

# Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine

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## I. BACKGROUND OF FAN FICTION

How would the annual Hunger Games look if set in Middle Earth? What would be the implications of a fully developed romance between Spock and Captain Kirk? Are both of Harry Potter’s sons destined for Gryffindor, or could they end up in the rival Slytherin House? Fan fiction has attempted to answer these questions, as well as a dizzying array of other topics. Fan fiction, generally speaking, is a work created by a writer set within the world of a previously created franchise.<sup>1</sup> Common examples today include stories written about the world of Harry Potter, Star Trek, and, most recently, the Hunger Games.<sup>2</sup> These franchises, while some of the most popular, are hardly the first works to be the subject of fan fiction. *Wide Sargasso Sea*, a novel that retold the story of *Jane Eyre* from the viewpoint of Rochester’s mad wife Bertha, was published in 1966.<sup>3</sup> Similarly, the unofficial “sequel” to Daphne du Maurier’s famous *Rebecca*, *Mrs. De Winter*, was written by unaffiliated author Susan Hill and published in the pre-Internet era of 1993.<sup>4</sup> A sampling of these precursors to fan fiction also included mediums other

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1. See Lev Grossman, *The Boy Who Lived Forever*, TIME (July 7, 2011), <http://www.time.com/time/arts/article/0,8599,2081784-1,00.html>.

2. See, e.g., FANFICTION.NET, <http://www.fanfiction.net> (last visited Nov. 11, 2012) (follow links under “Fanfiction”).

3. JEAN RHYS, *WIDE SARGASSO SEA* (1966).

4. SUSAN HILL, *MRS. DE WINTER* (1993).

than novels; *Rosencrantz and Guildenstern Are Dead*, for example, was a play that concentrated on a story occurring at the same time as Shakespeare's *Hamlet*,<sup>5</sup> and "fanzines" for Star Trek addicts included stories, poetry, and art.<sup>6</sup> These types of works introduced fans to the possibility of expanding upon their beloved stories or movies, and with the rise in popularity of the Internet in the late 1990s, fan fiction exploded.<sup>7</sup>

The Internet provided a forum where writers could easily post content and make their work accessible to other readers, and thus, the fan fiction community rapidly increased. Fan Web sites of popular television shows, novels, and movies quickly developed, and most of them provided forums for fans to post their own original stories based on the source material.<sup>8</sup> Soon after these Web sites and online forums developed intense followings, databases devoted exclusively to the fan-written works were also formed.<sup>9</sup> One such database, FanFiction.net, allowed users to form profiles and then post material online for Internet users across the globe to read.<sup>10</sup> Today, it features over two million users, thousands of stories, and hosts fan fiction of not only books, but also cartoons, video games, anime, and plays.<sup>11</sup> In contrast to prior published fan fiction works, these stories, many of which are the length of fully developed novels, are posted online for free, leaving the authors without any benefit other than the satisfaction of sharing their stories with other fans.<sup>12</sup> Even the multitude of databases are not for profit and instead run only for the enjoyment of fans.<sup>13</sup>

Works published on these databases and similar fan Web sites run the gamut of topics, but some of the more popular tropes of fan fiction can trace their roots to their twentieth-century precursors. Often these stories mirror the original plots and fill in narrative gaps of the source material from the viewpoint of a minor character, building an entirely

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5. TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* (Henry Popkin ed., 1967).

6. *Star Trek FanZines*, STAR TREK: THE ORIGINAL SERIES, <http://www.sttos.net/sttos/eng/zines.php> (last visited Nov. 11, 2012).

7. See, e.g., FANFICTION.NET, *supra* note 2.

8. See, e.g., *Chamber of Secrets*, MUGGLENET, <http://www.mugglenet.com> (follow link to "CoS Forums" under "Discussion" header; then follow "Flourish and Blotts" link under "Harry Potter") (last visited Nov. 11, 2012).

9. See, e.g., FANFICTION.NET, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

new story from the original.<sup>14</sup> Others focus on an alternative reality within the canon of the original work, and still others function as a prequel or sequel to the source material.<sup>15</sup> As these databases gained popularity and fans were exposed to other popular literary worlds, cross-over fan fiction developed, intertwining the characters and storylines from two or more separate works into one fan work.<sup>16</sup> These “mashups,” as they are called, serve as tools for fans of one genre to introduce fellow fans to other fictional worlds.<sup>17</sup>

While fan fiction’s main goal is to provide added entertainment for fans of a particular franchise, many authors of the original works feel that these new stories encroach on their property rights.<sup>18</sup> Reactions among authors are mixed, with some recognizing the value of fan fiction and others vehemently opposed to any appropriation of their characters or created works. Indeed, some authors go to the extent of sending frequent cease-and-desist letters to the managers of fan fiction databases, demanding that the sites refrain from hosting any potentially infringing material.<sup>19</sup> In the following Parts, this Comment will explore the basis for these claims of copyright infringement by discussing the boundary of copyright law as it stands today. It will then analyze court decisions related to the publication of fan fiction, and lastly propose a definitive ruling on its legality as a resolution to the current split among the circuit courts.

## II. RIGHTS AND BOUNDARIES OF COPYRIGHT PROTECTION

To assert a successful claim of copyright infringement, the copyright holder must first show that his work constitutes copyrightable material.<sup>20</sup> To that end, the holder must prove that the material is original, fixed in a tangible medium of expression, and owes its origin to an author.<sup>21</sup> In the United States Supreme Court decision *Feist Publications*,

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14. See, e.g., JAMES POTTER SERIES, <http://jamespotterseries.com> (last visited Nov. 11, 2012) (containing an online fan fiction novel focused on a minor character of the Harry Potter franchise).

15. See, e.g., *id.*

16. See, e.g., *Books Crossover FanFiction*, FANFICTION.NET, <http://www.fanfiction.net/crossovers/book/> (last visited Nov. 11, 2012).

17. See *Mashup (Book)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mashup\\_\(book\)](http://en.wikipedia.org/wiki/Mashup_(book)) (last visited Nov. 11, 2012).

18. See Lady Macbeth, *Authors/Publishers Who Do Not Allow Fan Fiction*, MM.ORG BLOG (Oct. 8, 2006), <http://www.mediaminer.org/blog/index.php/?archives/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html>.

19. *Id.*

20. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

21. 17 U.S.C. § 102 (2006).

*Inc. v. Rural Telephone Service Co.*, Justice O'Connor described these requirements as applied to a copyright infringement claim involving copied telephone book entries.<sup>22</sup> The company used the entries from Rural's published telephone book to create its own telephone directory that was then distributed to the public.<sup>23</sup> The Court held that this appropriation of data was legal, because the entries from the telephone book were mere facts, and facts are not copyrightable.<sup>24</sup> In short, they lack originality "because facts do not owe their origin to an act of authorship," another statutory requirement for copyrighted material.<sup>25</sup> Specifically, any material that may qualify for copyright protection must be "independently created by the author . . . and . . . posses[s] at least some minimal degree of creativity."<sup>26</sup>

Moreover, the Court asserted that a compilation of facts arranged in a completely unoriginal manner would fail to merit copyright protection.<sup>27</sup> The lower court held that simply compiling uncopyrightable data into a new work was sufficient for copyright protection.<sup>28</sup> The Supreme Court, however, disagreed.<sup>29</sup> Stressing that the "primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" the Court found instead that a mere arrangement of uncopyrightable material is not protectable based on a "sweat of the brow" theory of copyright law.<sup>30</sup> This caveat, the Court continued, ensures that others will be allowed to "build freely upon the ideas and information conveyed by a work," while simultaneously "assur[ing] authors the right to their original expression."<sup>31</sup>

This inherent tension in copyright law is reflected throughout subsequent Court opinions.<sup>32</sup> While authors of copyrighted works are granted a limited monopoly over their copyrighted material, their rights are balanced against the utilitarian principle of maximizing the amount of works available for the public to enjoy. To that end, the rights of the

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22. *Feist*, 499 U.S. at 345-46.

23. *Id.* at 343.

24. *Id.* at 364.

25. *Id.* at 347.

26. *Id.* at 345.

27. *Id.* at 348.

28. *Id.* at 343.

29. *Id.* at 358.

30. *Id.* at 349 (quoting U.S. CONST. art. 1, § 8, cl. 8).

31. *Id.* at 349-50.

32. *See generally* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (noting that courts struggle with the balance between protecting copyright owners and maximizing creation of new works).

copyright holders are tempered by both (1) the idea/expression dichotomy, which allows subsequent authors to utilize general concepts in their own works, regardless of whether another author has already used them; and (2) the fair use doctrine, which legally allows for the appropriation of copyrighted material for the purpose of creating a new, transformative work.<sup>33</sup>

However, initial copyright protection is still afforded to authors who satisfy the authorship, originality, and fixation requirements of the Copyright Act, and with that protection comes several exclusive rights enumerated in 17 U.S.C. § 106.<sup>34</sup> According to the statute, the copyright owner “has the exclusive rights to do and to authorize” reproductions of the copyrighted work, distribute copies to the public, and most importantly for the purposes of fan fiction, prepare derivative works based on the copyrighted work.<sup>35</sup> This exclusive right to prepare derivative works provides the basis for copyright-holding authors to use a copyright infringement action as a means of objecting to subsequent writers’ fan fiction.<sup>36</sup>

To prove infringement in a copyright lawsuit, the copyright holder has the burden of proving that (1) he or she owns a valid copyright in the material, (2) there was copying of the copyrighted material, and (3) the copying amounted to an improper appropriation.<sup>37</sup> For example, in *Arnstein v. Porter*, where the plaintiff accused the defendant of plagiarizing his musical compositions, the United States Court of Appeals for the Second Circuit held that the issues of unlawful copying and improper appropriation are two separate elements that the holder of the copyright must prove.<sup>38</sup> Laying out first the requisite evidence for proving actual copying, the Court stated that absent the defendant’s admission to the copying, the plaintiff must produce circumstantial evidence of the defendant’s access to the work from which the jury may then reasonably infer copying.<sup>39</sup> If the defendant in fact had access to the plaintiff’s work, the plaintiff must also persuade the trier of fact that there existed similarities between the two works that would suggest the defendant’s improper use of the original.<sup>40</sup> Should the plaintiff

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33. See *id.* at 1263-65 (describing both the idea/expression dichotomy and the concept of fair use).

34. 17 U.S.C. § 106 (2006).

35. *Id.*

36. See, e.g., *Suntrust*, 268 F.3d at 1262.

37. *Id.* at 1266.

38. 154 F.2d 464, 468 (2d Cir. 1946).

39. *Id.*

40. *Id.*

sufficiently prove that the defendant copied from the copyrighted work, the plaintiff must also show that the defendant's copying was improper.<sup>41</sup>

The test for improper appropriation in *Arnstein* was "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."<sup>42</sup> Thus, to constitute improper appropriation, the defendant must take from the "heart of the work," a phrase later coined by the Supreme Court in *Campbell v. Acuff-Rose, Inc.*<sup>43</sup>

The Second Circuit decision in *Nichols v. Universal Pictures Corp.* rendered sixteen years prior gives some elaboration to the *Arnstein* ruling.<sup>44</sup> While some district courts may have interpreted *Arnstein*'s "copying" standard to include only literal copying of copyrighted material, the court had previously stated in *Nichols* that "the [copy]right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."<sup>45</sup> Thus, a copyright holder may prove infringement by establishing that the copier took general concepts from the original work and then incorporated these elements into the new one. The key issue, the *Nichols* court continued, is whether the part taken is "substantial," not just whether it is an exact copy.<sup>46</sup> This case thus embedded the rule in copyright jurisprudence that copyright infringement may apply in situations where expressions other than exact words or passages are taken and incorporated verbatim into a new work.

Despite this holding, the *Nichols* court found the question of appropriation to be one of degree, and thus misappropriation must be balanced by both fair use and the idea/expression dichotomy.<sup>47</sup> These two doctrines protect the gray area of improper appropriation by ensuring that the alleged infringer retains their First Amendment rights of free expression.<sup>48</sup> For example, fair use allows the user to appropriate certain elements of a work for purposes of critique or to further artistic expression.<sup>49</sup> Likewise, the idea/expression dichotomy ensures that basic

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41. *Id.*

42. *Id.* at 473.

43. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

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

45. *Id.* at 121.

46. *Id.*

47. *Id.*

48. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

49. 17 U.S.C. § 107 (2006).

ideas like stock characters and generic storylines cannot be locked up by a copyright holder to prevent others from using basic themes in their own works.<sup>50</sup>

### III. COPYRIGHT IMPLICATIONS IN FAN FICTION

As noted in Part II, the copyright holder has, according to 17 U.S.C. § 106, the “exclusive right[] to . . . prepare derivative works based upon the copyrighted work.”<sup>51</sup> Thus, a work that falls into the category of an unauthorized derivative work is considered infringing material. For example, in *Anderson v. Stallone*, the plaintiff prepared a thirty-one page synopsis detailing a proposed plot for a possible *Rocky IV*, a sequel to the previous three *Rocky* movies.<sup>52</sup> Stallone wrote the scripts for and owned the copyrights to the previous movies including the characterizations of the characters contained in the films.<sup>53</sup> Stallone claimed that Anderson infringed upon his copyrights in these characters.<sup>54</sup> In evaluating Stallone’s claims of infringement, the court observed that the characters created in the first three *Rocky* movies were a “highly delineated group” that were “set forth in tremendous detail” in Stallone’s copyrighted works.<sup>55</sup> Moviegoers, the court noted, related these characters to specific character traits, so the court had “no difficulty ruling as a matter of law that the Rocky characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author.”<sup>56</sup> Anderson’s use of these characters thus violated Stallone’s copyright, and the work featuring them “infringe[d] upon the protected expression in the Rocky characters and render[ed] his work an unauthorized derivative work.”<sup>57</sup>

The court’s characterization of Anderson’s treatment in this case places fan fiction squarely within the realm of derivative works. While fan fiction writers frequently create entirely new characters and merely set them within the preexisting universe of their chosen franchise, fan fiction, by definition, appropriates elements of the original work. For example, the popular fan fiction, *James Potter and the Hall of the Elders’ Crossing*, features numerous characters that did not appear in the authentic *Harry Potter* series created by author J.K. Rowling; however, it

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50. *Nichols*, 45 F.2d at 122.

51. 17 U.S.C. § 106.

52. 11 U.S.P.Q.2d (BNA) 1161, 1162 (C.D. Cal. 1989).

53. *Id.*

54. *Id.*

55. *Id.* at 1166.

56. *Id.*

57. *Id.* at 1167.

is set at Hogwarts, includes characters featured in the books written by Rowling, and references events that occurred in the original series.<sup>58</sup> New characters or settings, while adding to the world of the original universe, would hardly appeal to fan fiction readers if there was nothing in the new work relating back to the original one. The Organization for Transformative Works, a Web site devoted to informing fan fiction writers of their rights against claims of copyright infringement, readily acknowledges that fan fiction infringes upon the original works and is categorized as a derivative work.<sup>59</sup> The heart of an argument for the legality of fan fiction, therefore, rests upon the defense of fair use.

First introduced via Justice Story's opinion in *Folsom v. Marsh*,<sup>60</sup> the fair use doctrine, an affirmative defense to copyright infringement, is now codified at 17 U.S.C. § 107.<sup>61</sup> After the plaintiff has established that a derivative work (or any infringing material) has violated his copyright, the defendant may assert a defense that his infringement was fair and therefore protected under the Copyright Act.<sup>62</sup> When evaluating claims of fair use, the court weighs, in concert, the four statutory factors from the Copyright Act:

- (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.<sup>63</sup>

As applied to fan fiction, these factors reveal that copyright holders have only a very thin justification for demanding that fan fiction writers refrain from using their material in the creation of new works. While the Supreme Court noted in *Harper & Row Publishers, Inc. v. Nation Enterprises* that fair use claims "must always be tailored to the individual case,"<sup>64</sup> because of the highly variable nature of infringing works, certain standards guide the fan fiction universe. An examination of the fair use

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58. JAMES POTTER SERIES, *supra* note 14.

59. *About the OTW: What We Believe*, ORG. FOR TRANSFORMATIVE WORKS, <http://transformativeworks.org/about/believe> (last visited Nov. 11, 2012).

60. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

61. 17 U.S.C. § 107 (2006).

62. *See, e.g.*, *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

63. 17 U.S.C. § 107.

64. 471 U.S. 539, 552 (1985).

factors demonstrates that the vast majority of fan fiction is protected by the doctrine of fair use.<sup>65</sup>

The first factor in fair use analysis, “the purpose and character of the use,” must determine whether the new work “merely supersedes the objects” of the original creation, or if it instead adds something new.<sup>66</sup> If the court finds that the infringing work contains new expression, meaning, or message, then the first factor will weigh in favor of the defendant.<sup>67</sup> This factor provides a persuasive argument for the legality of fan fiction. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court evaluated whether a parodic song that began with the opening words and sounds of “Pretty Woman” constituted fair use.<sup>68</sup> The Court held that each fair use factor is to be “explored and weighed together, in light of copyright’s purpose,” to promote science and the arts, which “is generally furthered by the creation of transformative works.”<sup>69</sup> In light of this, the first factor weighs against the plaintiff in a copyright infringement suit if the new work “alter[s] the original with new expression, meaning, or message.”<sup>70</sup> In *Campbell*, the Court noted that the parodic nature of the infringing work rendered it sufficiently transformative, because parody “can provide social benefit, by shedding light on an earlier work, and, in the process, creat[e] a new one.”<sup>71</sup>

In the case of fan fiction, each story arguably adds to the enrichment of society through the creation of new works. While it is common to deride fan fiction for being amateur literature, each new story is a distinctive work that the public can enjoy. Moreover, the Supreme Court in *Campbell* recognized that it is not the role of the Court to evaluate a work’s quality.<sup>72</sup> Accordingly, whether the infringing work is objectively “good” “does not and should not matter to fair use.”<sup>73</sup> Referencing the late Justice Holmes, the *Campbell* Court reasoned that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation.”<sup>74</sup> It may be

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65. See, e.g., *id.* at 560-68.

66. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

67. *Id.* at 569, 585.

68. *Id.* at 572-74.

69. *Id.* at 569, 579.

70. *Id.* at 569.

71. *Id.* at 579.

72. *Id.* at 582.

73. *Id.*

74. *Id.* at 582-83 (alterations in original).

easy for a published author to deride the efforts of a fan fiction writer and argue that it does not add a message or enrich society, but the sheer volume of fan fiction and its popularity throughout American culture adds weight to the argument that society craves and appreciates these new works.

Nor is the reasoning in *Campbell* limited to infringing works that employ parody to transform the original work.<sup>75</sup> For example, in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit noted:

If the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.<sup>76</sup>

Thus, a work does not need to be a strict parody of the original to be considered “transformative” under the first fair use factor, but rather may transform the work in some other way. The *Castle Rock* interpretation of the first factor therefore squarely encompasses the general idea of fan fiction. While these works appropriate the raw material of the original work, these elements are then used to create entirely new stories and different experiences for the reader.

The first fair use factor also includes an examination of the secondary work’s commerciality.<sup>77</sup> If the allegedly infringing work is commercial in nature, and the defendant created the work with the purpose of making a profit, then the first factor shifts slightly in the plaintiff’s favor.<sup>78</sup> If, however, the defendant created his work without any desire for a profit, but rather to further the arts, then this portion of the first factor weighs more heavily towards a finding of fair use.<sup>79</sup> Despite Samuel Johnson’s cynical comment that “[n]o man but a blockhead ever wrote, except for money,”<sup>80</sup> writers of fan fiction who only post material on free, online databases do not seek any financial gain from their works, but rather publish online so as to reach a larger audience. Thus, taken with the transformative nature of fan fiction and its tendency to create “further works” simply by its creation, the first

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75. 150 F.3d 132 (2d Cir. 1998).

76. *Id.* at 142 (alterations in original) (internal quotation marks omitted).

77. *Campbell*, 510 U.S. at 584.

78. *Id.* at 585.

79. *Id.*

80. *Id.* at 584 (alteration in original).

factor could be found to weigh distinctly in favor of the author of the derivative work.

The Supreme Court noted in *Campbell* that the other factors become less important in light of the transformative nature of the derivative work, but the other factors are still evaluated on their own merits.<sup>81</sup> The next factor taken into consideration is the nature of the copyrighted work.<sup>82</sup> Under this second element of the fair use defense, the court looks to whether the copyrighted material is an expressive, creative work (as opposed to fact-based) and whether the work is published.<sup>83</sup> Courts have generally determined that creative works are granted more copyright protection than factual works because creative works are “closer to the core of intended copyright protection.”<sup>84</sup> Similarly, copyright is intended to protect unpublished works more stringently, so published works are afforded less protection than unpublished ones.<sup>85</sup>

In practice, courts routinely decide the second factor for the party that the other three factors favor, whether or not their reasoning is consistent through different opinions.<sup>86</sup> For example, in a case where the other three factors weigh in favor of the plaintiff, the court will likely focus on whether the original work is creative versus factual.<sup>87</sup> In contrast, in cases where the court feels that an infringing work constitutes fair use through the other factors, the court will focus on the published/unpublished distinction.<sup>88</sup> In a fan fiction context, the vast majority of copyrighted works are published, creative works. While the author of the original work will undoubtedly argue that the second factor should weigh in his favor due to the creative nature of his work, the fan fiction writer may argue in turn that the work has been published, which diminishes its copyright protection. However, this factor is rarely determinative in fair use cases because, as the Supreme Court noted in *Campbell*, derivative works “almost invariably copy publicly known, expressive works.”<sup>89</sup>

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81. *Id.* at 579.

82. 17 U.S.C. § 107 (2006).

83. *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

84. *Campbell*, 510 U.S. at 586.

85. *Blanch*, 467 F.3d at 256.

86. *See, e.g., id.* at 244; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

87. *E.g., Salinger v. Colting (Salinger II)*, 607 F.3d 68, 74 (2d Cir. 2010).

88. *E.g., Blanch*, 467 F.3d at 256.

89. *Campbell*, 510 U.S. at 570.

In contrast, the third factor features prominently in the fair use analysis. Looking to the amount and substantiality of the portion of the copyrighted work used in the infringing work, a court evaluates this factor by determining whether the “quantity and value of the materials used” is “reasonable in relation to the purpose of the copying.”<sup>90</sup> In *Campbell*, the Court examined this factor in relation to the “purpose and character of the use,” recognizing that parody may take from the “heart of the work” without weighing against the defendant, because “[parody’s] art lies in the tension between a known original and its parodic twin.”<sup>91</sup> While the United States Court of Appeals for the Sixth Circuit in *Campbell* had held that this factor should weigh against the defendant, because their song appropriated the best-known pieces of the original work, the Supreme Court explicitly rejected this analysis.<sup>92</sup> “If [the defendant] had copied a significantly less memorable part of the original,” the Supreme Court reasoned, “it is difficult to see how its parodic character would have come through.”<sup>93</sup> Although the nature of a parodic work necessitates appropriation of the core of the original and generally qualifies as fair use, the Court advised lower courts to still examine whether the secondary work took an amount beyond what was necessary for the purposes of the derivative work.<sup>94</sup> If, as in the case of *Campbell*, the appropriated material was supplemented by elements that “departed markedly” from the original work, then this third factor will be found to weigh in favor of the defendant.<sup>95</sup>

Like parody, fan fiction would have little value if it did not “conjure up” the original work.<sup>96</sup> As discussed in the Introduction, the purpose of fan fiction is to provide new stories and entertainment to the canon of an original work, and this purpose would be frustrated if fan fiction writers were unable to appropriate distinctive elements of the original work, such as setting, characters, and plot. However, the leeway the *Campbell* court grants the author of the derivative work is tempered by its recognition that the infringer cannot “skim the cream and get away scot free.”<sup>97</sup> Therefore, fan fiction writers would have to ensure that they do not appropriate more of the original than is necessary to conjure up the

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90. *Id.* at 586 (citation omitted) (internal quotation marks omitted).

91. *Id.* at 587-88.

92. *Id.* at 588.

93. *Id.* at 588-89.

94. *Id.* at 589.

95. *See id.*

96. *See id.* at 573.

97. *Id.* at 589.

work.<sup>98</sup> For example, appropriating exact lines of dialogue from the original work simply to “avoid the drudgery in working up something fresh” would weigh heavily in favor of the author of the original work.<sup>99</sup> However, if the use of such dialogue or other appropriated elements furthers the purpose of the narrative, for example, referencing a specific scene to demonstrate that certain events were occurring concurrently, then it would be considered necessary to the purpose of the work.<sup>100</sup> The line in the third factor between fair use and purely infringing use is thin, but if fan fiction authors refrain from needlessly copying details from the original that do not further the purpose of their own written works, then the third factor would also weigh in their favor.<sup>101</sup>

Lastly, the court concludes its fair use analysis by looking at the “effect of the use upon the potential market for or value of the copyrighted work.”<sup>102</sup> This examination takes into account not only market harm to the original work, but also potential harm to the market for any licensing or creation of derivative works.<sup>103</sup> While initially this consideration seems to warrant a per se finding against a fan fiction author, the *Campbell* Court stressed that this factor must be weighed in concert with the first, the transformative nature of the derivative work.<sup>104</sup> If the work is sufficiently transformative, the Court held, “market substitution is at least less certain, and market harm may not be so readily inferred.”<sup>105</sup> In the case of parody in particular, the Court found, “[I]t is more likely that the new work will *not* affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it . . . because the parody and the original usually serve different market functions.”<sup>106</sup> The key to the analysis of the fourth factor is thus whether the infringing work “usurps” the market of the original by serving as a substitute for the original author’s work.<sup>107</sup>

It is extremely difficult to see how any piece of fan fiction could commandeer the market of the original franchise. Indeed, it is the rabid fan base of the original works who comprise the majority of the fan fiction audience, because they cannot get enough of the worlds of their

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98. *Id.*

99. *Id.* at 580.

100. *See id.* at 579.

101. *See id.* at 589.

102. 17 U.S.C. § 107 (2006).

103. *See Campbell*, 510 U.S. at 590.

104. *Id.* at 590-91.

105. *Id.* at 591.

106. *Id.* (emphasis added).

107. *See id.* at 592.

favorite stories.<sup>108</sup> Even if a work of fan fiction is published and generates significant sales, the author of the original series would undoubtedly be able to release his own sequel or alternative take on his works and its market would still hold strong. The only credible argument the original author could assert as to this factor is that an unauthorized fan fiction may usurp the potential market for licensing the right to create derivative works to other parties. However, because fan fiction does not serve as a substitute for the plaintiff's work, this factor, like the previous three, weighs in favor of the fan fiction author.<sup>109</sup>

#### IV. SPLIT IN THE APPEALS COURTS OVER DERIVATIVE WORKS

Despite the support this reasoning has regularly received in amici briefs, courts have adopted contrasting views on the application of the fair use doctrine.<sup>110</sup> The United States Court of Appeals for the Eleventh Circuit focuses its fair use analysis on the development of the Copyright Act and how the Copyright Clause in the United States Constitution was framed as intending to benefit society.<sup>111</sup> In contrast, the Second Circuit, which hears numerous copyright cases because of its location in New York, is decidedly more author-friendly. Its opinions favor a more rigid interpretation of the rights of copyright holders, emphasizing that authors of original works should be protected in order to incentivize the creation of more artistic works.<sup>112</sup> Despite the Supreme Court's guidance in *Harper & Row* and *Campbell*, the contrasting attitudes of these circuits are reflected in their analysis of the fair use factors, which may be skewed to benefit the defendant or copyright holder in any particular case.

The decision most favorable to writers of fan fiction is undoubtedly the Eleventh Circuit's *Suntrust Bank v. Houghton Mifflin Co.*<sup>113</sup> In *Suntrust*, Alice Randall wrote and published *The Wind Done Gone*, a novel that reimagined the famous *Gone with the Wind* from the viewpoint of Scarlett's slave.<sup>114</sup> Even considering the blatant commercial nature of *The Wind Done Gone*, the Eleventh Circuit held that Randall's

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108. See FANFICTION.NET, *supra* note 2; see also Grossman, *supra* note 1.

109. See *Campbell*, 510 U.S. at 590-91.

110. *E.g.*, Brief of Amici Curiae American Library Association et al. in Support of Defendants-Appellants and Urging Reversal, *Salinger II*, 607 F.3d 68 (2d Cir. 2010).

111. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260-62 (11th Cir. 2001).

112. See *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Salinger II*, 607 F.3d 68 (2d Cir. 2010); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

113. 268 F.3d 1257.

114. *Id.* at 1259.

use of elements from *Gone with the Wind* constituted fair use.<sup>115</sup> The court's reasoning began with an examination of the history of copyright law and concluded with the observation that the Copyright Clause "was intended 'to be the engine of free expression,'" with its primary purpose to "promote learning by guarding against censorship."<sup>116</sup> This objective was further demonstrated statutorily in the limited terms of copyright protection, which "ensured that a maximum number of new works would be created and published."<sup>117</sup> The granting of exclusive rights to the author, the Eleventh Circuit implied, is an important but ultimately secondary concern to the promotion of learning in copyright law.<sup>118</sup>

This promotion of learning, the court continued, was furthered by the protection of First Amendment rights via the doctrines of the idea/expression dichotomy and fair use.<sup>119</sup> The court's aim in protecting the integrity of furthering creative works was clear in the beginning of the opinion, and their ensuing analysis of fair use emphasized this position. In evaluating the first fair use factor, the court noted that while Randall's work was for profit, its "for-profit status [wa]s strongly overshadowed and outweighed in view of its highly transformative use."<sup>120</sup> Because "the story of [the protagonist] and her perception of events in [*The Wind Done Gone*] certainly add[ed] new 'expression, meaning, [and] message'" to *Gone with the Wind*, the court found *The Wind Done Gone* sufficiently transformative.<sup>121</sup> Indeed, the court argued it would be "hard to imagine how Randall could have specifically criticized [*Gone with the Wind*] without depending heavily upon copyrighted elements of that book."<sup>122</sup> The court concluded that the "more transformative the new work, the less will be the significance of other factors," like commercialism, that may weigh against a finding of fair use.<sup>123</sup> In analyzing the other factors, the Eleventh Circuit closely followed the reasoning the Supreme Court set out in *Campbell* and ultimately classified Randall's *The Wind Done Gone* as a fair use of *Gone with the Wind* because its transformative nature as a commentary

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115. *Id.* at 1276.

116. *Id.* at 1261 (quoting *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985)) (citing Jane C. Ginsberg, *Creation and Commercial Value: Copyright Protection in Works of Information*, 90 COLUM. L. REV. 1865, 1873 (1990)).

117. *Id.*

118. *Id.*

119. *See id.* at 1263.

120. *Id.* at 1269.

121. *Id.* (fourth alteration in original).

122. *Id.* at 1271.

123. *Id.* (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994)).

on the original work outweighed the other factors and furthered the aims of copyright law.<sup>124</sup>

The Second Circuit, in contrast, interprets the Supreme Court's *Campbell* and *Harper* decisions quite differently. With their sympathies clearly partial to the copyright holder, the Second Circuit's decisions in *Salinger v. Colting* and *Castle Rock* took a more stringent view of the transformative use standard and based their subsequent evaluations of the other factors around findings that the derivative works were not sufficiently transformative.<sup>125</sup> In *Salinger*, writer Fredrik Colting published an unauthorized "sequel" to J.D. Salinger's famous novel *The Catcher in the Rye*, called *60 Years Later*, and asserted that publication of his novel should be protected by fair use.<sup>126</sup> Rather than using the history of the Copyright Act as a baseline guide like the Eleventh Circuit, the Second Circuit began with a discussion of Salinger's vigorous and constant defense of his copyrights.<sup>127</sup> Despite the fact that this concern goes to trademark protection, not copyright, the court noted that "Salinger has not published since 1965 and has never authorized any new narrative involving Holden or any work derivative of *Catcher*."<sup>128</sup> Moreover, Colting "did not seek Salinger's permission to publish *60 Years Later*."<sup>129</sup>

Following their admonition of Colting's actions, the court then began to analyze Salinger's claim under the fair use factors. The Second Circuit largely deferred to the district court's evaluation of Colting's fair use claim, which focused primarily (as most of the fair use analyses do) on the first factor, the purpose and character of the use.<sup>130</sup> The district court found that Colting's *60 Years Later* was not sufficiently parodic of Salinger's original work, because it lacked "specific criticism of any character or theme."<sup>131</sup> Because courts have regularly recognized that a work may be sufficiently transformative without being a traditional parody, the district court had to concede that Colting's novel could not be automatically excluded from fair use protection simply because it was not a parody.<sup>132</sup> However, the court, nonetheless, concluded that Colting's

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124. *Id.* at 1276.

125. *See* *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Salinger II*, 607 F.3d 68 (2d Cir. 2010).

126. *Salinger II*, 607 F.3d at 71-72.

127. *Id.*

128. *Id.* at 71; *see* 15 U.S.C. § 1051 (2006).

129. *Salinger II*, 607 F.3d at 71.

130. *Id.* at 73-74.

131. *Salinger v. Colting (Salinger I)*, 641 F. Supp. 2d 250, 257-58 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

132. *Id.*

novel had only “some transformative value” and was not transformative as a whole.<sup>133</sup> The district court reasoned that (1) Colting’s stated purpose in writing the novel was “not to comment on Salinger but to write a *Catcher* sequel”; (2) a character that Colting added was only a minor, supporting character in *60 Years Later*; and (3) the ratio of transformative elements to appropriated elements was too low to consider the entire work transformative.<sup>134</sup> After determining that Colting’s novel was not sufficiently transformative, it followed that the other factors weighed against Colting, as well.<sup>135</sup>

The Second Circuit’s adoption of the district court’s analysis in this case is simply baffling when taken into account with the Supreme Court’s previous evaluations of the fair use factors. First, an author’s objection to derivative works does not enter into an analysis of fair use. If a court were to base its evaluation on the copyright holder’s objections to the unauthorized derivative work, virtually every case that entered the court system would be deemed “unfair.” An author’s efforts to protect his property rights are a factor in trademark analysis, but in evaluation of a copyright claim, it simply is not a consideration.<sup>136</sup> The implementation of fair use was designed as a counterbalance to the original author’s rights, thus allowing other authors to create works that comment on previous ones.<sup>137</sup> It is not, contrary to the Second Circuit’s interpretation, a further protection of the original author’s rights.<sup>138</sup>

Further, unlike the Second Circuit’s examination in *Salinger*, the *Campbell* court by no means limited its analysis of the fair-use factors to only works of parody. While the facts of *Campbell* applied to a parodic song, the Court did not state that a work had to be parody in order to be transformative.<sup>139</sup> Parody “has an obvious claim to transformative value,” the Supreme Court noted, but only defined transformative works as a work that “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>140</sup> This extremely broad interpretation of transformative nature would certainly encompass a novel evaluating a character’s life sixty

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133. *Salinger II*, 607 F.3d at 73.

134. *Id.* at 73-74.

135. *Id.* at 74.

136. *Compare* 15 U.S.C. § 1051 (2006) (“Application for registration; verification” of a trademark) *with* 17 U.S.C. § 107 (2006) (fair use factors in copyright) *and* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994) (analyzing fair use factors in a copyright infringement suit).

137. *Campbell*, 510 U.S. at 577.

138. *Id.*

139. *See id.* at 569.

140. *Id.* at 579.

years after the events of his original adventures, as in the case of *60 Years Later*.<sup>141</sup> Colting's novel was a sequel to *Catcher in the Rye*, but it nonetheless included significant commentary on the status of Holden Caulfield's life, which would render the work transformative under the Supreme Court's *Campbell* standard.<sup>142</sup> Likewise, the Court's quantitative determination that the "ratio" of transformative elements was too low is based on an analysis with no precedential support. The Court in *Campbell* used no such mechanical device to gauge whether a work is significantly transformative; but rather stated that "how much more is reasonable will depend, say, on the extent to which the [derivative work's] overriding purpose and character" is to comment upon the original work.<sup>143</sup> This more fluid interpretation does not foreclose a work from fair use protection if it simply appropriates more elements than it adds to the derivative work. Lastly, the Second Circuit's evaluation of *60 Years Later* was arguably tainted by its opinion of the merits of Colting's novel and thus is in direct contradiction with *Campbell*'s affirmation of Justice Holmes' sage advice that courts refrain from imposing their own judgments on the merits of a work.<sup>144</sup>

## V. PROPOSED SOLUTION

Of the contrasting circuit approaches discussed in Part IV, the Eleventh Circuit's decision in *Suntrust* clearly aligns most closely with the Supreme Court decisions in *Harper* and *Campbell*. The *Campbell* Court chose to broaden the doctrine of fair use by recognizing the importance of balancing the rights of authors against the rights of the public by maximizing the amount of works in the public domain.<sup>145</sup> Further, the Supreme Court discredited the use of bright-line rules in fair-use analysis, particularly in regard to commerciality, instead arguing that the four factors all be weighed in concert.<sup>146</sup> The Court chose this approach in another attempt to broaden the scope of the first factor, rather than restrict it by arguing that commercial enterprises should automatically weigh in favor of a plaintiff in a derivative works case.<sup>147</sup> Because *Campbell* concerned a clear parody, circuit courts have been able to dance around its broad holding and instead restrict it to instances

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141. See *Salinger II*, 607 F.3d 68, 71-72 (2d Cir. 2010).

142. See *id.*

143. *Campbell*, 510 U.S. at 588.

144. *Id.* at 582-83.

145. *Id.* at 577-78.

146. *Id.* at 578.

147. *Id.* at 572.

of parody.<sup>148</sup> Until the Supreme Court reviews a nonparodic derivative work and elects to explicitly give a ruling beyond the realm of parody, fan fiction writers will be subjected to this distinction that has been controlling in the circuit courts.

This is a potentially damaging situation because certain authors have already chosen to send cease-and-desist letters to databases containing fan fiction, thereby robbing the public of any derivative works based upon the original franchises. While the purpose of copyright law does include protections for authors, the balance of fair use was implemented so that such a result would not occur. Without a definitive ruling on the matter of fair use outside the realm of parody, fan fiction writers may be intimidated into not writing their new works because of their fear of litigation from high-powered authors. If the Supreme Court truly wants to further the aim of the Copyright Act and allow it to function as “the engine of free expression,”<sup>149</sup> the Court must encourage the creation of these new works by eliminating the ambiguity in the circuit courts and allowing fan fiction writers to distribute their stories to the public without fear of reprisal. Such a decision would “promot[e] the public access to new ideas and concepts.”<sup>150</sup> And really, wouldn’t we all like to read about Harry’s adventures after Hogwarts?

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148. *E.g.*, *Salinger II*, 607 F.3d 68 (2d Cir. 2010).

149. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985).

150. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001).