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Lights! Camera! Infringement? Exploring the Boundaries of Whether Fan Films Violate Copyrights

Jyme Mariani

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Lights! Camera! Infringement?

Exploring the Boundaries of Whether Fan Films Violate Copyrights

*Jyme Mariani**

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I. INTRODUCTION

At the age of 19, Luis de los Rios has already worked on twelve films.¹ De los Rios started writing films when he was 15, and he received his first director credit at the young age of 17.² He produced

1. E-mail from Luis de los Rios to author (Aug. 3, 2012) (on file with author).

2. *Id.*

and wrote all twelve of the films he has worked on, and he directed two as well.³ His fan base is in the millions, yet you have probably never heard his name or viewed any of the films in his impressive resume. His lack of mainstream name recognition stems from the fact that de los Rios creates fan films – amateur films not made for profit that are created by fans for other fans.

Even with his already wide range of film accomplishments, de los Rios still has a vision: “My dream project would be any fan film which is legal and allowed by the companies who have the rights to the character.”⁴ De los Rios is not alone. Hundreds of amateur fan filmmakers exist, and thousands of fans view their movies daily.⁵ Three elements tie these fan filmmakers together: their love for a particular original work; their desire to add their own twists to that original work; and the threat that they may be pulled into a legal battle at any moment because of alleged copyright infringement.

This Thesis examines the situation that de los Rios and other fan filmmakers face because of the inherent conflict fan films have with the original author’s intellectual property rights. It outlines the culture and specifics of fan fiction and the different subgenres within it and their relationship with one another. This Thesis also traces the origins of fan films to gain a better understanding of why filmmakers create them and the potential legal battles that have developed over time. The potential legal issues discussed address the rights of the original author and how courts have interpreted copyright protection for individual elements as well as the work as a whole. This Thesis also suggests several solutions to the fan film/original author dilemma that allows both parties to fulfill the goals of copyright laws.

This Thesis outlines the state of U.S. copyright law and advocates that de los Rios and other fan filmmakers do have a right to create their own works if they adhere to certain guidelines.⁶ I argue that fan films should be classified as non-derivative works or, in the alternative, be considered fair use. Fan films, unlike most other forms of fan fiction, exist as a stand-alone, not-for-profit endeavor that is neither easy nor cheap to produce. In fact, fan films may actually increase the value of the original work rather than take profits away. Intellectual property theory supports allowing fan filmmakers to create films if they follow certain criteria, so that they are rewarded for their labor and also to encourage more creativity. Fan filmmakers today often evolve into the

3. *Id.*

4. *Id.*

5. No accurate count of fan filmmakers exists because there is no central database or listing.

6. See discussion *infra* Part VI.

Hollywood filmmakers of tomorrow. As a whole, fan films serve a positive role that benefits the public without seriously limiting the intellectual property owner's ability to profit or to create or to license derivative works.

Part II of this Thesis dissects fan fiction as a whole and analyzes its beginnings and how fan films fit into the overall genre. Part II also defines the different elements of fan fiction and how fan films both differ and conform to the rest of the genre. Part III looks at what fan films essentially are and how they fit into culture by tracing their roots as backyard fun to their emergence onto the Internet. It also examines the most popular source works for fan films and the attitudes of the original authors toward the user-generated media. Part IV delves into the legal arguments and issues involving fan films, including an analysis of derivative works and what elements can be protected. Part IV also describes the litany of tests that courts can use to determine the level of protection a character may receive as well as the easier analysis for protection of plot elements and ideas. Part V shows how fair use fits into the legal equation by walking through the four factors. Part VI offers possible solutions to the fan film infringement dilemma. Part VII concludes with the idea that fan films should not be deemed infringing and should exist in harmony with source works as opposed to them.

II. FAN FICTION: WHAT IT IS AND WHERE IT COMES FROM

The best place to start any story is often at the beginning. In fiction, a popular, although trite, beginning is "Once Upon a Time." After these four words, anything is possible – heroes rescue damsels in distress, warriors fight epic battles to save their homelands, young boys come of age and turn into men, and so on – until "The End."⁷

Since the early days of storytelling, people have not been satisfied with "The End." Those two words have probably inspired more new stories than any others in any language. Without the thirst for "What happened next?," there would have been no Virgil's *The Aeneid*⁸ or Homer's *The Odyssey*⁹ after *The Iliad*¹⁰ or a New Testament¹¹ after the completion of the original Hebrew Bible.¹² Probably one of the best examples of early "fan fiction" appears in Dante Alighieri's 14th-

7. These archetypal plotlines comprise many modern and ancient tales – from THE BIBLE to *Star Wars* to the *Harry Potter* series.

8. VIRGIL, *THE AENEID* (Robert Fitzgerald trans., 1990).

9. HOMER, *THE ODYSSEY: THE FITZGERALD TRANSLATION* (Robert Fitzgerald trans., 1998).

10. HOMER, *THE ILIAD* (Bernard Knox ed., Robert Fagles trans., 1990).

11. J.B. PHILLIPS, *THE NEW TESTAMENT IN MODERN ENGLISH* (1996).

12. *A READER'S HEBREW BIBLE* (A. Phillip Brown II & Bryan W. Smith eds., 2008).

Century poem *The Divine Comedy*.¹³ In the *Inferno*,¹⁴ Virgil guides Dante through the circles of hell, where they encounter historical and fictional characters doomed to spend eternity paying for their sins.¹⁵ While no one would, or actually could, accuse Dante of violating copyright laws in the 14th Century,¹⁶ Dante still perfected the art of “borrowing” characters and themes from history and previous works of many other authors to create a story uniquely his own. In modern days, however, Dante would face a challenge equal to that of Sisyphus if he tried to rewrite *Inferno* with today’s fictional characters and copyright laws.¹⁷

A. A Modern-Day Look at Defining Fan Fiction as a Genre

Unlike during Dante’s time, where his work most likely would be labeled as just a story or an epic poem, fan fiction evolved into its own genre. Scholar and MIT professor Henry Jenkins described this shift best: “In many ways, fandom extends traditional folk practices into a modern era of mass production.”¹⁸ While it still technically belongs in the “fiction” category, fan fiction itself stands as a separate genre of user-generated content that encompasses smaller classes within. As a genre, fan fiction is a “broadly-defined term for fan labor regarding stories about characters or settings written by fans of the original work, rather than by the original creator.”¹⁹ Although this definition clarifies the “what” angle, it does not explain *why* people create fan fiction. Jenkins has also developed the best and most concise definition of “why” fan fiction exists: “Fan fiction can be seen as an unauthorized expansion of these media franchises into new directions which reflect the reader’s desire to ‘fill in the gaps’ they have discovered in the commercially produced material.”²⁰ It is this desire to complete or alter

13. DANTE ALIGHIERI, *THE DIVINE COMEDY* (David H. Higgins ed., C.H. Sisson trans., 1981).

14. DANTE ALIGHIERI, *Inferno*, in *THE DIVINE COMEDY* 45-196 (David H. Higgins ed., C.H. Sisson trans., 1981).

15. *Id.*

16. True copyright protection did not exist in the 14th Century. The earliest law that bestowed any rights to authors is the British-created Statute of Anne in 1710, which gave authors the exclusive rights to print their own works. See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 526 (1990).

17. The legend of Sisyphus dooms him to Hades where he must continually push a boulder up a mountain, only to have it roll down to the bottom when it reaches the top.

18. Henry Jenkins, *Reception Theory and Audience Research: The Mystery of the Vampire’s Kiss*, in *REINVENTING FILM STUDIES* 165, 175 (Christine Gledhill & Linda Williams eds., 2000).

19. *Fan Fiction*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fan_fiction (last visited Jan. 7, 2014).

20. Henry Jenkins, *Transmedia Storytelling 101*, *CONFESSIONS OF AN ACA-FAN* (Mar. 22,

the original story that motivates fan fiction creators to produce their own works.

The genre of fan fiction can be broken down into distinct units based on the common theme. The largest category is fanfic, which is the accepted shorthand for written works.²¹ Throughout this paper, I will refer to fan fiction as the overall genre, and fanfic to denote the category of written works whenever possible. Fanvid is the next largest category. Fanvid creators generally create a video by taking footage from a movie or television show and running it along with music that is not from the original visuals.²² Fan film is one of the smaller categories, although it has seen a growth spurt in recent years. Fan films are “an unauthorized amateur or semi-pro film, based on pop culture characters or situations, created for noncommercial viewing.”²³ The major fan fiction category this Thesis focuses on is the fan film, although its relationship to and differences from both fanfic and fanvid play important roles in the analysis of copyright infringement.²⁴

B. Common Elements Shared Among Fan Fiction Subclasses

To analyze whether fan fiction may infringe on copyrights, it is important to understand what fan fiction is and who is behind it. All categories within fan fiction share four basic elements. First, fan fiction is user-generated content. This means that amateurs borrow from or repackage the professional content, which is usually distributed over the Internet.²⁵ For example, a fanvid “takes footage from a popular television show or film and reworks it into a music video that comments on or critiques the original source.”²⁶

2007), http://www.henryjenkins.org/2007/03/transmedia_storytelling_101.html.

21. Fanfic refers to “derivative creative stories featuring the characters, settings, premises, etc. . . based on the original source material, but written by a fan. It is a form of transformative work designed as an expression of appreciation and exploration of the canon material.” Moonbeam’s Predilections, *Common Fandom Terms*, FANFICTION TERMINOLOGY (updated Nov. 2014), <http://www.angelfire.com/falcon/moonbeam/terms.html>.

22. Fanvids refer to “music videos and montages created by a fan using a combination of clips from original source material set to a song or tune. It is a form of transformative work designed as an expression of appreciation and exploration of the canon material.” *Id.*

23. This is Clive Young’s “modern” definition of a fan film. He also offers the traditional definition of fan film: “A fictional movie created by fans imitating heroes from pop culture.” CLIVE YOUNG, *HOMEMADE HOLLYWOOD: FANS BEHIND THE CAMERA* 3-4 (2008).

24. See discussion *infra* Part II.C.

25. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1500 (2008) (defining “user-generated content” as “widely used in both technology and media circles to refer to certain kinds of amateur creations typically distributed on the Internet”).

26. Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 649 (2007).

The second shared element is that “an underlying fandom exists.”²⁷ This fandom consists of a community of fans who shares information and opinion about a particular television show, book, video game or movie.²⁸ The third element is that the fan fiction cannot be “for profit.”²⁹ The fourth element relies on the amateurs’ use of canon in creating fan fiction. Canon is “all of the events which expressly happen in the fandom. Meaning, everything, person, event, statement, that happens in the show, movie, or book is canon.”³⁰ Reliance on or deviation from canon allows amateurs to put their own spin on fan fiction.

Good fan fiction can be complicated to create. To gain a basic understanding of fan fiction overall, one must examine the elements that comprise it and that set it apart from other forms of fiction. There is no formula for creating fan fiction. Rather, an amateur combines certain elements (setting, characters, or events) from the original story to tell or, in some cases, retell, what happened. Fan fiction relies on the audience sharing the same “reality.” Fan fiction both “contributes to and draws from the community’s collective understanding of character.”³¹ Although the amateur must contribute novel ideas and events (and sometimes even introduce new characters) to the established world, “it must also be in constant dialogue with the source text’s characters, already fully realized and well known to the story’s reader.”³² This constant dialogue concept is important across all subclasses in fan fiction, although it is realistically hardest to achieve in fan films where the original actors do not appear in the amateur movies. These fan fiction realities can be broken into three different notions from which amateurs borrow: canon, fanon, and alternative universe. Understanding these three notions will become important in the copyright analysis on whether the amateur may be infringing on the original work.

27. Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 435 (2003).

28. The Urban Dictionary defines “fandom” as “[t]he microcosm made up of people who are fans of a fiction genre, or of a subgenre, who have their own clubs, conventions and amateur magazines (fanzines), dating back (in some cases) to the early 1930s. Some of these are overlapping. *Star Trek* fandom, for example, started in science fiction fandom and eventually became a separate fandom on its own. Comics fandom and even rock (music) fandom also started there before becoming separate entities.” *Fandom*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=fandom> (last visited Jan. 7, 2015).

29. See discussion *infra* Part VI.B.

30. *A Fanspeak Dictionary*, EXPRESSIONS, <http://expressions.populli.net/dictionary.html> (last visited Jan. 7, 2015).

31. Deborah Kaplan, *Construction of Fan Fiction Character Through Narrative*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 134, 136 (Karen Hellekson & Kristina Busse eds., 2006).

32. *Id.*

Canon is probably the most important element in creating fan fiction. Fan fiction could not exist without conforming to or strategically breaking away from canon. For example, teenage wizard *Harry Potter* fan fiction would not work if Harry simply attended a normal high school, worked at a Dairy Queen on weekends and did not use his magic. Without some element of magic or “wizarding” that the Potterverse recognizes, the story just devolves into a tale about people with names similar to those of the “famous” characters.

Fan fiction uses canon in two basic ways. “First, it refers to the overall set of storylines, premises, settings, and characters offered by the source media text.”³³ Second, canon is used as “a descriptor of specific incidents, relationships, or story arcs that take place within the overall canon.”³⁴ Fan fiction needs the constants canon provides so that the fandom can follow along with where the amateur takes them. Canon creates the crux of the possible copyright infringement analysis since amateurs directly lift or borrow these elements from the original source.³⁵

The second element that fan fiction can rely on is fanon. Fanon “refers to common plot or character elements that were *not* established by the original source material, but are generally accepted to be true by the fans anyway.”³⁶ These unofficial details often become “so prevalent in the fandom that their origins (which fan came up with the idea first) are no longer remembered.”³⁷ *Harry Potter* fanon runs rampant on the Internet and even has its own wiki website that includes spells, potions, magical items, and characters.³⁸ Unlike canon, fanon does not usually fit as neatly into the copyright analysis. Since amateurs create the fanon in the first place, it is hard for the original author to claim ownership of the new details. However, even this analysis is not as clean cut as it appears.

To make the dichotomy between the original author’s ideas and what is added by a fan more complicated, fanon can evolve into canon. This can be at the whim of the source author or when fans merge the new “truth” with the already existing canon. As one website explains:

Fanon is ‘promoted’ to Canon mainly because the theme or subject of

33. Juli J. Parrish, *Inventing a Universe: Reading and Writing Internet Fan Fiction* (July 26, 2007) (unpublished Ph.D. dissertation, University of Pittsburgh), available at <http://d-scholarship.pitt.edu/8963/1/Parrish2007.pdf>.

34. *Id.*

35. See discussion *infra* Parts IV.C-D.

36. Moonbeam’s Predilections, *supra* note 21.

37. *Id.*

38. See HARRY POTTER FANON, http://harrypotterfanon.wikia.com/wiki/Main_Page (last visited Jan. 7, 2015).

the fanon had not been planned out by the author beforehand. Whether it's officially shown in a canon work is another matter, but most of the time the author sees some minutiae they hadn't thought too much of themselves as a decent enough explanation that they don't mind.³⁹

Fanon often ties up loose ends that only real fans care about, such as the birthplace of *Star Trek's* Captain Kirk.⁴⁰ This fanon-turned-canon complicates the copyright analysis because an amateur added new details to the source author's work, which the source author and other fans now accept as evolving from the original source. Fanon is tricky though – even if fanon becomes widely accepted as canon, some fans may not acknowledge the new “facts.”⁴¹

In its third incarnation, fan fiction creators often go directly against canon to initiate stories that cannot or would never exist in the original work. These works are typically classified as Alternative or Alternate Universe (“AU”).⁴² Again, the analysis of whether or not AU infringes on the source author's copyright is a tossup. It will depend on how much source material the amateur takes and other issues discussed in detail in Parts IV.C-D.

Creating successful AU requires deep knowledge of the fandom and original source material. For example, in a *Harry Potter* AU, it is acceptable for Ron Weasley to find himself in a parallel universe where Harry Potter became a Slytherin instead of a member of Gryffindor.⁴³ An AU storyline would not work in the *Harry Potter* universe if Harry never existed. That scenario would deviate too far from the original for fans to accept the changes. One reason amateurs create AU is because “fan fiction often imagines rather earthshaking changes for the characters – marriage and death, among others – that the ‘canon’ cannot

39. *Ascended Fanon*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/AscendedFanon?from=Main.SureWhyNot> (last visited Jan. 7, 2015).

40. *Id.* (stating that “Kirk being from Iowa was fanon before *Star Trek IV*. Someone told Nicholas Meyer, who was one of the film's writers, that Kirk was from Iowa. Consequently, it ended up in the film and became canon.”).

41. *Fanon*, STAR TREK EXPANDED UNIVERSE, <http://stexpanded.wikia.com/wiki/> (last visited Jan. 7, 2015) (stating, “Proponents of ‘fanon’ or ‘personal canon’ have been known to be offended when these terms are used, as ‘fanon’ facts have often become better accepted than canon. This is widespread among *Star Trek* fans; for example, *Star Trek: Enterprise* is rejected by many Trek fans on the basis that it violates ‘fanon’ regarding the history of the Federation.”).

42. For example, fanfic author JunoMagic states in the paragraph before his work, *A Promise*, “This is AU. And yes, I admit it: I write it solely because I think that the real ending of the series sucks.” JunoMagic, *A Promise*, FANFICTION (Aug. 18, 2006), http://www.fanfiction.net/s/3111289/1/A_Promise.

43. BlackHawk13, *Mirror, Mirror*, FANFICTION (last updated Sept. 18, 2010), http://www.fanfiction.net/s/4843238/1/Mirror_Mirror.

accept without signaling the end of the show.”⁴⁴ This does not mean that the characters can act wildly different from canon, such as in the nonexistence of Harry Potter in the Potterverse described above. If the deviation is too great, the AU fails.⁴⁵

AU itself can typically be sorted into several categories. Contextual reassignment occurs when the “fundamental aspect that is changed is the world itself.”⁴⁶ In contextual reassignment, the characters are transported to another time, place, or situation – such as a high school or a Nazi death camp.⁴⁷ In a “What If?” AU, either an alternate universe (where the amateur “takes one event in the universe and changes the outcome of it radically, such as an important decision, or who won an important fight, and continues from that point”)⁴⁸ or character facets (an amateur “speculates on what would happen if a single facet of a character’s environment was different”)⁴⁹ can change. The last major AU type occurs when characters crossover into other universes, such as when the *Torchwood* team enrolls in Hogwarts School of Witchcraft and Wizardry and meets the children from *Harry Potter*.⁵⁰

Continuation stories fall between canon and AU. These stories start where a series, movie, or book left off and carry on from there. Continuation fan fiction is “frequently seen for television series or anime that were cancelled before they could complete their Story Arcs, or which concluded with deliberately ambiguous endings, or whose author died with the series still incomplete.”⁵¹ Sometimes continuation fan fiction is created to give a “more satisfactory ending than the one provided by the original writer(s)”⁵² or when the series lacked a distinctly defined ending at all.⁵³ Unlike the rest of AU, continuations

44. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 671 (1997) [hereinafter Tushnet, *Legal Fictions*].

45. *Alternative Universe (Fan Fiction)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Alternative_universe_\(fan_fiction\)](http://en.wikipedia.org/wiki/Alternative_universe_(fan_fiction)) (last visited Jan. 7, 2014) (stating that “a common mistake made by inexperienced fan fiction writers is to believe that writing an AU fan fiction means that the writer can acceptably and drastically alter the personalities of major characters; in fact, the point of AU fan fiction is that the characters’ personalities remain as much the same as possible, and the only changes are those which would rationally be caused by the differences from canon.”).

46. *Alternate Universe Fic*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/AlternateUniverseFic> (last visited Jan. 7, 2015).

47. *Alternative Universe (Fan Fiction)*, *supra* note 45.

48. *Alternate Universe Fic*, *supra* note 46.

49. *Id.*

50. Bella The Strange, *The Magic of Torchwood*, FANFICTION (last updated Dec. 24, 2014), http://www.fanfiction.net/s/7151727/1/The_Magic_Of_Torchwood.

51. *Continuation*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/Continuation> (last visited Jan. 7, 2015).

52. *Id.*

53. *Id.*

pose a particular threat to the original source author in that the fan fiction may potentially replace or usurp a sequel in a series of books or movies.

Many fan films fall into the continuation category, although canon still plays an important role in these amateur works. Canon becomes crucial in fan films because recognized characters often have a new face, and no fan film has been made that casts the original actor in the role from the professional production. The audience needs canon – the standard recognized elements – to identify and connect with the amateur movie. Even when characters are readily identifiable from a distance, such as a man in a caped, blue leotard with an “S” emblazoned on his chest, it is important to have the right actor wear the proper costume for the audience to believe the fan film. The actor must play the part: he also needs to be chiseled with the traditional black hair and spit curl for the fan film to strike a chord with the audience.

C. Major Differences Among Fan Fiction Subclasses

Even though many similarities exist among the subclasses, four major differences separate fan films from the other subclasses. The first major difference is in the way the traditional subcategories break down into subgenres. The second shift is that fan films require more effort. The third difference lies in some of the amateur’s motivation for creating fan fiction in the first place. The last difference, and one that is very important in the copyright analysis, is fan filmmakers may break fewer laws than their fan fiction counterparts.⁵⁴

One major difference between fan films and fanfic occurs in the breakdown of subcategories. Three major established subgenres occur in fan fiction: gen, het, and slash.⁵⁵ Gen stories refer to general stories about the subject matter, with no “imposed romantic relationships among the characters.”⁵⁶ Het stories involve a heterosexual relationship, either one “invented by the author or one presented in the primary source text.”⁵⁷ Slash stories center around homoerotic relationships created by the amateur author, although slash stories often involve fetishes and violence as well.⁵⁸ Unlike fanfic, most fan films belong in the gen category. This is probably due mainly to the medium. On paper, an

54. See discussion *infra* Part IV.

55. Karen Hellekson & Kristina Busse, *Introduction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 5, 10 (Karen Hellekson & Kristina Busse, eds., 2006).

56. *Id.*

57. *Id.*

58. *Id.*

amateur author can take liberties with characters to create twisted character pairings laced with violence.⁵⁹ In fan films, these same types of treatment would be labeled as pornography.⁶⁰ These restrictions do not seem to stop fanvids from dubbing or splicing images together to create both slash and het videos.⁶¹

The second main difference in the genre is that fan films require more effort to produce than the rest of fan fiction. Fan films remain a much smaller category because they require more resources and planning to execute. Fan films can take many years and thousands of dollars to complete.⁶² Fan films require cameras and other equipment and usually more than one person for the production. Anyone can attempt fanfic with very limited supplies in one day on his own. Fanfic merely takes an idea and some way to write it down. In addition, fanfic authors “publish” only on the Internet and rely on beta readers to help them improve their fiction or fact-check their works.⁶³ Their work nowadays is rarely even printed and exists only on a computer or on the Internet. Fan filmmakers have to accomplish more work than fanfic authors. Fan filmmakers must write a script, find actors to work for free, scope out a setting, create the backgrounds, design the costumes and the makeup, and then film the end result. Creating a movie takes more effort, time and money than typing and hitting the save key, which is how fanfic is generated. Although a little more equipment is needed to create a fanvid than fanfic, it is nowhere near the amount of gear necessary for a fan film. All that is required to produce a fanvid is a computer, and little else other than time and an idea. Fan filmmakers, on the other hand, create an actual physical form of their work – they must create a tape, cassette, or film with live actors so that it can be edited or

59. See, e.g., short-n-sweet05, *Harry Potter Porn*, FANFICTION (last updated Feb. 14, 2008), http://www.fanfiction.net/s/1427480/1/Harry_Potter_Porn.

60. See, e.g., *About Whorrey Potter*, WHORREY POTTER, http://whorreypotter.com/wordpress/?page_id=95 (last visited Jan. 7, 2015) (claiming that *Whorrey Potter* is the first gay porn movie shot in 3D – and that it is a parody of *Harry Potter*); Kevin J. Guhl, *The 14 Most Amusing Porno Parodies of Nerdy Subjects*, TOPLESS ROBOT (June 19, 2009, 8:06 AM), http://www.toplessrobot.com/2009/06/the_14_most_amusing_porno_parodies_of_nerdy_subjec.php (listing such classics as *Quantum Deep*, *Buffy the Vampire Layer*, *Whore of the Rings*, *This Ain't Star Trek XXX*, *Porn Wars: Episode I*, and *San Fernando Jones and the Temple of Poon*).

61. See, e.g., MsSpiderpig93, *Harry Potter and the Secret Porn Basement, Part 1*, YOUTUBE (Dec. 12, 2011), <http://www.youtube.com/watch?v=giQRHXUlpdk>.

62. For example, *Revelations* took three years and \$20,000 to complete. YOUNG, *supra* note 23, at 234. The set for the bridge in *Star Trek New Voyages* cost \$100,000. *Id.* at 248.

63. Angelina I. Karpovich, *The Audience as Editor: The Role of Beta Readers in Online Fan Fiction Communities*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 171, 171-73 (Karen Hellekson & Kristina Busse, eds., 2006) (explaining that beta readers often act “in relation to the superficially similar roles performed by commercial literary editors and test audiences for pre-release films”).

copied before it is transferred to cyberspace. Overall, fan films are the most expensive and time-consuming genre in fan fiction.

The third difference between fan films and the other subcategories in fan fiction lies in one of the motivations of the amateurs to create their works. All of the amateur creators in fan fiction design their works because they have love and admiration for the original work. These creators also want to share their love and ideas with other fans. “Fans make meanings to communicate with other fans.”⁶⁴ If not, they would not expend the effort to write fanfic, design a fanvid, or develop a fan film. Aside from the love for the source material, amateurs have other motivations to create their fan fiction. Most writers create fanfic to fulfill their own desires as well as to show their love for the original work.⁶⁵ The same is true for fan filmmakers, but the filmmakers are different in that their intended audience is meant to be wider. Fanfic authors’ primary audience consists of other fans rather than the television, literary, or movie industry.⁶⁶ Even if fanfic writers can make the transition from amateur to professional writer, they still may prefer the freedom that the outlet of traditional fanfic allows them.⁶⁷ The opposite is true for most fan filmmakers. Fan filmmakers often use fan films as a training ground for bigger and better commercial projects – with budgets that do not come out of their own pockets.⁶⁸ This means that their intended audience expands past traditional fans to also try and capture the attention of professional filmmakers and studios as well. This is not to say that fan filmmakers do not create their films for other fans; rather they *also* produce these films to be discovered or recognized so that they may move into the mainstream.⁶⁹ Several fan filmmakers have received

64. JOHN STOREY, *CULTURAL CONSUMPTION AND EVERYDAY LIFE* 58 (1999) (explaining why fans create fan fiction or “meanings” and how they use these works to interact with one another).

65. See Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 225, 227 (Karen Hellekson & Kristina Busse, eds., 2006) (stating that “fan fiction writers tend to be defiantly amateur in the sense of writing precisely what they want for love alone”); Maria Cohen, *Interview with L.J. Maas*, FANLAW.ORG, <http://psylockelaw.home.mindspring.com/Interviews.htm> (last visited Jan. 7, 2015) (stating that “we wrote *Xena* fan fiction for the love of the show, characters, etc.” and not to be published later).

66. Coppa, *supra* note 65, at 235.

67. *Id.* at 234-35 (stating “fans may become professional movie or teleplay writers while still maintaining their identities as fans and while writing fan fiction” and that fanfic writers prefer prose and words to television and writing screenplays).

68. See YOUNG, *supra* note 23, at 98-125 (2008) (detailing the seven-year adventure that three friends undertook in re-creating *Raiders of the Lost Ark* frame by frame).

69. Sandy Collora, a famous fan filmmaker, created fan films so that he could be recognized by mainstream media. Collora wanted to direct in Hollywood, so he decided to create his own Batman film. *Id.* at 187-89.

paychecks for later creating mainstream work after their fan films were “discovered” by Hollywood producers.⁷⁰ As the mainstream media have pointed out: Fan films may just be the training ground for “the next generation of both Hollywood luminaries and indie darlings.”⁷¹ On the opposite end, very few fanfic authors move into the professional publishing world.

III. FAN FILMS: WHAT THEY ARE AND HOW THEY FIT INTO CULTURE

Most fan films are bad.⁷² Many share the same characteristics: an “incredible lack of quality, craftsmanship, or even basic understanding of how to make a moderately coherent movie.”⁷³ Then why do people make them? Fan film director and columnist Larry Longstreth summed up his experience: “More than anything, our fan films were practice. Practice for bigger and better things.”⁷⁴ This is not to say that even 0.01 percent of fan film directors ever make the transition into Hollywood films. It is impossible to estimate how many fan films are created every year since many are never published on the Internet or seen by anyone other than family members or friends. Fan film expert and author Clive Young believes that only 20 percent of fan films started ever reach the finish line.⁷⁵

A. *The History of Fan Films: Our Gang and Tarzan*

Fan films have been around as long as people have had access to motion picture cameras.⁷⁶ The earliest known fan film was created in 1926 by two con artists in Anderson, South Carolina: *Anderson Our Gang*.⁷⁷ Although the *Anderson* film was more of a get-rich-quick scheme than a traditional fan film, Young and other experts still classify it as the first fan film.⁷⁸ The earliest known fan film to fit the “classic

70. See YOUNG, *supra* note 23, at 34-43 (detailing the stories of fan filmmakers-turned professionals including Don Glut, John Carpenter, and Marv Newland).

71. Jane Graham, *The New Wave of Fan Films*, GUARDIAN (May 13, 2010, 11:10 AM), <http://www.guardian.co.uk/film/2010/may/13/fan-films-wes-anderson-spiderman>.

72. YOUNG, *supra* note 23, at 1 (stating that the “average fan film stinks”).

73. *Id.*

74. Larry Longstreth, *Fan Films. Why?*, FAN FILM FOLLIES (Feb. 19, 2010, 6:12 AM), <http://www.fanfilmfollies.com/featured/fan-films-why>.

75. YOUNG, *supra* note 23, at 2.

76. *Id.* at 16.

77. Two men using aliases cobbled together plots from two *Our Gang* shorts and recruited children from Anderson to “star” in the film. The film had three public showings in Anderson, then the men left town. *Id.* at 9-16.

78. *Id.*

definition”⁷⁹ appeared in 1936 when a teenage boy decided to create a Tarzan movie with his two brothers.⁸⁰ Its director and star, Robbins Barstow, claimed: “Most of this original 1936 fan film was developed through on the spot instinct and inspiration.”⁸¹ The film is now part of the Internet Archives where it has been downloaded more than 206,000 times.⁸² Barstow filmed his *Tarzan and the Rocky Gorge* with a hand-cranked Eastman Kodak 16mm camera, and he edited it at home on a small Kodak editing and titling machine.⁸³

In the 1930s, Barstow was in the small minority of Americans who could afford a home video camera⁸⁴ and the editing equipment that went along with it.⁸⁵ In 1965, Kodak introduced the Super 8, and fan film technology remained unchanged until the video camera in the 1980s.⁸⁶

B. Technological Advances Fuel Fan Films

One reason more fan films started to appear was because of technological advances. To put it simply: “Time and technology have changed[,] so why doodle a picture of Superman on paper when you can put on a blue costume and nail a green screen to the wall?”⁸⁷ Advances in both producing the movies and in the distribution of the fan films help these films reach a wider audience.⁸⁸

The first practical videotape recorder (“VTR”) appeared in 1951.⁸⁹ While it “captured live images from television cameras by converting the information into electrical impulses and saving the information onto

79. See discussion *supra* note 23.

80. YOUNG, *supra* note 23, at 16-21.

81. Cullen Gallagher, *A Conversation with Robbins Barstow*, UNIONDOCS (Nov. 15, 2010), <http://www.uniondocs.org/a-conversation-with-robbins-barstow/>.

82. Downloads as of January 7, 2015: 330, 709. *Search Results*, INTERNET ARCHIVES, [http://archive.org/search.php?query=tarzan %20and%20the%20rocky%20gorge](http://archive.org/search.php?query=tarzan%20and%20the%20rocky%20gorge).

83. Gallagher, *supra* note 81.

84. “When I was a kid, I desperately wanted to make films, but back then (pre-video) the cost of doing anything like that was prohibitive. If I was 12 today, though, I’m certain that I’d be shooting/editing like crazy.” Brendan Tripp, Comment to *Let’s Make a Movie: The Astonishing Rise of Fan Films*, NOKIA CONNECTS (June 5, 2012, 6:48 PM), <http://nokiaconnects.com/2012/06/05/lets-make-a-movie-the-astonishing-rise-of-fan-films/>.

85. For a complete history of early film equipment, see YOUNG, *supra* note 23, at 24-30.

86. *Id.* at 30.

87. Longstreth, *supra* note 74.

88. See *Let’s Make a Movie: The Astonishing Rise of Fan Films*, NOKIA CONNECTS (June 2012), <http://nokiaconnects.com/2012/06/05/lets-make-a-movie-the-astonishing-rise-of-fan-films/> (stating, “Since affordable technology – digital video cameras, editing software, file-sharing, YouTube and the like – has made it easy for budding auteurs to shoot and cut their own home-made masterpieces, there’s been a huge proliferation of homages to more mainstream movies”).

89. *The History of Video and Related Innovations*, ABOUT.COM, <http://inventors.about.com/library/inventors/blvideo.htm> (last visited Jan. 7, 2015).

magnetic tape,” its base price was out of range of the average consumer: in 1956, the price was \$50,000.⁹⁰ Sony made the market a little more affordable in 1971 by selling the first videocassette recorder (“VCR”).⁹¹ VCRs and their copying capability allowed for a cheaper method to widely distribute homemade movies. Instead of setting up a film projector in a basement, fan filmmakers could hand out copies of their works either in person or through the mail. DVDs eclipsed the importance of the VCR in the late 1990s.⁹² VCRs and home movies also allowed fan filmmakers inexpensive ways to capture color and sound that was far superior to simple home movies.⁹³

Magazines and scholars noted the increase in technological advances as early as 2000. Want-to-be artists could now “use videotapes, camcorders, Photoshop, digital film editing, recordable CDs, MP3 files, and the Internet. The result has been an explosion of amateur films, fiction, and music, all of which can be ‘published’ for a minimal investment by putting them on the Web.”⁹⁴ Jenkins echoed this sentiment in March 2000, when he wrote:

On the one hand, the past several decades have seen the introduction of new media technologies (from the VCR to MP3) that empower consumers to archive, annotate, appropriate and recirculate cultural materials. On the other, the emergence of new economic and legal structures makes tight control over intellectual property the basis for the cross-media exploitation of “branded” materials.⁹⁵

As early as 1999, famed director George Lucas⁹⁶ realized how fast technology for amateurs was meeting up to what was available to the “real” Hollywood movie industry. In 1999, Lucas attended Sony Corporation’s launch party keynote address where Sony released a digital high-definition movie camera.⁹⁷ Lucas told the crowd, “the new

90. *Id.*

91. *Id.*

92. *See DVD*, WIKIPEDIA, <http://en.wikipedia.org/wiki/DVD> (last visited Jan. 7, 2015).

93. YOUNG, *supra* note 23, at 89-92 (detailing the advantages of videos over home movies, including that users did not have to wait weeks for the film to be developed, the increase in picture quality, the addition of sound, and the advanced features video cameras allowed).

94. Jesse Walker, *Copy Catfight: How Intellectual Property Laws Stifle Popular Culture*, REASON (Mar. 1, 2000, 12:00 AM), <http://reason.com/archives/2000/03/01/copy-catfight/>.

95. Henry Jenkins, *Digital Land Grab*, MIT TECHNOLOGY REVIEW (Mar. 1, 2000), <http://www.technologyreview.com/article/400696/digital-land-grab/>.

96. George Lucas created the entire *Star Wars* universe, as well as *Raiders of the Lost Ark* and *American Graffiti*. *George Lucas*, IMDB, <http://www.imdb.com/name/nm0000184/bio> (last visited Jan. 7, 2015). *See discussion infra* Part III.C.1.a.

97. Martyn Williams, *George Lucas, Playstation 2 Highlight Sony Keynote at Comdex*, CNN (Nov. 16, 1999, 12:01 PM), <http://edition.cnn.com/TECH/computing/9911/16/comdex.idei.keynote.idg/index.html>.

digital camera would enable him to ‘finally catch up with the amateur consumer market,’ [and] Lucas summed up his enthusiasm for the new technology thus: ‘This is it. This is the revolution, and I’m in the middle of it. It’s a great time to be alive.’”⁹⁸

The culmination of technology in the early 2000s advanced fan films to the point where they looked like professional productions instead of something an amateur shot in his backyard with a handheld camera.⁹⁹ Film critics observed that fan films were “just as likely to be sharp, witty, original pieces of work with impressive production values and strong performances.”¹⁰⁰

Although technological advances on the film sets contributed to higher-quality fan films that were cheaper to create, the Internet provided the biggest boost in distribution opportunities for fan films. Before widespread use of the Internet, fan films could only be viewed in people’s homes and, later, through distribution of videotapes.¹⁰¹ With the surge in popularity and mainstream availability of the Internet in the late 1990s and early 2000s, fan filmmakers gained new avenues for access to their works.¹⁰² For the first time, YouTube and other video hosting sites gave fan filmmakers a place to distribute their work to mass audiences for free.¹⁰³

C. *Of Stormtroopers and Browncoats: The Main Inspirations for Fan Films*

Fan films, like the rest of the fan fiction genre, generally fall into one of several fandom categories: movies, television shows, comic

98. *Id.*

99. See Graham, *supra* note 71 (stating, “The wide availability of cheap and portable high-calibre equipment, instant distribution through the internet, and the increased involvement of acting and film-school graduates, means that the most popular offerings are no longer characterized by (in the words of veteran fan film-maker Larry Longstreth) ‘some goofy dipshit with access to a few costumes on the top of a parking deck’”).

100. *Id.*

101. YOUNG, *supra* note 23, at 26-35 (describing how amateur filmmakers showed home movies in their basements to friends and family members).

102. See, e.g., TROOPS (*film*), WIKIPEDIA, [http://en.wikipedia.org/wiki/Troops_\(film\)](http://en.wikipedia.org/wiki/Troops_(film)) (last visited Jan. 7, 2015) (stating that the 2002 film *TROOPS* has often been credited as jump-starting “the modern fan film movement, as it was one of the first short films to bring fan films into the digital age, taking advantage of internet distribution and affordable production and special effects equipment”).

103. See YOUNG, *supra* note 23, at 240-43 (discussing the instant distribution feature for fan films allowed by the invention and popularity of the Internet); Saikat Basu, *Watch 5 Cool Fan Films Online & Keep Track Of Other Upcoming Fan Productions*, MAKE USE OF (Dec. 8, 2010), <http://www.makeuseof.com/tag/watch-5-cool-fan-films-online-track-upcoming-fan-productions/> (stating, “Thanks to mediums like YouTube and other free video hosting sites like Daily Motion and Vimeo, it’s easy to showcase a fan film”).

books, and video games. While it is clear that certain types of fan films will never be made,¹⁰⁴ others most certainly will.¹⁰⁵ The most popular sites for fan films list multiple genres, but more amateur films are made about two main categories:¹⁰⁶ science fiction dealing with space¹⁰⁷ and Joss Whedon's productions.¹⁰⁸ These popular categories are discussed below, along with the original source authors' attitudes toward fan films.

1. A Long Time Ago, in a Galaxy Far, Far Away . . . Fan Films Attempt to Re-create Space: The Final Frontier

Space may be known as "the final frontier," but fan filmmakers have tackled it extensively.¹⁰⁹ The two biggest original sources from which fan filmmakers take inspiration are the *Star Trek* franchise and the *Star Wars* movies. While *Star Wars* receives the most attention currently, "fan fiction and organized media fandom have been traced to the second season of *Star Trek* in 1967."¹¹⁰ Both franchises are discussed below in their relation to fandom and fan fiction and how the copyright owners view fan films.

a. *Star Wars* Earns Top Spot for Fan Films

Fan filmmakers put their own spin on the *Star Wars* universe more

104. "You're right about fan films staying locked into certain genres; I haven't seen any Jane Austen fan flicks recently – like ever!" Republicot 3.0, *Fan Film Friday: Interview: Clive Young Talks About the Fan Film Subculture*, REPUBLICOT.COM (Dec. 4, 2009, 12:00 AM), <http://www.republicot.com/content/fan-film-friday-interview-clive-young-talks-about-fan-film-subculture?page=0,2>.

105. Lemonheadian answered "Why are so many fan films sci fi?" with: "Writers of sci fi TV/books can create a world that becomes something so much bigger than the writers could have ever intended. Science fiction allows us a connection to our imaginations that has long been beaten out of us by the drudgery of the real world." lemonheadian, Comment to *Why Are so Many Fan Films Sci Fi?*, REDDIT (June 25, 2012), http://www.reddit.com/r/scifi/comments/urcua/why_are_so_many_fan_films_sci_fi/.

106. See generally FAN FILM FOLLIES, <http://www.fanfilmfollies.com/movie-links> and FANFILMS.NET, <http://www.fanfilms.net/> (last visited Jan. 7, 2014). These are the two largest general-interest fan film sites on the Internet.

107. *Star Wars* and *Star Trek* easily top the number of fan films made. See discussion *infra* Parts III.C.1.a-b.

108. See discussion *infra* Part III.C.2.

109. The original 1966 *Star Trek* series begins with a voiceover by William Shatner stating, "Space . . . the final frontier . . . endless . . . silent . . . waiting . . ." Desilu Productions Inc. Inter-Department Communication from John D.F. Black to Gene Roddenberry (Aug. 2, 1966), available at *Original "Star Trek" Opening Monologue*, BUZZFEED, <http://www.buzzfeed.com/donnad/original-star-trek-opening-monologue> (last visited Jan. 7, 2015).

110. Tushnet, *Legal Fictions*, *supra* note 44, at 655 (citing Henry Jenkins, *At Other Times, Like Females: Gender and Star Trek Fan Fiction*, in SCIENCE FICTION AUDIENCES: WATCHING DR. WHO AND STAR TREK 196 (John Tulloch & Henry Jenkins eds., 1995)).

than any other fandom.¹¹¹ Internet film critics at Rotten Tomatoes even acknowledge that “fan films set in the world of *Star Wars* are something of a cottage industry on their own.”¹¹² In fact, when you scroll “Top Fan Film” lists, there is always at least one *Star Wars* takeoff on each list.¹¹³ There are so many *Star Wars* fan films that entire websites and lists are dedicated to the genre.¹¹⁴

This mutual fan/director love fest seems rosy on the surface, but George Lucas was not always receptive to the idea of user-generated content, even though he owes all of his success to his fans.¹¹⁵ At first, Lucas only allowed documentaries and parodies of *Star Wars*.¹¹⁶ Lucas warmed up to the idea of some *Star Wars* fan films and started his own amateur contest in 2002.¹¹⁷ In 2007, Lucas began allowing “in universe” fan films after the release of all his *Star Wars* movies.¹¹⁸ Lucas even

111. See generally RT Staff, *RT's Top 5 Fan Films*, ROTTEN TOMATOES (Apr. 15, 2009), http://www.rottentomatoes.com/news/1811402/rt_top_5_fan_films/ (stating, “If you add up all the fan-produced *Star Wars* films, you get a running time longer than the entire Lucasfilm’s canon (including cartoons).”).

112. *Id.*

113. See Rob Bricken, *The 9 Greatest Fan Films Ever Made*, TOPLESS ROBOT (June 8, 2009, 5:00 AM), http://www.toplessrobot.com/2009/06/the_9_greatest_fan_films_ever_made.php (listing three *Star Wars* movies in the list: *Hardware Wars*, *The Odd Star Wars Couple*, and *TROOPS*); RT Staff, *supra* note 111 (listing *TROOPS* in its Top 5); David McVay, *Top 10 Fan Films*, GEEK, ACTUALLY (May 6, 2010, 4:52 PM), <http://geekactually.com/2010/05/06/top-10-fan-films/> (listing *Pink Five*, *TROOPS*, *Duality*, *Hardware Wars*, and *George Lucas in Love*); *The Top Ten Star Wars Fan Films*, TIME MAG., http://content.time.com/time/video/player/0,32068,589287877001_2012690,00.html (last visited Jan. 27, 2015) (listing the Top 10 films).

114. See Dennis Wong, *The Top 10 Star Wars Fan Films*, TIME (Aug. 24, 2010), <http://techland.time.com/2010/08/24/the-top-10-star-wars-fan-films/>; Jay Hainsworth, *Our Favorite Star Wars Fan Films: The Force Is Strong With These Films*, IGN (Feb. 4, 2009), <http://movies.ign.com/articles/951/951053p1.html>; Sarah Moran, *Top 10 Star Wars Fan Films*, NERD BASTARDS (May 12, 2011), <http://nerdbastards.com/2011/05/12/top-10-star-wars-fan-films/>; Christopher Moshier, *Fan Film Follies Top Ten Star Wars Fan Films*, FAN FILM FOLLIES (Aug. 31, 2010), <http://www.fanfilmfollies.com/featured/fan-film-follies-top-ten-star-wars-fan-films>; Jeremy Conrad, *10 Great Star Wars Fan Films*, FURIOUS FANBOYS (Oct. 29, 2010, 9:32 AM), <http://furiousfanboys.com/2010/10/10-great-star-wars-fan-films/>.

115. “Fans who continued to try to live in the *Star Wars* universe for a generation after the *Return of the Jedi* gave George Lucas the audience base he needed to foist on us three *Star Wars* prequels, Jar Jar Binks, a universe of flimsy plastic toys, and \$100 replica light sabers in your choice of Jedi colors.” Jessica D. Litman, *Creative Reading*, 70-SPG LAW & CONTEMP. PROBS. 175, 175 (2007) (citations omitted).

116. The original contest limited “the content of entries to short film and video parodies, documentaries, and documentaries of the *Star Wars* universe and fan experience.” *The Official Star Wars Fan Film Awards*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Official_Star_Wars_Fan_Film_Awards (last visited Jan. 7, 2015) [hereinafter *Fan Film Awards*].

117. *Id.*; see also *The Official Star Wars Fan Film Awards*, STAR WARS FANPEDIA, http://swfans.wikia.com/wiki/The_Official_Star_Wars_Fan_Film_Awards (last visited Jan. 7, 2015).

118. *Fan Film Awards*, *supra* note 116. The movies in the *Star Wars* universe are *Star Wars*,

allowed the winners to be shown on cable channel Spike TV in 2010.¹¹⁹ Lucasfilm Ltd. discontinued the contest in 2012, stating that the company would be “looking for new ways for fans to share their creativity.”¹²⁰ However, the contest was revived in late 2014, with the winners to be screened at the annual *Star Wars* celebration event in April 2015.¹²¹ In November 2012, The Walt Disney Company purchased the intellectual property rights to all Lucasfilm Ltd. properties, including *Star Wars*, and it is uncertain how the media giant will react to other fan films.¹²²

Even after initiating the awards, not all fan films receive Lucas’ blessing, and his views remain inconsistent.¹²³ Fan filmmakers add customized disclaimers at the end of their films. Here is the disclaimer at the end of Kevin Rubio’s *TROOPS*:

Star Wars and all *Star Wars* characters created by George Lucas. Property of Lucasfilm, Ltd. Used Without Permission for this not-for-profit production. Thanking you in advance for not suing us George!

And a few screens later:

It is illegal to sell, purchase or make any money from this production whatsoever. This video was made strictly for our amusement and yours (and to showcase the underused talents of the participants). Do not even think about selling it! If you do, I will hunt you down and kill you! Have a nice day . . . and may the force be with you.¹²⁴

The Empire Strikes Back, The Return of the Jedi, The Phantom Menace, Attack of the Clones, and Revenge of the Sith. Star Wars Film Selector, STAR WARS, <http://www.starwars.com/explore/the-movies/> (last visited Jan. 7, 2015).

119. bradiger, *Atom Films Presents the Star Wars Fan Movie Challenge*, SPIKE (June 8, 2010, 6:36 PM), <http://www.spike.com/articles/l2snod/atom-films-presents-the-star-wars-fan-movie-challenge>.

120. Dustin, *Star Wars Fan Film Awards Canceled?*, THEFORCE.NET (May 31, 2012), http://www.theforce.net/latestnews/story/Star_Wars_Fan_Film_Awards_Canceled_146030.asp.

121. *Star Wars Fan Films Awards*, STARWARS.COM, <http://www.starwars.com/star-wars-fan-film-awards> (last visited Jan. 27, 2015).

122. Ty Burr, *What to Expect When Disney Buys ‘Star Wars,’* BOSTON.COM (Nov. 3, 2012, 7:41 PM), http://www.boston.com/ae/movies/2012/11/03/what-expect-when-disney-buys-star-wars/UJU624dHwUhhK06hfgy_eJ/story.html (stating that The Walt Disney Company plans to release more movies in the *Star Wars* franchise beginning in 2015 along with the warning that the “‘Star Wars’ saga, which began as a private fantasy about space warriors and princesses that a shy young man doodled on the margins of his homework, is now part of the most efficient content factory on the planet”).

123. Lucasfilm Ltd. has taken an inconsistent approach to its online imitators. Some fan films, like Kevin Rubio’s *TROOPS*, have “received Lucas’ warm praise.” Others, like *The Dark Redemption*, “received letters from lawyers telling them to shut down their sites, or else.” Walker, *supra* note 94.

124. Kevin Rubio, *TROOPS*, available at YOUTUBE, <http://www.youtube.com/watch?v=Gc5IqD0QibY> (last visited Jan. 7, 2015).

Lucas' official stance on fan films remains unclear. When Lucas owned the movie rights, StarWars.com contained this statement in its legal elements: "Except as expressly provided for under these Terms, the creation of derivative works based on the Materials contained herein is expressly prohibited."¹²⁵ Now that Disney owns Lucas' rights, the outlook may change.¹²⁶

b. Star Trek Holds Its Own in the Fan Film Universe

Star Trek owes much to its fandom. Commentators and media historians are quick to point out that hard-core fans remain responsible for the original television series remaining on the air past its first season.¹²⁷ The other television series and movies that followed the original are further proof of the fans' loyalty.¹²⁸ But the relationship is more symbiotic than most commentators give credit. While fans saved *Star Trek*, *Star Trek* also gave birth to the notion of media fandom. As Francesca Coppa observed, "Gene Roddenberry's strategy of turning a blind eye to fan art and fiction was probably responsible for the flowering of media fandom."¹²⁹

Roddenberry's blind-eye approach to *Star Trek* has not held true across the decades, especially after the rise of the Internet. Paramount Pictures and Viacom, the current owners of most *Star Trek* copyrights, earned a reputation for being cutthroat in patrolling and following up on any unauthorized use of the *Star Trek* franchise.¹³⁰ However, one fan

125. *Terms of Use, 8. Lucas Ownership Rights*, STARWARS.COM (last updated Sept. 8, 2011), <http://starwars.com/welcome/about/copyright.html#13>.

126. Timothy Geigner, *Will Disney Block Star Wars Fan-Made Content?*, TECHDIRT (Nov. 6, 2012, 2:37 PM), <https://www.techdirt.com/articles/20121101/13355120910/will-disney-block-star-wars-fan-made-content.shtml>. See *Terms of Use*, WALT DISNEY CO., <http://disneytermsofuse.com/english/> (last updated July 10, 2014).

127. See Coppa, *supra* note 65, at 44-46; Litman, *supra* note 115, at 175 (claiming that "*Star Trek* was just one of a bunch of TV series canceled for poor ratings, until some women got together at science-fiction conventions and started exchanging home-made *Star Trek* short stories based on the premise that Kirk and Spock were lovers.").

128. "Fan fiction, fan art, and a generation of people who attended science-fiction conventions to dress up in Klingon costumes gave *Star Trek* a second life that was far more commercially successful than the first. Paramount built the remnants of *Star Trek* into a multimillion-dollar franchise initially on the backs of creative fans." Litman, *supra* note 115, at 175-76.

129. *Id.* at 45.

130. See, e.g., Greg Burk, *Space Suit: Star Trek: Parody or Galactic Menace?*, L.A. WEEKLY, June 7, 1996, at 33 (discussing Paramount Studios' lawsuit against a small theater troupe's *Star Trek* parody in 1996); Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 YALE J.L. & HUMAN. 451, 499 n.220 (2001) (claiming that "[a]lthough the *Star Trek* recodifications went unchallenged in pre-Web days, the creation of an authorized *Star Trek* website by Viacom – owner of the *Star Trek* copyrights – led it to crack down on unauthorized uses of *Star Trek* materials on unofficial *Star Trek* Web sites.").

film series has thrived and survived over the years: *Star Trek New Voyages*.¹³¹ Fan James Cawley worked with original *Star Trek* and *Star Trek: Next Generation* costume designer William Ware Theiss to create the Internet series.¹³² Cawley's "ultimate goal is to produce a full year's worth (twenty-two or more) web episodes maintaining Gene Roddenberry's philosophy and vision for the original 1960's television show."¹³³ Cawley began the series in 2004, and shooting of new episodes is ongoing.¹³⁴ Paramount supports *New Voyages* as long as it remains non-for-profit.¹³⁵

2. A Closer Look at the Whedonverse

The Whedonverse – named in honor of director and writer Joss Whedon – encompasses the second biggest category for fan filmmakers.¹³⁶ Whedon's popularity rises from his subject matter, which involves quality television and movies in the science fiction genre and the fact that he actively supports fan filmmakers and fan fiction in general.¹³⁷ Unlike many of his counterparts, Whedon has been openly supportive. He told *The Guardian*:

I love it. I absolutely love it. I wish I had grown up in the era of fanfic-

131. The website states that "*Star Trek New Voyages: Phase II* is an award-winning independent webseries that produces new episodes of Classic Star Trek. Continuing the fourth and fifth seasons of the original series, we film the untold stories of the U.S.S. Enterprise, Captain Kirk, and his crew with the intention of filling in the missing years of the original five year mission, and bridging the gap to *Star Trek: The Motion Picture*. We are a group of fans who have come together with a common love for the classic era *Star Trek* for the purpose of having fun while making new episodes. It is the goal of *Star Trek New Voyages: Phase II* to support and promote the CBS/Paramount Star Trek franchise by giving fans an active way to continue their interest in Classic *Star Trek*." *Frequently Asked Questions*, STAR TREK PHASE II, http://www.startreknewvoyages.com/?page_id=526 (last visited Jan. 7, 2015).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (stating that "[d]ue to copyrights, there are no stations broadcasting our episodes. *Star Trek: Phase II* is a web-series. The episodes are available for FREE via the Internet. IF YOU FIND OUR EPISODES FOR SALE or RENT ANYWHERE, WHAT YOU HAVE FOUND IS AN ILLEGAL COPY. We cannot and do not make any money from the episodes"); *Star Trek: New Voyages Phase II*, IMDB, <http://www.imdb.com/title/tt0458122/> (last visited Jan. 7, 2015) (stating, "Although this is a 'non-official' *Star Trek* incarnation, Paramount Pictures which owns the name and the rights to *Star Trek* agreed to allow the producers of *New Voyages* to make these episodes on the condition that no profit was to be garnered from the show.").

136. Joss Whedon's television shows include *Buffy the Vampire Slayer*, *Angel*, *Firefly*, and *Dollhouse*. Joss Whedon, IMDB; <http://www.imdb.com/name/nm0923736/> (last visited Jan. 7, 2015).

137. See, e.g., Roz Kaveney, *Buffy the Vampire Slayer Without Joss Whedon? That's Been Going on for Years*, GUARDIAN (Nov. 24, 2010, 9:04 AM), <http://www.guardian.co.uk/commentsfree/cifamerica/2010/nov/24/buffy-vampire-slayer-joss-whedon-movie-fanfiction/print>.

tion, because I was living those shows and those movies that I loved and I would put on the score to Superman and just relive the movie over and over.¹³⁸

Whedon also supports slash fanfic, which places him in the minority.¹³⁹ Whedon's relationship with fan fiction creators has even coined a term used across all fan fiction: Jossed.¹⁴⁰

One project in the Whedonverse centered on fan filmmaking dedicates itself to "increase the awareness of non-profit charities through fan made films."¹⁴¹ Browncoat Big Damn Fan Films¹⁴² ("BDF") started as "an all-volunteer grassroots organization, created for charitable purposes."¹⁴³ Fans of the television and film series *Firefly* and *Serenity* formed BDF "around the principle that the energy and talents of members of the fandom could be channeled into giving back to the community."¹⁴⁴ The organization raised more than \$113,000 for charity during 2010-2011 through donations to support the making of the fan film *Browncoats: Redemption*.¹⁴⁵ What makes *Browncoats: Redemption* unique is that the film, set in the universe of Joss Whedon's cult TV favorite *Firefly*, received both Whedon's and 20th Century Fox's nod of approval because "its focus was on raising money for charities, including Equality Now, Whedon's charity of choice."¹⁴⁶ The film was

138. *Id.*

139. *Id.* (Whedon admitted, "In my world, heroes bugger each other senseless. Not all of them, but more than you'd think, and probably not who you're thinking.")

140. "(To Be) Jossed - To have events in one of your fan fictions be invalidated by a canon development. Originally derived from *Buffy* fandom, the term 'Jossed' is named after *Buffy* creator/writer/guru/god Joss Whedon." *Fan Fiction: A User's Guide*, H2G2, <http://h2g2.com/dna/h2g2/alabaster/A632062> (last visited Jan. 7, 2015). "A fan gets Jossed when the elaborate Epileptic Trees or FanFic that they've lovingly built upon canonical elements is abruptly disproved by further canon or by the Word Of God. Named after Joss Whedon; *Buffy the Vampire Slayer* was notorious for this, as fans would come up with detailed and elaborate theories or plots during summer hiatuses, most of which got completely thrown out within three episodes of the new season." *Jossed*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/Jossed> (last visited Jan. 7, 2015).

141. BROWNCOAT BIG DAMN FAN FILMS, <http://www.bigdamnfanfilms.com/> (last visited Jan. 7, 2015).

142. "Browncoats" has dual meanings. It is the nickname for *Firefly* fans and also part of the show's canon. "'Browncoat' is the name given to the Independent Faction who fought against the Alliance in a war that ends six years before the show begins. Not unlike the southern states during the Civil War, the Browncoats fought for sovereignty and the right to their own government, and like the South, they lost." *What Is a Browncoat?*, BROWNCOATS.COM, <http://www.browncoats.com/index.php?ContentID=42e7e88e69ab5> (last visited Jan. 7, 2015).

143. BROWNCOAT BIG DAMN FAN FILMS, *supra* note 141.

144. *Id.*

145. *Independent Film Raises Over \$113,000 for Charity Through Social Media*, BROWNCOATS REDEMPTION, <http://browncoatsmovie.com/> (last visited Jan. 7, 2015).

146. *Id.*

produced, bankrolled, and starred by fans, although there were cameos by original *Firefly* cast members Adam Baldwin and Michael Fairman.¹⁴⁷ BDF is working on another film for charity involving zombies and a comic book shop.¹⁴⁸

As evidenced above, source creators have different views on fan films. These views can change over time and what may be allowed one year may be taken away without notice the next.¹⁴⁹ Joss Whedon may be the most lenient example of allowing fan filmmakers freedom in regards to using his Whedonverse, although he is not the typical role model. Some copyright holders allow fans to create films from their properties, but the legal questions are still out there.

IV. LEGAL ARGUMENTS INVOLVING FAN FICTION: DERIVATIVE WORKS AND THE MINEFIELD CREATED BY CHARACTER AND SCENE PROTECTION

Many legal arguments swirl around the genre of fan fiction. Does it violate copyright law? Or trademark law?¹⁵⁰ Or, is it merely a “new” form of artistic expression that does not violate the original author’s rights at all? These questions are not easy to answer because of the current state of the laws and the varying attitudes toward fan fiction held by the original authors.

A. “Borrowing” Moves from Cultural Acceptance to Legal Action

Before there were any copyright laws, storytellers often borrowed from one another to improve upon the myth and the characters. In today’s society, these legends no longer rest in the hands of the authors. Instead, the rights to them are gobbled up by large corporations or sold to the highest bidder. Although the author does rightfully profit from these licenses and sales, the growing distance between the author and the story post-creation seems to invite interlopers, such as fan fiction amateurs, to add their own spin to the tale.

Amateurs do not see their fan fiction creations as “harming” the author. The copyright owner may not generally share this sentiment.¹⁵¹

147. *Id.*

148. See BROWNCOAT BIG DAMN FAN FILMS, *supra* note 141.

149. See discussion *supra* Part III.C.1.a.

150. Trademark laws involving characters and other creations are separate issues not discussed here. The Federal Trademark Act does not allow civil actions against “noncommercial use” of the mark to be actionable under the theory of dilution. 15 U.S.C. § 1125(c)(3)(C) (2012).

151. In 1999, J. Michael Straczynski, executive producer of the cult television series *Babylon 5*, spoke to students in Henry Jenkins’ science fiction class at MIT. A student asked Straczynski what he thought about “fans.” “After a pause, he replied, ‘You mean, copyright infringers.’ The

Scholar and MIT professor Henry Jenkins sums up the current situation best when he wrote: “Fan fiction is a way of the culture repairing the damage done in a system where contemporary myths are owned by corporations instead of owned by the folk.”¹⁵² This sentence is the most quoted – and usually only– “academic” sentence regarding fan fiction found on fan fiction websites themselves.¹⁵³ Fan fiction creators have used Jenkins’ words as a rallying cry to give their efforts meaning outside of the subculture in which they exist. As scholar Juli Parrish states, “Website creators seem to see Jenkins not only as a necessary reference but, more fundamentally, as an authorizing source text, one that legitimizes and even defines fan fiction in the first place.”¹⁵⁴

In most cases, fan fiction creators know they may be breaking the law, but they often choose to be defiant anyway. Creators and the websites that host fan fiction plaster warnings prominently on their works.¹⁵⁵ Some people ignore the intellectual property laws because they do not think they are “harming” the original author; others feel that the authors owe them something for their years of patronage.¹⁵⁶ Commentators have stated that “even the most socially conventional fan fiction is an act of defiance of corporate control.”¹⁵⁷

So far, no court cases have been brought over fan fiction. This does not mean copyright owners are unaware of the infringement; it just

remark was met with nervous laughter and mutual misunderstanding.” Jenkins, *Digital Land Grab*, *supra* note 95.

152. HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 24-27 (1992).

153. Parrish, *supra* note 33, at 61 (stating the prevalence of Jenkins’ statement across the Internet in May 2006).

154. *Id.* at 62.

155. See, e.g., H2G2, *supra* note 140 (stating that “[f]an fiction websites invariably contain a host of disclaimers, acknowledging the borderline legality of the pursuit. While not done for commercial purposes, fan fiction inevitably involves the use of copyrighted characters and settings, and fanfic authors basically operate at the mercy of TPTB. The good archives all recognize this - hence their clear legal disclaimers - and are usually only too willing to take down any material if TPTB ask them to. Any responsible site which archives fanfictions will have a blanket disclaimer on the main page and any index pages, stating that the stories were written for fun and are reproduced on the web for the enjoyment of other fans, and that there is no commercial intent.”).

156. See, e.g., Lady Sybilla, *Your Turn! How Do You Feel About Fan Fiction?*, HUBPAGES, <http://sockii.hubpages.com/hub/is-fan-fiction-wrong> (last visited Jan. 19, 2015) (stating “We, the fans of the world, own a part of whatever works we make famous. The money those bestselling authors make comes from us. We pay for the books, we read them, and the work becomes ours just as much as the author’s.”); Resabi, *Your Turn! How Do You Feel About Fan Fiction?*, HUBPAGES, <http://sockii.hubpages.com/hub/is-fan-fiction-wrong> (last visited Jan. 19, 2015) (stating that “[f]an fiction is a sign that someone is invested and immersed in an author’s created world – and that is a compliment.”).

157. Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 61, 72 (Karen Hellekson & Kristina Busse eds., 2006).

means they are taking other actions to stop the infringement or they passively allow it to occur.¹⁵⁸ The most common route of action for the original author or copyright owner involves sending the infringer a cease-and-desist letter.¹⁵⁹ Cases involving other instances of copyright infringement, analogous to fan fiction in some aspects, are detailed below.

*B. *This Film Is Based on Another's Work, But Is It Really Derivative?*

The U.S. Copyright Act grants copyright owners the exclusive rights to reproduce their works, prepare derivative works, distribute copies, perform their works, and display their works publicly.¹⁶⁰ The Act grants these rights to authors only for their original “expression,” and not for the idea.¹⁶¹ Fan films generally do not violate the original authors’ rights to reproduce, distribute, perform, or display their works publicly. But, in the narrowest of readings of the U.S. Copyright law, fan fiction may infringe on the original author’s rights to create derivative works. However, it is with this right that fan filmmakers also have two good arguments to protect themselves against potential charges of infringement: (1) Fan fiction creators can counter with the idea that their works fit into fair use or (2) that the items borrowed from the original author, like the character, are not protectable in the first place.¹⁶²

Many fan filmmakers disclaim upfront that their works are “based on” material from another source¹⁶³ by adding phrases such as, “This is a non-profit work of fanfiction and no copyright infringement is intended.”¹⁶⁴ In doing so, they hope to avoid the wrath of the source

158. Some copyright owners welcome fan fiction. *See* discussion *supra* Part III.C.1.

159. *See, e.g., Fan Fiction*, CHILLING EFFECTS, <http://chillingeffects.org/fanfic/faq.cgi> (last visited Jan. 7, 2015) (finding that “[m]any owners have tried to stop that use, and as a result, fan fiction authors have received letters telling them to take their stories off-line (cease and desist letters).”); Maria I. Cohen, *Cease-and-Desist Letters*, FANLAW.ORG, http://psylockelaw.home.mindspring.com/FanLaw_Articles/CeaseandDesist.htm (last visited Jan. 27, 2015) (showing examples of these letters and what steps to follow).

160. 17 U.S.C. § 106 (2012).

161. 17 U.S.C. § 102(b) (2012).

162. *See* discussion *infra* Part V.

163. *See* H2G2, *supra* note 140.

164. *See, e.g., NoDrogs, Possible Leverage*, FANFICTION (Dec. 28, 2008), http://www.fanfiction.net/s/4718549/1/Possible_Leverage (“I do not own Leverage, Kim Possible, or any related characters. They are the property of their original owners. This is a non-profit work done for fun only. No copyright infringement intended, no money made, please do not sue me.”); Disclaimer, PRIMORDIAL SOULS, <http://www.primordialsouls.com/disclaimer.php> (last visited Jan. 7, 2015) (“No copyright infringement intended. This is a non-profit site. Some of the fanfiction featured on this site contains adult content and situations not suited for people under the age of 18.

author so they are not charged with violating a copyright. Commentators conclude that these fan-made works serve a purpose. Scholar Patrick McKay claims: “Fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture, and in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products.”¹⁶⁵ It is these rights of cultural importance that have to be balanced against the rights of the original author granted by the U.S. Copyright Act.

The purpose of the U.S. Copyright Act comes from the U.S. Constitution and is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁶⁶ One right that the U.S. Copyright Act grants for authors is the exclusive right to prepare or authorize derivative works, which are works based on pre-existing works.¹⁶⁷ The U.S. Copyright Act defines a derivative work as follows:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”¹⁶⁸

This definition does not set many clear legal parameters and acts more to give only broad strokes as to what *may* be considered a derivative work. It is important to note that the language “recast, transformed, or adapted” refers not to sequels, but only to changing the original work “into another medium, mode, language, or revised version, while still representing the ‘original work of authorship.’”¹⁶⁹ Often what is at stake is the court’s need to balance “the incentive to create original works which copyright protection fosters and the freedom to produce

They are properly marked. You have been warned. The characters from Buffy the Vampire Slayer and Angel the Series that are used in these fics belong to Joss Whedon, Mutant Enemy, Kuzui Enterprises, Sandollar Television, 20th Century Fox, Warner Brothers, et. al. and are being used without permission.”).

165. Patrick McKay, Note, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 117 (2011).

166. U.S. CONST. art. I, § 8, cl. 8.

167. 17 U.S.C. § 106(2) (2012).

168. 17 U.S.C. § 101 (2012).

169. Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513, 538 (S.D. N.Y. 2008).

secondary works which monopoly protection of copyright stifles – both interests benefit the public.”¹⁷⁰

Luckily for fan filmmakers, courts have not interpreted § 106 of the Act as granting copyright owners complete control over every aspect of their original work. Courts support the idea that “[a] work is not derivative, however, simply because it is ‘based upon’ the preexisting works.”¹⁷¹ A work is not considered derivative if it is transformative, either.¹⁷² Derivative works that are “subject to the author’s copyright transform an original work into a new mode of presentation; such works – unlike works of fair use – take expression for purposes that are not “transformative.”¹⁷³

To legally use someone else’s copyrighted work in a derivative work, one generally has to receive permission from the original author.¹⁷⁴ This usually includes compensating the original author for using his work. In analyzing the concept of a derivative work, courts have been skeptical of allowing too many “ideas” to be copyrighted unless an actual portion of the copyrighted work appears in the derivative work.¹⁷⁵ Courts have also struggled to determine exactly what qualifies as a derivative work when only a character or setting is involved in the new work.¹⁷⁶ Scholar Samuel J. Coe argues that there are “also far more subtle ways to comment upon and transform a character which the fair use doctrine has been reluctant to recognize.”¹⁷⁷ For the most part, characters incorporated into works by professional, for-profit creators other than those of the original works have often been found to infringe on the original work.¹⁷⁸

170. *Id.* at 540.

171. *Id.* at 538. The Court further explained: “The law in this Circuit has recognized that ‘even when one work is “based upon” another, “if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.”’” *Id.* at 554 n.17 (quoting *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003) (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 143 n.9 (2d Cir. 1998))).

172. See discussion *infra* Part V.B.1.

173. *Castle Rock*, 150 F.3d at 143.

174. 17 U.S.C. § 101.

175. See, e.g., *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (stating that “a work is not derivative unless it has been substantially copied from the prior work”).

176. “While adaptations of novels into films or a recording of an existing song in a new music form are obvious derivative works, the issue becomes far more difficult when the dispute is centered on one literary character being ‘based’ off another.” Samuel J. Coe, *The Story of a Character: Establishing the Limits of Independent Copyright Protection for Literary Characters*, 86 CHI.-KENT L. REV. 1305, 1318 (2011).

177. *Id.* at 1320.

178. *Id.* (arguing, “Because fair use provides little protection for authors who want to use

Most fan filmmakers do not receive permission or compensate the authors, even though this is the safest route. Instead, fan filmmakers often rely on the idea of fair use in justifying the “borrowing” of another creator’s characters or universe.¹⁷⁹

C. *Character Protection: Does Superman Deserve Super Protection Under Copyright Laws, or Should the Man of Steel Be Open Source to the Masses?*

From the beginning, courts have not been completely clear on whether fictional characters by themselves can be protected under copyright law. Character protection, or the lack of it, affects fan filmmakers more than the other copyright laws. Since fan filmmakers generally focus their works on characters or a setting from a professional work, their need to use a particular character is important to the resulting film. In other words, a fan film about Superman will have an actor dressed like the Man of Steel. The amateurs create their own dialogue, storylines, and scenes rather than lifting them from the source work, so the amount of material copied from the copyrighted material is substantially low or nonexistent if characters by themselves are not protected under copyright laws. If this is true, then the likelihood that fan filmmakers can be found as infringers greatly decreases. Judge Learned Hand developed a rough first test for character protection in 1930, and parts of his test are still applied today.¹⁸⁰

1. The First Tests for Character Protection: Learned Hand and the Case of *Abie’s Irish Rose* in *Nichols*

One of the earliest cases to look at character protection is *Nichols v. Universal Pictures Corp.*¹⁸¹ In that case, Judge Learned Hand warned

character ideas with similar artistic ‘purpose’ in mind, over-protecting those character ideas significantly impairs authors’ abilities to make new contributions to a popular existing genre.”) (citations omitted). *See also* Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (upholding that Colting infringed when he created a novel that explored what happened to Salinger’s character Holden after *Catcher in the Rye*); and Dr. Seuss Enters., L.P., v. Penguin Books USA, Inc., 924 F. Supp. 1559 (S.D. Cal. 2004) (concluding that *The Cat Not in the Hat! A Parody by Dr. Juice* infringed on Theodor Geisel’s characters from the *Cat in the Hat* and *Horton Hears a Who* and were satire rather than parody).

179. “Fair use is an exception to a copyright holder’s right to exclusive use of the original work and its derivatives.” *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1150 (C.D. Cal. 2010).

180. *See infra* Part IV.B.1.

181. In *Nichols v. Universal Pictures Corp.*, playwright Nichols sued Universal Pictures for releasing a movie that she claimed infringed on the copyright for her play *Abie’s Irish Rose* because she believed the plots were similar. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 119-22 (2d Cir. 1930).

that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”¹⁸² In doing so, Judge Hand seemed to extend copyright protection only to characters clearly defined by specific characteristics. The court went on to hold that the playwright could not copyright an idea, even if the circumstances in defendant Universal’s movie involved the same situations with similar stereotypical characters.¹⁸³ Judge Hand also alluded to another aspect that applies to fan filmmakers when he stated:

When plays are concerned, the plagiarist may excise a separate scene; or he may appropriate part of the dialogue. Then the question is whether the part so taken is ‘substantial,’ and therefore not a ‘fair use’ of the copyrighted work; it is the same question that arises in the case of any other copyrighted work. But when the plagiarist does not take out a block in suit, but an abstract of the whole, decision is more troublesome.¹⁸⁴

Although the issue in *Nichols* did not involve the same exact characters in both the play and the movie, the case did allow another creator to use the same character type in a new work without infringing on the original work.

Another early case dealing with the same parameter of character protection stemming from *Nichols* is *Detective Comics, Inc. v. Bruns Publications*.¹⁸⁵ In that case, Detective Comics sued Bruns Publications for creating a Wonderman character that appeared similar to Detective Comics’ Superman.¹⁸⁶ The court did extend protection to the Superman character.¹⁸⁷ But the court also stated that *Nichols* was too broad and that Detective Comics “is not entitled to a monopoly of the mere character of a ‘Superman’ who is a blessing to mankind.”¹⁸⁸ Although it looked like from that statement Bruns might be able to keep Wonderman, the court banned Bruns from “printing, publishing, offering for sale or selling, or in any way distributing any cartoon or cartoons, or any periodical or

182. *Id.* at 121.

183. *Id.* at 122.

184. *Id.* at 121 (citations omitted).

185. *Detective Comics, Inc. v. Bruns Publ’ns, Inc.*, 111 F.2d 432 (2d Cir. 1940).

186. The court compared the number of similarities and settled on the statement that “The only real difference between them is that ‘Superman’ wears a blue uniform and ‘Wonderman’ a red one.” *Id.* at 433.

187. *Id.* at 433-34 (stating that “So far as the pictorial representations and verbal descriptions of ‘Superman’ are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the act.”).

188. *Id.* at 434.

book portraying any of the feats of strength or powers performed by ‘Superman’ or closely imitating his costume or appearance in any feat whatever.”¹⁸⁹

2. The Next Step: The Story Being Told Test

The next chapter in character protection emerged from the Ninth Circuit’s decision in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*¹⁹⁰ In that case, Warner Brothers brought a copyright infringement suit against author Dashiell Hammett after Hammett sold rights to *The Maltese Falcon* to Warner Brothers, then wrote other stories involving Sam Spade.¹⁹¹ The test derived from the case hinges on the concept that characters are only protected by copyright if “the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”¹⁹²

Subsequent courts seem to have taken only this portion of what has been nicknamed the Sam Spade Test without looking at the dicta in the case. The *Warner Bros.* court stated in dicta: “If Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author’s use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefor.”¹⁹³ This statement appears to limit or reserve the future character use to the author exclusively, not to the general public.¹⁹⁴

In *Columbia Pictures Corp. v. National Broadcasting Co.*, decided just a year later, the U.S. District Court for the Southern District of California concluded that characters could not be protected at all in some instances.¹⁹⁵ In that case, the court held that a television broadcast of the burlesque *From Here to Obscurity* did not infringe the copyright of the producer in the film *From Here to Eternity*.¹⁹⁶ That court stated that the

189. *Id.*

190. *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954).

191. *Id.* at 945-47.

192. *Id.* at 950.

193. *Id.*

194. The court also stated: “We conclude that even if the Owners assigned their complete rights in the copyright to the Falcon, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story.” *Id.*

195. “Some of the material ordinarily appearing in a copyrighted literary or dramatic work is not capable of ownership, is not protectible, and may freely be taken by others without infringing the copyright . . . (a) The title, (b) The theme, (c) The locale and settings, (d) The ‘situations,’ (e) ordinarily the characters, (f) The ideas, and (g) Bare basic plots.” *Columbia Pictures Corp. v. National Broad. Co., Inc.*, 137 F. Supp. 348, 353-54 (S.D. Cal. 1955).

196. *Id.* at 348.

“copyright owner’s protectible property consists in the development, treatment and expression given in the copyrighted work to such elements,” and not in the elements themselves.¹⁹⁷ Although that case involved a “burlesque,”¹⁹⁸ the court recognized more broadly that “[s]ubsequent authors, writers and the general public have the right to use the protectible material in the copyrighted work without liability for infringement if such use is within the limitations of the doctrine of fair use.”¹⁹⁹ This ruling allowed freer use of copyrighted items under the fair use umbrella. The court reasoned that a burlesquer must make “a sufficient use of the original to recall or conjure up the subject matter being burlesqued,”²⁰⁰ so the law should permit “more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.”²⁰¹

3. The Character Delineation Test: “Visual” Characters Gain More Protection Than Their “Literary” Counterparts

In 1978, the Ninth Circuit refined the Sam Spade Test to give broader protection to the “visual” class of characters. In *Walt Disney Productions v. Air Pirates*, Disney sought an injunction to prevent Air Pirates comics from depicting its “innocent” characters in drug-laced counterculture situations.²⁰² That court looked at the precedent set in *Warner Bros.* and decided: “Judge Stephens’ reasons for that conclusion provide an important indication of the applicability of that conclusion to comic book characters as opposed to literary characters.”²⁰³ That court distinguished the two cases by stating:

While many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression. Because comic book characters therefore are distinguishable from literary characters, the Warner Brothers language does not preclude protection of Disney’s characters.²⁰⁴

The *Walt Disney* court then proceeded to eliminate the defendant’s fair

197. *Id.* at 353.

198. A burlesque equates to the modern parody. *Id.* at 354.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751, 753-54 (9th Cir. 1978).

203. *Id.* at 755.

204. *Id.* at 756.

use defense because, by “copying the images in their entirety, defendants took more than was necessary to place firmly in the reader’s mind the parodied work and those specific attributes that are to be satirized.”²⁰⁵ Apparently, the defendant’s depiction of Mickey Mouse looked too much like the original,²⁰⁶ which exceeded what the court deemed as “permissible for a parody.”²⁰⁷ The seemingly new deviation developed in *Walt Disney* has been referred to as the Character Delineation Test.

Subsequent courts continued to extend “visual” characters more protection than literary ones by using the Character Delineation Test, although courts have been reluctant to abandon the Sam Spade Test altogether, even with visual characters.²⁰⁸ Courts have stated that the “precise legal standard this Court should apply in determining when a character may be afforded copyright protection is fraught with uncertainty”²⁰⁹ and that the *Warner Bros.* test was merely dicta.²¹⁰ Commentators suggest that one problem with the Character Delineation Test is “its unreliable judicial application and tendency to over-protect literary characters.”²¹¹

The uncertainty surrounding character protection leaves fan filmmakers in a precarious situation. Until the U.S. Supreme Court hears a case involving character protection or Congress changes the laws to clarify the level of protection characters receive, the extent of character protection under the law will remain unclear. As it stands now, courts

205. *Id.* at 758.

206. The defendant claimed that “the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else.” *Id.*

207. *Id.*

208. See *Olson v. Nat’l Broad. Corp., Inc.*, 855 F.2d 1446, 1451-52 (9th Cir. 1988) (the court used both the Sam Spade Test and the Character Delineation Test in analyzing whether two television shows were too similar); *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at *7-8 (C.D. Cal. Apr. 25, 1989) (the court mentions both tests but decides characters from the *Rocky* film series are the story being told so it will not analyze the characters under the Character Delineation Test); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1294-96 (C.D. Cal. 1995) (stating “There have been no Ninth Circuit cases on the protectability of visually-depicted characters since *Olson*, and therefore, it behooves this Court to analyze James Bond’s status under the *Sam Spade/Olson*/Ninth Circuit ‘story being told’ test, as well as under the *Air Pirates*/Second Circuit ‘character delineation’ test”); *Gaiman v. McFarlane*, 360 F.3d 644, 660-61 (7th Cir. 2004) (using only the Sam Spade Test in analyzing whether a comic book character could be copyrightable because the Ninth Circuit law was not binding authority as well as the idea of the difference “between literary and graphic expression”).

209. *Anderson*, No. 87–0592 WDKGX, 1989 WL 206431, at *6.

210. The *Olson* court skirts the issue by stating that it does not have to decide whether the Character Delineation Test was mere dicta because the case before it did not have strong enough characters for any test to apply. *Olson*, 855 F.2d at 1452.

211. Coe, *supra* note 176, at 1313 (Although Coe refers to the Character Delineation Test as the Distinctly Delineated Test, they are the same test.).

may come to differing conclusions when trying to decide whether a fan filmmaker infringes when he uses a standard or stock-type character from a film, like a Stormtrooper from the *Star Wars* fandom,²¹² in his own production. Under Learned Hand's test, a Stormtrooper might be regarded as "stereotypical" of a law enforcement agent.²¹³ If so, then the Stormtrooper would not gain copyright protection since it does not have enough "specific characteristics" to warrant that protection. Courts might arrive at the same outcome in applying the Story Being Told Test²¹⁴ since a Stormtrooper is more of a background character than the main character. If courts apply the Character Delineation Test,²¹⁵ the fan filmmaker might be liable for infringement because the Stormtrooper is a visual character rather than a literary one.

D. Non-Protected Elements: Plots, Ideas, and the Notion of Scenes a Faire

Fan filmmakers have an easier time deciphering the law involving settings and some plot elements from source works. Courts have held that certain stock elements in films and books are not copyrightable because they represent ideas, not expressions.²¹⁶ In *Alexander v. Haley*, the U.S. District Court for the Southern District of New York defined *scenes a faire* as the "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."²¹⁷ Courts have applied the scenes a faire analysis to nontraditional themes and stories, as well as to the mundane.²¹⁸ These

212. Stormtroopers are "elite soldiers of the Galactic Empire These faceless enforcers of the New Order . . . often used brutal tactics as a way to keep thousands of star systems throughout the galaxy in line. At the height of the Empire, stormtroopers had effectively become symbols of brutality and terror." *Stormtroopers*, WOOKIEEPEDIA, <http://starwars.wikia.com/wiki/Stormtrooper> (last visited Jan. 7, 2015).

213. For an explanation of Learned Hand's test, see discussion *supra* Part IV.C.1.

214. For an explanation of the Story Being Told Test, see discussion *supra* Part IV.C.2.

215. For an explanation of the Character Delineation Test, see discussion *supra* Part IV.C.3.

216. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1986) (stating: "These similarities therefore are unprotectible as 'scenes a faire,' that is, scenes that necessarily result from the choice of a setting or situation. Neither does copyright protection extend to copyright or 'stock' themes commonly linked to a particular genre.").

217. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

218. See *id.* at 40-43 (comparing the treatment of slaves in two books); *Wavelength Film Co. v. Columbia Pictures Indus., Inc.*, 631 F. Supp. 305, 307 (N.D. Ill. 1986) (stating that indispensable elements in science fiction included "an alien arrives on earth in a spaceship; all humans are afraid of the unknown alien; governmental authorities are trying to capture or destroy the alien; one human becomes friendly with the alien and tries to help it return home safely; and the alien leaves earth on a spaceship immediately before death"); *Walker*, 784 F.2d at 50-51 (not allowing protection for "common elements in police fiction," such as "drunks, prostitutes, vermin and derelict cars" and "foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish

scenes a faire “are not copyrightable except to the extent they are given unique—and therefore protectible—expression in an original creation.”²¹⁹

In analyzing the level of plot protection, it is helpful to go back to Judge Learned Hand’s opinion in *Nichols v. Universal Pictures Corp.*²²⁰ The judge easily would allow a different author to imitate the plot, character types, exposition, conflict, resolution, and all of the other original elements of the source work as long as the wording was not exactly the same.²²¹ In relation to a play, which is easily analogous to a movie, the *Nichols* court stated:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.²²²

If you apply this analysis to a movie, it is nearly impossible for actors in a fan film to create a carbon copy of the source work. A fan production is a “string of compromises one after another, from the story, casting, and locations to the effects, editing, and the final product.”²²³ When it comes to fan films, “[n]o one can make a \$200 million summer blockbuster for 20 bucks, try as he or she might.”²²⁴ A fan film featuring a teenage boy in the role of Indiana Jones will not capture the same effect as Harrison Ford on the big screen in the same role.²²⁵

In examining both character protection and scenes a faire, courts would probably decide a fan film does not infringe on a copyright if it contains its own original dialogue and storyline. For example, if a fan filmmaker only used certain elements from *Star Wars* – such as the setting of Tatooine and the idea of a merchant selling droids²²⁶ – to

cop”).

219. *Id.*

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

221. *Id.* at 121.

222. *Id.*

223. YOUNG, *supra* note 23, at 242.

224. *Id.* at 241-42.

225. *Id.* at 242 (detailing what would happen if a teenage boy in a fan film played Indiana Jones).

226. Tatooine, Luke Skywalker’s home planet, is the scene of several battles between the Rebel forces and Imperial Army. *Tatooine*, WOOKIEEPEDIA, <http://starwars.wikia.com/wiki/Tatooine> (last visited Jan. 7, 2015).

create a film and then added original dialogue and a story, it is likely courts would not find infringement. The filmmaker created the dialogue and story; the borrowed elements would be scenes a faire. Tatooine is scenes a faire because it can be characterized as a generic, formulaic setting often found in a space genre – it is just a planet, much like a saloon appearing in a western film.²²⁷ A merchant who sells droids adds only another generic element or character that exists to fill out the standard scene.²²⁸ Both are merely ideas. Therefore, if fan filmmakers only use these non-protected “ideas” from copyrighted works, they should not be held as infringing on the source material.

V. *The Concept of Fair Use:*

PLACING LIMITATIONS ON A COPYRIGHT HOLDER’S EXCLUSIVE RIGHTS

Whether fair use applies depends on the court’s interpretation and its application of the law and the facts.²²⁹ Fair use was added to the U.S. Copyright Act in 1976, although it had existed in common law for some time.²³⁰ Fair use limits a copyright holder’s rights by allowing other people to take parts of the original work if the newer work follows certain guidelines.²³¹ Fair use can also serve as a defense that excuses some acts by protecting potential infringers when these acts conform to standards set forth by the U.S. Copyright Act. Scholar Frank Houston sums up § 107’s objective as “to carve out certain ‘fair uses’ that allow a secondary author to incorporate copyrighted elements of an original work – whether an excerpt or something new that derives from that original – that are technically infringing, but statutorily defensible.”²³²

227. Tatooine is merely a prototype of a planet in outer space. It is an example of an element that is “so inextricably connected to a certain genre that [its] appearance in the work cannot be considered to be unique or original.” Jacqueline Lai Chung, Note, *Drawing Idea From Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 920 (2007).

228. See *id.* at 930 (explaining that “[s]tock characters, in their undeveloped and generalized state, exist as the unremarkable elements of the literary terrain; at best, they serve as the short-cut signifiers to a particular literary theme or genre. For example, a barmaid, a saloon owner, and a town sheriff are the figures decorating the scene in a typical country western.”).

229. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (stating that “[f]air use is a mixed question of law and fact”).

230. See Frank Houston, *The Transformation Test: Artistic Expression, Fair Use, and the Derivative Right*, 6 FIU L. REV. 123, 124 (2010) (citing Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (2006))).

231. *Id.* The fact that Congress named § 107 “Limitations on Exclusive Rights: Fair Use” shows the intent of the lawmakers to shrink copyright holder’s rights against other parties. 17 U.S.C. § 107 (2012).

232. Houston, *supra* note 230, at 124.

Courts apply the fair use doctrine to allow other creators more flexibility than the rigidity of the standard infringement analysis. Courts have stated: “Subsequent authors, writers and the general public have the right to use the protectible material in the copyrighted work without liability for infringement if such use is within the limitations of the doctrine of fair use.”²³³

The U.S. Copyright Act of 1976 expressly states the concept of fair use at the beginning of § 107.²³⁴ The Act allows fair use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”²³⁵ Figuring out whether the new work fits into one of these categories is the first step of the fair use analysis.

A. *Fan Films Can Fit Into the Narrow Categories Allowed by the Act*

Fan filmmaking does not neatly fit into one of the categories Congress outlined in § 107. It is not really news reporting, teaching, scholarship, or research. The categories listed in § 107 are not dispositive, though, so some analysis is required in regards to fan films. Although, fan films created to educate other members of fandom might fit into the educational category if the courts use the same analysis the U.S. District Court for the Southern District of New York followed in *Paramount Pictures Corp. v. Carol Publishing Group*.²³⁶ In that case, the court stated, “While a commentary on *Star Trek* does not fall within the traditional elitist notion of an educational work, the Court is ‘alert to the risk of permitting subjective judgments about quality to tilt the scales [of fair use].’”²³⁷ Applying fan films as a comment could be a stretch, too, as fan films do not merely present a review on the original source.

Fan films could be interpreted as criticism, although they would not conform to the traditional literary critic template.²³⁸ Fans who develop their own AU or who go against canon essentially are criticizing the original author’s work by asking, “What if?” or “Why not?” and then

233. Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 947 (9th Cir. 1954).

234. 17 U.S.C. § 107.

235. *Id.*

236. *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998).

237. *Id.* at 335.

238. Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 1, 8 (2010) [hereinafter Tushnet, *Hybrid Vigor*] (explaining that “[m]any fanworks don’t fit the prototypical fair use of biting, mocking criticism that targets aspects of the original in order to reject them”).

answering these questions themselves in their new works. Jenkins outlines in-depth one example of criticism from fanfic that rewrites the ending of *Thelma and Louise* so that the women become lovers and, eventually, vampires.²³⁹ Jenkins believes that fanfic author Susan Douglass used slash to rewrite the ending in a way that empowers women and criticizes the mainstream Hollywood ending.²⁴⁰ Jenkins likens the changes Douglass incorporates in her short story to almost serving as the role of a film critic who points out what is wrong or missing in the original work.²⁴¹ He concludes that “new modes of critical writing are more and more drawing upon traditions of fan discourse, making the way for more openly appropriative, playful, autobiographical, and inventive genres of critical analysis.”²⁴²

B. *The Four-Factor Statutory Analysis Under Fair Use*

Examining the categories does not end the fair use analysis. Even if the unauthorized use falls into one of the approved categories, courts still must use at least the four-factor analysis to determine whether fair use is present. Section 107 outlines four factors courts weigh in determining whether another work is fair use or infringing:

(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.²⁴³

The four factors are not “winner-take-all categories to be tallied at the end to determine the prevailing party; they are intended to be carefully weighed case by case with an eye towards the policies underlying copyright protection.”²⁴⁴ To complicate the analysis, the four factors are not exclusive, and courts may bring in other elements to balance the potential infringer’s right to use against those of the original copyright owner.²⁴⁵ Of these four factors, two come into play most often with fan

239. Jenkins focuses on Susan Douglass’ short story *Music of the Night*. Jenkins, *supra* note 18, at 165-79.

240. *Id.* at 165-67.

241. *Id.*

242. *Id.* at 179.

243. 17 U.S.C. § 107 (2012).

244. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1150-51 (C.D. Cal. 2010).

245. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (stating in its fair use analysis that the “listing was not intended to be exhaustive” or “to single out any particular use as presumptively a ‘fair’ use”) (internal citations omitted).

films – factors one and four – although all are discussed below.

1. The First Factor: Purpose and Character

The first fair use factor – the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes²⁴⁶ – has been read by the courts in conflicting ways. In one of the more famous fair use cases, the U.S. Supreme Court defined the first factor analysis by stating, “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”²⁴⁷ In that case, the *Nation* purposely scooped a competitor’s magazine by illegally obtaining and publishing excerpts from Gerald Ford’s manuscript. Although this is not the type of instance that would occur in fan films, because fan films generally do not try and beat the source material to completion, the Supreme Court’s ruling stresses the importance of looking past just the non-profit and profit analysis to see whether any economic harm results to the copyright holder from the use where the second party may profit. Also, commentators suggest that “Congress did not intend for courts to use this factor to restrict the fair use doctrine to educational or non-profit uses but rather wanted to ensure that commercial motivation was considered in judicial analyses.”²⁴⁸

In analyzing the first factor, fan films are not of a “commercial nature” by definition because they are free to view and download. Fan filmmakers, like the rest of the fan fiction creators, stress that their works are “not for profit.”²⁴⁹

To complicate the first factor analysis further, the Supreme Court has also stressed the importance of looking at the “transformative” nature of the new work. The transformative analysis is not new; it dates back to an 1841 copyright case involving George Washington’s biography.²⁵⁰ Transformative nature seemed to lie dormant until 1994,

246. 17 U.S.C. § 107.

247. *Harper & Row*, 471 U.S. at 562.

248. Gregory M. Duhl, *Old Lyrics, Knock-off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 682 (2004).

249. See generally Tushnet, *Legal Fictions*, *supra* note 44, at 664 (noting that “[f]an fiction is mostly nonprofit, and on the Web no one has to pay to read it”); *Fan Fiction*, *supra* note 159 (explaining that fan fiction is not for profit); Zachary Knight, *Where Fan Fiction Stands on Copyright: A Legal Primer*, TECHDIRT (Aug. 16, 2012, 12:11 PM), <http://www.techdirt.com/articles/20120814/20110220055/where-fan-fiction-stands-copyright-legal-primer.shtml#c503> (stating “[f]an fiction is not about money or profiting [sic] from a creator’s work”).

250. In *Folsom v. Marsh*, Justice Story held that “no one can doubt that a reviewer may fairly

when the Supreme Court relied on that concept to allow 2 Live Crew's appropriation of Roy Orbison's "Oh, Pretty Woman" in its song parody "Pretty Woman."²⁵¹ In analyzing the first fair use factor in *Campbell v. Acuff-Rose Music Inc.*, the Supreme Court stated:

The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."²⁵²

The Court acknowledged that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."²⁵³ The *Campbell* Court separates the "transformative" idea into two tests. The first test evaluates how much the new work alters the original.²⁵⁴ The second test looks at the new work's value in promoting public or social welfare.²⁵⁵ The first test is more relevant in the analysis of whether fan films are transformative, as courts have been reluctant to apply the second test regarding social welfare to fiction works.²⁵⁶ Although the work in *Campbell* was a song parody, the Court did not limit the transformative get-out-of-jail-free card to parody alone, instead stating that "parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."²⁵⁷

Fan films are "transformative" whether they are parodies or not. Fan films borrow elements from the original source and repurpose them with new dialogue, visuals and storyline. They significantly alter the original, which satisfies the first test, and they loosely promote social welfare by fulfilling the framers' intent to encourage authors to create

cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism." *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841). Story went on to clarify that "if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Id.* at 344-45.

251. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-74 (1994).

252. *Id.* at 579 (citations omitted).

253. *Id.* at 580.

254. *Id.* at 579.

255. *Id.*

256. When analyzing whether *The Seinfeld Aptitude Test* book was fair use of the *Seinfeld* television series, the court stated in its fair use analysis that "[w]e also note that free speech and public interest considerations are of little relevance in this case, which concerns garden-variety infringement of creative fictional works." *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998).

257. *Campbell*, 510 U.S. at 581.

works. For example, Erin Pyne wrote and directed two *Harry Potter* fan films – *The Marauders’ Worst Memory* and *The Potter Prophecy* – based on her own “fleshed out stories only briefly mentioned in the original [J.K.] Rowling books.”²⁵⁸ Pyne’s new storylines, different actors, and original dialogue fit squarely into the “further purpose or different character” and “new expression, meaning, or message” outlined in *Campbell*.²⁵⁹ Scholar Rebecca Tushnet writes in support of fan fiction, its place in culture, and its transformative nature.²⁶⁰ Tushnet claims, “Once we recognize the richness and multidimensionality of transformativeness [in fan fiction], we can assess fair use claims more usefully, paying attention to the way a new remix fits into its broader context.”²⁶¹

2. The Second Factor: The Nature of the Work

The second factor – the nature of the copyrighted work²⁶² – would depend on the type of original work in the fandom. In most cases, fan films pay tribute to subjects in fiction rather than historical or factual works.²⁶³ Courts have held that creative works of fiction are entitled to the highest level of protection, so this factor will generally weigh against the fan filmmaker.²⁶⁴

Although this factor may look like it automatically weighs in favor of the copyright holder, commentator Meredith McCardle has added another facet to the second factor analysis by including how the copyright owner has protected the original work against fan fiction creators.²⁶⁵ In her analysis, she uses the idea that “unpublished works are usually given more protection than published works, which has led many

258. YOUNG, *supra* note 23, at 232-33. *Harry Potter* creator J.K. Rowling embraces most fan fiction. Her lawyers have only sent cease-and-desist letters to adult-themed fanfic. See *Harry Potter in the Restricted Section*, CHILLING EFFECTS (Jan. 13, 2002), <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522> (showing a cease-and-desist letter sent by Rowling’s attorneys to a website featuring *Harry Potter* “adult fan fiction.” The letter states, “For the avoidance of doubt, our clients make no complaint about innocent fan fiction written by genuine *Harry Potter* fans.”).

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

260. See, e.g., Tushnet, *Legal Fictions*, *supra* note 44; Tushnet, *Hybrid Vigor*, *supra* note 238; Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133 (2011); Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889 (2010).

261. Tushnet, *Hybrid Vigor*, *supra* note 238, at 10.

262. 17 U.S.C. § 107 (2012).

263. See discussion *supra* Part III.C.

264. See *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998); *Twin Peaks Prods., Inc. v. Publ’n’s Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993).

265. McCardle, *supra* note 27, at 458.

commentators to note that published or widely-distributed works should receive less protection.”²⁶⁶ In her argument, McCordle focuses more on the actions or inactions of the copyright owner in determining the second factor.²⁶⁷ She states, “if a copyright owner has kept close control over the licensing and use of his product, the fan fiction writer’s argument is probably weaker than if the same argument is made in the face of a lazy copyright owner who tolerates use of the work in other manners.”²⁶⁸ Either way, the case for the fan filmmaker is not strong. It might not matter though, as scholars have stated in relation to fan fiction that the second factor “is rarely significant, though it is regularly cited.”²⁶⁹ Tushnet’s view sums it up best: “fan fiction is unlikely to be written about factual narratives; therefore, this fair use factor may simply be irrelevant to the analysis.”²⁷⁰ Therefore, although the second factor should be in the analysis, it would not be weighed as heavily as the first and fourth factors.

3. The Third Factor: Amount and Substantiality

The third factor – amount and substantiality of the portion used in relation to the copyrighted work as a whole²⁷¹ – has to be examined in context on a case-by-case basis.²⁷² The Supreme Court stated, “this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”²⁷³ This means the third factor breaks down into several subparts, depending on the case.

In general, courts analyze the “amount” of material borrowed from the copyrighted material by verbatim copying.²⁷⁴ In fan films, verbatim copying cannot be readily achieved in terms of reproducing the copyrighted work in its whole form in the new film. However, a fan film still may borrow story elements, characters and settings from the copyrighted material. These elements fit better into the “substantiality” analysis of the third factor.

Character analysis fits into the third factor for fair use since it can be part of the “substantiality” of the copyrighted material. Even if a fan filmmaker uses the “whole character” from the original work in his film,

266. *Id.*

267. *Id.*

268. *Id.*

269. Tushnet, *Legal Fictions*, *supra* note 44, at 662.

270. *Id.* at 676-77.

271. 17 U.S.C. § 107 (2012).

272. *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

273. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

274. *Id.* at 589.

it does not necessarily mean that the work infringes on the original copyright owner. Characters by themselves generally cannot be copyrighted,²⁷⁵ and they usually “only merit protection when they are sufficiently delineated in a copyrighted work.”²⁷⁶ Therefore, if the characters in the source material fill only ancillary roles, their “use might thus be deemed to involve only a part of another’s creation”²⁷⁷ rather than infringing enough for the fan filmmaker to be liable. Still, issues involving § 107(3)²⁷⁸ may come directly into play regarding fan films that cherry-pick elements from other films, such as using the *Star Wars* universe to follow a day in the lives of Stormtroopers at work.²⁷⁹ Attorney Carole E. Handler warns of this prospect when she claims “new media technologies encourage the exchange of smaller bits of information. Perhaps only one or two characteristics of a character are borrowed, inviting a *scenes a faire* defense. . . . [C]opyright owners will likely be contesting numerous efforts to expand the scope of the fair use doctrine and apply it to such media.”²⁸⁰

An extreme example weighing in favor of the copyright holder would be if a fan film uses Superman as its main character. In that case, the copyright owner would have a stronger case since the courts have expressly stated that character deserves special protection.²⁸¹ On the other end of the spectrum, a fan film featuring a Stormtrooper running a convenience store would weigh more in favor of the fan filmmaker since a Stormtrooper is probably not sufficiently delineated to receive protection.

Another piece of the puzzle in the third factor is whether the secondary work takes “the heart of the matter” from the copyrighted material.²⁸² This analysis looks more at the part of the material that is

275. See discussion *supra* Part IV.C.

276. Tushnet, *Legal Fictions*, *supra* note 44, at 677.

277. *Id.*

278. 17 U.S.C. § 107(3) (2012) (referring to “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

279. Kevin Rubio’s *TROOPS* is shot in a documentary style on the planet Tatooine, combining *A New Hope* and the television series *COPS*. It follows the Imperial Forces as they investigate stolen droids and a domestic dispute at the Skywalker home. Rubio, *supra* note 124.

280. Carole E. Handler, *Fictional Characters in New Media*, 1016 PLI/Pat 65, 68 (Sept. 2010).

281. See *Detective Comics, Inc. v. Bruns Publ’n’s, Inc.*, 111 F.2d 432 (2d Cir. 1940) and discussion *supra* notes 185-189.

282. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court held that although the secondary work copied little (less than thirteen percent of the original work) from Harper & Row Publishers’ copyrighted book, the elements taken by the *Nation* were the “heart of the book,” so this factor weighed against the accused infringer. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565-66 (1985). The Supreme Court emphasized the importance of the selected material by claiming that the “*Nation* article is structured around the quoted excerpts which

taken rather than how much of the material is lifted from the copyrighted source. If the secondary work takes too much of the “heart of the matter,” then this factor will weigh against the secondary material. For example, in *Campbell*, the Supreme Court agreed with the Court of Appeals when it stated “that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.”²⁸³ Since *Campbell* dealt with a song parody and most fan films do not parody the source material, the correlation cannot be linear, but it still applies. The key revolves around whether the secondary work takes “no more . . . than necessary”²⁸⁴ to accomplish the connection to the original.

With a fan film, scholar Steven Hetcher noted with “regard to factor three, there is no typical case – some fan fiction and remix draw heavily from the underlying works, either quantitatively or qualitatively (or both), while other works draw relatively little from the underlying works and add much that is creative and original.”²⁸⁵ In general, courts will give more weight in favor of the copyright owner where the fan filmmaker borrows heavily from the original work, and conversely weigh this factor in a different fan filmmaker’s favor who adds multiple original elements and content while borrowing little from the source material.

4. The Fourth Factor: Effect on the Market

The fourth factor – the effect of the use upon the potential market for or value of the copyrighted work²⁸⁶ – is “undoubtedly the single most important element of fair use.”²⁸⁷ It is also the trickiest to analyze with regard to fan films for two main reasons.

The first reason fan films may not have an effect on the copyright holder’s market deals directly with economic harm. One scholar noted the importance of this element when he stated, “If fair use is invoked as a defense, any analysis of potential economic harm to the original work by the alleged infringing work should be limited to the effect on the market factor. To do otherwise would be contrary to congressional

serve as its dramatic focal points.” *Id.* at 566.

283. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994). *Campbell* dealt with a song parody that borrowed the opening bass riff and the first line of the original song, but changed the rest of the lyrics and added more to the music. *Id.* at 588.

284. *Id.* at 589.

285. Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1908-09 (2009).

286. 17 U.S.C. § 107 (2012).

287. *Harper & Row*, 471 U.S. at 566.

intent.”²⁸⁸

The focus on economic harm played strongly in the case of *Sony Corp. of America v. Universal Studios*.²⁸⁹ In the fair use analysis in that case, the Supreme Court stated, “A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”²⁹⁰ The Supreme Court emphasized the importance of showing “*some* meaningful likelihood of future harm exists”²⁹¹ for the copyright owners to prevail.

Fan films fit into the classification of “noncommercial” since they are not made for profit. Under *Sony*, the copyright owners would have a difficult time establishing that the fan filmmakers would cause them any economic harm.²⁹² Without this showing, the fourth factor might weigh in favor of the fan filmmakers.

The second reason lies in the fact that fan films may actually *benefit*, not harm, the copyright owner. One scholar phrased the complexity of this issue by stating:

The inherent difficulty in defining markets and in accurately assessing benefit and harm, combined with a historical bias in favor of private property rights, has resulted in judicial uncertainty, inconsistency, and inaccuracy in applications of the fourth fair use factor to situations where the copyright holder benefits from an unlicensed use.²⁹³

These benefits include generating additional interest in the copyrighted work through more exposure to it for other fans and by gathering opinions on the source material through viewing the fan filmmaker’s work as a commentary.²⁹⁴ One example that scholar Gregory M. Duhl uses in his analysis to support copyright holder’s benefits in unauthorized uses involves the Japanese comic book industry and its

288. Thomas P. McBride, *Fairness in the Copyright Act’s Fair Use Doctrine*, 52 MO. L. REV. 175, 187 (1987).

289. In that case, copyright owners of television programs brought an action for copyright infringement against Sony and other VCR manufacturers. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

290. *Id.* at 451.

291. *Id.*

292. In *Sony*, the Supreme Court stated, “If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.” *Id.*

293. Duhl, *supra* note 248, at 667-68.

294. See Sam Ford, *Fanning the Audience’s Flames: Ten Ways to Embrace and Cultivate Fan Communities*, in MIT CONVERGENCE CULTURE CONSORTIUM 37 (2006) (stating that “fan fiction . . . can be seen as offering clues to audience taste, as providing a recruiting ground for new talent and new concepts, and as prolonging the shelf life of media franchises”).

acceptance of manga's subsidiary industry in dojinshi, "which consist of well-known, copyrighted manga characters written about and drawn for the most part by unauthorized authors and artists."²⁹⁵

Critics can argue that fan films using the same canon as the original work or that treat the canon in an AU form may have a negative effect on the source work by taking away some of the core audience. In other words, critics will state that the mainstream audience may choose to see a free fan film featuring Superman at home on the Internet rather than paying to see the latest Hollywood production featuring the Man of Steel at a movie theater.²⁹⁶ This argument contains several flaws. First, it is doubtful that mainstream audiences will ever stumble on the fan film, since most fan films appear only on the Internet.²⁹⁷ Members of the Superman fandom who see the fan film will not use it to replace the Hollywood production. Scholar Tisha Turk noted this distinction when she said, "fans consuming fan works are perfectly well aware that there is in fact a boundary between the original text and the fantext."²⁹⁸ Second, fans will view a fan film as another person's unique view on the fandom, which only increases the original source's value.²⁹⁹ In the end, it would be more beneficial to cultivate fan filmmakers than to alienate

295. Duhl, *supra* note 248, at 668-70 (stating that, "Instead, manga authors and publishers have tolerated (and in some cases encouraged) the proliferation of dojinshi, with several manga publishers regularly advertising their products at dojinshi conventions.") (citations omitted).

296. This situation is playing out with certain comic book characters, although no cases have made it to court yet. One recent example involves Marvel's Punisher character and fan filmmaker Mike Pecci. Marvel sent a cease-and-desist letter to Pecci, which the director heeded. The letter stated that Pecci's film would "confuse the audience." Mike Pecci, *A Better Punisher: The Story of My Fan Film*, MIKE PECCI, <http://www.mikepecci.com/tdebd01/> (last visited Jan. 28, 2014). The letter also said:

While we appreciate your affection for the character, we must demand that you immediately stop your unauthorized use, advertising, sale and/or distribution of any production of The Punisher or any other Marvel character-based films therefor, and any other use of the images, likenesses, artwork or other intellectual property owned by Marvel.

Id. See also Trent Moore, *Watch a Teaser for the Punisher Fan Film Marvel's Trying to Shut Down*, BLASTR (Oct. 9, 2013, 9:18 AM), <http://www.blastr.com/2013-10-8/watch-teaser-punisher-fan-film-marvel-trying-shut-down>; Matt D. Wilson, *Marvel Puts a Halt to Punisher Fan Film*, COMICS ALLIANCE (Oct. 9, 2013, 5:11 PM), <http://comicsalliance.com/marvel-stops-punisher-fan-film-video/>; and Eric Diaz, *Marvel/Disney Hits Punisher Fan Film with Cease & Desist... But Why?*, NERDIST (Oct. 8, 2013), <http://www.nerdist.com/2013/10/marveldisney-hits-punisher-fan-film-with-cease-desist-but-why>.

297. YOUNG, *supra* note 23, at 240-41.

298. Turk refers to fan vids and fanfic, but the analogy can be extended to all fan fiction, including fan films. To support the extension of this argument, Turk also stated, "No one is likely to confuse a written story or a music video with a movie or an episode of TV, or to confuse a fan-made text with a professionally-produced one." Tisha Turk, *Metalepsis in Fan Vids and Fan Fiction*, in *METALEPSIS IN POPULAR CULTURE* 83, 89 (Karin Kukkonen & Sonja Klimek eds., 2011).

299. *Id.* at 89 (stating that "[f]or fans, the processes of fan participation and creation are important parts of the fantext").

them.³⁰⁰

VI. POSSIBLE SOLUTIONS

Fan films deserve limited liability – both in the law and from the law – as legitimate original works that fulfill the framers’ intent to encourage creativity benefiting the public good.³⁰¹ This limited liability can be accomplished in several ways, including “in the law” by clarifying character protection and “from the law” by adding another fair use category in which fan films can thrive without harming the source creator’s profits. There is also a third solution that does not involve the legal system or the government at all: encourage copyright holders to embrace their fan base and work with them, not against them.

A. *‘In the Law’ Solutions Depend on Congress or the Courts*

Solutions made in the law would allow fan filmmakers the freedom to create their own works without the fear of infringement. Cleaning up the controversy surrounding character protection is a great first step.³⁰² This would require either a case accepted for review by the Supreme Court or an amendment to current copyright laws explaining the limitations on coverage for characters.

These character laws could be modeled after parts of the exclusions outlined in the Trademark Dilution laws.³⁰³ Under trademark law, a potential infringer has the benefit of a fair use category for nominative uses “when a defendant uses a trademark to reference the trademark holder’s product” but not for a commercial purpose.³⁰⁴ For use of the trademark to be acceptable, “the manner in which it is used may not imply an affiliation such as sponsorship or endorsement.”³⁰⁵ The basic concept in favor of allowing nominative fair use as an affirmative defense for trademark law is based on the idea that there is no attempt to confuse consumers on the source of the product, but rather only use the

300. See generally Ford, *supra* note 294, at 55 (warning that “[a] prohibitionist stance damages your ties with the fan community, erodes their loyalty to your property, and encourages them to take actions which further damage your brand. A collaborationist stance reconnects you with your consumers, increases the value of your property, and strengthens the moral economy which is needed to ensure respect for intellectual property concerns.”).

301. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stating that “copyright’s purpose is to promote the creation and publication of free expression”).

302. See discussion *supra* Part IV.C.

303. 15 U.S.C. § 1125(c)(3) (2012).

304. Sara A. Johnson, *Century 21 Real Estate Corp. v. Lendingtree, Inc.: Making a Big Deal out of Nominative Use*, 8 TUL. J. TECH. & INTELL. PROP. 207, 208 (2006).

305. *Id.* at 208-09.

trademark as a reference.³⁰⁶ In fan films, the characters serve as a reference to the copyrighted work but they do not attempt to be viewed as the original source. Although the goals of trademark and copyright laws differ, the nominative fair use concept could be extended to cover characters from copyrighted works in noncommercial circumstances where fan filmmakers use them in a non-endorsement or non-sponsorship manner.

My proposed statute for characters states the law as follows:

For fictional characters (literary or visual). It shall not be actionable as infringing on a copyright for a nonprofit fan film to use, without the copyright owner's permission, a character in connection with identifying, parodying, criticizing, or commenting upon that character. A fan filmmaker may still rely on fair use defenses. A copyright owner may still take action against a fan film that uses a character in a way:

- (A) That substantially tarnishes the character;³⁰⁷ or
- (B) That the copyright owner can prove causes economic harm.

This law would allow a fan filmmaker to use the character without fear of legal recourse, but still grants the copyright owner the rights to stop tarnishment of a character. It would also allow the copyright holder to stop the fan filmmaker if he can prove economic harm. Although critics may say that by the time "economic harm" occurs the source author is already damaged, this argument cannot carry much weight if the fan film does not make any profit. As previously stated, it is unlikely that a person will substitute watching a fan film featuring Superman for the copyright owner's Hollywood production. The copyright owner will still receive the box office ticket sales and the DVD purchase receipts, while the fan filmmaker will benefit from the knowledge that other fans appreciate the work.

If the Supreme Court did decide a case involving character protection, the best option for fan filmmakers would be an adaptation of the test used in *Columbia Pictures*.³⁰⁸ That court decided to limit the copyright owner's protection to the expression of the elements, rather than protection of the individual characters themselves, as long as it was still within the boundaries of fair use.³⁰⁹ By adopting a similar test that the *Columbia Pictures* court used for burlesques, fan filmmakers could

306. *Id.* at 209-10.

307. By not allowing tarnishment of a character, uses involving pornography would not be covered in this statute, although potential infringers who use "slash" genres in fan fiction may still rely on the traditional fair use defense. *See* discussion *supra* Part II.C.

308. *See* discussion *supra* Part.IV.C.2.

309. *Columbia Pictures Corp. v. Nat'l Broad. Co., Inc.*, 137 F. Supp. 348, 353-54 (S.D. Cal. 1955).

borrow characters from copyrighted works as long as their creations did not economically affect the copyright holder.³¹⁰

Deciding on protection for characters in a Supreme Court case or amending the copyright laws, like the suggestion above, take away most of the worry that the source creator may claim the fan fiction is a derivative work. The door will still be open for the source author to create sequels or other derivative works based on the character. The suggestions above only allow more creativity to be accomplished by other people as well. In addition, clarifying the law on character protection helps to improve judicial efficiency overall since a number of cases on the subject have already occurred.³¹¹ Other issues still exist that may cause conflict, but the biggest potentials for legal problems with fan films involve character protection and derivative works legislation.

B. 'From the Law' Solutions: Clarifying Fair Use

Fan filmmakers deserve at the very least a legal, fair use loophole that helps balance the legal scales in their favor against prosecution by the copyright owners of the source material. Adding an entry to the current fair use categories factors outlined in the preamble of § 107 of the U.S. Copyright Act of 1976 would give fan film creators a greater chance of prevailing with an affirmative legal defense if they were ever faced with infringement in the courtroom.³¹²

I advocate including “nonprofit or noncommercial dramatic works” as a subcategory exception in § 107. Although this would exclude fanfic and fanvids, it may allow for the narrower category of fan films to be listed as fair use. This limitation would also exclude pornography from the category since pornography exists as a for-profit industry. Critics may say that this category will allow in other forms of dramatic works beyond fan films. While some others may potentially slip in, courts have the ability to examine each on a case-by-case basis, so the source creator and the potential infringer can explain and examine the content.

A common-sense basis exists for this categorical inclusion as well. As one commentator points out – logically, it is legal to write or improvise your own *Star Wars* adventures using action figures.³¹³ It is

310. The *Columbia Pictures* court did not allow protection of certain elements, including: the title, theme, locale and settings, the “situations,” characters, ideas, and basic plots. *Id.*

311. See discussion *supra* Part IV.C.

312. The categories allow fair use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107 (2012).

313. Walker, *supra* note 94.

legal to record your adventures on video.³¹⁴ “Shouldn’t it be legal to show those home movies to anyone you please?”³¹⁵

C. *Work Together Toward a Common Goal*

The easiest solution does not involve the law or government at all: Encourage copyright holders to work with fans to create a better community overall. Common sense dictates that fans drive the commercial success of copyrighted works. In the simplest sense, fans buy copyrighted works, which economically benefits the copyright owner. If copyright owners openly allowed fan films, a synergy could develop that gives both parties advantages: Copyright owners would profit and fan filmmakers could create works without worrying about the possibility of a lawsuit.

Copyright owners’ attitudes toward fan fiction vary widely. Many copyright owners openly oppose any sort of fan fiction.³¹⁶ Author Anne Rice takes the attitude that fan fiction violates her personal space and her ideas.³¹⁷ Novelist Lee Goldberg regularly rants about the evilness and unhealthy obsessiveness of “fanficcors,” although he writes tie-in novels and screenplays for television series, including *Monk* and *Diagnosis Murder*.³¹⁸ Novelist Stina Leicht compares fan fiction to music

314. *Id.*

315. *Id.*

316. More information is available about authors’ attitudes toward fanfic and fan fiction in general, rather than specifically toward fan films. See Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012, 6:49 PM), <http://www.wsj.com/articles/SB10001424052702303734204577464411825970488>.

317. When asked about how she feels about fan fiction, Anne Rice replied, “I don’t ever want to read about my characters in someone else’s writing. It’s too upsetting for me, because they are mine and from my mind. I never read fan fiction. Other writers feel differently about it and are happy and encouraging of it. I don’t make judgments—I prefer to ignore it.” Tony Peregrin, *Anne Rice on Monsters, Facebook and Fifty Shades of Grey*, CHICAGOIST (Apr. 13, 2012, 11:00 AM), http://chicagoist.com/2012/04/13/interview_with_a_vampire_chronicler.php.

318. In a blog entry, Goldberg attacks a fan fiction author by calling her “arrogant, stupid, and like so many fanficcors, [she] has a ridiculous sense of entitlement. She thinks that just because she read Marion Zimmer Bradley’s books, and liked them, they belong to her in every conceivable way. She seems stunned that anybody would question that . . . or that the author, or in this case the author’s estate, might actually enforce their creative and legal rights.” Lee Goldberg, *What’s Yours Is Mine*, A WRITER’S LIFE (Oct. 7, 2012), <http://www.leegoldberg.com/whats-yours-is-mine/>. In another entry, Goldberg criticizes fans for being too emotionally involved in characters. Lee Goldberg, *What’s Stupid About It?*, A WRITER’S LIFE (June 15, 2005), http://www.leegoldberg.com/whats_stupid_ab/. Goldberg wrote, “A TV show is something I write, something I do, it’s not my world, it’s not my religion, it’s not who I am and my reason for breathing. It’s not my obsession. . . . When the show is cancelled (or I leave it for whatever reason), I stop thinking about the characters and their ‘lives.’ I move on creatively and emotionally to something else. There are viewers who are incapable of doing that . . . who become so emotionally attached to fictional characters and an imaginary world that they can’t ever let go.” *Id.*

sampling, and she believes the amateurs should pay for using her characters and universe.³¹⁹ Some authors' attitudes toward fan fiction started as negative, but they are changing toward the positive.³²⁰ Some copyright owners openly embrace fan fiction and fan films, including Joss Whedon,³²¹ Orson Scott Card,³²² and Stephen King.³²³

Bridging the gap between copyright owners and fan filmmakers could be accomplished in several ways. One option is to create a roundtable discussion between the two parties where representatives from both sides could exchange pros and cons to establish a set of rules for fan filmmakers to follow. Another opportunity exists for fan filmmakers to follow the lead of other industries by creating a Best Management Practices Guide that could spell out what can and cannot be used in fan films.³²⁴ When documentary filmmakers worked together to create this type of guide, copyright owners quickly agreed to the standards and started working with the filmmakers instead of against them.³²⁵ The importance lies in finding common ground to unite the fans

319. Stina Leicht, *Fan Fiction, Ethics and Authors*, LIVEJOURNAL (May 5, 2010, 1:35 PM), <http://stina-leicht.livejournal.com/221884.html>.

320. See Alter, *supra* note 316, <http://online.wsj.com/article/SB10001424052702303734204577464411825970488.html> (stating that “[a]fter spending years fending off fan fiction, and occasionally sending out ‘cease and desist’ letters through his lawyer to block potential copyright violations, science-fiction novelist Orson Scott Card has started courting fan writers.” Card will publish the winning stories as an anthology that will become part of the official “canon” of the *Ender’s Game* book series.); Billy Martin (formerly Poppy Z. Brite), *Fanfic: At the End of the Day*, DISPATCHES FROM TANGANYIKA (May 8, 2010, 5:57 PM), <http://docbrite.livejournal.com/728512.html> (stating: “The Internet seems to be having one of its periodic cycles of wank about fanfic – or maybe it’s always there and I only notice it periodically – so this would probably be a good time to mention that I used to be anti-fanfic (and personally squicked by the idea of people writing about my characters), but no longer am.”).

321. See discussion *supra* Part III.C.2.

322. Orson Scott Card has stated, “Every piece of fan fiction is an ad for my book. What kind of idiot would I be to want that to disappear?” Alter, *supra* note 316.

323. Stephen King openly encourages amateurs to create films based on his short stories. *Dollar Baby*, WIKIPEDIA, http://en.wikipedia.org/wiki/Dollar_Baby (last visited Jan. 7, 2015). King “sells” these amateurs the rights to create the movies from a list of his short stories for \$1. *Dollar Babies*, STEPHENKING.COM, <http://www.stephenking.com/dollarbabies.php> (last visited Jan. 7, 2015). These “dollar babies” are only allowed to be screened as nonprofit on a limited basis with King’s approval. *Id.*

324. See Pat Aufderheide, *Fair Use Put to Good Use: “Documentary Filmmakers’ Statement” Makes Decisive Impact*, DOCUMENTARY, <http://www.documentary.org/content/fair-use-put-good-use-documentary-filmmakers-statement-makes-decisive-impact> (last visited Jan. 7, 2015) (detailing that “[t]he Statement clarifies when it is safe for a filmmaker to assert fair use, which is the unauthorized use of copyrighted material under certain circumstances. The clarification makes it possible for filmmakers to dramatically lower clearance costs while also honoring copyright ownership.”).

325. *Id.* (claiming, “Most important, from a filmmaker’s perspective, it is gradually becoming normal for gatekeepers to accept filmmakers’ fair use claims, when backed by the principles and limitations articulated in the Statement”).

with the copyright owners.

Researchers have suggested that “alert content providers should monitor fan communities for potential surplus audiences, try to understand what draws them to the property, and then seek ways to expand this interest without alienating their core markets.”³²⁶ Fan filmmakers already take this step when creating their own works. Their films showcase avenues mainstream movie producers would not try for a multimillion dollar project. In this way, fan filmmakers can be classified as part of the “unintended audiences that appropriate content in ways that media producers never intended or even imagined.”³²⁷ Examples of fan films fulfilling these roles include *StarLego*,³²⁸ *Batman: Dead End*,³²⁹ and *Star Wars: Revelations*.³³⁰ These three films cross boundaries and use creative means to tell a story that the original copyright owners explored afterwards – or should explore, in the case of *Star Wars* – with much commercial success. Fan filmmakers can add the missing element large media conglomerates cannot even fathom. Nowadays,

[f]ranchise products are governed too much by economic logic and not enough by artistic vision. Hollywood acts as if it only has to provide more of the same, printing a *Star Trek* logo on so many widgets. In reality, audiences want the new work to offer new insights into the characters and new experiences of the fictional world.³³¹

Fan filmmakers add a spark of creativity to excite audiences while at the same time bring the fans back to the copyright source for more content.

Jenkins reaffirms the importance of fan filmmakers and fan fiction

326. Ford, *supra* note 294, at 27.

327. *Id.*

328. *StarLego* was a stop-motion film shot in 1990, long before the *Star Wars* Lego sets were even dreamed of. YOUNG, *supra* note 23, at 122-23. Lego custom kits are now huge sellers with large price tags. See, e.g., Lego Starfighter, LEGO, http://shop.lego.com/en-US/Star-Wars-ByTheme?CMP=KAC-SAHGOOGLEUS&HQS=lego+star+wars&OVMT=Exact&site=&creative=11871296641&OVKEY=lego%20star%20wars&url_id=37472341&adpos=1t1 (last visited Jan. 7, 2015).

329. *Batman: Dead End* re-cast the Dark Knight as the brooding, moody superhero that had been missing from the big screen. YOUNG, *supra* note 23, at 188-90. Marvel seemed to take a silent cue from the 2002 movie since it restarted the Batman franchise in 2005 with a much darker Caped Crusader in *Batman Begins*. *Batman Begins*, IMDB, <http://www.imdb.com/title/tt0372784/> (last visited Jan. 7, 2015).

330. *Star Wars: Revelations* was released in 2005 and did something no other George Lucas film has done: The lead character was a strong female. YOUNG, *supra* note 23, at 234-35. Although a strong female lead has still not materialized in the *Star Wars* universe, there is still hope since more films are to come in the franchise.

331. Henry Jenkins, *Transmedia Storytelling*, MIT TECHNOLOGY REVIEW (Jan. 15, 2003), <http://www.technologyreview.com/news/401760/transmedia-storytelling/page/0/1/>.

creators by stating, “Fan fiction helps to broaden the potential interest in a series by pulling its content toward fantasies that are unlikely to gain widespread distribution, tailoring it to cultural niches under-represented within and under-served by the aired material.”³³² Jenkins emphasizes the fan filmmaker’s relevance to copyright owners because, “[i]n theory, such efforts could increase the commercial value of media products by opening them to new audiences, though producers rarely understand them in those terms.”³³³

VII. CONCLUSION

Fan films have a rich and colorful history in the United States – and an uncertain future under current copyright laws. Fan films’ futures remain unknown because of the inherent nature of the conflict these amateur films have with the original author’s intellectual property rights. While a court battle over fan films has not occurred yet, the potential exists until either Congress or the Supreme Court clarifies the copyright issues fan filmmakers face. As this is unlikely in the near future, in the interim, fan films should be classified as non-derivative works or, in the alternative, be considered fair use.

Fan filmmakers should have the right to create their own movies if they adhere to certain guidelines, including remaining as nonprofit works, crediting the original source for the material, and not directly copying from the source material. Fan filmmakers serve in a positive role that benefits the public without seriously limiting the intellectual property owner’s ability to profit or to create or to license derivative works. As a nonprofit industry, fan films increase the value of the original work by adding to its appeal and popularity rather than taking profits away from it. Fan filmmakers and copyright owners can coexist, and they should work together to increase the popularity of the source material.

Fan filmmakers may be the Hollywood directors of tomorrow. With his fan filmmaking experiences, Luis de los Rios is already on the road to becoming the Christopher Nolan³³⁴ of his generation. And, if the laws

332. Henry Jenkins, *Quentin Tarantino’s Star Wars?: Digital Cinema, Media Convergence, and Participatory Culture*, in *RETHINKING MEDIA CHANGE* (David Thorburn & Henry Jenkins eds., 2003), available at MIT COMPARATIVE MEDIA STUDIES/Writing, <http://web.mit.edu/21fms/People/henry3/starwars.html>.

333. *Id.*

334. Christopher Nolan has directed several blockbusters, including *Batman Begins*, *The Dark Knight*, and *The Dark Knight Rises*. Nolan started as a fan filmmaker. He began making films at age seven using his father’s Super 8 camera and an assortment of male action figures. *Christopher Nolan*, IMDB, <http://www.imdb.com/name/nm0634240/> (last visited Jan. 7, 2015).

are changed or clarified, maybe one day soon de los Rios will get to fulfill his dream of creating a fan film with the characters of his choosing – without fear of a lawsuit for copyright infringement.