

**FAN FICTION AND THE FAIR USE DOCTRINE UNDER
COPYRIGHT LAW**

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ABSTRACT

Fan fiction is not an entirely new concept but it has certainly been reinvented and pushed to the forefront in this digital age. The world as we know it has changed tremendously in leaps and bounds with the evolution of internet; but changes in law haven't always followed in as rapid a succession. Internet is a platform that brings together people with similar interests and ideas. This means that traditional means of fandom communication such as 'fanzines' are now out-dated and replaced by 'fan sites'. It is not unusual for one to watch a movie or a TV show or read a book and feel that certain aspects of it could have gone differently; when these feelings are reproduced in the form of writing it becomes fan fiction. Fan fiction incorporates the characters, the setting, and the environment of the original work. The author of fan fiction uses the original storyline as a backdrop for his/her work. This use can be considered an infringement of the intellectual property rights of the original author, in particular the copyrights of the original author. Copyright law has been formulated in order to protect the creative and economic interest of the original author. While fan fiction for long remained obscure and in background and was

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allowed to develop without much hindrance from copyright laws. The thrust that internet has given to it has resulted in it being pushed to the mainstream and its wide spread prevalence means that it can no longer be written off and pushed to the side. While fan fiction has traditionally been written and published for no charge, there has been a recent increase in the number of fan fiction works that are commercial and written for profit. The question before law is now to decide how much of the original work should be protected under the ambit of copyright laws in order to ensure that the original author's creative and economic interests are protected. The law also needs to ensure that its presence in the form of copyrights do not hinder the development of creativity in the society. It is also important to note that most works which garner such interest and fan activities are those which belong to the sci-fi or fantasy genres. The article is divided into seven sections (or headings), first of which introduces the topic. Second explains the meaning as well as the history of fan fiction, the third section explains how authors of fan fiction have changed their mode of publication from fanzines to websites and blogs on the internet and the role that mass media plays in fan fiction. The fourth considers the new species of fan fiction *i.e.* commercial fan fiction and its impact on copyright law. Next section explains fan fiction with respect to one of the more widely phrased copyright law, that of the US. Section 107 of the Copyright Act of the US, deals with the Fair Use Doctrine, which is an exception to copyright infringement. Similarly, the Indian Copyright Act, 1957 has Section 52 which details acts which do not fall within the purview of infringement of

copyright. Section 52 has been discussed in the sixth section of the article with a brief historical run down of the copyright law in India. The last section sums up various aspects that have been discussed in the article and presses on the need of a suitable law on fan-fiction balancing various conflicting interest.

1. INTRODUCTION

The second half of the twentieth century saw massive changes in the world of storytelling. Genres like science fiction and fantasy, which earlier lurked in the background were brought to the limelight and became immensely popular. With the rise of these genres came the rise of fandoms. Fandoms are not restricted to these genres, but some of the biggest and most popular ones are certainly linked to them. One of the first such formal fandoms was that of the *Star Trek* series which saw overwhelming popularity. While factors such as globalisation and technological advancements certainly played a crucial role in advancement of its popularity, another important factor to be considered is the immersive and imaginative nature of the story. These modern fantasy series created completely different and self – sufficient secondary works which has sparked in readers the need to explore and understand these worlds and imagine events outside of the story itself. The 1960's saw one of the first examples of fan fiction when fans of the *Star Trek* series published stories based on the characters and the environment of the series in magazines known as fanzines. The 1990s saw another drastic change in the world of fan fiction with the introduction of internet which brought together fans

from across the globe and provided them with a medium to interact and build communities.¹ Today, fans communicate using media such as websites, blogs, etc. Not all works published in the name of fan fiction are done so for free. Certain works of fan fiction are published for commercial purposes. Fan fiction arises from the human impulse to know ‘what happened next.’² Fan fiction provides fans with a medium to discuss, enjoy and portray the original works in ways that might not have been contemplated by the original author. Despite all this, the legal status of fan fiction remains unclear. On one hand, law has to protect the rights of these fan fiction authors and provide protection to their works. The question then arises, how much fan fiction should the law protect? Should the law protect only fan fiction that is made purely for the love of the work and not for monetary benefit or include in it commercial works of fan fiction? Balanced against these, on the other hand, are the interests of copyright holders and the original authors. Fan fiction can alter story lines of the original work or portray characters in ways that the original author may not be comfortable with. Hence, law should also protect the economic and creative interests of the original authors and copyright holders.³

The Indian law has had relatively no exposure to fan fiction and so there exists no legal guidelines to define the position of these works. Section

¹ Jane Becker, *Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet*, 14 CONN. PUB. LIT. L. J. 133, 133-34 (2014).

² Rebecca Tushnet, *Legal Fictions: Copyright, Fan fiction and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 652 (1997).

³ Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 387 (2009).

52 of the Copyright Act of India, 1957 aims to provide protection to works that fall under the ambit of fair use. Fan fiction might not fall under this protection and thus leaving fan fiction authors without protection; and if it does, there might be an infringement of the rights of the original author. The article aims to address these ambiguities in law.

2. DEFINITION AND HISTORY OF FAN FICTION AND FANDOMS

“Fan fiction” broadly speaking is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show and is not produced as “professional writing.”⁴ This definition highlights three important aspects of fan fiction. They are; one, it is in writing and not in any other mode of fan activity such as video mash ups, etc. Second, fan fiction is based on an identifiable segment of popular culture and thirdly that the written matter must not be produced as professional writing.⁵

Although fan fiction is associated with internet, its genesis was at least one hundred years prior to the popularisation of internet. When Sir Author Conan Doyle stopped publishing new stories of the popular *Sherlock Holmes* series, his readers began to write their own stories with these characters. From 1869 to 1930, more than two hundred fans used the characters from Lewis Carroll’s *Alice in Wonderland* in order to write their

⁴ Tushnet, *supra* note 2, at 655.

⁵ Jacqueline Lipton, *Copyright and the Commercialization of Fan Fiction*, 52 HOUS. L. REV. 425, 434-35 (2014).

own works. These works included rewritten ending to elaborate political parodies.⁶

Modern day fan fiction can be traced back to the Star Trek era of the 1960s and 70s. Fans of the original *Star Trek* television series published their fan writings in Star Trek fanzines which had a very limited audience.⁷

Most fans are predisposed to behave in a certain way when it comes to fan fiction. Some of the common characteristics that they show include: firstly, fans refrain from activities that would negatively impact the copyright holder's economic and creative interests. Practices that erode these interests could potentially result in the stopping of publication of the works that they are fans of. Secondly, fans incentivise others to share in their affections. Through various modes like blogs, websites, fan conventions, newsletters, *etc.* fans not only interact with one another but also create interest in and expose the original work to others. Thirdly, fans are very particular about differentiating between canon (the official work that is considered to have actually happened in the fictional world) and non-canon works. For example, in the US, fans of works like *Star Wars* and *Star Trek* have created entire databases to distinguish between canon and non-canon works. Fourthly, fans also consider their fan community or fandom (fan and kingdom) very integral to their role as a fan. These fan communities often create an extra legal code of conduct that invariably

⁶ Mollie Nolan, *Search for Original Expression: Fan Fiction and the Fair Use Defence*, 30 ILL. U. L.J. 533, 549 (2006).

⁷ *Id.* at 550.

protects the creative and economic interest of the copyright holder; non-abidance of these rules can lead to ostracism.⁸

3. FAN FICTION IN THE DIGITAL WORLD

Mass media today plays a crucial role in helping us define images of beauty, ideas about gender, sexuality, *etc.* Media greatly influences the way we think and perceive things on a daily basis. Popular culture such as books, television shows, movies, comics, *etc.* gaining a global following due to the internet and mass marketing.⁹ Mega franchises like Harry Potter, Pirates of the Caribbean, Marvel's The Avengers, *etc.* are immensely popular stories that have become part and parcel of our culture and greatly influence the society's thought. Cultural and societal change has accelerated due to greater accessibility to media.¹⁰

The truth is, however, that most of these stories are published through corporates that are owned and controlled by major media conglomerates. Take for example the world of movies Viacom owns Paramount Pictures, MTV, Comedy Central, Nickelodeon and various others. This narrows the diversity of the content considerably to only those versions of the story that best fit ideals of these large conglomerates.¹¹

Through internet, fan fiction authors have a mode of publication that is free of cost and gives access to a limitless number of readers. The internet

⁸ Nathaniel Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan Based Activities*, 20 SETON HALL J. SPORTS & ENT. L. 131, 138 (2010).

⁹ Lipton, *supra* note 5, at 138-39.

¹⁰ *Id.* at 138.

¹¹ *Id.* at 139.

also gives these authors a chance to write and publish works without imposing conditions. One of the largest fan fiction websites is fanfiction.net that has eight categories of fan fiction including books, television shows, comics, movies, cartoons and even video games. Fan fiction is published on this website in 20 languages. In the television category alone there are 450 shows which have fan fiction in numbers ranging from only a few to a few thousands.¹²

The internet provides a platform for those works which represents categories of the society such as women, LGBT persons, people of colour, *etc.*, as, such works would have otherwise gone unpublished for being incompatible with the models of large corporates.¹³ Although fandoms are usually male dominated, 90% of fan fiction authors are female. The reason for this is because the target audience of these works are the males whose interests are satisfied. Women on the other hand are forced to identify with male characters. Fan fiction in a roundabout way gives women a chance to better identify with the protagonists of the story.¹⁴

4. COMMERCIALISATION OF FAN FICTION

One of the most commonly used defences to fan fiction is that it is published free of cost and is written for non-commercial purposes. Fan fiction is supposed to be written to a target of audience of fans who are already aware of the facts and circumstances in the original work. But of

¹² Nolan, *supra* note 6, at 550-51.

¹³ Lipton, *supra* note 5, at 139- 40.

¹⁴ *Id.* at 141-42.

late more and more fan fiction works have been published as commercial works. For example, the best-selling ‘Fifty Shades of Grey’ and Gabriel’s ‘Inferno’ were both originally fan fictions of the popular Stephanie Meyer’s ‘Twilight’ series and have been sold successfully across the globe making profits.¹⁵

Realising the potential for selling commercialised fan fictions, Amazon Publishing in 2013 launched Kindle Worlds publication platform which is based on its ‘Kindle Direct Publishing’ (KDP), a self – publishing platform. Amazon first obtains licenses from the copyright holders of the original works of large fandoms to publish fan fiction and sell them to customers for profit. The author of the fan fiction work then gets a cut of the profits, but not as much as he/she would get if the book is published as an original work. In addition, Amazon also holds an irrevocable, exclusive license for the copyright term of the fan fiction work and also decides the price at which the work would be sold. Amazon also imposes certain conditions like no crossover characters (*i.e.*, characters from another book/series) are allowed in fan fictions. The original copyright holders too set out some guidelines to be followed while publishing fan fiction on the Kindle World program.¹⁶

Another example of commercialised fan fiction is that of the ‘Harry Potter Lexicon’. The Harry Potter fandom is one of the largest fandoms, mainly due to its being published during the age of the internet. Fans built

¹⁵ Lipton, *supra* note 5, at 429.

¹⁶ *Id.* at 430-31.

thousands of websites with millions of pages dedicated to this well-loved series. J. K. Rowling, the author of the Harry Potter series, is known to encourage fan fiction works. The Harry Potter Lexicon was a website of Steven Vander Ark. The lexicon was an encyclopaedia of Harry Potter to the world and contained various characters, places and objects mentioned in the books.¹⁷ In 2007, Steven Vander Ark and RDR Publishers decided to publish the lexicon in book format. This matter was looked into in the case of *Warner Brothers v. RDR Books*.¹⁸ Warner Brothers (the copyright holders of Harry Potter) won the case and Steven Vander Ark was asked to make necessary changes in the lexicon before it was published.¹⁹

In the case of *Suntrust Bank v. Houghton Mifflin Co.*,²⁰ the fan fiction of Alice Randall was found not to be infringing the copyright of ‘Gone with the Wind’ written by Margret Mitchell, instead it was construed to be a parody called ‘The Wind Done Gone’; which is written from the point of view of the African – American slaves of the original story.²¹

Commercial fan fiction is a problem under copyright law; although it may not be right to refer to it as fan fiction because being a professional production it lacks some of the basic features of fan fiction. Lack of litigation is also a hindrance in resolving the stance of law with respect to commercialised fan fiction.²²

¹⁷ Schwabach, *supra* note 3, at 420-21.

¹⁸ Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 519-24 (S.D.N.Y. 2008).

¹⁹ *Id.* at 428-30.

²⁰ Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266-67 (11th Cir. 2001).

²¹ Lipton, *supra* note 5, at 437.

²² *Id.* at 459-60.

5. COPYRIGHT LAWS AND THE FAIR USE DOCTRINE IN U.S.

Copyright law in U.S., similar to India, has its roots in British Law. The Statute of Anne, which was enacted in Britain in 1710, is a predecessor to the American laws. The statute was concerned with the printing, reprinting and importing of books. The fair use doctrine in the U.S. was decided by various Supreme Court cases in the mid nineteenth century. Section 107 of the Copyright Act of the U.S. deals with the Fair Use Doctrine. The Fair Use Doctrine was incorporated by the legislature in the Copyright Act, 1976.²³

Copyright holders have certain exclusive rights: these include:

- i. The reproductive right; wherein the law grants the copyright holder a “work in authorship.” A third party cannot copy from the original work without authorisation from the original author. This copying is not limited to verbatim, wholesale copying. In order to establish infringement the plaintiff has to prove that “the defendant copied his/her work and that the defendant’s copying amounted to unlawful or improper appropriation.”
- ii. The Derivative Works Right; A derivative work is defined in the statute as “A work based upon existing work in the form of ... or in any other form in which a work may be recast, transformed or adopted.” The infringement of this right depends on the source work.

²³ Lipton, *supra* note 5, at 443-45.

iii. The Distribution Right; A strict liability is attached to the infringement of this right, irrespective of whether or not the work was written for commercial purpose. The distribution right is typically infringed along with the reproduction right. This right is particularly problematic in the digital world where a work can be published at the push of a button without incurring any other costs.²⁴

5.1. THE FAIR USE DOCTRINE

In fan fiction cases, the most obvious defence to a claim of copyright infringement is that of fair use given under Section 107 of the Copyright Act.

The need for this doctrine is justified by the following theories:

- a. The Economic Theory; this theory balances the public's access to authorship with the author's incentive to produce creative works. This right limits the public access to make works based upon other work and excessively promotes the overproduction of authored works. It also discourages any improvements made to the original work. It also does not take into account non – commercial art and fan works.
- b. The Labour Theory; this theory was propounded by John Locke. Under this theory, the result of a person's labour is his/her property. In the case of *Feist v. Rural Telephone Service*,²⁵ the court held that copyrighted work does not create copyrightable work and that the *sine qua non* of copyright is

²⁴ *Id.*

²⁵ *Feist v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

originality. Fan fiction authors who labour over their works lack protection because their idea was not original enough.

- c. The Personhood Theory; this theory recognises that each artist has a special connection to his/ her art. This theory is dangerous as the author can no longer control his/ her work after it has been published in a public domain and the public is not required to respect his/ her wishes with regard to the publication of derivative works.²⁶

The following four theories are used by the court in determining if a particular use can be described as fair. The first factor is the nature and purpose of the use; most fan fictions are written free of cost and are published freely on internet. Most fan fiction works also begin with a disclaimer proving their intention to not infringe the rights of the copyright holder and give due credit to the original author. Another aspect of this factor is transformative use. When a fan fiction author takes from an original work characters and settings and then explores new situations in which they can be used, it requires a considerable amount of time and effort. It can easily fall in the category of transformative use. In *Batlin Sons Case*, the court held that fan fiction was a copyright infringement because it did not require sufficient talent and skill to create.²⁷ This is an unfortunate statement and most certainly does not take into consideration the creativity and skill that goes into writing and publishing a work of fan fiction. Further, there

²⁶ Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fan Fiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 193-96 (2014).

²⁷ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

exists no demarcation to determine the original and copied works as most works are to a certain extent inspired by another work.²⁸

The second factor is the effect of the use on the potential market. One of the main purposes of copyright law is to protect the economic interests of the original author. Fan fiction keeps the spark of interest in the original work ignited and keeps its readers loyal to the characters. In *Lewis Galoob Toys, Inc. Ltd v. Nintendo of America, Inc.*,²⁹ the court recognised that access to alternate video game characters had the potential to improve market conditions for the original product. Along the same lines, fan fiction considers possibilities in the story that copyright holders most likely would not allow to be published. Fan fiction often involves rather unbelievable changes in the characters and cannot therefore be considered as substitutes. Lack of copyright protection especially for derivative works has stimulated creativity and investment in new technologies such as photographs, cable, television, radio and even the Internet.³⁰

The third factor is the amount and sustainability. What this means is that fan fiction is more likely to fall under the fair use defence when the amount of the original work borrowed is insignificant. In the case of *Warner Bros. Pictures, Inc. v. Columbia Board Sys., Inc.*,³¹ or the *Sam Spade Case*

²⁸ Tushnet, *supra* note 2, at 664-68.

²⁹ *Lewis Galoob Toys, Inc. Ltd. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

³⁰ Tushnet, *supra* note 2, at 669-76.

³¹ *Warner Bros. Pictures, Inc. v. Columbia Board Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954).

in which the court held that characters are an integral part of the story can be protected by copyright but not “chessmen” characters.³²

The fourth factor is the effect on the original work’s market. Under this factor, fan fiction works that are economic substitutes are generally not protected by the fair use doctrine. While on one hand copyright holders need to have important rights in their creations, they must not be allowed to hoard them so this will go against society’s interest. While fan fiction authors suggest that since their works are both transformative as well as non-commercial it doesn’t make sense that they be considered as instruments to erode the market of the original work. Copyright holders counter argue with the point that they should be allowed the liberty of deciding how and when additional interest should be spurred.³³

6. THE DEVELOPMENT OF COPYRIGHT LAW IN INDIA

The idea of copyright protection came with the advent of printing, which allowed works to be duplicated using machinery. After 1483, England emerged as a major centre for printing trade in Europe. This led to the creation of a class of book printers who also doubled as book sellers. In 1557, Queen Mary I granted them the right to regulate the book trade. This was the first clear law aimed at protecting literal copyright and checking piracy. The first codified law came with the passing of the Statute of Anne in 1710. This statute gave authors the right to print their works for a period

³² Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss*, 9 B.U. J. SCI. & TECH. L. 434, 458-60 (2003).

³³ *Id.* at 461-63.

of fourteen years. The copyright acts of 1814 and 1842 increased the time of protection for the authors from fourteen to twenty eight and forty two years respectively. An Act passed in 1847, during the rule of the British East India Company, applied the English Copyright law to India. Under this, the author's rights were protected for his lifetime and seven years after his death but could not exceed forty two years. The Copyright Act of India 1914 added some new provisions to copyright law in India and remained applicable until the Copyright Act of 1957 was passed in India. This Act has been amended five times in 1983, 1984, 1992, 1999 and 2012. This Act set up a copyright office under the registrar of copyright who acts under the Central government. A copyright board for the judicial proceedings has also been set up under this Act. The term of Copyright protection was extended to 60 years by the 1992 amendment.³⁴

6.1. FAIR USE UNDER THE COPYRIGHT ACT OF INDIA

Section 52 of the Copyright Act of India, 1957 gives us the acts which are considered not to be an infringement of copyright. These acts include; private use including research, criticism or review, making copies or adaptation of a computer program, for the purpose of reporting current events, reading or recitation in public of a reasonable extract and publication in an educational institution.³⁵ The difference between Section 107 of the American Copyright Act and Section 52 of the Copyright Act of India is

³⁴ Charu Dureja, *Historical Development of Copyright Law in India*, 4 I.J.A.R.M.S.S. 50, 50–57 (2015).

³⁵ Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

that the Section 107 can be read and interpreted a lot more widely than Section 52.

The Copyright Act of India under Section 52 lays down very clear guidelines to decide what falls and what does not fall under exceptions to the infringement to copyright. Under the Copyright (Amendment) Act, 2012 under clause (o) of Section 52 the words “public library” has been amended to “non – commercial public library.”³⁶ This very clearly shows that commercial fan fiction under the Indian law will not receive much protection especially in comparison with non – commercial fan fiction. The Indian law does not have any precedents or judicial ruling in the matter of fan fiction. It is therefore very difficult to ascertain the position of Indian law with respect to this matter.

7. CONCLUSION

Since beginning, story tellers have spoken in myths and legends and have retold them and their different versions. The fact that these stories are now recorded in a fixed medium should not prevent such retelling of stories. The original aim of the copyright act was to provide protection to the authors of works as well as their creative ideas while also enabling others to cultivate ideas to the works and so help in the growth of creativity. Lack of litigation in the area of fan fiction and copyright infringement in India is certainly a hindrance in understanding the stance of Indian law in this respect. Lack of certainty as to the legal position of copyright law with

³⁶ Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

respect to the non – commercial fan fiction itself means that commercial fan fiction has a long way to go before its position is clarified. But the essence of fan fiction is lacking when fan fiction is sold for commercial purposes and the intent of furthering the original story as a fan and for no gain of their own is lost. The current copyright law fails to address such issues especially with regard to emerging technologies that make individuals feel that copyright law which has thus far ignored them does not apply to them. And when individuals work outside the scope of law they tend to rely on the concept of fairness rather than legitimacy. Recognising the legitimacy or the illegitimacy of fan fiction on the Internet is a good starting point from which the law can further build up. People should be able to participate actively in the creative aspects of the world around them. Emphasising on non – commerciality, it is in most peoples’ opinion a just way of going up this matter. Non - commercial users are rarely found guilty of copyright infringement and also resounds well with what can be considered the ethics of story - telling. A very loosely worded and vague copyright law, such as the current one, makes fan fiction authors feel legally intimidated. The main concern for copyright holders is that through fan fiction characters and elements of the story may be portrayed in ways that they might not be comfortable with or could end up in the story being misrepresented. The onus is therefore on the law to think of a solution in which the interests of copyright holders, authors as well as fans are taken into consideration. Context is one of the most important elements of a case. This holds true even in copyright law and fan fiction. Fan fiction is a unique blend of

properties that includes its non – commercial nature, as a tool of communication among members of the fandom, and the benefits that it provides to copyright holders and these properties set it apart from other derivative works. Fan fiction is a very good example of how free speech can also be seen in copyright law without infringing on the author’s as well as the copyright holder’s rights. Fan fiction is a unique challenge to copyright law as it is a direct conflict between the interests of the copyright holders and authors of the original work on one hand; and fan, fandoms, and authors of fan fiction on the other, keeping in mind the rights of public to fair use. The current copyright law does not accommodate adequately the interests of these parties and therefore it is important that new rules are framed to effectively address the clashes of interests and ambiguities in law.