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Fan Fiction: Is the Creation of these Derivative Works Fair or Foul?

Drew Leatherman

I. Defining Fan Fiction & the Tension it has Created

Many creative fictional works, including novels, television shows, and movies have captured the hearts and imaginations of their fans. The enthusiastic followers of works such as *Harry Potter*, *Twilight*, and *The Hunger Games* have developed a continually expanding subculture known as fan fiction. Fan fiction is a fan's creation of new works, which incorporate the same characters and settings from an original author's copyrighted work. Understandably, the Internet has increased the creation and availability of fan fiction by providing many forums for fans to share their new expansions of original works. One such forum had 662,000 derivative works from fans of J.K. Rowling's famous *Harry Potter* series, 213,000 works from the *Twilight* series, and 34,200 from the recent *Hunger Games* trilogy.¹ This popular activity has given fans the ability to eternalize their beloved characters and stories even after the original creator has finished their authorship of the original series.

Fans customarily share their stories for free, and derive no economic benefit from their works, but, predictably, the original author typically has no knowledge, and thus has not authorized, these extensions of their original works. Unsurprisingly, there exists a tension between some author's beliefs that fan fiction encroaches on their property rights

¹ See, e.g., FanFiction.net, <http://www.fanfiction.net> (last visited Oct. 26, 2013) (A fan fiction forum with millions of shared works).

derived from their original works, and a fan's right to create new derivative works and share them in the public domain.² Many authors and publishers have taken affirmative steps to prevent fan's creation of derivative works from their originally copyrighted materials.³ These authors and publishers assert that fan fiction infringes on their exclusive property rights, derived from applicable copyright law. At issue is how copyright laws, and specifically the Fair Use Doctrine, should be interpreted and applied in the realm of fan fiction.

In deciding this issue, courts have been assigned the duty to balance the original author's property rights with the maximization of creative works in the public domain by looking to how the new use of a copyrighted work tends to either benefit or injure the copyrighted work's marketability. This balancing of interests looks to the economic, creative, and transformative aspects of the two works in order to determine if the third party use of a copyrighted work is permitted. Circuit Courts have reached differing decisions when weighing these factors. In Part II this paper will analyze the relationship between the fair use doctrine and U.S. copyright laws. Specifically, it will discuss the applicability of the copyright laws to fan fiction, including whether it should be afforded protection under the fair use doctrine. Then, in Part III, it will argue that as long as the creator of fan fiction derives no material benefit from the creation of the derivative work, and likewise, the new work does not materially injure the original creator, then fan fiction

² Michelle Chatelain, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, 15 Tul. J. Tech. & Intell. Prop. 199, 202 (2012).

³ See Lady Macbeth, *Authors/Publishers Who Do Not Allow Fan Fiction*, MM.org Blog (Oct. 8, 2006), <http://www.mediaminer.org/blog/index.php/?/archives/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html> (A list of authors and publishers who do not allow fan fiction derived from their original works).

does not infringe upon the originator's copyright because the use is protected under the fair use doctrine. It will then conclude by reaffirming its proposed solution, and also, looking toward possible problems with its application. The main problems being, at what threshold point does a material benefit, or material detriment, actually accrue to a party, and also, whether abundant fan fiction postings, in themselves, tends to injure the original copyright by allowing the public unlimited access to these derivative works, and thus, possibly reducing the demand for the original copyrighted work.

II. The Uncertain Applicability of Copyright Infringement Laws to Fan Fiction, Specifically the Fair Use Doctrine

A. Protections Afforded to the Author of a Copyrightable Material

An author's work is subject to the protection of copyright laws if the work constitutes copyrightable material. To qualify as copyrightable material, a work must meet two fundamental elements. First, it must be an original work of authorship, and second, it must be fixed in any tangible medium of expression.⁴ The Supreme Court went on to explain that an original work of authorship means the work was independently created by the author and contains some minimal degree of creativity.⁵ The Court further elaborated that originality does not signify novelty, but that a work can be original even if it closely resembles other works so long as the similarity is not the result of copying.⁶

⁴ 17 U.S.C.A. § 102(a).

⁵ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

⁶ *Id.* at 345-346.

Therefore, literary works such as *Harry Potter*, *Twilight* and *The Hunger Games*, are subjected to copyright protection because they are the author's original creations, and they are set in whatever tangible medium the text is presented.

Once a work is subject to copyright protection, the author or publisher of the work holds certain exclusive rights to its use, which are limited under certain circumstances. 17 U.S.C.A. § 106 reads in pertinent part:

The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.⁷

⁷ 17 U.S.C.A. § 106.

This section of the United States Code gives the author of a copyright the exclusive rights for the enumerated uses outlined above. Three of those exclusive rights are directly relevant to fan fiction: reproduction, distribution, and creation of derivative works.⁸ However, these exclusive rights are limited in certain circumstances governed by the Fair Use Doctrine, codified in 17 U.S.C.A. § 107.

B. The Fair Use Doctrine

The Fair Use Doctrine provides an affirmative defense⁹ to copyright infringement by providing exceptions to a copyright holder's exclusive rights to the original work. The doctrine is used to balance a copyright holder's exclusive rights to the work and the public's interests in accessing and using the copyrighted works. Its function closely aligns with the purpose of U.S. copyright law, to protect an artist's incentives for creating new works while giving the public access to the works in order to promote learning in the arts and sciences.

Generally, the rule permits the use of a copyrighted work for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁰ The statute also promulgates four (4) factors to be considered by the court in determining whether the use of the copyrighted work is considered a fair use. The court shall consider:

⁸ Nathaniel T. Noda, *When Holding on Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities*, 2008 Den. U. Sports & Ent. L.J. 64, 73 (2008).

⁹ *E.g.*, Chatelain, *supra* note 2, at 217 (citing *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)).

¹⁰ 17 U.S.C.A. § 107.

- (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.¹¹

However, even if the use falls into one of the general categories of permitted use, the court must still analyze the use under the four factor test.¹² Also, The Supreme Court went on to clarify that there is no generally applicable definition of fair use under the statute, and that each case must be decided on its own facts,¹³ thus rendering broad discretion to the court when analyzing the four factors.

1. The Purpose and Character of the Use

The first factor, the purpose and character of the use, essentially seeks to establish whether the purpose of the use is commercial in nature, and also, whether the resulting new work can be characterized as transforming the original into a sufficiently new creative work. A court uses three separate dichotomies when evaluating the first factor.¹⁴

¹¹ *Id.*

¹² 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, 681 (2004).

¹³ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (quoting House Report, at 65, U.S. Code Cong. & Admin. News 1976, p. 5678).

¹⁴ *E.g.*, Duhl, *supra* note 12, at 682.

The first is a comparison between non-licensed uses for commercial purposes versus those for non-commercial purposes.¹⁵ While a court's determination of commercial use tends to lean towards a finding of infringement, a finding of non-commercial use leans to an inclination of fair use.¹⁶ The second comparison is between transformative and non-transformative use.¹⁷ In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court explained that a work is transformative if it adds something new to the original, such as a further purpose or different character, altering the first with new expression, meaning, or message.¹⁸ Although such transformative use is not imperative to a finding of fair use,¹⁹ the more transformative the new work, the more it weighs in the favor of the new work's creator.²⁰ The last of the dichotomies is the distinction between factual or historic use, which is generally not copyrightable, and expressive use, which generally is copyrightable; noting that courts usually find the copying of a mode of expression not protected by fair use.²¹

¹⁵ *Id.* (citing *Harper & Row*, 471 U.S. 539, 562 (1985) (“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.”)).

¹⁶ *E.g.*, *Noda*, *supra* note 8, at 75 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”)).

¹⁷ *E.g.*, *Duhl*, *supra* note 12, at 683 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (explaining a transformative use alters or adds to the copyrighted work)).

¹⁸ *Campbell*, 510 U.S. at 579.

¹⁹ *Id.* (citing *Sony Corp. of America*, 464 U.S. at 455 (finding that the goals of copyright, promoting the science and arts, is generally furthered by transformative works)).

²⁰ *Id.*

²¹ *E.g.*, *Noda*, *supra* note 8, at 76 (citing *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (holding that a work which appropriates the style of another work without holding that style up to ridicule does not constitute fair use)).

Although courts find commercial use of a newly created work a slight factor in favor of the original author,²² it should be given more weight by the courts in determining infringement only if the new author has the potential to derive a commercial benefit. Due to the fact that fan fiction always incorporates at least portions of copyrighted works, including characters, settings, and ideas; if a creator of fan fiction experiences any type of commercial gain at the expense of the original author, it should be heavily weighed against the defendant in a copyright infringement suit. This is because if creators of fan fiction were able to accrue commercial gain at the expense of the copyright holder, that gain would be, at least in part, owed to the creations of the original author.

2. The Nature of the Copyrighted Work

This factor seeks to uncover whether the copyrighted work was the type that are afforded greater copyright protection. Here, courts are to balance such factors as fictional versus factual works, with fictional works receiving greater protection, and also, whether the work was published or unpublished.²³

It seems that this factor would weigh heavily against fan fiction because copyrighted fictional works are the types of works at the core of copyright protection. Thus, it appears this factor would favor a conclusion of unfair use. However, as a matter

²² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (deciding that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use).

²³ *Campbell*, 510 U.S. at 586 (citing *Harper & Row*, 471 U.S. at 563–564 (contrasting fictional and factual); *Sony*, 464 U.S. at 455 (comparing unpublished and published works)).

of practice, “courts routinely decide the second factor for the party that the other three factors favor.”²⁴ This is because the vast majority of fan fiction is based on published fictional works, which are of course, expressive and creative in nature, and therefore, this factor is not a good way to distinguish among them in terms of what uses are fair and what uses are not. Therefore, in the context of comparing different works of fan fiction, this factor will not be determinative because it fails to differentiate one type of fan fiction from another.

3. The Amount and Substantiality of the Portion Used

The third fair use factor seeks to calculate the amount and substantiality of the portion of the original work used in relation to the copyrighted work as a whole.²⁵ Courts have broad discretion when interpreting this factor.²⁶ For example the Supreme Court noted that, “a taking may not be excused merely because it is insubstantial with respect to the infringing work”²⁷ but that, in general, if the taking was an important part of the infringed work, or put differently, if the taking was qualitatively substantial, then it weighs against a finding of fair use. However, other courts have found that copying a small portion of the copyrighted work that is unrelated to the work’s creative core is

²⁴ *E.g.*, Chatelain, *supra* note 2, at 209 (citing *Blanch v. Koons*, 467 F.3d 244, 244 (2d Cir. 2006); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)) (finding that in the context of derivative works, the second fair use factor is rarely determinative because these works invariably copy publicly known, expressive works).

²⁵ *Harper & Row*, 471 U.S. at 562.

²⁶ *E.g.* *Noda*, *supra* note 8, at 77.

²⁷ *Harper & Row*, 471 U.S. at 565.

acceptable as de minimis use²⁸, and thus would not weigh against a defendant in an infringement action because the copying was not considered qualitatively substantial.

This factor of fair use seems like a threshold question of how similar the new work's elements are to that of the original. The Supreme Court's analysis of this factor may tend to weigh against creators of fan fiction because fan fiction undoubtedly uses important creative aspects of the original work, such as characters, settings, and plots. In making the determination of whether the taking is qualitatively substantially, the court's inquiry should predominately focus on whether the new work has transformed the use of the substantially similar aspects into something creative and original. For example, although a creation of fan fiction may use the exact same characters as the copyrighted work, the analysis should focus on whether the alleged infringer has sufficiently transformed other aspects of the work, such as the plot or setting, when analyzing this fair use factor.

However, the analysis of this factor should not end on this step. In making a final determination if this factor weighs for or against a finding of fair use, courts should view this factor in conjunction with the fourth factor to establish, to what degree, the new work's use of the substantially similar elements tends to injure the copyrighted work. Therefore, this element could distinguish works of fan fiction based on whether an injury would likely run to the copyrighted work due to the derivative work's use of the original's characters, settings, or plots. For instance, if a published fan fiction work based on J.K.

²⁸ *E.g.*, *Duhl*, *supra* note 12, at 687 (citing *Toulmin v. Rike-Kumler Co.*, 316 F.2d 232, 232 (6th Cir. 1963); *Werlin v. Reader's Digest Ass'n, Inc.*, 528 F. Supp. 451, 464 (S.D.N.Y. 1981) (finding the copying of two separate lines from an article "to be so fragmented as to be de minimis").

Rowling's *Harry Potter* series replicated a substantial aspect of the original, then the threshold question should involve an inquiry into whether the taking of Rowling's ideas, coupled with the public's free access of the new work, tends to commercially injure Rowling. Therefore, it is suggested that if a court were to find the derivative's use of the original qualitatively substantial, and also, that the public may tend to utilize the new work in lieu of purchasing the original copyrighted work, then it should lead to a finding of unfair use. The commercial injury aspect of this proposed inquiry is important because all fan fiction will obviously use a substantially similar portion of the original. However, in accordance with the foregoing, a finding that a derivative work does not substantially transform the taking of an important aspect of the original should lead to a determination of unfair use because that, in itself, tends to injure the copyrighted work by substantially using the originator's ideas in a qualitatively uncreative way.

4. The Effect of Use Upon the Copyrighted Work's Potential Market or Value

The fourth fair use factor, the effect of the use on the copyrighted work's potential market or value, is an economic inquiry, which the Supreme Court in *Harper & Row*, noted was "undoubtedly the single most important element in fair use."²⁹ The Court went on to conclude that if fair use was to be properly applied, it should not materially impair the marketability of the copyrighted work.³⁰ The *Harper & Row* Court also concluded

²⁹ *Harper & Row*, 471 U.S. at 566 (noting that some economists believe a use will only constitute fair use under the exception if the copyrighted work's market fails, and thus, the copyright work's price on the open market is near zero).

³⁰ *Id.* at 566, 567 (quoting 1 Nimmer § 1.10[D], at 1-87).

that, “once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.”³¹ Furthermore, one can show the use is not protected by fair use if the “challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work,’”³² including potential harm to the market of its derivative works.³³

This factor, taken in concert with the first factor, which seeks to establish if the use is transformative and commercial, ties back to the earlier sections of this paper which argued that fan fiction should be considered fair use as long as the creator of the new work does not derive any commercial or economic benefit at the expense of the original author. This factor of the fair use test seeks to quantify the value of the holder’s rights,³⁴ in order to determine the new work’s effect on that value. However, in contrast to Michelle Chatelain’s opinion in her law review article, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, in which she argues that it would be difficult for a piece of fan fiction to “commandeer the market of the original franchise,” and thus, even if a piece of fan fiction is published and generates revenue it should still be considered fair use because it will not injure the original’s

³¹ *Id.* (citing 3 Nimmer § 14.02, at 14–7—14–8.1).

³² *Id.* at 568 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (clarifying that to negate fair use, actual harm need not necessarily be shown if one can show potential harm to the copyrighted work’s market)).

³³ *E.g.*, Chatelain, *supra* note 2, at 211 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

³⁴ *Harper & Row*, 471 U.S. at 568 (noting that a defendant’s work which adversely affects the value of any of the rights of the copyrighted work constitutes a finding of unfair use).

market;³⁵ this paper asserts that any unlicensed use of a copyrighted work which results in an economic or commercial gain has affected the copyrighted work's potential market, and thus should likely not be considered fair use. One argument to be made by the original copyright holder is that the unlicensed use of their works for profit affects their ability to realize economic benefits from potentially licensing their works. If creators of fan fiction are able to profit from the unlicensed use of a copyrighted work, then this could have a snowball effect, potentially resulting in a copyright holder's limitation in licensing their work for monetary gain.

However, the unanswered question remains, what is considered a material benefit to the authors of fan fiction, and what should be considered a material injury to the original copyright holder's work? For instance, if *Harry Potter* fan fiction is free for all to read, does it tend to materially injure Rowling's work by absorbing some of the market demand for works using the Harry Potter character, and consequently, is this use material enough to potentially diminish Rowling's profit? This is a difficult question to answer due to the practical inability to measure lost profits arising from this type of situation. This paper argues that the general posting of fan fiction for others to access for free does not in itself constitute a material injury to the copyrighted work, but that, at some threshold point, the quantity and prevalence of posting freely accessible fan fiction will eventually involve a material injury to the copyright holder. Thus, when viewed on a case by case basis, this analysis could fall in favor of either party based on the facts of the specific proceeding.

³⁵ *E.g.*, Chatelain, *supra* note 2, at 211.

C. Relevant Judicial Decisions and How the Fair Use Doctrine Should Generally be Applied to Fan Fiction

In his comment, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, Gregory Duhl notes that the Supreme Court has been reluctant to create coherent guidelines for weighing the fourth factor of the Fair Use Doctrine, and that this uncertainty necessitates a “consistent approach to protecting both the economic incentives of artists and creators as well as the public interest” where an unlicensed use can have the potential to benefit the copyrighted work’s market.³⁶ He then compares the considerations of preserving the copyright holder’s right to profit from his exclusive right to license the copyrighted work³⁷ and situations in which the unlicensed use has the potential to benefit the copyright holder’s market.³⁸ He notes that courts have consistently found unlicensed uses unfair if they believe the copyright holder lost opportunities to realize financial gain from licensing the copyrighted work.³⁹

For example, although *Harper & Row, Publishers, Inc. v. Nation Enterprises*, did not involve fan fiction, it presents an instance where the copyright holder’s financial interests were adversely affected by a defendant claiming fair use. In *Harper & Row*, former President Gerald Ford contracted with petitioners to publish his unwritten

³⁶ *E.g.*, Duhl, *supra* note 12, at 697.

³⁷ *Id.* at 712.

³⁸ *Id.* at 718.

³⁹ *Id.* at 712.

memoirs, which included the exclusive right to license prepublication excerpts.⁴⁰ As the memoirs were nearing completion, petitioners negotiated a licensing agreement with Time Magazine, which allowed the magazine to publish certain portions of the memoirs prior to their official publication.⁴¹ However, prior to Time Magazine’s publication of the excerpts, an unauthorized source provided another magazine, The Nation Magazine, with the excerpted portion of the memoirs which had been exclusively licensed to Time Magazine.⁴² Time Magazine refused to pay under the terms of the contract because their interest in the excerpts was extinguished,⁴³ effectively precluding the copyright holder from receiving compensation for their exclusive licensing rights to the work. Petitioners brought an action against The Nation Magazine, alleging copyright infringement, and respondents asserted the affirmative fair use defense.⁴⁴ The Supreme Court used the four fair use factors to balance the copyright holder’s exclusive right to license the work for financial gain and the public’s interest in the subject matter of the memoirs. The Court noted that the fourth factor is “undoubtedly the single most important element of fair use,”⁴⁵ and consequently, held that the defendant’s use was unfair because it adversely affected the copyright holder’s ability to license the unpublished work for financial gain.⁴⁶ However, it should also be noted that the Court found it important that the copyrighted work was unpublished, as these types of works are afforded greater

⁴⁰ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 539 (1985).

⁴¹ *Id.* at 539.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 566.

⁴⁶ *Id.* at 569 (“[The Court of Appeals] erred, as well, in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use.”).

copyright protection. The Court further failed to comment on how the facts may have turned if the copyrighted work was published.

DC Comics Inc. v. Reel Fantasy, Inc., is another decision which did not involve fan fiction, but its holding placed great weight on the copyright holder's adversely affected economic interests, even when the unlicensed use had the potential to increase the copyrighted work's market. In *DC Comics Inc.*, a comic book store chain named one of its stores, "The Batcave" and used other unlicensed symbols from the Batman series, to which DC Comics is the copyright holder.⁴⁷ The Court held that although the store's unlicensed use of the protected works may have the effect of benefiting the original work by increasing DC Comic's sales, it was still considered an unfair use because DC Comic's potential market for licensing the copyrighted work was decreased.⁴⁸

Chatelain notes the Second Circuit has rendered decisions most favorable to the copyright holder.⁴⁹ In the 2010 case, *Salinger v. Colting*, the defendant published an unlicensed sequel to *The Catcher in the Rye*, and offered the affirmative defense of fair use.⁵⁰ The court concluded that the defendant's work was not afforded protection under the Fair Use Doctrine because the new work only had some transitive value but was not transformative as a whole. The court found it persuasive that defendant only added one minor character to the new work, and also, that the new work did not contain a sufficient number of transformative elements as compared to appropriated elements. The Court also

⁴⁷ *E.g.*, Duhl, *supra* note 12, at 712 (citing *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 25 (2d Cir. 1982)).

⁴⁸ *Id.* at 713 (citing *DC Comics Inc.*, 696 F.2d at 28).

⁴⁹ *E.g.*, Chatelain, *supra* note 2, at 214.

⁵⁰ *Salinger v. Colting*, 607 F.3d 68, 71-72 (2d Cir. 2010).

took into consideration the fact that the author of *The Catcher in the Rye*, J.D. Salinger, had not authorized any new derivative work of *The Catcher in the Rye*, and that, the commercial nature of the use “further cuts against Defendants on the ‘purpose and character of the use’ factor.”⁵¹

However, in contrast to the holding in *Harper & Row, DC Comics Inc.*, and *Salinger*, other courts have found unlicensed derivative works to constitute fair use. Chatelain compares the Second Circuit’s partiality toward the copyright holder with the Eleventh Circuit’s decision in *Suntrust Bank v. Houghton Mifflin Co.*, which is most favorable to the author’s of fan fiction.⁵² In this case, the defendant wrote and published a derivative work of *Gone With the Wind*, titled *The Wind Done Gone*, by narrating the story from the viewpoint of Scarlett’s slave.⁵³ Although the work was obviously commercial in nature, the Court still deemed the defendant’s derivative work a fair use.⁵⁴ The Court reasoned that the core purpose of copyright law is to promote learning and free expression⁵⁵ by ensuring that a maximum number of new works be created and published.⁵⁶ The Court went on to conclude that while the exclusive property rights of the original author are important, they are secondary to the “promotion of learning in copyright law.”⁵⁷ Therefore, the Eleventh Circuit is of the opinion that when balancing

⁵¹ *Id.* at 74 (quoting *Salinger v. Colting*, 641 F. Supp. 2d 250, 255 (S.D.N.Y. 2009) *vacated*, 607 F.3d 68 (2d Cir. 2010)).

⁵² *E.g.*, Chatelain, *supra* note 2, at 212.

⁵³ *Id.* (citing *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260-62 (11th Cir. 2001)).

⁵⁴ *Id.* (citing *Suntrust Bank*, 268 F.3d at 1276).

⁵⁵ *Id.* (citing *Suntrust Bank*, 268 F.3d at 1261) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (citing Jane C. Ginsberg, *Creation and Commercial Value: Copyright Protection in Works of Information*, 90 Colum. L. Rev. 1865, 1873 (1990)).

⁵⁶ *Id.*

⁵⁷ *Id.*

the aims of copyright law, specifically, increasing the number of creative works in the public domain in order to promote learning against a copyright holder's exclusive right to prepare derivative works from the original copyrighted work,⁵⁸ the former consideration holds more weight in determining whether the use is a fair use.

In comparing the derivative works of *Gone With the Wind* in the *Suntrust* case with that of *The Catcher in the Rye* in the *Salinger* case, it appears the Courts' main inquiry was whether the works were substantially transformative, and not whether some sort of commercial benefit or injury accrued to the respective parties. Therefore, these cases show that courts have tended to find the creative nature of the use paramount when determining fair use. However, this paper contends that the vital inquiry should not necessarily be the transformative use, although that should remain an important factor in the legal analysis, but instead, the principal concern should be whether the new work materially benefits the author at the expense of the copyrighted work. Or posed differently, does this new use materially injure the original copyright holder. For example, if in the *Suntrust* case, *The Wind Done Gone* had the potential of decreasing *Gone With the Wind's* profits, then the fact that it was substantially transformative should only be ancillary to the issue of whether a material injury ran to the original work.

III. Proposed Solution

⁵⁸ 17 U.S.C.A. § 106.

Although the above Circuits reached different decisions when deciding whether a work of fan fiction constituted fair use, the facts tend to distinguish each case in regard to the first factor of fair use, specifically, the transformative nature of each work. Both the *Suntrust* and *Salinger* decisions placed heavy weight on the transformative nature of the works, and therefore, under that type of analysis, reached the proper decisions based on the factual circumstances of each. However, this proposed solution argues that the transformative nature of the work should be a secondary determination when compared to the fourth factor, the effect of the use on the copyrighted work's potential market. In balancing the copyright holder's property rights with the maximization of creative works in the public domain, courts should tend to find fan fiction which is commercial in nature that materially benefits, either commercially or economically, the alleged infringer, or materially injures the copyrighted work, should not be considered fair use. Conversely, fan fiction which offers no benefit to the creator other than the ability to share their works in the public domain, and likewise, presents no harm to the copyrighted work such as potentially decreasing licensing opportunities, should be deemed protected by fair use. When the author of the new work derives no material benefit from its creation, and the copyright holder suffers no injury, the copyright holder's property rights have not been infringed. However, it should be noted that an unlicensed non-transformative derivative work would likely be a *per se* detriment to the copyright holder by placing, what is essentially a near replica of the originator's work, in the public domain. When this type of derivative work becomes freely accessible to the public, it has effectively reduced the original work's potential to realize commercial and economic gain from the sale of the work, and thus would lead to a finding of unfair use.

Therefore, based on this proposal, the Court's decisions in *Harper & Row*, *DC Comics*, *Salinger*, and *Suntrust*, can be reexamined.

Although not necessarily related to fan fiction, the *Harper & Row*, and *DC Comics*, decisions most closely align with this proposed solution. There, the Courts found economic considerations most compelling in finding for the copyright holder. However, the Courts put more weight into the potential missed licensing opportunities to the copyright holder than the defendants' potential commercial and economic gains. In *Harper & Row*, the Supreme Court seemed to focus almost exclusively on the financial detriments which ran to the copyright holder in rendering its holding, but did not necessarily evaluate the benefits which could have accrued to the alleged infringer. However, courts should analyze these two economic elements concurrently when determining the fourth factor of fair use. Likewise, in *DC Comics*, the Court put more weight on the copyright holder's missed licensing opportunities than the defendant's potential commercial and economic gains by naming the comic book store "The Batcave." However, when asking what injuries may accrue to the copyright holder, the Court should simultaneously ask what benefits may pass to the user. In *DC Comics*, the fact that the defendant stood to commercially and economically benefit by naming their store after a famous character's lair, and deriving that benefit by directly associating their store with the copyright, should be a strong factor in a Court's finding of unfair use.

Next, the *Salinger* decision, which involved fan fiction, can be analyzed under the proposal. Although the Court gave heavy weight to the fact that the work was not sufficiently transformative, as long as the defendant did not have the potential to recognize any commercial benefit at the expense of the copyright holder, the Court should have probably found the work a fair use. Under this proposed solution, the Court should have put more weight into whether the defendant had the potential to accrue a material benefit from the work, and less weight on the issue of how transformative the work was. Even if the new work only created one new minor character, as long as the entry of the work into the public domain does not commercially benefit the defendant, and does not injure the copyrighted holder, then the Court should have been more willing to find the copyright holder's rights were not violated and the derivative work a fair use. However, in this type of context, publishing a substantially non-transformative work which is freely accessible in the public domain would most likely adversely affect the copyright holder's interest in the work. Allowing the public to view the substantially similar work for free would undoubtedly reduce the original holder's potential to profit by reducing their ability to sell the original work.

Lastly, in the *Suntrust*, decision, the Court gave greater importance to the promotion of learning by maximizing the amount of works in the public domain than the copyright holder's rights. Although the derivative work was deemed substantially transformative, this proposal does not necessarily give the utmost weight to that factor, but instead, puts more influence on the potential commercial and economic benefits which could accrue to the author. If this Court were to find that the work was a

commercial success, and either tended to economically benefit the new creator, or alternatively, injure the copyright holder by limiting their right to license the derivative work for economic or commercial gain, then this should probably be found an unfair use. However, if the work did not commercially benefit the new author, and did not economically injure the copyright holder, then the use should likely be deemed a fair use. Realistically, if the work becomes a commercial success, as *The Wind Done Gone* did, then this factor should strongly cut against a finding of fair use. Then, only after the Court heavily weighs this factor of the work's use should it then give weight to whether the work is substantially transformative. Under the facts of the *Suntrust* decision, although the work was substantially transformative, this proposed solution contends that, because the author derived commercial and economic gain at the expense of *Gone With the Wind*, the work should be deemed an unfair use due to that material benefit and material injury to the respective parties.

IV. Conclusion

This proposed solution attempts to elucidate the concept that even if a derivative work is not sufficiently transformative, the copyright holder's exclusive rights are not violated if there is no commercial or economic benefit to the new author, and similarly, no potential for commercial or economic injury to the copyright holder. Therefore, as applied to fan fiction, the derivative works should be deemed fair use as long as no material benefit runs to the new creator at the expense of the copyright holder.

However, the new inquiry becomes, at what threshold point does a material injury begin to run to the original copyright holder? This is difficult to answer and will likely be fact specific. On one end of the spectrum is a fan that posts a single fan fiction story as a hobby and has no apparent possibility to derive a material benefit. This type of fan fiction likely poses no chance of injury to the copyright holder. On the other end of the spectrum is an author who creates a substantially transformative work from an original, which ends up being a commercial success, and thus has the potential to derive an economic gain. Obviously, a copyright holder would assert that every piece of fan fiction has the potential to lead some member of the public to freely access the derivative work in lieu of buying the original work, and thus should be considered unfair use, and that this may further lead to problems quantifying the copyright holder's potential lost profits. Conversely, the creators of fan fiction would contend that their derivative works promote creativity and learning in the arts, and that it would be farfetched to consider their Internet posts to have the effect of materially injuring the copyright holder. However, this fact sensitive threshold question can only be resolved by future litigation, and will always be determined under a subjective analysis.

Along the same vein, the remaining perplexing issue revolves around the concept of whether numerous fan fiction postings, in themselves, tends to injure the original copyright by allowing the public unlimited access to these derivative works, and thus, possibly reducing the demand for the original copyrighted work. While this issue currently seems unquantifiable without significant research, if this undertaking continues

to grow at a rapid rate, it may become more apparent that these freely accessible works either do, or do not, materially injure the original copyright holder.

Thus, a future judicial decision may help reconcile some of these issues. However, until the courts hold that certain aspects of fan fiction are determinative as to whether it constitutes fair use; authors such as J.K. Rowling probably won't have much recourse when the newest Harry Potter adventure is posted in an Internet forum: *Harry Potter and the Trouble with his Tight Leather Pants*.