Fan Fiction, Copyright Infringement, and Fair Use in U.S. Copyright Law

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Fan fiction is a kind of fan-based, unprofessional creation which features characters from works of popular culture. Some original writers reject the fan fiction versions of their works and believe it is the copyright infringement. Under the U.S. Copyright Law, fan fiction may constitute the infringement of original writers’ reproduction right and derivative works right. Fan writers can defend themselves by using the Fair Use doctrine. However, relevant laws and regulations are far from perfect and fan fiction remain within a grey area of copyright world.

Key Words: Fan fiction; Copyright; Fair Use; U.S. Copyright Law

Introduction

Fan fiction is a form of unprofessional, fan-written artistic creation that develops its stories based on already-established characters, scenarios and settings from popular publications. Although fan fiction has gained in popularity worldwide, it remains a controversial genre of writing. Despite opposition from many original writers, fan fiction writers also have to contend with possible Copyright issues. In the context of fan fiction, the two main issues that emerge surrounding evaluation of possible copyright infringement (1) whether or not the original work contains copyrightable subject matter and (2) whether or not the fan-written work infringes upon the Copyright owner’s rights. Although there are established tests that can be used by lawyers to evaluate if the original characters are copyrightable, authors of fan fiction have at their disposal the “fair use” clauses to defend their works. Because most works of fan fiction are not commercial ventures and draw elements of an original work’s plot, elements of “fair use” become viable arguments because they do not harm the potential market of the original works. Yet, even with the availability of the “fair use” doctrine, published literary works remain
protected by Copyright Law and fan writers are at risk of infringement if they cross certain boundaries of artistic creation. The question remains: how does Copyright Law apply to works of fan fiction? And how can works of fan fiction exist within the boundary of Copyright and not infringe upon the rights of the original author? This chapter will explore these questions and work toward a better understanding between an original and fan-written work in the context of U.S. Copyright Law. I will first offer a definition of fan fiction, and then unpack how these works figure within Copyright Law, including discussion of Copyright infringement, and the “fair-use” method of self-defense for fan writers. Using Fifty Shades of Grey as a case study, this chapter argues that fan fiction operates within a grey area of fan fiction, showing how the law remains very much open to interpretation.

What is Fan Fiction?

Fan fiction is the product of popular culture in recent years. People have different opinions about the origin of fan fiction, but it could be tracked back to the 20th century (Reißmann et al., 2017). With developments in cheap printing techniques and distribution, Jane Austen inspired fanzines. Her dedicated fans called themselves the Janeites and the first published work of Austen fan fiction, Old Friends and New Fancies: An Imaginary Sequel to the Novels of Jane Austen by Sybil Brinton, released in 1913 (Morrison, 2012). Fan fiction of popular culture and organized media fandom have been traced to the second season of Star Trek (Tushnet, 1997). In the 1960s, groups of Star Trek fans began writing and exchanging stories based on the characters and settings of the Star Trek universe. The stories were compiled in magazines and were distributed to limited audiences (Becker, 2014).

The definition of fan fiction varies from person to person. One of the definitions that has been broadly accepted by researchers describes fan fiction as: “any written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing” (Tushnet, 1997). Another defines fan fiction as a category of amateur creative expression that features characters from movies, TV shows, and popular culture in new situations or adventures (Christian, 2013; Lipton, 2014). Oppenheim and Turner noticed the intersection of different works in the fan world and defined fan fiction as a genre that “makes
use of characters, situations, and concepts from the series and may include crossover stories between more than one series” (1999). Generally speaking, fan fiction is a kind of fan-based, unprofessional creation which features characters from works of popular culture.

**Original Works, Fan Fiction and Copyright**

Given that fan fiction grows out of a previously published work of fiction and that their creators are the fans of certain original works, fan fiction, and original works are inextricably linked. Authors have divided attitudes towards the fan fictions of their original work. Some of them tolerate or support such secondary creation; for example, J.K. Rowling approved non-commercial and web-based fan fiction and Paramount decided not to sue fan-writers even when it does not approve of the fan fiction (Peaslee, 2015). Others show intense opposition to fan fiction, seeing it as a personal violation and copyright violation (Roth & Flegel, 2014). Diana Gabaldon, the author of the popular *Outlander* series, for example, stated her opinion that fan fiction is immoral and illegal (Christian, 2013) and author Anne Rice stated that she does not allow fan fiction because the characters are copyrighted (Roth & Flegel, 2014; Peaslee, 2015). Here, authors explicitly put forward the copyright issue. Yet the potential illegality of fan fiction remains unclear. Since copyright laws differ from one country to another, we only take the example of U.S. Copyright Law, which states:

> A form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed. (U.S. Copyright Office, n.d.-b)

Under this law, Copyright is defined as:
A form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works. (U.S. Copyright Office, n.d.-b)

Two aspects must be concerned when deciding whether or not a work of fan fiction infringes upon the copyright of the original work: (1) whether the original work a copyrightable subject matter and (2) whether the fan works infringe upon the copyright owner’s rights (Peaslee, 2015). In accordance with the above definition, published (and unpublished) novels (literary works) are a form of intellectual property protected by Copyright Law. However, as fans fiction writers borrow characters or settings instead of taking the original work as a whole, the issue that emerges concerns whether or not characters are independently copyrightable. One way in which infringement can be tested is through the “story being told” and the “sufficient delineation” tests (Peaslee, 2015).

The “story being told” test originated from the “Sam Spade” case (Christian, 2013; Peaslee, 2015; Tushnet, 1997). In this case, Dashiell Hammett and his publisher sold motion picture, television and radio rights for the Hammett’s *The Maltese Falcon* to Warner Bros. Later, Hammett granted the exclusive right to use Sam Spade, the lead character in the story, and other characters from the story to a third party, but withheld the right to use the story itself. Warner Bros. brought the action for copyright infringement and unfair competition (Nimmer, 1955). The Ninth Circuit court¹ was asked to decide whether Warner Brothers’ copyright to *The Maltese Falcon* had been infringed (Tushnet, 1997). The court claimed that the character “Detective Sam Spade” was not copyrightable because he was only “the chessman who told the story”, not constituted the story (Christian, 2013; Peaslee, 2015; Tushnet, 1997). However, it was not clear that how to define “tell the story” and “constituted the story.” When the “story being told” test was criticized by courts, the “sufficient delineation” test emerged (Peaslee, 2015). In the “Nichols v. Universal” case, the plaintiff is the author of a play *Abie’s Irish Rose*, which is a story about a Jewish man who marries an Irish Catholic girl against the wishes of both of their

¹ Known popularly as the Ninth Circuit court, The United States Courts of Appeals for the Ninth Circuit hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies (United States Courts, n.d.).
fathers, with a happy ending. In the movie produced by the defendant, characters’ features and plotlines are highly similar to *Abie’s Irish Rose* (Digital-law-online, n.d.). Judge Hand claimed that a character could be protected independently in certain situations, including when this character was sufficiently delineated or developed in the original work (Peaslee, 2015). That is to say, there is greater risk a well-developed protagonist is the focus of a fan fiction. However, if they create a new story about character with a marginal role in the original work, the risk of Copyright infringement decreases. After confirming the copyright of the original work, whether infringement exists in fan fiction should be investigated.

The process becomes more complicated when judging the infringement of fan fictions. Firstly, according to U.S Copyright Law, copyright owners have several rights to their work. Researchers focus mainly on two kinds of rights that are tightly related to Copyright infringement in fan fiction: (1) the right to reproduction and (2) the right to authorize derivative works (Peaslee, 2015; Lipton, 2014; Roth & Flegel, 2014). Reproduction right protects the copyright holder’s work from being copied by the third party without authorization (Lipton, 2014). With regard to fan fiction, infringement of reproduction right occurs when fan fiction is “substantially similar” to the original work. Meaning, if the fan work copied elements such as characters and settings, it is at risk of infringing the reproduction right (Lipton, 2014; Peaslee, 2015). Speaking in defence of fan fiction, Tushnet (1997) argues that fan writers do not claim originality of their characters. In fact, Tushnet posits that fan fiction readers know very well they are not reading the original work. Regardless, the boundary line on infringement is challenging, especially for cases of fan fiction that uses existing roles and contexts to tell new stories, or expanding upon plot lines from the original work. Thus, fan fictions could fall into the field of “substantially similar” easily.

U.S Copyright Law contains a clause on derivative works, which protects copyright holders’ exclusive right to create derivative work based on their copyrighted works (Morrow, 2009). “Derivative work” means a work based upon one or more pre-existing works, like a TV series dramatized from a novel, but the right is equally implicated in a secondary work in the same format of the original one (Lipton, 2014). Therefore, fan fiction could be seen as the derivative
work because they are indeed based upon the original works; as such, they are likely to constitute the infringement of the exclusive right of copyright holders.

What does this mean for fan fiction? Does it mean that works of fan fiction are automatically infringing upon Copyright Law? The answer, though complicated, is no. If a fan author is granted creative license from the copyright holder or his/her work constitute “fair use,” then he/she would be free to use copyrighted characters according to U.S Copyright Law (Peaslee, 2015). However, since it is impossible for every fan writer to be authorized in practice, authors tend to turn toward the fair use doctrine to defend their rights. The fair use doctrine, in effect, establishes limitations on a copyright owners’ exclusive rights. Four factors determine whether or not a work of fan fiction meets the standards of fair use:

1. the purpose and character of the use, including whether it is commercial or nonprofit;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion related to the copyrighted work; and
4. the effect of the use upon the potential market for or value of the copyrighted work (Lantagne, M., 2011; Christian, 2011; Lipton, 2014; Peaslee, 2015).

Since most fan fictions are nonprofit and non-commercial, the first factor weighs heavily in favor of the fan fiction author. Similarly, since fan fiction materials are not typically published and sold commercially, they are not in a position to harm potential market of the original work. Sometimes, fan fictions can even provoke their readers’ interest in the original work. For example, in Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., the Ninth Circuit held that a computer program that allowed Nintendo players to change character features was a fair use, in large part because it had the potential to improve the market for the original by adding variety to it (Tushnet, 1997, pp.670). Also, fan writers sometimes create content or plots that would not be favoured to original writers, like romantic elements (Lipton, 2014); thus, conflict between fan

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2. The Nintendo Entertainment System is a home video game system; users control game characters and progresses through the game. The games of this system are protected as audiovisual works. The Game Genie is a device manufactured by Galoob, which allows the player to alter up to three features of a Nintendo game, including increase the number of lives of the player’s character, increase the speed of the characters, etc. Thus, Nintendo sued Galoob for copyright infringement (Justia Law, n.d.).
fiction and original works in the market remains rare. It is not hard to defend fan fiction using abovementioned first and fourth factors because they are non-commercial and would not affect the potential market of the original work.

But what about the second and the third factor of fair use? The second factor depends on the degree of original works’ creative expression. Under fair use, creative works such as novels, movies, and songs will be given more protection than factual works like technical articles. Also, published work will be given more protection than unpublished ones (U.S. Copyright Office, n.d.-a). As such, fan fictions is at a disadvantage, as many fan creations were based on previously published pop-culture products.

The third factor of fair use considers the amount and substantiality of copyrighted works used in fan fictions. This factor could be hard to measure in fan fiction, as fan writers do not quote directly from the original work. Instead, they use the settings and characters from the original material (Christian, 2011), which lies under the “substantially similar” clause of protecting copyright owners. As mentioned above, if fan writers use scenic and character elements from the original work, then they take the risk of infringement of reproduction right. In this perspective, fan fiction seems to be in a grey area, that the U.S. Copyright Office would have to evaluate on a case-by-case basis. That is to say, in certain cases, the use of an entire work could be seen as fair use, while using a small amount of a copyrighted work could be determined as unfair if the fan writer chooses an integral or work-defining moment of the original (U.S. Copyright Office, n.d.-a).

**Case: Fifty Shades of Copyright**

When people talk about fan fiction, the first example that comes to their mind is often *Fifty Shades of Grey*. Written as a fan fiction spin-off on the of Stephanie Meyer’s *Twilight* series on a small, online writers community, *Fifty Shades of Grey* by E.L. James became the best-selling erotic romance novel (Business Insider, 2015). *Fifty Shades of Grey* evolved from *Masters of the Universe*, in which E.L. James borrowed the character names from *Twilight*. Bowne (2015) claimed it was “an unauthorized derivative work” and “technically illegal”. Before publishing, E.L. James changed the characters name, leaving certain plot elements (found throughout...
literature) to link *Fifty Shades of Grey* to *Twilight*. However, Bowne (2015) still argued that since the original fan fiction is known and available, according to U.S. Copyright Law, it “renders the entire work, including the latest movie, absolutely illegal unless granted license by Twilight’s creator”. Because the author of *Twilight*, Stephenie Meyers, has shown no interest in getting involved to this issue (Abrams, 2015), legal disputes around these two works have not emerged yet. Nevertheless, the success of *Fifty Shades of Grey* has triggered much discussion about issues of fan fictions and Copyright infringement.

From the discussion above, we can see that there is no absolute law for defining whether a fan fiction work infringes the right of the original writer. While some sections of Copyright Law stand in favour of fan fictions, others do not. Determine whether or not work of fan fiction constitutes Copyright infringement needs to be analyzed on a case-by-case instance, evaluating the relationship between the original and fan-written works, and relies in all instances on the judgment of the court. For now, the law leaves much room for interpretation, and the increase in fan-written works might lead to new regulations within Copyright Law.

**Conclusion**

The Internet has provided a fertile ground for the creation and dissemination of fan works, and the number of fans writers is increasing rapidly—even though fan fiction writers know that their creative works fall into this grey area of publishing. Under these new circumstances, new practices have emerged to encourage the amateurs’ self-expression and provided resources for selling their work. For instance, Amazon’s “Kindle Worlds” program, which based on Kindle Direct self-publishing platform has obtained licenses from copyright holders to allow fans to sell their secondary creations directly to consumers (Kindle Worlds, n.d.; Lipton, 2014). Although their creative work and profits may be restricted under the licenses, the program still signals a major shift toward offering fans an outlet for sharing and selling their work in a legal context.

Although Copyright Law and regulations are far from perfect, and there are many disagreements among original writers about the attitude of fan novels, a fan fiction writer’s passion for writing should not be cast aside. What drives them to pick up the pen on the hand is
not the predatory desire to harm the copyright owners, but the enthusiastic love for the original works.

Reference


Morrison, E. (2012). *In the beginning, there was fan fiction: from the four gospels to Fifty Shades.* *The Guardian.*


