both authors would be faced with the tough job of determining where to draw the line between permissible celebration and impermissible freeriding. They would be dismayed at how little actual legal protection exists internationally to protect their choices.

Although no international treaties existed in Austen's day to prohibit unauthorized “adaptations” and “translations” of her works, such rights have been enshrined since 1886 with the creation of the Berne Convention — the first international agreement governing copyright.

Even if 21st-century, new-author Jane would have the legal right to prevent such uses, the ability to prevent the appearance of a stripper version of Elizabeth Bennet or a vampire version of Fitzwilliam Darcy would be harder to predict.

Ironically, the best country to protect Austen's vision of her work may be France — the country where it was first pirated.

France has a long tradition of protecting authors' “moral rights.” Moral rights internationally give authors the right to prevent unauthorized alterations to their works that are harmful to their reputation. This “right of integrity” survives any transfer of copyright and in France lasts in perpetuity. (Article L-121-1, French Intellectual Property Code).

Moral rights have proven particularly hardy in prohibiting unauthorized versions of copyrighted works. Most famously, they were used to secure an injunction against the performance of an all-female cast version in Italy of “Waiting for Godot” by Samuel Beckett, on the grounds such casting was contrary to the author's conception.

GLOBAL IP



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(The injunction was ignored by the theater company.)

Yet even French courts have recognized that moral rights are not absolute. In 2007, the French Cour de Cassation denied a petition by Victor Hugo's descendants to prohibit publication of two unauthorized sequels to “Les Misérables.” The court found that any moral rights concerns were outweighed by the “freedom to create” that arose from the public domain nature of the work.

New-author Jane's ability to

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prevent the appearance of stripper Elizabeth Bennet would be further constrained by the growing vitality of the fair use-fair dealing doctrine internationally to protect parodies and criticisms of an author's work. Most “fair dealing” countries — most recently Canada — include parodies, satires and criticisms as categorically permissible exceptions to copyright protection.

Much like moral rights arguments, however, arguments for fair use protection, while similarly strong, are also not absolute. In the U.S., in *Salinger v. Colting*, 641 F. Supp.2d 250 (SDNY 2009), rev'd on other grounds, 607 F.3d 68 (2d Cir. 2010), the court rejected a fair-use defense for the publication of an unauthorized sequel to “Catcher in the Rye,” finding that “the mere facts that Holden Caulfield's character is 60 years older and the novel takes place in the present day” did not make the sequel “transformative.” Such is the case-by-case environment in which 21st century Austen would find herself immersed.

Given present insecurities in using copyright to prevent so-called “fan fiction,” today's Austen would be better advised to create a clear policy on the types of fan fiction she would not allow. Typical limitations include requiring fan fiction to be non-commercial in nature and restrictions on relationships or developments that violate the fundamental canon of the author's visions.

Communicating these limitations, and their reasons, to her fan base will not wholly eliminate violators. But it will help use the social norming function of the Internet to allow her fan base to patrol such uses.

At the 250th anniversary celebration, who knows what new creatures might inhabit the fan-created adjacent world to Austen's created universe?

Perhaps not a ravenous zombie Elizabeth Bennet — but rather, Elizabeth Bennet, fierce defender of artistic creativity.