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Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet

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I. INTRODUCTION

The second half of the 20th century saw the rise of several major developments in storytelling. The science fiction and fantasy genres erupted in popularity thanks to works such as J.R.R. Tolkien's *The Lord of the Rings* novels and George Lucas's *Star Wars* films. These works, along with others they inspired, hearkened back to myth and folklore and created vast, intricately detailed fantasy worlds for audiences to explore. Television shows such as *Star Trek* gained enormous followings made up of dedicated fans who wanted to know everything there was to know about the worlds of the stories. More recently, shows such as J.J. Abrams's *Lost* have once again redefined what it means to be a fan, with thousands of dedicated—some would even say obsessive—viewers meeting online to dissect every frame of that week's episode in order to uncover clues about the overall story.¹

The overwhelming popularity of these stories can be attributed to several factors. Globalization and advancements in technology are partly responsible; texts now reach sheer numbers of consumers that they never could have in the past. Another factor lies in the imaginative, immersive nature of the stories themselves. The first modern fantasy authors, most notably J.R.R. Tolkien and C.S. Lewis, introduced readers to constructed

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¹ James Poniewozik, *Why the Future of Television is Lost*, TIME MAGAZINE (Sept. 24, 2006), <http://perma.cc/KDP9-FZ7Y>.

worlds nearly as complete and real as the one they lived in. For Tolkien, the construction of fantasy worlds was not a childish waste of time but a sacred act of “sub-creation”² by which the author emulates God in building a “secondary world” that is self-sufficient, with coherent natural laws.³ A successful secondary world “must be as consistent and as interconnected as tree and leaf,”⁴ able to hold up under a reader’s scrutiny. Such worlds offer exciting new vistas to explore, prompting fans to eagerly pick them apart in order to learn about every aspect of their history, culture, and geography, and to imagine what other events might take place there outside the bounds of the author’s narrative.

In the 1960s, groups of *Star Trek* fans began writing and exchanging stories based on the characters and locales of the *Star Trek* universe.⁵ The stories were compiled in magazines, known as zines, and were distributed to limited audiences; typically they could only be acquired from others who were already fans. Fan conventions—gatherings where fans from disparate areas could get together and share their love of a particular story with each other—also sprang up at around this time.⁶ These fans collectively formed the first modern “fandom,” or community of fans dedicated to a particular work. For several decades, their activities remained underground and largely unknown to the wider public. In the late 1990s, however, this changed in a major way thanks to the public availability of a revolutionary technology: the Internet.⁷

The Internet has enabled a flowering of communication and creativity of a magnitude not seen since the invention of the printing press.⁸ Individuals can share ideas without the delay and cost associated with traditional means of publication. Fans from around the globe who would never have known of each other’s existence can now interact and build communities.⁹ Initially, online fan communities took the form of electronic mailing lists that often focused exclusively on a particular show or character. Today, fans commonly run blogs on sites such as Livejournal or Tumblr where they may discuss aspects of their everyday lives in

² KATHARYN CRABBE, J.R.R. TOLKIEN 153 (1981).

³ *Id.* at 154. Tolkien created the world of Middle-Earth in the hope of providing England with a mythology of its own; he was bothered by the fact that England had no native folklore but only fragments of Welsh, Norman, and Germanic myth.

⁴ *Id.*

⁵ Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997).

⁶ Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 41, 46 (Karen Hellekson & Kristina Busse eds., 2006).

⁷ Kristina Busse & Karen Hellekson, *Introduction in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET*, 5, 13 (Karen Hellekson & Kristina Busse eds., 2006).

⁸ Coppa, *supra* note 6, at 57–58.

⁹ *Id.* at 54–55.

addition to their fan activities.¹⁰ They can speak to one another across these distances in real time, as though sitting together in the same backyard, and new communities grow rapidly.¹¹ The Internet allowed a cross-pollination of what may have previously constituted recognizably distinct fandoms—media fans divided from celebrity fans divided from comics fans, and so on—resulting in the dissemination of ideas and jargon across fandoms, such that the sense of fandom as global community became even more pronounced.¹² The growth of transmedia storytelling has further blurred the lines between different types of fandom.

Despite this brave new landscape, the core of fan communities remains the same: a shared love of stories and a desire to explore, critique, and celebrate those stories with other fans. The exchange of fan fiction¹³ remains an important part of the discussion that takes place within these communities. The greater visibility of fandom, however, has brought its own problems. As more and more creators become aware of the fact that individuals may be producing fan fiction based on their original properties, fans face an increased risk of legal action on the part of creators who believe that fan fiction infringes upon their copyrights.¹⁴ Fan fiction is therefore a “potential liability bomb” for the fans who write it.¹⁵

This note argues that fan fiction as a cultural practice should be permitted under copyright law even though not all individual works of fan fiction would necessarily constitute fair use under today’s analysis. A blanket protection for fan fiction is feasible because the type of fan fiction with which this note is concerned is an exclusively noncommercial practice that resembles the kind of private, imaginative uses that have long been permissible despite the presence of copyright. Fan fiction is an important medium for community building and cultural comment through which consumers engage with the texts that affect them the most, and within which marginalized groups can reinvent the narratives of the dominant culture. Fan fiction’s role as cultural dialogue and its potential to infringe on copyrights allow it to serve as a crucible for issues at the intersection of copyright and the First Amendment. Copyright is not intended to prevent this type of use, but the legality of fan fiction under the current fair use regime is nevertheless uncertain and current free speech safeguards within copyright law provide inadequate protection. Finally, there is no evidence to suggest that fan fiction negatively affects the market for the original

¹⁰ *Id.* at 57.

¹¹ Anne Jamison, *The X-Files, Buffy, and the Rise of the Internet Fic Fandoms*, in *FIC: WHY FANFICTION IS TAKING OVER THE WORLD* 112 (Anne Jamison ed., 2013).

¹² Coppa, *supra* note 6, at 57.

¹³ Outside of academic discussion, “fan fiction” is usually written as one word—“fanfiction”—and may be shortened to “fanfic” or even simply “fic.”

¹⁴ Jamison, *supra* note 11, at 114–15.

¹⁵ AARON SCHWABACH, *FAN FICTION AND COPYRIGHT* 15 (2011).

work or its official derivative works. If anything, fan fiction is capable of introducing consumers to new works and expanding the market for the original properties.

II. DEFINING FAN FICTION

Fan communities, now more than ever, are responsible for generating tremendous bodies of creative work—including art, music, videos, graphics, prose, fiction and poetry—based popular texts.¹⁶ Aaron Schwabach provides a useful set of definitions which will be adhered to here:

a ‘fan’ is someone who enjoys works set in a particular fictional world or about a particular character or set of characters. The fans of a particular world or set of characters are, in the aggregate, a ‘fandom.’ A ‘fan work’ is any work by a fan, or indeed by anyone other than the content owner(s), set in such a fictional world or using such preexisting fictional characters.¹⁷

Arguably the most popular of type of fan work is fiction;¹⁸ after all, not everyone can afford video editing software, but anyone can try their hand at writing a story based on their favorite characters. These stories range in length from “drabbles” (bite-size works of exactly one hundred words) to novel-length epics. Stories may be written as gifts for other fans or in response to another story. An author might pen a short piece to accompany a favorite work of fan art as a way of thanking or starting a dialogue with the artist. These prose stories take the characters of the original work and place them in new situations, either within the setting of the original or in alternative settings where the characters are recognizably the same individuals but have different occupations, relationships, or lifestyles. Almost all fanfic today is distributed over the internet, either on fans’ personal blogs or websites, or on archives maintained by third parties.

Stories within the world of fan fiction are categorized in several different ways. On one level, they are categorized by genre, as mainstream fiction is—action/adventure, romance, supernatural, and many others. On another, they are grouped further into the categories of gen (general

¹⁶ Coppa, *supra* note 6, at 58. “Texts” here will refer to the original works around which fan communities are based, the works whose copyrights fanfic allegedly infringes. They may take the form of books, movies, television shows, graphic novels, web comics, or any other media used to tell narrative stories.

¹⁷ SCHWABACH, *supra* note 15, at 8.

¹⁸ Called fan fiction, fanfic, or even simply fic. Fanfiction is also sometimes written as a single word.

fiction), het (heterosexual romance), and slash (homosexual romance.)¹⁹ There is also a genre known as “real person fiction,” or RPF that deals with the lives of real people, usually celebrities or historical figures.²⁰ Stories may furthermore be labeled according to their relationship to the canon text; for example, an “episode fix” or “coda” is a story meant to supplement or alter an existing scene, while an alternate universe (AU) is a story in which some major element of the original, such as the historical time period or the characters’ roles or occupations, is changed.²¹

The body of fan fiction addressed by this note will be limited to stories based on fictional original works (as opposed to real people) and distributed for free over the internet. Other forms of fan fiction may raise different issues requiring a more conventional copyright analysis or, in the case of “real person fiction,” forays into rights of publicity.²² This note intends to distinguish this particular type of fan fiction from other types of potentially-infringing derivative works, and so an adherence to the category of noncommercial fiction-based stories is crucial. Likewise, “referential” fan works, such as the *Harry Potter* encyclopedia that was the subject of the litigation in *Warner Bros. v. RDR Books*, will not be included in this analysis.²³

III. WHY PROTECT FAN FICTION?

Fan fiction does not have the most flattering reputation.²⁴ Much of it (though certainly not all) is created by inexperienced writers and is of dubious literary value. Furthermore, much fan fiction is based not on classic works but on popular, contemporary stories which are themselves often accused of lacking such merit.²⁵ So the idea that fanfic should not only be accepted but afforded special protection under copyright law may well raise eyebrows. The value of fan fiction, however, is not in its literary merit, nor is it in the ability of fan fiction to launch the careers of new

¹⁹ Busse & Hellekson, *supra* note 7, at 10. The term “slash” comes from the practice of abbreviating pairing names with a backslash; the original example is believed to be “Kirk/Spock” to designate a story featuring Kirk and Spock in a romantic relationship.

²⁰ David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1, 36 n.206 (2011).

²¹ Busse & Hellekson, *supra* note 7, at 11.

²² Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1579–80 (2005).

²³ Warner Bros. Entertainment, v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

²⁴ Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 225, 229 (Karen Hellekson & Kristina Busse eds., 2006).

²⁵ Michelle Kerns, *Harold Bloom Says J.K. Rowling is Cliched, Stephen King is Inadequate; What, Then, Should We Read?*, THE EXAMINER (Apr. 7, 2009), <http://www.examiner.com/article/harold-bloom-says-j-k-rowling-is-cliched-stephen-king-inadequate-what-then-should-we-read>.

creators. Rather, fan fiction represents an increasingly important exercise of imaginative freedom that can serve as a response to, and occasional balm for, a culture increasingly driven by a handful of media conglomerates.

A. The World of Mass Media

Speech is more likely to be protected when it is part of the political and cultural discourse necessary for a functioning democratic society.²⁶ The role of fan fiction as speech is more easily understood when one considers the context in which fandoms and fanfic originated and the role that fanfic plays in that space. Today, the reach of popular culture is broader than ever, with books, movies, and television shows earning global fan followings thanks to mass marketing and online word of mouth. Ideas and information about popular texts can be shared across the Internet in seconds. In turn, mass media plays a larger role than ever in shaping our ideas about ourselves and our world. Images of beauty, ideas about gender, sexuality, and social roles, even concepts of good and evil, are all offered to us in the texts we experience every day.

A great deal of fan fiction is based on popular book and film series, many of which fall into the categories of science fiction and fantasy. Many of these stories are mega-franchises like *Harry Potter*, *Pirates of the Caribbean*, or Marvel's *The Avengers*. The cultural value of such stories is a subject of frequent debate. Questions of literary merit, however, are irrelevant when these massively popular stories have become undeniably ingrained in our culture: "[m]ass-media products are central features of everyday life. In addition to serving as common reference points for imagination and conversation, they shape the agenda for public discourse and reinforce or redirect widely held assumptions about our social and political universe."²⁷ The stories that reach the widest audiences, that inspire the largest numbers of people, are the stories that shape the world—for better or worse.

Popular stories can, in a sense, be understood to shape culture in a manner similar to the way in which language shapes thought; "[e]xisting works of authorship, ranging from scholarly texts to cartoon characters, may embody a significant part of the discourse, understandings, standards, norms, and even definition of social and professional groups," and "some expressive works have...come to populate and inform the very language of mass culture."²⁸ These works form the canon for today's cultural discourse just as much as the classics form the canon or "cauldron of story" from

²⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

²⁷ NEIL W. NETANEL, COPYRIGHT'S PARADOX 33 (2008).

²⁸ *Id.* at 134.

which today's literature emerges.²⁹ To simplify a complex and dynamic process, much of the cultural influence of stories occurs through a sort of feedback loop: a story may introduce a controversial element, such as a gay character; over time, the shock wears off, the public becomes more comfortable with the idea, and other writers feel more comfortable doing the same thing. This process of cultural change has accelerated in recent decades thanks to greater accessibility of media.

If stories control culture, then who controls the stories? Despite the emergence of new technologies that make it easier for independent artists to create and share their work, most of the stories the public encounters are owned and controlled by major media conglomerates.³⁰ A handful of corporations are responsible for a vast percentage of the content on the market.³¹ They decide which projects are financed and developed and in what ways those projects will be distributed. Film is arguably today's most influential medium, and the top six Hollywood studios routinely earn about 80% of the yearly market share.³² The studios' parent companies are larger still. Viacom, owner of Paramount Pictures, also controls the channels MTV, Comedy Central, Spike, and Nickelodeon, among many others.³³ These conglomerates make it a goal to amass vast copyright libraries and draw as much profit from those properties as possible.³⁴

The economics of the entertainment industry do not incentivize diversity in original works. Film studios gamble huge amounts of money on their top projects, and in turn they count on profits from those projects to cover the costs of any lower-budget, experimental pictures they produce. With this kind of money at stake, studios have come to rely on a limited set of story formulas that have proven to be successful. As long as these formulas continue to bring in revenue, the studios have little incentive to try anything more daring. Exacerbating the problem is the lack of diversity in the upper echelons of the entertainment industry; the majority of top decision-makers—executives, producers, directors—are overwhelmingly white and male (and most likely straight).³⁵ As a result, many blockbuster

²⁹ The "cauldron of story" is J.R.R. Tolkien's metaphor for the principle that all stories are formed from components of more ancient stories that have been "added to the pot" through the ages.

³⁰ NETANEL, *supra* note 27, at 43.

³¹ *Id.* at 144–45.

³² BOX OFFICE MOJO, <http://www.boxofficemojo.com/studio/?view-parent&view2=yearly&yr=2013&p=.htm> (last visited Mar. 16, 2014). These six studios are Buena Vista (Disney), Warner Bros., Paramount, 20th Century Fox, Sony, and Universal. "Independent" studio Lionsgate has, in recent years, often beaten out at least one of the six, largely thanks to their acquisition of such enormous properties as the *Twilight* and *Hunger Games* franchises.

³³ *About Viacom*, VIACOM, <http://www.viacom.com/about/pages/default.aspx> (last visited Mar. 16, 2014).

³⁴ NETANEL, *supra* note 27, at 145.

³⁵ Martha M. Lauzen, *Boxed In: Employment of Behind-the-Scenes and Onscreen Women in 2012-13 Prime-Time Television* (2013) <http://perma.cc/UA8L-M7SY>.

films continue to suffer from such problems as the underrepresentation of women, persons of color, and LGBT persons, and stereotypical portrayals or predictable plotlines for these characters when they are present at all.³⁶ In addition to making companies risk-averse, profit drives companies' treatment of copyrights. An entertainment company's copyright library represents its revenue-drawing capacity. In recent years, revenue from home video sales has exceeded box office receipts, providing companies with a strong incentive to cling to their copyright holdings for as long as possible.

B. "A Literature of the Subordinate"

When copyrighted properties are tied up in the possession of media companies, members of the general public are restricted in their use of those properties for purposes of creating their own expression and contributing to public discourse.³⁷ As a result, "given the skewed distribution of copyright holdings, copyright's speech burdens fall far more heavily on certain categories of speakers than on others."³⁸ Those certain categories include the members of the public who do not control vast copyright libraries; they include members of groups who do not often see themselves represented in media, and who lack the power to push stories through publishing houses or through the development departments of film studios.³⁹ In the end, entertainment companies control a majority of the content we see and there is little that individuals in the general public can do about it.⁴⁰

Fan fiction is one way of doing something about it. Fans are keenly aware of the extent to which they are at the mercy of the media producers who control their favorite texts.⁴¹ Fan fiction becomes a way for consumers, especially consumers belonging to demographics underrepresented in the entertainment industry, to engage with and respond to the stories that affect them the most.⁴² It is subversive in that it constitutes a taking-back of the text, a rejection of what Lawrence Lessig calls the "Read-Only" paradigm, in which consumers are expected to

³⁶ GLAAD 2013 Studio Responsibility Index (2013) <http://perma.cc/S3KP-85TM>.

³⁷ NETANEL, *supra* note 27, at 144.

³⁸ *Id.*

³⁹ Coppa, *supra* note 24, at 227. ("Few fan fiction writers will ever have access to the means of production for mass media storytelling").

⁴⁰ *Id.* at 227.

⁴¹ MARK DUFFET, UNDERSTANDING FANDOM: AN INTRODUCTION TO THE STUDY OF MEDIA FAN CULTURE 72 (2013).

⁴² Tushnet, *supra* note 5, at 657. ("Fans refuse to be passive consumers of the cultural productions that have deeply affected them.")

remain passive.⁴³ In fan communities, readers explore and critique the ideas presented in texts and, if necessary, reshape them. Fan fiction becomes a means of critical dialogue within those communities, where fans frame their responses not only to the original text but to the shared understandings and re-imaginings of the text that develop within the community.⁴⁴

Abigail Derecho interprets fan fiction as a type of “archontic” literature, or literature that builds on and responds to works that have come before.⁴⁵ The term archontic is favored over “derivative” or “appropriative” both because it lacks the slightly negative connotations of those terms and because it better conveys the idea that the texts in question are expansions upon or new perspectives on preceding texts, rather than inferior imitations.⁴⁶ The archontic text does not replace or devalue the original; rather, it exists simultaneously, as another possible reading that is equally as valuable and valid as the original.⁴⁷ In particular, “archontic writing has often been used as a technique of social, political, or cultural critique” by marginalized groups, including women and minorities.⁴⁸ Archontic writing allows members of subordinated groups to assert their identities and experiences as valuable.⁴⁹ For this reason, Derecho calls archontic literature, and particularly fan fiction, “a literature of the subordinate.”⁵⁰ Classifying fan fiction as archontic helps to illuminate the relationship between fan fiction as art and fan fiction as practice.⁵¹ The creation of archontic literature is as much about the act of reclaiming narratives and asserting identities as it is about the end product of the new artistic endeavor.⁵²

Not coincidentally, the vast majority of fan authors—as many as 90%—are women, even though fan culture is perceived to be male-dominated.⁵³ The reason for this has been the subject of much scholarly investigation. The answer may be that men seldom feel the need to reinvent their favorite stories, since they are the target audience and many of the stories on the market tend to validate their existing views about the

⁴³ Emily Chaloner, *A Story of Her Own: A Feminist Critique of Copyright Law*, 6 V/S: J. L. & POL’Y FOR INFO. SOC’Y 221, 224–25 (2010).

⁴⁴ SCHWABACH, *supra* note 15, at 18.

⁴⁵ Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 63 (Karen Hellekson & Kristina Busse eds., 2006).

⁴⁶ The term “archontic” is related to “archive.” *Id.* at 64.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.* at 66–67.

⁴⁹ *Id.* at 76.

⁵⁰ *Id.* at 71.

⁵¹ Derecho, *supra* note 45, at 63.

⁵² *Id.* at 72.

⁵³ HENRY JENKINS, *FANS, BLOGGERS, AND GAMERS: EXPLORING PARTICIPATORY CULTURE* 43 (2006). (“Media fan writing is an almost exclusively feminine response to mass media texts”).

world.⁵⁴ Women, on the other hand, “are often forced to perform a kind of intellectual transvestism—identifying with male characters in opposition to their own cultural experiences” and respond by inventing alternative texts as a means of “explor[ing] their own narrative concerns.”⁵⁵ Whether because of the unsatisfactory representation of female characters or the perpetuation of harmful constructions of masculinity, women have good reason to be dissatisfied with the texts of the dominant culture.⁵⁶

Fan writing can be viewed as an evolution of a private oral and written culture that women have long used to share their experiences and construct identities apart from the dominant culture.⁵⁷ In the Victorian era, women exchanged letters with one another as a means of alleviating the isolation they often felt within their strictly patriarchal world.⁵⁸ Today, the characters and stories presented in mass media provide women with “shared points of reference to confront many of the same issues that concerned nineteenth-century women: religion, gender roles, sexuality, family, and professional ambition.”⁵⁹ Slash, one of the more frequently studied genres of fan fiction, is a powerful example of women’s reconfiguring of popular texts.⁶⁰ Slash is a way of reading female pleasures and experiences onto male protagonists while critiquing traditional masculinity.⁶¹ In a society where women may “feel like tourists” when viewing popular texts, it allows women to better identify with those protagonists in a roundabout way.⁶² Slash is “an unpoliticized, uncensored forum for female networking.”⁶³

Fan fiction may not always be obvious in its critique or reworking of its source material. Some works of fan fiction do, to all appearances, uphold societal norms and endorse the text’s narrative.⁶⁴ It is “a literature of reform, not of revolt.”⁶⁵ Fans celebrate their love of the original work even as they rework the text to their own tastes. Fan fiction is paradoxical in that it is simultaneously created out of love for the text even while it is ultimately an expression of the fact that the source text as “completed” by the author is still in a sense insufficient; the original can never explore all

⁵⁴ *Id.* at 44.

⁵⁵ *Id.*

⁵⁶ DUFFET, *supra* note 41, at 203.

⁵⁷ JENKINS, *supra* note 53, at 44.

⁵⁸ *Id.* at 44–45.

⁵⁹ *Id.* at 45.

⁶⁰ In slash stories, normally-heterosexual male characters are construed as sharing homosexual interest in one another. The sociological implications of slash are complex and have been much-studied. For a more thorough discussion, see JENKINS, *supra* note 53, at 37–112.

⁶¹ DUFFET, *supra* note 41, at 173.

⁶² *Id.*

⁶³ *Id.* at 177.

⁶⁴ Derecho, *supra* note 45, at 71.

⁶⁵ JENKINS, *supra* note 53, at 54.

possibilities latent within itself, or else there would never be a finished work. This is especially true of the expansive science-fiction and fantasy worlds featured in many of today's most popular texts. Derecho notes that even non-critical fan fiction is a "resistant" practice because through it fan writers—especially women—defy copyright holders' demands that they passively accept the narratives they are given.

IV. FAN FICTION UNDER COPYRIGHT LAW

A. Creators' Responses

Fan writers face a problem. The majority of the works about which fan fiction is written are still—and will be for some time—under copyright. While fan fiction for public domain works does exist (there is fan fiction for some of Shakespeare's plays, for instance), the works that inspire the most fanfic tend to be multi-part books, films, and television shows that are often in the aforementioned sci-fi and fantasy genres, and that have been released in the past half-century. Meanwhile, many of these franchise works remain highly lucrative. In recent years, more and more people have become aware of the existence of fanfic. The internet, which allows fans to communicate and quickly distribute fanfic free of charge, also makes fan works accessible to the creators of the properties on which the works are based.⁶⁶

Henry Jenkins notes that, on the whole, "the media industries do not quite know how to react to fan creativity."⁶⁷ They seem to recognize the benefits that having such devoted fans can bring—free publicity, enthusiastic consumers—but they often take issue when fan authors appear to change or reinterpret their texts in any way.⁶⁸ Some copyright holders, like *Vampire Chronicles* author Anne Rice, are infamous for their hostility toward any fan tampering with their stories.⁶⁹ For others, fan creativity is acceptable only so long as it stays in line with copyright holders' intentions for the text.⁷⁰ Some copyright holders fear that fan fiction represents a loss of the owner's ability to control the image of the copyrighted work.⁷¹ For this reason, some copyright holders only approve of fan fiction that is

⁶⁶ The television show *Supernatural*, entering its tenth season as of this writing, recently aired an episode entitled "Fan Fiction." The episode poked fun at fans' interpretations of the series while offering a surprising show of support for fan creativity. *Supernatural: Fan Fiction* (Kripke Enterprises Nov. 11, 2014).

⁶⁷ HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 154 (2008).

⁶⁸ DUFFET, *supra* note 41, at 72.

⁶⁹ Mollie E. Nolan, Comment, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533, 556-57 (2006). Rice has drawn back somewhat from her earlier stance, but her reputation as virulently anti-fic nonetheless persists amongst fans.

⁷⁰ DUFFET, *supra* note 41, at 176.

⁷¹ *Id.* at 175.

produced according to guidelines that they set forth, as in the case of LucasFilm's official online fan fiction archive.⁷² J.K. Rowling has stated that she does not mind fan fiction as long as it is not sexually explicit.⁷³

Authors' responses to fan fiction often betray a skewed understanding of the purpose of copyright law and the protections it affords.⁷⁴ The language used in many cases seems to indicate a belief in a sort of moral right to their works. Stephanie Meyer, author of the *Twilight* novels, posted a statement online in response to the premature leak of one of her manuscripts. She described the leak as "a huge violation of my rights as an author, not to mention me as a human being."⁷⁵ While she was not speaking about fan fiction in this instance, the statement provides insight into her understanding of copyright law. The leak of the manuscript was wrong, but not for the reasons Meyer thinks. She frames the injury done to her as a moral wrong, rather than an economic one.⁷⁶ Moral rights, however, do not exist for literary works under U.S. copyright law, and authors lack a basis for asserting control over fan fiction on such grounds.⁷⁷

Some authors' reputation-related assertions may stem from an economic argument, out of the belief that fan works that do not conform to the author's vision for the text (for example, sexually explicit fanfic) may harm the public's image of the text. This is likewise a misunderstanding on the authors' part. Reader interpretation and public opinion of a text, however, cannot be controlled by copyright.⁷⁸ In the end, how media producers react to fan creativity and how they treat fan authors seems to depend on how they're feeling on a particular day and how they perceive—based on evidence or not—the fanworks affect their moral interests or financial bottom line.⁷⁹ This approach to fan fiction is not grounded in the law and may constitute unnecessary chilling of fans' speech.

B. Fans' Defenses

The defenses that fans raise in response to accusations of infringement

⁷² WILL BROOKER, USING THE FORCE: CREATIVITY, COMMUNITY, AND *STAR WARS* FANS 168–69 (2002).

⁷³ Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC News (May 27, 2004, 7:11 AM), <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm>.

⁷⁴ Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 17 (2010).

⁷⁵ Stephenie Meyer, *Midnight Sun: Edward's Version of Twilight*, THE OFFICIAL WEBSITE OF STEPHENIE MEYER (Aug. 28, 2008) <http://stepheniemeyer.com/midnightsun.html>.

⁷⁶ Lipton, *supra* note 74, at 17.

⁷⁷ Christian Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 439 (2006). The only exception is the Visual Artists Rights Act ("VARA"), which affords moral rights to limited categories of works which are not at issue here. Visual Artists Rights Act of 1990, 17 U.S.C. §§ 101, 106(a) (2000).

⁷⁸ Tushnet, *supra* note 5, at 674–75.

⁷⁹ DUFFET, *supra* note 41, at 176.

help to reveal how fans perceive their work and their purpose in creating it. Fans frequently make two assertions about why fan fiction is or should be legal. They first point out that fan fiction is noncommercial; that is, fans receive no monetary compensation for their work in creating fanfic.⁸⁰ Fan writers will often assert this fact in a disclaimer at the opening of a story.⁸¹ Fans base this assertion on the first fair use factor, which asks whether the “purpose and character” of the use is commercial or noncommercial in nature, as well as whether it is for educational or similar nonprofit purposes.⁸² This reliance on noncommerciality as a determining factor in fair use makes some sense from the point of view of a layperson. A basic understanding of copyright law is that its purpose is to grant certain exclusive economic rights to creators and that it is illegal to make money off of someone else’s creativity. It should follow that if no money is made, the use must not be problematic under copyright law. This reasoning, however, has been explicitly denied by courts: “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement” just as not all for-profit uses are automatically infringement.⁸³ While noncommerciality does weigh heavily in a defendant’s favor,⁸⁴ courts have made it clear that in the absence of other considerations it is not enough to rely upon.

In addition to asserting noncommerciality, fans often claim that their work is sufficiently transformative to be considered fair use.⁸⁵ The Organization for Transformative Works (OTW), a nonprofit group dedicated to preserving and promoting fan culture, advocates for the legality of fan fiction as fair use, citing fan fiction’s transformativeness as the primary basis for this claim.⁸⁶ Transformative use doctrine asks whether the secondary work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message [...]”⁸⁷ Courts strongly favor transformative works under fair use analysis because “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works,” which advance cultural dialogue by adding new ideas to old or revealing new facets of an original work.⁸⁸

⁸⁰ SCHWABACH, *supra* note 15, at 86.

⁸¹ Tushnet, *supra* note 5, at 678–79.

⁸² 17 U.S.C. § 107 (1994).

⁸³ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 584 (1994).

⁸⁴ Anne Jamison, *The Briar Patch*, in *Fic: Why Fan Fiction is Taking Over the World* 276 (Anne Jamison, ed., 2013).

⁸⁵ Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 19 INTELL. PROP. L. BULL. 183, 207 (2014).

⁸⁶ *Frequently Asked Questions*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <http://perma.cc/PB95-MYEEY> (last visited Mar. 17, 2014).

⁸⁷ *Campbell*, 510 U.S. at 579.

⁸⁸ *Id.*

C. Fan Fiction and Fair Use

Some previous articles have agreed that fan fiction may be protected under current fair use, suggesting that it be granted a special exception akin to the one allowed for parody.⁸⁹ They argue that fan fiction resembles parody in that it is an art form which involves copying expression from a source text in order to comment in some way upon that text. Parody is one example of a situation in which the courts seemed to bend the rules of fair use analysis in order to accommodate what they believed was the right outcome according to free speech principles, as in *Campbell v. Acuff-Rose Music*, a case involving a rap parody of the song “Pretty Woman.”⁹⁰ The purpose of parody is not to borrow from an original work so as to “avoid the drudgery in working up something fresh” but rather to engage with that work and point out another way of looking at it.⁹¹ The effectiveness of a parody depends on the copying that allows it to evoke the original work, the very thing likely to make the parody infringe on the copyright of the original.⁹² Courts are therefore directed to be more permissive toward copying within works that are parodies or critical reinterpretations.⁹³ These observations apply even when a parody is commercial.⁹⁴ This does not mean that all parodies are fair use, but it does demonstrate a case in which standard fair use analysis is modified so that copyright can better accommodate free speech interests.

Three other points made in *Campbell* bear on an analysis of fan fiction. The first is that the artistic merit of a fair use parody or other derivative work is not relevant to its status as protected speech.⁹⁵ The Court pointed to *Yankee Publishing v. News America Publishing*, in which it was noted that “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”⁹⁶ An evaluation of fanfic, therefore, must not consider the fan writer’s skill to be a factor in whether or not her speech is protected. Secondly, a copyright holder’s denial of a license to the party wishing to create a derivative work does not mean the derivative work, subsequently created against the copyright holder’s wishes, is presumptively unfair.⁹⁷ Indeed, requiring the parodist to obtain a license—which the copyright holder, not wishing to allow the lampooning of his work, would never grant—would be an unfair

⁸⁹ See, e.g., Rachel Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTEL. PROP. L. REV. 191 (2010).

⁹⁰ *Campbell*, 510 U.S. at 572.

⁹¹ *Id.* at 580.

⁹² *Id.* at 588–89.

⁹³ *Id.* at 589.

⁹⁴ *Id.* at 584.

⁹⁵ *Campbell*, 510 U.S. at 582.

⁹⁶ *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

⁹⁷ *Campbell*, 510 U.S. at 592.

burden on speech. A copyright holder's displeasure with a parody of his work has no weight under U.S. copyright law; likewise, authors who object to fan fiction on moral grounds have no basis for doing so, because the reception and interpretation of their work by consumers is not something that copyright allows them to control. Thirdly, following from that observation, the Court stated that economic harm caused by a successful critical parody of a work does not give rise to a claim under copyright.⁹⁸ Harm to a work's reputation is not the same as harm that would be caused if a derivative work amounted to a substitute for the original.

Suntrust Bank v. Houghton Mifflin also involved an unauthorized derivative work; in that case, the defendant had taken *Gone with the Wind* and rewritten it from the perspective of one of the slaves.⁹⁹ The new novel, titled *The Wind Done Gone*, was deemed to be fair use.¹⁰⁰ *Suntrust* adopted a broad legal definition of parody: a work is a parody "if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work."¹⁰¹ A parody need not be humorous.¹⁰² The plaintiffs alleged that while *The Wind Done Gone* offered a critique of *Gone with the Wind*, it borrowed more from the original text than was necessary to identify the target of the parody.¹⁰³ The fact that a work copies more than the necessary minimum, however, does not make it automatically infringing.¹⁰⁴ Quoting the test set forth in *Campbell*, the court noted that copying extra details is acceptable if the work's overriding purpose is to parody and if it does not amount to a market substitute for the original.¹⁰⁵ To say that the copying of even nonessential details is potentially fair use is a concession relevant to the case of fan fiction because works of fanfic often do copy large amounts of detail in order to evoke the world of the original story. *Suntrust* and *Campbell* indicate that such copying does not automatically run against existing copyright law.

Some commentators agree with fans' assertion that fan fiction is universally transformative, arguing that it implicates the same principles addressed by courts in the parody cases and that any work of fan fiction, by its very nature, constitutes a comment on the original work.¹⁰⁶ According to this theory, even a story that does not significantly alter any of the

⁹⁸ *Id.* at 591-92.

⁹⁹ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

¹⁰⁰ *Id.* at 1276.

¹⁰¹ *Id.* at 1268-69.

¹⁰² *Id.* at 1269 n.23.

¹⁰³ *Id.* at 1272.

¹⁰⁴ *Id.* at 1273.

¹⁰⁵ *Suntrust*, 268 F.3d at 1273.

¹⁰⁶ Natalie Montano, *Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fiction*, 11 NW. J. TECH. & INTELL. PROP. 689, 33 (2013).

details of the original is a comment in that it expresses approval of the original.¹⁰⁷ That all fan fiction comments in some way on its source text may be technically true. To reach the level of legal transformativeness, however, a work must do more than merely affirm the values expressed by the original. It must instead contribute “something new, with a further purpose or different character, altering the first with new expression, meaning or message.”¹⁰⁸ Fan fiction that is insufficiently transformative may infringe the copyright holder’s derivative work right.¹⁰⁹ Transformative use doctrine’s complexity and its central role in arguments favoring fan fiction merit closer examination.

D. Is Fan Fiction Universally Transformative?

In recent years, transformativeness has risen to prominence as the most influential factor in fair use analysis.¹¹⁰ If a court finds a secondary use to be transformative, it will very likely find that use to be fair.¹¹¹ This is a reversal of traditional fair use analysis, in which the effect on the market factor held the favored position. Indeed, transformativeness has in some cases seemingly rendered the fourth factor redundant under the reasoning that if a use is transformative, it presumably will not function as a market replacement. If fan fiction were found to be universally transformative, a blanket finding of fair use would be much more plausible. Whether courts would make such a finding is, however, less clear than fans might like.

Despite its importance, transformativeness is ill-defined. Courts have adopted an “I know it when I see it” approach to transformative use that blurs the line between legal and artistic judgment.¹¹² Matthew Bunker and Clay Calvert have identified three unofficial categories of transformativeness, which courts have employed but not formally acknowledged. “New purpose” transformativeness does not physically change the original work but uses it for some purpose other than the one for which the author created it, such as a novel used for research rather than entertainment.¹¹³ “Creative metamorphosis” uses the original work as part of a new artistic creation without necessarily commenting in any way on the original.¹¹⁴ Finally, “new insight” is the type of transformativeness

¹⁰⁷ *Id.*

¹⁰⁸ *Campbell*, 510 U.S. at 579.

¹⁰⁹ Romanenkova, *supra* note 85, at 184.

¹¹⁰ See Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

¹¹¹ Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 76 (2012).

¹¹² Matthew Bunker and Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After Campbell v. Acuff-Rose Music*, 12 DUKE L. & TECH. REV. 92, 94 (2014).

¹¹³ *Id.* at 116.

¹¹⁴ *Id.* at 106.

made famous by *Campbell v. Acuff-Rose Music*, entailing the creation of a secondary work which critiques the original in some way.¹¹⁵ Further complicating the matter, some works that appear to be transformative may infringe the original author's derivative work right, which is generally accepted to include the right to produce, among other things, sequels and spin-offs based on one's work.

Two cases in particular pose a challenge for fan fiction on this front. In *Anderson v. Stallone*, the defendant had prepared a treatment for a sequel to the Rocky franchise, entitled "Rocky IV."¹¹⁶ He met with executives at MGM to discuss the possibility of developing Rocky IV and signed a waiver supposedly releasing the studio from liability that might arise from its future use of the treatment.¹¹⁷ MGM later used ideas very similar to those in Anderson's treatment to develop the story for Rocky IV without compensating Anderson.¹¹⁸ The court found that Anderson could not recover because his treatment was an infringing work not entitled to copyright protection due to its use of copyrighted characters from the first three Rocky screenplays.¹¹⁹ The court did not comment on whether the treatment would have been fair use in other circumstances. It only noted that Anderson's use of the Rocky characters, even though they had been placed in a new situation with a new storyline, was enough to constitute infringement.¹²⁰

In *Salinger v. Colting*, the defendant had written a novel entitled *60 Years Later*, which told the story of Holden Caulfield, the protagonist of *The Catcher in the Rye*, sixty years after the events of the original work.¹²¹ The court rejected Colting's claim that the new novel was a parody, since it "contain[ed] no reasonably discernable rejoinder or specific criticism of any character or theme of *Catcher*."¹²² The new work's exploration of the character at a later stage in life did not qualify as a transformative use but rather merely rehashed the themes of the original.¹²³ Citing the Second Circuit's test in *Castle Rock v. Carol Publishing*,¹²⁴ the court asserted that the transformation or recasting required to create a derivative work did not

¹¹⁵ *Id.* at 102.

¹¹⁶ *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431 at *1 (C.D. Cal. 1989).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *6.

¹²⁰ *Id.* at *8.

¹²¹ *Salinger v. Colting*, 641 F.Supp.2d 250 (S.D.N.Y. 2009). The Second Circuit reversed the district court's grant of a preliminary injunction but agreed with the district court as to the unlikelihood of Colting's success with a fair use defense. *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

¹²² *Id.* at 258.

¹²³ *Id.* at 259–60.

¹²⁴ *Castle Rock Enter. v. Carol Pub. Group*, 150 F.3d 132 (2d Cir. 1998).

make the use transformative for purposes of fair use.¹²⁵ While the added elements created “some transformative value,” they did not make the work consistently transformative.¹²⁶ *Salinger* seems to suggest that the sort of “new meaning” required by transformative use comes in types and degrees. A story that builds upon an original work and adds new insight to its themes may not necessarily add the kind of new meaning necessary for legal transformativeness, especially if the market for derivative works is at issue.

The *Salinger* court was not necessarily correct in its decision. Its narrow conception of transformativeness would block out many works that would seem to meet *Campbell’s* more general requirement for new meaning.¹²⁷ While they are imperfect precedent, *Anderson* and *Salinger* nevertheless shed a light on transformative use that may not be favorable to fan fiction. Some fan fiction does significantly alter the characters, settings, and message of its source, as did *The Wind Done Gone*, but other works more closely resemble offshoots of the original text, much like *60 Years Later*. These works sit on an uncomfortable borderline between transformative and derivative. The centrality of transformativeness to fair use means that if fan fiction cannot necessarily be affirmed as universally transformative, its prospects for a favorable outcome under a fair use analysis weaken. As a result, fan fiction ends up back where it began in the realm of legal uncertainty.

V. FAN FICTION AS PROTECTABLE SPEECH

A. Distinguishing Fan Fiction from Infringing Derivative Works

Despite fan fiction’s new home on the Internet, it is in fact an evolution of practices that have long been considered permissible. Fans who exchange fan fiction are sharing stories and reflections based on their favorite works in a way that resembles a private, non-infringing use of the original texts. Fans online “are typically not motivated to reach a broad audience or produce a marketable product. Their acts of speech, in fact, are more like participating in an ongoing conversation than producing a fixed, mass-distributed product.”¹²⁸ Each work of fan fiction builds on an existing text, and together they form a fluid dialogue in which no one work is the final word. Other fans may continue the conversation with discussion in a comments section, or by posting works of their own, such

¹²⁵ *Salinger*, 641 F.Supp.2d at 262.

¹²⁶ *Id.*

¹²⁷ Michelle Chatelain, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, 15 TUL. J. TECH. & INTELL. PROP. 199, 215–16 (2012).

¹²⁸ NETANEL, *supra* note 27, at 41.

that the body of work created by a fandom forms an ever-changing universe of interpretations surrounding the original text. A type of fan fiction known as “commentfic”¹²⁹ epitomizes this phenomenon. As its name implies, commentfic is posted in the comments section of another fan’s story or journal entry as a response to the preceding work. Because the dialogue boxes used to submit comments often come with character limits, commentfic is usually short.¹³⁰ Works of fan fiction shared in such a manner are never truly complete; another fan may always come along and add another comment.

Cultural taboos within fan communities prevent fans from seeking profit from their work, ensuring that fan fiction remains noncommercial.¹³¹ The Archive of Our Own (AO3), currently the Internet’s premier fan fiction archive, operates entirely off of donations and earns no revenue from advertising.¹³² Some individuals within fan communities have questioned the strength of this taboo in light of the recent commercial success of works such as *Fifty Shades of Grey*, which famously began life as a *Twilight* fanfic.¹³³ Such cases, however, form a fraction of a percent of all fan fiction, and any notion of profiting off of fan fiction is still frowned upon by a majority of fans.¹³⁴ This note does address such uses of fan fiction.

While fan fiction as an act of speech remains noncommercial, it feels like any other conversation at the office or on a park bench.¹³⁵ It would be deeply disturbing if individuals were suddenly prohibited from discussing the latest television shows with their colleagues, or if children were no longer allowed to play as their favorite characters and act out their own adventures. Such acts constitute “part of our creative appropriation of mass culture, the way we define ourselves in relation to the images and sounds of mass media that surround us. To make such acts infringing...feels like a gross impingement on our privacy, personal liberty, and self-expression.”¹³⁶ In the early days of fanfic, stories were distributed in magazines primarily because that was the best way fans had of communicating with each other across different parts of the world. Only rarely did fans have the opportunity to meet at conventions or other organized gatherings and speak to one another. The Internet changed all of this, “bring[ing] a vast new arena of expression and global communication

¹²⁹ *Commentfic*, FANLORE, <http://fanlore.org/wiki/Commentfic> (last visited Nov. 28, 2014).

¹³⁰ *Id.*

¹³¹ JAMISON, *supra* note 84.

¹³² *Frequently Asked Questions*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <http://perma.cc/PB95-MYEE> (last visited Mar. 17, 2014).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ NETANEL, *supra* note 27, at 73.

¹³⁶ *Id.*

within the embrace of what millions of Internet users experience as their personal, private, self-expressive domain.”¹³⁷ Now, every fan’s home has become a meeting space. In these spaces, surrounded by their peers and free from editorial pressures, fans exchange stories that convey their hopes, disappointments, and theories about their favorite characters. Author Naomi Novik characterizes the life of a fan community as one in which “[w]e were gathering around a campfire to sing and tell stories with our friends. The campfire was just a bigger one, and instead of telling new stories about Robin Hood, we told new stories about Captain Picard, because that was who we saw on television every week.”¹³⁸ The Internet makes the communal function of fanfic more apparent by allowing freedom of exchange unencumbered by distance, as it would occur if fans really were able to gather in each other’s backyards.¹³⁹

The Internet’s mingling of public and private has been problematic for sociologists and legal scholars alike. The Internet is a place where public and private spaces are construed differently than they are in the offline world. It is a global public forum accessed from the privacy of one’s own home (or one’s own café table). This disconnect is not only a feature of the copyright world; the properties of the Internet complicate the application of many types of law. The fact that fans believe their use to be private is not a conclusive factor; downloading music from the Internet may feel private as well, but that act is still an illegal infringement of copyrights. The “private” nature of fan fiction, however, is another feature that places it in a unique position at the intersection of copyright, the evolving world of cyberlaw, and the First Amendment, and recalls its heritage as living room cultural discourse.

C. The “Effect on the Market”

While transformativeness has arguably taken the lead in courts’ analysis of infringement, the potential impact of a secondary work on the market for the original remains an important factor.¹⁴⁰ Evidence that fan fiction has the potential to harm the market for an original work would undermine assertions that fan fiction is a benign private use of copyrighted works. Scholarship on the economic impact of fan fiction is less robust than the scholarship on its sociological implications, but what exists tends to support the idea that fan fiction bolsters interest in the original work, rather than diminishing it.

¹³⁷ *Id.*

¹³⁸ *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary H.R.*, 113th Cong. 23–31 (2014) (statement of Naomi Novik) (available at <http://perma.cc/4N8K-8GN4>).

¹³⁹ *Id.*

¹⁴⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

First, fan writers can garner huge amounts of positive publicity for the properties they write about. They are typically highly active within fan communities.¹⁴¹ Fandom helps expand the market reach of an original work, especially as fan writers move between multiple fandoms and spread the news about new works they discover to their friends.¹⁴² The fact that fan fiction can coexist with official derivative works and show no evidence of harming sales also supports the idea that fan writers and copyright holders are not competing for the same space.¹⁴³ Official Star Trek derivative works have remained lucrative despite the massive amounts of Star Trek fan fiction available.¹⁴⁴ Paramount has recognized the benefits that Star Trek fan fiction brings to that franchise.¹⁴⁵

Second, fan fiction's archontic nature means that it allows fans to explore different possibilities latent in the source text while leaving the source intact. Since most fan fiction is produced out of love for the original work, fans do not wish to see that work permanently changed. Fan fiction, one might say, allows fans to have their cake and eat it too: they can enjoy brining to life these alternate possibilities—including many that the original author would be highly unlikely ever to exploit¹⁴⁶—and then return to the source text. In fact, fan fiction assumes that the reader is familiar with the body of original work and will make little sense to anyone who is not. Even when a work of fan fiction closely adheres to an original work, by its very nature it also stands apart. The Court in *Eldred v. Ashcroft* noted that the First Amendment does not protect the right to "make other people's speeches."¹⁴⁷ But making others' speeches is precisely what fan fiction is not—if the author of the original work had said everything there was to say, fan fiction would not exist. The purpose of fan fiction is to explore possibilities the author did not think of or would never have included—it is the fans' imaginations given free reign. For this reason, fan fiction does not attempt to substitute for the original work or its offshoots. Finally, because fan fiction is free to produce and consume and therefore does not siphon off funds that fans would otherwise spend on official content, fans need not sacrifice consumption of official works to engage in their hobby.¹⁴⁸

¹⁴¹ Heidi Tandy, *How Harry Potter Fanfic Changed the World (or at Least the Internet)*, in *FIC: HOW FANFICTION IS TAKING OVER THE WORLD* 165, 167–68 (2013).

¹⁴² Ranon, *supra* note 77, at 443–44.

¹⁴³ Tushnet, *supra* note 5, at 672.

¹⁴⁴ Tushnet, *supra* note 5, at 672.

¹⁴⁵ *Id.* at 673.

¹⁴⁶ Derecho, *supra* note 45, at 74.

¹⁴⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003).

¹⁴⁸ Tushnet, *supra* note 5, at 671.

VII. PROTECTING CREATORS

If a special exception were created for fan fiction, courts would need to be sure that individuals who do infringe copyrights are not allowed to benefit, and that copyright holders are not harmed. There is already a general understanding among fans that fanfic is not to be sold; it seems unlikely that an official prohibition against doing so would be met with much resistance. This note has not discussed other forms of fan works, such as fan art, which are more commonly sold for profit. Some unauthorized derivative works do constitute fair use of the original text and may be commercialized; those works deserve their own analysis.

That being said, there is one significant obstacle to a happy agreement between fans and copyright holders, which calls for mention here. Fantasy author Marion Zimmer Bradley was well-known for her positive interactions with fans, even reviewing and editing fan-written works based on her stories.¹⁴⁹ In 1992, however, Bradley sought to use a portion of a fanfic entitled *Masks*, which had previously been published in a fan magazine, in her forthcoming novel *Contraband*. Unclear on how much of the story Bradley meant to borrow, the fan became upset and a controversy erupted. The incident resulted in the cancellation of Bradley's publishing contract for *Contraband*.¹⁵⁰ *Anderson v. Stallone*, discussed above, is another example.¹⁵¹ When MGM used Anderson's treatment for Rocky IV without crediting or compensating Anderson, Anderson alleged unjust enrichment and copyright infringement.¹⁵² As a result of incidents like these, authors feel a need to avoid fan fiction of their work lest they be accused of stealing a future story idea from one of their fans.¹⁵³

Even if authors should not have a right to stop fan fiction from being written, neither should they have to worry that fans will interfere in such a way with their future artistic pursuits. If a blanket protection for fan fiction such as the one suggested in this note were adopted, authors would need to be protected from such claims. Fortunately, these occurrences are rare. Some authors simply make a policy of avoiding fan fiction in order to protect themselves.¹⁵⁴ Alternatively, in exchange for legitimization of their activities, fans could waive their rights to any legal claims in the event that an author incorporates an idea from a fanfic into an original story. Taking an idea is already permissible, and since fans do not have any copyright

¹⁴⁹ Catherine Coker, *The Contraband Incident: The Strange Case of Marion Zimmer Bradley*, 6 TRANSFORMATIVE WORKS AND CULTURES (2011), <http://perma.cc/9P52-BA9S> (last visited Sept. 20, 2014).

¹⁵⁰ *Id.*

¹⁵¹ *Anderson*, No. 87-0592 WDKGX, 1989 WL 206431 at *.

¹⁵² *Id.*

¹⁵³ Nolan, *supra* note 69, at 558.

¹⁵⁴ Neil Gaiman, *Neil Gaiman's Opinion on Fanfiction*, NEIL GAIMAN OFFICIAL TUMBLR (Apr. 24, 2012, 6:46 PM), <http://perma.cc/F3Q9-XQ92>.

interest in the characters they write about, such a waiver would probably not infringe on any rights they might have.¹⁵⁵ Furthermore, protection for fan fiction would not mean that authors need divest themselves of their right to create their own derivative works.

VIII. CONCLUSION

In the words of the Supreme Court, “context is everything.”¹⁵⁶ Fan fiction’s unique combination of properties—its role within fan communities, its noncommercial nature, and its ability to provide benefits to copyright holders—sets it apart from infringing derivative works. It is only by examining fan fiction as a practice within the context of fan communities, and not merely as an end product, that we can begin to understand its importance. Fan fiction reveals where there is room to better allow free speech interests to flourish within copyright law, without harming copyright holders’ existing legal interests.

¹⁵⁵ Some popular works have already made use of ideas generated within fan communities: for example, in the film adaptation of the first *Hunger Games* novel, the character Effie Trinket utters the line “That is mahogany!” when Katniss stabs an expensive table with a knife. The line became an in-joke among fans and was referenced in the second film, when Effie points out that all of the wood in President Snow’s palace is mahogany.

¹⁵⁶ *Campbell*, 510 U.S. at 589.

