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Natalie H. Montano

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Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fiction

By Natalie H. Montano*

Copyright law is designed to protect the ownership and financial rights of the original author of a literary work. However, the internet has created new opportunities for amateur writers to create their own fan fiction based on such literary works. Borrowing from the ideas and characters of a work, fan fiction authors build upon and re-imagine these stories. Such fan works should be protected under the Fair Use Defense, but the power imbalance between amateur fan fiction authors and successful published authors often leads to the eradication of fan stories from the public domain.

This Comment argues that fan fiction should be defined as universally transformative so as to avoid any possibility of infringement lawsuits on the basis of a derivative work that, by law, belongs only to the original author. Such a legal definition is favorable due to the sociological and literary benefits that fan fiction has for the public at large, due to its ability to create and perpetuate modern myths.

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I. INTRODUCTION

¶1 Much has been written about the legal position of fan fiction and whether it falls under fair use in regard to copyright infringement. Past decisions such as *Warner Brothers & J.K. Rowling v. RDR*[1] and *Suntrust v. Houghton Mifflin*[2] indicate that fan-written fictional works fall comfortably under fair use if they are in a noncommercial capacity or if their content rises to the level of parody. However, fan fiction, which exists almost exclusively on the internet, is easily shut down with a simple cease & desist letter from the copyright owner. These letters effectively bully the fan writers into removing their work regardless of whether or not they could raise a Fair Use Defense in court.[3] There is a distinct tension between the sociological benefits of retelling stories as a means to form a cultural narrative and the constraints and goals of modern American copyright law.[4] By universally categorizing fan literary works as transformative in nature, and therefore conclusively entitled to the protection of the Fair Use Defense, a compromise is reached between the need to protect the rights of original authors and the need to allow for cultural and literary reinterpretations that benefit society at large. Drawing on the principles of myth and literary theory, this Comment will argue that all fan fiction is essentially transformative as a criticism of the original literary work, whether or not it rises to the level of parody or is more "derivative"[5] in nature.

¶2 Section II of this Comment will examine how literary works are protected under American copyright law and what constitutes an infringement of a literary work. Section III will explore the evolution of fan fiction and its current expressions. Section IV will analyze the origins, meaning, and importance of myth in society and how fan fiction relates to the emergence of modern myth. Section V will examine basic literary theory in relation to authorial intent and its effect on our perceptions of fan fiction. Section VI will explore how myth and literary theory form the basis for persuasive arguments that all fan fiction be considered transformative rather than derivative under copyright law due to its societal value. Lastly, Section VII will address and refute mainstream arguments against categorizing all works of fan fiction as transformative.

II. COPYRIGHT INFRINGEMENT

¶3 The definition of a "literary work" is codified in American copyright law under Title 17 of the United States Code (U.S.C.). The statute defines "literary works" as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they

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[1] 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (holding that commercial use is an explicit aspect in determining whether a secondary work can qualify as transformative).

[2] 268 F.3d 1257, 1276 (11th Cir. 2001) (holding that a parody, by nature, seeks to comment on or criticize an original work, and is thus transformative).

[3] 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.

[4] *See* HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE (1992).

[5] *See* 17 U.S.C. § 106 (2006).

are embodied."[6] One of the main purposes of copyright law is to assign the author of the copyrighted work exclusive rights to (1) reproduce, (2) prepare derivative works based upon the original, (3) distribute copies of the copyrighted work for profit, (4) perform the copyrighted work if applicable, (5) to display the copyrighted work publicly if applicable, and (6) to perform the copyrighted work publicly by means of a digital audio transmission if applicable.[7]

¶4 Based on the significance of these six exclusive rights to the copyright owner/author, it is a natural extension of the statute that a copyright infringer be defined as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122."[8] However, infringement of literary works most commonly emerges under the second exclusivity rights of authors. A "derivative" work is defined in the Copyright Statute as "a work based upon one or more preexisting works," that "may be recast, transformed, or adapted."[9] This definition is broad, and may lead a casual reader of the Copyright Act to believe that fan fiction, an inherently derivative practice, is copyright infringement.

¶5 Fortunately for fan authors, § 107 of the Copyright Act contains a built-in defense to such an argument: the Fair Use Defense.[10] Under this defense, a secondary work must "transform" itself beyond being merely derivative in order to claim judicial protection.[11] Four factors are set forth to determine whether a work is transformative by being "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[12] These four factors are:

> (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.[13]

It is the author's argument that all fan fiction essentially comments on the original copyrighted work by transforming a piece of the original, no matter how small. In examining whether a work rises to a comment or critique of the original, copyrighted work, a court will seek to determine whether the new work "supersedes the objects of the original creation," or whether it, "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[14]

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[6] *Id.* § 101.
[7] *Id.* § 106.
[8] *Id.* § 501; *see also* 17 U.S.C. §§ 107–22 (focusing on the limitations of the six exclusive rights, including the most significant one for purposes of this Comment: the Fair Use Doctrine in § 107).
[9] 17 U.S.C. § 101.
[10] *Id.* § 107.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

¶6 The most legally established example of a transformative literary work is that of parody.[15] Parody is the most apparent and easily understood example of a transformative work since, by its very nature, a parody comments on the original work. Through such commentary, the work gives a new meaning to the original, thus providing a social function that is not purely entertaining or aesthetic.[16]

¶7 Multiple courts have examined the issue of what factors determine whether a work rises to the level of parody. In 2001, a satirical reimagining of the classic novel *Gone With the Wind*, entitled *The Wind Done Gone*, was considered to be a parody under the Fair Use Defense because the new work commented on the original by humorously critiquing racist and sexist aspects of the original novel's plot and characters.[17] However, in an equally infamous case, the Second Circuit ruled that an unauthorized sequel of J.D. Salinger's *The Catcher in the Rye* did not rise to the level of parody and was an infringing, derivative work, even though the main focus of the sequel was to comment on and mock Salinger, rather than merely create a straightforward sequel to the original novel.[18] The dichotomy between these two decisions indicates that there are no set criteria for what causes a secondary work to rise to the level of a transformative parody rather than an infringing and derivative unauthorized sequel. It is clear, however, that if fan fiction is to receive full protection of the Fair Use Defense, it must be found to be transformative in nature.

III. WHAT IS FAN FICTION?

¶8 What exactly is fan fiction? To the uninitiated, fan fiction may be an abstract concept. Since most fan fiction is an endeavor that exists purely in the cyber world, Wikipedia, the people's encyclopedia, is a good place to start in attempting to define fan fiction. Wikipedia defines it as, "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] A more academic definition states that "[f]an fiction is simply that: fiction created by fans, typically of popular commercial works, such as the *Harry Potter* book and film series."[20] Yet another scholar defines fan fiction as "any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show" that is not categorized as "'professional' writing."[21]

¶9 Thus, it is clear that fan fiction belongs to the novice and is outside the world of "professional" authorship.[22] Fan fiction can arise from books, television shows, movies, plays, and any other creative medium with characters or the semblance of a plot. For

[15] 2 Pat. L. Fundamentals § 6:76 (2d ed.).
[16] *Id.*
[17] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276–77 (11th Cir. 2001).
[18] Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010) (It should be noted that this case has been remanded, but that the Appeals Court has noted that the Fair Use Defense is unlikely to succeed on remand.).
[19] *Fan Fiction*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fan_fiction (last visited Oct. 9, 2011).
[20] Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1870 (2009).
[21] Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997).
[22] *Id.*

purposes of this Comment, however, the focus is on fan fiction inspired by books and other literary works.

¶10 Having defined fan fiction, the next question becomes how courts have treated and categorized fan works in relation to the established copyright laws. Because fan works are noncommercial in nature, they are natural candidates for the Fair Use Defense. Yet, there is very little case law that directly addresses whether fan fiction rises to the level of copyright infringement. While the court in *The Wind Done Gone* case did spend some time discussing whether fan works were subject to an exception similar to that of the transformative parody exception, the court's decision ultimately relied only on the definition of parody under Copyright Law.[23] Any distinct criteria for what would constitute a transformative fan work was outside the scope of that case.[24]

¶11 The recent case between J.K. Rowling, author of the *Harry Potter* book series, and the would-be creators of a fan-published lexicon of information drawn from the *Harry Potter* universe raised some interesting points about the legal categorization of fan fiction.[25] The court held that this informational lexicon was not transformative since it was merely a collection of facts and other information from the *Harry Potter* series and failed to comment on or critique the original work in a way that would cause the lexicon to rise above a derivative categorization, a right belonging exclusively to J.K. Rowling as the copyright holder.[26] The court also expressed concern that the potential fan-published lexicon could affect the profits that J.K. Rowling would make should she ever decide to create her own encyclopedia of the *Harry Potter* universe (which she plans to do and was clearly a motivation for the lawsuit).[27] This possibility was problematic to the court because copyright owners have the exclusive right to profit from a derivative work.[28]

¶12 Although this case may at face value appear to limit the availability of the Fair Use Defense for authors of fan works, the unique nature of a fact-based lexicon, as opposed to the standard fan-written stories, shelters the more traditional fan works that will be discussed in this Comment. In fact, *Warner Bros.* highlights the difference (both in form and judicial treatment) between a fan-produced lexicon void of new or original content and a fan-produced literary work that relies on existing work but contains original material.[29]

¶13 It is significant that nearly all fan fiction is for nonprofit and noncommercial use, and it is published only on the internet on webpages dedicated to the medium, such as FanFiction.net and FictionAlley.org.[30] In fact, J.K. Rowling herself supports these traditional types of fan fiction based on her *Harry Potter* series, saying that she is "flattered" and that her only concern is that "[fan fiction] remains a non-commercial activity to ensure fans are not exploited and it is not being published in the strict sense of

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[23] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001).
[24] *Id.*
[25] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 535-36 (S.D.N.Y. 2008).
[26] *Id.*
[27] *Id.* at 552.
[28] *Id.* at 551.
[29] *Supra* note 1.
[30] *Frequently Asked Questions About Fan Fiction*, CHILLING EFFECTS, http://www.chillingeffects.org/fanfic/faq.cgi (last visited Oct. 9, 2011); *see also* FICTION ALLEY: CREATIVITY IS MAGIC, http://fictionalley.blogspot.com/ (last visited Nov. 6, 2011); FANFICTION.NET, http://www.fanfiction.net/ (last visited Oct. 9, 2011).

traditional print publishing."[31] However, many authors do not support fan fiction, and are quick to contact websites that host these fan-made stories to request that any fan fiction inspired by their copyrighted works be removed.[32] It is an easy task for authors to send a cease & desist letter to a website and essentially bully a fan fiction author into taking her work down, regardless of whether the fan author would have a viable Fair Use Defense in court.[33] Since there is such a limited amount of established law on the status of fan fiction, there is little incentive for published authors to halt these cease and desist letters, even if they are undermining the goals of the fair use provision in the Copyright Act.

¶14 Of course, the notion of what makes fan fiction a universally transformative medium, and thus subject to the Fair Use Defense, has yet to be examined by judge or jury. High litigation costs likely prevent a fan fiction author from ever defending herself in court once receiving a cease and desist letter from the copyright owner. Although the Copyright Act specifically contains the Fair Use Defense to protect socially beneficial endeavors like fan fiction, the power and financial imbalance between novice writer and successful author oftentimes nulls the effectiveness and availability of the Defense. Although the anxiety and overprotectiveness of authors is understandable when it comes to protecting their stories, the very nature of fan fiction is the kind of critique and commentary protected by the Fair Use Defense writ large across the internet.

IV. MYTH FORMATION AND FAN FICTION

¶15 But how is fan fiction beneficial to society and why should anyone care about whether fan fiction is protected by the Fair Use Defense? Beginning in this Section, and continuing in Sections V–VI, this Comment will make the argument that fan fiction is a modern expression of myth and collective narrative, and thus, has inherent societal value that should be protected and uninhibited by copyright law.

A. What is Myth?

¶16 It is not a new concern that copyright law limits free speech and public rights; in fact, the First Amendment and copyright law seem to be at odds with one another.[34] In a more recent article in the Journal of the Copyright Society of the U.S.A., Nathaniel Noda addresses the creative nature of fan-based activities and argues that, "an author's placement of his or her creative work in the stream of public consciousness . . . implicitly cedes certain rights of interpretation to the public at large."[35] Noda's thesis relies on the underlying idea that certain rights belong to the public consciousness and allow for the audience to appropriate aspects of an original work to use in a way that reinterprets the

[31] Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS (May 27, 2004), http://news.bbc.co.uk/2/hi/entertainment/3753001.stm.

[32] *Id*.

[33] *See* Macbeth, *supra* note 3.

[34] *See* Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 57 J. COPYRIGHT SOC'Y U.S.A. 987, 995 (2010). For an in-depth discussion of the tension between the Copyright Act and the First Amendment that is beyond the scope of this Comment, see also Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (2010).

[35] Noda, *supra* note 34, at 995.

original.[36] Such an argument can be read as an assertion that the public should have access to stories, characters, and other aspects of original works in order to perpetuate myth.

¶17 Myth, a broad and complex category of stories and human experience, can be viewed as "a societal story that expresses prevailing ideals, ideologies, values, and beliefs."[37] Anthropology scholars consider myth to be an "essential social narrative, a rich and enduring aspect of human existence, which draws from archetypal figures and forms to offer exemplary models for social life."[38] One of the foremost scholars on myth and its effect on society is Joseph Campbell, who wrote extensively on the structures and elements of myth in his famous treatise, *Hero with a Thousand Faces*.[39] In *Hero*, Campbell set forth the basic notion that characters, stories, and ideas are all essential parts of creating myths.[40] It is in his treatise, *The Power of Myth*, however, that he expounds on the importance that myth holds for human society, psychology, and overall social development.[41] Campbell writes:

> Myths are stories of our search through the ages for truth, for meaning, for significance. We all need to tell our story and to understand our story. We all need to understand death and to cope with death, and we all need help in our passages from birth to life and then to death. We need life to signify, to touch the eternal, to understand the mysterious, to find out who we are.[42]

¶18 In his examination of the origin of myth, Campbell asserts that it plays an essential role in helping humans come to terms with the realities of every stage of our existence by giving meaning to birth, life, and finally, death.[43] Regardless of whether the meaning we assign to these rites of passage is truly representative of reality, what matters is the way we use our projected meanings to understand our own existences and identities.

B. How Has the Power of Myth Influenced Copyrighted Works?

¶19 In examining the importance of myth in literary works, it is important to first explore how many popular stories that are considered to be original, and more significantly, copyrighted, have drawn from each other in order to reframe and reinterpret basic archetypes as set forth by Campbell. In *Hero*, Campbell explains the most basic heroic archetype, in which the story takes the hero through a period of (1) separation, (2) initiation, and (3) return.[44] In layman's terms, he describes this circular journey as follows: "A hero ventures forth from the world of the common day into a region of

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[36] *Id.*
[37] Jack Lule, *News as Myth: Daily News and Eternal Stories*, *in* MEDIA ANTHROPOLOGY 101, 102 (Eric W. Rothenbuhler & Mihai Coman eds., 2005).
[38] *Id.*
[39] JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (3rd ed. 2004).
[40] *Id.*
[41] JOSEPH CAMPBELL, THE POWER OF MYTH (Betty Sue Flowers ed. 1988).
[42] *Id.* at 26.
[43] *Id.*
[44] CAMPBELL, *supra* note 39, at 28.

supernatural wonder: fabulous forces are there encountered and a decisive victory is won."[45]

¶20 Two of the most famous and beloved fantasy series epitomize this "monomyth"[46] that Campbell sets forth: the *Harry Potter* series and *The Lord of the Rings* trilogy.[47] Tolkien's *The Lord of the Rings* was written in 1954 and follows the story of hobbit Frodo Baggins, who is small and orphaned (*separation* from society at large).[48] Frodo leaves behind his common, everyday life for that of adventure, when magical circumstances larger than himself sweep him into an epic journey to battle evil; he is flanked by a fellowship of heroic companions and faces many challenges of increasing difficulty (thus *initiating* his acceptance into the new, magical world).[49] He is advised by an old, wise, and eccentric wizard who sacrifices his life for him, which ultimately allows Frodo to conquer the evil antagonist through the emphasis of basic human emotions such as love and friendship (the *return* phase to basic human emotion and values).[50]

¶21 Compare this with the narrative arc of the *Harry Potter* series, which was first published in 1997: Harry Potter, who is small and orphaned (*separated* from society at large), leaves behind his common, everyday life when he discovers he is a wizard, and becomes a member of a magical, whimsical world where forces larger than himself push him into an epic battle against the powers of evil.[51] Surrounded by a cast of characters that introduce and characterize the Wizarding World, Harry is faced with many challenges of increasing difficulty (thus satisfying the *initiation* phase). Just like Frodo, Harry is advised by a wise, old, eccentric wizard who sacrifices his life for Harry, which ultimately allows him to conquer evil with the use of basic human qualities such as love and friendship (the *return*).[52]

¶22 It is obvious that *Harry Potter* draws heavily from the narrative arc of *Lord of the Rings*. In addition to these broad, overall similarities, both books use many other identical elements which include but are not limited to: giant spiders, cursed jewelry, elves, goblins, magic swords, cultural exploitation, and, of course, a heavy dependence on magical beings in general. Yet, no one would argue that *Harry Potter* is a derivative sequel of *Lord of the Rings*.

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[45] *Id.*

[46] *Id.*

[47] J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1st American ed. 1998) [hereinafter SORCERER'S STONE]; J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (1st American ed. 1999) [hereinafter CHAMBER OF SECRETS]; J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (1st American ed. 2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (1st American ed. 2003); J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (1st American ed. 2005); J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (1st American ed. 2007) [hereinafter HALLOWS]; J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING (3rd ed. 1979) [hereinafter FELLOWSHIP]; J.R.R. TOLKIEN, THE TWO TOWERS (3rd ed. 1979) [hereinafter TWO TOWERS]; J.R.R. TOLKIEN, THE RETURN OF THE KING (3rd ed. 1979) [hereinafter RETURN].

[48] *See* FELLOWSHIP, *supra* note 47, at 41–42.

[49] *See id. passim*; *see also* TWO TOWERS, *supra* note 47; RETURN, *supra* note 47.

[50] It is Frodo's deep friendship with Samwise Gamgee that ultimately saves the day. *See* RETURN, *supra* note 47, at 252–71.

[51] *See* SORCERER'S STONE, *supra* note 47, at 12, 50–51.

[52] It is Harry's essential goodness and love for his friends that repeatedly saves his life and the Wizarding World at large. In fact, Harry's very existence is predicated on his mother's love, which caused the evil antagonist's "Killing Curse" to rebound and harm the caster instead. *See, e.g.*, HALLOWS, *supra* note 47, at 709–10.

¶23 Rather than infringing Tolkien's copyright, this is an example of the use of collective cultural myth to retell the same story in a different context. Despite the many similarities between the two series, there are significant differences in the *Harry Potter* series that modernize the basic hero narrative present in both stories and reinterpret aspects of Tolkien's novels. For example, *The Lord of the Rings* has only three significant female characters,[53] while the *Harry Potter* series is filled with important women characters with strong personalities, discernible identities, and individual narrative arcs beyond that of the hero, Harry.[54] Another way in which the *Harry Potter* series reinterprets the hero myth as set forth in *Lord of the Rings* is through its examination of racism. In *The Lord of the Rings*, while different magical races work together against the evil antagonist, it is undeniable that there is an underlying current of Western elitism, with the "good" characters hailing from the West and the "evil" characters hailing from the East.[55] In contrast, one of the main narrative tenets of the *Harry Potter* series is that any racial elitism is unquestionably evil, as can be seen in the book's lengthy criticism of characters who prize "pureblood" wizards rather than "mixed-blood" wizards or, according to some of the more obscene terminology of the books, "mudbloods."[56]

¶24 By essentially retelling the hero monomyth in a new context that reworks social values and ideologies that have changed over time, the *Harry Potter* books transform the basic monomyth. If J.K. Rowling is ever sued by the Tolkien estate for copyright infringement, she would have an easy case arguing that her work is in every way transformative of the original *Lord of The Rings* trilogy on the basis of reworking and rethinking the central concepts of Tolkien's story through her own cultural schema.

¶25 This heavy inspirational borrowing transcends the genre of fantasy. Take, for example, Hilary Jordan's recent novel, *When She Woke*.[57] On the back cover of the novel is praise for the book which reads, "Hilary Jordan channels Nathaniel Hawthorne by way of Margaret Atwood in this fast-paced dystopian thriller."[58] This praise came from a fellow author and gracefully sidesteps the fact that Jordan was not merely channeling Hawthorne or Atwood, but in reality reworking huge elements of Hawthorne's *The Scarlet Letter* and Atwood's *The Handmaid's Tale*.[59] In Jordan's novel, criminals have their skin tinted according to a color that matches their crime.[60] The protagonist, Hannah,

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[53] The three significant female characters are Arwen, Galadriel, and Eowyn. Nancy Enright, *Tolkien's Females and the Defining of Power*, *in* J.R.R. TOLKIEN'S THE LORD OF THE RINGS 171, 171–86 (Harold Bloom ed., 2008).

[54] *See, e.g.*, SORCERER'S STONE, *supra* note 47. These characters range from the brilliant Hermione Granger to the terrifying and psychotic Dolores Umbridge. This span of female characters also indicates a breakaway from stereotypical feminine roles.

[55] Christine Chism, *Charges of Racism*, *in* J.R.R. TOLKIEN ENCYCLOPEDIA: SCHOLARSHIP AND CRITICAL ASSESSMENT 558 (Michael D.C. Drout ed., 2007).

[56] Note that in the *Harry Potter* universe, a "mudblood" is a witch or wizard born from non-magical parents, while a "mixed-blood" or "half-blood" person is a witch or wizard with both magical and non-magical heritage. *See, e.g.*, CHAMBER OF SECRETS, *supra* note 47, at 115–16; Elaine Ostry, *Accepting Mudbloods: The Ambivalent Social Vision of J.K. Rowling's Fairy Tales*, *in* READING HARRY POTTER: CRITICAL ESSAYS 89–99 (Giselle Liza Anatol ed., 2003).

[57] HILLARY JORDAN, WHEN SHE WOKE (2011).

[58] *Id.*

[59] NATHANIEL HAWTHORNE, THE SCARLET LETTER (Simon & Brown 2011) (1850); MARGARET ATWOOD, THE HANDMAID'S TALE (Everyman's Library 2006) (1985).

[60] *See* JORDAN, *supra* note 57.

has an adulterous affair with a highly regarded and well-loved minister, which leads to an illegal abortion.[61] Her punishment is to have her skin "chromed" red and to be released back into the public at large.[62] These elements are essentially identical to *The Scarlet Letter*, in which Hester Prynne has an adulterous affair with a highly regarded and well-loved minister, and as punishment is forced to wear a red badge of shame.[63]

¶26 The fact that the main character in *When She Woke* was criminalized for an abortion evokes Margaret Atwood's famous novel, *The Handmaid's Tale*.[64] Jordan's futuristic society is nearly identical to the overtly religious, decaying, and totalitarian state that Atwood created.[65] But Jordan's heavy borrowing from these two famous novels isn't copyright violation. Instead, her novel is hailed as a vivid re-working of the main ideas and devices of *The Scarlet Letter* and *The Handmaid's Tale* that transforms the original works and brings them up to date. Jordan's reinterpretation of the badge of shame taps into modern society's fears regarding what new kinds of punishment become possible with emerging technologies. Similarly, her usage of Atwood's religious and totalitarian state evokes the current culture war being waged. Atwood's novel was published in 1985 and touched on the succinct fears of feminists at the time. Jordan's novel takes these same uncertainties and infuses them with a contemporary sensibility, working in the fear of terrorism and the deteriorating separation between church and state. In many ways, Jordan's novel is just a very well-written fan fiction that got published.

C. How Does Fan Fiction Create Myth?

¶27 Just as a famous copyrighted work can transform elements of a previous copyrighted work and create a new cultural narrative, so can fan fiction comment on, reinterpret, and rethink aspects of the original work. Literary scholars have been quick to pick up on fan fiction's ability to add to the cultural narrative and describe fan fiction as "part of a basic drive toward storytelling as the preserve of a 'shared cultural tradition' from Homer onward."[66] Online fan communities compound the effect of literary fan works, creating "communal (albeit contentious and contradictory) interpretation in which a large number of potential meanings, directions, and outcomes co-reside."[67] Returning to the *Harry Potter* example, participants in the "fandom"[68] not only rework elements of the original *Harry Potter* story, but also generate narrative themes and character arcs that become norms within their fan communities. For instance, in *Harry Potter* fan fiction, homosexual relationships between characters are frequent plot points although there are

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[61] *Id.*
[62] *Id.*
[63] HAWTHORNE, *supra* note 59.
[64] ATWOOD, *supra* note 59.
[65] See *id.*
[66] Mafalda Stasi, *The Toy Soldiers from Leeds: The Slash Palimpsest*, *in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 115, 117 (Karen Hellekson & Kristina Busse eds., 2006) [hereinafter FAN FICTION].
[67] *Id.* at 7.
[68] "Fan fiction" is defined as "stories involving popular fictional characters that are written by fans and often posted on the Internet." *Fan Fiction Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/fan fiction (last visited Apr. 2, 2013).

no apparent homosexual characters in the novels.[69] Thus, the *Harry Potter* fandom is simultaneously reinterpreting the source material and its traditional monomyth aspects while creating new templates for story creation that garner wide social acceptance within the closed-universe of *Harry Potter* fan fiction writers.

V. LITERARY THEORY AND FAN FICTION

¶28 The way in which the Copyright Act is written supports the modern notion of the author as the primary source of a literary work, but there is no reason that authors should be considered the sole owner of that work. The famous literary scholar, Roland Barthes, explored the modern inclination to prize individual authors over collective stories that belonged to the public in his essay, *Death of the Author*.[70] Barthes wrote that, "[O]nce the author has written the words, they no longer belong to the author, but to the cultural narrative at large"[71] and argued that the idea of authorship as ownership emerged as Western society "discovered the prestige of the individual," thus causing us to attach importance to the "'person' of the author."[72] He concluded "[t]o give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing."[73]

¶29 The notion of originality or ownership would have been foreign to ancient or medieval writers and storytellers, who drew from collective narratives and myths constantly.[74] As scholar Karen Hellekson succinctly notes in her essay on fan fiction and fan communities, such referential behavior by authors would today "attract the notice of lawyers."[75] If readers were unburdened by the role of the individual author, they would more easily be able to add to the public store of knowledge in a way that adds to our collective creative teleology.[76]

¶30 This reinterpretation of the collective teleological narrative arises when fans change the endings of iconic stories or when fans create "alternate universes" in ongoing series that alter the direction of the narrative in a way that suits their own tastes or opinions.[77] By re-writing established endings and plotlines, fan authors are essentially reclaiming the stories from the power of the original author(s) and adding to the collective narrative that the public can access.

VI. COPYRIGHT LAW, MYTH, AND LITERARY THEORY: HOW DOES IT ALL FIT TOGETHER?

¶31 The previous Sections have explored how fan fiction generates myth and adds to the public pool of knowledge, but how do these social achievements fit with copyright law? Drawing from the earlier analysis of how fan fiction has literary merit and is a

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[69] *Harry Potter Pairings*, FANLORE (Apr. 15, 2013, 1:30 PM), http://fanlore.org/wiki/Category:Harry_Potter_Pairings.

[70] Roland Barthes, *The Death of the Author*, *in* PARTICIPATION 41 (Claire Bishop ed., 2006).

[71] *Id.* at 1.

[72] *Id* at 41.

[73] *Id.* at 44.

[74] FAN FICTION, *supra* note 66, at 124–25.

[75] *Id.*

[76] Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 57 J. COPYRIGHT SOC'Y U.S.A. 987, 997 (2010).

[77] *Id.*

powerful tool for myth creation, this section will further examine how fan fiction establishes a universally transformative nature for itself. The noncommercial nature of fan fiction situates it as the best compromise between enforcing authorial rights under copyright law and allowing for public access to the collective narratives of our culture.

¶32 The goals of copyright law are set forth in the Constitution: "To 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."[78] In an individualistic culture like ours, it makes sense that the main way in which we attempt to further the arts is by assigning significance to the individual author by bestowing rights of ownership.[79] However, the true goal of copyright law is to incentivize artists to create, free of the fear that their works will be misused by the public at large.[80] Allowing fans (or critics) of a work to write new endings or change plotlines should not be seen as misuse, particularly since there is no monetary reward for such acts. Rather, these re-worked stories are purely intellectual and emotional expressions of the fan's reaction to the original works. An author may have the exclusive right to publish and profit from their works, but copyright laws do not give them ownership over the reactions and commentaries that their works will garner among the public. Thus, fan fiction stands in a unique position to remedy the negative side effects that sole ownership of literary works can have on collective myth formation. To put it succinctly, "Fanfiction is the way of the culture repairing the damage done in a system where contemporary myths are owned by corporations instead of owned by the folk."[81] By defining fan fiction as universally transformative and putting these works outside the scope of potential lawsuits, we get the best of both worlds: original author protection and the collective ability to construct and retain modern myth.

¶33 But is fan fiction really universally transformative rather than derivative? If a fan story remains within the confines of the original work in terms of narrative voice and content, it perpetuates and reaffirms the original work's place in our popular narrative.[82] By reaffirming the values inherent in the original work, the fan author is commenting on the original work by implicitly approving of these values. If a fan story drastically changes or re-works a significant, teleological plot point or a main character's personality, it is a critique on how the original work is confined to a certain space and schema.[83] By changing aspects of the original work, the fan author implicitly comments on the original work by disapproving (for whatever reason) of the values or assertions made in that original work. By constructing her own narrative voice through the original work, the fan author creates a new, individualized voice. Whether through affirmation or reconstruction, the fan author is commenting on and transforming the original work's meaning and effect on popular culture.[84]

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[78] U.S. CONST. art. I, § 8, cl. 8.

[79] *See generally* R. Anthony Reese, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707 (1995).

[80] *Cf.* Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH & INTELL PROP. 531, 559 (2012) (explaining the purpose of literary property as a supplement to copyright).

[81] *See* JENKINS, *supra* note 4.

[82] *See* Stasi, *supra* note 66.

[83] *Id.*

[84] *Id.*

¶34 In establishing that all fan fiction is transformative in nature, a few more specific examples will be helpful. One of the most interesting aspects of modern fan fiction is how fan stories are written to include diverse and non-traditional viewpoints often absent from the popular culture at large.[85] As Sonia Katyal writes in her exploration of homosexual pairings in fan fiction:

> [T]he audience has the following choices to make: (1) adopt either the proffered or dominant 'codes' offered by the speaker, (2) adopt a negotiated stance where the reader might modify the code in a way that reflects their own experiences and interests, or (3) create an oppositional reading that enables the reader to reject and oppose the dominant meaning offered.[86]

Whichever choice the audience makes, it adds to the cultural dialogue being constructed on the internet.[87] Exemplifying modern myth generation, fan fiction, blogs, Tumblrs, LiveJournal pages, and numerous other fansites bring together "examples of connectivity and dialogue fueled by diverse participants and ideas."[88] These examples "embrace the ethos of sharing, which, in turn, requires tolerating, if not also harnessing, the differences among us."[89] Through this process of audience participation on the internet, copyrighted works become part of a cultural dialogue about what we desire to see in popular stories and what we desire to be changed in society at large. By expressing these desires, a diverse interaction occurs that transforms the original work into a macrocosmic critique of itself.

¶35 Fan fiction arises from the audience's interaction with the canon source material "as made legible by dominant cultural knowledge and formulas for reading" and its subsequent reorientation based on "the demands and desires brought to it by the subjectivity of the fan/reader and her knowledge of the world."[90] As Roland Barthes remarked, "[T]o keep these spoken systems from disturbing or embarrassing us, there is no other solution than to inhabit one of them."[91] This idea of inhabitation as the ultimate transformation of the copyrighted source material is exemplified by the "Mary Sue" phenomenon in fan fiction culture.[92] A "Mary Sue" is a distinctly female character inserted into a fan fiction who is usually attractive, talented, and annoyingly perfect.[93] Most significantly, "Mary Sues" often share personality and physical traits with the fan author herself, allowing the author to effectively insert herself into the fictional world and

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[85] *See generally* Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461 (2006).

[86] *Id.* at 475.

[87] Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RES. L. REV. 195, 249 (2010).

[88] *Id.*

[89] *Id.*

[90] Ika Willis, *Keeping Promises to Queer Children: Making Space (for Mary Sue) at Hogwarts*, *in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 93, 93 (Karen Hellekson & Kristina Busse eds., 2006).

[91] ROLAND BARTHES, THE PLEASURE OF THE TEXT 29 (Richard Miller trans., 1975).

[92] *See* Anupam Chander & Madhavi Sunder, *Everyone's A Superhero: A Cultural Theory of "Mary Sue" Fan Fiction As Fair Use*, 95 CAL. L. REV. 597 (2007).

[93] *Id.*

re-work it to her liking.[94] The popularity of this trope takes on even more significance when acknowledging the fact that only 27% of film writers and 19% of television writers are female, while the vast majority of fan fiction authors are women.[95] Insertion of fan authors into their own stories serves as a way for minorities and under-represented voices to gain control over the dominant narrative voice, and allows them to create a fictional world in which their underrepresented identities are the norm, rather than the exception. While creating a more progressive and inclusive popular culture narrative, fan works such as these undeniably comment on the dominant narrative voice present in the original copyrighted work and transform it into an alternative, minority viewpoint.

¶36 This same structure exists for queer authors as it does for female authors.[96] Eve Kosofsky Sedgwick, a scholar of gender and queer theory, has written that in fan fiction, queer authors attempt to "make invisible possibilities and desires visible; to make the tacit things explicit; to smuggle queer representation in where it must be smuggled and, with the relative freedom of adulthood, to challenge queer-eradicating impulses frontally where they are to be so challenged."[97]

¶37 The previously mentioned examples of homosexual "slash"[98] pairings in the *Harry Potter* fanverse are perfect examples of queer reinterpretations. As previously mentioned, homosexual relationships are noticeably absent from the novels,[99] but just as female authors insert their own selves through a "Mary Sue" character, these fan stories both create a more progressive dialogue about human relationships at large and necessarily transform the meaning of the original novels. Writing a story with a gay hero allows for mythic creation that popular culture disallows. Mainstream culture may be quick to categorize a story with a gay main character as belonging to a niche of gay culture, but a fan author who writes a story about Harry Potter being gay takes a thoroughly mainstream character and story and infuses it with a new set of values that are unprejudiced and open-minded. A young reader may never have picked up a novel with a gay main character, but they may stumble upon a fan fiction about their favorite literary character who just happens to be gay; by reading a story about Harry Potter with an

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[94] *Id.*

[95] *Most Writers Are Male*, TELEVISION TROPES & IDIOMS, http://tvtropes.org/pmwiki/pmwiki.php/Main/MostWritersAreMale (last visited Nov. 6, 2011). While it is difficult to determine an exact percentage of female fan fiction authors due to the anonymous nature of fan writing, it is generally believed in fan culture that women dominate the genre. *See Most Fanfic Writers are Girls*, TELEVISION TROPES & IDIOMS, http://tvtropes.org/pmwiki/pmwiki.php/Main/MostFanficWritersAreGirls (last visited Nov. 6, 2011); s*ee also* Jarrah Hodge, *Fanfiction and Feminism*, GENDER FOCUS (Feb. 18, 2010), http://www.gender-focus.com/2010/02/18/fanfiction-and-feminism/.

[96] Willis, *supra* note 90, at 93.

[97] *Id.*

[98] Wikipedia defines "slash fiction" as: a genre of fan fiction that focuses on the depiction of romantic or sexual relationships between fictional characters of the same sex. *Slash Fiction*, WIKIPEDIA, http://en.wikipedia.org/wiki/Slash_fiction (last visited Nov. 6, 2011).

[99] Although, it is interesting to note that J.K. Rowling publicly acknowledged that Albus Dumbledore, a main character and mentor to the titular Harry Potter, was gay. She made this announcement after the final novel was published, and it is significant that there is no indication in the novels of his sexual orientation. Gay rights activists were quick to criticize the move, saying, "I am disappointed that she did not make Dumbledore's sexuality explicit in the Harry Potter book. Making it obvious would have sent a much more powerful message of understanding and acceptance." After making the announcement about Dumbledore's sexual orientation, Rowling commented, "Oh, my god . . . the fan fiction." *JK Rowling Outs Dumbledore as Gay*, BBC NEWS (Oct. 20, 2007), http://news.bbc.co.uk/2/hi/7053982.stm.

alternate identity, that alternate identity enters into the consciousness of the young reader, and the notion of a gay hero may become part of the young reader's narrative expectations.

¶38 Even beyond the schemas of feminist and queer theory, any way in which a fan author uses characters or elements of a copyrighted work somehow comments or critiques the original in a way that is transformative. If a fan author writes a romance between two unlikely characters, the fan version of that relationship somehow comments on the lack of a relationship in the original work. Whether it is the relationship between two minor characters who are undeveloped in the original work, or an alternative take on two main characters (such as a relationship between two male characters who are characterized as heterosexual in the original work), the fan author's story is saying something new about the original work. It is the nature of all literature that any reinterpretation is a critique of a previous work.

¶39 The transformative nature of fan fiction goes beyond mere copyright law, however. Its ability for non-professionals and people of all ages, genders, and races to reinterpret mainstream stories to their own, individual experiences is an alternative form of myth creation for underrepresented voices that could not otherwise exist.

VII. DEBUNKING THE ARGUMENTS AGAINST UNIVERSALLY TRANSFORMATIVE FAN FICTION

¶40 Many have raised arguments that fan fiction should not be considered as transformative of original copyrighted works. Three of the most common objections will be examined here in no particular order. First, most fan fiction is poorly written and has no merit, so it should not be considered transformative in nature.[100] Second, fan authors should simply ask for permission from original authors to create fan works.[101] Third, the original author has a "moral right"[102] to protect the integrity of her original characters.

¶41 The first argument that fan fiction is simply of such a low quality that it should not be considered transformative of the original work is easily dismissed by the fact that the quality of work carries no legal weight. In *Campbell v. Acuff-Rose Music, Inc.*, the Court noted that there is no requirement in copyright law that a work be "good"[103] in their examination of whether a humorous rap version of the classic song "Pretty Woman" was fair use. In their decision, the Court was quick to quote Justice Holmes in saying:

> [I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure

[100] Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1901 (2009).

[101] Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 176–77 (2011).

[102] See Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 537 (2011) for an in-depth discussion of moral rights, copyright law, and the Visual Artists' Rights Act.

[103] 510 U.S. 569, 582 (1994).

> to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[104]

Thus, the Court in *Campbell* accordingly reversed the Court of Appeals decision that the bawdy rap song in question did not qualify as Fair Use, despite whatever "merit" the song held.[105]

¶42 As discussed in the previous Section, even poorly written fan works are representative of the fan's own desires and/or viewpoint and, accordingly, are reinterpretations of the original work. In fact, one of the positives of fan fiction is that unsophisticated voices still get to have a say. Since any reinterpretation necessarily comments on the original work, it becomes transformative, even if the writing is of poor quality.

¶43 The second objection most often cited is that fan authors should simply seek permission from the original author if they would like to create a fan work based on the copyrighted work. While this argument does not directly attempt to strip fan fiction of a transformative categorization, it completely ignores the Fair Use Defense, which allows noncommercial uses that an original author may not otherwise permit.[106] The Fair Use Defense provides legal protection for works to promote the public's access and use of material. As is discussed above, despite the fact that the Fair Use Defense protects fan authors, it is not uncommon for authors to send cease and desist letters to web providers of fan fiction in order to remove any fan fiction inspired by their works.[107] Even though the copyright owner may be acting outside the scope of copyright protection, it is understandably concerning for an IP provider to receive such notices. The notion that one must ask permission to draw from a copyrighted source in order to critique or recast the original work ignores the fundamentals of copyright law and effectively suggests that the Fair Use Defense be eradicated. Copyright owners should recognize that fans do not need to seek permission to create their own interpretations and should behave accordingly.

¶44 The last argument raised most often against the transformative nature of fan fiction arises from the moral rights of the author.[108] The moral rights of original authors arise from the idea that an author should not be forced to be personally offended by the way their characters are used by fan authors.[109] As Stacey Lantagne notes in her article on fan fiction, "[T]he argument that fanfiction should not be permitted because it transforms the original authors' characters mirrors the argument for exactly why fanfiction should be permitted under copyright law."[110]

¶45 Transformative works are protected because they add value to the canon of public knowledge by critiquing, commenting on, and reworking an original piece in a creative new way. An author asserting that a fan should not be allowed to rework or re-imagine her characters directly conflicts with the value assigned to transformative works by

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[104] *Id*. at 582–83.
[105] *Id*.
[106] Lantagne, *supra* note 102, at 176.
[107] *See supra* note 25.
[108] *See* Barthes, *supra* note 70.
[109] Lantagne, *supra* note 1012, at 175.
[110] *Id*.

copyright law. If original authors owned all aspects of their stories, the public would have been deprived of some of the most wildly popular book and movie franchises of the past decade.

VIII. CONCLUSION

¶46 Fan fiction should be considered to be universally transformative, and thus subject to the Fair Use Defense in any copyright infringement dispute. Fan fiction is the primary way in which the public can participate in creating a collective popular narrative and generate modern myth. All fiction has borrowed from ancient stories and archetypes, and through such borrowing and recasting in different contexts, old myths and archetypes have been kept alive while being reformulated for a modern audience. The internet allows for modern fans to constantly recast their favorite stories in a new light that suits their purposes, whether it be personal preference, a desire to change the teleological development of a serial story, or a clear intention to use loved characters in progressive situations that shed an alternative viewpoint on a widely accepted story. Every time a fan fiction is inspired by an original work, that fan piece somehow comments on values of the original work by changing elements or keeping them the same. By categorizing fan fiction as transformative in nature, a balance between the goals of copyright law in protecting the rights of original authors and protecting works that help the public create myths that would otherwise remain dormant, is struck.

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