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## Rebranding Batman

Alice Preminger

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## Rebranding Batman

### Cover Page Footnote

Great thanks to both Peter DiCola, for his guidance, thoughtful commentary and endless patience, Zoe Levine for her invaluable insight into fan communities.

# Rebranding Batman

ALICE PREMINGER\*

*While one could reasonably characterize fan fiction as "socially controversial," with some lauding the practice as a creative outlet and others meeting it with sneers, legally speaking, its position is undeniably precarious. Fan content, including fan fiction and fan films, lives in the liminal space between copyright infringement and fair use. Fan creators argue their works are motivated by a desire to connect with beloved copyrighted expressive works—frequently popular media franchises—and are intended only for enjoyment by themselves and very small fan communities. Copyright owners find the practice of creating fan work far less innocuous, claiming the works threaten to undermine the value of their franchises by creating competition with sanctioned works and over-saturating their markets.*

*This article attempts to reconcile this conflict by turning to trademark law, and its "likelihood of confusion" standard. The article will argue that the types of expressive works that typically give rise to fan works—media franchises—are so heavily branded and commodified that they closely resemble tangible products. Corresponding to this product-like quality are a distinctive set of ownership interests that are highly reminiscent of a trademark owner's interest in their brand. These interests diverge from the normative functions of copyright law in a significant enough manner such that tailoring a specific framework is warranted. Trademark law can offer the copyright regime a set of key principles that can be adopted within its existing framework to accommodate the interests of rightsholders without squelching the creativity of fans.*

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\* Alice Preminger is a J.D. candidate at Northwestern Pritzker School of Law. Great thanks to both Peter DiCola, for his guidance, thoughtful commentary and endless patience, Zoe Levine for her invaluable insight into fan communities.

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## Introduction

Harry Potter is raised by an eccentric biochemist who's both fully aware and completely supportive of his identity as a wizard.<sup>1</sup> Tony Stark is confronted with a disgruntled Shrek and Donkey, who turn up in his office without warning.<sup>2</sup> Darth Vader finally achieves his dream of throwing himself a backyard birthday party.<sup>3</sup> While the magical world of *Harry Potter* is vast, the multi-dimensional Multiverse, stretching even beyond the Galaxy Far Far Away is the human imagination and our need to tell stories. Few channel this creative drive toward their professional career, but the rest of us must get our fix in other ways. We ravenously devour arts and entertainment, spend hours immersed in daydreams, and may even indulge in petty gossip from time to time. We also, of course, develop creative hobbies, among the most notorious of which is producing fan fiction.

One could reasonably characterize fan fiction as socially “controversial,” with some lauding the practice as a creative outlet and others meeting it with sneers; legally speaking, however, its position is undeniably precarious. Fan fiction and, by extension, all fan-generated content<sup>4</sup> occupies a space somewhere between infringement and fair use.<sup>5</sup> While it may be tempting to call the space a gray area, it's really more of a black box. When it comes to unauthorized works, copyright owners typically operate in the realm of extremes, with enforcement strategies ranging from non-enforcement to mercilessly dispensing cease-and-desist letters.<sup>6</sup> In the case of the latter, almost all do cease and desist, as day care centers and grieving families are understandably squeamish about the prospect of getting sued.<sup>7</sup> While this pre-empts expensive and time-consuming litigation, it also pre-empts the development of case law.<sup>8</sup>

Thus far, academic conjecture has had to stand in for legal precedent, with most arguing that fan fiction falls squarely within fair use.<sup>9</sup> While fair use can and should provide refuge for most fan works, pointing to the fair use doctrine alone is

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1. Less Wrong, *Harry Potter and the Methods of Rationality*, FANFICTION.NET, <https://www.fanfiction.net/s/5782108/1/Harry-Potter-and-the-Methods-of-Rationality> [<https://perma.cc/4J6M-2T6A>] (last visited May 12, 2022).

2. Midnight Wolf, *Shrek in the MCU*, QUOTEV.COM, <https://www.quotev.com/story/12946553/Shrek-in-the-MCU> [<https://perma.cc/5XMA-NE7R>] (last visited May 12, 2022).

3. CowsLovePennies, *An Unexpected Guest*, FANFICTION.NET, <https://www.fanfiction.net/s/2607903/1/An-Unexpected-Guest> [<https://perma.cc/A7DJ-QH54>] (last visited May 12, 2022).

4. This article uses “fan content” and “fan works” to refer to all fan created expressive works, including written stories, films, visual art, music, and merchandise including clothing and accessories.

5. See Mynda Rae Krato, *Fictitious Flattery: Fair Use, Fan Fiction, and the Business of Imitation*, 8 INTELL. PROP. BRIEF, 92, 93 (2016).

6. Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1888-89 (2009).

7. Elisa Menendez, *Disney Bans Grieving Father from Having Spider-Man on Son's Grave*, METRO (July 5, 2019), <https://metro.co.uk/2019/07/05/disney-bans-grieving-father-spider-man-sons-grave-10118348/> [<https://perma.cc/PBJ8-9WQC>]; *Why Disney Threatened to Sue Daycare Centers*, ZENBUSINESS (Dec. 13, 2021), <https://www.zenbusiness.com/blog/disney-threatened-sue-daycare-centers/> [<https://perma.cc/2QD2-Y8VA>].

8. Johnathan Bailey, *The Messy World of Fan Art and Copyright*, PLAGIARISM TODAY (May 3, 2010), <https://www.plagiarismtoday.com/2010/05/13/the-messy-world-of-fan-art-and-copyright/> [<https://perma.cc/T4M7-967Y>].

9. *Id.*

not enough to ensure that fan creators have the freedom and security to engage with a beloved passion. Instead, a systemic approach to fan works ought to be created so that a fair use analysis produces consistent, predictable outcomes.

To do this, one might look beyond copyright law itself and turn to its sibling regime, trademark law. This article will argue that the types of expressive works that typically give rise to fan works (i.e., media franchises) are so heavily branded and commodified that they closely resemble tangible products. Corresponding to this product-like quality are a distinctive set of ownership interests that are highly reminiscent of a trademark owner's interest in their brand. These interests diverge from the normative functions of copyright law in a significant enough manner such that tailoring a specific framework is warranted. Trademark law can offer the copyright regime a set of key principles that can be adopted within its existing framework to accommodate the interests of rightsholders without squelching the creativity of fans.

This piece proceeds with Part I, which considers the nature of fan works and the interests of fan creators, then juxtaposes them to those of conventional authors. Part II then examines how existing copyright and trademark regimes address fan works, and identifies gaps and shortcomings. Part III explains how the nature of media franchises renders them akin to branded products, and proposes the adoption of a copyright-specific version of trademark's "likelihood of confusion" test. Part III also suggests incorporating this analysis into a tailored version of the fair use test that rewards non-commercial fan works that present a low likelihood of confusion with authorized content from the rightsholder's franchise.

## I. Fans vs. Authors: A Tale of (Not-So) Conflicting Interests

### A. Fans' Interests

#### 1. The Nature of Fan Works

Fan works may most simply be defined as non-professional creative works based on an existing "identifiable segment of popular culture."<sup>10</sup> Fan creators draw upon existing media to produce their own novel works, using familiar characters and fictional worlds to tell new stories.<sup>11</sup> Despite being non-professional, many fan works are skillfully executed, with fan creators engaging in extensive external research in an effort to achieve a cohesive, consistent, and believable final product.<sup>12</sup> While the majority of fan works are literary narratives, or "fan fiction," they may also take the form of films, music, and visual art.<sup>13</sup>

While the fan works themselves are typically created by individual authors, fan creators are often part of a collective endeavor comprised of a broader

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

11. *Id.*

12. See Emma Lord, *13 Things Fan Fic Writers Are Tired of Explaining*, BUSTLE (Mar. 23 2015) <https://www.bustle.com/articles/71438-13-things-fan-fiction-writers-are-very-tired-of-explaining> [<https://perma.cc/U499-RXYW>].

13. Patrick McKay, *Culture Of The Future: Adapting Copyright Law To Accommodate Fan-Made Derivative Works In The Twenty-First Century*, 24 REGENT U. L. REV. 117, 121 (2011).

fan culture.<sup>14</sup> Fan creators are often members of “fandoms,” or communities of individuals similarly devoted to a particular franchise.<sup>15</sup> Fan works are distributed through multiple channels, with the earliest fan fiction disseminated as physical “zines” at fan conventions.<sup>16</sup> More modern works are often found posted on internet forums and fan sites, or distributed privately through email listservs.<sup>17</sup> While the archetypical female tween and teen fan fiction writers do have a presence among fan communities, fandoms are not monoliths, and they also include creators of every age and gender identity.<sup>18</sup> Further, unlike the popular perception of the fan fiction author as obsessive and unsophisticated, fan creators include highly successful professionals among their ranks, including professional writers.<sup>19</sup>

Fan works themselves are as varied as the people who create them. The myriad genres of fan works include “alternate universe” stories, transplanting a franchise’s characters into a new setting; “crossover” works, bringing together characters and settings from multiple properties; “angst” stories, based on the main character’s suffering; and “fluff” stories, based on the main character’s triumphs.<sup>20</sup> By far the best known and most notorious genres are “Slash” and “Mary Sue.”<sup>21</sup>

“Slash” fiction refers to the genre of fan works exploring same-sex romantic pairings between fictional characters.<sup>22</sup> While those outside fan communities may find some of the more graphic slash stories especially delicious fodder for mockery (particularly those based on franchises targeted at children), most slash works are far less salacious than the handful of graphic stories about eight-way polyamorous relationships between Lego characters.<sup>23</sup> Instead, many slash works

14. Tushnet, *supra* note 10, at 655-656.

15. Library of the Future, *Fandom*, AMERICAN LIBRARY ASSOCIATION, <https://www.ala.org/tools/future/trends/fandom> [https://perma.cc/9C98-DUJE] (last visited May 11, 2022).

16. David Plotz, *Luke Skywalker is Gay?*, SLATE (Apr. 14, 2000), <https://slate.com/news-and-politics/2000/04/luke-skywalker-is-gay.html> [https://perma.cc/XA3L-DQTD].

17. Nicole Pellegrini, *FanFiction.Net vs. Archive of Our Own*, HOBBYLARK (Oct. 14, 2021), <https://hobbylark.com/fandoms/fanfictionnet-vs-archive-of-our-own> [https://perma.cc/D37N-BZVR].

18. Melissa Taylor, *FanFic Is Big with Teens and Tweens: Here’s What Parents and Educators Need to Know*, BRIGHTLY, <https://www.readbrightly.com/what-parents-educators-need-to-know-about-fanfiction/> [https://perma.cc/44HU-L8FS] (last visited May 11, 2022); Plotz, *supra* note 16; Sarah Shaffi, *From Fans to Famous: 8 Authors Who Started out Writing Fan Fiction*, STYLIST, <https://www.stylist.co.uk/books/el-james-cassandra-clare-rainbow-rowell-fanfiction/248413> (last visited Dec. 16, 2022); Emma Whitford, *Lev Grossman, S.E. Hinton and Other Authors on the Freedom of Writing Fanfiction*, VULTURE (Mar. 15, 2015), <https://www.vulture.com/2015/03/6-famous-authors-whove-written-fanfiction.html>.

19. *Id.*; HENRY JENKINS, TEXTUAL POACHERS 47 (2013).

20. Yolanda Saray, *From the Fluff to the Angst. The Popular Fanfiction Genres*, MEDIUM (Mar. 31, 2020), <https://medium.com/@ysgomez/from-the-fluff-to-the-angst-the-most-popular-fanfiction-genres-270379d2559> [https://perma.cc/N7UK-DGLB].

21. Laura Miller, *A Reader’s Advice to Writers: Beware of Mary Sue*, SALON (April 21, 2010), [https://www.salon.com/2010/04/21/mary\\_sue/](https://www.salon.com/2010/04/21/mary_sue/); JR Thorpe, *5 Things You Should Know About Slash Fiction*, BUSTLE (Nov. 17, 2015), <https://www.bustle.com/articles/124101-5-things-you-should-know-about-slash-fiction>.

22. JR Thorpe, *5 Things You Should Know About Slash Fiction*, BUSTLE (Nov. 17, 2015), <https://www.bustle.com/articles/124101-5-things-you-should-know-about-slash-fiction> [https://perma.cc/R98K-QFQL].

23. Rachel North, *50 Shades of WHAT now? 12 of the Internet’s Most Bizarre Works of Fan Fiction*, EMPIRE, Nov. 2, 2015, <https://www.empireonline.com/movies/features/weirdest-fanfiction-online/> [https://perma.cc/YH8L-RXA3].

are solidly in the realm of the mundane, including the popular series of *Star Trek* fictions reimagining Spock and Kirk as domestic partners navigating the banalities of family life.<sup>24</sup>

“Mary Sue” works, on the other hand, are a class of fan stories that involve the insertion of more inclusive characters into familiar but homogenous properties.<sup>25</sup> The genre is named for “Lieutenant Mary Sue,” the lead character in an early *Star Trek* fan fiction, who serves as the first female commander of the USS enterprise, a role previously filled only by men.<sup>26</sup> While initially centered upon placing women in prominent roles traditionally reserved for men, the genre has since expanded to include greater representation of a broader range of under-represented identities, including ethnic and racial minorities, LGBTQ characters, and characters with disabilities.<sup>27</sup> The genre’s popularity stems from the desire to include characters whose perspectives are left out of franchises which are “authored, directed and filmed mostly by men,” giving women and other marginalized identities the opportunity to “subvert that perspective, fracture a story, and recast it.”<sup>28</sup>

The majority of fan works are based on prominent and broadly-disseminated media franchises, including *Star Trek*, *Star Wars*, *Harry Potter*, *Lord of the Rings*, *Game of Thrones*, *Twilight*, *Marvel*, and *Disney*, just to name a few.<sup>29</sup> But fan works have been inspired by a wide range of content beyond popular fictional media franchises. *Bill Nye* has an active fandom, which has produced stories ranging from ill-fated experiments, to weddings, to *Dance Dance Revolution* competitions.<sup>30</sup> Popular commercial characters like the *Trix* Rabbit enjoy a fan following, as do heavily advertised brands.<sup>31</sup> Even video games receive attention, with one notable *Pong* fan fiction recounting the plight of “Ball,” and their attempt to finally break free and escape from the game.<sup>32</sup> Fan works may center upon central characters or more peripheral ones, or may eschew existing characters entirely and instead insert new characters into a familiar fictional world.<sup>33</sup>

24. *The Stowaway*, ARCHIVE OF OUR OWN, <https://archiveofourown.org/works/3209417/chapters/7005932> [<https://perma.cc/9K4L-C22R>] (last visited May 12, 2022).

25. Anupam Chander and Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of ‘Mary Sue’ Fan Fiction as Fair Use*, 95 CAL. LAW. REV. 597, 599 (2007).

26. *Id.*

27. *Id.* at 601; Rae Binstock, *Why Do Queer People Write Fan Fiction? To See Themselves in Mainstream Culture*, SLATE (May 30, 2016), <https://slate.com/human-interest/2016/05/queer-people-write-fan-fiction-to-see-themselves-in-mainstream-culture.html> [<https://perma.cc/E27Q-BWPP>].

28. Elizabeth Minkel, *Why it Doesn’t Matter what Benedict Cumberbatch Thinks of Sherlock Fan Fiction*, NEW STATESMAN (Oct. 17, 2014), <https://www.newstatesman.com/culture/2014/10/why-it-doesn-t-matter-what-benedict-cumberbatch-thinks-sherlock-fan-fiction> [<https://perma.cc/2JCG-38RB>].

29. Hrvoje Milakovic, *10 Biggest and Best Fandoms in the World, Ranked*, FICTIONHORIZON (Oct. 18, 2021), <https://fictionhorizon.com/biggest-and-best-fandom/> [<https://perma.cc/BM76-GGD9>].

30. Erin McCarthy, *6 Amazing Plots from Bill Nye Fan Fiction*, MENTAL FLOSS (Nov. 27, 2012), <https://www.mentalfloss.com/article/31612/6-amazing-plots-bill-nye-fan-fiction> [<https://perma.cc/3KWL-MGBD>].

31. Among these include a fan fiction about *Folger’s* foray into wedding catering, and a *Snuggly* sweater that goes rouge, Erin McCarthy, *12 Subjects We Didn’t Realize Had Their Own Fan Fiction*, MENTAL FLOSS (Dec. 12, 2012), <https://www.mentalfloss.com/article/31887/12-subjects-we-didnt-realize-had-their-own-fan-fiction> [<https://perma.cc/9MZE-BL5Q>].

32. McCarthy, *supra* note 31.

33. Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 101, 107 (2008).



Fan fiction has historically been treated as a “tolerated use,” with the owners of the copyrighted franchises generally turning a blind eye.<sup>34</sup> But the internet has only grown in ubiquity, and fan creators are becoming ever more visible, expanding beyond the confines of little-known fan sites to mainstream platforms like YouTube.<sup>35</sup> Further, with the increasing sophistication of phone cameras and film editing software, what have historically been low-tech passion projects are now venturing into the realm of high-production value commercial films.<sup>36</sup> Rightsholders have taken note of these more high-profile works, and some have moved beyond cease-and-desist letters and actually initiated litigation.<sup>37</sup> However, since little case law has developed, fan creators and franchise owners alike are left with little more than speculation regarding how such infringement lawsuits may play out.<sup>38</sup> With rising stakes for both fan creators and rightsholders, the copyright regime may need to develop a clear approach to fan works that can be used by fan creators ex-ante to avoid incurring liability.

## 2. The Purpose of Fan Works

Fan creators are frequently met with condescension surrounding what critics call eccentricity, obsession, or even perversion. Their very relationship with creativity is treated with derision.<sup>39</sup> Fan creators have been labeled as lazy and unimaginative, or, as Tolkien put it, “writing in others’ universes” as a means of “taking the easy way out.”<sup>40</sup> This narrative is appealing and fits neatly within the familiar copyright paradigm whereby creative expression is intended to have a broad social benefit and must be motivated by the promise of economic profit.<sup>41</sup> But like many convenient narratives, it’s also wrong.

Fan authors’ interests sharply differ from those of other authors.<sup>42</sup> First, unlike other authors and artists, fan authors aren’t creating to be “authors.” Admonitions like Tolkien’s fail to take into account that fan authors aren’t writing “in someone else’s universe” because they want to write but otherwise don’t know how. They write in that universe because they want to be in *that* universe.<sup>43</sup> This is the entire point: writing in the universe of a franchise isn’t a means to an end, it’s the end itself. This becomes clear when considering the fan writers who are themselves professional authors. Often such authors’ professional writing is in entirely different genres, using different characters, and telling completely different types

34. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008)

35. Hetcher, *supra* note 6, at 1931.

36. *Id.* at 1910.

37. Paramount Pictures Corp. v. Axanar Productions, Inc., 2017 WL 83506.

38. Tushnet *supra* note 10, at 664.

39. Henry Jenkins, *Star Trek Rerun, Reread, Rewritten: Fan Writings as Textual Poaching*, 5 CRITICAL STUDIES IN MASS COMM’N, 85, 85 (1988).

40. George Martin, *FAQ*, GEORGE R.R. MARTIN, <https://georgerrmartin.com/for-fans/faq/> [<https://perma.cc/VQB6-E4U6>] (last visited May 12, 2022).

41. Author’s Guild vs. Google, 804 F.3d 202, 212 (2<sup>nd</sup> Cir. 2015).

42. *Infra* Part I.A.

43. Martin, *supra* note 40; Sadie Trombetta, *Why Fanfiction is Good for Readers—and Writers*, BUSTLE (Mar. 3, 2017), <https://www.bustle.com/p/why-fanfiction-is-a-good-thing-for-writers-readers-39359> [<https://perma.cc/92EE-BHVB>] (responding to Tolkien and Martin by explaining the purpose of fan writing: “fans love their stories, love their characters, love their worlds, and just want more of it”).

of stories.<sup>44</sup> Meg Cabot, author of the popular *Princess Diaries* series, has been vocal about her own *Star Wars* fan fiction practice and its role in her development as a storyteller.<sup>45</sup> Cabot's fictional world, involving a socially awkward American teenager being abruptly thrust into European aristocracy, is radically different than Lucas's multi-planet universe of *Star Wars*, which is replete with futuristic technology, robots, and aliens. Whatever utility Cabot found in fan writing, it clearly wasn't a creative shortcut allowing her to avoid the more difficult task of creating something new.<sup>46</sup>

Having dispensed with the idea that fan creators generate works as a way to circumvent the more arduous aspects of the artistic process, the question remains what function fan creation *does* serve. While there are likely as many reasons for creating fan works as there are fan creators, a handful of common themes emerge. First, there is the notion that fans create works as a means of "giving themselves what they want."<sup>47</sup> While perhaps reductive in its phrasing, fan works are ultimately about fans engaging with an existing property in a way that serves a personal need separate from generating an audience. "Mary Sue" works, discussed *supra*, are a salient example of how fan creators might generate works as a means of inserting people like themselves into worlds in which they're absent.<sup>48</sup> Fan creators are frequently members of marginalized or less privileged groups. Substituting female, queer, transgender, and non-binary persons, and persons of color, for the typically straight, white, cis-gendered males dominating popular franchises is a means of pushing back on stereotypes about these underrepresented communities.<sup>49</sup> By promoting inclusiveness in this manner, the original works become more relatable and relevant to groups of people that haven't historically been represented in popular media.<sup>50</sup>

Just as fan works help fans connect to the original work itself, they also connect fans to each other. Because media franchises are so deeply entrenched in popular culture, they have taken on profound social meaning such that engaging with franchises is a means of engaging with culture more broadly.<sup>51</sup> Unlike general audiences, fan creators are not content to be passive consumers of media. Instead, they strive to create their own interpretations of works that they may share with other like-minded people.<sup>52</sup> Further, because the ubiquity of certain franchises has imbued the characters and settings contained within them with a social meaning, members of fandoms share a common language that facilitates and strengthens personal connections among them.<sup>53</sup> Fan communities are unique sites of

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44. Lord, *supra* note 12.

45. Meg Cabot, *Fan Fiction*, MEG'S BLOG (Mar. 8, 2006), <https://www.meg-cabot.com/2006/03/114184067156643148/> [<https://perma.cc/GY9Z-AP4C>].

46. Or, in the words of *Campbell v. Acuff-Rose Music*, "to avoid the drudgery of having to work up something fresh." 510 U.S. 569, 591 (U.S. 1994).

47. Devin Faraci, *Will Star Wars Just be Fanfic From Now On*, BIRTHMOVIESDEATH (Dec. 24, 2015), <https://birthmoviesdeath.com/2015/12/24/will-star-wars-just-be-fanfic-from-now-on> [<https://perma.cc/6X8K-LCYZ>].

48. See Chander and Sunder, *supra* note 25, at 609.

49. Khaliah Peterson-Reed, *Fanfiction as Performative Criticism: Harry Potter Racebending*, J. CREATIVE WRITING STUD., 2019, at 3; Chander and Sunder *supra* note 25, at 599.

50. Binstock, *supra* note 27.

51. Alex Kozinski, Mickey & Me, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 467 (1994).

52. Tushnet, *supra* note 10, at 657.

53. *Id.* at 656.

membership, where writers connect and support each other. Members use shared knowledge and common language to develop stories, and they bond with each other in the process.<sup>54</sup> Fan creators share feedback and offer advice about how to develop or improve a piece, sometimes even suggesting possible directions for future works.<sup>55</sup> If fan creators may be said to be targeting an “audience,” it’s not the passive, general audience targeted by media producers. Instead, these audiences are highly participatory and engage with fan-generated content not merely for purposes of consumption, but also for social connection.<sup>56</sup>

What motivates fan creators then is not the prospect of monetary gain or professional advancement. Creation of fan works is internally motivated, driven by the desire for connection, whether with others or with the work itself. While fan works may have significant social benefits, especially those incorporating underrepresented identities and presenting new perspectives, the fundamental utility of fan creation is far more intimate than cultural enrichment writ large. The endeavor is a personal one: a means of enjoying the culture that has already been endowed to society.

## B. The Authors’ Interests

### 1. Moral and Reputational Interests

Copyright law does not generally recognize “moral rights,”<sup>57</sup> or an author’s “right to object to any distortion, mutilation or other modification of or degraded action” regarding their work that would be “prejudicial to [the author’s] honor or reputation.”<sup>58</sup> Yet, authors frequently cite these types of personal interests when articulating concerns about certain types of fan content. J.K. Rowling, who has otherwise voiced support and even encouragement of *Harry Potter* fan fiction, was quick to specify that fan works “were not to be obscene,” and she has referred to sexually explicit fan fiction as “a matter of serious concern.”<sup>59</sup>

Such concerns typically stem from two sources. The first source is the author’s desire to protect their reputation as an artist among their audiences.<sup>60</sup> The second is a more personal “integrity interest” in the preservation of the expressive

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54. Evans, Davis, et. al. *More than Peer Production: Fanfiction Communities as Sites of Distributed Mentoring*, ACM DIGITAL LIBRARY (Nov. 25, 2017), <https://dl.acm.org/doi/pdf/10.1145/2998181.2998342> [<https://perma.cc/BKQ4-QYJG>] (proceedings of the 2017 ACM Conf. on Comput. Supported Coop. Work and Social Computing).

55. Tushnet, *supra* note 10, at 657.

56. *Id.*

57. While the Visual Artists Rights Act extends a limited set of moral rights for visual art, other forms of creative works are typically not afforded such protections.

58. Berne Convention for the Protection of Literary and Artistic Works, Art. 6bis(1), 1971.

59. Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC (May 24, 2004), <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm> [<https://perma.cc/S32P-8T9K>]; DMCA Takedown Notice issued by Theodore Goddard on behalf of JK Rowling and Warner Brothers, to RestrictedSection.org, LUMEN (Jan. 13 2002), <https://lumendatabase.org/notices/1182>.

60. See Michael Helfand, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 639 (1992).

work the author created and to which the author has become personally attached.<sup>61</sup> Fan works jeopardize both of these interests, as they place the author's characters and fictional worlds outside of the author's control, creating the potential for uses the author might find distasteful or offensive.

An author's concerns about their reputation regard both the author's perceived artistic value as well as their broader social appeal. Since fan fiction is often construed as being synonymous with "low quality," authors may bristle at the prospect of the proliferation of inferior quality work that may be confused with their own.<sup>62</sup> Further, because fan works often deviate substantially from the author's original story line, characters and plots may be used in a way that's fundamentally inconsistent with the original work, eroding the work's internal logic and the integrity of its narrative structure.<sup>63</sup> Even absent a risk of confusion, the existence of a vibrant fan community alone may prove threatening to certain authors. These authors may fear the stigma of having produced the "type of work" that gives rise to fan fiction, which may be construed among certain artistic communities as less culturally valuable.<sup>64</sup>

Accompanying these concerns are fears surrounding the loss of certain fan bases. In her takedown notice to the fan site "*Harry Potter in the Restricted Section*," which was home to a collection of adult-themed *Harry Potter* fan fiction, Rowling explained, "there is plainly a very real risk that impressionable children . . . will be directed to your sexually explicit website."<sup>65</sup> Because the *Harry Potter* franchise was fundamentally directed towards children, Rowling feared that material "most right minded people would consider wholly inappropriate for minors" would undermine the franchise's family-friendly image and alienate its primary audience.<sup>66</sup>

Beyond reputational concerns, many authors describe a more spiritual connection to the worlds they have created. Commentators have recognized this interest, referred to as the "artistic right" of an author to prevent the "spiritual products of the mind" from being altered without consent.<sup>67</sup> In a manner analogous to Radin's conception of "property as personhood," the thinking goes, an author ought to be able to control the use of her work upon which the author is deemed to have "projected her personality."<sup>68</sup> Under this "romantic theory of authorship," the emotional needs of the author take precedence over any creative opportunities for fans wishing to utilize the fictional world in their own fan works.<sup>69</sup> In this paradigm, using a fictional world in a manner with which the author disagrees is tantamount to a personal injury.<sup>70</sup> While *Hannah Potter and the Continuity Crisis* may

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61. Mollie E. Nolan, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533, 536 (2006).

62. See Faraci, *supra* note 47.

63. Tushnet, *supra* note 10, at 675.

64. Faraci, *supra* note 47.

65. DMCA Takedown Notice issued by Theodore Goddard on behalf of JK Rowling and Warner Brothers, to RestricteedSection.org, LUMEN (Jan. 13, 2002), <https://lumendatabase.org/notices/1182>.

66. *Id.*

67. Ernest Bruncken, *The Philosophy of Copyright*, 3 MUSICAL Q., 477, 479, 482 (1916).

68. Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV., 1213, 1250 (1997).

69. *Id.* at 1254.

70. *Id.*

not include any content that's "obscene" in the traditional sense,<sup>71</sup> given Rowling's well-documented condemnation of transgender youth, a story depicting the teenage Potter coming out as a young woman may nevertheless be construed as personally offensive.<sup>72</sup>

These theorists argue that, by using the author's work to create their own stories, fan creators hijack the personality of the author in a manner that undermines the author's sense of personal integrity. Meg Cabot describes this discomfort in her discussion about her relationship with fan fiction. She compares reading certain works to "watching someone I know and love do something totally out of character."<sup>73</sup> This feeling of disappointment, even betrayal, has been echoed by many and argued by some to be the grounds for using copyright protection as a normative force to protect artistic integrity.<sup>74</sup>

## 2. The Interest in Commercial Exploitation

The other fundamental interest of an author is the interest in being able to commercially exploit their work.<sup>75</sup> Copyright not only recognizes this interest, it is in fact premised upon it.<sup>76</sup> The exclusive rights conferred by the Copyright Act, including the rights to reproduction and preparation of derivative works, function to maximize authors' opportunities to commercially exploit their work.<sup>77</sup> Fan works are threatening to authors who perceive them as having the potential to diminish the economic value of their own work. By allowing a fan creator to produce a work based on the original piece, the authors lose their exclusive right to use copyrightable elements of their creation to produce derivative works.<sup>78</sup>

This is concerning to authors for several reasons. First and foremost, there is the fear that the fan work may come to compete with, or even substitute for, the original work and any potential derivative works the author may choose to produce.<sup>79</sup> While the precise contours of the scope and purpose of the derivative works right are somewhat fluid, it has frequently been invoked as a way to address the perceived threat of competition.<sup>80</sup> Commentators postulate that in the absence

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71. *Hannah Potter and the Continuity Crisis*, ARCHIVE OF OUR OWN, <https://archiveofourown.org/works/28259916/chapters/69434262#workskin> [https://perma.cc/8FEX-SHG8] (last visited May 12, 2022).

72. Darnell Christie, *Trans Anger as JK Rowling Compares Hormone Treatment to Gay Conversion Therapy*, REUTERS (July 6, 2020), <https://www.reuters.com/article/us-trans-rowling-trfn/trans-anger-as-j-k-rowling-compares-hormone-treatment-to-gay-conversion-therapy-idUSKBN2472DC> [https://perma.cc/7BAH-K4TF].

73. Cabot, *supra* note 45.

74. See Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1304 (2003).

75. Garon, *supra* note 74, at 1321.

76. *Id.* at 1306-07.

77. *Id.* at 1306.

78. OMRI RACHUM-TWAIG, *COPYRIGHT LAW AND DERIVATIVE WORKS: REGULATING CREATIVITY*, 96 (2019).

79. RACHUM-TWAIG, *supra* at 96.

80. DJ Gervins, *The Derivative Works Right or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 786 (2013).

of the derivative works right, the authors will need to cede various forms of control over the production of their work.<sup>81</sup>

For example, there has been much speculation about the value of derivative works right as stemming from allowing the author to retain control over production timelines.<sup>82</sup> Timing of releases for derivative works has been theorized as playing a key role in an author's ability to optimize the market for their work.<sup>83</sup> Derivative works released too quickly may compete with the original work, while waiting too long might result in a market losing interest.<sup>84</sup> Confronted with the pressure to stay ahead of any particularly compelling fan works, authors may be forced to release new derivative works prematurely.<sup>85</sup> Such an untimely release, theorists argue, means the author will be unable to "extract the full value" from their original work, as derivative works are released on the heels of each other and saturate a work's market.<sup>86</sup> Retention of control over derivative works theoretically allows the author to "protect" elements of their works, including characters, settings and plotlines, while forthcoming derivative works are in production.<sup>87</sup>

Leaving aside considerations of the derivative works market, authors are also concerned about being confronted with the possibility of free-riding and other forms of unfair competition at the hands of fan creators.<sup>88</sup> Unfair competition claims frequently play accompanying roles to copyright suits, illustrating the strong link between infringement and competition.<sup>89</sup> They argue that in creating derivative works based on the author's original writing, fan creators appropriate the author's content, which they may then attempt to pass off as their own.<sup>90</sup>

Finally, authors have the normative interest in protection against the perceived loss of value of their work arising from fan creator's heavy use of their characters, settings, and other distinctive content.<sup>91</sup> Similar to concerns regarding market saturation arising from an author's own derivative works, authors fear that co-existence with innumerable fan works may result in a loss of consumer interest, as audiences are bombarded with a slew of similar works.<sup>92</sup> Having lost its distinctiveness and unique character, there will be little drawing prospective audiences to the original author's work, resulting in the diminution, if not evaporation, of the original author's market.<sup>93</sup>

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81. See Deidre A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 522-523 (2012).

82. RACHUM-TWAIG, *supra* note 78 at 95.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See *Klinger v. Conan Doyal Est., Ltd.* 988 F. Supp. 2d 879, 889-90 (N.D.IL 2013) (suggesting that plotlines, dialogues, characters and other "story elements" are all discrete protectable "increments of expression" that may be protected as derivative works).

88. Stacey Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 290 (2015).

89. See *Ideal Toy Corp. v. Kener Prods. Div.*, 443 F. Supp 291 (S.D.N.Y. 1977).

90. PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES*, 7-8 (2<sup>nd</sup> ed. 1981).

91. See Lantagne, *supra* note 88, at 490.

92. See *Brown v. It's Entertainment Inc.*, 34 F. Supp. 2d 854, 859 (E.D.N.Y. 1999).

93. Nolan, *supra* note 61, at 563.

## II. Fan Fiction and the Existing Legal Regimes: An Exploration of Plot-Holes

### A. Fan Fiction and Copyright Law

#### 1. Fan Fiction as Prima Facie Infringement

Fan fiction is prima facie infringement of two of the exclusive rights granted by the Copyright Act. The first is infringement of the right to exclusively reproduce material.<sup>94</sup> This type of infringement happens when fan creators use protectable elements of the rightsholder's work in their own creations, including characters and settings.<sup>95</sup> The protectability of characters under copyright law is well-established.<sup>96</sup> Characters are generally held to be protectable so long as they have both "physical and conceptual qualities," are "sufficiently delineated" as to be "recognizable as the same character" and are "distinctive" with "unique elements of expression."<sup>97</sup> Fan works almost always involve the types of well-delineated and distinctive characters that enjoy copyright protection.<sup>98</sup> By using the character in their own work, the fan creator reproduces original copyrighted content, as despite being imagined in "new and startling situations," the characters retain those unique elements of expression present in the original work that make them recognizable.<sup>99</sup> While the protectability of settings has received less attention, the same framework might logically be applied to these and other non-narrative elements of plot-driven expressive works, including physical structures, such as the USS Enterprise or the Hogwarts Castle.<sup>100</sup>

The second exclusive right fan fiction arguably infringes upon is the right to prepare derivative works.<sup>101</sup> While many fan works explore dimensions of a franchise that haven't been—and are unlikely to be—explored by the rightsholder, they draw upon and reconstruct elements of the original in a manner that could be characterized as derivative.<sup>102</sup> While the characters reimagined in fan works often feature new characteristics, they also must retain sufficient core traits to make

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94. 17 U.S.C. § 106(1).

95. Tushnet, *supra* note, 658-59.

96. Andrew Thomas, *Evolving Standards in Copyright Protection for Dynamic Fictional Characters*, COMM'N L. 9, 9 (2013).

97. DC Comics v. Towle, 802 F.3d 1012, 1021 (9<sup>th</sup> Cir. 2015).

98. Christina Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 425 (2006).

99. Rachel L. Stroude, *Complementary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191, 210 (2010).

100. For example, while the Batmobile was characterized as a "character" in *Towle*, it may better be understood as a non-narrative element of the franchise.

101. 17 U.S.C. § 106(2).

102. Michelle Chatelain, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works and the Fair Use Doctrine*, 15 TULANE J. INTELL. PROP. 199, 205 (2012).

them recognizable.<sup>103</sup> Retention of those core traits thus results in a type of “non-literal” copy that constitutes infringement of the derivative works right.<sup>104</sup>

## 2. Fan Fiction and Fair Use

While many fan works would be found to be infringing, fan writers may avoid liability in certain circumstances by claiming fair use. To determine whether an otherwise infringing use is “fair” courts consider:

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;
4. The effect of the use upon the potential market for or value of the copyrighted work.<sup>105</sup>

At first blush, the fair use test would seem to weigh heavily in the fan creator’s favor. The works are ostensibly highly transformative in character, as they imagine characters in vastly different situations, and with starkly different identities.<sup>106</sup> Assuming such transformativeness, there would thus be a lower likelihood of finding a negative market impact, as the rightsholder is unlikely to authorize a similar derivative work, or license the seemingly outlandish use.<sup>107</sup> The nature of the rightsholder’s copyrighted work is certainly expressive, and thus “closer to the core of what copyright seeks to protect.” But, given that the nature of the challenged use is engaging with a cherished and culturally significant media franchise, the original work necessarily *has* to be creative.<sup>108</sup> And while the use of an entire character may be quantitatively and qualitatively substantial, the fan creator must use at least a bare minimum of the original work to ensure their work is recognizable.<sup>109</sup>

When considering each factor in turn, however, the test becomes slightly more unstable. While fan fiction may function as a way for fans to connect with each other and a beloved media franchise, its purpose also could be characterized as a way for fans to entertain themselves.<sup>110</sup> Irrespective of impetus, fans’ use of original material to create appealing new storylines serves fundamentally the same entertainment-function as the authorized content. And while some fan works certainly have elements of critique or commentary,<sup>111</sup> many others do not, and instead engage with the original content with reverence. Far from having a transformative purpose, the works may be construed as a means for fans to give

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103. Stroude, *supra* note 99.

104. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A], at 13-39 (2013).

105. 17 U.S.C. § 107.

106. Tushnet, *supra* note 10, at 658.

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

108. *C.f.* at 586 (like parodies, the nature of fan fiction is such that it will nearly always be copying a creative work).

109. Stroude, *supra* note 99.

110. Faraci, *supra* note 47.

111. Chander and Sunder, *supra* note 25 at 600; Tushnet *supra* note 10, at 657.



themselves more of what they want without having to wait for the rightsholder to produce additional content.<sup>112</sup>

The transformative status of fan works remains unclear even when considered in other terms, including the imbuing of new aesthetics, insights, and understandings.<sup>113</sup> Certainly, many fan works give rise to new insights, as they imagine divergent story lines and settings, eliminate certain characters and add new ones.<sup>114</sup> Some change enough to completely alter the aesthetic of the original, like by changing the setting or adding characters from other fandoms.<sup>115</sup> But other fan works may involve little more than a shift in character perspective, or more nuanced exploration of a character's inner life.<sup>116</sup> Such changes may be too subtle for a finding of transformativeness, particularly if their primary purpose is to engage audiences in the same manner as the franchise owner.<sup>117</sup>

Complicating the transformativeness calculus is the fact that the nature of franchises may warrant new considerations about what "transformative" even means. The nature of franchises is such that derivative uses that may be properly characterized as "transformative" in the context of other types of expressive works are actually highly predictable in the context of franchises. Franchises such as Harry Potter, Star Wars, and Marvel's Multiverse are all examples of what media scholar Henry Jenkins calls "transmedia storytelling" or forms of storytelling wherein multiple narrative modalities are used with the goal of enhancing the consumer experience, and engaging new audiences.<sup>118</sup> Among the strategies franchise owners use to "expand their narrative world", there is the production of derivative works that explore "parallel universes" unfolding alongside the original work and also "peripheral stories" that consider tertiary characters or other narratives unfolding in the same universe as the original but are only weakly connected, as well as "interstitial micro stories" that explore gaps within narratives.<sup>119</sup> These uses closely mirror many types of fan works, particularly "recontextualization" works filling in "missing scenes" in official content, "refocalization" works that emphasize secondary and tertiary characters, and "character dislocation" works imagining franchise characters in new settings.<sup>120</sup> While it remains speculative whether courts would account for such recent developments in storytelling conventions when evaluating transformativeness, such logic could be used to undermine otherwise robust arguments in favor of a fan work.

Without being designated as a transformative use under Factor One, a challenged fan work would have extreme difficulty satisfying the fair use test's

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112. See, *Paramount Pictures Corp. v. Axanar Prods., Inc.*, 2017 WL 83506 at \*7 (finding that a fan-produced *Star Trek* film was produced as a means of providing "a whole new way fans can get the content they want.")

113. Pierre Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

114. Tushnet *supra* at 658, 665.

115. Nolan *supra* note 61, at 554.

116. See Peterson, *Fan Fair Use: The Right to Participate in One's Own Culture*, 17 U.C. DAVIS BUS. L.J. 217, 220 (2017).

117. See *id.*

118. Henry Jenkins, *Transmedia Storytelling 101*, HENRY JENKINS (Mar. 21, 2007), [http://henryjenkins.org/blog/2007/03/transmedia\\_storytelling\\_101.html](http://henryjenkins.org/blog/2007/03/transmedia_storytelling_101.html) [<https://perma.cc/DT9P-24KH>].

119. Carlos Scolari, *Transmedia Storytelling: Implicit Consumers, Narrative Worlds and Branding in Contemporary Media Production*, 3 INT'L J. COMMUN. 586, 598 (2009).

120. JENKINS, *supra* note 19, at 165.

remaining factors. Franchises are inherently expressive works, as they must be sufficiently evocative to inspire fandoms in the first place.<sup>121</sup> Further, the fan creator must take enough original content so that the work is recognizable as belonging within the world of the franchise.<sup>122</sup>

Finally, many fan works are precisely the type of content rightsholders may themselves wish to produce, as the works expand universe of the franchise and develop new storylines that consumers may find enjoyable.<sup>123</sup> In addition to the common transmedia-storytelling practices discussed above, other types of dramatic alterations, including new romantic pairings, alternate endings, or even character deaths, are occasionally incorporated into franchises by rightsholders.<sup>124</sup> Given the demonstrated potential for rightsholders to pull premises and concepts from fan works into their own productions, the market for such authorized derivatives may conceivably be eroded by the fan works. First and foremost, audiences may spend on the fan work the money they would otherwise devote to the authorized franchise.<sup>125</sup> But even fan works that are accessible for free may have detrimental impacts, as fans might ultimately prefer to access fan-generated content rather than paying for the rightsholder's authorized version.<sup>126</sup>

Even when a rightsholder has no interest in producing an authorized version of a fan work they may still be losing licensing revenue that might otherwise be available. The now defunct KindleWorlds platform illustrates how a licensing market for fan fiction is plausible.<sup>127</sup> KindleWorlds facilitated both the authorization and sale of fan works by allowing authors to assign rights to their works to Amazon Publishing, where they could be used by fan writers in works of commercial fan fiction.<sup>128</sup> In exchange, the authors would receive royalty fees generated by the sale of fan works.<sup>129</sup> While KindleWorlds shut down after five years, it offers proof of concept that a licensing structure for fan fiction is conceivable. The one-time existence of a formal fan fiction licensing regime may be enough for a court to find a "workable market" for licensing fan fiction.<sup>130</sup> Franchise owners may argue, and courts may find, that any efforts to re-establish such a market may be

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121. See *Paramount Pictures Corp. v. Axanar Prods., Inc.*, 2017 WL 83506 at \*8 (commenting upon the nature of the *Star Trek* series as having the creative capacity to "transport the hearts of a legion of fans to the *Star Trek* universe.")

122. See *Id.* at \*8 ("Defendants intentionally use elements from the *Star Trek* Copyrighted Works to create works that stay true to *Star Trek* canon down to excruciating details. These elements in *Star Trek* canon are important to *Star Trek* fans and hence to the success of any *Star Trek* work.")

123. Faraci *supra* note 47.

124. See Faraci, *supra* note 47.

125. See *Paramount*, 2017 WL 83506 \*9 ("Defendants have successfully raised over a million dollars from *Star Trek* fans at Defendants' prompting of funding the *Axanar* projects instead of "dumping hundreds or thousands of dollars a year on . . . channels" on which the *Star Trek* copyrighted works are shown.")

126. *Id.* at \*9.

127. Nate Hoffelder, *Amazon is Now Looking to Monetize FanFic and Once Again Disrupt Publishing*, THE DIGITAL READER (May 22, 2013), <https://the-digital-reader.com/2013/05/22/amazon-is-now-looking-to-monetize-fanfic/> [<https://perma.cc/Q3P2-NVG3>].

128. *Id.*

129. *Id.* (the platform attracted numerous rightsholders, including WB subsidiaries, and the owners of popular properties such as *Gossip Girl*, *Pretty Little Liars* and *Vampire Diaries*.)

130. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2<sup>nd</sup> Cr. 1994) (holding that a market need only be "workable" and does not have to be "conventional" to find in favor of a plaintiff on Factor Four).

undermined by the proliferation of unauthorized fan fiction, which would work towards compelling a finding against the fan defendant on Factor Four.<sup>131</sup>

## B. Fan Fiction and Trademark Law

### 1. Existing Protection for Franchises

While the franchises giving rise to fandoms are creative works within the purview of copyright law, many rightsholders seek supplemental protection under trademark law. Trademark protection offers additional value to rightsholders through its power to remove certain elements of a protected work from the public domain for an indefinite amount of time, and further restricts certain uses of the work by anyone other than the rightsholder or licensees.<sup>132</sup> Trademark protection offers considerable utility and is commonly sought for a franchise's fictional characters.<sup>133</sup> While copyright law protects the expressive elements of a character, it does not protect the character's name, or any other isolated characteristics that, despite being distinctive and making a character recognizable, aren't in of themselves copyrightable.<sup>134</sup> Trademark law offers a way to protect these uncopyrightable elements of a character such that they can't be appropriated by unauthorized users trying to evoke the original work in their own endeavors.<sup>135</sup>

Trademark protection is easier to acquire when characters have physical depictions.<sup>136</sup> Having a graphic nature allows the character to function essentially as a logo, identifying the franchise as the character's source.<sup>137</sup> When it comes to fan works, trademarks covering only the character's physical depiction is of little help to rightsholders, as many fan works are written and thus unlikely to include pictorial representations.<sup>138</sup> For rightsholders wishing to limit the use of a franchise's characters in literary fan fiction works, protection of the character's name is far more valuable as without it a writer is free to use the character's name or other signature traits without incurring liability.<sup>139</sup>

Unfortunately, it is far more difficult to acquire.<sup>140</sup> A character name alone cannot receive protection unless it has taken on a socially significant

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131. *Id.*

132. Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH L. J. 1473, 1508 (2004).

133. *See id.* at 1506-07.

134. *See* 17 U.S.C. § 102 (limiting copyrightable subject matter to that which is original).

135. *See Lone Ranger, Inc. v. Cox*, 124 F.2d 650, 651-52 (4<sup>th</sup> Cir. 1942) (after failing to produce evidence of copyright infringement, Plaintiff tried case on alternate grounds of trademark and unfair competition).

136. *See Warner Brothers v. American Broad.Co.*, 720 F.2d 231, 246 (2<sup>nd</sup> Cir. 1983).

137. *Id.*; *In re Scholastic Inc.*, 223 U.S.P.Q. 431, 431 (TTAB 1984).

138. Nolan, *supra* note 61, at 542 (citing Kurtz, *The Independent Legal lives of Fictional Characters*); Plotz *supra* note 16.

139. *See id.* (citing Kurtz, *The Independent Legal lives of Fictional Characters*).

140. *Id.*

“secondary meaning.”<sup>141</sup> The ability of audiences at large to connect the character to the franchise by the character’s name alone imbues the name with the sort of “secondary meaning” recognized by the USPTO as sufficient to confer trademark protection.<sup>142</sup> For this to happen, however, both the character and the franchise it belongs to both must have acquired a certain degree of recognizability and significance such that upon seeing or hearing the name, a consumer will associate it with only a single, specific source.<sup>143</sup> This may be accomplished as the character undergoes a “reasonable degree of circulation” and receives a minimum level of visibility in such a manner as to directly link the character to the franchise.<sup>144</sup> For literary works, for example, this might mean ensuring the character’s name is prominently written on the spine of a book, or on visual displays.<sup>145</sup> For films, it frequently means use in advertising and merchandising.<sup>146</sup>

Given the cultural prominence of the franchises giving rise to fandoms, these broad-circulation and social significance requirements are often met, allowing corporate rightsholders to accumulate hundreds, even thousands of trademarks.<sup>147</sup> Courts have been generous with rightsholders in the entertainment industry, allowing trademark protection for any “ingredient” of a franchise capable of “symbolizing the [company] or its product in the mind of the public.”<sup>148</sup> As a result, rightsholders’ expansive trademark libraries go far beyond character names, and include fictional places, objects, as well as certain words and phrases that have taken on special meaning within the franchise.<sup>149</sup>

## 2. Gaps in Trademark Protection

Despite production companies’ success with registering marks, their impressive trademark collections have little power to actually limit use of the protected names and words in fan works. These limitations stem from the statutory boundaries of trademark infringement found in the Lanham Act, as well as specific doctrinal carve-outs created to protect creative works and limit constraints on free speech.

The Lanham Act makes clear that commerce is at the heart of both trademark protection and infringement. First, in order to acquire a trademark, the mark

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141. TMEP § 1202.10: *Names and Designations of Characters in Creative Works*, <https://tmept.uspto.gov/RDMS/TMEP/print?version=current&href=TMEP-1200d1e2735.html> [<https://perma.cc/KGF6-4B3G>].

142. *Id.*

143. Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide Note*, 41 CONN. L. REV. 921, 942 (2009).

144. *Id.* at 941 (citing *Fischer v. Star Co.* and *Frederick Warne & Co. v. Book Sales Inc.*).

145. TMEP § 1202.10.

146. *Linking Trademarks and Character Merchandising*, KPG, <https://www.kashish-world.com/blog/linking-trademarks-and-character-merchandising/> [<https://perma.cc/Z8F3-A4QA>] (last visited May 11, 2022).

147. As of May 2022 Warner Bros has over 1200 of them (*Warner Bros Trademarks*, GERBEN TRADEMARK LIBRARY (May 12, 2022), <https://www.gerbenlaw.com/trademarks/entertainment/warner-bros/> [<https://perma.cc/LF9L-BJES>]).

148. *DC Comics v. Filmation Assocs.*, 486 F.Supp. 1273, 1277 (S.D.N.Y. 1980).

149. For example, WB’s impressive *Harry Potter* trademark list includes phrases like “mischief managed” and “the leaky cauldron,” entities such as “Hufflepuff” and “Ravenclaw” and even objects including “golden snitch.” *Warner Bro. Trademarks*, GERBEN TRADEMARK LIBRARY (May 12, 2022), <https://www.gerbenlaw.com/trademarks/entertainment/warner-bros/> [<https://perma.cc/LF9L-BJES>].

must be “used in commerce” or registered with a “bona fide intent to be used in commerce.”<sup>150</sup> To establish infringement the mark-owner–plaintiff must demonstrate that the junior-user–defendant used the mark “in connection with the sale or advertising of goods and services” without consent, and in a manner that is likely to confuse consumers.<sup>151</sup> The commerciality requirement is equally applicable to newer theories of trademark infringement, including dilution by blurring.<sup>152</sup> Among the activities courts consider to be “commercial” for the purposes of establishing trademark infringement is anything “viewed with regard to profit,” “designed for a large market,” “emphasizing skills and subjects useful in business” or “supported by advertisers.”<sup>153</sup>

Based on these definitions, while some fan works may be characterized as commercial, the overwhelming majority are not.<sup>154</sup> Far from being “viewed with regard to profit,” fan works are created by fans, for fans, with no expectation of remuneration.<sup>155</sup> Most are shared only with small fan communities on quiet corners of the internet, with no eye towards broader dissemination.<sup>156</sup> And while some fan creators may be well-regarded artists in their own right, their participation in fandoms is entirely distinct from their professional creative endeavors, and their contributions aren’t intended to advertise or otherwise promote their artistic abilities.<sup>157</sup> Given this decidedly non-commercial character, even fan creators’ most prominent uses of rightsholders’ trademarks won’t satisfy the elements required by the Lanham Act for an infringement claim.

In addition to statutory limitations, judicial interpretation of the Lanham Act creates constraints regarding the expansion of trademark protection beyond the trademarked words themselves. While discrete words or images from a franchise may be trademarked, that trademark doesn’t extend beyond the individual word in question such that the franchise becomes protected in its entirety.<sup>158</sup> While rightsholders may be able to hoard trademarked names, words and phrases, a cluster of marks loses its protective value when taken as a whole, as courts have made clear that such cumulative coverage would amount to trademarking the work itself.<sup>159</sup> This matters for fan creators as the inability to extend trademark protection to franchise content means that while fragments of the franchise’s language describing a fictional world or character may be trademarked, the fictional world or character itself cannot be. This means that fan creators may pull distinctive

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150. 15 U.S.C. § 1127.

151. 15 USC § 1125(a)(3).

152. 15 USC § 1125(c)(3)(C).

153. *Commercial*, Merriman Webster (11<sup>th</sup> ed.); 15 A.L.R. Fed. 368 § 5(a) (“Use of mark deemed to be ‘in commerce.’”).

154. *See infra* Part III.C.1.b.

155. Jaqueline Lai Chung, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WILLIAM AND MARY L. REV. 903, 927 (2007).

156. *See* Hetcher, *supra* note 6 at 1885.

157. *Id.*

158. *EMI Catalogue Partnership v. Hill, Holiday et. al.*, 228 F.3d 56, 64 (2<sup>nd</sup> Cir. 2000) (holding that trademark protection doesn’t extend beyond a work’s title to protect its corpus, and as such that products cannot serve as their own trademarks).

159. To a certain extent, this concept is a corollary to the notion that a compilation of uncopyrightable elements may become copyrightable as a whole based on the originality of their ordering and arrangement.

characters and settings from the universes of franchises without facing liability for trademark infringement.

Finally, doctrines created to protect expressive works may render an otherwise infringing use unactionable.<sup>160</sup> Given that trademark law involves restrictions on language that inherently implicate free speech, certain doctrinal carve-outs have been created in the interest of protecting First Amendment rights. In an effort to allay concerns about trademark's impact on First Amendment rights, and its potential for stifling creativity, courts have allowed the use of trademarks in creative expression so long as the use remains within certain parameters.<sup>161</sup> This "expressive works exception" was first articulated in the context of unfair competition laws in *Rogers v. Grimaldi*, wherein a film producer's use of the names of the famed dancers Rogers and Astaire in the film's title was challenged under the Lanham Act.<sup>162</sup> Concerned that the "overextension of the Lanham Act" would "intrude on First Amendment values" the court allowed the use of the names in the title despite any risk of confusion, as use of the dancers' names was the only way to express what the film was about.<sup>163</sup>

Though initially applied to implied sponsorship claims, *Grimaldi's* central premise of allowing the use of language otherwise protected by the Lanham Act in an expressive rather than commercial context has since been extended to the trademark context.<sup>164</sup> Courts have differing criteria for what constitutes expressive use of a mark, though all fundamentally ask whether the mark is well known and culturally relevant, if there's an artistic justification for using the mark, and whether the use of the mark is explicitly misleading.<sup>165</sup> To be artistically justified, the use of the mark within the context of the expressive work "must be related to the meaning associated with the mark itself."<sup>166</sup> In other words, the mark must be used in the same context, and denote the same character, object, concept, or other attribute within the expressive work as outside of it.<sup>167</sup> When marks are used in a vacuum without connection to the mark's accepted meaning the expressive works exception doesn't apply, no matter how creative the endeavor.<sup>168</sup>

Trademark protection thus has a paradoxical effect when it comes to fan works, which are undeniably expressive for the purposes of the expressive works exception. First, the marks used within fan works have achieved extreme social significance, and are widely recognized. Second, the use of the marks in the fan work is of critical artistic relevance. In order to articulate their narrative, the fan creator must necessarily use the franchise's language, including trademarked character names, places, objects and phrases.<sup>169</sup> Finally, the convention of fan creators'

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160. Practical Law Intellectual Property and Technology, *Trademark Litigation: Fair Use and First Amendment Defenses*, THOMPSON REUTERS PRACTICAL LAW.

161. *Id.*

162. *Rogers v. Grimaldi*, 875 F.2d 994 (2<sup>nd</sup> Cir. 1989).

163. *Id.* at 998.

164. Practical Law Intellectual Property and Technology, *Trademark Litigation: Fair Use and First Amendment Defenses*, THOMPSON REUTERS PRACTICAL LAW.

165. *Id.*

166. *Warner Bros Entertainment v. Global Asylum*, 2012 WL 6951315 (2012) \*16.

167. *Id.* at \*17.

168. *Id.*

169. *See Rogers*, 875 F.2d 998 (establishing the standard for when use of a trademark is required to articulate desired meaning within expressive work).

use of disclaimers satisfies the expressive works exception requirement that the expressive use of a mark not be explicitly misleading. The insertion of conspicuous disclaimers at the beginning of their works is highly probative of the fan creator's lack of intent to mislead their audiences as to the source of their material.<sup>170</sup> Such disclaimers are antithetical to claims of false sponsorship or affiliation as they explicitly disavow the franchise owner's relationship to the fan work, making clear that their work should not be confused with authorized "cannon."<sup>171</sup>

Finally, even if a fan defendant fails to defeat an infringement claim on any of the aforementioned theories, they may still challenge the validity of rightsholder's mark itself.<sup>172</sup> In the case of characters belonging to media franchises, one way defendants have accomplished this is by demonstrating the character cannot be attributed to a single source.<sup>173</sup> While a given character may be easily connected to a particular franchise, the franchise itself is the product of multiple parties, among which are the original authors, screenwriters, directors and actors, all of whom have a role in giving the franchise its cultural significance.<sup>174</sup> Multiple of these parties may have competing property interests, and none may be said to be the ultimate "source" of the franchise.<sup>175</sup> A fan defendant may thus argue that a character's source isn't the franchise itself, but rather the innumerable creators of the franchise. Because the ability to indicate a single source is one of the core pillars of trademark law, the fact that no such singular origin exists would render the character's trademark invalid, and thus relieve the fan defendant of any liability.<sup>176</sup>

### III. Regimes Rebooted: A Re-Imagined Approach to Fan Fiction

Media franchises are unlike any other form of creative expression, and fan fiction is unlike any other type of infringing use. Copyrights held by franchise owners confer the same set of rights as are granted to any copyright holder. But the subject matter to which those copyrights pertain, and the set of interests they protect, are notably distinct. While media franchises are comprised of individual expressive works, those works function differently than other forms of art. Though the distinction between art and entertainment is a question for another field, an

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170. In fact, any courts require an affirmative misstatement regarding the purported sponsorship to establish intent to mislead (Practical Law Intellectual Property and Technology, *Trademark Litigation: Fair Use and First Amendment Defenses*, Thompson Reuters Practical Law).

171. *How to Write a Disclaimer in Fanfiction*, WRITINGBEGINNINER, <https://www.writingbeginner.com/how-to-write-a-disclaimer-in-fanfiction/#:~:text=You%20write%20a%20disclaimer%20in.earn%20money%20from%20your%20story> [https://perma.cc/7TPP-EMST] (last visited May 12, 2022).

172. USPTO, *About Trademark Infringement*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/page/about-trademark-infringement> [https://perma.cc/38FF-7J7Q] (last visited May 12, 2022).

173. *Universal City Studios Inc v. Nintendo Co*, 578 F. Supp. 911, 911 (S.D.N.Y. 1983).

174. Ryan Gilbey, *Ten Years of Making Harry Potter Films, by Case and Crew*, THE GUARDIAN (July 11, 2011), <https://www.theguardian.com/film/2011/jul/07/harry-potter-making-the-films-cast-and-crew> [https://perma.cc/3VJZ-CDVT] (interviewing the producers of the Harry Potter films).

175. *Universal v. Nintendo*, 578 F. Supp. at 923.

176. *Id.* at 911.

articulable distinction can be made between the types of creative works that are conventionally understood as “art” and those that comprise commercialized media franchises.

This section begins by examining what makes media franchises different from other types of expressive works; both in terms of the nature of the creative content, and the interests of their creators and owners. It then goes on to argue that this unique type of creative work warrants its own approach to intellectual property protection—a hybrid trademark-copyright approach that is at once protective of the franchise owner’s interests, while more forgiving of benign competition in the form of fan works. Finally, it concludes by envisioning what this approach would look like: in the form of an amended fair use analysis informed by principles from trademark law.

### A. *Reconceptualization of Franchises as Expressive Products*

#### 1. Media Franchises as Branded Products

Media franchises are unlike any other form of creative endeavor, straddling the line between art and commodity. With the advent and proliferation of multi-modal forms of storytelling, fictional worlds have themselves become products capable of commodification and exploitation.<sup>177</sup> This largely stems from franchises’ ownership and production by profit-driven entertainment corporations that have massive financial stakes across innumerable media platforms.<sup>178</sup> While copyright law inherently presumes an author’s desire to profit from their work, as profitability dictates virtually everything about franchise owners’ expressive output.<sup>179</sup> Commentators have remarked that stories carry value only insofar as they may be “equated with being marketable or producing cultural capital,” suggesting that artistic input is viewed purely in terms of the work’s potential commercial value.<sup>180</sup>

As in any commercial industry, production companies seek to generate profit by attracting consumers and exploiting new audiences through expanding the franchise in a manner that generates new business opportunities.<sup>181</sup> While *Harry Potter* may have started as a series of children’s books, expanding the franchise to include film, toys and even food creates new and enticing “touchpoints” for those engaging with the franchise—drawing in new consumers in demographics that may not otherwise be accessible.<sup>182</sup> Franchises are uniquely exploitable in this regard, as the nature of the properties makes them especially well-suited to this type of diversification across markets. Rather than being limited to singular dissemination platforms (like TV networks, streaming services, or publishing companies) media franchises may harness distinct forms of media to target discrete

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177. Scolari, *supra* note 119, at 599.

178. *Id.* at 589.

179. HERBERT SCHILLER, *CULTURE, INC.*, 43 (1989).

180. Megeen de Bruin-Mole, *Does It Come with a Spear*, 42 *FILM AND MERCH* (Nov. 2018), <https://quod.lib.umich.edu/f/fc/13761232.0042.205?view=text;rgn=main> [<https://perma.cc/27GM-MB4K>].

181. Jay Lemke, *Critical Analysis Across Media: Games, Franchises and the New Cultural Order*, 2-3 (First Intl’l. Conf. on CDA, 2004); Scolari, *supra* note 119, at 589.

182. *Id.* at 2-4; Scolari, *supra* note 119, at 597



audiences—ranging from live-action films geared towards adults, cartoons targeting younger children, and novels aimed at teens.<sup>183</sup>

To accomplish this goal of profit-maximization, franchise owners harness the same strategies used by other industries peddling other types of commodities. Chief among these strategies is an emphasis on marketing; ensuring the franchise has a consistent, cohesive brand that is appealing to as many audiences as possible. The branding of media franchises resembles branding of more tangible products.<sup>184</sup> Discrete franchise “products” dispersed across an expansive array of media platforms retain a sense of “visual or textual coherence” such that they are recognizable as all belonging to a single entity.<sup>185</sup> Through the strategic cultivation of content and aesthetics across mediums, franchise properties are imbued with symbolic meaning and social value that allows them to be commodified and sold.<sup>186</sup>

Warner Brother’s development of the *Batman* franchise provides a helpful illustration of this power of branding to create a cohesive and highly profitable franchise. WB’s live-action cinematic production *Batman*—directed by Tim Burton in 1989—was heavily criticized for its heavily stylized gothic aesthetic, gratuitous violence, and sexualization of female characters in a manner that deviated from its family-friendly origins in DC’s comic strips. Responding to these concerns, the production company went on to develop an animated cartoon series that incorporated elements of Burton’s gritty aesthetic, but paired them with more sanitized narratives that excluded some of the extreme violence and sexual content of the Burton film.<sup>187</sup> Such selective incorporation of elements from both Burton’s film and the original DC comic strip created a signature brand that was dark without being macabre, sophisticated without being explicit, and emphasized mystery and plot rather than violence alone.<sup>188</sup> The brand was distinctive enough to be instantly recognizable, and thus heavily marketable.<sup>189</sup> The more recent *Dark Night* trilogy and *The Batman*—directed by Christopher Nolan and Matt Reeves, respectively—epitomize this approach. The films are fundamentally psychological-thrillers, heavily emphasizing the emotional complexity of the characters while telling sophisticated stories against a noir-ish backdrop of a Gotham that’s gritty but still realistic.<sup>190</sup>

While the *Dark Knight* films are widely regarded as being cinematic triumphs, the need for brand coherence typically comes at a steeper creative cost.

183. Matthew Freeman, *Transmediating Tim Burton’s Gotham City: Brand Convergence, Child Audiences, and Batman: The Animated Series*, 7 NETWORKING KNOWLEDGE: J. OF THE MECCSA POSTGRADUATE NETWORK 41, 42 (2014); de Bruin Mole, *supra* note 180.

184. Freeman, *supra* note 183 at 43.

185. *Id.* at 43.

186. *Id.* at 42; Scolari, *supra* note 119, at 599-600.

187. Freeman, *supra* note 183 at 49.

188. *Id.* at 50.

189. *Id.*

190. *The Batman, The Dark Night Trilogy*, David Miller *How The Batman’s Gotham compared to Nolan and Burton’s Versions*, SCREENRANT (Mar. 5, 2002), <https://screenrant.com/the-batman-gotham-city-comparison-nolan-burton/> [https://perma.cc/P92C-TKSB]; James Hunt *Is the Batman Better than the Dark Knight*, SCREENRANT (Mar. 6, 2022), <https://screenrant.com/the-batman-nolan-dark-knight-movies-comparison-worse/> [https://perma.cc/496W-QLN5]; Zack Sharf, *The Batman Producer Warned Christopher Nolan: We’re Trying to Beat You and Dark Knight*, VARIETY (Mar. 3, 2022), <https://variety.com/2022/film/news/batman-producer-warned-chris-nolan-beat-dark-knight-1235195114/> [https://perma.cc/QRK7-7GUY].

Artists tasked with developing franchises are confronted with the reality of needing to “cede their creative vision to market forces,”<sup>191</sup> subordinating their personal artistic sensibilities to what will be best received by target audiences.<sup>192</sup> Media scholar Megen de Bruin Mole explains how the need for commodification often compromises artistic agency, using the “Disney Princess” franchise as an example.<sup>193</sup> Despite growing pressure to appeal to a more diverse range of audiences, Disney’s strong brand identity—an identity which allowed it to achieve such astounding commercial success—limits the media behemoth’s opportunities for true creative innovation. “Disney’s emphasis on universal canonicity places pressure on the storytellers to deliver a consistently marketable story world,” de Bruin Mole explains, illustrating how franchises are confronted with harsh artistic limits that aren’t imposed on any other type of creative endeavor to nearly the same degree.<sup>194</sup>

Considering again Burton’s portrayal of *Batman*, it is clear how, in the case of franchises, artistic vision is subservient to brand interest. As a director, Burton himself has developed his own distinctive and iconic brand, with a grotesquely whimsical Dr. Suess-meets-Stephen King aesthetic. Burton’s stand-alone films, including *Nightmare Before Christmas*, *Beetlejuice*, and *Edward Scissorhands*—all of which were released around the same time as Burton’s *Batman* films—were met with accolades, with the director being described as a “master of macabre ingenuity.”<sup>195</sup> Despite sharing the same creative ethos, *Batman* was met with much harsher critical reception, with Burton’s signature “jokey malevolence” now described as “nightmarish and mean spirited.”<sup>196</sup> Warner Brothers was left scrambling to respond to the outcry surrounding the incongruence between the film’s “sour and cynical spirit” and the “longstanding child-friendly brand image” of the *Batman* franchise.<sup>197</sup> The production company swiftly put the kibosh on the third installment of the Burton trilogy, and instead focused on the development of the more brand-compliant animated series.<sup>198</sup> Burton, meanwhile, went on to hone his signature visual aesthetic on his own terms—becoming widely regarded as one of the most iconic and influential contemporary directors.<sup>199</sup>

## 2. Shape-Shifting Creative Interests

### a. *Impersonal Works: The Weakening of an Author’s Personal Interest*

191. SCHILLER, *supra*, note 179, at 43.

192. de Bruin Mole, *supra* note 180.

193. *Id.*

194. *Id.*

195. Janet Maslin, *Infiltrating the Land of Sugar Plums*, N.Y. TIMES (Oct. 9, 1993), <https://www.nytimes.com/1993/10/09/movies/review-film-festival-infiltrating-the-land-of-sugar-plums.html> [<https://perma.cc/XS3Z-3PZB>].

196. Freeman, *supra* note 183 at 44.

197. *Id.*

198. Adrienne Tyler, *What Time Burton’s Batman 3 Would’ve Looked Like (And Why It Didn’t Happen)*, SCREENRANT (Sept. 20, 2021), <https://screenrant.com/batman-3-movie-tim-burton-sequel-riddler-catwoman-cancelled-reason/> [<https://perma.cc/4MCY-LZVQ>].

199. Aja Romano, *Tim Burton has built his career around an iconic visual aesthetic. Here’s how it evolved*, VOX. (Apr. 17, 2019), <https://www.vox.com/culture/2019/4/17/18285309/tim-burton-films-visual-style-aesthetic-disney-explained> [<https://perma.cc/6J42-FA7D>].

One of the most pervasive normative arguments regarding copyright protection is the interest of the author in preserving the integrity of their work.<sup>200</sup> However, with the commercialization of a franchised property, the value of an author's creative expression is relevant only insofar as it has the potential for generating revenue.<sup>201</sup> This subordination of artistic vision to market forces undermines, if not severs, the integrity of the personal creative connection the author has to their work.

There are two primary ways in which this cession of personal creative connection to franchised properties may happen. The first, and most conceptually straightforward, is an author who outright assigns the copyright to the original work to a corporate entity, which then produces the franchise. By assigning the rights to their work to another entity, the author cedes total control over the work's distribution and future development to the new owner.<sup>202</sup> Alternatively, an author may retain partial ownership of the copyright, or have a working relationship (or affiliation) with entertainment and publishing companies that are producing derivative works—but in practice have little to no participation in the substantive creative process.<sup>203</sup>

Commodifying creative works and outsourcing substantive artistic production in these manners has long been understood to compromise an author's artistic integrity, especially when it's in the interest of maximizing profit.<sup>204</sup> The commodification of works comes with a dramatic drop in artistic agency, even for the authors who have a more hands-on role in the shaping of derivative works.<sup>205</sup> Authors' creative sensibilities are entirely subordinated to commercial potential, with marketability and profits dictating the efforts of everyone from novelists to screenwriters to directors.<sup>206</sup> Rather than seeing themselves as "parents" of the characters they begot,<sup>207</sup> authors perceive themselves as merely "caretakers" of the franchise's characters—belying their own sense of passiveness towards the creative process.<sup>208</sup>

Even absent ownership assignment or licensing arrangement, authors who personally drive the franchising of their properties have been observed to approach their work with a sense of personal detachment from the beginning. Commentators note that even the earliest works of certain serialized properties, which later grew to expansive multi-media franchises, have a fragmented aspect to them.<sup>209</sup> Stan Lee, for one, purportedly displayed exactly this dispassion in his creation of *Spider Man*.<sup>210</sup> Having an aspiration of ultimately becoming a novelist rather than comic-

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200. *Infra* Part I.A.

201. SCHILLER, *supra* note 179, at 31.

202. *Copyright Assignment – How-to Guide*, LEGALZOOM (May 2, 2022), [https://www.legalzoom.com/articles/copyright-assignment-how-to-guide?li\\_source=LI&li\\_medium=AC\\_in\\_article](https://www.legalzoom.com/articles/copyright-assignment-how-to-guide?li_source=LI&li_medium=AC_in_article) [<https://perma.cc/WP2K-ARPG>].

203. SCHILLER, *supra* note 179, at 37.

204. Bruncken, *supra* note 67, at 490.

205. SCHILLER, *supra* note 179, at 37.

206. *Id.* at 43

207. Helfand *supra* note 60, at 628.

208. Faraci, *supra* note 47.

209. *Id.*

210. *Id.*

book writer, readers have observed that Lee wrote with a certain prescience that his properties would one day be developed by other authors.<sup>211</sup> In these cases, one might argue the expressive work was always emotionally and creatively alienable, destined to be developed by other entities.

In all cases, the distancing between the original author and the franchised content gives rise to an argument that the author's creative interest in their franchise—if they retain any at all—doesn't include the personality interest espoused by proponents of the “spiritual product” theory.<sup>212</sup> Using Cabot's metaphor, it's difficult to characterize a work that was conceived and produced entirely by other artists as analogous to a person an author “knows and loves,” and thus worthy of protection from uses the author might find disappointing.<sup>213</sup>

*b. Brand over Morals: Brand Reputational Interest Replacing Moral Interest*

While the shift towards franchise development may negate the original author's moral interest in controlling the content and use of their work, the franchise owner nevertheless retains an interest in maintaining the franchise's integrity. Rather than this integrity interest residing in spiritual relationship between the work and author, it lies instead in the reputational interest of a commercial brand. While not within the ambit of copyright law, reputational concerns regarding one's brand and products are legally cognizable interests addressed by trademark dilution.<sup>214</sup>

Franchise owners' reputational interest comes in two forms. The first is fundamentally a quality control interest, akin to trademark's “dilution by blurring.” Rightsholders have an interest in preserving the consistency of a creative property by maintaining a baseline quality of production, continuity of plot lines, and consistency of characters.<sup>215</sup> Fan fiction threatens to rightsholders because it's often synonymous with “low quality.”<sup>216</sup> Given that fan content is often perceived as lacking artistic merit, rightsholders may be concerned that a proliferation of fan work might cheapen their own content, which might come to be associated with such “marginal” and “devalued” content.<sup>217</sup>

The second reputational interest, more closely resembling trademark “dilution by tarnishment,” regards the “brand” of the content. Rightsholders have an interest in controlling the interpretation of their franchises to ensure certain interpretations don't render the creative properties unappealing to target audiences.<sup>218</sup> Salacious depictions of characters like Mickey and Pluto engaging in various adult activities are threatening to Disney not because Mickey's cocaine use is morally

211. *Id.*

212. See Voegtli, *supra* note 68 (describing theory of copyright as expressive work being the “spiritual product” of the author's mind).

213. Cabot, *supra* note 45.

214. Legal Information Institute, Dilution (Trademark), CORNELL UNIVERSITY, [https://www.law.cornell.edu/wex/dilution\\_\(trademark\)](https://www.law.cornell.edu/wex/dilution_(trademark)) [<https://perma.cc/6M6G-SLRA>] (last visited May 13, 2022).

215. Tushnet, *supra* note 10, at 675.

216. J. Lee Hazlett, *We Need To Talk About Fan Fiction*, MEDIUM (Oct. 14, 2017), <https://medium.com/@jleehazlett/we-need-to-talk-about-fan-fiction-551394050ef5> [<https://perma.cc/H8KD-84SW>].

217. Tushnet, *supra* note 10, at 655.

218. See Kozinski, *supra* note 51, at 469.

offensive, but rather because it undermines Disney's brand.<sup>219</sup> Rather than conjuring a family-friendly image of "innocent delightfulness," vulgar depictions of the iconic characters create negative associations—potentially jeopardizing Disney's ability to make a profit.<sup>220</sup>

Franchise owners recognize this reputational concern and concede it dictates their own creative choices. The production of franchised derivative works has been described as "a form of brand management."<sup>221</sup> Content creators need to generate new work that's at once innovative enough to "activate" new audiences, without departing too sharply from the franchise's brand such that they'd alienate existing ones.<sup>222</sup>

*c. Economic Interests and the Right to Commercial Exploitation*

Beyond reputational interests (and indeed underlying them), rightsholders are concerned about their ability to commercially exploit their creative properties. The right to create derivative works is especially valuable in this regard, as it grants rightsholders the opportunity to tap into an expansive number of prospective markets.<sup>223</sup> Indeed, the potential for the development and commercial exploitation of derivative works is one of primary drivers of franchise owners.<sup>224</sup> Similarly, licensing opportunities are also highly leveraged to generate ongoing revenue streams.<sup>225</sup> Because these activities are so critical to rightsholders' ability to profit from their creative properties, it naturally follows that they're inclined to actively police uses that jeopardize either of these opportunities.

There is good reason that the right to prepare derivative works is highly valued by franchise owners, as production costs for feature length films are often staggering. The first *Twilight* film cost \$37 million to produce,<sup>226</sup> while *Harry Potter and the Sorcerer's Stone* cost Warner Bro's \$125 million.<sup>227</sup> Owners argue that such expensive endeavors justify the monopoly over production of derivative works, as the potential revenue from future derivative works is needed to offset the considerable investment in earlier works.<sup>228</sup> Indeed, the net profit for the eight total *Harry Potter* films is well over \$ 6.5 billion dollars.<sup>229</sup> Given this lucrativeness,

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219. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9<sup>th</sup> Cir. 1978).

220. See *id.* at 753; See also Kozinski, *supra* note 51, at 469.

221. de Bruin-Molé, *supra* note 180.

222. de Bruin-Molé, *supra* note 180.

223. *Infra* Part III.A.1

224. See Voegtli, *supra* note 68, at 1235.

225. See *id.* at 1241.

226. José Gabriel Navarro, *Twilight movies: production costs and global box office revenue 2008-2017*, STATISTA, <https://www.statista.com/statistics/323404/twilight-production-costs-box-office-revenue/> [<https://perma.cc/C4CA-C9Z8>] (last visited May 13, 2022).

227. Navarro, *Harry Potter movies: production costs and global box office revenue 2001-2017*, STATISTA, <https://www.statista.com/statistics/323356/harry-potter-production-costs-box-office-revenue/> [<https://perma.cc/H3Z5-GWUE>] (last visited May 13, 2022).

228. See Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1215-16 (1996).

229. Kerry Close, *This Is How Much Money the Harry Potter Movies Have Made So Far*, MONEY (Nov. 17, 2016), <https://money.com/harry-potter-movies-money-box-office/> [<https://perma.cc/2Y5S->

franchise owners are incentivized to hoard creative properties in the interest of exploiting the vast economic rewards that may be derived from a franchise.<sup>230</sup>

Franchise owners take a similarly aggressive approach towards licensing. This is particularly striking in the film industry, where the lion's share of profit isn't generated by the movie itself, but rather through extensive licensing.<sup>231</sup> The merchandising component of licensing revenue is particularly profound; returning to the *Harry Potter* franchise, merchandising revenue dwarfed the already astonishing film revenue—accounting for one third of the franchises' total value.<sup>232</sup> The film was a measly 9%.<sup>233</sup> Enforcement of these licenses is aggressive. Entities from toy manufacturers to elementary school PTAs have found themselves targets of Disney's licensing crusade—be it in response to Mattel's production of Ana and Elsa dolls, or the screening of *The Lion King* remake at Emerson Elementary School's movie night.<sup>234</sup>

The role of fan fiction in all of this is, of course, that it's viewed as a theoretical threat to both of these means of generating profit.<sup>235</sup> Alternative story lines and re-imaginings of certain characters are rife with possibility for reboots.<sup>236</sup> Meanwhile, platforms such as Amazon's now defunct Kindle Worlds illustrate the viability of potential licensing regimes.<sup>237</sup> Production companies may thus perceive fan fiction as siphoning off potential revenue, either by pre-empting prospective derivative works, or usurping a viable licensing market. All of this is purely speculative, of course, with there being little empirical evidence that any fan work has ever seriously jeopardized a franchise's profitability.<sup>238</sup> But because even a normative control interest remains grounded in the statutorily granted derivative works right, franchise owners can claim a legal basis for such heavy-handed enforcement, regardless of the magnitude of the threat.

## B. Proposal for Hybrid Trademark-Copyright Approach

### 1. Applicability and Usefulness of the Trademark Regime

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[6K2Y]. (This estimate of \$ 6.5 billion was as of 2016. Within the past five years the films have almost certainly made more).

230. See Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 434 (1994).

231. See Voegtli, *supra* note 68, at 1241.

232. Madeline Kruhly, *Harry Potter Inc: How the Boy Wizard Created a Billion Business*, THE ATLANTIC (July 15, 2011), <https://www.theatlantic.com/business/archive/2011/07/harry-potter-inc-how-the-boy-wizard-created-a-21-billion-business/241948/> [<https://perma.cc/4E8P-SUXM>].

233. *Id.*

234. See Christie D'Zurilla, *Some dads screened 'The Lion King' at a school fundraiser. Now Disney is the bad guy*, LA TIMES (Feb. 7, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-02-07/disney-pta-licensing-lion-king> [<https://perma.cc/44EF-7NPH>]; MATTEL, *Mattel and Disney Announce Multi-Year Global Licensing Agreement for Disney Princess and Disney Frozen Franchises* (Jan. 26, 2022), <https://corporate.mattel.com/news/mattel-and-disney-announce-multi-year-global-licensing-agreement-for-disney-princess-and-disney-frozen-franchises> [<https://perma.cc/L76U-XQ9Y>].

235. See Chung, *supra* note 155, at 935-36.

236. See, e.g., Faraci, *supra* note 47.

237. See Dennis Abrams, *Amazon Introduces Kindle Worlds*, PUBLISHING PERSPECTIVES (May 22, 2013), <https://publishingperspectives.com/2013/05/amazon-publishing-introduces-kindle-worlds-a-new-model-for-fan-fiction/> [<https://perma.cc/S2K8-NUTH>].

238. See, e.g., Lantange, *supra* note 88, at 309.

a. *Doctrinal Usefulness of the Trademark Approach*

The reputational interest of their brand and the ability to profit from their work are the two primary creative property interests franchise owner seek to protect. These interests also closely resemble those held by trademark owners. Among the critical functions of trademark law is protection of a seller's interest in the identification of their goods, such that their products may be distinguished from those of other sellers.<sup>239</sup> This ability to distinguish between products both protects the consumer, who may avoid purchasing a product they don't want, as well as the producer, who avoids losing a sale to a competitor.<sup>240</sup> Given the nature of media franchises as more product-like than other types of creative expression protected by copyright, and the interests of rightsholders in protecting their brand's reputation and retaining economic control over their work parallel mark-holders', it may be useful to consider principles from trademark law when contemplating a doctrinal approach to fan fiction.<sup>241</sup>

Applying a traditional trademark framework is instructive when considering a legal approach to fan fiction, as the relationship between copyrighted franchise content and corresponding fan works is not unlike that between a branded generic product. As the result of heavy marketing efforts and careful cultivation of content, narrative worlds have become both products and brands.<sup>242</sup> Returning to the example of Batman, one can see how the development of a franchise is not just about the content—the characters, plots, and settings—but also about “the look of the branded story-world.”<sup>243</sup> Burton succeeded in producing Batman *content*—his characters were present in the DC comics, the film was set in Gotham, the plot involved the avenging of innocents through vigilante justice—and yet, the world he created was not that envisioned by Warner Brothers. The incongruence between the “mean spirited” film, and the kid-centric comics and various franchise accoutrements including advertisements, product placement, and even Happy Meal toys, resulted in a sort of “brand splintering.”<sup>244</sup> While the elements of the franchise were technically consistent, they lacked a unifying theme that rendered them recognizable as stemming from a single entity.<sup>245</sup> It wasn't until WB undertook deliberate, strategic efforts to impart a set of standardized aesthetic and stylistic qualities upon all works created as part of the Batman franchise that the franchise began to take on a sense of unity.<sup>246</sup> As a result of this relative aesthetic conformity, the Batman brand became recognizable across different types of media and throughout a myriad of iterations by innumerable artists.

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239. 4 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (1996).

240. *See id.* at § 2:3.

241. While this article addresses only fan works, this same logic may theoretically be extended to any form of derivative work arising from a similar type of heavily commercialized expressive property.

242. *See Scolari, supra* note 119, at 599.

243. *See Freeman, supra* note 183, at 43

244. *Id.* at 44

245. *See id.*

246. *See id.* at 42-43.

What this offers is a proof of concept such that it is possible to have content that includes certain elements of a franchise in terms of the characters, settings and themes, while still lacking certain signatures of the franchise's brand. As a result, the incongruous content clearly diverges from the otherwise unified corpus of the franchise.

From here, one can then draw a parallel between "branded" franchise content and "generic" content lacking those signatures of the franchise, including content generated by fans. The relevance of trademark law is evident when considering how the underlying principles of the trademark regime might apply in this context. First, there is the role of trademark in identification of a seller's goods, and distinguishing those goods from those of a competitor.<sup>247</sup> The significance of "canon" among fan creators mirrors this principle. Among fan communities, there is a distinction between canonical works—those works officially produced as part of the franchise—and fan-generated content.<sup>248</sup> While fans may create their own narratives using the franchise's characters and settings, these fan works are held to be non-canonical, and in so being lack the same "authenticity" of their authorized counterparts.<sup>249</sup> Canonical works are recognizable as such because of the unique stamp the franchise owner places upon their work in the form of marketing and branding, which is absent from stories that might otherwise be very similar in terms of content, but are created by fans.<sup>250</sup> It is in this distinction that franchised works gain their status as canon, as it signals their source as being the official franchise rather than a fan.<sup>251</sup>

This distinguishability of canonical works based on their set of distinct stylistic and aesthetic attributes makes them analogous to the branded goods of the mark-holder.<sup>252</sup> While fans may use individual components of a franchise to produce new stories, those stories may lack the same constellation of signature elements that make it clear the content was officially produced.<sup>253</sup> Consequently, the works may be relegated to the status of being "generic," in the sense that while they contain the same building blocks as official content, they're packaged in a manner that makes them distinct, and signals they were produced by someone other than the franchise owner.<sup>254</sup>

Similarly, the function of trademark as a signifier that all goods bearing the mark come from a single source, even if that source is anonymous, has parallels to the concept of canonicity.<sup>255</sup> Embedded in the concept of canon is the idea that the content came from a single point of origin, the franchise owners.<sup>256</sup>

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247. 4 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (1996).

248. See *A Fanspeak Dictionary*, <https://expressions.populli.net/dictionary.html> [<https://perma.cc/NH5Q-NBPF>] (last visited Dec. 16, 2022).

249. See de Bruin Molé, *supra* note 180 (discussing the relationship between canon and authenticity).

250. See *id.*

251. See *id.*

252. See Scolari, *supra* note 119, at 600.

253. See *id.*

254. See, e.g., de Bruin Molé, *supra* note 180.

255. See 4 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (1996).

256. Stephanie Pickrell, *Reconciling Our Desire to Define: Canon, Copyright, and Creativity*, HOTHOUSE (Mar. 11, 2021), <https://hothouselitjournal.com/2021/03/11/reconciling-our-desire-to-define-canon-copyright-and-creativity/> [<https://perma.cc/7E6Z-4DC9>].



Additionally, there is the function of trademark as indicator that all goods are of equal quality.<sup>257</sup> This function tracks closely with the rightsholder's reputational concerns regarding the quality of their content. Consumers, including fan writers, have an expectation that rightsholder's authorized output will be consistent.<sup>258</sup> This consistency may be measured in terms of production value, writing quality, and, in the cases of film and television franchises, the involvement of the same actors.<sup>259</sup> The franchise owner has an interest in maintaining this consistency, which makes authorized works more uniform, and consequently, more recognizable.<sup>260</sup>

In addition to traditional trademark law, one of trademark's recent innovations—dilution by blurring—is equally useful in understanding the relationship between rightsholders and fan writers. Dilution by blurring refers to the infringing use of a famous mark in a manner that “impairs the distinctiveness of the famous mark” such that it becomes less readily associated with the rightful mark-holder.<sup>261</sup> It often occurs when a junior user introduces a product that uses the “commercial magnetism” of the senior mark-holder to attract the mark holder's customers to the junior user's product, and in doing so weakens consumers' associations with the senior mark-holders.<sup>262</sup> One may easily see the parallels between the senior mark holder and the rightsholder of a copyrighted franchise. Rightsholders' concerns about fan fiction are analogous to those of the senior mark-holder's, which are that by using those elements of the copyrighted work that give it commercial magnetism, including its characters, setting and plot points, those distinctive features will be diminished in their power to conjure up the authorized versions of the work.<sup>263</sup> While fan creators may not be able to replicate a franchise's branding perfectly, the use of any distinctive elements belonging to franchise in question will nevertheless be evocative in a manner that threatens to diminish the singularity of the authorized content.<sup>264</sup> Works that introduce new romantic pairings, shift gender roles, or take place in alternate settings have been argued to “devalue canon” by creating new storylines that rightsholders argue may render the narratives presented in the authorized works outdated or superfluous, and thus less relevant and/or compelling.<sup>265</sup>

257. See 4 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR *Competition* § 3:1 (1996).

258. See, e.g., Torsten Ingvaldsen *Graph Suggests 'Game of Thrones' Deterioration in Quality is Quantifiable*, HYPEBEAST (May, 27, 2019), <https://hypebeast.com/2019/5/game-of-thrones-graph-writing-quality-deterioration-graph> [<https://perma.cc/WFM9-45YY>].

259. See, e.g., *id.* (addressing the detrimental impact of short-changing dialogue and character development in *Game of Thrones*); See also Phil Archbold, *Actor Replacements That Totally Ruined The Movie*, LOOPER (Feb. 18, 2022), <https://www.looper.com/35982/actor-replacements-ruined-movie/> [<https://perma.cc/69C6-5Y65>].

260. *Infra* Part III.A.2.b.

261. 15 U.S.C. § 1125(c)(2)(B); See also 4 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:118 (1994).

262. Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1912-13 (2015).

263. See, e.g., Kozinski, *supra* note 51, at 469.

264. See Scolari, *supra* note 119, at 600.

265. For example, a post by user LordByroric on a Dr. Who fandom platform decrying the disdain writers of certain types of fan fiction are met with as the result of deviating from canon. Gallifrey, *Doctor Who Discussion and News*, <https://np.reddit.com/r/gallifrey/comments/2u73cg/tumblr-bashing-why-or-why-not/co5ucsk/> [<https://perma.cc/CY9P-7TAC>] (last visited May 12, 2022).

Given the parallel interests of mark-holders and franchise owners, and heavily branded product-like nature of franchises, the contours of trademark law make it well-suited to address the unique challenge fan fiction poses within the copyright regime. While trademark law itself ought not to provide refuge for rightsholders for the reasons discussed in the following section, its principles can be harnessed to fashion a regime applicable to franchised creative works that accommodates the interests of both rightsholders and fan creators.

*b. Doctrinal Limitations*

While trademark law is enticing in its doctrinal usefulness, it is an ill-suited protection for the types of creative properties that are often the subjects of fan fiction. The limitations of trademark law as it relates to fan works are twofold. First, there is the nature of what trademark law seeks to protect. While heavily branded franchises have many of the same attributes as other types of commercial products, they also lack the key elements necessary for trademark's doctrinal hooks. The second, which has been discussed at great length by other scholars, is that if applied to creative works, certain elements of trademark protection would function to defeat the primary goal of copyright law, which is to generate creativity by enriching the public domain.<sup>266</sup>

While official franchise content and the fan works generated by that content are similar in nature, and while rightsholders may fear that the fan works will compete with their authorized content, fan writers aren't competitors in the same manner as producers of competing products. This is because, despite the fact they might be argued to be producing "competing" content, fan writers are actually rightsholders' primary consumer base.<sup>267</sup> In traditional trademark law, the group of competing producers aren't inherently the same group as the consumers who are interested in purchasing the mark-holder's product.<sup>268</sup> Unlike a junior user attempting to "pass off" their product as the senior user's, fan creators aren't trying to *compete* with the rightsholder in any meaningful way. In fact, the production of the fan work that rightsholders construe as "competing" with their content is actually a form of consumption of the rightsholder's "senior" product.<sup>269</sup>

Additionally, the rightsholders' creative properties, despite being owned by a single entity, don't *actually* have a "single source" for the purposes of identification by customers. While fans may hold dear the notion that "canon" stems from the mind of a single creator, this origin story is a fiction, and the identity of the single creator is a moving target. For example, there is no clear "source" for much of the franchised *Harry Potter* content. JK Rowling may have penned the books, but would she be considered to be the "source" for the purposes of the video games? What about the jellybeans? Not to mention the fact that many fans

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266. See Moffat, *supra* note 132, at 1474.

267. See W. Michael Schuster, *Fair Use And Licensing Of Derivative Fiction: A Discussion Of Possible Latent Effects Of The Commercialization Of Fan Fiction*, 55 S. TEX. L. REV. 529, 530 (2013).

268. See McKenna, *supra* note 259, at 1848 (delineating how the law addresses consumers and competitors as distinct groups).

269. See Schuster, *supra* note 264, at 530 (characterizing fan fiction as a type of active consumption of media franchises).

are consciously working to excise Rowling's presence from the franchise in the wake of her disparaging comments about the transgender community.<sup>270</sup> Rowling was conspicuously absent from HBO's reunion special *Harry Potter: Return to Hogwarts*, representing perhaps the first step in the process of disassociating the problematic author from the Potterverse.<sup>271</sup> What's more, unlike trademarked products, there is no single corporate source of the *Harry Potter* franchise either. Warner Brothers produced the *Harry Potter* films, yet Harry Potter World is owned by Universal Studios. Scholastic publishes the *Harry Potter* books, but only in the United States, and only after September 1998.<sup>272</sup> The original editions were published by Bloomsbury, a full year earlier.<sup>273</sup>

In addition to the doctrinal restrictions regarding trademark's applicability to fan fiction, certain facets of trademark law, including the indefinite term of protection and monopolization of expression, are at odds with the very purpose of copyright law.<sup>274</sup> Rather than extending trademark law itself, a more useful approach would be to import certain principles from the trademark regime, and apply them within a copyright framework.

### c. *The Benefits of a Hybrid Approach*

Taking a hybridized approach towards franchises and fan works has benefits for both franchise-owners and fan creators. Understanding a franchise owner's copyrighted works as products allows for analogizing between the relationships of rightsholders to fan creators and that of market competitors. Such an analogy illustrates two principles. First, it suggests both may constructively coexist. Second, it shows that just as competition enriches a market for goods, the presence of fan writers is a boon to the generation of new creative content.

Trademark law is also helpful in this context because it distinguishes "actionable unfair competition" and "mere competition," the latter of which is not just

270. See Julia Jacobs, *Harry Potter Fans Reimagine Their World Without Its Creator*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/style/jk-rowling-transgender-fans.html> [<https://perma.cc/D598-ZUQ2>]; *On Reclaiming Harry Potter From JK Rowling And Separating The Artist From The Art*, HAMMOCK OF BOOKS (June 11, 2020), <https://hammockofbooks.wordpress.com/2020/06/11/on-reclaiming-harry-potter-from-jk-rowling-and-separating-the-artist-from-the-art/> [<https://perma.cc/Z6GN-PG7K>].

271. See Sophie McEvoy, *What We Know About JK Rowling's Absence From The Harry Potter Reunion*, BUSTLE (Dec. 30, 2022), <https://www.bustle.com/entertainment/why-is-jk-rowling-not-at-hbo-harry-potter-reunion> [<https://perma.cc/QG4Z-SLAK>].

272. Scholastic MediaRoom, *Harry Potter 20 Years of Magic: 20 Facts about the Harry Potter Book Series*, [http://mediaroom.scholastic.com/files/20-HARRY-POTTER-FACTS\\_SEPT2018.pdf](http://mediaroom.scholastic.com/files/20-HARRY-POTTER-FACTS_SEPT2018.pdf) [<https://perma.cc/45KT-54SA>] (last visited May 13, 2022).

273. See Alison Millington, *JK Rowling's pitch for Harry Potter was rejected 12 times – read the now-famous letter here*, INSIDER (Jul. 30, 2018), <https://www.insider.com/revealed-jk-rowlings-original-pitch-for-harry-potter-2017-10> [<https://perma.cc/YH4E-28UE>].

274. Much has been written about the concerning extension of trademark law to creative works, including fictional characters. For additional reading, see, e.g., Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429 (1994); see also Connie Davis Nichols & Charley Carroll, *Trouble in Trademark Law: How Applying Different Theories Leaves Door Open for Abuse*, 17 SCI. & TECH. L. REV. 1 (2014); see also Viva Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L. J. 1473 (2004); see also Michael Helfand, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623 (1992).

tolerated, but actively encouraged.<sup>275</sup> The right to produce a particular product is not an exclusive one, and actionable infringement occurs only where there is a risk of unfair competition.<sup>276</sup> This logic could be extended in cases involving challenged fan works such that the concern is not about preventing infringement, but unfair competition. If we treat fictional works as products, the rightsholder might be analogous to a senior mark user, and the fan writer a junior user who offers their version of that same product. The rightsholders' copyrighted work and the fan works are thus related goods, whose coexistence only becomes a problem when a junior user attempts to pass off their goods as those of the senior user.<sup>277</sup> Such passing off creates the risk that consumers will mistakenly purchase the goods of the junior user and obtain a disappointing result, which may be wrongly attributed to the senior user whose reputation and future sales will suffer as a consequence.<sup>278</sup>

Instead, what if it was possible to craft a regime that would allow fan writers to create "products" that otherwise resemble those of the rightsholders in terms of their characters, fictional worlds, or other distinctive characteristics, without creating a risk that a consumer would conflate the work with one produced by the rightsholder? Such a regime would grant fan creators confronted with liability for infringement a baseline set of rights not otherwise available under copyright law.

Such a paradigm is indeed possible. First, and most fundamentally, just as a mark holder's right to trade is subject to competition,<sup>279</sup> so too should a franchise owner's right to creative production be subject to fans' ability to use that product with their own expressions of creativity. The same social interest in avoiding monopoly that compels competitor entry into a market also compels fan engagement with franchises that deeply resonate with them. Barring fans' ability to engage with the characters, settings, and other building-blocks of franchises is tantamount to creating a creative monopoly in a manner that differs from that granted by copyright to an individual author. There is a vast difference in the interests and power differential between an individual author and the owner of a multi-billion dollar franchise.<sup>280</sup> An individual author may have a personal or spiritual connection to their work that may be argued to supersede a fan's interest in engaging with that work in any particular way.<sup>281</sup> Similarly, individual authors may have a greater financial reliance on the proceeds generated by their work, such that financial loss is more threatening.<sup>282</sup> Conversely, franchise owners can claim no comparable spiritual connection to their creative output, nor are they as reliant upon copyright's economic protections, as their prominent production companies have vast amounts

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275. See McKenna, *supra* note 259, at 1841.

276. Excluding, of course, products under patent protection.

277. See McKenna, *supra* note 259, at 1903.

278. Mark Lemley & Mark McKenna, *Owning Markets*, 109 MICH. L. REV. 137, 142 (2010).

279. See McKenna, *supra* note 259, at 1879.

280. Jennifer Maloney, WALL ST. J. (Nov. 18, 2015), <https://www.wsj.com/articles/betting-big-on-literary-newcomers-1447880214> [<https://perma.cc/E6XV-6K84>] (authors may generally expect about \$100,000 as an advance for a literary novel); Craig Donofrio, *Most Valuable Media Franchises in the World*, WORK + MONEY (Mar. 19, 2019), <https://www.workandmoney.com/s/most-successful-media-franchises-b3aca9a9436b48a5> [<https://perma.cc/2PVY-CCB7>] (the *Batman* and *Spiderman* franchises are worth \$28 billion and \$ 29 billion, respectively).

281. See Voegtli, *supra* note 68, at 1269.

282. See *id.* at 1242.

of wealth.<sup>283</sup> These attributes obliterate whatever social interest a franchise owner might have in constraining others' creativity by limiting fan works.<sup>284</sup>

Just as trademark holders may not “steal from people their right to make artifacts” by barring them from entering a market, rightsholders may not steal from fans their right to their own creativity and culture by prohibiting fan fiction.<sup>285</sup> But, just as a competitor's right to enter a market is subject to certain constraints, so too is a fan writer's right to engage with franchised content. The limitations imposed on fan writers generally ought to resemble those imposed upon market competitors. As will be discussed in the following section, the “likelihood of confusion standard,” with its roots in both trademark and unfair competition law, may provide an elegant means of minimizing fan writers' liability for infringement, while mitigating against any negative impact fan works may have on a rightsholders' ability to control and profit from their franchises.

## 2. Likelihood of Confusion Standard

### a. *Why It's Helpful*

At the heart of trademark law is the concept of customer confusion. Introduced by the Lanham Act as the standard for a finding of trademark infringement,<sup>286</sup> the crux of the of the confusion inquiry is whether there is a likelihood consumers would be confused as to the source of a set of goods.<sup>287</sup> To assess confusion, courts have developed a multi-factor “likelihood of confusion” test to establish whether a junior user's mark is sufficiently similar to that of the senior user's mark such that consumers would mistakenly believe a set of goods emanated from or were sponsored by the senior user.<sup>288</sup> While each federal circuit has their own specific test for assessing likelihood of confusion, all share several key elements, including the similarity of both the marks and goods in question, the extent of any actual confusion among customers, the nature of the customers, and whether there was any malintent on the part of the junior user.<sup>289</sup> The likelihood of confusion standard is particularly helpful in the context of fan works as it addresses the concerns of both rightsholders and fans, and has the added benefit of being familiar to courts.

Regarding rightsholders' concerns, a likelihood of confusion standard would assuage previously addressed reputational and financial interests. While the

283. See generally SCHILLER *supra* note 179 at 30-45.

284. See Voegtli, *supra* note 68, at 1269.

285. SHILLER, *supra* note at 44-45 (citing Henry Glassie).

286. 15 U.S.C. § 1125(a)(1)(A).

287. TRADEMARK MANUAL OF EXAMINING PROCEDURE, § 1207.01: Likelihood of Confusion (2017). <https://tmep.uspto.gov/RDMS/TMEP/current#/current/TMEP-1200d1e5044.html> [<https://perma.cc/2MSP-3VZW>].

288. See USPTO, *Likelihood of confusion*, <https://www.uspto.gov/trademarks/search/likelihood-confusion#:~:text=Likelihood%20of%20confusion%20exists%20between,come%20from%20the%20same%20source> [<https://perma.cc/TTS9-EV3L>] (last visited May 13, 2022).

289. See generally PRACTICAL LAW INTELLECTUAL PROPERTY AND TECHNOLOGY, TRADEMARK LITIGATION: LIKELIHOOD OF CONFUSION TESTS BY CIRCUIT CHART, THOMPSON REUTERS PRACTICAL LAW.

concept of “canon” may have special significance for fans, even lay viewers can tell when a franchise seems to wander astray. Commentators have noted the creep of elements from fan fiction into authorized works, lamenting their increasingly indulgent nature, and bemoaning the loss of narrative devices that would truly push franchises forward, such as character development.<sup>290</sup> While this argument may sound backwards—after all, wouldn’t this only make it *easier* to confuse fan fiction with authorized works?—it illustrates that, for better or worse, there are certain aspects of fan fiction that are undeniably unofficial, and noticeably so. The fact that there’s something about fan fiction that’s easy to spot indicates that there’s also something that makes it easy to distinguish, such that a reader who stumbles upon a *Twilight* post taken from Archive of Our Own isn’t going to find it at-odds with the works coming from Stephanie Meyer via Little Brown and Co. and Lionsgate.

Fans too would benefit from the standard, which provides both clarity and creative flexibility. Fan works were never intended to imitate or replace official content, but instead are created as a means of exploring elements of the franchise that speak to particular fans.<sup>291</sup> By using the confusion standard, fans would be free to pursue these personal connections with the rightsholder’s work, as such individualized re-imaginings are highly unlikely to be conflated with the original. Even to the extent that certain themes explored by fan writers may also have been explored within the authorized franchise—for example, the gender-swapped versions of *Twilight*—the confusion standard still holds. Authors have been recognized as having the latitude to explore elements of creative works that are “similar but not the same.”<sup>292</sup>

One of the greatest appeals of the likelihood of confusion standard is its intuitiveness and familiarity. Indeed, while it may go by a different name, courts already apply a “likelihood of confusion” standard when determining if a work is infringing. By asking whether an “ordinary observer would be disposed to overlook similarities” the Second Circuit’s “ordinary observer” test implicitly asks whether two works are sufficiently distinct such that there could be no mistaking one for another.<sup>293</sup> The Ninth Circuit’s instruction for assessing “intrinsic similarity” follows a similar line of inquiry in asking a jury to consider the “total concept and feel” of a work.<sup>294</sup> And sometimes the application is even more explicit. While doctrinally problematic, courts have already been blurring the concepts of trademark and copyright law. Courts have injected the language of source confusion and concepts of distinctiveness and recognizability into substantial similarity analyses, suggesting that the degree to which a copyrighted work is recognizable as having a particular source may have bearing upon a finding of infringement.<sup>295</sup> Unfair competition law too makes use of trademark’s standard of confusion, making it an essential element of a cause of action.<sup>296</sup> Given this ongoing inclination to

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290. See Faraci, *supra* note 47 (commenting on the indulgence of fan fiction as hindering the development of franchises).

291. See Grady, *supra* note 49.

292. See Litman, *supra* note 227, at 435.

293. See generally 6 NIMMER ON COPYRIGHT § 39.04 (2012).

294. See 4 NIMMER ON COPYRIGHT § 13.03 (2012).

295. See Helfand, *supra* note 60, at 641-44.

296. *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Group*, 443 F. Supp. 291 (S.D.N.Y. 1977) (applying the likelihood of confusion standard in an unfair competition suit in which manufacturer

import trademark's standards into infringement analyses, creating a coherent framework for a when a hybrid analysis should be used and what it should entail is warranted.

*b. Clarifying Confusion: A New Factor Test*

Just as trademark's likelihood of confusion standard employs a multi-factor "likelihood of confusion test," so too would an analogue under copyright law. Also much like the likelihood of confusion test under trademark law, certain factors may bear more weight than others, no one factor would be dispositive, and not all factors would be relevant in each particular case.<sup>297</sup> Likelihood of confusion would be considered as of the time of the fan work's creation. There are two rationales for fixing the analysis at this point in time. The first is to create an element of predictability for fans, who would be free to engage with novel concepts and premises in their work without concern they might later face liability should some of those themes be adopted by rightsholders at some point in the future. The second stems from the need to prevent rightsholders from hoarding creative content by claiming the development of an authorized version of the fan work's alternate telling was right around the corner.

The factors themselves offer a concrete framework for analysis based on a codified set of dimensions. These factors include the following: platform of the work; medium of the work; whether the work appeals to the same audiences; inconsistencies between the fan work and copyrighted work; and whether the fan work adheres to the narrative conventions of the particular genre. While tempting to include among these considerations the "quality of the work," copyright law has traditionally been skeptical of courts' inquiries into a work's artistic merit.<sup>298</sup>

Some of the factors ring familiar, as they're probative of the degree to which a fan work has fundamentally altered franchised content. In this respect, the test is a collection of concrete articulations of the substantial similarity inquiry for prima facie infringement, and fair use's transformativeness inquiry. Rather than being framed in abstract and subjective terms such as "total concept and feel,"<sup>299</sup> "further purpose or different character,"<sup>300</sup> "alteration ... with new expression, meaning"<sup>301</sup> or "new aesthetics, new insights and understandings,"<sup>302</sup> the factors are more objective and targeted at specific dimensions of the work rather than the work as a whole. Other factors, however, would push the traditional boundaries of transformativeness, and create space for considerations that have previously been left behind.

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of "Star Wars" toys challenged a competitor's sale of a similar alien and robot themed action figures under the name "Star Team").

297. TMEP § 1207.01 (2017).

298. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits").

299. BILL PATRY, *PATRY ON COPYRIGHT* § 9:71 (2022).

300. C. T. Drechsler, *Extent of Doctrine of Fair Use Under Federal Copyright Act* 23 A.L.R.3d 139 (1969).

301. *Id.*

302. *Id.*

Each of the factors are now considered in turn.

### *Platform of the work*

In trademark law one of the most fundamental inquiries within every circuit's likelihood of confusion test is the proximity of the junior and senior users' goods.<sup>303</sup> When it comes to confusion, "context is king."<sup>304</sup> For the purposes of assessing the possibility of mistaking a fan's work for that of the rightsholder, the platform on which a work is encountered provides this critical context.

In many cases, this factor will be clear. Fan works are often siloed, confined to interest groups where authorized works are unlikely to be found.<sup>305</sup> Some are hidden even further from public view, distributed only through private email listservs among subscribers actively participating in a fan community.<sup>306</sup> It's unlikely a consumer would just stumble upon these fan sites by accident, and even less plausible that they'd unwittingly find themselves subscribed to a mailing list. The people encountering platforms like Archive of Our Own and Wattpad aren't there to find authorized content, they're there to either post fan works of their own, or to engage with the fan community.<sup>307</sup>

Conversely, mainstream platforms like Netflix and Hulu are home to more costly commercial works produced by major entertainment corporations.<sup>308</sup> Presence on these major streaming platforms may suggest to viewers that content is produced by the franchise owner, rather than by an independent individual. Were a viewer to encounter work in this context, it could easily create the perception that the work was official—especially in circumstances where the franchise and fan work share the same platform.

But while one can feel fairly confident that works posted on fanfiction.net are indeed works of fan fiction, and those on Netflix are officially sanctioned, the status of works on other platforms is less obvious. Platforms such as Tumblr or YouTube, which are more closely associated with user-generated works, have a host of both fan-produced content, as well as content posted by rightsholders themselves.<sup>309</sup> Works encountered on these platforms may be more ambiguous, with greater uncertainty surrounding their origin. As a result, fan works found on these platforms would be more likely to create a likelihood of confusion.

### *Medium of the work*

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303. See McKenna, *supra* note 259, at 1844.

304. Alexandra Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1997, 2003 (2019).

305. Tushnet, *supra* note 10, at 676.

306. Plotz, *supra* note 16.

307. Alternatively, they may also visit the fan sites as trolls in search of fodder for mockery of fan writers. Lord, *supra* note 12.

308. Spangler, *Netflix Remains King of Bandwidth Usage, While YouTube Declines*, VARIETY (May 14, 2014), <https://variety.com/2014/digital/news/netflix-youtube-bandwidth-usage-1201179643/> [<https://perma.cc/SAK5-JLTV>].

309. See *Trouble in Fandom Paradise: Tumblr Users Lash Out Against Its Beta Subscription Feature*, TECHCRUNCH (July 22, 2021), <https://techcrunch.com/2021/07/22/tumblr-community-lash-out-post-plus-subscription/> [<https://perma.cc/6YWM-SQE8>] (referencing Neil Gaiman's infamous Tumblr account).



Much like the platform of a work, a work's medium is a contextual cue that gives a clue as to its origin. Given that many franchises most beloved by fan writers span multiple media, this factor may not always be as relevant as others.<sup>310</sup> The medium inquiry will be most helpful in circumstances where copyrighted visual characters are used in a written fan work. Where characters owned by the rightsholder are visual rather than written, there would be less risk of a reader of fan fiction of immediately and necessarily recognizing the character as they might if the character was visually represented in a work of fan art or a fan video.<sup>311</sup> Such a medium transfer thus reduces the likelihood of confusion, weighing in favor of the fan writer. While courts currently don't consider change in medium alone adequate for a finding of transformativeness,<sup>312</sup> it is nevertheless a useful guidepost, as it may signal to a consumer that the works in question may have different origins.

#### *Whether work appeals to the same audiences*

Because branding and market dominance is such an integral concern for rightsholders, the intended audience of a work is an incredibly helpful inquiry when assessing whether a fan work creates source confusion. The most obvious (and notorious) example of this is, of course, the myriad "adult" fan works based on franchises created for children. Demira Wither's reimagining of the relationship between Voldemort and Harry as a homoerotic mentorship was clearly not targeted towards the same 8-16 year old set as Rowling's texts.<sup>313</sup>

But the distinctions may also be more subtle. Fan works are often characterized as being for other fans, suggesting there might be intrinsic differences between a work written for a fan community versus a mainstream audience.<sup>314</sup> Such differences would belie a different origin, reducing the likelihood of confusion. This is highly intuitive, and neatly fits within courts' current approaches to transformativeness, wherein appeal to a different audience may be characterized as serving a "new and different function."<sup>315</sup>

#### *Inconsistencies between the fan work and copyrighted work*

While courts are reluctant to take on the role of arbiter of a work's artistic merit for fear of exceeding the limits of their knowledge, assessing inconsistencies between two pieces of work takes considerably less expertise.<sup>316</sup> While most franchises, especially those that are long-running, are riddled with inconsistencies and plot-holes, these inconsistencies are typically minor, noticeable only by those most

310. See Target Internet, *Transmedia Storytelling*, TARGET INTERNET, <https://www.targetinternet.com/transmedia-storytelling-in-2021/> [<https://perma.cc/V8XT-9TT6>] (last visited May 13, 2022).

311. Helfand, *supra* note 60, at 631.

312. *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992); *Castle Rock Ent. v. Carol Publ'g. Group*, 150 F.3d 132, 143 (2d Cir. 1998).

313. See *The Play*, ARCHIVE OF OUR OWN, <https://archiveofourown.org/works/3271262> [<https://perma.cc/TLC8-WDSE>] (last visited May 13, 2022).

314. Tushnet, *supra* note 10, at 665.

315. See *Brown v. Netflix*, 462 F.Supp.3d 453, 461 (S.D.N.Y. 2020) (holding that Defendant's use of a children's song in a film about burlesque dancers was transformative given the difference in the film's intended audience).

316. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

intimately familiar with their content.<sup>317</sup> More glaring inconsistencies, however, may amount to a fundamental incongruity, such that even casual consumers would be unlikely to believe the works have a common origin.

These inconsistencies may take several forms. First, they may manipulate certain elements of the rightsholder's work to suit their individual tastes. Fan works are often premised on a specific yen of the individual fan creator, and are deliberately tailored to accomplish a particular objective that has special meaning to the individual fan.<sup>318</sup> This often presents itself as fan works having a greater emphasis on relational elements of an official work.<sup>319</sup> Rather than emphasizing narrative development, fan works are often more relationship-oriented, with stories emphasizing the dynamics between characters.<sup>320</sup> "Slash fiction," which are stories that reimagine prominent characters in same-sex romantic pairings, is one example of relationship-driven work that's received the most attention.<sup>321</sup> The emphasis on relationships may be less salacious, of course, with many works featuring characters sitting in coffeeshops having banal conversations and other "sub sitcom level interactions," and others exploring elaborate backstories for otherwise marginal characters.<sup>322</sup> These works stand in contrast to official versions of the work, which are primarily plot-driven.<sup>323</sup> Audiences may be able to pick up on this difference in focus, and be able to more readily to distinguish between the sources of the content.

Fan works may similarly be based on premises foreclosed by the franchise. Certain creative choices regarding character development, resolution of conflicts, and other plot points necessarily negate other alternatives. Given the impossibility of certain fan-created storylines coexisting with the franchise's narrative arcs, there would be no confusion regarding the source of the material as a non-affiliate of the franchise. In the same vein, fan works often feature characters in "new and often startling situations," which, even if not outright contradicted by the authorized work, create a distinct sense of disorientation among consumers such that they're unlikely to be mistaken for authorized works.<sup>324</sup>

Written fan works also might differ sharply in terms of their writing styles compared to the franchise's literary content. While some degree of fragmentation is frequently observable within the corpus of a franchise, starkly different writing styles can evince a difference in source.<sup>325</sup> The power of writing style is especially helpful in circumstances where the content of a fan work might not radically differ from that of the original. Take the case of a Judy Blume fan fiction, following the central character, Stephanie, as she navigates 8<sup>th</sup> grade.<sup>326</sup> While the

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317. TJ Peters, *Small Inconsistencies in the Harry Potter Movies Movie Fans Couldn't Help But Notice*, RANKER (Feb. 24, 2021), <https://www.ranker.com/list/inconsistencies-in-harry-potter-movies/tpetersccc> [<https://perma.cc/D3AK-9USR>].

318. Plotz, *supra* note 16.

319. *Id.*

320. *Id.*

321. Thorpe, *supra* note 22.

322. Plotz, *supra* note 16.

323. *Id.*

324. Tushnet, *supra* note 10, at 658.

325. *See infra* Part III.A.1.

326. *Learning to Love Life: A Stephanie Hirsch Story*, FANFICTION.NET, <https://www.fanfiction.net/s/11383893/1/Learning-to-Love-Life-A-Stephanie-Hirsch-Story> [<https://perma.cc/6586-CNSM>] (last visited May 13, 2022).

content of the story is itself not terribly different than that in official series, the writing differs sharply. The dialogue between the characters in the fans work reads as less fluid, cutting back and forth between dialogue and third-person present tense, giving it the feel of a screenplay rather than novel.<sup>327</sup> This character doesn't render the fan work as being *worse* than the official work, but it does make it clearly distinguishable.

There are, of course, a certain class of works—namely fan videos—where analysis of consistency will inevitably veer into the territory of appraisal of a fan work's quality. But these inquiries may still be distinguished from the type of holistic judgements regarding a work's inherent artistic merit courts have cautioned about. Instead, they consider very specific elements of the fan work in isolation. The “production value” of a fan work, for example, is an especially obvious example of how a fan works may clearly be distinguished from their authorized counterparts. Similarly, the presence of high-profile actors may be a clear indication that a work is part of a major franchise rather than the creation of an independent amateur.

Fan works are notably inconsistent with authorized content will be more readily identifiable as such, and are thus less likely to create a likelihood of confusion. The question of consistency tracks with both the transformativeness inquiry regarding altered aesthetics, as well as the Ninth Circuit's “total concept and feel” test for substantial similarity. Differences in aesthetic choices have long been assessed by courts as part of substantial similarity analysis, with inconsistencies regarding these choices regarded as being favorable to a finding of non-infringement.<sup>328</sup> In cases where the inconsistencies between a fan work and original work aren't glaring enough to render the fan work as lacking substantially similarity to the original, the differences between the works may still be sufficient such that when coupled with a favorable finding on other factors, the sources of the works could not be conflated.<sup>329</sup>

*Whether fan work adheres to narrative conventions of the particular genre*

While corporate-owned creative properties have come to function as commodities, they are still expressive works, and their creation is governed by certain artistic principles. Authorized works typically adhere to general and genre-specific narrative conventions that fan works may eschew.

For example, certain genres employ specific literary tools and tropes that signal to audiences that a work belongs to that particular genre.<sup>330</sup> Vampire stories, for example, feature a character with some combination of the following elements:

327. *Id.*

328. *Sheldon Abend Revocable Trust v. Spielberg* 748 F.Supp.2d 200 (S.D.N.Y. 2010) (holding that differences in setting and mood, and the presence of subplots was sufficient for a finding against substantial similarity); *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomj, Inc.* 338 F.3d 127 (2d Cir. 2003) (holding that an analysis of specific aesthetic decisions is critical to an assessment of whether works share the same overall “total concept and feel”).

329. Shyamkrishna Balganes, Irina D. Mantra & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 282-84 (2014) (addressing the instability of the “substantial similarity” analysis regarding the context-dependent nature relative weight observers attach to discrete elements of works when making determinations about the works' holistic similarity).

330. RACHUM-TWAIG, *supra* note 78, at 65.

affinity for darkness; anomalous complexions; parasitic relationships with humans; and, of course, blood as a dietary staple.<sup>331</sup> Also frequently embraced by the genre are themes of romantic longing and the existential angst of immortality, as well as the existence of other supernatural creatures.<sup>332</sup> *Twilight*, of course, riffs on many of these signature tropes, with its brooding insomniac vampires that sparkle in the sun, humanely nourish themselves with animal blood, and form intense codependent romantic relationships with humans.<sup>333</sup> Not all *Twilight* fan works share these elements, however. In fact, some lift an entirely different set of conventions from a different genre. The fan work *Witches of Twilight*, takes the franchise's supernatural elements in a very different direction, more reminiscent of the fantasy genre more associated with *Harry Potter*, with references to telekinesis, mind-reading and teleportation.<sup>334</sup> While the characters' names and backstories are consistent with the *Twilight* characters, the work is otherwise unrecognizable. With none of the hallmarks of the "vampire" genre, the work wouldn't even fall under the same category of fiction as the Stephanie Meyer works, and thus is unlikely to be confused as being part of the official franchise. While changes in genre alone have appeared to be insufficient to support findings of a changed "purpose and character" as part of a transformativeness inquiry,<sup>335</sup> they have a dramatic effect on the work all the same, and are certainly sufficient to render it distinguishable for the purposes of avoiding confusion.

Further, many narrative choices are dictated by the rightsholder's desire to maximize the potential for continued expansion of the franchise.<sup>336</sup> Because story arcs must be limited to those that allow the franchise to continue in a believable manner, producers are likely to avoid certain plotlines that might terminate or severely limit the franchise.<sup>337</sup> Fan works are created with no such eye towards continuity, and in fact often center upon the same "earthshaking" situations rightsholders may go out of their way to avoid.<sup>338</sup> Plot developments that might be "signaling the end" of a franchise, including such pivotal events as the marriage or death of a key character often feature prominently in fan works.<sup>339</sup> Because rightsholders are likely to be more judicious with the incorporation of these types of momentous events in their own narratives, fan works centering upon such dramatic situations will be readily distinguishable from the copyrighted properties.

### C. Revising the Fair Use Analysis for Fan Works

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331. See Philip Athans, *Science Fiction Writing Tips: How to Make a Vampire Not Suck*, WRITER'S DIGEST (Mar. 30, 2015), <https://www.writersdigest.com/write-better-fiction/science-fiction-writing-tips-how-to-make-a-vampire-not-suck> [<https://perma.cc/J4UZ-C3WT>].

332. *Id.*

333. See generally, STEPHANIE MEYER, *TWILIGHT* (2005).

334. *Witches of Twilight*, FANFICTION.NET, <https://www.fanfiction.net/s/5026939/1/Witches-of-Twilight> [<https://perma.cc/CWW5-T4XP>] (last visited May 13, 2022).

335. See *Dr. Seuss Enters, v. Penguin Books, USA Inc.*, 109 F.3d 1394, 1399-401 (9<sup>th</sup> Cir. 1997) (suggesting that a change in genre alone wouldn't be enough to warrant a finding of transformativeness absent critical commentary on the original).

336. David Auerbach, *The Cosmology of Serialized Television*, THE AMERICAN READER, <https://theamericanreader.com/the-cosmology-of-serialized-television/> [<https://perma.cc/LEQ9-X5T2>].

337. *Id.*

338. Tushnet, *supra* note 10, at 671.

339. *Id.*

Given the unique nature of both fan works and franchised content, and the specific set of questions and challenges that arise when trying to assess whether a given fan work constitutes a fair use, courts might adopt a specific approach to interpreting certain fair use factors as they apply in fan fiction litigation]. More specifically, the transformativeness inquiry in Factor One and the market harm inquiry in Factor Four may be more consistently and accurately conducted by approaching the factors through a framework formulated to address the interests of rightsholders, while recognizing the right of fan creators to engage with culturally significant content. Because factors one and four are at once the most abstract and the most determinative, having a concrete framework in which to apply them will make the fair use test both easier to administer and more likely to yield a predictable outcome.

*a. Transformativeness*

Because transformativeness is the crux of the fair use analysis, all parties to fan fiction litigation would benefit from a concrete and predictable approach to transformativeness that addresses the specific suite of concerns presented by fan fiction. A concrete framework, which may be found in the proposed “likelihood of confusion test” would be beneficial, as the factor-based inquiry gives courts guidance as to what specific dimensions of a work ought to be analyzed. Further, the test offers benchmarks for determining when differences between the original content and fan work rise to the level of being transformative.

But the utility of the test isn’t just that it offers an interpretive framework—it also asks the right question. By asking whether there is a likelihood of confusion surrounding the fan work’s origin, the test articulates the form of transformativeness that’s most relevant to the particular parties involved. The possibility of confusion regarding a work’s origin is inherently a transformativeness inquiry. For a challenged work’s character to be so significantly different from that of the original such that their sources couldn’t be conflated, something substantially new or different was necessarily added to that original work in a manner that certainly qualifies as imbuing with new meaning, or creating a new aesthetic.

*b. Market harm*

While Factor One’s “purpose and character” inquiry turns primarily on transformativeness, the first factor also asks about other facets of the work’s use, including whether it’s used for commercial purposes.<sup>340</sup> This question of commerciality is distinct from Factor Four’s inquiry regarding the “effect of use upon the potential market for the value of the work,” which considers whether a challenged work might usurp the original within the marketplace or erode an existing or viable derivative works or licensing market.<sup>341</sup> Both commerciality and market harm are often considered in light of transformativeness, such that a highly transformative work is likely to be found to be a fair use regardless of its commercial nature or potential for having a detrimental economic impact.<sup>342</sup>

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340. 17 U.S.C. § 107.

341. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 592 (1994).

342. *Id.* at 591.

The unique nature of fan fiction, media franchises, and the relationship between fan creators and rightsholders warrants a different calculus regarding the significance of commerciality and market harm, and their interplay with both transformativeness and each other. Unlike other types of plaintiff–defendant pairings in copyright litigation, the rightsholder–plaintiff’s and fan–defendant’s relationships to the economic potential of their expressive works are completely antithetical. All but the most mercenary of fan creators are at most agnostic towards any potential pecuniary value of their work.<sup>343</sup> Their production of expressive works isn’t motivated by the need to earn a livelihood or generate profit, but rather by the desire to engage with the works they love and to connect with each other.<sup>344</sup> Franchise owners, of course, are almost entirely profit-driven.<sup>345</sup> This vast difference in weight placed upon a work’s commercial viability by parties to fan fiction copyright litigation ought to be reflected in the way courts weigh fair use factors in these unique types of cases.

When assessing whether a fan work is fair use, the commerciality inquiry must take on increased significance, regardless of the degree to which the fan work is transformative. More specifically, it should be fan work’s commercial or non-commercial character rather than its transformative nature that defines the scope of the market harm inquiry. Factor Four’s analysis of a fan work’s impact on the franchise contents’ value ought to be limited to findings of commerciality. In cases where the fan work is found to be commercial, however, while transformativeness will still have bearing on the market harm inquiry, it’s this commercial nature, rather than transformative character, that should control the analysis.

#### *Assessing Commerciality*

Commerciality, not to be confused with being “for profit,” refers to the “advance[ment of] a person’s commercial or economic interests” typically through an “exchange for economic use or benefit.”<sup>346</sup> Commerciality is anathema to many fan creators, whose works are “labor(s) of love,” and exchanged among members of a fan community as part of a gift economy.<sup>347</sup> Within certain corners of the fan community, however, the otherwise strong norm against commercialization has started to shift.<sup>348</sup> Whether it’s in the interest of supporting other fan creators, leveraging ad-generated revenue, or more traditional attempts at sales, money is increasingly changing hands among members of fandoms.<sup>349</sup>

There are three primary ways in which fan works may be commercialized, each of which would render the work as being “commercial in nature” for the purposes of a fair use inquiry. The first, and most direct, is if a fan creator attempts to

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343. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 527 (2009); see Hetcher, *supra* note 6, at 1885.

344. *Infra* Part I.B.

345. *Infra* Part III.A.1.

346. *Commercial Purposes*, LAW INSIDER, <https://www.lawinsider.com/dictionary/commercial-purposes> [<https://perma.cc/4UGD-4ZZG>].

347. Henry Jenkins, *Transforming Fan Culture into User-Generated Content: The Case of FanLib*, HENRY JENKINS (May 22, 2007), [http://henryjenkins.org/blog/2007/05/transforming\\_fan\\_culture\\_into.html](http://henryjenkins.org/blog/2007/05/transforming_fan_culture_into.html) [<https://perma.cc/6ZNY-ADFR>].

348. Hetcher, *supra* note 6, at 1884-85.

349. Christina Chung, *Holy Fandom, Batman! Commercial Fan Works, Fair Use, And The Economics Of Complements And Market Failure* 19 B.U. J. SCI. & TECH. L. 367, 368 (2013).

sell their work for remuneration. These types of direct to consumer sales are most common among fan art, fan merchandise and commissioned short stories.<sup>350</sup>

The second are fan creators' increasing use of crowdfunding as a means of supporting their work.<sup>351</sup> While more subtle than direct sales, the patron-model is especially concerning from a copyright law perspective, as the premise for giving fan works special consideration under a fair use analysis is that fan works stand outside copyright's incentive structure. By invoking the same paradigm that justifies the copyright scheme—namely that creators must be paid in order to generate new works—the justification for treating fan fiction differently than other types of creative expression collapses.

Finally, and least directly, fan fiction may be rendered commercial by nature of where it's posted. While certain fan sites are maintained entirely by fan creators themselves, others rely heavily on add revenue.<sup>352</sup> Complicating matters further, even fan works that may have originated on entirely volunteer-powered sites may find their way onto other platforms that *are* driven by ads, potentially without the fan creator's knowledge or consent.<sup>353</sup> For these works, commerciality would be determined based on the intent of the author—did the author circulate a fan video among a private email listserv only to have another listserv member post the video to YouTube? Or, did the author themselves post to YouTube? In the interest of ensuring predictability for fan creators, a commerciality analysis would be based solely on those platforms where the creator posted directly.

#### *Assessing Market Harm*

The scope, and indeed the very applicability, of the Factor Four market harm analysis is entirely contingent upon the character of a fan work as being commercial or non-commercial. For fan works whose nature is non-commercial as defined above, even the most profound and damaging market impacts on the franchise wouldn't be recognized as legally cognizable harms. Given that franchise owners' interests are fundamentally economic, disregarding potential damage to market value seems to be an oxymoronic result. But, when considering those franchises as products rather than pure creative expression, the outcome is entirely consistent.

For a franchise owner, the interest ostensibly undermined by fan works is the ability to commercially exploit the franchise in all its current and future forms.<sup>354</sup> And the suite of exclusive rights conferred by the Copyright Act makes such commercial exploitation possible.<sup>355</sup> But control over commercial

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350. *Id.* at 371; *Get the Best Fanfic Services*, FIVERR <https://www.fiverr.com/gigs/fanfiction> [<https://perma.cc/C9XT-ZA2Q1>] (last visited Dec. 16, 2022).

351. Lantagne, *supra* note 88, at 265.

352. *Ads on Wattpad*, WATTPAD (May 15, 2022), <https://support.wattpad.com/hc/en-us/articles/211678146-Ads-on-Wattpad> [<https://perma.cc/DX4U-5CKN>].

353. Andrea Hannah, *This Queer Harry Potter FanFic Is Going Viral on TikTok and It Ships 2 of the Marauders*, ELITE DAILY (Jan. 14, 2022), <https://www.elitedaily.com/lifestyle/all-the-young-dudes-lgbtq-harry-potter-fanfic-tiktok-viral> [<http://perma.cc/AA4C-RC2V>] (after three years on the non-commercial fan fiction platform, "Archive of Our Own" a piece of *Harry Potter* fan fiction found its way onto TikTok and subsequently went viral).

354. Voegtli, *supra* note 68, at 1241.

355. 17 U.S.C. § 106.

exploitation is distinct from control over an entire market. Evoking again a hybrid trademark-copyright framework, the corporate rightsholder may be construed as a firm who, while having a right to control commercial exploitation of products bearing their mark, doesn't have the right to control the *market* for those mark-bearing products.<sup>356</sup> A junior firm may come in and sell a superior product that erodes the senior firm's market, and so long as it does so using a different mark, the harm is unactionable. A fan creator may be understood as being much like the junior firm—free to enter and disrupt the rightsholder's market so long as they abide by certain rules. For the competing junior firm, this looks like using a sufficiently distinctive mark. For the fan creator, it means creating a sufficiently transformative work and honoring copyright law's recognition of the rightsholder's exclusive right to commercial exploitation of the rightsholder's content.

When a fan's work is commercial, however, this argument drops out, leaving the fan-defendant to rely on the traditional Factor Four analysis informed by transformativeness under the likelihood of confusion standard. In these cases, a finding of market harm will hinge on the specific mechanism by which the fan work threatens the original work's value.<sup>357</sup> Any losses that stem from audience disillusionment arising from a fan work should be characterized as the same type of legally incognizable collateral damage wrought by a pointed commentary, unfavorable review, unflattering parody, or any other transformative use. While corporate rightsholders retain an interest in reputational preservation, they cannot insulate themselves from the whims of public opinion any more than can any other company. In releasing works to broad audiences, rightsholders cede control over the interpretation of their output, and thus tacitly accept the possibility that elements of their properties may be mischaracterized in ways they may find embarrassing or distasteful.<sup>358</sup> Further, the likelihood of confusion test accounts for the type of actionable competition-based harms recognized under trademark law. This renders any losses suffered by the rightsholder no different than those arising from the entry of any competing product into a marketplace.

Market harms do become cognizable when a fan work has a potential impact on the market for derivative works and licensing opportunities. While other fair uses may circumvent these harms by having sufficiently transformative characters as to render arguments regarding the rightsholder's desire to exploit a given derivative or licensing market null, because the transformative nature of a fan work is assessed without consideration of whether a rightsholder may wish to enter the same creative space, considerations of competition with derivative works and licensing markets is more relevant.

While a rightsholder may be unlikely to produce or license a parody or social criticism of their work, many fan works are built upon premises rightsholders may have an interest in exploring themselves. Take for example, the multitude of fan works imagining central characters as having a different gender, race, ethnicity, or sexual orientation. As even the most mainstream of production companies become more inclusive, producers may be interested in developing works featuring a

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356. See Lemley & McKenna, *supra* note 275.

357. Walt Disney Company (2021) Form 10-K, <https://www.sec.gov/ix?doc=/Archives/edgar/data/1744489/000174448921000220/dis-20211002.htm> [<https://perma.cc/M8YM-QZT2>] (assuming the work is transformative under the likelihood of confusion test).

358. Tushnet, *supra* note 10, at 657-58.



more diverse and representative range of identities.<sup>359</sup> While an all-female *Ghostbusters* reboot may have formerly been relegated to obscure corners of the internet, it was released as an authorized film distributed by Columbia Pictures in 2016.<sup>360</sup> Then there is Stephanie Meyer's 2015 *Twilight: Life and Death, Twilight Reimagined*, a gender-swapped reboot featuring characters with "slightly different personality traits" and "slight plot differences" but otherwise adhering to the original work.<sup>361</sup> Fan works centered upon the gender-bent premise abound, with single platforms having over ten thousand "genderswap" fan stories.<sup>362</sup>

Rightsholders are of course likely argue that any fan work could be a viable authorized production, meaning courts must have a framework to assess the true likelihood of a rightsholder entering the derivative market in question. This likelihood might be assessed by looking at what trademark law calls "bridg(ing) the gap," or the possibility that a senior mark holder might extend their line of products into the same market as the junior mark holder.<sup>363</sup> Rather than include this inquiry within the "likelihood of confusion" test, as trademark law does, reserving the question for the market harm analysis better suits the purpose of the revised fair use test. The goal of the reformulated fair use analysis is to give fan creators more predictability and greater leeway to engage with the content they love. Including the franchise owner's likelihood of expansion at the within likelihood of confusion test at the transformative use stage would undermine fans' ability to comfortably use franchise material, as it introduces a factor that fans can't predict *ex ante*. A fan creator has the ability to control where they post their work, the mediums they work with, and whether they adhere to certain artistic conventions. What they do not have, however, is the ability to confidently predict which specific projects a franchise owner may pursue. Because the range of derivative works a franchise owner may elect to produce is so vast, requiring fan creators to avoid any topic or premise in which the franchise owner may take interest would foreclose their opportunity to work with wide swaths of content, and severely constrain opportunities for creativity. Excluding the likelihood of expansion analysis from the transformativeness inquiry that influences the outcome of other parts of the fair use test minimizes the damage a finding against the fan-defendant on this point can have on the overall fair use analysis. In essence, it's a means of avoiding punishing fans for something they have no control over.

To demonstrate a possibility for expansion, rightsholders might point to existing production plans, recent productions, or even points of criticism regarding gaps in the franchise that need to be addressed. Using existing production plans or proposals to demonstrate the rightsholder was planning to develop a derivative

359. Faraci, *supra* note 47.

360. Howard, *Sexist Ghostbusters' Backlash Coincides with 2016 Gender Divide*, NBC NEWS (May, 26, 2016), <https://www.nbcnews.com/news/nbcblk/sexist-ghostbusters-backlash-coincides-2016-gender-divide-n580921> [<https://perma.cc/4FPU-A8EQ>] (regrettably, the film was wildly unsuccessful, and almost universally panned by critics).

361. THR Staff, *Stephenie Meyer Announces New Gender-Swapped 'Twilight' Book*, THE HOLLYWOOD REPORTER (Oct. 6, 2015), <https://www.hollywoodreporter.com/news/general-news/new-twilight-book-gender-swapped-life-death-829758/> [<https://perma.cc/DN65-A454>].

362. Archive of Our Own, <https://archiveofourown.org/tags/Genderswap/works> [<https://perma.cc/832N-7HJS>].

363. Practical Law Intellectual Property and Technology, *Trademark Litigation: Likelihood of confusion Tests by Circuit Chart*, THOMPSON REUTERS PRACTICAL LAW.

work that would compete with the fan work is straightforward enough. But even without concrete plans, a rightsholder can still point to recent efforts suggesting the development of a derivative work similar to the challenged fan work was imminent, if not immediate. Returning to the example of more inclusive reboots, consider a hypothetical Disney challenge to a *Snow White* fan fiction, reimagining the ‘Snow White’ character as a non-binary individual. Disney may point to their more contemporary works and how they reflect a commitment to more diverse lead characters. Starting with the release of *Princess in the Frog*, centered upon the then 85-year old company’s first ever Black princess, and continuing through its most recent representation of a Southeast Asian princess in *Raya and the Last Dragon*, and forthcoming live-action remake of *The Little Mermaid*, with a Latinx Arielle, Disney may claim it is committed to representing identities that had previously been left out of popular culture. Such a demonstrable effort at inclusion would make more believable a claim that Disney was planning on producing a remake of *Snow White* with a gender-nonconforming lead at some point.

Alternatively, rightsholders might also point to criticisms of their franchises and their desire to address weak points of their narratives in future works. Rightsholders have an interest in pleasing their audience and addressing points of dissatisfaction is one way to accomplish this.<sup>364</sup> The gender-swapped *Twilight* illustrates this type of creative correction. Meyer explained her motivation in creating the new book as being an effort to refute arguments that her work celebrated toxic gender stereotypes.<sup>365</sup> By inverting the genders of the lead characters, Meyer hoped to demonstrate to her critics that the work “it really is the same story because it’s just a love story and it doesn’t matter who’s the boy and who’s the girl.”<sup>366</sup>

Non-narrative fan works, like fan art and fan music (or ‘filk’) are even easier to address. Rightsholders would easily be able to demonstrate that these types of works may compete with existing products, or those shortly to be developed.<sup>367</sup> One need only look at the overwhelming popularity of Disney musical soundtracks to be convinced that franchise-themed musical works is a market worthy of exploitation.<sup>368</sup> The vibrance of the market for franchise-based artwork is even more obvious. Posters of Ana and Elsa can be purchased at Walmart.<sup>369</sup> Replicas of the USS Enterprise come plated in gold.<sup>370</sup> Indeed, commercial markets for merchandise like sweatshirts, tote bags and portraits, all of which are commonly

364. Faraci, *supra* note 47.

365. THR Staff, *supra* note 358.

366. *Id.*

367. See Chung, *supra* note 346, at 386.

368. Andrew Unterberger, ‘We Don’t Talk About Bruno’ From ‘Encanto’ Now Tops Billboard’s Greatest of All Time Disney Songs Chart Ranking, BILLBOARD (Apr. 6, 2022), <https://www.billboard.com/music/chart-beat/biggest-disney-hits-all-time-1235018081/> [<https://perma.cc/99PM-SLXW>] (Disney has had no fewer than 25 Billboard Top 100 hits over the past 30 years).

369. *Frozen – Anna & Elsa Poster Print*, WALMART, <https://www.walmart.com/ip/Frozen-Anna-Elsa-Poster-Print-Item-VARTIARP6039/30827997> [<https://perma.cc/6K83-39AY>].

370. *EagleMoss Reveals Their Gold XL TOS USS Enterprise*, THE TREK COLLECTIVE (May 1, 2021), <https://www.thetrekcollective.com/2021/05/eagleMoss-reveals-their-gold-xl-tos-uss.html> [<https://perma.cc/Z7J2-ADBA>] (alternatively, the truly devoted can also get a life-sized replica of the Enterprise for \$97 million); Beau Peregoy, *Calling All Trekkies! A Life-Size Replica of the Enterprise Has Been Built in China*, ARCHITECTURAL DIGEST (May 31, 2015), <https://www.architecturaldigest.com/story/star-trek-enterprise-building-china> [<https://perma.cc/2WMF-NPEB>].

produced by fans creators, generate more profit than the expressive components of the franchise.<sup>371</sup>

Given the relative ease with which rightsholders can demonstrate fan works may compete with authorized derivatives, it would be far more difficult for even a transformative commercial fan work to find refuge under fair use. But despite this decreased likelihood of finding in favor of a fan creator in cases of commercial fan works, even these fan creators are no worse off than under traditional fair use. And by clarifying the transformativeness standard and creating a carve-out for non-commercial fan works that satisfy it, this new articulation of fair use would allow for greater predictability. It at once affords fan creators the opportunity to engage with the works they love, while recognizing and honoring the interests of rightsholders.

## Conclusion

Fan creators may be muggles and not metahumans, but they have a power all their own. Snark and derision aside, fan works are undeniably socially valuable sources of meaning and joy, and provide significant opportunities for interpersonal connection. Fan creators' passion and ingenuity deserves to be recognized by copyright law. By adopting a trademark-inspired fair use regime, fan creators may gain the freedom to engage with beloved franchises, while rightsholders continue to enjoy protection of their reputational and economic interests in their properties. Copyright law does not have to be stifling to be protective. Under this proposed regime, it may instead encourage the production of benign fan works, many of which are interesting and unexpected enough to delight even the most hardened fan fiction skeptics.

After all, isn't Darth Vader's cake preference at least a little intriguing?<sup>372</sup>

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371. Voegtli, *supra* note 68, at 1241.

372. He's apparently a fan of chocolate frosting. CowsLovePennies, *supra* note 3.