

Fanfiction Dilemma: Is it Copyright Infringement or Fair Use?

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I. Introduction

From the beginning of humanity, people have found ways to tell stories to each other. Cave drawings depict scenes of the hunt, symbols used to mark property, tales to teach morality to tribe members.

In more modern times, nations have recognized the need to protect creative efforts of authors. In exchange for furthering the arts, the authors are granted protection of their creations. Authors, however, often look to each other for inspiration, and sometimes take elements of another author's work to create an evolution into a new work. Today, thanks in part to the Internet, authors are able to communicate and share their works in ways completely unlike the past.

It is easier than ever for fans to take to the Internet to proclaim their love of characters or frustration with plot lines. Fans now write their own versions of their favorite television shows, movies, and books. While this writing is often an expression of admiration for a particular work, it may run afoul of the protections granted to the original author. Fanfiction writers, through their love of a work, may actually be doing harm to the characters that they love.

This paper outlines the basic provisions of copyright law, explains fanfiction to the uninitiated, and examines how seemingly innocent fun can do harm to original works, and ultimately answer the question "is fanfiction copyright infringement?"

II. Background on Copyright Law

Copyright is a constitutionally authorized right. Article 1 Section 8 Clause 8 of the United States Constitution states "The Congress shall have the power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This grant of power covers both Copyright and Patent right. Throughout the evolution of copyright law there has been debate over who is an author, how long a limited time should last, and what promotes the progress of

the useful arts. The first Copyright Act was codified in 1790¹, as the arts and technology have evolved, so too has copyright law.

Copyright is what many in the legal field call a “carrot;” it is a treat for authors to encourage creation. Copyright gives authors a limited monopoly so that they may publish and exploit their work and be compensated for their painstaking, time consuming efforts. Society is concerned that without copyright protection, there is less motivation to create new works, because others can get a free ride on the investment of time and money by the creator.²

A. What is Required for a Copyright?

Copyright is a term that is thrown about but many do not know what is encompassed in this term. At the most basic level copyright requires an original work of authorship fixed in a tangible medium, independently created, and minimally creative.³ Copyright exists when someone writes a story and it is fixed e.g., writing a story in a computer, assuming it is creative and original, and someone can perceive the writing through the word processing program. Registration with the Copyright Office is not required for a grant of copyright, but it is necessary for litigation.⁴

B. What is Not Covered by Copyright?

Copyright protects expression not ideas.⁵ Facts are not copyrightable. Copyright is meant to protect creative artistic expression, it is not meant as a means to lock up information or

¹ ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT CASES AND MATERIALS 4-5(7th ed. 2006).

² *Id.* at 20-26(quoting WILLIAM LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003))(explaining the economic impact of copyright protection and the costs and benefits this protection gives to society).

³ The Copyright Act of 1976, 17 U.S.C. §102(a) (2000)(outlining the required subject matter for copyright protection).

⁴ 17 U.S.C. §411.

⁵ 17 U.S.C. §102(b).

discoveries. A fact is not copyrightable, but the expression of that fact is copyrightable. When an author writes about a fact that another author wrote about, the author does not infringe unless he or she copies the expression of the first author.

C. What Does an Author get for Creating a New Work?

As mentioned above, copyright grants to an author a limited monopoly in his or her work. This means the author has the exclusive right to perform, copy, produce, distribute, and sell his or her work.⁶ This also means an author can stop others from doing so without authorization. This paper focuses on copyright in the context of fanfiction, it emphasizes the right to make a derivative work.

A derivative work is defined in the copyright statute as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”⁷

The easiest way to think of a derivative is the sequel or the adaptation. Sequels are easy: *Rocky I, II, III, IV*⁸; each has a distinct story, but someone other than the author of *Rocky I* would need permission to make *Rocky II*. Adaptation is taking a work in one form, for example, a book, and translating to a new form, like a movie, for example *Gone with the Wind*⁹ the book being adapted into *Gone with the Wind*¹⁰ the movie.

⁶ 17 U.S.C. §106.

⁷ 17 U.S.C. §101.

⁸ ROCKY (United Artists 1976); ROCKY II (United Artists 1979); ROCKY III (United Artists (1982); ROCKY IV (MGM/UA Entertainment Co. 1985).

⁹ MARGARET MITCHELL, GONE WITH THE WIND (Macmillan 1936).

¹⁰ GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).

So what happens if someone uses one story for inspiration to write another story? Is there copyright infringement? This is where things get tricky.

D. Copyright Infringement

There are no hard and fast rules for determining if one work infringes another. The basic test for copyright infringement is composed of three parts: is there copying, is there substantial similarity, and is there improper appropriation of the copyrighted elements in the original work.

i. Copying

Is there copying? Typically, someone accused of copyright infringement does not admit he or she copied someone else's work. There are no witnesses that can state, "Yes, I saw him copying." Copying is typically proven through access and similarity. If a book is published and available at stores and libraries, there is access. Hearing a song on the radio is access. Similarity requires detailed analysis and comparison of the expressive elements of each work to determine if there is substantial similarity. An accused infringer can claim independent creation, e.g., "I was on an island in the south pacific completely cut off from the rest of the world, no radio, no television, how could I have possibly known about this song?"

ii. Substantial Similarity

The problem is determining where the similarities become substantial. It is easy to determine the extremes: very little about the two works is similar or the two works are nearly identical. Somewhere in the middle there is a point where some people might look at the two works and think, "Hmm, this work reminds me a lot of that other work." It is important to note that the courts do not look for literal similarity. If literal similarity was required, infringers would escape liability by merely changing some words.¹¹

¹¹ Sheldon v. Metro-Goldwin Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936)(holding that defendant's movie infringed expressive elements of plaintiff's play, both of which were based on factual events).

iii. Improper Appropriation

The analysis for improper appropriation can vary from court to court. Some courts dissect a work because some parts of a work are not considered copyrightable. Common themes like star crossed lovers, police chases, or dark and mysterious villains are not protected by copyright because they are merely common ideas. After parts that are not protectable are factored out, courts perform a side by side comparison of what is left. Other courts examine the overall impression. In assessing improper appropriation, the works must be viewed in light of the intended audience. Expert testimony that draws conclusions as to improper appropriation should not be allowed in court, however, testimony related to how lay persons perceive the works are acceptable.¹²

For example: the idea of star crossed lovers has been covered by *Romeo and Juliet*, *West Side Story*, *Abie's Irish Rose*, and *The Cohens and the Kelleys*.¹³ The idea is not protected, the expression is protected. If someone made *Romeo and Juliet*, and Juliet was dressed in an angel costume and kissed Romeo in a pool, it would infringe the expression of Baz Luhrmann's *Romeo and Juliet*.¹⁴

E. Fair Use

Even if a work is found to be infringing of another, the infringer is afforded the affirmative defense of fair use. The underlying purpose of copyright is to promote the progress of the arts. Copyright recognizes the difficulty of being truly original, something that has never been done before and shares no similarities to another work. Copyright allows for evolution.

¹² *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)(holding that when comparing songs in copyright infringement suit the testimony of experts could be helpful in showing how lay people perceive the songs, but experts should not testify on the issue of copying.)

¹³ *Nichols v. Universal Pictures Corp.*, 49 F.2d 119 (2d Cir. 1930)(holding that the movie *The Cohens and the Kelleys* did not infringe the play *Abie's Irish Rose* despite both stories focusing star crossed lovers being disowned by their families: the expression and portrayals of the characters were not substantially similar).

¹⁴ *ROMEO + JULIET* (20th Century Fox 1996).

Authors who use one work and transform it so as to create a new work may find refuge in the fair use defense.

Fair use was originally a judge made rule of reason that was then codified in the 1976 Copyright Act. Before codification, fair use recognized that only using a small part of an original work could be fair and not an infringing use.¹⁵ The Copyright Act only gives general guidance in determining fair use, and outlines a non-exclusive list of what may be considered fair use: criticism, comment, news reporting, teaching, etc.¹⁶ The Supreme Court held that parody is a form of comment and can be a fair use.¹⁷

Fair use looks to four factors: the purpose and character of the use, the nature of the copyrighted work, the amount used of the copyrighted work, and the effect on the market of the original.¹⁸

Under purpose and character of the use the courts look to factors such as if the new works is commercial in nature, if it is a productive use, such as news reporting, and whether or not the new work is transformative. Many artists claim their works comment on the original in the form of parody. Parody uses an object to make fun of *that* object. In a parody, the audience must be able to identify the target of the parody.¹⁹ Satire, which has also been recognized as a possible form of fair use, uses an original work to comment on something else and needs to justify the use of an original work.²⁰

¹⁵ 4 NIMMER ON COPYRIGHT, §13.05 (2009).

¹⁶ 17 U.S.C. §107.

¹⁷ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 578 (1994)(holding that a rap version of *Oh, Pretty Woman* with shocking lyrics was a fair use because it was transformative and not likely to affect the market for the original sound recording or derivative works).

¹⁸ *Id.* at 577 (quoting U.S.C §107).

¹⁹ *See Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992)(holding that a sculpture based on a photograph was not a parody and not a fair use; a parody is when an artist imitates the style of another artist and is a valued form of criticism so long as the copied work is identifiable so that they audience can attribute the work to rightful owner).

²⁰ *Dr. Seuss Enters. LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997)(holding that the use of Dr. Seuss language and drawings to tell the story of the O.J. Simpson criminal murder trial was a satire that did not need to use so many expressive elements of *The Cat in the Hat* and other Seuss stories).

The more transformative the work is, the stronger the case is for fair use. The court can find that the work is not transformative when the new work is an unauthorized derivative, or stands on the shoulders of the original. Obviously this would weigh very heavily against the accused infringer. One example of a transformative work is 2 Live Crew's rap version of Roy Orbison's *Oh Pretty Woman*. The rap version used the same beat and distinctive guitar riff, but used different lyrics. The original sweet love ballad was transformed into a dark and gritty song about the disgusting reality of relations with prostitutes.

The nature of the copyrighted work usually does not have a strong effect on the fair use analysis. Creative works are protected by copyright. This factor may have a stronger influence on the outcome when a work is factually based, like a biography. The author of a biography cannot own the facts contained within the biography, but could bring a copyright infringement claim over someone who has copied the expression within the biography.

The audience needs to be able to identify a work that is parodied. Outside of parody and satire, the court balances how much is used with how transformative the work is. Copying a very small part may be considered de minimis and the copier may escape liability. Some courts look to see if the "heart of the work" is being copied.²¹ In some instances many elements may be necessary for a particular genre and the court will factor this out under the scenes a doctrine.²² There is no simple equation to determine what amount is too much; it varies from case to case.

Effect on the market of the original looks to if sales of the original work will be harmed and also to the market for derivative works and licensing opportunities.²³ The court may also consider harm to the reputation of the original work.

Courts look to these four factors and balance the results to determine if the infringing work transforms the original or is merely acting as a market replacement. At one extreme is a

²¹ Harper Row Pub. Inc. v. Nation Enter., 471 U.S. 539 (1985)(holding that a magazine's verbatim copying of a small portion of Gerald Ford's biography took the heart of the work, acted as a market replacement, and was not vindicated by newsworthy purposes, was found to infringe and was not a fair use).

²² Rice v. Fox Broadcasting Corp., 148 F.Supp.2d (C.D. Cal. 2001)(explaining the scenes a faire doctrine as factoring out elements in a story that are common, necessary, or expected within a certain genre, and thus are not protectable, such as a mysterious, masked magician.)

²³ Campbell, 510 U.S. at 590.

work that copies a large portion of an original work with small changes, which could act as a replacement. The purpose of furthering the progress of the arts is not served by this type of work. At the other end of the extreme is a work that only uses small parts of an original work and creates a new expressive work that serves a different purpose in the market place and does not harm the demand for the original. This type of work does promote the progress of arts and should not be prevented from being displayed or performed. No one factor is dispositive and this analysis is very fact intensive and varies from situation to situation.

III. Background on Fanfiction

A. What is Fanfiction ?

Fanfiction, just as the name suggests, is a story created by a fan. It is not entirely clear when fanfiction started. Many point to the fanzines created in response to the television show *Star Trek*.²⁴ Fanfiction may have roots that go back even earlier with an author writing an addition to Chaucer's *Canterbury Tales*.²⁵

Fanfiction typically focuses on television shows, books, and movies. In fanfiction anything goes, the authors can change whatever they want: dead characters can be alive, reviled characters can be killed off; the characters can travel through time, whatever the author chooses.

In the early days of fanfiction, many authors wrote for themselves and possibly some other fans. The authors would have to write out or type the stories and make copies in order to disseminate to other fans. Now in the Internet age, authors can just type and upload stories on to the Internet. There are websites that are dedicated to specific shows and movies. There are other websites that are huge databases for any and all types of fanfiction.

²⁴ *Star Trek* (NBC television broadcast 1966).

²⁵ Bill Tancer, *Life after Potter, Bonanza and Gunsmoke*, TIME, Aug. 30, 2007, <http://www.time.com/time/business/article/0,8599,1657764,00.html> (last visited Dec. 20, 2009).

B. So why do they write?

To many people writing new story lines for *Twilight*²⁶ may seem like a lot of work and pointless, but for the fanfiction writer it is about being connected to the stories and characters that he or she loves. One of the biggest driving forces behind fanfiction is the “shipper.” Shipper comes from relationship and was a term usually reserved for those who wanted to see Mulder and Scully of *The X Files*²⁷ have a romantic relationship. The shippers are still going strong writing about relationships they want to see in many other works, including *Twilight* and *Harry Potter*.²⁸

C. Fanfiction Lexicon

Within fanfiction there are certain terms that authors use to explain the premise of the story.

- AU: Alternate Universe: physics and reality are different; for example, people can fly.
- AR: Alternate Reality: Harry Potter never goes to Hogwarts.
- Alternate Timeline: Characters are in a different time- like ancient Egypt.
- Cross over: character from one show or movie intersects with characters from another show. For example, Mulder is injured and ends up in ER having Dr. Carter treat him.
- Slash: Homosexual erotica: Mulder and Krycek are a couple, or Harry Potter and Snape are a couple.

D. Why is Slash a big deal?

It is not uncommon for authors to tolerate fanfiction until they hear about slash stories. Authors typically want to control the image of their characters and if slash is contrary to the

²⁶ STEPHENIE MEYER, *TWILIGHT* (Little, Brown Book Group 2006)(2005).

²⁷ *The X Files* (Fox television broadcast 1993).

²⁸ J.K. ROWLING, *HARRY POTTER AND THE PHILOSOPHER’S STONE* (Bloomsbury Publishing 1997).

characters' images, authors want it suppressed. The more wholesome the character's image, the more likely the author will be upset with a story line that contradicts that image.

Slash storylines are not the only stories that upset authors. An author is likely to be just as upset if a wholesome character was using illicit drugs or committing crimes in fanfiction. Storylines that are contrary to the image and mythology built up around a particular character are often loathsome to the original author.

E. Why is Fanfiction Fun?

Writers in fanfiction love the ability to express themselves and take an opportunity to right what they feel are previous wrongs. Alternative Universe is probably the most popular type of fanfiction. The Philes (*The X Files* fans) enjoyed writing storylines that involved Alex Krycek, and in particular, enjoyed giving him back both of his arms. For those not familiar with *The X Files*, there was an episode where Krycek lost one of his arms. Characters in fanfiction tend to have more fun with the use of both arms. The Philes could also bring back Mulder's sister, who was possibly kidnapped by aliens, or kidnapped as part of government conspiracy. The most popular story line in *The X Files* fanfiction was Mulder and Scully finally realizing their love for each other, expressed in a variety of ways by the Shippers. The Shippers would also express a variety of permutations, such as Scully getting involved with Skinner instead. The Shippers also had a lot of fun with the fact that Mulder did not have a bed (for those not familiar with *The X Files* mythology, viewers only saw Mulder sleep on a couch in his apartment, never a bed, until a later season when he finally did get a bed). In AU, writers could ignore certain plot lines or inconsistency in plots. So the Shippers could ignore the fact that Mulder eventually got a bed. Shippers also had Scully get abducted and Mulder was always coming to the rescue. In AU the writers could ignore the black oil alien virus plot line, which got very convoluted and contradictory.

Fanfiction writers could also write about the very mundane things that people do in day to day lives that never appear on screen, like Mulder going to the grocery store. Fanfiction could also push the limits of reality and have Mulder travel through time.

IV. So What is the Problem with Fanfiction: Unauthorized Derivative v. Fair Use

Copyright grants an author a limited monopoly to his or her work. The original author has the exclusive right to reproduce, display, and make derivatives. It is possible for authors to claim that when fanfiction writers use characters from books or the derivative movies, the fans are infringing the author's copyright by creating an unauthorized derivative.

When an author writes a book, the book is protected by copyright. Fully delineated characters can also be protected by copyright.²⁹ In copyright, stock characters are not protected: a mysterious magician is not protected, but a young boy that goes to a special school to become a wizard, is protected. As popular books are adapted into movies the central characters become visually realized and fully delineated, giving many more details of that character. When a fanfiction author writes about a character and includes expressive elements of that character, he or she has now created a derivative work. The original author that created the expressive elements of that character owns those elements and the right to create derivatives that use those elements. The Fanfiction author that takes those expressive elements is exploiting a derivative market.

This paper will walk through the recent district court decision in *Salinger v. Colting*³⁰ to show how courts analyze copyright infringement in the context of another writer using an original author's character.

A. *60 Years Later: Coming Through the Rye*³¹

Recently, a young author in Sweden wrote the book *60 Years Later: Coming Through The Rye* using the pseudonym J.D. California. It did not take long for bloggers to question if this

²⁹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930)(stating that distinctively delineated characters may be protected independently of the copyrighted work.)

³⁰ *Salinger v. Colting*, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 (SDNY July 1, 2009).

³¹ FREDRIK COLTING, *60 YEARS LATER: COMING THROUGH THE RYE* (Windupbird 2009).

book was by J.D. Salinger, author of *The Catcher in the Rye*³², writing a long awaited and strongly desired sequel. Salinger has stated many times in the past that everything there is to Holden Caulfield is in the original book, and that is all there is to it.³³ Salinger has been very protective of Holden Caulfield and has rejected many offers to make a movie version of *Catcher*, even rejecting offers from Steven Spielberg.³⁴

The book, *60 Years Later*, was released in Europe, and was going to be sold in the United States in the Spring of 2009; Salinger, however, brought suit asking for an injunction against the importation and sale of the book. Originally, the back book cover stated that it was an unauthorized sequel to *The Catcher in the Rye*. Later this comment was removed from the back cover.³⁵

For those not familiar with *The Catcher in the Rye*, here are some of the important points put the lawsuit into context. In *Catcher*, Holden Caulfield is 16 years old, escapes from prep school and goes to New York City. Holden wanders around the city encountering many different people along the way. Holden goes to Central Park and contemplates where the ducks go in winter. Holden has a particular manner of speaking, using slang like a typical teenager. After various encounters with people throughout the city, including a prostitute, the book ends with Holden at the carousel in Central Park talking with his sister, Phoebe.

In *60 Years Later*, a 76 year old Mr. C escapes from a retirement home, and wanders around New York City, wondering where the ducks in Central Park go for the winter, having an encounter with a prostitute, running into the same characters as in *Catcher*, speaking with the same style and slang as in *Catcher*. While the main character is only referred to as Mr. C. it is evident that this character is meant to be an older embodiment of Holden Caulfield. His journey through New York City mirrors the plot of *Catcher*. He even speaks to his sister, Phoebe.

J.D. California, who is actually Fredrik Colting, has given statements in the past about his

³² J.D. SALINGER, *THE CATCHER IN THE RYE* (Little, Brown and Company 1951).

³³ Doug Gross, *Lawsuit targets 'rip-off' of 'Catcher in the Rye,'* CNN.COM, June 3, 2009, <http://www.cnn.com/2009/SHOWBIZ/books/06/03/salinger.Catcher.lawsuit/index.html> (last visited Dec. 21, 2009)

³⁴ *Id.*

³⁵ Pl.'s Br. at 2.

love of *Catcher in the Rye*, and his desire to write a sequel. After Salinger's lawsuit was filed, Colting changed his tune and tried to explain that his book was not a sequel but an exploration of the relationship between author and character.³⁶ In *60 Years Later*, Salinger appears as a character, angry at Mr. C and wants to destroy him. The character Salinger resents that Mr. C is so popular and well known, and has become bigger than life, while Salinger has become more of a fictional character.

B. Is This an Unauthorized Derivative or a Fair Use?

Starting with the case for copyright infringement, *Catcher* has been published for decades and is a well known novel, so there is access. *60 Years Later* follows characters that were created in *Catcher*, and has a similar plot arc, and linguistic style. This is an abbreviated analysis but it shows that copyright infringement can be shown. When a court finds copyright infringement, the infringer can use the affirmative defense of fair use. An affirmative defense of fair use allows an accused infringer to admit that he or she has infringed, but if successful in demonstrating the fair use can escape liability.

i. The Purpose and Character of the Use

The purpose and the character of the use have several different factors that the court will consider. One consideration is if the allegedly infringing work is commercial. Commercial works once had the presumption of not being a fair use, but this concept has changed over time and commerciality is merely a factor the courts consider.³⁷ Courts also consider if the work is for commentary, news reporting, or education. For example, a book review can quote passages from

³⁶ Dave Itzkoff, *Author Responds to Salinger Lawsuit*, N.Y. TIMES, June 16, 2009 <http://artsbeat.blogs.nytimes.com/2009/06/16/author-responds-to-salinger-lawsuit/?hp> (last visited Dec. 21, 2009).

³⁷ Campbell, 510 U.S. at 584.

a new book before the book is released for sale, however there are limits on what can be quoted for this journalistic purpose.³⁸

In analyzing purpose and character of the use, the central question is whether the new work supersedes the original or if it transforms the original by adding something new.³⁹ In assessing whether a work supersedes or transforms, the court reflected upon the central goal of copyright, to promote the progress of the arts.⁴⁰ The purpose of fair use is to give a defense to a work that builds and transforms an original work into something so new and different it can stand on its own merit. A superseding work is one that takes many elements of the original and can act as a substitute. Courts value a transformative work and will often allow a transformative work to copy more from the original, so long as it is for this transformative purpose.⁴¹

Sometimes within the arts it is necessary to use elements of past works to evolve and create something new to continue the progress. Works that merely stand on the shoulders of others to avoid the effort of creating something are not protected as a fair use. In copyright, the idea of standing on a previous work's shoulders should not be inferred as meaning that the new work is greater than the original. Instead, standing on shoulders should be thought of as the new work is getting a free ride while the original does all the work.

a. Parody and Satire

The courts have previously recognized that the parody of a work can be transformative and a fair use. A parody is a work that targets the original to make fun of it or criticize it. A satire is different in that a satire uses one work to make a broader comment on society.⁴² Courts allow parodies to use more elements from the original because the audience needs to recognize the

³⁸ Harper Row, 471 U.S. at 607-08.

³⁹ Campbell, 510 U.S. at 579.

⁴⁰ Salinger, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 at *8.

⁴¹ Campbell, 510 U.S. at 588.

⁴² *Id.* at 580-81.

target of the parody for it to be successful.⁴³ A parody in which the audience does not recognize the target holds little value. Courts do not allow the same breadth with satire because satire could use anything to convey its message.⁴⁴

In determining if *60 Years Later* is a parody, as the defense claimed, the court looked to *Campbell* and *Suntrust Bank* to guide its analysis.⁴⁵ The court concluded that *60 Years Later* “contains no reasonably discernable rejoinder or specific criticism of any character or theme of *Catcher*.”⁴⁶ Parody should be readily perceived in the accused work, and not arise as an afterthought in response to litigation. In examining *60 Years Later*’s portrayal of an older Holden Caulfield and his adventures through New York City, the court stated, “[i]t is hardly parodic to repeat that same exercise in contrast, just because society and the characters have aged.”⁴⁷ The court concluded that the purpose of *60 Years Later* was not to comment on Holden Caulfield but to fulfill the need of Holden Caulfield fans for more of the character.⁴⁸ This was further reiterated by comments made by Colting in stating that he always wondered what happened to Holden and how Holden deserved to have a second life.⁴⁹ In essence, *60 Years Later* is supplanting *Catcher*.

It is evident from the author’s own statements before the suit that he set out to write a sequel to *Catcher*. The claim of parody only arose as a defense to the copyright infringement lawsuit and the credibility of this claim is diminished by Colting’s inconsistent statements. This prong weighs in favor of Salinger.

⁴³ *Campbell*, 510 U.S. at 580-81

⁴⁴ *Id.*

⁴⁵ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001)(holding that *The Wind Done Gone* was a transformative parody of *Gone with the Wind* and was a fair use).

⁴⁶ *Salinger*, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 at *13.

⁴⁷ *Id.* at *17.

⁴⁸ *Id.* at *19.

⁴⁹ *Id.* at *19 n. 3.

ii. Nature of the of the Copyrighted work

The second prong typically does not have much weight in a fair use analysis. It is common for parodists to target a well-known creative work so that the audience can perceive the message. Parody falls flat if the audience cannot discern that the work is a parody; there is little motivation to parody a work that the audience would not recognize.

Highly creative works are entitled to high levels of protection in copyright, as opposed to works that are more factual in nature which have a thinner copyright protection. For example, if an author had written a biography of J.D. Salinger the historical facts are owned by the author for merely writing about them. There is a lesser protection for facts in the sense that anyone can write about the facts, but not use the same expression of those facts in the original. A purely fictional work has protection over characters, plot lines, story arcs; there is a greater breadth of protection for the expression in fictional works. *Catcher* is a creative work and entitled to protection. This weighs in favor of Salinger.

iii. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This prong of the fair use analysis closely relates to the first prong. The amount of the original used is tied to the purpose of the work.⁵⁰ When an author parodies or comments on a work, the reader must be able to identify the targeted work; the author, however, must not take too much from the original—more than is necessary to identify the portion commented on or made fun of. There is no equation for calculating how much is too much.

In commenting on the character of Mr. C, the court stated he “has similar or identical thoughts, memories, and personality traits to Caulfield, often using precisely the same or only slightly modified language from that used by Caulfield in *Catcher*, and has the same friends and family as Caulfield.”⁵¹ The court then proceeds to compare events and passages from *60 Years later* to *Catcher*. The court admits that to comment on Salinger as an author, Colting would need

⁵⁰ Salinger, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 at * 30.

⁵¹ *Id.* at *31-32.

to reference and allude to *Catcher*.⁵² In examining the totality of *60 Years Later* and how much had been taken from *Catcher*, the court found that the ratio of borrowed elements to new elements was unnecessarily high for the purpose of parody.⁵³

In addition to the elements of the plot line that were borrowed or repeated from *Catcher*, the court also looked to the overall style. The narratives were both presented from the first person perspective, both sarcastic, and Mr. C used the same slang as Caulfield. In comparison, in *The Wind Done Gone*, the author, Randall, used a different writing style from Mitchell's *Gone with the Wind*. There were new characters, and the original characters were reflected in a different light.⁵⁴ This was not present in *60 Years Later*. There was no change in style to "reinforce any parodic or other purpose"⁵⁵

The court recognized the privilege to critique Salinger, but this right does not give one the privilege to "take more than is necessary from Salinger's own copyrighted work"⁵⁶ Ultimately the court found that Colting took more from *Catcher* than was necessary to further his claimed purpose of commenting on Salinger. This factor weighed in favor of Salinger.

iv. The Effect of the Use on the Markets of the Copyrighted Work

In evaluating the effect on the markets for the copyrighted work, the court looks to the harm that could impact the original copyrighted work as well as harm done to the market for derivatives.⁵⁷ The court considers if sales would be diverted from the original work, if consumer confusion harms the reputation of the original which would then harm sales, and if the new work

⁵² Salinger, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 at *39.

⁵³ The court uses "barrowed to new elements" which was expressed in Judge Marcus's concurring opinion in *Suntrust Bank*. 268 F.3d at 1280. The court in *Suntrust Bank* found that a low ratio of barrowed to new elements cut in favor of the parodist. *Id.*

⁵⁴ Salinger, at *40.

⁵⁵ *Id.*

⁵⁶ *Id.* at *41.

⁵⁷ *Id.* at *41-42 (quoting Campbell).

would harm sales of future derivatives that the author would have the right to make. Even assuming *60 Years Later* would not harm market demand for *Catcher*, it could still harm the market for *Catcher* derivatives and sequels, it could cause confusion if a sequel did come to the market and consumers were confused as to which the authentic sequel was and which the parody was.

Salinger has previously stated that he does not want to write a sequel to *Catcher*, these statements, however, cannot weigh against him as an author has the power to change his mind.⁵⁸ Salinger, as the author owns the right to the derivative markets and it is within his discretion to capitalize these markets.

The court ultimately found that *60 Years Later* would harm the market for derivatives and found this part of the analysis favored Salinger.⁵⁹

C. Bringing All the Factors Together

No one factor is dispositive in the fair use analysis. As explained in section IV(B)(i), the more transformative the use, the more copying that can be tolerated. Here, Colting purported to be commenting on Salinger, yet took many elements from *The Catcher in the Rye* that were not necessary to comment on Salinger the author, and created a potential harm to the demand for the original work and for derivative works. Ultimately, the court decided that *60 Years Later* was not a fair use and its distribution in the United States could cause irreparable harm to *The Catcher in the Rye* and granted an injunction preventing publication and sales in the United States.

D. Did the Court Get it Right?

It is important to note that the issue before the court was a preliminary injunction to stop *60 Years Later* from being released in the United States, so the court addressed the likelihood of

⁵⁸ Salinger, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012 at *44 (citing *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)).

⁵⁹ *Id.* at *45.

success on the merits of a copyright infringement claim and the possible harm to *The Catcher in the Rye*.⁶⁰

After this decision came down, it at first appeared to be a victory for authors and their rights to protect their works and their characters, but there are some dissenters. Groups such as the Fair Use Project and the American Library Association voiced concern over the injunction stopping a book from being published. They perceived this to be an affront to the First Amendment and Free Speech.⁶¹ These groups call for a higher standard when issuing an injunction against the publication of a book because there is a particular harm in this type of prior restraint in publication of a work which goes against the purpose of the First Amendment.

This case is currently on appeal to the United States Court of Appeals for the Second Circuit. Many groups have filed amici briefs in opposition to the holding of the lower court.⁶² While many object to the injunction against the publication of the book, the district court decided that *60 Years Later* was an infringing work and that it would cause irreparable harm to *Catcher*, and the Court of Appeals will have to review this decision and either affirm or reverse.

E. Why Did This Come Out Differently Than Suntrust Bank?

Throughout the Southern District Court of New York's opinion in *Salinger v. Colting*, there were many quotations and references to *Suntrust Bank*.⁶³ In *Suntrust Bank*, the Estate of Margaret Mitchell, author of *Gone With The Wind* (GWTW), brought infringement claims against Alice Randall who wrote *The Wind Done Gone*⁶⁴ (TWDG).

⁶⁰ The factors the court addresses in determining to issue a preliminary injunction: 1 that the complaining party will be irreparably harmed if an injunction is not granted and 2 either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation. *Salinger*, at *45-46.

⁶¹ Anthony Falzone, *Confusion over Copyright Injunctions And Other Restraints Of Speech* (Aug. 3, 2009) <http://cyberlaw.stanford.edu/node/6230> (last visited Dec. 21, 2009).

⁶² *Id.*

⁶³ *Suntrust Bank*, *supra* note 45.

⁶⁴ ALICE RANDALL, *THE WIND DONE GONE* (Houghton Mifflin 2001).

The first half of TWDG sets the stage at Tara, the O'Hara family plantation, following characters from GWTW such as Mammy, Scarlett, Ashley, and Rhett. The book evolves into its own story, as told through the eyes of Scarlett's half sister and slave Cynara. The book is more than telling the story of GWTW through a different point of view, it is a commentary on Antebellum South and the reconstruction period. While GWTW may have been a starting point, TWDG is its own story and stands on its own two feet, rather than standing on the shoulders of its predecessor. The court in *Suntrust Bank* found fair use in the transformative work that did not take too much from the original work.

It is worth noting that throughout TWDG, Randall refers to Scarlett as "Other" and Rhett as R.B., and the names of many other characters were changed as well. The court does not seem to make anything of this change. It could surely be argued that it is the narrator's impression of these characters, but one has to question if it was Randall's choice in avoiding particular names so as to not infringe. Avoiding the use of a name is not enough to avoid infringement.

Reconciling these two cases, it is apparent that *60 Years Later* took too much from *The Catcher in the Rye*. Both *60 Years Later* and *The Wind Done Gone* took characters from other works, but it is what was done with the characters that truly influence the courts. Mr. C runs around New York essentially retracing the footsteps of his same adventure sixty years earlier, meeting the same characters, saying the same things. There is no evolution or transformation. *The Wind Done Gone* tells the story of the South, Civil War, slavery, and the adventures of Cynara, with Rhett, Scarlett, Mammy, and many others in supporting roles, and with the addition of commentary of the social norms at the time.

V. Is Fanfiction Copyright Infringement?

This is obviously a difficult question to answer, and copyright infringement is always dependent on the specific facts of the situation. When a writer has access to a work and then creates a work that is substantially similar it is copyright infringement. When a fanfiction author takes a few elements from another's original work and creates something different the question of copyright infringement becomes more convoluted.

Blatant copying is out. Determining copyright infringement may become more difficult in the context of television shows and movies where the copyrighted work is visual and the secondary work is prose. There is an underlying script and then there is the actual recording of the show or movie which is seen on the television or theater screens. Is the summary of what is seen an infringement? It may be the viewer's interpretations and expression of what is seen, but it is not truly transformative to just summarize what is seen. In the context of a review, there is added content and value, so this would become transformative. A transliteration of what is seen on screen would not be a transformative work, and this factor would tilt in favor of unprivileged copyright infringement.

For example, take the *Seinfeld* Aptitude Test.⁶⁵ This was a board game based on the show *Seinfeld*⁶⁶, that asked questions about the characters of the show by summarizing some part of a plot line and asking "who did...?" among other things. Did the board game infringe a TV show or did it transform it? The court held that it infringed the show and was not transformative and therefore not a fair use.⁶⁷ Extrapolating from this, if a board game infringes, a plot summary or outline could be found to infringe because the summary has even fewer new elements than a board game.

Fanfiction is typically more than a plot summary. What about the fanficers that summarize part of a particular episode to frame the reader's point of reference to set up the rest of the fanfiction? This occurred at different points in *The Wind Done Gone* and the court was still able to find fair use. Commentary, such as parody, will need to use some elements of the original to indicate to the reader what is being commented upon. As stated in *Salinger v. Colting*, the courts can look to the ratio of borrowed to new elements.⁶⁸ Obviously, more original

⁶⁵ *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (holding that the *Seinfeld* Aptitude test was not a fair use when it had little transformative purpose, constituted a repackaging of the show, used disproportionate number of examples compared to its intended purpose, and this game would fill a market niche that the owner could have developed).

⁶⁶ *Seinfeld* (NBC 1990).

⁶⁷ *Castle Rock*, at 146.

⁶⁸ *Salinger*, No. 09 Civ. 5095 2009 U.S. Dist. LEXIS 56012, at *39.

elements are better, which will make the new work transformative and more likely to be considered a fair use.

There is, however, a caveat. The court in *Suntrust Bank* valued TWDG’s commentary on society in antebellum South, giving the book a transformative purpose. Often fanfiction lacks this level of social commentary. Some fanfiction could be seen as a criticism of the original, or a parody taking shots at the original, but typically it is just an offshoot of the original, a truly unexplored plotline. The statute leaves the door open for other fair uses by using the language “for purposes *such as* criticism, comment, news reporting”⁶⁹

A. Use of Characters in Fanfiction

Typical fanfiction does not copy plot from the original work. Usually the plot is very different and it is merely the characters that are used in fanfiction. Fanfiction writers typically give a reference point such as between season five and season six of the show, or alternate ending to the second book, etc. Fanfiction authors primarily utilize the characters of the underlying work. It is important to explore whether the use of the character’s name and qualities are enough to rise to copyright infringement or be considered a fair use.

The courts have previously recognized that possibility of characters having copyright protection independent of the original work in which they appear so long as they are substantially delineated.⁷⁰ A general character with little detail and expression is not entitled to such protection.⁷¹ In other words, the more detail an author gives to a character, the more protection is granted to that character. Courts have previously granted more protection to characters that have a visual representation such as characters on television shows, movies, or comic books.⁷² The visual representation gives a new level to the depiction, whereas a literary

⁶⁹ 17 U.S.C. §107 (emphasis added).

⁷⁰ Nichols, *supra* note 29.

⁷¹ *Id.*

⁷² Gaiman v. McFarlane, 360 F.3d 644, 660-61 (7th Cir. 2004)(explaining the difference in expression and how literary characters leave more to the imagination of the reader than a character that is presented visually in movies or in drawings).

character is interpreted and envisioned by the reader. A written description can only go so far, whereas a picture is worth a thousand words. At the bottom of the character protection spectrum is the stock character. Stock characters are common stereotypes that are not afforded protection, like the British butler or the French maid.

The use of characters further complicates the analysis of the idea/expression dichotomy. As explained earlier, the idea expression dichotomy is something that is very important in copyright law. At what point does the general idea of a character become a substantial delineation so as to protect that character? Is there a point where a character is so well known that the mere mention of the name will encompass so much mythology and back story that it will infringe copyright protections of another work?

i. Character Example: Major Tom

To illustrate the intricacies of the idea/expression dichotomy with characters this paper will examine the different expressions of the character, “Major Tom” as described in David Bowie’s 1969 song *Space Oddity* and Peter Schilling’s 1983 song *Major Tom*. Below are side by side copies of the lyrics to both songs with arrows indicating similar language in the two songs.

Both songs start with the image of a man getting ready to step onto a space ship, and then proceeds to a countdown. The ship lifts off; Major Tom is in outer space. Then ground control tries to contact him, and something goes wrong. Major Tom is left floating in outer space.

The two songs have very different sounds. *Major Tom* has an up tempo, 1980’s synth pop, new wave sound; *Space Oddity* is more melodic and has been described as psychedelic folk.⁷³ The lyrics follow a similar trajectory, and tell similar stories, but utilize different words. Both involve the same character in the same situation, yet the portrayal and overall impression on the listener is different. *Space Oddity* has a more sincere tone while *Major Tom* is a little more tongue in cheek. *Space Oddity* ends with a sense of defeat “planet earth is blue and there is nothing I can do” while *Major Tom* ends with a different tone in that Major Tom is content with “floating weightless, coming home.”

⁷³ Psychedelic Folk, <http://www.psychedelicfolk.com/Psychedelicfolk.html> (last visited Dec. 21, 2009)(describing psychedelic folk as music associated with mind expanding experiences with acoustic instrumentation).

It is also noteworthy that David Bowie released *Ashes to Ashes*⁷⁴ a song which follows Major Tom who is now back on Earth and is a junkie. *Ashes to Ashes* was released before *Major Tom*. This timing makes it difficult to argue that *Major Tom* would have had an adverse impact on David Bowie's right to record derivative works, as he obviously already exercised that right.

No copyright litigation has sprung over the use of Major Tom. While there is no judicial opinion, it is easy to speculate why no one fought over the ownership of this character. Major Tom is not a substantially delineated character, not too much is known about him, he is an astronaut, he is married, and that is essentially it. There are many ways for others to build on this image and explore what it means to go into space. There is a bigger idea and expression of isolation from humanity, if one wants to go through a detailed psychological analysis of the metaphor the song represents. Stating things more simply all the songs about Major Tom create different impressions and tell slightly different tales. A listener may wonder if Major Tom is a real person after hearing both songs. This is indicative of Major Tom being an idea or fictional fact that each artist can express in different ways

⁷⁴ DAVID BOWIE, *ASHES TO ASHES* (RCA 1980).

*Space Oddity*⁷⁵

Ground Control to Major Tom
Ground Control to Major Tom
Take your protein pills and put your helmet on

Ground Control to Major Tom
Commencing countdown, engines on
Check ignition and may God's love be with you

Ten, Nine, Eight, Seven, Six, Five,
Four, Three, Two, One, Liftoff

This is Ground Control to Major Tom
You've really made the grade
And the papers want to know whose shirts you wear
Now it's time to leave the capsule if you dare

"This is Major Tom to Ground Control
I'm stepping through the door
And I'm floating in a most peculiar way
And the stars look very different today

For here
Am I sitting in a tin can
Far above the world
Planet Earth is blue
And there's nothing I can do

Though I'm past one hundred thousand miles
I'm feeling very still
And I think my spaceship knows which way to go
Tell me wife I love her very much she knows"

Ground Control to Major Tom
Your circuit's dead, there's something wrong
Can you hear me, Major Tom?
Can you hear me, Major Tom?
Can you hear me, Major Tom?
Can you....

"Here am I floating round my tin can
Far above the Moon
Planet Earth is blue
And there's nothing I can do."

*Major Tom*⁷⁶

Standing there alone the ship is waiting
all systems are go are you sure?
control is not convinced
but the computer has the evidence
"no need to abort" the countdown starts

watching in a trance the crew is certain
nothing left to chance all is working
trying to relax up in the capsule
"send me up a drink" jokes Major Tom
the count goes on

4 3 2 1
Earth below us drifting falling
floating weightless calling calling home...

second stage is cut we're now in orbit
stabilizers up running perfect
starting to collect requested data
what will it effect when all is done
thinks Major Tom

back at ground control there is a problem
go to rockets full

not responding
"hello Major Tom are you receiving
turn the thrusters on we're standing by"
there's no reply

4 3 2 1
Earth below us drifting falling
floating weightless calling calling home...

across the stratosphere a final message
"give my wife my love" then nothing more

far beneath the ship the world is mourning
they don't realize he's alive
no one understands but Major Tom sees
now the life commands this is my home
I'm coming home

Earth below us drifting falling
floating weightless coming home...
Earth below us drifting falling
floating weightless
coming home...Earth below us drifting falling
floating weightless coming coming home...
home.....

⁷⁵ DAVID BOWIE, SPACE ODDITY (Mercury Records 1969).

⁷⁶ PETER SCHILLING, MAJOR TOM (Elektra Records 1983).

ii. Another Example of Character Idea Expression Dichotomy

If asked who is the character that is a clean cut man by day and serial killer by night, what answer would you give? Patrick Bateman or Dexter Morgan? Patrick Bateman is the central character of *American Psycho*⁷⁷ by Bret Easton Ellis. Bateman is a yuppie in the 1980's; he is successful, wealthy, and clean cut. Bateman also enjoys killing prostitutes and the homeless. Dexter Morgan is the central character of *Darkly Dreaming Dexter*⁷⁸ by Jeff Lindsey. There is also the television series *Dexter*⁷⁹ on Showtime. Dexter works at the Miami Police Department analyzing blood splatter, and by night he stalks and kills criminals that the judicial system has not been able to punish.

The idea of both books is a serial killer that is able to function within society. The expression of this idea, however, is different for each character. While both are killers that are able to maintain a façade of normalcy among friends and coworkers, the general impression of these characters are very different. Dexter is much more likeable as a character. Dexter becomes a family man, and he tries to do good in the world. Patrick Bateman is shallow and mean spirited; he is a character that the reader is disgusted by, not someone the reader can relate to or like.

While the idea is the same, the expression is very different. In reading the books, there is a very different feel. Ellis's writing style is very detailed and dense, Lindsey's style is much easier to read because it is less wordy and less complicated in structure. The origins of the characters are very different; everything from jobs, homes, friends, and lifestyles are distinguishable for each character. The idea that is shared by both characters is the dual personality of normal person by day, serial killer by night.

⁷⁷ BRET EASTON ELLIS, *AMERICAN PSYCHO* (Vintage 1991).

⁷⁸ JEFF LINDSAY, *DARKLY DREAMING DEXTER* (Double Day 2004).

⁷⁹ *Dexter* (Showtime 2006).

B. Expression of Character

Expression of a character comes about in many different ways. It starts with the general idea of a character, such as Major Tom, the astronaut, or the highly functional serial killer, but the author must then add more and develop the character. The physical appearance, mannerisms, back story, and personality quirks all build together to give dimension to a character.

Some characters have a true mythology built around them, for example, James Bond. Just the name evokes various images: tuxedo, martini, Aston Martin, Walther PPK, and so on. It does not necessarily matter whether the audience pictures Sean Connery or Daniel Craig, or any other actor in between. The mythology around this character is expansive and carries all of the previous stories with the name. The expression to the character, however, is varied with each portrayal. Daniel Craig's Bond is darker and more aggressive compared to previous Bonds that relied on gadgets and lots of one-liners. If a fanfiction author were to write about James Bond he or she would either have to specify which Bond he or she is writing about or let the reader fill in his or her own Bond of choice. James Bond, despite the many visual depictions has so much mythology it would be difficult not to infringe.

There is a different analysis for pictorial characters; when there is a visual element in drawings, films and so forth, there is much more to the character than just the words on a page, which gives more protection and use of these characters, even in a different story from the original could be copyright infringement.⁸⁰ Once a literary character is used in film or television, much more is added to the character, and for those familiar with the character in his various embodiments, there is much more expression that will follow the character.

Characters that have a visual expression or are substantially delineated can be protected with copyright. These characters that have so much detail built around them, that have become bigger than life, are the most likely to be featured in fanfiction. How the characters are used in fanfiction is also an important consideration.

⁸⁰ Gaiman, *supra* note 72.

C. Expression of Character Tied to Plot

Some characters always appear in a particular setting or with a specific story arc. For example, the character of Rocky Balboa who is mentally slow, and is always the underdog in fights, and typically triumphs despite the odds.

A writer decided to draft a treatment for *Rocky IV* in which Rocky goes to the Soviet Union to fight for America in a metaphorical battle against communism. This story featured the typical build up of Rocky being the underdog and triumphing in the end, and featured central characters to the Rocky franchise including Rocky's family and trainer, etc. This writer attempted to sell this screen play to the studio that produced the Rocky Movies. Negotiations broke down, and then some time later Sylvester Stallone gave interviews and made statements about the next Rocky movie, which was about Rocky going to the Soviet Union to fight for America.

The writer filed a lawsuit against Stallone for copyright infringement. The court found that the writer's work was an unauthorized derivative that was not entitled to copyright protection.⁸¹ The court was very critical of the author who copied the embodiment of not only the characters, but also the usual plot arc of the Rocky movies and then tried to sue the original author for copyright infringement.⁸²

VI. Distinguishing the Use of Characters in Fanfiction

In fanfiction, the writer builds stories around characters that are already thoroughly developed. The characters have a particular image, personality, and back story already built in. If a fanficer writes about Fox Mulder, for those familiar with *The X Files*, readers know what he looks like, that Dana Scully is his partner, he works for the FBI, he thinks his sister was

⁸¹ Anderson v. Stallone, No. 87-0592, 1989 U.S. DIST LEXIS 11109 (C.D. Cal. April 25, 1989)(holding that the author of an unauthorized derivative work was not entitled to a copyright and could not bring an infringement claim against the author of the original work).

⁸² *Id.* at *29.

kidnapped by aliens and so on. The question to ask is “does the writer take some of the expression of the original author just by writing the name Fox Mulder?”

It is certainly plausible that a writer does take a piece of what has been built up around Fox Mulder. It is also possible to argue that writer does not take any of the expression behind the character simply by using his name because it is the reader who is familiar with the mythology and applies his or her own personal knowledge when reading the story. A casual viewer of *The X Files* will have a different image of Fox Mulder than that of the obsessed Phile. Granted, both would envision David Duchovny, but the Phile will know more about Mulder’s back story, will also know little quips he has made in certain episodes, and minute details, like his fondness of sunflower seeds. The Phile might get more out of a piece of fanfiction by knowing odd little details, but the casual viewer may still be able to enjoy the same story.

In examining if the use of the name infringes the copyright of the original work, it is still appropriate to examine the other details of the work. It is very difficult to argue that the use of the name in a vacuum is enough to infringe, however, the use of the name in conjunction with other characters from *The X Files* and using some of the same story arcs might come closer to substantial similarity.

Writing about a literary character that has not been visually interpreted in movie or film may escape the trappings of the fully delineated character problem.⁸³ Writing about this character, without taking similarity from the original character may be more permissible. Writing a personalized interpretation of a particular type of character would be allowed, this goes back to the idea expression dichotomy. The spy that gets into impossible circumstances, yet always survives is an idea. James Bond, Austin Powers, and Jason Bourne are expressions of this idea.

Writing about minor characters that are not central to the plot may also be a less infringing option. For example, the play turned movie *Rosencrantz and Guildenstern are Dead*,⁸⁴ follows the two small characters from *Shakespeare’s Hamlet* who have little back story and who the readers of the play do not know much about. *Hamlet* is in the public domain, but it has been

⁸³ “It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” Nichols, at 122.

⁸⁴ ROSENCRANTZ AND GUILDENSTERN ARE DEAD (Cinecom Picutres 1990).

made in movie form several times. There are many expressions of these two characters out there in copyrighted movies, and yet a new movie can be created about these two little known characters without infringing on other works.

Writers of fanfiction have to be very careful which characters they use. The more fully developed the character the more likely the simple use of the character's name will infringe the author's copyright. Writing about a lesser known character that is not substantially delineated may avoid copyright infringement.

A. Is There a Fair Use Argument?

Utilizing the fair use defense will vary depending on which work is targeted and the intended purpose of the fanfiction. The majority of fanfiction is not commercial, however, this is not dispositive of fair use. If the fanfiction is a commentary or a parody of the original this will also factor in favor of fair use. The further the piece of fanfiction moves away from the original work, the more fair use is favored. Using *The X Files* as an example, in the show, Mulder and Scully were typically tracking down some sort of paranormal activity. In fanfiction, if the plot is significantly different: no investigating paranormal activity, no mention of other characters from the show; this creates a new form of expression and a work that can stand on its own. Creating a work that does not influence the market of the original is also important. For example, a fan of *Harry Potter* created a lexicon which explained various terms used throughout the *Harry Potter* novels.⁸⁵ When publishers attempted to print and release this book, they were stopped. Obviously, this book would not act as a market replacement for *Harry Potter* novels, but it would have an impact on the market for a *Harry Potter* lexicon if J.K. Rowling chose to write one of her own.

There is a very interesting comment from the court in the *Harry Potter* lexicon case in regards to the fictional facts created by authors. The court stated the market for reference guides

⁸⁵ Warner Bros. Enter. Inc. v. RDR Books, 575 F. Supp. 2d 513 (SDNY 2008)(finding copyright infringement and no fair use when writer used portions of Harry Potter books in a lexicon that defined many terms and fictional facts used in the Harry Potter book series).

did not solely belong to the original author.⁸⁶ The court ultimately decided that there was not a fair use defense, but only awarded minimal damages to the plaintiffs. This is arguably a strong victory for fans who utilize the fictional facts created by their favorite authors in their works of fan fiction.

B. So Why Have Authors Not Shut Down the Fanfiction Sites?

While it is arguable that many fanfiction sites infringe many copyrights, many operate with little repercussion. Occasionally fanfiction writers report receiving cease and desist letters, but for the most part, the sites go undisturbed. The most probable answer is economics. Fanfiction sites can help drive interest in the original work. Furthermore, movie studios and television networks have the advantage of learning from the music industry which was vilified for going after students and single mothers for file sharing of music. While authors obviously have the right to protect their works enforcement of rights can do more harm than good.

Many industries have taken note of what happened after Napster.⁸⁷ There was substantial negative commentary directed at the recording industry for suing students for illegally downloading music. Now many authors proceed with caution when targeting fans, knowing that the backlash can be costly.

VII. Conclusion

For the most part it appears that authors and fanficers can co-exist and thrive in their mutual respect for each other. While coexistence is possible, fanfiction writers must still have respect for the original authors and know that like any relationship, there can be a turn for the worse. Authors often love fanfiction writers, but the studios that acquire rights to turn books into movies often do not like any form of competition and may target the fanfiction writers.

⁸⁶ RDR Books, 575 F. Supp. 2d at 550.

⁸⁷ A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)(holding that there was not fair use because downloading MP3 files did not transform the copyrighted work, Napster was engaged in “wholesale copying”, and a likelihood of market harm for the original audio CD sales).

Obviously, for most fanfiction writers, the risk is worth the reward and fulfillment gained from the writing. Fanfiction writers must realize that when authors create works, whether books, plays, movies, or television shows, the characters may have copyright protection apart from the work in which they appear. This protection follows the characters, and ownership belongs to the author. The author chooses to write sequels, create adaptations, and decides the fate of the character. When a fanfiction writer takes a character and writes a new story, he or she is taking something that belongs to the original author. When a fanfiction writer places that character in a similar setting, using similar plot structures, and takes many elements from the original work, he or she runs the risk of taking far too much than fair use can allow.

When a fanfiction writer uses a character but puts the character in a different setting, having completely different adventures from the original work, then this can be considered transformative. The greater the transformation the more congruent the writing is with the concept of fair use. Works that are new and far removed from the original use fewer elements from the original work and are less likely to replace the original work, or harm the derivative market that the original author would want to explore.

Fortunately, the majority of fanfiction writers take their favorite characters and put them in unusual predicaments that would probably not be explored by the original author. Following this trend, most fanfiction would be transformative and more likely to be considered a fair use. Fanfiction writers need to be careful when they start to write about the characters in a plot that too closely follows the original work. This is a dangerous zone that draws the ire of authors. So long as fanfiction writers use characters in a safe distance from original works, they should be able to peacefully coexist with the original authors.