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Fictitious Flattery: Fair Use, Fan Fiction, and the Business of Imitation

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Fictitious Flattery: Fair Use, Fan Fiction, and the Business of Imitation

FICTITIOUS FLATTERY: FAIR USE, FANFICTION, AND THE BUSINESS OF IMITATION

*Mynda Rae Krato**

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INTRODUCTION

Fanfiction is what literature might look like if it were reinvented from scratch after a nuclear apocalypse by a band of brilliant pop-culture junkies trapped in a sealed bunker.

Lev Grossman, author of *The Magicians*.¹

Fanfiction is defined 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.’”² This definition, provided by a scholar on the matter of fanfiction and fair use, falls short as there are many types of fan-created mediums beyond “written creativity.” These mediums include art,³ films,⁴ and video games.⁵ *Fifty Shades of Grey*, a New York Times-bestselling book trilogy by author E.L. James, started out as a fanfiction based on Stephanie Meyer’s hugely popular *Twilight* series.⁶ In February 2015, Focus Features released the first of three *Fifty Shades of Grey* films.⁷ A month prior, Asylum released *Bound*, a “mockbuster” of the *Fifty Shades of Grey* film.⁸ Finally, in January 2015, comedian filmmaker Marlon Wayans

¹ Lev Grossman, *The Boy Who Lived Forever*, TIME (Jul. 7, 2011), <http://content.time.com/time/arts/article/0,8599,2081784,00.html>.

² Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 168 (2011) (citing Rebecca Tushnet, *Legal Fictions: Copyright, Fanfiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997)).

³ See, e.g. DEVIANT ART, <http://www.deviantart.com/> (last visited Apr. 27, 2016) (a website allowing users to publish original and fan-based graphic art).

⁴ See Matt Singer, *Is This the Age of Fanfiction Films?*, INDEP. FILM CHANNEL, (Dec. 5, 2015), <http://www.ifc.com/2011/12/muppets-age-of-fanfiction> (describing the most recent *Muppets* movie as fanfiction and J.J. Abrams’ *Super 8* as a *Close Encounters of the Third Kind* and *E.T.* fanfiction film).

⁵ See, e.g. Minute Minecraft Parodies, “*The Legend of Zelda*” – *Minecraft Parody*, (Mar. 14, 2015), <https://www.youtube.com/watch?v=KN1jQ9aFHEM> (a parody of a video game created using a video game called *Minecraft* and posted to YouTube).

⁶ Natasha Bertrand, ‘*Fifty Shades of Grey*’ Started Out as ‘*Twilight*’ Fan Fiction Before Becoming an International Phenomenon, BUS. INSIDER (Feb. 17, 2015), <http://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2>.

⁷ *Fifty Shades of Grey*, IMDB.COM, INC., <http://www.imdb.com/title/tt2322441/>.

⁸ James McConnaughy, *Fifty Shades of Grey vs. Bound: When a Mockbuster Beats Its Original*, MARY SUE, (Feb. 3, 2016), <http://www.themarysue.com/bound-mockbuster/>.

released *Fifty Shades of Black*, a parody of the *Fifty Shades of Grey* film.⁹ This capitalization on original works through derivative works is not a new phenomenon in publishing and film, and brings about a variety of legal issues. Namely, issues concerning infringement and fair use. Fanfiction is growing as a creative medium, and governing law must shift in order to accommodate the changes in creative landscape.

Judge Leval accurately surmised the two competing issues concerning fair use in *Authors Guild*,¹⁰ stating:

The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption . . . [however,] in certain circumstances, giving authors *absolute* control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge¹¹

In terms of fanfiction, the two prevailing viewpoints suggest that (1) Copyright law needs to be strengthened to ensure original copyright owners enjoy the rights and financial incentives to creation or; (2) Copyright law must be relaxed to promote creativity and the expansion of creative works. This Article advocates for a more liberal use of the fair use doctrine in relation to works derived from fanfiction. Such a stance is necessary to promote progress and expansion in creative realms under the Copyright Act and in turn, allow for the commercialization of innovative works to benefit creators. Additionally, this Article presents a statutory licensing system as a potential solution to the tension between original authors and fanfiction authors.

Section II of this Article will provide a brief background of relevant statutory and case law surrounding derivative works, fair use and fanfiction. Section III of this Article will analyze the recent outgrowth of fanfiction that has been met with commercial success, suggesting that the fair use defense be construed broadly to promote the protection of such works, as well as the resulting expansion of creativity and innovation through these works. Section III will also

⁹ Alyssa Sage, 'Fifty Shades of Black's' Marlon Wayans on Parody Films: 'There's a Science to It', VARIETY, (Jan. 27, 2016), <http://variety.com/2016/scene/vpage/marlon-wayans-fifty-shades-of-black-1201690102/>.

¹⁰ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), cert. denied, 2016 U.S. LEXIS 2545 (Apr. 18, 2016).

¹¹ *Id.* at 212.

discuss the possibility of a licensing system under which original authors might seek royalties. Section IV will provide a brief conclusion.

I. BACKGROUND

A. Foundational Statutory and Case Law

Copyright law is rooted in the Progress Clause of the United States Constitution: “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”¹² Copyright law is codified through the Copyright Act.¹³ The Copyright Act grants exclusive rights to copyright holders in protected works and aspects of works, and these rights include the right to reproduction, derivative works, distribution, performance, display, and transmission.¹⁴

A plaintiff establishes infringement by illustrating (1) Ownership of a valid copyright and (2) Copying of the constituent elements of the work that are original.¹⁵ Courts determine the extent of infringement by first establishing which elements of a work are original to that work.¹⁶ Courts then analyze whether there is a substantial similarity between those elements which are original to the plaintiff's work and those within the defendant's work.¹⁷ The test for substantial similarity is based upon the judgment of an “ordinary observer” and whether he, unless he set out specifically to look for the disparities, “would be disposed to overlook [the disparities] and regard [the] aesthetic appeal [of the two works] as the same.”¹⁸ Additionally, courts look at the total concept and feel of the two works at issue.¹⁹

The Copyright Act defines derivative works as a work based on “one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which

¹² U.S. CONST. art. 1, § 8, cl. 8.

¹³ Copyright Act, 17 U.S.C. §§ 101-810 (1976).

¹⁴ *Id.* § 106.

¹⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row, Publrs. v. National Enters.*, 471 U.S. 539, 548 (1985)). See also Copyright Act § 501 (“The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

¹⁶ See *Feist Publ'ns, Inc.*, 499 U.S. at 348, 350.

¹⁷ See *Prunte v. Universal Music Grp.*, 484 F. Supp. 2d 32, 40-41 (D.D.C. 2007).

¹⁸ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

¹⁹ See *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002) (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)); *Sid & Marty Krofft TV Prods. v. McDonalds Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977)).

a work may be recast, transformed, or adopted.”²⁰ The definition of derivative works includes works that could be considered editorial revisions, annotations, elaborations, or other modifications that together, represent an “original work of authorship.”²¹ Therefore, the derivative works definition encompasses “prequels, sequels, and the retellings of existing works,” encapsulating much of what is considered to be fanfiction works.²² There is no statutory definition of fanfiction, but works within the genre are considered to be the “unauthorized sequels, prequels and retellings of existing works by fans generally not for any monetary reward but purely for the enjoyment of participating in the fandom.”²³ This Article will explore this definition and the issues that emerge when participation in the creation and dissemination of fanfiction crosses the line of free enjoyment to commercialized success.

Fair use is another concept that is closely linked to fanfiction. Fair use is a limitation on the exclusive rights outlined in the Copyright Act. The fair use defense can be traced back to the 1841 case, *Folsom v. Marsh*.²⁴ *Folsom* introduced the four-factor test discussed below and codified by § 107 of the Copyright Act.²⁵ Courts examine four factors when analyzing whether a work is protected by the fair use defense:

(1) The purpose and character of use; (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.²⁶

The fair use defense allows the use of a copyrighted work for purposes of criticism, comment, news reporting, educational teaching, scholarship, and research.²⁷ Fair use is established on a case-by-case basis and therefore, case outcomes are difficult to predict.²⁸

²⁰ Copyright Act §101.

²¹ *Id.*

²² Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 951, 957 (2014).

²³ *Id.*

²⁴ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

²⁵ *See id.*

²⁶ Copyright Act §107.

²⁷ *Id.*

²⁸ *See* Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Reorganizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 286-88 (2015) (discussing the various, differing outcomes of fair use cases) (citing *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008); *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 13711370 (N.D. Ga.), *vacated*, 252 F.3d 1165 (11th Cir.

Within the statutory language of the fair use defense is the exception for works of parody. The Supreme Court tailored the fair use inquiry for parody cases in *Campbell v. Acuff-Rose Inc.*,²⁹ establishing that there is no presumption that all parody is fair use,³⁰ transformative elements of parody reduce the significance of commercialism,³¹ the use of parody to advertise a product is less likely to fall within the fair use defense,³² and that the effect on the market does not include harm due to ridicule.³³ When considering works such as *Fifty Shades of Black* and the *Scary Movie* franchise, parody remains a steadfast defense for lampoon-like works borne out of original copyrighted material. However, parody within fair use cannot represent the only pathway to protection for fanfiction, as fanfiction often embodies multiple genres beyond parody.

B. Fanfiction Case Law

Although fanfiction has existed since the Victorian Era, the medium has only become prevalent recently through bestselling works such as *Fifty Shades of Grey*, which began as a *Twilight* fanfiction,³⁴ and *The Mortal Instruments* series, which was written by a popular *Harry Potter* fanfiction author.³⁵ While there have been no cases that directly concern infringement in the context of works that are defined as pure fanfiction, this section analyzes works that follow the vein of fanfiction, or have been created by fans of original works, and have faced conflict under the current copyright law regime.

i. Literature

The most recent jurisprudence surrounding fair use and derivative works is *Authors Guild, Inc. v. Google, Inc.* (the “*Google case*”).³⁶ The case considered whether Google’s act of creating digital copies of roughly 20 million books, and making such copies available to the

2001), and *rev'd*, 268 F.3d 1257 (11th Cir. 2001); *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 140 (2d Cir. 1998)).

²⁹ *Campbell*, 510 U.S. at 569.

³⁰ *Id.* at 584-86.

³¹ *Id.* at 579.

³² *Id.* at 585.

³³ *Id.* at 583.

³⁴ Lantagne, *supra* note 28 at 266-67.

³⁵ Jeneé Osterheldt, *Author Cassandra Clare Sheds Light on her Shadowhunters in the New 'Lady Midnight'*, KAN. CITY STAR (MAR. 11, 2016), <http://www.kansascity.com/living/liv-columns-blogs/jenee-osterheldt/article65458592.html>.

³⁶ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

public via a search function, constituted fair use.³⁷ The court examined the traditional four-factor fair use test, ultimately determining that Google’s digitalization of the contested works, creation of the search function, and display of text snippets through that search function did not equate to infringement and were protected under the fair use defense.³⁸ The court held as such because it deemed the search function to be highly transformative, providing users copies of original books that “served a different function from the original.”³⁹ The court found the fact that Google utilized its digitalization system for profit to be inconsequential, as “[m]any of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.”⁴⁰ The *Google* case, though not directly aligned with fanfiction, illustrates the reach of the transformative element of the fair use test.

Similarly, the court in *SunTrust Bank v. Houghton Mifflin Co.*⁴¹ examined the fair use test in the context of what could be considered a fanfiction work. Alice Randall authored *The Wind Done Gone*, a retelling of Margaret Mitchell’s *Gone With the Wind* told from the viewpoint of an original character named Cynara.⁴² The court conducted a comparison of the two works, noting that *The Wind Done Gone* featured many of the same, copyright-protected characters as *Gone With the Wind*.⁴³ However, these characters were renamed and viewed from a distinct viewpoint.⁴⁴ The court continued on to conclude that although *The Wind Done Gone* was created for commercial purposes and achieved commercial success, this attribute was “overshadowed and outweighed in view of its highly transformative use of [*Gone With the Wind*’s] copyrighted elements.”⁴⁵ This led the Court of Appeals to hold that *The Wind Done Gone* constituted fair use under the first factor as *The Wind Done Gone* commented and criticized *Gone With the Wind*.⁴⁶ *The Wind Done Gone* took characters and scenes from *Gone With the Wind* and altered characteristics, storylines, and events.⁴⁷ These alterations brought the work as a whole to an

³⁷ See *id.* at 207-208.

³⁸ *Id.* at 229.

³⁹ *Id.* at 217 (citing *Authors Guild, Inc. v. HaithiTrust*, 755 F.3d 87, 97 (2d Cir. 2014)).

⁴⁰ *Id.* at 219.

⁴¹ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

⁴² See *id.* at 1259, 1267.

⁴³ See *id.* at 1267.

⁴⁴ See *id.*

⁴⁵ *Id.* at 1269.

⁴⁶ See *id.* at 1271-774.

⁴⁷ See *id.*

ample level of transformation to warrant protection under the fair use doctrine.⁴⁸ Additionally, the court established that *The Wind Done Gone* did not supplant the marketplace for *Gone With the Wind*.⁴⁹

Alternatively, the court in *Salinger v. Colting*⁵⁰ established that a story set 60 years after *Catcher in the Rye*, entitled *60 Years Later: Coming Through the Rye*, was not sufficiently transformative and therefore did not warrant the protection of the fair use defense.⁵¹ The *Salinger* case is closely aligned to fanfiction, as the defendant's novel took a "recognizable character and re-imagin[ed] them at a different stage of life."⁵²

⁴⁸ *See id.*

⁴⁹ *See id.* at 1274-77

⁵⁰ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

⁵¹ *See id.* at 83.

⁵² Stacey Lantagne, *The Better Angels of our Fanfiction: The Need for True and Logical Precedent*, 33 *Hastings Comm. & Ent. L.J.* 159, 169 (2011).

The court in *Salinger* stated that altering a setting and aging a character was not sufficient to establish transformative fair use.⁵³ Contrary to the *Google* case,⁵⁴ the court in *Salinger* agreed with a lower court, stating that the commercial nature of the defendant's work weighed against a finding of fair use under the purpose and character of use element.⁵⁵ The *Salinger* case introduces the issues that fanfiction authors face upon attempting to commercialize their works. Fair use and fanfiction scholar Stacey Lantagne describes the *Salinger* case as “not an ideal fanfiction precedent” as “most fanfiction is not-for-profit.”⁵⁶ However, this case represents the emergence of fanfiction as a prevalent medium for commercialization in the literature industry.

In line with the court in *Salinger*, the court in *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*,⁵⁷ held that a parody of Dr. Seuss' *The Cat in the Hat*, entitled *The Cat NOT in the Hat! A Parody by Dr. Juice*, was not transformative enough to constitute fair use.⁵⁸ The court determined that the defendant's work did not ridicule or appropriately parody Dr. Seuss' work and additionally, did not put forth enough “effort to create a transformative work” through new expression, meaning, or message.⁵⁹ This holding is particularly relevant for fanfiction artists who seek to defend their works based on parody and transformative nature—courts have not created a bright line rule concerning how transformative a literary work must be in order to be protected under fair use.

⁵³ *Salinger*, 607 F.3d at 73-74.

⁵⁴ See *supra*, note 39 and accompanying text.

⁵⁵ *Salinger*, 607 F.3d at 73-74.

⁵⁶ See Lantagne, *supra* note 52 at 170.

⁵⁷ *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

⁵⁸ See *id.* at 1401.

⁵⁹ *Id.*

ii. Films, Stage Productions, and Photography

Fair use analysis in films and art is applied on a case-by-case basis and the courts have yet to hold uniformly.⁶⁰ Recently, the Second Circuit Court of Appeals held that a parody stage adaptation of the 1991 film *Point Break*, called *Point Break Live!*, was protectable under the fair use defense as the work stayed “within the bounds of fair use” and was sufficiently original.⁶¹ In terms of sufficient originality, the author of *Point Break Live* added jokes, props, theatrical staging, and other “humorous theatrical devices” to transform his work and distinguish it from *Point Break*.⁶² Furthermore, the court established that the author of an unauthorized work, protectable under fair use and “exhibiting sufficient originality,” is entitled to claim independent copyright protection.⁶³ This holding seems to light the way for fanfiction works to establish independent copyright protection.

Photography and art are often at the center of the fair use debate. The court in *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*⁶⁴ held that a reimagined *Men in Black* promotional poster and trailer did not rise to the level of fair use because the poster and trailer “merely incorporate[d] several elements” of *Men in Black*.⁶⁵ The court established that the defendant sought attention for their work and avoided “the drudgery in working up something fresh.”⁶⁶ Alternatively, the court in *Leibovitz v. Paramount Pictures Corporation*.⁶⁷ held that an advertisement for *Naked Gun 33 1/3: The Final Insult*, which featured an image that parodied an Annie Leibovitz photograph of Demi More, was fair use as the advertisement could noticeably be perceived as “commenting on the seriousness, even the pretentiousness, of the original.”⁶⁸ The issue with holding fanfiction to a standard such as this is that not all fanfiction directly comments on the work from which it is derived. Fanfiction often is a continuation of a story, or an alternate

⁶⁰ See Lantagne, *supra* note 28 at 286-87.

⁶¹ *Keeling v. Hars*, 809 F.3d 43, 45 (2d Cir. 2015).

⁶² *See id.*

⁶³ *Id.* at 54.

⁶⁴ *Columbia Pictures Indus. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998).

⁶⁵ *Id.* at 1188 (listing similar elements such as carrying large weapons, the New York skyline, and a similar layout).

⁶⁶ *See id.* at 1188.

⁶⁷ *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D.N.Y. 1996).

⁶⁸ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998).

storyline all together. Holding fanfiction to the standard of parody is unrealistic, and further places fanfiction in fair use purgatory.

iii. Sound Recordings

Briefly discussed above, *Campbell v. Acuff-Rose Music, Inc.* solidified the place of parody within the meaning of section 107 of the Copyright Act.⁶⁹ The case examined “Pretty Woman,” by 2 Live Crew, which was a parody of “Oh, Pretty Woman,” originally by Roy Orbison.⁷⁰ The Supreme Court held that 2 Live Crew’s “Pretty Woman” was protected by fair use, as the song provided comment or criticism, was a parody song in nature, did not present market harm to the original, and because 2 Live Crew did not copy excessively from the original.⁷¹ Beyond parody, music has a dense history in terms of derivative works in the form of sampling. Sampling can be considered a type of fanfiction, as it combines original, often copyrighted material, with an artist’s new material. Historically, sampling was automatically considered infringement.⁷² The opinion in *Grand Upright Music Ltd. v. Warner Bros. Records*⁷³ begins with “[t]hou shalt not steal,” which is acutely reflective of the sentiments expressed by the court.⁷⁴ The defendant utilized lyrics from “Alone Again (Naturally),” written by Raymond “Gilbert” O’Sullivan.⁷⁵ The court determined that because the defendant failed to secure rights to the composition, the defendant knowingly committed infringement.⁷⁶ As such, a preliminary injunction was granted to halt the production and selling of the defendant’s albums with the infringing song.⁷⁷ The opinion was short and to the point—if an artist does not secure the rights to a song, he is infringing.⁷⁸

⁶⁹ See generally *supra* notes 28-32 and accompanying text.

⁷⁰ See *Campbell*, 510 U.S. at 572-75.

⁷¹ See *id.* at 593-94.

⁷² See generally *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

⁷³ *Id.*

⁷⁴ *Id.* at 183.

⁷⁵ *Id.*

⁷⁶ *Id.* at 185.

⁷⁷ See *id.*

⁷⁸ See *id.*

The court's holding in *Bridgeport Music, Inc. v. Dimension Films*⁷⁹ represented the turning point for sampling as infringement. The plaintiff claimed infringement upon "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics by N.W.A.⁸⁰ Notably in this case, the court considered *de minimis* copying, ruling that N.W.A.'s brief use of "Get Off Your Ass and Jam" was infringement.⁸¹ In the simplest of terms, the court stated, "Get a license or do not sample. We do not see this as stifling creativity in any significant way."⁸² This holding represented judicial bodies' foray into enforcing the compulsory licensing schema under section 115 of the Copyright Act.⁸³ Section 115 establishes a compulsory license for nondramatic musical compositions to ensure copyright owners receive royalties when their works are utilized.⁸⁴ Despite the amount of what could be considered "sampling" in literature and film, no such statutory system exists for these mediums. Furthermore, in a world that is technologically evolving at a rapid pace, it is questionable whether section 115 remains useful, or is toothless.

C. Popular Culture and the Power of Fandoms

⁷⁹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

⁸⁰ *Id.* at 796.

⁸¹ *See id.* at 798.

⁸² *Id.* at 801.

⁸³ Copyright Act § 115.

⁸⁴ *Id.*

Fanfiction is popular, the monetization of fanfiction is mainstream, and fandoms are powerful. Take *Veronica Mars*, for example. *Veronica Mars* was a television show about a teenage detective that ended in 2007.⁸⁵ However, fans continued to write fanfiction, upload fan videos to YouTube, and speak about the show online.⁸⁶ The show's creator, Rob Thomas, announced he would make a *Veronica Mars* film if fans could raise \$2 million in thirty days through Kickstarter.⁸⁷ Fans raised \$5.7 million in that time.⁸⁸ Similarly, a fanfiction-like, video blog series centered on Elizabeth Bennet of *Pride and Prejudice*, managed to raise \$60 thousand in less than six hours and \$462,405 by the end of the fundraiser.⁸⁹ The internet makes connecting fans around the world easy, providing fandoms the tools to consume and fiscally support unconventional mediums such as fanfiction. With the advent of such a force, fanfiction can no longer occupy the purgatorial space it has nested in under the current copyright system. The following section analyzes where fanfiction fits in under current copyright law, and how copyright law must change to allow for this fit.

Fanfiction has only risen in popularity in recent years. Fanfiction.net,⁹⁰ for example, is a popular website wherein users can publish their fanfiction. Fanfiction.net does not provide statistics of how many users utilize the site or how many stories have been published. For illustrative purposes however, there are 739,000 *Harry Potter* stories uploaded to date.⁹¹ The world of fanfiction is no longer limited to a few select groups of online nerds and fan girls. Fanfiction is part of a rising tide of creative fiction that will soon require legal guidance under copyright law. As such, this Article analyzes three specific issues, providing recommendations

⁸⁵ Michael Ausiello, *Veronica Mars is Now "Officially Dead"*, TV Guide (June 11, 2007, 7:09 PM), <http://www.tvguide.com/news/veronica-mars-officially-8545/>.

⁸⁶ Lantagne, *supra* note 28 at 279.

⁸⁷ *Id.* at 282.

⁸⁸ *Id.*

⁸⁹ *Id.* at 283.

⁹⁰ FANFICTION.NET, <https://www.fanfiction.net/> (last visited Apr. 27, 2016).

⁹¹ FANFICTION.NET, <https://www.fanfiction.net/book/> (last visited Apr. 27, 2016).

concerning each: (1) Fanfiction merits protection under the Copyright Act; (2) The fair use defense should be applicable to fanfiction; and (3) The Copyright Office should implement a compulsory licensing system similar to that used within the music industry for commercialized fanfiction works. Each recommendation presents distinct advantages and disadvantages. However, it is undeniable that lawmakers must find a place for fanfiction, grounded within the Copyright Act, as the collective appetite of consumers for such works grows.

II. ANALYSIS AND RECOMMENDATION

A. Copyright Protection of Fanfiction

Fanfiction merits protection under the Copyright Act and relevant case law. One scholar outlines several compelling arguments against the protection of fanfiction under the Copyright Act.⁹² Most notably, she suggests that opponents of fanfiction argue that fanfiction is not aesthetically pleasing and fanfiction is not real writing.⁹³ However, aesthetic pleasure and the determination of what is “real writing” is entirely subjective. Furthermore, transformative use is objective. Stacey Lantagne looks to the court’s opinion in *Warner Bros. Entm’t Inc. v. RDR Books*, which recalls *SunTrust* and states: “Whether Mitchell’s heirs must tolerate *The Wind Done Gone* did not turn on [sic] wither either they or even the public liked the retelling.”⁹⁴ It follows that if a work of fanfiction is transformative under the fair use doctrine, as *The Wind Done Gone* was, that work should merit individual copyright protection and should not be considered an unauthorized, infringing work. Furthermore, if a work of fanfiction fulfills the basic tenements of copyrightable material under the Copyright Act—“[an] original work of authorship fixed in any tangible medium of expression”—that work merits protection.⁹⁵

⁹² Stacey Lantagne, *The Better Angels of our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 173-180 (2011).

⁹³ *See id.*

⁹⁴ *Id.* at footnote 96 (citing Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 615 (2007)).

⁹⁵ Copyright Act, § 102.

Fanfiction could be considered a derivative work, as it falls nicely under the definition of derivative work under the statute.⁹⁶ However, creating a bright line rule to categorize fanfiction as a derivative work would make all fanfiction unauthorized derivative works. Such a rule would stifle the creative output that fanfiction provides, directly contradicting the fundamental purpose of the Progress Clause of the Constitution. Therefore, the fair use defense must be broadly construed to allow for the protection of fanfiction.

B. Fanfiction and the Fair Use Defense

As fanfiction cannot always be categorized as a derivative work, the fair use analysis test is necessary to provide some modicum of protection for fanfiction works. Genuinely transformative fanfiction warrants protection under the fair use defense. The key factor becomes the first factor of the fair use doctrine, “the purpose and character of use,”⁹⁷ which was the focus of the background cases surveyed and analyzed in this Article. Some scholars argue that this factor weighs in favor of copyright holders, as “fanfiction is almost always based on copyrighted works that go to the core of copyright law, such as novels, television shows, and movies.”⁹⁸ Others scholars, like Rebecca Tushnet, find that the transformative factor is nearly inconsequential as “fanfiction focuses on fictional, never factual, events” and warrants protection as such.⁹⁹ Furthermore, parody continually represents an easy fallback for fanfiction-like works, as demonstrated by *Point Break Live!* in *Keeling*¹⁰⁰ and the *Naked Gun* advertisement in *Leibovitz*.¹⁰¹ However, fanfiction does not always present itself as parody. Expansion of the fair use doctrine to encompass fanfiction presents its own set of problems.

⁹⁶ *Supra* notes 20-22 and accompanying text.

⁹⁷ Lipton, *supra* note 22 at 961-62 (citing William F. Paltry, 4 PALTRY ON COPYRIGHT § 10.13 (2010)).

⁹⁸ Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fanfiction*, 58 SMU L. REV. 1551, 1568 (2005).

⁹⁹ *See id.* at 1571 (citing Rebecca Tushnet, *Symposium: 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, 664 (1997)).

¹⁰⁰ *Keeling v. Hars*, 809 F.3d 43, 45 (2d Cir. 2015).

¹⁰¹ *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D.N.Y. 1996); *see also* Stendell, *supra* note 96 at 1567 (“With respect to purpose, at least, fanfiction parodies are better positioned to claim fair use protection than other works.”).

The fair use doctrine, as it stands is, is applied on a case-by-case basis, lacking bright line rules and gradients to determine what amount of change is enough to warrant considering a work transformative. Granting protection to “minimally transformative” works would undercut authors of original works.¹⁰² On the other hand, refusing protection to works that are transformative enough would hinder creative expression. The analysis utilized by the courts in the *Google* and *SunTrust* cases finds a comfortable median between overprotection and underprotection.¹⁰³ These cases remain demonstrative of a liberally-construed fair use doctrine. The central solution would be this type of application across all circuits. Fair use analysis is integral to the defense of fanfiction, but the survival of fanfiction as a genre depends on more rigorous demarcation under copyright law. Fanfiction currently occupies a space of hit-or-miss protection. Beyond a broadly construed fair use defense, the future of fanfiction depends on a new statutory framework, as discussed in the following section.

C. Commercialization of Fanfiction and a Compulsory Licensing System

An adage states, “You cannot squeeze blood from a turnip.” In terms of the law and damages, one can only win money as the result of a suit if the defendant has money to give. The most compelling issue for authors of original works who seek protective orders or damages from authors of fanfiction is whether the fanfiction author has achieved a high enough level of success to warrant the suit. Under current law, copyright holders are entirely within their right to file suit against fanfiction creators and are likely to be successful.¹⁰⁴ However, the commercialization of fanfiction not only brings the matter to the attention of the author, but also makes filing suit more appealing: “[T]he only cases that have advanced to litigation, so far, have involved fan works intended to be sold.”¹⁰⁵ The greater concern for authors is unauthorized profit from their work rather than pure recognition that a fanfiction stems from their work.¹⁰⁶

¹⁰² See generally *Stendell*, *supra* note 96 at 1577.

¹⁰³ See *Authors Guild*, 804 F.3d at 217; see generally *SunTrust Bank*, 268 F.3d 1257.

¹⁰⁴ See Victor Mayer-Schönberger & Lena Wong, *Fan or Foe? Fan Fiction, Authorship, and the Fight for Control*, 54 *IDEA* 1, 21 (2013) (“If and when a work of fanfiction turns commercial or otherwise morphs into a significant threat, authors can advance conventional copyright claims against fan fiction authors, and will likely be relatively successful.”).

¹⁰⁵ Lantagne, *supra* note 28.

¹⁰⁶ Lipton, *supra* note 22 at 993.

Copyright law does not allow for copyright infringement upon an idea or stock characters.¹⁰⁷ As such, plaintiffs in copyright suits must also consider the idea-expression dichotomy in relation to commercial impact when filing suit. This idea was explored by the court in *SunTrust*: “[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.”¹⁰⁸ Artists are entitled to profit from ideas, if they can. However, fanfiction often rides the line between ideas and expression, which is protectable under copyright law.

A way to protect this unique expression would be through a compulsory licensing system that mirrors that which was created for sound recordings under Section 115. The sound recording licensing system allows for a royalty to be paid to an original copyright owner.¹⁰⁹ If such a system were created for other mediums of art, fanfiction authors could pay a statutorily-set rate through an agency to ensure attribution and remuneration to lawful copyright owners. The compulsory system for sound recordings is at the center of copyright debates.¹¹⁰

¹⁰⁷ See, e.g. *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.* 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (finding a Bond-like, British spy to be unprotectable); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979; *Warner Bros. v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). But see *Salinger v. Colting*, 607 F.3d 68, 71-72 (2d Cir. 2010) (finding that the character, Holden Caulfield, as eligible for protection because of direct references to the character).

¹⁰⁸ *SunTrust Bank*, 268 F.3d at 1264 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)).

¹⁰⁹ See Copyright Act, § 115(c).

¹¹⁰ See, e.g. Eriq Gardner, *Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too*, HOLLYWOOD REP. (Feb. 5, 2015), <http://www.hollywoodreporter.com/thr-esq/why-taylor-swift-may-soon-770698> (examining a Copyright Office publication suggesting a way for music publishers to opt out of the Section 115 compulsory license).

This does not exclude the idea of a similar system, with more favorable rates set by the Copyright Royalty Board for original copyright holders, to be created and set in place for literature, film, and other creative mediums. The *Bridgeport* court's notion, "Get a license or do not sample,"¹¹¹ could be directly applicable to the creation and dissemination of fanfiction. While fanfiction has traditionally been published online for free,¹¹² negating the need for such a system, fanfiction authors have expanded past free to monetization. The Copyright Act will need to adjust to allow for the emergence and staying power of this creative medium.

D. A Final Note on Fandoms and the Law

The attitude toward fanfiction is changing due to the undeniable power of fandoms.¹¹³ To illustrate, Lucasfilm, historically embraced fan-made content.¹¹⁴ In 2014, a website compiled and counted user-submitted content to various fan-art sites, estimating that the *Star Wars* fandom extended to six million individuals.¹¹⁵ When the Walt Disney Company purchased Lucasfilm, critics of the merger worried that Lucasfilm would retract its support for its widespread fandom.¹¹⁶ However, Lucasfilm has continued to embrace the work of its fans, even continuing to hold a contest called "The Star Wars Fan Film Awards."¹¹⁷ The contest, existing since 2002,¹¹⁸ asks fans to submit videos based on the *Star Wars* universe.¹¹⁹ Lucasfilm's support of its fan base is a testament to the evolving attitude toward fanfiction and fandoms.

¹¹¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

¹¹² See Lantagne, *supra* note 28 at 301-302.

¹¹³ See generally, *supra* note 83-87 and accompanying text.

¹¹⁴ See Joe Mullin, *Disney Owns Lucasfilm: Will it Have Room for the Star Wars fan movies?*, ARSTECHNICA (Oct. 30, 2012), <http://arstechnica.com/tech-policy/2012/10/disney-owns-lucasfilm-will-it-have-room-for-star-wars-fan-movies/>.

¹¹⁵ See GEEK TWINS, *Internet Fandom By the Numbers* (last visited Apr. 27, 2016), <http://www.thegeektwins.com/2014/03/internet-fandom-by-numbers-infographic.html#.VyONRN-rTEY>.

¹¹⁶ See Mullin, *supra* note 112.

¹¹⁷ See STAR WARS FAN FILM AWARDS, <http://www.starwars.com/star-wars-fan-film-awards> (last visited Apr. 27, 2016).

¹¹⁸ Mullin, *supra* note 112.

¹¹⁹ See STAR WARS FAN FILM AWARDS, *supra* note 115.

Fandoms are unlikely to retreat in terms of protection of their fan-made art. Fanfiction represents a medium through which fans can not only imitate, but add something to art they enjoy.¹²⁰ Fans desire a way expand their experience of a work by manipulate characters and storylines and engaging in creative exercise over a work.¹²¹ Once fanfiction transforms a work, and consumers see value in that work, the work takes on an entirely different form from the original. This is the point at which fanfiction authors enter the business of imitation. Fandoms desire more fanfiction, and there must be legal restraints and protections on this medium to ensure just compensation for both the original copyright owner and the fanfiction creator. The Organization for Transformative Works (“OTW”) seeks to educate the public on the legal issues surrounding fandoms, fanfiction, and copyright protection.¹²² It is organizations like this that will pave the way for fanfiction as copyright law faces the inevitability of reform.

CONCLUSION

Fanfiction is a growing medium for creative works. While fanfiction is often published for free, commercialized forms of fanfiction are also growing in popularity. Copyright law will need to evolve to accommodate these works and as such, the fair use defense must be construed broadly to ensure further innovation and protection of unique, artistic, fanfiction in all mediums. Additionally, the Copyright Office should consider a statutory framework similar to the compulsory licensing system for music, as it would allow for royalties to be paid to original authors. The desire for more fanfiction-based media ultimately necessitates copyright reform to ensure the fair protection of the rights of both original authors and fanfiction authors.

¹²⁰ See Lantagne, *supra* note 28 at 301-302.

¹²¹ See *id.*

¹²² ORGANIZATION FOR TRANSFORMATIVE WORKS, <http://www.transformativeworks.org/> (last visited Apr. 28, 2016).