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ESSAY

WHEN THE AUTHOR OWNS THE WORLD: COPYRIGHT ISSUES ARISING FROM MONETIZING FAN FICTION

By: Steven D. Jamar* and Christen B'anca Glenn**

Fan fiction is amateur writing that imaginatively reinvents a work in pop culture while maintaining the identifiable aspects of the preexisting work.¹ Fans of various books, films, and television series write their own versions of the stories and post them online in fan fiction communities.² Fan fiction as practiced today is a way for fans to creatively express themselves and become integrated into the story and world they love. The stories range from highly derivative works, where relatively few plot points are changed, to entirely new plot lines using the same world and characters of the original, underlying work.³ Some provide backstories about existing characters, and some are more in the nature of sequels. Some are quite original works more in the nature of “inspired by” than “derived from.”

Some authors and publishers of the original works welcome fan fiction because it helps their works become more known and, more than likely, results in increased readership (and buyers) of the original works.⁴ Some do not.⁵ Few works that qualify as fan fiction ever make

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1. ANNE JAMISON, *FIC: WHY FANFICTION IS TAKING OVER THE WORLD* (2013).

2. Fanfiction.net, the wiki Fandom Wank, JournalFen, and Fanhistory.com are four of the more popular online fan fiction communities.

3. Fan fiction readers usually begin reading fan fiction because it is a way for them to stay connected to the world that they love. Monica Hesse, *Potter Familias: Spawning a Host of Spinoffs; For Harry, Fan Fiction Is Creating Endless Beginnings*, July 21, 2007, at C1 (“Blame ‘American Idol’ and the endless alternative endings on DVDs. Why should readers accept anything—from a character’s death to the end of the series—when it’s so easy to instantly change things with a keystroke?”). See generally Alter, *supra* note 3 (“Ms. Flanagan started writing her own takes on ‘Twilight’ three years ago, after devouring Ms. Meyer’s vampire books. She has since written 15 stories, including some that are as long as novels.”).

4. Most of these authors support fan fiction because of the positive regard it brings to their works. See Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J., June 15, 2012, at D1. For example, Orson Scott Card, author of the *Ender’s Game* series supports fan fiction because he sees it as free marketing. *Id.* According to Card, “[e]very piece of fan fiction is an ad for [his] book.” *Id.* Joss Wheedon, creator

money for the authors of the fan fiction or for the authors of the underlying work from the sale or distribution of the fan fiction for various reasons,⁶ one of which is the familiar tenet among the fan fiction community not to profit or receive any commercial value for the work.⁷

One exception is *Fifty Shades of Grey*,⁸ the “provocative romance” novel⁹ that originated as an online fanfic set in the world of *Twilight*.¹⁰ In the editing process for publication it was changed significantly to

of *Buffy the Vampire Slayer*, supports fan fiction because it “[encourages] . . . fans to stay connected to the series and characters.” *Id.* Both Stephenie Meyers and J.K. Rowling even allow fan fiction writers to profit from fan fiction that is based on their respective works.

5. Anne Rice, author of *The Vampire Chronicles*, and George R. R. Martin, author of *The Game of Thrones*, perceive fan fiction for-profit as copyright infringement and do not condone fan fiction as a form of creative expression; both Rice and Martin value the creative process in developing the characters in their respective works. *Important Message from Anne on Fan Fiction*, ANNE RICE (Sept. 14, 2009), <http://www.annerice.com/ReaderInteraction-MessagesToFans.html> (“It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.”); *Frequently Asked Questions*, GEORGE R. R. MARTIN, <http://georgerrmartin.com/faq.html> (last visited Mar. 5, 2013); see also *Someone Is Angry on the Internet*, NOT A BLOG (May 7th, 2010, at 7:35 PM) <http://grm.livejournal.com/151914.html> (George R.R. Martin’s Personal Online Journal). Rice asks her readers to “write [his or her] own original stories with [his or her] own characters.” RICE, *supra* note 5. . Martin discourages his fans who are interested in becoming a writer against “writ[ing] in [his] universe . . . or any other borrowed background . . . [because] [e]very writer needs to learn to create his own characters, worlds, and settings . . . and [u]sing someone else’s world is the lazy way out.” *Frequently Asked Questions*, GEORGE R. R. MARTIN, <http://georgerrmartin.com/faq.html> (last visited Mar. 5, 2013).

6. See Jacqueline D. Lipton, *Copyright’s Twilight Zone*, 70 MD. L. REV. 4, 5 (2010) (“Newer online consumer-creator communities, however, generally engage in conduct that is not typically motivated by commercial profit; the rewards of much of this conduct lie instead in communicative and reputational value.”) (citations omitted). But see Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1893–94 (2009) (“[M]any amateur creators will seek to commercialize their work if they can. The reason is obvious: most people need to make a living. If some people are gifted at creating fanworks, it would be natural for them to seek to support themselves in this manner . . . to sustain their art.”); *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994) (“No man but a blockhead ever wrote, except for money.”) (quoting Samuel Johnson, in 3 JAMES BOSWELL, 3 THE BOSWELL’S LIFE OF JOHNSON 19 (G. Hill ed., 1934)).

7. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 657–58 (1997) (“Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters.”).

8. E.L. JAMES, *FIFTY SHADES OF GREY* (2011).

9. “Provocative romance” is a phrase E.L. James uses on her website to describe *Fifty Shades of Grey* and the other two novels in the *Fifty Shades* trilogy. *Books—E.L. James*, E.L. JAMES, <http://www.eljamesauthor.com/books/> (last visited Jan. 30, 2014).

10. STEPHENIE MEYER, *TWILIGHT* (2005); Stephenie Meyer, *New Moon* (2006); Stephenie Meyer, *Eclipse* (2007); Stephenie Meyer, *Breaking Dawn* (2008).

make it less and less closely tied to the *Twilight* world.¹¹ While E.L. James was not the first author to violate this principle, she is the first author to do so in such a monumental way.

There are endless riffs on sci-fi and fantasy authors of all sorts, most notably *Harry Potter*.¹² While the internet has been a great facilitator of fan fiction, fan fiction in some form has ancient roots traceable to the ancient Greeks, and probably extends even further back as storytellers in all lands and cultures embellished upon and developed offshoots from well-known stories.¹³ The more sure origins of what is recognizably fan fiction start with that detective *par excellence*, Sherlock Holmes.¹⁴ There were some early stories not written by Arthur Conan Doyle that used Sherlock as the protagonist. As noted by Lev Grossman in his forward to Jamison's book:

Holmes was a particular focus for early fan fiction: when an American actor named William Gillette wrote a stage play about Holmes, he contacted Arthur Conan Doyle asking for permission to marry Holmes off. Doyle replied, accommodatingly enough, "You may marry him or murder him or do whatever you like with him."¹⁵

Deciding whether fan fiction infringes the copyright in the original is a case-by-case matter. To bring some order to the analysis, we begin by considering elements of fiction that are used to categorize something as either copied from, derived from, or merely inspired by an underlying work.

All stories are derivative, in an informal sense; this is certainly true at a sufficient level of abstraction. The story of the hero,¹⁶ of the romantic tragedy,¹⁷ of the person coming of age are all ancient.¹⁸ At this level of abstraction, the stories are not protected because they are

11. FAQ, E.L. JAMES, <http://www.eljamesauthor.com/faq/> (last visited Jan. 30, 2014) ("An earlier version of [*Fifty Shades of Grey*] began as *Twilight* fan fiction [that] was posted on the internet.").

12. E.g., J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* (1997).

13. JAMISON, *supra* note 1, at 26–36; see also Ariana Eunjung Cha, *Harry Potter and the Copyright Lawyer; Use of Popular Characters Puts Fan Fiction Writers in Gray Area*, WASH. POST, June 18, 2003, at A1 ("We don't grow up hearing stories around the campfire anymore about cultural figures. Instead we get them from books, TV or movies, so the characters that today provide us a common language are corporate creatures.").

14. JAMISON, *supra* note 1, *The Sherlock Holmes Material*, 39–70.

15. *Id.* at xii.

16. Hero myths are as old as storytelling. See generally JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (3d ed. 2008) (1949) (discussing and comparing the heroes of mythology and religions across the world and throughout history).

17. For example, Shakespeare's *Romeo and Juliet* was an old story when he reworked it into the masterpiece we know today. See *Romeo and Juliet*, WIKIPEDIA, http://en.wikipedia.org/wiki/Romeo_and_Juliet (last modified Jan. 30, 2014).

18. Coming of age stories and myths are ancient and exist in all cultures. Oedipus Rex is one such story, as is the story of Siddharta before his enlightenment, thus becoming Buddha. J.D. Salinger's *A Catcher in the Rye* is a 20th century coming of age story.

merely ideas. Similarly, genres are not protected because they, too, fall on the idea side of the idea/expression dichotomy.¹⁹ Thus no one can tie up the plot of star-crossed lovers, intrepid explorers, detective mysteries, or any of the innumerable flavors of science fiction, fantasy, or historical fiction.

Other attributes of stories that are not protected are standard scenes and plot devices, typical sorts of characters, and relationships among characters in general.²⁰ The loner, the paired detectives, the cold, distant parent, the hyper-rational person, the impulsive emotional person, the sage elder, and so on are all general types that cannot be tied up in any particular realization of them in any particular fictional character. Similarly, stock plot devices, like a fall down the stairs, a chase scene, an unlikely coincidence, and time travel, are all available to authors free of charge.

Fiction set in the real, physical world cannot hope to prevent others from using the same locations and settings. But the extent to which, if at all, copyright should protect fictional or fictionalized worlds, often the product of deeply creative efforts by the author, is less obvious. Later authors get drawn into the fictional worlds and want to place stories in that world, and if copyright protection extends to fictional universes, they cannot do so without permission from the world's creator. Simply put, are fictional settings free for use by everyone? Not all of the stories from Tolkien's *Middle Earth*²¹ and Herbert's desert world in *Dune*²² have been told. A third sort of fictional setting, i.e., settings other than in the real physical world or settings in a completely fictional world, is exemplified by the *Harry Potter* series, which is set in a contemporary setting in the real world, but with the addition of making magic real.²³

Even if the fictional universe is not protected, copyright protection could possibly be extended to elements of it so as to exclude later authors. Particular spells ("avada kedavra"), particular places

19. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

20. See *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986); *Warner Bros., Inc. v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954) (holding that the Sam Spade character is not adequately definitively drawn to warrant protection); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (discussing the similarities between the James Bond character as developed in films and the spy chase sequence in a Honda commercial).

21. J.R.R. TOLKIEN, *THE LORD OF THE RINGS* (1955).

22. FRANK HERBERT, *DUNE* (1965).

23. J.K. Rowling published a series of seven Harry Potter books between 1997 and 2007. J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* (1998); J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* (1999); J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* (2000); J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* (2000); J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* (2003); J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* (2005); J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* (2007).

(Hogwarts), modes of travel (brooms, fireplaces, objects), and more, seem integral to the *Harry Potter* world. Writing a story in the wizard-infested muggle world of *Harry Potter* would seem to require use of at least some of them or else it would not be the same world.

The extent to which copyright protection extends to universes or to particular artifacts in it may be considered a relatively open issue, but copyright clearly extends to at least some characters inhabiting Rowling's *Harry Potter* world. As we develop below, for at least non-commercial fan fiction copyright, protection should not extend to bar second comers from setting stories in fictional universes using the artifacts, places, and characters of that world. Plot presents a somewhat more subtle problem, but we reach the same conclusion. While we think most commercial fan fiction should similarly be protected from copyright claims, the commercial setting should have somewhat different standards relating to the degree of transformation or originality in the fan fiction. The closer the fan fiction is in plot to the underlying work, the more it makes sense to require permission from the author of that underlying work, or to otherwise limit the second comer's ability to financially profit directly from the fan fiction, perhaps through a compulsory licensing scheme similar to that used for performances of music.²⁴

Assessment of copyright protection for fictional universes, artifacts, settings, and characters involves two significant inquiries under United States' copyright law: (1) whether copyright attaches to the attribute at all²⁵ and (2) if so, whether the use qualifies as fair use.²⁶ Fair use assessment is done under multi-factor test, which in part considers the commercial or non-commercial aspect of the potentially infringing work. Part of the inquiry for fair use includes an assessment of what some have described as market failure, i.e., the situation where the market is not meeting the needs and reasonable expectations of users of the works.²⁷ In such a situation the argument for fair use is stronger (though market failure is only one aspect of the assessment of fair use; there are other interests of the copyright holder and of the users of that work at stake).

24. 17 U.S.C. § 115 (2012).

25. *Id.* § 102.

26. *Id.* § 107.

27. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1627–33 (1982); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 207–08 (rev. ed. 2003); see also LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008); ALEXIS OHANIAN, *WITHOUT THEIR PERMISSION: HOW THE 21ST CENTURY WILL BE MADE, NOT MANAGED* (2013).

And this leads us to the problem of Amazon's attempt to monetize fan fiction through its Kindle Worlds initiative²⁸ and what impact, if any, that initiative should have on the copyright analysis of fan fiction. As we develop below, the availability of Kindle Worlds or other similar products that might be developed should not affect the copyright analysis of the protections (or lack thereof) given to fan fiction.

Copyright in a literary work extends to the work as a whole as well as to various parts of it. For fiction, the copyright can cover characters and plot as well as the work as a whole.²⁹

Certain aspects of literature are not protectable including (1) genres or types of fiction like sci-fi, fantasy, detective stories, romances, etc.; (2) *scenes a faire* (standard scenes like a confrontation between the hero and villain or settings like a dark and stormy night); (3) stock characters like the comic sidekick or wise woman giving advice; (4) any of the myriad plot devices used to move things along (accidental encounters, supernatural intervention, found objects); and, more generally, (5) the plot itself at some levels of abstraction (nothing is more formulaic than television action shows).³⁰

The basic concept used in copyright law to distinguish between what is protected and what is not is the idea-expression dichotomy.³¹ Ideas are not protected; a particular expression of those ideas is protected. One way to draw the line in fiction is to examine the detail with which the world, character, or artifact is developed. A detailed, consistent universe or world would be more likely to get copyright protection while a mere general setting, even a fictional one, would not. A character with a name and individual physical, emotional, and mental characteristics would be protectable, e.g., Gandalf or Morgana or Dumbledore, while a stock character, e.g., a wizard, would not be. A wizard's magic wand would not be protectable, but Harry Potter's wand with its particular characteristics may be protectable. The idea of a soul being parceled out into other objects is an unprotectable idea, but the realization of it in *The Picture of Dorian Gray*³² or in Voldemort's horcruxes³³ might have very thin protection. The gap between the idea of a picture aging and the person staying young in Dorian Grey or between the idea of a soul residing in a diary³⁴ and the particular, detailed development or expression of it in *Harry Potter and the Chamber of Secrets* is very small, and an assertion of infringe-

28. *Kindle Worlds*, AMAZON, <http://www.amazon.com/gp/feature.html?docId=1001197421> (last visited Jan. 26, 2014).

29. *See* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

30. *Id.*

31. *Baker v. Selden*, 101 U.S. 99 (1879); 17 U.S.C. 102(b) (2012).

32. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (1891).

33. Voldemort's horcruxes were first introduced in *Harry Potter and the Half-Blood Prince*. HARRY POTTER AND THE HALF-BLOOD PRINCE, *supra* note 23.

34. HARRY POTTER AND THE CHAMBER OF SECRETS, *supra* note 23.

ment based on someone else using that device alone should be a hard case to make.

Drawing the line between unprotected ideas and protectable expression requires consideration of all the facts and circumstances of the particular matter at hand. There is no simple formula to determine whether something is an idea or an expression of the idea. As explained by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*,³⁵

It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, [prior] decisions cannot help much in a new case

[W]hen the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.

Nobody has ever been able to fix that boundary, and nobody ever can As respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance.

For fictional literature, not just plays, plot and characters are still the essential core of the work, in the sense Judge Hand means, but the settings and artifacts and “rules” of the setting or universe may also be protectable. Sometimes a setting can almost be a character, e.g., the Starship Enterprise,³⁶ and an artifact can be integral to the plot, e.g., the Whomping Willow in *Harry Potter and the Prisoner of Azkaban*.³⁷ But the first author cannot prevent a later author from using a starship as a setting and character nor from using an animate willow from moving the plot forward.

There are two tests for determining whether copyright attaches to a particular character. First, if the character is fully developed with sufficient detail so as not to be a stock character or just a “type,” then copyright will probably attach.³⁸ A detective who simply visits crime

35. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

36. See *USS Enterprise (NCC-1701)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/USS_Enterprise_\(NCC-1701\)](http://en.wikipedia.org/wiki/USS_Enterprise_(NCC-1701)) (last modified Feb. 1, 2014).

37. *HARRY POTTER AND THE PRISONER OF AZKABAN*, *supra* note 23.

38. See generally *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996); *Hoelting v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

scenes and investigates crimes will not be protected. However, one with attributes that define the detective as different from all others in some identifiable way will be protected. Sherlock Holmes, Monk,³⁹ and many others fit this category.

Second, if the character is essentially the story being told, that is, the story is about that person, then the character will be protected.⁴⁰ For example, Harry Potter, James Bond,⁴¹ and David Copperfield, as well as many other characters in stories are of this type and so the character would be copyrightable.

But if the character really is just a type—a spy, a detective, a wizard, a queen—moving through a plot, then the character will not be copyrightable.⁴² Where plot is king, the character is not. Types can extend to all sorts of beings such as vampires, werewolves, witches, elves, dwarves, dragons, and endless other types of monsters.

Scenes a faire are stock plot elements or scenes that cannot be protected. Car chases, characters confronting each other, chance meetings, bar fights, and so on are simply not protectable. They are available building blocks for any author to use to create a story.

Artifacts are all the things in the stories that matter. For the most part, artifacts in most literature do not matter no matter how detailed the description; tableware, chairs, tables, cars, and so on are simply part of the background. A transporter device, as in *Star Trek*, is a similar artifact—howsoever important it may be to many, many plots. For such an artifact, the only thing protected would likely be the exact description used to describe or explain it. Artifacts often, indeed generally, run afoul of the merger doctrine—if the thing and the description of it are really one and the same, then it cannot be protected.

Providing copyright protection to the world or universe of the story is problematic. Drawing the line between the protectable expression of the idea and the idea itself is primarily an exercise in metaphysical line-drawing on an endless formless plane. Setting a story in any real place at any real time is the easy case: that world cannot be protected; anyone else can set his or her story there as well.

Creating a completely imaginary world “in a galaxy far, far away” in a setting long, long ago⁴³ might be protected, if it is sufficiently well-drawn to distinguish it from every other world or universe. A world inhabited by alien species, robots, an order of knights, a despotic em-

39. *Monk (TV series)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Monk_\(TV_series\)](http://en.wikipedia.org/wiki/Monk_(TV_series)) (last visited Mar. 15, 2014).

40. *Warner Bros. v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

41. *See Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor, Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995).

42. *See Warner Bros., Inc.*, 216 F.2d at 950 (finding that the Sam Spade character is not adequately definitively drawn to warrant protection).

43. *See STAR WARS EPISODE IV: A NEW HOPE* (Lucasfilm 1977) (alluding to the film’s opening crawl).

peror using dark powers—well, that is just the stuff of much of science fiction, and the universe thus described falls on the unprotectable idea side of the line. The point at which, if any, the universes of *Star Trek* or *Star Wars* shift to the protectable expression side is difficult to define outside of the characters that inhabit them and outside of the plot that the original author placed there, which together really give the universe form.

A composite world, such as that inhabited by Harry Potter and company, where there is the recognizably real, non-magical world with a parallel world of magicians, presents a different problem. A world in which there is magic is an unprotectable idea, as are worlds in which there are wizards or a school for wizards (especially one modeled after English public schools (what would be called private boarding schools in the United States)). It is hard to define anything in such a setting that would truly be a protectable attribute of that world itself. That is, at the first level of abstraction where one simply removes the proper nouns, it seems that there is no particular aspect of the world or universe that is protectable.

The Orwellian world of 1984⁴⁴ seems well-drawn with many details such that it would seem protectable. But closer examination seems to force the reader the other direction: dividing the world into three political blocks or into a relatively few authoritarian blocks is just an idea, as is government spying and lying. It becomes difficult to delineate just what of the Orwellian world would be protected by copyright in our world even though the world he created is so well understood as to have been collapsed into one word: Orwellian. Once again, the reader is drawn toward viewing plot and characters moving through that world—much more than the world itself—as being protectable.

In the end, it would seem that for the most part, universes and worlds, even fictional ones, should not receive copyright protection and that all the general attributes of them must be open to others to use as mere ideas. But when a second author places a story and characters (assume new ones for this point) into a world like Middle Earth and uses the geography, place names, peoples and beings and events of Middle Earth as the backdrop for the new story, the line becomes harder to draw. The second author is intentionally exploring the world created by another to tell her story. Even in this situation, we should be loath to extend copyright protection to the universe, even with proper names and geography and rules of how it operates. The universe created by the first author should not be protected from appropriation by fan fiction authors and this sort of creative use should be allowed. It is part of what copyright is about: encouraging the creation and dissemination of ideas and information, and creative works. There

44. GEORGE ORWELL, 1984 (1949).

is no need to protect universes, even highly original ones, from others setting their stories in them.

All fictional universes are highly derivative themselves. For example, the movie *Avatar* can be traced to a variety of sources including *Pocahontas*.⁴⁵ These created worlds have rules. In Martin's *A Song of Fire and Ice*⁴⁶ (aka *Game of Thrones*), there are many peoples, dragons, white walkers, various forms of magic, assassins, special weather cycles, and many, many characters. As complex and detailed the world of the *Game of Thrones* is, it still draws upon the real world and fictional attributes long ago created by others. To what extent, if any, should Martin be able to prevent someone from placing a story north of the wall in the world of *A Song of Fire and Ice*? Stories could be someone's back-story; or events of a small village not even mentioned by Martin, but told from the perspective of one of the blades of grass being trampled by the elephants going to war. That story should be able to be told, and Martin should not be legally able to control all aspects of the world he created. He should not be allowed to play Zeus and strike later authors with thunderbolts when he dislikes their efforts.

In each of these well-drawn worlds, there are original locations, like Hogwarts or the Whomping Willow, or Mordor, or the cities of Westeros, and specific castles, buildings, rooms, and other locations developed in some detail. These worlds also have customs and celebrations. And they have various artifacts like storied swords (Orcrest) or magic spells ("avada kedavra"), or communication orbs (palantir) or magic fire (the wildfire in *Game of Thrones*). Surely none of these items can be protected by copyright, standing alone (other than perhaps the use of them by name, coupled with parroting the exact description used by the original author).

As can be seen from this brief summary, copyright can and does protect some characters and plot, provided both are adequately well delineated and are more than types or generic plots or genres. Protecting locations and settings is more difficult as is protecting the elements or artifacts or the "rules" of that world.

45. One of the better illustrations of the derivative nature of *Avatar* is a marked up "script" of Disney's *Pocahontas*. See Posting of Chris, *Avatar = Pocahontas*, WTFODGE (Jan. 4, 2010, 10:55 PM), <http://wtfoodge.com/avatar-pocahontas/>. Others have likened it to *FernGully* (gaia tree, bulldozer), *Star Wars* (revolutionaries against imperial power), *Born on the Fourth of July* (wounded warrior finds redemption), *Dances with Wolves* (invader saves natives), and *The Matrix* (a linked-in avatar functioning in another world). See, e.g., Daniel Carlson, *Five Movies that Avatar Ripped Off*, MANIA (Aug. 31, 2009), http://www.mania.com/five-movies-avatar-ripped-off_article_117340.html. More sources could easily be added.

46. *A Song of Fire and Ice* is a set of five published books. GEORGE R.R. MARTIN, *A SONG OF FIRE AND ICE* (1991–2011). The publication began in 1991 with the first book, *A Game of Thrones*, and has continued through 2011 with the fifth book, *A Dance with Dragons*. *Id.* The sixth (of a planned seven) is underway. *Id.*

It is relatively easy to write oneself out of the first author's world, or at least out of the aspects of the world that could lead to copyright infringement disputes. For example, the best seller *Fifty Shades of Grey* started as an online fan fiction book entitled, *Masters of the Universe*,⁴⁷ and was based on the two lead characters of the *Twilight* series.⁴⁸ When the book was going to be published for sale, the characters were renamed and other changes were made that made it sufficiently different in the eyes of the *Twilight* copyright holders and author so that they no longer objected.⁴⁹

The question remains to what extent, if any, should the author's world be protected from other stories placed in it, or even from essentially the same story being told from a different perspective or with some different plot twists. That is, to what extent should fan fiction be protected from efforts to shut them down as infringing works?

If copyright attaches to the fictional universe, then under U.S. law, the author can stop people from using that world at all (satire excepted)⁵⁰ because any work will be either a copy (if enough is taken)

47. FAQ, E.L. JAMES, *supra* note 11 ("An earlier version of [*Fifty Shades of Grey*] began as *Twilight* fan fiction [that] was posted on the internet."). With *Masters of the Universe*, James used the penname "Snowqueens Icedragon."

48. STEPHENIE MEYER, *TWILIGHT* (2005), Stephenie Meyer, *New Moon* (2006), Stephenie Meyer, *Eclipse* (2007), and STEPHENIE MEYER, *BREAKING DAWN* (2008).

49. In writing *Master of the Universe*, James merely transformed the fantasy *Twilight* tale into a story centering on the rampant sexual escapades of a developing sadistic relationship between a billionaire entrepreneur and a college student. Edward Cullen, the love-struck vampire, and Bella Swan, his human lover, the central characters in *Twilight*, were converted to Christian Grey, a billionaire entrepreneur and Anastasia "Ana" Steele, a college student at Washington State University. See Courtney, "Master of the Universe" FanFiction is Being Published!! But Do You Like Its New Title and Character Names? (See here!), POP CULTURE JUNKIE (Mar. 10, 2011, 12:00 AM), <http://www.popculturejunkie.net/profiles/blogs/master-of-the-universe>; see also Anne Malcom, *Fifty Shades of Twilight*, WALL ST. J. (Oct. 8, 2012, 1:00 PM), <http://blogs.wsj.com/speakeasy/2012/10/08/fifty-shades-of-twilight/> ("Fifty Shades of Grey is really a vampire story without the vampires."); Emily Eakin, *Grey Area: How "Fifty Shades" Dominated the Market*, N.Y. REV. BOOKS BLOG (July 27, 2012, 11:34 AM), <http://www.nybooks.com/blogs/nyrblog/2012/jul/27/seduction-and-betrayal-twilight-fifty-shades/>; Jane Litte, *Master of the Universe versus Fifty Shades by E.L. James Comparison*, DEAR AUTHOR (May 13, 2012), <http://dearauthor.com/features/industry-news/master-of-the-universe-versus-fifty-shades-by-e-l-james-comparison/>. Vintage Books, however, refutes that the *Master of the Universe* is essentially *Fifty Shades of Grey* and, instead, declares that *Fifty Shades of Grey* is an original work: "It is widely known that E.L. James began to capture a following as a writer shortly after she posted her second fan fiction story," Vintage said in a statement, "She subsequently took that story and re-wrote the work, with new characters and situations. That was the beginning of the 'Fifty Shades' trilogy." *Id.* But see Maressa Brown, "50 Shades of Grey" Movie May Be Killed by "Twilight," THE STIR (July 3, 2012, 2:14 PM), http://thestir.cafemom.com/entertainment/139929/50_shades_of_grey_movie (arguing that *Fifty Shades of Grey* is an original work dissimilar from *Twilight*).

50. For example, see Alice Randall's *The Wind Done Gone*, a satire of Margaret Mitchell's *Gone With the Wind*, which is told from the perspective of the slaves. See generally ALICE RANDALL, *THE WIND DONE GONE* (2001). The second book resulted in a copyright suit by the estate of Mitchell. *Suntrust v. Houghton Mifflin Co.*, 252 F.3d 1165, 268 F.3d 1257 (11th Cir. 2001). After the Eleventh Circuit vacated the district

or a derivative work.⁵¹ If the world were separately protected, then placing a new story in that world would be a direct copy. If the universe is not protected apart from the plot and characters, then use of that universe per se would not be infringing.

A copy is just that—a copy.⁵² When someone makes a photocopy or copies a digital file verbatim, the reproduction of the original is clear. However, when someone lifts a portion of the work, then the resulting work could be an infringing copy, or a derivative work,⁵³ or merely an “inspired by” sort of work. Someone who takes the entire plot of a story, but not the exact words or expression and changes the setting and characters may still be violating the copyright in the underlying work to the extent the copyright extends to the plot. Someone who writes an entirely new story using a character created by another may infringe the first author’s copyright in the character. Someone could write a Sherlock Holmes story because Conan Doyle’s works, including his star character, are in the public domain. But one could not legally write and publish a new story with James Bond as the protagonist because Bond is still protected by copyright. The character is copyrighted, and using the character would be infringing the right to reproduce the copyrighted work, the character, held by the original author. But someone could write a new spy novel with a misogynistic spy who acts first and thinks later, but not call him (or her) “Bond, James Bond,” and have enough other distinguishing features to move to the idea side from the expression side of the character.

In addition to the right to prohibit others from reproducing a copyrighted work, including characters or plots or a work of fiction as a whole, the original author has the exclusive right “to do and to authorize [the preparation of] derivative works based on the copyrighted work.”⁵⁴ A new story written about an existing character could also constitute a derivative work because it would be “based upon one or more preexisting works” that has been “recast, transformed, or adapted.”⁵⁵ Or a work that simply changes a few points in a plot line (e.g., Hermione ends up with Harry rather than Ron or Dumbledore does not die) would be a derivative work.

Because the right to make or authorize the making of derivative works is one of the exclusive rights of the copyright holder, a person who makes a work that would otherwise be a derivative work, but who does so without permission of the original author or does not fall

court decision, the case settled with permission given to Randall and her publisher in exchange for the publisher making a donation to Morehouse University. “*Wind Done Gone*” Copyright Case Settled, REPORTERS COMMITTEE FOR FREEDOM PRESS (May 29, 2002), <http://www.rcfp.org/node/92088>.

51. 17 U.S.C. § 106 (2012).

52. *Id.* §§ 101, 106.

53. *Id.* §§ 101, 103, 106.

54. *Id.* § 106.

55. *Id.*

under another exception that would make the use of the underlying work lawful, e.g., fair use, would be an infringer. But if the second author is using the underlying work lawfully, that second author would not be an infringer and could get a copyright in the new portions of the second work, provided other conditions of fixation, creativity, and originality are met.

A work of fan fiction is almost by definition either a copy or a derivative work insofar as it either copies protected aspects of the expression in the underlying work or it is based upon and incorporates copyrighted aspects of the protected work. Even if the universe is not protected, fan fiction that heavily uses characters and plot lines from the first work could be infringing the copyright in the characters and plots. Absent some exception or limitation to the reach of the copyright holder's rights in the underlying work, the fan fiction author would be an infringer. The primary potential shield is fair use.⁵⁶ Even if copyrighted aspects for the underlying work are used, the second author could still be protected from an infringement suit by the doctrine of fair use. Fair use could extend to the universe created by the first author, if copyright were deemed to extend that far, as well as to the more established copyright in characters and plot.

Fair use is a doctrine that provides that some uses of copyrighted works, beyond those specifically allowed in the Copyright Act in other discrete provisions,⁵⁷ are not infringing. There are a number of difficulties with the fair use doctrine from a fan fiction author's perspective, not least of which is that fair use is to be determined under all the facts and circumstances, not unlike negligence in torts, subject to only a few guiding principles. The absence of a relatively bright line makes it hard to predict whether a particular work would be protected by fair use. The establishment in the *Oh, Pretty Woman* case of what has

56. *Id.* § 107.

Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

57. *Id.* §§ 108–22.

functionally become close to a bright-line test for parodic works⁵⁸ has proven efficacious in permitting greater certainty for some types of works. The bright-line division that protects parody as fair use has generally been extended by on-the-ground usage to satire as well.

Equally troubling as the all-the-circumstances indeterminacy for the fanfic author is that the fair use determination is necessarily made after-the-fact; there is no safe harbor in which the second comer can seek refuge from the possible litigation storm that may be unleashed her way by someone with far deeper pockets.⁵⁹

Section 107 provides in part that “fair use of a copyrighted work, including such use . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”⁶⁰ It is not much of a stretch to consider fan fiction to be done for a purpose, in part, akin to criticism or commentary on the underlying work. Some fan fiction is implicitly exactly that: when you change the ending or other major aspect of the plot, that change is itself inherently making a comment and often criticism of the original.⁶¹ Other fan fiction that explores a character more deeply similarly is a form of commentary. Works that are not closely related to an original plot or original characters but are more in the nature of new stories set in the original universe are less in the nature of commentary or criticism, but also are taking far less that is protectable, if indeed they are taking anything that copyright does or should protect. Even if something is taken that is deemed copyrightable in such new stories, those new explorations of Westeros or Hogwarts provide a kind of perspective on the original work that should be treated as sufficiently like criticism and commentary for § 107 purposes—the clause says “such as,” not “including only.” A work that sheds new light upon a universe by definition provides a new perspective and adds something new that helps one think about that universe differently. That is in keeping with the nature of the fair use provision.

Once the work is deemed fair-use eligible, then a multifactor test is used to decide whether the use is fair or not. The four factors listed in

58. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). The decision itself is more nuanced insofar as it not only does not create a bright-line exception for parody, it even prohibits a presumption that parodic use is fair use. Nonetheless, the use of a work for parody or commentary tilts things substantially in favor of the second author’s use being considered lawful under § 107.

59. *See Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 553–54 (S.D.N.Y. 2008) (holding that the publication of the Harry Potter Lexicon was not fair use because too many quotes were lifted directly from J.K. Rowling’s works); STEVE VANDER ARK ET AL., *THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS* (2009); *see also Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (home video of a toddler bopping to the Prince song “Let’s Go Crazy” held fair use).

60. § 107.

61. *See RANDALL*, *supra* note 50.

the code are again not intended to be exhaustive—the use of the word “include” to introduce them makes that clear—but nonetheless highlight salient factors to be considered. The four factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.⁶²

The argument for treating non-commercial fan fiction as fair use is straightforward: the fan fiction author is not getting any substantial commercial benefit from the fan fiction (factor one) and the potential market for the copyrighted work is more likely helped than harmed (factor four). Fan fiction probably in general actually helps create or expand the market for the original work much as a movie version of a book boosts sales of the book, e.g., *The Great Gatsby*.

The impact of factor two, the nature of the copyrighted work may vary depending upon exactly what is being used. If only the universe is used, then the copyright protection, if any, should be thin and less protection given. The nature of the copyrighted work, a work of fiction, tends to argue for somewhat greater protection than a work of nonfiction which depends heavily on unprotectable facts.⁶³ Nonetheless, because so many plots are so similar, genres cannot be protected, general plot lines cannot be protected, stock characters and scenes and artifacts cannot be protected, and even critical aspects of the world or universe of the fiction cannot be protected because they are ideas or because the expression merges with the idea, the protection for a novel or other work of fiction should not be considered to be too broad. If characters and plot are used extensively, then both factors two and three become potentially more significant.

Commercial use should be tested not by whether there is any commercial advantage to someone but rather by whether the use is, in the terms of the code itself, of a “commercial nature.” Posting fan fiction on a website that makes money from advertising should not shift the analysis toward the commercial nature or commercial purpose side; the fan fiction is being written and posted for reasons other than to make money.⁶⁴ Nor is it educational in the sense the code uses the term. It is something else, something more neutral, but still tending away from commerce and toward public benefit. The use is non-com-

62. § 107.

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

64. The idea of “predominantly commercial” should be pressed into service in this setting. See, e.g., Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 Nw. U. L. REV. 1607, 1648–49 (2009).

mercial at least insofar as the fan fiction author is not receiving significant economic benefits from it and in general does not intend to do so.

The third factor, the amount or substantiality of the portion of the work used in relation to the copyrighted work as a whole, varies widely from works that merely rewrite endings, to those that follow the same plot but from another character's perspective, to those that create whole new stories with new plot lines and new characters set in the world of *Middle Earth*, *Westeros*, or *Harry Potter*, etc. Our suggestion is that this factor should be treated as irrelevant for non-commercial fan fiction.

Part of the function of the fair use doctrine is to safeguard the public interest from overreaching by copyright holders. Public interest is a vague, nebulous, protean concept that presents various faces depending upon the circumstances under which it is asserted. One area of public interest derives from the purpose of copyright to advance the public interest in more information and ideas, and more creation and dissemination of content. Fan fiction epitomizes the public purpose, the constitutional purpose, the democratic purpose of copyright—the enrichment of society through participation in creation of original works. Fan fiction, through the vehicle of the internet, gets disseminated in an almost frictionless, costless way. It is freely available to others to read, to build upon, and to be inspired by. It encourages the creation of new content, of original works. In short, it accomplishes what copyright is, at some deep level, all about.

One set of normative theories supporting fan fiction as fair use may be termed “cultural interchange” or its close cousin “customary use.”⁶⁵ Under these theories (clustered here because they address the same kind of interest and function very similarly for fan fiction), society and culture are the result of shared experiences of people in a variety of ways, including in particular, in the arts. If we cannot talk about, use, or disseminate ideas and expressions of those ideas to each other, we lose cohesion and cultural sensibility suffers. Subsets of culture and of society make this more visible: *Star Trek* fans or online gaming fans holding conferences depend on shared experiences through the arts of film, television, stories, characters, fictional universes, and endless memes and tropes that whiz around the internet.

“Customary use” is that use of works that people generally accept as appropriate and that copyright holders and disseminators of copyrighted works can fairly be held to have impliedly consented to that

65. See Memorandum for Andrew J. Pincus, General Counsel, Department of Commerce from Randolph D. Moss, Acting Assistant Attorney General, Whether Government Reproduction of Copyrighted Materials Invariably is a “Fair Use” under Section 107 of the Copyright Act of 1976 (Apr. 30, 1999), available at <http://www.loc.gov/flicc/gc/fairuse.html>.

common usage.⁶⁶ When authors know that fan fiction exists and when it is not only tolerated, but encouraged and even celebrated in its non-commercial, online manifestation (at least by some authors), the customary usage theory of fair use has strong traction, especially for uses that are transformative to even a modest degree.

Another normative theory supporting fair use is the so-called market failure theory.⁶⁷ Under this theory, fair use exists (in part) to provide a way to correct a failure of the market to properly disseminate works at a price and in such a way that they are adequately available while still preserving the incentive to produce more works as a means of realizing the copyright purpose of advancing society. This theory over-trivializes the non-economic values of copyright and of works in general if it is used as the dominant or exclusive underpinning of fair use. Fair use protects values other than economic interests. The market failure theory, if treated as the sole determinant of fair use, would undervalue those interests. Courts have not bought into the market failure theory in its strongest, most exclusive form. Properly so.

Nonetheless, to the extent market failure is used appropriately merely to inform one's assessment of fair use, it can be helpful. In the fan fiction setting the costs of obtaining permission from copyright holders and publishing houses with exclusive publishing licenses can be prohibitive, if available at all. The costs of publishing via traditional means, i.e., hard copy, also will not work to get the works out and disseminated—there is not much money in most fan fiction. Thus the market fails to meet the demand and the cultural expectations of a significant segment of the population.

When this aspect is considered along with the four statutory factors, the predicate purpose of the fan fiction (commentary or expansion of the stories of the relevant universe, etc.), and the cultural interchange and customary expectations of the users, the argument for considering non-commercial fan fiction as protected by fair use not simply on a case-by-case basis but also as categorically protected, like parodies, is strong. Indeed, the need to protect it categorically is obvious if one wants to protect this cultural phenomenon and wants to have some predictability for those working in that cultural space.

Until recently, “the market” did not provide a means to efficiently regulate the creation and dissemination of fan fiction. The market has failed to provide a means to handle the desire of people to create fan

66. *Harper & Row v. Nation Enters.*, 471 U.S. 539, 551–52 (1985) (finding that the fair use doctrine was originally “predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption”); *see also Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1355–56 (Ct. Cl. 1973), *aff’d per curiam by equally divided court*, 420 U.S. 376 (1975).

67. Gordon, *supra* note 27, at 1627–33; Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997); PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 207–08 (rev. ed. 2003).

fiction and the demand of others to read it. The people's response was to do it online, electronically, where fan fiction can be freely posted by anyone who writes and freely read by anyone who seeks it out; it was a non-commercial solution for the fan fiction writers and readers. The fan fiction universe would qualify as a solution to a case of copyright regime market failure.

But this possibly changed in the spring of 2013 when Amazon announced that it had created an online system under which authors of the underlying works could get paid some royalties for the fan fiction based on their works while the authors of the fan fiction would receive a share of the royalties for their fanfics. In other words, a market has been created to address the problem of the inability to connect fan fiction authors, readers, and authors of the original works and imposing some sort of tax on the fan fiction so that both authors get paid. If a fan fiction author wishes to use this avenue to distribute her fiction, she can do so, provided the author of the underlying work agrees. This sort of consensual arrangement is unaffected by and does not affect fair use directly.

But not all authors of the underlying copyrighted works will use this service, so many targets of fan fiction will not be included in the system. Similarly, most fan fiction authors are not trying to write for commercial gain and should not be stymied in their efforts because of the availability of this sort of system to allow monetization of fan fiction.

The availability of a means to monetize fan fiction should not significantly affect the protection of fan fiction under the doctrine of fair use. Some fan fiction may be created for commercial purposes. For such works, the analysis changes somewhat, but not completely. For example, if the universe is not protected, then even a work written for commercial gain, placed in that world, would not infringe because there would be no copyright in the first place. Thus fair use, and the commercial-use factor, would not come into play.

Similarly, if portions of a plot are used, and if some characters show up in the fan fiction, then, even though the work would be derived from or based upon the other work, fair use analysis should generally protect the second work. The commercial purpose and impact is not the only factor to consider. If the fan fiction essentially lifts the whole plot, changes just one or two items, and uses the same characters, then the claim for fair use for commercial fan fiction is weaker. But courts should still not easily find infringement even in that commercial setting where the impact on the market for the copyrighted work is negligible or even positive.

An example of the problem of commercial exploitation in hard copy and predominantly non-commercial exploitation online is pro-

vided in the *Harry Potter Lexicon* case.⁶⁸ J.K. Rowling's *Harry Potter* series has generated a huge industry in commercial derivative works, including films, ornaments, toys, and more. It has also generated a huge internet presence of unauthorized websites with non-commercial fan fiction commentaries. J.K. Rowling has not tried to stop this online explosion. Nor has she tried to block the ongoing creation and online publishing of *The Harry Potter Lexicon*, a Harry Potter online cyclopedia. Indeed, evidence was admitted in court that she herself used it when writing the later books in the series: "This is such a great site that we have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing). A website for the dangerously obsessive; my natural home."⁶⁹

But when Steve Vander Ark, the author of the online version of *The Harry Potter Lexicon*, decided to publish a hardcopy version, Rowling sued and stopped him. Ultimately, protected by the doctrine of fair use, a shorter version of *The Harry Potter Lexicon* that used less material directly from the books (for example, fewer descriptive paragraphs were taken verbatim or in slightly modified form) was published.⁷⁰

The online version of the lexicon and all of the fan fiction are derivative works under current law and thus could be barred by Rowling and the other copyright holders. Thus, their existence is contingent upon the forbearance of the copyright holders. It should not be. These works should be encouraged. Neither Rowling nor Warner Brothers need broader rights to incentivize their creative *Harry Potter* books and movies, respectively. Nor do they need to stop fans from doing what they are doing online to make money through other avenues.

In the end, copyright impacts the shape of the creative world. If we want a world where social justice concepts of inclusion and empowerment flourish,⁷¹ then we should respect new technology and its new uses and the power of people to tell stories without fear of copyright infringement. We should let fan fiction take over the world.⁷²

68. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 521 (S.D.N.Y. 2008).

69. *Id.*

70. See generally VANDER ARK ET AL., *supra* note 59. This decision is a bit hard to square with the *Seinfeld* case, *Castle Rock Entertainm't, Inc. v. Carol Publishing Group, Inc.*, in which the court treated facts trivia from the show as protectable expression rather than as unprotectable. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998). The attributes of a fictional world are not only fact-like, but are, indeed, from the outside, facts and thus, arguably, should not get copyright protection.

71. See Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 120–22 (2009); see also Peter Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881 (2011).

72. ANNE JAMISON, *FIC: WHY FANFICTION IS TAKING OVER THE WORLD* (2013).

The modest recommendations we are making in this Essay are as follows:

For works that are not predominantly commercial, i.e., most fan fiction, there should be a per se rule of fair use for all aspects of the underlying copyrighted work including the universe, artifacts, characters, and even plot.

For works that are predominantly commercial, e.g., *Fifty Shades of Grey*, fair use should be broadly interpreted to allow use of protectable elements such as characters and even to a more limited extent plot lines.

Copyright protection should not be extended to universes or worlds and artifacts and rules for those worlds.

Copyright should further the public interest and should further the inclusion and empowerment aspects of social justice; indeed, the Constitution requires that copyright be for the advancement of society and culture,⁷³ not the creation of wealth for a few. The types of inducements formerly needed for creation and publication of many types of fiction no longer are relevant for the general category of fan fiction.⁷⁴ The flowering of creative expression and communities based on common interests in worlds that prompt fan fiction will flourish best without cramped views of fair use and without expansive protection of copyrights in the copyrighted works. Little, if any, harm is caused to those traditional interests by such an interpretation. Indeed, the purpose of copyright, the advancement of society and culture through the creation and dissemination of new works, is furthered not by cutting down the forest of fan fiction, but rather by simply letting it be.

73. Congress is empowered "To 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." U.S. CONST. art. I, § 8, cl. 8.

74. For those who wish to find a way to make a living from fan fiction, copyright should facilitate the creation and dissemination of new works, not act as lodestone. See generally RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM (Kansas City, MO, U.S.A.: Ewing Marion Kauffman Foundation, 2011); MEGAN M. CARPENTER, ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW (2012) (part of the Elgar Law and Entrepreneurship series, Shubha Ghosh and Robin Paul Malloy, series editors); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (Oxford Univ. Press 2012); RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (Harvard Univ. Press 2013); WILLIAM PATRY, HOW TO FIX COPYRIGHT (Oxford Univ. Press 2011).