

The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine

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THE FAIREST OF THEM ALL: THE CREATIVE
INTERESTS OF FEMALE FAN FICTION WRITERS
AND THE FAIR USE DOCTRINE

INTRODUCTION

- I. THE WORLD OF FAN FICTION AND FANDOM
 - A. *The Basics*
 - B. *Varieties of Fan Fiction*
 - C. *History of Fan Fiction*
 - D. *Women: Queens of Fandom*
- II. A TALE OF ONE'S OWN: THE ROLE OF FAN FICTION AMONG ONLINE WOMEN WRITERS
 - A. *The Why: Rationales for Writing Fan Fiction*
 - 1. *Personal Interest, Alternative Forums of Expression, and Belonging*
 - 2. *Critique of Social Conventions and Normative Life*
 - B. *The How: The Processes of Consumption, Interpretation, and Creation*
 - 1. *Consumption and Interpretation*
 - 2. *The Writing Process and Creative Critique*
- III. COPYRIGHT LAW AND THE FAIR USE DOCTRINE
 - A. *Authors' Moral Rights*
 - B. *Copyright and Infringement*
 - C. *The Fair Use Doctrine*
 - 1. *The Courts and Fair Use*
 - 2. *Fair Use: Factor by Factor*
 - a. *The First Factor: Purpose and Character of the Use*
 - b. *The Second Factor: Nature of the Copyrighted Work*
 - c. *The Third Factor: Amount and Substantiality of the Copyrighted Portion Used*
 - d. *The Fourth Factor: Effect of the Use Upon the Potential Market for the Copyrighted Work*
- IV. WHAT BALANCING TEST? THE FAILURE OF FAIR USE
- V. MAKING THE FAIR USE DOCTRINE FAIR
 - A. *The Spirit of Copyright Law*
 - B. *The Fairest Doctrine of Them All*

CONCLUSION

INTRODUCTION

Sometimes, when I'm waist-deep in course work, I remind myself, "Law student' doesn't define you. Don't forget you're a

writer, too.” I have no doubt that others out there substitute “law student” with “accountant” or “teacher” or “FedEx delivery man” or, for that matter, “lawyer.” Some of us—these self-proclaimed amateur writers—write fan fiction. A significant majority of those writers are women.¹ These female fan fiction writers, myself included, write with the realization that “the good stories are out there waiting to be told in a fresh, wild way.”² Fan fiction writers derive good stories from the material in movies, television shows, video games, and books. These writers know that what they “have to offer is [their] own sensibility, . . . or insider pathos or meaning,”³ making each story transformative and, in a broad sense, original.

The creative process of writing and the inherent originality that results in every derivative work seems lost on the legal minds that create and apply copyright law. An examination of the values behind copyright law and the fair use doctrine—a defense to copyright infringement employed by authors of derivative works—uncovers exclusively economic policy concerns. Besides protecting primarily commercial interests, copyright law reflects a male-centric world-view that fails to consider and protect the reality of female-dominated amateur fan fiction communities.

This Note will argue that the current fair use doctrine fails to account for the interests of writers of fan fiction, nearly all of them women, and that, in order to be a fair balancing test, it must do so. Part I will introduce the world of fandom and fan fiction. Part II will explain the predominance of female participants in fandom, rationales behind and the process of creating fan fiction, and the function of fan fiction within fandom communities. Part III will summarize copyright law relevant to fan fiction, including the fair use doctrine. Part IV will highlight the inadequacy and inherent unfairness of the fair use doctrine, drawing attention to ways in which the doctrine fails to consider the interests of fan fiction writers. Part V will propose that the fair use test consider the interests of fan fiction writers with justifications grounded in policy that draws from previous discussion. Finally, in the Conclusion, this Note will suggest that the courts

1. See Charles Sendlor, *Fan Fiction Demographics in 2010: Age, Sex, Country*, FAN FICTION STAT.: FFN RES. (Mar. 18, 2011, 10:58 AM), <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html> (stating nearly eighty percent of fan fiction writers on a popular fan fiction website self-identify as women); Sarah Gerina Carpenter, *Narratives of a Fall: Star Wars Fan Fiction Writers Interpret Anakin Skywalker's Story*, at 57 (Sept. 2011) (unpublished M.A. thesis, University of Oregon), available at <https://scholarsbank.uoregon.edu/xmlui/handle/1794/11989> (“Further, gender does have particular relevance for a study of fan fiction, inasmuch as fan fiction communities are decidedly feminine spaces.”).

2. ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* 181 (1994).

3. *Id.*

acknowledge the unique interpretations and originality inherent in all works of fan fiction, and allow the fair use doctrine to treat female writers of non-commercial fan fiction fairly.

I. THE WORLD OF FAN FICTION AND FANDOM

A. *The Basics*

Fan fiction or fanfiction (commonly abbreviated as fanfic or fic) refers to stories produced by fans, whether authorized or unauthorized by the current right-holder in the source work, based on worlds, plot lines, and characters⁴ from either a single source work or else a “canon”⁵ of works. Some scholars suggest alternative definitions, including Rebecca Tushnet, who provides one of the most commonly cited definitions of fan fiction: “any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”⁶ It is important to note that source works are not limited to texts.⁷ Some writers produce fan fiction for profit, creating “profic”⁸ like *Wide Sargasso Sea*, *Wicked*, *Once Upon a Time*, and *Fifty Shades of Grey*.⁹

4. See, e.g., Bronwen Thomas, *What Is Fanfiction and Why Are People Saying Such Nice Things About It?*, 3 STORYWORLDS 1, 1 (2011); Rachel L. Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191, 193 (2010).

5. “Canon” includes a source or sources considered authoritative by the fannish community. See *Canon*, FANLORE, <http://fanlore.org/wiki/Canon> (last visited Mar. 30, 2014). Canon is “what fans agree ‘actually’ happened in a film, television show, novel, comic book,” or other source material. *Id.* “The term derives from the theological concept of canon, the foundational texts of a religion. Specific sources considered canon may vary even with a specific fandom.” *Id.* A fandom “may embrace one work by an author and reject a closely related work as ‘not canon.’ An author’s works may be considered canon, while statements by the author are often considered to be merely opinion.” *Id.* The Sherlock Holmes fandom first used the word “canon” in its fannish sense in 1911. *Id.*

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

7. *Id.*

8. See *Profic*, FANLORE, <http://fanlore.org/wiki/Profic> (last visited Mar. 30, 2014) (explaining that pro-fic, or profic, is “professionally published fiction,” produced for profit).

9. See Sara Paretsky, *‘Sargasso’ Re-Imagines the Madwoman of ‘Jane Eyre,’* NAT’L PUB. RADIO (Sept. 10, 2009, 12:33 AM), <http://www.npr.org/templates/story/story.php?storyId=112644399>; *Wicked Author Gregory Maguire is Headed Out of Oz*, WIRED (Feb. 20, 2013, 9:00 AM), <http://www.wired.com/underwire/2013/02/geeks-guide-gregory-maguire/>; Maureen Ryan, *Review: ‘Once Upon a Time’s’ Admirable Attempt to Bring Magic to Primetime*, HUFFINGTON POST (Oct. 21, 2011, 2:45 PM), <http://www.aol.com/2011/10/21/review-once-upon-a-time/>; Zoe Triska, *‘Fifty Shades of Grey’: Here to Stay?*, HUFFINGTON POST (Nov. 2, 2012, 4:41 PM), http://www.huffingtonpost.com/2012/11/02/fifty-shades-of-grey_n_2066553.html.

Profic can take the form of books, television shows, or movies.¹⁰ This Note, however, focuses exclusively on amateur fan fiction written by women, not produced for profit, and usually published on the Internet.

Fan fiction exists within the framework of fandom. Fanlore.org, “a collaborative site by, for, and about fans and fan communities that create and consume fanworks” and a project of the Organization for Transformative Works,¹¹ defines fandom as “a community of people with similar interests, participating in [fan activities] and interacting in some way, whether through discussions or creative works. The interaction may be face-to-face at gatherings such as conventions, or written communication, either off- or on-line.”¹² Fandom consists of all fan interactions, forums, fanart,¹³ and fan fiction on the Internet. The word may also be used to describe any particular subset of fandom according to its source material. For example, fans that consume and create fan works about Harry Potter belong to the Harry Potter fandom. Sizes of fandoms vary, but if a source work exists, a corresponding fandom most likely exists as well.

B. Varieties of Fan Fiction

Fan fiction comes in endless varieties.¹⁴ Writers publish stories on fan fiction archives or social networking sites,¹⁵ occasionally as parts of challenges or fests,¹⁶ with varying word counts.

In sorting fan fiction, fandom first classifies stories according to its source material. Then, fandom may sort stories by genre, such as romance or drama, but most often classifies them by types of

10. Other examples of popular profic include *Frasier*, *Sherlock*, and *The Avengers* movie franchise. See *The Frasier Online Guide to 'Frasier': History*, FRASIER ONLINE, <http://www.frasieronline.co.uk/abouttheshow/history.htm> (last visited Mar. 30, 2014); *About Sherlock*, BBC ONE, <http://www.bbc.co.uk/programmes/b018ttws/features/about> (last visited Mar. 30, 2014); *Sony and Market Studios Set New Release Dates!*, SUPERHEROHYPE (Mar. 12, 2009), <http://www.superherohype.com/features/articles/98427-sony-and-marvel-studios-set-new-release-dates>.

11. Fanlore, <http://fanlore.org> (last visited Mar. 30, 2014).

12. *Fandom*, FANLORE, <http://fanlore.org/wiki/Fandom> (last visited Mar. 30, 2014).

13. See *Fanart*, FANLORE, <http://fanlore.org/wiki/Fanart> (last visited Mar. 30, 2014) (defining fanart as “any amateur art for a specific TV show, movie, book, or other media event not owned or created by the artist”).

14. This Note will cover fan fiction in a general sense; it cannot possibly address trends related to every variety, genre, or mode.

15. Such as LiveJournal, fan fiction archives, or Tumblr.

16. *Challenge*, FANLORE, <http://fanlore.org/wiki/Challenge> (last visited Mar. 30, 2014) (defining challenge as “an organized activity in which participants agree to produce fanac[tivity] or fanworks according to some pre-determined criteria”); *Fest*, FANLORE, <http://fanlore.org/wiki/Fest> (last visited Mar. 30, 2014) (defining fest as a “challenge in which participants provide prompts (generally for fanfic) and then choose a prompt from a list compiled by the fest moderators”).

character pairings. Het stories focus on romantic heterosexual relationships (or ships)¹⁷ or a mere male/female encounter that may or may not exist in canon.¹⁸ Slash—a common subject of criticism, research, and scholarly debate—refers to stories that romantically or sexually pair characters of the same sex or gender.¹⁹ Its name originates from the punctuation mark used to divide the names of characters (e.g., Kirk/Spock, Holmes/Watson).²⁰ Slash refers specifically to male/male pairings, while fans use femslash to refer to female/female relationships.²¹ Stories containing no romantic or sexual content, including fics without ships or ones based on platonic friendships, are classified as gen.²²

Fandom also classifies stories according to particular themes, such as apocafic,²³ or narrative functions. Gap-filling stories, for instance, portray action never shown between television episodes or scenes; such stories may or may not jibe with canon. Other stories provide backstory, or “plot and character details . . . that occurred before the main timeline of the [source] work.”²⁴ These stories can shift the perspective from which fans enjoy familiar events or characters.²⁵

C. History of Fan Fiction

Fandom’s exact origins are unknown. Forerunners, however, include oral and mythic traditions of collective interpretation, such as Jewish midrash.²⁶ Contemporary fandom dates to the 1920s and

17. Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 391 (2009) (explaining that “shipping” refers to a “devotion to a particular canon or non-canonical romantic relationship”).

18. *Het*, FANLORE, <http://fanlore.org/wiki/Het> (last visited Mar. 30, 2014) (noting that, to be classified as “het” the relationship need not be explicit, but may be hinted at or subtle, and that these fics often contain romantic or sexually explicit content, ranging from hand-holding to graphic sex).

19. For further discussion on the history and controversy surrounding slash fan fiction, see *Slash*, FANLORE, <http://fanlore.org/wiki/Slash> (last visited Mar.30, 2014).

20. Schwabach, *supra* note 17, at 390–91.

21. *Femslash*, FANLORE, <http://fanlore.org/wiki/Femslash> (last visited Mar. 30, 2014) (noting that the name is derived from “female slash”).

22. *Gen*, FANLORE, <http://fanlore.org/wiki/Gen> (last visited Mar. 30, 2014).

23. *Apocafic*, FANLORE, <http://fanlore.org/wiki/Apocafic> (last visited Mar. 30, 2014) (“A portmanteau of ‘apocalypse fic,’ apocafic is fiction set during or after some sort of apocalypse, or the end of the world. Some canons carry a built-in apocalypse against which protagonists are fighting: in apocafic, they lose. For example, apocafic in *Stargate* and *X-Files* is usually set after the alien occupation; *Supernatural* apocafic is set on a demon-controlled Earth.”).

24. *Backstory*, FANLORE, <http://fanlore.org/wiki/Backstory> (last visited Mar. 30, 2014) (explaining that backstory is often invented by fans to explore minor characters, or to investigate the possibilities of the past, or simply to flesh out plots or characterizations).

25. Thomas, *supra* note 4, at 13.

26. *Id.* at 1.

1930s, when fans connected through “fanzines”²⁷ and face-to-face encounters.²⁸ For approximately the next fifty years, fandom remained an underground and marginalized activity,²⁹ despite its popular explosion with *Star Trek*’s second season in 1967.³⁰

The advent of the Internet punted fandom communities into the digital world. As the most important advancement for fandom,³¹ the Internet eliminated obstacles to widespread networking. Modest financial resources and geographical distances no longer burdened fans, who suddenly enjoyed regular, nearly limitless interaction,³² locating like-minded fans more easily than ever before.³³ After entering the blogosphere in the early 2000s, fandom soon cultivated a significant presence on websites like LiveJournal, a journal-based global networking community.³⁴

Now online archives offer free storage space for and provide easy access³⁵ to thousands upon thousands of fanworks.³⁶ Some of the most popular archives and sites include: Fanfiction.net, LiveJournal, Dreamwidth, Archive of Our Own, and Tumblr.³⁷

D. Women: Queens of Fandom

Women rule fandom.³⁸ They comprise nearly all writers of non-profit, Internet-published fan fiction. These women represent many

27. *Id.*

28. See, e.g., Nicola Santilli, *Online Publishing: (Anime) Fan Fiction and Identity*, 3 J. DIGITAL RES. & PUBL’G 40, 42 (2010).

29. See, e.g., Thomas, *supra* note 4, at 2.

30. Stroude, *supra* note 4, at 193.

31. See, e.g., Santilli, *supra* note 28, at 42.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Fanfiction.net, for example, hosts approximately 670,000 *Harry Potter* works, 50,500 *Lord of the Rings* works, 58,200 *Doctor Who* works, 89,800 *Supernatural* works, and 4,800 *West Wing* works alone. See *TV Shows*, FANFICTION, <https://www.fanfiction.net/tv> (last visited Mar. 30, 2014); *Books*, FANFICTION, <https://www.fanfiction.net/book/> (last visited Mar. 30, 2014). Archiveofourown.org, a smaller, more restricted membership site, hosts over 611,000 stories written by 133,900 members. ARCHIVE OF OUR OWN, <http://archiveofourown.org/> (last visited Mar. 30, 2014).

37. One cannot obtain a number for fan fiction works on all of these sites, especially LiveJournal and Tumblr, where works may be posted under a “locked” privacy status for controlled access. Fans use all of these platforms, however, to share fan fiction and participate in other fan activities, and each forum possesses its own unique atmosphere and attracts users with varying levels of fandom capital and experience, with many newer fans gravitating toward fanfiction.net.

38. See Carpenter, *supra* note 1, at 57 (sharing the author’s personal encounters of only female fan fiction writers on LiveJournal during her time in fandom, an experience I share during regular participation in fan communities on the same platform); see also

racess, nationalities, classes, and sexual orientations.³⁹ They function as consumers and creators, reading and writing material that reflects female experiences not often portrayed or addressed in mainstream media.⁴⁰ Like authors in general, they write for many reasons, but the following Part examines those most commonly mentioned by fans themselves and studied in academic literature.

II. A TALE OF ONE'S OWN: THE ROLE OF FAN FICTION AMONG ONLINE WOMEN WRITERS

A. *The Why: Rationales for Writing Fan Fiction*

Motivations for creating fan fiction vary as widely as the personalities of its writers, but few, if any, fans write with a desire to profit.⁴¹ Fanlore.org's fan fiction article notes that some writers create fan fiction to make themselves or their "fan friends" happy or improve their writing skills.⁴² Other fans write fan fiction to explore personal interests or feel a sense of belonging to a community. Still others write to respond to society, critiquing conventions or addressing important issues they view as under-represented in popular culture. Although this Note mentions several of these rationales, it will focus on one: fan fiction as a critique of social convention and normative life.

1. Personal Interest, Alternative Forums of Expression, and Belonging

Inspiration to write fan fiction usually stems from a genuine interest in the source material. What happens next? Why is a character the way she is? Who does he love? What was his childhood like? In their search for answers, some fans consult cast interviews or fan sites, both official and unofficial, and often stumble across fan fiction. Initially discovering it by accident, fans find it easy to share ideas or express passion for a particular fictional universe when they arrive in fandom.⁴³ Due to its interactive nature, fandom encourages discussion

Sendlor, *supra* note 1 (stating nearly eighty percent of fan fiction writers on a popular fan fiction website self-identify as women).

39. Fandom participants are, of course, limited by Internet access. Many low-income women, for whom accessing the Internet is difficult or impossible, do not regularly participate in fandom. Fandom, however, remains a diverse community. For further discussion, see Schwabach, *supra* note 17, at 392.

40. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 541 (2009) [hereinafter Tushnet, *Economies of Desire*].

41. See, e.g., Stroude, *supra* note 4, at 206.

42. See *Fanfiction*, FANLORE, <http://fanlore.org/wiki/Fanfiction> (last visited Mar. 30, 2014).

43. See Thomas, *supra* note 4, at 1; Stroude, *supra* note 4, at 193.

about interpretations of fan fiction and its source material.⁴⁴ Writing fan fiction, then, becomes a new, creative, and challenging vehicle for discussion and interaction.⁴⁵

Some women, in addition to harboring an interest in particular source materials, become dissatisfied with conventional avenues of expression.⁴⁶ They actively seek fandom communities as alternative forums. As members of fandom, fans can freely engage in alternative interpretation and discourse. They can critique conventional forms of consumer culture with other community members, and discuss sexuality, gender, and forced conformity.⁴⁷ The derivative medium suits this kind of interaction, since fan fiction draws from popular culture in ways that large communities can relate to and enjoy.⁴⁸ This group participation allows individuals a chance to connect through common “cultural and social ties” involved in fandom interactions,⁴⁹ to find others who are like-minded, and, together, to contribute to popular culture in ways that appeal to them.⁵⁰

Unsurprisingly, fandom communities appeal to women a great deal; by sharing their viewpoints through fan fiction, women spare themselves exposure to the biased and discriminatory world of male-centered mass media.⁵¹ For example, a 2003 study revealed that, of the 250 top grossing films of 2002, “more than one out of five films released in 2002 employed no women directors, executive producers, producers, writers, cinematographers, or editors.”⁵² These films also feature few female characters and, “of the clearly identifiable protagonists, [seventy-seven percent] were male and [sixteen percent] were female.”⁵³ When women are offered major roles, they play romantic interests or “women-in-peril.”⁵⁴ Women are similarly under-represented in the art, theatre, and fashion industries, creating a vacuum difficult for many women to overlook.⁵⁵

44. Carpenter, *supra* note 1, at 2.

45. *Id.*

46. Emily Chaloner, Comment, *A Story of Her Own: A Feminist Critique of Copyright Law*, 6 I/S J.L. & POL'Y FOR INFO. SOC'Y 221, 232–33 (2010).

47. Santilli, *supra* note 28, at 41.

48. Tushnet, *Legal Fictions*, *supra* note 6, at 658.

49. Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1560 (2005).

50. Mollie E. Nolan, Comment, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533, 568 (2006).

51. Chaloner, *supra* note 46, at 237.

52. *Id.* at 233.

53. *Id.*

54. *Id.* at 233–34.

55. In the art world, the Guerrilla Girls, a group of women disguised in gorilla masks, have tried to expose sexism within the industry. They have drawn attention through their

In contrast to the mainstream media, fandom provides not only a creative outlet off the traditional beaten path, but also a place of social acceptance.⁵⁶ Fans engage in many kinds of social networking and community building; nearly all platforms that host and cultivate fandom communities exist first as broad social networking communities.⁵⁷ For many fans who have not received financial or cultural rewards in general society, agreement with or praise from other fans carries significant weight and meaning.⁵⁸ In these fan communities, women offer one another needed protection and emotional support, carefully welcoming new members but genuinely looking out for one another.⁵⁹

As members of fandom, fan fiction writers “make friends” with readers, betas,⁶⁰ and other writers. They encourage each other’s wish fulfillment, sympathizing with one another’s frustration over producers’ inability to tell the stories they identify with or want to see.⁶¹ Fan fiction writers often trade stories as birthday or holiday presents, take requests, and develop “plot bunnies” with other writers.⁶² These connections often lead to in-person meet ups, “real life” friendships, or other interactions outside of fandom activities, building a very real community of diverse, expressive women.⁶³

2. Critique of Social Conventions and Normative Life

In addition to providing a community in which to express ideas and explore personal interests, fan fiction offers a voice for women

campaign, “Do Women Have to be Naked to get into U.S. Museums?”. See Chaloner, *supra* note 46, at 235. They state that “less than [three percent] of the artists in the [Metropolitan] Museum are women, but [eighty-three percent] of the nudes are female.” *Id.* They have also publicized that the Los Angeles County Museum of Art added a new modern art wing that featured the work of thirty artists, eighty-seven percent of whom were male. *Id.* Similarly, in the theatre industry, women are treated differently than men, experiencing severe difficulties in getting their work produced. To illustrate, of the fifty plays being mounted in New York by living playwrights, forty were written by men, yet much of the work presented at film festivals is done by women. *Id.* at 234–35.

56. See *id.* at 236–37.

57. See, e.g., Thomas, *supra* note 4, at 6.

58. Santilli, *supra* note 28, at 41.

59. Thomas, *supra* note 4, at 19.

60. *Beta*, FANLORE, <http://fanlore.org/wiki/Beta> (last visited Mar. 30, 2014) (defining a “beta” or “beta reader” as “someone who looks over a story before the author posts it publicly, checking it for some combination of spelling, grammar, cohesiveness, flow, plot holes, characterization, etc.”).

61. Santilli, *supra* note 28, at 42.

62. *Bunny*, FANLORE, http://fanlore.org/wiki/Plot_Bunny (last visited Mar. 30, 2014) (describing a plot bunny, or simply “bunny,” as a story idea that has popped into a fanfic author’s head).

63. Based on personal experiences in fandom on the LiveJournal platform for more than ten years (from 2003 to the present).

and other marginalized groups.⁶⁴ Fans use existing worlds and characters to express interests, concerns, and issues within their own lives.⁶⁵ These issues often extend beyond those raised in the source material and sometimes focus on highly personal or controversial themes such as pregnancy, abortion, suicide, homosexuality, or transgender lifestyles.⁶⁶ With these themes, fan fiction operates as a “springboard for commenting on society, allowing writers to explore the world in sometimes subversive ways.”⁶⁷

Fan fiction also allows women writers to respond to media representations of gender⁶⁸ and provides an outlet to subvert male-centered mass media.⁶⁹ Female writers often perceive mainstream culture and its media as primarily masculine.⁷⁰ Official productions of mainstream media often use exceptionally “beautiful” actresses in TV shows or movies, and still portray women, sex, and power with a conservative and patriarchal gloss.⁷¹ Women appear in a sexist and unrealistic fashion, their airbrushed bodies objectified to sell products, whether consumer products or the media itself.⁷² Male-produced commercial media also tends to depict varying versions of an ideal, good, or beautiful woman, commenting on behavior as appealing or not.⁷³

As a result of dominant patriarchal and cultural media discourses, many women often feel bad about themselves, feeling as though they cannot measure up to what they may perceive as society’s norms or expectations.⁷⁴ Some young women even experience identity crises during and beyond adolescence due to popular images of a female ideal.⁷⁵ In general, women are more likely than men to feel that their lives and concerns are not being addressed in mass culture⁷⁶ and to

64. Thomas, *supra* note 4, at 7.

65. See, e.g., Santilli, *supra* note 28, at 44.

66. See *id.*

67. Stendell, *supra* note 49, at 1560–61.

68. See Tisha Turk, “Your Own Imagination”: *Vidding and Vidwatching as Collaborative Interpretation*, 5 *FILM & FILM CULTURE* 88, 90 (2010), available at http://digitalcommons.morris.umn.edu/cgi/viewcontent.cgi?article=1001&context=eng_facpubs. Despite this Note’s focus on vidding, the assertions apply to fan fiction writing; both are popular fan activities that involve the same processes of interpretation of a source material and subsequent expression of those interpretations.

69. See Chaloner, *supra* note 46, at 221.

70. See Carpenter, *supra* note 1, at 43–44.

71. See *id.* at 49.

72. See Chaloner, *supra* note 46, at 239.

73. Michael P. Levine & Sarah K. Murnen, “Everybody Knows That Mass Media Are/ Are Not [Pick One] a Cause of Eating Disorders”: A Critical Review of Evidence for a Causal Link Between Media, Negative Body Image, and Disordered Eating in Females, 28 *J. SOC. & CLINICAL PSYCHOL.* 9, 14–16 (2009).

74. See Chaloner, *supra* note 46, at 239.

75. See Santilli, *supra* note 28, at 40.

76. See Turk, *supra* note 68, at 90–91.

seek alternative discourses⁷⁷ in which they can explore their own ideas of sexuality and gender. Fan fiction provides them with the means to react with a personal but creative critique and engage in the meaningful discussion they seek.⁷⁸

Slash fan fiction, for example, allows women to explore gender issues, deconstructing traditional gender roles or constructing non-traditional ones.⁷⁹ It may serve as a critique of normative social narratives or express unhappiness with the way particular stories are told.⁸⁰ Even when dealing with traditional or heteronormative portrayals, women will derive their own meanings from source materials, often contrary to mainstream values, and create the stories they wish existed in popular texts, film, and television.⁸¹ By publishing their fan fiction, women validate their critiques and ideas of sexuality, gender roles, and power.⁸²

B. The How: The Processes of Consumption, Interpretation, and Creation

Not only do women set out to critique mainstream society and values, but they succeed; their fan fiction often functions like academic literary criticism and arises through a similar process.⁸³ Copyright law, however, fails to acknowledge this function,⁸⁴ reflecting a deep misunderstanding of the writing process, both creative and academic, and the originality that emerges with each new work. The process of creation happens in a messy, muddled fashion, but this Note deconstructs the identifiable phases to provide a clearer understanding of the process. First, I will discuss consumption and interpretation. Second, I will discuss the process of creation, paying special attention to how unique individuals yield unique interpretations and, in turn, unique expressions.

1. Consumption and Interpretation

When artists make their works publicly available, the public inevitably consumes and interprets these works.⁸⁵ During the

77. Santilli, *supra* note 28, at 40.

78. See Chaloner, *supra* note 46, at 239.

79. *Id.* at 247. Most writers of slash are women. Schwabach, *supra* note 17, at 390.

80. See Chaloner, *supra* note 46, at 247.

81. See Turk, *supra* note 68, at 90–91.

82. See Carpenter, *supra* note 1, at 49 (elaborating on the relationship between mainstream media and the “folklore” culture of fandom communities).

83. *Id.* at 20.

84. See *infra* Part III.

85. Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 293 (2007) [hereinafter Tushnet, *My Fair Ladies*].

consumption stage—reading a written work, viewing a visual work, etc.—each consumer will invest new meaning in the work conjured up by the author, creating multiple meanings due to the unique individuality of every consumer-interpreter.⁸⁶

Roland Barthes's theory of literary interpretation suggests that an artist cannot circumscribe a given work's specific and exclusive meanings through either history or intention.⁸⁷ Once a final work reaches consumers, the work is out of the author's hands, and the author loses control over its interpretation.⁸⁸ A complementary theory, Lawrence Lessig's Read/Write (RW) culture theory, explains how media consumers generate interpretation and meaning.⁸⁹ The RW culture produces an "amateur culture"⁹⁰ that creates and re-creates the culture around them, effectively adding to it.⁹¹ These theories underlie "the fannish undertaking of interpretation that makes possible fan fiction's exploration of possibilities beyond the source material."⁹²

Readers and writers of fan fiction do not passively consume source texts and materials; they actively interpret, critique, and subvert the variable meanings encoded in those works.⁹³ Each fan fiction writer interprets the original works differently based on individual personality, experiences, and biases.⁹⁴ Sometimes the fandom community's knowledge of the source work or other literary or cultural media informs individual interpretations.⁹⁵ Interpretations may be formed individually or collaboratively.⁹⁶ The interpretative process functions as the central fan activity,⁹⁷ reinforcing fandom's sense of community. The source works become a part of fans' consciousness, like any piece of information consumed in daily life,⁹⁸ and create an individual body of interpretation.

86. Stroude, *supra* note 4, at 192.

87. Carpenter, *supra* note 1, at 4.

88. Stroude, *supra* note 4, at 196.

89. See Chaloner, *supra* note 46, at 224–25 (contrasting Lessig's Read/Write theory of culture with the Read/Only theory, in which consumers passively interact with media and culture).

90. "Amateur culture" refers to "a type of creative activity where people are trying to create for personal satisfaction rather than for profit." Chaloner, *supra* note 46, at 230. It is "more participatory than cultures of the past because the audience engages with already existing artistic creations." *Id.*

91. *Id.* at 225.

92. Carpenter, *supra* note 1, at 4.

93. See Turk, *supra* note 68, at 88.

94. Carpenter, *supra* note 1, at 18.

95. *Id.* at 19 (noting that the references a particular reader or writer weaves into her own interpretations will often later be used in the writing process in order to resonate with readers).

96. See *id.* at 32 (explaining the formation of a fan's head!canon).

97. See Turk, *supra* note 68, at 89–90.

98. See Tushnet, *My Fair Ladies*, *supra* note 85, at 293.

The body of interpretation of a given fan is referred to in fandom as “head!canon.”⁹⁹ Head!canon complements the source material to provide an internally consistent narrative from the source’s often conflicted chronology or characterization.¹⁰⁰ Building head!canon and composing fan fiction overlap; they are “mutually constitutive productions of meaning.”¹⁰¹ The consumption of any source work, then, involves individualized interpretation, and each creation as a result of these interpretations is just as individualized, just as unique, and just as original.

2. *The Writing Process and Creative Critique*

Accepting that each fan fiction reader (and writer) assigns a unique interpretation to source material, it follows that creations that result from those interpretations are just as unique, if not more. Every work of fan fiction adds new elements to its source material, reflecting the author’s identity and insights.¹⁰² That is, each new work of fan fiction contains the author’s personal interpretation of the source material, transforming characters and settings or pursuing an alternative course of events in the source’s plot.¹⁰³

Armed with their personal interpretations of source material—their head!canons—writers make “the textual territory their own” and create fan fiction.¹⁰⁴ Fan fiction is essentially a “manifestation[] of the head!canon.”¹⁰⁵

These manifestations simultaneously encompass both borrowed material and original expression. Every book in literature, science, and art borrows and uses—to varying degrees—what was well known and used before.¹⁰⁶ Like any other writer, each fan fiction writer composes through a unique filter of experiences, beliefs, and feelings. Due to this veneer, each portrayal of or departure from source characters, settings, and plots become individualized because of that filter. When a writer creates fan fiction she marks the borrowed material with an original signature that cannot be forged, transforming the source material into a unique expression.

99. Carpenter, *supra* note 1, at 13–14.

100. *See id.* (explaining that head!canon as a tool is even more useful for series created by multiple writers, like television series or movie franchise, which tend to have more continuity problems than a single work by a single creator, or even a single series created by a single author).

101. *Id.* at 23.

102. Stroude, *supra* note 4, at 196.

103. *Id.*

104. Carpenter, *supra* note 1, at 19.

105. *Id.* at 22.

106. Stroude, *supra* note 4, at 212.

Fan fiction, as a final product, not only constitutes an original expression, but also a female critique or critical interpretation of source material.¹⁰⁷ Functionally, fan fiction writers “[achieve] through narrative an effect of critique similar to that in which literary scholars engage.”¹⁰⁸

As in academic circles, fan fiction authors express their interpretations through stories without seeking a consensus from others in fandom or the creator of the source work.¹⁰⁹ Like literary critics and scholars,¹¹⁰ fan fiction writers express their own “idiosyncratic interpretations”¹¹¹ that are both internally consistent and reasonably argued.¹¹² Unlike critics and scholars, fan fiction writers argue and present interpretations creatively—with prose, sometimes even haiku—making each work both critical and creative.¹¹³

Fan fiction writers’ expressive methods, however, should not preclude the validity of their interpretations.¹¹⁴ Rather, their creative methods lend legitimacy to the writer’s position because, unlike academic writers, fan fiction authors present their interpretations in the same medium as the original source: written fiction.¹¹⁵ A fan fiction author’s choice to use a parallel medium makes interpretations more accessible and clear, since consumers of those secondary works need not translate from one medium to another to understand the message of the secondary creator.

Fan fiction writers may not cite to renowned authors or scholars, but they do include “footnotes” or give due credit to the creators or copyright holders of the source material. Instead of traditional footnotes, fan fiction writers use “disclaimers” to credit the owners of source material.¹¹⁶ The use of these disclaimers suggests that fan fiction writers deliberately separate their works from their sources and acknowledge its similar yet transformative qualities, much like academic scholars.

107. See Turk, *supra* note 68, at 88–89.

108. Carpenter, *supra* note 1, at 72.

109. *Id.* at 5.

110. *Id.* at 20 (arguing that fan fiction functions like literary criticism, in that the narratives are interpretations of scenes and characters within a particular canon).

111. *Id.* at 5.

112. *Id.*

113. See *id.* at 7.

114. See Carpenter, *supra* note 1, at 5.

115. See Turk, *supra* note 68, at 88–89 (quoting and expanding on the idea of Francesca Coppa, which asserts that vidding—the process by which fans create a fan video, or vid, based on source films or television shows and other music to express an interpretative message—“stages an argument, but, unlike academic essays or written reviews, vids allow their creators—called vidders—to present arguments in the same medium as the original source”).

116. Stendell, *supra* note 49, at 1571.

While literary and media scholars produce work that the public and academic communities respect as legitimate, these scholars do not possess an exclusive right to express critical interpretations of media materials.¹¹⁷ In academia, scholars would use their unique interpretations to write essays or academic articles about source materials. These works of literary or media criticism analyze every conceivable aspect of source materials, exploring characters, plot, symbolism, history, cultural implications, and other devices on which fan fiction authors comment. Scholars similarly criticize source materials or offer commentary from their own perspectives, analyzing a source work, for example, through a feminist lens. Fan fiction performs an identical function in a different form, offering interpretations of source material, based on an author's unique perspectives and views.

Like scholarly articles, fan fiction presents a unique commentary on external, borrowed materials. Literary criticism that analyzes the adolescent growing pains of Harry Potter from a psychological perspective carries no more legitimacy than fan fiction that addresses the same issue. To claim otherwise, as copyright law does, only proves a misunderstanding of individual consumption, interpretation, and expression.

III. COPYRIGHT LAW AND THE FAIR USE DOCTRINE

A. Authors' Moral Rights

An author's moral rights usually involve a perceived right to maintain the integrity of an original creation.¹¹⁸ Producers of original works often feel tied to their creations in personal ways. Moral rights derive from this connection, rather than any concern for possible economic harms that may result from fan fiction or other derivative works.¹¹⁹ Copyright law, in the United States, refuses to directly recognize an author's moral right.¹²⁰ Moral rights, however, play a role in the drama of copyright infringement law and deserve discussion.

An author generally appeals to moral rights when objecting to the way fan fiction uses or depicts source material.¹²¹ A fan work may portray the source material in an "unrealistic" way, for example.¹²² Additionally, many authors feel that their moral rights are tied to

117. Carpenter, *supra* note 1, at 72 (comparing fan fiction authors and literary scholars).

118. Nolan, *supra* note 50, at 536.

119. Schwabach, *supra* note 17, at 406–07.

120. *Id.* at 402.

121. *Id.*

122. *Id.*

their incentive to produce new creative works. If authors feel like their creations are not safe, if their characters will be “ruined,” then they are less incentivized to create more. These objections and perceived incentives may lead an author to pursue legal recourse against a fan fiction writer, making the appeal to moral rights relevant to fan fiction writers.

Authors of source material will likely have more success appealing to the moral rights inherent in copyright policy, claiming that fan fiction erases incentives to create. People, however, are “pattern-finding and story-telling animals. It’s what [they] do.”¹²³ They do not need an economic incentive. They will create because they want to bring something into the world, to express criticism, or simply express themselves. Once that story-telling begins, it generally continues because creation is simply addictive.¹²⁴ Even without legal protection, many people will create works due to the intrinsic, reputational, and other non-copyright rewards for creativity.¹²⁵ The creation and proliferation of fan fiction likely fails to discourage copyright holders from creating new works, “which is the rationale behind copyright law.”¹²⁶

The moral argument that authors give not only runs counter to the presumption that creation need not be incentivized, but also to the idea that the “original” will always be preserved. Nobody can “kill” the original; “characters, unlike real people, are unkillable.”¹²⁷

Fan fiction authors borrow characters, and change them and their sexualities, potentially “damaging” them in the eyes of the authors. Judge Kozinski defended the right of companies and authors to control their characters, insisting that by allowing writers other than the original creators to portray a given character, “they will become different characters . . . Batman and Superman . . . have changed: they’re not the same Batman and Superman I was reading about in 1964. I’m kind of sorry, because I liked the old Batman . . .”¹²⁸

Judge Kozinski, however, has nothing to worry about. The “old Batman” still exists, ready for his consumption. Other Batmans happen to exist, too. These different Batmans fight different villains, address different issues, and appeal to different consumers, but the “old Batman” lives on in his original expression.

Regardless of what fan fiction authors do to the initial conceptualizations of these characters, the characters in the source material will always stay as they are; that expression will remain intact and

123. Tushnet, *Economies of Desire*, *supra* note 40, at 534.

124. *Id.* at 535.

125. Tushnet, *My Fair Ladies*, *supra* note 85, at 303.

126. Stendell, *supra* note 49, at 1561.

127. Tushnet, *Economies of Desire*, *supra* note 40, at 530.

128. Tushnet, *Legal Fictions*, *supra* note 6, at 675.

untouched. One scholar pointed out that “multiplication of copies and performances made clear that no one appearance of a character necessarily competed with or altered another.”¹²⁹ This explains why audiences can watch, enjoy, and differentiate between different portrayals of James Bond or Sherlock Holmes.¹³⁰ Each manifestation of a character lives on safely and distinctly in the minds of consumers. Writers can create different versions of stories and characters without contradictions, only variations.¹³¹ This notion directly rebuts not only the idea of an author’s moral rights, but also the ownership-focused, incentive-based theories underlying copyright law today.¹³²

B. Copyright and Infringement

Most fandoms produce work for source material that is still protected by copyright.¹³³ Copyright law¹³⁴ protects “original works of authorship fixed in any tangible medium of expression,” including the literary, dramatic, graphic, and audiovisual works from which many fan works draw inspiration.¹³⁵ Copyright protects the original expression—the source material, be it text, film, etc.—and may protect specific characters.¹³⁶ Copyright does not protect characters not “sufficiently developed,” the meaning of which is unclear.¹³⁷ The two primary tests to determine whether copyright protects characters turn on the “distinctiveness” of the character at issue and how central the character is to the “story being told.”¹³⁸ These tests depend on a high level of subjective assessment and individual understanding of what makes a character “especially distinctive.” Phrased another way, judges seek a particular level of originality. Without knowledge of the creative process, judges lack an important tool to evaluate originality and must rely on their own definitions when applying these tests. Despite this shortcoming, most authorities agree that characters can be protected under copyright.¹³⁹

129. Tushnet, *Economies of Desire*, *supra* note 40, at 531.

130. *Id.* at 530–31.

131. *Id.* at 531.

132. *Id.* at 536.

133. Schwabach, *supra* note 17, at 396 (noting that some fan works raise no copyright concerns because the source work is in the public domain, the copyright having expired; however, this is seldom the case).

134. For a thorough history of copyright law dating back to the birth of the United States, see Chaloner, *supra* note 46, at 227–28.

135. Schwabach, *supra* note 17, at 395.

136. *Id.* at 397.

137. *Id.* at 418.

138. For the “especially distinctive” test, see *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d. Cir. 1930), and, for the “central to the story” test, see *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

139. Tushnet, *Legal Fictions*, *supra* note 6, at 659.

Under section 106 of the Copyright Act, authors of copyrighted works have the exclusive right to do and to authorize (1) the reproduction of the copyrighted work and (2) the preparation of derivative works based upon the copyrighted work.¹⁴⁰ Derivative works are “works based upon one or more preexisting works” and includes “translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁴¹

With regard to rights over derivative works, the copyright holder has sole control over the creation and distribution of derivative works.¹⁴² In theory, this includes all works of fan fiction.¹⁴³ With regard to much fan fiction, an original author (or current copyright holder) has a strong claim that the secondary author has violated the right to prepare derivative works when a fan fiction author creates works based on the copyrighted work.¹⁴⁴

A derivative work infringes when it is “based upon the copyrighted work” and incorporates some of the copyrighted work in some form.¹⁴⁵ A derivative work must also lack “requisite originality.”¹⁴⁶ That is, the work must “substantially copy” the “specific expression of ideas in the original.”¹⁴⁷ A work of fan fiction may anticipate elements of an author’s future works, precluding the author from publishing them.¹⁴⁸

For an author or artist to have a prima facie case for an infringement claim, the copyright holder must “prove that a work of fan fiction infringes on its copyright.”¹⁴⁹ Due to the similarity between most works of fan fiction and their source materials, copyright holders will nearly always have a prima facie case for copyright

140. A copyright holder’s legal rights also include the exclusive rights to distribute, perform the copyrighted work publicly, display the copyrighted work publicly, and perform the copyrighted work, in the case of sound recordings, publicly. 17 U.S.C. § 106 (2000).

141. Stendell, *supra* note 49, at 1553.

142. Schwabach, *supra* note 17, at 398.

143. All fan fiction necessarily derives from a source, making every piece of fan fiction a “derivative work.” However, even though a copyright holder may have the right to control derivative works, whether the holder will seek to enforce this right is another matter. Many authors choose not to exercise this right to its fullest extent, sometimes remaining silent and sometimes only sending cease and desist letters to fan work creators. *See* Schwabach, *supra* note 17, at 398.

144. Stroude, *supra* note 4, at 198.

145. Tushnet, *Legal Fictions*, *supra* note 6, at 660.

146. Stendell, *supra* note 49, at 1553.

147. *Id.* (quoting Harper and Row).

148. *See* Schwabach, *supra* note 17, at 388.

149. Stendell, *supra* note 49, at 1554.

infringement against fan fiction writers who write without the copyright holder's authorization.¹⁵⁰

Like other rights, copyright protection is not absolute.¹⁵¹ Facing copyright infringement, a fan fiction writer may choose to employ the defense of the fair use doctrine. An infringement action will fail if the fan fiction in question is considered fair use.

C. *The Fair Use Doctrine*

"A fan fiction author facing a copyright infringement claim will most likely seek refuge in the fair use doctrine."¹⁵² Fair use operates as a complete defense to copyright infringement.¹⁵³ A work found to be fair use, including use "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research," does not constitute copyright infringement.¹⁵⁴

In weighing four factors, a court utilizes the fair use doctrine to mediate between the competing interests of protected copyrighted material and secondary works by determining the extent of each protection.¹⁵⁵ The four factors of fair use under section 107 of the Copyright Act are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;¹⁵⁶ (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁵⁷

1. *The Courts and Fair Use*

Campbell v. Acuff-Rose Music, Inc.,¹⁵⁸ *Warner Bros. Entm't, Inc. v. RDR Books*,¹⁵⁹ *Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd.*,¹⁶⁰ and *Leibovitz v. Paramount Pictures Corp.*¹⁶¹ are the most useful cases

150. *See id.*

151. *See* Tushnet, *Legal Fictions*, *supra* note 6, at 661.

152. Stroude, *supra* note 4, at 192-93 n.4.

153. *Id.*

154. 17 U.S.C. § 107 (2000).

155. *See* Stroude, *supra* note 4, at 192.

156. The quality of the work is not a factor under this or any other prong of the fair use test. "To include quality as a criterion would inevitably require the courts to make judgments for which they are ill-qualified." Schwabach, *supra* note 17, at 409.

157. 17 U.S.C. § 107 (2000).

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

159. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

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

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

in trying to make sense of a possible fair use case involving participatory fan fiction.¹⁶² The latter three cases, none of which resulted in a finding of fair use, turned primarily on whether the derivative work was “sufficiently transformative.”¹⁶³ *Campbell* established that “transformative use” is favored by law, stating that the “purpose of this investigation is to see . . . whether the new work . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁶⁴

This concept of transformative use has been used as only a gloss in evaluating fair use cases; *Campbell* established that the transformative nature of the work was neither necessary nor sufficient for a fair use ruling.¹⁶⁵ Courts have not consistently interpreted the criteria for “sufficiently transformative.”¹⁶⁶ The *Campbell* definition has been paired with the work’s communication of meaningful social commentary.¹⁶⁷ In *Suntrust Bank v. Houghton Mifflin Co.*, the court ruled that *The Wind Done Gone*, a novel based on *Gone With the Wind*, appropriated a significant portion of the source work’s material, but was sufficiently transformative “for the purpose of commentary.”¹⁶⁸ *The Wind Done Gone* commented on black-white race relations and criticized the romanticization of the American South after the Civil War.¹⁶⁹ While some works of fan fiction comment on important modern issues, such as gender and sexuality, such amateur, informal work may not appear to rise to the level of *The Wind Done Gone*. In comparison, courts may see fan fiction as trivial, meant for a smaller audience. They may ultimately see it as lacking transformative qualities, despite the interpretive, creative process undertaken to create fan fiction.

Overlaying the four-factor test with such a muddled gloss encourages judges to incorporate their own subjective value judgments.

162. For a full discussion of these cases, see Stroude, *supra* note 4, at 199–205. Stroude notes, however, that all of these cases addressed referential fan works rather than participatory fan works, a category that encompasses all creative fan fiction. *Id.* at 207. No court has heard a case concerning a participatory work, as most of those incidents are settled with cease and desist letters or other settlements. *Id.* As no court has decided this type of case, scholars can only guess the outcome based on treatment of referential fan works under the fair use doctrine. *Id.*

163. *Id.* at 205.

164. Tushnet, *Legal Fictions*, *supra* note 6, at 662 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

165. See *Campbell*, 510 U.S. at 579; see also Carpenter, *supra* note 1, at 73.

166. Carpenter, *supra* note 1, at 73 (explaining that “transformative” has been defined as “adding value,” which hardly clarifies the issue).

167. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272 (11th Cir. 2001); Schwabach, *supra* note 17, at 429.

168. *Id.*

169. *Id.*

Additionally, a poor understanding of the true transformative nature of all fan fiction works and the interests of fan fiction writers compounds the entire analysis.

2. *Fair Use: Factor by Factor*

The uncertainty of fair use analysis, coupled with the fact that no court has yet heard a case involving a non-reference derivative work, makes any attempt at legal analysis in the context of participatory fan fiction educated guesswork. Scholars have tried predicting how a court might apply the fair use doctrine. This analysis provides the background necessary for identifying possible inadequacies of the fair use doctrine.¹⁷⁰

a. *The First Factor: Purpose and Character of the Use*

Section 107 of the Copyright Act enumerates a list of purposes that may allow a work to be fair use: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,”¹⁷¹ and courts have recognized that this is an illustrative, not an exhaustive list.¹⁷² This prong “focuses on the extent to which the new work ‘transforms’ the original” or “what it adds in terms of character, expression, meaning, or message.”¹⁷³ To be adequately transformative, a derivative work must add value to the original by creating new information, new aesthetics, new insights, and new understandings.¹⁷⁴ The more a derivative “adds value” to an original, the less important the other fair use factors become.¹⁷⁵

The *Warner Bros.* court suggested ways authors of referential works could avoid copyright infringement claims.¹⁷⁶ In order to do so, derivative works should: serve different purposes than the original work; be consistently transformative by avoiding substantial and excessive verbatim copying of the original author’s work, which infers that the fan fiction author should provide unique commentary, analysis, and criticism of the work as to avoid plot summary; benefit the public; and use no more than necessary of the original work to fulfill its purpose.¹⁷⁷

170. See *infra* Part IV.

171. 17 U.S.C. § 107.

172. See Stroude, *supra* note 4, at 208.

173. Stendell, *supra* note 49, at 1566.

174. *Id.*

175. *Id.*

176. Stroude, *supra* note 4, at 208.

177. See *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008); Stroude, *supra* note 4, at 208.

These suggestions easily convert to a participatory work context, but still provide too little protection for nonprofit, creative fan works.

This factor also addresses whether the derivative work has been written for commercial or noncommercial purposes.¹⁷⁸ The use for non-commercial purposes is relevant but not determinative.¹⁷⁹

Both cultural and legal scholars have made much of fan fiction's similarities to and protection under parody within the "purpose" prong of the fair use doctrine.¹⁸⁰ The Copyright Act lists permissible purposes for derivative works, including "criticism, comment, news reporting, teaching . . . , scholarship, or research."¹⁸¹ Parody's purposes, criticism and comment, directly overlap with the Act's list, making it often "statutorily accepted."¹⁸² Parody uses elements of an original work to comment on or criticize that original work.¹⁸³ A parody must mimic the original work in order to fulfill its function, which entitles creators of parody a claim to use portions of the original or borrow from the original work.¹⁸⁴ Satire, related to parody, can stand alone and has no need to mimic the original, so it must provide justification for borrowing from a source.¹⁸⁵

However, parodies may only use enough of the original work to "conjure up" the original work. Any further use must help the parody achieve its specific purpose.¹⁸⁶ A parody may not copy substantially more than it requires.¹⁸⁷

Fan fiction and works that qualify as "parody" under the fair use doctrine both borrow from original works to fulfill their respective purposes.¹⁸⁸ Like parody, fan fiction must also use enough of the

178. This may also have an effect on whether an original author will bring an infringement action in the first place. Some authors rarely bother with noncommercial works. J.K. Rowling, for instance, and her publishers do not tolerate fan fiction written for profit. She has, however, encouraged nonprofit fan fiction, saying she has read and even enjoyed some of it. See Schwabach, *supra* note 17, at 421.

179. Stendell, *supra* note 49, at 1566.

180. Stroude, *supra* note 4, at 209 (asserting that parody is the most appropriate model to analyze whether a fair use defense would be available to fan fiction).

181. Stendell, *supra* note 49, at 1565 (quoting Copyright Act).

182. *Id.*

183. See Stroude, *supra* note 4, at 209.

184. *Id.* The Supreme Court determined that a parody goes to the "heart" of the original work in order to successfully "conjure up" the original work. *Id.* at 210; see also Schwabach, *supra* note 17, at 399.

185. See Schwabach, *supra* note 17, at 399.

186. See Stroude, *supra* note 4, at 210. *Houghton Mifflin* does not require creators of parody to take only the bare minimum amount of copyrighted material necessary to conjure up the original work, since parody must be able to conjure up at least enough of the original work to make the object of its critical wit recognizable. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273 (11th Cir. 2001) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994)).

187. See Schwabach, *supra* note 17, at 399–400.

188. Stroude, *supra* note 4, at 193.

source material to conjure up the original work in the reader's mind; otherwise, fan fiction works could not achieve their purpose.¹⁸⁹

Fan fiction contains some parody.¹⁹⁰ These works often take the form of screenplays, making fun of the flaws or inconsistencies of fantasy or science fiction movies.¹⁹¹ Because many fan fiction writers do not intend to parody the original work (but rather critique society or a message within the work that represents dominant mass culture), their work may not fall under this purpose¹⁹² or, rather, the Court's current understanding of this purpose. *Campbell* established that if "the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly. . . ." ¹⁹³ In order to qualify as a parody, fan fiction must target the original work, not just use the original work to comment on society in general.¹⁹⁴ Despite similarities, parody and fan fiction works serve different purposes.¹⁹⁵ Parody criticizes the original work, but fan fiction, though it may criticize or comment on its source, more commonly criticizes or comments on society or media in general.¹⁹⁶

b. The Second Factor: Nature of the Copyrighted Work

This factor focuses on protecting the type of work that is being infringed.¹⁹⁷ Creative works are considered more deserving of protection.¹⁹⁸ With few, if any, exceptions, this factor weighs in favor of the original creator or copyright holder.¹⁹⁹

c. The Third Factor: Amount and Substantiality of the Copyrighted Portion Used

This factor "considers whether the secondary work justifiably copied as much as it did of the original work."²⁰⁰ It focuses on "the

189. *Id.* at 210.

190. Schwabach, *supra* note 17, at 413.

191. *Id.*

192. Chaloner, *supra* note 46, at 250.

193. Tushnet, *Legal Fictions*, *supra* note 6, at 665 (emphasis omitted) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

194. Chaloner, *supra* note 46, at 250.

195. Stroude, *supra* note 4, at 210.

196. Chaloner, *supra* note 46, at 250.

197. Stendell, *supra* note 49, at 1568.

198. Stroude, *supra* note 4, at 204. This was stated by the court in *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

199. *See* Stendell, *supra* note 49, at 1568–69.

200. *Id.* at 1569.

amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²⁰¹ Similar to the parody analysis for the first factor “purpose prong,” fan fiction necessarily copies some material from its source in order to fulfill its purpose.²⁰² The outcome of this section of the balancing test would depend in part on how a court would view the purpose of fan fiction and whether this “justifies” the use of borrowed material. Scholars disagree on the likely outcome.

The Second Circuit has specified that the context in which the use occurs must be considered.²⁰³ The Supreme Court should heed this advice; when evaluating an infringement claim involving fan fiction, it should consider the context of the entire fandom community and its functions and purposes to appropriately weigh this factor. Fans find value in retelling and restructuring a favored source work in order to comment on contemporary issues, even mundane ones.²⁰⁴ Without this connection to the source work, fan fiction would “utterly fail to fulfill its purpose” in the context of fandom communities.²⁰⁵

d. The Fourth Factor: Effect of the Use Upon the Potential Market for the Copyrighted Work

This factor analyzes “the effect of the use upon the potential market for or value of the copyrighted work.”²⁰⁶ Courts consider lost sales and decreases in future potential sales of derivative works of the original material.²⁰⁷ They often focus on the latter considerations and ask whether “[the infringing] work is one that the copyright owner might at some point wish to produce.”²⁰⁸

Most fan fiction authors would be able to show that their works present no economic threat to and would result in no economic harm to the copyright holder.²⁰⁹ A sophisticated market can handle multiple renditions of the same character, and consumers can simultaneously juggle a continued following of the original canon and entertain secondary variations of this canon.²¹⁰ Scholars have made compelling arguments to suggest that fan fiction rarely, if ever, represents a market substitute or threat.²¹¹ Copyright holders, unlike fan fiction

201. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

202. Stendell, *supra* note 49, at 1569.

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

204. *See* Stendell, *supra* note 49, at 1569.

205. *Id.*

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

207. Stendell, *supra* note 49, at 1570.

208. *Id.*

209. Schwabach, *supra* note 17, at 433.

210. Stroude, *supra* note 4, at 209.

211. *See* Tushnet, *Legal Fictions*, *supra* note 6, at 665; Stendell, *supra* note 49, at 1570.

writers, are “unlikely to parody or critically comment on [the source] works.”²¹² Some scholars even suggest that fan fiction would only improve and never damage the market for original works.²¹³ In almost all imaginable cases, this factor will weigh in favor of fan fiction authors.

Fan fiction works serve different purposes than their corresponding source works.²¹⁴ Consequently, fan fiction and source works will complement each other, but rarely compete with each other in the same market.²¹⁵ This speaks to the purposes that drive fan fiction authors to create and the purposes their works serve—to encourage and participate in a direct, alternative discourse with other fans concerning topics like gender and sexuality.

This distinct purpose serves to protect both markets—one for fan fiction and another for source material.

IV. WHAT BALANCING TEST? THE FAILURE OF FAIR USE

The fair use defense likely will not protect fan fiction writers against infringement claims.²¹⁶ As a result, current copyright law impedes the creativity of female fan fiction writers, obstructing rather than aiding in the production of creative works and a useful dialogue to many women.²¹⁷ As it stands, copyright is couched in masculine terms, characterizing creative works as pieces of property.²¹⁸

The fair use doctrine, too, speaks in the constructs of commercialization, markets, and monetary exchange.²¹⁹ This leads courts to focus on the product, leaving out considerations of the public interest and other non-economic motivations for creating derivative works, many of which are influenced by gender.²²⁰ Focusing on the text itself without understanding how it is being responded to and used by fans leaves much unexplained²²¹ and results in a half-empty legal analysis.²²² Despite the Court’s urging that “context is everything,”²²³ the

212. Stendell, *supra* note 49, at 1570.

213. *Id.* at 1570–71.

214. Stroude, *supra* note 4, at 211.

215. *See id.* (noting that, when analyzed from an antitrust perspective, consumers do not perceive fan fiction works and source works to exist within the same market).

216. Stendell, *supra* note 49, at 1572.

217. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 557 (2006).

218. *Id.* at 559.

219. *Id.* at 560.

220. *Id.*

221. Thomas, *supra* note 4, at 5.

222. *See* Tushnet, *Economies of Desire*, *supra* note 40, at 515.

223. Tushnet, *Legal Fictions*, *supra* note 6, at 665 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

Court and the law have failed to inquire about the non-economic motivation for writing derivative works.

As a result, fan fiction writers generally cannot claim levels of “transformative use” in their works that would satisfy a court and provide a defense under the fair use test.²²⁴ The problem is not that these writers would fail to meet the fair use criteria; it is that the fair use doctrine would fail to meet theirs. Copyright currently responds to the needs of corporations that own copyrights in mass media.²²⁵

A less discussed misunderstanding of the fair use doctrine involves the Court’s failure to understand and define “transformative.” Scholars suggest that fan fiction has a “lack of a permissible purpose,”²²⁶ suggesting that it is not considered legitimate commentary or criticism, like parody. True, fan fiction and parody look and read differently, but the commentary and unique interpretations found in fan fiction more closely resemble the commentary of scholarly criticism.²²⁷ As discussed previously, fan fiction often comments on society, sexuality, and personal relationships by means of creatively expressing unique, personal interpretations of a source work.²²⁸ Fan fiction fuses the purpose of scholarship and commentary with a creative form, transforming each source work with individual perspective that cannot be replicated or copied, except, perhaps, by a perfect clone of each individual writer.

The obvious similarities in purpose have not yet been recognized by courts or even some scholars, who define the purposes of fan fiction rigidly and narrowly.²²⁹ By rejecting the ideas that fan fiction contains elements of scholarship and commentary and consequently falls outside of fair use’s “permissible purposes,” courts and scholars show their basic misunderstanding of the originality brought by each individual writer to every creative process.

This all represents a major flaw in current interpretations and applications of the fair use doctrine; its factors fail to weigh feminine interests of fan fiction writers who ignore copyright’s economic incentives and create for other perfectly valid reasons.²³⁰

224. See Carpenter, *supra* note 1, at 71 (arguing that fan fiction writers make use of copyrighted materials and must look to fair use as a defense).

225. Tushnet, *Legal Fictions*, *supra* note 6, at 666.

226. Stendell, *supra* note 49, at 1567.

227. See Carpenter, *supra* note 1.

228. See *supra* Part II.A.2.

229. See Stendell, *supra* note 49, at 1572 (identifying fan fiction’s purposes as “entertainment, creative self-expression, and sociocultural communal participation” and does not acknowledge fan fiction as commentary or criticism on both complex and simple issues).

230. See Tushnet, *Economies of Desire*, *supra* note 40, at 532.

V. MAKING THE FAIR USE DOCTRINE FAIR

Currently copyright law more than adequately represents commercial interests while undervaluing women's creative work and non-commercial interests. As such, the law should be recalibrated to expand protections to women's unique interests.²³¹

A. *The Spirit of Copyright Law*

The Copyright Clause of the U.S. Constitution was designed "to be the engine of free expression."²³² Current copyright law, however, fails to fulfill this purpose. The fair use doctrine was designed "to ensure that copyright law does not 'stifle the very creativity which that law is designed to foster,'"²³³ but ignore the real public interests inherent in fan fiction's creation, especially among the female-dominated fandom communities.

By focusing only on economic and market incentives and motivations, copyright law protects commercial culture and fails to recognize the interests of non-commercially focused women.²³⁴ Non-commercial, non-market artistic production "turns out to be what women do" in fandom communities.²³⁵

With unclear doctrine and a flawed fair use test, current copyright law discourages the reimaginings and creativity required to produce fan fiction.²³⁶ The fear of looming infringement actions will effectively repress not only the creative dialogue of fan fiction writers, but also the growth of larger communities outside of fandom.²³⁷

Consequently, copyright law needs to change in order to promote creativity among amateur female fan communities. Consideration for the motivations and interests of fan fiction writers will help copyright law avoid stifling the creative drives it is designed to protect.²³⁸

231. See Bartow, *supra* note 217, at 564.

232. See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001).

233. Stendell, *supra* note 49, at 1565.

234. Chaloner, *supra* note 46, at 226 (arguing that copyright law takes an active role in protecting male culture and interests at the expense of female interests).

235. Tushnet, *My Fair Ladies*, *supra* note 85, at 299.

236. Chaloner, *supra* note 46, at 221.

237. Carpenter, *supra* note 1, at 83.

238. See *id.* at 84.

B. The Fairest Doctrine of Them All

The law, which currently ignores fandom (and decidedly female) interests, should not force fan fiction writers to fit their works into the limited confines of the fair use doctrine. Rather, protection for fan fiction should be a real possibility under the doctrine, reflecting the true and real interests of fan fiction writers and their communities: the interests in original interpretations of source materials and in their subsequent expression that speaks to the needs of themselves and their communities. The fair use factors should better consider noncommercial motivations, including a need to critique and address issues within contemporary society among members of a community.²³⁹ Economic incentives and concerns should be part of the fair use balance, but should not, as they do today, overwhelm it.²⁴⁰ The type of transformation inherent in creating fan fiction, involving the addition of much time and effort, should constitute a “transformative use”²⁴¹ and, consequently, fair use.

Silencing fan fiction writers would damage distinctly female fan communities and muzzle the diverse dialogue about gender and sexual issues in contemporary society.²⁴² Fan fiction writers contribute to this shared dialogue by expressing their unique interpretations of source material, serving an important cultural function.²⁴³ One need only look to “profic” to find a public interest even beyond Internet fandom. The public has an interest in the availability of works like *Wide Sargasso Sea* and *Wicked* because of the high social and cultural value of exchanging diverse viewpoints. If one accepts that premise, one must also accept that the public, including fan communities themselves, has an interest in sharing and preserving the issues that concern female fan fiction writers, often ignored or distorted in mainstream media.

Creation helps make meaning of society and contemporary life, and this meaning contributes to human growth.²⁴⁴ This cultivation of the human race by means of “the useful arts” should be at the heart of copyright law. The law must respect the possibility that

239. Tushnet, *Economies of Desire*, *supra* note 40, at 539.

240. *Id.*

241. See Tushnet, *Legal Fictions*, *supra* note 6, at 665.

242. Carpenter, *supra* note 1, at 81–82 (asserting that stopping fan fiction writers would affect fan communities and, in turn, the larger cultural structures to which those communities belong).

243. *Id.* at 82 (adding that fan fiction is more than a simple impulse to tell a story, but to add to a shared tradition—in the case of fandom, the tradition of exchanging interpretations and social commentary).

244. Tushnet, *Economies of Desire*, *supra* note 40, at 537.

every person has a unique perspective and new meaning to contribute to a vast, global dialogue.²⁴⁵ Copyright law should maximize participation in popular culture and include protection for the ideas and communities facilitated by fan fiction and derivative works.

CONCLUSION

Good laws, like good fiction, should make sense. So far, U.S. courts have not decided a case involving written fan fiction disseminated for non-commercial use. Going forward, courts must proceed with a workable, fair test. To be fair, courts must not only consider the interests of copyright holders, but they must also seriously consider the interests of secondary authors and the general public. The fair use doctrine should be revised to account for the creative process and resulting originality in every piece of fan fiction. The current fair use doctrine fails to adequately consider the high level of original interpretation and production involved in writing fan fiction. This results in a doctrine predisposed to ignoring the interests of amateur female writers and favoring copyright holders in mainstream media. If the fair use doctrine remains the same, we should at least call it something else.

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245. *See id.* at 539.

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