

Let Everyone Play: An Educational Perspective on Why Fan Fiction Is, or Should Be, Legal

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Abstract

This article makes a theoretical, legal, and moral proposition that fan fiction, a form of derivative writing based on existing media and popular culture, be considered fair use of copyrighted materials under U.S. copyright law. In our discussion, we draw from the U.S. legal system's definition of fair use and significant cases related to copyright in order to make the argument that fan fiction writing constitutes fair use because it is transformative, because it is noncommercial, and, above all, because it is educational. In making this claim, we are taking a stand against corporate attempts to stamp out the creative remixing and distribution practices enabled by new technologies and are positioning ourselves in support of online participatory learning and literacy practices engaged in by youth from around the world.

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Introduction

In recent years, empirical and theoretical accounts of youths' engagement with digital media have pushed toward what Lankshear and Knobel (2006) call "a conceptual extension" (p. 108) of our understandings of writing to include on- and offline forms of remixing. Remixing is the topical term used to describe how individuals "poach" (Jenkins 1992) from available cultural materials to rework them into something new. In language and literacy instruction, remixing is hardly a novel practice, although many educators and its practitioners may not recognize it as such. Specifically, one of the primary ways that children learn to write is by drawing from available cultural resources, such as words, images, media, and other texts, to create their own meanings and make sense of the social and textual world around them (Dyson 1997; Lessig 2005 cited in Lankshear and Knobel 2006).

This article focuses on a particular form of remixing known as "fan fiction," or derivative stories that are written by fans based on existing literature, media, and forms of popular culture. As we will discuss, fan fiction has existed for centuries; however, the rapid expansion of fan fiction into digital realms has made this derivative or remixed form of writing more visible, which in turn has led to tension between fan authors and the copyright holders of the media that serve as source texts for these remixes. The debate surrounding online fan fiction is tied to a larger conversation taking place around the democratization of the Internet and the struggles against corporate control of popular cultural materials. Proponents of the so-called "free culture" movement (www.freeculture.org) argue that engagement with media should be a participatory activity, with media consumers playing an active role in interpreting, responding to, and even reworking the content that they consume. However, these activities may conflict with the sometimes far-reaching rights that copyright holders assert over the creative use of popular media.

Discussion for this article is situated within these broader debates in order to illuminate the current legal climate surrounding fan fiction. We begin with an introduction to the practice of fan fiction writing and an introduction to *fair use*, as it is defined by the U.S. legal system. Next, we draw from significant cases related to copyright in order to make the argument that fan fiction writing constitutes fair use because it is transformative, because it is noncom-

mercial, and, above all, because it is educational. In making this claim, we support Lessig and others who argue that attempts to stamp out the creative remixing practices enabled by new technologies amount to what is essentially a war on our children (Lessig 2008) and their informal literacy and learning practices.

Is Fan Fiction Fair?

Artistic and literary production has a long tradition of derivative works. *The Chronicles of Narnia* by C. S. Lewis is a melding of myths, fairy tales, and biblical stories into a new, independent work; Shakespeare's *Romeo and Juliet* begat *West Side Story*; and *Rent* is a modernization of *La Bohème*. However, those works were predicated on literature that did not have copyright protection. Fan fiction, on the other hand, is frequently based on stories that are in fact copyrighted. A well-reasoned definition of fan fiction is offered by Rebecca Tushnet in her article "Legal Fictions: Copyright, Fan Fiction, and a New Common Law"—"Fan fiction,' broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as 'professional' writing" (Tushnet 1997, p. 655). For example, a fan fiction author might want to compose a story about a marriage between the characters Harry Potter and Judy Jetson after their precipitous meeting at Hogwarts. Does the author of that story, or so-called fan fiction, infringe on the copyrights of the creators of *Harry Potter* and *The Jetsons*?

The U.S. Copyright Act (Title 17, U.S.C. Section 106) vests the owner of a valid copyright with the exclusive right "to prepare derivative works based upon the copyrighted work." A "derivative work" is defined in the House Report on the Copyright Act as one "based upon the copyrighted work" (H.R. Rep. No. 94-1476, at 62 (1976)). However, the rights of the copyright holder are subject to the fair use doctrine, which can be raised as a defense to a claim of copyright infringement. The fair use doctrine contains factors used in determining whether a derivative work violates the original author's copyright. Section 107 of the Copyright Act provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes

such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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

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

The four prongs listed above lay out the conditions under which a work may be considered fair use. Because fan fiction authors are making a productive and beneficial use of the source material inasmuch as they are enhancing their literacy and transforming the original works, and doing so without seeking profit, fan fiction constitutes fair use, and the authors should not be subject to legal penalties for their creative acts.

While U.S. laws frame this analysis, most nations have their own statutory copyright protections, which may differ from those in the United States. For example, although “the *Canadian Copyright Act* has no explicit concept of derivative works, it does confer on artists and authors the exclusive right to control the production of their works in other mediums and adaptations” (Westcott 2008, n.p.). According to Westcott:

Arguing that fan fiction is fair within the Canadian concept of fair dealing is tough. Unlike the open-ended American concept of fair use, fair dealing is defined by a specific list of purposes: criticism and review, research and private study, or news reporting. Of these, only criticism and private study are even conceivable fits for fan fiction.

On the other hand, Australia’s laws are similar to those in the United States, providing for a fair use

defense, albeit specifically limited by statute to “review,” “criticism,” and “parody” (Chua 2007, pp. 218–222).

A series of treaties—the Berne Convention, currently having 164 signatory nations (WIPO 1979, n.p.); the WIPO Copyright Treaty, a “special agreement” under the Berne Convention, currently with 67 contracting nations (WIPO 1996, n.p.); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), under which all members of the World Trade Organization (WTO), currently numbering 153, are bound (WTO 1994, n.p.)—prescribe for signatory nations and citizens of those nations the internationally mandated minimum rights of intellectual property owners. Articles 2 and 12 of the Berne Convention provide copyright protection to original, derivative, and adaptive works (WIPO 1979, n.p.). Articles 3 and 4 provide that member countries must extend the same protections it offers to its nationals to all foreigners (WIPO 1979, n.p.). The United States is a signatory to each of the aforementioned treaties. In ascertaining the extent of rights of a copyright holder, one must refer to the laws of both their home nation as well as the nation in whose court enforcement is desired.

Transformative Works

In *Campbell v. Acuff-Rose Music, Inc.* [510 U.S. 569, 579] (1994), the Court used the word “transformative” in deciding whether the infringing use fell within the affirmative defense provided by the fair use doctrine. According to former judge and current legal scholar Pierre N. Leval, for a use to be considered “transformative”

[it] must be productive and must employ the quoted matter in a different manner or for a different purpose than the original. If the secondary use adds value to the original—if [the original work’s protected expression] 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. (Leval 1990, p. 1111)

In her article “Everything is Transformative: Fair Use and Reader Response,” Heymann (2008) notes that “[a]lthough some uses are more appropriately considered with regard to whether they are ‘transformative’ than others, the term has since become as fundamental a part of any fair use analysis as the

statutory language itself” (p. 103). As an example, the recently formed Organization for Transformative Works (OTW), a fan collaborative aimed at protecting the interests of fans by “providing access to and preserving the history of fanworks and fan culture in its myriad forms” (OTW 2008, n.p.), offers that a transformative work is one that takes “something existing and turns it into something with a new purpose, sensibility, or mode of expression” (OTW, n.p.). Drawing on the Court’s decision in *Campbell v. Acuff-Rose Music, Inc.* (1994), the OTW chose the term transformative for its title to emphasize “one of the key legal defenses for fanworks of all kinds... : that they are transformative of original source materials” (OTW, n.p.).

Along similar lines, we take the position that fan fiction is a creative and transformative literacy practice by which fans repurpose the original media to reflect new ideas, topics, and themes. But, to date, there has not been a case that determines whether fan fiction violates an author’s copyright or falls within the fair use exception (Tushnet 1997, p. 664). A recent trial, commonly known as the “Lexicon Case,” touched on some relevant legal issues, yet provides limited guidance to fan fiction authors because of the specific facts of the case (which concerned a guidebook companion to both underlying novels and reference guides). The decision by the trial court in this case, *Warner Brothers Entertainment, Inc., et al. v. RDR Books, et al.*, before the Southern District Court of New York (Case No. 07-CV-9667 (RPP)), was rendered on September 8, 2008 (*Warner Brothers*, Opinion & Order, 2008, p. 68); it appears that an appeal will be filed (*Warner Brothers*, Order Granting Extension of Time to File Appeal, 2008, n.p.). In the Lexicon Case, the court considered whether an encyclopedia—the “Lexicon”—a derivative of the *Harry Potter* series of books and companion pieces written by J. K. Rowling and made into motion pictures by Warner Brothers, violated copyright law and, if so, whether the Lexicon was a fair use of the source materials (*Warner Brothers*, Opinion & Order, 2008, *passim*). At the threshold, the court determined valid ownership of copyright by the original author, and infringement by the author of the Lexicon (*Warner Brothers*, Opinion & Order, 2008, pp. 30–38). The court then considered and rejected the fair use defense (*Warner Brothers*, Opinion & Order, 2008, pp. 40–62), concluding, in part:

The first factor does not completely weigh in favor of Defendant because although the

Lexicon has a transformative purpose, its actual use of the copyrighted works is not consistently transformative.

...many portions of the Lexicon take more of the copyrighted works than is reasonably necessary in relation to the Lexicon’s purpose. Thus, in balancing the first and third factors, the balance is tipped against a finding of fair use. The creative nature of the copyrighted works and the harm to the market for Rowling’s companion books weigh in favor of Plaintiffs. In striking the balance between the property rights of original authors and the freedom of expression of secondary authors, reference guides to works of literature should generally be encouraged by copyright law as they provide a benefit to readers and students; but to borrow from Rowling’s overstated views, they should not be permitted to “plunder” the works of original authors, “without paying the customary price” lest original authors lose incentive to create new works that will also benefit the public interest. (*Warner Brothers*, Opinion & Order, 2008, p. 62, internal citations omitted)

Certainly, despite the defeat of the fair use defense in the Lexicon Case, it cannot be said that “traditional” fan fiction, which transforms rather than plunders the underlying works, would suffer the same fate. More likely, if an appellate decision is issued, it will likely be limited to the facts of that case, involving wholesale copying for commercial benefit. Though not directly on point, there remain several court decisions regarding fair use that arguably can be applied to fan fiction (Tushnet 1997, p. 654). Tushnet, an early and frequent commentator on fan fiction and copyright law, has claimed that the fair use exception protects authors of fan fiction because they are secondary creative expressions of a noncommercial nature (Tushnet 1997, p. 654). It is assumed, for purposes of this analysis, that fan fiction is noncommercial, as most fan fictions are distributed through the Internet without charge.

In *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the Supreme Court considered the copyright holder’s complaint that 2 Live Crew violated its rights to the Roy Orbison song “Pretty Woman” in its song “Oh Pretty Woman,” which copied a line directly

and unabashedly from the former. 2 Live Crew's song started with the line "[p]retty woman, walking down the street," the same line as in the original lyric; from there, it substantially diverged from the sweet sentiment of the original. The fact that actual copying was involved was uncontested, as was the claim that 2 Live Crew's use was to parody the original song; unless an exception under the fair use doctrine applied, 2 Live Crew's use would be an infringement (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 574 (1994)).

The Court in *Campbell* unanimously decided that the infringement could be within the fair use exception. Perhaps most significantly, while considering the provisions set forth at Section 107 of the Copyright Act, the Court held that each assertion of the fair use doctrine must be considered on a case by case basis, and that the four factors do not provide a bright-line test, are not exhaustive, and must each be weighed with no one factor (in that that case, commercial purpose of the secondary work) controlling (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577–578 (1994)).

The *Campbell* decision provides some instruction for authors of fan fiction. When considering the first factor in determining fair use—purpose and character—the Court stated, in part:

The central purpose of this investigation is to see...whether the new work merely "supersede[s] the objects" of the original creation...or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use...the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright...and 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. [*Campbell v. Acuff-Rose Music* (510 U.S. 569, 579 (1994))]

While the quoted passage appears to indicate that fair use would be a viable defense to a copyright infringement

claim, it cannot be overlooked that the context in which the Court considered the defense was one of parody. The Court noted that "parody has an obvious claim to transformative value" and, therefore, like comment or criticism, is entitled to the protection of the fair use doctrine (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)). Significantly, the Court continued:

If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994))

Most of the balance of the Court's opinion follows the rest of the Section 107 factors and relates them specifically to parody, offering little in the way of guidance with respect to fan fiction that is not parodic in nature. However, the Court's discussion of market dilution, that is, if a consumer would substitute the derivative work for the original then the author of the original copyrighted work could suffer financial loss, may be relevant. The Court opined that "[e]vidence of substantial harm to [the marketability of copyrighted works] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals," but did not decide how this fact, if present, would have impacted the balance of the analysis because evidence of market dilution was not available to the Court (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 593–594 (1994)).

A narrow reading of the Court's reasoning in *Campbell* may suggest that the case is tied to the parodic nature of the use, especially since the issues raised were not disposed by way of that decision, but rather remanded to the lower court with instructions that the entirety of the fair use doctrine be applied to the facts, as opposed to the original appellate disposition based solely on the commercial nature of the derivative work. However, a broader reading is championed by some commentators (Tushnet 1997, pp. 662–663, 668). For example, the OTW, apparently relying on the *Campbell* decision, asserts that fan

fictions, as derivative but transformative works, are entitled to “special consideration in the fair use analysis” (OTW, n.p.). Indeed, they claim that they are not trying to change the law (vis-à-vis copyright and fan fiction) because “[w]hile case law in this area is limited, we believe that current copyright law already supports our understanding of fan fiction as fair use. We seek to broaden knowledge of fan creators’ rights and reduce the confusion and uncertainty on both fan and pro creators’ sides about fair use as it applies to fanworks” (OTW, n.p.). While we concur with claims such as the OTW’s—that fan fiction, by virtue of its transformative, non-commercial, and educational properties, should fall under the rights of fair use—we urge fan authors to be cautious about assuming that these rights exist, as claims alone do not make law, and the law in this regard is not yet settled.

Some years after the *Campbell* decision, an appellate court weighed in on fair use in a case that also may be significant to writers of fan fiction. In *Suntrust Bank v. Houghton Mifflin* (268 F.3d 1257 (11th Cir. 2001)) the court considered whether publication of the book *The Wind Done Gone*, admittedly based on *Gone with the Wind*, should be halted as a result of copyright violation. Essentially, *The Wind Done Gone* is the story of *Gone with the Wind*, retold from a slave’s point of view. The author of *The Wind Done Gone*, Alice Randall, and her publisher, Houghton Mifflin, were sued by Suntrust Bank, as trustee of the Mitchell Trust, owner of the *Gone with the Wind* copyright. Although Houghton Mifflin disputed the contention that portions of *Gone with the Wind* were copied verbatim, it did not dispute that characters and portions of the plot were indeed copied. Rather, the publisher of *The Wind Done Gone* argued in the alternative that it was entitled to publish the book either because it was not substantially similar to *Gone with the Wind*, or that it was within the purview of the fair use doctrine because it was primarily parodic. In a lengthy opinion, the court vacated the trial court’s injunction, allowing the book to be published; the remaining claims were sent back to the lower court to reconsider.

The specific facts in the *Suntrust* case are particularly interesting. For example, the characters from *Gone with the Wind* were used in an almost wholesale manner in *The Wind Done Gone*, albeit with some variations in their names: Scarlett O’Hara, for instance, is called *Other*, Rhett Butler is “R.B.,” and Melanie is referred to as “Mealy Mouth,” which is

how Margaret Mitchell described her in *Gone with the Wind* (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1267 (2001)). Similarly, the settings in *The Wind Done Gone* mirrored those of *Gone with the Wind*: The latter’s Tara was renamed “Tata,” and Twelve Oaks Plantation became “Twelve Slaves Strong as Trees” (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1267 (2001)). Portions of the plot were taken directly from *Gone with the Wind* (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1267 (2001)). In a particularly strongly worded affirmation of the lower court, the court in *Suntrust* held that *The Wind Done Gone* “is largely ‘an encapsulation of [*Gone with the Wind* that] exploit[s] its copyrighted characters, story lines, and settings as the palette for the new story’” (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1267 (2001)). Indeed, according to the court:

While we agree with Houghton Mifflin that the characters, settings, and plot taken from [*Gone with the Wind*] are vested with new significance when viewed through the eyes of Cynara in [*The Wind Done Gone*], it does not change the fact that they are the very same copyrighted characters, settings, and plot. (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1267 (2001))

Interestingly, the recitation of facts by the court in *Suntrust* is virtually indistinguishable from those that are true with respect to fan fiction in that fan authors borrow from plots, settings, and characters as starting points for creating their own unique narratives.

As the Supreme Court had done in the *Campbell* decision, the court in *Suntrust* considered whether the parodic nature of the derivative work rendered it within the fair use doctrine. In so doing, it relied on what it termed the “broader view” of parody articulated by the court in *Campbell*: “[W]e will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work” (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1268–1269 (2001)). A substantial portion of the actual holding in *Suntrust* is directed toward the parodic nature of *The Wind Done Gone*, so although it may be persuasive authority supporting the theory that fan fiction is defensible pursuant to the fair use doctrine, it is by no means conclusive or directly on point for fan fiction that is not parodic.

Nonprofit

Additional support for the proposition that fan fiction will ultimately be found to be within the fair use doctrine can be gleaned from the *dicta* of the *Suntrust* decision. The court, in considering the first factor of the fair use doctrine, noted that “[d]espite whatever educational function [*The Wind Done Gone*] may be able to lay claim to, it is undoubtedly a commercial product.” Of great importance with respect to fan fiction is footnote 24 attached to that statement: “Randall did not choose to publish her work of fiction on the internet free to all the world to read; rather, she chose a method of publication designed to generate economic profit” (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1269 (2001)). It is interesting that the court implied in footnote 24 that its consideration and ultimate finding of fair use might have been easier to reach had Randall gone the way of traditional fan fiction authors and published her story without profiting.

Also boding well for the proposition that fan fiction is within the dictates of the fair use doctrine is the court’s analysis in *Suntrust* of the fourth prong of the fair use analysis doctrine—the effect on the market value of the original work. Whereas the Court in *Campbell* framed its analysis in terms of market dilution, the court in *Suntrust* focused its attention on the potential of market substitution, that is, the likelihood that a potential purchaser of *Gone with the Wind* would instead buy *The Wind Done Gone* (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1274–1276 (2001)). The court stated:

Thus, we conclude, based on the current record, that *Suntrust*’s evidence falls far short of establishing that [*The Wind Done Gone*] or others like it will act as market substitutes for [*Gone with the Wind*] or will significantly harm its derivatives. Accordingly, the fourth fair use factor weighs in favor of [*The Wind Done Gone*]. (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1275–1276 (2001))

Even a conservative analysis of the *Suntrust* decision leads to the likely conclusion that, at least as it applies to noncommercial fan fiction, the fourth prong in the fair use doctrine weighs in favor of fair use.

Professional Authors’ Perspectives

Professional authors have, not unexpectedly, taken different positions regarding fan fiction, which can be

summarized into three groups: those who approve of it, those who seem to ignore it, and those who oppose it as a violation of their rights. Such positions may form the basis for defenses other than “fair use” for fan fiction writers. In her article “Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?” Meredith McCardle posits several potential defenses (McCardle 2003, pp. 17–31). Her first suggestion, a defense of consent, that is, that the copyright owner has acquiesced to fan fiction, is a common-sense approach (McCardle 2003, pp. 17–18).

Some authors explicitly welcome fan fiction, so the fan fiction author transforming their work is not likely to be subject to a claim of infringement, at least not for noncommercial fan fiction.

J. K. Rowling, author of the *Harry Potter* novels, has expressed being flattered by fan fiction, and has explicitly permitted it with certain caveats (Waters 2004). Similarly, Meg Cabot, author of *The Princess Diaries*, “says she was delighted to discover that her books had inspired hundreds of stories by fans” (Jurgensen 2006). With authors who have taken this position, a fan fiction author could assert “waiver” or “consent” as a defense to an infringement action.

A slightly more tenuous claim, that of implied consent, is also suggested with respect to copyright owners who have turned a blind eye toward fan fiction. Authors taking this position are more elusive to pinpoint; however, according to *The Wall Street Journal*:

One sign of the growing influence of these authors and stories is that media companies, usually quick to go after people who use their copyrighted material, are increasingly leaving fan fiction writers alone. Mindful of the large, loyal audience the writers represent, many companies are adopting an attitude one media professor describes as “benign neglect.” While most professional writers say their lawyers advise them not to read fan fiction to protect themselves against charges of plagiarism, some say they check the numbers of fan fiction stories posted about their work regularly as a measure of their success. (Jurgensen 2006)

The third group of authors who have commented on fan fiction are those who vigorously, vociferously, and vigilantly object. Anne Rice is one of the authors

who fall within this group. She has the following on the front page of her website:

IMPORTANT MESSAGE FROM ANNE ON
“FAN FICTION”

Anne has posted the following message regarding fan fiction: “I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.” (Rice 2008, n.p.)

The Berne Convention, in Article 6bis (WIPO, n.p.), provides for “moral rights,” the type of rights upon which Anne Rice may rest her “prohibition:”

(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation....

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Except in regard to visual arts, however, the U.S. Copyright Act does not provide for moral rights (17 U.S.C. Section 106A), and TRIPS, in Article 9.1, specifically excludes the moral rights protections above quoted (WTO, n.p.). Compared to Canada, and perhaps most of the rest of the world:

The U.S. analysis of fan fiction makes barely a passing nod to moral rights. No wonder: in the U.S. the notion of moral rights is fairly slight. (And a media corporation cannot have moral rights; it is strictly a personal right.) But in Canada, and much of the rest of the world, an individual author has the moral right both to be credited as the author (or to remain anonymous, if he or she chooses) and to have the integrity of the work protected. That integrity is infringed if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified, or associated

with any product, service, cause or institution. (Westcott 2008, n.p.)

Thus, with regard to fan fiction, moral rights might have a legal impact on the decision of whether the work is an infringement of copyright in many countries; however, this is not necessarily the case in the United States.

Moral rights aside, it is worth noting that the owner of the copyright has the right to maintain an action for infringement; in the United States, this is called “standing.” Section 201 of the Copyright Act vests the copyright in the author of a work. The author thereafter has the right to license the work, for example, to a publisher of a novel, or to a network for a television program (Hollaar 2002, n.p.). It is for this reason that the Lexicon Case was brought by both J. K. Rowling—the copyright holder—and Warner Brothers Entertainment, to whom she had licensed exclusive film rights (*Warner Brothers* 2008, pp. 2–3). Indeed, many publishing contracts oblige the publisher to secure the copyright in the author’s name, and to defend the copyright against infringement. The Model Contract–Hardcover promulgated by the Science Fiction and Fantasy Writers of America, Inc. (SFWA) sets forth both of those obligations. (SFWA 2008, n.p.). Because the owner’s rights are being protected, and as most authors retain ownership of the copyright, their consent to fan fiction may be persuasive.

While the wishes of the authors deprive an author of fan fiction of the potential defense of waiver, either express or implied, the author’s “prohibition” is not dispositive. For fan fiction transformative of the author’s work, the fan fiction author would need to rely on other defenses. The use in the United States is subject, at a minimum, to the fair use doctrine (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572–573 (1994)). As previously discussed, the Supreme Court considered fair use despite the copyright holder’s explicit refusal to permit use of its lyrics.

Another possible, but as yet untested, defense can be found in the coupling of disclaimers, which have become ubiquitous at the top of fan fictions as a way of acknowledging the source material from which the fiction is derived, with the noncommercial nature of fan fiction (McCardle 2003, pp. 18–20; Tushnet 1997, p. 685). According to Tushnet:

Noncommerciality is a compelling boundary because it strikes most people as just, and it

also comports well with actual practice. Non-commercial users are rarely, if ever, found liable for copyright infringement. The problem is that the vague state of current copyright law allows fan authors to be legally intimidated. (Tushnet 1997, p. 685)

The intimidation described by Tushnet generally takes the form of “cease and desist” letters. Chilling Effect Clearinghouse, a self-described monitor of the legal climate as it relates to the Internet industry, collects and displays sample letters. One such letter posted on their website reads, in part:

I am General Counsel for CrossGen Entertainment, Inc. and its subsidiary CrossGen Intellectual Property, LLC. This email is a cease and desist letter effective immediately. You are not authorized, permitted or licensed to use any CrossGen intellectual property in any manner, specifically titles, story lines and characters from the CrossGen Universe and/or Code 6 Comics.

You must immediately remove the Material from the Internet at <http://www.cgfanfiction.net/> and any other location where it is posted. You are not, nor will you ever be, authorized, permitted or licensed to use any CrossGen intellectual property. If you fail to remove the material by 3:00 p.m. tomorrow, June 8, 2003, we will take all legal steps available to force the removal and recover damages from you and the website. If you ever use any CrossGen Intellectual property again without authorization, we will immediately take all legal steps available to us to force the removal of the material and recover damages from you and the website upon which you post or place such material. Please govern yourself accordingly. (Chilling Effect Clearinghouse 2008, n.p.)

It is certainly understandable that receipt of such a letter by a non-lawyer, particularly by an adolescent, could be extremely intimidating, and result in the kneejerk response of deleting the material in question, even if it is legally protected.

Rather than immediately capitulating to the claims of copyright holders, authors of fan fictions would be well served to respond with a demonstration of the facts that illustrate how their work fits within the defense of fair use. For example, they could explain that the work is a transformative,

nonprofit, and noncommercial use of a small portion of the source work. The risk to the fan fiction author of being brought into court are negligible—unless, of course, the fan fiction they are claiming is defensible under the fair use doctrine is more akin to the Lexicon than the transformative, noncommercial, and educational fan fiction herein considered. Copyright owners are unlikely to pursue costly legal action against a likely judgment-proof fan fiction author who raises the specter of a well-articulated fair use defense.

Although McCardle’s review indicates that there is a split of authority regarding whether a disclaimer is a valid defense to infringement, a disclaimer is likely to at least generate a degree of goodwill from the authors (McCardle 2003, p. 19). Many fan fiction hosting sites include disclaimer requirements, with fan fiction authors giving attribution to the source work’s author. Historically, there are instances where law develops from custom and usage. In a law review article entitled “Custom as a Source of English Law,” E. K. Braybrooke explains that:

When writers on jurisprudence assert that custom is a source of law their primary meaning seems to be that in any given case a course of conduct persisted in by all or most of the members of a society engenders a rule of law enjoining the continuance of that course of conduct. (Braybrooke 1951, p. 71)

With respect to disclaimers and noncommercial fan fiction, it is not unimaginable that the custom and usage of the fans and fan communities, with support from a large number of authors, could have a significant influence on the law.

Education by Any Other Name

Perhaps the most salient aspect of the defense against copyright infringement is that fan fiction is an educational endeavor (McCardle 2003, pp. 20–21). McCardle has stated that “[w]hen making an educational use inquiry, courts tend to examine an alleged infringer’s purpose, and when there is a valid educational purpose, courts are more likely to find fair use” (2003, p. 21). However, McCardle does not comprehensively address the pervasive educational agenda of online fan fiction. As will be discussed below, it has been argued that fan fiction helps writers and readers alike to practice and improve their language and

literacy skills, and many features of fan fiction websites, such as peer review mechanisms, are explicitly aimed at supporting this effort (Black 2008). The educational merits of fan fiction could be a powerful factor in a finding that fan fiction falls under fair use.

There is a great deal of anecdotal evidence that writing, editing, and reading fan fiction has led to the honing of skills sufficient for fan fiction authors to become bona fide, published writers. Cory Doctorow notes that “[m]any pros got their start with fanfic (and many of them still work at it in secret)...” (Doctorow 2007). Doctorow himself is one of those authors, having won the 2000 John W. Campbell Award for best new science fiction or fantasy writer, and having published numerous positively reviewed titles including *Little Brother* (2008), *Overclocked: Stories of the Future Present* (2007), and *Down and Out in the Magic Kingdom* (2003). Doctorow (2007) explains that he started writing—and learned to write—by writing fan fiction as a child:

I wrote my first story when I was six. It was 1977, and I had just had my mind blown clean out of my skull by a new movie called *Star Wars*.... I wrote a lot of *Star Wars* fanfic that year. By the age of 12, I'd graduated to Conan. By the age of 18, it was Harlan Ellison. By the age of 26, it was Bradbury, by way of Gibson. Today, I hope I write more or less like myself. (Doctorow 2007)

Several reader responses to Doctorow's article echo the learning benefit derived from the writing of fan fiction: “[m]y daughter (17) has been writing and reading fanfic since the age of 9. Her first efforts were, well, not so good, but she has become an excellent writer, and I give fanfic.com the credit (Anonymous, May 17, 2007)”; “I've used fanfiction over the years to seriously hone my talents as a writer. The stories I write today are a hundred times better than they were ten years ago, and that's thanks not to the poor U.S. education system teaching me my particles and predicates, but from my fan fiction readers and beta editors and friends, teaching me what works and what doesn't, what's grammatically correct and what's not...(Van, May 18, 2007)”; and “[w]riting fanfic has made me a much stronger writer in general and stronger writing teacher. I use writing challenges and beta techniques in my public school classroom, where a number of my students write fanfic themselves. (Anonymous, May 21, 2007)” (Doctorow 2007).

Another author who credits the exploration of fan fiction with success as a writer is Francisca Solar, whose book *La Septima M* was published in 2006. Ms. Solar was discovered, and obtained a multibook contract with Random House, as a result of her popular Spanish language “Harry Potter” fan fiction. She has said: “All the things I know about literature, about writing, I learned in the fan fiction world...I owe it everything” (*BBC News* 2007).

Academic research also supports the proposition that fan fiction is a worthy educational endeavor. A groundbreaker in the study of online participatory fan culture, Henry Jenkins has written extensively on the educational benefits of fan fiction. In his article “Why Heather Can Write” (2004), Jenkins argues the benefits of youths' engagement with popular culture and claims that “some of the best writing instruction takes place outside the classroom in online communities” (n.p.). In this article, Jenkins documents the experiences of several youth who have developed sophisticated literacy and social skills as a result of participating in fan fiction communities (n.p.). According to Jenkins, students have an easier time in beginning their writing by using the work of others as a launching point, which allows them “to focus on other aspects of their craft” (n.p.). As Jenkins points out, “[o]ften, unresolved issues in the books stimulate [the students] to think through their own plots or develop new insights into the characters” (n.p.).

Also important, according to Jenkins, within the realm of literacy development through fan fiction is that:

Through online discussions of fan writing, the teen writers develop a vocabulary for talking about writing and they learn strategies for re-writing and improving their own work. When they talk about the books themselves, the teens make comparisons with other literary works or draw connections with philosophical and theological traditions; they debate gender stereotyping in the female characters; they cite interviews with the writer or read critiques of the works; they use analytic concepts they probably wouldn't encounter until they reached the advanced undergraduate classroom. (Jenkins 2004)

Moreover, “[s]chools have less flexibility than the fan community does to support writers at very different states of their development” (Jenkins 2004). Fan

fiction communities can serve as a complementary and supplementary tool for students who need extra help with their literacy and composition skills. Many young fan fiction aficionados

are getting accepted into top colleges and pursuing educational goals that stem from their fan experiences. Fandom is providing a rich haven to support the development of bright young minds that might otherwise get chewed up by the system, and offering mentorship to help less gifted students to achieve their full expressive potential. (Jenkins 2004)

The peer reviewing and editing process is a learning exercise for all participants, as writers benefit from the pointed feedback, and readers benefit from heightened attention to rhetorical purpose and conventions. Thus, fan fiction can be a key component in youths' literacy and social development.

As another example of academic research that supports the educational merits of online fan fiction, in her ethnographic work on the site Fanfiction.net, Rebecca Black focused her research on a non-English-based source work, or "fandom," in search of the ramifications of fan fiction writing and reading for English language learners' (ELL) language development and socialization. Among her findings, she noted that many of these youth preface their fan fiction texts with explicit and implicit requests for audience feedback as a means of improving their English language and writing abilities (Black 2008). Black has found that, particularly for ELLs and beginning writers, writing derivatives is helpful because

they provide writers with a preexisting framework of action or plot to follow.... Additionally, if spelling and grammatical errors make the piece difficult to understand, readers will still be able to follow or at least have a sense of the plot if they are familiar with the original text that the author is drawing from. (Black 2005)

The timely feedback received by young writers also advances the educational benefit resulting from participating in fan fiction communities:

This immediate and interactive response from reviewers promotes affiliation with writing in two very salient ways. First, the dynamic interaction between author and reader helps the writer develop a strong sense of audience

and practice revision through fashioning and refashioning texts to address input from the audience. Second, the immediate feedback provides writers with a good reason to keep writing, as they receive encouragement and support from an audience that is eagerly awaiting the next chapter of their story. (Black 2005)

Black's work suggests that fan fiction sites foster engagement with a range of activities that are relevant to school-based composition practices such as practicing with different genres of writing, composing with a specific audience and purpose in mind, developing rich plots, settings, and characters, and conducting research to create culturally, linguistically, and historically accurate texts, to name just few (Black 2008).

Black also noted that once entrenched in the fandom, many ELL youth also began to read and review fan fictions. According to Black (2005), "[s]uch reading activities also scaffold writing development by helping ELLs to learn the organizational patterns and structures of the English language through engagement with a range of authentic texts" (n.p.). Moreover, readers engage in activities that resonate with school-based literacy practices, such as participating in peer review, giving constructive feedback, editing, proofreading, and interpreting different genres of text (Black 2008).

Returning to legal matters, the *Suntrust* decision sets the stage for a discussion of the educational purpose provision of the fair use doctrine within the Copyright Act. The court in *Suntrust* reviewed the historical purpose of copyright law, starting with England's 1710 Statute of Anne and continuing through the present-day Copyright Act. It noted that from its inception, the primary goals of copyright protection have always been "the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author" (*Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1260, 1260–1263 (2001)). The order in which these goals is recited may give insight into the value the court placed on each, with "the promotion of learning" at the forefront.

The principal cases in which the educational purpose consideration of the fair use defense is reviewed offer little in the way of guidance vis-à-vis fan fiction. There is a body of cases concerning the intersection of commerce and education; however, since fan

fiction is usually a nonprofit endeavor, they are not particularly helpful. Many of the cases deal with out-right copying, for example the copying of substantial portions of published materials for sale as course packs in *Basic Books, Inc. v. Kinko's Graphics Corp.* (758 F.Supp. 1522 (S.D.N.Y. 1991)) and *Princeton University Press v. Michigan Document Services, Inc.* (99 F.3d 1381 (6th Cir. 1996)) or the playing in the classroom the entirety of television programs in *Encyclopaedia Britannica Educational Corp. v. Crooks* (542 F.Supp. 1156 (W.D.N.Y. 1982)).

Some direction may be gleaned from *Higgins v. Detroit Educational Television* (4 F.Supp.2d 701 (E.D. Mich. 1998)). In *Higgins*, a portion of a song was played, without permission, as background music during segments of an educational television show (pp. 701, 703). Although a tape of the show was available for purchase by educational institutions for educational purposes only, not many copies were sold, and the program was primarily used in classrooms (pp. 701, 703–704). In finding that there was fair use, the court focused on the educational use of the program (pp. 701, 704). While at first glance the *Higgins* decision may support the assertion of fan fiction being within the educational purpose prong of the fair use doctrine, according to McCardle:

[S]ince the *Higgins* court focused on the fact that educational use was the *only* purpose of using the song, the fan fiction author may have to show that no other motives exist. This portion of the court's opinion undercuts the argument that fan fiction is fair use because the very nature of most fan fiction is to fulfill a personal desire, which is a different motive from writing development. Any educational purpose is usually secondary. (McCardle 2003, p. 22)

We, however, would like to suggest that, for many fans, learning how to improve their writing is a primary goal in posting fan fiction online. The act of uploading a fiction to a peer-review website such as Fanfiction.net could be seen as a clear indicator of authors' intentions to improve their writing skills, and thus self-educate. Moreover, it may be that, if authors explicitly mark their work as being solely for educational purposes (e.g., in the author's notes), their case for fair use could be strengthened significantly.

Even in cases in which the educational purpose is not the only function of writing fan fiction, *Higgins*

may nonetheless support a finding of fair use, when coupled with a discussion, although *dicta*, in the *Suntrust* opinion. At footnote 27, the court engaged in a rather lengthy discussion of form over substance:

Suntrust suggests that Houghton Mifflin decided—as a legalistic afterthought—to market [*The Wind Done Gone*] as a “parody.” We are mindful of Justice Kennedy's admonition [in his concurring opinion in the *Campbell* case] that courts “ensure that no [*sic*: not] just any commercial takeoff is a parody” [citation omitted]. Justice Kennedy's concurrence simply underscores the danger of relying upon facile, formalistic labels and encourages us to march this alleged infringement through fair use's four-pronged analysis.... [The book may be] label[ed]...whatever they like, and that fact would be largely irrelevant to our task.... Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious. [Quoting *Campbell (Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1273–1274 (2001))*]

As discussed above, there is both academic research and extensive anecdotal evidence to suggest that fan fiction is an educational, worthwhile and worthy teaching and learning tool. That it is also entertainment does not preclude protection of it under the fair use doctrine, as it “serves its goals whether labeled or not,” and there is “no reason...to require” fan fiction to “state the obvious”: that is it a palatable form of literacy learning, especially for English language learners and struggling writers and readers who do not feel motivated, encouraged, and/or supported in classroom writing spaces.

Looking with a different view at the decisions considering parody as a potentially transformative fair use, they can be recast as supporting fan fiction as an educational endeavor, well within the preamble of Section 107 of the Copyright Act. The courts in both *Campbell* and *Suntrust* found that a parodic work can be within the provision, at Section 107, as a “criticism” or “comment.” The Supreme Court in *Campbell* noted the societal value of parody:

Like less ostensibly humorous forms of criticism, [parody] can provide social benefit, by shedding light on an earlier work, and in the process, creating a new one. (*Campbell*

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

It is axiomatic that no less a social benefit can be ascribed to education, and, in particular, to literacy. Alongside “criticism” and “comment,” Section 107 excepts from infringement the use of a copyrighted work for the purpose of “teaching.” These exceptions, coupled with the first prong of the fair use analysis, “the purpose and character of the use...for nonprofit educational purposes,” weigh mightily in favor of finding that noncommercial fan fiction is a socially worthwhile and protected use of copyrighted works.

In terms of the aforementioned exceptions of criticism, comment, and teaching, fan fiction authors, as a matter of common practice, engage in creative reworkings that offer both subtle and overt forms of criticism and commentary on existing texts. They create original characters, such as female heroines, as a means of pushing back against traditional action-adventure tropes that are dominated by male protagonists. They develop same-sex character relationships that challenge prevalent representations of gender and sexuality. Fans also extend the timelines and plotlines of favorite texts, developing prequels and sequels and imagining alternate endings for media narratives. On fan fiction websites, these forms of criticism and comment may not be explicitly labeled as such; nonetheless, these activities strongly parallel creative practices used in literature and language arts classrooms to prompt critique and commentary related to canonical literary texts.

The law does and must evolve as technology changes, though most certainly it will do so at a slower pace. The logical leap necessary to conclude that noncommercial fan fiction is defensible under the fair use doctrine as a teaching and learning practice is not outside typical evolution of statutory construction by courts. If the courts are ultimately persuaded that noncommercial fan fiction falls within the scope of the first prong of the fair use doctrine’s test, purpose of use, they still will need to consider the remaining three prongs, performing the balancing analysis mandated in the *Campbell* decision. Tipping the scales in favor of finding fan fiction as a fair use of the underlying works should not be difficult. Although the second prong, nature of the work, may tip the scales in favor of a challenge by a copyright holder, particularly when the nature of both the works is creative prose, the third and fourth prongs tip heavily in favor of fan fiction authors. Confining the analysis to fan fiction as defined

herein, the third prong, the amount and substantiality used, is readily satisfied: Fan fiction authors do not copy wholesale, but rather use the work “as a preexisting framework of action or plot to follow” (Black 2005) and allow the writers, “[b]y poaching off [other writers]...to start with a well-established world and a set of familiar characters...[thus allowing the writers] to focus on other aspects of their craft” (Jenkins 2004). There is simply no incentive for fan fiction writers to use more than necessary to establish a point from which to jump off, so they do not. Lastly, although some fan fiction authors have parlayed the writing skills learned from writing fan fiction into writing careers, the vast majority of fan fiction is not of a quality such that a reader would be swayed away from the original work in a form of market substitution or confusion (Tushnet 1997, p. 670), the consideration relevant to the fourth prong.

Conclusion: All’s (Sometimes) Fair

In his book *Convergence Culture*, Jenkins (2006) discusses the so-called “Potter wars,” referring to the highly publicized conflicts surrounding J. K. Rowling’s popular texts. The two primary foci of the Potter wars are attempts made by religious groups to remove Rowling’s series from school libraries and local bookstores, and the Warner Brothers corporation’s efforts to control fan activities. As Jenkins points out, from the perspective of fans and consumers, both of these efforts attempted to constrain children’s rights to “participate within the imaginative world of *Harry Potter*—one posing a challenge to their right to read, the other posing a challenge to their right to write” (Jenkins 2006, p. 170). Jenkins relates these modern challenges to historical struggles over literacy as a gatekeeping mechanism, positing, “We may also see the current struggle over literacy as having the effect of determining who has the right to participate in our culture and on what terms” (p. 171).

As new technologies continue to facilitate practices of remixing and provide the general public with ready means of producing and distributing their own cultural materials, such struggles between copyright holders, corporations, and consumers are likely to intensify and move further into uncharted legal territory. Since youth are at the forefront of much of this debate, it is crucial to consider viable strategies for helping young people understand both their rights and responsibilities in relation to intellectual property. At

the same time, it is also important not to allow young people's creative agency and informal learning and literacy practices to be stifled by overstated assertions of copyright over shared cultural materials.

As this article has sought to demonstrate, the transformative, noncommercial, and educational attributes of fan fiction should cause it to fall within the fair use doctrine. Fan fiction, on balance, satisfies the four-prong test provided in Section 107 of the Copyright Act, as interpreted by the Court in *Campbell*. Nevertheless, the intimidation of actual or potential lawsuits could discourage many young authors, regardless of the eventual outcomes, thereby doing significant harm to the progress of the creative arts and education in this country and around the world. In this article, we have attempted to demonstrate the validity of fan fiction as a creative and educational medium, in the interest of preventing fan fiction writing from becoming a casualty of this war on our youth and their informal literacy activities. Fan fiction writers are not thieves or miscreants; they are practicing authors and culture producers, a self-supporting society of striving young minds. To prevent the diverse voices of this community from being silenced, it is critical that fan fiction be recognized as a protected exception to copyright law.

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