The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright

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INTRODUCTION

Every few years, popular magazines and news sources seem to rediscover the existence of fan works and fanfiction.1 Pointing to various online communities and websites that allow fans to share their work, the media marvels at the variety and creativity of this "new" medium, implying that fanfiction is solely a product of the Internet. Fanfiction, however, is not exclusively an Internet phenomenon.

Despite its current popularity and growing presence in our social consciousness, fanfiction existed long before the Internet.2 The concept of taking popular characters from an existing work of fiction and recreating them in another, by altering their names or the setting in which they exist, is an essential part of entertainment. The popular new Sherlock Holmes television series on the BBC, Sherlock,3 and the CBS series, Elementary,4 are two very different interpretations of Sir Arthur Conan Doyle’s famous detective adventures.5 These two shows represent the essence of fanfiction—taking something that is loved and recreating it from a different perspective. Profit is all that separates the BBC’s Sherlock from the average piece of fanfiction.

Recently, fanfiction, which thrives on borrowing existing content to create new content, has been classified as part of the “remix culture.” Coined by Lawrence Lessig, the term refers to any content created using existing creative content.6 Musical remixes, samples of songs used by rappers, and even art collages—new ways in which the younger generation interacts with entertainment—all fall within the remix culture. The growing number of remixed works points to a trend in interactive, as opposed to passive, entertainment.

Although the majority of fanfiction writers receive no money for their

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5. E.g., ARTHUR CONAN DOYLE, THE ADVENTURES OF SHERLOCK HOLMES (1892).

work, those that do may be reluctant to admit it due to the legal quagmire it presents. Despite its apparent popularity, fanfiction exists in a legal limbo—no case has yet to definitively address the legal status of fan-generated works. If a piece of fanfiction were challenged in court, however, it could very well be considered an unauthorized derivative work under the current Copyright Act. This risk explains why authors who obtain publishing deals for their fanfiction try to erase all evidence that their work was based on an original.

Many claim fanfiction is a prime example of non-infringing fair use under the copyright fair use doctrine. Most fanfiction is not written to profit the author and is considered first and foremost a labor of love, which theoretically satisfies the fair use factors under section 107 of the Copyright Act. However, such a classification is far from certain given the ambiguous nature of the fair use test and the lack of a wholesale exception for fan works. Thus, fanfiction writers run the risk of infringing original works as authors of unauthorized derivatives.

Despite its precarious status, fanfiction has been around for over four decades and continues to exist with little opposition. Fanfiction’s existence can be qualified as a détente between fandom and copyright holders. Fans who do not try to profit from their derivative works are generally left alone. Some copyright owners likely send takedown notices and cease and desist letters, but the number of such letters is difficult to estimate because those who receive them are understandably reluctant to share. Further, the lack of substantial litigation over fandom activity makes it nearly impossible to determine the legal status of fanfiction. Both sides—the original authors and the fan writers—have legitimate arguments about why fanfiction should or should not exist.

One reason for copyright holders’ reluctance to sue is that fans participating in “fannish” activities, like writing fanfiction, are often the most dedicated and most vocal proponents of the authored work and its related products. Litigating against one’s most loyal fan base is not a good business strategy. Another reason may be that copyright holders are unsure about their chances of winning such a lawsuit. With circuit courts split on how to treat derivative works, there is no certain outcome for either party. As such, the détente will continue indefinitely until the courts or the legislature take action.

The fandom problem—the existence of a growing body of derivative

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9. See, e.g., Noda, supra note 7.


12. See infra Part I.B.
works based on copyrighted content—is only a problem if the derivative work right reserved to authors by the 1976 Copyright Act continues to exist in its current state. To be rid of the fandom problem, some have argued that an exception should be made specifically for fan works under the fair use doctrine. Such an exception seems unlikely, however, given the malleable nature of the doctrine. The better solution to the fandom problem is to revise the derivative work right to exclude fan works and similar creative content from the category of infringing. Allowing people to produce creative work based on ideas of others without fear of a lawsuit would encourage creativity and “promote the progress of . . . [the] arts,” as envisioned by the writers of the Constitution. Nevertheless, it is difficult to imagine Congress passing such a law anytime soon. In the meantime, both content creators and fans must make do with the resources they have to negotiate the world of fandom.

Parts I and II of this paper focus on the development and theoretical justifications of the derivative works doctrine. Part III discusses fanfiction’s status as a derivative work, and Part IV offers possible solutions to the fandom problem.

I. THE DERIVATIVE WORKS DOCTRINE

Fanfiction and fan works are interpretations of existing creative works. A fanfiction author may place existing characters in an original setting or place new characters in an existing setting. The author may make slight changes to the original plot or create a new plot entirely.

Despite their amazing variety and originality, all fan works are based on preexisting creative works, which makes them derivatives. The 1976 Copyright Act defines a derivative work as “a work based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . . .” Possible derivative works include a “translation, musical arrangement, dramatization, fictionalization, motion picture version, [and] sound recording,” though the list is not exhaustive. As Professor Melville Nimmer explains, “a work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work.”

15. U.S. CONST. art. 1, § 8, cl. 8.
17. Id.
18. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.01 (Matthew Bender rev. ed. 2010).
Section 106 of the 1976 Copyright Act gives authors the exclusive right to prepare or authorize derivate works. Thus, unless a copyrighted work has fallen into the public domain, the exclusive right means any secondary work that uses existing copyrighted material without the owner's permission infringes the original. But this was not always the case. The derivative works doctrine has expanded in recent history to give authors stronger protection. The "copy" right, which started out as a way of protecting publishers, has become a guarantee of redress to authors upon another's misappropriation of their work. The derivative work doctrine emerged as a way of punishing those who recreate a copyrighted work without exactly copying it.

A. THE ORIGIN OF THE DERIVATIVE WORK RIGHT

Copyright law in the United States has its roots in British law. The Statute of Anne, which was enacted in Britain in 1710 and is the predecessor to modern copyright law, applied to the printing, reprinting, and importing of books. The statute was generally concerned with the costs of printing and distribution incurred by publishers.

Interestingly, despite the statute's clear intent to protect the publishers and distributors of books, the first case that arose under the statute, Burnett v. Chetwood, involved a derivative work. In 1720, the Burnett defendants attempted to publish an English translation of a well-known Latin work. The Lord Chancellor determined that the translation was not an infringement because of the amount of skill required in the "art of language." For the Lord Chancellor, the skill and effort required for translating amounted to the creation of an original work. The Lord Chancellor's broad interpretation of creation would later be echoed in the U.S. decision of Stowe v. Thomas and would remain the prevailing standard well into the nineteenth century.

At its inception, U.S. copyright law centered around preventing unauthorized publications, rather than determining what constituted infringement. By mid-nineteenth century, U.S. judges struggled to clearly define infringement that was not just simple copying. Justice Joseph Story, who would go on to become the youngest Supreme Court Justice,
was instrumental in adopting English copyright law and defining the line between infringement and originality. As a circuit judge between 1839 and 1845, Justice Story was the first to articulate the idea that some appropriation of a work should be allowed without running afoul of copyright law.

In *Folsom v. Marsh*, Justice Story outlined the boundaries of what would eventually become the fair use doctrine. In the decision, Justice Story, recognizing the care needed to define infringement, listed potential justifications for borrowing from a copyrighted work. He noted that determining copyright infringement was not as simple or straightforward as identifying patent infringement. Unlike patented works, copyrighted works may be reproduced for legitimate non-infringing uses, such as review or parody. Justice Story recognized the complications caused by a secondary work that did not reproduce or copy the original work, but instead simply borrowed an idea or a storyline. He further identified the difficulty in drawing the line between originality and copyright in *Emerson v. Davies*, stating:

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

Following Justice Story’s death, circuit courts applied various tests for identifying infringing derivative works with differing results. For instance, in 1853, Justice Grier held that a German translation of *Uncle Tom’s Cabin* did not infringe Harriet Beecher Stowe’s copyright. Justice Grier reasoned that, after publication, “[t]he author’s conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language.” Echoing the prior century’s British decision of *Burnett*, Justice Grier praised the level of art and skill embodied in quality translation and limited the author’s right to a monopoly on copying and distributing her work. Justice Grier found that Stowe’s copyright did not

31. Id. at 27.
32. Id. at 28.
33. 9 F.Cas. 342, 344-45 (No. 4901 C.C.D. Mass. 1841).
34. Id. at 348 (“In short, we must often, in deciding questions of this sort, look to the nature and objects of the selection made, the quantity and values of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”).
35. Id. at 344-45.
36. Id.
37. Id. at 345.
38. 8 F.Cas. 615 (No. 4436 C.C.D. Mass. 1845).
39. Id. at 619.
40. *KAPLAN, supra* note 20, at 29.
42. Id. at 206.
43. Id. at 207.
extend to the distribution of ideas, characters, and all other intangible aspects embodied in her work.44

While the decision over the translation of Uncle Tom’s Cabin seems to align with Justice Story’s reasoning in Emerson, it was not in tune with the opinions of other contemporaneous circuit judges.45 Justice McLean, for instance, lamented that copyright law did not coincide with patent law in that “a machine acting upon the same principle, but of less expensive structure than the one patented” was undoubtedly infringing.46 Presumably, following Justice McLean’s logic, any book written on the same subject or with the same idea as a copyrighted work would infringe.47

Justice McLean’s “principle” approach toward infringement was echoed two decades later in Daly v. Palmer.48 In a case that represented a departure from confining copyright to “copying rights,” a district judge enjoined defendants from performing a scene in a play because it was similar to a scene from the plaintiff’s play in the “action, the narrative, and dramatic effect and impression, and the series of events.”49 The scene under scrutiny, in which a character was tied to railroad tracks but fortuitously rescued, had little similarity to the original except in the very basic plot.50 Justice McLean’s reasoning suggested that an author’s intellectual property extended beyond the written or spoken word and into the intangible realm of plot elements.51 It was a reasoning diametrically opposed to Justice Grier’s decision in Burnett only fifteen years prior.52

Congress attempted to reconcile the differing circuit decisions by enacting a copyright statute in the early nineteenth century.53 The 1909 Copyright Act aligned with the time period’s trend of granting authors the exclusive right to authorize derivative works.54 Unlike prior legislation, the 1909 Act strove to grant copyright holders a monopoly in more than just the physical copy of their work.55 The new law gave copyright holders the right to translate or dramatize their work and to “make any other version thereof.”56 It also extended the renewal term of copyright by fourteen

44. Id. (‘Hence, in questions of infringement of copyright, the inquiry is not, whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work . . .’).
45. KAPLAN, supra note 20, at 29.
47. KAPLAN, supra note 20, at 29.
48. 6 F.Cas. 1132 (C.C.S.D. N.Y. 1868).
49. Id. at 1136 (“The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical.”).
51. Id.
52. KAPLAN, supra note 20, at 32.
53. Id. at 38–39.
54. Id. at 39.
55. Id. at 40.
years.\textsuperscript{57}

After the implementation of the 1909 Act, many court decisions followed \textit{Daly} to find most derivative works infringing, regardless of the level of creativity and transformation.\textsuperscript{58} These decisions helped blur the line between derivative works that were independently copyrightable and infringing works that violated the copyright holders' rights to reproduce or perform their work.\textsuperscript{59} This line did not become any clearer when Congress passed the 1976 Copyright Act, nor did courts have any less trouble distinguishing between the copyrightable expression of a work and the ephemeral, non-copyrightable idea of the work.

In the 1911 decision of \textit{Kalem Company v. Harper Brothers},\textsuperscript{60} the Supreme Court found that the defendant's motion picture, which was based on the plaintiff's book, infringed the plaintiff's dramatization and reproduction rights.\textsuperscript{61} Justice Holmes defined the defendant's movie as a series of "moving images" that represented passages in the book and not as a creative work in its own right.\textsuperscript{62} Such a view demonstrated courts' departure from the belief that a translation of a book required sufficient skill and artistic interpretation to qualify as original expression. To Justice Holmes, it seemed perfectly clear that the transformation of a written work into a movie was both a dramatization and a reproduction of the written material and thus an infringement of the plaintiff's exclusive rights.\textsuperscript{63}

Moreover, Justice Holmes summarily dismissed the plaintiff's argument that the court was overstepping its bounds:

It is suggested that to extend the copyright to a case like this is to extend it to the ideas, as distinguished from the words in which those ideas are clothed... The law confines itself to a particular, cognate, and well-known form of reproduction. If to that extent a grant of monopoly is thought a proper way to secure the right to the writings, this court cannot say that Congress was wrong.\textsuperscript{64}

Justice Holmes' decision ensured that any movie company wanting to make a motion picture of a popular novel would first have to secure rights to that novel—no doubt a fair and equitable outcome. Movie companies should not capitalize on the popularity of a novel without compensating the original author. The decision also ensured that the temporary monopoly granted to authors was no longer limited to reproduction. Authors could control not only exact copies of their works, but also any related works created by different authors.\textsuperscript{65} The derivative work right became part of the established bundle of rights extended to authors of creative works.

\begin{thebibliography}{99}
\bibitem{57} Id. § 7.
\bibitem{58} KAPLAN, \textit{supra} note 20, at 39–41.
\bibitem{59} Goldstein, \textit{supra} note 50, at 215.
\bibitem{60} 222 U.S. 55 (1911).
\bibitem{61} Id. at 61.
\bibitem{62} See id.
\bibitem{63} Id. at 62.
\bibitem{64} Id. at 63.
\bibitem{65} Goldstein, \textit{supra} note 50, at 215.
\end{thebibliography}
B. THE DERIVATIVE WORK RIGHT IN RECENT HISTORY

There has not been substantial litigation over fanfiction. Litigation over derivative works, however, is quite frequent.

In the published literary world, imagining a novel by writing from the point of view of a minor character or imagining the main character sixty years into the future is not a rarity. Arguably, these imaginings constitute a type of fanfiction, differing only from the fan works popular on websites and forums in that their authors desire to make a profit from publishing their derivative work. Thus, decisions that have addressed the legal status of derivative works can shed light on how fanfiction might be treated in an infringement case.

In *SunTrust v. Houghton Mifflin* and *Salinger v. Colting*, two circuit courts reached very different conclusions about how derivative works should be treated. Both circuits relied on the Supreme Court decision in *Campbell v. Acuff-Rose*, where the Court found that a rap parody of the song “Pretty Woman” constituted fair use, to arrive at opposing outcomes. Despite the circuit split, no Supreme Court decision has discussed derivative works following *Campbell*, leaving unclear the status of derivative works such as fanfiction.

In *SunTrust*, the Eleventh Circuit held that the defendant’s novel, *The Wind Done Gone*, did not likely infringe Margaret Mitchell’s novel, *Gone with the Wind*. Mitchell’s estate brought suit against the publisher Houghton Mifflin for publishing Alice Randall’s reimagining of Mitchell’s classic. Unlike the original, *The Wind Done Gone* focused on the African-American perspective of the Civil War in the South. Randall included some of the major characters from the original novel, but a substantial portion of the plot was wholly original.

In its discussion of the two novels, the circuit court differentiated between the protected and unprotected aspects of *Gone with the Wind*. Citing the famous *Baker v. Selden* dichotomy between idea and

68. 268 F.3d 1257 (11th Cir. 2001).
69. 607 F.3d 68 (2d Cir. 2010).
70. 510 U.S. 569 (1994).
71. *Id.* at 594.
72. *SunTrust*, 268 F.3d 1257, 1259 (denying an injunction due to lack of evidence of infringement).
73. *Id.*
74. *Id.*
75. *Id.* at 1266–67.
76. *Id.* at 1263–64.
77. 101 U.S. 99 (1879).
expression, the court stated that "[c]opyright cannot protect an idea, only the expression of that idea." The court found that copyrightable aspects of Gone with the Wind included Mitchell’s characters, Rhett Butler and Scarlet O’Hara, as well as certain plot points. Non-copyrightable aspects included “scenes a faire” and certain intangible features of the work, such as a setting in the antebellum South.

Further, the circuit court held that a work that substantially copied another work would be excused from infringement if the copying was “fair use.” As Judge Marcus pointed out in his concurrence, parody—a fair use—serves an important function in society and should be afforded the highest First Amendment protection. The doctrine of fair use represents a way of reconciling that protection with the rights of authors.

Defendants claimed that The Wind Done Gone was a parody and thus fell under fair use. After a lengthy analysis, the court agreed with the defendants and denied the plaintiff’s injunction request. By recognizing the value of the different perspective offered by The Wind Done Gone, the court was willing to give Randall every benefit of the doubt.

The overarching basis of the SunTrust decision was the Eleventh Circuit’s choice to “take the broader view.” Using the Supreme Court’s admonition in Campbell that “courts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character,” the Eleventh Circuit expanded parody to encompass a broad field of allowed use. The court focused on the parodying and critiquing elements of Randall’s derivative work, ignoring the fact that The Wind Gone Done is a literary work written, among other things, for profit. The court seemingly assumed the work’s parodic character and focused on the work’s transformative aspects to justify a finding of no infringement. The court’s analysis suggests that a derivative work that seeks to recast rather than copy does not infringe if it transforms the character of the copyrighted work.

In Salinger, the Second Circuit used the reasoning in Campbell to come to a different conclusion than the SunTrust court. The author of Catcher in the Rye, J.D. Salinger, brought suit against Fredrik Colting for

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78. SunTrust, 268 F.3d at 1263.
79. Id. at 1266–67.
80. Id. at 1266 (“[S]cenes a faire—the stock scenes and hackneyed types that ‘naturally flow from a common theme’—are considered ‘ideas,’ and therefore not copyrightable.”).
81. Id.
82. Id. at 1277–78 (Marcus, J., concurring).
83. Id. at 1264.
84. Id. at 1259.
85. Id. at 1277 (Marcus, J., concurring) (discussing the merits of The Wind Done Gone as a way of shattering Gone with the Wind’s window on life in the antebellum South).
86. Id. at 1268.
87. Id.
88. Id. at 1269–71.
89. Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).
writing an unauthorized sequel, *60 Years Later: Coming Through the Rye.*90 Colting's "sequel" deals with *Catcher in the Rye* 's protagonist, Holden Caulfield, as a seventy-six-year-old man and includes a fictionalized Salinger who wishes to kill his greatest creation.91 The district court found that Colting's work was neither a parody, nor was it transformative.92 The court did not question the district court's initial finding that *60 Years Later* is substantially similar to *Catcher in the Rye,* especially in its portrayal of Holden Caulfield.93 The court did not inquire how a seventy-six-year-old character and a sixteen-year-old character could be portrayed with substantial similarity. The court concentrated its efforts on the grounds for granting an injunction, using, surprisingly, a patent case94 as relevant precedent.95

The Second Circuit ultimately found that the district court had applied the injunction standard improperly and vacated the injunction.96 In dicta, however, the court agreed that letting the defendant publish an unauthorized sequel, even if it did not interfere with the plaintiff's market for *Catcher in the Rye,* might interfere with any future sequel written by the plaintiff.97

The court was willing to enjoin an existing derivative work so that the plaintiff could exploit a potential market for a theoretical sequel that had not been written. Notably, Salinger himself had not produced any new material since 1965.98 The court's decision appears to be completely out of tune with both the *Campbell* decision and the promotion of creativity discussed by the *SunTrust* court. In formulating its decision, the court may have taken into account the fact that Salinger explicitly forbade any adaptations of his works and decided to honor the wishes of the author.99 After all, part of the derivative work right is the right to *not* authorize or produce derivative works.

*SunTrust* and *Salinger* show that courts still have trouble distinguishing what aspects of literary works are protected by copyright. The level of transformation and recasting required for a work to be considered original in its own right is difficult to measure. Though ideas are excluded from copyright, courts appear to focus more on the idea than expression when faced with a creative work.

The claim that two different characters with the same name cannot have a set of adventures that are entirely unique is misguided. Having a

90.  *Id.* at 71.
91.  *Id.* at 72.
92.  *Id.* at 73.
93.  *Id.*
95.  *Salinger,* 607 F.3d at 76.
96.  *Id.* at 84.
97.  *Id.* at 74.
98.  *Id.* at 71.
99.  *Id.*
character with the same name as a character in an existing copyrighted work should not expose an author to liability if her expression is substantially original. Yet many published authors who borrow liberally from existing works employ plausible deniability, changing the character’s name and little else. This outcome makes little sense if one believes that the theoretical justification for copyright is to promote a greater variety of creative expression.

II. THEORETICAL JUSTIFICATIONS FOR THE DERIVATIVE WORKS DOCTRINE

The power to grant copyrights comes from Article I, Section 8 of the Constitution, which allows Congress to grant “authors and inventors the exclusive right to their respective writings and discoveries.” Such a monopoly is given “for limited times” and is meant “to promote the progress of science and useful arts.” In a letter to Isaac McPherson, Thomas Jefferson explained the logic behind limiting the grant of intellectual property rights:

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, . . . like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.

What differentiated the underlying theory of American copyright from British copyright was the belief articulated by Jefferson that “[s]ociety may give an exclusive right to the profits from [inventions], as an encouragement to men to pursue ideas.” The primary reason for copyright’s existence was therefore economic, though both plaintiffs and courts have used other philosophic justifications at different times.

An author’s right to control derivative works is more difficult to justify than the right to prohibit literal copying. The derivative work right has been interpreted to mean that those who significantly or radically improve an existing copyrighted work cannot receive copyright, even in their original expression. In practice, this means that large media corporations may have exclusive rights to create a movie and all subsequent merchandise related to that movie, thereby establishing a monopoly for that work in all possible mediums. Such a right is difficult
to reconcile with the Framers' intent that copyright be a limited monopoly. The economic theory, the labor theory, and the personhood theory offer various explanations for the existence of a derivative work right, though none are without criticisms.

A. THE ECONOMIC THEORY

Traditional economic theory balances an author's incentive to produce creative works against access by the public to works of authorship. This balance, also known as the incentive-access paradigm, takes into account the costs authors and publishers expend to create expressive works and the uncertainty they face in recouping their costs.\textsuperscript{107} The incentive-access paradigm's justification for the derivative work right is that the right increases the author's incentive to invest more resources into creation with the knowledge that she may later benefit monetarily by transforming her work into a new medium to be sold in a new market.\textsuperscript{108} The right, however, also limits public access to copyrighted works by increasing their price and limiting the material others can use to create additional works.\textsuperscript{109}

Several facts make the economic theory problematic in relation to derivative works. First, granting authors extensive control over derivatives encourages overproduction of authored works and underproduction of non-work products—products that are not based on copyrighted works.\textsuperscript{110} For example, a movie studio has a greater incentive to produce a movie based on an existing bestseller rather than use an original screenplay because the studio has an idea of the existing market for such a movie.\textsuperscript{111} Discouraging creators from investing in non-work products leads to a lack of variety—a few authored works are endlessly reiterated in numerous secondary markets.

Furthermore, the incentive-access model of current copyright law discourages improvements made by anyone other than the original author.\textsuperscript{112} This is a problem especially relevant to fanfiction. Unlike patents, where significant improvement of an existing patent can lead to a new patent, improvers of existing copyrighted works are considered infringers and cannot always rely on the fair use defense.\textsuperscript{113} This may result in an outcome where a later work using the same historic or public domain material as an earlier work is enjoined from distribution because of infringement. Taken to its natural extreme, such an outcome would result in very few works existing around the same canon or historical event.

\textsuperscript{107} LANDES & POSNER, supra note 104, at 11.
\textsuperscript{108} Id. at 110; Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483, 485 (1996) ("Broadening the scope of copyright increases the incentive to produce works of authorship and results in a greater variety of such works.").
\textsuperscript{109} LANDES & POSNER, supra note 104.
\textsuperscript{110} Id. at 633.
\textsuperscript{111} See id.
\textsuperscript{112} Lemley, supra note 105, at 1023.
\textsuperscript{113} See id. at 1024–25 (discussing the effect of fair use factors on improvers of creative works).
Finally, the economic theory does not take into account the rise of appropriative art and fan works, which are created with no expectation of profit.\textsuperscript{114} Given the millions\textsuperscript{115} of unauthorized derivative works created by fans with no expectation of profit, it is difficult to say with absolute certainty that the incentive-access paradigm functions the way economics dictates. The ease of publishing content online (both in literary and visual format) at virtually no cost to the creator poses a significant challenge to traditional ideas about the necessity of incentivizing creativity. It may be that the quality of fan works is subpar compared to those Congress seeks to encourage, but fan works should at least be considered in the calculus. If copyright exists to incentivize creation, it should not punish those who strive to improve or refine existing works by deeming the new work infringing. Further, the law should not ignore the fact that many artists need no economic incentive to create. If anything, fanfiction is proof that \textit{ars gratia artis}\textsuperscript{116} is alive and well.

B. THE LABOR THEORY

The labor theory has its origin with John Locke, who posited that, according to natural law, the result of a person’s labor is her property.\textsuperscript{117} As applied to intellectual property, this means that an individual has the natural right to derive benefits from her intellectual labor. In other words, an individual is entitled to anything acquired by the sweat of her brow. Since an individual must take from the Commons\textsuperscript{118} to acquire property, she must leave others enough and as good of the resources she took.\textsuperscript{119} The labor theory played an important role in many early court decisions, but lost some of its credibility after the Supreme Court decision of \textit{Feist v. Rural Telephone Service}.\textsuperscript{120} In \textit{Feist}, the Court held that additional labor put into the copyrighted work did not automatically create a new copyrightable work.\textsuperscript{121} The Court stated that the \textit{sine qua non} of copyright is originality, not the amount of labor put into creation.\textsuperscript{122}

In a market economy, people labor to produce products that become inputs for another’s labor.\textsuperscript{123} Yet society chooses not to grant a licensing right to all those involved with the production of a creative work, even if

\begin{enumerate}
\item Voegtli, \textit{supra} note 106, at 1244–55 (discussing the development of post-modern art).
\item A Latin phrase meaning "art for art’s sake."
\item \textit{JOHN LOCKE, SECOND TREATISE ON GOVERNMENT}, ch. V, “Of Property” (1690).
\item Locke’s “Commons” refers to the shared pool of both physical and intellectual resources all individuals have in common.
\item Also known as the Lockeian proviso, this is one of two limitations on the natural property right. See Voegtli, \textit{supra} note 106, at 1247 (discussing derivative works and Locke’s labor theory).
\item \textit{id.} at 345
\item \textit{id.}
\item Lunney, \textit{supra} note 108, at 632.
\end{enumerate}
their labor made the work possible. It is not the labor, but the originality of the author—as a sole creator or collaborator—that society values. Moreover, because the derivative work right privileges copyright owners over appropriators, it is difficult to reconcile the labor theory with U.S. copyright law. Fanfiction authors who lovingly labor over their derivative novel or piece of art are overlooked as creators because their ideas are not original enough. This outcome does not support the labor theory as justification for copyright.

C. THE PERSONHOOD THEORY

The personhood theory, often used to justify the existence of moral rights, recognizes that each artist has a special connection to her art. An extension of the theory of natural rights, the personhood theory views an author’s work as a mirror of her personality. By recognizing originality as the most important factor in deciding whether a work is worthy of copyright, the law’s approach to copyright has shifted from the “sweat of the brow” to the personhood model. This approach is not necessarily inconsistent with Locke’s theory of labor.

Courts have generally accepted the personhood theory as both valid and necessary when defining an author’s rights. Indeed, it is likely that the Romantic concept of an author as creator has played a role in expanding copyright law to include intangible expression that is the embodiment of the author’s self.

The personhood theory is a problematic justification for copyright in several ways. Firstly, the Romantic conception of authorship—an individual male, giving life to the vision that has inspired him—is not the only one in existence. In the Middle Ages, for example, art flourished in anonymity. Modern and post-modern philosophers have increasingly rejected authorship as sacred and idolized, going as far as to claim that the author is dead.

After a creative work is published, it is no longer within the author’s control, and the public has no obligation to interpret or treat the work a certain way. Though fanfiction is often written against an original

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124. Id. at 632.
125. Voegtli, supra note 106, at 1249.
129. Id. at 1883 (“According to Locke, one owns the fruits of one’s efforts because they are the labour of his body, and the work of his hands; hands and body are parts of oneself, and every man has a property in his own person. If every man owns himself, then Locke’s bodily continuity concept would also support the conclusion that the author owns those things in which his self may be found.” (internal quotations marks omitted)).
130. RAJAN, supra note 127, at 52.
132. Id.
author's wishes, it continues to flourish. Both authors and readers find incredible value in having an alternative narrative for works they know and love. A creative work's success no longer depends solely on its appeal as a stand-alone work, but on the willingness of others to engage with it. Similarly, some creative works become surprisingly successful because the fans are willing to engage by reinterpreting and reimagining the author's vision. With fanfiction, the creative process is not just a one-way street. A published author's vision is not the only vision that exists, nor the only one fans appreciate.

Second, basing an entire copyright system on a single conception of authorship is ignoring the reality of modern production, which often requires little authorial input. When multiple authors create a work, whose wishes is copyright law meant to honor when it comes to protecting the sanctity of the work? What if the different authors have competing desires when it comes to the production of derivative works? Protecting a creative work through extensive copyright law simply because the work is supposed to represent a single author's insoluble soul ignores the reality of authorship.

Finally, the personhood theory, like the labor theory, ignores the input of appropriators and the amount of creative expression expended in transforming an existing copyrighted work. Providing extensive protection for only some authors, regardless of their personal investment in the work, conflicts with the very ideals Justice Holmes sought to uphold.

III. FANFICTION AS A DERIVATIVE WORK

The notion that the derivative work right is getting out of hand is not novel. Even before the 1976 Copyright Act, legal scholars noted that copyright had become more extensive than its original conception. The Internet has made copying and distribution easier than ever before. It seems Congress has tried to compensate by giving authors a greater monopoly. But why should it matter that technology has changed everything? The answer is quite simple—there is a large community of fanfiction writers creating derivative works, yet simply consider themselves fans of the original material rather than original authors. The existence and prominence of this community is the result of recent technological innovation—almost all of this material can be accessed through the Internet. More often than not, these fan works are created with no profit incentive, no permission from the author of the work, and no desire other than the right to exist in peace.

The scale of the fanfiction community and the vast amount of largely

133. Voegtl, supra note 106, at 1252–53 (stating that works made for hire have little personality interest and derivative rights should be reserved for works with significant personality interests).
134. Id. at 1253.
135. See KAPLAN, supra note 20 (discussing deficiencies of the 1909 Copyright Act and the expansive nature of the derivative works right).
136. Id.
unpaid labor that goes into maintaining this community calls into question many established beliefs about the justifications for copyright law. In light of this, it is worth understanding how fanfiction came into being and analyzing it as derivative work.

A. A BRIEF HISTORY OF FANDOM

The word fandom originates from the joining of the words fan and kingdom. Within this kingdom of fans thrive those who appreciate creative works by reimagining and re-contextualizing them. With its origin in sports enthusiasts, the word fan has been tinged with negative connotations that suggest an irrational person consumed by her love of a single thing. The modern perception of the word has been tempered somewhat, though what currently constitutes Internet fandom, with its collection of websites and message groups, is not without its share of the overly zealous.

For present purposes, let us define a fan as one who enjoys an artistic work by actively participating in fandom activities. Such activities can range from discussing the creative work on an Internet forum, to writing fanfiction, to attending fan conventions. A book, a movie, or a television show may have a fandom of its own. Even a YouTube video can have its own following and inspire the creation of derivative works.

Fandom, as it is currently known, can be traced back to the advent of Star Trek in the 1970s. Aside from a cult-like following of male science fiction fans, Star Trek was unique from other popular science fiction series in that it inspired a following of women who engaged with the show and wrote stories about their favorite characters. Many of these stories were published in self-made magazines, colloquially known as zines, and sold to likeminded fans at prices that rarely exceeded the cost of printing. These stories became a new way for the public to enjoy a favorite

137. In Internet communities, fandom is often used to denote either the following of a specific creative work or all of these communities as a whole. Here, the latter definition is used. See Fandom, FANLORE, http://fanlore.org/wiki/Fandom (last visited Feb. 18, 2014).

138. JENKINS, supra note 2, at 13–15 (discussing the evolution of the word “fan”).

139. Fandom, supra note 137 (“I can’t imagine my life without fandom. . . . I’m grateful to have had this space in which to develop so many of the best fannish relationships—and friendships—in my life.”).


141. A notable example is the YouTube video of an enterprising octopus stealing a diver’s camera. Victor’s Videos, Octopus Steals My Video Camera and Swims off with It While It’s Recording, YOUTUBE (Apr. 15, 2010). The video became the subject of at least six different fanworks. 6 Works in ‘Octopus Steals My Video Camera and Swims off with It While It’s Recording,’ ARCHIVE OF OUR OWN, http://archiveofourown.org/tags/Octopus%20Steals%20My%20Video%20Camera%20and%20Swims%20off%20with%20It%20While%20It%27s%20Recording%20%28YouTube%29/works (last visited Apr. 16, 2014).

142. See JENKINS, supra note 2, at 157.

143. Id. at 152.

144. Id. at 158.

145. Id.
television series. In fanfiction, authors could explore storylines abandoned by television writers, point out flaws in character development, and create new characters (who often bore an unsurprising resemblance to the fanfiction author) to inhabit the Star Trek universe.

Though the number of fanfiction writers grew as time went by, the growth of the fan community and fanzine distribution were limited. Knowledge of fanfiction was shared primarily by word of mouth, at conventions or through fan club newsletters. If one had no contact with those "in the know," it was likely that she would not have heard of fanfiction at all. As such, fanfiction remained in obscurity and exclusivity. In some cases, producers of popular films tried to control the content created by fans, especially when it came to pornographic material. The fan reaction to this proposed prohibition was overwhelmingly negative. Fans criticized content owners for their attempts to control how fans could "experience" and think about the work. In 1978, the editors of a Star Trek fanzine, Dreadnought Explorations, received a cease and desist letter from Paramount Pictures because the photograph of the Enterprise on the fanzine cover allegedly suggested the material was an official Star Trek product. After extensive communication with Paramount, the matter remained unresolved. The editors refrained from publishing the sixth issue of Dreadnought, but continued to sell the first five issues with no further complaint from the copyright holder.

Less than twenty years after Star Trek first appeared on television screens, the fandom landscape changed dramatically. The Internet, the catalyst for this change, allowed users to publish content in a public forum or on a website where anyone looking for such material could find it. The first public fanfiction forums existed on Usenet, a website containing a collection of newsgroups accessible through most university mainframes. As personal computers and Internet use grew throughout the 1990s, fandom expanded to discussion boards hosted by Yahoo! and other bulletin board service providers. By the end of the decade, fandom gained a noticeable presence in popular culture and on the Internet, particularly due to the popularity of fanfiction surrounding the Harry Potter series.

146. See id.
147. Id. at 162.
148. Id. at 158–59.
149. Id.
150. Id. at 30–31.
151. Id.
152. Id. at 32.
154. Id.
155. Id.
FanFiction.net, founded in 1998 by computer programmer Xing Li, was the first large fanfiction archive that allowed users to post their stories by category and engage in discussion on the site’s message boards. At the same time, the rise of first generation social networking platforms, like Blogger and LiveJournal, and free ad-supported website hosting offered by GeoCities, meant that fans could create whole websites and communities based on their specific interests. Fanfiction communities and websites, especially those centered on the Harry Potter series, spread at an incredible rate. FanFiction.net itself hosts over 500,000 Harry Potter fanfiction stories. Currently, a Google search for “Harry Potter Fanfiction” returns upwards of nine million results. A search for “Fanfiction” returns over nineteen million. Discounting duplicates and explanatory materials on the fanfiction phenomenon, these numbers show that fanfiction has become a substantial part of Internet culture.

B. FANFICTION WRITERS AS INFRINGERS

The unclear legal status of fanfiction makes it difficult for both fans and copyright holders to know when a fanfiction work infringes on the original. It is not a foregone conclusion that all the fanfiction contained in Internet archives is infringing. If a fanfiction work borrows nothing from the original except the characters, the work infringes only if the borrowed characters are independently copyrightable. Many courts, however, have found that characters in creative works are copyrightable per se. This is especially true of visual character portraits like cartoon or movie characters.

Further, some copyright holders are convinced that fanfiction violates their copyright, even when it clearly does not, and send takedown notices to websites demanding removal of the allegedly infringing material. In these instances, the site often removes the work because a power imbalance prevents a fan or fanfiction writer from defending the work. Even in a larger fan community, like the one surrounding the Harry Potter series, fans are vulnerable to pressure from large media companies and are likely to take down their work upon receiving a cease and desist letter, regardless

**Footnotes:**

164. Id. (type “Fanfiction” into the text box and click “google search”).
165. See Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (finding protagonist Holden Caufield to be “sufficiently delineated” to receive copyright protection).
167. Id.
of whether the work would be considered infringing under the law.

From the original author’s point of view, in a world where takedown
notices can be easily ignored, individual authors may be in the position of
seeing their work plagiarized and misrepresented online with no recourse.
There is, however, some self-correction and monitoring within the fan
community. Like most communities, fandom adheres to certain standards.
Many deem outright copying of a work, whether it is published or
unpublished, to be reprehensible. Examining how community standards for
fanfiction make it different from straightforward plagiarism or
infringement through substantial copying may help with understanding
fanfiction’s transformative character. Though this does not save fanfiction
from potential infringement as a derivative work, it should help persuade
both courts and future lawmakers that fanfiction does not exist to interfere
with the author’s statutorily granted monopoly.

1. Remix Culture and “Innocent” Infringers

Borrowing material from an existing work to create another artistic
work is not a novel idea. What makes current borrowers different from
those in the past, however, is their significant numbers. Anyone who has a
computer, a minimum level of skill, and Internet access can share a
fanfiction story, a video she made from clips of movies, or a GIF\textsuperscript{168} image
of her favorite television show—all of which are potentially infringing.\textsuperscript{169} An examination of fan-made pages on the popular website Tumblr shows
numerous examples of the above.\textsuperscript{170} The sheer amount of this material calls
into question the compatibility of the current cultural standard of borrowing
with copyright law.

Professor Lawrence Lessig has argued that present-day technology
allows for an incredible range in creativity by permitting the younger
generation to remix old creative work.\textsuperscript{171} For example, a fan who takes
clips from her favorite movie and joins them together with a song in the
background has created a new unauthorized derivative work. A cursory
search on YouTube for any movie name plus “music video” returns
thousands of these works. Such videos may focus on minor characters,\textsuperscript{172}
expose a new theme,\textsuperscript{173} or place the movie in a completely different
context.\textsuperscript{174} Remixes encourage the younger generation to become creators

\begin{footnotesize}
\begin{enumerate}
\item[168.] GIF refers to “graphic interchange format,” a file format that allows a series of images to
loop through as a mini video clip. \textit{Gif Definition}, \textit{MERRIAM-WEBSTER DICTIONARY}, \textit{available at}
\item[169.] Lessig, \textit{ supra} note 6, at 965.
\item[170.] TEEN WOLF TUMBLR, http://teenwolf.tumblr.com/ (last visited Mar. 8, 2014); AVENGERS
TUMBLR, http://theavengers-assembling.tumblr.com/ (last visited Mar. 8, 2014); GAME OF THRONES
\item[171.] Lessig, \textit{ supra} note 6, at 965.
\item[174.] Blimvisible, \textit{Us}, \textit{YOUTUBE} (June 2, 2007), http://youtu.be/_yxHKgQyGx0.
\end{enumerate}
\end{footnotesize}
rather than simple consumers of culture.\textsuperscript{175}

Part of the problem in drawing the line between infringing and non-infringing derivative works is that the widespread nature of infringing content on the Internet lends it legitimacy. If millions of people around the world illegally download a popular television show\textsuperscript{176} without any accountability, how can it be wrong to make videos using only clips of that television show? The Copyright Act makes it clear that the derivative work right, along with the copyright, is exclusively reserved to authors. But if no one follows or enforces the law, it becomes useless in establishing a standard for conduct.\textsuperscript{177}

Copyright infringement is commonplace with the younger generation, who have grown up with the Internet. Young people may illegally download a television show or create and post fanfiction without knowing their behavior constitutes infringement. The average age of fanfiction writers is difficult to calculate for a variety of reasons, chief among them the anonymity afforded by the Internet. But according to one statistical analysis, the majority of fanfiction writers on FanFiction.net are likely between the ages of thirteen and seventeen.\textsuperscript{178} It is difficult to expect teenagers and even young adults to have an advanced understanding of copyright law, especially when it come to the derivative work right or fair use.

2. Honor Among Thieves: Transformation vs. Plagiarism

It would be wrong to say that fanfiction writers do not care about intellectual property rights. Young fanfiction authors may start out using their favorite characters as "training wheels" to develop their writing, but that is not why the majority of fanfiction authors write. Fanfiction's true raison d'etre is to change or expand some part of the existing canon in a creative work. As such, fanfiction writers pride themselves on the transformative aspects of their work.\textsuperscript{179} While fans may feel entitled to the content and characters in their favorite creative work, plagiarizing—taking someone else's words and presenting them as one's own—is still frowned upon. The "Cassandra Claire Plagiarism Debacle" that swept through the Harry Potter fandom in 2001 and lasted for over five years is an excellent example of the way fandom attempts to monitor the most grievous forms of

\textsuperscript{175} Lessig, supra note 6, at 965.
\textsuperscript{176} Ernesto, 'Game of Thrones' Most Pirated TV-Show of 2013, TORRENTFREAK (Dec. 25, 2013), http://torrentfreak.com/game-of-thrones-most-pirated-tv-show-of-2013-131225/ (estimating the popular television show Game of Thrones was illegally downloaded 5.9 million times in 2013).
\textsuperscript{177} 17 U.S.C. § 101 (2012).
\textsuperscript{179} See Laura Hale, Plagiarism Is Wrong, WRITERS UNIVERSITY (Oct. 15, 2001), available at http://web.archive.org/web/20021102171913/http://writersu.s5.com/steal.html ("To me, fan fiction is not the retooling of other people's work by doing a search and replace to change names and eye colors. Fan fiction is original fiction written by fans of some thing be it a book, television show, movie or video game. Stories are derived from, that is they use characters, setting, people, from the source, other material. They are not material rewritten.").
copyright infringement.\textsuperscript{180}

In 2001, Cassandra Claire,\textsuperscript{181} the author of a very popular fanfiction series about a secondary character from \textit{Harry Potter}, published a chapter of her work on FanFiction.net.\textsuperscript{182} A member of the site read the chapter and noticed a striking similarity between Claire’s work and the work of fantasy author Pamela Dean.\textsuperscript{183} Specifically, the member noticed that Claire had copied an entire scene from Pamela Dean’s \textit{The Hidden Land}, with some dialogue rewritten verbatim.\textsuperscript{184} Upon closer inspection, the reader found that Claire’s entire collection of work liberally “borrowed” from popular television shows and books by reproducing quotes and entire passages.\textsuperscript{185} The reader submitted a summary of the situation to the moderators of FanFiction.net, who deleted both the story and Claire’s account from the website.\textsuperscript{186}

The reaction to Cassandra Claire’s blacklisting was varied. A large number of people defended Claire’s actions.\textsuperscript{187} Science fiction author John Scalzi, who was asked to weigh in on the debate in 2006, wrote that “[a]ll [fanfiction] is entirely illegal to begin with. . . . And, really, if you’re already wantonly violating copyright, what’s a little plagiarism to go along with it?”\textsuperscript{188}

But many fans were immensely bothered that the work was not mostly original—that it was merely a patchwork of scenes cobbled together from various sources.\textsuperscript{189} The underlying outrage over Claire’s plagiarism is not difficult to understand. Any fiction writer knows that coming up with witty and intelligent-sounding dialogue is difficult—inserting entire scenes word-for-word from popular works is substantially easier. In short, plagiarism is much closer to cheating (if not outright stealing) than what many fans perceive fanfiction to be.

Whether the distinction between borrowing certain elements from a preexisting work and outright plagiarism is indeed a kind of honor among thieves, the fact that the distinction exists is relevant to how copyright holders should perceive fanfiction. If the derivative work right exists as a separate right in current copyright law and is not merely a reiteration of the reproduction right,\textsuperscript{190} then fanfiction should be viewed as a derivative and

\begin{itemize}
\item \textsuperscript{181} Also known as Cassandra Clare, New York Times Bestselling Author of young adult fiction. See CASSANDRA CLARE, http://www.cassandraclare.com (last visited Feb. 18, 2014).
\item \textsuperscript{182} \textit{The Cassandra Clare Plagiarism Debacle}, JOURNALFEN (Aug. 8, 2006), http://www.journalfen.net/community/bad_penny/8985.html.
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{189} \textit{The Cassandra Clare Plagiarism Debacle}, supra note 182.
\item \textsuperscript{190} Goldstein, \textit{supra} note 50, at 215 n.28.
\end{itemize}
transformative work. If, on the other hand, the derivative work is simply an extension of the reproduction right and there is no substantive difference between fanfiction and plagiarism, fanfiction has no right to exist without explicit permission from the author.

Given the questionable legality of fanfiction, the fandom community has a strong interest in self-monitoring and enforcing standards that make the issue of whether a work infringes as ambiguous as possible. This makes it more difficult to find the “real” infringers, but helps to create a body of fan works that showcase the authors’ originality rather than ability to copy words from a book.

3. More Shades of Grey

Fanfiction is often, but not always, produced without expectation of profit. Generally, fanfiction authors do not compete with published authors in the marketplace, and this fact significantly differentiates fanfiction writers from those who publish unauthorized sequels and other derivative works with an expectation of profit. Interference with the copyright holder’s market is not required for a finding of infringement under the Copyright Act, though courts will consider it if the secondary author asserts a fair use defense.191

Unfortunately, the real world economics of fanfiction present a more complicated picture than the “no profit” model, which makes it difficult for fanfiction authors to claim their works do not impinge on the original author’s market. Fanfiction websites and archives, unless they are funded privately or through donations, use sponsored ads to generate revenue. The majority of that revenue goes to paying for hosting space and website maintenance.192 But considering the amount of Internet traffic fanfiction generates, it is not difficult to imagine someone using a combination of page hits and sponsored ads to profit from hosting infringing material. If these pages begin to interfere with the “official” Internet presence of authors, a court may interpret that as an interference with the author’s market. Such an interpretation would make the fanfiction hosted on such a site less likely to fall within fair use.

Furthermore, in addition to the rare instances of fanfiction and fan art being sold to fans, fandoms often host auctions to generate funds for disaster relief or to help a fan in need.193 FandomAid is a community where “like minded authors representing hundreds of fandoms, and countries of the world, have come together to offer custom-written fic in support of those affected by natural disasters.”194 These auctions are hosted with the best of intentions and for good causes, but generating any monetary value from infringing work calls the nonprofit nature of fandom into question. Even authors who explicitly support fanfiction and fandom activity may

192. The author speaks from personal experience, as she has operated such websites.
194. Id.
hesitate to approve of such exploitation. Yet various forms of fandom aid are a regular part of fandom activities.

Leaving moral implications aside, profit-generating activities need to be kept in mind when deciding where to draw the legal line for fandom. While the majority of fanfiction authors do not intend to profit from their fan works, the real world economics of Internet hosting make it difficult to clearly differentiate between for-profit and nonprofit works. The fact that some fan works are used to generate revenue for good causes further complicates the issue because the works are typically sold without the original content owner's knowledge or approval. Unfortunately, these aspects of fanfiction make it difficult to argue that fan works should be allowed simply because their creators derive no profit from their work. Thus, a solution to the fandom problem must take into account the traditions of Internet activism and the realities of webhosting.

IV. POSSIBLE SOLUTIONS TO THE FANDOM PROBLEM

No one solution to the fandom problem is likely to satisfy both the fanfiction writers and the original authors. One solution is to amend copyright law by changing the derivative works doctrine or creating an exception for fan works using the fair use doctrine. Though such changes would be effective, they are highly unlikely because precedent for limiting an author's rights through copyright law is nonexistent. Another solution is to expand authors' moral rights to give them greater power over how their content is used by others. Ideally, this expansion would allow authors to police derivative content, like fanfiction, without resorting to the derivative works doctrine. Yet another possibility is to provide limited licenses to fans who wish to create fan works. If copyright holders allow their fans to freely create derivative works, fans would not have to worry about getting sued, and copyright holders would not have to worry about competing with their fans.

Unfortunately, no single solution will likely resolve the fog surrounding fanfiction and other derivative works. Some of the problems can, however, likely be resolved by better representation for fan communities. Better-organized fans will be in a better position to negotiate with copyright holders and stand a better chance of making their voices heard in Congress.

A. AMENDING THE DERIVATIVE WORKS DOCTRINE

The most radical solution to the fanfiction problem is to alter the derivative work right in an amendment to the Copyright Act. Numerous legal scholars have noted that the derivative works doctrine is too broad and hinders more creativity than it encourages.195 A new, more limited derivative work right could solve this problem. Congress could redefine

195. See, e.g., Voegli, supra note 106, at 1264.
derivative work as a work that is based on a preexisting copyrighted work that does not significantly transform or recast the work.\textsuperscript{196} Copyright holders would retain their exclusive right to authorize or prohibit derivative works, except for those that contain a significant amount of original creation. Unfortunately, such a solution is unlikely to please licensees who acquire licenses specifically to produce derivative works. Moreover, the analysis of how transformative a work is could lead to arbitrary decisions by courts. Whether a work is truly original is often a matter of personal opinion rather than legal reasoning.

Another possible alteration to the law that would likely solve the fanfiction problem is to permit unauthorized derivative works that are not made for economic benefit and do not interfere with the existing work’s current and future economic market. Economic harm is essential to deciding whether a work qualifies for the fair use defense.\textsuperscript{197} Considering economic harm as a factor of a derivative work right instead of fair use would save authors of derivative works from being treated as automatic infringers, allowing for more rational decisions by both fans and copyright holders.

This second alteration may present problems when it comes to fanfiction. While fanfiction is not necessarily made for profit, websites hosting potentially infringing material use ads to sponsor their activity.\textsuperscript{198} It would be very difficult to separate fanfiction that derives absolutely no economic benefit from fanfiction that does (even if that benefit is received by a third party). Furthermore, a definition of derivative work that takes into account economic harm may benefit fanfiction writers, but would not help authors of derivative works who strive to get their work published. The outcome for the defendant in Salinger, which dealt with an unauthorized sequel to J.D. Salinger’s famous novel \textit{Catcher in the Rye}, would likely remain the same under this analysis. And if an author were opposed to derivative works as a matter of principal, she would have no recourse against those who make unauthorized derivative works for no profit.

While amending the derivative works doctrine would provide a more definite position for both fans and copyright owners, it is unlikely that any amendment would satisfy both sides.

B. FAIR USE EXCEPTION FOR ALL FAN WORKS

Another solution to the fandom problem is to create a special fair use exception for all fan-created works.\textsuperscript{199} Like the fair use exceptions for education, criticism, and parody,\textsuperscript{200} a creative works exception would

\begin{thebibliography}{999}
\bibitem{196} Id. at 1267.
\bibitem{197} Goldstein, \textit{supra} note 50, at 232.
\bibitem{198} See supra Part III.B.3.
\bibitem{199} See, e.g., Chung, \textit{supra} note 13; Noda, \textit{supra} note 7.
\bibitem{200} 17 U.S.C. § 107 (2012) ("[N]otwithstanding the provisions of § 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including
provide a safe haven for fan activities and encourage creative appropriation.

Unfortunately, creating an exception for fan-created works generates certain problems. The fair use doctrine has become significantly more extensive, often justifying seemingly unjustifiable uses of copyrighted material. An additional amendment to the doctrine that would broaden its already considerable power is likely to be met with strong opposition from content creators. Further, court decisions based on the fair use doctrine have been inconsistent. Like all factor tests that lack a single deciding factor, fair use decisions tend towards the arbitrary. Economic harm is often, but not always, the most important factor. The court in SunTrust, for instance, focused on the transformative nature of the work.

Thus, while fanfiction defendants would have better chances in court with a special fair use exception, fans would have no certain knowledge as to the legal status of their activities. Fans would still have no guarantee before creating and putting a derivative work online that their work is non-infringing. Fandom would remain a grey area in the law.

Moreover, a fair use exception would not solve the legitimate concern some authors have about others producing unwanted derivative works. An author like J.D. Salinger, for example, could use the derivative works right to forbid any derivative works and produce none himself. Courts do not give the personhood theory much weight in justifying extensive copyright, but they will consider the wishes of the author regarding her own work. Allowing people to create derivative works under the fair use doctrine, even if they are not profiting from their creation, would go directly against some authors’ wishes.

A fair use exception for fan works is an appealing prospect. Many fan communities have already begun to justify their own existence as “fair use” without any clear understanding of whether there is any truth in that description. But creating an exception for fan works within fair use would mean stretching a bloated doctrine even further and would provide no recourse for those authors that want to prevent any and all derivative works. For these reasons, though it is often advocated as the ideal, an exception within fair use would not be the best solution to the fanfiction problem.

C. EXPANDING AN AUTHOR’S MORAL RIGHTS

Yet another way to address the fandom problem would be to expand

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201. See Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (holding that Google’s digital reproduction of millions of copyrighted books for its library project was “fair use”).
the moral rights provision in the Copyright Act. This may be a way to compensate for the deficiencies of current copyright law when it comes to complying with the wishes of authors.

Moral rights have never been a significant part of American copyright law. The original French concept of droit moral was meant to convey personal or spiritual rights. Based on the personhood theory, moral rights recognize the art as an extension of the artist and the special relationship contained therein. Further, moral rights are neither an extension nor a substitution for copyrights. Both rights may exist independently of each other and be held by many different parties, as pieces of copyright often are.

Unlike the United States, many European countries provide authors with extensive moral rights. In the United States, the Visual Artists Rights Act of 1990 ("VARA"), passed by Congress as a way of complying with the Berne Convention for the Protection of Literary and Artistic Works, an international treaty governing intellectual property, provides for the protection of visual artists’ integrity and attribution rights. The right of attribution prevents anyone from misrepresenting the author’s work as their own. The right of integrity prevents anyone from modifying the art without the artist’s permission. The artist maintains these rights even if she transfers the ownership in the work to someone else, which essentially makes the rights inalienable. According to the VARA, only visual artists have moral rights, and only visual works of “recognizable stature” are protected from destruction. As such, authors who are opposed to someone modifying their literary work, even if such modification is within the doctrine of fair use, have no legal recourse. Extending the current moral rights doctrine to literary works would provide such recourse.

The First Amendment makes extending moral rights in the United States problematic. The fair use doctrine represents a compromise between the freedom of expression guaranteed by the First Amendment and the limits placed on that freedom by copyright law. The United States interprets freedom of expression quite broadly and is wary of restraining this most basic right. The existing moral rights provision for visual works is proving difficult enough to enforce. A moral rights extension for literary

205. RAJAN, supra note 127, at 49.
206. Id. at 50–52.
208. Id. at 44.
209. See id. at 45–46.
210. See id. at 47–49.
211. 17 U.S.C. § 106A(a)(3) (2012) ("[T]o prevent any intention distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation..." and (B): "[T]o prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work.").
212. Liemer, supra note 207, at 50.
213. Id. at 52.
214. Keshawn M. Harry, A Shattered Visage: The Fluctuation Problem with the Recognized
works could be a disaster. Copyright owners, who would have the right to prevent anyone from modifying their literary work, may have opposing interests to licensees and publishers when it comes to enforcing such rights.

In determining whether to extend moral rights to literary works, society would have to decide whose interests are more important and whom copyright is truly meant to benefit. If copyright exists solely for the promotion of useful arts, the artist’s personal desires regarding her work should be irrelevant. If the artist’s wishes regarding her work are irrelevant, then fanfiction need not be analyzed as anything other than potential economic loss in the market. Congress would need to consider whether this would discourage a significant number of artists from creating. The stated purpose of copyright law is, after all, to incentive creation.

D. LIMITED LICENSES

A licensing system or the creation of an online space for fans to share their derivative works would address some of the concerns copyright owners have about fanfiction. In discussing fanfiction, a frequently cited anxiety is the pornographic or adult material created from an age inappropriate source. Lewd content aside, both parents and content owners may also be worried about a child finding fanfiction that, for instance, reexamines Beauty and the Beast as a case analysis of the Stockholm syndrome. J.K. Rowling, the author of the Harry Potter series, supports fanfiction insofar as it remains a noncommercial activity and the stories are “not obscene.” Since the target audience for Harry Potter is minors under the age of eighteen, Rowling understandably does not support X-rated derivations.

Moreover, when authors encounter fanfiction, accidentally or because an enterprising fan wants to share her work, there is a strong possibility of the Anderson v. Stallone problem. In Anderson, Timothy Anderson, a fan of Rocky III, wrote a thirty-one page “treatment” that functioned as a sequel to the movie. The treatment incorporated the characters created by Sylvester Stallone and cited Stallone as co-author, but the studio did not purchase Anderson’s screenplay. When the official sequel, Rocky IV, hit theaters, Anderson sued, claiming that Stallone incorporated ideas from the unauthorized sequel into his final script.


218. Id. at *1.

219. Id.

220. Id.
Even if Stallone did not purposefully copy Anderson’s unauthorized sequel, he may have incidentally used the same themes. It would be difficult, if not impossible, to prove where the source for Stallone’s expression originated. There may only be so many ways to write “Rocky goes to Russia.” Stallone may have used common tropes or stereotypes, building on the character of Rocky that had emerged from the first three movies.

Authors of published works face the same problem as Stallone when they encounter fanfiction. If a fan preempts them in a fanfiction published online, they face the possibility of being accused of stealing the fan’s work. As such, even authors who approve of fanfiction may refuse to read it for “legal reasons.”

Given the widespread nature of fanfiction’s existence, it is clear that content owners’ concerns are not stopping fans from creating fan works. It might even be easier for content owners to create spaces for fans to post their fan works. Many publishers and movie studios have web pages with forums, games, and “extra” content based on the existing creative work. It would not be difficult to set up, while implementing some boundaries, a space for fanfiction or fan art. Only age-appropriate material would be allowed and the copyright holder could claim ownership of all uploaded content. Creating havens for fans to exercise their imaginations and play with their favorite characters would address some of the demand for derivative works. In addition, such a space would give copyright owners some control over what fans do with their content.

Admittedly, this solution does not address original author concerns about the creation of unauthorized derivative works. Nor does it address the fan desire to make whatever content they wish without limitations. When the popular website FanFiction.net deleted all mature content, many fans left the site for other archives. Websites attempting to keep content age-appropriate would need to not only institute a policy, but also to invest in moderating to make sure users followed the policy. This may require more resources than content holders are willing to invest for an online fan playground. Some websites have attempted to create this space despite the potential costs; Amazon’s “Kindle Worlds” is a good example. Only time will tell if such a solution is sustainable.

E. ORGANIZED FAN COMMUNITIES

An emerging solution to the fanfiction problem facing both fans and authors is the Organization for Transformative Works (“OTW”), a

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nonprofit “established by fans to serve the interests of fans.” The organization worked with the Electronic Frontier Foundation to create an online space for fan works that is unaffected by advertising considerations and arbitrary limits imposed by private archives. The site is run by volunteers and sponsored entirely by donations. The OTW also provides legal advice to fans that receive notices of infringement. Overall, the OTW is a good example of what fans can achieve when they stand together.

The OTW’s goal is to get all fan works recognized as transformative works, presumably making the works non-infringing. But given the Supreme Court’s decision in Campbell and the current circuit split, this classification seems far-fetched. However, fanfiction is not something that will magically disappear because content holders disapprove. While banding together may give fans more negotiating power, having a single organization dedicated to the legalization of fanfiction may make negotiating easier for both authors and copyright holders.

Treating fandom as a single entity in discussion is useful, but it also ignores the reality of fandom organization. Fandom consists of many disparate communities with differing interests that may not feel a connection to one another. This means negotiating with authors and copyright holders is practically impossible. Further, some fans who write fanfiction or post their stories online may not necessarily consider themselves part of the larger fandom community or choose not to associate with more radical fan behavior. When speaking of a licensing scheme or defining a better fair use defense for fandom activities, it is useful to remember that fandom is neither organized nor cohesive.

While better organization within the fandom community would not solve the fandom problem, it would be a good way to even the playing field for fans and copyright holders. Without having resources explaining copyright law and effective lobbyists, fans will have trouble negotiating with copyright holders and defending their position in Congress.

V. CONCLUSION

The fandom problem continues to exist without any legal direction from U.S. courts despite regular clashes between fanfiction authors and copyright holders. Unauthorized derivative works have become part of the Internet culture. The fandom problem developed in part because of the increasing derivative work right in U.S. copyright law. This broader derivative work right does not necessarily serve the purported purpose of copyright and is difficult to justify theoretically in relation to the original conception of copyright. Furthermore, fandom activities pose a problem for authors that wish to limit the creation of derivative works and have no other recourse to do so. Limiting the derivative work right statutorily would help encourage fandom activity, but would provide no recourse for authors that
wish to discourage such activity. Moreover, in order to approach a
conversation about the various merits of these two types of creative works,
one must be able to address fandom as a whole or, at least, as a few
organized communities.

Creative appropriation is by no means a new development in popular
culture. As Justice Story pointed out, every creative work builds on existing
works in some way. Both courts and legislatures should hesitate before
prohibiting the broad range of creative activities that currently exist on the
Internet. It is likely that no one solution will be able to resolve the conflict
between copyright holders and the creators of unauthorized derivative
works. Some combination of the solutions presented here would be best if
the rights of both fans and authors are considered. Better organization and
representation for fandom as an entity is certainly a good start to working
out a solution. In whatever form solution exists, one hopes that it will strike
a balance between the legitimate interests of authors in protecting their
works and the incredible creative output of fans who love those works.