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FANFIC AND FAN FACT: HOW CURRENT COPYRIGHT LAW IGNORES THE REALITY OF COPYRIGHT OWNER AND CONSUMER INTERESTS IN FAN FICTION

Leanne Stendell

I. INTRODUCTION

TEENAGERS do it. Grandmothers, too. It's rampant on the Internet. Even Mark Twain was known to dabble. "It" is reading and writing fan fiction.¹ One of the most unique outgrowths of popular culture of the last three decades, fan fiction involves stories based on popular books, television series, and films that expand and embellish upon the plots, characters, and settings found in those works.²

Fan fiction, largely a fringe hobby before the advent of the Internet, has exploded onto the scene. Stories now number in the millions, spurring the mainstream news media to periodically "discover" the phenomenon.³ This newfound visibility, while legitimizing production and consumption of fan fiction as a pastime and increasing the ranks of its devotees, has also provoked the copyright owners of original works to consider their legal options. Some are content to ignore fan fiction's existence, but others feel the need for legal grandstanding accomplished by firing off cease-and-desist letters to the operators of fan websites.⁴ The sincerity of these maneuvers is difficult to gauge; to date, all conflicts between fans and the corporate interests that own the objects of their fascination have been settled out of court.⁵

Nevertheless, as long as fan fiction remains, the legal questions will surround it. Do fan stories violate the original creators' copyrights? Are

1. Mark Twain's *A CONNECTICUT YANKEE IN KING ARTHUR'S COURT* could be considered a work of fan fiction loosely based on the King Arthur legends.

2. See Rebecca Tushnet, Comment, *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, 655 (1997).

3. See, e.g., Natasha Walter, *Comment & Analysis: Fan Fiction on the Internet is Revitalizing Classic Stories and Bringing an Oral Tradition Back to Society*, *THE GUARDIAN* (London), Oct. 27, 2004, at 24; David Orr, *The Widening Web of Digital Lit*, *N.Y. TIMES*, Oct. 3, 2004, § 7, at 26.

4. *Cease and Desist Notices: Fan Fiction*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/fanfic/notice.cgi> (last visited Jan. 19, 2005).

5. Tushnet, *supra* note 2, at 664.

there any defenses? How can the law better accommodate fan fiction? Should it even do so?

This Comment seeks to address some of those questions and propose possible solutions. Part II analyzes the prima facie case for copyright infringement and provides an overview of copyright holder reactions to infringement. Part III considers the defenses, justifications, and proposed solutions to the fan fiction issue. Lastly, Part IV briefly looks at other possible legal issues.

II. ANALYSIS OF COPYRIGHT INFRINGEMENT CLAIMS

A. WHAT IS FAN FICTION?

At its most basic level, fan fiction refers to creative works that highlight characters from books, movies, television shows, comic books, video games, or other popular culture sources.⁶ The stories use characters and settings from copyrighted sources, but the plots of the stories are original, expanding upon and enriching the world of the copyrighted work.⁷ Fan fiction serves as a way for consumers of a particular source to mold that original work into a form that reflects their own cultural and social interests while nevertheless acknowledging the importance of the original work.⁸ Although fan fiction first gained popular prevalence in response to the original *Star Trek* series, it has existed in various forms for thousands of years.⁹ Commercial examples based on public domain sources abound, such as popular retellings of the King Arthur story in books like *The Once and Future King* and the film *Excalibur*,¹⁰ or the companion piece to *Huckleberry Finn*, *My Jim*, which follows the struggles of Jim's wife while he is off having adventures with Huck.¹¹ This

6. *Frequently Asked Questions (and Answers) About Fan Fiction*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/fanfic/faq.cgi> (last visited Jan. 28, 2005). Maintained by the legal clinics of several universities, among them Harvard, Stanford, and Berkeley, Chilling Effects includes cease-and-desist letters sent to website operators as well as legal analysis of the issues raised by the letters and by fan activities in general. Chilling Effects Clearinghouse, <http://www.chillingeffects.org/index.cgi>.

7. See Helen Razer, *Fanfic: Is it Right to Write?*, THE AGE (Melbourne), Jan. 5, 2004, <http://www.theage.com.au/articles/2004/01/02/1072908900255.html> (last visited Sept. 9, 2005).

8. HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 23-24 (Routledge 1992). "Fans, like other consumers of popular culture, read intertextually as well as textually and their pleasure comes through the particular juxtapositions that they create between specific program content and other cultural materials." *Id.* at 37. Dr. Jenkins, director of comparative media studies at MIT, is "the leading scholar of fanfic." David Plotz, *Luke Skywalker Is Gay? Fan fiction is America's literature of obsession*, SLATE, Apr. 14, 2000, <http://slate.msn.com/id/80225/> (last visited Sept. 9, 2005).

9. *Fan fiction*, Wikipedia, http://en.wikipedia.org/wiki/Fan_fiction (last visited Jan. 10, 2005); Tushnet, *supra* note 2, at 655. Virgil's *THE AENEID*, based on Homer's *ODYSSEY*, could be considered an early work of fan fiction. *Fan fiction*, http://en.wikipedia.org/wiki/Fan_fiction. In the late nineteenth century, a popular source for fan retellings was Lewis Carroll's *ALICE IN WONDERLAND*, which at least one commentator suggests was responsible for the novel's widespread popularity. Personal website of Henry Jenkins, <http://web.mit.edu/21fms/www/faculty/henry3/pub/alice.htm> (last visited Jan. 28, 2005).

10. See JENKINS, *supra* note 8, at 38.

11. Jennifer Reese, *My Jim*, ENT. WKLY., Jan. 21, 2005, at 93.

Comment focuses on the popular force that is fan fiction: millions of stories written by fans, provided free of charge on the Internet for no purpose other than to share their creativity with members of the fan community.¹²

B. THE CASE FOR COPYRIGHT INFRINGEMENT

Copyright protection is vested in the Constitution, which states that Congress shall have the power “[t]o 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.”¹³ Congress enacted the first copyright statute in 1790, providing only very limited protection, and has periodically reconsidered the statute, each time increasing the protection afforded.¹⁴ Congress enacted the present-day statute, the Copyright Act of 1976, which codified common-law expansions of copyright law.¹⁵ The Act provides that, “Subject to [17 U.S.C. §§ 107-22], the owner of copyright under this title has the *exclusive rights* to do and to authorize any of the following: . . . to reproduce the copyrighted work . . . [and] . . . to *prepare derivative works* based upon the copyrighted work.”¹⁶ Derivative works are defined as, “work[s] based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁷

It is not enough that the work is based entirely or substantially on a prior work; a work must also lack the requisite originality before it constitutes an infringing use.¹⁸ The specific *expression* of ideas in the original must have been *substantially* copied.¹⁹ In this way, copyright law ensures that creators retain the right to their unique expression of ideas “but encourages others to build freely upon the ideas and information conveyed by a work.”²⁰ However, even works with “a different total concept and feel from the original work” can be infringing works, particularly if differences in genre by their nature require the disparity.²¹

To date, not a single case of copyright infringement on the basis of fan fiction has ever gone to trial; not a single reported opinion contains even

12. Refer to note 75, *infra*, for a discussion of the number of stories available online.

13. U.S. CONST. art. I, § 8, cl. 2.

14. *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003); *SunTrust Bank v. Houghton Mifflin Co.*, 286 F.3d 1257, 1261 (11th Cir. 2001).

15. 17 U.S.C. §§ 101 *et seq.* (2000); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (stating that Congress intended the fair use defense in 17 U.S.C. § 107 to codify the common-law doctrine of fair use).

16. § 106 (emphasis added).

17. § 101.

18. 1-3 NIMMER ON COPYRIGHT § 3.01 (2004) [hereinafter NIMMER].

19. *Harper & Row*, 471 U.S. at 547; NIMMER § 3.01.

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

21. *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 140 (2d Cir. 1998).

an oblique mention of fan fiction.²² As a result, a copyright infringement claim against a fan fiction author would be a question of first impression for any court considering it.

Therefore, analogous copyright law must be examined to predict how courts would decide an infringement case based on the creation of fan fiction. The case of *Anderson v. Stallone* is instructive, not because it involves a work of fan fiction but because it is perhaps the closest parallel to it.²³ Anderson wrote a film treatment for a sequel to the *Rocky* series.²⁴ Anderson presented his treatment to the film studio, and it allegedly became the basis for *Rocky IV*.²⁵ The studio did not compensate Anderson for his script or acknowledge him as a co-author.²⁶ The court determined that Anderson's script was an unauthorized derivative work, declining to determine the question of substantial similarity because it was unnecessary: Anderson concededly lifted the characters from the prior *Rocky* movies and built his story on their past experiences.²⁷ Because the treatment exhibited "literal similarity" and had not been authorized by the *Rocky* copyright holders, it was an unauthorized derivative work that infringed on the holder's copyrights.²⁸

The first hurdle for a copyright holder would be to prove that a work of fan fiction infringes on its copyright. Ultimately, questions of substantial similarity might be irrelevant. As in *Anderson*, fan fiction clearly concedes that it is based on the source by use of the same characters, with the same names, in the same settings.²⁹ Even if a more searching analysis were applied, almost all fan fiction would fairly easily meet the standards of substantial similarity.³⁰ Because virtually all works of fan fiction are most likely substantially similar to the original works, copyright holders have a prima facie case for copyright infringement against those fan fiction authors and distributors who act without the copyright holder's permission.

One can only speculate on the chances of a successful suit against an author of fan fiction for copyright infringement. Because there are no reported cases, the discussion of the legalities of fan fiction is largely speculative, confined to the realm of law review articles and Internet discussions, produced by legal professionals and amateurs debating the issue. These issues are unlikely to be resolved any time soon, as copyright owner "saber-rattling" against individuals, usually in the form of cease-

22. Tushnet, *supra* note 2, at 664; Personal website of Henry Jenkins, <http://web.mit.edu/21fms/www/faculty/henry3/pub/alice.htm>.

23. No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989).

24. *Id.* at *2.

25. *Id.* at *2-3.

26. *See id.* at *3.

27. *Id.* at *24.

28. *Id.* at *24-25.

29. *See id.*; but see NIMMER § 13.03[A] (explaining that plaintiffs must still prove that copying is "substantial" even if the defendant concedes that copying occurred).

30. *See Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1298 (C.D. Cal. 1995).

and-desist letters, has never failed to produce the owner's desired results.³¹ Without pro bono representation, which has thus far not materialized, individual users are unlikely to fight a cease-and-desist order.³² Therefore, although the impact of legal issues cannot be ignored, extra-legal methods of copyright enforcement, along with other copyright holder reactions to fan fiction, are important considerations for copyright holders as well as fan fiction consumers.

C. REACTIONS OF COPYRIGHT HOLDERS

Copyright holders have reacted in diverse ways to the existence of fan fiction. Although their chances of success in a copyright infringement suit are high, it is actually relatively unusual for them to take even preliminary legal action. Indeed, this makes cataloguing reactions a difficult process, as many copyright owners' policies regarding fan fiction are unstated or are matters of fan rumors that cannot easily be verified. These various reactions offer an intriguing insight into the struggle between traditional intellectual property law and unconventional infringing uses such as fan fiction.

Perhaps the most common response is silence. Silent copyright holders provide no indication of their views on fan fiction, positive or negative, or even whether or not they are aware of its existence.³³ Nevertheless, silence does not equal approval. More likely explanations are the facts that (1) it is exceedingly difficult on the whole to discover violations, and most importantly, (2) it is overwhelmingly more expensive for a copyright holder to act against the use than any possible harm the violation could cause.³⁴ Indeed, the common wisdom is that it is not worth the copyright holder's time and effort to go after individuals—that it is nearly impossible to track them down, and that even if they could, the fear of public outcry would deter prosecution.³⁵ Some copyright holders may also practice strategic ignorance, based on the belief that allowing fan fiction would equate to abandoning their copyrights, though they are unwilling to actively litigate because they are ambivalent about such use.³⁶ This

31. Personal website of Henry Jenkins, *supra* note 22.

32. *Id.*

33. See *The Fan Fiction Policy Page*, Writers University, <http://www.writersu.net/?link=authpolicy> (last visited Jan. 5, 2005) (cataloging every type of author response to fan fiction, from licensing and encouragement to promises to prosecute infringement, but there are no listings for authors who have not indicated how they feel about fan fiction).

34. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 417 (2003).

35. Symposium, *Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 895-96 (2004) [hereinafter *Public Appropriation*]; see also Roland Green, Writers University, <http://www.writersu.net/?link=authpolicy&id=75> (last visited Jan. 2, 2005) (suggesting that "it isn't worth going to court over" not-for-profit fan fiction). The symposium participants say this is incorrect. *Public Appropriation* at 897. The music industry brought suit against 261 individuals for illegal file-sharing online, a successful assault that led to a 40% decrease in illegal use of one file-sharing service. *Id.*

36. See Steven Brust, Writers University, <http://www.writersu.net/?link=authpolicy&id=37> (last visited Jan. 28, 2005).

belief is mistaken, probably based on confusion between the requirements of copyright and trademark law.³⁷

The biggest danger for fan authors is that copyright holders will choose to enforce their rights. Copyright owner policies among those who do not tolerate fan fiction vary, with some preferring to merely state their objections to fan fiction, whereas others seek formal legal remedies. On the more lenient side, the creator of *Babylon 5* publicly implored fans to not post fan fiction.³⁸ He expressed concerns that authors of fan fiction could bring legal action against the copyright holders for infringement if the ideas in fan fiction appeared in the original source—incidentally, not an idle fear, as discussed *infra* at 16—a particularly pressing concern with the (at the time) upcoming release of authorized *Babylon 5* novels.³⁹ Other copyright holders more explicitly threaten suit. Brian Lumley's website includes a page that discusses fan fiction, calling it copyright-violating plagiarism and deriding ineffectual defenses such as ignorance of copyright law and disclaimers.⁴⁰ Author Orson Scott Card stated even more directly, "If they [fan fiction authors] try to publish it (including on the net) . . . I will sue . . ." ⁴¹ In one of the few substantiated instances where legal action was taken, author Chelsea Quinn Yarbro sued a fan fiction publisher; the case was settled out of court. Today Yarbro continues to adhere to a strict no-tolerance policy for fan fiction.⁴² Finally, Chilling Effects Clearinghouse includes actual cease-and-desist letters sent to those who host fan fiction on their websites.⁴³ A typical letter regarding a *Caroline in the City* fan site informs the fan that "posting and distribution of . . . fanfics infringes upon CBS's exclusive copyrights [O]ur standard policy is to . . . threaten all [] necessary legal action CBS must insist that all . . . 'fanfics' immediately be removed from your website."⁴⁴

Some copyright holders engage in selective enforcement based on the content of specific stories. Lucasfilm, which owns the rights to *Star Wars*, was one of the earliest to object on these grounds, threatening circa 1981 to sue if a story violated the films' "family values" orientation.⁴⁵ This move was a resounding failure, having little effect beyond temporarily

37. Tushnet, *supra* note 2, at 674.

38. *Babylon 5*, Writers University, <http://www.writersu.net/?link=authpolicy&id=30> (last visited Jan. 28, 2005).

39. *Id.*

40. *Copyright Information*, Brian Lumley.com, <http://www.brianlumley.com/copyright/> (last visited Jan. 28, 2005).

41. *Questions for a Research Paper*, Hatrack River: The Official Web Site of Orson Scott Card, at <http://www.hatrack.com/research/interviews/yoda-patta.shtml> (1994) (last visited Sept. 9, 2005). Card describes fan fiction as "an attack on my means of livelihood." *Id.*

42. *Chelsea Quinn Yarbro*, Writers University, <http://www.writersu.net/?link=authpolicy&id=54> (last visited Jan. 28, 2005).

43. *Chilling Effects Notices*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/notice.cgi> (last visited Jan. 28, 2005).

44. *Caroline in the City Fan Fiction*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=1067> (last visited Jan. 10, 2005).

45. JENKINS, *supra* note 8, at 30-31.

sending adult-oriented stories underground.⁴⁶ Today, adult-oriented *Star Wars* fan fiction is unabashedly present on the Internet.⁴⁷ Likewise, Warner Bros. has sent cease-and-desist letters to sites that contain adult-oriented *Harry Potter* fan fiction.⁴⁸ One letter states that “our clients make no complaint about fan fiction written by genuine Harry Potter fans.”⁴⁹ The other letter contains the same line, with the added modifier “innocent fan fiction” perhaps providing some enlightenment as to the copyright holder’s notion of who “genuine” fans are – those who do not write adult-oriented fan fiction.⁵⁰ The letters acknowledge that the sites contain content warnings but characterize them as ineffective and counter-productive, possibly enticing underage readers instead of deterring them.⁵¹ Again, as with *Star Wars*, adult-oriented *Harry Potter* stories do not appear to have suffered much.⁵² Both of the sites that received cease-and-desist letters still exist, albeit one at a new location.⁵³ Instead of simply warning about the adult material, both sites are accessible only with a password, which the site owners will provide to users who affirm that they are over the age of 18.⁵⁴ This is seemingly sufficient, as there is no indication that either J.K. Rowling’s or Warner Bros.’ legal representatives have objected to the sites in their new incarnations.

Among those copyright holders who acknowledge the existence as well as the value of fan fiction, a common response is some form of licensing scheme. These range from informal statements from copyright holders to more precise agreements that provide detailed terms of use. No copyright holders require payment. The most informal licensing schemes appear to have little legal effect beyond enunciating a particular copyright holder’s position on fan fiction. For example, author Anthony Piers stated that he did not mind fan fiction because it would help budding authors improve their writing skills and because permitting it was a sign of respect for his fans.⁵⁵ He required only that fan authors not profit

46. *Id.* at 31.

47. As of Feb. 6, 2005, there were 459 R-rated *Star Wars* stories available on FanFiction.net. *Movies: Star Wars*, FanFiction.net, <http://www.fanfiction.net/list.php> (last visited Feb. 6, 2005).

48. *Notices*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=534> and <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522> (last visited Jan. 28, 2005).

49. *Id.* J.K. Rowling has publicly stated that she does not have any problem with people writing fan fiction based on the *Harry Potter* books, though her agent cautions against commercial or adult-oriented uses. Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC News, May 27, 2004, <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm> (last visited Feb. 6, 2005).

50. See *Notices*, *supra* note 48.

51. *Id.*

52. There are currently 21,212 R-rated *Harry Potter* stories available at FanFiction.net. *Books: Harry Potter*, FanFiction.net, <http://www.fanfiction.net/list.php> (last visited Feb. 6, 2005).

53. Restricted Section, <http://www.restrictedsection.org/> (last visited Feb. 6, 2005); The Potter Slash Archive, <http://glassesreflect.net/index1.html> (last visited Feb. 6, 2005).

54. *Id.*

55. *Piers Anthony & Xanth*, Writers University, <http://www.writersu.net/?link=authpolicy&id=28> (last visited Jan. 28, 2005).

from their use of his material.⁵⁶ Marion Zimmer Bradley's case illustrates one of the most stringent licensing agreements, and the events leading up to it serve as an unfortunate cautionary tale to any copyright holder who might otherwise be content to allow fan fiction to flourish without comment.⁵⁷ The late Bradley at one time was very supportive of fan fiction.⁵⁸ A fan sent Bradley a story, which she apparently read, that contained content similar to that in Bradley's unpublished novel *Contraband*, a continuation of her series.⁵⁹ The fan threatened to sue Bradley for copyright infringement unless she received credit as co-author of Bradley's novel and half of the profits.⁶⁰ As a result, Bradley's publisher refused to release *Contraband*, and Bradley was forced to revamp her novel.⁶¹ Bradley's agent then instituted a new policy for fan fiction: all unauthorized uses of Bradley's works would be prosecuted unless the fan author first obtained a release from Bradley, acknowledging Bradley's ownership of the copyrighted material and that Bradley owns all rights in the fan fiction.⁶² Finally, Lucasfilm offered fans free pages on its website, with the caveat that Lucasfilm would own the rights to all fan fiction posted there.⁶³

In some instances, copyright holders have been known to solicit consumer contributions or to actively encourage fan fiction. Often such encouragement is accompanied by various stipulations, such that the policy could more accurately be described as an optional licensing agreement. Conversely, some copyright holders send conflicting signals—such as J.K. Rowling's unqualified verbal approval of fan fiction in conjunction with legal action against certain types of stories.⁶⁴ *Buffy the Vampire Slayer* creator Joss Whedon is frequently quoted lauding fan fiction,⁶⁵ but distributor 20th Century Fox has aggressively targeted fan sites.⁶⁶ Of course, in spite of this action, both *Harry Potter* and *Buffy* fan fiction thrive on the Internet.⁶⁷ Authentic and authoritative encouragement, conversely, seems largely apocryphal. Author Lois McMaster Bujold's

56. *Id.*

57. Marion Zimmer Bradley, Writers University, available at <http://www.writersu.net/?link=authpolicy&id=53> (last visited Jan. 2, 2005).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Plotz, *supra* note 8.

64. See *supra* note 51 and accompanying text.

65. Patrick Lee, *Interview: Joss Whedon Gets Big, Bad, and Grown-Up with Angel*, SCI-FICTION WKLY., Sept. 27, 1999, <http://www.scifi.com/sfw/issue128/interview.html>. Regarding fan fiction, Whedon stated, "[T]here seems to be a great deal of it, and that's terrific." *Id.*; see also *Buffy the Vampire Slayer*, Writers University, <http://www.writersu.net/?link=authpolicy&id=38> (last visited Jan. 28, 2005).

66. *Buffy the Vampire Slayer*, *supra* note 65.

67. As of Feb. 6, 2005, there were 175,574 *Harry Potter* stories and 25,531 *Buffy* stories available on FanFiction.net. *Category: Books*, FanFiction.net, <http://www.fanfiction.net/cat/202/> (*Harry Potter*) (last visited Feb. 6, 2005); *Category: TV Shows*, FanFiction.net, <http://www.fanfiction.net/cat/208/> (*Buffy*) (last visited Feb. 6, 2005).

fabled support of fan fiction, as a one-time author of fan fiction herself, boils down to her statement that fans should “feel free to write amongst [themselves]” but that legal realities force her to ignore its existence although she “would prefer to be fanfic friendly.”⁶⁸ One of the clearest examples of encouragement is found on author Katherine Kurtz’s official website, which advertises a fan fiction magazine, issues of which date from 1978 to present. The magazine contains stories that Kurtz herself either edited or at a minimum approved herself.⁶⁹

The best weapon a copyright holder who objects to fan fiction has could be what some commentators refer to as Internet “self-regulation,” which involves targeting the hosting services on which an author’s fan fiction is posted. These services lack the vested interests of the fan story’s author and often provide in the initial hosting agreement that use of the service for purposes of copyright infringement will be cause for deleting the account. In this way, copyright owners can ensure that fan fiction disappears without having to directly confront the fan community.⁷⁰ Often, in fact, the sites disappear with little more explanation to the site’s creator than that it was deleted for violations of the terms of service, and the copyright holder’s involvement is never revealed.⁷¹ Although service providers are not liable under the Copyright Act for infringing activities of their users, most are nevertheless quite responsive to copyright holder complaints.⁷²

III. DEFENSES, JUSTIFICATIONS, AND SOLUTIONS⁷³

A. THE SIGNIFICANCE OF FAN FICTION

Why defend fan fiction at all? Why do many copyright holders choose to ignore or even encourage what are arguably clear cases of copyright infringement? The answer ultimately may lie with the importance of fan fiction as the centerpiece of a thriving fan culture, a community that benefits copyright holders economically as well as intangibly.

68. Posting of Lois McMaster Bujold, lbujold@mn.uswest.net, to lois-bujold@herald.co.uk (Oct. 16, 1997), <http://lists.herald.co.uk/old-archives/lois-bujold/971016-918> (last visited Jan. 28, 2005); Posting of Lois McMaster Bujold, lbujold@uswest.net, to lois-bujold@herald.co.uk (Nov. 30, 2001), <http://lists.herald.co.uk/old-archives/lois-bujold/011201-4840> (last visited Jan. 28, 2005).

69. *Fan Corner*, Welcome to Deryni Destination: The Official Deryni/Katherine Kurtz Website, <http://www.deryni.net/fanficm86.html> (last visited Jan. 28, 2005).

70. See generally Christian Ahlert, Chris Marsden and Chester Yung, *How ‘Liberty’ Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation* (May 1, 2004), <http://pcmlp.socleg.ox.ac.uk/liberty.pdf> (last visited Jan. 28, 2005).

71. One fan related an incident in which he posted a fan story on a website unattached to the copyright holder. A few months later, his account on the copyright holder’s site was deleted for copyright infringement. *Everquest*, Writers University, <http://www.writersu.net/?link=authpolicy&id=66> (last visited Jan. 28, 2005).

72. See 17 U.S.C. § 512 (2000).

73. Possible First Amendment defenses will not be explored. While this is a favorite justification urged by fan fiction authors, courts usually decline to consider it in copyright infringement cases. The fair use defense is considered sufficient to protect free speech rights without impeding too far into copyright holders’ exclusive rights. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264-65 (11th Cir. 2001).

It is impossible to know the precise numbers involved in fan fiction, whether the question is the number of stories available, the original sources involved, or the readership, because of the dispersed nature of fan fiction—that is, its availability offline and online on private e-mail circles, the World Wide Web, Internet journals (“weblogs” or “blogs”), etc.⁷⁴ Clearly, however, the numbers are considerable. A search on Google for “fan fiction” generates 10,300,000 hits;⁷⁵ on FanFiction.net, the largest archive of fan fiction online, there are perhaps as many as 2 million stories.⁷⁶ Fan fiction is a force to be reckoned with.

Fans of a given source who form communities are “particularly active and vocal,” united not only in their passion for the source but also by extensive cultural and social ties.⁷⁷ The creation and consumption of fan fiction is an important aspect of the fans’ social interaction, permitting them to shape and reinforce differing constructions of the original text and to relate to the original text in “fundamentally different” and ultimately far more meaningful ways than the passive recipient.⁷⁸ Through this process, the original medium becomes an integral part of a fan’s life.⁷⁹ These fans exhibit extreme devotion to the favored text. It would be inconceivable for them to consider missing a new episode, novel in the series, etc.⁸⁰ On a different level, fan fiction may hearken back to earlier times, when folk culture embellished popular stories, thus representing “the flowering of modern folk culture” as well as an expression of fans’ dual fascination with a particular work and their frustration with private owners who expect their works to be passively consumed.⁸¹ Finally, fan fiction may be a springboard for commenting on society, allowing writers

74. See JENKINS, *supra* note 8, at 156-57. In the 1980s and earlier, before Internet usage became widespread, the spread of fan fiction was constrained by logistics. See *id.* at 158-59 (discussing the distribution of fan-published compilations of stories known as “zines”). Today, however, technology has made it easier than ever for consumers to use copyrighted works as a platform for self-expression. Liu, *supra* note 34, at 418.

75. Google, <http://www.google.com/search?hl=en&q=fanfiction> (last visited Feb. 6, 2005).

76. Two million stories is an estimate based on the numerical IDs of new stories posted Feb. 6, 2005, in the 2.2 million range, as well as an academic estimate from early 2003 that the number of stories on FanFiction.net would exceed 1 million by the summer of 2003 and that this number would double annually. *Just In*, FanFiction.net, <http://www.fanfiction.net/justin.php> (last visited Feb. 6, 2005); Mary Ellen Curtin, *Fanfiction.net Statistics*, Alternate Universes Fanfiction Studies, available at <http://www.alternateuniverses.com/ffnstats.html> (last updated Jan. 14, 2003) (last visited Aug. 18, 2005).

77. JENKINS, *supra* note 8, at 27, 45-46.

78. *Id.* at 45. In a survey of fan fiction readers and writers, most said they do so “for enjoyment and to give a sense of belonging to a community.” Michela Ecks, *Fan Fiction, Novels, Copyright, and Ethics*, WHOOSH!, Nov. 2001, ¶ 22, <http://www.whoosh.org/issue62/ecks2.html> (last visited Feb. 6, 2005).

79. JENKINS, *supra* note 8, at 57. “No other text could possibly substitute” in the mind of this type of fan. *Id.*

80. *Id.* at 57. Every detail of the source is important to the fan who interacts in a community. Anything less would place the fan at a disadvantage relative to other fans, reducing the fan’s ability to effectively interact within the community. See *id.* at 57-58.

81. Plotz, *supra* note 8 (discussing Jenkins’ novel, *Textual Poachers*, cited *supra* note 8).

to explore the world in sometimes subversive ways.⁸²

Producers of copyrighted material can exploit fan communities, brought together by fan fiction, to realize benefits. Highly engaged fans, those most likely to participate in reading and writing fan fiction, “re-read” the original source repeatedly for their own entertainment and are eager to introduce their fandom friends to new media, providing more opportunities for producers to reap profits from activities that are central to the “economic structure of . . . [their] industries.”⁸³ Jenkins provides the example of a fan working to keep up interest in her favorite TV show even though it has been off the air for decades; the success of such tactics is demonstrated by situations such as large American followings of British shows that never aired in the United States⁸⁴ Furthermore, for fans, revisiting the source is a way to fuel their imaginations, for fan fiction or otherwise.⁸⁵ Fans’ creative intertextual activities add to the “richness” of the original, meaning they can rewatch even when a non-fan might find doing so “infantile and regressive.”⁸⁶ Because fans base their perceptions on characters’ experiences, each new addition to the canon, consumed in the order the producer chooses to present it, is important as a means of “shedding light on character psychology and motivations.”⁸⁷ In terms of policy, it is unlikely that the proliferation of fan fiction would serve to discourage copyright holders from creating works in the first place, which is the rationale behind copyright law.⁸⁸

If fan fiction is a valuable activity—if the creative self-expression it encompasses has any significance at all—then current copyright laws are the blunt instruments that smother it.⁸⁹ Notwithstanding some copyright holders’ decisions to let sleeping dogs lie by declining to take legal action, at the risk that infringement litigation represents for fan authors is ever present. It is not enough that the labyrinthine Internet provides protec-

82. Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 442-43 (2003).

83. See JENKINS, *supra* note 8, at 68-70.

84. *Id.* at 70.

85. *Id.* at 74.

86. *Id.*

87. *Id.* at 99, 109.

88. See Note, *Originality*, 115 HARV. L. REV. 1988, 1998 (2002).

[R]ewriting a canonical work does not discourage the creation of the underlying work. No underlying writer would think, “I won’t bother to write my own work, because I’ll be losing money to the rewriter of my book after it becomes famous.” Also, rather than discourage readers from buying the underlying work, the rewriting is likely to return the reader to the underlying work and thereby promote its sale. Who reads *A Thousand Acres* and thinks, “No need to read *King Lear*; I already know how the story comes out?”

Id.

89. Mainstream recognition of the value of fan fiction has increased over the years. One editorial, published the day before the sixth *Harry Potter* book was released, lauded the efforts of fan fiction authors, describing them as “engaged in a collective act of imagination” and suggesting that “interactive storytelling” is “the Next Big Thing.” Editorial, *Mind Over Magic: Let’s Nurture the Harry Potter Creative Spark*, THE DALLAS MORNING NEWS, Jul. 15, 2005, at 24A.

tion in its sheer impenetrability because if the expression is important enough to protect on the aggregate, each individual expression deserves protection as well. As Jenkins puts it:

If you are a housewife in Nebraska and you receive a letter from Viacom's attorneys telling you to remove your website or they will take away your house and your kid's college fund, you don't think twice. You fold. Computer activists reassure us that it is impossible to police the web, that sites which are taken down will spring up tomorrow from another location, but when you're the one in the crosshairs, you blink.⁹⁰

B. SOME FAN FICTION MAY NOT INFRINGE UPON COPYRIGHTS

Although works of fan fiction may technically be based on a copyrighted source, at least some specific stories may contain enough originality that they do not infringe on any intellectual property rights.⁹¹ Liu suggests that fan fiction could transform the original material to a sufficient degree to be more like traditional authorship, copyrightable in its own stead.⁹² In this way, he distinguishes between "minimally transformative" means of self-expression, such as creating a mix tape with several songs by different artists or drawing a picture of Superman fighting Batman, and fan fiction, which "can embody significant creative contributions" despite its reliance on other works.⁹³

Despite Liu's suggestions regarding the potential transformative value of creative works, most works of fan fiction constitute pure copyright infringement. Nevertheless, two types of fan fiction might be sufficiently original as to overcome that burden: what Jenkins identifies as "character dislocation" and "personalization forms."⁹⁴ A character dislocation story is a "radical manipulation" in which "characters are removed from their original situations and given alternative names and identities."⁹⁵ Here, though basic elements about the characters' personalities remain the same, there is little to connect the fan's work with the original—to the extent that, without the fan author's own designation of the story as being based on a given original text, the work would not be identified as fan fiction at all.⁹⁶

The other story type, personalization, involves the addition of original characters, based on the fan fiction author, to the source material.⁹⁷ At least some of these stories may again be sufficiently transformative so as

90. Personal website of Henry Jenkins, *supra* note 22.

91. "[A]uthors often consume earlier works in the process of creating their own works. Indeed, no work is truly and entirely new. All works build upon earlier work to some extent." Liu, *supra* note 34, at 405.

92. *Id.* at 416.

93. *Id.* at 415-16.

94. JENKINS, *supra* note 8, at 171.

95. *Id.*

96. *See id.*

97. *Id.* at 171-72. Fans derogatorily refer to these as "Mary Sue" stories. *Id.*

to prevent infringement of the original.⁹⁸ This would not be the case where the author's persona merely interacts with canonical characters in their original settings—the vast majority of such stories.⁹⁹ Yet some stories might focus completely on the author's character only nominally in the source world, with canonical characters left out entirely or afforded only brief references.¹⁰⁰ The legal question presented is thus the opposite as with character dislocation: instead of focusing on the requisite degree of originality in the characters, the central issue is whether the “world” of the original text is adequately transformed in the fan's story.

If either of these types of stories was the basis of a copyright infringement suit, the copyright holder would be required to prove that the expression of ideas in the secondary work is “substantially similar” to the expression of ideas in the original work.¹⁰¹ Substantial similarity is shown when the alleged infringer adopts the expression of ideas, not the ideas themselves, from the original work, and the amount copied is more than minimal.¹⁰² When the original work consists of a series of separate yet interconnected pieces, such as a television series, the extent of copying is determined by comparing the secondary work to the original works as an aggregate, not individually.¹⁰³ Copying several small fragments from a large number of such an interconnected whole can be significant enough to meet the “amount of copying” requirement.¹⁰⁴ An overview of some other tests for substantial similarity might also be illustrative. The “ordinary observer” test asks whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal of the two works as the same.”¹⁰⁵ This determination is left to the fact finder, who would ordinarily view both the original and the allegedly infringing work.¹⁰⁶ The “total concept and feel” test considers “‘the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting’ of the original and allegedly infringing works.”¹⁰⁷ This can be a fine line and is often very fact-specific. For example, substantial similarity between the James Bond films and a commercial featuring an action sequence was shown because both feature all of the following: (1) plots that involve an unflustered

98. See Pat Pflieger, *Too Good to Be True: 150 Years of Mary Sue*, Presentation to the American Culture Association (Mar. 31, 1999), http://www.merrycoz.org/papers/MARY_SUE.HTM (last visited Feb. 6, 2005).

99. See *id.*

100. See *id.*

101. *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 137 (2d Cir. 1998).

102. *Id.* at 138 (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)).

103. *Id.* at 138.

104. *Id.* (copying 643 fragments from 84 episodes of the same television series was sufficient).

105. *Id.* at 139 (quoting *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992)).

106. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1299 (C.D. Cal. 1995).

107. *Castle Rock*, 150 F.3d at 140 (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)).

hero, accompanied by a beautiful female, who escapes a fantastical villain in a high-speed car chase using high-tech gear, (2) settings that involve high-speed car chases, (3) special effects and fast-paced music, (4) “dry wit and subtle humor,” and (5) characters who are similar in appearance and behavior.¹⁰⁸ The “fragmented literal similarity” test considers whether the derivative work uses verbatim quotations from the original or closely tracks the original’s language.¹⁰⁹ Finally, the “comprehensive nonliteral similarity” test considers whether the original’s “fundamental essence or structure” is copied in the derivative work.¹¹⁰ Thus, a *Seinfeld* trivia book that based its questions on fictional events that occurred on screen satisfies the substantial similarity test, even though the trivia book used few, if any, direct quotations, had little in common with the essence or structure of the original, and the concept was entirely different. It was enough that the book duplicated a more than minimal amount of the original show’s expression of ideas.¹¹¹ The fact that a work has been “re-cast” in a medium different than the original, such as a sculpture based on a photograph, has no bearing on a finding of infringement.¹¹²

Literary characters are copyrightable, as are graphic and other forms of non-literary characters who, under a more stringent standard, are central to “the story being told” or, under the lesser standard, are merely depicted with enough specificity to warrant copyright protection.¹¹³ Under either test, for example, James Bond is a copyrightable character because of his distinctive traits that are not typical of all spy characters and because those traits remain the same from film to film, regardless of the different actors who play the character.¹¹⁴

As far as applying these standards to the question of fan fiction is concerned, much would hinge on which version of the substantial similarity test the court chooses to apply. The transformative uses discussed above would probably easily pass the “ordinary observer” test because few reasonable people would find substantial similarity in, for example, a story in which Harry Potter leaves his world to go to high school in America with a teenage fan, or conversely a story in which Harry Potter is not Harry Potter at all but perhaps a medieval squire with a different name and without many of the characteristics that make him “Harry Potter” in the novels.¹¹⁵ The “total concept and feel” test could go either way, depending on the number of events in the story that coincide with the original, the similarity of the characters to characters in the original (which could

108. *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1298.

109. *Castle Rock*, 150 F.3d at 140.

110. *Id.*

111. *Id.* at 140-41.

112. See *Rogers v. Koons*, 751 F. Supp. 474, 478 (S.D.N.Y. 1990), *aff'd*, 960 F.2d 301 (2d Cir. 1992).

113. *Metro-Goldwyn-Mayer*, at 1295-96.

114. *Id.* at 1296.

115. See *Castle Rock*, 150 F.3d at 139.

be significant or absent, depending on the story), and so forth.¹¹⁶ However, the latter test might be more difficult for the fan fiction author to satisfy—if correspondence of elements such as “dry wit and subtle humor” is sufficient to support a finding of substantial similarity, then even the most transformative use that retains some spark of the original’s tone could be infringing.¹¹⁷ Nevertheless, these most transformative types of fan fiction stand a better chance of escaping a copyright infringement suit.

C. FAIR USE DEFENSE

Justice Story explained in 1845 that:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.¹¹⁸

The fair use defense is the justification most commonly urged by fan authors.¹¹⁹ The law of fair use is complicated, and without test cases on which to base conclusions, fair use may not be the safe haven so many fan fiction proponents perceive it to be.

The Copyright Act provides that:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall 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 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.¹²⁰

The purpose of the fair use doctrine is to ensure that copyright law does not “stifle the very creativity which that law is designed to foster.”¹²¹ Whether or not a given work constitutes fair use of the original source is

116. See *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1291-98 (discussing what this case refers to as “substantial similarity of general ideas” but what *Castle Rock*, *supra* note 107, identifies as the “total concept and feel” test).

117. See *id.*

118. *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845) (No. 4436).

119. *FAQ About Fan Fiction*, Chilling Effects Clearinghouse, available at <http://www.chillingeffects.org/fanfic/faq.cgi#QID138> (last visited Jan. 28, 2005).

120. 17 U.S.C. § 107 (2000).

121. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

to be determined on a case-by-case basis.¹²² The four statutory factors are not exclusive, and each factor must be weighed against the others.¹²³ Furthermore, because the line between fair use and copying is such a fine one, courts may wish to hesitate to enjoin activities that appear to exceed the limits of fair use lest they injure the public interest promoted by the challenged work.¹²⁴

As with determinations of fair use, each work of fan fiction must be considered on a case-by-case basis. No two stories are alike, and where one story might easily fall within the parameters of fair use, another might just as clearly be a violation.

The first factor, "purpose and character of the use," focuses on the extent to which the new work "transforms" the original; what it adds in terms of character, expression, meaning, or message.¹²⁵ Because the fair use factors are balanced against one another, the more transformative the new work, the less important the other factors become.¹²⁶ A work that "adds value to the original" by creating "new information, new aesthetics, new insights and understandings" is sufficiently transformative to satisfy the requirements of this factor.¹²⁷ There is no hierarchy of permissible fair uses; in other words, it is irrelevant that the content of the new work concerns subject matter that might be deemed "plebeian, banal, or ordinary."¹²⁸ Additionally, the fact that the use is for non-commercial purposes is relevant but by no means determinative.¹²⁹ Therefore, a work may generate profit and yet still constitute fair use of the original.¹³⁰ Finally, the fact that the copyright holder denied permission for the secondary work has no bearing on a finding of fair use.¹³¹

The other prong of the first factor concerns the "purpose" requirement, which the Copyright Act lists as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹³² A parody has a claim to fair use because its purposes, criticism and comment, are statutorily accepted.¹³³ To come under the umbrella of fair use, therefore, a parody must actually use elements of the original work for those purposes and not merely "to avoid the drudgery

122. *Campbell*, 510 U.S. at 577; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985).

123. *Campbell*, 510 U.S. at 577-78.

124. *Id.* at 578 n.10. At least, this is the case with parodies or other critical works. See *id.*

125. *Id.* at 579.

126. *Id.*

127. *Castle Rock Entm't, Inc. v. Carol Pub'l'g Group*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

128. *Id.* at 142.

129. *Campbell*, 510 U.S. at 584.

130. *Id.*

131. *Id.* at 585 n.18.

132. See 17 U.S.C. § 107.

133. *Campbell*, 510 U.S. at 579.

in working up something fresh.”¹³⁴ The permissible purposes listed are not exclusive.¹³⁵ That said, despite assurances by courts to the contrary, the focus does appear to be largely on whether or not the secondary work meets the listed purposes.¹³⁶ Thus, a trivia book based on a TV show did not satisfy the first factor because it did not mesh with any of the statutory purposes and instead had a purpose to provide fans with the expression they enjoyed from the TV show in a different form.¹³⁷ The court in the trivia book case explicitly stated that an “entertainment purpose” was not sufficiently transformative and therefore failed the fair use test.¹³⁸ Conversely, a book that contained synopses of episodes did fulfill the permissible commentary purpose.¹³⁹

With respect to purpose, at least, fan fiction parodies are better positioned to claim fair use protection than other works.¹⁴⁰ Lack of a permissible purpose, however, is the main problem for other types of fan fiction. Whereas parodies arguably do serve as “criticism” or “commentary” on the original, works that aim to fulfill more traditional fan fiction roles—such as filling in gaps in the original narrative, focusing on secondary characters, and so forth—do not satisfy any of the listed factors.¹⁴¹ The closest might be “education.” Some copyright owners state that they support fan fiction because it helps budding writers improve their skills.¹⁴² Fan fiction can be used educationally, as a catalyst for encouraging youngsters to read and write.¹⁴³ Indeed, such encouragement is becoming more common, with major media outlets soliciting short pieces of fan fiction from young writers.¹⁴⁴ But while the education purpose probably shields those instances of fan fiction, it may be a stretch to extrapolate it to all fan fiction. In-class preparation of fan fiction or submission of fan fiction in a media contest for children differs greatly from the reality of most fan fiction online, which is written by fans during their free time, for the enjoyment of other fans. Even if those home authors contend that they are reaping educational benefits from their efforts, it is at

134. *Id.* at 580.

135. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

136. *See Castle Rock Entm't, Inc. v. Carol Pub'lg Group*, 150 F.3d 152, 142-43 (2d Cir. 1998).

137. *Id.*

138. *Id.* at 144.

139. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1374 (2d Cir. 1993).

140. Parodies are common in the fan fiction world; they are one of sixteen story types on FanFiction.net, alongside such staples as “romance,” “mystery,” and “drama.” FanFiction.net, <http://www.fanfiction.net/> (last visited Jan. 28, 2005).

141. *See Twin Peaks*, 996 F.2d at 1374; JENKINS, *supra* note 8, at 162-77 (discussing the different types of fan fiction).

142. *See, e.g., Piers Anthony & Xanth, supra*, note 55.

143. Henry Jenkins, *Why Heather Can Write*, TECH. REV., Feb. 6, 2004, http://www.technologyreview.com/articles/04/02/wo_jenkins020604.asp (last visited Jan. 8, 2005); *Fan Fiction Lesson*, Teacher's Writing Portfolio, <http://www.msu.edu/~bristows/teacherpage.html> (last visited Jan. 8, 2005).

144. *See, e.g., Nancy Churnin, 'Harry Potter' Fans Write in with Detailed Predictions*, THE DALLAS MORNING NEWS, Jul. 12, 2005, <http://www.dallasnews.com/sharedcontent/dws/fea/texaslivigin/family/stories/> (last visited July 17, 2005).

most internally focused self-study far from the usual instances of permissible copying for educational purposes.¹⁴⁵ However, though fan fiction does not fit the listed purposes, that does not mean it absolutely cannot support a finding of fair use because the purposes are nonexclusive.¹⁴⁶

Next, courts should consider that most fan fiction is a not-for-profit endeavor in its analysis of whether the fair use defense applies.¹⁴⁷ This could be significant; there is some indication that courts rarely have the opportunity to consider truly noncommercial, purely-for-entertainment literary works, so fan fiction's nonprofit nature might ultimately carry more weight in favor of finding fair use despite the fact that commercial uses might not weigh equally as heavily against fair use.¹⁴⁸ An interesting wrinkle could arise with regard to websites that host works of fan fiction and that make money from advertisements. Most fansites are too small to generate advertiser attention, but massive ones like FanFiction.net do accept ads and possibly even profit from them.¹⁴⁹ The line between the copyright infringement in the stories hosted on the sites and the ads themselves is perhaps too attenuated, especially since FanFiction.net hosts millions of stories about thousands of different sources, and it would be difficult to pinpoint one copyright holder's material as the source of commercial profit over others.¹⁵⁰ Nevertheless, a fan fiction host who profits from advertisements could fail even this factor, which typically would fall in favor of fan fiction producers. Furthermore, regarding all fan fiction, the fact that it does not fit a listed purpose is also another factor against a finding of fair use, although not a determinative one.¹⁵¹

The second factor, "nature of the copyrighted work," considers how concerned copyright law is with protecting the type of work that is being infringed.¹⁵² Thus, factual subject matter, which exhibits little spark of creativity, is less deserving of protection than a fictional story.¹⁵³ This factor merits little discussion, largely because fan fiction is almost always based on copyrighted works that go to the core of copyright law, such as novels, television shows, and movies.¹⁵⁴ As a result, this factor weighs in

145. See 17 U.S.C. § 107 (teaching purposes include "multiple copies for classroom use").

146. See *Harper & Row Publishers, Inc. v. Nations, Inc.*, 471 U.S. 539, 561 (1985).

147. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994).

148. See *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 144 (2d Cir. 1998). If courts truly believe that "no man but a blockhead ever wrote, except for money," they might be quite surprised at encountering the vast body of fan fiction written purely for pleasure and other emotional rewards. See *id.* (quoting JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* (1791)). Indeed, the court fails to consider Boswell's next sentence, "Numerous instances to refute this will occur to all who are versed in the history of literature." James Boswell, Project Gutenberg's *Etext of Life of Johnson*, <http://www.gutenberg.org/dirs/etext/98/ljnsn10.txt> (last visited Feb. 6, 2005).

149. See FanFiction.net, <http://www.fanfiction.net> (last visited Jan. 19, 2005).

150. See *id.*

151. See *Harper & Row*, 471 U.S. at 561.

152. *Campbell*, 510 U.S. at 586.

153. See *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *Harper & Row*, 471 U.S. at 563.

154. See *Harper & Row*, 471 U.S. at 563.

favor of copyright holders.¹⁵⁵

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” considers whether the secondary work justifiably copied as much as it did of the original work.¹⁵⁶ Relevant matters include how extensive the quantity of copying was in addition to the impact the copied portion has relative to the whole of the copyrighted work—that is, whether the copied portions go to the heart of the original piece’s “quality and importance.”¹⁵⁷ This also demands that the nature of the new work be considered, because that will determine the necessity of the copying.¹⁵⁸ A parody, for example, loses all meaning if the original work being lampooned is unidentifiable; identification requires that the new work make use of the most important features of the original.¹⁵⁹ That said, “context is everything, and the question of fairness asks *what else* the parodist did besides go to the heart of the original.”¹⁶⁰ This factor asks a different question than the preliminary question of “substantial similarity” with respect to copyright infringement, which concededly has occurred with most works of fan fiction.¹⁶¹ A finding of substantial similarity is not sufficient to turn this factor in the copyright holder’s favor; instead the focus is on the context in which the use occurs.¹⁶²

The third factor is again difficult to apply to a category as broad as fan fiction. Whereas the extent of copying in some stories is extensive, with passages of dialogue and descriptions lifted verbatim from the origin, others use so little of the original that it would be difficult to connect the work of fan fiction with the original without contextual clues provided by the author.¹⁶³ Moreover, even where the similarities between the two works are extensive, the nature of fan fiction is such that the copying may be necessary.¹⁶⁴ As with parodies, the value that fans find in fan fiction is in the retelling and restructuring of a favored (and copyrighted) text.¹⁶⁵ Without sufficient cues in the story to connect it with the original, fan fiction would utterly fail to fulfill its purpose: indeed, it would not *be* fan fiction at all and would more appropriately be described as a work of original fiction “inspired” by ideas in previous works, copyrightable in its own stead.¹⁶⁶ Thus, if fan fiction serves a fair use purpose alongside parody, and if substantial copying is necessary in at least some cases in fan

155. See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 144 (2d Cir. 1998); *Twin Peaks*, 996 F.2d at 1376.

156. *Campbell*, 510 U.S. at 586.

157. *Id.* at 587.

158. *Id.* at 586-87.

159. *Id.* at 588.

160. *Id.* at 589 (emphasis added).

161. See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 144 (2d Cir. 1998).

162. *Id.*

163. See generally JENKINS, *supra* note 8.

164. See *Campbell*, 510 U.S. at 588.

165. See *id.*

166. See Liu, *supra* note 34, at 416.

fiction as it is in parody, then this third factor may fall in favor of fan fiction as fair use of the original notwithstanding extensive copying.¹⁶⁷

The fourth and final factor, "the effect of the use upon the potential market for or value of the copyrighted work," considers the lost current sales, decrease in future potential sales, and decrease in future potential sales of derivative works of the original material.¹⁶⁸ Courts may not presume harm when the case involves anything more extensive than commercial verbatim copying.¹⁶⁹ The more that the secondary work cannot serve as a substitute for the original, the greater the likelihood that the market has not been harmed and the more this factor weighs in favor of the infringer.¹⁷⁰ The same analysis applies to potential derivative works created by the copyright holder: the only consideration is whether or not the infringing work serves as an adequate substitute for the potential derivative work;¹⁷¹ that is, the impact on the market for the potential derivative work if the infringing use were to become widespread.¹⁷² A pertinent consideration is whether or not the alleged infringer's work is one that the copyright owner might at some point wish to produce.¹⁷³ Copyright holders are unlikely to parody or critically comment on their works, and so these types of works produced by others are unlikely substitutes for the copyright holder's market.¹⁷⁴ Conversely, a copyright holder might very well produce an entertainment-based use such as a trivia book that casts a favorable light on the original work, and therefore such an unauthorized work produced by a third party is a substitute that does damage the copyright owner's market.¹⁷⁵ Although all factors are to be balanced against one another, the fourth factor deserves particular scrutiny and is central to the fair use analysis.¹⁷⁶

There are no reliable indicators of the impact of fan fiction on the market for the original works. Fandom lore and academic conjecture suggest that fan fiction only improves the market for the original works, by creating and maintaining fans' interest in these works. This is accomplished by ensuring that fans who wish to participate in fan communities remain well versed in the canon of the original work as a way of keeping up with their compatriots. Furthermore, by generating demand for additional products from the original work's creator, the object of fans' fascination becomes an ever more integral part of their lives.¹⁷⁷ Copyright holders may embrace this view as well, particularly those who engage in strategic silence

167. See *Campbell*, 510 U.S. at 588.

168. *Campbell*, 510 U.S. at 590.

169. *Id.* at 591.

170. *Id.*

171. *Id.* at 593.

172. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 537, 568 (1985).

173. *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 144 (2d Cir. 1998).

174. See *id.*

175. *Id.*

176. *Stewart v. Abend*, 495 U.S. 207, 238 (1990). On the other hand, *Castle Rock* says that *Campbell's* emphasis on balancing the four factors means that that this fourth factor is not any more important than the others in weighing fair use. 150 F.3d at 145.

177. JENKINS, *supra* note 8, at 68-70.

in response to violations.¹⁷⁸ Conversely, many copyright holders view fan fiction as a threat, fearing that it will diminish the original (at least with certain types of fan fiction that drastically alter the context of the original, such as adult-oriented *Harry Potter* stories) or serve as such a perfect substitute that demand for the original work and its derivatives will be diminished.¹⁷⁹ Without concrete evidence of fan fiction's impact, positive or negative, on the market for the original work, it is difficult to determine which party this factor would favor. The focus would have to be on how apt a substitute for the original work fan fiction might be.¹⁸⁰ There is little indication that fans abandon the original work in favor of fan fiction (for example, that they stop watching new episodes of a television show, or do not read newly-released novels in a series)—in fact, the opposite appears to be true.¹⁸¹ Fans who are engaged in a community tend to be more loyal to the original work; even when they object to the direction the original is taking, they nevertheless continue to consume it because anything less would place them at a participatory disadvantage relative to the better-informed fans who populate their communities.¹⁸² The same applies to rereading of the original, since fandom requires more detailed knowledge of the text than does passive reception.¹⁸³ Additionally, copyright holders' authorized derivative works would never parallel some fan fiction storylines—this again recalls the sexually explicit *Harry Potter* stories, which take the story in directions J.K. Rowling most certainly will not.¹⁸⁴ Thus, fan fiction may be a particularly poor substitute for the original work and authorized derivative works. As a result, unless copyright holders could demonstrate an empirical impact on their markets, they would be hard-pressed to swing this factor in their favor.

Tushnet argues that fan fiction, in conjunction with the disclaimers that authors use to credit the copyright owners, does constitute fair use.¹⁸⁵ Regarding the first factor, she emphasizes fans' noncommercial, transformative use, which she argues deserves the same protection as parodies.¹⁸⁶ She proposes that the second factor is irrelevant to analyzing a fair use defense of fan fiction because fan fiction focuses on fictional, never factual, events.¹⁸⁷ She points out that the effect on the copyright holder's market is probably positive because "fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters."¹⁸⁸ Finally, Tushnet suggests that

178. See discussion of neutral copyright holder reactions, *supra* notes 35-39 and accompanying text.

179. See discussion of negative copyright holder reactions, *supra* notes 40-56 and accompanying text.

180. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-93 (1994).

181. JENKINS, *supra* note 8, at 68-70.

182. *Id.*

183. *Id.*

184. See *Notices*, *supra* note 48.

185. Tushnet, *supra* note 2, at 664.

186. *Id.* at 664-68.

187. *Id.* at 676-77.

188. *Id.* at 669.

while the third factor might weigh in favor of copyright holders, the strength of the first and the fourth factors might be such that fan fiction is still fair use.¹⁸⁹

Overall, however, it is difficult to determine how the fair use analysis would be resolved with respect to individual works of fan fiction. Because the purposes of most fan fiction, entertainment, creative self-expression, and sociocultural communal participation, are not statutorily recognized under the first factor, the other three factors would have to be convincing indeed.¹⁹⁰ The damaging effect of the first factor could be somewhat ameliorated by the fact that most fan fiction is noncommercial, but that alone is likely not enough to tip the scales one way or the other. Furthermore, the second factor, the nature of the copyrighted work, will almost always work against fan fiction authors. Thus, it is up to the final two factors. Regarding the third factor, if fan fiction is acknowledged by the court as a use that demands substantial copying, it could support fan fiction as fair use of the original.¹⁹¹ Conversely, if the particular story in question uses very little of the original work (if it extensively "transforms" the original with little reference to it), the third factor would most likely help the fan author's case regardless of whether or not the court acknowledges the necessity of substantial similarity between fan fiction and the original.¹⁹² However, for a story that does make substantial use of elements from the original work, this factor could just as easily work against fan authors.¹⁹³ Finally, the fourth factor probably favors fan fiction, since it would be extremely difficult for copyright holders to make an adequate showing of market damage, but that alone may not be enough to make the case for fair use. This is particularly so if the court, in the absence of financial evidence, finds that fan fiction is a persuasive substitute for the original works and its derivatives, a possibility that cannot be overlooked.¹⁹⁴ Therefore, on the whole, the fair use defense is most likely an inadequate shield against claims of copyright infringement.

D. SELF-HELP

Not content to wait for the legal hatchet to come down, some fans have taken to self-help measures to either elude detection or ameliorate specific concerns copyright holders might have with regard to their stories.¹⁹⁵ There is a tradition in fan fiction of existing on the edges of legitimacy, with activity taking place underground or with a variety of means for dis-

189. *Id.* at 678.

190. *See* JENKINS, *supra* note 8, at 68-70; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 1994.

191. *See* Campbell, 510 U.S. at 588.

192. *See id.* at 587-88.

193. *See id.*

194. Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 145 (2d Cir. 1998).

195. The specter of legal enforcement always hangs over fan fiction aficionados, "threaten[ing] at any moment to disrupt the pleasure that fans find in creating and circulating their own texts." JENKINS, *supra* note 8, at 32.

appearing to avoid legal restrictions.¹⁹⁶ To the extent that copyright holders are unable to find infringing uses, the infringers cannot be prosecuted. In the early days of fandom, before the Internet offered a convenient, international platform for fan activities, remaining unnoticed was a simple matter. Fan fiction was by necessity available only through fan-produced publications, which were advertised only to fans who were introduced to a fan circle by established fans.¹⁹⁷ Today, on the other hand, remaining unnoticed on the Internet is an uncertain proposition: there is safety in numbers, but any individual is vulnerable the second he or she moves outside of exclusive fora such as members-only e-mail circles. It is nevertheless possible for fandom to go underground on the Internet. After *Interview with the Vampire* author Anne Rice aggressively threatened litigation against fan fiction authors and distributors such as FanFiction.net, virtually all stories based on her works seemingly disappeared from the Internet.¹⁹⁸ Yet a fan author coyly suggests to those wanting to know where to find such stories, "We don't know. And we certainly couldn't tell you if we did."¹⁹⁹ That fan's site also includes steps for eluding detection, such as using free web servers for posting stories and eliminating means by which posters' identities could be traced.²⁰⁰ One option the fan does not mention is simply outsourcing the web archive overseas, especially to a jurisdiction with poor or no enforcement of international copyright restrictions, which might be even more effective.²⁰¹

By far the most common means of self-help protection is the ubiquitous disclaimer. Many fan fiction authors believe that disclosing the fact that they do not own the source material serves as an effective shield against litigation for copyright infringement.²⁰² Indeed, authors usually take pains to point out that they are not profiting from their stories and that they do not have enough money to make suing them worthwhile. Examples of such disclaimers abound: "Disclaimer: The characters, settings and basic plots of the Harry Potter novels belong to J.K. Rowling. I own nothing";²⁰³ "I am not Misty. I don't own anything that has to do with Valdemar, they don't belong to me So don't sue me, please. I'm dead broke anyway[]."²⁰⁴ Ironically, lack of money would likely not

196. *Id.*

197. *Id.* at 158-59.

198. *Where Has Anne Rice Fanfiction Gone?*, Croatoan Fanfic, <http://www.angelfire.com/rant/croatoan/> (last visited Jan. 28, 2005).

199. *Id.*

200. *Id.*

201. See generally Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273 (2002).

202. See Fero, *FanFiction: Fan's Right or Copyright Nightmare?*, KuroShin, July 20, 2003, <http://www.kuroShin.org/story/2003/7/18/175640/391> (Jul. 20, 2003).

203. See Stardrops, *Untouchable No Longer*, FanFiction.net, Jan. 17, 2005, <http://www.fanfiction.net/s/2223217/1/> (last visited Jan. 28, 2005).

204. Liquid-Goddess-Reformation, *Ruin/Resurrection*, FanFiction.net, Jan. 20, 2005, <http://www.fanfiction.net/s/2228106/1/> (last visited Jan. 28, 2005).

be a concern of copyright holders bent on eliminating fan fiction. It would be difficult if not impossible to prove that the infringing use damaged copyright holders monetarily, and they might be unable to take advantage of statutory damages, leaving the statutory remedy of injunction as the most attractive option.²⁰⁵ Obviously, the infringer's financial health has no bearing on the latter. Furthermore, the fact that the author is not profiting from fan fiction, while relevant to a determination of whether or not the fair use defense applies, is immaterial with regard to a finding of copyright infringement.²⁰⁶ Thus, a disclaimer stating such is likely to have little effect. Finally, the mere acknowledgement of another's ownership of source material does not absolve the fan author from culpability for infringing uses.²⁰⁷ Therefore, disclaimers are virtually useless, at least as far as a defense against copyright infringement is concerned.

Lastly, some fan fiction providers require that readers provide a password to access story archives.²⁰⁸ The purpose of these passwords appears to be solely for keeping underage readers out of adult-oriented sites. As long as that is the copyright holder's main concern, passwords are apparently sufficient.²⁰⁹ But in terms of copyright infringement, passwords have no legal significance. The fact that access to an infringing use is restricted is no excuse for the infringement, and no such exception is recognized.²¹⁰ That said, in practical terms passwords could be one more means that fans use to remove their sites from the mainstream. Passwords, for example, could help keep search engines out of the site (in fact, some sites include coding to misdirect all search engine robots so that the sites will not be listed).²¹¹ In that respect, at least, passwords serve as an effective means of avoiding detection.

E. IMPLIED CONSENT DEFENSE

Some copyright holders explicitly encourage or approve of fans writing stories based on their works.²¹² McCardle proposes that, since express consent equitably estops copyright holders from later objecting to infring-

205. See 17 U.S.C. §§ 501-06 (2000).

206. See § 106 (providing that the ability of an infringer to pay is not an element of a copyright infringement case).

207. Likewise a disclaimer does not weigh against an infringer raising the fair use defense, making it equally irrelevant on the part of a copyright holder who would seek to use it against the purported infringer. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994) (failing to mention the fact that the infringer acknowledged the copyright holder's ownership of the source material on the derivative work).

208. See, e.g., *Restricted Section*, <http://www.restrictedsection.org/> (last visited Feb. 6, 2005); *The Potter Slash Archive*, <http://glassesreflect.net/index1.html> (last visited Feb. 6, 2005).

209. See discussion *supra* p. 15.

210. See 17 U.S.C. § 106 (2000) (failing to mention such a defense).

211. See Danny Sullivan, *Search Engine Features for Webmasters*, SEARCH ENGINE WATCH, Dec. 5, 2002, <http://searchenginewatch.com/webmasters/article.php/2167891> (last visited Jan. 28, 2005).

212. See discussion *supra* notes 57-59 and accompanying text.

ing uses, a copyright holder's implications that they do not consider fan fiction to infringe on their rights would similarly bar them from later bringing suit.²¹³

However, this may not be the case. In *Castle Rock Entertainment v. Carol Publishing Group*, the copyright holders were aware of the unauthorized *Seinfeld* quiz books, requested copies to use as promotions for the show, and publicly referred to the books in favorable terms.²¹⁴ This did not prevent the court's finding that the quiz books infringed on NBC's copyrights, although these acts indicate more approval than even the most enthusiastic proponents of fan fiction have offered.²¹⁵ Additionally, the broader impact of an implied consent defense cannot be ignored by the fan who does not wish to imperil the entire body of available fan fiction. If implied consent is recognized as a defense, it would encourage more suits for infringement or at the very least discourage copyright holders from expressing any form of acquiescence to the dispersal of fan fiction. Therefore, fan fiction authors or distributors facing an infringement suit might consider an implied consent defense, but they should be aware that it is most likely not the best argument they have in their favor.

F. OPTIONAL LICENSING AGREEMENTS

Optional licensing agreements, in which copyright holders voluntarily license use of their material to fan fiction authors, are one possible solution. Liu discusses the manner in which market machinations could lead to some form of voluntary system for dealing with copyright violations. He suggests that the fact that infringing activity exists indicates that copyright holders are leaving needs unmet, which means that they have the opportunity to do something about it.²¹⁶ In other words, if copyright owners could act to fulfill the needs of consumers, through some form of voluntary system, then they could reap the benefits of that use rather than losing profits when consumers act to fill the needs on their own.

Unfortunately, optional licensing agreements are not without pitfalls. Liu suggests that the downfall would come with copyright owners, who would be unable to cede a measure of control sufficient to ensure that consumers would have the flexibility they desire.²¹⁷ A relevant consideration is that optional licensing agreements might have little legal significance and thus would also fail to meet the needs of copyright holders. For example, if works of fan fiction constitute fair use of the original work, then the copyright holder could not control the market for fan fic-

213. McCardle, *supra* note 82, at 449.

214. 150 F.3d 132, 136 (2d Cir. 1998).

215. *See id.* at 135.

216. Liu, *supra* note 34, at 424-25.

217. *Id.* at 426. In aesthetic terms as well, too much control by copyright holders could be damaging. Owners would logically bar all forms of expression of which they did not approve, therefore marring "much of the diversity and value of consumer self-expression." *Id.* at 427.

tion by licensing it—even without the license, fan fiction authors would have the legal right to produce it.²¹⁸

Ultimately, such optional licensing agreements may be unnecessary. If fan fiction is not protected by the fair use defense, then it infringes on the holder's copyright. Unauthorized works are not entitled to copyright protection, and the authors of the unauthorized works may not claim infringement when the rightful owners use the expression in their own works.²¹⁹ Nevertheless, it is understandable that some copyright holders fear situations like Marion Zimmer Bradley's, where regardless of the merits of the infringer's claims, publishers might be reluctant to purchase the creator's works because they wish to avoid even baseless litigation.²²⁰

G. COMPULSORY LICENSING

Compulsory licenses, which would require copyright holders to permit fan fiction upon receipt of a statutorily determined fee from a fan fiction author, have their basis in the Copyright Act. Any person who desires to make and distribute phonorecords of copyrighted "nondramatic musical works" or "musical arrangement[s]," rights that 17 U.S.C. § 106 grants exclusively to the copyright owner, can obtain a compulsory license from the copyright holder.²²¹ The licensor is entitled to royalties for each phonorecord distributed of 2.75 cents, or 0.5 cents per minute of playing time, whichever amount is larger.²²² Netanel proposes an offshoot of compulsory licenses, noncommercial-use levies, for free peer-to-peer file sharing.²²³ The levy would be imposed on the sale of each product that could be distributed through such file sharing, thereby permitting purchasers to share music online while still compensating the original copyright holder for the potential lost sales.²²⁴

Either of these compulsory schemes could be a potential solution to meet the needs of both fan fiction authors and copyright holders. As a practical matter, however, both have their shortcomings. With respect to compulsory licensing, licensees are willing to pay the royalty because they are also making money off of their own works.²²⁵ This is not the case with fan fiction. Furthermore, there would be no easy way to determine how many "copies" had been distributed as well as what constitutes a copy. Each time a new user downloads the story, which would be close to impossible to track? Each "hit" on the link, several of which could come from the same person? For stories distributed on mailing lists, the num-

218. See *Castle Rock*, 150 F.3d at 146 n.11.

219. *Anderson v. Stallone*, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109, at *30-32 (C.D. Cal. 1989).

220. See *Marion Zimmer Bradley*, *supra* note 57.

221. 17 U.S.C. § 115(a)(1)-(2) (2000).

222. 17 U.S.C. § 115(c)(2) (2000).

223. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 1 (2003).

224. *Id.* at 4.

225. See § 115(c)(2).

ber of members on the lists? Few fan fiction authors would be equipped with the technical know-how to determine any of these. The license quickly becomes unwieldy and impossible to regulate. As for levies, there are two main problems. First, unlike the situation with online file-sharing of music, there is no clear-cut evidence that the market for the original work is damaged by fan fiction, and thus the rationale for imposing the levy is weakened.²²⁶ Second, there could very well be political objection to imposing costs on media such as novels and movies, particularly when it is impossible to determine the extent of fan fiction participation. It is difficult to justify a tax to benefit the uses of a potentially small group of consumers, further enriching copyright holders who cannot adequately demonstrate that they are deserving of additional profits to begin with.²²⁷ As a result, although some form of compulsory licensing scheme is academically interesting, it is probably not the best, or even a good, solution to the fan fiction dilemma.

H. EXPANSION OF FAIR USE

Perhaps the most controversial possibility is the notion that copyright law itself must undergo a dramatic change in order to accommodate the beneficial expression represented in fan fiction. Liu discusses some of the problems with current copyright law. He first considers traditionally legal interests of consumers: the desire for autonomy, that is, the ability to determine the manner in which they interact with a copyrighted work; and the interest in communicating and sharing thoughts with others about a work.²²⁸ These interests dovetail with another important consumer interest: the interest in creative self-expression, which “go[es] directly to the ability of consumers to derive meaning from copyrighted works.”²²⁹ Consumers exercise their self-expression interests by engaging in acts of “copying that is minimally transformative,” a category that may or may not encompass fan fiction and that may or may not be protected by current copyright law.²³⁰ Liu argues that this failure is dangerous and that too much control of consumer activities could impact personal consumption, down to what people derive from works and how they think about them.²³¹ Copyright law, therefore, should address the interest in creative self-expression.²³² He suggests that the law should weigh all three consumer interests in autonomy, communications, and creative self-express-

226. See discussion *supra* p. 31.

227. See *id.*

228. Liu, *supra* note 34, at 406-07, 411-12.

229. *Id.* at 422.

230. See *id.* at 415, 419. Liu feels that current copyright law is based on outmoded notions of all consumers as passive recipients. *Id.* at 424. An example of this attitude is a court's statement that derivative works, created for the purpose of entertainment, that are based on “creative fiction works” do not merit the same level of free speech and public interest protection as would works based on, for example, important historical events. *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 146 (2d Cir. 1998).

231. Liu, *supra* note 34, at 422-23.

232. *Id.* at 424.

sion while engaging in a fair-use analysis.²³³

One possible suggestion is that fair use should be expanded to permit use of popular culture works because of the difficulty of delineating the line between expression and idea when “fictional worlds become so prevalent in everyday lives that people consider them a part of reality.”²³⁴ Vitanza urges the adoption of a “workable standard,” balancing acknowledgement that transformative uses can turn a protected expression into permissible ideas, consideration of factors to determine an original work’s popular culture status, rewarding uses that “add substantial value” to the original work, focus on whether a work borrowed “more than necessary” for its purpose as opposed to the substantial similarity test, and finally a de-emphasis on the importance of protecting a copyright holder’s market access.²³⁵

With respect to fan fiction, the possibility of expanding fair use is perhaps less objectionable than it might be for commercial uses like those discussed in Vitanza’s proposal. Ultimately, the best system might include stringent safeguards to ensure that copyright holders retain all necessary rights and power to maximize their profits. This would mean that any fair use expansion would need to be limited to strictly not-for-profit works, perhaps those published only outside of traditional venues (so, for example, fan fiction published online or self-published and distributed at cost would be permissible). Furthermore, while disclaimers currently have no legal effect with respect to copyright claims, a requirement that they be included on fan fiction could help to ensure that any possible consumer confusion between authorized derivatives and fan-published works is eliminated.

IV. OTHER POTENTIAL LEGAL ISSUES

A discussion of the legality of fan fiction would be incomplete without a brief consideration of other potential legal issues that might arise. The issues raised *infra* are far too complex for an exhaustive analysis in the limited space provided, but each in turn might pose unique challenges to both copyright holders and authors of fan fiction.

A. TRADEMARK CLAIMS

Trademark claims, the yin to copyright’s yang, could potentially sound the death knell for fan fiction if copyright law does not. Nearly all characters as well as unique terms contained in copyrighted works have been trademarked in the U.S.²³⁶ As opposed to copyright infringement, trademark holders who fail to prosecute infringing uses could be deemed to have abandoned their trademark, making the trademark a generic term

233. *Id.* at 428.

234. Eliza Vitanza, *Popular Culture Derivatives: Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 14 BERKELEY TECH. L.J. 43, 54-55 (1999).

235. *Id.* at 56, 58-60.

236. McCardle, *supra* note 82, at 464.

free for use by any who might wish to do so.²³⁷ This could spur further litigation on the part of trademark holders. Several factors are considered in determining whether or not trademark infringement has occurred.²³⁸ The major consideration, “likelihood of confusion,” weighs heavily in favor of fan fiction authors.²³⁹ The likelihood of confusion analysis considers, among other factors, “evidence of actual confusion.”²⁴⁰ Because virtually all fan fiction stories include disclaimers acknowledging the copyright owner of the original text and stating that the author is writing fan fiction for entertainment purposes only, perhaps no reasonable person would confuse fan fiction with the original.²⁴¹ This may very likely be the case, particularly for textual fan fiction based on visual media such as television shows or films. Furthermore, even in the absence of disclaimers, much fan fiction appears in sites clearly dedicated to fan fiction that include a variety of signals that the works contained within are not produced by the original work’s creator.²⁴² FanFiction.net is illustrative: for example, few people would believe that they had actually stumbled upon the next *Harry Potter* novel on a site that is labeled FanFiction.net, that contains millions of stories (tens of thousands in the *Harry Potter* section alone) by hundreds of thousands of authors, with a variety of links explaining to new users what the site is for and what fan fiction is.²⁴³ As a result, it might indeed be very difficult to prevail on a claim of trademark infringement from use in fan fiction. On the other hand, no single likelihood of confusion factor is dispositive, so a particular outcome cannot be guaranteed.²⁴⁴ There is nevertheless a requirement that the trademark be “used in commerce.”²⁴⁵ Fan fiction is mostly a not-for-profit endeavor, and so usually trademark infringement cases would fail the “use in commerce” standard.²⁴⁶

B. OTHER ISSUES

Most fan fiction is based on fictional sources. There are, however, a small but growing number of stories that elaborate on the fictional exploits of real people.²⁴⁷ The potential liabilities of this practice have not gained much attention, but at least one sports figure threatened a defa-

237. See *Abandonment of Trademark*, U.S. TRADEMARK L. DIG. (Martindale-Hubbell), 2004.

238. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

239. See *Savin Corp. v. Savin Group*, 391 F.3d 439, 456, 459 (2d Cir. 2004).

240. *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

241. See *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). *Twin Peaks* suggests that the following disclaimer is sufficient to prevent confusion: “[This] publication has not been prepared, approved, or licensed by any entity that created or produced [the original work].” *Id.*

242. See, e.g., FanFiction.net, <http://www.fanfiction.net> (last visited Feb. 7, 2005).

243. See *id.*

244. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 352 (9th Cir. 1999).

245. 15 U.S.C. §§ 1114(1)(a), 1125(c) (2000).

246. See *id.* For a discussion of possible commercial uses, refer to p. 31 *supra*.

247. *The Fanfiction Glossary*, <http://www.subreality.com/glossary/terms.htm#R> (last visited Jan. 28, 2005).

mation suit.²⁴⁸ In addition to defamation, there is also the risk of suits based on right to publicity. Similar to the right to privacy, this protects an individual's right to control the use of his or her name.²⁴⁹ Although novel with respect to "real person" fan fiction, either could potentially pose problems for the distributor.

Sexually explicit fan fiction might also be a source of litigation. For copyright holders who object to such content, threats of infringement suits are usually sufficient to deter specific uses, and if the owner's goal is simply to prevent minors' access to the material, the distributors of such fan fiction will often agree to restrict access with the use of passwords or other methods to settle a suit.²⁵⁰ Should that be insufficient to satisfy the copyright owners, they could urge prosecution of authors and hosts on obscenity charges. The Child Online Protection Act, the constitutional status of which is unclear, might be a final option, although it requires restricting minors' access to communications for *commercial* purposes that are "harmful to minors," a standard that would absolve most distributors and their Internet service providers.²⁵¹

A final issue might arise if Congress ever decided to recognize all creators' moral rights, as they did for creators of visual art in the Visual Artists Rights Act of 1990.²⁵² Moral rights encompass "the right to claim authorship of the work in the form created, to prevent distortion, mutilation, or misrepresentation of the work, and the right to prevent the use or representation of the author or his work in such a way as to injure his reputation."²⁵³ Granting these rights to authors might be another weapon in their arsenal to prevent objectionable portrayals of their characters. At this time, however, there has been no indication of interest in expanding moral rights in America.

V. CONCLUSION

As fan fiction progressively gains prevalence, conflicts between fans and copyright owners can only increase. It is vital that fans understand their legal rights, both so that they can respond appropriately to a copyright holder's legal action and so that they can prevent its occurrence in the first place. Likewise, copyright holders must ensure that the actions they take are truly in their best interests. It makes little sense to attack one's most devoted fans—those who logically are the ones most immersed in the world of fan fiction—if there is no need to do so when fan

248. *Defamation on FanDomination.net Website*, Chilling Effects Clearinghouse, <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=598> (last visited Jan. 19, 2005).

249. 18 AM. JUR. 2D *Copyright and Literary Property* § 76 (2004); Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 80 (2001).

250. See discussion *supra* pp. 14-15.

251. See 47 U.S.C. § 231(a)-(b) (2000), *enforcement preliminarily enjoined by ACLU v. Ashcroft*, 322 F.3d 240, 270-71 (3d Cir. 2003), *aff'd and remanded by* 124 S. Ct. 2783, 2795 (2004).

252. See 17 U.S.C. § 106A (2000).

253. 18 AM. JUR. 2D *Copyright and Literary Property* § 76.

fiction is not damaging the copyright holder financially, and if failure to act is of no consequence legally. This Comment addressed some of those concerns by analyzing the viability of potential legal claims against fan fiction authors and distributors, as well as the potential success of defenses against those claims. It suggested possible solutions in the form of alternative licensing agreements, ultimately proposing that, if the current doctrine of fair use is inadequate to cover the beneficial, noncommercial creative expressions that comprise fan fiction, fair use should be expanded to include such uses.

Perhaps the status quo will hold. Owners of copyrighted material will continue, mostly, to turn a blind eye to infringement. Participants in the fan fiction community will remain largely unaffected by random acts of drive-by litigation, crafting millions of works when possible and disappearing underground when necessary. How long this impasse can stand remains to be seen. When and if the time comes, however, courts should carefully consider the unplumbed richness and complexity of fan fiction culture and the unique artistic expressions it creates. The destruction of this “modern folk culture” should be contemplated with hesitancy, only after engaging in a full and careful balancing of all the represented interests and taking nothing for granted. If there is anything of value to be found in fan fiction, the law must at the very least adjust, or possibly even revolutionize its approach to copyright questions, to permit fan fiction’s significant contributions to popular society.

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