NOTE

FAN FICTION, FANDOM, AND FANFARE: WHAT'S ALL THE FUSS?

Meredith McCardle[*]

TABLE OF CONTENTS

[*] J.D., Boston University School of Law, 2003; B.S. Journalism, B.A. Theatre, University of Florida, 2000.

I. INTRODUCTION

Do you remember that *Star Trek* episode where Captain Kirk and Spock confess their romantic feelings for each other? No? Well, how about that *Harry Potter* storyline in which Harry befriends Draco Malfoy, and they join together to combat the forces of evil? Still, no? One more try, what about that scene in *Star Wars* where an angst-filled Darth Vader seeks solace through the composition of love sonnets? Are you still scratching your head, wondering if you have missed something? Welcome to the world of fan fiction, a world in which a fan's wildest and most imaginative dreams come to life, a world that is probably bigger and more encompassing than you ever realized.

What exactly is fan fiction? Rebecca Tushnet provided one of the most succinct definitions when she described fan fiction as "any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as 'professional' writing."[1] Have you ever walked out of a theatre wishing a movie had more fully explored a certain plot element or wondering what drove a character to act a certain way? Chances are you have. When somebody takes the extra step and puts pen to paper, thereby crafting an extended plot or adding a scene exploring that character's motivation, the result is fan fiction. You yourself might have even written fan fiction and not realized it. For example, did you ever read the short story *The Lady, or the Tiger*[2] in a junior high or high school English class? Did your teacher ask you to compose an ending to it? If you answered yes, congratulations, you have written fan fiction.

This Note is a guide for anyone interested in the plight of the fan fiction author, be it the writer himself, the consumer of cultural products, or the passive observer with an interest in intellectual property law.[3] Nonetheless,

---

[1] Rebecca Tushnet, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997).

[2] FRANK R. STOCKTON, THE LADY, OR THE TIGER (1886) (telling the story of a young lover who will find either a new bride or a mauling death when he opens a gate to a Roman arena, but whose fate is not revealed before the tale ends, leading many educators using this story in class to ask students to create their own personalized endings).

[3] Of course, the reader should also understand that this Note is for an informational purpose and is not to be taken as legal advice. Copyright is an exceedingly complex and ever-changing area of the law, so you, the reader, are urged to seek proper legal advice if you truly want to analyze your rights under copyright law.

this Note's orientation is written primarily for the fan fiction author. Part II of this Note will begin by familiarizing the lay person with the world of fan fiction. It will explain basic terms and trace the history of fan fiction. Also, it will explore the cultural and sociological significance behind the writing of fan fiction. Part III of this Note will delve into the copyright issues surrounding fan fiction and determine which exclusive rights of a copyright owner fan fiction authors violate when they write stories. Of particular importance to the fan fiction author, Part III will also set out any defenses he or she could use if tested by a copyright owner, beginning first with implied consent. This Note will then explain the fair use doctrine as it relates to fan fiction and will give fan fiction authors basic guidelines to structure their stories within the current scope of fair use precedent. Part III will next undertake a discussion of trademark law and determine whether fan fiction authors could face liability for trademark dilution. Finally, Part IV of this Note will summarize the issues and provide something of a checklist that fan fiction authors can use to avoid liability.

II. WHAT EXACTLY IS FAN FICTION?

A. Is all fan fiction the same?

1. I've heard there are various types of fan fiction. What are they?

For every work of fan fiction, an underlying "fandom" exists. Fandom is defined as "the world of fans and enthusiasts, especially of fans of science fiction magazines and conventions."[4] As most fan fiction writers know, fandoms come equipped with their own languages. For instance, if a fan fiction author were to say, "My story is primarily gen/het but it's also an AU featuring a non-MS OC," any other fan fiction author would nod his head in approval, knowing exactly what the other was trying to communicate.[5] For anyone not familiar with the language of fan fiction, however, this relatively simple statement is nothing more than gibberish.

The first term a fan fiction neophyte[6] should learn is "canon," which refers to the original work from which the fan fiction author borrows.[7] There's the

---

[4] THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 487 (9th ed. 1995) (defining "fandom"). For example, writers of *Star Trek* fan fiction exist within the *Star Trek* fandom, writers of *Buffy the Vampire Slayer* fan fiction exist within the *Buffy* fandom, and so on.

[5] Translated into common English, the above quotation would read along the lines of, "My story features characters engaging in a general, heterosexual relationship, but it takes place in an environment different from that of the original and features a new character I've created, though I've tried my best not to make this character a stereotype."

[6] A fandom would call you a "newbie."

[7] Tranquility Amongst The Stars, *Fan Fiction Glossary*, *at* http://www.swtats.com/glossary.html (last visited May 7, 2003) (defining "canon" as "professional source material, or the official facts as stated by the original book, movie, or show episode").

Star Trek canon, which includes all episodes and movies, or the *Harry Potter* canon, which includes all of the books published by J.K. Rowling. Fan fiction authors sometimes refer to their canons as their Bibles, and most try to remain as true to the canon as possible so that other readers will see their stories as a natural extension of the story arc.[8] However, a niche genre of fan fiction takes the opposite approach by presenting the characters in an environment diametrically opposite to that of canon. This story is termed the "Alternate Universe," shortened within the fandom as "AU."[9] For example, in the *Star Trek* fandom, taking Captain Kirk and his crew off of the Enterprise and transporting them to modern-day New York City would be rightly classified as an AU.

Most fan fiction stories fall into one of two classifications based on the characters' relationships. A fan fiction in the first classification is called a "gen/het" story and involves a heterosexual relationship between two characters that may or may not be romantically linked in canon. "Gen/het" is a shorthand way of saying the story involves general/heterosexual relationships. A fan fiction in the second classification is called a "slash" story and features two characters engaged in a homosexual relationship that are most often heterosexual in the canon.[10]

Apart from relationships, many works of fan fiction center around the characters themselves, exploring their psyches or attempting to explain choices made in canon. Sometimes fan fiction authors feel the need to insert additional characters of their own creation to fully explore a canon character. From a general perspective, these added entities are termed "other characters," or "OCs" for short.[11] While most fandoms tolerate the use of additional characters in stories, nearly all keep a watchful eye out for a specific type of OC, the much loathed and widely ridiculed "Mary Sue," shortened within the fandom as "MS."[12] A "Mary Sue," or "Gary Stu" if the character is a man, is typically perfect in nearly every way imaginable. Beautiful, intelligent and quick-witted, these characters usually come equipped with a certain disregard for rules and normally wind up stealing the heart of a main canon character.

---

[8] *Id.* (referring to "canon" as a "holy text").

[9] *Id.* (defining "alternate universe" as "fanfic set in a universe which is different from the canon show universe. AUs are also known as What Ifs (What if Luke had joined Vader?), Elseworld (DC, Marvel fandom) and Uber (Xena fandom)").

[10] *See* HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 186 (Routledge, Chapman and Hall 1992) (explaining how the term "slash" originated from 1960's *Star Trek* fandom because writers of *Star Trek* slash fan fiction would label their works as containing a "Kirk/Spock" pairing (read 'Kirk-slash-Spock'), and over time, the term "slash" became the popular way to refer to any fan fiction involving a homosexual pairing).

[11] *Fanspeak Dictionary, available at* http://expressions.populli.net/dictionary.html (last visited May 8, 2003).

[12] *See* ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 119-20 (Stanley Fish & Fredric Jameson eds., 1998).

The Mary Sue story, common to every fandom, is despised across the board as most fandoms feel these stories cheapen the better works of fan fiction and give the entire fandom a bad name.[13]

The list of terms goes on and on, with each fandom incorporating its own vocabulary and set of abbreviations. However, terms such as "canon," "AU," Mary Sue," "gen/het" and "slash" are common to every fandom. Having a general understanding of their meanings will aid anyone attempting to explore the various cultural and legal underpinnings of fan fiction.

2. Should the courts take a categorical approach to fan fiction?

In a perfect world, the cultural and sociological underpinnings of the fan fiction community might merit special protection for every piece of fan fiction ever composed. This protection could lump them together into one tidy, organized category in such a way as to warrant treating them with uniformity. In reality, however, the various forms fan fiction can take are wildly different and do not lend themselves to orderly classification.[14] Consequently, it would be extremely difficult to make a successful categorical argument, though some have tried.[15] A categorical argument fails primarily because not all fan fiction works can fit neatly into predefined categories. Advocating protection across the board ironically runs the risk of weakening protection as a whole because wilder, more controversial forms of fan fiction are apt to swallow the entire genre of fan fiction.[16] Taking an individualized approach, on the other hand, would help alleviate this dilemma by allowing a court to focus on the distinct qualities inherent to every work of fan fiction.[17]

B. Does fan fiction have a traceable history?

We are natural storytellers. We especially love to tell stories based upon other stories. Ask the parent of any toddler, and he or she will fill your ears with a plethora of examples for how children love to tell stories based upon the characters in *Sesame Street* or *Arthur*. Think about this for a moment. As we grow older, we never really stop telling ourselves these stories, do we? Think of your favorite television show for a moment. Have you ever wondered what would happen if the plot went a different direction? Have you created your own subplot and pondered its viability? How about mentally expounded on a character's background? Chances are you have, at a minimum, *thought* along the lines of "what would happen if . . ." In essence, fan fiction authors take

---

[13] *See id.*

[14] *See supra* Part II.A.i for discussion about the various forms of fan fiction.

[15] *See generally* Tushnet, *supra* note 1.

[16] For instance, many of the cease and desist letters sent to websites concern the writing of "adult" fan fiction, the attention of which runs the risk of overshadowing other forms of fan fiction. *See* Chilling Effects Clearinghouse Web site, *at* http://www.chillingeffects.org (committed to the legal plights of fan fiction authors).

[17] Notably, an individualized approach will undercut efforts for uniformity in precedent.

that extra step, asking themselves "what would happen if . . .," formulating an answer, and then writing it down.

Let us return to the beginning. Where did this desire to expound come from? For as long as history has been recorded, people have been asking themselves, "What happens next?"[18] Beginning first with oral narratives, the impulses of human nature led people to expand on the stories passed down in their cultures, changing plotlines or adding characters.[19] The practice grew increasingly common, perhaps coming to a head in the Elizabethan era, where borrowing of plot, character and setting was a common practice.[20]

For nearly 200 years, the tradition of borrowing from predecessor works continued unchecked by modern notions of copyright law and fair use, but the practice was bound to change in 1710 when England enacted the very first copyright law in history.[21] Known as the Statute of Anne, the law's main purpose was "to destroy the booksellers' monopoly of the booktrade and to prevent its recurrence."[22] The statute showed some resemblance to modern copyright law in that it protected only new creative works and for only a limited duration.[23]

The Statute of Anne provided the framework for the United States to create its own form of copyright law.[24] The Framers of the Constitution used the statute for guidance when they wrote Article I, sec.8, cl.8, which reads, "The Congress shall have power . . . 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."[25] Out of this grew the Copyright Act of 1790.[26] The 1790 Act, while striving to promote learning and ward off censorship, limited the copyright in literature to the right "to publish and vend books."[27] Early judicial interpretations of the Act took the

---

[18] Tushnet, *supra* note 1, at 652.

[19] *See id.*

[20] *Id.* at 652 n.3 (citing HAROLD OGDEN WHITE, PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE (1935) for "discussing stunning creativity of Elizabethan era in England enabled by widespread borrowing of plot, character, and setting").

[21] Amy Masciola, *A History of Copyright in the United States*, Association of Research Libraries, *available at* http://arl.cni.org/info/frn/copy/timeline.html (last modified Nov. 22, 2002).

[22] L. Ray Patterson, *Understanding the Copyright Clause*, 47. J. COPYRIGHT SOC'Y USA 365, 379 (2000).

[23] Masciola, *supra* note 21.

[24] *Id*.

[25] *Id.* U.S. CONST. art. I, § 8, cl. 8.

[26] J.A. Lorengo, *Whats Good for the Goose is Good fo the Gander: An Argument for the Consistent Interpretation of Patent & Copyright Clause,* 85 J. PAT. & TRADEMARK OFF. SOC'Y 51, 53 (2003) (explaining that general misgivings about monopolies were a driving force behind the limited duration of protection in the Patent and Copyright Clause of the U.S. Constitution and the Copyright Act of 1790).

[27] Patterson, *supra* note 22, at 383.

term "copy" quite literally and held that an author only had the right to prevent others from copying their works verbatim.[28] However, the landmark 1841 case of *Folsom v. Marsh* lessened this early rule's severity somewhat.[29] This opinion, penned by Justice Story, originated the fair use doctrine, which was later codified in 1976.[30] The case involved a biographer's unauthorized use of George Washington's private letters, which the court found to be a permissible use.[31] In his opinion, Story stated, "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work."[32] As revolutionary as Story's opinion was to become, at the time it actually helped to further the copyright monopoly because translations or variations on copyrighted works were not seen as infringement.[33] In 1909, the Copyright Act underwent its first major revision, although Story's fair use vision would not see codification quite yet. Rather, the 1909 Act extended protection to "all works of authorship" and extended protection to twenty-eight years plus another twenty-eight years upon renewal.[34] In 1976, the Copyright Act again underwent a major revision.[35] The Act extended a copyright's duration to the life of the author plus an additional fifty years and made it possible to get copyright in any work "fixed in a tangible medium of expression," thus removing the previous requirement that a work be first published.[36] Additionally, the fair use requirement first detailed in Story's 1841 *Folsom* opinion was codified.[37]

---

[28] *See* Stowe v. Thomas, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13514) (holding that a German translation of Stowe's novel *Uncle Tom's Cabin* was not an infringement because it was not a literal copy of the work verbatim).

[29] 9 Fed. Cas. 342, 348 (C.C. Mass. 1841).

[30] Masciola, *supra* note 21.

[31] *Folsom,* 9 Fed. Cas. at 342.

[32] *Folsom,* 9 Fed. Cas. at 348.

[33] *See, e.g. Stowe,* 23 Fed. Cas. at 206.

[34] Masciola, *supra* note 21; *see* Lorengo, *supra* note 26.

[35] *See* Masciola, *supra* note 21 (explaining that there were two primary reasons for the 1976 revision. "First, technological developments and their impact on what might be copyrighted, how works might be copied, and what constituted an infringement needed to be addressed. Second, the revision was undertaken in anticipation of Berne Convention adherence by the U.S. It was felt that the statute needed to be amended to bring the United States into accord with international copyright law, practices and policies").

[36] 17 U.S.C. § 102(a) (2000) (protecting any work "fixed in a tangible medium of expression"); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 669 (1996) ("Beginning in 1978, the basic term was switched to life of the author plus fifty years").

[37] 17 U.S.C. § 107 (2000) (in determining whether a use is fair, the factors to be considered include: "(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

A basic knowledge of copyright law's history helps in understanding its application to fan fiction's development during the years leading up to the 1976 revision. In the mid-nineteenth century, right around the time Story created the fair use doctrine, writings based on other works grew and gained more popularity.[38] Beginning in the late 1860s, fans began to rewrite endings to Lewis Carroll's works and wrote entire parodies based on them.[39] The practice was relatively common and continued unchecked for nearly a century, but with the advent of modern media and television, the game changed.[40] The modern idea of fan fiction as is prevalent in today's society was not born until the second season of *Star Trek* hit the airwaves in 1967.[41] Out of the show's popularity grew a number of "fanzines," which were fan-based magazines that included original works of fiction based around the characters on the show.[42] The first such fanzine, "Spockanalia," was published during the shows original series in 1967.[43] The popularity of "Spockanalia" spurred the creation of dozens more *Star Trek* fanzines, including "adult" fanzines and "slash" fanzines that explored homosexual relationships between otherwise heterosexual characters.[44]

The first instance of a recognized clash between fan fiction authors and copyright owners occurred in June of 1977 when Paramount, the copyright holder to *Star Trek*, sent a cease and desist letter to Linda Maclaren and Gina Martin, publishers of a *Star Trek* fanzine.[45] However, Paramount voluntarily dropped the case when it learned the fanzine was not a professional

---

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").

[38] *See generally* Henry Jenkins, *Digital Land Grab*, MIT ALUMNI ASS'N TECH. REV. (2000), *available at* http://www.whoosh.org/jenkins.txt (Mar./Apr. 2000) (explaining the rise fan fiction's appeal).

[39] *Id*. (noting Christina Rossetti and Frances Hodgson Burnett as being among writers who reworked Lewis Carroll's writings).

[40] *Id. See also* COOMBE, *supra* note 12, at 89-90 (detailing how the rise in popular cultural icons in the mid-Twentieth Century has led to a society saturated with media images, which in turn has resulted in an increased fixation and desire to expound on these images).

[41] Tushnet, *supra* note 1, at 655.

[42] Worlds Without Boundaries: Destina's Fan Fiction, *Destina's Fan Fiction FAQ (Frequently Asked Questions)*, *at* http://www.lyricalmagic.com/fanficFAQ.html#origin (last visited May 7, 2003); *see also* THE CONCISE OXFORD DICTION OF CURRENT ENGLISH 488 (9th ed. 1995) (defining "fanzine" as "a magazine for fans, especially those of science fiction, sport, or popular music").

[43] Michela Ecks & Writers University, *A History of Television Fan Fiction*, WRITERS UNIVERSITY, *at* http://writersu.s5.com/history/shistory03tv.html (last visited Mar. 26, 2003).

[44] *Id.* The particularities of "slash" fan fiction will be fully explored in Parts II-C-I and III-C.

[45] *Id*.

publication.[46] The next instance occurred in September of 1981, when Maureen Garrett, the head of the Official Star Wars Fan Club, sent a cease and desist letter to the publishers of "Guardian," a fanzine that published adult fan fiction based on *Star Wars* characters.[47] Garrett alleged the club had violated an informal policy of copyright holder LucasFilms Ltd., which had tolerated fanzines provided they were not pornographic. The publishers of "Guardian" backed down and ceased publication.[48]

Fan fiction used to exist solely in the fanzine form, which meant its visibility was limited to those willing to search out the individual publications. The birth of the Internet signified a change in the method of distribution and catapulted fan fiction into the main stream, allowing anyone with a computer and a modem to instantly read fan fiction.[49] Accordingly, with the increased Internet posting of fan fiction came the increased mailing of cease and desist letters to website operators.[50] In today's online world, cease and desist letters from copyright holders are routine practice, yet the popularity of fan fiction continues to grow at exponential rates. Despite this, not a single fan fiction case has appeared on a court docket, although this distinct absence of litigation may not continue indefinitely. Fan fiction authors could quite possibly find themselves defending their actions before a tribunal at some point in the future.

C. Okay, but why do people write or read fan fiction? Does it serve any purpose in society?

The reasons an individual author will give for writing fan fiction are varied and extensive. To get a real feel for what drives the composition of fan fiction, it helps to turn to a few of the writers themselves for their individual explanations. Some people write for the experience and training it provides, such as Erin Bartuska, a 15-year-old high school freshman who writes fan fiction.[51] "I write because I love to," Bartuska said.[52] "I get feedback, which is great because I know where I'm messing up and what people think is good. It's not as if I see myself continuing to write fan fiction indefinitely, but it's like training wheels for a writer. It's lovely while you need it."[53] Other people write fan fiction in order to further expand upon a television show or movie, as is the case with 30-year-old Debbie Fulmer.[54] "I have written scenes to express 'I wish this is how the episode had really gone' or to fill in a

---

[46] *Id*.

[47] *Id.*

[48] *Id*.

[49] *See* Jenkins, *supra* note 38.

[50] *Id.* (explaining that not only were cease-and-desist letters standard corporate practice, but that when Fox had dozens of *Buffy the Vampire Slayer* websites removed, fans did not bat an eye because many saw it as a common occurrence in today's copyright age).

[51] E-mail from Erin Bartuska, (Oct. 24, 2001) (on file with author).

[52] *Id.*

[53] *Id.*

[54] E-mail from Debbie Fulmer, (Oct. 26, 2001) (on file with author).

character's history or future," Fulmer said.[55] "I love seeing the potential in 'unconventional' pairings — those which are not explored in a show or book's canon, and my writing allows me to create couples I might not otherwise get to see."[56] A key perk of being a fan fiction author is getting feedback from other authors and readers within the fan fiction community. Kellie Bindas, a 23-year-old university admissions director, said "There is nothing quite like the feeling of pouring your heart and soul and all your energy into a chapter, and then being told that it's actually *good*, that people like it, even love it. It's a rush."[57]

In her book *The Cultural Life of Intellectual Properties*,[58] Rosemary Coombe expands on these reasons and details the way in which cultural figures fulfill an inherent human drive, particularly for women. Coombe first details the fanzine phenomenon, out of which grew the modern proliferation of Internet fan fiction. As Coombe reports, middle-class women started the very first *Star Trek* fanzines in an attempt to explore and expand the characters and their relationships.[59] Early on, these women used the fanzines "to explore their own subordinate status, voice frustration and anger with existing social conditions, envision and construct alternatives, share new understandings and express utopian aspirations."[60] Fan fiction, in turn, serves a purpose more important than merely reworking existing stories. Fan fiction serves as a medium for social comment, criticism or satire, allowing women to explore their place in a male-dominated society. The much-ridiculed fandom staple, the "Mary Sue" story, illustrates this purpose.[61] While fandom uniformly feels disdain for "Mary Sue" and her romantic endeavors, the vast majority of fan fiction writers have, at one point or another, written a "Mary Sue" story.[62] Most often, an author writes a "Mary Sue" story as one of their first forays into fan fiction.[63] Many academics and social theorists suggest that women use these "Mary Sue" stories to "recreate their adolescent selves" in an attempt to undo or minimize the pain, shame or regret they harbor from those years with respect to themselves or their place in society.[64]

---

[55] *Id.*

[56] *Id.*

[57] E-mail from Kellie Bindas, (October 21, 2001) (on file with author).

[58] COOMBE, *supra* note 12.

[59] *Id.* at 117-18.

[60] *Id.* at 118.

[61] *See* Part II-A-i (defining the "Mary Sue" story. "Mary Sue" stories, which are uniformly scorned and mocked by the rest of the fandom, center around an ideal women created by the fan fiction writer. The character is always an aggressive, sharp-witted, steel-tongued mass of intellectualism who also happens to be young and beautiful. This character will ultimately become the love interest of one of the main canon characters).

[62] COOMBE, *supra* note 12, at 119.

[63] *Id.*

[64] *Id.* at 120.

Another identified way in which the writing of fan fiction allows women (and more recently, gay men) to explore their role in postmodern society is the writing of "slash" fan fiction, a very particularized and important subgenre of fan fiction. Slash is fan fiction that features homosexual relationships between otherwise heterosexual characters in a copyrighted work.[65] The practice has become increasingly widespread and is now prevalent in nearly every genre of fan fiction.[66] While fans and fan fiction authors might enjoy the stories, several copyright and trademark owners are not nearly as happy, fearful that the intimation that their characters are homosexual will tarnish their product's commercial nature.[67] More than any other genre of fan fiction, slash carries with it a slough of misconceptions. Contrary to popular belief, the vast majority of slash fan fiction is not rightly categorized as erotica or sexually-explicit fiction.[68] In fact, most slash fan fiction centers around the complexities of a relationship between two people of the same sex, and the stories are normally characterized by their emphasis on emotion and feeling, rather than the clinical aspects of a sexual relationship.[69]

During the infancy of slash, such writing was a definite underground movement.[70] Slash writers today still fear certain repercussions, and most still write under a pseudonym, although the backlash today is nowhere near as severe as it was in the early days of slash, when slash writers feared "social ridicule, loss of employment and potential legal repercussions."[71] Even within the fandom, there are still many writers who look down upon slash, perhaps out of moral or religious concerns, but also because many perceive slash as being unfaithful to canon or shedding a negative light on the rest of the fandom. Despite the potential consequences of writing slash, the genre has grown at exponential rates.[72]

Why has the writing of slash fan fiction become so popular? According to a number of social and cultural theorists, a very basic desire to explore life, love and sexual relationships drives slash authors.[73] Many, if not most, slash stories share a common endowment of one male with typically feminine characteristics and another male with predominantly masculine characteristics,

---

[65] *See supra* Part II-A-i (discussing slash fan fiction).

[66] Stephanie Schorow, *Net Life: For Young Fans, Stories Never End*, BOSTON HERALD, Aug. 6, 2002, at 36 (listing examples of slash fan fiction available online, including Starsky/Hutch, Legolas/Aragorn of "The Lord of the Rings," Sam Seaborn/Josh Lyman of "The West Wing" and Justin/Lance of 'N Sync).

[67] *See* COOMBE, *supra* note 12, at 91, 120-21.

[68] *Id.*

[69] *Id.*

[70] COOMBE, *supra* note 12, at 121.

[71] *Id.*

[72] Jenkins, *supra* note 38 (detailing the continuous efforts of corporations to protect their intellectual rights)

[73] *See* BACON-SMITH, ENTERPRISING WOMEN: TELEVISION FANDOM AND THE CREATION OF POPULAR MYTH 238-44 (Patrick B. Mullen ed., 1992).

thus giving both males the opportunity to explore traditional gender roles. According to Coombe, this practice then allows women, as the perceived subservient gender in society, the opportunity to "empower themselves and their communities."[74]

So far as the law is "not simply a set of prohibitions, but (is) an authoritative and pervasive discourse that defines, shapes and is imbricated within the everyday life of cultural practice," the legal realm intersects with slash fan fiction.[75] Copyright law has legitimized the societal benefits embedded within certain works primarily in the codification of the fair use doctrine.[76] The doctrine specifically carves out a role for commentary and criticism, meriting such public feedback special consideration.[77] As Coombe and several other cultural theorists argue, fan fiction is a form of social commentary.[78] According to the rationale of Henry Jenkins, fans do not view their respective canons as "a privileged form of intellectual property," but rather they view themselves "as loyalists, fulfilling the inherent promise and potential for the (canon) — a potential unrealized or betrayed by those who 'own' the intellectual property rights in it."[79] The argument for fan fiction as a fundamental form of social and cultural commentary is further strengthened by authors' use of their writings to explore gender roles, social movements and political climates. Thus, on an elementary level, the writing of fan fiction deserves the type of protection that Congress intended the fair use doctrine to provide.[80]

III. OKAY, FROM THE POINT OF VIEW OF A FAN FICTION AUTHOR, IS FAN FICTION LEGAL?

A. Am I infringing on copyright?

Cutting straight to the chase, yes, writing fan fiction infringes on copyright protections. Understanding what rights statutes and common law grant to copyright holders is essential to understanding exactly why fan fiction is an infringement. However, the main objectives of copyright law as a whole also work to confine its scope:

> The primary objective of copyright is not to reward the labor of authors, but to promote the progress of science and the arts. To this end, copyright

---

[74] COOMBE, *supra* note 12, at 123.

[75] *Id.* at 124.

[76] 17 U.S.C. § 107.

[77] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001)

[78] COOMBE, *supra* note 12, at 123.

[79] *Id.* at 125. citing Henry Jenkins, *Star Trek Rerun, Reread, Rewritten*, 5 CRITICAL STUDIES IN MASS COMMUNICATION 85, 87 (1988).

[80] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (recognizing that copyright law "encourages others to build freely upon the ideas and information conveyed by a work").

> assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.[81]

With this statement, the Supreme Court recognized in *Feist Publications, Inc. v. Rural Telephone Service Co.*[82] the importance of promoting the creation of supplemental works of art. Indeed, courts generally seem to embrace an attitude that copyright law should not be interpreted in such a way that would stifle creativity.[83]

Before fan fiction authors can consider their defenses, they need to identify two issues. First, they need to determine exactly what is at issue with the piece of fan fiction. Second, they need to determine the precise right of the copyright holder upon which this piece of fan fiction infringes. After this, fan fiction authors may raise any available defenses to copyright infringement.

B. How far does copyright extend? There must be some limits to it, right?

Though authors sometimes borrow setting and plot devices, fan fiction's central issue is the borrowing of characters. Thus, the first critical inquiry into copyright law a fan fiction author should make is whether characters can be copyrighted.

Over the past few decades, the intellectual property protection of characters has changed in several important ways. The result is a weakened, though once strong, boundary between copyright and trademark law.[84] Both the rise of fandoms in the 1960s and the desire of intellectual property owners to protect the profitability of their characters have caused the blurring of this boundary.[85] As of late, courts are more apt to protect owners. Yet, this dissolves "analytical boundaries between statutory copyright, statutory and common law trademark, unfair competition, and dilution, thereby retooling traditional tests of infringement to produce particularly strong, and at times, too strong, protection for fictional characters."[86] Add to this convergence a lack of uniformity among the circuit courts, and the need for a uniform legal approach to the copyright of characters comes into light.

---

[81] *Id.* at 349-50.

[82] *Id*.

[83] *See, e.g.* Stewart v. Abend, 495 U.S. 207, 211, 250 (1990) (explaining the fair use doctrine is an "equitable rule of reason" allowing courts to avoid a strict application of copyright statute where it would contravene the very creativity for which the copyright law was designed to promote).

[84] *See* Michael Todd Helfand, Note, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 641-43 (1992).

[85] *See id.*

[86] *Id.* at 641.

Early on, fictional characters did not merit much individual copyright protection, especially literary characters.[87] Pictorial characters were protected under copyright law with more frequency due to their physical embodiment, though many commentators have noted the irony in this, pointing out that literary characters had less protection despite being "often considered creatively and intellectually superior to 'mere cartoons.'"[88] Most commentators agree that this irony saw its birth in the now-famed 1930 Learned Hand opinion set down in *Nichols v. Universal Pictures Corp*.[89] Hand's opinion has been credited with creating the "sufficient delineation test," which mandates characters can only be protected if they are sufficiently developed enough in the underlying work.[90]

In addition to the Second Circuit's delineation test, the Ninth Circuit inadvertently muddied the water some more when it created the "story being told test" in the famed "Sam Spade" case.[91] Rather than determining whether the character Sam Spade was well-developed in the stories in which he appeared, as the Second Circuit would have done, the Ninth Circuit decided that copyright law can only protect a character when the character "really constitutes the story being told."[92] Despite the Ninth Circuit's best intentions, no one is quite sure how to apply this test. According to at least one commentator, "it is difficult to imagine a court ever finding a character to be 'the story being told'" under the Ninth Circuit's test.[93]

After both of these opinions were on the books, many scholars noted that courts began granting an alarmingly expansive level of protection to characters and, in so doing, began to commingle the separate doctrines of copyright and trademark.[94] As such, "[t]he popularity of a character began to implicitly, if not explicitly, be factored into the analysis."[95] Two subsequent Ninth Circuit decisions vividly illustrate this new phenomenon. In the first, *Sid & Marty*

---

[87] *Id.* at 629 (explaining that the courts' separate treatment of copyright and trademark analysis rarely resulted in copyright protection for literary characters).

[88] *Id.* at 631.

[89] 45 F.2d 119 (2nd Cir. 1930).

[90] *See id.* at 121 ("If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play . . . . It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly").

[91] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).

[92] *Id.* ("It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright").

[93] Helfand, *supra* note 84, at 633.

[94] *Id.* at 644.

[95] *Id.*

Krofft Television Productions v. McDonald's Corp., the court looked at subjective criteria under the "look and feel test" to determine that a copyright in a set of fictional graphic characters had been infringed.[96] The very next year, the Ninth Circuit decided a second important case, *Walt Disney Productions v. Air Pirates*.[97] In this case, the court, in dicta, limited the "story being told" test to literary characters and again affirmed its use of the "look and feel" test.[98]

In the decades since these cases were handed down, owners of copyright in fictional characters have been suing at an exponential rate.[99] This has led to an increase in inconsistent precedent for copyright protection of fictional characters, with courts either fusing the tests[100] or seeking to minimize their reach.[101] Instead of these more constrained approaches, perhaps the *Krofft* court was heading in the right direction when it noted in dicta that it is "the combination of many different elements which may command copyright protection."[102] Undoubtedly, a more uniform approach to fictional characters is desirable.

C. What rights do copyright holders actually have?

For now, the truth remains that the test for copyright protection of fictional characters is something of an irregular guessing game. Yet, despite this uncertainty, fictional characters do still receive copyright protection. Thus, a fan fiction author needs to next determine the precise owner's right in copyright upon which a piece of fan fiction infringes. Most fan fiction centers

---

[96] 562 F.2d 1157, 1169 (9th Cir. 1977) ("The expression inherent in the H.R. Pufnstuf series differs markedly from its relatively simple idea. The characters each have developed personalities and particular ways of interacting with one another and their environment. The physical setting also has several unique features"); *see also* Helfand, *supra* note 84, at 644 (equating the court's use of the "look and feel" test to a test of secondary meaning in trademark law).

[97] 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979).

[98] *Id.*, at 755; *see also* Helfand, *supra* note 84, at 646 (noting the court's attention to Mickey Mouse's prevalence in the public eye and its use of trademark law to decide a copyright issue).

[99] Helfand, *supra* note 84, at 626-627 (noting that the rise in profitability from fictional characters has created in a multi-billion dollar industry, resulting in a predictable onslaught of character infringement claims in the last two decades).

[100] *See, e.g.* Metro-Goldwyn-Mayer v. American Honda Corp., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

[101] *See, e.g.* Olson v. National Broadcasting Co., 855 F.2d 1446, 1451-52 (9th Cir. 1988) (discussing whether the "mere chessman" language in the "Sam Spade" case was "mere dicta").

[102] *Krofft*, 562 F.2d at 1169. *See also* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970). It is possible that the *Krofft* court had a compilation approach in mind, and such an approach may alleviate much of the headache the current fictional character precedent has caused.

around widely distributed movies, television shows and novels, all of which the copyright statute considers proper subject matter for protection.[103]

In order to prevail on a claim of copyright infringement, a plaintiff must establish the two prima facie elements: (1) ownership of a valid copyright, and (2) infringement of that copyright.[104] Few defendants dispute the first element, leaving most courts to spend the majority of their analyses determining whether the defendant infringed a particular right of the copyright owner.[105] Under the Copyright Act of 1976, a copyright owner is vested with certain exclusive rights, namely the rights

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based on the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public . . .; (4) . . . to perform the work publicly; [and] . . . (5) to display the copyrighted work publicly . . . .[106]

Since characters can be copyrighted, with the caveats noted, a fan fiction author infringes the owner's first exclusive right in reproduction every time she reproduces a character in fan fiction.[107] Along the same lines, when that fan fiction author then uploads his story onto the Internet and allows the public to access it, she has violated the owner's third exclusive right in distribution.[108] Finally, a fan fiction writer is also guilty of violating the second exclusive right in derivative works.[109] The House Report on the Copyright Act of 1976 defined a derivative work as one that is "based upon the copyrighted work."[110] Accordingly, courts will likely consider fan fiction a derivative work because it takes the copyright holder's original creation and adds new characters, settings or plotlines, thus creating a new and different work.[111]

---

[103] 17 U.S.C. § 102 (2000) (covering novels as "literary works" under subsection (1) and movies and television shows as "motion pictures and other audiovisual works" under subsection (6)).

[104] *Feist Publ'ns*, 499 U.S. at 361.

[105] *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266 (11th Cir. 2001) (illustrating that copyright ownership is rarely challenged); Twin Peaks Prods., Inc. v. Publications Int., Ltd., 996 F.2d 1366, 1372 (2nd Cir. 1993) (same); Castle Rock Entertainment Co. v. Carol Pub. Group, Inc., 955 F. Supp. 260, 264 (S.D.N.Y. 1997) (same); *but see Metro-Goldwyn-Mayer, Inc*., 900 F. Supp. at 1293 (spending a good deal of time determining that petitioner, owner of the copyrights to several, but not all, of the James Bond films, nevertheless satisfied the ownership prong of the test).

[106] 17 U.S.C. § 106 (2000) (enumerating a copyright holder's exclusive rights).

[107] *See* 17 U.S.C. § 106(1). *See also* MAI Sys. Corp. v. Peak Computing, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that placing a document into RAM constitutes making a copy).

[108] *See* 17 U.S.C § 106(3).

[109] 17 U.S.C. § 106(2).

[110] H.R. Rep. No. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.A.A.N 5659, 5675.

[111] *See* Tushnet, *supra* note 1, at 660.

In that a fan fiction author risks violating, at a minimum, three of the five exclusive rights granted to a copyright owner under § 106, fan fiction authors find themselves on the opposite side of the law. The burden then shifts to the fan fiction author to argue any available defenses.

D. Do I have any defenses under copyright law?

1. Can't I make some sort of implied consent argument?

In certain fandoms, implied consent may be the strongest argument a fan fiction author can make. If the copyright owner has known about the fan fiction writing and has either encouraged it or allowed it to continue unchecked, the fan fiction author should be able to argue that the owner impliedly consented, thereby quashing any subsequent attempts by the owner to stop fan fiction distribution and creation. This argument, similar to that of equitable estoppel, is strongest when "there is express consent by the copyright owner or [he gives] some statement that he does not regard the defendant's acts as infringing or that he has no objection to the defendant's work."[112] When a copyright owner has made these sorts of implications, a defendant's implied consent argument should win.

Thus, fan fiction writers should know the attitudes of canon authors towards fandom. The views of copyright owners concerning fan fiction encompass a broad spectrum.[113] On one extreme are owners such as Anne Rice, who expressly forbid the writing of fan fiction and try to quash it.[114] On the other extreme lie owners such as Lois McMaster Bujold, who encourages the writing

---

[112] Coleman v. EPSN, Inc., 764 F. Supp. 290, 296 (S.D.N.Y. 1991); *see also* Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 329-330 (S.D.N.Y. 1990) (discussing an implied consent argument in the context of the "unclean hands" equitable doctrine).

[113] *See* Jekkel, *Corporate Bandwagon*, *at* http://www.fanfiction.net/column.php?columnid=38 (last visited Mar. 22, 2003) (providing a general feel of copyright owners' views by listing the fan fiction policies of a number of authors at the end of each column).

[114] *See The Official Anne Rice Web site*, *at* http://www.annerice.com (accessed Aug. 22, 2002) (on Apr. 7, 2000, on the front page, Ms. Rice had the following message for fan fiction writers: "I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes"). The message has since been removed, but Rice's policy towards fan fiction remains. *See, e.g. Croatoan Fanfic: Where Has Anne Rice Fanfiction Gone?*, *available at* http://www.angelfire.com/rant/croatoan/ (accessed Apr. 11, 2003). *See also Ursula K. Le Guin's Official Website, at* http://www.ursulakleguin.com/FAQ_Questionnaire5_01.html#FF (accessed Jan. 19, 2003) ("Writing for your own pleasure is one thing but disseminating it is something else. It used to be that fan fiction would reach only a specific audience — a close circle of friends and acquaintances. But with the Web things have changed.").

of fan fiction and even posts fan fiction on her personal Website.[115] Most owners seem to occupy the middle ground, tolerating fan fiction.[116]

In that many authors tolerate fan fiction writing, implied consent may be one of a fan fiction's strongest arguments. If the circumstances are right and the fan fiction writer borrows from a consenting copyright owner, a court should excuse the writing of fan fiction based on equitable grounds.

2. Isn't what I'm doing a fair use?

In addition to implied consent, a fan fiction author can potentially make a fair use argument. Of course, fair use, like implied consent, is an affirmative defense that is raised only after infringement is established.[117] At least one court has posited that fair use should be an affirmative right rather than a defense, but the majority view, and the view espoused by the Supreme Court, remains that fair use is a defense.[118] Four factors are considered in determining whether a court will excuse a particular use as fair, as the Copyright Act of 1976 sets out:

> (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.[119]

a. The Purpose and Character of the Use: "But I don't make any money off of this and am learning to become a better writer in the process. That has to count for something, right?"

In determining the purpose and character of the use, two factors are most important. These are whether the use is noncommercial and whether the use supplants or transforms the original work.[120] Noncommercial use is more apt

---

[115] *See The Lois McMaster Bujold FanFic Archive, at* http://www.dendarii.co.uk/FanFic/ (last visited Mar. 22, 2003).

[116] *See, e.g. Journal of Neil Gaiman*, Apr. 8, 2002, *at* http://www.neilgaiman.com/journal_archives/2002_04_01_archive.asp (articulating a view typical among many copyright owners confronted with fan fiction: "As long as people aren't commercially exploiting characters I've created, and are doing it for each other, I don't see that there's any harm in [fan fiction], and given how much people enjoy it, it's obviously doing some good. It doesn't bother me").

[117] 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (LexisNexis 2002) (stating that fair use is an affirmative defense).

[118] *Suntrust Bank*, 268 F.3d at 1260 n.3 (arguing in dicta that fair use should be considered an affirmative right but acknowledging the court is bound by the Supreme Court's decision in Campbell v. Acuff-Rose Music, Inc., which makes clear fair use is a defense).

[119] 17 U.S.C. § 107.

[120] *See* 4 NIMMER, *supra* note 117, at § 13.05(A)(1).

to constitute fair use.[121] The main thrust behind this factor is a determination whether the work "supersedes the objects" of the copyrighted work or whether it adds something to it and alters it.[122] As set out by the court in *Campbell v. Acuff-Rose Music, Inc.,* if a work transforms the original, it is less likely to constitute copyright infringement, or, alternatively, the court is more likely to excuse the infringement as fair use.[123]

In deciding whether or not to allow a particular work of fan fiction as a fair use, the first question is whether the writing of a particular piece is a noncommercial use. Fortunately for the fan fiction author, most fan fiction, by its very definition, is a noncommercial usage.[124] Fan fiction is mainly a product of the Internet, and fan fiction authors do not make their readers pay a fee to access the stories.[125] One court has implied that when writers upload their works onto the Internet and allow readers to access them for free, this is a noncommercial use that weighs towards a finding of fair use.[126] Following the reasoning of another court, most fan fiction writers are not "in the business of" copying copyrighted works because no money ever changes hands.[127] The ultimate purpose behind fan fiction writing is to satisfy innate desires, not to make a profit.

Fan fiction authors themselves see their use as noncommercial.[128] This is evidenced by one of the defining elements of a work of fan fiction — the disclaimer that usually appears atop the work.[129] This disclaimer, written by the fan fiction author, acknowledges that the author does not own the copyright to the work and typically points out that the author is not receiving any sort of financial benefit from the work.[130]

Several courts are more prone to find a defendant's use is fair when the defendant acknowledges that the material is borrowed from a copyrighted source, such as by adding a disclaimer.[131] Typical disclaimers in the fan

---

[121] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[122] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

[123] *Id.* at 579.

[124] *Supra* Part II-C (explaining briefly that fan fiction is not professional writing marketed for profit but rather is written to further a segment of popular culture).

[125] Tushnet, *supra* note 1, at 664.

[126] *See Suntrust Bank*, 268 F.3d at 1269 n.24 ("[the author] did not choose to publish her work of fiction on the Internet free to all the world to read").

[127] *See* Higgins v. Detroit Educ. Television Found., 4 F. Supp. 2d 701, 705 (E.D. Mich. 1998).

[128] Tushnet, *supra* note 1, at 664.

[129] *Id.*

[130] *Id*.

[131] Karll v. Curtis Pub. Co., 39 F. Supp. 836, 838-39 (E.D. Wis. 1941) (holding that defendant magazine's reprinting of a few verses of a song was fair where the magazine expressly attributed the authorship of the song to plaintiff copyright holder); *but see* Henry Holt & Co. v. Liggett & M. Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (holding that a cigarette manufacturer's quoting of scientific research was not a fair use, despite the

fiction world include the following: "The following story is classified as Fan Fiction. The characters of Xena, Gabrielle and others who have appeared in the series, *Xena: Warrior Princess*, are the property of MCA/Universal Television and Renaissance Pictures. I only borrowed them;"[132] "BeastMaster: The Legend Continues, its characters and images are property Tribune Entertainment. This fan fiction is for fun and not for profit."[133]

"Of course, there is always the almighty disclaimer of the fandom," said 18-year-old high school senior and fan fiction author Caroline Ratajski, "but then I, on occasion, will borrow some other things, such as lines from movies. I put a disclaimer, citing the line and the movie it was borrowed from."[134] When asked, most fan fiction authors say they are not worried about copyright liability because they believe their actions are non-infringing because they do not derive a financial benefit from their works. "I make absolutely no profit from my fiction and never really hope to. How can you sue someone who has no income?" Ratajski asks.[135]

Ratajski's comments identify the "general social consensus" among fan fiction authors that their noncommercial works constitute fair use,[136] although the mere fact that an infringer lacks any intent to infringe will not shield him from liability.[137] On the other hand, fan fiction has a long history, and copyright owners, as well as fan fiction authors, have come to regard it as a reasonable and customary use.[138] That this use has been tolerated for an extensive period of time strengthens the argument that a court should excuse fan fiction writing.[139]

In addition to noncommercial use, educational use is another kind of use expressly included in the statute's first fair use factor.[140] Thus, if the purpose

---

attribution to the infringement).

[132] L.Z. Clotho, *Golden Moments, at* http://www.poky.net/xena/argo/golden%20momemts.htm (last visited Jan. 24, 2002) (displaying disclaimer at the top of the Internet page).

[133] *Mydland's Own BeastMaster Fan Fiction*, *at* http://mydlands.fanspace.com/fanfic/ (archiving *BeastMaster* fan fiction) (last visited Apr. 11, 2003).

[134] E-mail from Caroline Ratajski, (Oct. 22, 2001) (on file with author).

[135] E-mail from Caroline Ratajski (Oct. 22, 2001) (on file with author) (raising the interesting point that where some consider statutory damages to require willful intent, most fan fiction authors may be able to negate an award because they do not view their activities as infringement).

[136] *See* Tushnet, *supra* note 1, at 664.

[137] *See* Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962) (holding that substantial copying of a song will not be excused as fair use merely because the infringer had no intention to infringe); *but see* Broadway Music Corp. v. F-R Pub. Corp. 31 F. Supp. 817, 818 (S.D.N.Y. 1940) (deciding that a lack of intent to infringe, while not determinative, should be factored in to fill out the "whole picture").

[138] *See supra* Part II-B and C (detailing the personal and sociological importance of cultural commodities such as fan fiction).

[139] *See id.*

[140] 17 U.S.C. § 107(1) ("in determining whether the use made of a work in any particular

of borrowing from the copyrighted work is for educational ends, a court is more likely to excuse the use as fair.[141] For purposes of this Note, however, whether or not fan fiction falls into the educational use category is not a clear-cut inquiry.

Nearly all fan fiction in existence today finds a home on an Internet Web site. The Web sites range from personal users' pages, which usually only provide links to stories, to the large, all-encompassing Web sites, such as fanfiction.net, which has archived close to 500,000 works of fan fiction.[142] A common feature of the larger Web sites is the use of either bulletin boards or help forums in which users are invited to post.[143] In particular, most Web sites also have sub-forums, fulfilling the collective purpose of helping fan fiction authors improve their writing.[144] Many fan fiction authors themselves admit that the more they write, the better they get.[145]

Fan fiction authors may be able to argue that their development as writers fulfills an educational use. When making a educational use inquiry, courts tend to examine an alleged infringer's purpose, and when there is a valid educational purpose, courts are more likely to find fair use. *Higgins v. Detroit Educational Television*[146] is one of the leading cases on point. There, a television station used the plaintiff's copyrighted song in the opening and closing segments of an educational television show that relayed an anti-gun-violence message.[147] Finding that the educational purpose behind the program transformed the use of the song into a fair use, the court focused on the fact that the program was not mass-marketed and was intended for use only by

---

case is a fair use the factors to be considered shall include . . . the purpose and character of the use, including whether such use is . . . for nonprofit educational purposes) .

[141] *See id.*

[142] *See* e-mail from Xing Li (Aug. 16, 2002) (on file with author) (writing as owner and administrator of http://www.fanfiction.net, Li details the steep increase in the amount of fan fiction posted to the Internet since 1998).

[143] *Id*.

[144] *See* FanFiction.Net, *at* http://www.fanfiction.net/columns.php (last visited Mar. 23, 2003) (linking visitors to 18 different editorial columns written to help authors improve the quality of fan fiction writing).

[145] *Supra* Part II; *see also* e-mail from Erin Bartuska, (Oct. 24, 2001) (on file with author) (responding to the question "why did you begin writing fan fiction?" with "I was having a great deal of trouble with characterization, the basics of writing, really. Fan fiction was a great forum for learning to write"); e-mail from Melissa Jones (Oct. 27, 2001) (on file with author) ("I write fan fiction because I enjoy writing; it's something I've been doing almost half my life. It has increased and strengthened my vocabulary and grammar"); e-mail from Kellie Bindas (Oct. 21, 2001) (on file with author) ("I continue writing [fan fiction] because it's a wonderful way to improve my writing skills. I love writing so much that I may someday actually try to write something with original characters. So I'm using my (fan fiction) to my advantage in that regard. It's getting me comfortable with my own abilities and style").

[146] 4 F. Supp. 2d 701 (E.D. Mich. 1998).

[147] *Id.* at 703.

educational facilities.[148] In addition, information given at the end of the program relayed that a videotape of the program could be purchased, but "for educational use only."[149]

The *Higgins* opinion raised several implications for the fan fiction author, but the degree to which the opinion will apply in a particular case depends on the individual activities and motives of the fan fiction author. First, a fan fiction author should question his or her motives to write. The fan fiction author may have an educational use argument if one of the motives is to hone writing skills. However, since the *Higgins* court focused on the fact that educational use was the *only* purpose of using the song, the fan fiction author may have to show that no other motives exist.[150] This portion of the court's opinion undercuts the argument that fan fiction is fair use because the very nature of most fan fiction is to fulfill a personal desire, which is a different motive from writing development. Any educational purpose is usually secondary.[151]

Parody is yet another means of protection potentially available to fan fiction authors under the first fair use factor. The Supreme Court spoke to this issue at length in *Campbell v. Acuff-Rose Music, Inc.* and concluded that a parody of a copyrighted work can be allowed as a fair use.[152] According to the Court, parody is "a 'literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,' or as a 'composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.'"[153] Under copyright law, a second-comer may use a work for parody purposes if it creates a new work that comments on the original.[154]

Thus, the Court advises that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."[155] The Court warns that the artistic or creative nature of the controversial work is not subject to evaluation, as such judgments are highly subjective. A court should only inquire as to whether the "parodic element is slight or great and copying small or extensive . . . for a work with slight parodic element and extensive copying will be more likely to merely

---

[148] *Id.* at 704.

[149] *Id.*

[150] *See id.*

[151] *Supra* Part II-B (explaining the intrinsic value behind fan fiction).

[152] 510 U.S. at 579 ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107").

[153] *Id.* at 580 (quoting AM HERITAGE DICTIONARY 1317 (3d ed. 1992); 11 OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989)).

[154] *Id*.

[155] *Id.* at 582; *but see* Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (holding that to be a proper parody, the subject of the parody must be the copyrighted work itself, and that a mere parody of a secondary subject in a manner that appropriates the copyrighted work's style or tone will not be excused as fair use).

'supersede the objects' of the original" than to constitute fair use.[156] The court's rationale was that most copyright holders are not likely to license parodies of their works.[157] As Wendy Gordon has stated, parody is an important element of contemporary society and therefore, courts should not allow copyright owners to use their rights to the detriment of society.[158]

Thus, we have reached another inquiry relevant to the case of the fan fiction author. The fan fiction author must determine whether his or her work is a parody, since classifying it as such gives it an additional chance of being a fair use.[159] In her article, Tushnet alludes to the fact that "the poor fellow in the red shirt who beams down with Kirk, Spock, and McCoy is going to be the one of the four to die," and offers that the distinction between parody and other simple transformative use is hard to make.[160] If this example is a parody, a fan fiction author could argue that paying homage to a copyrighted work in a piece of fan fiction is equivalent to a parody of that work.[161] Such an inquiry requires a thorough examination of the law, because the answer turns on the precise way in which courts have developed the parody-as-fair-use common law.

In a recent decision, the Eleventh Circuit Court of Appeals determined that a work is a parody "if its aim is to comment upon or criticize prior work by appropriating elements of the original in creating new artistic, as opposed to scholarly or journalistic, work."[162] The court stated that a parody is a transformative use, and as such, it is necessary to determine whether the alleged parody adds to the original.[163] In determining that the book *The Wind Done Gone* was a proper parody of *Gone with the Wind*, the court noted that the latter half of *The Wind Done Gone*, although using several of *Gone with the Wind*'s characters, created new plot elements not found in *Gone with the*

---

[156] *Campbell*, 510 U.S. at 582 n.16, (quoting Bleisetin v. Donaldson Lithographing, 188 U.S. 239, 251 (1903)).

[157] *Id.* at 592.

[158] *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1570 (May 1993); Tushnet, *supra* note 1, at 668.

[159] *See* e-mail from Xing Li (Aug. 16, 2002) (on file with author) (explaining that many of the stories housed on fanfiction.net are rightly categorized as parodies because parody "is a very popular genre for writers on the site to work with").

[160] Tushnet, *supra* note 1, at 668 (referencing DAVID BROMWICH, PARODY, PASTICHE, AND ALLUSION IN LYRIC POETRY: BEYOND NEW CRITICISM 328, 328-31 (Chaviva Hosek & Patricia Parker eds., 1985)).

[161] *Id.* (referencing BROMWICH (arguing that parody is always also homage to an original work)*; but see* Castle Rock Entertainment v. Carol Pub. Group, Inc., 955 F. Supp. 260, 271 (S.D.N.Y. 1997) (commenting that a *Seinfeld* trivia book is an homage to rather than a parody of the television series).

[162] *Suntrust Bank*, 268 F.3d at 1268-69.

[163] *Id.* at 1269, referencing *Campbell*, 510 U.S. at 579.

Wind.[164] This language is especially helpful to fan fiction authors, who often borrow characters from copyrighted works and transport them into new settings and adventures, and usually also offer some sort of commentary on the original.[165]

The *Suntrust* court determined that *The Wind Done Gone* was very clearly a parody of *Gone with the Wind* because its aim was to satirize the positive spin the popular novel puts on the Southern antebellum lifestyle.[166] Most works of fan fiction, on the other hand, do not undertake such a blatantly satiric purpose. The *Suntrust* opinion might avail only the rare fan fiction author who aims to truly satirize the themes of the original.

For fan fiction authors who do not write to satirize the original work, there have been many cases dealing with fair use of fictional characters for parodic purposes. Courts only seem to allow uses which keep character reference to a minimum.[167] For example, a television studio's creation of a parodic program centered on a bungling person acquiring extraordinary powers and occasionally using a Superman-type line did not infringe upon Warner Bros. copyright in the Superman character, partially because the television program did not reference Superman by name, nor did it use his likeness.[168] While this case is not directly applicable here because the court was concerned with whether the use was an infringement and not whether the use was a proper parody, it is noteworthy nonetheless. For most fan fiction authors, this case spells trouble and points out the major stumbling block fan fiction authors will face in making a parody argument. Most works of fan fiction borrow the actual characters and tend not to create larger-than-life character versions that mimic the originals. The vast majority of fan fiction writers will not be able to use a parody argument because many stories seek to remain true to canon and portray the characters as realistically as possible. For a select few, however, parody might be an appropriate defense. If the goal of a fan fiction author is to take a piece of popular culture, such as a television show, and write a story that

---

[164] *Id.* at 1270.

[165] *See* e-mail from Xing Li (Aug. 16, 2002) (on file with author) (noting the substantial numbers of stories housed on fanfiction.net that are classified as "parodies" of the original copyrighted work).

[166] *Suntrust Bank*, 268 F.3d at 1271.

[167] *See* Walt Disney Productions v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1978) (holding that copying the likeness of Walt Disney cartoon characters and portraying them in a parody on their wholesomeness as acting in a vulgar and lewd manner engages in an excessive amount of copying such that fair use is negated); Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397, 1397-98 (S.D. N.Y. 1975) (holding that copyright owners to "Mickey Mouse March" could enjoin the parodic use of the theme in an adult movie where the theme played for close to five minutes in the movie, while the original theme was only two minutes long); *but see* Pillsbury Co. v. Milky Way Productions, Inc., 1981 U.S. Dist. LEXIS 17722, 18 (N.D. Ga. 1981) (stating that a parodist is entitled to a broader license to use an original work than a non-parodist).

[168] Warner Bros., Inc. v. American Broad.., 523 F. Supp. 611, 616 (S.D.N.Y. 1981).

pokes fun at its popularity, the author might be able to claim a proper parodic purpose.[169]

In summary, the purpose and nature of fan fiction weigh mostly in the favor of a fair use finding, despite available arguments that the same purpose and nature could also cut against a fair use finding. Of primary importance, fan fiction is a noncommercial use that has a rich history of mainstream acceptance by most copyright holders.[170] Additionally, fan fiction authors can argue that their work is either an educational use or valid form of parody, although these arguments are admittedly weaker.[171]

b. The Nature of the Copyrighted Work: "Does it make a difference if the original work is a TV show, movie or book?"

Under this factor, courts generally give more protection to works of fiction and less to works of fact.[172] Particularly in the worlds of science and fine arts where scientific and literary creations provide wide social benefits, courts give broader scope to the definition of fair use. Conversely, courts are less likely to find a fair use in situations where business competition and financial underpinnings exist.[173] Also, unpublished works are usually given more protection than published works, which has led many commentators to note that published or widely-distributed works should receive less protection.[174]

For the fan fiction author, these general observations have several implications, although this factor will not ultimately get the writer very far. First, by definition all works of fan fiction are based on works of fiction, including novels, movies and television shows.[175] All such works of fiction have gained popularity as a result of broad, often global, distribution.[176] As a preliminary matter, fan fiction authors should note that while fictional works inherently receive greater protection, fictional works are also usually in wide distribution, thereby bolstering a fair use argument. However, according to Paul Goldstein, "It is the copyright owner's efforts to keep its work closely cabined, and not technical measures of publication, that determine the special protection from the fair use defense."[177] As such, fan fiction authors should

---

[169] *See* e-mail from Xing Li (Aug. 16, 2002) (on file with author) (explaining that parody is a popular genre of fan fiction).

[170] *Supra* Part II-B.

[171] *See Campbell*, 510 U.S. at 581 (holding that all the fair use factors must be weighed, thus rejecting a per se fair use defense for parody or educational uses).

[172] Tushnet, *supra* note 1, at 676.

[173] *See, e.g.* Loew's, Inc. v. Columbia Broad. Sys., Inc., 131 F. Supp. 165, 175 (S.D. Cal. 1955).

[174] *See* Tushnet, *supra* note 1, at 677.

[175] *Id.* at 676-77.

[176] *See* America Online, *Fan Fiction on the Net*, *at* http://members.aol.com/ksnicholas/fanfic/index.html (last visited Mar. 23, 2003) (indexing over 100 different fan fiction pieces, all of which constitute broad distribution).

[177] 1 PAUL GOLDSTEIN, COPYRIGHT 1.4.2, at 1:12-:13. *See also Sony Corp.*, 464 U.S. at

turn to the actions of the underlying copyright owners to determine the potential applicability of this factor. Similar to the implied consent argument, if a copyright owner has kept close control over the licensing and use of his product, the fan fiction writer's argument is probably weaker than if the same argument is made in the face of a lazy copyright owner who tolerates use of the work in other manners.[178]

c. The Amount and Substantiality: "C'mon, now — All I'm using are the characters. Is that okay?"

The different types of fan fiction are varied and extensive, with some stories merely borrowing characters and transporting them to an alternate time or location, and other stories borrowing elements of character, time and setting from the original copyrighted work.[179] Consequently, several works of fan fiction are more likely to receive fair use protection because of an insignificant amount of borrowing.[180] As should be obvious, the less of a copyrighted work a secondcomer borrows, the more likely it will amount to a fair use.[181] In the world of fan fiction, this leads to an inquiry into whether (1) the borrowing of characters and settings with the addition of elements and plots is small enough to constitute fair use, or (2) the borrowing of these elements gets to the heart of the original work in such a way that fair use is negated.[182] Despite the erratic and inconsistent tests used to determine the copyrightability of fictional characters, they can be copyrighted.[183] While a call for uniformity would be a welcomed relief in most academic and practical circles, for the time being, a fan fiction author seeking to apply the fair use doctrine must scour legal precedent and compare his or her actions to the actions of countless copyright defendants.

The first case of importance to the fan fiction author is the Ninth Circuit case, *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*,[184] also known

---

417 (indicating that a free, widespread broadcast of a television program supports a finding of fair use).

[178] *See supra* Part III-D-i.

[179] *Compar* Kellie, *Harry Potter and the Carnelian Key*, http://www.schnoogle.com/authorLinks/Kellie/Carnelian_Key/ (borrowing main characters, setting and plot elements from the copyrighted *Harry Potter* world), *with* Karei, *Years of the Snake*, http://www.schnoogle.com/authorLinks/Karei/The_Years_of_the_Snake_Year_One/ (borrowing only a minor character from *Harry Potter* and adding additional characters, settings and plots).

[180] *See* Tushnet, *supra* note 1, at 677-78.

[181] *But see* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 565 (1985) (stating that "a taking may not be excused merely because it is insubstantial with respect to the *infringing* work").

[182] *See generally supra* Part III-D-ii-1 (explaining that taking from "the heart" of a copyrighted work is less likely to receive protection).

[183] *See supra* Part III-B (discussing the copyrightability of fictional characters).

[184] 216 F.2d 945 (9th Cir. 1954).

as the "Sam Spade" case. In this case, the court noted that, at least in the genre of mysteries, authors typically carry their leading characters from one story to the next.[185] Other novel genres, television shows and movie sequels also do this, making the court's findings just as applicable today. The court touched on the world of fan fiction writers with its comment that "[i]t is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story, he is not within the area of protection afforded by copyright."[186] Thus, at least for fan fiction authors who reside within the jurisdiction of the Ninth Circuit, fan fiction authors should ask themselves whether the characters they took are "mere chessmen" in the underlying story.[187]

The Ninth Circuit has stumbled repeatedly in trying to apply its test. This has led to further confusion and uncertainty, much to the dismay of the fan fiction author and others seeking to apply a fair use defense.[188] For example, the court in *Metro-Goldwyn-Mayer v. American Honda Motor Co.*, holding that graphic characters are more likely to get copyright protection, relied in part on *Air Pirates*, a case that discussed and left unresolved the potential limits of the Sam Spade case to literary characters.[189] However, the court then noted that character is but one element to look at in making a fair use determination, and "plot, theme, dialogue, mood, setting, pace . . . and sequence of events" remain vital.[190] Ultimately, the court analyzed the facts of the case under both tests.[191]

For the fan fiction author, this court's cautious analysis has several implications. First, authors should ask themselves whether their canons are literary works, such as novels or visual works. Visual works may include television shows and movies. The *American Honda* rationale warrants more protection to characters in television characters, which cuts against a fair use defense.[192] The second implication is that fan fiction authors should engage in a compilation analysis of sorts in response to the *American Honda* court's

---

[185] *Id.* at 949.

[186] *Id.* at 950.

[187] *See id.* (discussing the Ninth Circuit's test, the meaning of which remains unclear and renders a proper application of its treatment in a fair use analysis uncertain).

[188] *See generally* Part III-B (discussing the erratic treatment of fictional characters in copyright law in general and in the Ninth Circuit in particular).

[189] Metro-Goldwyn-Mayer v. American Honda Motor Co., Inc., 900 F. Supp. 1287, 1295 (C.D. Cal. 1995) (*citing Air Pirates*, 581 F.2d at 755).

[190] *Id.* at 1297.

[191] *Id.* at 1296.

[192] *See id.* at 1295 (providing a corollary argument to be made relating to the first fair use factor's attention to transformative use: despite the *American Honda* court's reluctance to find fair use in the borrowing of a visual character, a fan fiction author using such characters might argue that his or her use is transformative, taking a visual character and transposing it into a literary medium).

implied concern with the overall feel of a character.[193] The more that a fan fiction author can distinguish the character about which he or she is writing from the character portrayed in the canon, the more likely fair use will be granted under *American Honda*.

To cover all bases, the fan fiction author should also examine his or her actions under the Second Circuit's sufficient delineation test.[194] Based on the treatment of this test by subsequent courts, if a fan fiction writer significantly delineates a character in his or her work, such that the character has received an identity independent from the original canon, the character deserves special copyright protection.[195] Using this analysis, the fan fiction author should ask whether the characters he or she has borrowed are the type of larger-than-life characters such as Mickey Mouse or Superman, which have independent lives beyond their pages or studio sets. For the majority of fan fiction authors who merely use characters that are only capable of existing within their fictional environments, the Second Circuit's reasoning strengthens their fair use defense.

d. The Effect on the Market for the Original: "Could a court really think that I somehow take money away from the original?"

According to the Supreme Court, the effect on the market for the copyrighted work is "undoubtedly the single most important element of fair use."[196] Under this factor, uses that economically substitute for the original work, thereby reducing market demand for it, are generally not protected by the fair use doctrine.[197] Turning to the Court's *Sony* rationale, a more fundamental type of market argument emerges, one relating to the goals of economic efficiency in society as a whole and one originating with John Locke. The argument goes that on the one hand, copyright owners have important rights in their creations, but on the other hand, the owners should not be allowed to hoard their creations in a way that would harm society-at-large. Stamping out the writing of fan fiction would have negative effects on society, and thus, most fan fiction should be excused as a fair use.[198]

---

[193] *Id.* at 1297.

[194] *See* Nichols v. Universal Pictures Corp., 45 F.2d at 121 ("we are rather concerned with the line between expression and what is expressed").

[195] *See* Anderson v. Stallone et al., 1989 U.S. Dist. LEXIS 11109, *20 (C.D. Cal. 1989) (holding that the Rocky characters have been developed so extensively over a number of movies that the characters deserve independent copyright protection).

[196] *Harper & Row Publishers*, 471 U.S. at 566.

[197] *Campbell*, 510 U.S. at 584.

[198] This Note takes a non-categorical approach to fan fiction and recognizes that certain types of fan fiction could very well cause great harm to the copyright holder. In that situation, under a Lockean theory, allowing the individual work fan fiction to be excused as fair use would cause more harm to the owner than would provide a reciprocal benefit to society, so the work should not be allowed.

Professor Wendy Gordon notes that many of our society's premiere creative works affect society in such a profoundly psychological way that they become "part of" an individual.[199] When that happens, the individual begins to think that "if I cannot use [these works], I feel I am cut off from part of myself. I would prefer never to have been exposed to them rather than to experience that sort of alienation."[200] Additionally, in today's omnipresent media culture, individuals are constantly subconsciously bombarded with a wide array of cultural artifacts, and many times the individual will have no way of knowing in advance how these will affect her.[201] If an individual is deeply moved by a cultural artifact, so much so that the individual feels drawn to create a new worked based on the old, then that individual would be harmed if copyright law forbids it.

Turning thus to fan fiction specifically, many commentators have noted that fan fiction, as a noncommercial and transformative use, does not have a noticeably adverse effect on the market for the original.[202] Fan fiction authors can usually argue that there is no harm to the copyright holder because their practice is noncommercial and the two works are operating in different markets, the fan fiction author existing in an online format and the copyright holder existing in digital or print form.[203]

However, copyright owners have a very strong counterargument that they should be able to determine how and when additional interest should be spurred.[204] Under this view, a copyright holder could determine whether or not a particular use should be allowed, regardless of its potential to affect the market or act as a substitute. The court in *Castle Rock Entertainment v. Carol Publishing Group, Inc.*[205] espoused this view in a case involving an unauthorized trivia book based on the popular *Seinfeld* television program. While noting that no evidence showed that the book had diminished interest in

---

[199] Gordon, *supra* note 158, at 1569.

[200] *Id.* at 1569.

[201] *Id*. *See also* Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 1009 (1990).

[202] *See* Tushnet, *supra* note 1, at 669-70 (noting that "enabling consumers to play with and alter videogame characters has the potential to improve the market for the official product," something that holds true for fan fiction as well).

[203] *See* Tushnet, *supra* note 1, at 671 n.94, *citing* 1 PAUL GOLDSTEIN, COPYRIGHT 1.4.2, at 1:12-:13; *see also* College Entrance Book Co. v Amsco Book Co., 119 F.2d 874 (2nd Cir. 1941) (commenting that when goods such as French booklets are competing for the same market, a finding of fair use on the part of an alleged infringer is less likely, due to the commercial nature of both products); Horn Abbot, Ltd. v. Sarsaparilla, Ltd., 601 F. Supp. 360, 367-68 (N.D. Ill. 1984) (holding that a book based on plaintiff's Trivial Pursuit board game was not fair use where it was prepared for commercial sale and would severely undercut plaintiff's financial market).

[204] *See* Stephen M. McJohn, *Fair Use and Privatization in Copyright,* 35 SAN DIEGO L. REV. 61, 93-94 (1998).

[205] 955 F. Supp. 260, 272 (S.D.N.Y. 1997).

the program or had reduced its value,[206] the court nevertheless found against the defendant book authors. The court focused its inquiry on determining the "potential market" for the copyrighted work, including "potential derivative works."[207] Importantly, the court did not consider the market for potential derivative works to be all-encompassing, but rather found it to include "only those that creators of original works would in general develop or license others to develop."[208]

The *Castle Rock* court then distinguished between a copyright holder's failure to develop a derivative work because of neglect, and failure to do so because of a conscious decision.[209] According to the court, if a copyright holder made a specific decision not to create a derivative work, this would severely undermine any finding of fair use on the part of a subsequent creator.[210] Thus, fan fiction authors should ask themselves whether the copyright owner has specifically addressed the writing of fan fiction.[211] If the copyright owner has spoken out against it, this weighs against a fair use defense for the fan fiction author.[212]

The *Castle Rock* decision, as a whole, might prove troubling for fan fiction authors. The court expressed concern for a copyright owner's choice to prevent the market from being saturated with variations of the original.[213] This cuts against a finding that fan fiction is fair use, since copyright holders might want to prevent different "versions" of the original. The *Castle Rock* court was concerned with the commercial nature of the derivative author's work and the drain on the financial market for the copyright holder.[214] While fan fiction is a noncommercial use, this concern may nonetheless trouble fan fiction authors because copyright holders frequently distribute novelizations of their movies and television shows.[215] For fan fiction based on television shows, courts could regard the stories as infringing upon the potential novelization market because they drain the potential profitability of novelization for the copyright owner. However, most online fan fiction are works that the copyright holder

---

[206] *But see id.* at 271 (noting to the contrary that the book, if anything, might bolster interest in *Seinfeld*).

[207] *Id.* at 271.

[208] *Id*. (quoting *Campbell*, 510 U.S. at 592).

[209] *Id.* at 272.

[210] *Id.* (noting also that this argument would apply differently to parody).

[211] *See supra* Part III-D-i.

[212] *Id.*

[213] *Castle Rock Entm't*, 955 F. Supp. at 272.

[214] *Id.* at 269; *see also* Marcus v. Rowley, 695 F.2d 1171, 1173, 1178-79 (9th Cir. 1983) (holding that there will not be a finding of fair use when the copying of portions of a book led others to refuse to buy the book but to rather rely on defendant's copies); New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517, 1528 (S.D.N.Y. 1988) (holding that defendant's music video is nor fair use because it usurps the market for plaintiff's work).

[215] Tushnet, *supra* note 1, at 670.

would not market because they commonly contain additional characters or portray the leads as acting out of character.[216] While the *Castle Rock* argument cannot be fully countered, this combined with the noncommercial nature of fan fiction does soften its blow a bit.

Additionally, another court decision, *Twin Peaks Productions, Inc. v. Publications Int., Ltd.*, intimated that if a copyright holder has no interest in occupying a derivative market, a defendant's subsequent use is more likely to be fair.[217] Critical to the *Twin Peaks* opinion was whether the defendant's derivative work was a market substitute for the original, thus depriving the copyright holder of profits.[218]

The *Twin Peaks* court was concerned that readers would buy defendant's book, a summary of the plaintiff's television show episodes, and not feel the need to watch the actual program or rent a videotape of it.[219] Most fan fiction authors should find this rational helpful because a user is unlikely to feel that reading fan fiction online is an adequate substitute for the original when the very nature of most fan fiction is to significantly alter the original.[220]

E. Hmm, that's good to know. Moving on . . . wait, what? Trademark law, you say?

Even if fan fiction is able to leap the copyright hurdle, a finding of infringement is still a real threat under trademark law. In most works upon which fan fiction is based, the individual characters are not only protected under copyright law, by their delineation in a copyrighted work, but these characters are often individually protected under trademark law.[221] Of importance to this issue is the recent "Barbie case," *Mattel, Inc. v. MCA Records*, in which a musical composition used the plaintiff's trademarked name.[222]

The *Mattel* court ultimately determined that defendant's song "Barbie Girl" was a parody of plaintiff's product, but the court's discussion and rationale is important to understanding how trademark law applies to the realm of fan fiction. The court stressed that trademarks represent "a limited property right in a particular word, phrase or symbol, but cannot be used to allow trademark owners to eviscerate all discussion of their marks they might find annoying or offensive."[223] Thus, trademark law does not automatically preclude the use of

---

[216] *Id.* at 670-71; *but see Walt Disney Productions*, 581 F.2d at 759 (expressing concern with character saturation).

[217] 996 F.2d 1366, 1377 (2d Cir. 1993).

[218] *Id.*

[219] *Id.*

[220] *Supra* Part III-A (arguing that the addition of extra elements to a work of fan fiction constitutes a transformative work).

[221] *See generally* Tushnet, *supra* note 1, at 674-76.

[222] 28 F. Supp. 2d 1120 (C.D. Cal. 1998), *affirmed* 296 F.3d 894 (9th Cir. 2002).

[223] *Id.* at 1141 (relying on New Kids on the Block v. News Am. Publ'g., Inc., 971 F.2d 302 (9th Cir. 1992)).

trademarked characters in fan fiction, but trademark owners may nonetheless have a claim for tarnishment or blurring.[224]

This issue is becoming increasingly prevalent in the world of fan fiction due in part to the increased attention paid to "slash" fan fiction. Slash is fan fiction that centers around homosexual relationships between characters that were heterosexual in the original copyrighted work.[225] Many trademark owners look down on slash fan fiction, perhaps fearful that it will tarnish their trademarks with the intimation that their protected characters are homosexual.[226]

As far as the fan fiction author is concerned, the first task is to determine whether the characters he is writing about are trademarked. Fictional characters cannot be trademarked solely for their own protection, but "they can be trademarked when they are used to indicate the source of a product."[227] Thus, a fan fiction author does not need to worry about trademark law as long as he is not using characters that also act as source-identifiers. However, trademark law is implicated in several popular genres of fan fiction that involve trademarked characters, such as Harry Potter, whose name and likeness have been separately trademarked.[228]

After determining that a character is indeed trademarked, the inquiry must continue for those fan fiction writers who chose to borrow these characters. The first issue for these authors is whether their works could lead to a claim of trademark dilution.[229] This topic is particularly relevant to slash writers, who find themselves and their stories in the limelight with the most frequency. Courts have recognized that a claim of dilution can take two forms.[230] The first is a "blurring" or "whittling down" of the distinctiveness of the mark.[231] The second is a "tarnishment" of the mark, which occurs when a defendant

---

[224] Ringling Bros.-Barnum & Baily Combined Shows, Inc. v. Utah Div. of Travel Develop., 955 F. Supp. 605, 614 (E.D. Va 1997) ("Blurring" is "the lessening of the capacity of a famous mark to identify and distinguish goods or services."); *see also* L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987) ("Tarnishment" occurs when a second comer uses a famous mark in such a way that diminishes the mark's goodwill or quality connotations.); Coca-Cola v. Alma-Leo U.S.A., Inc., 719 F. Supp. 725, 728 (N.D. Ill. 1989); Eastman Kodak Co. v. D.B. Rakow, 739 F. Supp. 116, 118 (W.D.N.Y. 1989); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979).

[225] *See* COOMBE, *supra* note 12, at 121-22.

[226] *See id.*

[227] Helfand, *supra* note 84, at 636.

[228] *See, e.g.* Warner Bros., *The Official Harry Potter Website*, *at* http://www.harry potter.com (last visited Mar. 23, 2003) (warning on the website's front page that, "HARRY POTTER, characters, names and related indicia and WARNER BROS., shield logo and related indicia are trademarks of Warner Bros.").

[229] *See generally* 3 J. THOMAS MCCARTHY, TRADEMARK AND UNFAIR COMPETITION, § 24.13 (3d ed. 1973).

[230] *Id.*

[231] Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1039 (N.D. Ga. 1986).

uses the mark in a way that "creates an undesirable, unwholesome or unsavory mental association" with the mark.[232] Copyright owners would arguably be worried about the latter when it comes to fan fiction. Accordingly, this Note will focus its dilution discussion on tarnishment. A good starting ground for the analysis is the Federal Trademark Dilution Act, which provides that

> The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark.[233]

To prove dilution, a party need not show "the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception."[234]

Based on the language of the statute itself, a trademark owner will most likely lose a dilution claim against a fan fiction author. While the statute favors the mark owner by not requiring a showing of confusion or competition, the statute's commercial use requirement will likely impede the owner.[235] As the court in *L.L. Bean, Inc. v. Drake Publishers, Inc.* made clear, a noncommercial use of a trademark will not lead to a cause of action for dilution .[236] A court will entertain a claim for tarnishment or dilution only when the defendant's use of the mark is in a commercial setting, and the accompanying House Report to the Federal Trademark Dilution Act makes this clear.[237]

The comments of the courts and the legislature indicate good news for fan fiction authors who borrow trademarked characters primarily because fan fiction tends to be noncommercial.[238] Additionally, the law makes the general rule clear that others may lawfully use a trademark in a negative context, even if the trademark owner finds the use offensive.[239] Thus, it appears that fan

---

[232] *Id.* However, the recent Supreme Court opinion in *Moseley v. V Secret Catalogue, Inc*., 123 S. Ct. 1115 (2003), mentioned in dicta that it couldn't find where the statute says tarnishment was evidence of dilution.

[233] 15 U.S.C. § 1125(c)(1) (2000).

[234] *Id.* § 1127.

[235] *Id.*

[236] 811 F.2d 26, 33 (1st Cir. 1987) (holding that defendant's noncommercial use of plaintiff's trademark in a pornographic magazine did not dilute the mark).

[237] *Id.* at 29; H.R. REP. 104-374 at 4 (1996) ("The bill will not prohibit or threaten 'noncommercial' expression, as the term has been defined by the courts. Nothing in this bill is intended to alter existing case law on the subject of what constitutes 'commercial' speech"); *see also* 141 CONG. REC. S19306, at S19310 (1995) ("The bill will not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction"); 141 CONG. REC. H14317, at H14318 (1995) (same).

[238] *See supra* Part III-D-ii-1 (discussing the noncommercial nature of fan fiction).

[239] *See* New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 307 n.5 (9th Cir.

fiction portraying trademarked characters in a light that is offensive to trademark owners, including portraying characters as engaging in homosexual relationships, is not a practice that is outright unlawful.[240] Of particular importance to slash fan fiction, sexual innuendo and sexual but nonobscene speech "is entitled to no less protection than other forms of speech."[241] Thus, when characters in a work of fan fiction are portrayed in a homosexual relationship, this portrayal alone will not lead to a tarnshiment claim.[242]

As a final note, fan fiction authors will assuredly improve their legal status by using disclaimers. Fan fiction authors typically use disclaimers to make clear that their works are not in any way associated with the owners of the copyright or trademark.[243] Courts have held that disclaimers are a valid and productive means by which defendants can distance themselves from the plaintiff's ownership interest.[244] Therefore, fan fiction authors can place a disclaimer in their work to further allay some of the fears of dilution or tarnishment that a plaintiff trademark owner might possess.

IV. CONCLUSION: WELL . . . THAT WAS A LOT OF INFORMATION AT ONCE. CAN YOU SUM ALL OF THIS UP FOR ME?

When confronting the numerous legal issues surrounding fan fiction, various historical, sociological and cultural underpinnings of this genre become central to understanding its place in today's world. Consumers of fictional narratives naturally ask "What happens next?"[245] From the beginning of time, the storyteller has expounded on cultural myths and legends, and simply because these myths are now recorded into a fixed medium, the practice of retelling and retooling them should not cease.[246] The practice continued unchecked — and in some instances, with much encouragement — until the birth of the Internet and corporate control of copyrights changed the game.[247] The Copyright Act's

---

1992).

[240] *See L.L. Bean, Inc.,* 811 F.2d at 31.

[241] *Id.* at 34.

[242] *See id.* at 31 (noting that a court cannot find dilution or tarnishment of a mark solely because the mark is portrayed in an "unwholesome" light. Rather, a mark is tarnished or diluted only when consumer capacity to associate it with the appropriate product or service has been diminished, especially where the mark is linked to shoddy quality or such); *but see* Pillsbury Co. v. Milky Way Prods, Inc., 1981 U.S. Dist. LEXIS 17722, 29-30 (N.D. Ga. 1981).

[243] *Supra* Part III-A (discussing the widespread use of disclaimers in the fan fiction community).

[244] *See* Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1052 (2d Cir. 1983) ("We are satisfied that the disclaimer is adequate to distance CU and Regina").

[245] Tushnet, *supra* note 1, at 652.

[246] *See* Jenkins, *supra* note 38.

[247] *Id.* (explaining that in our contemporary folk culture, "our core myths now belong to corporations, rather than the folk").

original aim was to ensure that authors had rights to their original expressions, while also encouraging others to add to the ideas of the works, thereby fostering creativity.[248] However, in today's market, the balance seems to have shifted, and the goal of encouraging others to build onto established works has been pushed into the background.[249]

This devaluing is unfortunate in light of the innate desires that fan fiction can fulfill in people immersed in a society saturated with cultural icons.[250] For women in particular, the primary writers of fan fiction and fandom provide an escape from traditional societal gender roles and permit a writer to explore the contours of relationships in a postmodern society.[251] This is increasingly true with regards to slash fan fiction.[252]

Despite the personal benefits derived from writing fan fiction, it is copyright infringement, nonetheless.[253] Characters can receive copyright protection, and when a fan fiction author borrows them without permission, he is violating a number of the copyright owner's exclusive rights.[254]

Notwithstanding the infringement, fan fiction authors can potentially use a number of defenses to escape liability, although the success of these defenses varies based on the individual piece of fan fiction involved.[255] Thus, what follows is a guide of sorts for a fan fiction author, in which potential infringement claims are evaluated and suggestions are offered based on current intellectual property precedent.

When trying to decide whether any defenses exist under the law, there are a number of question a fan fiction author should ask. A good place to start is implied consent because this defense is a fan fiction author's strongest potential argument.[256] Many copyright owners are aware when fan fiction authors use their work, yet they make no affirmative steps to prevent it. If a fan fiction author is borrowing from the creations of such a copyright owner, this fan fiction author will have a strong implied consent argument.[257]

Of course, not all fan fiction authors will be able to avail themselves of this defense, but the fair use doctrine might yet provide relief.[258] Under Section

---

[248] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

[249] *See* Jenkins, *supra* note 38.

[250] *See* COOMBE, *supra* note 12, at 89-92.

[251] *Id.* at 119-21.

[252] *Id.*

[253] *See supra* Part III-A.

[254] *See supra* Part III-C (arguing that the exclusive rights to reproduce, distribute and prepare derivative works are violated by fan fiction authors).

[255] *See supra* Part III-D (explaining that the individualistic nature of fan fiction effectively precludes taking a categorical approach).

[256] *See supra* Part III-D-i.

[257] *See id.*

[258] *See* Part III-D-ii (explaining the fair use doctrine). Even if a fan fiction author has a strong implied consent argument, that author should still examine his or her actions under the fair use doctrine as well.

107 of the Copyright Act, a fan fiction author must evaluate four factors.[259] Under the first factor, the purpose and character of the use, fan fiction authors should ask themselves whether they are making *any* commercial profit from their stories. If the answer is yes, a fair use argument will be extremely difficult to make because courts are apt to say commercial use is not fair.[260] Fan fiction authors can help make their use noncommercial by adding a disclaimer atop their stories in which they forthrightly state they do not own the copyright to the characters and are making no money off the stories. Second, fan fiction authors should examine their motives for writing. If the fan fiction author is primarily motivated by a desire to hone her writing skills, the fair use argument strengthens.[261] Finally, a fan fiction author should ask whether the story is properly classified as a parody, which involves determining whether the story's purpose is to comment on or poke fun at the original.[262]

Under the second factor, the fair use analysis turns to the nature of the copyrighted work. This factor is not tremendously applicable because nearly all fan fiction is based on fictional works, which receive greater copyright protection.[263] A fan fiction author who writes stories based on highly-popular and widely-distributed works might have a stronger argument than the fan fiction author who writes stories based on smaller, "cult classics."[264]

The third factor is the amount and substantiality of the portion used, which requires fan fiction authors to examine the borrowing of characters. Certain fan fiction authors might only borrow a few characters or a basic theme and subsequently add new characters and settings.[265] The more fan fiction authors engage in this addition of elements and retreat from wholesale borrowing of the original, the more likely a court will find their use is fair.[266]

The final fair use factor relates to market impact. On a preliminary note, a fan fiction author should argue that the copyright law's underlying goals to encourage a use that does not harm the original's market or potential market and to discourage any attempt by a copyright owner to monopolize that market

---

[259] 17 U.S.C. § 107 (The four factors are: "(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").

[260] *Sony Corp*., 464 U.S. at 455 (1984) ("Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment").

[261] *See* Part III-D-ii-1 (discussing an educational use defense, however, the presence of other motives, such as personal desires to expand on cultural icons, might impede such a defense).

[262] *See Campbell*, 510 U.S. 569, 579 (1994).

[263] *See* Part III-D-ii-2.

[264] *See id.*

[265] *See* Part III-D-ii-3.

[266] *Id.*

to the detriment of society.[267] Although some have argued that copyright owners should control potential expansion into derivative markets, if a copyright owner has no interest in occupying a particular derivative market, that market should open to subsequent users.[268] Thus, if a fan fiction author is writing based on an original work that is unlikely to distribute novelizations of the work, the fair use argument strengthens.

Finally, copyright law aside, a fan fiction author also needs to keep an eye out for any potential trademark liability, which could arise if a fan fiction author is composing stories based on trademarked characters. This is particularly relevant to slash writers, whose controversial works create a target for a claim of trademark tarnishment. However, in order for a trademark owner to succeed on a tarnishment claim, he will likely have to prove that the fan fiction author used the mark in a commercial manner.[269] Thus, because most fan fiction is rightly categorized as a noncommercial activity, this claim is relatively weak.

---

[267] *See* Gordon, *supra* note 158, at 1608.

[268] *See Castle Rock Entm't.*, 955 F. Supp. at 271; *Twin Peaks Prods.*, 996 F.2d at 1377.

[269] *See* 15 U.S.C. § 1125(c)(1) (1997).