



Copyright Law and Fanfiction

Hemendra Singh[†] and Shalinee Vishwakarma

Jindal Global Law School, O P Jindal Global University, Sonapat — 131 001, India

Received: 23rd July 2023; revised: 8th February 2024

Fanfiction is the medium of choice for fans to express themselves, as well as their love for the books they read and the movies and television shows they watch. While it is been around for a while, so much so that even some classics are in a way fanfiction. The cyber space though has truly unleashed fan fiction, making it a hundred times more diverse and so much more accessible to all. This paper will deal with the various cultural effects of fanfiction as well as its effects on the social sphere. It shall look into the legal aspects of fanfiction, the rules of copyright that must be adhered to and those that are often flouted by fans, whether knowingly or unknowingly. It shall look into the issues that arise out of the ease of availability and how this affects children and young teens. Finally, it shall shed some light upon the various aspects of financing fan fiction, the difficulties as well as the possibilities.

Keywords: Fanfiction, Law of Copyright, Defenses, Doctrine of Fair Use, Movies

For as long as there have been fans there has been fanfiction. While the current interpretation of fanfiction arose in the 1960's with Star Trek fans creating their own alternate plots, endings, and epilogues, fanfiction in its essence has been around from some time now. Many literary classics from Dante's *Inferno* to Shakespeare's *Hamlet* have roots in much older stories. However, in the advent of the digital age, the fan universe, or fandom, to use the colloquial term, has expanded like nothing else in this world. And with it so has fan expression and fanfiction. Fanfiction has been made available world over, and through it fans of the same books, movies and television shows have been able to interact with one another. In truth fanfiction is a cultural phenomenon, connecting people with similar interest from whole continents away.

What is Fanfiction?

Imagine finishing a book that is part of a series. Now imagine that the next book that does not release for another year. Of course, no one wants to wait that long. So what do you do? You turn to reading, and eventually writing your own fanfiction. Thousands of fans write their own theories and alternate endings. They add things that they wish had happened. They create unconventional pairings between characters (this is most often known as "shipping"), in what is known as slash fiction. More often than not these pairings tend to be sexual and homoerotic, such

as *Harry/Draco* from the *Harry Potter* series or *Kirk/Spock* from *Star Trek*.¹ They come up with their own theories about how a series will end. A lot of fan fiction is simply taking their beloved characters out of the universe where they reside and placing them in a different setting, or as fandoms call it, an AU (Alternate Universe). Fans take the original material and use it to enhance their own creativity.

From a cultural standpoint, fanfiction can be seen as a means of creating a worldwide community of people with the same interests. Fanfiction writers practically have their own language, using a number of terms that would be incomprehensible to anyone who is not in the know. Terms like canon, AU, shipping, etc. are commonly used by people in a fandom, but would make no sense to an outsider.

Further it is also known to further the abilities of a fan as a writer. While it is widely believed that fanfiction is necessarily poorly written, this is not actually true. For many writings fanfiction is a means of honing their skills as a writer. In fact, several authors, including the likes of Isaac Asimov² and Meg Cabot,³ started out as fanfiction writers.

Copyright Issues arising out of Fanfiction

A question that is most often asked by fanfiction writers is whether or not they are infringing the copyright of the original creator. More often than not the answer to this question is yes. Yes, a copyright has been infringed. Copyright law allows the creator a number of

[†]Corresponding author: Email: hsingh1@jgu.edu.in

exclusive rights, including the rights of reproduction, distribution, performance, display, transmission, as well as the right to produce derivative works. Fanfiction is by its very nature derivative. It must be derived from some original work that the writer is a fan of, otherwise it is not fanfiction at all, it is merely regular fiction. And so, in creating fanfiction, fans are usually in violation of these exclusive rights. In fact, in many cases, the usage of a particular character can even be trademark infringement. For example, a character like James Bond is not only protected by copyright but also by trademark. Of course, where the original creation has passed into the public domain, there can be no infringement. For example, writing fanfiction using characters, plotlines or settings out of *Pride and Prejudice* is not infringement. But in the case of fanfiction based on, say, *Lord of the Rings*, the estate of J.R.R Tolkien is well within its rights to sue the writer.

Different authors have different views on fanfiction. While most tend to be pretty much indifferent,⁴ especially since removing every bit of fan fiction would be nearly impossible, others are in support of fanfiction. Joss Whedon, the creator of *Buffy the Vampire Slayer* has reportedly said that he “loves Fandom”. Authors in support of fanfiction see it as a way of gaining recognition and popularity for their work. Essentially fanfiction furthers the outreach of the fan base. Since fanfiction is usually highly reverential of the work that it is based on, it can hardly be seen as detrimental to the interests of the author.

Some authors are tolerant up to a point. JK Rowling allows for fanfiction, and has reportedly said that she “finds it flattering that people love the characters” as long as it is not sexual or pornographic in nature, a stipulation that goes largely ignored. But there are certain authors who are vehemently opposed to fanfiction in all its forms. Authors like George R R Martin, of *Game of Thrones* fame and Anne Rice, the author of *The Vampire Chronicles* do not want anyone writing anything using their copyrighted original material. Rice has issued a number of complaints requiring websites and online portals to remove all such fanfiction, and she is well within her rights to do so.

Therefore, in general, the reactions of the original creators, to fandom and fanfiction are quite varied. They may love it or hate it. They may also be entirely indifferent.

The truth is that most writers of fanfiction do not know very much about the laws that surround the writing and publication of fanfiction. Very few know anything about the liabilities they incur when the

upload a piece of their writing on an online portal or publish it in a fan magazine or fanzine if you will. As a result, there are a number of common myths when it comes to the relation between copyright law and fanfiction. These include:

Disclaimers Protect the Fan

Most pieces of fanfiction will be headed by a disclaimer stating that the writer does not own any part of the story or any of the characters, and that all rights belong to the original creator. However, this disclaimer cannot exempt a person from infringement. While a disclaimer of this sort may help in mitigating any damage, since it shows a clear intention of not committing infringement, it does not truly offer much by way of protection in a lawsuit. Disclaimers do not create exceptions for the people who have used them, not even if they are children.

Fanfiction is or can be Original

While it is true that any new characters or settings that are created would belong to the fanfiction writer, if this new character cannot exist outside of the original creator’s universe, then the fanfiction cannot be said to be original. It is simple to determine whether the new character is original or not. The writer needs only to ask himself this question. Can this character exist if I remove him from the setting of the book, movie or television series? If the answer is no, the character is not original. Furthermore, if this new character draws his traits from a pre-existing character created by the original author, then the character created cannot be called original and the fan runs the risk of a lawsuit. Of course, stock characters and settings that exist in a particular genre are not copyrightable. Thus, anyone can write a story about a wizard or a werewolf. It is only when such a character starts to take on the specific traits of an existing character that copyright infringement is possible. Again, it must be stipulated that if the traits belong to a character who has passed into the public domain, then they are fair game. Thus, anyone can make a new adaptation of *Romeo and Juliet*, no matter how many such adaptations already exist and when they have been made. Further certain contributions can be protected by copyright if they are the original work of the author but only if they are completely new.

Fanfiction cannot be Plagiarized

It is a commonly held belief that since fanfiction writers do not actually own their content, there is no

question of plagiarism. This however is false. Fanfiction can be plagiarized like any other creative or academic work. This is because copyright is not necessary for plagiarism. Even if a person has no actual rights in a work that work can be plagiarized if the other work is the same of substantially similar to the earlier fanfiction. However, this does not actually mean that a lawsuit in this respect would be successful. Therefore, while fanfiction can be plagiarized, it cannot be defended in a court of law.

Another important question that arises is: What all can be protected by copyright? Where fiction is set in the real world, of course the places used are free for all to use in their fanfiction. But where a fictional place has been created, such as “*Westeros*” from *Game of Thrones* or “*Middle Earth*” from *Lord of the Rings* usage of these places can attract copyright issues.⁵ Similarly certain words or phrases can be copyrighted as they are unique to particular character or piece of fiction. A prime example of this is the phrase “shaken not stirred” commonly used by James Bond. Artifacts that only exist in the universe of the original fiction are all protected by copyright. Of course, specific characters are all copyright protected, but stock characters can be manipulated and used in whatever way a fanfiction writer chooses.

Common Defenses used by Fanfiction Writers

Non-Commercial Nature of Fanfiction

While fanfiction is, in essence, an infringement of copyright, writers do have some defenses available to them. They may not claim ownership in any form but they may defend their usage of the owner’s original work in various ways.

Perhaps the most common argument in favor of the writer is the fact that they do not make any money off it. Fanfiction is rarely commercial in nature. If in anything it provides commercial gain to the original creator not the writer. However, fanfiction as rule does not make any money for the writer. The writer writes fanfiction for no reason other than that they enjoy it. Fanfiction writers upload their work on various online forums like fanfiction.net for free. There is no financial gain for the writer. Nor does the writer ask for or expect any monetary recompense. For the writer, fanfiction is merely a hobby.

Now like every other rule this one also has its exceptions. Probably the most significant of these is the literary juggernaut *Fifty Shades of Grey* by E.L. James. The *Fifty Shades* series which may be classified as

“provocative romance” started out as fanfiction for the *Twilight* series. The series grew from a piece of fanfiction called “*Master of the Universe*”⁶ written under the screen name “*Snowqueen’sIcedragon*”. The popularity of this piece soared and so E.L. James began to rewrite and edit it under her own name. The names of the protagonists were changed, and all elements of vampirism or really anything regarding the supernatural were removed from the storyline. Since romance is a fairly common genre it could hardly be protected by copyright. Following publication the fanfiction it arose from has of course been removed from the internet. Since the piece had been stripped of anything unique to *Twilight*, the series has avoided any major legal issues, thereby successfully exploiting loopholes in the existing Intellectual Property regime. And now there exists a large amount of fanfiction based on *Fifty Shades of Grey* and so we have come full circle.

However, this is still an exception. Almost no fanfiction writer would even attempt to publish commercially, let alone succeed.

Doctrine of Fair Use

Another commonly used argument defending fanfiction is the Doctrine of Fair Use. The Doctrine of Fair Use allows for some amount of leeway for the fan when it comes to liabilities arising from using the author’s original work. Even if the fan has in some way misappropriated the work, if such usage or misappropriation is deemed fair, then the courts will find that there has been no infringement of copyright. There are number of factors that determine whether the usage of some part is fair or not.

Purpose and Character of the Use

Finding fair use is highly dependent on how the element of the original work is being used, whether the use is of a commercial, or is for non-profit or even educational purposes. Generally commercial use will be presumed to be unfair. Therefore, it is for the defendant to prove that this usage is not unfair. This particular factor applies not only to fanfiction, but also to every other kind of fan merchandise. In order for the Doctrine of Fair Use to apply to the derived work, there must be some significant transformation, as well as the possible addition of something new, that serves a different purpose entirely. Perhaps the most commonly cited example of this is the book “*The Wind Done Gone*”⁷ which uses the copyrighted characters from Margaret Mitchells book “*Gone with the Wind*”. While the book made a number of

references to the original work, there was also the addition of various new characters and plotlines that were not explored in the canon. The book was meant to have the effect of criticizing the original work. The additions to the original work had a great effect in transforming the story into a very different tale. It also placed the original characters and situations into an entirely new context. For this reason, the work was deemed to be fair, despite its commerciality as the derived work was seen as sufficiently transformative.

Nature of the Copyrighted Work

In order to protect the copyrighted work, it is necessary to define what the nature of the work is as well as the nature of the copyright protection. Most works that fans write fanfiction about are fiction which is strongly protected. The stronger the protection is, the more heavily this factor weighs in the favor of the creator. Therefore, it is obvious that, due to the nature of the canon work, the chances of finding fair use by the fans are very low.

Amount and Substantiality

The portion of the copyrighted work that has been taken and used by the fan also has a role to play in the determination of fair use. One of the ways of determining this is to find out if the portions that have been taken were necessary for the purpose of their usage. Basically, the question to be answered is- Was too much of the original work taken by the writer in order to write the fanfiction?

This question most often arises in the creation of parodic works. In these cases, the courts must determine if the parody was too dependent on the original. It is important for the courts to tell the difference between what is superfluous for fanfiction or parody, and what is the permissible limit for usage of another person's work? There must be a very clear distinction between artistic opinions and legal opinions. The significance of this particular criteria varies quite widely as there is a wide range of or types of fanfictions.

Effect on the Market of the Canonical Work

This factor does not merely include the market of the copyrighted work. It also includes the effect on the markets of the derivative works. Therefore, any unauthorized work which may have a negative effect on the market of the derivative work shall not be protected by the defense of fair use. Where there is a potential of the fan work giving competition to the original or negatively affecting the market, there can

be no fair use. But where the fanfiction has a positive effect, fair use is available as a defense.

The application of fair use is somewhat uncertain when it comes to fanfiction and other fan works. While some factors generally are in favor of the fans, others are more likely to weigh against them.

Children and Fanfiction

The ease of availability of fanfiction has been hotly debated for many years now. With the advent of the cyber space, fanfiction has become altogether too easy to access. The readership of fanfiction spans across an extremely diverse age group- often from young teens to adults in their 30's. With fans from so many age groups there are bound to pieces that are suitable for the younger members of a fan community. This raises some serious apprehensions in the minds of parents' world over, as they are often unable to control the content that is being made available to their children. Large amounts of fanfiction is highly unsuitable for children of a young age, since it is often highly graphic, violent, sexual, and sometimes even pornographic. And since so much fanfiction is based on books, movies and television shows that are meant for all ages, it is difficult to keep children away. Millions of fan stories have been written about the "*Harry Potter*" series which is inherently meant for kids, even if it is read by all ages. Therefore, the question arises- How do you keep children away from age unsuitable fanfiction?

Many websites have attempted to put security measures in place to prevent children from accessing things they should not. Graphic stories are often password protected and can no longer be tracked by search engines. Some websites have even banned stories which contain elements of a sexual nature, in order to satisfy angry parents who wish to protect their children from the corrupting influence of such fanfiction.

Some websites also require users to create an account and give their date of birth in order to prevent children from finding inappropriate fanfiction. All fanfictions also have a minimum age disclaimer in the description. Fanfiction rated M is for mature readers, G is for everyone and so on and so forth. The problem though is that it is very easy for minors to get around these security systems. One merely needs to feed in the wrong date of birth. There is no means of checking or preventing this.

Financing Fan Fiction and Amazon's Dream

As has been discussed above financing and commercializing fanfiction is nearly impossible. One

of the only reasons why authors allow it to exist is that it does not make any money for the fan. And most fans don't even want any money for the fanfiction they create. They just want to be part of a rich and diverse community, spanning across the world, of people who share the same interests. There are exceptions like *Fifty Shades of Grey*, which stripped the original work down to its bare bones in the editing process to avoid legal hassles. Then there are those parodies and pieces which have managed to get around the infringement issues by making use of the provisions of the Doctrine of Fair Use, such as *the Wind Done Gone*" as mentioned earlier.

Certainly, in some cases the original creator can also be very accommodating. Such was the case with *Sherlock Holmes*, perhaps the earliest ever subject of fanfiction as it is known today. When an American actor, William Gillette, asked permission from Sir Arthur Conan Doyle to marry off Holmes in a stage play he was writing, Doyle reportedly said, "You may marry him or murder him or do whatever you like with him". If the original creator gives his or her permission to use some aspect of the creation, the fan can use it. But only those fans who have received permission, and only for the purpose for which they have received such permission.

And certainly, there are the slew of fanfictions based on classics that have entered the public domain, the most common of these being Jane Austen fanfiction. In the case of such fanfiction, the writer may use as many or as few of the elements that he chooses. He may keep it to himself, put it up online, or publish it commercially. As can anyone else. When it comes to the public domain Intellectual Property has no part to play.

When it comes to the monetization of fanfiction another aspect may also come into play. A number of studios are willing to pay through the nose to write and add more stories to a popular original creation. For example, Disney has recently taken over the *Star Wars*" franchise and has added to the story. On the other hand, fans do precisely this for free when they write fanfiction. It may be possible to bridge the two. This would probably lead to greater profits for all. A circle could be created where fanfiction writers and other creators buy work from one another to the benefit of all.

Kindle Worlds Project

As discussed above, fanfiction is at the receiving end of lots of legal tussles. Corporate entities and

original creators are rarely willing to allow others to benefit financially from their work. And even if they do allow fans to publish their work commercially, all the licensing agreements are just too much trouble. The result is that the ease of monetizing fanfiction ranges between highly impractical to impossible.

Amazon however, appears to have found a way to get around all these problems. In 2013, it was announced that licensing agreements had been made with three major fandoms- *Gossip Girl*, *Pretty Little Liars*, and *Vampire Diaries*. These licensing agreements were to allow fanfiction writers to publish their works via a new platform- Kindle Worlds. Such publication would be exclusively for Kindle. The revenues were to be split between the rights holder and the author. The standard rate of royalties for the rights holder was supposed to be 35% of the total revenue.⁸

Undeniably, at first sight this appears to be an excellent deal for the writer of fanfiction. Finally, the writer will legally be allowed to not only write but also profit from his work. However, a number of authors and lawyers have expressed certain concerns about the project. The publishing agreement as well the program's potential impact on professional writers and their existing media tie-ups are a topic of concern for some. Others have pointed out a worrisome clause in Amazon's contract which grants Amazon and the licensor rights to the texts of the stories as well as any original elements. Basically, if the fan does create and write something new, they shall have no rights over it and they shall not be allowed to publish it anywhere outside of the Kindle Worlds platform. Further Amazon can pass on the license for the original work to other media houses, and those media houses can use the work with impunity. The agreements are actually quite dubious on closer inspection.⁹

Fans on the other hand are actually quite happy that Amazon should take an interest in fanfiction and its financial potential. However, there are still some concerns about the rights that get signed away. Amazon also has a list of restrictions in the content- for example they do not allow crossover fiction or anything pornographic. There are also certain ambiguous restrictions such as "offensive content". To some these restrictions point out the necessity for unrestricted platforms where fans can express themselves freely. However, in spite of these reservations there are plenty of fans who are willing to sign on in the hopes of making some money off their work.

Conclusion

To sum it up, fanfiction is an integral part of pop-culture. It creates a sense of community for people who are worlds away. It allows fans a medium of expression so that they can put their own spin on tales that they love. Although, legally, fans who write fanfiction swim in somewhat unsafe waters, this medium is important for the fans who write. The financial viability of fanfiction may be low due to the difficulties in legally publishing fanfiction and turning a profit. But steps are being taken in the right direction to allow fans to enjoy their writing. And even if they were not fans would continue to write. Legal hassles or not, financial difficulties aside fanfiction is here to stay.

References

- 1 Meredith McCardle, Fanfiction, Fandom, and Fanfare: What's All the Fuss, <https://www.bu.edu/law/journals-archive/scitech/volume92/mccardle.pdf> (accessed on 28 May 2023).
- 2 Gooch B, The Communication of Fan Culture: The Impact of New Media on Science Fiction and Fantasy Fandom, *Georgia Institute of Technology*, <https://repository.gatech.edu/server/api/core/bitstreams/46568e27-3eef-438f-9fbf-766c32b6e260/content> (accessed on 29 May 2023).
- 3 Deb McAlister, Copyright Myths from the World of Fan Fiction, <https://debmcialister.com/2013/04/28/copyright-myths-from-the-world-of-fan-fiction/> (accessed on 29 May 2023).
- 4 George E, Playing in Someone Else's Sandbox: A Legal and Cultural Overview of Fanfiction, Briefing Book, *Berkman Centre of Internet and Society*.
- 5 Jamar S D & Christen B'anca Glenn, When the Author Owns the World: Copyright Issues Arising from Monetizing Fanfiction, *Texas A & M Law Review*, 1(2014) 4.
- 6 Morrison E, In the Beginning, there was Fanfiction: From the Four Gospels to Fifty Shades, *The Guardian*, 13th August, 2012.
- 7 Barooah S P, Guest Post: The Murky World of Fan Fiction and Copyright, *Spicy IP*, <https://spicyip.com/2015/01/14526.html> (accessed on 6 June 2023).
- 8 Benton J, Amazon finds a way to Monetize Fanfiction, *Niemanlab*, 22 May 2013, <http://www.niemanlab.org/2013/05/amazon-finds-a-way-to-monetize-fan-fiction/> (accessed on 6 June 2023).
- 9 Ediden R, Kindle World's Lets Authors Publish Fanfiction- At Dubious Cost, *Wired*, 23rd May, 2013, <https://www.wired.com/2013/05/kindle-worlds-fanfic-copyright/> (accessed on 9 June 2023).