Honor Among Thieves: Copyright Infringement in Internet Fandom

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“Warner Brothers bullies girl over Harry Potter fan site.”1 What does this newspaper headline have to do with serious social criticism of popular culture? This note examines the popular


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phenomenon of Internet fan fiction, and it explores how it is an accessible and important form of social criticism for non-academics. Internet fan sites deconstruct both the marginalization of certain social groups and the traditional representation of gender roles in popular culture. This note argues for the creation of a fair use exception for Internet fan fiction. Internet fan fiction is fiction written by a fan for the Internet about a person, fictional character, or universe of which the person is a fan. The Internet created a global, self-regulating community responsible for its own cultural norms, largely based on common sense about the realities of the marketplace, and good faith. Fan fiction websites emerged on the web according to those norms. Fan fiction quickly became a medium through which members of the fan community could communicate with each other about their favorite shows, movies, novels, and celebrities.

Part I of this note discusses the background and purposes of copyright law and fan fiction and outlines the fair use doctrine and the social context from which fan fiction developed. Part II of this note addresses the legal status of fan fiction, and briefly discusses other claims that authors or publishers may have against authors of fan fiction, such as moral rights, trademark, and libel claims. Part II ultimately argues for a categorical exception to Internet fan fiction. Furthermore, it discusses author responses to fan fiction, and the advantages of a fair use exception for fan fiction for both authors and publishers.

Copyright is embodied in the United States Constitution. Generally, U.S. copyright law provides authors with exclusive rights to their writings. Copyright law protects individual authors’ economic interests in order to further the public interest. However, common law has long recognized that certain acts of copying are defensible as fair use, and in the 1976 Copyright Act, Congress codified the fair use doctrine into statutory law. Fair use works as an equitable rule of reason. The rule permits courts to avoid rigid application of the copyright statute when it would stifle the creativity that the law is designed to foster.

Some commentators have suggested that the case for fair use in fan fiction should be considered on a case-by-case basis, but this note argues for a categorical exception for Internet fan fiction. The

3. Id.
4. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender & Co. ed., 2004).
real danger to authors of fan fiction is the threat of litigation rather than the original authors and publishers actually bringing suit against them. The standards for invoking the fair use doctrine are so vague that in the face of threats of legal action, a prudent fan fiction author would simply remove the offending work from the website. There are certain uniformities of fan fiction as a whole that distinguish it from literary categories such as parody or satire, which are not given categorical protection. This uniformity makes a strong argument for making an exception for fan fiction.

Fan fiction operates within certain cultural norms that make it acceptable to write such fiction as long as one does not make money from it and is not claiming credit for work that is not her own. The standard disclaimer at the head of most fan fiction tells the reader clearly that the author does not own any of the characters she is borrowing. Internet fan fiction is not written for the purpose of turning a profit, and fan fiction is so ubiquitous and often of such dubious quality that people would choose to opt out of a fan fiction Internet market that attempted to make viewers pay for individual stories.

Promotional costs often far outweigh other costs associated with a creation. Unofficial fan websites containing fan fiction often contain links to other sites, like webrings, which help develop a fan community both financially and emotionally invested in the original work. These websites often link to the original product as well. Within an Internet fan community, customers may also feel pressure to purchase the popular creative products (i.e. the original books, television shows, and movies) that allow them to join in conversations about the common fan culture, including official copyrighted characters and plot twists. Both scholars and commentators in mass media recognize that fan fiction is a social phenomenon that serves as a valuable discussion and reworking of dominant culture.

So far, Congress has decided not to afford mass media authors or publishers any moral rights to their work. Fan fiction is fiction and for entertainment purposes only. Authors of fan fiction do not attribute their works to the original authors, or claim that what they write is true. Authors of fan fiction that do not profit from their writing or claim credit for original works by the author deserve a

categorical exemption for their work, protecting this important social criticism from claims of Copyright Infringement.

I. BACKGROUND

A. Fan Fiction on the Internet: Fan Fiction Defined

Some see the Internet as the final frontier of free speech. Internet communities seem to spring up and disappear overnight. The Internet affords individuals the ability to exchange ideas on every imaginable issue with an ever-growing world community. Individuals who collaborated by taking pieces of each other’s work and building on them built the web. This collaborative individualism “is the ‘open source’ philosophy that pervades cyberspace,” such as in webrings, where individual sites link together to create relatively cohesive communities.

This open source philosophy finds a parallel in the folklore tradition. Folklore is where fan fiction finds its roots. Folklore explores the beliefs, traditions, and customs of a people through communities of oral storytellers. Each subsequent tale concerns a moment of real life surrounding the prior work and reweaves the context of tale, ultimately changing it. There is no single story in folklore. There is the kernel of the idea, and each subsequent story is simultaneously revisionist and original.

Many scholars on folklore view the existence of an entire group of storytellers in a culture as itself a deliberate statement of
meaning. Scholars have interpreted the often bizarre content of folk culture in functional and context-specific ways as serving functions such as “educating the young, achieving group solidarity, negotiating individual competition within folk-groups, voicing social protest, allowing imaginative escapism, palliating the tedium of work, or licensing the breach of verbal or behavioral taboos.”

The open source Internet culture and the folklore tradition come together in the phenomenon of fan fiction. The retelling and revision of classic stories is still alive and well in the print market, but fan fiction shares its roots equally, if not more, with the oral tradition. Like the Internet, fan fiction began as a private act that quickly took on a life of its own. It begins with the individual, who reacts to an original work with the question, “Now what?” and ends with thousands of individuals coming together in Internet communities to explore each other’s answers to this question.

The Fan Fiction Glossary defines fan fiction, often shortened to “fanfic,” as “[u]nauthorized, not-for-profit fiction about copyrighted characters, or the use of original characters in a copyrighted universe.” “Fan Fiction” is defined as: “Original fiction by fans of a show, movie, book, or video game. The fiction involves characters and the location of the show from which the person is a fan.” The definition also offers one of the most popular reasons why fans write fan fiction: “to explore themes and ideas that the creators of a show, movie, book, or video game do not explore.” Fan fiction frequently departs from the “canon,” or the “established history and characterizations” of the original source. A broader definition of fan fiction that comports with these definitions is fiction written by a fan

14. Id. (referring to a "whole folk group or vernacular milieu").
15. Id. (citing WILLIAM R. BASCOM, Four Functions of Folklore, in THE STUDY OF FOLKLORE, 279-99 (Alan Dundes ed., Prentice-Hall 1965)).
17. See Hudson, supra note 9.
18. See, e.g., FanFiction.net, http://www.fanfiction.net (last visited Feb. 21, 2006). This website's header reads, "unleash your imagination and free your soul," suggesting the level of emotional intensity that seizes fans of an original work. See id.
21. Id.
that incorporates some person, character, or universe of which the person is a fan.

Fan fiction and organized media fandom have been traced to the second season of Star Trek in 1967, but authors of printed literature have been borrowing plot, character and setting for hundreds of years, and oral storytellers have been borrowing for even longer. Fan fiction is often denigrated as written by authors who are not creative or good enough to write professional work, but apologists of fan fiction on the Internet defend it as an art form which is “ungated by editors or producers,” and thus takes on a “new and refreshing democracy.” The baseline and characters of certain original works achieve a kind of autonomy in the mind that lends itself to fan fiction. This most often occurs with series, frequently with some element of fantasy or science fiction.

Other commentators have noted that television “mythology” series require active engagement from their audiences, spurring them into becoming “cosmic Sherlocks who must keep finding the hidden truths in an only partially recognizable universe.” Fan fiction is a way of the culture repairing the damage done in a system where corporations, rather than the folk own contemporary myths. The open source traditions of the Internet and folklore traditions work together. The combined effect allows cultural repair through fan


26. Id. (defining “baseline”: “There is a familiarity, an intimacy of knowledge, an affection, that seeps into the bones of the readers over time, like a silent radiation. This is not an intellectual knowledge. It cannot be matched by giving them a quick rundown of some new character’s life, then throwing them into the middle of it and expecting them to be affected in the same way.”).

27. See Matthew Gilbert, Getting ‘Lost’: Show Pursues TV’s Most Elusive Genre – Mythology. Or Maybe That’s Not It at All, BOSTON GLOBE, Oct. 27, 2004, at E1 (“Usually tinged with the supernatural, if not out-and-out science fiction, [mythology shows are] to the medium what ‘Star Wars’ is to the movies, or what Ursula K. LeGuin novels are to literature, or what comic books are to the magazine rack.”); see also Mary Ellen Curtin, The Fan Fiction Universe: Some Statistical Approaches, http://www.alternateuniverses.com/fanficuniv.html (last updated Nov. 6, 2002).


29. See Curtin, supra note 27.
fiction, where amateurs take mass media entertainment and transform it.30

B. Copyright Theory

Modern copyright law is rooted in English statutory and common law. The first modern Anglo-Saxon copyright statute was England’s Statute of Anne, enacted in 1710.31 The statute granted authors the exclusive right to copy their books for a limited term of fourteen years, with the copyright belonging to the public at the end of the term.32 This “balance between a creator’s right to protect his literary creation and the public’s right of access” provided the model for copyright law in the United States.33 The drafters of the United States Constitution conferred upon the legislative branch the power to create patents and copyrights “to promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”34

The Copyright Clause has been coined “the engine of free expression.”35 To that end, Congress enacted copyright laws to achieve three main goals: “the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.”36 Congress enacted the first Copyright Act in 1909,37 and then considerably revised the Act in 1976.38 Throughout the various incarnations of the Act, Congress granted a property right to authors that confers a limited monopoly in their work. This monopoly created by copyright thus rewards the individual author in order to benefit the public.39 By establishing this marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.40

30. Id.
31. 8 Ann., c. 19 (1709) (Eng.); see NIMMER, supra note 4, § 2.04[D][2] (noting the Statute of Anne as the first copyright statute).
33. Id.
34. U.S. CONST. art. I, § 8, cl. 8.
Congress enacted copyright statutes over the last 210 years with the purpose of equalizing tensions between providing sufficient incentives for the creation of works and making works available for public consumption.\(^{41}\) Courts have construed cases in light of the purpose of copyright, “to create the most efficient and productive balance between protection (incentive) and dissemination of information to promote learning, culture and development.”\(^{42}\) Without the limited monopoly, authors would have little economic incentive to create and publish their works.\(^{43}\) This limited grant “is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”\(^{44}\) “Additionally, granting protection for only a limited time offers security for the authors’ works while attempting to not impede freedom of expression.”\(^{45}\)

C. The Fair Use Doctrine

In determining whether given conduct constitutes copyright infringement, courts have long recognized that certain acts of copying are defensible as “fair use.”\(^{46}\) Fair use is a judge-made doctrine that relies on a “case-specific analysis of all the relevant circumstances, taking into account the entire complex of facts and equities presented.”\(^{47}\) The first fair use case in the U.S. was *Folsom v. Marsh*, a case which elucidated some of the problems of balancing, and outlined an analytical approach to cases in which an author may make a claim of fair use.\(^{48}\) In its analysis concerning whether the copying of George Washington’s letters were defensible under fair use, the *Folsom* court “look[ed] to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use prejudiced the sale, diminished the profits, or superseded the objects, of the original work.”\(^{49}\)


\(^{42}\) Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1235 (3d Cir. 1986).

\(^{43}\) See Leafer, *supra* note 32, at 5.

\(^{44}\) Sony, 464 U.S. at 429.


\(^{46}\) NIMMER, *supra* note 4, § 13.05.


\(^{48}\) See generally Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

\(^{49}\) Id. at 348.
The Supreme Court has noted that:

[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.  

Fair use constitutes a mixed issue of law and fact, but the question of what facts are sufficient to raise this defense in any given case is not clear. Under fair use, it is acceptable to use copyrighted information “even against the will of the writers.” Fair use is “a privilege in others other than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”

One court labeled the fair use doctrine “the most troublesome in the whole law of copyright,” and another described it as “entirely equitable” and “so flexible as virtually to defy definition.”

In the Copyright Act of 1976, Congress codified the fair use doctrine, describing it as a limitation on exclusive rights. Section 107 listed the four factors to be considered in a fair use case:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Section 107 lists some examples of fair use under the doctrine, including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” These examples of possible fair uses are illustrative rather than exclusive. Courts weigh all of the four factors together “in light of the purposes of

51. See NIMMER, supra note 4, § 13.05.
52. Folsom, 9 F. Cas. at 347.
57. Id.
58. Id.
The legislative history of § 107 suggests that Congress intended to leave the reins to the doctrine firmly in the hands of the courts. The section utilizes permissive language such as “including,” “for purposes such as,” and “shall include,” reinforcing the notion that courts have broad discretion under the statute to apply the doctrine.

Further, § 107 gives no guidance as to the relative weight to be ascribed to each of the listed factors, and takes each of these factors alone “in only the most general terms” so that the courts retain “almost complete discretion in determining whether any given factor is present in a particular case.” The Supreme Court believes that fair use is “an ‘equitable rule of reason,’ which ‘permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster.’”

Prior to the Campbell v. Acuff-Rose Music, Inc. decision in 1994, courts isolated and overemphasized individual words and phrases. Often, courts took language intended as guidance as limitations on their power, and erroneously created “presumptions” in favor of particular factors of the fair use doctrine. Before Congress codified fair use, the factors were not treated as a “checklist;” instead, each factor was reduced simply to a plus or minus. Scholars have suggested that “[t]he failure of some courts to recognize Section 107’s unique nature as statutory recognition of a judge-made rule of reason is responsible for much of the damage to the doctrine.” “Despite Congress’s desire that the courts continue to chart their own development of fair use, the very presence of the statutory provision has inhibited many from doing so.” In Campbell, the Supreme Court announced that the four statutory factors may not be “treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”

60. H. R. REP. No. 94-1476, at 65-66 (1976) (“[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”).
62. See NIMMER, supra note 4, § 13.05.
64. Patry and Perlmutter, supra note 47, at 670-71; see also Sony, 464 U.S. at 448 (contemplating a presumption against fair use if market harm exists).
65. Patry and Perlmutter, supra note 47, at 685.
66. Id. at 674.
67. Id. at 670.
1. The Purpose and Character of the Use

In analyzing this first prong of fair use doctrine, a court looks at two factors: (1) whether the allegedly infringing work serves a commercial purpose or nonprofit education purpose, and (2) whether the work is transformative.\(^{69}\) In *Harper & Row*, the Supreme Court stated that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”\(^{70}\)

In *Campbell*, the Supreme Court characterized the “central purpose” of the investigation under the first fair use factor as determining “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. . . . [I]t asks, in other words, whether and to what extent the new work is ‘transformative.’”\(^{71}\) A work that merely supplants or supersedes another is likely to have a substantially adverse impact on the potential market of the original work, while a transformative work is less likely to do so.\(^{72}\)

The 1909 Act codified the concept of a derivative work, that an author has the right to protect his original work against imitation.\(^{73}\) Before the 1909 Act, courts applied the fair use doctrine to literal copies of the work.\(^{74}\) A “derivative work,” over which a copyright owner has exclusive control, is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”\(^{75}\) Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works – unlike works of fair use – take expression for purposes that

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71. *Campbell*, 510 U.S. at 579 (internal citations omitted).
73. SunTrust Bank, 268 F.3d at 1261.
74. See, e.g., Stowe v. Thomas, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a translation of Uncle Tom’s Cabin into German was not a copyright infringement because it was not a "copy" of the work as published). Under current statutory copyright law, this would fall under the author’s control over derivative works. See 17 U.S.C. § 106(2) (2000).
are not “transformative.” The more transformative the new work, the less significance the other factors have in the inquiry. Factors such as commercialism will not weigh as heavily against a finding of fair use.

The Supreme Court and legislative history of the Copyright Act both entertain the idea that fair use may apply to psychological benefits. The House Committee emphasized that “the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight given them will differ from case to case.” Other aspects of the use’s “purpose and character” considered by the courts have included the user’s bad faith, distortion of the copyright owner’s work, the user’s interest in responding to a personal attack, public interest, the First Amendment, privacy concerns, and additional equitable factors.

2. The Nature of the Copyrighted Work

The second factor of fair use analysis recognizes that original creative works receive greater protection than derivative works or factual compilations. “[T]his second factor more typically recedes

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76. See Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 143 (2d Cir. 1998).
78. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.40 (1984) (stating the only purpose of “using a VTR to enable a [hospital] patient to see programs he would otherwise miss . . . [is to] contribut[e] to the psychological well-being of the patient”); see H. R. REP. No. 94-1476, at 73 (1976) (“the making of a single copy or phonorecord by an individual as a free service for a blind persons [sic] would properly be considered a fair use under section 107”).
79. H. R. REP. No. 94-1476, at 73.
81. See Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1261 (2d Cir. 1986) (stating a “commission of errors in borrowing copyright material” is a proper consideration for fair use).
82. See Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152-53 (9th Cir. 1986) (stating the public interest in allowing the user to respond to a personal attack rebuts a presumption of unfairness).
84. See id. at 311 (stating “[t]he spirit of the First Amendment applies to copyright laws” to some extend).
85. Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 144 (2d Cir. 1998).
into insignificance in the greater fair use calculus.”86 This factor may be of less importance when assessed in the context of certain transformative uses. The fictional nature of the copyrighted work becomes more significant where the secondary use is minimally transformative.87

3. The Amount and Substantiality

The third factor of fair use goes to the question of substantial similarity rather than whether the use is “fair.” “There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”88 In analyzing this second factor, the Supreme Court “did not require that the [alleged infringer] take the bare minimum amount of copyright material necessary to conjure up the original work.”89 Rather,

"substantial similarity" requires that the copying [be] quantitatively and qualitatively sufficient to support the legal conclusion that infringement . . . has occurred. The qualitative component concerns the copying of expression, rather than idea, facts, works in the public domain, or any other non-protectable elements . . . . The quantitative component generally concerns the amount of the copyrighted work that is copied . . . .90

Other tests that may be applied in order to determine the level of similarity between two works are the “ordinary observer” test, the “total concept and feel” test, the “fragmented literal similarity” test and the “comprehensive non-literal similarity” test.91

Under the ordinary observer test, “[t]wo works are substantially similar where 'the ordinary observer . . . would be disposed to overlook [the disparities], and regard [the] aesthetic appeal [of the two works] as the same.”92 Under the total concept and feel test, courts analyze “the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting”

86. Nimmer, supra note 4, § 13.05[A][2][a].
87. See Castle Rock, 150 F.3d at 144; Campbell, 510 U.S. at 586 (stating that the second factor is never “likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works”).
88. Maxtone-Graham, 803 F.2d at 1263.
89. SunTrust Bank, 268 F.3d at 1273.
90. Castle Rock, 150 F.3d at 138 (alterations in original) (quoting Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997)).
91. See id. at 139-40 (listing alternative tests that were not especially helpful in the court’s analysis).
92. Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1071 (2d Cir. 1992) (alterations in original) (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).
of the original and the allegedly infringing works. Under the fragmented literal similarity test, the court focuses on the copying of direct quotations or close paraphrasing. The comprehensive non-literal similarity test examines whether “the fundamental essence or structure of one work is duplicated in another.”

4. The Effect of the Use Upon the Potential Market

The fourth factor of the fair use analysis looks to the potential adverse impact on the demand for plaintiff’s copyrighted work through defendant’s copying of the original expression from such work. The 1967 House Report cautioned that the fourth factor of the fair use analysis “must almost always be judged in conjunction with the other three criteria.”

Prior to the Campbell decision in 1994, courts frequently identified the fourth factor of the fair use defense as the most important element of a fair use analysis. Courts treated the fourth factor as an automatic evidentiary presumption in favor of significant market harm. The Courts suggested that in order to negate fair use, one need only show that widespread dispersion of the challenged work would adversely affect the potential market for copyrighted work.

In Campbell, the Court announced that “no ‘presumption’ or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes.” The Court noted that commercial use is only one factor weighing against fair use that shall be considered, suggesting others should also be construed. The Court also noted that the force of commercial use disfavoring fair use “will vary with the context.”

The Court’s emphasis on an aggregate weighing of all four fair use factors represented a modification of the Court’s earlier view that

93. Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996).
94. Castle Rock, 150 F.3d at 140 (citing Nimmer, supra note 4, §§ 13.03[A][1]-[2] (1997)).
95. See Nimmer, supra note 4, § 13.05[A][4].
98. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (“If the intended use is for commercial gain, that likelihood [of significant market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.”); see Harper & Row, 471 U.S. at 568.
101. Id.
the fourth factor was “the single most important element of fair use,”102 a characterization conspicuously absent from the Campbell opinion.103 Rather than accord the fourth factor primacy, the court explicitly noted, “the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”104

The only harm resulting from derivative infringement applying to the fair use analysis is the harm of market substitution.105 “The enquiry[sic] 'must take account not only of harm to the original but also of harm to the market of derivative works.' ”106 In the context of verbatim copying, a commercial use “clearly supersedes . . . the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.”107 However, when the second use is transformative, market substitution is less certain, and market harm may be harder to determine.108 If the second use harms the market in a way that kills demand for the original, it does not produce harm cognizable under the Copyright Act.109 “It is not copyright's job to 'protect the reputation' of a work or guard it from ‘taint’ in any sense except an economic one.”110

II. ANALYSIS

A. Is Fan Fiction Illegal?

Fan fiction qualifies as an unauthorized derivative work,111 and is therefore illegal. This is “generally” true because some forms of fan fiction, such as “real person fiction,” are not based on a preexisting

103. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998).
104. Id. at 113 (quoting Campbell, 510 U.S. at 590 n.21).
105. Campbell, 510 U.S. at 593.
107. Id. at 590 (internal quotations omitted) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (1841) (No. 4,901) and citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).
108. Id.
109. Id. (providing examples such as a “scathing theater review” or “lethal parody”).
111. See 17. U.S.C. 101 (2000) (defining a “derivative work” as “a work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent a work of original authorship, is a 'derivative work.' ”).
work, but instead incorporate fictionalized versions of people, often celebrities, who exist in real life. The statutory rights of a copyright owner include the exclusive right “to prepare derivative works based upon the copyrighted work.” One who violates the copyright owner’s right to create derivative works is an infringer. There are two main components of a prima facie case of infringement: a plaintiff must show (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.

The first component is fairly easy to prove, since with fan fiction there is no question of whether a valid copyright exists, and a prospective plaintiff would be the original artist or a publishing or entertainment company with the attendant privileges of copyright protection in the work. The second component, copying, may be separated out into two different elements: the plaintiff will have to prove that (1) the alleged infringer copied his work, and (2) that the copying amounts to an improper or unlawful appropriation.

For fan fiction, the first element of the copying prong of a prima facie case of infringement is not at issue because the main premise of fan fiction is that the fan fiction author has taken certain recognizable elements of a copyrighted work and created an original work based on those elements. The fan fiction author has admittedly taken characters or setting from a copyrighted work, so there is no question of access. This component turns instead on the question of the status of these characters or fictionalized worlds as copyrighted work.

Some courts hold that a character is copyrightable only if it constitutes the “story being told.” In the landmark Sam Spade case, the Ninth Circuit held that the literary character Sam Spade was not copyrightable because he did not constitute “the story being told.”

112. See Wikipedia, The Free Encyclopedia, Real Person Fiction, http://en.wikipedia.org/wiki/Real_Person_Fiction (last modified Feb. 19, 2006). This type of fiction is controversial, and has been banned from the most popular collection of fan fiction on the Internet, FanFiction.net. Real person fiction may also be illegal, but not as an unauthorized derivative work, since people or their public personas are not considered pre-existing copyrighted works under the contemplation of the Copyright Act. See id.

114. See id. § 501(a).
116. Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998); Nimmer supra note 4, § 13.01.
chessman in the game of telling the story he is not within the area of
the protection afforded by the copyright.” 118 Later cases noted that
“cases subsequent to [the Sam Spade decision] have allowed copyright
protection for characters [that] are especially distinctive.” 119 The
Second Circuit has adopted a test that is less stringent than the “story
being told” test, instead holding that copyright protection is granted to
a character if it is developed with enough specificity to constitute
expression worth protecting. 120

The Seventh Circuit has noted that while stock or stereotyped
characters are not copyrightable expression, 121 a character that has a
specific name and a specific appearance in a graphic novel is
sufficiently distinctive for copyright. 122 Although courts seem to
distinguish graphic depictions of characters and literary descriptions
of characters, they recognize that literary characters can be
sufficiently distinctive, and note that the factors that contribute to
this distinctiveness of character include expressive content such as the
character’s name and speech. 123 This kind of expressive content moves
characters from the realm of abstract ideas into concrete expression.

For the second element of the copying prong of a prima facie
case of infringement, the author of the original work must show that
the unauthorized derivative work meets the “substantial similarity”
test. 124 In general, the test for substantial similarity and testing
whether a work is derivative are similar. Unless enough of the pre-
existing work is contained in the latter work to constitute an
infringement of the former, the latter by definition is not a derivative
work. 125 A work is not derivative unless it is a substantial copy of the
original work. In most copyright infringement cases, infringement of
expression occurs only when the total concept and feel of the works in
question are substantially similar. The derivative works issue, like the
fair use issue, should turn on the qualitative nature of the taking.
Thus, a work may be derivative even if it has a different total concept
and feel from the original work. 126

118. Id.
120. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
121. Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004) (providing for
examples: “a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing
dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, a
masked magician”).
122. Id. at 659-60.
123. Id.
124. Nimmer supra note 4, § 13.03.
125. See id. § 3.01.
126. See Gaiman v. McFarlane, 360 F.3d 644, 659-60 (7th Cir. 2004).
What authors of fan fiction actually do incorporates both components of an infringement claim. Having established that characters may be copyrighted, the real problem with applying this to fan fiction is the fact that many elements of what make a character copyrightable often do not appear in fan fiction; it is instead an assumed knowledge on the part of readers. Is it dispositive of an infringement claim that the fan fiction author professes to have “borrowed” characters from a copyrighted work? Is it a qualitative enough taking to simply use a single name, that of a main or secondary character, from a copyrighted work?

Because of what fan fiction readers bring to any given piece of fan fiction they read, the construction of fan fiction is largely a two-sided process, and the amount of pre-existing expressive content utilized is low. For literary characters, the name often evokes all the expressive content associated with that character, including the character’s manner of speech, personality, appearance, and other aspects of that character’s personhood. Many authors of fan fiction use the name but frequently have the characters act out of character, or place the characters in an original or different setting than the canon author used. In many works of fan fiction, if the author were to change the recognizable names of the characters, the work would become unrecognizable to readers. Most authors of fan fiction do not use the speech that the canon authors use, but instead create altogether original dialogue and plots that never appeared in the canon.

The canon authors have clearly created characters that have achieved a kind of autonomy within the imagination of many people of the fan fiction community. The authors have expended enough creative effort into their copyrighted works to make their characters and world indefinitely sustainable within the minds of their fans. One of the ideas that retains the most force in the proliferation of fan fiction is the idea that fan fiction readers already know what characterization to assume from the characters and setting, and so authors of fan fiction need never actually borrow anything except names. Some authors attempt to achieve a similar narrative feel, or try to have characters act within character as much as possible, but for the most part, fan fiction relies on a communal mindset over actual expression of copyrighted elements. No single piece of fan fiction would be read if not for the understood emotional and character baseline that pre-exists the work. This baseline need not appear in the fan fiction work itself.

Is much of fan fiction accurately a copy of copyrightable expression of the original work at all? For the most part, this
The communal assumption aspect of fan fiction is not a legal defense to copyright infringement and remains an academic exercise in literary theory. There is no doubt that authors of fan fiction consider their works to take place in a copyrighted universe, or with borrowed copyrighted characters.

B. Claims Which Lie Outside of Copyright

1. Moral Rights

Some authors view fan fiction as infringing on any moral rights they may hold. Congress, however, has declined to extend legal moral rights protection to mass-market entertainment. So while fine visual artists hold “moral rights,” which allow them to prevent prejudice to their honor or reputation caused by destruction or mutilation of their original or limited-edition works of recognized stature, even after sale, authors of books, movies and television shows do not hold the same moral rights. That Congress distinguished between “individual works of art” and “mass-produced creativity” suggests that “widely distributed characters ‘belong’ in part to the audiences who make them hits.”

2. Trademark

Some authors fear that fan fiction might dilute any trademarks they hold in their works under the Lanham Act. The Lanham Act contains the federal statutes governing trademark law in the United States. Courts have adopted three approaches to balance First Amendment interests in free speech with the protections of the Lanham Act: (a) the “likelihood of confusion” test; (b) the “alternative avenues” test; and (c) the Rogers v. Grimaldi test.

Under one approach, the “likelihood of confusion” test, a court analyzes:


129. Tushnet, supra note 23, at 676.


131. See id.

132. See Parks v. LaFace Records, 329 F.3d 437, 447 (6th Cir. 2003); Rogers v. Grimaldi, 875 F. 2d 994, 999 (2d Cir. 1989).
1) the strength of the plaintiff’s mark; 2) the relatedness of the goods; 3) the similarity of the marks; 4) evidence of actual confusion; 5) the marketing channels used; 6) the likely degree of purchaser care; 7) the defendant’s intent in selecting the mark; and 8) the likelihood of expansion in the product lines of the parties.133

A second approach is the “alternative avenues” test. Under the “alternative avenues” test, if sufficient alternate means exist allowing for an artist to convey an idea, the title of an expressive work will not be allowed protection through a false advertising claim.134

The third approach comes from the Second Circuit case Rogers v. Grimaldi, which the Third, Fifth, Sixth and Ninth Circuits follow as well. Under Rogers, a title receives protection “unless it has ‘no artistic relevance’ to the underlying work or, if there is artistic relevance, the title ‘explicitly misleads as to the source or the content of the work.’ ”135

Authors of fan fiction neither sell their works nor attribute those works to the canon authors. In addition, it is customary in fandom to add a disclaimer before all works of fan fiction,136 and courts have held that such disclaimers are adequate to distance the owner of the trademark from the user of the trademark.137 Such disclaimers are customary in fandom.

3. Libel

Real people may have tort libel claims against authors of a certain fan fiction category called “real person fiction” – fictionalized stories which feature real people, most often celebrities or even politicians.138 Under libel, however, the general rule is that when the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, meaning with knowledge that it was false or with reckless disregard of whether it was false or not.139 Fan fiction, as is self-evident from its title, is fiction. Authors of fan fiction

133. Id. at 447-48.
134. Id. at 448.
135. Id. (citing Rogers, 875 at 999).
136. See generally FanFiction.com, supra note 18 (illustrating the frequent use of disclaimers).
make no claims that what they write is the truth, and in fact notify the reader that their stories are untrue.140

Ultimately, claims based on moral rights, trademarks, and libel are not strong legal arguments against fan fiction. The norms of fan fiction address the concerns that creators of original works have, and Congress has thus far not allowed authors to extend their reach into fan fiction under these claims. The strongest arguments for the protection of fan fiction lie within copyright law.

C. Why Should There Be a Fair Use Exception for Fan Fiction?

1. Author Responses to Fan Fiction

[T]hose who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.141

I suppose the character is public ground. If you’re willing to bring it into people’s houses every week, the [fans] are entitled to certain liberties, wherever their imagination is carried by those characters.142

Since fan fiction first sprang up on the Internet, authors have responded with varying levels of support or outrage.143 Some authors have publicly expressed their support for the fan fiction community, adding that as long as the fan fiction is not attributed to them or exploited for a commercial purpose, they have no problem with it.144 The canon authors recognize that fan fiction clearly has value to fans, and view it with varying degrees of tolerance.145


142. Cynthia Brouse, Internet Authors Put TV Buddies in Unusual Romances, GLOBE & MAIL (Toronto), Aug. 8, 1998, at C6, available at 1998 WLNR 6225251 (alterations in original; internal quotations omitted) (quoting Paul Gross, who plays Benton Fraser on Due South and also serves as the show’s executive producer).


Other authors view it with contempt or anger, and actively attempt to stamp it out through legal threats.146 The fan fiction community has responded to this either by respecting the authors’ wishes or with defiance and outrage of its own. A website called Defense Against the Dark Arts, along with its partner website PotterWar, launched a boycott against all Harry Potter products developed by AOL-Time Warner.147 Defense Against the Dark Arts’ mission is embodied in their tagline, “Protecting Fans from the Real You-Know-Who,” referring to corporations who try to quash fan websites.148 The media sometimes publicizes these “clashes,” producing negative publicity about a company. These clashes often appear in David and Goliath terms, with an individual bullied by a large corporation.149

2. The Advantages of a Fair Use Exception for Fan Fiction

Fan websites can help the entertainment industry, considering that “the promotional costs often far outweigh the other costs associated with a creation.”150 When publishers choose to publish books, it is like tapping into a vein of gold. Publishers are looking for authors that have lasting commercial value and that can be established as a brand name. Once an author has reached a certain level of popularity, the name — more so than the book itself — sells the book, so it is well worth publishers’ resources to establish that brand,

commercially exploiting characters I’ve created, and are doing it for each other, I don’t see that there’s any harm in it, and given how much people enjoy it, it’s obviously doing some good. It doesn’t bother me. . . . [I’ts a good place to write while you’ve still got training wheels on – someone else’s character or worlds. . . . I do understand that there are grey areas, and I think of fan fiction as existing in them. . . . But I’d hope you’d see it as a privilege and not a right.”). 146. See Linton Weeks, IT was a dark+stormy Nite… Online, Anyone Who Types Can Be a ‘Writer.’ In Theory, That Is, WASHINGTONPOST.COM, Feb. 1, 2004, at D01 (“A few authors, including Anne Rice and Nora Roberts, have objected to the genre. (Rice says she is still developing her characters and doesn’t need any amateur assistance.).”)


149. See Jason Kottke, Osil8 Thwarted by the Man, at http://www.osil8.com/episodes/99/03/29/index.html (last visited Feb. 26, 2006) (Showing the "damn the man" mentality and open-source nature of the Internet. The webmaster removed a parody of the 3Com Palm V organizer advertisement after a threat from 3Com’s legal staff, but the site contains links to other sites that have posted copies of the original spoof); McCarthy, supra note 1 (discussing Warner Bros.’s threat of legal action against a Harry Potter fan site).

and a tremendous amount of those resources go into publicity. Observers have noted that the opening of a book has increasingly come to resemble the opening of a movie, and that “[l]ike the film and music industries, publishing is now driven wholly by the search for blockbuster books . . . .”

Many authors benefit from the Internet and online retailers’ marketing efforts, such as making available portions of the authors’ works to encourage sales. Online markets sometimes have a way for readers to look at the cover illustrations as well as the back cover descriptions that are often among the main reasons that readers purchase particular books – a cover catches their eye, and then they decide to read more about the book.

Unofficial fan websites containing fan fiction contain links to other sites (like webrings), which help develop a web community that is financially and emotionally invested in the original work and linked to these unofficial sites. The information contained in these sites may be distributed to a limitless number of readers, unlike book, television, newspaper, and radio advertising, which have a finite reach. The presence of an Internet fan community itself is useful to publishers because, within the community, “consumers [hopefully] will feel pressure to purchase these popular creative products to allow them to join conversations with friends about the movie plotline, television character, or book, and to belong to the group of consumers that has enjoyed the popular creative work.” Legal scholars arguing for allowing personal use of creative works have noted that “it is likely to be to rights-holders’ long-term economic advantage to allow some level of unauthorized use by consumers . . . . It is apparent that some

151. Popular deceased authors’ names have sometimes been trademarked, and then sold as the brand of book fans of that author are looking for. See Business Center (CNBC television broadcast, Oct. 10, 2002); J. Cokley, Hell to Pay When a ‘Dead’ Author Writes, SUNDAY MAIL (Queensl.), Sept. 22, 1991; Linton Weeks, Ghost Writers in the Sky: A Popular Author’s Death No Longer Means the End of a Career, WASH. POST, Aug. 6, 1999, at C01.


157. Nadel, supra note 150, at 798 (citations omitted).
degree of unauthorized copying and use expands rights-holders’ markets and contributes to the development of new markets.”

In addition to marketing and free advertising, fan fiction and its associated sites are also a good gauge for the popularity of a book series, show, or movie. Observers of entertainment culture note that finding a web community with fan fiction is “the ultimate signal of cult status.” Some argue that fan fiction actually helps contribute to cult status and popularity of a creative work, but whether readers want to engage in a “chicken or the egg” debate, it is clear that fan fiction communities are certainly a symptom of popularity, if not the sole reason for that popularity. Apart from commercial gain for publishers and authors, fan fiction serves as a social phenomenon of cultural significance, as a subject of academic discussion and theories concerning modern communication in the Internet age.

D. Case for Categorical Uniformity

Some have suggested that fair use as applied to fan fiction should be considered piecemeal, that no real exception should be carved out for the category as a whole, and that the defense should be applied to each individual case and not to all Internet fan fiction. However, it seems clear that the real danger is not from authors or publishers who actually bringing suit against individual authors of fan fiction, but rather the threat of litigation, which most authors of fan fiction can ill afford. These cases are often bad for public relations, paralleling the individual suits against people who download music by the recording industry. It is difficult to prohibit actions that are acceptable according to cultural norms, but it does not stop publishers and authors from trying. How does one remove the threat of suit when it is anyone’s guess as to whether the suit will be successful?

The standards for invoking the fair use doctrine are so vague that the fear of litigation often chills the creation of important fan fiction. At best, a fan can only cross her fingers and hope that her

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161. See McCardle, *supra* note 5.
162. Nadel, *supra* note 150, at 806 (“Thus, the clear message these cases send to creators (and publishers) who seek to build on others’ idea is: if you publish it, they will come ... to get you.”).
163. *Id.*
site does not catch the eye of someone with deep pockets. We need a more uniform and even-handed application of a fair use defense to fan fiction because, oftentimes, it is too cost prohibitive for an individual to litigate, and so the legal threat contained within cease-and-desist letters suffices to silence most if not all authors of fan fiction. Most fans do not consider it worthwhile to litigate over a single work of fan fiction, and will remove the offending work from their website, even though that work often will end up on another website, or will be available by email to interested members of the online fan community.

There are certain uniformities of fan fiction as a whole that distinguish it from a literary category such as parody or satire, and which argue strongly for making an exception for it. The purpose of Internet fan fiction is not turning a profit. Internet fan fiction will never be sold, largely because people will opt out of the market where payment is required (and quality is dubious). Further, when there is such a proliferation of free fan fiction, there is no problem finding new sites. As for economic value, a minor issue exists as to what sort of revenue webmasters amass from fan fiction websites – but it is likely that the amount is legally negligible, and is not for any particular piece of fan fiction, but rather for the upkeep of the website.

Legal scholars have observed that the public generally believes that there is a distinction between commercial and noncommercial activities, with the former constituting infringement and the latter acceptable behavior; and while that perception has never been the law, it has largely reflected actual practice. Publishers will often forgo the legal resources where there is no illegal diversion of profits. Additionally, the norms of fan fiction help to alleviate the moral rights-rooted fears of canon authors that the fan fiction will be attributed to them; it is customary for authors of fan fiction to insert disclaimers before the text of their work.

The ideas that academics offer about literary theory and textual analysis may serve to alleviate fan fiction authors’ fears, but they may not get an author far with a court. The commercial theories that stem from Internet culture will speak to the fears of publishers, and the cultural norms of fandom speak to author’s fears. It seems


166. See generally AdultFanFiction.net, supra note 140 (providing a general disclaimer at the bottom of the homepage); FanFiction.net, supra note 18 (hosting a community for authors to submit fan fiction with disclaimers as to character ownership).
fair to say that some courts will be sympathetic to the cultural value of fan fiction, while others will consider that the authors' rights outweigh any good the public may derive from the writing and reading of fan fiction.

E. Fair Use Analysis

1. Purpose and Character of the Use

It is clear that fan fiction does not serve a commercial purpose, and as such, the primary question we must determine is whether the work is transformative. It is useful to examine the reasons why people write fan fiction, and what sort of cultural and social value may be derived from the writing and reading of fan fiction. The best way to do this is by looking at the different types of fan fiction that exist in fandom.

The most popular collection of Internet fan fiction appears at FanFiction.net, whose header reads, “Unleash your imagination and free your soul.”167 Throughout the website’s history, FanFiction.net has experimented with a variety of different categories and rating schemes, and removed many categories and articles or otherwise made them inaccessible to authors of fan fiction.168 In a collection of online petitions, authors of fan fiction air their grievances concerning FanFiction.net’s removal of their favored categories.169 Most apologists of fan fiction describe their reasons for writing fan fiction in broad emotional terms, emphasizing the power that characters and worlds have over their imagination and dreams, and how much the original work holds sway over the discourse of their everyday lives.

The value in fans being able to actively engage with the stories that have such force in their lives is clear in individual terms, but is it also transformative? Some apologists claim that fan fiction has importance for readers as well as writers, that there is value in fan fiction as a form of mass communication as well as in what fan fiction does for the individual writer.170 Fan fiction derives part of its value

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167. Id.
170. See In Defense of Fan Fiction [sic], http://hansonfiction.com/llamaesque/
from its existence as a class or category of social commentary, as opposed to simply the effect of individual works of fan fiction. This aggregate benefit lends itself to an argument for a fair use exception across the board.

Fan fiction has gained increasing visibility in both mass media and academia, and thinkers in both arenas have developed various theories about the purposes and functions of fan fiction. Commentators have noted:

Although the creators and producers of a TV show may intend for their product to be interpreted in one way, it is the reworking by its loyal fans, which perhaps may be in diametrical opposition to the original intent of the material, which gives deeper meaning to the work. It is this tension between user and creator that motivates textual poaching by fans.171

The fans struggle “to articulate to themselves and others unrealized possibilities within the original works. . . . In the process, fans cease to be simply an audience for popular texts; instead, they become active participants in the construction and circulation of textual meanings.”172 Fan fiction writers “do not so much reproduce the primary text as they rework and rewrite it, repairing or dismissing unsatisfying aspects, developing interests not sufficiently explored.”173

One of the most interesting and important developments in fan fiction is the development of slash.174 The majority of slash authors
are heterosexual women. Scholars have asserted that slash “may be fandom’s most original contribution to the field of popular literature.” In *Textual Poachers*, Jenkins notes that slash is “not so much a genre about sex as it is a genre about the limitations of traditional masculinity.” Jenkins maintains that slash, “like most of fan culture, represents a negotiation rather than a radical break with the ideological construction of mass culture; slash, like other forms of fan writing, strives for a balance between reworking the series material and remaining true to the original characterizations.” The ultimate importance of slash may lie in its “questioning of sexuality and popular culture [rather] than for its specific answers.”

Other scholars have approached fan fiction from varying perspectives, and some commentators have noticed that fan fiction authors often engage with the dominant culture, showing loyalty to a particular program, but also diverge from the plot. Scholars seem to agree that fan fiction serves as a valuable discussion and reworking of dominant popular culture. Commentators in the mass media also seem to recognize that fan fiction is a social phenomenon that serves as an ongoing dialogue between the creators and consumers of popular cultural works.

Some theorists have suggested that fair use protection should apply only when a work offers commentary that is critical of the original. These parodies should be protected because creators of an original work will refuse to license derivative works that “damage the
public reputation of the originals through negative criticism,” and these copyright holders cannot have the power to censor those works critical of their own. Some courts have noted, however, that “the fair use doctrine is broad enough to protect even those commentaries that are not so damaging that the original author would refuse to license them for a fee.” For the reasons outlined above, it seems likely that courts will also consider fan fiction as a transformative class of creative work, and thus this factor cuts in favor of fan fiction.

2. The Nature of the Copyrighted Work

Most fan fiction finds its basis in copyrighted original creative works, which receive greater protection than derivative works or factual compilations. While this factor weighs in favor of the copyright holder, legal scholars and courts have attributed little to no value to this factor “when assessed in the context of certain transformative uses.”

3. Amount and Substantiality of the Use

The third factor utilizes the substantial similarity test to determine whether the copying is “quantitatively and qualitatively sufficient to support the legal conclusion that infringement . . . has occurred.” The qualitative component concerns the copying of expression, while the quantitative component concerns the amount of the copyrighted work appearing in the subsequent work. “There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”

If a work of fan fiction consisted only of verbatim duplication of the canon that the fan fiction author claimed as her own, it would not be subject to a fair use defense. This is never the case with fan fiction, however, because the purpose of fan fiction is not to “create

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184. See Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d Cir. 1998); Gordon, supra note 183; Posner, supra note 183.
185. See, e.g., Leibovitz, 137 F.3d at 115 n.3 (“A parodist need not demonstrate that the copyright owner would prohibit the use in order to qualify the copy as fair use under Campbell.”).
186. Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 144 (2d Cir. 1998).
187. See id.; Nimmer supra note 4; see also supra text and accompanying notes 85-87.
188. Castle Rock, 150 F.3d at 138 (quoting Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997)).
189. Id.
something which already exists in that exact form. Some authors claim that their works of fan fiction are parodies, while others are more earnest in scope. If a fan fiction author purports or intends to be faithfully duplicating an author's voice or characterization, does this automatically count against her under a fair use defense?

Sometimes the author uses certain narrative or rhetorical structures in order to evoke the feel of the canon work, a technique which is similarly used in parody.¹⁹¹ The fan fiction often does not need to use too much of the author's narrative devices, because the mention of elements of the world or characters is frequently enough to invoke the emotional "baseline" which fans of the canon recognize and understand.

4. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

Internet fan fiction generally does not usurp the demand for the canon author's work through the fan fiction author's copying of expression protected in the original work. A possible complication enters the picture when authors market an original work in a "fan fiction" universe where multiple authors get to play, and the works are not part of the continuity of the original universe.¹⁹² A publisher would have a stronger argument that fan fiction occupies a place in a profitable derivative market in this scenario. Authors of fan fiction do not write Internet fan fiction for a profit, however, and thus Internet fan fiction does not divert any profits from original authors or publishers.

A publisher may argue that the proliferation of fan fiction decreases the demand for new original works, but much of fan fiction acts as a gap filler, because there are not enough original works on the market. Also, because of the nature of fan fiction, it is unlikely that fan fiction will ever be licensed out in a derivative market, because much of the value of fan fiction is reworking an idea that the canon asserts as dominant. Fan fiction acts as a complement to, rather than a substitute for, the original work, and it is likely that fan fiction sustains the commercial community for the original work as well.

¹⁹¹ Some fan fiction authors use phrases that are associated with particular characters, such as "Go ahead, make my day," associated with Dirty Harry, or they use a rhetorical style that a canon author uses, such as asyndetic narrative or a certain kind of first person narrative. Parody similarly uses the tropes of a genre or the particular quirks of an author in order to evoke the original work. See, e.g., All About Romance Novels, supra note 156.

¹⁹² Examples include "Star Trek," "Buffy the Vampire Slayer," and comic books.
There is often a long period between books, shows, or movies, and fan fiction keeps the canon work fresh and alive in fans’ minds. The Internet fan community also keeps fans updated on release dates and other commercial products of interest.

III. CONCLUSION

Scholars of popular culture seem to agree that fan fiction is a socially valuable phenomenon that is worth studying, but there are many topics worth studying that do not necessarily need to be given legal protection. As a form of mass communication in the Internet age, fan fiction serves as a dialogue about the dominant culture between consumers and producers of creative products. This transformative communication deserves protection from threats of litigation by authors or publishers. Internet fan fiction is a highly prevalent form of critique and examination of popular works which otherwise do not receive this kind of critical attention from literary communities. Literary communities tend to confine their scholarly critiques to works that they consider part of a literary canon, so Internet fan fiction is a non-scholarly, creative, critical form that is unique to popular culture, and is a form that anyone may use to engage with those works that help to shape popular cultural consciousness. Authors should not be able to silence these voices simply because fan fiction uniquely interacts with their canon works.

The best way to protect this useful, transformative category of creative works is through a categorical fair use exception for Internet fan fiction. The cultural norms of fandom set to rest authors’ fears of wrongful attribution, and publishers’ fears of trademark dilution or diminished profits. Fans write for love of the canon work, knowing that they will gain no profit from their fan fiction, but fan fiction serves beneficial uses to authors and publishers as well as the Internet community, providing free promotional efforts and numerous Internet links to commercial products of those publishers and authors.
Policies driving Copyright law serve to further the public interest through economic incentives. Authors lie on both sides of the spectrum, ranging from those who encourage fan fiction to those who want to stamp it out altogether. Those who wish to erase fan fiction entirely do so for reasons that are generally unrelated to economic concerns, and are instead rooted in feelings of moral rights and absolute possession over their works. Congress has chosen to strike a balance against the moral rights of authors of mass media, but fans may yet respect their favorite authors’ wishes. In fandom, both common sense and good faith still reign supreme.

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