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## Note

### Live Long and Prosper<sup>1</sup>: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law

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“[D]on’t write in my universe, or Tolkien’s, or the Marvel universe, or the Star Trek universe, or any other borrowed background . . . . Using someone else’s world is the lazy way out.”<sup>2</sup> George R.R. Martin, author of the widely successful book series *A Song of Ice and Fire*, included this warning in his advice to aspiring writers.<sup>3</sup> While Martin did not mention fan fiction by name, his previous comments on the subject<sup>4</sup> make it clear that he was referencing the popular fan practice of writing stories based on a preexisting work and then posting them online.<sup>5</sup> Fan fiction has been an integral feature of the fan

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1. THR Staff, *10 Spock Quotes To Remember Leonard Nimoy*, HOLLYWOOD REP. (Feb. 27, 2015, 12:24 PM), <http://www.hollywoodreporter.com/heat-vision/star-trek-quotes-leonard-nimoy-778305/> (noting this is a popular quote from the television show *Star Trek*).

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2. FAQ, GEORGE R.R. MARTIN, <http://www.georgerrmartin.com/for-fans/faq> (last visited Mar. 2, 2016).

3. *Id.* This book series has now been turned into a very successful television show on HBO entitled *Game of Thrones*. See *A Game of Thrones 5-Book Bundle*, GEORGE R.R. MARTIN, [http://www.georgerrmartin.com/grrm\\_book/a-game-of-thrones-5-book-bundle](http://www.georgerrmartin.com/grrm_book/a-game-of-thrones-5-book-bundle) (last visited Mar. 2, 2016).

4. For one of the most infamous statements Martin has made about his negative view of fan fiction, see George R.R. Martin, *Someone Is Angry on the Internet*, LIVEJOURNAL: NOT A BLOG (May 7, 2010, 7:35 PM), <http://grrm.livejournal.com/151914.html>.

5. See Natalie H. Montano, Note, *Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fic-*

community for decades, but the advent of the Internet has broadened its reach. In response, many authors who share Martin's sentiment attempt to prohibit its online publication, either by disavowing the practice and hoping their fans respect their wishes<sup>6</sup> or by taking direct action and issuing takedown notices to remove the allegedly infringing work.<sup>7</sup> Legislation such as the Digital Millennium Copyright Act (DMCA) gives websites incentives to remove work that someone has flagged as infringing by offering them a shield from liability.<sup>8</sup> Website compliance and the relative ease of issuing DMCA takedown notices have led to their proliferation.<sup>9</sup>

While some authors dislike fan fiction for personal reasons,<sup>10</sup> legally speaking the most frequently touted argument is that the practice conflicts with the exclusive rights guaranteed to authors under the Copyright Act.<sup>11</sup> One of these exclusive rights in particular pertains to the right of the author to create a derivative work, which is a work based upon, but different from, the original copyrighted material.<sup>12</sup> Fan fiction, some ar-

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tion, 11 NW. J. TECH. & INTELL. PROP. 689, 692 (2013) (giving a general definition of fan fiction).

6. Some fan fiction archives will not allow fans to post stories based on a work if the author has denounced the practice. See, e.g., Lady MacBeth, *Authors/Publishers Who Do Not Allow Fan Fiction*, MEDIAMINER (Oct. 8, 2006), <http://constructionlitmag.com/wp-content/uploads/2012/06/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html>.

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

8. Digital Millennium Copyright Act, Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512 (2012)).

9. See *infra* Part I.B.3 (explaining the mechanics of the DMCA). For examples of these notices, see LUMEN, <https://www.lumendatabase.org> (last visited Mar. 2, 2016).

10. A common argument is that the characters they write are like their children, and they are uncomfortable with other people "making off with them." Martin, *supra* note 4. Famously, author Diana Gabaldon compared writing fan fiction about her characters to someone "selling [her] children into white slavery." The original post in which she made this comment has been deleted, but evidence of it exists on several websites. See, e.g., Gavia Baker-Whitelaw, *An Introduction to "Outlander," Starz's New Flagship Show*, DAILY DOT (July 28, 2014, 8:00 AM), [http://www.dailydot.com/geek/introduction-outlander-starz; Diana Gabaldon, FANLORE, http://fanlore.org/wiki/Diana\\_Gabaldon](http://www.dailydot.com/geek/introduction-outlander-starz; Diana Gabaldon, FANLORE, http://fanlore.org/wiki/Diana_Gabaldon) (last visited Mar. 10, 2015).

11. Martin, *supra* note 4 ("[Fan fiction] is NOT fair use, by the way. . .").

12. Copyright Act, 17 U.S.C. §§ 101, 106 (2012).

gue, is no more than an unauthorized derivative work.<sup>13</sup> In defense of the practice, others argue that fan fiction falls under the fair use defense, which constrains these otherwise exclusive rights of authors by balancing several factors to determine if the use should nevertheless be allowed.<sup>14</sup>

Despite the strong interests on each side, this conflict has been largely passive, with fan fiction surviving by “flying below the radar” and out of the courtroom.<sup>15</sup> Recent events, however, have begun to attract more attention to the practice.<sup>16</sup> In 2012, E. L. James’s *Fifty Shades of Grey* was published commercially and gained worldwide success, but the story actually began its life on the Internet as fan fiction.<sup>17</sup> Subsequently, in 2013, Amazon Publishing launched Kindle Worlds, a platform that facilitates commercial publication of fan fiction.<sup>18</sup> A new addition to the *Twilight* franchise in 2015, in which author Stephenie Meyer rewrote the first *Twilight* book but switched the genders of most characters, has also raised questions about how the practice interacts with the traditional realm of copyright law.<sup>19</sup> With these questions come concerns about how authors may react to these events. The least problematic response would be the issuance of more aggressive takedown notices, but there is also the more serious risk that an author may finally take a noncommercial fan author to court.<sup>20</sup> The former option may be

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13. Martin, *supra* note 4.

14. See Copyright Act § 107; Montano, *supra* note 5, at 705.

15. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 142 (2007) [hereinafter Tushnet, *Payment in Credit*] (explaining that no cases from the fan community have been litigated).

16. See Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012, 6:49 PM), <http://www.wsj.com/articles/SB10001424052702303734204577464411825970488> (“Fan Fiction . . . has been bubbling up to the surface lately . . .”).

17. See Bethan Jones, *Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey*, 15 TRANSFORMATIVE WORKS & CULTURES 1, 1.1–1.2 (2014), <http://journal.transformativeworks.org/index.php/twc/article/view/501/422>.

18. KINDLE WORLDS, <https://kindleworlds.amazon.com> (last visited Nov. 4, 2014).

19. See *infra* Part III.B.1 for a discussion of how Stephenie Meyer’s newest book has rekindled discussions about the *Twilight* series and fan fiction.

20. Litigation has so far only arisen when there is a monetary element involved. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259, 1277 (11th Cir. 2001) (finding that a novel about *Gone with the Wind* from the perspective of a slave had a viable fair use defense); *Anderson v. Stal-lone*, No. 87-0592 WDKGX, 1989 WL 206431, at \*1, \*11 (C.D. Cal Apr. 25, 1989) (finding that a script for a film sequel was an unauthorized derivative

overstepping the author's legal rights,<sup>21</sup> and the latter could result in an unfavorable ruling that could detrimentally impact both author and fan alike.<sup>22</sup> If a court held that fan fiction categorically infringed on the copyright owner's rights, this would prevent fan authors from practicing the craft and would prohibit copyright owners who approve of the practice from tapping into this creative resource.<sup>23</sup>

In light of the present uncertainty and changing atmosphere, now is an ideal time to create a solution that serves everyone's interests, before a court makes any bright-line rule. This Note suggests a licensing scheme as a solution to this uncertainty, and attempts to temper the aspirational nature of such a comprehensive solution by underscoring the benefits to all parties, in an effort to facilitate the necessary cooperation for legislative action. Part I introduces the practice of fan fiction and the relevant copyright law. Part II scrutinizes the fair use defense and certain other practices, ultimately concluding that the existing framework provides insufficient protection for fan fiction authors. Part III describes the ideal licensing scheme that could solve this problem. This system would be comprised of a compulsory licensing scheme between websites and copyright owners and a terms of service agreement on the website to enforce the license against fan authors. By working on two levels, this solution seeks to balance the interests of both fan authors and copyright owners, so that both sides benefit equally from the system.

## I. FAN FICTION AND COPYRIGHT LAW IN THE AGE OF THE INTERNET

In order to identify the problems that exist in the current legal framework, it is important to have an understanding of

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work); Viktor Mayer-Schönberger & Lena Wong, *Fan or Foe? Fan Fiction, Authorship, and the Fight for Control*, 54 IDEA 1, 11 (2013).

21. See Elisabeth S. Aultman, *Authorship Atomized: Modeling Ownership in Participatory Media Productions*, 36 HASTINGS COMM. & ENT. L.J. 383, 394 (2014). Primarily, this approach ignores the fair use defense as detailed *infra* Parts II.A–B.

22. Courts have concluded that commercial fan fiction that is referential in nature is infringing rather than fair use. Rachel L. Stroude, Comment, *Complimentary Creation: Protecting Fan Fiction As Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191, 205 (2010). While courts would likely struggle if confronted with noncommercial, nonreferential fan fiction, there is a chance that this trend would continue. *See id.*

23. For a discussion of how fan fiction can benefit copyright owners, see *infra* Part III.B.

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the interests involved in the dialogue. Despite gaining unprecedented popularity in the online sphere, fan fiction has been a presence in the fan community since long before the advent of the Internet. Section A of this Part will discuss fan fiction itself, providing a brief overview of its evolution and varied nature. Despite its long history, it was fan fiction's recent migration online that has prompted vociferous discussion about its legality. Section B will discuss the relevant rules of law, focusing particularly on the fair use defense, and the ways both Congress and the public have adapted the legal rules to accommodate changes in creative expression.

#### A. THE EVOLUTION OF FAN FICTION FROM SPACE TO CYBERSPACE

Understanding fan fiction and its place in an increasingly digital world is a necessary step in understanding where it fits within existing law. The first part of this Section will provide a foundation for this understanding by defining the practice and detailing its early history. The second part will go on to detail fan fiction's move onto the Internet and the implications of this migration.

##### 1. Foundation of Fan Fiction

At its core, fan fiction is simply fans writing about any preexisting work.<sup>24</sup> The modern connotation of the practice, however, is more specific. As it is more commonly known, fan fiction is the creation of stories based upon works of popular culture, such as television shows, films, and books.<sup>25</sup> The events in the original work are referred to as "canon" and provide the base for the fan work.<sup>26</sup> The modern practice of media fan fiction, as it is sometimes called, is often attributed to the televi-

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24. See AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION 8 (2011).

25. See Rebecca Tushnet, Note, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) [hereinafter Tushnet, *Legal Fictions*]. Some fan authors also write stories about their favorite celebrities, although this practice is controversial and beyond the scope of this Note. See Mollie E. Nolan, Note, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533, 555 (2006); cf. Kristina Busse & Karen Hellekson, *Introduction: Work in Progress*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET, *supra* note 7, at 13 (referring to fan fiction writers who write based on real people as "real person slash").

26. Busse & Hellekson, *supra* note 25, at 5, 9.

sion show *Star Trek*.<sup>27</sup> It was the sci-fi fans of the 1960s whose *Star Trek* inspired stories created many of the central aspects of today's fan fiction, such as the term "slash" to designate stories depicting homosexual relationships.<sup>28</sup> Media fan fiction involves the critical analysis and reimagining of "shared media," like television shows, and is sometimes considered to have started "fan fiction proper."<sup>29</sup> Indeed, the term fan fiction as used in this Note generally refers to this practice of rewriting aspects of popular culture in particular.

Fan fiction can vary in its treatment of the original work. On one end of the spectrum are "missing scene" stories, which are situated within the preexisting canon and add detail or fill in gaps between scenes.<sup>30</sup> On the other end are "Alternate Universe" or "AU" stories, which take the characters from the underlying work and place them in an entirely new setting.<sup>31</sup> In between is a range of other types of fan fiction that adhere to the canon in varying degrees.<sup>32</sup> This variety in fan fiction has only increased with the advent of the Internet and the freedom the platform facilitates.

## 2. Consumption of Fan Fiction

In the beginning stages of media fan fiction, stories were exchanged in hard copy form and distributed to a relatively small number of people.<sup>33</sup> The shift from this early form of fan fiction into today's modern practice occurred in the 1990s with

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27. *Introduction: Why a Fan Fiction Studies Reader Now*, in *THE FAN FICTION STUDIES READER* 1, 6 (Karen Hellekson & Kristina Busse eds., 2014) (stating that media fan fiction began with "rewriting shared media" in this era).

28. This term developed from the use of a slash between the names Kirk and Spock (Kirk/Spock) to describe a story that featured this type of relationship. Nolan, *supra* note 25, at 549–50.

29. *Introduction: Why a Fan Fiction Studies Reader Now*, *supra* note 27.

30. Busse & Hellekson, *supra* note 25, at 11. Henry Jenkins describes this type of work as "recontextualizing" the source material. HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE* 162 (1992).

31. Busse & Hellekson, *supra* note 25, at 11.

32. *Id.* (providing other examples such as "episode fix" and "deathfic" which may alter only a few elements of the canon). For a list of ten specific types of fan fiction with accompanying examples, see JENKINS, *supra* note 30, at 162–77.

33. See Anna Rogozińska, *Virtual Fan Communities: The Case of Harry Potter Slash Fans*, 1 *MASARYK U. J.L. & TECH.* 33, 33–34 (2007) (explaining that fanzines contained not only stories, but also reviews, interviews, art, and poetry).

the popularization of the Internet.<sup>34</sup> Today, fan fiction is published online, free for both the author and the consumer and open to a large and diverse group of individuals.<sup>35</sup> The Internet did more than simply change the delivery method of fan fiction; the ease of simply posting something online has resulted in “instant publishing,” in which the lack of a professional publisher and legal oversight has made copyright infringement more likely.<sup>36</sup>

The Internet allows insight into the demographics of the fan community, and among other things it demonstrates that a significant number of those involved in the practice are minors. In examining user profiles of one of the largest fan fiction sites, FanFiction.net, a study published in 2011 found that 80% of users who included their age on their profiles were between thirteen and seventeen years old.<sup>37</sup> While these statistics are only indicative of self-reported information on just one site, it is important in a discussion of fan fiction and copyright law to keep in mind that the community involved is a relatively young one.

Fan fiction’s migration onto the Internet, where content is posted and consumed at no cost, is one reason why it is non-commercial.<sup>38</sup> This fact can also be attributed to fan culture itself, in that the community generally shares the belief that fan fiction should not be for profit.<sup>39</sup> There are instances of fan authors violating this principle, however. One example is *Fifty Shades of Grey* by British author E. L. James.<sup>40</sup> The successful book series began its life as an AU fan fiction for Stephenie Meyer’s *Twilight* series.<sup>41</sup> In 2012, James contracted with The Writer’s Coffee Shop, an online publishing house that focuses

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34. Busse & Hellekson, *supra* note 25.

35. *See id.* For examples of popular fan fiction websites, see ARCHIVE OF OUR OWN, <http://archiveofourown.org> (last visited Mar. 2, 2016), and FANFICTION.NET, <https://www.fanfiction.net> (last visited Mar. 2, 2016).

36. *See* SCHWABACH, *supra* note 24, at 14.

37. Charles Sendlor, *Fan Fiction Demographics in 2010: Age, Sex, Country*, FFN RESEARCH (Mar. 18, 2011, 10:58 AM), <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html>.

38. *See* Busse & Hellekson, *supra* note 25; Tushnet, *Payment in Credit*, *supra* note 15, at 143.

39. *See* Tushnet, *Legal Fictions*, *supra* note 25, at 657, 664.

40. *See* Steven D. Jamar & Christen B’anca Glenn, *When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction*, 1 TEX. A&M L. REV. 959, 960–61 (2014).

41. Jones, *supra* note 17.

on publishing fan fiction.<sup>42</sup> James's *Twilight* fan fiction was taken off of the Internet and *Twilight*-specific elements, such as character names, were altered for publication.<sup>43</sup> Significant backlash followed. Some fan authors condemned the monetization of fan fiction, while others were critical of the fact that many readers provided feedback and other encouragement online that contributed to what would become *Fifty Shades of Grey*.<sup>44</sup> In this respect, some fans felt like James had taken advantage of the fan community.<sup>45</sup> These instances of commercialization are where the practice conflicts most obviously with copyright law.<sup>46</sup>

## B. THE RESPECTIVE RIGHTS OF AUTHORS AND USERS UNDER COPYRIGHT LAW

Copyright law has long served to protect the interests of authors of creative works.<sup>47</sup> Fan fiction exists against this backdrop of authorial rights. Subsection 1 will describe how copyright law achieves this goal by detailing the rights that the Copyright Act gives to creators. However, there are limitations to these rights, and Subsection 2 will specifically describe one such limitation: the fair use defense. Importantly, copyright law has not remained static as society has shifted into the digital age, and Subsection 3 explains how copyright law has adapted to this new environment. Finally, Subsection 4 details other ways in which traditional authorial rights have been modified through licensing.

### 1. Authors' Rights and What Material Is Protected

Congress adopted the most recent, comprehensive version of the Copyright Act in 1976.<sup>48</sup> Its power to enact such legislation comes from Article I of the Constitution, which gives Con-

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42. *Id.* at 1.2. While playing down its fan fiction underpinnings, the site describes how fan fiction can allow authors to begin their creative journey. *Become a Writer*, WRITER'S COFFEE SHOP, <http://www.thewriterscoffeeshop.com/page/c/become-a-writer> (last visited Mar. 2, 2016).

43. Jones, *supra* note 17, at 1.2.

44. *Id.* at 3.4.

45. *Id.*

46. See *infra* Part I.B.2 (discussing the impact of commercialization in the fair use context).

47. The English Parliament passed the Statute of Anne in 1710, which was the basis for modern U.S. copyright law. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 431 (6th ed. 2012).

48. *Id.* at 432–33.



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gress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>49</sup>

Copyright vests in “original works of authorship fixed in any tangible medium of expression,” including books, films, and musical compositions.<sup>50</sup> The Copyright Act grants copyright owners certain exclusive rights over these works, such as reproduction and distribution.<sup>51</sup> One particularly important right is the right to prepare derivative works, which are works produced by modifying the preexisting copyrighted material, when those modifications are substantial enough that they constitute an “original work of authorship” eligible for its own copyright protection.<sup>52</sup>

One caveat to this protection for derivative works is that it does not extend to any portion of the work that illegally uses preexisting material.<sup>53</sup> For example, in *Anderson v. Stallone*, Timothy Anderson wrote a script entitled “Rocky IV” that he hoped Sylvester Stallone, lead actor for the existing three *Rocky* films, would use as a sequel to *Rocky III*.<sup>54</sup> Anderson claimed that the actual script adopted for *Rocky IV* infringed on his version, but the District Court determined that he did not have permission to use the preexisting work (the other *Rocky* films).<sup>55</sup> The court found that an original work “pervade[s]” an unauthorized derivative work, so any new material that would otherwise merit its own protection is too intertwined with the preexisting work to allow any copyright to vest.<sup>56</sup> However, if the derivative work was authorized or based upon materials in the public domain, then the derivative work would be protected if it were substantially original.<sup>57</sup>

Once the determination has been made that something is protected, the copyright owner is granted exclusive rights to

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49. U.S. CONST. art. 1, § 8, cl. 8.

50. Copyright Act, 17 U.S.C. § 102 (2012).

51. *Id.* § 106.

52. *Id.* §§ 101, 103, 106.

53. *Id.* § 103.

54. No. 87-0592 WDKGX, 1989 WL 206431, at \*1 (C.D. Cal. Apr. 25, 1989).

55. *Id.* at \*8.

56. *Id.* at \*10.

57. See *Gracen v. Bradford Exch.*, 698 F.2d 300, 302, 305 (7th Cir. 1983) (finding that plaintiff’s painting was not entitled to copyright protection).

use the work for a period of time.<sup>58</sup> But these exclusive rights are not without limitations, which keep the power granted to the author in check.

## 2. Users' Rights: The Fair Use Defense

One control on the expansive rights contained within the Copyright Act is the doctrine of fair use. Fair use is a statutory exception that allows others to use the copyrighted material without the permission of the copyright owner.<sup>59</sup> The Copyright Act lists four factors needed to determine whether a particular use falls within this exception: (a) the purpose and character of the use; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used; and (d) the effect of the use on the potential market of the copyrighted work.<sup>60</sup>

### a. *The Purpose and Character of the Use*

The first factor (the purpose factor) examines the motive behind the use of the copyrighted material. For example, one important distinction is whether the use is commercial in nature, in which case it is considered more inequitable.<sup>61</sup> However, in *American Geophysical Union v. Texaco*, which involved a for-profit company making photocopies of copyrighted articles for archival purposes, the court emphasized that the commercial/nonprofit distinction was just one element in the inquiry.<sup>62</sup> The court also differentiated between uses that directly result in commercial gain and uses that are more indirectly related to a "commercial activity," such as the photocopying at issue in the case.<sup>63</sup> Thus, this factor looks at more than just whether the use of the copyrighted work results in monetary gain. Another element that courts have continually emphasized is whether the use is "transformative."<sup>64</sup>

A transformative use is one that adds "new expression, meaning, or message" to the original work.<sup>65</sup> An exemplary

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58. For works created after 1978, the term is generally the life of the author plus seventy years. Copyright Act §§ 106, 302.

59. *See id.* § 107.

60. *Id.* § 107(1)–(4).

61. *See id.*; *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994).

62. *Texaco*, 60 F.3d at 915, 921–22.

63. *Id.* at 921–22.

64. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

65. *Id.* at 569.

transformative use is parody,<sup>66</sup> epitomized in the Supreme Court case *Campbell v. Acuff-Rose Music, Inc.*, in which a music group released a rap song based on the 1964 song “Oh, Pretty Woman.”<sup>67</sup> This was the first time the Supreme Court issued an opinion about whether a parody could be considered transformative. The Court decided that “parody has an obvious claim to transformative value.”<sup>68</sup> Like other statutory fair uses such as comment or criticism, parody provides a social benefit by “shedding light on an earlier work.”<sup>69</sup> In contrast, satire is not transformative.<sup>70</sup> Parody needs to imitate the original work in order to comment on it, whereas satire uses the original work to comment on something else.<sup>71</sup> This distinction can be difficult to apply in practice, but just because a use is satirical does not mean that fair use cannot still be found.<sup>72</sup> The difference is that the author of a satirical work needs to prove that the use of the preexisting material was required for a reason beyond just to avoid thinking of something new.<sup>73</sup>

An important distinction also exists between a work that is transformative and a work that is derivative.<sup>74</sup> *Warner Brothers Entertainment Inc. v. RDR Books* provides guidance upon this point as it relates to fan fiction, although the court never refers to the work at issue in that case as fan fiction. Steven Vander Ark created a website entitled “The *Harry Potter* Lexicon,” which functioned as an organized encyclopedia based upon the *Harry Potter* book series by J.K. Rowling.<sup>75</sup> The court determined that the Lexicon was not a derivative work because, rather than retelling *Harry Potter* in another medium, the Lexicon gave the preexisting material another purpose entirely—an informational purpose rather than one of entertainment.<sup>76</sup>

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66. Montano, *supra* note 5.

67. *Campbell*, 510 U.S. at 572.

68. *Id.* at 579.

69. *Id.*

70. *Id.* at 580–81.

71. *Id.*

72. See *Blanch v. Koons*, 467 F.3d 244, 254–55 (2d Cir. 2006) (finding that principles of fair use can apply to satire so long as there is sufficient justification for the use).

73. *Campbell*, 510 U.S. at 580–81; see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214–15 (2d Cir. 2015).

74. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 539 n.18 (S.D.N.Y. 2008).

75. *Id.* at 519–20.

76. *Id.* at 539, 541. Despite being transformative, the court nonetheless determined that the commercial publication of the Lexicon was not fair use

This distinction between transformative and derivative works also exists in the context of fan-written sequels, such as the work at issue in *Anderson v. Stallone*.<sup>77</sup> Interestingly, though, the court there did not conduct a fair use analysis.<sup>78</sup> *Salinger v. Colting* is a similar case, in which the defendant wrote *60 Years Later: Coming Through the Rye* based off of J.D. Salinger's *The Catcher in the Rye*.<sup>79</sup> The new work depicted an elderly version of *The Catcher in the Rye*'s main character as well as a fictionalized version of Salinger himself, and it was marketed as a sequel to Salinger's work.<sup>80</sup> The Second Circuit found that the intent to write a sequel was more pervasive than any intent to comment on the original material, and therefore it was derivative rather than transformative.<sup>81</sup> In other words, derivative works tend to involve "changes of form," which are different from the changes in purpose, such as commentary or criticism, that underlie transformative works.<sup>82</sup> This distinction is difficult to parse out, but if a work does not rise to the level of being transformative, it is less likely to be considered a permissible fair use.<sup>83</sup>

*b. The Nature of the Copyrighted Work*

The second factor (the nature factor) considers the nature of the copyrighted work, shifting the focus from the allegedly infringing use to the preexisting material.<sup>84</sup> This factor acknowledges that some works are "closer to the core of intended copyright protection," and therefore fair use should be less attainable when these types of works are copied.<sup>85</sup> Two patterns arise from this concern: (1) fictional works generally obtain more protection than factual ones; and (2) unpublished works

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based on the other factors. *Id.* at 551.

77. No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989) (finding there was no copyright infringement as Anderson was not authorized to use the preexisting work).

78. This could be due in part to the fact that it was decided several years before the *Campbell* decision and the subsequent case law that developed the transformative distinction. *Campbell*, 510 U.S. at 579; *Stallone*, 1989 WL 206431, at \*18.

79. 607 F.3d 68, 71 (2d Cir. 2010).

80. *Id.* at 71–72.

81. *Id.* at 73–74; see also Montano, *supra* note 5.

82. Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015).

83. See Montano, *supra* note 5.

84. See Copyright Act, 17 U.S.C. § 107(2) (2012).

85. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

are more protected than published ones.<sup>86</sup> This factor helps ensure that the fair use exception does not expand to abolish an author's control over her unpublished, creative works.

*c. The Amount and Substantiality of the Portion Used*

The third factor (the amount factor) examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>87</sup> Regardless of whether only a small amount of the original work was copied, the material could still constitute the “heart” of the preexisting work.<sup>88</sup> In that case, this factor would weigh against the alleged infringer.<sup>89</sup>

This factor is dependent in part on the purpose factor. The relevant question is: was more of the copyrighted work copied than was required for the purpose of the secondary use?<sup>90</sup> For example, *Suntrust Bank v. Houghton Mifflin Co.* involved a novel entitled *The Wind Done Gone*, which was a retelling of *Gone with the Wind* that critiqued the original's portrayal of slavery in the Civil-War South.<sup>91</sup> The Court of Appeals for the Eleventh Circuit found that *The Wind Done Gone* was a successful parody, a use that required taking enough material from the preexisting work to assure identification but not so much so that it affected the market for the original work.<sup>92</sup> Determining how much material a secondary use is allowed to copy is therefore a very fact-specific inquiry and one that is intertwined with the other factors. One important determination is whether the amount taken will affect the market for the original, which is a question addressed in the fourth and final factor in the fair use analysis.

*d. The Effect of the Use upon the Potential Market*

The fourth factor (the effect factor) looks to “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>93</sup> Elements of this factor include the effects of the se-

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86. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (finding that the author's right of first publication necessitates more protection for unpublished works).

87. Copyright Act § 107(3).

88. *Harper & Row*, 471 U.S. at 564–65.

89. *Id.*

90. See *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006).

91. 268 F.3d 1257, 1259 (11th Cir. 2001).

92. *Id.* at 1273–74.

93. Copyright Act, 17 U.S.C. § 107(4) (2012).

cond use on both the original and derivative markets and the impact on potential licensing revenues in reasonable areas.<sup>94</sup> Like the amount factor, this inquiry is dependent in part on the purpose factor. If a work is considered transformative, a copyright holder cannot impede an otherwise fair use by concocting a licensing market for the use.<sup>95</sup> Therefore, while the effect factor may be critically important, the outcome of the purpose factor could significantly lessen its impact.

The fair use factors are highly influenced by the details of both the copyrighted work and the allegedly infringing use. The fact-specific nature of the inquiry makes it difficult to draw bright-line rules around what is and is not fair use. In addition, this statutory exception is not the only piece of legislation that is relevant to a discussion about fan fiction, and other legal mechanisms exist that further complicate the analysis.

### 3. The Implications of the Digital Millennium Copyright Act

Just as fan fiction adapted to the advent of the Internet, so too did copyright law. Near the turn of the century, Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA) to amend certain sections of the Copyright Act.<sup>96</sup> The DMCA accomplishes many things throughout the Copyright Act,<sup>97</sup> but important for fan fiction purposes is that it provides a limit on the liability of online service providers for copyright infringement in certain circumstances.<sup>98</sup>

The DMCA added section 512 to the Copyright Act, which states that a service provider will not be held liable for copyright infringement for storing material, at a user's discretion,

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94. *Harper & Row*, 471 U.S. at 568; *see also* *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–30 (2d Cir. 1994). Not all negative market impacts repudiate a finding of fair use. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994).

95. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d. 605, 614–15 (2d Cir. 2006).

96. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. § 512 (2012)). *See generally* THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (1998) [hereinafter DMCA SUMMARY] (summarizing each part of the DMCA).

97. *See, e.g.*, Digital Millennium Copyright Act, Computer Maintenance Competition Assurance Act, Pub. L. No. 105-304, 112 Stat. 2887 (1998) (codified as amended at 17 U.S.C. § 117 (2012)) (allowing copying of a computer program for maintenance purposes).

98. Digital Millennium Copyright Act, Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512 (2012)).

on a system or network that the provider controls, so long as the provider has no knowledge that infringing material is present and acts to remove the work upon notice of its existence.<sup>99</sup> In order to be eligible for this protection, a service provider must have a designated agent to receive notices of infringing work.<sup>100</sup> Legislators recognized that without a safe harbor from liability, service providers “may hesitate to make the necessary investment in” improving the Internet because their ordinary operation exposes them to potential liability.<sup>101</sup>

The DMCA has been largely successful in providing more certainty for service providers and copyright holders concerning their liability and protection, respectively, in the new digital age.<sup>102</sup> However, the same cannot be said for its protection of end users, because DMCA takedown notices generally disregard the fair use doctrine.<sup>103</sup> A 2008 case, *Lenz v. Universal Music Corp.*, addressed this by establishing that a copyright owner must consider whether the secondary use is fair before proceeding under the DMCA.<sup>104</sup> However, even if a fair use was improperly taken down, a copyright owner is only liable for misuse of the takedown procedures if the user can prove that the copyright owner acted in bad faith.<sup>105</sup> It is highly unlikely that a user would want to undergo a lawsuit to raise the fair use defense in the face of a takedown notice.<sup>106</sup> Thus, the material remains offline.

The DMCA takedown procedure is also a prime tool for removing fan fiction from the Internet.<sup>107</sup> One example is a notice

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99. Copyright Act, 17 U.S.C. § 512(c)(1)(A)(i)–(iii) (2012); DMCA SUMMARY, *supra* note 96, at 11–12.

100. Copyright Act § 512(c)(2).

101. S. REP. NO. 105-190, at 2, 8 (1998).

102. See Matthew Schonauer, Note, *Let the Babies Dance: Strengthening Fair Use and Stifling Abuse in DMCA Notice and Takedown Procedures*, 7 *IS: J.L. & POL'Y FOR INFO. SOC'Y* 135, 151–52 (2011).

103. See *id.* at 152.

104. 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008). This holding was later affirmed by the Ninth Circuit. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1133 (9th Cir. 2015). The case involved YouTube and a mother who uploaded a video of her children dancing to a song Universal owned. *Lenz*, 572 F. Supp. 2d at 1151–52.

105. Copyright Act § 512(f); see *Lenz*, 572 F. Supp. 2d at 1155 n.5; Kathleen O'Donnell, Comment, *Lenz v. Universal Music Corp. and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of § 512 of the DMCA*, 2009 *DUKE L. & TECH. REV.* 10, ¶ 28.

106. Schonauer, *supra* note 102, at 160 (suggesting the economic disadvantage of the end users as one reason for the lack of challenges).

107. Lumen lists examples of DMCA takedown notices that target fan fic-

sent on behalf of J.K. Rowling, author of the *Harry Potter* book series, to the administrators of a fan fiction website that archived sexually explicit fan fiction based on the series.<sup>108</sup> The notice distinguished between so-called “innocent” fan fiction and the explicit content housed on the site and expressed concerns about the harm the explicit content could inflict upon young readers.<sup>109</sup> The site implemented an age screening process in response, although the site closed to new submissions in 2009.<sup>110</sup>

The DMCA introduced much needed certainty into copyright law in the context of the Internet, but the respective rights of creators, websites, and end users are not completely balanced as a result. Legislation is also not the only legal tool that can affect authorial rights and impact end users. The popularity of licensing schemes can further upset the balance of power.

#### 4. Licensing as a Tool To Avoid Fair Use

While fair use is a popular response to an allegation of infringement, it is by nature a reactive tool that is brought up after an alleged infringer is brought to court. As a more permissive and cooperative technique, licensing can sometimes act as a substitute that avoids the need for a fair use analysis.<sup>111</sup> After providing an overview of how licensing works, this Section turns to an example of licensing in the fan fiction context.

##### *a. Licensing Generally*

Licensing is a process by which the copyright owner grants use rights to another person.<sup>112</sup> As previously detailed, it is also

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tion. LUMEN, *supra* note 9 (search for “fan fiction”).

108. *Harry Potter in the RestrictedSection*, LUMEN, <https://lumendatabase.org/notices/1182> (last visited Mar. 2, 2016).

109. *Id.*

110. *Restricted Section*, FANLORE, [http://fanlore.org/wiki/Restricted\\_Section](http://fanlore.org/wiki/Restricted_Section) (last updated Sept. 18, 2013, 3:02 PM). Recently the website has been reborn as Restricted Section 2, which was created by community members of the original Restricted Section website. See *About Us*, RESTRICTED SECTION 2, <http://restrictedsection2.org/about.html> (last visited Mar. 7, 2016).

111. Some commentators have argued against this substitution claim. Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY CTR. TECH. L.J. 1447, 1447 (2014) [hereinafter Tushnet, *All of This Has Happened Before*].

112. See Brad Frazer, *Open Source Is Not Public Domain: Evolving Licensing Philosophies*, 45 IDAHO L. REV. 349, 359 (2009). Some legal scholars suggest that licensing is better understood as a property right rather than a con-



a consideration in the effect factor of the fair use analysis.<sup>113</sup> In the copyright context, licensing takes many forms depending on the market in which it is employed.

For example, the Copyright Act established a compulsory license for making and distributing things like CDs and cassette tapes of nondramatic musical works.<sup>114</sup> Another modification to the traditional copyright scheme is embodied in the privately created Creative Commons license, which allows copyright owners to craft their own licenses by retaining the rights that are significant to them and granting the rest to the public.<sup>115</sup> Creative Commons offers six combination licenses, one of which is called “Attribution-NonCommercial-ShareAlike.”<sup>116</sup> This allows users to build upon a work so long as they credit the original copyright owner, their use is noncommercial, and they subsequently license their creations under the same Creative Commons license.<sup>117</sup> Licensing, as a more cooperative legal mechanism, is one tool that has been employed in the fan fiction context.

b. *Kindle Worlds*

Amazon Publishing adopted Kindle Worlds in 2013, and it is an example of a licensing approach that is more rigid than those just described.<sup>118</sup> Fan authors, who must be eighteen years or older,<sup>119</sup> are only authorized to write in one of a limited number of approved “Worlds,” which the copyright owners have licensed to Amazon.<sup>120</sup> Each World comes with a unique set of guidelines that limit the alterations fan authors can make to

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tract right. See Christopher M. Newman, *A License Is Not a “Contract Not To Sue”: Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1109 (2013).

113. See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–30 (2d Cir. 1994).

114. Copyright Act, 17 U.S.C. §§ 101, 115 (2012).

115. See Ashley West, Comment, *Little Victories: Promoting Artistic Progress Through the Enforcement of Creative Commons Attribution and Share-Alike Licenses*, 36 FLA. ST. U. L. REV. 903, 904 (2009).

116. *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses> (last visited Mar. 2, 2016).

117. *Id.*

118. See Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1467–68.

119. *Welcome to Kindle Worlds*, KINDLE WORLDS, <https://kindleworlds.amazon.com/faqs> (last visited Mar. 2, 2016).

120. *How It Works*, KINDLE WORLDS, <https://kindleworlds.amazon.com/how> (last visited Mar. 2, 2016).

the canon.<sup>121</sup> When a fan author submits her story, Amazon obtains an exclusive license to all of the elements within the story along with the right to produce any merchandise, movies, or other derivative works based upon the story.<sup>122</sup> The fan authors receive a royalty of 20–35% of the price of their works, which are all sold for less than four dollars.<sup>123</sup> And, if Amazon does choose to create a derivative work based upon a fan story, the fan will receive royalties in some form.<sup>124</sup>

Fan fiction is a varied practice, especially since its transition onto the Internet. Copyright law has adapted to the digital age as well, limiting service provider liability through the DMCA and providing a mechanism to remove allegedly infringing work, such as fan fiction, from the Internet. A criticism of this system is that it does not adequately account for the fair use defense and licensing is one way to avoid the defense altogether. But is fan fiction fair use?

## II. THE INADEQUACIES OF THE CURRENT LEGAL FRAMEWORK

In order to create a solution to remedy the uncertainties surrounding fan fiction, it is necessary to understand the problems that exist within the current framework. One of the largest of these problems is the reliance on fair use in the fan fiction context. Section A will apply each of the four fair use factors to the practice in order to highlight the deficiencies in relying solely on this defense. Another problem exists on the side of the authors in their use of DMCA takedown notices, and Section B will demonstrate that such a mechanism is also improper. Finally, while licensing is a preferable alternative to the reliance on fair use, Section C will emphasize the restric-

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121. See, e.g., *G.I. Joe*, KINDLE WORLDS, <https://kindleworlds.amazon.com/world/GIJOE> (last visited Mar. 3, 2016) (allowing the killing off of main characters); *Ravenswood*, KINDLE WORLDS, <https://kindleworlds.amazon.com/world/ravenswood> (last visited Mar. 2, 2016) (prohibiting novelization of television series episodes).

122. *Rights and the Publication Agreement*, KINDLE WORLDS, <https://kindleworlds.amazon.com/faqs?topicId=A31DTV3VSRP82B> (last visited Mar. 2, 2016).

123. *Sales, Royalties, and Payments*, KINDLE WORLDS, <https://kindleworlds.amazon.com/faqs?topicId=A3T3UQCG5AG03W> (last visited Mar. 2, 2016) (describing the payment scheme for the fan authors who publish through Kindle Worlds).

124. *Rights and the Publication Agreement*, *supra* note 122; *Sales, Royalties, and Payments*, *supra* note 123.

tiveness of the Kindle Worlds model and how this is an insufficient approach to licensing fan fiction.

#### A. FAN FICTION IS NOT CATEGORICALLY FAIR USE

Many advocates for the legality of fan fiction claim that the practice is fair use.<sup>125</sup> The Organization for Transformative Works, a nonprofit with the purpose of preserving fan culture, takes this approach.<sup>126</sup> But the fatal flaw in this argument is evident in the articles supporting it: fan fiction is simply too varied. Hence, articles championing fair use often restrict their analysis to only certain types of fan fiction.<sup>127</sup> Some fan works could easily be considered transformative and likely fair use, but categorically enveloping all fan fiction within the transformative definition raises concerns about expanding the concept far beyond its intended purpose.<sup>128</sup> Others also argue that the fair use defense itself is not adequate for dealing with fan fiction at all, because it fails to account for the non-monetary motivations of fan authors.<sup>129</sup> Alternatively, even with a hypothetical fair use exception for fan fiction, the arbitrary way in which courts deal with fair use claims would not lead to any more certainty than currently exists.<sup>130</sup> Each of the following sections looks at how a court would weigh an individual fair use factor if it were to apply a formal fair use analysis to noncommercial, Internet fan fiction.

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125. See, e.g., Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction As Fair Use*, 95 CALIF. L. REV. 597, 601 (2007) (arguing that a specific type of fan fiction should be considered fair use); Montano, *supra* note 5, at 705 (arguing that fan fiction is "universally transformative" and therefore subject to the fair use doctrine); Stroude, *supra* note 22, at 212–13 (suggesting that certain types of fan fiction should face an analysis similar to that of parody under the fair use doctrine).

126. ORG. FOR TRANSFORMATIVE WORKS, <http://transformativeworks.org> (last visited Mar. 2, 2016).

127. One article concentrates on "Mary Sue" fan fiction as fair use, wherein the fan author inserts a new, idealized character into the story. Chander & Sunder, *supra* note 125, at 599–600. Another article distinguishes "referential" and "participatory" fan fiction, with the former being more informative and generally not fair use. Stroude, *supra* note 22, at 194–97.

128. See Nolan, *supra* note 25, at 569.

129. See Pamela Kalinowski, Note, *The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine*, 20 WM. & MARY J. WOMEN & L. 655, 680 (2014).

130. See Kate Romanenkova, Comment, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 207 (2014).

### 1. The Purpose and Character of the Use

If the use of the copyrighted material is transformative, it certainly aids in finding fair use, although it is not dispositive.<sup>131</sup> Much of fan fiction can be seen as transformative because “[i]t is the nature of all literature that any reinterpretation is a critique of a previous work.”<sup>132</sup> For example, in creating a homosexual relationship between two characters in the slash context, the fan author is commenting on the lack of such a relationship in the canonical work.<sup>133</sup> Fan fiction is also often analyzed in the parody context, as was the case with *The Wind Done Gone*, which used aspects of *Gone with the Wind* to comment specifically on the original’s portrayal of slavery.<sup>134</sup> Because parody is usually transformative, framing fan fiction as parody strengthens the argument that it is fair use.<sup>135</sup>

Some fan works, however, do not reach the transformative level. Case law demonstrates that fan works that purport to be a sequel to a copyrighted work do not rise to this level.<sup>136</sup> The Second Circuit Court of Appeals concluded in *Salinger v. Colting*, the case involving a new story depicting an elderly version of *The Catcher in the Rye*’s main character, that the intent to write a sequel overshadowed any intent to comment on the work.<sup>137</sup> Similarly, many fan works are situated within the canon of a particular work.<sup>138</sup> While some argue that these works are still transformative,<sup>139</sup> the fact that they alter even less than sequels suggests that courts would similarly not view them as transformative.

Additionally, some fan fiction is satirical rather than parodical. While satire can still be fair use, the author of a sat-

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131. See SCHWABACH, *supra* note 24, at 69.

132. Montano, *supra* note 5, at 703.

133. See *id.*

134. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268–69 (11th Cir. 2001).

135. See Montano, *supra* note 5.

136. Anderson’s script in *Anderson v. Stallone* is an example of this. No. 87-0592 WDKGX, 1989 WL 206431, at \*1, \*8 (C.D. Cal. Apr. 25, 1989) (finding that a proposed sequel to *Rocky III* was an unauthorized derivative work). For further discussion of fan works that extend the timeline of copyrighted material, see JENKINS, *supra* note 30, at 163–65.

137. 607 F.3d 68, 71–74, 83 (2d Cir. 2010).

138. See JENKINS, *supra* note 30.

139. See *id.* at 162, 169 (arguing that canonical works recontextualize the original work by shifting its focus); Montano, *supra* note 5, at 700 (arguing that fan works situated within canon reaffirm the substance of the original work).

ire needs to give sufficient justification as to why she used the particular underlying work.<sup>140</sup> Fan fiction often critiques broad societal constructs rather than focusing on the particular underlying work itself.<sup>141</sup> If there is sufficient justification, such a use would still be fair, but not every satirical fan fiction will meet this burden, because there is less of a reason to use the specific underlying work.<sup>142</sup>

Finally, while fan fiction is largely noncommercial,<sup>143</sup> this determination is not dispositive.<sup>144</sup> Moreover, not all fan fiction is noncommercial. Stories posted through Kindle Worlds have a commercial component, however small.<sup>145</sup> Some fans may also use fan fiction as a sort of “training ground” in an effort to one day write professionally,<sup>146</sup> a trend which could increase in a post-*Fifty Shades of Grey* world.<sup>147</sup> While this is not explicitly commercial, it does raise questions of indirect commercial motivations.

Some fan fiction can easily be considered transformative, either by being analogized to a parody or even a satire with sufficient justification, but others may adhere too closely to canon or lack the necessary justifications. Additionally, some fan fic-

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140. See, e.g., *Blanch v. Koons*, 467 F.3d 244, 254–55 (2d Cir. 2006) (finding that wanting to comment on magazine culture justified using a photograph of legs from a fashion magazine).

141. Fan works that center on heroic women exemplify this aspect of fan fiction, as these works do not often exist in popular culture. JENKINS, *supra* note 30, at 167. These works are a broader critique on the patriarchy rather than a parody that comments specifically on the underlying work’s lack of a heroine. See Joanna Russ, *Pornography by Women for Women, with Love*, in THE FAN FICTION STUDIES READER, *supra* note 27, at 82, 90; Montano, *supra* note 5, at 700 (explaining that the fan author comments on and transforms the meaning of the original work).

142. See Tushnet, *Payment in Credit*, *supra* note 15, at 161.

143. See *supra* Part I.A.2; cf. Michelle Chatelain, Note, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, 15 TUL. J. TECH. & INTELL. PROP. 199, 200 (2012) (defining fan fiction’s main purpose as providing entertainment for fans of a particular work).

144. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994).

145. *Sales, Royalties, and Payments*, *supra* note 123 (describing the payment scheme for the fan authors who publish through Kindle Worlds).

146. However there is disagreement over how large a faction this represents. Cf. JENKINS, *supra* note 30, at 48–49 (stating some authors may instead be using fan fiction as a “permanent outlet for their creative expression”).

147. Jones, *supra* note 17, at 1.5 (quoting a member of the fan community who commented on the rise of fan authors attempting to become the next E. L. James).

tion may have a commercial purpose. It is therefore difficult to say that fan fiction *categorically* satisfies the purpose factor of the fair use analysis. Thus, relying on the fair use defense may be insufficient to properly protect the broad range of works that comprise fan fiction.

## 2. The Nature of the Copyrighted Work

The variety inherent in fan fiction is not as problematic under the nature factor. Fan fiction is almost always based off of a fictional work, which merits the most protection.<sup>148</sup> As a result, this factor often weighs against the fan author.<sup>149</sup> Although not the focus of this Note, fan fiction that is based on real people, such as actors and band members, may fare differently under this factor.<sup>150</sup> Regardless, despite the fundamental variety in media fan fiction, one of its defining features is its basis in fictional works of popular culture. Therefore, the nature factor will rarely favor the fan author.

## 3. The Amount and Substantiality of the Portion Used

The amount of the underlying work the fan author uses depends on their intent under the purpose factor.<sup>151</sup> If the fan's purpose were to fill a gap in the canon, like a "missing scene" story, then the fan author would necessarily need to borrow the settings, plots, and characters to fulfill this purpose.<sup>152</sup> An AU story, on the other hand, only needs to borrow the characters.<sup>153</sup> How much borrowing is permitted depends on whether it is for a permitted purpose, such as a parody or satire. In short, the variety of fan fiction does not allow for a single, concrete answer to the question of how much a fan author is allowed to copy and, following from that, makes it difficult for fan authors to rely on the fair use defense to protect their work.

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148. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (explaining that the law generally considers there to be a greater need for the dissemination of factual works than fictional ones).

149. See Chatelain, *supra* note 143, at 209; Nolan, *supra* note 25, at 562.

150. Nolan, *supra* note 25; *RPF*, FANLORE, <http://fanlore.org/wiki/RPF> (last visited Mar. 2, 2016).

151. See *supra* Part I.B.2.c (describing the intersection between the purpose and the amount factor).

152. See Busse & Hellekson, *supra* note 25, at 11.

153. *Id.*

#### 4. The Effect of the Use upon the Potential Market

For the fan fiction that is transformative the effect factor may have little import, because there is essentially no market for transformative works. However, a part of this analysis is also the effect on licensing markets.<sup>154</sup> While it is unlikely that fan fiction would usurp the original market for the copyrighted work,<sup>155</sup> there is a potentially affected licensing market in the form of tie-in novels. These are “published work[s] meant to complement . . . another published work.”<sup>156</sup> Professional *Star Trek* novels, which former fan fiction authors are sometimes tasked to write, are an example of this.<sup>157</sup> In this way, creators may have a legitimate interest in authorizing fan fiction. Whether tie-in novels are, in fact, just professional forms of fan fiction is up for debate, because unlike traditional fan fiction, authors of tie-in novels are subject to “a long list of requirements” in order to keep the tie-in novel in line with the copyright owner’s vision.<sup>158</sup> Naomi Novik, co-founder of the Organization for Transformative Works, concluded in her testimony in front of a congressional subcommittee that these requirements are indicative of the fundamental problem with licensing: it is inherently meant to avoid transformation.<sup>159</sup>

Following this logic, fan fiction that is situated within the canon of the original work may have a greater impact on the licensing market for tie-in novels than more transformative works. Therefore, the presence of both types of fan fiction again undermines an attempt to categorically say that it is fair use.

What this analysis demonstrates is that, because of the breadth of fan fiction, it is extremely difficult to ever make a categorical statement about it. Thus, it is difficult to know prior to litigation whether a use is fair.<sup>160</sup> If fan fiction were to go be-

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154. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–30 (2d Cir. 1994).

155. See Chatelain, *supra* note 143, at 211.

156. *Tie-in*, FANLORE, <http://fanlore.org/wiki/Tie-in> (last visited Mar. 2, 2016).

157. See JENKINS, *supra* note 30, at 48–49.

158. See *The Scope of Fair Use: Hearing Before the S. Comm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 24 (2014) [hereinafter *Hearing*]; see also JENKINS, *supra* note 30, at 48–49 (describing how a number of fans have gone on to write professional *Star Trek* novels).

159. *Hearing*, *supra* note 158 (“The point of licensing . . . almost always is to avoid transformation.”).

160. See SCHWABACH, *supra* note 24, at 64.

fore a court, depending on what type it was, the court could find against fair use, which would result in a detrimental, precedential impact on the future legality of the practice. In short, relying solely on the fair use analysis is not the best protection for fan fiction given the case-by-case, fact-specific nature of the defense and fan fiction's inherent variety.

#### B. TAKEDOWN NOTICES ARE NOT TAILORED TO THE VARIED NATURE OF FAN FICTION

Part of the reason that case law in this area is underdeveloped is that copyright owners currently issue takedown notices to simply get the fan work removed from the Internet instead of taking the fan author to court.<sup>161</sup> Lumen is a research project involving law clinics from several schools that catalogues cease-and-desist letters and takedown notices that individuals submit to the project's site.<sup>162</sup> The site has an entire page dedicated to fan fiction. The page discusses the practices of some entertainment companies that are known for issuing cease-and-desist letters against online fan creations.<sup>163</sup> The DMCA and its takedown procedures are of particular relevance in a discussion of fan fiction because both the DMCA and fan fiction exist in the online context.<sup>164</sup>

On the one hand, the takedown procedures outlined in the DMCA eliminate the need to bring an infringement action to court.<sup>165</sup> Section 512(g) of the Copyright Act, added by the DMCA, was intended to guard against misuse by providing "putback procedures" for users whose material was improperly taken down.<sup>166</sup> On the other hand, even with this provision, the Act fails to adequately protect end users. The Act itself favors copyright holders and incentivizes websites to comply with the notices through the safe harbor provision.<sup>167</sup> This bias results in

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161. See *Derecho*, *supra* note 7, at 72.

162. *About Us*, LUMEN, <https://lumendatabase.org/pages/about> (last visited Mar. 2, 2016).

163. *Fan Fiction*, LUMEN, <https://lumendatabase.org/topics/3> (last visited Mar. 2, 2016). The page does note that other companies either encourage or tolerate fan fiction. *Id.*

164. See Rebecca Alder Rock, Comment, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 692 (2014) ("The DMCA was passed in 1998 'to adapt copyright law to the digital age.'").

165. See *id.* at 694.

166. Copyright Act, 17 U.S.C. § 512(g) (2012); O'Donnell, *supra* note 105, ¶ 13.

167. O'Donnell, *supra* note 105, at 13–14.



notices issued for non-copyright reasons, such as stifling free speech, and use by individuals who may not own the copyright in the first place.<sup>168</sup> These procedures also largely disregard the fair use doctrine.<sup>169</sup>

*Lenz v. Universal Music Corp.* established that a fair use assessment is required before a copyright owner can initiate the DMCA takedown procedures.<sup>170</sup> Even if a use is fair, however, a copyright owner is not liable for attempting to remove it unless the user can demonstrate that the owner was acting in bad faith.<sup>171</sup> Thus, the burden on copyright owners is relatively small.<sup>172</sup> It is also difficult for end users to fight a takedown if they believe that their use is fair. A survey based on data from the Lumen project indicates that few individuals fight takedown notices through the statutorily-provided counter notices, although certain aspects of the research could have accounted for this small number.<sup>173</sup> Filing a counter notice opens the challenger up to a federal lawsuit where she will often be at an economic disadvantage.<sup>174</sup> There is also no guarantee that an individual will even know her material has been removed. Many takedown notices catalogued on Lumen are submitted to Google,<sup>175</sup> and search engines such as Google often do not have the ability to notify the individual that her work has been delisted, nor are search engines generally liable under the DMCA.<sup>176</sup>

Despite the difficulty in formally incorporating a fair use analysis into the takedown process, creators may already be doing a similar analysis. For instance, the notice sent on behalf of

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168. See Schonauer, *supra* note 102, at 152–54 (describing a news anchor issuing notices to remove screen shots of himself to which he did not have a copyright).

169. See *id.* at 152, 154.

170. 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008).

171. Copyright Act, 17 U.S.C. § 512(f); *Lenz*, 572 F. Supp. at 1154–55.

172. See O'Donnell, *supra* note 105.

173. The creators of the survey did not draw any explicit conclusion from this data and indicated that more research is necessary. Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 679–80 (2006).

174. See Schonauer, *supra* note 102, at 160. Fan fiction authors are typically from a marginalized sect of society and thus may not have access to the necessary resources for a lawsuit. Tushnet, *Payment in Credit*, *supra* note 15, at 141 (“[F]ans tend to see their legal status as similar to their social status: marginal . . .”).

175. Urban & Quilter, *supra* note 173, at 641.

176. *Id.* at 680–81.

J.K. Rowling and Warner Brothers to the adult *Harry Potter* fan fiction site made a distinction between the site's content and "innocent" fan fiction, explicitly stating that the copyright owners had no issues with the latter type of fan works.<sup>177</sup> It was the site's explicit content that "most right-minded people would consider wholly inappropriate for minors" that the copyright holders requested be taken down.<sup>178</sup> In this way, some creators may already be making a distinction between uses they perceive as fair.

While some creators may be more judicious in their use of takedown notices, on the whole the procedures are not set up to require any formal fair use inquiry. This means that, in some instances, works are taken down that are actually beyond the copyright owner's reach. Therefore, takedown notices have an improper effect on online fan fiction.

### C. KINDLE WORLDS IS TOO RESTRICTIVE OF A MODEL

Fan fiction has several important benefits. It is necessary to highlight these benefits in order to understand the inadequacies in the Kindle Worlds framework. First, fan fiction provides a unique space for individuals to experiment with creative expression. Fan authors learn how to work with both preexisting and newly created elements and can hone their skills in a way that is unavailable in other mediums.<sup>179</sup> Beyond a technical perspective, fan fiction also serves as a mechanism for social commentary and critique. In reworking aspects of preexisting works, fans are filling a perceived gap that may exist not only in the original work but also in popular culture at large.<sup>180</sup> Even the often maligned sexually explicit fan fiction serves an important representational role not only in allowing marginalized groups to create media reflective of their own experiences, but also in allowing readers and writers a safe place to explore their own interests.<sup>181</sup> Furthermore, fan works can

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177. *Harry Potter in the RestrictedSection*, *supra* note 108.

178. *Id.*

179. See Claudia Rebaza, *Fanfiction's Benefits*, ORG. FOR TRANSFORMATIVE WORKS (Feb. 4, 2014, 6:44 PM), <https://transformativeworks.org/news/otw-fannews-fanfictions-benefits> (quoting authors who have used fan fiction to overcome writer's block).

180. JENKINS, *supra* note 30, at 167 (discussing the insertion of strong female characters); see Russ, *supra* note 141; Montano, *supra* note 5, at 700.

181. While "[m]ainstream discussions of X-rated fanfic usually veer toward the gleefully smug or the bemusedly grossed out," it had been defended as a way for young adults, particularly females, to safely explore their sexuality in

“reaffirm[] the values inherent in the original work” and thereby comment on the importance of those values in society.<sup>182</sup> Fan fiction provides a platform that allows individuals to both experiment with the technical aspects of their writing and comment on broader ideological issues in popular media. With the advent of the Internet, these benefits are now open to a far wider audience than ever before, and companies such as Amazon have attempted to capitalize on this phenomenon.

Amazon Publishing has chosen a route that avoids the need for the fair use defense or aggressive takedown notices, opting instead for the licensing agreement embodied in Kindle Worlds. Prospective fan authors chose “a licensed World” and, following the guidelines for that World, write and upload their story under Amazon’s publishing agreement.<sup>183</sup> Despite its unique, license based approach, Kindle Worlds has been “lack-luster at best.”<sup>184</sup> One statistic shows that, while FanFiction.net boasts over one hundred new fan stories every hour, Kindle Worlds has over 1,000 works as of March 2016.<sup>185</sup> One likely reason for this tame response is that, in general, Kindle Worlds is too restrictive to draw in most fan authors.

The existence of specific content guidelines at all makes Kindle Worlds more restrictive than free hosting sites. While other fan fiction sites have some guidelines, they usually only restrict the type of work rather than the actual content of the work.<sup>186</sup> Amazon’s strict guidelines stem from the view that the copyright holder has complete and total control over her works.

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a way that is not available in other mediums. Claire Fallon, *Welcome to the Sex-Positive Wonderland of Erotic Fan Fiction*, HUFFINGTON POST (Oct. 12, 2015, 9:53 AM), [http://www.huffingtonpost.com/entry/erotic-fan-fiction-value\\_us\\_561294efe4b0768127029355](http://www.huffingtonpost.com/entry/erotic-fan-fiction-value_us_561294efe4b0768127029355).

182. Montano, *supra* note 5, at 700.

183. *How It Works*, *supra* note 120.

184. Jeff Roberts, *Amazon’s Fan-Fiction Portal Kindle Worlds Is a Bust for Fans, and for Writers Too*, GIGAOM (Aug. 17, 2014, 8:00 AM), <https://gigaom.com/2014/08/17/amazons-fan-fiction-portal-kindle-worlds-is-a-bust-for-fans-and-for-writers-too>.

185. KINDLE WORLDS, <https://kindleworlds.amazon.com> (follow “shop” hyperlink; then select “see more” in the “Worlds” sidebar) (last visited Mar. 2, 2016).

186. See, e.g., *FanFiction Content Guidelines*, FANFICTION, <https://www.fanfiction.net/guidelines/> (last updated Nov. 20, 2008) (prohibiting entries such as polls and choose your adventure stories); *Terms of Service FAQ*, ARCHIVE OF OUR OWN, [https://archiveofourown.org/tos\\_faq](https://archiveofourown.org/tos_faq) (last visited Mar. 2, 2016) (prohibiting posting of some forms of original fiction). The one content-specific prohibition some sites have involves fan fiction about real people. See *FanFiction Content Guidelines*, *supra*.

This view restricts transformative uses<sup>187</sup> and is undermined by the fact that a fair use defense, which does not require authorial permission, exists in the first place.<sup>188</sup>

Many Worlds prohibit any description of sexual acts and erotica, a guideline that makes Kindle Worlds especially restrictive.<sup>189</sup> This alienates a significant amount of fan fiction, predominately slash stories, which often explore assumptions about sexuality in popular media.<sup>190</sup> While such prohibitions appear to target heterosexual as well as homosexual adult content, some commentators have suggested that, given Amazon's sordid past with "suppressing gay and lesbian content and 'kinky' content," it is more likely for heterosexual adult content to persist in light of this restriction.<sup>191</sup> However, this argument may falter in light of certain Worlds like the *Silo Saga*, which at its inception stated in its guidelines that "[h]omosexuality and explorations of gender identity are not frowned upon in the least."<sup>192</sup> At a minimum, it is clear that Kindle Worlds places a limitation on graphic fan fiction that does not exist in other repositories of fan works.

A final restriction is that, in order to write for Kindle Worlds, a fan author must be eighteen years or older.<sup>193</sup> In contrast, other fan fiction sites such as FanFiction.net and Archive of Our Own, which is run by the Organization for Transformative Works, only have a minimum age requirement of thirteen,

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187. See Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1471.

188. See Copyright Act, 17 U.S.C. § 107 (2012). Some scholars suggest that a creator gives an interpretive right to the public upon publication of their work. Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 20 SETON HALL J. SPORTS & ENT. L. 131, 140 (2010).

189. See, e.g., *G.I. Joe*, *supra* note 121; *The Vampire Diaries*, KINDLE WORLDS, [https://kindleworlds.amazon.com/world/VampireDiaries?ref=kww\\_home\\_ug\\_VampireDiaries](https://kindleworlds.amazon.com/world/VampireDiaries?ref=kww_home_ug_VampireDiaries) (last visited Mar. 2, 2016).

190. See Sara Gwenllian Jones, *The Sex Lives of Cult Television Characters*, in THE FAN FICTION STUDIES READER, *supra* note 27, at 116, 119.

191. Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1471.

192. *Loose Canon—A New Kind of Fan Fiction*, CURIUSER INST., <http://www.curiouserinstitutione.com/blog/curiouser/loose-canon-new-fan-fiction> (last visited Mar. 2, 2016) (describing the original guidelines for *Silo Saga* on Kindle Worlds). The current, revised content guidelines are worded more conservatively. *Silo Saga*, KINDLE WORLDS, [https://kindleworlds.amazon.com/world/SiloSaga?ref=kww\\_home\\_ug\\_SiloSaga](https://kindleworlds.amazon.com/world/SiloSaga?ref=kww_home_ug_SiloSaga) (last visited Mar. 2, 2016). This small change again raises the concern that certain types of sexual relationships may be kept out under this rigid licensing scheme.

193. *Welcome to Kindle Worlds*, *supra* note 119.

an age chosen to ensure compliance with the Children's Online Privacy Protection Act.<sup>194</sup> Statistics show that most fan fiction authors, 80% in one sample from FanFiction.net, are minors.<sup>195</sup> Kindle Worlds thus excludes a large swath of fan authors, who use the fan community for support and as a way to develop their skills.<sup>196</sup> This is another significant issue with this restrictive model of licensing.

Despite its flaws, Kindle Worlds and its licensing agreement are unique.<sup>197</sup> With some modifications to address the aforementioned problems, its licensing approach could be the best alternative to protect fan fiction.

### III. LICENSING FAN FICTION

Fan fiction provides a unique space for individuals to comment on the values and ideas present in popular media, in addition to exploring their own writing abilities, and is therefore an important tool that should not be suppressed by legal technicalities.<sup>198</sup> Rather than leave fan fiction to struggle under the uncertainty of the fair use defense, this Note proposes that a well-crafted licensing scheme is a better mechanism by which to clear up the legal gray area that surrounds Internet fan fiction. This Note is not the first to propose a licensing scheme as a way to protect participatory practices like fan fiction,<sup>199</sup> but it is unique in the way that it endeavors to utilize licensing devices that already exist in other areas of copyright law. This approach gives the proposed licensing scheme a solid basis, which makes it more predictable and easier to administer. Section A

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194. *Terms of Service*, FANFICTION, <https://www.fanfiction.net/tos/> (last visited Mar. 2, 2016); *Terms of Service FAQ*, *supra* note 186.

195. Sendlor, *supra* note 37.

196. See Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1471–72.

197. See *Welcome to Kindle Worlds*, *supra* note 119 (recognizing that Kindle Worlds is “a new publishing model” that attempts to overcome legal barriers in the fan fiction arena).

198. See *supra* Parts I.A.1, II.A.1, and II.C for discussion of the importance of fan fiction and its role in fan culture.

199. Most recently, Elizabeth S. Aultman proposed a licensing scheme for participatory media more broadly, which involves a daisy chain license and compulsory royalties possibly distributed by a nonprofit entity. Aultman, *supra* note 21, at 402. It should be noted that there are others who caution against licensing fan fiction, although the scheme described in this Note will address many of those concerns. See, e.g., W. Michael Schuster, *Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction*, 55 S. TEX. L. REV 529, 543 (2014) (discussing the impact licensing has on fair use).

will describe how these existing mechanisms can be combined into the framework of this ideal system. One downside to this approach is that it necessitates involvement from Congress, which itself would require coordination and cooperation from all sides. Section B will discuss the benefits of this scheme in order to demonstrate what incentives Congress and the interested parties have in creating such a system.

#### A. THE IDEAL FRAMEWORK

The proposed licensing scheme has a two-tiered structure. On the first level, a licensing agreement would exist between the copyright holder and the hosting website, granting the website permission to host derivative works in the form of fan fiction.<sup>200</sup> On the second level, fan authors would be subject to this licensing agreement through the website's terms of service. This two-tiered system provides the best protection for both the copyright holder and the fan authors.

##### 1. The Licensing Agreement Between Websites and the Copyright Owner

The first level of this proposed scheme is inspired by Kindle Worlds and the way in which the copyright owner deals directly with Amazon Publishing instead of the fan authors.<sup>201</sup> This first level will correct the more limiting features of the Kindle Worlds model, including its significant content and age restrictions, and will also ensure that the licensing scheme is not construed too broadly, as copyright owners fear. There are two features of this proposed scheme that serve these goals<sup>202</sup>: (a) a compulsory license and (b) a statutory limitation.

###### a. A Compulsory Scheme

The proposed licensing scheme would be premised on a compulsory license that Congress would establish in the Copyright Act. A similar provision already exists in many areas, including the use of certain musical works and the retransmis-

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200. Fans also create artwork and videos in addition to fiction, and while a scheme that includes all aspects of Internet fan culture would be welcomed, such a scheme involves much more than what is covered by this Note. For a discussion of the legal issues raised by other types of fan work, see SCHWABACH, *supra* note 24, at 74–92.

201. See *Rights and the Publication Agreement*, *supra* note 122.

202. See *supra* Part II.C.

sion of television broadcasts over cable and satellite systems.<sup>203</sup> A compulsory licensing scheme provides a tool when a copyright owner either refuses to negotiate or cannot be contacted in order to negotiate a license traditionally.<sup>204</sup> The exact steps in obtaining a compulsory license differ depending on the specific area in which it operates, but the key requirement is that the user will pay a royalty fee to the copyright owner.<sup>205</sup> The benefit of a compulsory license is that it “is a compromise between giving the copyright owner complete control over certain uses and granting users a complete exemption from liability.”<sup>206</sup>

The concept of such a license is not without its critics. There was an attempt to remove the compulsory license for musical works during the drafting of the Copyright Act of 1976. Those who attempted to remove it argued that the rights holder should have control over how her work is used and that the policy reasons that prompted the adoption of the compulsory license in the early twentieth century no longer existed.<sup>207</sup> The record companies strongly objected, however, arguing that their industry depended upon the mechanism in order to prevent monopolies.<sup>208</sup> This debate resulted in Congress ultimately deciding to keep the compulsory license in the 1976 Act.<sup>209</sup> Thus, despite the argument that a compulsory license undermines the author’s control over her own work, Congress found that the benefits of the license outweighed this concern. Indeed, Congress has continued to view compulsory licenses as beneficial in certain areas, especially as a response to changes in technology,

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203. Copyright Act, 17 U.S.C. §§ 111, 115, 119 (2012); U.S. COPYRIGHT OFFICE, CIRCULAR 73: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 1 (2009) (detailing licenses in the music sector); *see also* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 432–33 (3d ed. 2010) (discussing compulsory license in cable and satellite retransmissions). For a description of all the different types of compulsory licenses in the Copyright Act, *see* MERGES ET AL., *supra* note 47, at 592–93.

204. *See* U.S. COPYRIGHT OFFICE, *supra* note 203, at 1–2.

205. If the owner is unknown or refuses to accept delivery the notice is served on the Copyright Office. *Id.* at 2–3; *see also* COHEN ET AL., *supra* note 203, at 432 (explaining that under the 1976 Act, a compulsory license compensates copyright owners “through the payment of a fee, [but] they are not permitted to refuse to license their works”).

206. COHEN ET AL., *supra* note 203, at 432.

207. *See* Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 224 (2010).

208. *Id.* at 225.

209. *Id.* at 224–25.

and have added additional compulsory licensing schemes since the 1976 Act.<sup>210</sup>

As applied to fan fiction, a compulsory licensing scheme would be limited to the right to make a derivative work, just as the compulsory license for musical works is limited to the right to make and distribute phonorecords, such as CDs or tapes, of the work.<sup>211</sup> Copyright owners would be statutorily required to license this right, but, as will be detailed in the next Section, they would only be required to do so with specific websites.<sup>212</sup> In order to make sure that these websites do not abuse this mechanism, the sites would be required to deposit information about their usage of this license with the Copyright Office, as is required by the compulsory scheme for cable retransmissions.<sup>213</sup> In exchange, the website will pay the copyright owner a statutorily prescribed royalty.<sup>214</sup>

Rather than allowing copyright holders to place specific content restrictions on fan fiction, as Kindle Worlds exemplifies, the compulsory scheme would contain more general limitations. Primarily, the license would require that the derivative works (fan fiction) remain noncommercial, the importance of which is demonstrated by the popularity of Creative Commons licenses that include this obligation.<sup>215</sup> Attribution is another feature of Creative Commons licenses that would be incorporated into this compulsory scheme.<sup>216</sup> This element would require that all fan fiction acknowledge the author of the underlying work. Finally, fan fiction would in turn be subject to the same type of license as the original author, meaning fan authors would have to allow others to make derivative works of their fan fiction, again modeled after the “ShareAlike” option of Creative Commons licenses.<sup>217</sup>

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210. One such area was that of satellite television in relation to transmissions to “underserved households.” COHEN ET AL., *supra* note 203, at 433.

211. Copyright Act, 17 U.S.C. § 115 (2012).

212. *See infra* Part III.A.1.b.

213. Copyright Act § 111(d).

214. The terms of royalty payments could be set and adjusted by the Copyright Royalty Judges under the Copyright Act, who already set the royalties for musical works. *Id.* §§ 115, 801.

215. *See* Casey Fiesler, Note, *Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 755 (2008).

216. *See About the Licenses, supra* note 116.

217. *See id.*



In a sense, this scheme would be legally enforcing practices that are already a norm in fan culture. As discussed previously, most fan authors already consider the noncommercial nature of fan fiction to be a core feature of the practice.<sup>218</sup> Attribution is also already commonplace in fan culture, primarily through the use of disclaimers.<sup>219</sup> Finally, many types of fan fiction are already based off of other fan creations, such as fan artwork.<sup>220</sup>

One potential problem with the compulsory aspect of the scheme is that fan fiction spans most of the categories of copyrightable subject matter laid out in the Copyright Act, including literary works, motion pictures, and dramatic works, and therefore many unique industries are covered by the license.<sup>221</sup> An exacerbating factor is that industry requirements vary between the different types of works.<sup>222</sup> While the specifics of how to navigate the particular standards in each industry is beyond the scope of this Note, one way to ease this problem is to narrow the applicability of this proposed compulsory license.

*b. Statutory Limitation*

In order to keep the compulsory license from having too dramatic of an impact on copyright owners, the ideal scheme would also include a statutory limitation under which the compulsory license is only available to a specific set of interested parties: websites. Again the Copyright Act already provides a basis for this type of scheme. Section 110(5) of the Act allows certain businesses to play a radio or TV without running afoul of the performance rights granted to composers of musical

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218. See *supra* Part I.A.2.

219. Disclaimers are placed at the beginning of the fan work and disavow ownership of the underlying work. See Jonathan Band et al., *Artists Don't Get No Respect: Panel on Attribution and Integrity*, 28 COLUM. J.L. & ARTS 435, 442 (2005) (statement of Rebecca Tushnet) (explaining that the use of disclaimers may be becoming more implied rather than explicit).

220. For a description of some of these practices, see FANLORE, [http://Fanlore.org/wiki/Main\\_Page](http://Fanlore.org/wiki/Main_Page) (last visited Jan. 2, 2015) (search "Reverse Bang" for a description of fan fiction based on fan created artwork; search "trope" for fan works based on a common fan fiction theme).

221. Copyright Act, 17 U.S.C. § 102(a) (2012).

222. There is a concern about how feasible it is to bring the film and TV industries into the world of fan fiction because of their particular guild requirements, which involve payments to the original scriptwriters. See Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1468–69; Jay Kogan et al., *Copyright Society: Fan Productions*, REBECCA TUSHNET'S 43(B)LOG (June 9, 2014), <http://tushnet.blogspot.com/2014/06/copyright-society-fan-productions.html>.

works.<sup>223</sup> Along that train of thought, the proposed licensing scheme would provide a sort of statutory exception for certain websites that would allow them to take advantage of the compulsory licensing component. Just as Section 110 has certain requirements for a business to fall under the exception,<sup>224</sup> the websites wishing to host fan fiction would similarly have to meet certain specifications just as they do to comply with the DMCA.<sup>225</sup> For example, a site hosting sexually explicit content could be required to have an age screening mechanism in place, such as an age statement that some fan sites already contain.<sup>226</sup>

The most important role that the statutory limitation plays is as a mitigating feature that addresses what is likely to be the most vociferous criticism of this scheme—that it removes the absolute control copyright that owners have come to expect over their work.<sup>227</sup> Other solutions proposed in the fan fiction context are oriented towards giving copyright owners control over the more controversial types of fan fiction, which usually involve explicit and often taboo sexual content.<sup>228</sup> One proposal addressing this concern centers around moral rights, a copy-

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223. Copyright Act § 110(5); TODD B. TATELMAN, CONG. RESEARCH SERV., RS21107, COPYRIGHT LAW'S "SMALL BUSINESS EXCEPTION": PUBLIC PERFORMANCE EXEMPTIONS FOR CERTAIN ESTABLISHMENTS 3 (2003). The World Trade Organization found that a portion of the business exception described above was too broad and thus inconsistent with specific international agreements, although the United States has yet to amend the law. MERGES ET AL., *supra* note 47, at 592. With this in mind, it would be important for this statutory exemption to be leery of international obligations, especially given the global nature of fan communities. *See, e.g.*, JENKINS, *supra* note 30, at 159 ("Women who have low prestige jobs . . . can gain national and even international recognition as fan writers . . ."); Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET, *supra* note 7, at 41, 44 ("Media fandom, now a gigantic international phenomenon, clearly began its life in a very small pool.").

224. Copyright Act § 110(5).

225. *See supra* Part I.B.3.

226. *See, e.g.*, ARCHIVE OF OUR OWN, *supra* note 35 (requiring readers to click past a statement declaring that certain works contain adult content); LIVEJOURNAL, <http://www.livejournal.com> (last visited Mar. 2, 2016) (requiring confirmation that a reader is over eighteen before proceeding to explicit works).

227. *See* Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1471 (discussing copyright owners' claims of absolute control).

228. *See, e.g.*, Brian Link, *Drawing a Line in Alternative Universes: Exposing the Inadequacies of the Current Four-Factor Fair Use Test Through Chanslash*, 33 T. JEFFERSON L. REV. 139, 141 (2010) (describing a genre of fan fiction known as "chanslash," which depicts underage characters in sexually explicit scenarios).

right concept more accepted in Europe than in the U.S.,<sup>229</sup> and would require courts to consider whether “the secondary work mutilates the original” when conducting a fair use analysis.<sup>230</sup> While such an additional factor does not solve the unpredictability of the fair use analysis,<sup>231</sup> authorial interests in the integrity of their work are an important consideration. The statutory limitation would therefore be constructed with these interests in mind, determining what types of fan fiction are most likely to be offensive and requiring certain measures be taken to prevent young readers from unintentionally finding such works, like an age screening process.<sup>232</sup> While copyright owners would still lack the absolute control to which they have become accustomed, the statutory limitation is meant to address the concerns that prompt authors to rely on this control in the first place.

## 2. Websites and the Fan Authors

Turning to the second tier of the proposed licensing scheme, the compulsory license between the website and the copyright owner would be enforced against the fan author through the website’s terms of service. As a result, fan authors would be able to upload fan fiction in a way that mirrors current practice.<sup>233</sup> Because it enforces existing norms, this second tier requires less work to implement. Nonetheless, outlining how fans and websites will interact through the terms of service is important in order to understand the benefits of this scheme.

Terms of service exist on almost every website and form a type of contractual relationship between the user and the website owner.<sup>234</sup> Websites would incorporate the broad limitations of the compulsory license, like the noncommercial requirement, into their terms of service, thereby binding the users of the

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229. Moral rights protect an author’s non-economic interests, such as the right of attribution and integrity. See COHEN ET AL., *supra* note 203, at 392–93.

230. Link, *supra* note 228, at 174.

231. See *supra* Part II.A (discussing the problems inherent in reliance on the fair use defense).

232. See Link, *supra* note 228, at 139.

233. See *supra* Part III.A.1.a for how the compulsory scheme mirrors accepted fan practice.

234. See Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 32 (2013) (stating that many people enter into these contracts without even realizing it).

site.<sup>235</sup> One important feature of this second tier is the ability to lower the age restriction on fan authors. When contracting directly with the fan author, it is safer for copyright owners to require that the authors be eighteen for enforcement purposes.<sup>236</sup> By keeping the actual licensing agreement in the first tier, the scheme allows the age restriction to be the same as that of the existing sites because fan authors are not contracting directly with the copyright holders.

There are questions as to how binding terms of service actually are on end users, but notice of the terms and manifest consent seem to be at the heart of enforceability.<sup>237</sup> The seminal case in this area, *Specht v. Netscape Communications Corp.*, made clear that whatever mechanism a site uses to create the agreement (in that case the clicking of a download button), it must be clear to the user that such an action signifies consent to the terms of service.<sup>238</sup> This is especially important in the context of minors.<sup>239</sup> Most jurisdictions allow the enforcement of contracts against minors in many circumstances.<sup>240</sup> Although there is always the specter of the infancy defense that is codified in most states, which allows minors to disavow certain contracts, courts have generally held that these agreements are nevertheless enforceable against minors if the minors received a benefit from the contract.<sup>241</sup> For example, the District Court

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235. Agreement to these terms could be mere use of the site in some instances. *Id.*

236. Minors generally have the privilege to disaffirm contracts in certain circumstances. James Chang & Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege To Disaffirm Online Contracts*, 2 U.C. IRVINE L. REV. 627, 633–34 (2012).

237. See generally Jack Blum, *Offer and Acceptance in Cyberspace: Ensuring That Your Client's Website Is Protected by Enforceable Terms of Service*, 47 MD. B.J. 18 (2014) (stressing that buried terms of service may not be enforceable); Garcia, *supra* note 234 (surveying the various forms of licensing agreements present online and their legal validity).

238. 306 F.3d 17, 29–30 (2d Cir. 2002). Of course the question that remains is what satisfies this conspicuousness requirement. Garcia, *supra* note 234, at 46–54; see, e.g., *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 124 (Ill. App. Ct. 2005) (finding that the blue typeface of the link to the website's terms and conditions was sufficiently conspicuous).

239. See generally Chang & Alemi, *supra* note 236 (examining how different jurisdictions have treated contracts with minors).

240. *Id.* at 633, 638 (finding that jurisdictions today recognize that minors can enter into contractual agreements and noting their large presence online).

241. See Jeffrey Neuburger, *Are Clickwrap Agreements with Minors Enforceable? The Fourth Circuit Won't Say, but the District Court Said Yes*, PROSKAUER (Apr. 30, 2009), <http://newmedialaw.proskauer.com/2009/04/30/are-clickwrap-agreements-with-minors-enforceable-the-fourth-circuit-wont>

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for the Southern District of Illinois held in *E.K.D. ex rel. Dawes v. Facebook, Inc.* that the plaintiffs were bound by Facebook's terms of service despite being minors, because they received the benefit of utilizing Facebook.<sup>242</sup> As a consequence, the age for posting on these fan fiction websites could be lowered to thirteen as it is on most sites today, and websites would feel more confident that these terms would be enforced.<sup>243</sup>

## B. BENEFITS OF THE PROPOSED LICENSING SCHEME

Because this proposed scheme is constructed out of other existing licensing arrangements, it has the advantage of being grounded in copyright law. Beyond this precedential value, the scheme has other benefits that are favorable to all three interested parties: the copyright owners, the websites, and the fan authors. This Section specifically outlines four benefits that resolve, to some extent, many of the problems detailed previously in this Note.

### 1. Noncommercial Fan Fiction

Perhaps most importantly, this scheme serves to keep fan fiction noncommercial, which is preferable for both fan authors and copyright owners alike. Under this scheme, non-commerciality is a requirement under the compulsory license.<sup>244</sup> Thus, any fan fiction that is made for profit would fall outside of this scheme and would be subject to the precedents set out in the case law. As court opinions in this area demonstrate, unless a fan work rises to the level of being transformative, it will most likely be considered infringing.<sup>245</sup>

Maintaining this distinction between commercial and non-commercial fan fiction benefits copyright holders because it allows them to exert control over the fan fiction that would com-

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-say-but-the-district-court-said-yes.

242. 885 F. Supp. 2d 894, 900 (S.D. Ill. 2012) (stating that the infancy defense is meant to be a shield rather than a sword).

243. See *supra* Part II.C (discussing the higher age restriction on Kindle Worlds).

244. See *supra* Part III.A.1.a.

245. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 71, 83 (2d Cir. 2010) (finding that a commercially published unauthorized sequel is unlikely to be considered fair use); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008) (finding no fair use for commercially published, fan-made reference material); cf. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269, 1276 (11th Cir. 2001) (stating that commercially published parody is considered transformative).

pete most directly with their franchise—commercial fan fiction. They can do this either by appending content restrictions on things like a licensed tie-in novel, or by bringing a suit against unauthorized commercial publications. The latter choice would still reserve the fair use defense for the fan author, thereby preserving the benefits of that system.<sup>246</sup> Despite the concerns of some copyright owners, noncommercial fan fiction does not present these same competitive risks, and so it does not necessitate as much authorial control. A recent example of this lack of competition is found in the newest addition to the *Twilight* franchise, a novel entitled *Life and Death*.<sup>247</sup> In this novel, author Stephenie Meyer rewrote the first *Twilight* novel but reversed the genders of almost all of the characters.<sup>248</sup> So-called “genderswap” stories are popular in the fan fiction community,<sup>249</sup> and there are already examples of this type of work in the *Twilight* fandom.<sup>250</sup> While some commentators question whether this new novel should be considered fan fiction or not,<sup>251</sup> this work is noticeably different than the average genderswap fan fiction, precisely because it was written by the original author. For example, no one is complaining that it was released commercially, as they did with *Fifty Shades of Grey*.<sup>252</sup> Importantly, the preexisting genderswap fan fiction did not prevent Meyer from releasing this novel by usurping the market, because

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246. See *supra* Part II.A for an analysis of how the fair use defense would apply.

247. STEPHENIE MEYER, *LIFE AND DEATH: TWILIGHT REIMAGINED* (2015) (rewriting the popular *Twilight* novel with main characters Bella and Edward becoming Beau and Edythe respectively).

248. *Id.*

249. *Genderswap*, FANLORE, <http://fanlore.org/wiki/Genderswap> (last visited Mar. 2, 2016) (defining “genderswap,” its variations, and its use in fan fiction).

250. Archive of Our Own lists several genderswap fan fictions for the *Twilight* series. *Twilight Series—Stephenie Meyer*, ARCHIVE OF OUR OWN, <https://archiveofourown.org> (last visited Mar. 2, 2016) (select “fandom” and choose “Books & Literature” from the drop down list; then select “Twilight Series—Stephenie Meyer” and type “Genderswap” into the “Other Tags” search on the sidebar). It should be noted, however, that genderswap does not comprise a large part of the *Twilight* fan fiction catalogue on that site by any means. *Id.* That being said, simply skimming a list of notable genderswap fics demonstrates the overall popularity of the genre. *Genderswap*, *supra* note 249.

251. See, e.g., Mathilda Gregory, *Gender-Swap Twilight Should Expose the Flaws in the Original—I Can’t Wait*, GUARDIAN (Oct. 7, 2015, 11:52 AM), <http://www.theguardian.com/commentisfree/2015/oct/07/gender-swap-twilight-stephenie-meyer-life-and-death> (“Can it be fan fiction if it is by the author of the original work?”).

252. See *supra* Part I.A.2.

those preexisting works simply could not compete with the authority that comes from being written by the original author.

For the fan authors, keeping the practice noncommercial retains creative freedom, a crucially important feature of fan fiction. The compulsory licensing agreement would allow fan authors to transform the work however they wanted so long as their work continued to meet the broad restrictions in the license.<sup>253</sup> Because the compulsory license mirrors preexisting norms within the practice,<sup>254</sup> there are no undue restrictions placed on fan authors, a commonly critiqued symptom of licensing schemes that exploit fan fiction.<sup>255</sup> Additionally, licensing schemes are often a bad economic deal for fan authors, a fact often overshadowed by the commercial success of *Fifty Shades of Grey*.<sup>256</sup> For Kindle Worlds, the royalties paid to the fan authors are minimal at best, and even if a fan fiction were to gain wide success, the fan author has already ceded TV, movie, and merchandising rights to Amazon Publishing and the copyright holders.<sup>257</sup>

Maintaining the non commerciality of fan fiction allows fan authors to transform the work in whatever way they see fit, while giving copyright owners the ability to control commercial fan fiction that would most directly compete with their franchise. Additionally, requiring that fan fiction be noncommercial protects fan authors from inequitable economic deals that most other licensing agreements impose, while still allowing them the choice to enter into those agreements should they so desire.

## 2. Economic Benefits for Websites and Copyright Owners

One of the key benefits for copyright owners is the opportunity to monetize their franchises.<sup>258</sup> The compulsory scheme establishes a royalty that the copyright owners must be paid.

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253. The lack of transformability in licensing is often critiqued. *See Hearing, supra* note 158.

254. *See supra* Part III.A.1.a (describing how the compulsory scheme reflects common practice).

255. *See Tushnet, All of This Has Happened Before, supra* note 111, at 1470 (“With commercial exploitation comes a lack of creative freedom.”).

256. *Id.* at 1469–70.

257. *See Rights and the Publication Agreement, supra* note 122; *Sales, Royalties, and Payments, supra* note 123.

258. *See* Press Release, Amazon Publ’g, Amazon Publishing Introduces “Kindle Worlds,” a New Publishing Model for Authors Inspired To Write Fan Fiction—Launching with an Initial License of Popular Titles from Warner Bros. Television Group’s Alloy Entertainment (May 22, 2013), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1823219>.

Because the licensing agreement is with the website, there is more assurance that the copyright owner will be paid this fee, due to the commercial nature of many websites.<sup>259</sup>

One critique of this system is that it has the potential to eliminate smaller websites from the fan fiction market because of their inability to pay royalties. However, the scheme also benefits the websites that take advantage of it, because it opens up new opportunities for profit. This proposed scheme would be fertile ground for one revenue-generating source in particular: targeted advertising.

A version of targeted advertising exists in Google's Content ID for YouTube, which allows a copyright owner to submit files of their content to YouTube and when a user uploads matching content several options are granted to the copyright owner.<sup>260</sup> On the one hand, they can disable the video or mute certain parts.<sup>261</sup> On the other, the feature allows them to run ads on the video and track the video's statistics.<sup>262</sup> It is the latter aspect that could be implemented into the proposed fan fiction licensing scheme.<sup>263</sup> Copyright owners could target sites that contain the most works based on their material and negotiate with the website to run ads for other features of their franchises. Such uses of data collection may raise privacy concerns beyond the scope of this Note,<sup>264</sup> but this benefit is more attainable with the forced cooperation that a licensing scheme brings. This could result in additional revenue for both the copyright holder and the website.

Keeping the licensing agreement between the website and the copyright owner allows both parties to profit from the agreement. In essence, the scheme keeps the monetary aspect of licensure between the commercial parties who are in a better

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259. The amount of money a website can make varies, but for information on how websites can make a profit, see Balaji Viswanathan, *How Do Free Services on the Web Make Money*, FORBES (Feb. 26, 2013, 11:24 AM), <http://www.forbes.com/sites/quora/2013/02/26/how-do-free-services-on-the-web-make-money>.

260. *How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Mar. 2, 2016).

261. *Id.*

262. *Id.*

263. The specifics of the Content ID program extend beyond the reach of this Note, but for more information about its copyright implications and its relationship to other programs like Kindle Worlds, see Tushnet, *All of This Has Happened Before*, *supra* note 111.

264. *See id.* at 1458.



position to bargain with one another, rather than with the fan author who has relatively little leverage.

### 3. Enforcement of the License Is More Effective

Another benefit of this licensing scheme is that it reduces the complications of having to individually license with each fan author.<sup>265</sup> From the copyright owner's perspective, there are too many expenses associated with attempting to grant a license to each potential fan author, who themselves often lack the resources to obtain a license.<sup>266</sup> This same concern has spawned similar mechanisms in other industries to streamline these procedures. Most prominent is the creation of three performance rights organizations (PROs) in the music industry that facilitate licensing between radio and television stations and the copyright owners, and that substantially lower the transaction costs required to play music over the air.<sup>267</sup> The fan fiction websites under this proposed scheme would perform the same intermediary function as these PROs.

One potential counterargument is that fan fiction today is hosted on a variety of sites and therefore does little to streamline the number of potential licensees.<sup>268</sup> A widely adopted licensing scheme may serve, however, to condense fan fiction onto fewer sites, although with that result comes concerns about the potential for censorship.<sup>269</sup> Regardless of the number of sites that take advantage of the license, because the license is compulsory the number of websites that are eligible to utilize the scheme has less of an impact than if the copyright owners still had to individually negotiate with every site. Because any site that meets the statutory requirements can take advantage of the license, the risk of censorship is lessened. In addition, anti-

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265. See *Hearing, supra* note 158 (stating that licensing is not a practical solution because of the expenses associated with individually contracting with each author).

266. *Id.* at 23–24.

267. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 50 (2004).

268. See Piotr Kowalczyk, *15 Most Popular Fanfiction Websites*, EBOOK FRIENDLY, <http://ebookfriendly.com/fan-fiction-websites> (last updated July 27, 2015). For example, even the book-reviewing site Goodreads hosts fan fiction. *Fanfiction Stories*, GOODREADS, <http://www.goodreads.com/story/tag/fanfiction> (last visited Mar. 2, 2016).

269. See Tushnet, *All of This Has Happened Before, supra* note 111, at 1451, 1483.

trust legislation could play a regulatory role if power becomes too concentrated in only a few sites.<sup>270</sup>

#### 4. Access to Voluntary Creative Labor

Aside from opportunities to further monetize their franchise, fan fiction also gives copyright owners the opportunity to connect with their fans and their fans' creative resources.<sup>271</sup> For a franchise that produces tie-in novels, this could be a remarkably easy way to find its next author. In the pre-Internet era, *Star Trek* was one such franchise that engaged with fan authors and tapped into that creativity.<sup>272</sup> From this franchise came *Star Trek: The New Voyages*, which was a collection of fan-written, published short stories and was one of the first attempts to make fan fiction "respectable."<sup>273</sup>

In addition, fan fiction plays a significant role in fan studies, which gives insight into how audiences engage with materials and is therefore another useful resource for copyright holders to gauge how audiences respond to their work.<sup>274</sup> Rebecca Tushnet, a prolific legal scholar in the area of fan fiction, points out that copyright owners who do not suppress the creativity of their fans have "robust and profitable fandoms."<sup>275</sup> Although Tushnet claims licensing schemes "corral" fan fiction onto "'authorized' channels,"<sup>276</sup> the compulsory nature of this proposed scheme addresses this fear by allowing almost any website to take advantage of the license.

In short, this proposed licensing scheme provides substantial benefits to all of the impacted parties. It does so by striking the appropriate balance between authorial control and creative expression, while solving many of the problems inherent in other licensing schemes.

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270. Antitrust measures have served to assuage similar fears in the music industry regarding PROs. FISHER, *supra* note 267, at 51.

271. See Jones, *supra* note 17, at 3.7 (quoting a statement by Professor Alexis Lothian about the use of fan labor).

272. SCHWABACH, *supra* note 24, at 9.

273. *Id.*

274. See *Introduction: Why a Fan Fiction Studies Reader Now*, *supra* note 27, at 1; Jones, *supra* note 17, at 3.8 (giving examples of TV show creators using the fan community to receive immediate feedback on episodes).

275. Tushnet, *All of This Has Happened Before*, *supra* note 111, at 1477.

276. *Id.*

## CONCLUSION

Fan fiction has been a popular practice for decades, and, with the advent of the Internet, it has expanded to become more diverse and accessible than ever before. For the most part, fan authors presume that their use of the underlying copyrighted work is fair. Conversely, creators often see fan fiction as infringing and send takedown notices to prompt its removal.

This Note critiqued both approaches. While some fan fiction is fair use, the practice is inherently diverse and too varied to presume that *all* of it is fair use. Takedown notices are also often inappropriate, because some fan works are improperly removed. In an attempt to harmonize these two approaches, this Note proposed a licensing scheme that works on two levels. First, a compulsory licensing scheme for copyrighted works that only applies to websites avoids giving copyright owners too much power to restrict creativity but still retains the owner's rights in the commercial context. Second, a terms of service agreement on the website enforces the license against fan authors, without monetarily exploiting the practice. Fan authors who want to commercialize their fan fiction would thus be outside the licensing scheme, and the fair use analysis would apply. This licensing scheme protects both fan authors and copyright owners in a way that allows the practice of fan fiction to continue to grow and flourish.