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# A Brief Overview of the Fair Use Analysis in the Fanfiction Context

BY GABRIELLA FERNANDEZ / ONOCTOBER 31, 2023



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Fanfiction is a creative process where fans of an original work of fiction develop their own stories based on the characters in that original work.<sup>1</sup> These stories are often shared on fanfiction websites, traditional publishing routes, or popular applications such as Wattpad.<sup>2</sup> Unfortunately, some authors of original works may have concerns about fanfiction. They may feel uneasy when fan-created stories gain popularity and recognition comparable to their own original works, as it involves fans benefitting financially or gaining fame from ideas that these fanfiction authors did not originally conceive of themselves.<sup>3</sup> Consequently, authors sometimes resort to legal measures by filing copyright infringement lawsuits to address their concerns.<sup>4</sup> Therefore, the question is, how can fanfiction authors avoid these copyright infringement claims? Essentially, fanfiction authors should take measures to ensure that their work can potentially be protected under the fair use doctrine in the event of a copyright infringement lawsuit.

To be able to effectively utilize the fair use doctrine as an affirmative defense in the event a copyright infringement lawsuit is brought against them, fanfiction authors should first understand how an author of an original work can initiate such a lawsuit. The creation of an original, fictional work typically begins with the formation of an overarching idea or theme, which gradually evolves into a more concrete plot.<sup>5</sup> In essence, the progression moves from an abstract concept to a specific narrative captured in written form.<sup>6</sup> Copyright law permits fanfiction authors to draw inspiration from the highest level of abstraction, namely the overall idea or theme.<sup>7</sup> However, it prohibits the use of the original author's more specific and less abstract elements, such as the actual words.<sup>8</sup>

An illustrative case that demonstrates the application of copyright law against a fanfiction author is the *Dr. Seuss Enterprises v. Penguin Books USA* lawsuit.<sup>9</sup> In this instance, Penguin Books USA published a book titled "The Cat Not In the Hat," which narrated the OJ Simpson trial in the distinctive style of Dr. Seuss.<sup>10</sup> The court deemed this type of fanfiction impermissible under copyright law as it went beyond drawing inspiration from the general theme or concept of "The Cat In the Hat" and instead replicated specific, concrete elements of the original work, such as mimicking a poem found within it.<sup>11</sup>

Having gained an understanding of how a fanfiction author can face a copyright infringement lawsuit, it is important for the author to be aware of the available defenses to mitigate potential liability. Within this context, the main defense fanfiction authors can invoke is the fair use doctrine.<sup>12</sup> This defense was created "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>13</sup> The court analyzes four factors to determine if the defense can be used: "(1) the purpose and character of the accused use; (2) the nature of the copyrighted work; (3) the importance of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the accused use on the potential market for or value of the copyrighted work."<sup>14</sup> Gaining a comprehensive understanding of the case law that examines the four factors used to determine whether a fanfiction author's work constitutes copyright infringement can assist fanfiction authors in avoiding such lawsuits or help them defend themselves if faced with legal action.

The most important thing to understand about the first factor of the fair use analysis, purpose and character of the accused use, is that the court will not deem a fanfiction author's work as fair use if it is intended to merely continue or exalt the original author's work.<sup>15</sup> For instance, in the case of *Salinger v. Colting*, a fanfiction author wrote a novel intended to be a sequel to "The Catcher in the Rye".<sup>16</sup> The court determined that this fanfiction constituted copyright infringement because it essentially continued the work of "The Catcher in the Rye."<sup>17</sup> In order for this fair use factor to weigh in favor of the fanfiction author, the fanfiction would have needed to transform, critique, or parody the original work.<sup>18</sup>

The next two factors of the fair use analysis, namely the nature of the copyrighted work and the significance of the portion used in relation to the copyrighted work as a whole, can be

seen as emphasizing a similar point. That is, both factors require the court to ensure that the content depicted in the fanfiction is not excessively similar to the content of the original work.<sup>19</sup> Therefore, if an individual were to write a Harry Potter fanfiction and construct a storyline involving three young wizards engaged in a struggle against a villain attempting to destroy the wizarding world, it would not be considered fair use.

The final factor fair use analysis, the effect of the accused use on the potential market for or value of the copyrighted work, focuses on the impact of the accused use on the potential market value of the copyrighted work.<sup>20</sup> It is crucial to recognize that fanfiction should not diminish the potential profits of the original author's work.<sup>21</sup> Therefore, if a fanfiction gains more popularity or readership than the original work in the same market, the fair use defense will likely not provide protection for that fanfiction.<sup>22</sup> This situation nearly arose in the case of *Paramount Pictures v. Acanar*, where the fanfiction in question had achieved a level of popularity comparable to the original work.<sup>23</sup> However, the court determined that it did not constitute copyright infringement based on other grounds, and the lawsuit was settled.<sup>24</sup>

A great example of a fanfiction that has yet to confront a copyright infringement lawsuit is the popular trilogy, "Fifty Shades of Grey" by E.L. James. This trilogy was originally a fanfiction of the popular book series, "Twilight," by Stephenie Meyer.<sup>25</sup> Fanfiction authors should look to this novel as an example when trying to ensure that their work will not be confronted with any copyright law issues.

It is probable that this fanfiction was never confronted with a lawsuit because the fanfiction is easily defensible by the fair use doctrine. The first factor of the fair use analysis, the purpose and character of the accused use, weighs in favor of fair use because "Fifty Shades of Grey" completely transforms the idea "Twilight" is based on. That is, "Twilight" is about a human falling in love with a vampire, but the overarching idea behind the novel is the struggles that accompany falling in love with someone completely different than you. "Fifty Shades of Grey" takes this underlying theme and transforms it into a story about a young, naïve woman falling in love with an older man who has never been in a romantic relationship for the purpose of finding love.

Furthermore, the the next two factors of the fair use analysis, the nature of the copyrighted work and the significance of the portion used in relation to the copyrighted work as a whole, weigh in favor of fair use because the content of "Fifty Shades of Grey" is not at all similar to the content in "Twilight." That is, as previously stated, "Twilight" is a book about a human falling in love with a vampire whereas "Fifty Shades of Grey" is about two humans with different outlooks on the world struggling to fall in love.

Finally, the last factor of the fair use analysis, the effect of the accused use on the potential market for or value of the copyrighted work, weighs in favor of fair use because "Fifty Shades of Grey" does not take away from the "Twilight" financial profits for several reasons. First,

many "Twilight" fans are science-fiction fans, and "Fifty Shades of Grey" is not a science-fiction novel at all. Second, and as explained previously, the events that drive the theme of the novel differ drastically from the events that take place in "Twilight." This means that no "Twilight" reader will find that "Fifty Shades of Grey" can replace it and choose to read it instead. Essentially, "Fifty Shades of Grey" cannot take away from "Twilight's" market value because they are not in the same market.

Ultimately, if fanfiction authors want to keep creating their work without being confronted by a copyright infringement lawsuit, they should look to fanfiction authors that have remained unscathed by copyright law and emulate how they managed to create a work that was protectable by the fair use doctrine.

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