

# ARTICLE

## COPYRIGHT AND THE COMMERCIALIZATION OF FANFICTION

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### ABSTRACT

Anne Rice doesn't "allow" fanfiction; Hugh Howey encourages it; E.L. James became a millionaire as a result of her foray into fanfiction; and L.J. Smith can only make money from her own original vampiric creations as a fanfiction author. No longer a geeky backwater of the writing community, fanfiction has entered the mainstream of creative and commercial literary endeavor in the digital age. Not only has the rise of the Internet enabled the exponential growth of traditional noncommercial fanfiction communities, but it has set the stage for the successful commercialization of fanfiction. However, copyright law has not kept pace with these developments. It was previously assumed by many scholars that fanfiction was permissible as a fair use provided it was noncommercial in nature.

Commercialization alters the paradigm. Commercially successful fanfiction authors such as E.L. James and Sylvain Reynard have brought the practice, and its commercial potential, into the spotlight. More recently, the Kindle Worlds project, launched by Amazon.com in 2014, changed the landscape for

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fanfiction writers and brought some previous assumptions about copyright, licensing, and ownership into sharp focus. This Article examines the application of copyright law to the most recent commercial fanfiction practices, with specific reference to the fair use defense. It also considers the impact of programs like Kindle Worlds on legal and market assumptions about the ownership of fan-created content.

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## I. INTRODUCTION

Given recent trends in popular culture, vampires are a useful inroad to a discussion of fanfiction. Anne Rice, author of the best-selling *Interview with a Vampire* series of books, notes on her website that she does not “allow” fanfiction.<sup>1</sup> Meanwhile, E.L. James<sup>2</sup> and Sylvain Reynard<sup>3</sup> respectively made fortunes publishing books derived from their fanfiction based on Stephenie Meyer’s best-selling *Twilight* series.<sup>4</sup> In contrast, L.J. Smith, author of the original *Vampire Diaries* books, never actually owned her original works because she wrote them as works for hire.<sup>5</sup> She was replaced by a ghostwriter after the first seven books, and was not able to complete—at least commercially—the story according to the canon she created.<sup>6</sup> It was not until Amazon introduced its Kindle Worlds publishing platform<sup>7</sup> that L.J. Smith was able to continue and commercialize the story her way, effectively as a fanfiction author under license from the copyright holders.<sup>8</sup>

It’s not only vampires that spawn fanfiction communities. Well before the advent of the Internet (and before the modern vampire craze), fanfiction has been written about many popular books, movies, games, and television shows. One of the first, if not the first, fandoms developed around the original *Star Trek* television series in the 1960s.<sup>9</sup> Fanfiction may be defined as “a

1. See Anne Rice, *Anne Rice Readers Interaction: Anne’s Messages to Fans*, ANNERICE.COM, <http://annerice.com/ReaderInteraction-MessagesToFans.html> (last visited Nov. 17, 2014).

2. E.L. JAMES, *FIFTY SHADES OF GREY* (Vintage Books 2012) (2011); E.L. JAMES, *FIFTY SHADES DARKER* (Vintage Books 2012) (2011); E.L. JAMES, *FIFTY SHADES FREED* (Vintage Books 2012) (2012).

3. SYLVAIN REYNARD, *GABRIEL’S INFERNO* (Penguin Grp. 2012) (2011); SYLVAIN REYNARD, *GABRIEL’S RAPTURE* (Penguin Grp. 2012) (2012); SYLVAIN REYNARD, *GABRIEL’S REDEMPTION* (2013).

4. Carolyn Kellogg, *The ‘50 Shades’ Effect: ‘Gabriel’s Inferno’ Lands Major Publisher*, L.A. TIMES (Aug. 1, 2012), <http://articles.latimes.com/2012/aug/01/news/la-jc-the-50-shades-effect-gabriels-inferno-lands-major-publisher-20120801>; see also STEPHENIE MEYER, *TWILIGHT* (2005); STEPHENIE MEYER, *NEW MOON* (2006); STEPHENIE MEYER, *ECLIPSE* (2007); STEPHENIE MEYER, *BREAKING DAWN* (2008).

5. Alexandra Alter, *A Vampire Writer Bites Back*, WALL ST. J., Apr. 18, 2014, at D1.

6. *Id.*

7. *Kindle Worlds: How It Works*, AMAZON: KINDLE WORLDS, <https://kindleworlds.amazon.com/how> (last visited Nov. 17, 2014).

8. Alter, *supra* note 5.

9. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) (“Fan fiction and organized media fandom have been traced to the second season of *Star Trek* in 1967.”); see also Henry Jenkins, *At Other Times, Like Females’: Gender and Star Trek Fan Fiction*, in SCIENCE FICTION AUDIENCES: WATCHING *DOCTOR WHO* AND *STAR TREK* 196, 196 (John Tulloch & Henry Jenkins eds., 1995).

genre of amateur writing based on characters and events from mass entertainment or popular culture.”<sup>10</sup> Common assumptions about fanfiction, at least until recent years, have been that it is written for noncommercial purposes, and that it is directed primarily at an audience of fans of the original work who will be familiar with the settings and characters employed in the secondary works.<sup>11</sup> The advent of the participatory user-generated-content-focused Internet has allowed the burgeoning of voluminous fanfiction communities engaging in content derived from sources from *Gone with the Wind*<sup>12</sup> to *The Hunger Games*.<sup>13</sup>

The growth of fanfiction on the Internet has spawned discussion as to the nature and purpose of online fan activities, including the extent to which some of these activities might amount to copyright infringement. In particular, the creation of fanfiction works raises issues of infringement of the exclusive reproduction,<sup>14</sup> public distribution,<sup>15</sup> and derivative works<sup>16</sup> rights of the copyright holder, as well as the potential application of the fair use defense.<sup>17</sup>

While there are no cases on fanfiction in the Internet context,<sup>18</sup> some commentators have advocated treating fanfiction as a fair use, particularly where the fans’ activities are noncommercial.<sup>19</sup> This comports with the attitude of many online

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10. OXFORD AMERICAN DICTIONARY AND THESAURUS 466 (2d ed. 2009); see also Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J., June 14, 2012, at D1 (defining fanfiction as “amateur works based on the characters and settings from novels, movies, television shows, plays, videogames or pop songs”).

11. See *Fan Fiction*, CHILLING EFFECTS, <https://www.chillingeffects.org/topics/3> (last visited Nov. 17, 2014).

12. See, e.g., *Books: Gone with the Wind*, FANFICTION.NET, <https://www.fanfiction.net/book/Gone-with-the-Wind> (last visited Nov. 17, 2014) (listing almost 800 *Gone with the Wind* fanfiction stories uploaded by users).

13. See, e.g., *Books: Hunger Games*, FANFICTION.NET, <https://www.fanfiction.net/book/Hunger-Games> (last visited Nov. 17, 2014) (listing almost 34,000 *Hunger Games* fanfiction stories uploaded by users).

14. 17 U.S.C. § 106(1) (2012).

15. *Id.* § 106(3).

16. *Id.* § 106(2).

17. *Id.* § 107.

18. See Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 168 (2011) (“Although fanfiction is a flourishing medium, there has been no true case evaluating it under a fair use analysis.” (footnote omitted)); Alter, *supra* note 10 (noting the lack of legal precedent relating to fanfiction).

19. Tushnet, *supra* note 9, at 686 (“When no lucrative market share is sought and productive use is made of copyrighted characters, fan fiction should be recognized as expressing a protected and valuable form of human creativity . . . .”); see also Steven D. Jamar & Christen B’anca Glenn, *When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction*, 1 TEX. A&M L. REV. 959, 978 (2014).

writing communities.<sup>20</sup> The prevailing view appears to be that fanfiction should be tolerated, and maybe even encouraged, as a teething ground for new authors, and as a place for fans to express their fondness for, and emotional investment in, the original works.<sup>21</sup> Several commercially successful authors have endorsed or actively encouraged noncommercial fanfiction.<sup>22</sup>

Even if this position is correct, recent years have evidenced a paradigm shift in the fanfiction world as the works of fans begin to take on a more commercial aspect. In years past, a number of popular fanfiction authors were expected to cease their fanfiction activities and create new worlds and characters in their attempts to become commercial authors.<sup>23</sup> However, in more recent times, several fanfiction authors have successfully commercialized works unapologetically based on fanfiction. The best-selling *Fifty Shades of Grey*<sup>24</sup> and *Gabriel's Inferno*<sup>25</sup> series are obvious examples. The original books in both trilogies were initially written as *Twilight*<sup>26</sup> fanfiction and little was arguably changed when the works were commercialized.<sup>27</sup> No legal action was brought by any of the *Twilight* copyright holders<sup>28</sup> with respect to these works, but theoretically actions might have been brought under the reproduction, derivative works, and public distribution rights.

20. See, e.g., Jacqueline D. Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VAND. J. ENT. & TECH. L. 585, 622 (2014); see also Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1880 (2009).

21. Lipton, *supra* note 20, at 610–11.

22. See, e.g., *Maggie Stiefvater: The Official Blog: FAQ*, MAGGIE STIEFVATER, <http://maggiestiefvater.com/faq/> (last visited Nov. 17, 2014) (“So long as I’m acknowledged as the creator of the original characters and no money is being made on the derivative fiction, fanfic away!”); Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS (May 27, 2004), <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm> (“JK Rowling’s reaction is that she is very flattered by the fact there is such great interest in her Harry Potter series and that people take the time to write their own stories. Her concern would be to make sure that it remains a noncommercial activity to ensure fans are not exploited and it is not being published in the strict sense of traditional print publishing.” (internal quotation marks omitted)).

23. Lipton, *supra* note 20, at 610–11; see also Alter, *supra* note 10.

24. JAMES, *supra* note 2.

25. REYNARD, *supra* note 3.

26. MEYER, *supra* note 4.

27. Jason Boog, *Twilight Fan Fiction History of Gabriel's Inferno*, GALLEYCAT (Aug. 1, 2012), [http://www.mediabistro.com/galleycat/sylvain-reynard-fan-fiction\\_b55297](http://www.mediabistro.com/galleycat/sylvain-reynard-fan-fiction_b55297) (examining similarities between *Gabriel's Inferno* and the original fanfiction version); Jane Litte, *Master of the Universe Versus Fifty Shades by E.L. James Comparison*, DEAR AUTHOR (Mar. 13, 2012), <http://dearauthor.com/features/industry-news/master-of-the-universe-versus-fifty-shades-by-e-l-james-comparison/> (analyzing the extent to which the text of *Fifty Shades of Grey* contains similarities to E.L. James’s earlier *Twilight* fanfiction).

28. Summit Entertainment holds copyright in the *Twilight* movie adaptations and Stephenie Meyer retains copyright in the original literary texts.

Apparently realizing the potential for the commercialization of fanfiction, and the legal risks inherent in the practice, Amazon recently launched its Kindle Worlds program<sup>29</sup> which is based on its Kindle Direct self-publishing platform<sup>30</sup> with a wrinkle. Amazon has obtained licenses from copyright holders of works with large fandoms to allow the fans to commercialize their creative endeavors and sell them directly to consumers.<sup>31</sup> Under the program, the fanfiction author gets a cut of the profits,<sup>32</sup> but a smaller cut of the profits than a self-published author publishing an original work.<sup>33</sup> Additionally, Amazon currently obtains an irrevocable exclusive license for the term of the copyright in the fan-created works<sup>34</sup> as well as sets the sale price for them.<sup>35</sup> The program also restricts what fanfiction authors can do in their secondary works: for example, crossover characters are not generally allowed under Kindle Worlds licenses, while they are not uncommon in traditional fanfiction.<sup>36</sup>

29. See *Kindle Worlds: How It Works*, *supra* note 7; see also Press Release, Amazon, Now Open: Kindle Worlds Store and Self-Service Submission Platform (June 27, 2013), <http://phx.corporate-ir.net/phoenix.zhtml?ID=1833478&c=176060&p=irol-newsArticle>.

30. See *Kindle Direct Publishing*, AMAZON: KINDLE DIRECT PUBLISHING, <https://kdp.amazon.com/> (last visited Nov. 17, 2014).

31. See *Kindle Worlds: How It Works*, *supra* note 7. To date, participating copyright holders include those who hold the rights in *G.I. Joe*, *The Vampire Diaries*, the *Silo* saga, *Veronica Mars*, *Pretty Little Liars*, and *Gossip Girl* to name a few. See *Kindle Worlds: Select a World*, AMAZON: KINDLE WORLDS, <https://kindleworlds.amazon.com/worlds> (last visited Nov. 17, 2014). Interestingly, possibly due to a shaky relationship with Amazon.com in recent years, none of the five major American book publishers are represented within the program. See David Streitfeld, *Amazon to Cut E-Book Prices, Shaking Rivals*, N.Y. TIMES, Apr. 12, 2012, at A1 (discussing how price-fixing-antitrust charges against five major publishers put Amazon in a position to lower prices on e-books).

32. The current royalty rates are available at *Kindle Worlds FAQs: Sales, Royalties, and Payments*, AMAZON: KINDLE WORLDS, <https://kindleworlds.amazon.com/faqs?topicId=A3T3UQCG5AG03W> (last visited Nov. 17, 2014).

33. For example, authors of works of 10,000 words or more under Kindle Worlds currently receive 35% of the royalties, compared with 70% of the royalties for authors of original works under Kindle Direct publishing. *Id.*; *Kindle Direct Publishing*, *supra* note 30.

34. See *Kindle Worlds Publishing Agreement*, AMAZON: KINDLE WORLDS, § 4(a), <https://kindleworlds.amazon.com/publishing-agreement> (last updated Nov. 1, 2014) (“Effective as of the date we first make your Work available through the Program, you grant us the exclusive, irrevocable license for the full term of copyright protection available (including renewals), to develop, license, reproduce, print, publish, distribute, translate, display, publicly perform and transmit your Work, in whole and in part, in each country in the world, in all languages and formats, and by all means now known or later developed, and the right to prepare derivative works of your Work.”).

35. *Id.* § 5(g); see also *Kindle Worlds*, AMAZON, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1001197431> (last visited Nov. 17, 2014) (“Amazon Publishing will set the price for Kindle Worlds stories. Most are priced from \$0.99 through \$3.99.”).

36. *Kindle Worlds FAQs: Content Guidelines and Review Process*, AMAZON: KINDLE WORLDS, <https://kindleworlds.amazon.com/faqs?topicId=A2W2IF5J2WZDKT> (last visited

In other words, characters from one fandom cannot appear in fanfiction set in another fandom. Finally, the original content holders set out content guidelines with which fan authors must comply and which differ from fandom to fandom.<sup>37</sup> Amazon reviews fan submissions for compliance with these guidelines.<sup>38</sup>

This Article considers the application of copyright law to the new commercial models for fanfiction. Part II examines past and current fanfiction activities with particular reference to the move from purely noncommercial to more commercially-oriented fan activities. Part III considers the potentially applicable copyright laws, focusing on the reproduction, distribution, and derivative works rights, as well as the fair use defense. Part IV examines the application of copyright principles to both unlicensed and licensed commercial fanfiction. It argues that the existence of licensing markets for fanfiction, such as the Kindle Worlds program, might skew the application of copyright principles, particularly the fourth factor of the fair use defense. Analyzing this factor, courts often hold that the existence of a licensing market for an otherwise infringing activity mitigates against a finding of fair use in cases where a defendant has not obtained a license. The existence of a licensing market may also create general market assumptions against unlicensed fanfiction. The Article concludes with suggestions for future directions in the application of copyright principles to commercial fanfiction. The aim is to initiate discussion of the issue, rather than provide definitive solutions because so many competing interests are implicated in resolving the complex questions raised, and the commercialization of fanfiction is a relatively new practice.

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Nov. 17, 2014) (noting that Amazon's contracts with original copyright holders do not allow crossover characters).

37. *Id.* ("World Licensors have provided Content Guidelines for each World, and your work must follow them. You should read the Content Guidelines before you commit the time and effort to write, and check them again before you submit your work, in case they've changed.").

38. *Id.* ("Each World Licensor will have a different tolerance for mature content and a sense of what is appropriate for their audience. Their guidelines for each World are posted on the Kindle Worlds Self-Service Submission Platform. We'll review your submission to make sure it is in bounds. If we have any questions during the review process, we'll let you know.").

## II. "WHAT IF?": A PRIMER ON FANFICTION

*What if Edward Cullen, the moody vampire heartthrob in Stephenie Meyer's best-selling "Twilight" series, was an undercover cop? Or a baker who specializes in bachelor-party cakes? Or a kidnapper who takes Bella hostage?*<sup>39</sup>

A. *The History of Fanfiction*

In order to examine the commercialization of fanfiction and its implications for copyright infringement, it is necessary to wade into the history of fanfiction. Surprisingly little is definitively known about the application of copyright law to fanfiction despite the prevalence of the practice and its exponential popularity in the wake of the participatory Internet. While the challenges inherent in applying copyright law to the digital world of fanfiction might be regarded as one aspect of the problems inherent in applying copyright to the digital world more generally, fanfiction does raise its own issues specific to the balance of content ownership and artistic expression.<sup>40</sup>

Fanfiction derives from the tendency of humans to want to know "what happened next" or "what would happen if" when approaching products of popular culture.<sup>41</sup> However, the repurposing of existing stories is not a new phenomenon. Writers have historically repurposed existing material to create new stories. Most of Shakespeare's plays, for example, are based on preexisting materials.<sup>42</sup> Creators of new works have never written in a vacuum. They have always had generations of past human creation on which to base their efforts.

In terms of legal protection, literary works were the original foundation of copyright protection.<sup>43</sup> However, in the digital age, much scholarly writing about copyright has focused on other digitized creative industries, such as music, movies, computer software, and video games.<sup>44</sup> It is only in

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39. Alter, *supra* note 10.

40. Tushnet, *supra* note 9, at 651–52; 661–62; *see also* Jamar & Glenn, *supra* note 19, at 974.

41. Tushnet, *supra* note 9, at 652.

42. ANDREA GALYNEA ET AL., N.Y. TIMES, SMARTER BY SUNDAY 203 (John W. Wright ed., 2010).

43. *See* Statute of Anne, 1710, 8 Ann., c. 19, §§ 1, 2 (vesting the copyright, for the first time, in the authors rather than the publishers).

44. *See* Lipton, *supra* note 20, at 586–87, 590, 594 (noting copyright litigation discrepancies between these industries and the publishing industry in the digital age and suggesting possible explanations for it); *see also* Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431 (2010) (commenting on copyright issues related to music in the digital age).



recent years that the digitization of literary works has taken the forefront of legal discussions involving the application of copyright to the Internet.<sup>45</sup> Thus, a discussion of fanfiction and the application of copyright principles to the practice is particularly timely in light of both the rise of the practice and the recent interest in the application of copyright law to digital literary works.

As noted above, fanfiction, much like any other literary creation, is based on the impetus of people to want to know what would happen “if” or what would happen “next” when confronted with an existing text. The desire to ask these questions is a basic human trait. After all, who hasn’t seen a movie, or read a book, and asked a version of at least one of these questions? Who *doesn’t* want to know if Scarlett and Rhett get back together after the closing pages of *Gone with the Wind*? What if Hamlet had been a little less indecisive? What if he had managed to kill Claudius when the ghost told him to, or marry Ophelia and take the Danish crown with Ophelia as his queen? What if Hamlet and Horatio became lovers?

Challenges for fanfiction arise when so much of existing literature is owned by corporations that want to assert powerful control of their rights.<sup>46</sup> Secondary works based on existing works that are out of copyright or were never copyrighted in the first place are unproblematic, even if published commercially: for example, Geraldine Brooks’s *March*<sup>47</sup> (based on the absent father from the classic *Little Women*<sup>48</sup> by Louisa May Alcott); Seth Grahame-Smith’s *Pride and Prejudice and Zombies*<sup>49</sup> as well as multiple other

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45. See Lipton, *supra* note 20, at 601–04 (discussing recent copyright infringement cases in the publishing industry, and noting how the infringement the publishing industry has actively pursued are services which provide substantial public benefits—such as Google Books).

46. Tushnet, *supra* note 9, at 652–53 (“Because of social and economic changes during the past few hundred years . . . most readily available and widely known characters are now corporate creatures.” (citing RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996); HERBERT I. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION (1989); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991))).

47. GERALDINE BROOKS, *MARCH* (2005); see also *March*, GERALDINE BROOKS, <http://geraldinebrooks.com/the-books/march/> (last visited Nov. 17, 2014).

48. LOUISA MAY ALCOTT, *LITTLE WOMEN* (1868). The copyright for *Little Women* ended in 1999.

49. JANE AUSTEN & SETH GRAHAME-SMITH, *PRIDE AND PREJUDICE AND ZOMBIES* (2009); Tim Masters, *Pride and Prejudice: Jane Austen Fans Celebrate Novel’s 200th Anniversary*, BBC NEWS (Jan. 24 2013), <http://www.bbc.com/news/entertainment-arts-21078941>.

secondary works spawned by Jane Austen's classic novel,<sup>50</sup> and Lisa Klein's young adult retelling of Shakespeare's *Hamlet* through Ophelia's eyes, *Ophelia*.<sup>51</sup>

However, when the original work is under corporate control, it is more difficult to engage in these kinds of retellings without risking the threat of a copyright infringement suit, or at least receiving a demand letter. Nevertheless, what the writing community regards today as fanfiction has traditionally been created and disseminated for noncommercial purposes, perhaps arguably not threatening the commercial bottom lines for the original works, and maybe even enhancing them.<sup>52</sup> Fanfiction may attract more eyes to a given fandom and increase sales of, or interest in, the original works. Certainly, some creators of original works have facilitated or encouraged fanfiction on the condition that the products of the fan's artistic endeavors are not commercialized, or even that those products are owned by the creator of the original work under license.<sup>53</sup> In the pre-Internet era, fanfiction was generally photocopied by hand and circulated through "fanzines," generally for noncommercial purposes.<sup>54</sup> The rise of the participatory Internet has led to an explosion of online fandoms,<sup>55</sup> again usually distributing their works free of charge.

### B. A Working Definition of Fanfiction

Before considering the commercial and copyright paradigms facing the authors of fanfiction and the owners of copyrights in the original works, however, it is worth canvassing what is meant by fanfiction, at least for the purposes of this Article. Not all works based on preexisting works would merit the fanfiction label, and it is important to understand what we mean by fanfiction in order to differentiate it from other forms of literary works based on preexisting works.

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50. See, e.g., ELIZABETH ASTON, *THE SECOND MRS. DARCY* (2007).

51. LISA KLEIN, *OPHELIA* (2006); see also *Ophelia*, GOODREADS, <http://www.goodreads.com/book/show/293583.Ophelia> (last visited Nov. 17, 2014).

52. Alter, *supra* note 10 ("Why bar a 'Twilight' fan from writing Edward the vampire's Twitter feed when it could help sell more books and movie tickets?").

53. Steve Kovach, *Disney Is Going to Nuke All the 'Star Wars' Books and Comics Fans Have Been Enjoying for Decades*, BUS. INSIDER (Apr. 25, 2014), <http://www.businessinsider.com/disney-star-wars-expanded-universe-2014-4>.

54. Alter, *supra* note 10.

55. *Id.* ("The Web has fueled an explosion of fan fiction as communities of fans have formed digital enclaves to share and critique each other's work. Sites devoted to particular fandoms have sprung up . . ."); see Tushnet, *supra* note 9, at 651–52 (noting that even in 1997—the date of the article's publication—fanfiction had already become "widely accessible via the Internet").

Professor Rebecca Tushnet has described fanfiction as “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.”<sup>56</sup> This definition comprises three important elements. The first is that it applies to *written* creativity as opposed to things like video mashups based on popular culture.<sup>57</sup> The second is that the subject of the written creativity has to be an *identifiable segment of popular culture*. And the third element is that the written work must not be produced as *professional writing*.

Thus, establishing whether a particular literary endeavor meets this definition involves ascertaining the meaning of “professional” in the context of the third factor: for example, does “professional” equate with “commercial”? For the purposes of this discussion, the terms “professional” and “commercial” obviously overlap to a degree, but it is assumed that a written endeavor can be “commercial” while not being “professional.” It may be that some forms of commercialized fanfiction, such as those created under the Kindle Worlds publishing platform, are of this type. They are commercialized in the sense that the author of the fan-work is publishing it at least in part for commercial profit motives, but it is not professionally produced by a major publishing house, but rather self-published by the author.

While not articulated specifically in Professor Tushnet’s definition of fanfiction, the classification of a literary endeavor as fanfiction may also require a determination of the nature of the secondary work itself. Some secondary works that are based on an identifiable segment of popular culture may not amount to fanfiction even if they are not (or not initially) produced as professional writing.<sup>58</sup> For example, a lexicon of terms based on a popular work may not qualify as fanfiction, particularly if it is not a story but rather a dictionary or key to someone else’s story. Another example of a secondary work that is not fanfiction may be a work that is inherently critical of the original work, such as Alice Randall’s *The Wind Done Gone*, a story that retells Margaret Mitchell’s *Gone with the Wind* from the perspective of the slaves on the plantation.<sup>59</sup>

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56. Tushnet, *supra* note 9, at 655.

57. Jacqueline D. Lipton, *Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 21–28 (2010) (describing the application of copyright principles to video mashups based on elements of popular culture).

58. For example, the Harry Potter Lexicon, written and distributed noncommercially by Steve Vander Ark before being picked up for commercial publication. After the work was commercialized, the copyright holders sued the publisher. Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 519–24 (S.D.N.Y. 2008).

59. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259, 1269–70, 1279–80 (11th Cir. 2001) (“[*The Wind Done Gone*] is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of

Most fanfiction is an extension of the original creator's vision of her created world from the perspective of an audience that is receptive to the original work in a fond and positive way.<sup>60</sup> Thus, secondary works that comment negatively on the original works probably do not meet the definition and may have to be interpreted for copyright purposes separately to fanfiction paradigms. Such works may fall more toward the "criticism and commentary" end of the fair use spectrum than secondary works that are truly classified as fanfiction.<sup>61</sup> Suffice to say for present purposes that this discussion focuses on secondary works that are engaged in by a group of people (or "fandom") who highly regard the original work and want to ask the "what if" or "what happens next" questions as an homage to the original work.

Another aspect of fanfiction that is perhaps absent from—or could be expressed more clearly than it is in—Professor Tushnet's definition of fanfiction is the idea that perhaps goes without saying: Fanfiction ought to differ substantially from the original work in order to qualify under the definition.<sup>62</sup> Otherwise, it is more akin to plagiarism.<sup>63</sup> Best-selling young adult author Maggie Stiefvater, although obviously incorrect in her description of the applicable law, explains the difference between her attitude to fanfiction and plagiarism as follows:

So long as I'm acknowledged as the creator of the original characters and no money is being made on the derivative fiction, fanfic away! I am not, however, a fan of derivative works—i.e., fanfic where my writing is taken word for word with only the characters or minor details changed. Please don't plagiarize!<sup>64</sup>

Adding the two "glosses" mentioned above to Professor Tushnet's definition of fanfiction, there are arguably five identifiable elements to the modern practice. Fanfiction may be regarded as: (a) a written work; (b) based on an identifiable

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slavery and the relationships between blacks and whites in [*Gone with the Wind*]. . . . Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War.").

60. Tushnet, *supra* note 9, at 656 ("These works . . . link the stories and their authors to an existing and receptive community by virtue of their shared raw materials."); *id.* at 657–58 ("Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters." (footnote omitted)).

61. *Suntrust Bank*, 268 F.3d at 1264, 1268–70.

62. Alter, *supra* note 10.

63. For a discussion of the relationship between copyright and plagiarism, see RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 12–14 (2007).

64. *Maggie Stiefvater: The Official Blog: FAQ*, *supra* note 22.

aspect of popular culture; (c) not written professionally;<sup>65</sup> (d) for purposes of further exploring the existing world and characters, often as an homage to the original work, and evidencing an affection for—or some emotional resonance with—the original work; and (e) in a manner that substantially differs from the original work so as not to amount to rote copying or plagiarism.

Under this definition, a story that explores what happens next, after the closing lines of *Gone with the Wind*, written by a fan for a noncommercial purpose would classify as fanfiction, while Alice Randall's *The Wind Done Gone* arguably would not, even though it might amount to a fair use.<sup>66</sup> Randall's book would fail at least the third, if not the fourth, element of the fanfiction definition set out above. With respect to the third element, *The Wind Done Gone* was written professionally for clear commercial motives.<sup>67</sup>

With respect to the fourth element, the writing did not necessarily evidence the kind of emotional resonance with the original work that fanfiction typically does, although this point is debatable. It is worth noting in this context that some secondary creativity that may be classed as fanfiction contains implicit criticism of the original work: for example, the insertion of female characters in largely male-dominated worlds. This may be analogized with Alice Randall's implied criticism of the "white-washed" tone of *Gone with the Wind* by reworking the narrative from the African-American point of view. Nevertheless, one might argue that true fanfiction that contains implied criticism of the original work suggests a greater affection for, and a lesser overt criticism of, the original work than a secondary work like *The Wind Done Gone*. Fanfiction is also written largely for a readership comprised of fans of the original work who share that emotional connection with the original story.

### C. The Rise of Commercial Fanfiction

Fans of existing work engage in fanfiction for a number of purposes. Historically, commercial profit motives have not been high up in the list. An obvious, and early identified, motivation for these fan activities is the desire to "participate" in popular

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65. Of course, as noted above, one may question the extent to which "professional" overlaps with "commercial" in this context.

66. *Suntrust Bank*, 268 F.3d at 1276–77 (holding that the work was "entitled to a fair-use defense").

67. *Id.* at 1269 (noting that *The Wind Done Gone* "is undoubtedly a commercial product").

culture rather than simply consume it.<sup>68</sup> Additionally, writing fanfiction is now acknowledged as a legitimate avenue toward becoming a professional author. Many of today's successful authors initially cut their teeth writing fanfiction before graduating to creating worlds and characters of their own.<sup>69</sup> Most readers and authors have no objection to a writer starting with fanfiction before turning to professional writing, provided that the professional writing is "original" and they do not repurpose their fanfiction as professional work without paying royalties, and providing appropriate attribution, to the copyright owner of the original work.<sup>70</sup>

However, this proposition is obviously tested by recent commercial successes of novels that are unapologetically self-proclaimed as fanfiction. Two obvious examples in the romance/erotica genre are the best-selling *Fifty Shades of Grey* and *Gabriel's Inferno* trilogies. The first book of each respective trilogy, if not portions of the subsequent books, originally appeared as noncommercial *Twilight* fanfiction before being commercialized with the characters' names changed and arguably other details altered.<sup>71</sup>

Even in the wake of the recent commercialization of some fanfiction based on currently copyrighted works, courts have not pronounced specifically on the legality of the practice. While courts in the past have considered the legality of other kinds of secondary works arisen with respect to existing works, they have never done so with reference to the fanfiction context specifically. Most prior cases have been based on commercially published works that take an unauthorized, and often uncomplimentary,

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68. Tushnet, *supra* note 9, at 684 ("People should be able to participate actively in the creative aspects of the world around them. When most creative output is controlled by large corporations, freedom to modify and elaborate on existing characters is necessary to preserve a participatory element in popular culture." (footnote omitted)); *see also* Leslie A. Kurtz, *Fictional Characters and Real People*, 51 U. LOUISVILLE L. REV. 435, 441, 479–80 (2013).

69. Alter, *supra* note 10 ("Meg Cabot, the best-selling author of the 'Princess Diaries' series, started writing 'Star Wars' fan fiction when she was 11 years old. Young-adult fantasy author Cassandra Clare, whose books about teenage demon hunters have sold 12 million copies, wrote Harry Potter and 'Lord of the Rings' fan fiction before she broke into professional publishing. Novelist Naomi Novik, who writes a best-selling fantasy series about dragons that's set during the Napoleonic Wars, started writing 'Star Trek' fan fiction when she was a college student at Brown in the 1990s.").

70. Lipton, *supra* note 20, at 616–18 (discussing how the fanfiction community believes that fanfiction authors who choose to transition to professional writing "have a higher obligation to be original than those writing for purely expressive nonprofit purposes"); *Maggie Stiefvater: The Official Blog: FAQ*, *supra* note 22.

71. *See* Boog, *supra* note 27 (examining similarities between *Gabriel's Inferno* and the original fanfiction version); Litte, *supra* note 27 (examining similarities between *Fifty Shades of Grey* as commercially published and *Twilight* fanfiction).

stance on an existing work, such as Alice Randall's take on *Gone with the Wind* in *The Wind Done Gone*.<sup>72</sup> Additionally, cases involving unauthorized lexicons to existing works have been litigated.<sup>73</sup>

In recent years, the commercialization of fanfiction has arisen in at least two different contexts. The first example of the commercialization of fanfiction is the commercial publication of a secondary work that was originally created as a noncommercial fan-work. The commercial publication of *Fifty Shades of Grey* is an obvious example of a previously noncommercial work—fanfiction based on Stephenie Meyer's *Twilight*—which was subsequently sold commercially and went on to become a bestseller. We might refer to this category of commercial fanfiction as “unlicensed” commercial fanfiction.

The second way in which fanfiction has become commercialized is under license. The new Kindle Worlds platform developed by Amazon is an example of this. We might refer to this category as “licensed” commercial fanfiction. Each form of commercialized fanfiction raises distinct challenges for the application of copyright law.

Unlicensed commercial fanfiction requires a reconsideration of the scope and operation of the fair use defense. As noted above, many have assumed that fanfiction has traditionally comprised fair use because of its noncommercial nature which is relevant under the first fair use factor in Section 107 of the Copyright Act. This paradigm must be reexamined when a fan-work is published commercially. Does the fact that noncommercial fanfiction is presumptively a fair use require us to accept an opposing presumption that commercial fanfiction is presumptively a copyright infringement? Or could application of the fair use factors nevertheless lead to the conclusion that even some commercially published fanfiction is not a copyright infringement? Courts have certainly held in the past that some derivative works outside the fanfiction context *are* fair uses even if they have been published commercially.<sup>74</sup> Thus, there is probably insufficient legal precedent to suppose that the commercial publication of a fan-work in and of itself requires a holding that the resulting work is a copyright infringement. The

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72. See, e.g., *Suntrust Bank*, 268 F.3d at 1259–60.

73. See, e.g., *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 519–24 (S.D.N.Y. 2008).

74. See, e.g., *Suntrust Bank*, 268 F.3d at 1269, 1276–77 (holding that *The Wind Done Gone* was entitled to a fair-use defense, even though it was published commercially, due to its “highly transformative use of [*Gone with the Wind*’s] copyrighted elements”); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 95 (S.D.N.Y. 2003).

extent to which an unlicensed fan-work might be regarded as a fair use is examined in more detail in Part III.

In contrast to the case of unlicensed commercial fanfiction, the situation of licensed commercial fanfiction (such as the Kindle Worlds program) creates other issues for the application of copyright law. Fan-works sold commercially under a scheme such as Kindle Worlds are hardly likely to comprise copyright infringement because they are ultimately licensed by the copyright holder.<sup>75</sup> Provided that the fanfiction author complies with the Kindle Worlds license terms, there will be no copyright infringement and no breach of the license terms. If the fanfiction author deviates from the license terms, she may be liable for both breach of contract and copyright infringement. For example, because the Kindle Worlds license prohibits importing characters from one fan-world to another, a fanfiction author who imports, say, a character from Hugh Howey's *Silo* saga into a work of *Pretty Little Liars* fanfiction will have infringed its license and the relevant copyrights. Likewise, a fanfiction author who publishes her Kindle Worlds story outside the Kindle Worlds platform will have breached her license and likely infringed copyright as well.<sup>76</sup>

The legal issues raised by licensed commercial fanfiction are thus in some ways more simple than those raised by unlicensed commercial fan activities. However, they may be complex in other ways. For example, the existence of a licensing program such as Kindle Worlds creates, or supports, certain market assumptions that may or may not in fact represent legal reality. Does the ability to sell fanfiction commercially under license create a presumption that other commercial fanfiction is *per se* a copyright infringement? As noted above, some unlicensed commercially published derivative works based on popular literary works have been held to be fair use. Thus, it must be at least arguable that some commercially published fanfiction is a fair use, and not a copyright infringement. Providing a blanket licensing mechanism for some fanfiction might be seen as creating market assumptions that are unsupported by the Copyright Act.

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75. *Kindle Worlds Publishing Agreement*, *supra* note 34, § 3(a) ("The owner of the intellectual property related to the Original World (the 'World Licensor'), has granted us the right to allow you to participate in Kindle Worlds for the Original World. Accordingly, we grant you the limited, nonexclusive, nontransferable, revocable right to create your Work using elements from the Original World owned or controlled by the World Licensor, such as characters, scenes and events (collectively the 'Original World Elements'), in accordance with the World Content Guidelines. You may not use the Original World Elements, the New Elements (as defined in Section 4(b)) or the Other Author Elements (as defined in Section 3(b)) outside of the Program for the Original World.").

76. *Id.* § 4(b).



Of course, the fact that someone is prepared to license something—and agree to restrictive license terms—that she could otherwise have used without a license does not make the license wrongful in any way. However, such licensing can create presumptions about a growing area of creative endeavor that could potentially stifle as much creative endeavor as it encourages. Part IV examines the kinds of market assumptions that may be created by programs such as Kindle Worlds and considers the possible effect of licensing restrictions on creative endeavors more generally. Before considering the relationship between copyright law and commercialized fanfiction—of both the unlicensed and licensed categories—it is necessary to briefly outline the aspects of the copyright legislation that are most relevant to a discussion of commercialized fan-works.

### III. FANFICTION AND COPYRIGHT LAW

*Fan fiction can still be a touchy and controversial subject for writers and publishers. While some see it as free marketing, others regard it as derivative dreck at best and copyright infringement at worst.*<sup>77</sup>

#### A. Copyright Holders' Exclusive Rights: Reproduction, Derivative Works, and Distribution

1. *Reproduction Right.* Copyright law grants certain exclusive rights<sup>78</sup> to the holder of a copyright in a “work[] of authorship,” including a literary work.<sup>79</sup> For the purposes of this discussion, the most relevant exclusive rights—those most likely to be implicated by the creation and dissemination of fanfiction—are the reproduction right,<sup>80</sup> the derivative works right,<sup>81</sup> and the public distribution right.<sup>82</sup> The reproduction right is at the heart of copyright protection.<sup>83</sup> It prevents a third party from copying, without authorization by the copyright holder, the protected work.<sup>84</sup> While the reproduction right clearly covers wholesale copying, like the pirating of entire literary texts, its scope is not

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77. Alter, *supra* note 10.

78. 17 U.S.C. § 106 (2012).

79. *Id.* § 102(a)(1).

80. *Id.* § 106(1).

81. *Id.* § 106(2).

82. *Id.* § 106(3).

83. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.04[A], at 300 (5th ed. 2010) (“The exclusive right to reproduce a copyrighted work in copies or phonorecords may be regarded as the most fundamental right granted by the copyright law.” (footnote omitted)).

84. 17 U.S.C. § 106(1); H.R. REP. NO. 94-1476, at 61–62 (1976).

limited to wholesale verbatim copying. In order to establish infringement, the plaintiff must prove that the “defendant copied plaintiff’s copyrighted work and that defendant’s copying amounted to an unlawful or improper appropriation.”<sup>85</sup>

To establish improper appropriation, the burden is on the plaintiff to demonstrate that the “defendant copied a sufficient amount of the protectable elements of the . . . copyrighted work as to render the two works substantially similar.”<sup>86</sup> Because of the breadth of the concept of misappropriative copying, it is possible that a literary work—such as a fanfiction work—that is *based on* an existing work could infringe the reproduction right if it is “substantially similar” to the original work for the purposes of copyright law. In other words, if the fanfiction author has copied “a sufficient amount of the protectable elements” of the source work, including characters, settings, and plot points, the fanfiction author could have infringed the reproduction right.

Whether a given fanfiction work does, in fact, infringe the reproduction right will depend on the facts in any given case. However, it is likely that many fanfiction works would amount to *prima facie* infringements of the reproduction right because, in order for the story to be a successful contribution to the relevant fandom, presumably the author will have to utilize sufficient elements of the original story for readers to identify it as such. As Professor Tushnet has acknowledged, creators of fanfiction likely infringe the reproduction right with respect to the characters employed in their fan-works:

Most authorities . . . agree that a character can be protected by copyright. The difficult questions of “substantial similarity” in the law of character copyright—is Wonderman too much like Superman and thus an infringement of him?—do not present much of a problem for fan fiction, as fan authors do not claim to have created an independent character.<sup>87</sup>

Because copyright infringement attracts strict liability,<sup>88</sup> it is immaterial to a finding of infringement that the fanfiction author’s intent was to pay homage to the original author and was not to profit from or compete with the author. Of course, as fanfiction becomes more commercial in nature, even the

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85. LEAFFER, *supra* note 83, § 9.04[A], at 424.

86. *Id.*

87. Tushnet, *supra* note 9, at 658–59 (footnotes omitted).

88. LEAFFER, *supra* note 83, § 10.21[F], at 539 (“Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.”).

mitigating effect of lack of commercial motive—to the extent there is any—falls away from the equation.

2. *Derivative Works Right.* Fanfiction may also comprise a *prima facie* infringement of the derivative works right.<sup>89</sup> While a number of prior cases involving literary works have been argued under the reproduction right, even where the defendant's secondary work is not a verbatim copy of the original work, they could just as easily have been argued as derivative works right cases.<sup>90</sup> Plaintiffs also have the option of arguing infringement of both rights in the same case.<sup>91</sup> The Copyright Act reserves to the copyright holder the right to make derivative works based on the original work.<sup>92</sup> For these purposes, "derivative work" is defined in the statute as including:

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.<sup>93</sup>

Many derivative works cases revolve around altering the format of a work:<sup>94</sup> for example, creating a script treatment (literary work) for a sequel to a motion picture.<sup>95</sup> However, the right is equally implicated when a secondary work based on the original work is created in the same format: for example, a case involving the creation and dissemination of an unauthorized *Harry Potter* lexicon (literary work based on original literary work) was argued under both the reproduction and derivative works rights.<sup>96</sup> Fanfiction is a literary work that may be based on either an original literary work or some other kind of work—like

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89. 17 U.S.C. § 106(2).

90. For example, *Suntrust Bank* dealt with the unauthorized retelling of *Gone with the Wind* from a slave's point of view and was argued as infringement of the reproduction right. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001). Derivative works were only discussed in the context of the fourth fair use factor. *See id.* at 1274.

91. For example, the *Harry Potter Lexicon* case was argued as an infringement of both the reproduction and derivative works rights. *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

92. 17 U.S.C. § 106(2).

93. *Id.* § 101.

94. LEAFFER, *supra* note 83, § 8.05[B], at 305 ("The issue of infringement of . . . the derivative work right, often arises in instances where a work is adapted to different media.").

95. Tushnet, *supra* note 9, at 660 (discussing a case law example of this phenomenon).

96. *See Warner Bros. Entm't*, 575 F. Supp. 2d at 524–33, 538.

a movie or television show. Thus, depending on the source work, the derivative works right may be infringed in either way.

In either case, the fan-work might well be regarded as a derivative work, as long as it is found to be sufficiently “based upon” one or more preexisting works. By the same token, fanfiction that combines elements from different fandoms may infringe the derivative works right: for example, a fan-work that populated Stephenie Meyer’s *Twilight* universe with characters from *The Vampire Diaries*. Such a remix might also infringe the reproduction right with respect to either or both of the source works provided that it copies a sufficient amount of the protectable elements of the respective source works.

3. *Distribution Right.* As Professor Leaffer has noted, the distribution right is relatively easy to infringe.<sup>97</sup> This is particularly problematic in the digital world where a work can be digitally disseminated to the public globally at the push of a button. As with the other exclusive rights reserved to the copyright holder, strict liability attaches to infringement of the distribution right, regardless of whether a commercial profit is made by the defendant as a result of the distribution.<sup>98</sup> Professor Leaffer notes that the distribution right is typically infringed along with the reproduction right because usually people do not reproduce a work without distributing it.<sup>99</sup> There would be no financial gain in doing so.<sup>100</sup>

In the participatory Internet context, people do retain an interest in distributing works even when they do not have a commercial profit motive. Fanfiction is an obvious example of this. Even commercialized fanfiction may be distributed largely for the purposes of sharing participation in the fandom with secondary hopes of making a few dollars out of the enterprise.<sup>101</sup> Noncommercial fanfiction is obviously distributed widely, but with purely nonprofit motives. However, the public distribution right may be infringed in either scenario.

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97. LEAFFER, *supra* note 83, § 8.04[C], at 303 (“It takes little to infringe the reproduction right. One unauthorized fixation can infringe the reproduction right even though the copy made is not sold or otherwise distributed to others.”).

98. *Id.* § 10.21[F], at 539 (“[I]nfringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.”).

99. *Id.* § 8.04[C], at 303.

100. *Id.*

101. Author Hugh Howey has suggested to his fans that they sell works they already planned to write for a profit, suggesting that the profit motive was a secondary concern. See Amazon Publishing, *Kindle Worlds Author Interview with Hugh Howey*, YOUTUBE (Mar. 7, 2014), [https://www.youtube.com/watch?v=7cZaFNO5\\_eU](https://www.youtube.com/watch?v=7cZaFNO5_eU).

*B. The Fair Use Defense*

1. *Section 107 of the Copyright Act.* The most obvious defense to a claim of copyright infringement in the fanfiction context is the fair use defense. Its elements are set out in Section 107 of the Copyright Act:

[T]he fair use of a copyrighted work . . . 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.<sup>102</sup>

The fair use doctrine derives originally from case law and was not incorporated into the legislation until the enactment of the 1976 Copyright Act.<sup>103</sup> The legislative intention of incorporating the defense in the statute was not to create a bright-line determination of which activities involving a copyright work would be excused as fair use, but rather to enable the continued development of the doctrine through the courts, allowing the doctrine to adapt to new circumstances over time.<sup>104</sup> The disadvantage of this flexibility is a lack of *ex ante* clarity as to which uses may or may not be regarded as fair uses.

2. *Section 107: The Preamble.* The preamble to the legislation sets out the kinds of uses of a copyright work that have typically been regarded as fair uses: criticism, comment, news reporting, teaching, scholarship, and research. However, the fact that a person has made such a use of a copyright work does not automatically mean that the use is a fair use.<sup>105</sup> By the same token, the fact that a use does not fit into any of these

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102. 17 U.S.C. § 107 (2012).

103. LEAFFER, *supra* note 83, §§ 10.03–.04, at 488–89.

104. *Id.* § 10.04, at 489.

105. See *Blackwell Publ'g, Inc. v. Excel Research Grp., LLC*, 661 F. Supp. 2d 786, 792–94 (E.D. Mich. 2009) (holding that Excel's creation of course packets for teaching purposes did not constitute fair use and was a copyright violation).

categories does not mean that it is *not* necessarily a fair use.<sup>106</sup> The preamble is intended to give guidance as to the kinds of uses typically regarded as fair uses, but not to provide a definitive rule on this point.

Fanfiction does not appear to fall within any of the categories set out in the preamble as typical fair uses. At a stretch, some fanfiction may be regarded as comprising criticism or comment: for example, fanfiction that incorporates powerful female characters into a male-dominated world in a preexisting work. It may be possible to argue that, say, the erotic nature of the secondary work *Fifty Shades of Grey*, originally conceived as *Twilight* fanfiction, is a comment on the naïve romanticism of the original work. However, that was unlikely to have been E.L. James's primary motivation, and it is a somewhat far-fetched argument in any event. Most fanfiction is undertaken for fun and purely expressive purposes without a specific critical agenda. Of course, the fact that fanfiction does not fall within a traditional category of uses that may in the past have been regarded as fair use is not decisive of its status in any given case. Courts are required to engage in an analysis of the four fair use factors to determine whether a specific use in a given case might comprise a fair use.<sup>107</sup>

3. *The First Factor: Purpose and Character of the Use.* The first fair use factor—the purpose and character of the defendant's use—is deceptively simple. While the statutory text suggests that the main consideration for this factor should be whether the use is for commercial or nonprofit educational purposes, courts have injected the idea of “transformative use” as a highly relevant element of the factor.<sup>108</sup> Transformativeness relates to the extent to which the defendant has injected new insights and understandings into the original work.<sup>109</sup> In other words, where the defendant is riffing on the original work in a way that creates new expressive meanings, rather than simply using the original work to attract attention or avoid the effort of creating something new, the use is likely to be transformative.<sup>110</sup>

In more recent years, some courts have accepted that a use may be transformative even if it involves verbatim copying of the

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106. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (holding that the reproduction of copyrighted posters and tickets that were used as historical artifacts fulfilled the fair use defense).

107. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

108. Tushnet, *supra* note 9, at 665; see also *Campbell*, 510 U.S. at 579.

109. *Campbell*, 510 U.S. at 579.

110. *Id.*

original work, provided that the copy is presented in a new context<sup>111</sup>—such as a thumbnail image used in an image search engine,<sup>112</sup> or a copy of an entire literary work in a digital library for enhanced searching and data mining purposes.<sup>113</sup> The underlying rationale for transformative use is to facilitate uses of copyrighted works that provide distinct social benefits.<sup>114</sup>

Much fanfiction is likely highly transformative in the sense that it “involves original input, taking the borrowed characters into new situations and exploring their thoughts and feelings in ways not present in the official texts.”<sup>115</sup> Thus, where fanfiction is not commercialized, there is a strong argument that the first fair use factor weighs heavily in favor of the fanfiction author. However, where the work is commercialized, the secondary author’s work runs counter to the other important aspect of the first fair use factor that requires courts to consider whether the defendant’s use is commercial. Commercializing fanfiction potentially has a significant impact on the likely availability of the fair use defense to protect much fan activity for this reason.<sup>116</sup>

Of course, most noncommercial fanfiction has not become, and is not likely to become, the subject of litigation.<sup>117</sup> Many copyright owners do not object to, and some cases actively encourage, the creation of noncommercial fanfiction.<sup>118</sup> In cases where the copyright owner does object to fanfiction, often the sending of a demand letter will be sufficient to deter a fan author

111. LEAFFER, *supra* note 83, § 10.05[B], at 490–91 (“The courts . . . have differed on whether the concept of productive use or transformative use should be limited to instances where the copyrighted work has been altered or to other situations where the copyrighted work is used in an entirely different context than the copyrighted work. Some courts have taken the latter, more expansive view.”).

112. *See, e.g.,* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1164–67 (9th Cir. 2007) (holding that Google’s use of copyrighted thumbnail images in image search results was highly transformative under the first fair use factor).

113. *See, e.g.,* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013) (holding that digitizing literary texts for ease of searching and data mining is a transformative use under the first fair use factor).

114. For a discussion of the “social benefits” aspect of transformative use, see Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 951, 990–91 (2014); *see also* LEAFFER, *supra* note 83, § 10.05[B], at 490 (noting that productive/transformative are uses that “confer public benefits”).

115. Tushnet, *supra* note 9, at 665.

116. *See* discussion *infra* Part IV.A.

117. Tushnet, *supra* note 9, at 664 (“Case law does not address fair use in the context of fan fiction or anything reasonably similar to it.”); *see also* Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 506 (2008).

118. *See, e.g.,* Maggie Stiefvater: *The Official Blog: FAQ*, *supra* note 22. At least one author encourages commercialization of fanfiction based on his world. *See* Amazon Publishing, *supra* note 101.

or community without the need to engage in actual litigation.<sup>119</sup> Commercial fanfiction may change the calculus. In cases where a fan author is making a significant profit from unauthorized fanfiction, and the copyright holder objects, the parties may be prepared to litigate to determine their respective rights. In such a scenario, courts will be forced to balance the extent to which the transformativeness of the secondary work outweighs the commercial profit motives of its creator.

4. *Second Fair Use Factor: Nature of the Copyrighted Work.*

The second fair use factor—relating to the nature of the copyrighted work<sup>120</sup>—will usually be of little help in resolving fanfiction cases. The factor supports the idea that some kinds of works should be more available to copy than others<sup>121</sup> to achieve the utilitarian copyright balance of promoting innovation in society generally.<sup>122</sup> To this end, functional and factual works receive narrower protection under this factor than highly expressive or artistic works.<sup>123</sup> Because this factor focuses on the nature of the underlying copyrighted work, rather than the actual uses made of it by the defendant, it will likely apply in the same way regardless of whether a fanfiction activity is commercial or noncommercial. It is thus not particularly relevant to a discussion of the impact on copyright law of commercializing fanfiction. The underlying works are likely to be fictional and thus toward the more copyright-protective end of the spectrum of the second fair use factor. Professor Tushnet suggests that the second fair use factor may, in fact, be irrelevant to the fanfiction discussion.<sup>124</sup> To the extent it is relevant, it will likely weigh against fanfiction authors. Regardless of which approach is correct, the commercialization of a fan-work will not affect the application of the second fair use factor.

5. *Third Fair Use Factor: Amount and Substantiality of the Portion Used.* The third fair use factor requires courts to consider the amount and substantiality of the portion of the plaintiff's work used by the defendant.<sup>125</sup> It incorporates both a qualitative and a quantitative inquiry.<sup>126</sup> A quantitatively small reproduction of material that goes to the heart of the plaintiff's work may tip this factor against the use as a fair use.<sup>127</sup> While this fair use factor raises some similar issues to the question of "substantial similarity" at the infringement stage, it arises at a different time—after infringement has been established.<sup>128</sup> Thus,

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119. Tushnet, *supra* note 9, at 664 (noting that most fanfiction authors do not have the wherewithal to contest a demand letter sent by a copyright owner).



according to Professor Leaffer: “This factor properly focuses on whether the defendant has taken more than is necessary to satisfy the specific fair use purpose.”<sup>129</sup>

This can be a difficult question to answer in the fanfiction context. Much will depend on the nature of the specific fan-work in question. In focusing on the copyrightability of characters, Professor Tushnet notes that it is difficult to analyze the third fair use factor with respect to fanfiction.<sup>130</sup> It is a challenge to identify the quantity and quality of what is “taken” from the original work for the purposes of the third fair use factor. Does the character comprise the entire copyrighted work? Does the character effectively comprise the story in the sense that character and plot are integral parts of a unified whole? This factor will provide significant challenges for fair use analysis regardless of whether the fan-work is made for commercial or noncommercial purposes. Because of these challenges, Professor Tushnet has suggested that perhaps the third factor is simply “too indeterminate in a productive use context to be weighed heavily.”<sup>131</sup>

Professor Tushnet’s suggestion has some merit. If we accept that noncommercial fanfiction has been tolerated (and even considered by many to be fair use) precisely because it isn’t likely to compete with the copyright holder of the source work, then that may be an argument for focusing analysis on the first and fourth fair use factors even in the case of commercialized

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120. 17 U.S.C. § 107(2) (2012).

121. LEAFFER, *supra* note 83, § 10.08, at 497 (“The second factor reflects the view that to support the public interest greater access should be allowed to some kinds of works than others.”).

122. *Id.* § 1.06, at 17 (noting the utilitarian justifications for American copyright law with specific reference to placing “consumer welfare in the forefront, treating reward to authors primarily as a means to that end”).

123. *Id.* § 10.08, at 497 (“Because the ultimate goal of copyright law is to increase our fund of information, the fair use privilege is more extensive for works of information such as scientific, biographical, or historical works than for works of entertainment.”); Tushnet, *supra* note 9, at 676 (“Under the second fair use factor, fictional sources get more protection than facts.”).

124. Tushnet, *supra* note 9, at 676–77 (“Like parody . . . fan fiction is unlikely to be written about factual narratives; therefore, this fair use factor may simply be irrelevant to the analysis.”).

125. 17 U.S.C. § 107(3).

126. LEAFFER, *supra* note 83, § 10.09, at 500 (“Questions of amount and substantiality of use have a qualitative, as well as quantitative, dimension.”).

127. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

128. LEAFFER, *supra* note 83, § 10.09, at 499.

129. *Id.*

130. Tushnet, *supra* note 9, at 677.

131. *Id.* at 678.

fanfiction. Detailed discussions of the amount and substantiality of the portion of the source work used in a fanfiction case are likely to be costly, and are unlikely to lead to any clear guidelines that may be referenced across the fanfiction spectrum. Undoubtedly some fanfiction takes objectively “more” from a source work than other fanfiction in terms of characters, plot points, and settings, but is this distinction really helpful in determining fair use?

Even if we do undertake this exercise, it seems likely that there will be strong arguments in many cases that the amount taken is appropriate to the use if we accept that most fanfiction is written for expressive purposes and to allow readers to engage actively with their favorite fictional worlds. It would seem that a strong argument could be made in favor of quite significant “taking” from a source work to engage in these purposes. Again, the pressure point for copyright holders is more likely to be the extent to which the fanfiction author was making an unauthorized profit from the source work. To what extent did she use the source work to attract attention to a competing unauthorized commercial endeavor, or to encroach into the value of—or a potential market for—the source work? These are all issues appropriately addressed under the first and fourth fair use factors. Thus, there is merit to an approach that gives the third fair use factor little weight in a fanfiction situation.

6. *Fourth Fair Use Factor: Effect of the Use on the Potential Market for or Value of the Work.* The application of the fourth fair use factor to fanfiction is where things become more complicated. This factor concerns the effect of the defendant’s use on the potential market for or value of the copyrighted source work.<sup>132</sup> This factor is sometimes referred to as the most important fair use factor because it goes to the underlying economic incentives for creating and distributing copyrighted works.<sup>133</sup> Historically, the fourth factor has been concerned with questions of market substitution: to what extent will the defendant’s use diminish the potential sale of the work, its marketability, or fulfill a demand for that work?<sup>134</sup>

Fanfiction does not operate as a market substitute for a source work, but rather a complement to it. Fanfiction may well drive additional consumer interest in the original work, rather than detract from it. However, the fourth fair use factor also contemplates

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132. 17 U.S.C. § 107(4) (2012).

133. LEAFFER, *supra* note 83, § 10.10, at 500.

134. *Id.*

*potential* market harm as mitigating against fair use. In this sense, copyright holders have in the past argued that if the defendant is, for example, offering a service that the copyright holder could have licensed, this mitigates against fair use.<sup>135</sup> The existence of licensing schemes for copyright works—such as lyric reprint licenses and synchronization licenses for music,<sup>136</sup> and reprint licenses for academic textbooks<sup>137</sup>—have been significant factors in holdings *against* fair use under the fourth factor in the past.

This argument may have particular resonance in the context of the *licensed* commercial category of fanfiction, such as the Kindle Worlds program. Where an existing licensing scheme is in place for the creation of fan-works in a particular fandom (e.g., the *Gossip Girl* universe under Kindle Worlds), that might support the argument that other fan-works based on the relevant source work do not satisfy the fourth fair use factor.

Even outside the licensing context, it may be argued that unauthorized fanfiction affects the market for derivative works based on a source work.<sup>138</sup> Holders of copyrights in literary works have historically made money from licensing rights to various derivative works, including authorized prequels and sequels.<sup>139</sup> Allowing the creation and dissemination of unauthorized derivative works in the fanfiction context arguably encroaches on the licensing market for such works. One problem with accepting this argument is that it effectively cuts off avenues for much creative work that would not be licensed by the copyright holder because of its content. While Margaret Mitchell's estate has licensed several derivative works based on *Gone with the Wind*,<sup>140</sup> they fought to stop the sale of Alice Randall's *The Wind Done Gone* because it was not faithful to their conception of the story and its characters.<sup>141</sup> In the course of the litigation,

135. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (“[S]ince there currently exists a viable market for licensing these rights . . . it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis.”).

136. For a discussion of these classes of licensing schemes, see LEAFFER, *supra* note 83, § 10.10, at 501.

137. See, e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1237 (N.D. Ga. 2012) (“This Court agrees . . . that where excerpts are reasonably available, at a reasonable price, it is only fair for this fact to be considered in determining whether Defendants’ unpaid uses of excerpts constitutes fair use.”).

138. Tushnet, *supra* note 9, at 670.

139. See *id.* at 672 (discussing official licensed derivative works in the *Star Trek* franchise).

140. See, e.g., DONALD MCCAIG, RHETT BUTLER’S PEOPLE (2007); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259, 1274 (11th Cir. 2001).

141. See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1363–64 (N.D. Ga.), *rev’d*, 268 F.3d 1257 (11th Cir. 2001) (discussing the terms to which the Mitchell Trust usually agreed for derivative works).

Mitchell's estate argued under the fourth fair use factor that *The Wind Done Gone* interfered with its licensed derivative works market.<sup>142</sup>

Professor Tushnet and others have likewise identified this problem with an application of the fourth fair use factor that potentially reserves the derivative works market to the copyright holder.<sup>143</sup> Professor Tushnet notes that much fanfiction does not actually threaten the copyright holder's derivative works markets because it explores plot possibilities "generally refused by copyright [holders]."<sup>144</sup> Fanfiction often adds romantic<sup>145</sup> or erotic elements<sup>146</sup> that would not be sanctioned by the copyright holders in authorized works. It is not uncommon for characters to die in fanfiction where the copyright holder would not license a work where the character died, as it would signal the end of that character's story.<sup>147</sup>

Professor Tushnet has also noted that even where a copyright holder does not monopolize all downstream markets for her works, the copyright holder continues to thrive economically. She notes that the sale of officially licensed derivative *Star Trek* works continues to thrive despite the enormous amount of *Star Trek* fanfiction available.<sup>148</sup> While Professor Tushnet presupposed that fanfiction was largely noncommercial at the time of making that observation,<sup>149</sup> it is possible that the commercialization of fanfiction will not make significant inroads into the economics relating to the fourth fair use factor.

Even where unlicensed fanfiction is commercialized, there may be no significant impact on the value of, or potential market for, the source works for the very reasons recognized by Professor

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142. *Suntrust Bank*, 268 F.3d at 1275 ("[S]untrust focuses on the value of [*Gone with the Wind*] and its derivatives, but fails to address and offers little evidence or argument to demonstrate that [*The Wind Done Gone*] would supplant demand for Suntrust's licensed derivatives.").

143. Tushnet, *supra* note 9, at 670–71 ("Copyright law does not grant copyright owners exclusive rights to all markets for their goods. One must define the market to which a copyright owner is entitled before deciding whether there is a significant market effect.").

144. *Id.* at 670.

145. *Id.*

146. For example, *The University of Edward Masen* and *Master of the Universe* are based on *Twilight*. Justine Ashley Costanza, 'Twilight' Inspired Erotica to be Published; Fanfiction Based on the Series Becomes a Genre, INT'L BUS. TIMES (Nov. 8, 2012), <http://www.ibtimes.com/twilight-inspired-erotica-be-published-fanfiction-based-series-becomes-genre-865476>.

147. Tushnet, *supra* note 9, at 670–71.

148. *Id.* at 672.

149. *Id.* at 654 ("Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction . . . is noncommercial . . .").

Tushnet in relation to noncommercial fanfiction. The fan-works may increase interest in the original works, rather than detract from them. And the secondary works certainly will not serve as direct market substitutes for the original works. In many cases, the derivative works may not be the kinds of works that the copyright holders would have licensed in the first place as they may incorporate story elements that would not be approved by the copyright holders. Thus, the commercialization of unlicensed fanfiction may not necessarily have the kind of impact on the underlying work that the fourth fair use factor typically contemplates.

The more significant aspect of commercialized fanfiction—at least with respect to the fourth fair use factor—is the recent availability of fanfiction licenses under programs like Kindle Worlds. If courts maintain the presumption that the existence of a licensing market mitigates against fair use under the fourth factor, that may provide a chilling effect on some fan-works. Where, for example, people want to write fanfiction but do not wish to comply with what some may consider restrictive license terms under a program like Kindle Worlds, their fan activities may be chilled if the program itself creates a presumption that nonlicensed work is not a fair use. These issues are considered in more detail in Part IV.

#### IV. COPYRIGHT AND THE COMMERCIALIZATION OF FANFICTION

*With the success of Alternate Universe fan fiction and the successful leveraging of that fandom into seven figure economic rewards, the influx of fan fiction into professional publishing is likely to begin at greater levels than previous. Some publishers give public guides as to how to disguise one's fan fiction.*<sup>150</sup>

##### A. *Unlicensed Commercial Fanfiction*

1. *Prima Facie Infringement.* As noted in Part III, commercialized fanfiction, like any work based on another's original work, can be either licensed or unlicensed. The ability to legally license a work can be highly relevant to the application of the all-important fourth fair use factor,<sup>151</sup> and may, in many circumstances, prove decisive in an infringement suit. Thus, licensing systems for fanfiction, such as Kindle Worlds, may have a significant impact on the market. Before turning to the operation and impact of licensing systems on commercial fanfiction, it is worth considering the extent to which unlicensed

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150. Litte, *supra* note 27.

fan activities might be copyright infringement in the absence of considerations about the availability of licenses.

A useful exercise in analyzing the legality or otherwise of unlicensed commercial fanfiction is to consider some recent examples of the practice. Some of the more obvious examples are *Fifty Shades of Grey* and *Gabriel's Inferno*. The authors of these works originally wrote them as noncommercial fanfiction riffing off Stephenie Meyer's best-selling *Twilight* series of books. The original noncommercial fanfiction version of *Fifty Shades of Grey* was entitled *Master of the Universe* and *Gabriel's Inferno* was initially *The University of Edward Masen*, its title openly referring to the name of one of the lead characters in *Twilight*.<sup>152</sup> There is some debate about the extent to which the authors of these secondary works rewrote the substance of their texts between writing the original noncommercial fanfiction versions and commercially publishing their best-selling erotic fiction works<sup>153</sup> to distinguish them from the original works. While neither series was expressly marketed as fanfiction, the origins of each as noncommercial *Twilight* fanfiction were well-known and have been well-documented.<sup>154</sup>

As noted in Part III, putting the fair use defense to one side, traditional noncommercial fanfiction is likely to amount to a *prima facie* infringement of the reproduction, derivative works, and public distribution rights exclusive to the copyright holder. Traditional fanfiction openly borrows copyrightable characters, settings and plot points. To create the secondary works, fanfiction authors effectively have to engage in a borrowing of copyrightable elements of the original works, thus potentially infringing the reproduction rights of the copyright holders of the source works. Even if that were not the case, the fan-works would likely amount to "derivative works"—works based on the original works. As soon as a fanfiction work is made available in a fanfiction community or more openly on the Internet, the public distribution right is likely also infringed.

What apparently would save most fanfiction from infringement would likely be the fair use defense—with particular focus on the first and fourth factors. As noted in

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151. See discussion *supra* Part III.B.6.

152. Edward Masen would be the name of Edward Cullen, the vampire hero from Stephenie Meyer's *Twilight*, prior to being turned into a vampire. Meyer identifies his human mother's name as "Elizabeth Masen." MEYER, NEW MOON, *supra* note 4, at 38–39.

153. See Boog, *supra* note 71; Costanza, *supra* note 146 (discussing the extent to which a number of commercially published *Twilight* fanfiction stories differ from the source text); Litte, *supra* note 27.

154. See, e.g., Costanza, *supra* note 146.

Part III, it appears to be accepted as a general proposition that noncommercial fanfiction is a fair use.<sup>155</sup> Even though some copyright holders would not agree with this approach, there is a strong argument that noncommercial use that has little demonstrable negative impact on the value of or potential market for the original work is a fair use.

How does the paradigm differ with respect to unlicensed commercial fanfiction in terms of both infringement and the potential availability of the fair use defense? In terms of infringement, the consideration of the reproduction and derivative works rights (on which an infringement of the public distribution right hinges) differs in the context of unlicensed commercial works like *Fifty Shades of Grey* because the copyrightable elements of the source work are less immediately obvious in the secondary work than in traditional noncommercial fanfiction. Authors like E.L. James and Sylvain Reynard will generally change character names and potentially also settings when seeking to publish their works commercially. Thus, the character of Edward Masen in the noncommercial *University of Edward Masen* fanfiction becomes Gabriel Emerson in *Gabriel's Inferno*, and his innocent love interest is Julianne Mitchell.<sup>156</sup> In *Fifty Shades of Grey*, Edward Cullen and Bella Swan become Christian Grey and Ana Steele.<sup>157</sup> Plot points and settings may additionally be altered to differentiate the secondary work from the original prior to commercial publication.

Thus, it may be that the final product is less likely to amount to prima facie infringement of the reproduction right than traditional noncommercial fanfiction that typically does retain the character names and other copyrightable material from the original work. Of course, it is possible for a secondary work to infringe the reproduction right even where the author changes character names. In *Suntrust Bank v. Houghton Mifflin Co.*, Judge Birch held that despite the fact that Alice Randall changed the characters' names from *Gone with the Wind* in her secondary work, *The Wind Done Gone*, she had prima facie infringed the reproduction right because the new work exploited sufficient copyrightable elements of the original—character traits, storylines, and settings—to be substantially similar to the original work.<sup>158</sup> The work was nevertheless held to be a fair use of Margaret Mitchell's original literary text as a parody of the original.<sup>159</sup>

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155. See Lipton, *supra* note 114, at 984.

156. See Boog, *supra* note 71.

157. See Jamar & Glenn, *supra* note 19, at 969 n.49.

158. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266–67 (11th Cir. 2001).

159. *Id.* at 1272, 1276.

Regardless of whether there is *prima facie* infringement of the reproduction right in a commercial fanfiction situation, there would likely be the potential for an infringement of the derivative works right. A work that was expressly created as an homage to the original will likely be a derivative work even in many cases where it is revised by its author to alter characters, settings, and plot points to distinguish it from the original. In some cases, the origin of a commercially published work as derivative fanfiction may be well hidden if the author publishes it under a name unassociated with her fanfiction author persona and rewrites it to the extent that no one familiar with the original fanfiction could make the connection between the two works. But in the current day of digital plagiarism-detection and text comparison services,<sup>160</sup> it is very likely that someone would notice the similarities.

Assuming a likelihood of infringement of either or both the reproduction or derivative works rights in many, if not all, unlicensed commercial fanfiction cases, an infringement of the public distribution right would also be made out once the work was distributed commercially. The next step in the copyright infringement analysis would be to consider the application of the fair use defense to unlicensed commercial fanfiction and the extent to which the application of the defense might differ here from the way it might apply to noncommercial fanfiction.

However, before engaging in a fair use analysis, it is worth noting that despite the wild popularity of some unlicensed commercial fanfiction,<sup>161</sup> copyright holders have not yet litigated against creators and publishers of these works. It may be too early in the day to see litigation or there may be other factors in play that affect the litigation calculus. While there is little obvious information available to explain the lack of litigation with respect to unlicensed commercial fanfiction, there is some anecdotal evidence as to why it is tolerated by copyright holders.

Some potential reasons to explain the lack of litigation include the following. Commercialization, particularly successful commercialization, of fanfiction may attract more attention to the original source works which may lead to increased sales of those works. Infringement litigation would be a costly endeavor at a time the publishing industry is fighting various new legal

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160. See Lipton, *supra* note 20, at 596–97, 620.

161. As acknowledged in Part IV.A.2, *infra*, the term “unlicensed commercial fanfiction” is somewhat of a misnomer in this context as the works are not expressly marketed as fanfiction, although their provenance is well known. However, the term is employed for the purposes of this discussion because of the difficulties inherent in devising a more accurate term that encapsulates the issues on which this Article focuses.



battles<sup>162</sup> and commercial fanfiction is not a top priority for the industry in this context. Infringement may be difficult to prove particularly in cases where publishers have taken care to ensure that the final published version of a secondary work is significantly different from the original work. Some copyright holders, particularly author-copyright holders, may be flattered by the homage to their work or may understand that the artistic process relies on the borrowing of preexisting works and do not begrudge others using their works.

With respect to the final point, some authors of successful works have articulated support, or at least lack of concern about, authors of secondary fan-works profiting commercially from them. When asked about the *Fifty Shades of Grey* phenomenon, Stephenie Meyer took the view that *Fifty Shades* author E.L. James obviously had a story in her that would have come out one way or the other and Meyer had no objection to it being loosely based on her own work.<sup>163</sup> Author of the best-selling *Silo* saga, Hugh Howey, went as far as encouraging authors of fanfiction based on his work to self-publish their works commercially.<sup>164</sup>

2. *Fair Use.* If unlicensed commercial fanfiction does become the subject of infringement litigation, the fair use defense will likely take center stage in determination of the cases, most notably the first and fourth factors, although some weight may also be given to the third factor. As noted above, the second factor should either be given little weight or will mitigate against fair use.<sup>165</sup> The nature of the copyrighted work will be the same regardless of whether the defendant's activities are commercially motivated or not.

The application of the first fair use factor raises newer issues for unlicensed commercial fanfiction than would arise with traditional noncommercial fanfiction. A commercial use is much less likely to be a fair use than a noncommercial use. However, most of the commercial fanfiction works we see in the market today are highly transformative of the original work. For example, *Fifty Shades of Grey* and *Gabriel's Inferno* recast the plot of *Twilight* in a much more adult and overtly sexual context.

162. For a discussion of these legal battles, see Lipton, *supra* note 20, at 601–08.

163. Fallon Prinzivalli, *'Fifty Shades of Grey': Stephenie Meyer Speaks Out*, MTV NEWS (May 29, 2012), <http://www.mtv.com/news/1685954/fifty-shades-of-grey-stephenie-meyer/> (“‘It might not exist in the exact form that it’s in,’ Meyer said. ‘Obviously, [James] had a story in her, and so it would’ve come out in some other way.’” (alteration in original)).

164. See Amazon Publishing, *supra* note 101.

165. See *supra* Part III.B.4.

Of course these books do not add the kinds of insights into the original work as, say, a traditional parodic fair use might. Retelling *Gone with the Wind* from the point of view of the slaves likely has more social benefit here than retelling a naïve teen paranormal romance as a contemporary erotic romance.

Nevertheless, the erotic romance examples are likely only the tip of the iceberg in relation to the kinds of unlicensed commercial fanfiction we could see in the future. The fact that these specific secondary works are not as transformative (in the socially beneficial sense) as some works that have been held to be transformative in past cases does not mean that commercial fanfiction can never satisfy the transformativeness test under the first fair use factor. Thus, in unlicensed commercial fanfiction cases, the commercial aspect of the secondary work will mitigate against fair use while the transformativeness question will rely on the specific fanfiction works under consideration in any given case.

The third fair use factor may become problematic in the unlicensed commercial fanfiction context. With respect to traditional noncommercial fanfiction, this factor will likely either weigh against fair use or will be neutral for the reasons discussed in Part III. One cannot write traditional fanfiction without drawing substantially from the copyrightable elements of the underlying work. Thus, by definition, a significant amount must be taken from the original to create a fanfiction work. This is not necessarily the case for unlicensed commercial fanfiction.

While the traditional noncommercial fanfiction author is expressly seeking to have her work identified with the original, the commercial author is seeking to do the opposite—to distance her work from the original and establish herself as the author of an original piece of commercial fiction, despite its fanfiction origins. Thus, while the traditional fanfiction author will emphasize the similarities to the original work while disclaiming infringement, the commercial secondary work author will de-emphasize those elements and diminish their importance in the finished product. The extent to which she is successful in doing so may be decisive in the application of the third fair use factor. Again, as with the “transformativeness” aspect of the first fair use factor, this inquiry will be case specific and will raise challenging evidentiary issues for courts and litigants.

As noted previously, the public dissemination of noncommercial fanfiction may well have little to no impact on the value of, or potential markets for, the copyrighted work under the fourth fair use factor. Fanfiction does not typically operate as a market substitute in a primary market, and the availability of

noncommercial fanfiction may in fact have little impact on the market for commercially licensed sequels, prequels, and retellings of copyrighted works.<sup>166</sup> Such secondary work may actually increase consumer interest in, and sales of, original works.<sup>167</sup> The question is whether the commercialization of works originally created as noncommercial fanfiction changes the equation under the fourth fair use factor. While it is at least arguable that noncommercial fanfiction does not encroach into the market for licensing authorized derivative works based on the original work, can the same be said when the fanfiction activities become commercial?

If an author can make more money commercially publishing a work based on an existing work *without* a license, why would she seek a license from the copyright-holder of the original work? Thus, the licensing market may be negatively impacted. Conversely, if the copyright holder would object to the content of the secondary work and would refuse a license, could the author of the secondary work argue that she is not encroaching on a market reserved to the copyright holder because it is not a market that the entity would have exploited anyway? As with the “transformativeness” issue under the first factor and the “amount taken” issue under the third factor, these questions will arguably be more difficult to resolve than may be the case for traditional noncommercial fanfiction.

3. *Conclusions on Copyright Infringement and Unlicensed Commercial Fanfiction.* Unlicensed commercial fanfiction is potentially problematic for copyright law in a number of respects, and it’s worth admitting here that it may be a misnomer to refer to it as fanfiction at all. Where the author has ceased to represent her work as fanfiction and instead is attempting to commercialize it as an original work, the fanfiction label may be inapposite. However, for the purposes of this discussion, it is difficult to devise a different term that incorporates the origins of the new works as fanfiction.

The first issue for the commercialization of this kind of writing is that in the absence of clear legal guidance on the origins of the practice—traditional noncommercial fanfiction—

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166. Tushnet, *supra* note 9, at 672.

167. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1281–82 (11th Cir. 2001) (Marcus, J., concurring) (“It is . . . possible that *The Wind Done Gone* will act as a complement to, rather than a substitute for, *Gone With the Wind* and its potential derivatives. Readers of Randall’s book may want to refresh their recollections of the original. It is not far-fetched to predict that sales of *Gone With the Wind* have grown since *The Wind Done Gone*’s publication.” (footnote omitted)).

there is little basis for formulating clear copyright guidelines with respect to its commercialization. The above analysis of the application of copyright law to these kinds of secondary works suggests that if copyright holders bring infringement suits, courts will be faced with very difficult challenges, particularly in application of the first, third, and fourth fair use factors.

The lack of litigation at present is also unhelpful in that it's too early in the development of the market for unlicensed commercial fanfiction to say whether the lack of lawsuits indicates anything about attitudes to copyright infringement. Copyright law, particularly the fair use defense, is unhelpful in giving guidance in the context of emerging markets like this. As the fair use defense is intended to be applied flexibly, it is difficult to give authors and publishers of commercial works based on prior fan-works clear upfront guidance on the likelihood of copyright infringement. While there is judicial precedent available on the commercialization of other kinds of derivative works based on literary works—such as unauthorized lexicons<sup>168</sup> and parodies<sup>169</sup>—there is no judicial guidance yet on works intended initially as an homage to the original. And, unlike the situation with noncommercial fanfiction, there is much at stake for authors of commercial fanfiction. In recent years, fanfiction authors, even smalltime self-published fanfiction authors, have been able to eke out a living from their endeavors and may well face bankruptcy if subject to an infringement suit.<sup>170</sup> At the very least, they may have to cease their endeavors if faced with a demand letter from a copyright holder.

While questions of copyright infringement when commercializing work originally devised as fanfiction remain unresolved, the development of licensing schemes for fanfiction may become as problematic as it is innovative. The following discussion considers the impact of licensing schemes such as the Kindle Worlds program on copyright paradigms in the fanfiction context.

### *B. The Impact of a Licensing Regime on Fanfiction*

The Kindle Worlds program is a wonderful example of an innovative platform that utilizes licensing to enable fans to

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168. See, e.g., *Warner Bros. Entm't Inc. v RDR Books*, 575 F. Supp. 2d 513, 535 (S.D.N.Y. 2008).

169. See, e.g., *Suntrust Bank*, 268 F.3d at 1259, 1276–77.

170. See *Amazon Publishing*, *supra* note 101 (showing Hugh Howey making the point that some self-published fanfiction authors have been able to support themselves with their fan writing).

unambiguously and legally commercialize their fan-works, at least in the worlds licensed by Amazon and under the license conditions that do impact content and ownership of fan-works. Amazon is not the only entity that has ventured into licensing arrangements for fanfiction. Even in the days of largely noncommercial fanfiction, some copyright holders engaged in licensing for fan-works. Lucasfilm historically licensed copyrightable elements of its *Star Wars* franchise for predominantly noncommercial purposes.<sup>171</sup>

The advantages of licensing are that it avoids doubt about the terms under which original works can be used and it encourages secondary creativity while removing the threat of copyright infringement. The disadvantages are that creativity may be restricted under the terms of the license. For example, under Kindle Worlds, characters and settings from one fandom may not be combined with those from another.<sup>172</sup> Copyright holders of original works also promulgate “content guidelines” for fanfiction that are enforced by Amazon.<sup>173</sup> While this is perfectly acceptable as a matter of licensing law, it is not copyright law’s traditional purpose to protect the reputation of a work in terms of unauthorized content that may subsequently be based on the original.<sup>174</sup>

Additionally, licenses may state that copyright of all the fan author’s work vests in the original copyright holder or at least that the copyright holder obtains an exclusive license to the content, regardless of whether that would be the case under existing law.<sup>175</sup> Additionally, an original copyright holder may take rights to further commercialize, and create new derivative works, based on fan-works, without compensating the fan author under a contract.<sup>176</sup> Thus, if E.L. James had initially published her work under such a licensing scheme,<sup>177</sup> she could not have

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171. See Jeff Petersen, *Lucasfilm Sets Record Straight on Star Wars Expanded Universe*, NEWSOK (May 8, 2014), <http://newsok.com/lucasfilm-sets-record-straight-on-star-wars-expanded-universe/article/4747939>.

172. See *Kindle Worlds FAQs: Content Guidelines and Review Process*, *supra* note 36.

173. *Id.*

174. This was expressly recognized by Judge Marcus in his concurring opinion in *Suntrust Bank*, 268 F.3d at 1280–81 (Marcus, J., concurring).

175. See, e.g., *Kindle Worlds Publishing Agreement*, *supra* note 34, § 3(a) (describing the rights system used in Kindle Worlds including the original owner of the work granting Kindle Worlds the right to allow fanfiction writers to participate).

176. See, e.g., *id.* § 4(b) (stating that the new elements of fanfiction can be used by the “World Licensor” who is the owner of the original intellectual property).

177. For avoidance of doubt, it is worth noting that the *Twilight* franchise is not part of the Kindle Worlds program and there are no official authorized *Twilight* fandoms. In fact, Summit Entertainment, copyright holder of the *Twilight* movie franchise, has protected its rights aggressively in the past. See, e.g., Lipton, *supra* note 57, at 37.

obtained the commercial success she later achieved as an independent author. Her work would have belonged to the copyright holder. Interestingly, under the Kindle Worlds license, Amazon itself receives *an exclusive irrevocable license* in the fan-created works.<sup>178</sup>

Further, a license will typically restrict the profits the fan author can make from her work. Under Kindle Worlds, for example, a fanfiction author earns about half the royalties that a traditionally self-published author on Amazon would earn.<sup>179</sup> This seems to make logical sense—a cost of the license is the loss of royalties. However, it doesn't take into account the fact that if fanfiction authors could effectively claim fair use for a commercialized fan-work, they could double their royalties. An author confident of arguing that her fanfiction was not a copyright infringement could make twice the money of an author availing herself of a Kindle Worlds license: for example, by publishing as an independent author under a platform like Kindle Direct.<sup>180</sup> With no *ex ante* clarity about the extent to which a commercial fanfiction work without a license is a fair use, fanfiction authors will likely gravitate to licensing services, where available, and thus significantly lower their own potential profit margins, as well as surrender much of their commercial control over their work.

Additionally, authors within fandoms for which there is no licensing market might find themselves in an invidious position. Does the fact that licensing markets are available with respect to *some* existing works create a presumption that commercializing fanfiction for *other* works is an infringement? Or does it potentially help the fanfiction author's position under the fourth factor of the fair use defense? Courts have traditionally held that the availability of a license scheme, and the defendant's failure to obtain a license when a license is available, mitigates against fair use.<sup>181</sup> If fanfiction licenses are available for, say, *Divergent*, but not for *The Hunger Games*, does that mean that an author writing unlicensed commercial *Divergent* fanfiction might have a lesser chance of satisfying the requirements of the fourth fair use factor than the same writer focusing on the world of *The Hunger Games*?

One reason why schemes like Kindle Worlds are likely to obtain significant traction, and likely to have more copyright holders and fanfiction authors avail themselves of the service

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178. See *Kindle Worlds Publishing Agreement*, *supra* note 34, § 4(a).

179. See *Kindle Worlds FAQs: Sales, Royalties, and Payments*, *supra* note 32; *Kindle Direct Publishing*, *supra* note 30.

180. See *Kindle Direct Publishing*, *supra* note 30.

181. See discussion *supra* Part III.B.6.

in the future, is that Amazon is operating in what is presently a legal vacuum. It has simply never been clear to what extent fanfiction was legal at all, especially if distributed commercially. The Kindle Worlds program removes this uncertainty, but replaces it with a set of terms over which fanfiction writers have little to no bargaining power. In other words, in seeking to help fanfiction authors, Amazon may inadvertently have put more power into the hands of copyright owners than the law would give them otherwise. Nevertheless, there is no way to apply the law to fanfiction in a cost-effective way that would give upfront guidance to those engaging in fan-writing, particularly those who aspire to commercialize that writing.

As with many developments in the digital publishing industry, the development of online licensing schemes to facilitate the commercialization of traditional fanfiction is in its early stages. It is too soon to say with any certainty what impact it will have on the creation and distribution of either noncommercial fanfiction or the likelihood that more authors will attempt to publish works initially drafted as fanfiction as their own independent creations. Programs like Kindle Worlds are innovative and serve the benefit of promoting fanfiction that is clearly and indisputably legal, as well as creating new expressive fan communities online. However, the downside of programs like this is that they potentially create market assumptions about copyright infringement and market share that may not arise in the absence of such schemes. Overall, they fill an obvious gap where there is uncertainty about the legality of commercializing fanfiction in the absence of a license. Nevertheless, they do so at a cost.

Currently, with little legal guidance available outside of licensing as to which fan activities are copyright infringements and which are not, contract may be the answer to a problem that cannot realistically be resolved in any other way. Contractual licensing has certainly proved useful in other areas where there was previously confusion and concern about the application of copyright law. An obvious example is peer-to-peer file sharing and unauthorized digital downloading of copyright content. Apple's iTunes and Google's GooglePlay, for example, are legal alternatives to unauthorized downloading of digital content the cost basis of which proved acceptable to consumers of online content.<sup>182</sup>

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182. See Brief for Viacom Inc. at 19, *Am. Broad. Cos. v. Aereo Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 880974 (explaining that numerous online services, including Google Play and iTunes, are online, licensed services).

However, several notable differences can be identified between the digital downloading context and the fanfiction context. A key difference is that cases involving digital content downloading were litigated *prior to* the advent of licensing schemes authorized by content owners. Thus, by the time the authorized licensing services were developed, the industry and consumers had clear guidance as to what online activities amounted to copyright infringement. Most unauthorized digital file-sharing and downloading services were held not to be fair uses,<sup>183</sup> thus making it clear that authorized licenses were the legal option.

Another difference between the digital downloading and fanfiction contexts with respect to the advent of content licensing is that the former involves unauthorized dissemination of verbatim copies of works, rather than development and dissemination of transformative creations based on the original works. In many ways, digital distribution of literal copies of protected works is a much easier case than the creation and dissemination of new works based on existing works. Under the constitutional conception of copyright, the law is intended to foster creativity and overall to increase the sum of creative works available within society.<sup>184</sup> Thus, requiring a license to create and disseminate transformative works like fanfiction raises more challenging issues than requiring a license to disseminate literal copies of existing works.

If projects like Kindle Worlds create a presumption that fanfiction activities are required to be licensed, such a presumption might chill the creation of such works, even for noncommercial purposes. The idea behind releasing licensing schemes for fanfiction into the digital publishing world contains many obvious benefits. However, it will be important for lawmakers and commentators to carefully observe the developments in this segment of the publishing industry to ensure that the licensing mechanisms do not have unintended adverse consequences.

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183. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016–17 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

184. LEAFFER, *supra* note 83, § 1.06, at 17 (describing utilitarian purposes of copyright law in the United States and Great Britain).



## V. CONCLUSION

As noted in the Introduction, the aim of this Article has been to raise issues for discussion, rather than to propose definitive solutions. It is simply too early in the development of commercial avenues for fanfiction—or works derived from fanfiction—to come to decisive answers about the extent to which any of these activities should amount to copyright infringement or may be excused by the fair use defense. Additionally, a number of complex interests and perspectives are implicated by the commercialization of fanfiction, not the least of which are important concerns about the balance between proprietary copyrights and First Amendment values relating to the protection of expressive speech in the digital age.

What this discussion hopefully has contributed to literature is a cohesive framework within which to debate issues relating to both noncommercial and commercial fanfiction and an identification of the kinds of speech and commercial interests implicated by fanfiction practices. In particular, concerns about the benefits and potential unintended negative consequences of digital licensing schemes for commercialized fanfiction have been canvassed. Concerns about the negative implications inherent in commercial licensing schemes for fanfiction in many ways echo concerns about copyright holders' superior bargaining position with respect to content licensing more generally. However, fanfiction raises specific problems because the creation and distribution of fanfiction is an area in which there is little legal certainty, but which implicates creative speech in a fundamental way.

At the end of the day, the lack of certainty about the legal position of noncommercial fanfiction has created a gap in the law with respect to the next step in the process—the commercialization of the practice. While derivative literary works, including fanfiction, have been commercialized in the past, this has typically taken place in the context of works that are not copyrighted or whose copyright has lapsed (the works of Shakespeare, Austen, etc.). This fact suggests that derivative fan-works derive from a rich literary tradition. However, where current corporate control of source works is the norm, the secondary fandoms may be adversely affected.

Of course, the simple answer might be that while a work is copyright protected, no one is supposed to be able to make an unauthorized commercial profit from it. However, that argument is a little simplistic and fails to take into account the need for human creativity based on retellings of existing narratives.

Additionally, in some ways it presupposes that copyright owners obtain absolute dominion over their works, which is not the case. It fails to take into account that derivative literary works have been successfully commercialized in the past even in the absence of specific permission by the original work's copyright holder, and often in the context of strenuous objections from the copyright holder.<sup>185</sup>

Fanfiction is not going to go away anytime soon, and the rise of inexpensive and effective self-publishing platforms will encourage at least some fanfiction authors to attempt to commercialize their works. The ability of entities that provide self-publishing platforms to also create licensing schemes, like Kindle Worlds, adds another wrinkle to the equation. The copyright questions raised by all of these activities are widespread and complex, and ultimately global in nature. Of course, we could assume that market forces will take care of the challenges, but that may ultimately put too much power in the hands of the copyright holders, operating often via contract with online intermediaries such as Amazon. Thus, it is worth engaging in debates about the commercialization of fanfiction, and the practice of noncommercial fanfiction more generally, to attempt to ascertain guidelines and norms that may be useful to those engaging in the creation and distribution of fan-works. Hopefully, this Article has served as a useful contribution to the debate, or at least convinced readers that it is worth engaging in such a debate.

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185. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).