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# I’LL TAKE IT FROM HERE: THE PSYCHOLOGY OF FANFICTION AND ITS RELATIONSHIP WITH COPYRIGHT LAW

*Ellen Williams\**

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## I. FANFICTION? IN 2023?

The term “fanfiction” conjures up images of teenage girls writing love stories in their diary that star themselves and their favorite celebrity or fictional character. While this is one facet of fanfiction, fanfiction comes in many forms and has been pervasive in popular culture for decades.<sup>1</sup> Fanfiction is a piece of media, based on an original fictional work or person, in which the creator distorts the source material to make a separate work—it both relies on and is independent from the source material.<sup>2</sup> This working definition is broad, as fanfiction can be found in every corner of the internet, in a multitude of forms, and about every possible movie, TV show, book, or celebrity.<sup>3</sup> Yet, fanfiction encompasses more than fan made works in the 20th and 21st centuries. In fact, important pieces of literature like Dante’s *Inferno* constitute fanfiction according to the definition above.<sup>4</sup> *Inferno* was an offshoot of the source material the Bible, and Dante created his own version of events where the main character, a stand in for himself, accompanied his favorite poet, Virgil, on a journey through hell.<sup>5</sup> *Inferno*’s age and religious source material allows it to avoid classification as a fanfiction.<sup>6</sup> But, at its core, *Inferno* shares similar qualities with modern day fanfiction.

Beyond traditionally published books like *Inferno*, Fanfiction exists in many other forms. Modern fanfiction primarily exists to connect people with a shared interest, typically fans within a larger “fandom.”<sup>7</sup> An early form of documented fanfiction was the use of zines within the Star Trek fandom in the 1960s.<sup>8</sup> Zines are homemade magazines about specific topics, and Star Trek fans used this forum to photocopy submitted fanfics and send them to fans on their mailing list.<sup>9</sup> Today,

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1. See Stephanie Burt, *The Promise and Potential of Fan Fiction*, NEW YORKER (Aug. 23, 2017), <https://www.newyorker.com/books/page-turner/the-promise-and-potential-of-fan-fiction>.

2. See Jacqueline D. Lipton, *Copyright and the Commercialization of Fanfiction*, 52 HOUS. L. REV. 425, 427 (2014).

3. See Burt, *supra* note 1.

4. See Kalea Martin, *Dante’s Masterpiece ‘La Divina Commedia’ is Actually Fanfiction*, MEDIUM (Sept. 16, 2020), <https://medium.com/life-is-lit/dantes-masterpiece-la-divina-commedia-is-actually-fanfiction-5246c838c0a6>.

5. See Alessandra Pagano & Matteo Dalena, *Dante’s ‘Inferno’ is a Journey to Hell and Back*, NAT’L GEOGRAPHIC (Oct. 21 2022, 9:47 BST), <https://www.nationalgeographic.co.uk/history-and-civilisation/2022/10/dantes-inferno-is-a-journey-to-hell-and-back>.

6. See *id.*

7. See *Fandom and Participatory Culture*, SUBCULTURES & SOCIOLOGY, <https://haenfler.sites.grinnell.edu/subcultural-theory-and-theorists/fandom-and-participatory-culture/> (last visited Jan. 7, 2023). Fandom is defined as a “subculture composed of fans characterized by a feeling of empathy and camaraderie with others who share a common interest.” *Fandom*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Fandom> (last visited Jan. 18, 2023).

8. See *Fandom and Participatory Culture*, *supra* note 7.

9. *Id.*

the advent of the Internet allows fans to connect and share their stories without having to physically mail them. Fans use popular social media sites like Tumblr, Twitter, and Tiktok to electronically meet, discuss their interests, stay updated on their particular fandom, share fanfics they wrote or enjoyed, and even engage in political activism.<sup>10</sup> Reading and sharing fanfic is only a portion of the overall experience on these platforms, but some websites are dedicated solely to the fanfiction community, such as Archive of Our Own (AO3) and fanfiction.net.<sup>11</sup>

In the past, only the most dedicated fans partook in the writing and reading of fanfiction.<sup>12</sup> Today, with social media introducing casual fans to the concept, fanfiction is more popular than ever before.<sup>13</sup> However, this growing popularity has resulted in increased attention to the legality of a fanfic author basing their story on another author's work, especially if the fanfic author eventually profits from their fanfiction.<sup>14</sup> This Note discusses the psychology behind fandoms, what drives a person to read or write fanfiction, the ways fanfiction can be commercialized, how commercialization impacts a fanfic author's ability to avoid infringing the original author's copyright, and how copyright law interacts with the practice of fanfiction.<sup>15</sup> However, this Note will focus on only fanfiction that concerns original works of television, movies, and books. While celebrity-based fanfiction is fascinating, the copyright concerns are not as prevalent because these fanfics do not involve the theft of an original idea but, instead, the use of a person for inspiration.

## II. TOTAL FAN BEHAVIOR

To first understand why a person would write a fanfic, one must first understand the psychology of the individuals participating in a fandom. Some fans casually interact with the media in question; others are stans, meaning they are “extremely

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10. See Raisa Bruner, *How K-Pop Fans Actually Work as a Force for Political Activism in 2020*, TIME (Jul. 25, 2020, 8:03 AM), <https://time.com/5866955/k-pop-political/>. Fandoms are all-encompassing communities that go beyond discussions of the source material. *Id.* These communities are spaces where individuals can interact with people outside of their bubble and expand their worldview in a comforting way. *Id.*

11. See Sarah Rahman, *Best Fan Fiction Apps and Sites*, BOOK RIOT (June 14, 2021), <https://bookriot.com/best-fanfiction-apps-and-sites/>.

12. See *Fandom and Participatory Culture*, *supra* note 7.

13. See Ayesha Mumal, *The Renaissance of Fanfiction*, OPEN BOOK (Dec. 14, 2021), <https://open-book.ca/Columnists/The-Renaissance-of-Fanfiction>.

14. See Lipton, *supra* note 2, at 427–32.

15. This Note will focus on only fanfiction that concerns original works of television, movies, and books. While celebrity-based fanfiction is fascinating, the copyright concerns are not as prevalent because these fanfics do not involve the theft of an original idea but, instead, the use of a person for inspiration.

or excessively enthusiastic and devoted fan[s].”<sup>16</sup> Stans are a more intense brand of fan: those who make supporting the specific media a key part of their identity.<sup>17</sup> No one thing transforms a casual fan to a stan, but once that threshold is met, stans want to do more than just casually consume the media.<sup>18</sup> Fanfiction allows stans to directly interact with the world they are obsessed with and their fandom in a deeply personal way.<sup>19</sup>

One reason why a person would write or read fanfiction is to feel more connected to their chosen online community.<sup>20</sup> Through their fandoms, fans create and exist within a somewhat private part of the Internet that is tailored entirely to their interests.<sup>21</sup> Fandoms thrive on new content, and one way to be an active participant in this community and foster the sense of identity that comes from belonging to a tight-knit group to contribute to the existing content.<sup>22</sup> As the name itself indicates, fanfiction is directly catered to fans. Fanfiction is made by and for stans who want to actively participate in the fandom because the existence of and desire to read fanfic implies the fan has finished the source material and wants more.<sup>23</sup> Consequently, and because each participant believes they are an important member of the community, fanfiction writers and readers maintain a smaller, more personal community within the greater fandom that leads to a greater sense of belonging for its participants.<sup>24</sup>

Another motivation for someone to write fanfiction is to put their own spin on the material.<sup>25</sup> By reading and writing fanfiction, fans can continue to live with the source material once the show or the book series ends.<sup>26</sup> If they are unhappy with the direction a story took and they want to fix it, fanfiction allows them to rewrite

16. *Stan*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/stan> (last visited Nov. 2, 2022).

17. *See Fandom and Participatory Culture*, *supra* note 7.

18. *See id.* (“Fan interaction with media becomes a social activity, and this process allows fans to build their own communities in which they can express themselves.”).

19. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651, 665 (1997).

20. *See id.* at 657.

21. *See, e.g.*, Laura Miller, *Harry Styles Threw Up Here*, *SLATE* (June 12, 2022, 7:30 PM), <https://slate.com/culture/2022/06/fandom-harry-styles-cumberbatch-books-tabitha-carvan-kaitlyn-tiffany.html>.

22. *Id.*

23. *See* Lipton, *supra* note 2, at 432, 437–38.

24. *See generally* VERA LUCIA CONCEICAO PEREIRA, *COMMUNITY AND IDENTITY IN FICTIONAL FANDOMS: A QUALITATIVE EXPLORATION OF INDIVIDUAL ACCOUNTS* (2017), <https://e-space.mmu.ac.uk/619241/1/Vera%20Pereira.pdf>.

25. *See* Burt, *supra* note 1.

26. *See* Lipton, *supra* note 2, at 433.

the perceived mistakes.<sup>27</sup> Fanfiction authors' desire to fix the course of events comes from a place of love towards a certain body of work.<sup>28</sup> Whether the couple they "shipped"<sup>29</sup> did not end up together or their favorite character died, a fanfiction writer can create their own version the story that sits better with them. And why shouldn't they? This new work is purely for their enjoyment and other like-minded individuals; they are not trying to appeal to the world at large but to their own community.<sup>30</sup> This type of fanfic also comes from a desire for justice.<sup>31</sup> Fans feel wronged when a story they cherish goes in a direction they do not enjoy because they consider themselves "guardians of the texts they love," so even if the original creator did not write it, fanfic writers and readers feel vindicated to see their preferred version of events in action.<sup>32</sup>

One example of this type of "fix-it fic is *Breakbones and the Dragonrider*, which was written after the sixth episode of *House of the Dragon*.<sup>33</sup> The show had a ten-year time jump between the fifth and six episode, and in that ten-year period, one of the main characters had a relationship with a supporting character.<sup>34</sup> However, that side character died in the sixth episode, so fans did not see how that relationship developed or much content about how the characters interacted.<sup>35</sup> On social media, fans were furious about the story's execution,<sup>36</sup> and fanfiction writers quickly worked to document what the show omitted from the main storyline.<sup>37</sup> Only a month after the episode aired, this fanfic had 24 chapters and over 70,000 words, which is the equivalent of 280 pages.<sup>38</sup> *Breakbones* is even tagged as "fix-it" and "fix-it of sorts."<sup>39</sup> This author's dedication to correcting a perceived wrong in the

27. *Id.*

28. See Tushnet, *supra* note 19, at 657.

29. Shipping is "[t]he act of supporting or wishing for a particular romantic relationship." *Shipping*, FANLORE, <https://fanlore.org/wiki/Shipping> (last visited Jan. 18, 2023).

30. See Lipton, *supra* note 2, at 435.

31. See Tushnet, *supra* note 19, at 657.

32. *Id.*

33. See Beneathawesternsky, *Breakbones and the Dragonrider*, ARCHIVE OUR OWN, <https://archiveofourown.org/works/41832864/chapters/104963316> (last visited Jan. 6, 2023).

34. Quinci LeGardye, *The 'House of the Dragon' Timeline and Time Jumps, Explained*, MARIE CLAIRE, (Oct. 25, 2022), <https://www.marieclaire.com/culture/tv-shows/house-of-the-dragon-timeline/>.

35. See *id.*

36. See Jenna Guillaume, *Fans are Reacting to the Two Big "House of the Dragon" Deaths This Week*, BUZZFEED (Sept. 27, 2022), <https://www.buzzfeed.com/jennaguillaume/house-of-the-dragon-killed-two-characters-and-people-are>.

37. See, e.g., Beneathawesternsky, *supra* note 32.

38. *Id.* At the time of writing this, the fanfic is not completed, so the statistics provided are likely to change. As of January 6, 2023, this fanfic had over 90,000 words.

39. *Id.*

show for no monetary benefit both indicates the love they have for the show and their anger at how the show handled one of its storylines.

Individuals may also have another motivation to participate in fanfiction: to see themselves as part of the fictional world they cherish.<sup>40</sup> One form of fanfiction is referred to as “self-insert” fanfic where the author inserts a new character into the existing world, and this new character is a substitute for the author or the reader.<sup>41</sup> To limit story disruption, there is typically little physical or emotional description of the placeholder character, and thus the reader can use the character as a self-insert into the story and feel as though they are interacting with it.<sup>42</sup> Another way fanfic writers make their mark on their preferred fandoms is through “original characters.”<sup>43</sup> These original characters may be a figment of their imagination or based on the author. Regardless, fanfic writers place original characters within the fabric of the original work to change some aspect of the story or to see how established characters interact with this new one.<sup>44</sup> The practice of original characters and self-insert stories allow authors to feel like an integral part of the original story, to write out a romance between themselves and their favorite character, or to understand the story on a new level.<sup>45</sup> Fans, especially those dedicated enough to participate in fanfiction, strive for ways to feel connected to the story and the characters they love; placing themselves or allegories of themselves into those stories is one way to accomplish that.<sup>46</sup>

A phenomenon on TikTok called “reality shifting” is another form of self-insert fanfiction.<sup>47</sup> Reality shifting is a practice where an individual will write out a script in which they are part of the desired fictional universe, and the author then mentally transports to this scripted world.<sup>48</sup> Medical experts see reality shifting as a form of lucid dreaming or maladaptive daydreaming because, like lucid dreaming or maladaptive daydreaming, it entails a particular process that tricks the mind into believing the fictional world is real and allows one to interact with this new reality

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40. See *Self-Insert Fic*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/SelfInsertFic> (last visited Jan. 6, 2023).

41. *Id.*

42. *Id.*

43. *Original Character*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/OriginalCharacter> (last visited Jan. 6, 2023).

44. *Id.*

45. *Id.*; see also *Self-Insert Fic*, *supra* note 340.

46. See *Self-Insert Fic*, *supra* note 40.

47. See Travis Andrews, *Inside ‘Reality Shifting,’ the Trend Where Tiktokers Claim They can Enter the World of Harry Potter*, WASH. POST (July 17, 2021, 6:00 AM), <https://www.washingtonpost.com/technology/2021/07/17/reality-shifting-tiktok/>.

48. *Id.*

as they wish.<sup>49</sup> Those who participate in reality shifting believe that, while in this mental state, they actually exist in and are interacting with this separate or “desired” reality.<sup>50</sup> Although the extra psychological element differentiates shifting from the more traditional form of fanfiction, at its core, shifting is fanfiction. Shifting is a story based on an original work for someone’s personal benefit. Some people who “shift” publish their scripts online as fanfics, which shows they see this practice as an offshoot of fanfiction.<sup>51</sup> Shifting is a way for these fans to feel truly immersed in their favorite fictional world, and the communities of those who shift are tight-knit groups online.<sup>52</sup> One TikTok account, @atipotter, is dedicated entirely to talking about her experiences with attempting to shift in the *Harry Potter* universe.<sup>53</sup> The creator describes her script in detail, including what her class schedule is, what fictional characters she is friends with, and what changes she has made to the original universe, among other things. Her place within the fandom is centered around shifting, and she posts about shifting to make friends and feel more connected to the source material.<sup>54</sup> Those same motivations also explain why others might partake in shifting or self-insert fanfics as well.

An alternative reason someone might write fanfiction, beyond wanting to be further immersed in the fictional world they love, is to gain writing experience.<sup>55</sup> Fanfiction is an incredibly low-stakes way to see if one is good at or even enjoys writing.<sup>56</sup> Typically, the fanfiction writer is publishing anonymously or under a

49. See Eli Somer et al., *Reality Shifting: Psychological Features of an Emergent Online Daydreaming Culture*, CURRENT PSYCH., (Oct. 30, 2021), <https://link.springer.com/content/pdf/10.1007/s12144-021-02439-3.pdf?pdf=core>. There are not many other studies on the topic of reality shifting. This could be because it is relatively new, as the practice gained popularity on TikTok in 2020, or because its participants are primarily young women who are easily characterized as obsessive and emotional and thus could make the topic feel less legitimate to some researchers.

50. Andrews, *supra* note 47.

51. See generally Cass (@cass.relf1), TIKTOK, [https://www.tiktok.com/@cass.relf1/video/6952906945867156742?\\_r=1&\\_t=8ZALT2eCdW1](https://www.tiktok.com/@cass.relf1/video/6952906945867156742?_r=1&_t=8ZALT2eCdW1) (last visited Jan. 19, 2023) (discussing a story she wrote based on her scripted “desired reality” and publishing it on Wattpad).

52. See generally Sav (@sav\_shifts), TIKTOK, [https://www.tiktok.com/@sav\\_shifts/video/7091079681109249322?\\_r=1&\\_t=8ZALqQuGbQA](https://www.tiktok.com/@sav_shifts/video/7091079681109249322?_r=1&_t=8ZALqQuGbQA) (last visited Jan. 19, 2023) (“I love the shifting community the people in it are so supportive . . . I feel like we’re all so close.”).

53. Ati Potter (@atipotter), TIKTOK, <https://www.tiktok.com/@atipotter?lang=en> (last visited Jan. 19, 2023).

54. See generally *id.* (posting consistently about *Harry Potter* and shifting for over two years); see also Ati (@atipotter), TIKTOK, [https://www.tiktok.com/@atipotter/video/7062457178178800943?\\_r=1&\\_t=8ZAMjrFKd2Z](https://www.tiktok.com/@atipotter/video/7062457178178800943?_r=1&_t=8ZAMjrFKd2Z) (last visited Jan. 19, 2023) (referring to her fellow shifters as “the best friends I could ask for.”).

55. See Lipton, *supra* note 2, at 429.

56. *Id.*

pseudonym, so they are not putting themselves up for critique.<sup>57</sup> Also, because publishing fanfiction online is free, the writer does not lose money if the fanfiction is unpopular.<sup>58</sup> While, technically, the author might lose money in terms of putting time towards writing a fanfic instead of using that time for more lucrative pursuits, a fanfiction writer does not actively lose money by posting their story online.<sup>59</sup> In addition, the characters and alternate world are already created and present. Therefore, the writer can use that pre-existing world as a vehicle for their own stories and ideas and not spend time creating their own world. Finally, because of how fanfictions are tagged online based on the fandom, the couple involved, and other factors, a reader interested in the aspects of that specific story will easily be able to find it and read it.<sup>60</sup> This theoretical reader may comment and provide free feedback, so the author has a true opportunity to improve their writing skills and grow a following for their fanfics.<sup>61</sup> Gaining a dedicated audience for fanfiction is not uncommon. However, if the fanfic author decides to transition to non-fanfiction, this former audience may prevent an easy transition because their audience would likely remember and mention that the author got their start using another author's ideas as their own.<sup>62</sup>

### III. THE LOVE IN YOUR HEART DOESN'T PAY THE BILLS

Fanfiction is primarily a not-for-profit endeavor.<sup>63</sup> The fans who write it do not make any instant profit off their work as fanfiction websites are openly “nonprofit [and] noncommercial.”<sup>64</sup> Additionally, the most popular fanfiction website, AO3, is a not-for-profit website.<sup>65</sup> AO3 is backed by the non-profit The Organization for Transformative Works and does not have ads to fund the website.<sup>66</sup> It also does not have a premium version of the website that users can buy to access, so every user has the same free level of access to the website's content.<sup>67</sup> AO3 hosts a fundraiser

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57. See Burt, *supra* note 1.

58. *Invitations* FAQ, ARCHIVE OUR OWN, [https://archiveofourown.org/faq/invitations?language\\_id=en#manageinvites](https://archiveofourown.org/faq/invitations?language_id=en#manageinvites) (last visited Jan. 19, 2023).

59. *Id.* (“AO3 [is] a free service for any fans who wish to use it.”).

60. *Tags* FAQ, ARCHIVE OUR OWN, [https://archiveofourown.org/faq/tags?language\\_id=en#wrangling](https://archiveofourown.org/faq/tags?language_id=en#wrangling) (last visited Nov. 2, 2022).

61. See Lipton, *supra* note 2, at 287.

62. See *infra* pp. 12–13.

63. See Abigail De Kosnik, *Should Fan Fiction Be Free?*, 48 CINEMA J. 118, 118 (2009).

64. ARCHIVE OUR OWN, <https://archiveofourown.org/> (last visited Jan. 6, 2023).

65. *Id.*

66. See *About the OTW*, ARCHIVE OUR OWN, <https://archiveofourown.org/about> (last visited Jan. 19, 2023); see also *Ad-Free*, ARCHIVE OUR OWN (Oct. 21, 2014, 3:59PM), [https://archiveofourown.org/admin\\_posts/1505](https://archiveofourown.org/admin_posts/1505).

67. See *About the OTW*, *supra* note 66.

each year to cover the cost of the website's general upkeep and maintenance, and the fundraiser's annual success speaks to the importance of fanfiction to certain groups.<sup>68</sup> In fact, AO3 raised \$275,724.51 in its April 2022 membership drive.<sup>69</sup> Although Wattpad, another popular fanfiction website and app, uses advertisements throughout its interface to fund its maintenance and offers a premium version for users who do not want to interact with ads.<sup>70</sup> It is worth noting that Wattpad promotes unpublished authors who are writing non-fandom-based works in addition to fanfiction, so their audience is both fandoms and individuals searching for an accessible way to read new material.<sup>71</sup> Unlike AO3, Wattpad is not attempting to profit solely from fanfiction writers and readers and instead reaps profits from original stories, the use of ads, and a premium version of the website.

The lack of immediate profit in fanfiction is both an advantage and disadvantage for new writers.<sup>72</sup> The advantage stems from the fact that any writer can enter the field: most popular fanfiction websites do not require a monetary fee to publish fanfics online.<sup>73</sup> In this way, one only needs the time to write fanfic to become a fanfiction author. The lack of monetary incentive also promotes this practice as a way for genuine fans, and not ones who are attracted by the possibility of money, to interact and support each other.<sup>74</sup> In the same vein, this non-monetary approach can be a disadvantage.<sup>75</sup> Not everyone can dedicate hours of their life for possible online recognition but with no monetary benefit. Many fanfiction sites allow one to publish under a username, and most individuals "choose to participate . . . under a pseudonym."<sup>76</sup> Many fanfic writers choose to not write under their legal name because of the stigma surrounding fanfiction or because they are more recognizable to the fandom with their pseudonym.<sup>77</sup> This practice of anonymity makes it difficult for an author to gain a following, and they may eventually transition away from the world of fanfiction because their true identity is

68. See *April 2022 Membership Drive: Thanks for Your Support*, ARCHIVE OUR OWN (Apr. 11, 2022, 6:30 AM), [https://archiveofourown.org/admin\\_posts/22285](https://archiveofourown.org/admin_posts/22285).

69. *Id.*

70. *Premium FAQ*, WATTPAD, <https://www.wattpad.com/premium/faqs/> (last visited Jan. 6, 2023).

71. See *Wattpad*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wattpad> (last visited Jan. 19, 2023).

72. See generally Tushnet, *supra* note 19, at 686; Aly Wilkins, *Fanfiction and Copyright: Has the Digital Age Rendered Copyright Laws Obsolete?*, MEDIUM (June 23, 2019), <https://medium.com/swlh/fanfiction-and-copyright-has-the-digital-age-rendered-copyright-laws-obsolete-aa8a82be6fc5>.

73. See *Invitations FAQ*, *supra* note 58.

74. See generally De Kosnik, *supra* note 63 (discussing how outsider attempts of commercializing fanfiction have failed because of the insular nature of the fanfiction community, which is a trait that should be protected).

75. See also Wilkins, *supra* note 72.

76. *Pseudonym*, FANLORE, (Dec. 17, 2022, 12:49 AM), <https://fanlore.org/wiki/Pseudonym>.

77. See *id.*

concealed.<sup>78</sup> Because of the lack of money immediately present in the fanfiction community, a fanfiction author is likely to write their work for the psychological reasons listed above: to connect with a community, to write for a guaranteed audience, and to feel more immersed in the source material.

While fanfiction is designed to be noncommercial, fanfic authors can commercialize their fanfiction.<sup>79</sup> A fanfic author may adjust their story by changing the characters' names, the setting, and any recognizable aspects of the source material to make it available for publishing as a non-fandom-based work, which is "known in fanfic circles as 'filing off the serial numbers.'"<sup>80</sup> Authors have multiple motivations for these changes.<sup>81</sup> One incentive is money because the author may want to make a profit from this time-consuming hobby of theirs. If their fanfictions are popular and high-quality, then the author may have a decent chance of making some money from their work once they have transitioned away from the world of fanfiction.<sup>82</sup> Another motivation a fanfic author may have to commercialize their writing would be recognition for their publications.<sup>83</sup> Because most fanfiction authors publish with an online identity, they are not receiving recognition for their hard work as themselves.<sup>84</sup> A fanfic author may be popular online, but they are not reaping any present, tangible recognition that could further a possible writing career because of this separation between their "real-life" and online personas.

In theory, it is easy for fanfiction authors to switch from fanfiction to commercialized works because the authors already have a body of writing they can use as a base for their non-fanfiction works. While they cannot use their fanfics as is, fanfic authors do not have to start a new story completely from scratch because they can tweak their already completed works to create an "original" story.<sup>85</sup> By being "published" online, the fanfic has received audience feedback, so the story has undergone a process resembling a first round of edits.<sup>86</sup> Therefore, fanfiction

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78. *Id.*

79. *See* Lipton, *supra* note 2, at 429.

80. Burt, *supra* note 1. Authors may not need to "file off the serial numbers" if they get permission from the copyright holder to publish their fanfiction as a licensed work under the copyright.

81. *See* Lipton, *supra* note 2, at 437–38.

82. *See* Lauren Brown, *Sphere Lands Five More from The Love Hypothesis Author Ali Hazelwood*, BOOKSELLER (Sept. 20, 2022), <https://www.thebookseller.com/rights/sphere-lands-five-more-from-the-love-hypothesis-author-ali-hazelwood> (discussing how Hazelwood, a former fanfic author, sold over 750,000 copies over her fanfic-turned-novel in one year).

83. *See generally* Pseudonym, *supra* note 76. The practice of writing under a pseudonym may grow tiring for an author who wants appreciation for their work outside of that online identity.

84. *Id.*

85. *See* Lipton, *supra* note 2, at 454.

86. *See* Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012, 6:49 PM), <https://www.wsj.com/articles/SB10001424052702303734204577464411825970488>. Readers of a

authors have already taken the first daunting steps in the novel writing process by writing fanfiction they can easily adjust for future uses.

Fanfiction authors have successfully transitioned to published non-fanfiction authors on more than one occasion. One famous example of a former fanfic author finding great success outside of fanfiction is Cassandra Clare.<sup>87</sup> Posting originally under the name “Cassie Claire,” Clare was a popular *Harry Potter* and *Lord of the Rings* fanfic author from 2001 to 2006.<sup>88</sup> She eventually shifted out of the world of fanfiction by removing her fanfiction from online archives and mailing lists prior to the publication of her first novel, *City of Bones*.<sup>89</sup> Clare removed all remnants of the *Harry Potter* universe in her writing to create an incredibly popular independent fantasy world.<sup>90</sup> *City of Bones* is the first book in *The Mortal Instruments* series, which is part of the greater *Shadowhunter* universe that spans over twenty books, two movies, and a television show.<sup>91</sup> While her fanfics are no longer online, some fans who remember her fanfiction theorize that the main characters in *City of Bones* are based on the versions of Draco and Ginny in her fanfictions.<sup>92</sup> Only those who are aware that *City of Bones* was originally fanfiction can see remnants of those stories in her published writing: one passage in her Draco Malfoy fanfic “appears word-for-word in *City of Bones* . . . the only differences are minor punctuation changes” and the amendment of one character’s name for another.<sup>93</sup> Additionally, she titled her final published fanfic “The Mortal Instruments.”<sup>94</sup> Clare’s writing is a great example of how fanfiction can be a vehicle for independent ideas. Clare used the *Harry Potter* universe as a framework to initially tell her story, but even without that framework, her work can stand on its own.

Another popular example of fanfiction being turned into novels is the *Fifty Shades of Grey* franchise. *Fifty Shades of Grey* began as a *Twilight* fanfiction titled

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fanfic can comment on a work and give “kudos,” the equivalent of a “like,” while reading the fanfic. Therefore, the fanfic author receives feedback between chapters that they can use to adjust the story moving forward, similar to an editor giving an author edits on their novel.

87. See *Cassandra Claire*, FANLORE (July 13, 2022, 11:40 PM), [https://fanlore.org/wiki/Cassandra\\_Claire](https://fanlore.org/wiki/Cassandra_Claire).

88. *Id.*

89. *Id.*

90. *Id.* As of 2017, Clare had “more than 50 million copies of her books in print.” Meredith Goldstein, *Tracing Cassandra Clare’s Fantasy Career*, BOS. GLOBE (May 30, 2017, 10:00 PM), <https://www.bostonglobe.com/arts/books/2017/05/30/tracing-cassandra-clare-fantasy-career/OmPahsAr616ptC4TiBOcDN/story.html>.

91. *Cassandra Clare*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Cassandra\\_Claire](https://en.wikipedia.org/wiki/Cassandra_Claire) (last visited Jan. 6, 2023).

92. See *Cassandra Claire*, FANLORE, *supra* note 87.

93. *Id.*

94. *Id.* By naming her first published series after her final fanfic, Clare both repurposes her fanfiction to suit her new needs as a published author and honors her fanfiction background.

*Masters of the Universe*.<sup>95</sup> Author E. L. James altered the character names and location and removed the vampire influence to create a widely successful book and movie franchise.<sup>96</sup> Author of the *Twilight* books, Stephenie Meyer, knows her books inspired James's novels.<sup>97</sup> Meyer did not seem to have an issue with James's use of her work, stating that "[James] had a story in her, and so it would've come out in some other way."<sup>98</sup> James used fanfiction as the starting point for the *Fifty Shades of Grey* books, and while elements of *Twilight* are present in her independent works, she was able to distance herself enough from *Twilight* to create her own success.

Finally, Ali Hazelwood's move from fanfiction to published novels is successful;<sup>99</sup> however, the maintained connection between her published books and her fanfiction raises some copyright concerns.<sup>100</sup> Hazelwood's novel *The Love Hypothesis* gained traction online in 2021, and she has since published three novellas as well as another novel.<sup>101</sup> Prior to these publications, Hazelwood was known online as a popular *Star Wars* fanfiction author, and her novels are taken directly from her published fanfictions.<sup>102</sup> Like Clare and James, Hazelwood removed the fanfiction from her online pages after deciding to turn it into a published novel.<sup>103</sup> But unlike Clare and James, readers can still easily access Hazelwood's other fanfiction via her public Tumblr and AO3 accounts.<sup>104</sup> Her image as an author remains directly tied to the world of fanfiction, whereas Clare and James have distanced themselves by deleting their accounts and online presence

95. See 'Fifty Shades of Grey' Originally Started out as 'Twilight' Fan Fiction Before Becoming an International Phenomenon, BUS. INSIDER (Feb. 17, 2015, 12:22 PM), <https://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2>.

James initially posted her stories on Fanfiction.net but "was forced to remove some of them from the site." *Id.* One of those removed was *Masters of the Universe*, and after this removal, James decided to "rewrite [the story] and create" *Fifty Shades of Grey*. *Id.*

96. *Id.* ("Since . . . 2012, 'Fifty Shades' has sold over 100 million copies . . . and . . . [its] film adaptation . . . [made] \$94 million on its opening weekend").

97. See Fallon Prinzivalli, 'Fifty Shades of Grey': Stephenie Meyer Speaks Out, MTV (May 29, 2012, 11:48 AM), <https://www.mtv.com/news/2y84w9/fifty-shades-of-grey-stephenie-meyer>.

98. *Id.*

99. See Brown, *supra* note 82.

100. See discussion *infra* Part IV.

101. Home, ALIHAZELWOOD.COM, <https://alihazelwood.com/> (last visited Jan. 6, 2023).

102. See Sarah El-Mahmoud, *Bestselling Romance Novel Inspired by Fanfiction About Star Wars' Rey and Kylo Ren Is Becoming a Movie*, CINEMABLEND.COM (Oct. 7, 2022), <https://www.cinemablend.com/star-wars/bestselling-romance-novel-inspired-by-fanfiction-about-star-wars-rey-and-kylo-ren-is-becoming-a-movie>.

103. See generally (@blvr1013), REDDIT (Oct. 27, 2021, 9:05 AM), *Does Anyone Know the Title of the Fanfic that Inspired the Love Hypothesis?*, <https://www.reddit.com/r/reylo/comments/qgx3o5>.

104. See Works by Ever\_So\_Reylo, ARCHIVE OUR OWN, [https://archiveofourown.org/users/Ever\\_So\\_Reylo/works](https://archiveofourown.org/users/Ever_So_Reylo/works) (last visited Jan. 6, 2023). At the time of writing, Hazelwood's Tumblr was the first result after searching "Ali Hazelwood fanfiction," and the link to her AO3 was on the main page of her Tumblr.

as fanfic authors.<sup>105</sup> Hazelwood further endorses her connection to the world of fanfiction: the dedication in her upcoming novel states “To all my readers, from the AO3 days to where we’re now,” as she clearly maintains a connection to her AO3 persona.<sup>106</sup>

Certain *Star Wars* characters clearly inspired Hazelwood’s work.<sup>107</sup> The character descriptions of *The Love Hypothesis*’s main characters and the cover art plainly indicate her story originally centered around Kylo Ren and Rey from the *Star Wars* sequel trilogy.<sup>108</sup> Other characters in Hazelwood’s story match characters in the *Star Wars* sequel trilogy as well.<sup>109</sup> Hazelwood’s work is thinly veiled fanfiction, and she made no clear effort to distance her work from the source material like Clare and James. In fact, Hazelwood originally published *The Love Hypothesis* as an alternate universe fanfic, and she only adjusted the character names prior to publishing.<sup>110</sup> The main character is even named Adam, and Kylo Ren, the character inspiration for Adam, is portrayed by the actor Adam Driver.<sup>111</sup> Hazelwood is explicitly profiting off another creator’s characters. However, as this Note later explains more in-depth, because she is not using those characters as they exist in the *Star Wars* universe, she is not infringing on *Star Wars*’s exclusive rights under their copyright.<sup>112</sup>

Another way fanfiction prompts fans to exchange money is by renewing interest in the source material, such as when a fanfiction becomes so popular among the fandom that it spawns interest in the original work and the original author profits as a result.<sup>113</sup> One example of this type of renewed interest is *All the Young Dudes*, a Marauders fanfiction placed within the *Harry Potter* universe.<sup>114</sup> This fanfiction currently has over 9 million reads on AO3 and has been translated into over ten

105. See generally *Cassandra Claire*, FANLORE, *supra* note 87. Clare’s page lists her occupation as being an author as well as a retired fanwriter. *Id.*

106. Ali Hazelwood (@alihazelwood), TIKTOK [https://www.tiktok.com/@alihazelwood/video/7158855069335637290?\\_r=1&\\_t=8X1khrsIB8&is\\_f rom\\_webapp=v1&item\\_id=7158855069335637290](https://www.tiktok.com/@alihazelwood/video/7158855069335637290?_r=1&_t=8X1khrsIB8&is_f rom_webapp=v1&item_id=7158855069335637290) (last visited Nov. 2, 2022).

107. See (@impliedatpaddyspub), REDDIT (Jan. 25, 2022, 12:33 AM), [https://www.reddit.com/r/reylo/comments/sc78rb/the\\_love\\_hypothesis\\_who\\_is\\_who/](https://www.reddit.com/r/reylo/comments/sc78rb/the_love_hypothesis_who_is_who/).

108. See El-Mahmoud, *supra* note 102.

109. *Id.*; see also (@impliedatpaddyspub), REDDIT, *supra* note 107.

110. See (@salvagedstarstuff), REDDIT (Dec. 23, 2021, 7:52 PM), [https://www.reddit.com/r/RomanceBooks/comments/rnaztj/love\\_hypothesis\\_is\\_a\\_fanfiction/](https://www.reddit.com/r/RomanceBooks/comments/rnaztj/love_hypothesis_is_a_fanfiction/).

111. ALIHAZELWOOD.COM, *supra* note 101; *Adam Driver*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Adam\\_Driver](https://en.wikipedia.org/wiki/Adam_Driver) (last visited Jan. 6, 2023).

112. See discussion *infra* Part IV.

113. Lipton, *supra* note 2, at 434.

114. See MsKingBean89, *All the Young Dudes*, ARCHIVE OUR OWN, <https://archiveofourown.org/series/1031154> (last visited Nov. 2, 2022).

different languages.<sup>115</sup> This story revived interest in the original source material for many fans and led many to reread the original books, rewatch the movies, and buy *Harry Potter* merchandise.<sup>116</sup> After reading *All the Young Dudes*, fans of the story wanted to stay connected to the *Harry Potter* universe and, in doing so, likely brought more attention and money to the original franchise. However, this fanfiction has an identity separate from the source material, as it “birth[ed] a fandom of its own.”<sup>117</sup> *All the Young Dudes* is an example of how fanfiction can benefit both the fans and the source material. However, this fanfiction’s independent identity could cause legal problems for its author because it exists independently from J.K. Rowling’s influence, while still having influence on Rowling’s creations within the online *Harry Potter* community.<sup>118</sup>

#### IV. IS ANY OF THIS LEGAL?

This Note limits examination of the legal use of fanfiction to copyright law because copyright law is most likely to conflict with the practice of fanfiction. The Constitution included the Patent and Copyright Clause “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>119</sup> Similarly, by protecting original creations from being infringed upon, the Copyright Act reflects a national desire to “foster creativity and . . . increase the sum of creative works available in society.”<sup>120</sup> Under this reasoning, fanfiction both conflicts with the purpose of protecting original writing and furthers the purpose of fostering creativity by providing more options for creative works.

A work gains copyright protection “the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or

115. *Id.*

116. See generally Rachele Hampton, *The Best Harry Potter Novel Isn't Written by J.K. Rowling*, SLATE (Nov. 27, 2021, 5:55 AM), <https://slate.com/culture/2021/11/all-the-young-dudes-harry-potter-fanfic-wolfstar-tiktok.html> (providing statistics on the impressions of *All the Young Dudes* and explaining how its popularity is unlike to wane).

117. *Id.*

118. See generally Gnat (@lucky\_slice), TIKTOK, [https://www.tiktok.com/@lucky\\_slice/video/7074031360754584874?\\_r=1&\\_t=8ZBeDLFdVp0](https://www.tiktok.com/@lucky_slice/video/7074031360754584874?_r=1&_t=8ZBeDLFdVp0) (last visited Jan. 20, 2023) (“[*All The Young Dudes*] . . . stands on its own. It feels very divorced from [J.K. Rowling] and [*Harry Potter*].”). *All The Young Dudes* focuses on LGBTQ+ storylines that Rowling omits in her original works, which may attract LGBTQ+ Harry Potter fans that did not see adequate representation in the *Harry Potter* series. Hampton, *supra* note 116.

119. U.S. CONST. art. I, § 8 cl. 8.

120. Lipton, *supra* note 2, at 464.

device.”<sup>121</sup> However, to bring a lawsuit for copyright infringement, the creator must register their work with the U.S. Copyright Office.<sup>122</sup> This registration includes an application, a filing fee, and a deposit fee.<sup>123</sup> Once the Copyright Office receives proof of registration, the creator has exclusive rights concerning the copyright of their work.<sup>124</sup> These copyright protections do not last forever: if the work is created on or after January 1, 1978, the law protects the work for the remainder of the author’s life plus 70 years or, if it is an anonymous work, 95 years from first publication or 120 years from creation depending on which term is shorter.<sup>125</sup> And depending on when they were created, works can be subject to copyright renewals or extensions.<sup>126</sup> Regardless of publication date, once the work’s copyright protection expires, the work becomes part of the public domain and the exclusive rights that come with copyright protection no longer apply.<sup>127</sup> Therefore, fanfiction regarding work in the public domain does not engender possible copyright infringement because the work’s copyright, and thus exclusive rights, are no longer effective.

Under 17 U.S.C. § 106, the owner of a copyright has the exclusive rights to “reproduce the copyrighted work . . . to prepare derivative works based upon the copyrighted work . . . [and] to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending” among other rights.<sup>128</sup> These rights to reproduction, derivative works, and distribution are most likely to be infringed upon by fanfiction.

#### A. *Reproduction Right*

Fan fiction does not literally infringe upon the reproduction right because fanfic authors are not directly reproducing the works as they exist under their copyright. Fanfic authors are, however, reproducing characters and locations that are protected by copyright and adjusting them for their own means. In a more abstract sense, fanfiction authors reproduce the essence and ideas behind a copyrighted work

121. *Copyright in General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html#:~:text=Your%20work%20is%20under%20copyright,of%20a%20machine%20or%20device>.

122. U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS 1, 4 (2021), <https://www.copyright.gov/circs/circ01.pdf>.

123. *Id.* at 5.

124. *Id.*

125. U.S. COPYRIGHT OFF., CIRCULAR 15A: DURATION OF COPYRIGHT 1 (2022), <https://www.copyright.gov/circs/circ15a.pdf>.

126. *Id.* at 2.

127. *See Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq-definitions.html> (last visited Jan. 20, 2023).

128. 17 U.S.C. § 106.

through the publication of their own stories, which could be a violation of the reproduction right. The possibility of direct reproduction of copyrighted ideas and characters depends on whether the fanfiction is canon or non-canon compliant.

A fanfic is considered “canon compliant” if it fits within the canon of the original work, i.e., it does not make any substantive changes to the base work’s structure or storyline.<sup>129</sup> Typically, these fanfics build on the characters and world as they were at the conclusion of the original story. In this way, the stories are more likely to infringe on an author’s reproduction right as they are reproducing the characters and story as they exist in the base work.<sup>130</sup> A canon compliant work can also pertain to a fanfiction that takes place before the beginning of the original work, and thus the events in the fanfic do not disturb the plot of the original work.<sup>131</sup> This type of canon compliant work is especially common in the *Harry Potter* fandom regarding Harry Potter’s parents and their generation, known as the Marauders era.<sup>132</sup> Because of its lack of canonical restraints, “Marauders era fanfic is one of the most popular subgenres within the *Harry Potter* fandom.”<sup>133</sup> These writers take the few facts and information given about these characters that were “given short shrift” in the original books and wield them into fully fleshed characters and storylines that fit within the greater canon of *Harry Potter*.<sup>134</sup>

In contrast, a non-canon compliant, or noncanonical, fanfic makes a substantial difference to the original characters, plot, or setting of the original work such that it does not naturally follow from the original author’s creation.<sup>135</sup> One example of a non-canon work is an alternate universe or “AU” fanfic, which are fanfics that take the characters and place them into a new, alternate universe.<sup>136</sup> Non-canon compliant fanfics are more akin to creating an independent work that merely draws inspiration from another creator’s work, rather than directly using another author’s ideas and characters. As such, the possibility of reproduction right infringement for

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129. *Canon (fiction)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Canon\\_\(fiction\)](https://en.wikipedia.org/wiki/Canon_(fiction)) (last visited Nov. 2, 2022).

130. *See id.*

131. *Id.*

132. *See Hampton, supra* note 116.

133. *Id.*

134. *Id.*

135. *Noncanonical*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/noncanonical> (last visited Jan. 6, 2023).

136. *See* Moriah Richard, *What is Fan Fiction in Writing?*, WRITERS DIG. (June 25, 2022), <https://www.writersdigest.com/write-better-fiction/what-is-fan-fiction-in-writing>.

non-canon compliant fanfictions is less clear given that the connection between the two stories is more muddled than with canon compliant works.<sup>137</sup>

Some canon-compliant fanfictions may reference or quote the source material when describing a flashback or a scene that is part of the original storyline.<sup>138</sup> These fanfics are a more obvious violation of the author's reproduction right because they are directly reproducing parts of the copyrighted work as part of their own story. One can argue that, in the most technical sense, fanfiction does not violate the reproduction right because fanfic authors are not reproducing the entire copyrighted work as it exists under its copyright. But most fanfiction, especially canon compliant fanfiction, infringes an author's reproduction right because they are reproducing the copyrighted work's ideas and characters.<sup>139</sup>

### B. Distribution Right

Fanfiction is not likely to infringe an author's distribution right because fanfiction authors are not distributing copies of the source material without permission from the copyright holder. While the distribution right seems to focus on the physical distribution of the copyrighted work, some could argue the right also applies to the distribution of ideas within the copyrighted work.<sup>140</sup> This abstract interpretation of the distribution right could cause fanfiction authors to violate this right because the nature of fanfiction is to take an author's original idea and present it in a new way. However, the text of the Copyright Act emphasizes the physical distribution of copies of the copyrighted work rather than the fixed ideas within copies.<sup>141</sup> So, fanfiction authors are not technically violating the distribution right because they are not distributing the entire work as it exists under its copyright. Therefore, authors may fail in their copyright claim against a fanfic author by citing a violation of the distribution right, but it is uncertain what the actual outcome would be because of the lack of litigated fanfiction cases.<sup>142</sup>

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137. See *Canon Discontinuity*, TVTROPES.ORG, <https://tvtropes.org/pmwiki/pmwiki.php/Main/CanonDiscontinuity> (last visited Jan. 20, 2023).

138. See generally *Canon (fiction)*, *supra* note 129. Fanfic authors often orient their story within the source material's canon by describing 'recent' canonical events that their story follows from, either in the form of direct quotes or general references of the original material.

139. See generally *Natkin v. Winfrey*, 111 F. Supp. 2d 1003, 1010 (N.D. Ill. 2000) (“[I]deas and facts are not copyrightable; rather copyright law protects only the tangible expression of ideas and facts.”). Therefore, an author cannot copyright ideas, but an author can copyright the expression of their ideas once they become fixed in a tangible medium. Thus, once an author publishes their work, those ideas as they are fixed in the work become guarded against possible infringement.

140. See *id.* Distributing the fixed ideas would be a distribution right violation, per *Natkin*, if the ideas as fixed in the copyright are seen as “distributed” in fanfiction. *Id.*

141. See 17 U.S.C. § 106.

142. See *Lipton*, *supra* note 2, at 447.

Fanfic authors may not always be the only ones violating the copyrighted work's distribution right. Sometimes, fans of the stories create the legal liability. For example, some fans may pay to "bind" fanfiction into physical book form.<sup>143</sup> Fans commonly place a request with someone who specializes in book-binding, and that specialist ships back the printed and bound fanfiction.<sup>144</sup> The fan pays for the story to be bound, so while the author of the fanfiction is not making any money from the fanfic, fans are spending money on their story. The book-binders themselves "recoup costs for materials and shipping," so they are not actively profiting from the fanfiction either.<sup>145</sup> Some book-binders state that they do not attempt to profit from the practice because they fear it may lead to legal action from the original authors.<sup>146</sup> While there have not been lawsuits about the practice of binding fanfiction, book-binders still fear profiting from another author's copyright because of the strict liability attached to copyright infringement.<sup>147</sup> Larger companies that participate in book-binding make it very clear that they will not bind fanfiction because they would "make a profit off the production of the book itself, which [is] making a profit off the original copyrighted source material."<sup>148</sup> While these book-binding companies warn that printing fanfiction without permission from the copyright holder of the source material is copyright infringement, fans still make requests to have fanfiction bound; they receive them because the companies may not catch that the order is for a piece of fanfiction until after the order is complete.<sup>149</sup>

Despite knowing that the practice is potentially illegal, fans continue to bind fanfictions or submit requests to have fanfics bound because of their connection to the stories. They view the fanfic as being on par with other published novels and

143. Julia Alexander, *Making Fanfiction Beautiful Enough for a Bookshelf*, VERGE (Mar. 9, 2021, 9:00 AM), <https://www.theverge.com/22311788/fanfiction-bookbinding-tiktok-diy-star-wars-harry-potter-twitter-fandom>.

144. *Id.*

145. *Id.*

146. *Id.*; see also *FAQs*, WORLDS BETWEEN BINDERY, <https://www.fanficbookbinding.com/faq> (last visited Jan. 7, 2023). This website owner states that she does not receive any commission because "[i]t is illegal to profit off fanfiction." Despite that sentiment, she has a link set up for tips and donations as well as a Patreon page where people can pay her to learn how to become a fanfiction bookbinder. *Id.* So, she is in fact profiting off fanfiction.

147. See Lipton, *supra* note 2, at 442. Book-binders seem to be aware that they have no real legal defense to their actions if caught profiting from the fanfiction because of the strict liability of copyright infringement. Therefore, book-binders avoid profiting from the copyrighted works as a partial defense, though telling a judge that they did not make money off another author's work would probably not downplay clear copyright infringement.

148. Lulu.com (@Luludotcom), TWITTER (Mar. 10, 2021, 2:26 PM), <https://twitter.com/Luludotcom/status/136974652554721280>.

149. *Id.*; See also Lulu.com (@Luludotcom), TWITTER (Oct. 7, 2020, 10:33 AM), <https://twitter.com/Luludotcom/status/1313865049287675904>.

deserving of a place on their bookshelf.<sup>150</sup> A fan might view a fanfiction as one of their favorite stories, despite it being based on another body of work, so they want a physical copy of it to have with them.<sup>151</sup> This mindset is mirrored with other published books: people who enjoy a book want a physical copy of it if they do not own it already.<sup>152</sup>

### C. *Derivative Works Right*

The derivative works right is the exclusive right most likely to be infringed upon by fanfiction. A derivative work is defined as a “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>153</sup> Any changes to a copyrighted work that “represent an original work of authorship” also constitute a derivative work.<sup>154</sup> Because fanfiction is a work based upon a preexisting work that represents an original work of authorship, fanfiction fits directly within this definition of derivative works.<sup>155</sup> If fanfiction infringes upon this right, along with the reproduction right, then why is it still allowed?

### D. *Fair Use Defense*

Copyright law describes the fair use defense as a limitation on the exclusive rights creators have over their original works. This provision states that the use of a copyrighted work for “purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research” is considered fair use and thus not copyright infringement.<sup>156</sup> Factors such as the purpose and character of the use, the nature of the copyrighted work, the effect of the new work on the value of the copyrighted work, and how much of the copyrighted work was used are all weighed to determine if the new work is a fair use.<sup>157</sup>

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150. See generally Lee (@hrhleemorgan), TikTok, [https://www.tiktok.com/@hrhleemorgan/video/7155866949228973358?\\_r=1&\\_t=8ZBIRpJSkU2](https://www.tiktok.com/@hrhleemorgan/video/7155866949228973358?_r=1&_t=8ZBIRpJSkU2) (last visited Jan. 20, 2023). This user has a bookshelf dedicated to bound fanfiction and also has bookshelves of other published novels next to her fanfic bookshelf. See *id.*

151. See *id.*

152. See *id.*

153. 17 U.S.C. § 101.

154. *Id.*

155. See discussion *supra* pp. 1.

156. 17 U.S.C. § 107.

157. See *id.*

In the famous fair use case *SunTrust Bank v. Houghton Mifflin Co.*, the story *The Wind Done Gone*, which used the framework and characters of *Gone with the Wind* to critique slavery and the Civil-War era, was entitled to the fair use defense for its infringement of *Gone with the Wind*'s copyright.<sup>158</sup> The court found that *The Wind Done Gone* was clearly a parody and critique of the earlier work and there was little risk the two works would be confused for each other.<sup>159</sup> While not all fanfiction can be considered a parody or critique of the source material, like the *Wind Done Gone*, fanfiction may be unlikely to be confused with the original work for multiple reasons. First, a fanfic does not have the same author or cover art as the original material, so outwardly, the two are not easily confused. Second, fanfiction is a product of online communities and is not mainstream, so fanfiction is unlikely to be available in the same sphere as a published book where consumers could mistake one for the other. Finally, fanfiction is typically comprised of lower quality writing than the original and does not have the same formal trappings, so even if one were to initially confuse the two, they would quickly realize their mistake. Therefore, using the argument that fanfiction is unlikely to be confused for the original work found in *SunTrust*, fanfiction would likely be entitled to the fair use defense.

Courts have added “transformative use” as a relevant factor in determining whether the fair use defense applies to a work possibly in violation of copyright.<sup>160</sup> Whether a work is “transformative” depends on whether it “adds something new, with a further purpose” to the original work such that it creates a new perception or message distinct from the original work.<sup>161</sup> If a work meets that threshold, and depending on other factors, the fair use defense may protect it. The court in *SunTrust* held that *The Wind Done Gone*'s “highly transformative use of [*Gone with the Wind*]'s copyrighted elements” weighed in favor of finding the work to be a parody of the original work such that it met the standard for the fair use defense.<sup>162</sup> The transformative nature of the new work outweighed its for-profit nature; this standard of the transformative use factor favors protecting fanfiction authors because the for-profit nature is not present. Fanfiction expands upon and adds independent meaning to the source material without seeking a profit.<sup>163</sup> The nature and character of fanfiction's transformative use of the copyrighted work does not pose a commercial threat to the copyrighted work.

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158. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

159. *Id.* at 1281.

160. *See* Lipton, *supra* note 2, at 446.

161. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

162. *SunTrust*, 268 F.3d at 1269.

163. *See* Tushnet, *supra* note 19, at 657, 665.

While fanfiction appears to be a transformative work, that alone does not garner the protection of the fair use defense. The noncommercial nature of fanfiction does weigh in favor of the fair use defense, but that does not necessarily outweigh the substantial similarities between itself and the source material, the possible reputational harm the fanfiction may bring on the original work, and the nature and purpose of fanfiction falling outside the categories of criticism, comment, or scholarship.<sup>164</sup> Therefore, it is unlikely that fanfiction would be entitled to the fair use defense.

## V. THE CURRENT STATE OF FANFICTION

Though fanfiction may violate the original author's exclusive copyright rights on its face, copyright infringement claims regarding fanfiction rarely make it to court.<sup>165</sup> Authors and their agents may send cease-and-desist letters to fanfic authors, and the mere threat of legal action could dissuade the authors from continuing to write their fanfiction or impel them to remove their fanfiction from its online platform.<sup>166</sup> Authors and their legal teams may send a cease-and-desist letter because the fanfic in question "dilutes" the distinctive quality of the source material.<sup>167</sup> For example, the owner of <http://www.psa.shadow-wrapped.net> received a cease-and-desist letter from J.K. Rowling's literary agency and Warner Brothers studio, the studio producing the *Harry Potter* movies at the time of the letter, because of the adult nature of the *Harry Potter* fanfiction found on the website.<sup>168</sup> The letter explains *Harry Potter*'s intended audience is children, and the existence of this explicit material online, where it can be easily found by children, threatens the "integrity of . . . Harry Potter properties."<sup>169</sup> Following the letter, the website owner made the website unavailable.<sup>170</sup>

However, other authors do not enforce their copyright against that write fanfiction—this could be for many reasons.<sup>171</sup> One reason may be because the average fanfic user is not commercializing their work, so they are not directly

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164. 17 U.S.C. § 107.

165. See Lipton, *supra* note 2, at 447-48.

166. See Tushnet, *supra* note 19, at 664 (discussing how most fanfic authors have an "inability to contest the demands" made by a copyright holder). This could be because the author has a lack of resources to challenge the claim or because they are afraid of the possible reputational harm done by refusing to comply with the demand.

167. See *Topics*, LUMEN, <https://www.lumendatabase.org/topics/3> (last visited Jan. 7, 2023).

168. See *Re: Harry Potter Adult Fan Fiction*, LUMEN, <https://www.lumendatabase.org/notices/1231#> (last visited Jan. 7, 2023).

169. *Id.*

170. See *id.* The source states that action was taken after the letter was sent and the website is not available, *id.*, so it can be assumed that the website owner complied with the demand.

171. See Lipton, *supra* note 2, at 456-57.

impacting the market value of the copyrighted work. Commercial impact is one of the main factors in determining whether something is fair use, so fanfiction's lack of commercialization mostly shields fanfic authors from these infringement claims.<sup>172</sup> Another reason may be the stigma surrounding fanfiction. Fanfiction is a primarily female and LGBTQ+ activity, so other communities do not assign it high levels of respect.<sup>173</sup> Additionally, some authors may be flattered by fanfiction, and those authors' legal teams may not view certain fanfiction as a copyright threat worthy of their time. In fact, in the cease-and-desist letter mentioned earlier from J.K. Rowling's legal team, the letter mentions that Rowling has "no complaint about fan fiction written by genuine Harry Potter fans."<sup>174</sup> Authors may adjust this sentiment of not seeing fanfic as a threat to the copyrighted work if someone commercialized their fanfiction and posed a real market threat to the copyrighted work. However, most fanfiction in its current state does not warrant legal action.

## VI. CONCLUSION

Fanfiction continues to provide a way for fans to experience free, new content with the characters they enjoy. Fanfiction's lack of financial barriers creates an accessible sphere for fans from all backgrounds to participate in a chosen community and hone a sense of identity. While monetization of the fanfic community is certainly possible, and has been attempted, fanfiction as it currently exists is a noncommercial space.<sup>175</sup>

As this Note explains, fanfiction as a practice violates copyright law.<sup>176</sup> Even though it directly infringes the reproduction and derivative works rights, most authors do not have much incentive to enforce their exclusive rights because fanfic authors are not commercializing their stories. As long as the fanfiction is not placed into the market and taking money away from their works, it is unlikely that the original author will file legal action or send a cease-and-desist letter against the fanfic writer. However, as seen with Rowling, cease-and-desist letters may be sent if the fanfic threatens the reputation of the source material.<sup>177</sup> Even if the fanfic author tries to commercialize their work through traditional or non-traditional publishing, the current market heavily incentivizes authors to rework their fanfiction to make money. Through the process of adjusting the fanfic, the story is no longer fanfiction but an original work. Therefore, at this moment in time,

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172. *Id.*

173. *See De Kosnik, supra* note 63, at 123.

174. *Re: Harry Potter Adult Fan Fiction, supra* note 168.

175. *See De Kosnik, supra* note 63, at 119.

176. *See generally* Lipton, *supra* note 2.

177. *See Re: Harry Potter Adult Fan Fiction, supra* note 168.

fanfiction and commercialized works are mutually exclusive such that fanfiction does not pose a threat to copyrighted works.

