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## Fanfiction and Copyright: Unsolvable equation? Legal impact of Fanfiction on copyright

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# Fanfiction and Copyright: Unsolvables equation?

*Legal impact of Fanfiction on  
copyright*

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Master in Multilingual Communication – Language  
and Culture



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## I. INTRODUCTION

What if Dennis Nedry could escape Jurassic Park with the dinosaur embryos?... What if Harry Potter was in Slytherin?... What would be Gandalf's childhood? Etc...

These questions might sound pointless to most people, but they were asked by many readers of these masterpieces. Some were motivated to answer these questions, while others tried to recreate new stories within the original. This is how fanfiction started to appear. New fiction created by fans based on their favorite original fiction.

All pop culture junkies, TV addicts, and other nerdy geeks would tell you that fanfiction is a “*Breath of fresh air*”<sup>1</sup> that allows you “*to participate in literature actively.*”<sup>2</sup> Many perceive fan fiction as the most innovative way to pay tribute to creative work and its author. Fanfictions are texts written by fans for other fans, but also for themselves, based on the plot of original works such as books, films, TV series, comics, animes, or mangas.

It has generated important and specific terminology over the past several decades, such as the word “Canon” as the original work in opposition to the “Fannon,” which is the fan fiction work. The word “Fandom” is frequently used to identify the people who enjoy a specific story, character, game, etc., actively interact with each other, and constitute the fans community. “Harry Potter”, “Marvel Cinematic Universe” and “Star Wars” have the biggest fandoms in the world. Many other terms were created, such as “Fanzine” for fan magazine, “Mary Sue” for the author’s favorite character, etc.<sup>3</sup>

Indeed, as a hobby, multiple anonymous readers and fans “rework” their favorite author’s characters to express and communicate to the community their passion and common interests in the original work.

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<sup>1</sup> The Pros and Cons of Fanfiction, <https://theactdiary.wordpress.com/2016/01/13/the-pros-and-cons-of-fanfiction/> (May 2021).

<sup>2</sup> C. BRODIE, Motivation and Fanfiction: The Key to Promoting Literary Development and Enthusiasm, Harvard Graduate School of Education, Spring 2016, 7.

<sup>3</sup> See the Fan Fiction Terms Glossary, <https://www.translationdirectory.com/glossaries/glossary319.php>



The purpose of these fans is to share with other fans their interrogations, questionings, investigations, and interest regarding their favorite fictional works, authors, or characters.

They actually create or invent all kinds of scenarios or stories that are not told in the original work, and they provide answers to all the typical questions a fan would have, such as What if? What if the story ended differently? What if such a character made such a decision instead? ...

As explained by professor Stendell, “*Fan fiction serves as a way for consumers of a particular source to mold that original work into a form that reflects their own cultural and social interests while nevertheless acknowledging the importance of the original work*”<sup>4</sup>.

This literary movement naturally is not new and appeared, as a form of art, for the first time in history with the invention and development of the first authorship regulations in the 18<sup>th</sup> Century. The phenomenon increased with the massive enthusiasm that emerged from American comics and TV series, such as Star Trek, Marvel Comics, and Very Special Agents, in the seventies, which led to a new wave of fans.

Then the arrival of the Internet has given a major boost to fanfiction by allowing access to fandoms anywhere in the world in a few clicks, as well as to read and write stories in different languages.

Quickly, multiple websites dedicated to Fanfiction flourished on the Web to host fanfiction writings, such as fanfiction.net, Wattpad, Archiveofourown, or Tumblr. With the internet, writers from around the world could publish and distribute their fan fiction writings much more quickly and cheaply to a much wider audience.

This popularization of the fanfiction practice also made the copyright holders and authors more careful and cautious about their creations and their rights. The massive development of fanfictions was increasingly perceived as a threat to the whole copyright legal system by authors and producers. These latter started multiple legal proceedings before the American courts to make fanfiction practice unlawful. Later these proceedings were also initiated in Europe, most of the time to protect American creative works.

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<sup>4</sup> L. STENDELL, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. Rev. 1552 (2005)

The present paper attempts to provide an analysis of fan fiction, as a literary movement in our modern societies, from a legal perspective to have a reading grid to understand the (un-)lawfulness of the Fanfiction practice regarding our copyright legal system.

Indeed, as described by scholars, “*While fan fiction’s main goal is to provide added entertainment for fans of a particular franchise, many authors of the original works feel that these new stories encroach on their property rights*”<sup>5</sup>.

After a historical review of the evolution of the “Fanfiction” practice (**Part II**), this paper shall define “Fanfiction”, as a literary movement, and try to provide a comprehensive description of its main features (**Part III**).

Once defined, Fanfiction shall be analyzed at its core to discover its legitimacy and its significant contribution to modern literature to the point that it should be considered a real intellectual piece of work (**Part IV**).

This paper shall examine the legal consequences of Fanfictions. In order to do this, the thesis shall provide a basic introduction to Belgian copyright law (**Part V**) before describing the implementation of these rules to the Fanfiction phenomenon (**Part VI**). On this occasion, the paper shall also describe the implementation of the United States Copyright law to this literary movement and highlight the differences existing with Belgian regulation and the resulting uncertainty of the legal approach.

This uncertainty puts fans and copyright holders on uneasy and unsteady ground, especially since the arrival of the Internet, which led to a vast and quick spread of information. The consequence is that the distinction between what is owned and what the public is allowed to do with it is getting thinner, and sometimes it is getting very nebulous.

That is why the thesis shall also suggest some potential proposals to amend or complete our copyright legal system to be more in step with the challenges of our time in terms of this literary phenomenon that represents millions of writers, fans, works, and potentially billions of euros of revenues (**Part VII**).

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<sup>5</sup> M. CHATELAIN, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, TUL. J. TECH. & INTELL. PROP., Vol. 15, p.201.

## II. HISTORY OF FAN FICTION

### A. An old tradition of storytelling and borrowing

The concept of fanfiction dates back to the early days of literature when readers would craft their own stories and poems featuring popular characters and plots. Although, the term “Fanfiction” didn't come into play until the 20th century when science fiction began to increase in popularity.

As humankind started to create fiction stories, people began to reproduce original stories and express them differently based on their historical circumstances, religious beliefs, or social contexts.

Throughout the annals of history, humanity has demonstrated an innate habit for storytelling that has passed down from one generation to the next.

In this light, fan fiction can be considered a modern iteration of oral literature, with numerous individuals contributing their unique perspectives to the unfolding narrative<sup>6</sup>. Oral storytelling is the oldest form of literature, with Greek mythology and folk tales as the inspiration for countless works of classical literature<sup>7</sup>.

As an illustration of this old tradition, Professor Jenkins referred to Homer’s *Odyssey* as using plots, characters, and storylines that were already well known to his audiences<sup>8</sup>. According to Jenkins, Fans write their own fiction as a part of the human tradition of storytelling and as a manifestation of our cultural tradition, which has always incorporated the practice of sharing<sup>9</sup>.

Other rhetorical forms, including riddles and proverbs, also feature prominently in African culture. The author Chinua Achebe was a master of the oral narrative tradition, as

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<sup>6</sup> A. KAHANE, Fan fiction, early Greece, and the historicity of canon, Royal Holloway, University of London, Egham, United Kingdom, available in

<https://journal.transformativeworks.org/index.php/twc/article/download/681/553?inline=1>

<sup>7</sup> R. STIJN, A. WAYSODORF, Fandom and FanFiction, 2017, p.5, available in <https://www.researchgate.net/publication/314712237>

<sup>8</sup> *Ibidem*, citing H. JENKINS, Digital land grab, *Technology Review*, 2000, 103(2), 103–106.

<sup>9</sup> *Ibidem*.

evidenced by his seminal work “*Things Fall Apart*,” drawing heavily from the cultural heritage of African oral tradition<sup>10</sup>.

Oral traditions occur through verbal means, and it involves folk tales, ballads, songs, and chants. Before having a writing system, the only way to preserve history and cultural heritage was to orally transmit the knowledge of each generation to the next one.

Plenty of literary examples prove the presence of “fan fiction alike” work before the creation of copyrights. Indeed, upon thorough inspection, it becomes apparent that Fan fiction existed for centuries before copyright laws were established.

Even the Bible is suggested by some scholars to be the subject of many Fanfictions throughout history<sup>11</sup>. Some even consider the Bible as a fan fictional piece of art based on the Ancient Testament or Jesus’s life<sup>12</sup>.

Before the creation of “fanfiction,” as admitted today, the history of humankind has many examples of “borrowings” in literature practice to transmit stories from one generation to another<sup>13</sup>. The writer’s task is not only to incorporate elements such as themes, characters, or structures into a new piece of literature. By doing so, they also enhance and contribute to literary creative work.

Borrowing allows writers to build upon the cultural and artistic heritage of storytelling, creating new layers of meaning and engaging in a dynamic literary dialogue.

In the analysis of linguistic borrowings, Einar Haugen states that “*the borrowing takes place without the lender’s consent or even awareness, and the borrower is under no obligation to repay the loan. One might as well call it stealing, were it not that the owner is deprived of nothing and feels no urge to recover his goods*”<sup>14</sup>. Writers or storytellers cannot stay faithful to the original narrative, plotlines borrowed, and characters reinvented. Borrowing elements such as plot, characters, and settings from existing stories has been a common practice in storytelling for a long time. This practice became even more widespread and peaked during the Elizabethan

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<sup>10</sup> A. CHINUA, *Things Fall Apart*, First Anchor Book Edition, 1959, 202.

<sup>11</sup> L. GROSSMAN, *The Boy Who Lived Forever*, TIME, Jul. 07, 2011.

<sup>12</sup> R. PAULAS, *The Bible Is Nothing but Fan Fiction for Jesus*, 1<sup>st</sup> April 2013, Vice, <https://www.vice.com/en/article/8gvpj5/the-bible-is-nothing-but-jesus-fan-fiction>

<sup>13</sup> G. HAWKINS, *The Art of Fanfiction: Exploring the Social, Cultural and Creative Contributions of Fanfiction for the Creative Writing Classroom*, University of Bedfordshire, September 2022, p.192

<sup>14</sup> E. Haugen, *The Analysis of Linguistic Borrowing* p 211, Published By: Linguistic Society of America. Vol. 26, No. 2 (Apr. - Jun., 1950), pp. 210-231.

era. William Shakespeare's plays, which are filled with allusions to earlier works of literature, as well as historical events and figures:

*“It should come as no surprise, then, that the works of William Shakespeare have amassed thousands of fanfictions, not only in the more abstract sense of film and modern adaptations but in the concrete sense of written fanworks posted online to sites (...)”*<sup>15</sup>.

Shakespeare’s famous plays, *Romeo and Juliet* or *Hamlet*, were based on other fictional works.

Scholars reveal that the first instance of fanfiction, in its modern form, was "*The Baker Street Letters*," written by Arthur Conan Doyle's fans during the late 1800s<sup>16</sup>. These stories showcased Doyle's renowned detective Sherlock Holmes and his companion Dr. Watson in adventures not written by Arthur Doyle<sup>17</sup>.

Jane Austen, the 18th-century English author known for her famous novels such as *Pride and Prejudice* and *Persuasion*, has also been the subject of Fanfiction works between the 19<sup>th</sup> century and today.

Indeed, hundreds of stories, sequels, rewritings, and continuations of her novels have been written and published over 200 years<sup>18</sup>.

Jane Austen’s novels have a significant influence on literature and society. Her voice has reached out to many women from different social classes. Her fiction represents her ideals and her vision of how the world should be. Her use of many literary styles like irony and parody and her sharp criticism of many social issues made her one of the most influential figures in English literature.

Jane Austen devotees and fans have even invented a term to define the enthusiasm for her work, “Janeite”. As an Austen scholar, Claudia Johnson defines “Janeite” as "*the self-consciously idolatrous enthusiasm for 'Jane' and every detail relative to her.*"<sup>19</sup> When the term appeared,

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<sup>15</sup> J. HAWLEY, *The Rivalry is Hot: Shakespeare, Harry Potter, and the Magic of Fanfiction*, Undergraduate research for Humanities, [https://www.researchgate.net/publication/342753458\\_The\\_Rivalry\\_is\\_Hot\\_Shakespeare\\_Harry\\_Potter\\_and\\_the\\_Magic\\_of\\_Fanfiction](https://www.researchgate.net/publication/342753458_The_Rivalry_is_Hot_Shakespeare_Harry_Potter_and_the_Magic_of_Fanfiction)

<sup>16</sup> S. M. LANTAGNE, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263 (2015).

<sup>17</sup> G. HAWKINS, *op.cit.*, p.47.

<sup>18</sup> PUCCI and THOMPSON, *Jane Austen and Co.: Remaking the Past in Contemporary Culture*. Albany, New York: State University Of New York Press, 2003

<sup>19</sup> C. JOHNSON, "Austen cults and cultures". *The Cambridge Companion to Jane Austen*, 1997, p. 211.

it brought together the English male elite, especially publishers and professors. However, reaching modern days, the term started to refer to Austen's enthusiasts, who were passionate about her world and books.

Jane Austen's novels have inspired many Fanfiction authors, producers, and scholars worldwide, especially in the cinema industry.

Through times and eras, Jane Austen's Fanfiction works to link the author and its stories forever to the present day with a wide receptive community sharing a passion for the novelist's irony and free speech.

### **B. First Popularization in the 60s**

The fanfiction phenomenon was intensely popularized in the late 60s with the television series Star Trek and the adventures of Mr. Spock and Captain Kirk. The fanfiction practice was based on a media fandom for the first time.

The show was so successful that it created huge fans. These fans were called 'The Trekkies'; they were passionately devoted to the show, which led to the creation of star trek fanzines. Many stories, shows, and parodies were created based on star trek's world and characters. Star Trek fandom was indirectly involved in the creation and the continuity of the show.

The show accumulated a strong and large fan base, especially in the United States, that has grown since then. The success of this TV show resulted in a massive merchandising campaign with posters, cards, figurines, and multiple items ... Fans were totally addicted and psychologically attached to the universe related to the show. At the first Star Trek conventions in 1972, fans could meet, exchange, communicate and share their passion for the first time, and Fanzines started to be distributed by fans to other fans.

Through all the Fanzines distributed, Star Trek fans imagined new stories and plots for Mr. Spock and Captain Kirk. These Fanzines deriving from the original work were printed and distributed at public events related to the series. Most of these fanzines included short stories, studies of the Stark Trek universe and its characters, but also poems, songs, comic strips, and fanfics.

Star Trek fandom and the fanzines movement were the main reasons for the show's success. Spockanalia was the earliest star trek fanzine; it served as a platform for the fans to continue to share their passion for star trek. Star Trek fanzine's content was vivid; it contained fan art, poetry, essays, and even discussions. Initially, it was distributed through mails and conventions until the rise of the internet. Online platforms, archives, and social media replaced fanzines.

Preserving and creating a solid fan community is a must for the success of any work. Therefore, creating spaces of exchange like conventions among fans was very important, especially in the early fandom culture. In his book "Playing Fans," Paul Booth recognized this creative and economic reality. As he noted, "*fans are now becoming crucial members of twenty-first-century media*"<sup>20</sup>.

The Professor of English Francesca Coppa described the intellectual reaction of the public to this science fiction masterpiece:

*"From the start, Star Trek fans produced not simply the critical discussion typical of science fiction fandom but creative responses to their favourite show. From the first, Star Trek zines included fan art – poems, songs, stories, drawings, teleplays [...] Indeed, a creative Trek culture rapidly developed through the proliferation of fanzines like Spockanalia, ST-Phile, T-Negative, and Warp Nine: A Star Trek Chronicle."*<sup>21</sup>.

In the same period, the TV series "The Man From U.N.C.L.E" followed a similar path between 1964 and 1968 with the development of a strong science fiction community that was even described by some researchers as "fanatic":

*"... not just because they dislike other programs that are on ...[but] because they are fans, fanatics... They talk about the program with other fans and go beyond that: they proselytize, they want to convert non-viewers!"*<sup>22</sup>.

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<sup>20</sup> P. BOOTH, *Playing Fans: Negotiating Fandom and Media in the Digital Age*, University of Iowa Press Iowa city, 2015, p.24.

<sup>21</sup> F. COPPA, *A Brief History of media fandom*. In: Hellekson, K., Busse, K. (Ed.). *Fan Fiction and Fan Communities in the Age of the Internet*, 2006, Jefferson: McFarland, p.41.

<sup>22</sup> C.W. WALKER, *The Gun as Star and the "U.N.C.L.E. Special"*, <http://www.manfromuncle.org/gun.htm>

These creations were, in the beginning, only shared with close friends or distributed in minimal amounts among the convention's participants. Fanfiction was considered an underground phenomenon for the first period of its existence.

However, the fanfiction practice increased significantly due to the impact of the Star Trek show and other science fiction series<sup>23</sup>.

In the eighties, media fandom kept spiking among the public, with many famous movies such as Ridley Scott's Bladerunner in 1982 and Steven Spielberg's Indiana Jones trilogy from 1981 to 1989.

Despite this first step in popularizing Fanfiction, this phenomenon in its printed format remained a marginalized Western (mainly North American) practice related mostly to American creative works<sup>24</sup>. Nevertheless, the new technologies have given fans, for the first time in history, the actual opportunity to meet their pairs online in order to write, exchange, critique, and discuss one another's fiction<sup>25</sup>.

### **C. Second popularization with the Internet**

As explained, the fanfiction phenomenon has been around for centuries and became a literary movement a long time before the arrival of the internet. However, the development of the World Wide Web boosted its spread around the world with much easier access and availability to a much larger audience, especially young people.

Following the popularization of the Internet came the creation of blogs, forums, and websites dedicated to fans of the same shows or books. These online platforms enabled people to exchange and communicate their interests and passion for literary masterpieces and other art pieces. This evolution contributed to continuing the tradition of “storytelling” and “borrowing” into the digital millennium.

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<sup>23</sup> At the same time, in Japan, a similar literary movement emerged with the “Dojinshi”. Dojinshi are stories derived from the mangas, very popular in Japan. They also were sold at manga fan meetings and conventions.

<sup>24</sup> C. YATRAKIS, "Fan fiction, fandoms, and literature: or, why it's time to pay attention to fan fiction" (2013). College of Liberal Arts & Social Sciences Theses and Dissertations, p. 6.

<sup>25</sup> R. W. BLACK, Language, Culture, and Identity in Online Fanfiction, E-Learning, Volume 3, Number 2, 2006, p.172.



Since the end of the 90s, the circulation and development of Fanfiction have been the result of the action of multiple online communities with the creation of several Fanfiction dedicated platforms like Fanfiction.net, Wattpad, and Archive of Our Own.

In 1998, the platform “Fanfiction.net” allowed users to upload their fan content to any fandom:

*“users can read and write stories which are adapted, recreated and modified from original famous books, tv series, movies, among others. By following stories and their authors, the fanfiction community creates a social network”*<sup>26</sup>.

Such a platform provided for the first time to fans the ability to self-publish their Fanfiction online and make them available to anyone around the world. Launching the platform Fanfiction.net is considered the beginning of the modern era of fanfiction.

It is admitted that *“The Internet provided a forum where writers could easily post content and make their work accessible to other readers, and thus, the fan fiction community rapidly increased.”*<sup>27</sup>.

To illustrate this new ability, it is essential to me that the novel “Fifty Shades of Grey” written by the British writer E. L. James as a fanfiction of the series “Twilight” originally titled “Master of the Universe” was at first self-published by James on her fanfiction website FiftyShades.com and other fanfiction websites before being officially published under the title “Fifty Shades of Grey” later<sup>28</sup>.

Step by step, fanfiction spread intensively because of the digitalization of the practice and the new communication tools and mediums made available to the fans. The multiple platforms used by fans enable them to share easily and immediately their creativity with the rest of the world.

The emergence of the Internet and online fan communities have brought to light the fanfiction phenomenon, which used to be quite underground, and aroused the fear of copyright holders

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<sup>26</sup> A. CARVALLO, Analyzing Network Effects on a Fanfiction Community, [https://www.researchgate.net/publication/335689802\\_Analyzing\\_Network\\_Effects\\_on\\_a\\_Fanfiction\\_Community](https://www.researchgate.net/publication/335689802_Analyzing_Network_Effects_on_a_Fanfiction_Community)

<sup>27</sup> M. CHATELAIN, *op.cit.* p.200.

<sup>28</sup> J. BOOG, "The Lost History of Fifty Shades of Grey". Media bistro <https://www.adweek.com/galleycat/fifty-shades-of-grey-wayback-machine/50128?red=as>

and producers. Indeed, some publishers and authors, facing the wave of online fanfictions, were deeply concerned about these derivative works infringing their copyrights.

However, even if some fanfictions are great commercial successes and thus acquire a professional dimension, this phenomenon's primary interest lies in its exercise by amateurs and real fans. Fanfiction is, first of all, a narrative and reflective writing that enables fans to debate their passion.

### **III. WHAT IS FANFICTION**

#### **A. Definition of fanfiction**

##### **1. Defining fanfiction**

The Cambridge Dictionary defines fanfiction as “*stories written about TV, film, or book characters by their fans (= people who admire them), or an example of such a story.*”<sup>29</sup>. It is also abbreviated to “fan fic”, “fanfic”, “fic” or “FF”.

The Oxford Dictionary of Science Fiction provides a similar definition of Fanfiction, limited to the science fiction context, explaining that Fanfiction is “*amateur science fiction and fantasy fiction; fiction that use characters or a fictional universe originally created by a professional author or for a television show, movie, etc...*”<sup>30</sup>.

The term “Fanfiction” was also used in 1944 in the Fancyclopedia, an encyclopedia of fandom jargon, defining this phenomenon as “*fiction about fans, or sometimes about pros, and occasionally bringing in some famous characters from [science fiction] stories.*”<sup>31</sup>.

In the 2023 version of the Fancyclopedia, “Fanfiction” is described as referring today “*to amateur fiction written by the enthusiasts of a TV series, usually, or sometimes a movie, a book,*

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<sup>29</sup> Cambridge Advanced Learner's Dictionary & Thesaurus, <https://dictionary.cambridge.org/dictionary/english/fanfiction>

<sup>30</sup> J. PRUCHER, ed. (2007). "fan fiction". Brave New Words: The Oxford Dictionary of Science Fiction. New York: Oxford University Press, Inc. p. 57.

<sup>31</sup> J. BRISTOL (1944), Fancyclopedia, The Fantasy Foundation.

*or comic book, which takes place in that universe, typically using the originators' characters.”<sup>32</sup>.*

All these definitions include unanimously the three most important elements of Fanfiction: (1) a story or a work, (2) written by a nonprofessional fan (3) referring to an existing work.

More academic approaches confirm these three basic elements of Fanfiction:

*“[f]an fiction is simply that: fiction created by fans, typically of popular commercial works, such as the Harry Potter book and film series.”<sup>33</sup>.*

Another scholar describes fan fiction as “*any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show*” that is not categorized as “*‘professional’ writing*”<sup>34</sup>.

Mainly, the general assumption is that fanfictions are “*stories authored by fans that create additional content through the incorporation of characters, plots and/or settings from a source text*”<sup>35</sup>.

This definition of fanfiction remains limited and reflects only a narrow view of the phenomenon with a focus mainly on the “storytelling aspect” and not other aspects such as the “community” and the “emotional” side<sup>36</sup>.

Indeed, fanfiction is a much larger subject than the aforementioned three basic elements might suggest. It includes the personal enjoyment of the fan in expressing his passion for a specific work and sharing it with other passionate.

## 2. Enjoying and sharing

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<sup>32</sup> Fancyclopedia 3, [https://fancyclopedia.org/Fan\\_Fiction](https://fancyclopedia.org/Fan_Fiction)

<sup>33</sup> S. A. HETCHER, Using Social Norms to Regulate Fan Fiction and Remix Culture, 157 U. PA. L. REV. 1869, 1870 (2009).

<sup>34</sup> R. TUSHNET, op.cit., note 20, p. 655.

<sup>35</sup> Janissary Collective, in ZWAAN, K., L. DUIJS and S. REIJNDERS (2014), The Ashgate Research Companion to Fan Cultures. Farnham: Ashgate, 2014, p.79.

<sup>36</sup> K. WOLTERS, Why We Need Femslash, Master's thesis Book and Digital Media Studies University of Leiden, p.7.

a. *The passion to reimagine is too strong*

There is a general consent among specialists that fanfiction works are made by enthusiasts, far from any financial consideration, because they enjoy writing about their passion and sharing it with other fans.

Scholars explain that “*it is clear that fan fiction belongs to the novice and is outside the world of “professional” authorship*”<sup>37</sup>. The “amateur” nature of fanfiction is its most significant feature, its DNA, its distinctive sign... The passion for creative work is the fuel that nourishes the fanfiction practice. Indeed, “*Many fans read and/or write fanfic as a way to continue to explore and/or build upon the universe of his or her favorite TV show, video game, movie, and so on.*”<sup>38</sup>.

There is no doubt that fanfiction writers want to address their achievements to other fans, and the work “*is first and foremost written for the fans, and not for a market of consumers*”<sup>39</sup>.

For instance, fanfiction is defined by the dedicated platform “fanlore.org” as:

*“a work of fiction written by fans for other fans, taking a source text or a famous person as a point of departure. It is most commonly produced within the context of a fannish community and can be shared online such as in archives or in print such as in zines. Fanfiction is also written by fans in isolation, perhaps shared with a few friends or no one at all. Writing fanfiction is an extremely widespread fannish activity; millions of stories have been written, and thousands more are written daily”.* (“Fanfiction” fanlore.org)<sup>40</sup>

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<sup>37</sup> N. H. MONTANO, Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fiction, 11 Nw. J. Tech. & Intell. Prop. 692 (2013) citing R. TUSHNET, *op.cit.* 651, p.655.

<sup>38</sup> K. BAHORIC, E. SWAGGERTY, Fanfiction: Exploring In- and Out-of-School Literacy Practices, Effective Writing Instruction, Colorado Reading Journal — Summer 2015, p.26.

<sup>39</sup> M. ROLLO, Influences Between Tv Series, New Technologies, Territory And User Generated Content A Practical Approach, POLYTECHNIC UNIVERSITY OF TURIN, Thesis, p. 20.

<sup>40</sup> See <https://fanlore.org/wiki/Fanfiction>

Professor Chatelain explains that “*fan fiction’s main goal is to provide added entertainment for fans of a particular franchise*”<sup>41</sup>.

Fanfiction is definitely not a usual work or writing; it is about creating different or alternative plots by putting existing fictional characters into new situations.

For Professor Lipton, “*Fanfiction derives from the tendency of humans to want to know “what happened next” or “what would happen if” when approaching products of popular culture*”<sup>42</sup>.

This type of writing allows fans to reimagine and recreate a new world based on their favorite stories. For example, the popular television show, *Once Upon a Time* was created to explore alternative endings to classic fairy tales, simply by asking the classic Fanfiction question: "what-if?"<sup>43</sup>. This Fanfiction illustrates the intellectual work performed by fans:

*“This narrative challenge creates the opportunity for fans to explore, via fanfiction, different behaviors and actions that help the characters overcome their problems, take charge of their lives, and find a happy ending”*<sup>44</sup>.

What if the princess did not marry the prince? Or what if snow white never ate that Apple? Fanfiction stands on the “what if’s” that give new possibilities to new exciting stories to exist unfamiliar twists to familiar classic stories. Fanfiction is about creativity, imagination, and exploring various possibilities for literary fictional works. Readers, fans, and enthusiasts are unable to let go of their fictional worlds due to their passion and obsession with the story. Fanfiction enables and offers fans to be engaged with their favorite show or book in a new imaginative way.

This kind of obsession is what makes them thirsty for more than what the original book or movie offers. The characters created by the author are limited to the worlds created for them. They cannot transcend or evolve beyond what the author has set for them. Fanfiction allows these characters to evolve and grow. It's the fan's imagination that keeps these characters alive.

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<sup>41</sup> M. CHATELAIN, *op.cit.*, p.201.

<sup>42</sup> J. D. LIPTON, « Copyright and the Commercialization of Fanfiction », *Houston Law Review* [en ligne], 2014, vol. 52, n° 2, p. 432.

<sup>43</sup> M. C. BAXTER, "The Challenge of Happily Ever After: How *Once Upon a Time* Fanfic Fairy Tales Model Strategies for Ordinary Life Challenges" (2014). <https://scholarsarchive.byu.edu/etd/4128>

<sup>44</sup> *Ibidem*, p.3.

Debbie Fulmer, a fanfiction writer, explains that *“I have written scenes to express ‘I wish this is how the episode had really gone’ or to fill in a character’s history or future. I love seeing the potential in ‘unconventional’ pairings — those which are not explored in a show or book’s canon, and my writing allows me to create couples I might not otherwise get to see”*<sup>45</sup>. Professor Tushnet also points out that the mainspring of Fanfiction is the added value by the fan to the original story; the simple transcription of an episode of a series cannot be considered fanfiction:

*“Adding value is what matters to fans; a transcript of a show is not a work of fan fiction”*<sup>46</sup>.

In order to provide a more comprehensive definition, Professor Lipton identified fanfiction according to five criteria. Indeed, she affirmed that *“Not all works based on preexisting works would merit the fanfiction label, and it is important to understand what we mean by fanfiction in order to differentiate it from other forms of literary works based on preexisting works”*<sup>47</sup>.

Professor Lipton confirmed the three basic elements already identified. First, fanfiction is a *“written work.”* Second, it is *“based on an identifiable aspect of popular culture. Third, it “is not written in a professional framework.”*

In addition, Professor Lipton considers that *“the classification of a literary endeavor as fanfiction may also require a determination of the nature of the secondary work itself”*<sup>48</sup>.

Therefore, she suggested that the fourth factor should be that fanfiction is written *“for purposes of further exploring the existing world and characters, often as an homage to the original work, and evidencing an affection for—or some emotional resonance with—the original work,”* and fifth factor, *“in a manner that substantially differs from the original work so as not to amount to rote copying or plagiarism”*<sup>49</sup>.

Accordingly, fanfiction is not only stories written about some creative work by fans for noncommercial purposes but also a new work to express originally the admiration of the

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<sup>45</sup> D. FULMER, cited by M. MCCARDLE, Fan Fiction, Fandom, and Fanfare: What’s All The Fuss?, B.U. J. SCI. & TECH. L., Vol. 9:2, 2003, p.460.

<sup>46</sup> R. TUSHNET, « Payment in Credit: Copyright Law and Subcultural Creativity », Law and Contemporary Problems, 2007, vol. 70, n° 2, p. 144, <https://scholarship.law.duke.edu/lcp/vol70/iss2/9>

<sup>47</sup> J. D. LIPTON, *op.cit.*, p. 434

<sup>48</sup> *Ibidem.*

<sup>49</sup> *Ibidem.*

original work by exploring the many possibilities offered by the initial story and reflecting all the emotions emerging from the existing universe.

*b. The desire to share is too strong*

Fanfiction is nothing without the community of fans constituting the “fandom” a group of fans of a particular work of fiction. Because criticism or admiration is not the only subject of fanfiction, it is also an opportunity to enter a community of admirers and enthusiasts of the same fictional universe and share discussions, thoughts, and ideas with them.

Professor Henry Jenkins highlighted the importance of the community, stating that:

*“One becomes a “fan” not by being a regular viewer of a particular program but by translating that viewing into some kind of cultural activity, by sharing feelings and thoughts about program content with friends, by joining a “community” of other fans who share common interests”<sup>50</sup>.*

In the pre-internet period, fans gathered at fanfiction conventions and discussed through fanzines. Internet increased significantly accessibility to fan creations and the possibility for fans to exchange their much-diversified content. The amount of fan fiction online has exploded with the Internet and the development of social networks.

Fandom plays a vital role in shaping popular culture. In participatory space, fans are engaged in cultural collective practices, beliefs, and activities within a community. Fandom allows fans of certain works to interact passionately based on their identity and shared cultural interests. These collective cultural practices are seen in the production of fan works such as fanfiction, fanzines, and fan art.

To maintain their rituals and tradition and to preserve their community, fans continue to attend conventions, organize fans' events, and participate in online discussions like many fan websites and platforms created by the fans for the fans. These fan interactions and their shared passion within the fandom shape fan culture.

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<sup>50</sup> H. JENKINS, Fans, bloggers, and gamers: Exploring participatory culture. New York, New York University Press, 2006, p.41.

Fandom and the work of fan shapes and contribute to the evolution of popular culture; through their fan productions, whether in art, literature, or media. Having a voice and a different vision form a collective fan movement that is strong and willing enough to influence the direction and the evolution of popular culture.

The internet served to create communities based on people's interests. It has become very easy for the audience and the creator of the work to communicate or exchange. With one click, everyone can access media content, YouTube videos, and Facebook groups...it is a limitless world. Every day, there is a new fandom, a new obsession with a film or a book. Fans all over the world create blogs and groups for their favorite fandom. "*Fanfiction can be found anywhere, but the most popular breeding ground for these works are on platforms such as Wattpad (2006-), archive of our own (AO3) (2009-), Fanfiction.net (1998-), and Tumblr (2007-)*"<sup>51</sup>.

The community became one of the pillars of the fanfiction practice:

*"Many fans, though notably not all, have a particular willingness, and sometimes eagerness, to share their experiences and interpretations of media texts with likeminded people. In doing so, fans become part of, and interact in, a fan community"*<sup>52</sup>

It is not, therefore, conceivable to define the concept of Fanfiction without approaching the "community" aspect, which is one of its main features. For many novice writers, writing Fanfiction is more than having a hobby, "*it is a way to produce and demonstrate their inner selves. To that end, fandom and fan fiction have grown and developed into safe places for young authors to practice their craft and for teenagers to express themselves in a way that cannot be overtly criticized or diminished by cultural norms and approved behaviors*"<sup>53</sup>.

Fanfiction is, therefore, a work that is not written only to express admiration for the original work but also to communicate to other fans the writer's efforts to explore the existing world and characters and share the emotions of the accomplished work.

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<sup>51</sup> S. NAWAZ, The Wide-Reaching Appeal of Fan Fiction and Its Merits in Popular Culture, Montclair State University Montclair State University Digital Commons, p.8.

<sup>52</sup> R. STIJN, A. WAYS DORF, *op.cit.*, p.

<sup>53</sup> C. YATRAKIS, *op.cit.*, p.11.



In a nutshell, fans “write fan fiction to explore personal interests or feel a sense of belonging to a community”<sup>54</sup>.

## **B. Fanfiction is a popular and intellectual literature**

### 1. Fanfiction as legitimate literature

As explained above, fanfiction is as old as literature, although it wasn't called under this specific name. This cultural phenomenon is often perceived as a “democratic” or “liberating genre”<sup>55</sup>.

Many share the idea that since Fanfiction is too derivative to be original, it doesn't deserve to be claimed as a literary genre. Fanfictions are frowned upon by groups in society and considered to be of no literary value or eligibility.

The original work is seen as an author's property, and only the founder of the work can transform or change it. People who reject fan fictional work because it's not canon, they tend to forget that “*the intention of most Fan fiction is precisely to not follow the canon and/or to reclaim the narrative; being faithful and staying true to the canon is not the aim of Fan fiction nor are the fans looking for real canon events. People who aren't familiar with Fan fiction tend to measure its legitimacy with originality not with its creativity and innovation.*”<sup>56</sup>.

Most of the time, fan fictional works tend to “*drift so far apart from the original fiction that they barely have any similar elements apart from the characters and their dynamics*”<sup>57</sup>. Fanfiction writers want to build upon existing characters and plots, using their creative ideas to further imagine plot twists and deep character transformation. Imagination and creativity are key concepts in fanfiction.

The emergence of the phenomenon of fanfiction and its fast spread on the Internet has been upsetting creators and copyright holders. Thus, authors, corporations, and producers have tried

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<sup>54</sup> P. KALINOWSKI, *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 (2014), p.661.

<sup>55</sup> S. PUGH, *The Democratic Genre. Fan Fiction in a Literary Context*, Glasgow, Seren, 2005.

<sup>56</sup> J. E. LORENTE, *Appreciation Or Abomination? A Study Of Fanfiction As Literature*, p.18.

<sup>57</sup> *Ibidem*, p.16.

to demonstrate the lack of legitimacy of fanfiction since it is based on previous copyrighted works<sup>58</sup>. It was not possible for authors to keep ignoring this cultural phenomenon that was so far somehow marginalized and underground.

The journalist Lev Grossman compared fanfiction emergence as a cultural phenomenon to “dark matter” in that it is primarily unseen or ignored by the mainstream and yet, is simultaneously a massive phenomenon that is not avoidable<sup>59</sup>.

Henry Jenkins explains that Fan fiction “*is a way of the culture repairing the damage done in a system where contemporary myths are owned by corporations instead of owned by the folk*”<sup>60</sup>.

Fanfiction writers allow the public to reappropriate humankind's old stories that were confiscated and privatized by authors and corporations.

Henry Jenkins also affirmed that :

*“Some seek to legitimize it by arguing that it is a stepping stone or training ground for professional writers as if commercialization of creative expression was the highest possible step an author could take. Others — myself among them — have argued that fan fiction should be valued within the terms of the community which produces and reads it, that a fan writer who only writes for other fans may still be making a rich contribution to our culture which demands our respect”*<sup>61</sup>.

Indeed, the community created by fanfiction legitimizes it since “*this group participation allows individuals a chance to connect through common “cultural and social ties” involved in fandom interactions, to find others who are like-minded, and, together, to contribute to popular culture in ways that appeal to them*”<sup>62</sup>.

Fanfiction is actually providing a priceless contribution to popular culture with the multiple interpretations of the original source materials and their subsequent expression addressed to the fan's communities to discuss, share and debate the original work.

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<sup>58</sup> R. TUSHNET, *op.cit.*, p. 653.

<sup>59</sup> L. GROSSMAN, The Boy Who Lived Forever, TIME, Jul. 07, 2011.

<sup>60</sup> H. JENKINS, Textual poachers : television fans & participatory culture, Routledge, 1992, 343.

<sup>61</sup> H. JENKINS, “Transforming Fan Culture into User-Generated Content: The Case of FanLib,” posted May 22, 2007, [http://henryjenkins.org/2007/05/transforming\\_fan\\_culture\\_into.html](http://henryjenkins.org/2007/05/transforming_fan_culture_into.html)

<sup>62</sup> P. KALINOWSKI, *op.cit.*, p.662.

In addition, the legitimization of fanfiction is that writers are giving the characters a new life and the readers a chance to continue their relationship with them<sup>63</sup>. It is also the large community created to express “*a form of love for the original author’s work*”<sup>64</sup>.

Other scholars also state that “*The negative connotation of fan fiction should be changed because it is a technique which has been applied by many great authors.*” Indeed, the process of retelling an old story has been in force since the beginning of humankind.

On that particular matter, Ann Jamison stated that “*Reworking an existing story, telling tales of heroes already known to be heroic, was the model of authorship until very recently*”<sup>65</sup>. For instance, several of Shakespeare’s works were actually his own version of older stories or “borrowed” from existing pieces of writing. Who might question the legitimacy of Shakespeare’s work and contribution to literature?

That is why Fanfiction does exist and shall continue to.

## 2. Creative works are linked and have no authors

Fanfiction “*refers to the stories produced by fans based on plot lines and characters from either a single source text or else a ‘canon’ of works*”. Several scholars explain that “*Fanfiction allows us to see a different angle on a previously explored and perceived text and therefore allows us a deeper understanding of that text*”<sup>66</sup>.

One story might hide several ones; this is the belief of Professors Hellekson and Busse, considering that fanfiction brings to life elements of a story that were previously ignored, omitted or forgotten. They stated that “*it is the fans who often make one-dimensional characters multifaceted and complexly intriguing*”<sup>67</sup>.

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<sup>63</sup> *Ibidem.*

<sup>64</sup> *Ibidem.*

<sup>65</sup> A. JAMISON, *Fic: Why Fanfiction is Taking Over the World*, <https://www.wattpad.com/40288211-fic-why-fanfiction-is-taking-over-the-world/page/4>

<sup>66</sup> G. HAWKINS, *The Art of Fanfiction: Exploring the Social, Cultural and Creative Contributions of Fanfiction for the Creative Writing Classroom*, University of Bedfordshire, September 2022, p.193

<sup>67</sup> K.HELLEKSON and K.BUSSE, *Fan Fiction and Fan Communities in the Age of the Internet: New Essays*. Jefferson, McFarland & Company, Inc., p.28.

Busse also argued that “*Every fan story is in conversation not only with the source text but usually also with other stories in the fandom and the discussions that permeate the community*”<sup>68</sup>.

Scholars describe the connection of the original work with related works like fanfiction as “intertextualities”<sup>69</sup>. The act of writing fanfiction, a story based on another story, is the archetype of “intertextuality”.

In its most basic form, intertextuality can be understood as an approach to interpreting texts that focus on the notion of exchanging and borrowing words and ideas from one another. It recognizes that all texts are linked and that every writer, both prior to and during the act of writing, draws upon the texts that have been written before his own<sup>70</sup>. A text results from the accumulated essence of several previous related texts.

In this perspective, writers cannot be only creators of certain works; they are also readers of any texts that have influenced and shaped their writing. They will always build upon, respond to, and transform existing literary works in their creative endeavors. In that sense, texts will continue to have a dialogue and interconnectedness with each other.

One of the most famous definitions of intertextuality comes from the French literary theorist Julia Kristeva. She defines intertextuality as “*a mosaic of quotations; any text is the absorption and transformation of another. The notion of intertextuality replaces that of intersubjectivity, and poetic language is read as at least double.*”<sup>71</sup>.

Jessica Hautsch summarizes Kristeva's vision by explaining that:

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<sup>68</sup> C. TOSENBERGER, *Mature Poets Steal: Children’s Literature and the Unpublishability of Fanfiction*. *Children’s Literature Association Quarterly* 39, 2014, p. 13.

<sup>69</sup> M. STASI, “The toy soldiers from Leeds: the slash palimpsest”, *Fan fiction and fan communities in the age of the internet*, 115-133 cited in L. KOCIC-ZÁMBÓ, *Resounding Words: Fan Fiction And The Pleasure Of Adaptation*.

<sup>70</sup> J. KRISTEVA, *Desire in Language: A Semiotic Approach to Language and Art*. Trans. Thomas Gora, Alice Jardine and Leon S. Roudiez, ed. Leon S. Roudiez. New York: Columbia University Press, 1980

<sup>71</sup> J. KRISTEVA, “Word, Dialog and Novel”, ed. Toril Moi, *The Kristeva Reader*, New York: Columbia University Press, 1986, p. 37 and J. KRISTEVA. *Séméiotikè*. Paris, Éd. du Seuil, coll. « Points », 1969, p. 84-85.

*“Fic writers openly acknowledge the intertextual nature of their stories, their focus on imitation, the quotative nature of their writing. Their stories explicitly exist in intertextual relation to the source material, poaching elements, monstrously combining them, adding to the archive. That is not, of course, to say that fanfiction writers are not wildly and wonderfully creative in their use of others’ texts, in the way in which they transform existing works. But, as a genre, fanfiction recognizes and makes explicit the intertextuality of writing”*<sup>72</sup>.

Fanfiction is a perfect illustration of intertextuality. Writers use other texts *“to establish and advance an argument or interpretation about the source text through analogies and juxtaposition”*<sup>73</sup>.

By doing this, fanfiction writers are “relativizing” texts in the sense of Kristeva's vision. Indeed, analyzing a text by approaching another will result in *“a new meaning while retaining the meaning it already had”*<sup>74</sup>. As explained by Hautsch, citing Kristeva, *“Readers come to understand the texts not just on their own, but through their relationship with one another”*<sup>75</sup>.

Therefore, texts are not isolated entities or art pieces; they are influenced, shaped, and drawn by other texts. That means that fanfictions are the natural result of the intertextuality of writings through time. Thus, the question of authorship must be raised since work is necessarily shaped by others. Does the author of a creative work have authorship of his own creation?

This question was answered by Roland Barthes in his famous book “The Death of the Author”. He said that *“Every text is a new tissue of recycled citations. Fragments of codes, formulae, model rhythms, bits of social discourse pass into the text and are redistributed within it”*<sup>76</sup>.

In “The Death of the Author” Barthes stated that *“The writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them”*<sup>77</sup>.

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<sup>72</sup> J. HAUTSCH, “One of your little pop culture references”: Argument, Intertextuality, and Literary Affordance in Buffy the Vampire Slayer Fanfiction in Understanding Fanfiction : Fan Practices and Theoretical Frameworks, *Slayage: The Journal of Whedon Studies*, 16.1 [47], Winter/Spring 2018, p.8-9.

<sup>73</sup> *Ibidem*, p.10.

<sup>74</sup> J. KRISTEVA, *op.cit.*, p.73.

<sup>75</sup> J. HAUTSCH, *op.cit.*, p.10.

<sup>76</sup> M. Orr, *Intertextuality, Debates and Contexts*, Cambridge: Polity Press (in association with Blackwell), 2003, p. 33, Citing R. Barthes.

<sup>77</sup> R. BARTHES, *The death of the author*, Fontana, London, 1977, p.146.

It is clear from his point of view that a work of literature may not be original since it is systematically based on other's works which are also resulting of other works; the essence of a work of literature is therefore not determined by the author but by the reader, who create the meaning of a text according to his perception and personal experience.

Barthes wrote in "The Death of the Author" that "[O]nce the author has written the words, they no longer belong to the author, but to the cultural narrative at large". He added that the idea of authorship as ownership emerged as Western society "discovered the prestige of the individual".

He concluded, "[t]o give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing"<sup>78</sup>. Fanfiction is a manifestation of the Barthesian theory and his revolution against the author's authority in the text. The role of the author disappears when the role of the reader starts. By removing the author, Barthes' vision celebrates the birth of the reader and "the survival of the text".

According to Barthes, the text can survive through multiple interpretations, deep different meanings and countless voices. In other words, the text can finally be free only by killing the author. Barthes urges for the plurality of authorship and the absence of an authoritative voice in the text. At some point, what matter is the purpose of the text, what does it add to literature as a whole, and how it is perceived by readers.

In a way, it is what fan fiction stands for, a message that has been transported and passed on from one author to another and from one generation to the next. Fanfiction echoes Barthes' concept of the multiplicity of a text which is the essence of fan fiction.

Therefore, in Barthes's point of view, since the text cannot be linked to its author, this latter is not legitimate in protecting it against infringers.

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<sup>78</sup> *Ibidem*, p.41-44.

Some other scholars describe the intertextuality of fanfiction as “Archontic”; Abigail Derecho suggested this word to approach this phenomenon<sup>79</sup>. The word “archontic” is based on the idea of texts being archives. It is taken from Jacques Derrida's work *Archive fever*<sup>80</sup>.

Abigail Derecho stated in “Fan Fiction and Fan Communities in the Age of the Internet” that *“fan fiction is a subgenre of a larger, older genre of literature that is generally called “derivative” or “appropriative.” I wish to replace these terms with a new one: I choose to call this type of writing archontic, which I think better describes what fanfic is and how it operates as literature”*<sup>81</sup>.

She asserted the following:

*“Archontic relates to the word archive, and I take it from Jacques Derrida's 1995 work Archive Fever, in which Derrida claims that any and every archive remains forever open to new entries, new artifacts, new contents. No archive is ever final, complete, closed: “By incorporating the knowledge deployed in reference to it, the archive augments itself, engrosses itself, it gains in auctoritas. But in the same stroke it loses the absolute and metatextual authority it might claim to have. One will never be able to objectivize it with no remainder. The archivist produces more archive, and that is why the archive is never dosed. It opens out of the future”*<sup>82</sup>.

Accordingly, fanfiction is an archontic literature, *“which means that a work of fan fiction contributes to the archive established by the original work or artefact on which the fiction is based”*<sup>83</sup>.

For Derecho, the word “archontic” *“is not laden with references to property rights or judgments about the relative merits of the antecedent and descendant works [...] Archontic texts are not delimited properties with definite borders that can be transgressed”*<sup>84</sup>.

This statement means that a creative work may not be infringed since it is not an exclusive property due to the fact that it is based on previous works. Therefore, fanfiction shall never be

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<sup>79</sup> A. DERECHO, “Archontic Literature A Definition, a History, and Several Theories of Fan Fiction *in* K.HELLEKSON and K.BUSSE, *Fan Fiction and Fan Communities in the Age of the Internet: New Essays*. Jefferson, McFarland & Company, Inc., p.63.

<sup>80</sup> J. DERRIDA, *Archive Fever. A Freudian impression*. Trans. Paul Patton. New York: Columbia University Press, 1995.

<sup>81</sup> A. DERECHO, *op.cit*, p.64.

<sup>82</sup> *Ibidem*,.

<sup>83</sup> P. GÜLDENPFENNIG, *Fandom, fan fiction and the creative mind*, Tilburg University, p.14.

<sup>84</sup> A. DERECHO, *op.cit*, p.64.

considered as a copyright infringement. Thus, fanfiction is not a derivative of the original work but rather constitutes an archive that extends the original text, adds something new, and allows a continuous expansion of the story.

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To sum up, the fanfiction phenomenon is an authentic form of literature that should be regarded as a legitimate literary genre. Scholars consider fanfiction as a tool that enables the public to reappropriate creations confiscated and privatized by authors and corporations. This legitimacy is confirmed by the fact that Fanfiction is an example of the intertextuality of a literary text with no real authorship. It is even an archive challenging the idea of ownership and copyright.

#### **IV. INTRODUCTION TO COPYRIGHT LAW**

To examine the legal implication of fanfiction and related issues, it is crucial in the first step to identify the applicable copyright rules and understand their legal implementation in the artistic environment.

Therefore, the present thesis shall overview the main copyright protection rules as provided by Belgian law within the European legal system in force and the legal status of the author as the creator of the original work and the owner of the exclusive rights.

##### **A. The copyright protection**

###### **1. Protection Requirements**

According to Belgian law<sup>85</sup>, when someone creates any original literary, scientific, or artistic work, such as poems, articles, films, songs, or sculptures, the creation is protected by copyright.

Nobody apart from the creator of such work has the right to use, exploit that work, or make it public or reproduce it<sup>86</sup>. In Belgium, and in most countries, creation is considered as a “work” if it is:

- Tangible ;

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<sup>85</sup> European Union Member States have very similar regulation.

<sup>86</sup> See, Article 165§1 of the CEL.



- Original<sup>87</sup>.

Copyright law does not protect simple ideas, concepts, systems, or methods of doing something. In order to be protected by law, the idea must be expressed in a tangible manner and fixed in a concrete medium of expression<sup>88</sup>.

Regarding the requirement of originality, it is unanimously admitted that, to be copyrightable, any creation must be original<sup>89</sup>. It is a work created through the “*fruits of intellectual labor*”<sup>90</sup> of its author and, therefore, requires not only that the author has not copied the work but also that there is a certain “*minimal degree of creativity*”<sup>91</sup>.

In Belgium, this notion of originality has been defined by the Supreme Court as “*the expression of the intellectual effort*” of the author<sup>92</sup>.

It is clear that according to the currently applicable law, a work is original if it is its author’s intellectual creation, which means that its author has made free and creative choices and stamped its creation with his own ‘*personal touch*’. No other condition is therefore required for a tangible work to be protected by copyright law apart from originality.

As described by the US Supreme Court in its famous “Feist” decision:

*"[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity."*

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<sup>87</sup> A. STROWEL, « Droits d’auteur et droits voisins », Les droits intellectuels, 2e ed., Bruxelles, Larcier 2013, pp. 332 à 337.

<sup>88</sup> A. BERENBOOM, Le nouveau droit d’auteur, 3<sup>ème</sup> Ed, Larcier, Bruxelles, 2005, p.69.

<sup>89</sup> *Ibidem*, p. 60.

<sup>90</sup> F-M. PIRIOU, Légitimité de l’auteur à la propriété intellectuelle, Diogène 2001/4 (n°196), p.120.

<sup>91</sup> HOWARD B. ABRAMS, Originality and Creativity in Copyright Law, 55 Law and Contemporary Problems, 1992, p.5.

<sup>92</sup> Cass. (3e ch.) RG C.14.0262.F, 14 décembre 2015 (S.L., S.A. / Warner/Chappell Music Belgium, Emi Music Publishing Belgium, Sony / Atv Music Publishing Belgium bv), Arr. Cass. 2015, liv. 12, 2915 : “*Elle est originale en ce sens qu'elle est une création intellectuelle propre à son auteur. Une création intellectuelle est propre à son auteur lorsqu'elle reflète la personnalité de celui-ci. Tel est le cas si l'auteur a exprimé ses capacités créatives lors de la réalisation de l'œuvre en effectuant des choix libres et créatifs*”.

It further found that there can be no copyright in a work in which "*the creative spark is utterly lacking or so trivial as to be virtually nonexistent.*"<sup>93</sup> It is obvious that such reasoning is very similar to the Belgian approach to originality. This latter is the core-notion of copyright, and the work must exhibit creativity and originality, reflecting the author's imprint.

## 2. Irrelevant criteria for copyright protection

### a. *Quality of the work*

It is important to mention that the authors and case law have asserted several times that the fulfillment of the originality requirement "*'throws out of the window' those national approaches that have traditionally made copyright protection dependent on an artistic and aesthetic value*"<sup>94</sup> Indeed, the predominant view in the European Union is that any "*aesthetic criteria to define originality is 'inadequate or unworkable'*"<sup>95</sup>. This point of view is legally understandable regarding the very subjective nature of such criteria. The critic was a long time ago well summarized by Professor Eugene POUILLET:

« (...) Mais, d'abord, qu'est-ce que la beauté? Où est-ce que commence le beau? Où est-ce qu'il finit? »<sup>96</sup>.

The Belgian case law is on the same wavelength:

*"A work or part of a work can be protected by copyright if it contains elements that express the author's own intellectual creation. The author must express his creative spirit so that the work expresses his personality. This is the case when, during the creation of the work, the author was able to express his creative abilities in an original way by making free and creative choices, thus giving his work a "personal touch". The addition of essential content, qualitative or aesthetic criteria is not relevant»<sup>97</sup>.*

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<sup>93</sup> Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 359.

<sup>94</sup> ROSATI, CJEU rules that copyright protection for designs only requires sufficient originality. JIPLP 14(12):p. 932 ; See also Case C-683/17, Cofemel, §35.

<sup>95</sup> Derclaye E (ed) "A model copyright/design interface: not an impossible and undesirable task?" in The copyright/design interface: past, present and future. Cambridge University Press, Cambridge, pp 421–458.

<sup>96</sup> E. POUILLET, Traité théorique et pratique des dessins et modèles de fabrique, 2<sup>nd</sup> Ed. Marchal and Billard, 1884, Paris.

<sup>97</sup> Gand 7 October 2019, Annuaire Pratiques du marché 2019, liv. 1, 860.

The originality is therefore defined by the freedom of choice of the author and its personal touch and never by the artistic and aesthetic value of the creative work.

*b. The Novelty*

It is commonly admitted that originality is not a novelty<sup>98</sup>. Indeed, a work might be original without being new. Copyrights protect the expression of an idea and not the idea in itself. Therefore, the expression of the idea by the author may be original even though the idea in itself is not new. The only requirement for a copyrighted work is that it must be original and not a copy of someone else's work.

Two artists performing a painting of the Eiffel Tower shall get the same protection from copyright law even though they initially had the same idea.

Originality is thus the only requirement and not the novelty of the concept or the idea expressed by the creator.

*c. The format or the length of the work*

The format of the work created by the author does not affect its copyrightability. Indeed, the work may be written, drawn, painted, registered, or filmed. Any sort of original work shall be covered and protected by copyright.

A title, a character, or a slogan shall be protected if they meet the originality requirement. The length or the duration of the work does not affect the protection. For instance, a few seconds of "Tik Tok" video shall have the same legal protection as any motion picture.

3. Duration and registration of the copyright Protection

*a. Duration of Protection*

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<sup>98</sup> A. BERENBOOM, *op.cit.*, p.75.

According to Belgian law, the duration of the author's copyright is 70 years since his death<sup>99</sup>. The seventy years are effective since 1<sup>st</sup> January of the year following the author's death<sup>100</sup>.

Therefore, in the European Union Member States, copyright protects works until 70 years after the creator's death.

*b. No registration system*

In Belgium and even within the European Union, protection by copyright law starts with the creation of the work by its author. Thus, there is no registration requirement like it is the case for trademarks or patents.

This rule has been established by Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, which provides that<sup>101</sup>:

*“The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”.*

In opposition to the US model<sup>102</sup>, where registration of the work is highly recommended for legal reasons, in Belgium, the protection provided by law does not require any prior formality<sup>103</sup>.

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<sup>99</sup> Article 166§ 1st of CEL .

<sup>100</sup> See also Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

<sup>101</sup> Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)

<sup>102</sup> In the United States, the registration of the copyrighted work provides additional rights to the author such as being eligible for statutory damages, attorney fees, and costs of lawsuit. Moreover, registration is mandatory for US copyright holders if they want to bring a copyright infringement suit in federal court.

<sup>103</sup> However, in recent years, the Benelux Office of Intellectual Property has developed an option for copyright holders to perform an “I-Depot” which is an online registration of expressed ideas and works. Such registration grants the author a certain date with proof of anteriority, which could be significantly important in case of infringement or lawsuit.

#### 4. Copyrighted Works

It is important to determine the works commonly considered “copyrightable”. There is no general list of such works; however, applicable legislations provide an important hint about the protected works.

Article 1 of the Bern Convention<sup>104</sup> states that:

*“The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works”.*

It is clear that for the purpose of copyright, the term “*literary works*” is not narrowed to works of literature in its common sense but is also understood as including all works expressed in writing, regardless of their potential artistic, visual or esthetic merits. Therefore, a wide variety of materials is clearly protectable under Article 2 of the aforementioned Berne Convention<sup>105</sup>. This provision is interpreted to take into account of new technologies and artistic practices.

If there is no definition of literary works in Belgian or European law, the United States Copyright Act of 1976, codified in Title 17 of the United States Code, defines it as “*works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied*”<sup>106</sup>.

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<sup>104</sup> Berne Convention for the Protection of Literary and Artistic Works, <https://www.wipo.int/treaties/en/ip/berne/>

<sup>105</sup> Furthermore, Article 2, which is titled “Protected Works”, mentions that:

“(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(...)

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(...)

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(...)”.

<sup>106</sup> 17 U.S. Code § 101 - Definitions

The meaning of literary and artistic works is thus very wide and, it encompasses all artworks such as photographs, written compositions, statues, architectural plans, models, and paintings, but also movies, video games, software, etc.

## 5. Uncopyrightable works

As mentioned above, copyright does not protect ideas but the expression of these ideas being fixed in a tangible, concrete medium. Systems, concepts, all forms of illustration, processes, procedures, principles, methods, systems, concepts, discoveries, etc.. are not copyrightable works.

Besides, it is unanimously admitted that titles, public information, official public speeches, official acts, names, short phrases, lettering, or coloring, listings of ingredients or contents are not protected<sup>107</sup>.

## **B. The Author Rights**

### 1. The ownership of the copyright

The first and initial owner of copyright in a work is always the natural person who initially created the original work<sup>108</sup>.

Belgian copyright law provides a legal presumption that the person whose name is mentioned on the work is considered the author of the work and, therefore, the copyright holder until proof to the contrary<sup>109</sup>.

A legal person can be the copyright holder if the ownership has been transferred by the natural person.

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<sup>107</sup> A. BERENBOOM, *op.cit.*, p.108 ; See also Article 2.8 of Bern Convention

<sup>108</sup> Article XI.170 of CEL states that « *Le titulaire originaire du droit d'auteur est la personne physique qui a créé l'œuvre* ».

<sup>109</sup> Article XI.170, al.2 of CEL: « *Est présumé auteur, sauf preuve contraire, quiconque apparaît comme tel sur l'œuvre, sur une reproduction de l'œuvre, ou en relation avec une communication au public de celle-ci, du fait de la mention de son nom ou d'un sigle permettant de l'identifier* ».

## 2. The economic rights of the author

The economic rights of the author of an original work are those rights that enable him to obtain economic benefits from the use or exploitation of its creation.

These rights are fundamental for the author since his copyright is essentially the right to prevent others from making copies of his creative works and control any act of reproduction or exploitation of his protected works<sup>110</sup>.

The main economic rights are the following:

- Reproduction right;
- Distribution right;
- Public performance right.

### *a. Reproduction Right*

The Author of the copyrighted work is exclusively allowed to use or reproduce its creation. This prerogative gives the author the power to control the use of its creation by any third party<sup>111</sup>.

Therefore, the reproduction right is perhaps the most important right granted by the author's copyright. Under this right, no one other than the copyright holder may make any reproductions or copies of the copyrighted work.

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<sup>110</sup> Article XI.165 §1 of CEL describes the economic rights of the copyright holder as follow:  
« *L'auteur d'une œuvre littéraire ou artistique a seul le droit de la reproduire ou d'en autoriser la reproduction, de quelque manière et sous quelque forme que ce soit, qu'elle soit directe ou indirecte, provisoire ou permanente, en tout ou en partie.*

(...)

*L'auteur d'une œuvre littéraire ou artistique a seul le droit de la communiquer au public par un procédé quelconque, y compris par la mise à disposition du public de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.*

*L'auteur d'une œuvre littéraire ou artistique a seul le droit d'autoriser la distribution au public, par la vente ou autrement, de l'original de son œuvre ou de copies de celle-ci ».*

<sup>111</sup> A. BERENBOOM, op.cit., p.108.

The unauthorized acts prohibited under this right include, for example, copying a logo, a book, a computer software program, using a protected draw on a t-shirt, or incorporating a portion of protected music or sound into a new song...

A copyright infringement does not require the entire original work to be copied; a substantial part of it is enough.

#### *b. Distribution Right*

The distribution right grants the copyright holder the exclusive right to distribute work to the public. It could be by sale, rental, lease, or lending.

The copyright holder is, therefore, the only one allowed to prevent the distribution of unauthorized copies of a work. Moreover, the distribution right entitles the author or the right holder to control and manage the first distribution of a particular authorized copy of the work. For instance, some activities that affect the distribution right include uploading a movie or a piece of music to online platforms...

#### *c. Public performance right*

The public performance right grants the copyright holder the ability to manage and control how a work is publicly performed.

A performance is “public” when the work is performed in a place open to the public or transmitted to multiple locations. For instance, the copyright holder of a movie or special event is empowered to control the showing of a motion picture in a public area or streaming movies, sports events, concerts, or music over the internet...

In contrast to moral rights (which are inalienable), economic rights are moveable, assignable, and transferable to third parties. For instance, the successful saga Harry was written by J.K. Rowling, and this latter is the original author of the published books. However, J.K. Rowling has transferred its economic rights to Warner Brothers, which is now the exclusive rights holder of intellectual property rights related to the Harry Potter universe.

### 3. The moral rights of the original author



a. *General considerations*

It is generally admitted that creative work often means more than just the economic value it can generate from exploitation. Indeed, the creation is the reflection of the author's personality and personal emotions, and, therefore, it requires additional protection that is different from traditional forms of property. Moral rights protect that non-economic interest.

For some, such right aims to protect the author from the intellectual dispossession of his work due to its disclosure to the world in order to keep and preserve certain control on it<sup>112</sup>.

As ruled by the Belgian Supreme Court, *“the author of an artistic work is entitled to oppose any deformation, mutilation or other modification of his work or any other damage to that work, prejudicial to his honor or his reputation”*<sup>113</sup>.

Thus, Belgian copyright law has been providing such protection for decades to authors<sup>114</sup>:

In application of this provision, the author has the exclusive right to disclose his creative work (“divulgarion right”); to claim authorship of the work (“paternity right”); and the right to have his work respected, which enables the author to object alterations or distortions of/to the work (“integrity right”). The moral right is not transferable or alienable.

b. *Paternity rights*

The author of a creative work protected by copyright has the right to be identified as the original author or director of the work. This right is known as paternity rights.

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<sup>112</sup> A. BERENBOOM, op.cit., p.179.

<sup>113</sup> Cass. (1re ch.) RG C.10.0496.F, 5 mai 2011 (Ville de Namur / N.N.) : « *l'auteur d'une œuvre artistique dispose du droit de s'opposer à toute déformation, mutilation ou autre modification de son œuvre ou à toute autre atteinte à la même œuvre, préjudiciables à son honneur ou à sa réputation* ».

<sup>114</sup> Article XI. 165§ 2 of CEL states that:

*“L'auteur d'une œuvre littéraire ou artistique jouit sur celle-ci d'un droit moral inaliénable.*

*La renonciation globale à l'exercice futur de ce droit est nulle.*

*Celui-ci comporte le droit de divulguer l'œuvre.*

*Les œuvres non divulguées sont insaisissables.*

*L'auteur a le droit de revendiquer ou de refuser la paternité de l'œuvre.*

*Il dispose du droit au respect de son œuvre lui permettant de s'opposer à toute modification de celle-ci.*

*Nonobstant toute renonciation, il conserve le droit de s'opposer à toute déformation, mutilation ou autre modification de cette œuvre ou à toute autre atteinte à la même œuvre, préjudiciables à son honneur ou à sa réputation* ».

For example, although all intellectual property related to the Harry Potter saga has been transferred to Warner Brothers inc., J.K. Rowling is entitled, in the application of its moral rights, to be identified systematically as the original author of the saga.

*c. The integrity work*

The author of a copyrighted work has the right not to have his work subjected to offensive or derogatory treatment. This right allows the author to object to addition to, deletion from or alteration, mutilation to, or adaptation of the original work that is unreasonable or is otherwise prejudicial and damaging to the honor or reputation of the author. This right enables the author to remain the only master of his work.

*d. The right of disclosure*

The right of disclosure is the exclusive author's right to decide to release his work to the public<sup>115</sup>. Only the author has the exclusive right to decide when he considers his work finished and ready for release.

*e. The duration of moral right*

According to case law and authors, the duration of moral right is equal to the length of copyright protection<sup>116</sup>.

Despite the absence of explicit provision, authors agree that Article 166 § 1<sup>er</sup> CEL implicitly recognizes such duration by stating that:

*“Le droit d’auteur se prolonge pendant septante ans après le décès de l’auteur ». Indeed, scholars claim that “La doctrine s’accorde pour inférer de ces textes que la mention « droit d’auteur » comprend à la fois les attributs pécuniaires et moraux »<sup>117</sup>.*

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<sup>115</sup> A. BERENBOOM, op.cit., p.180.

<sup>116</sup> M-C JANSSENS, Le droit moral en Belgique, (2013) 25 CPI, p.103.

<sup>117</sup> *Ibidem*.

## C. Exceptions and limitations to copyright protection

### 1. General considerations

Copyright protection is not absolute and includes important boundaries of literary and artistic property. The European directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society contains a list of 20 optional exceptions or limitations and one mandatory exception to some of the author's exclusive economic rights. Belgian law has transposed such exceptions and limitations in the Code of Economic Law.

Indeed, in certain circumstances covered by these exceptions, the prior authorization of the rights holder is then no longer necessary. The main relevant exceptions are the following:

- The right of quotation<sup>118</sup>: it allows the reproduction and communication to the public of an extract from a third party's protected work without its prior consent provided that:
  - the quotation is made for criticism, controversy, teaching or in scientific work;
  - the quote is made in accordance with honest practices in the profession;
  - the quotation is carried out in proportion to the aim pursued;
  - the quotation does not affect the exploitation of the work itself;
  - the source and the name of the author are mentioned unless it is impossible.
- The right to carry out caricature, parody or pastiche, observing fair practice<sup>119</sup>.

According to the European Union Court:

*“the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humor or mockery. The concept of ‘parody’ (...) is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.*

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<sup>118</sup> See Art. XI.189. § 1<sup>st</sup> CEL.

<sup>119</sup> Art. XI.190, 10<sup>o</sup> CEL.

*However, the application, in a particular case, of the exception for parody, (...) must strike a fair balance between, on the one hand, the interests and rights of persons (...), and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody”<sup>120</sup>.*

Any parody or sarcastic use of copyrighted work must be dealt with fairly. This concept shall be explained hereafter.

- Scholarly Works: The author of a scholarly work may use portions of a copyrighted work in certain circumstances, such as for educational purposes or in the context of scientific research, following a very strict condition<sup>121</sup>.

It is important to add that the use of any of the legal exceptions of copyright must be performed fairly to be considered as in compliance with legal requirements<sup>122</sup>.

This provision requires, for instance, that any parody use of a work must be ‘fair dealing’ to ensure that the exception is not misused.

To illustrate the importance of a “fair dealing” of the exceptions mentioned above, it is important to cite the case of “Johan Deckmyn” who is a member of a far-right Flemish political party and was responsible for the distribution of a parodic version of the cover of the comic book “Bob et Bobette” written by Willy Vandersteen. On the original cover, the book’s main character was depicted as wearing a white tunic and bowler hat while flying in a helicopter-type contraption and showering coins upon people who were trying to pick them up.

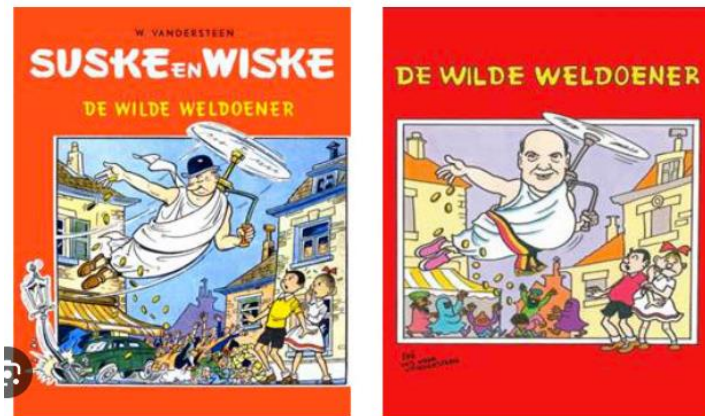
In the parodic version of the image, Johan Deckmyn has replaced the main character’s face with an image of the Mayor of Ghent distributing coins to people depicted as “*people wearing veils and people of color*”:

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<sup>120</sup> ECJ, 3 September 2014, C-201/13.

<sup>121</sup> Articles 191/1 – 192 CEL.

<sup>122</sup> Art. XI.192/3 CEL : « *Les exceptions visées aux articles XI.189, XI.190, XI.191, XI.191/1, XI.191/2, XI.192, § 1er, alinéa 2, XI.192/1 et XI.192/2 ne sont applicables que si elles ne portent pas atteinte à l’exploitation normale de l’œuvre ou de la base de données ni ne causent un préjudice injustifié aux intérêts légitimes de l’ayant droit* ».



The altered image was intended to make a political point about the Mayor's use of public money in favor of foreigners...

Johan Deckmyn was sued by Vandersteen's heirs for copyright infringement in the national court. The defendant claimed that its image was covered by the parody exception under Belgian law. However, the right holders argued that the legal requirements of parody exception were not fulfilled and that the defendant's image conveyed a discriminatory message.

The Belgian court asked the European Union Court of Justice to clarify the conditions of the parody exception<sup>123</sup>. The national court has finally found that Johan Deckmyn's drawing was conveying a discriminatory message and wrongfully associated the protected work with that message after assessing a fair balance between the interests and rights of the author and the user of the protected work.

## 2. Derivative Work

### a. *Definition*

The derivative work is an American legal concept defining any modification or transformation of a copyrighted preexisting work. That means making any changes to the work that results in a modification of its structure or form but do not alter the original sense of the work. Indeed, American legislation defines derivative work as follows:

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<sup>123</sup> ECJ, 3 September 2014, *Supra*.

“A “*derivative work*” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “*derivative work*”<sup>124</sup>.

Therefore, derivative work refers in particular to transformations, adaptations and translations of the work in a different literary or artistic form. Any work resulting from such modification of the original initial work is defined as a “*derivative work*” and is protected by the law if the resulting work is also creative and original, without prejudice to the rights attributed to the original author for its work.

*b. Applicable rules*

It is understood that a derivative work has to be based upon a pre-existing copyrighted work in order to be considered a derivative work:

“*[It] is a right that copyright law usually reserves to the author of the original work of authorship, so the only person allowed to create or authorize the creation of a derivative work is the rights holder*”<sup>125</sup>.

An illustration of derivative works is the adaptation of novels into screenplays, for instance. The American case law has, for instance, ruled that in a matter of computer programs, the program has to be significantly similar to the initial copyrighted work while including a portion of that work in its final product<sup>126</sup>. In another case regarding software, the court held that 70% similarity in the code is to be considered sufficient to claim the work to be derivative<sup>127</sup>.

Thus, the famous *Anderson v. Stallone* case is an illustration of how litigious might be a derivative work. Indeed, a Rocky fan wrote a sequel of the three Rocky movies and met with studio executives to discuss the sequel. The studio subsequently released a fourth movie that bore some similarity to the script suggested by the fan. This latter filed suit, alleging that the

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<sup>124</sup> 17 U.S. Code § 101.

<sup>125</sup> T. MARGONI and M. PERRY, Scientific and Critical Editions of Public Domain Works: An Example of European Copyright law (dis)harmonization, *Canadian Intellectual Property Review*, 27 C.I.P.R, 165.

<sup>126</sup> *Litchfield v. Spielberg*, 736 F. 2d 1352, 9th Cir. (1984).

<sup>127</sup> *United States v. Manzer*, 69 F.3d 222, 8th Cir., (1995).

studio appropriated his ideas. Thereafter, the studio and the actor Sylvester Stallone filed a motion for summary judgment in the plaintiff fan's action alleging copyright infringement.

The court finally held that the copyright of that derivative work belonged to the studio and Stallone. According to the Court, the holder of a copyright has the exclusive right to perform derivative works based on his copyrighted work<sup>128</sup>.

Another famous case clarified the notion of “derivative work” in the United States; the famous Andy Warhol’s use of a copyrighted photograph of musician Prince in a series of prints:



1981 Goldsmith Photograph (Left) and Sample Images from Warhol's "Prince" Series (Right)

In a nutshell, the famous photographer Lynn Goldsmith has taken in 1981 a photograph of the singer “Prince” in her studio, in which she holds the copyright. In 1984, Goldsmith’s agency licensed the photograph to Vanity Fair magazine for use as an artist reference. Vanity Fair commissioned Andy Warhol to make some pieces from the copyrighted photograph. Warhol relied on the photograph for the one piece Vanity Fair had ordered and created several additional prints featuring Prince’s face with Warhol’s signature aesthetic style (see above).

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<sup>128</sup> Anderson v. Stallone - No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989)

At first, the court ruled in favor of Andy Warhol, considering that it was a fair-use<sup>129</sup> and that the Prince Series was a transformative work<sup>130</sup>. This latter means the works convey a new message or meaning entirely different from the primary work. They have a new meaning, purpose, and character such that they stand apart from the primary work used to create them.

On appeal, the court found in favor of Goldsmith on all four factors of fair use<sup>131</sup>.

This decision highlighted the distinction between the fair use doctrine and the derivative work. Indeed, while fair use is not infringing on the copyright of the primary work's owner, the other does because derivative works, which present the same material in a new form without adding something new, require permission from the primary work to avoid infringement.

Typically, transformative works are works that use the primary work for criticism, comment, news reporting, research, scholarship, or parody<sup>132</sup>.

The Supreme Court finally ruled that minor alterations (“Modest alterations”) to a copyrighted work are not transformative under fair use where altered work was used commercially for a substantially similar purpose as the original; courts must analyze the specific use of an allegedly infringing work before determining whether that use was transformative<sup>133</sup>. Therefore, the Andy Warhol Foundation must pay royalties to the photographer Goldsmith.

In Europe, there is a similar concept designating the “*works that were based upon the original work or upon the original work and other pre-existing works, such as translation,*

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<sup>129</sup> 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use : “*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

*(1)the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

*(2)the nature of the copyrighted work;*

*(3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

*(4) the effect of the use upon the potential market for or value of the copyrighted work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”;*

<sup>130</sup> Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 316, 326 (S.D.N.Y. 2019).

<sup>131</sup> Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 51-52 (2d Cir. 2021).

<sup>132</sup> See 17 U.S. Code § 107.

<sup>133</sup> Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (598 U.S., 2023).



*musical arrangement, dramatization, sound recording or any other form in which the original work may be recast, transformed or adapted.”*<sup>134</sup>.

Indeed, European law recognizes derivative works as protected by copyright with the right to modify the content of an original work to create a new work, combine it with another work and translate it into another language<sup>135</sup>. For instance, in French law, derivative work is described as “oeuvre composite” and ruled as follows:

*« Est dite composite l'œuvre nouvelle à laquelle est incorporée une œuvre préexistante sans la collaboration de l'auteur de cette dernière »*<sup>136</sup>.

Ms. Murielle Cahen explains that :

*«Thus, it is advisable to respect the rights of the authors of the incorporated works. To do this, the creators of transformative works must request the authorization of the authors of the pre-existing works, failing which they would be guilty of infringement.*

*Indeed, reproducing and representing a work, even if it is only an extract and the work is modified, requires the authorization of the author. In addition, (...), this authorization should even be explicit, which means, it should indicate all the uses and all the media envisaged. (...).»*<sup>137</sup>.

Indeed, any derivative work requires the prior authorization of the original rightsholder; otherwise, it shall be construed as an infringement.

## **V. LEGAL IMPLICATIONS OF FAN FICTION**

It is time now to apply the aforementioned legal concepts and rules to fanfiction works as a literary or artistic creation.

Even though, as explained by Professor Derecho, fanfictions are, like other literary texts, “Archontic texts” with no limited “*properties*” or “*definite borders*” since they are a

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<sup>134</sup> I. BROWN, Implementing the EU Copyright Directive, (2003). Available at: <http://www.fipr.org/copyright/guide/eucd-guide.pdf>

<sup>135</sup> If the words “derivative work” are not used in European law, the concept is somehow described for the first time in the Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (hereinafter “Software Directive”).

<sup>136</sup> L. 113-2 al 2 du Code de la propriété intellectuelle.

<sup>137</sup> M. CAHEN, Les œuvres transformatrices, <https://www.murielle-cahen.com/publications/oeuvres.asp>

compilation of other previous texts, it is fundamental to show that in the legal point of view, on the one hand, fanfictions do constitute intellectual creations that shall be protected as such by the copyright legal system and, on the other hand, as derivative works, might be infringing the original works they are inspired from.

#### **A. A work that violates copyright?**

##### **1. Is fanfiction copyrightable?**

Fanfiction is fiction written by fans of existing fictional, creative, and copyrighted works. This phenomenon is the consequence of the success of some original works pushing some fans to express their passion and love for the original work through publishing fictional stories based on the original work.

This phenomenon is old and has evolved through centuries. It has been strongly popularized by the internet in the last decades, and thousands of fanfictions are now published every year on many popular websites devoted to fan fiction.

By its magnitude, copyright holders and authors may not allow themselves to ignore this phenomenon. Consequently, legal issues related to fanfiction emerged in the last decades. Indeed, fanfiction, once it has been externalized, is a work of the mind when it meets the criterion of originality as required by law.

As explained above, originality has been defined as “*the expression of the intellectual effort*” of the author; therefore, an author of fanfiction, even if, by definition, he uses elements of a third party’s creative work, usually shall reflect its personality in its creative choices in the conception of its work.

Kristeva's theory of intertextuality confirms this originality of fanworks. As explained above, fanfiction writers analyze and retell the original story based on their own perceptions and beliefs, resulting in “*a new meaning while retaining the meaning it already had*”<sup>138</sup>. As explained by Hautsch, citing Kristeva, “*Readers come to understand the texts not just on their own, but through their relationship with one another*”<sup>139</sup>.

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<sup>138</sup> J. KRISTEVA, *op.cit.*, p.73.

<sup>139</sup> J. HAUTSCH, *op.cit.*, p.10.

Since fanfiction writers are readers of original content, Barthes also emphasized that the reader is the one who actually creates the meaning of a text according to his perception and personal experience<sup>140</sup>.

Such work meets the originality requirement and is fully protected by copyright. Even if the fanfiction author borrows elements, plots, and stories created by another author, he performs choices as to the words he uses and as to their arrangement in the plot. He also makes choices as to the structure of his story, the points of view adopted, the dialogues, and the situations.

Thus, the fanfiction's author makes contributions likely to bear the imprint and the reflection of his personality and, as a result, be protected by copyright as any other original creative work.

Many authors pretended that fanfictions should not be protected by copyright because it is not good work. Indeed, they argue that “[A] terrible lot of fan-fic is outright cringe-worthy and ought to be suppressed on purely aesthetic grounds”<sup>141</sup>. The writer Lee Goldberg explained that fanfic “creeps out most of the authors I spoke to”<sup>142</sup>.

However, talent, aesthetic value, or any value judgment of a work is not a requirement to have a creative work protected. Scholars state that “Copyright law does not permit making something illegal because one doesn't think it's good. Instead, copyright law follows a doctrine of “nondiscrimination,” which recognizes that courts should not make value judgments”<sup>143</sup>.

For this reason, a fanfiction work is copyrightable if it is a creative expression regardless of its value or aesthetic merits. It is thus admitted that fans own copyright in their own original contributions, even if based on someone else's work.

For instance, the Fifty Shades trilogy was actually developed from a Twilight fan fiction series originally titled “Master of the Universe” and published on online fan fiction platforms. Nobody

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<sup>140</sup> See Supra, p.27.

<sup>141</sup> D. GABALDON, Fan-Fiction and Moral Conundrums, <https://kate-nepveu.livejournal.com/483239.html>

<sup>142</sup> L. GOLDBERG, Hot Button Topics with Mystery Writers, A WRITER'S LIFE (Apr. 25, 2005)

<sup>143</sup> S. M. LANTAGNE, The Better Angels of Our Fanfiction: The Need for True and Logical Precedent, 33 Hastings Comm. & Ent. L.J. p. 173 (2011).

may question that this trilogy is a creative work protected by copyright law, even though it is initially a fanwork.

## 2. Copyright infringement

### *a. The Public Domain*

As explained earlier, the copyright's duration is limited to seventy years after the death of the author. After this period of time, the creative work moves into the public domain and is not protected by copyright anymore.

Consequently, anyone is free to use parts from the work without legal repercussions. For instance, Gregory Maguire's *Wicked Years* series is a retelling of Lyman Frank Baum's classic *The Wonderful Wizard of Oz*. Upon Baum's copyright expiration, Maguire was able to utilize Baum's characters and universe even though his version of Oz and its characters are very different from the original work of Baum.

There are also a tremendous amount of Fanfictions retelling old stories such as King Arthur, Tarzan, Dracula... Successors of their original authors do not have any exclusive right to their works and may not prevent their use in any way, even for commercial purposes.

The only possibility for them to act is the moral right described earlier. However, this possibility is not necessarily available in all countries. For instance, in Belgium, as described above, the moral rights of the author expire at the same time as other economic rights<sup>144</sup>.

### *b. A derivative work*

In order to establish the undisputable existence of copyright infringement, a plaintiff must demonstrate the two *prima facie* elements: the ownership of a valid copyright and the infringement of that copyright.

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<sup>144</sup> In the opposite, in France, according to French legislation, moral rights are "perpetual, inalienable and imprescriptible".

It is generally admitted that fanfiction could be argued to infringe copyright or original authors. Indeed, as explained earlier, copyright law gives the holder a bundle of rights, such as the exclusive right to reproduce; to prepare derivative works; to distribute the work; perform the work publicly; to display the work publicly; etc....

It is clear that fanfictions could reproduce, communicate to the public or be an adaptation of copyrighted work and, therefore, infringe the aforementioned author's exclusive rights.

Since the original work, its plots, characters, etc.. are copyrighted, any reproduction within a fanfiction infringes the right holder's exclusive rights in reproduction and communication to the public.

The author Meredith McCardle explains that:

*“Since characters can be copyrighted, with the caveats noted, a fan fiction author infringes the owner's first exclusive right in reproduction every time she reproduces a character in fan fiction. Along the same lines, when that fan fiction author then uploads his story onto the Internet and allows the public to access it, she has violated the owner's third exclusive right in distribution. Finally, a fan fiction writer is also guilty of violating the second exclusive right in derivative works”<sup>145</sup>.*

Thus, without prior authorization of the author, a derivative work is an infringement of the original work. Fanfiction, as a derivative work, is therefore considered as infringing exclusive rights of the author either in the United States or in Belgium (Europe).

*i. In the United States*

In the United States, fanfiction is generally considered a “Derivative work”. This latter is defined as works “*based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted*”<sup>146</sup>.

The House Report on this provision stated that:

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<sup>145</sup> M. MCCARDLE, Fan Fiction, Fandom, and Fanfare: What's All The Fuss?, B.U. J. SCI. & TECH. L., Vol. 9:2, 2003, p.460.

<sup>146</sup> 17 U.S. Code § 101.

*“To be an infringement the “derivative work” must be “based upon the copyrighted work,” and the definition in section 101 refers to “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” Thus, to constitute a violation of section 106(2), **the infringing work must incorporate a portion of the copyrighted work in some form**; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause”.*

Applying this provision in US copyright law, any fan that takes a copyrighted audiovisual work and transforms it into another story shall be considered as creating a derivative work based on the original.

Fanfictions are usually created without any permission of the copyright owner of the original creation and, therefore, from a strictly legal point of view, are treated as copyright infringement in the United States. In the case law, courts have quickly held that a script treatment for a sequel to a movie was a derivative work when the treatment made extensive use of the original work's characters and settings<sup>147</sup>.

As mentioned earlier, in *Anderson v. Stallone*, the plaintiff, Anderson, drafted a plot for a possible sequel to the previous three Rocky movies. Stallone wrote the scripts for, including the characters, and owned the copyrights to the previous movies. He claimed that Anderson infringed upon his copyrights in the plot and the characters. The Court recognized that Rocky's characters were “*highly delineated group*” that was “*set forth in tremendous detail*” in Stallone’s copyrighted works<sup>148</sup>.

The Court decided with “*no difficulty ruling as a matter of law that the Rocky characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author.*”

Therefore, the Court said that Anderson’s use of these characters violated Stallone’s copyright and “*infringe[d] upon the protected expression in the Rocky characters and render[ed] his work an unauthorized derivative work.*”

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<sup>147</sup> See *Anderson v. Stallone*, II U.S.P.Q.2d (BNA) 1161, 1167 (C.D. Cal. 1989).

<sup>148</sup> *Ibidem*. p. 1166.

Consequently, to this ruling, fan fiction has been placed within the legal scope of derivative works since it appropriates elements of the original work. Indeed, fanfiction writers take actual characters from an original work and transplant them into their own works of fiction<sup>149</sup>.

The only way for fanfic writers to avoid an infringement court rule is the affirmative defense that their infringement was fair and therefore protected under the law. This defense shall be examined later<sup>150</sup>.

## ii. *In Europe*

As explained above, there is in Europe a similar to “Derivative work” designating “*works that were based upon the original work*”<sup>151</sup>.

Indeed, European law recognizes the concept of derivative works. However, the concept is not approached by specific legislation in all European countries. For instance, in French law, derivative work is described as “*oeuvre composite*”<sup>152</sup>.

There is no doubt that fanfiction incorporates copyrighted work, even under a modified form, and therefore infringes the copyright of the original author. Indeed, the adaptation of creative work includes its reproduction, even partially. In order to be incorporated into a second work, the original work must be reproduced somehow. Therefore, in applying the applicable law, such reproduction is unlawful without the author's prior consent<sup>153</sup>.

In Belgian law, the concept of derivative work is not defined; however, authors describe it as “*une œuvre distincte de l’œuvre originale qui lui est incorporée en tout ou en partie* »<sup>154</sup>. As in French law, such reproduction is unlawful without the prior consent of the original author<sup>155</sup>.

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<sup>149</sup> Charity A. Fowler, *Rewriting TV: Fan Fiction as Fair Use*, available at [https://www.academia.edu/5152526/Rewriting\\_TV\\_Fan\\_Fiction\\_as\\_Fair\\_Use](https://www.academia.edu/5152526/Rewriting_TV_Fan_Fiction_as_Fair_Use)

<sup>150</sup> *Folsom v. Marsh*, 9, F. Cas. 342 (C.C.D. Mass. 1841), the fair use doctrine, an affirmative defense to copyright infringement, is now codified at 17 U.S.C. § 107.

<sup>151</sup> See *supra*, p.48.

<sup>152</sup> See Articles L. 113-2 al 2 to 113-4 Code de la propriété intellectuelle.

<sup>153</sup> CARON Christophe, *Droit d’auteur et droits voisins*, 6<sup>e</sup> édition, Paris : LexisNexis, 2020, p. 303.

<sup>154</sup> LAURENT, P, *Logiciels libres et droit d’auteur: naissance, titularité et exercice des droits patrimoniaux*. Dans *Les logiciels libres face au droit*. Cahiers du CRID, Numéro 25, Académia Bruylant, Bruxelles, p. 40.

<sup>155</sup> *Ibidem* ; See F. DE VISSCHER et B. MICHAUX, *Précis du droit d’auteur et des droits voisins*, Bruxelles, Bruylant, 2000, p. 41.

A derivative work is thus an infringement, and the original author is entitled to claim a copyright infringement against fanfiction writers.

*c. Fans Disclaimers*

The particularity of the fanfiction phenomenon is that fans and fanfiction writers willingly acknowledge that they do not own any right over the original work or any of its elements.

As explained by Jessica Hautsch, citing Kristeva, “*Fic writers openly acknowledge the intertextual nature of their stories, their focus on imitation, the quotative nature of their writing. Their stories explicitly exist in intertextual relation to the source material, poaching elements, monstrously combining them, adding to the archive*”<sup>156</sup>.

They actually claim and proclaim their reproduction and imitation of the original work they love. They add to it the result of their personal reading and understanding of the original text.

For this reason, they start their work with a disclaimer to clarify the legal status of their creation, similar to the following:

*“All publicly recognizable characters, settings, etc., are the property of their respective owners. The original characters and plot are the property of the author of this story. The author is in no way associated with the owners, creators, or producers of any previously copyrighted material. No copyright infringement is intended”*<sup>157</sup>.

This is because fanfiction writers are not willing to appropriate or confiscate someone else’s work. Still, they want to make their favorite characters “*continue their story or come to a whole new world and start new adventures*”<sup>158</sup>. The fanfiction writers want to be considered as “*loyalists rather than infringers*”<sup>159</sup>.

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<sup>156</sup> See *Supra*, p.26.

<sup>157</sup> See <https://forficwritersbyficwriters.tumblr.com/tagged/disclaimer>

<sup>158</sup> X. CAI, Fanfiction and Copyright issues, available at <https://biblio.uottawa.ca/omeka2/linking-cultures/fanfiction-copyright-xiaofan>

<sup>159</sup> Charity A. Fowler, Rewriting TV: Fan Fiction as Fair Use, available at [https://www.academia.edu/5152526/Rewriting\\_TV\\_Fan\\_Fiction\\_as\\_Fair\\_Use](https://www.academia.edu/5152526/Rewriting_TV_Fan_Fiction_as_Fair_Use)



Besides, these disclaimers are sometimes drafted in a very sarcastic and derisive way. For instance, a fanfiction writer of the original work “Stargate” disclaimed as follows:

*“Stargate SG-1 and its characters are the property of Showtime/ Viacom, MGM/UA, Double Secret Productions, and Gekko Productions. I do not own the characters and indeed am only playing with them for a little while. I am not making any money from this and I'm still paying for everything I own so there's very little point in suing me. No copyright infringements whatsoever is intended. The story is for entertainment purposes only”<sup>160</sup>.*

Another one as follows:

*“This is a piece of (hopefully) original fan fiction, and in no way is meant to infringe on the copyrights of Chris Carter, Fox Television, and/or Ten-Thirteen Productions. And before they think about suing me, they should just realize that I'm in their most-valued viewing demographics, and if they take all my money away I won't be able to buy all that lovely merchandise”<sup>161</sup>.*

The writer of the famous fanfiction “James Potter and the Hall of Elders Crossing” disclaimed any link or confusion with the original J.K. Rowling work as follows:

*“James Potter and the Hall of Elders Crossing (the "Work") is Harry Potter series ("Series") fan fiction and was not created by Series author J.K. Rowling nor under her auspices. To the extent that trademarks of the Series (the "Proprietary Rights") are used in the Work, such use is incidental and not for purposes of source indication. Any such trademarks are and remain property of Ms. Rowling and her assigns. The author hereby disclaims any interest in said Proprietary Rights. The Work is © 2007 G. Norman Lippert”.*

Despite these disclaimers, it is clear that in strict compliance with copyright law to fanfiction, such a writer is infringing the original author's exclusive rights since his creative work was used and reproduced, even partially, without its prior consent.

Indeed, as explained earlier, copyright law gives the holder a bundle of rights, such as the exclusive right to reproduce; prepare derivative works; distribute the work; perform the work publicly; display the work publicly; etc....

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<sup>160</sup> See The Space Monkey's SG-1 Fanfic, <https://thespacemonkey.tripod.com/id1.html>

<sup>161</sup> R. TUSHNET, *op.cit.*, p. 669.

Regarding the nature of fanfiction, this latter does not copy the original work but likely infringes the author's rights through the reproduction of parts of its work (for instance, reproduction of characters, story, part of plots,...) and creation of derivative works without its prior authorization.

As described by scholars:

*“Many fan authors are aware that their disclaimers do not protect them against claims by the copyright owners.*

*(...)*

*Even if legally ineffective, copyright disclaimers serve an important nonlegal function. Fans are using statements about law to speak about themselves as consumers and producers of images. They are asserting both their allegiance to the media creations they enjoy and also their distance from the official texts. As fans, they recognize their subordinate status—they are just “borrowing” the characters. Fans recognize that they may not write “canon,” but can only evoke alternate possibilities”<sup>162</sup>.*

Thus, most fanfictions writers express their non-infringing intent and the fact that their contributions do not aim to replace or substitute the original work but to make a tribute to the author and its creation. In other words, *“through disclaimers, fan authors express their sense that credit must be given where it is due, to the .creators of the characters borrowed”<sup>163</sup>.*

Providing a disclaimer has become a habit for fanfictions writers. It is like a formal anticipated step to explain to authors that their fanfics are not endangering their creations. Somehow, it is a *“ritual”* addressed to *“authors and audiences that fan fiction can neither compete with nor be mistaken for “the real thing.”<sup>164</sup>.*

However, there is no doubt that such a disclaimer does not provide any actual legal protection and that copyright holders are fully entitled to protect their creations and original works from any infringement, including unauthorized reproduction or communication to the public.

Moreover, these disclaimers also symbolize the distinction between the legal and the artistic visions of fanfiction. Indeed, as explained before, Barthes, confirming the intertextuality of fanfiction, stated that the writer could only imitate an anterior work, mix writings, and never be

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<sup>162</sup> R. TUSHNET, *op.cit.*, p. 678-79.

<sup>163</sup> *Ibidem*, p. 680.

<sup>164</sup> *Ibidem*.

original. He even proclaimed the death of authorship since the text is merely the product of other texts. However, through this disclaimer, fanfiction writers concede that literary intertextuality is not recognized by law; it is even strongly objected and authorship is formally ratified.

## **B. A difficult balance of interests**

### **1. The author vs. the public**

As explained earlier, copyright law protects the rights of those who create and produce literary, artistic, dramatic, and musical works. The right holder has, indeed, the exclusive right to copy and use its original work<sup>165</sup>.

Its main purpose is to foster and incite innovation and creation in the literary area by granting exclusive rights to authors “*to reap the commercial rewards of their efforts.*”

In order to guarantee and maintain creations and a steady supply of valuable new works to the community, copyright has given to the “author”, as a creator of original work, incentives and rewards in the form of exclusive rights on the use of his creation.

In the United States of America, the entire copyright rules are based on Article 1, Section 8 of the U.S. Constitution, stating that:

*“The Congress shall have Power (...)*

*To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.*

This clause demonstrates the importance given to the economic aspects of copyright and the crucial need to protect the intellectual and material investment of the author to encourage this latter to be creative and supply the market with original works.

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<sup>165</sup> MARSHALL A. LEAFFER, Understanding Copyright Law, 2.

The Court even held that: “*The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’*”<sup>166</sup>.

The same central role was given to authors in England with the 1710 Statute of Anne, which explained that it was an “*Act for the Encouragement of Learned Men to Compose and write useful Books...*”<sup>167</sup>.

Authors are therefore considered the heart of copyright. Authorship is consecrated for the good of progress. This is why they deserve to be protected and encouraged to develop new creations.

Belgian law states that: “*The original copyright owner is the natural person who created the work*”<sup>168</sup>. Thus, the author is the aforementioned natural person that created the work.

It is crucial to approach the impact of fanfiction in copyright with a consideration of the concept of authorship in the light of the dominant role of authors in the progress of science and art.

Some even said that “*The law exists to ensure that creators have the opportunity to recover the costs of their efforts by providing them with a period of exclusive rights that allows them to charge higher prices for their works*”<sup>169</sup>.

The author remains the person that creates an original work and communicates it to the world. Scholars explain that “*To ascertain whether someone is an author, we must ask whether he has communicated original expression, either directly (through personal fixation) or indirectly (through authorizing another to fix it). That is what makes someone a copyright author*”<sup>170</sup>.

The law described the author in a way to provide the necessary protection and consideration to his status and his work, and consequently, he shall be compensated for his efforts.

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<sup>166</sup> Mazer v. Stein, 347 U.S. 201, 219 (1954).

<sup>167</sup> The Statute of Anne; April 10, 1710.

<sup>168</sup> Art XI.170 CEL : « Le titulaire originaire du droit d'auteur est la personne physique qui a créé l'œuvre ».

<sup>169</sup> C. BUCCAFUSCO, *A Theory of copyright authorship*, Virginia Law Review Association, 2016, p.1258.

<sup>170</sup> R. VERSTEEG, *Defining "Author" For Purposes of Copyright*, The American University Law Review, Vol. 45, p. 1365.

Indeed, the law expects some level of work to provide its protection. For this reason, as explained earlier, the author must convert its ideas into fixed, tangible expressions<sup>171</sup>. A simple idea without any concretization is not copyrightable and should be “*freely accessible for the good of humankind*”<sup>172</sup>.

As described above, the legitimate exclusive right of authors must be tempered by the need not to monopolize ideas to the detriment of technical progress and industrial development.

This dichotomy between ideas and the expression of creative works is one of the benchmarks of the balance that must be done between their exclusive and legitimate rights and the purpose of maximizing the number of works available to the public to allow the dissemination of knowledge.

It is admitted that “*Intellectual Property Rights works mainly on the incentive system and on the belief that providing protection to the innovation or any new creation would encourage people to openly disclose their innovation without any fear that others would appropriate their creativity and which allows subsequent authors to utilize general concepts*”<sup>173</sup>

However, overprotection shall be harmful as well and would somehow jeopardize the development of science and knowledge:

*“Copyright protection has never been absolute. If it were, it would defeat its constitutional goal of promoting the public good. As Judge Kozinski has written: Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture”*<sup>174</sup>.

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<sup>171</sup> For example, in the U.S case law : Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990) (noting general rule that person must translate ideas into copyrightable expression to be considered author); Riley Home Bldg. Corp. v. Cosgrove, 864 F. Supp. 1034, 1037 (D. Fan. 1994) (stating that copyright ownership vests only in person who creates fixed, tangible expression); Balkin v. Wilson, 863 F. Supp. 523, 527-28 (W.D. Mich. 1994) (discussing requirement that one must fix idea into tangible form to be author).

<sup>172</sup> R. VERSTEEG, *op.cit.*, p. 1365.

<sup>173</sup> PAUL, RITU, Intellectual Property Rights: A Utilitarian Perspective (May 9, 2021). Available at SSRN: <https://ssrn.com/abstract=3842429> or <http://dx.doi.org/10.2139/ssrn.3842429>.

<sup>174</sup> R. TUSHNET, *op.cit.*, p. 661; See also White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993).

For this reason, most legal systems have established several limitations to the author's exclusive rights.

## 2. Fan Fiction and exceptions to copyright

In Belgium, as explained earlier, the Code of Economic Law provides several situations where it is possible to invoke the benefit of specific exceptions to copyright. Thus, the agreement of the copyright holder is then no longer necessary to carry out the reproduction or communication to the public of the protected work.

As mentioned before, fan fiction refers to a written work produced by fans of a particular film, series, novel or any other existing fictional work. Naturally, fanfiction has several legal implications since writers of such work are using another author's copyrighted work without his prior authorization.

### *a. Is Fan fiction an authorized short quotation?*

As explained earlier, fan fiction generally involves the creation of new stories, characters, and settings using elements from pre-existing works of fiction, such as books, movies, or television shows.

It is, therefore, crucial to see how the right to quote may "legalize" the fan fiction practice regarding the author's exclusive rights in his original work.

The right to quote allows limited use of copyrighted material without the permission of the author or copyright holder under certain circumstances. These circumstances include using copyrighted materials for purposes such as criticism, commentary, news reporting, teaching, scholarship, or research.

The purpose of quotation is usually limited to a few situations strictly interpreted:

*"The quotation shall be made for one of the purposes specified in the law.*

*Those can be grouped into three categories: scientific, critical and informative purposes*<sup>175</sup>.

These purposes do not seem suitable with the inherent nature of Fan fiction; however, Henry Jenkins, the famous scholar, strongly criticized the power of media companies to secure their exclusive rights over creative works and prevent any use of such works:

*“Media companies are expanding their legal control over intellectual property as far and as wide as possible, strip-mining our culture in the process. They have made inventive uses of trademark law to secure exclusive rights to everything from Spock’s pointy ears to Superman’s cape, pushed policies that erode the remaining protections for fair use, and lobbied for an expansion of the duration of their copyright protection and thus prevented works from falling into the public domain until they’ve been drained of value”*<sup>176</sup>.

He added that due to this power of media companies, “... *we all suffer a diminished right to quote and critique core cultural materials*”<sup>177</sup>.

In that way, Jenkins recognized that the right holder is entitled to object to fanfiction as infringing the author’s exclusive rights with only very little space for any right to quote.

Yet, it is conceivable that fanfiction is created in order to analyze, explain and comment on the original work. Indeed, Belgian law states that quotations made for the purpose of criticism, controversy, or review, in accordance with the honest practices of the profession and to the extent justified by the aim pursued, do not infringe copyright<sup>178</sup>. For instance, there are thousands of Star Wars prequels fanfictions to provide explanations and stories about the past of the main Star Wars characters<sup>179</sup>.

Are those fanfictions protected by the “right to quote”?

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<sup>175</sup> J. CABAY and M. LAMBRECHT, Remix prohibited – How rigid EU copyright laws inhibit creativity JIPLP 2015, p.24.

<sup>176</sup> H. JENKINS (2000). Digital land grab, Technology review, 103(2), 103–106.

<sup>177</sup> *Ibidem*.

<sup>178</sup> See Art XI.189 CDE « *Les citations, tirées d'une œuvre licitement publiée, effectuées dans un but de critique, de polémique, ou de revue, conformément aux usages honnêtes de la profession et dans la mesure justifiée par le but poursuivi, ne portent pas atteinte au droit d'auteur* ».

<sup>179</sup> See <https://www.fanfiction.net/movie/Star-Wars/>

It is unlikely that it was in the legislator's will to associate the creation of a new story based on the original work with the “*criticism, polemic, or review*” purpose of quoting parts of such creative works, especially since the right to quote is supposed to be short and brief.

This is exactly the assertion of Belgian courts, which decided that:

*“The use of the term 'quotation' assumes that the work thus reproduced is so limited, to the extent necessary for its purpose; in other words, the extract from the work must remain brief, it is not sufficient on its own. It must be part of the development, the critical scheme of the one who makes the quotation, and whose quotation is simply the illustration of the subject. To concretely analyze whether or not it is a quotation, it is generally considered that the coherence of a text must exist independently of the quoted extracts and survive their deletion. »*<sup>180</sup>.

It is impossible to imagine a Star Wars prequels fanfic quoting briefly the original work to illustrate any criticism or comment of the original work.

The previous court decision is particularly clear and eloquent about the unsuitability of the right-to-quote exception since it states that the consistency of a text must exist independently of the quoted extracts and survive their deletion. Such deletion is impossible in fanfictions because they cannot survive without the original work.

Moreover, the purpose of fanfiction diverges from the simple quoting of the original work for purposes such as criticism or review; indeed, fanfiction allows fans to engage with their favorite fictional worlds and characters, expressing their creativity by writing stories that expand upon or reimagine existing narratives and original stories. Fanfiction writers aim to address unresolved plot points in the original work and explore what-ifs, and provide their own interpretations of events that may have been left unexplored or unsatisfying in the original canon material.

The purpose of fanfiction is also to allow a larger community to connect and share their passion for a specific story, series, or characters. These considerations are far from the original purpose of the right to quote, which is to authorize the use of works related to the reporting of current events to the extent justified by the informatory purpose, and quotations for purposes such as

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<sup>180</sup> Liège, n° 2012/RG/1366, 16 mai 2013



criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public.

Belgian scholars confirmed that:

*“In the current state of the law, the exception for quotation will generally be of little help for allowing truly transformative uses”*<sup>181</sup>.

Therefore, in view of the above, the right to quote’s exception may not legally support fanfiction from the right holder’s infringement claims.

*b. Is fanfiction an authorized parody or caricature?*

As explained earlier, *“the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humor or mockery”*<sup>182</sup>.

A parody does not require the prior authorization of the original right holder as long as the work is dealt fairly. It is generally admitted that fanfiction is not necessarily a parody of the original work, although parodies do exist within the realm of fanfiction.

Parody refers to a form of creative work that reproduces and somehow mocks another work, most of the time, for satirical purposes. Naturally, while some fanfiction may take such a humorous or satirical approach to the original creation, most fanfiction aims to expand upon or explore the existing storylines and characters rather than solely parodying them.

That being said, there are instances where fanfiction does incorporate parody elements, such as deliberately exaggerating or subverting certain aspects of the original work for comedic effect.

For instance, there are many fanfictions created to parody the J. K. Rowling's Harry Potter fantasy series. Some of them were even published, such as “Barry Trotter” a series of Harry Potter parodies written by Michael Gerber and published in the United Kingdom<sup>183</sup>.

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<sup>181</sup> J. CABAY and M. LAMBRECHT, *op.cit.*, p.26.

<sup>182</sup> ECJ, 3 September 2014, C-201/13. §33.

<sup>183</sup> M. GERBER, *Barry Trotter and the Shameless Parody*, Bragelonne ; October 2004.

Another parody of Harry Potter was published in France under the name “Harry Cover” (pronounced like haricots verts, French for green beans). It is a comic book parody written by Pierre Veys describing the story of a young boy who is a wizard and lives, like all his peers, in the world of Malodorus, that is to say of humans<sup>184</sup>.

These parodies have never been considered illegal since they were sarcastic and very different and distinct from the original Harry Potter series. Some other Fanfictions that pretended to be parodic were considered unlawful. It is the case of the Russian fanfiction “Tanya Grotter” which is a fantasy novel series by Dmitri Yemets, describing the life of Tanya, an orphan with some resemblances to J. K. Rowling's Harry Potter. Many books were published in Russia, but the series is not available in English translation because the first book has been judged by a Dutch court as a breach of copyright<sup>185</sup>. The court decided that the Russian series was not a parody but instead was infringing on Rowling's right to control derivative works.

However, it's important to remember that not all fanfictions are parodies, and many fan works are actually focused on exploring and expanding upon the source material rather than directly parodying it.

Indeed, It is clear that fanfiction covers a wide range of styles, including romance, adventure, drama, and more. Most of the fanfictions are serious, emotional, or even experimental in nature. The primary goal of fanfiction remains to engage with the original work and its characters, either by creating new stories within the established universe or by reimagining them in different contexts, environments, or scenarios.

Therefore, parody may be a legal solution to fanfiction if they meet the requirement of a sarcastic work as defined by the case law. Otherwise, the parody defense shall be rejected and the copyright infringement confirmed.

Scholars affirmed regarding fanfictions that:

*“it is fair to say that its scope remains quite narrow. In particular, where there is no humorous intent (and not every transformative use is intended to be funny), there is no parody. Other conditions (such as the amount taken from the original work) further limit its application and their interpretation by the courts*

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<sup>184</sup> See <https://www.bedetheque.com/serie-12386-BD-Harry-Cover.html>

<sup>185</sup> See <http://news.bbc.co.uk/2/hi/entertainment/2414045.stm>

*appear to be particularly stringent in Belgium as well as in France. In many cases of transformative uses that do not conform with the traditional cultural practices, in the field of contemporary art or user generated content, the parody exception will most probably provide very little breathing space”<sup>186</sup>.*

### *c. Scholarly Work?*

As explained earlier, the use or reproduction of a small part of creative works is allowed without the author’s prior authorization in certain circumstances, such as for educational purposes or in the context of scientific research.

However, Fan fiction is generally not considered a scholarly work in the usual academic sense. Fan fiction is a form of creative writing produced by fans for their enjoyment and curiosity that they share with other fellow enthusiasts. While fan fiction exhibits creativity, critical thinking, and literary skills, it is primarily a fan-driven creative expression rather than an academic analysis and intellectual process.

It is clearly different to hold a discussion regarding the philosophical and literary aspects of Jane Austen’s novels and address unresolved plot points of the work and explore what-ifs or alternative endings.

Even though it is quite undoubtful that the scholarly work exception shall not provide any satisfactory answer to the legal status of fanfiction, it's worth mentioning that there are many scholarly discussions about fan fiction within certain academic fields, such as cultural and media studies.

Academics may study fan fiction as a cultural phenomenon, exploring its impact, themes, and social dynamics. In such cases, scholarly works might analyze and discuss fan fiction, but the fan fiction itself may not be considered scholarly work.

### 3. Fanfiction is a derivative work.

#### *a. Derivative work infringes the copyrighted work*

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<sup>186</sup> J. CABAY and M. LAMBRECHT, *op.cit.*, p.35.

As explained above, fanfiction is a derivative work “*based upon the copyrighted work*”<sup>187</sup>. Either in Belgian or United States copyright law, fanfiction shall most of the time be considered as a derivative work since “*it takes the copyright holder’s original creation and adds new characters, settings or plotlines, thus creating a new and different work*”<sup>188</sup>.

Indeed, scholars agree that it is likely that “*Because virtually all works of fan fiction are most likely substantially similar to the original works, copyright holders have a prima facie case for copyright infringement against those fan fiction authors and distributors who act without the copyright holder’s permission*”<sup>189</sup>.

Most of the time, fan fiction writers do not only reproduce original characters and set them merely in another environment or plot, but they also create entirely new characters and set them within the preexisting universe of the original work.

For instance, the trendy online fan fiction, “James Potter and the Hall of the Elders’ Crossing”<sup>190</sup>, features new characters that did not appear in the authentic Harry Potter series created by author J.K. Rowling; however, it is set at Hogwarts, includes copyrighted characters and references events that occurred in the original work.

J.K. Rowling threatened legal action against this fanfiction writer G. Norman Lippert for allegedly violating her intellectual property rights by producing and publishing the online novel.

There were discussions among intellectual property specialists about whether such creation, involving new characters that did not appear in the original work, could be considered as infringing the original author’s exclusive rights. Some explained that “*If an insubstantial character from a novel is taken and built up by another author in a new story, that can be a defence against copyright infringements.*”<sup>191</sup>. This opinion was not shared by most specialists

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<sup>187</sup> H.R. Rep. No. 94-1476, at 62 (1976), reprinted in 1976 U.S.C.A.A.N 5659, 5675.

<sup>188</sup> M. MCCARDLE, *op.cit.*, p.460.

<sup>189</sup> L. STENDELL, *op.cit.*, p. 1554.

<sup>190</sup> G. NORMAN LIPPERT, James Potter and the Hall of Elders Crossing, 2007, [https://jspotter.fandom.com/wiki/James\\_Potter\\_and\\_the\\_Hall\\_of\\_Elders%27\\_Crossing](https://jspotter.fandom.com/wiki/James_Potter_and_the_Hall_of_Elders%27_Crossing)

<sup>191</sup> Mahesh Madhavan, cite in <https://www.scotsman.com/news/world/rowling-goes-potty-over-us-bid-to-post-harrys-sons-story-on-web-2472267>

since the story includes many copyrighted characters and references to events related to the original story.

However, J.K. Rowling dismissed her threat since Lippert offered her an advance copy of the novel to get her prior authorization. J.K. Rowling did not give him authorization and rejected any involvement in such fanfiction but never explicitly objected to Lippert's work.

This latter was conscious that his work was on the edge of the legal scope and decided to keep it as an online free fanfic:

*"I'd love to see my books printed since a lot of people won't read novels off of their computers. But I won't make a big legal mess like Vander Ark [writer of the disputed 'Harry Potter Lexicon']. I'd love to get Ms. Rowling's permission to publish if she thought my stories were worth it. I've told her that I'd split the proceeds with her for charity. But I won't fight her over it. I just want to keep the story going"*<sup>192</sup>.

While it is still a question of derivative works of J.K. Rowling's original creation, it is important to mention the legal action initiated by Warner Bros against an American publishing firm "RDR Books" to block the publication of the "Harry Potter Lexicon", a complete reference to the world of Harry Potter.

According to J.K. Rowling's lawyers, the book publishes excerpts from the novels and stills from the films without offering sufficient "transformative" material to be considered a separate work. The Court ruled in favor of J.K. Rowling, claiming that the book would violate her copyright. In December 2008, a modified and final version of the Lexicon was approved for publication and released.

It is, therefore, generally admitted that fan fiction infringes upon the original works and must be categorized as a derivative work.

*b. How to make it legal?*

It is clear that a derivative work is infringing the author's original work since it is performed without its prior consent. However, it is sometimes possible to "legalize" and justify the existence of such derivative work despite the absence of the author's prior consent.

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<sup>192</sup> Interview of George Norman Lippert, *On Eve of James Potter Sequel, Harry Potter fan Fiction Heats up: Unlikely Author Poised to Keep the Story Alive*, <http://www.prweb.com/releases/2008/07/prweb1080574.htm>

To examine this subject, it is crucial to distinguish the European perspective and the American regulation applied to fan fiction.

*i. In the United States – Fair use regulation*

The legality of fan fiction in the United States is mainly based on the defense of fair use. After the copyright holder has established that a derivative work has violated his copyright, the defendant may assert a defense that his infringement was fair and therefore protected under the fair use defense.

The fair use doctrine is considered an affirmative defense to copyright infringement that is codified at 17 U.S.C. § 107<sup>193</sup>. The impact of Fair use doctrine on Fan fiction is summarized by Tushnet as follows:

*“Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder's characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work”<sup>194</sup>.*

Tushnet considers fanfictions as meeting all fair use requirements described in provision 17 U.S.C. § 107.

- Non-commercial purpose?

Under the first factor, it is usually accepted that a noncommercial use weighs mostly in favor of a finding of fair use<sup>195</sup>. Under this factor, it is also the question of the purpose of the copying work; is it a mere copy or is it “transformative”?

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<sup>193</sup> 17 U.S.C. § 107: “(...) In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;  
(2) the nature of the copyrighted work;  
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and  
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>194</sup> R. TUSHNET, op.cit. p. 654.

<sup>195</sup> Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984): the US Supreme Court held that home videotaping for personal use was fair use.

Transformative uses are those that add something new or different with a further purpose or different character and do not substitute or replace the original use of the work. Indeed, the Supreme Court has set out in *Campbell v. Acuff-Rose Music, Inc.*, if a work transforms the original, it is less likely to constitute copyright infringement, or, alternatively, the court is more likely to excuse the infringement as fair use<sup>196</sup>.

Fanfiction is usually the result of enthusiasts who want to share their passion with the public. Therefore, there is no commercial purpose in Fanfiction. As explained by Meredith McCardle, “*Fanfiction is not professional writing marketed for profit but rather is written to further a segment of popular culture*”<sup>197</sup> and “*Fan fiction is mainly a product of the Internet, and fan fiction authors do not make their readers pay a fee to access the stories*”<sup>198</sup>.

Some courts have decided that “*most fan fiction writers are not “in the business of” copying copyrighted works because no money ever changes hands*”<sup>199</sup>. The final purpose of fan fiction writers is actually to satisfy innate desires, not to make a profit. They just want to share their common interest with other people.

For instance, one of the first cases between fan fiction authors and copyright owners occurred in 1977 when Paramount, the copyright holder to Star Trek, sent a cease and desist letter to publishers of a Star Trek fanzine. Eventually, Paramount dropped the case since it found out that the fanzine was not professional<sup>200</sup>.

However, in a few cases, Fanfiction work becomes very popular and might be very profitable. Indeed, very popular examples include *50 Shades of Grey* (originally a *Twilight* fanfiction), *After* (originally a *One Direction* fanfiction), and many others<sup>201</sup>. These Fan fictional works have become a huge source of profit for their writers with a pre-existing fanbase that is coming from the original copyrighted work.

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<sup>196</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994), p. 579.

<sup>197</sup> M. MCCARDLE, *op.cit.*, Part II-C.

<sup>198</sup> *Ibidem.*, p. 463.

<sup>199</sup> See *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 705 (E.D. Mich. 1998). Cited in M. MCCARDLE, *op.cit.* p. 463.

<sup>200</sup> M. ECKS & Writers University, *A History of Television Fan Fiction*, Writers University, at <http://writersu.s5.com/history/shistory03tv.html>

<sup>201</sup> *50 Shades of Grey* (Vintage Books, 2011); *After* (CalMaple, Frayed Pages Entertainment, 2019).

Moreover, fanfiction sites are taking advantage of these derivative works thanks to the advertisement revenues. For example, the Wattpad fanfiction platform has extended its activities by partnering with Sony and other big companies to produce fan content as original works<sup>202</sup>. These apparent financial successes demonstrate that a commercial benefit does not automatically mean that the fair use defense shall be rejected since the work is transformative and distinctive from the original creation.

Conclusively, it is usual to consider fan fiction as fair use under this first factor.

- Nature of the copyrighted work?

This factor assesses the extent to which the work that was used relates to the copyright's purpose of encouraging creative expression. The type of work being infringed is important in the fair use finding. Indeed, a fictional work is more protected than a factual work. Thus, factual subject matter, which is less creative, is less deserving of protection than a fictional and creative story.

Fan fiction is mostly creations based on fictional original works. Thus, these latter deserve better copyright protection. This second factor weighs in favor of copyright holders in the final finding.

- The amount of original work used?

The focus is on the context in which the use of the original work occurs. For scholars, the question is how much original materials have been copied in the secondary work compared to the initial creative work. Are they essential parts of the original work?

To sum up, the question is, “*How extensive the quantity of copying was in addition to the impact the copied portion has relative to the whole of the copyrighted work-that is, whether the copied portions go to the heart of the original piece's "quality and importance"*”<sup>203</sup>.

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<sup>202</sup> See Wattpad (Website) <https://www.wattpad.com/>.

<sup>203</sup> L. STENDELL, *op.cit.* p.1569.



It is not necessarily the quantity but more the quality of the copied and reproduced portions. Regarding this point, Tushnet explains that :

*“Analyzing the third fair use factor, the amount and substantiality of the portion used, is difficult. If a character can be copyrighted, then use of the character might be deemed use of the entire copyrighted material. But characters cannot be copyrighted in themselves; they only merit protection when they are sufficiently delineated in a copyrighted work”*<sup>204</sup>.

If the character is considered the heart of the copyrighted work, then its reproduction is substantial. According to the case law, the substantiality of the use should be evaluated in light of whether it is *“reasonable in relation to the purpose of the copying”*<sup>205</sup>.

Therefore, even if it is substantial, it might be considered a legitimate use. As explained by Tushnet :

*“Thus, even wholesale borrowing might well be legitimate if, as with fan fiction, the use is transformative, noncommercial, and not a market substitute”*<sup>206</sup>.

Fanfiction usually borrows copyrighted characters and creates a new universe or story involving these characters. When they are particularly elaborated and outlined, characters are the soul and flesh of the copyrighted work; that means that if the characters are borrowed, the heart of the work is copied.

To distinguish between legal or illegal copying, the Court held that authors must ask themselves whether the characters they took are “mere chessmen” or not:

*“[i]t is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story, he is not within the area of protection afforded by copyright.”*<sup>207</sup>.

McCardle shares this analysis:

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<sup>204</sup> R. TUSHNET, *op.cit.* p. 677.

<sup>205</sup> Campbell, 510 U.S. at 586.

<sup>206</sup> R. TUSHNET, *op.cit.* p. 678.

<sup>207</sup> Warner Bros. Pictures v. Columbia Broadcasting. United States Court of Appeals, Ninth Circuit. Nov 9, 1954. 216 F.2d 949 (9th Cir. 1954).

*“In the world of fan fiction, this leads to an inquiry into whether (1) the borrowing of characters and settings with the addition of elements and plots is small enough to constitute fair use, or (2) the borrowing of these elements gets to the heart of the original work in such a way that fair use is negated”*<sup>208</sup>.

Fanfiction shall be mostly considered fair use under this factor if its characters are capable of existing within their fictional environments with an identity that is independent of the original work.

- What is the effect of the use upon the potential market for or value of the copyrighted work?

In the United States, this last factor is perceived as *“undoubtedly the single most important element of fair use.”*<sup>209</sup>.

This factor measures whether or not the derivative work may serve as a substitute for the original and decrease any future sale of the original work. For doctrine, it is admitted that under this factor:

*“The more that the secondary work cannot serve as a substitute for the original, the greater the likelihood that the market has not been harmed and the more this factor weighs in favor of the infringer.”*<sup>210</sup>.

Any risk of economic harm sustained by the original author shall mean that the use of the original work by the fanfiction author does not meet the requirements of fair use defense. However, experience shows that most fanfictions do not negatively affect the success of an original work.

Stendell describes that:

*“There are no reliable indicators of the impact of fan fiction on the market for the original works. Fandom lore and academic conjecture suggest that fan fiction only improves the market for the original works, by creating and maintaining fans' interest in these works”*<sup>211</sup>.

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<sup>208</sup> M. McCardle, *op.cit.*, p.469.

<sup>209</sup> Harper & Row Publishers, 471 U.S. at 566.

<sup>210</sup> L. STENDELL, *op.cit.*, p.1570.

<sup>211</sup> *Ibidem.*

Actually, fanfiction gives the original work a stronger and wider audience by sharing a common interest and exchanging ideas and thoughts regarding the original work.

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Considering the above, it seems obvious that as applied to fanfiction, the United States Regulation, and more specifically, the fair use doctrine, led to the conclusion that copyright holders have only a few justifications for refraining fan fiction writers from using original works.

Indeed, scholars explain that “*An examination of the fair use factors demonstrates that the vast majority of fan fiction is protected by the doctrine of fair use*”<sup>212</sup>.

For many, fanfiction is considered a new work that may never replace, compete or substitute the original work:

*“fan fiction can neither compete with nor be mistaken for “the real thing.”*”<sup>213</sup>

To sum up, it is generally admitted that fanfictions are more likely to constitute fair use in the United States if they are transformative regarding the original work, if the fanfiction writer does not pursue any commercial purpose, if they appropriate few parts of the original work, and if they have no negative effect on the original work potential market.

In that way, the Fair use defense has confirmed Barthes’ assertion regarding the fact that original works do not belong to authors anymore but do belong to the community of fans<sup>214</sup>.

However, is there any other argument that copyright holders might use to object the faire use defense of the fanfiction writer?

In case of absence of intellectual property rights, it is common to use the “*unfair competition defense*” to prevent copying a work.

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<sup>212</sup> M. CHATELAIN, *op.cit.*, p.270.

<sup>213</sup> R. TUSHNET, *op.cit.* p. 680.

<sup>214</sup> See, *Supra*, p.27.

The unfair competition defense is used to protect commercial interests against deceptive business practices that are contrary to an honest and healthy competitive market<sup>215</sup>.

However, in order to have an unfair competition both products need to be in the market, which is not the case of most fanfictions. Moreover, as explained earlier, fair use defense is successful if the derivative work cannot serve as a substitute for the original work on the market. Thus, there is no fair use in case of commercial harm to the original work. To conclude, in case of fair use, it is unlikely that the unfair competition defense might obstruct the fanfiction practice.

ii. *In Belgian Law*

As explained above, there is no fair use doctrine in Belgian law. The concept of derivative work is not defined. The reproduction of copyrighted work is unlawful without the prior consent of the original author. It has been noted that Belgian law provides little space to legalize Fanfictions under few specific exceptions.

The current state of Belgian law (and European law) on exceptions and limitations to the author's exclusive right does not allow the majority of Fanfictions to be published and communicated to the public legally without the prior authorization of the right holders.

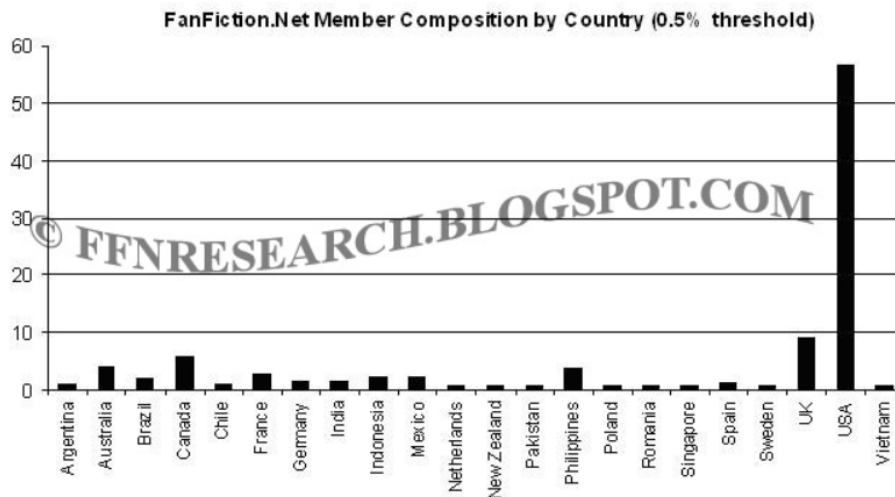
The absence of fair use doctrine or fair dealing practice in Belgium, and more generally within the European Union, has a strong deterrent effect on the spread and development of the fanfiction culture compared to other countries like the United States or the United Kingdom.

Indeed, a few studies show that on the famous fanfiction website “FanFiction.Net”, 57% of accounts originated from the United States, followed by 9.2% created in the United Kingdom, 5.6% in Canada, and 4% in Australia<sup>216</sup>:

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<sup>215</sup> See, [https://www.law.cornell.edu/wex/unfair\\_competition](https://www.law.cornell.edu/wex/unfair_competition)

<sup>216</sup> Fan Fiction Demographics in 2010: Age, Sex, Country, available in <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html>



Picture 2.

These numbers show that more than 75% of users of this platform originated from English speaker countries with fair use legal protection in their local regulations.

Another study performed in 2020 on the fanfiction platform “Archive of Our Own”, based on posted Harry Potter fan fiction works, found that 59.7% were located in North America, 16.1% were in Great Britain, with an additional 10% were otherwise located in Europe<sup>217</sup>.

Even though these studies are certainly not fully representative, they demonstrate an undisputable domination of the fair use doctrine countries compared to others. It is understood that copyright regulation is not the only factor impacting these results; indeed, some other factors explain such differences between North American countries and Europe, such as culture and history.

### C. Reactions of authors

It is essential to examine the reactions of authors regarding the Fanfiction phenomenon. Some authors are strictly defending their work and copyrights against any unauthorized use or exploitation. Some others do not act against fanfictions writers and prefer to ignore such practices.

<sup>217</sup> J. DUGGAN, Who Writes Harry Potter Fan Fiction? Passionate Detachment, 'Zooming Out,' and Fan Fiction Paratexts on AO3, 2020, Transformative Works and Cultures, no. 34. <https://doi.org/10.3983/twc.2020.1863>

History shows that legal proceedings and disputes are not common against Fanfiction writers. Most authors would rather take a public position on fanfiction to maintain a dialogue with their fans.

### 1. J.K. Rowling and fanfictions

J.K. Rowling's saga Harry Potter lasted more than ten years, from 1997 to 2007, through seven books. This fantasy masterpiece offered readers and fans an extremely diverse universe with many characters, intrigues, and themes. The action takes place in a magical world similar to ours, and the main story addresses several issues like tyranny, resistance, and madness.

During the whole ten years period, the Harry Potter universe provided an ideal environment for the production of thousands of fanfiction works related to the saga.

Fans have created many hypotheses and scenarios about all aspects of the original story with, for example, multiple extrapolations on the fate of Harry Potter's parents, secondary characters' lives, and even invented romances. Hundreds of thousands of stories have been written, published online, read, and commented on.

Regarding such a phenomenon, J.K Rowling was at first surprised and flattered by this practice. In an interview in March 2001, she said, *"It's wonderful ... I love writing more than almost anything in the world so the idea that Harry has inspired other people to write makes me very happy"*<sup>218</sup>.

Later, due to the massive fanfiction production based on her saga, J.K Rowling established some rules to tolerate Fanfiction works. These rules were notably summarized in a cease and desist letter sent by J.K. Rowling's lawyers to the [www.psa.shadow-wrapped.net](http://www.psa.shadow-wrapped.net) platform, publishing adult fanfiction of Harry Potter:

*"As you know, Mrs Rowling is the author of the Harry Potter books. Ms. Rowling therefore owns the copyright to her work. The sexually explicit content of the fanfiction and artwork available on [www.psa.shadow-wrapped.net](http://www.psa.shadow-wrapped.net), which is largely based on the characters and other elements of the fictional*

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<sup>218</sup> See Comic Relief live chat transcript, March 2001, <http://www.accio-quote.org/articles/2001/0301-comicrelief-staff.htm>

world created by Ms. Rowling in the Harry Potter books, is a real cause of trouble for our client. In addition, our client Warner Bros, which owns the rights to the films and products derived from the Harry Potter children's books, must protect the integrity of its property. To avoid any misunderstanding, **our customers do not complain about fanfiction written by real Harry Potter fans. There is simply a very real risk that sensitive children, who of course are the primary readership of the Harry Potter books, will be directed (by search engine results) to your site for sexually explicit content**, which you will recognize most people would say is inappropriate for minors. [...] »<sup>219</sup>.

J.K. Rowling has several times publicly stated that she does not have any problem with people writing fan fiction based on the Harry Potter books. However, she clearly cautioned that she would not accept any damage to her creations due to commercial or adult-oriented uses. During a New York event in 2006, J.K. Rowling repeated her position to the fans stating that “Overall, I think it's an exciting thing for readers being able to share (...). It's an interesting, exciting thing -- if used wisely”<sup>220</sup>.

## 2. Marion Zimmer Bradley and the “Darkover” Universe

Marion Zimmer Bradley created in 1958 the Darkover Series, a science fiction-fantasy novel and short story set on the planet of Darkover where a group of humans settled and developed their own culture and society. The novels focus on the conflicts between the human settlers and the local population of Darkover. The Darkover series received an excellent reception from the public, and progressively a group of fans published a fanzine called “Starstone” offering Darkover-inspired fanfictions.

At first, Marion Zimmer Bradley was flattered and encouraged the creation of fanfictions, and she even promoted their publication. She notably stated that:

*“If others wish to play in my fantasy world, who am I to slam its gates and in churlish voice demand that they build their own? ... Why should I deny myself the pleasure of seeing these young writers learning to do their thing by, for a little while, doing my thing with me?”*

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<sup>219</sup> Letter of Theodore Goddard to [www.psa.shadow-wrapped.net/https://creationsdefans.org/etudes/jkr.php](http://www.psa.shadow-wrapped.net/https://creationsdefans.org/etudes/jkr.php)

<sup>220</sup> An Evening with Harry, Carrie and Garp: Readings and questions #1, Radio City Music Hall, New York, NY, August 1, 2006, <http://www.accio-quote.org/articles/2006/0801-radiocityreading1.html>

After a disagreement with a fanfiction writer, Marion Zimmer Bradley changed her mind and prohibited any use of her novels or characters by fans:

*“Let this be a warning to other authors who might be tempted to be similarly generous with their universes. I know now why Arthur Conan Doyle refused to allow anyone to write about Sherlock Holmes. I wanted to be more accommodating, but I don't like where it has gotten me. It's enough to make anyone into a misanthrope”<sup>221</sup>.*

Some explained that the dispute with a fanfiction writer was motivated by the fact that Bradley was not allowed to use some parts of the fanfiction in her new novel<sup>222</sup>.

### 3. J.R.R. Tolkien and fanfictions

The English writer and author of the fantasy works “The Hobbit” and the saga “Lord of the Rings” was particularly hostile to any use of its work. He was overwhelmed by the fanfiction phenomenon and explained his opposition in a letter to his publisher in 1966:

*“I send you the enclosed impertinent contribution to my troubles. I do not know what the legal position is. I suppose that since one cannot claim property in inventing proper names, that there is no legal obstacle to this young ass publishing his sequel, if he could find any publisher, either respectable or disreputable, who would accept such tripe.*

*I have merely informed him that I have forwarded his letter and samples to you. I think that a suitable letter from Allen & Unwin might be more effective than one from me. I once had a similar proposal, couched in the most obsequious terms, from a young woman, and when I replied in the negative, I received a most vituperative letter.”<sup>223</sup>*

The Tolkien estate, the legal company that manages the property of J. R. R. Tolkien, including the copyright for most of his works, also has the same negative approach to fanfictions and any use of Tolkien's work. Tolkien Estate is very clear that any adaptation or derivative work based

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<sup>221</sup> G. COMANDINI, writers against fanfictions: the dark times of fandoms, Set 9, 2019  
<https://www.cercatoridiatlantide.it/en/writers-against-fanfictions/>

<sup>222</sup> J. C. MCKENZIE. "Fanworks, Marion Zimmer Bradley". Fanworks.org.

<sup>223</sup> B. DICKIESON Lewis, Tolkien and Different Views of Fan Fiction, Posted on August 1, 2018,  
<https://apilgriminnarnia.com/2018/08/01/csl-jrrt-copyright/>



on Tolkien's work is definitely not permitted. On the old Tolkien Estate's website, the FAQ provided some information regarding its "fanfiction's policy"<sup>224</sup> :

*"Is it possible to write stories that are set in Middle-earth?"*

*The short answer is most definitely **NO!***

*We understand only too well the fascination and enjoyment that the world of Middle-earth can bring, but the fact remains that this is an imaginary world, created by the author on his own terms and in his own right. So, however tempting, to publish this type of fan-fiction for personal or commercial purposes, even online, is absolutely not authorized.*

*In the era of the Internet, with people selling 'homemade' literary works on websites all over the world, it must be unambiguously stated that the Tolkien Estate has never authorized the commercialisation or distribution of such material, and has no intention of doing so.*

*The Tolkien Estate's mission is to defend and protect the integrity of J.R.R. Tolkien's works. As literary executor, it has always been Christopher Tolkien's goal to publish the writings of his father—both finished and unfinished—in the most faithful and scrupulous way, without adaptation or embellishment."*

On the current website, this policy has not changed:

*"Can I publish fan fiction or other books or material based on Tolkien's works?"*

*The Tolkien Estate has a duty to protect the integrity of Tolkien's original writings and artworks and takes copyright very seriously. This means that you cannot copy any part of Tolkien's writings or images, nor can you create materials which refer to the characters, stories, places, events or other elements contained in any of Tolkien's works"*<sup>225</sup>.

Tolkien's heirs were very concerned about protecting J.R.R. Tolkien's creations, especially after the advent of the internet and the popularization of online fanzines. Recently, a fan sued the Tolkien Estate for infringing his copyrights on his fanfic creation. The fan wrote a book, a work of fan-fiction set in J.R.R. Tolkien's Middle-earth, and called it "The Fellowship of the King" in 2017. The fan alleges that characters and storylines he created for his fanfic book were copied in the spin-off series, The Rings of Power, which aired in 2022. He also alleges that the series "copied exact language" from his book<sup>226</sup>. The Tolkien Estate sued back the fan for copyright infringement.

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<sup>224</sup><https://web.archive.org/web/20220215151450/https://www.tolkienestate.com/en/paths/faq/permissions-requests.html>

<sup>225</sup> See Tolkien's Estate website : <https://www.tolkienestate.com/frequently-asked-questions-and-links/>

<sup>226</sup> See Lord of the Rings Fanfic Writer Sues Amazon, Tolkien Estate For \$250M, April 24 2023 <https://kotaku.com/lord-of-the-rings-power-fanfic-amazon-tolkien-bezos-1850363244>

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Obviously, most famous writers are eager to protect their creations, works, and characters. However, many endeavor to maintain a healthy relationship with their fans by tolerating Fanfictions created by real fans in a non-commercial approach. Authors are also concerned with the integrity of their work and established some red lines not to cross, such as pornography, offending content, or any use that might damage their honor or the honor of the work.

## **VI. SOLUTIONS TO LEGALIZE FAN FICTION**

In Europe, most of the fanfictions are considered as infringing copyright holders' rights. As explained earlier, the primary goal of fanfiction remains to engage with the original work and its characters, either by creating new stories within the established universe or by reimagining them in different contexts, environments, or scenarios.

Therefore, the parody exception provided by European law is particularly thin for lawful fanfiction activities. Indeed, the parody exception may be a legal solution to fanfiction if they meet the requirement of a sarcastic work. Otherwise, the parody defense shall be rejected and the copyright infringement confirmed.

Since only parodic fanfiction can be published without being assessed as infringing the author's rights, it raises the question of amending the current state of the law to meet the reality of this phenomenon. It is, therefore, essential to suggest some thoughts on appropriate options.

### **A. A noncommercial public licensing**

A first solution would be general public licensing enabling fans to use the original copyrighted work under specific conditions.

This option could be modeled on what has been done with the Creative Commons (CC) license, which is a public copyright license that enables the free distribution of copyrighted works.

Creative Commons licenses were created on the premise that current copyright regulations were restraints to disseminating culture. These licenses were initiated to provide legal tools that

assure the protection of the copyright of an artistic work, on the one hand, and the free movement of cultural content, on the other hand, in order to make authors contribute to the knowledge freely available to all. Creative Commons, therefore, offers licenses for making works available.

The Creative Commons provides a license to distribute derivative works under certain conditions. For instance, UNESCO approved such licenses for the use of its work<sup>227</sup>:

**Attribution-NonCommercial-ShareAlike**

Users can remix, tweak, and build upon the work non-commercially and on the condition that any new works that use the content must also carry the same CC-BY-NC-SA license. UNESCO must be clearly credited as the owner of the work. Any use of the content for commercial purposes or in products that do not carry this license requires the written approval of [UNESCO Publishing](#).



The solution would be to apply the Creative common practice to the fanfiction environment. For that purpose, a specific regulation shall be adopted to govern the implementation of such public licenses through the copyright collecting agencies.

So far, these non-governmental agencies license copyrighted works on the authors' behalf and manage the affiliated authors' collective rights<sup>228</sup>.

Concretely, to implement this solution, the affiliated author with a copyright collecting agency would accept to submit his work to the public licensing regime and authorize noncommercial derivative works under his conditions.

As long as the use is noncommercial, respectful of conditions established by the author, and credited as the owner of the work, anyone may use the original work to create derivative works without paying any fees. If the use turns out to be commercial, the copyright collecting agency shall require the payment of prices according to the fees schedule. This noncommercial licensing shall clarify the situation regarding fanfiction works and provide legal security for everyone with the help of copyright collecting agencies and in compliance with the applicable regulation.

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<sup>227</sup> UNESCO Open access publications, <https://en.unesco.org/open-access/creative-commons-licenses>

<sup>228</sup> In Belgium, such entities are governed by articles XI.246 and following of CEL.

## **B. Contractual Licensing**

Another solution would be contractual licensing enabling fans to use the original copyrighted work and publish their work lawfully. Such an approach was proposed by Amazon through its “Kindle Worlds” online platform.

Indeed, Amazon had entered into multiple licensing agreements with copyright holders in order to authorize fanfiction writers to publish their works and sell them on the Kindle Store.

Some very successful creative works were involved in this platform, such as *Gossip Girl*, *Pretty Little Liars*, and *The Vampire Diaries*<sup>229</sup>.

The user wishing to publish his fanfiction on Kindle Worlds had to grant Amazon an irrevocable, exclusive license to it, and the revenue from the fanfiction work sales was split between Amazon, the copyright holder of the primary works, and the author of the fanfiction. Naturally, each original author was entitled to require specific conditions like rejection of any erotic or sexually explicit content, violence, vulgar language, racist content, etc.

Amazon discontinued the Kindle Worlds service on August 29, 2018, due to several problems. First, the platform had to make agreements with copyright holders, and most of them did not want to. The catalog of original work was, therefore, very restricted. Second, the platform was also criticized for making the fanfiction phenomenon a commercial activity which was not the real nature of the practice.

Tushnet explained that the commercial nature of Kindle Worlds had a negative effect on fanfiction writers who mainly act for the fan community without commercial purpose. For example, the popular *Pretty Little Liars* series showed forty-six Kindle Worlds works in June 2014, while there were nearly 6000 such works on the popular Fanfiction.net site<sup>230</sup>. Moreover,

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<sup>229</sup> LAUSSON Julien, « Avec Kindle Worlds, Amazon veut monétiser les fanfictions », Numerama [en ligne], 23 mai 2013. Disponible sur : <https://www.numerama.com/magazine/26024-avec-kindle-worlds-amazon-veutmonetiser-les-fanfictions.html>

<sup>230</sup> R. TUSHNET Rebecca, All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing, Berkeley Technology Law Journal, 2014, vol. 29, n° 3, p. 1477.

Tushnet described that the restrictions imposed on Kindle Worlds users by the licensing agreements, such as the age minimum rule, the minimum lengths of work, and the prohibition of some controversial topics (drugs, violence,...), were not accepted by fans communities.

It was obvious that Kindle Worlds was not made for fans and the community of fans. The platform did not offer any possibility for fans to interact, as it is the case in the fanfictions websites.

Despite the failure of Kindle Worlds, it is not unreasonable to imagine a major fanfiction platform such as Wattpad, Archive of Our Own, or Fanfiction.net being solicited by owners to create a similar experience to Kindle Worlds online platform with more flexible conditions.

However, everyone should learn a lesson from the fiasco of Kindle Worlds. Indeed, one of the major reasons for Amazon's debacle remains that fanfiction is not supposed to be commercial but the reflection of the shared passion of fans trying to communicate to each other their common interests in an original creation.

### **C. New exceptions to the copyright holder monopoly**

Another solution could be the potential extension of the field of copyright exceptions to the author's monopoly in favor of fanfiction, even if such a hypothesis comes up with several obstacles.

As explained earlier, the quotation and parody exceptions themselves appear to be particularly narrow and do not meet the needs of the fanfiction practice.

#### **1. The non-commercial user-generated content exception**

Such exception means that it does not constitute an infringement of copyright; the fact, for someone to use an original work or a copy of the original work already published or made available to the public to create another work and to authorize someone else to disseminate this new work.

Since the beginning of the internet and social networking, it has been common for users and individuals to express themselves through multiple forms of content online. It includes texts, videos, reviews, social networking, ads, link exchanges, collaborative creations... These contents might be performed by individuals for private purposes with the use of some copyrighted work.

In order to provide a safe harbor for this kind of work, the non-commercial user-generated content exception was created. This exception seems particularly well-tailored to fanfiction works as user-generated content for noncommercial purposes.

For instance, Canadian copyright law established such an exception in Section 29.21 (1) of the Canadian Copyright Act<sup>231</sup>.

Such a clause establishes a legal safe harbor for creators of non-commercial content that is generated by users, and that incorporates, to a greater or lesser extent, copyright works by others. It is only available for non-commercial purposes, and the names of the author, performer, producer, or broadcaster should be mentioned, if possible. Moreover, the beneficiary of this exception must believe, on reasonable grounds, that the work or its copy used in the creation was not infringing any other copyright. Finally, the use of the new work and the authorization to distribute it must have no significant negative effect on the exploitation of the original work, in particular, because the newly created work cannot substitute it on the market.

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<sup>231</sup> Section 29.21 (1) : *“It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if*  
*(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;*  
*(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;*  
*(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and*  
*(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one”.*

It is clear that this copyright exception seems to be very similar to the fair use defense as admitted in the United States, for instance. Therefore, its application might be very suitable for the admission of unauthorized fanfiction.

It might be, therefore, strongly recommended to fulfill the absence of fair use defense in Belgian and European copyright law by incorporating an additional exception to the copyright monopoly applicable to any non-commercial user-generated content, including fanfictions.

## 2. Extension of the current exceptions

The extension of the currently applicable exceptions could also be an option. Indeed, the extension of the scope of the right to quote or the parody exceptions in favor of the creation of fanfiction could provide the protection needed. That means an extension of these exceptions to works expressing a tribute to the original creation by drafting creative works that highlight its characters, plots, and stories and offer or suggest new plots, scenarios, and situations.

However, the implementation of such an extension might be difficult to concretize. It is important to recall that the parody exception is described as follows by courts: “*The essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humor or mockery*”. It is, therefore, impossible to extend the parody exception to fanfiction since the tribute to the original work does not meet the condition of humor or mockery required<sup>232</sup>.

Regarding the right to quote, the relevant European regulation gives large abilities to Member States to define the purpose of quotations. Thus, theoretically, it would be possible to expand the situations included in such an exception. In Belgium, quotations must be made for criticism, controversy, teaching, or scientific work.

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<sup>232</sup> See European Directive 2001/29/EC<sup>232</sup> on the harmonisation of certain aspects of copyright and related rights in the information and especially Article 2.

As explained above<sup>233</sup>, fanfiction is not considered a criticism of the original work, even though some would assert the opposite<sup>234</sup>. In order to include fanfiction works, the law should be amended to authorize quotations made for the purpose of noncommercial cultural tribute and references to the public.

It is natural for popular works of fiction to become cultural references and inspire fans, readers, and other writers. Therefore, this extension does not seem unreasonable<sup>235</sup>.

However, it is not excluded that some would try to take benefit of such exception to justify some other use of copyrighted works, such as videos online containing copyrighted works, for instance. It is likely that copyright holders would object to such a proposal.

### 3. A tailored exception applicable exclusively to fanfictions

It is also possible to picture a specifically customized exception in favor of literary fanfiction published online. Fanfiction is a major and legitimate cultural phenomenon that may not be ignored anymore. It is. Therefore, time to establish a specific exception to all fanfiction works that express the passion and interest in works of popular culture by individuals and a community of individuals sharing a common interest in the work. Naturally, in order to conceive such an exception, several factors must be selected to restrict the scope of this exception.

First, the exception should exclusively benefit the individuals who publish on a dedicated website a derivative work of an original creation. Secondly, the platform must be exclusively dedicated to such derivative works excluding any infringement of copyrighted work. Third, to benefit from the exception, the derivative work should be performed only for a noncommercial or nonprofit purpose. Fourth, the amount and substantiality of the portion used in relation to the original copyrighted work should be limited to the strictly required to the extent justified by the aim pursued and in accordance with honest practices not to infringe copyright.

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<sup>233</sup> See Supra, p.37

<sup>234</sup> P. LÉGER, La recherche d'un statut de l'œuvre transformatrice : contribution à l'étude de l'œuvre composite en droit d'auteur, Issy-les-Moulineaux : LGDJ une marque de Lextenso, coll. Bibliothèque de droit privé, 2018, p. 446 : she states that most of transformative works express a criticism of the creative choices performed by the original author.

<sup>235</sup> L. STENDELL, *op.cit.*, p.1552.



The conception of a new exception also creates some legal uncertainty. One More criterion means one more possibility for discussions and interpretations. It is likely that authors and organizations representing them would object to an amendment providing this additional exception.

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Although theoretically possible and interesting, the extension of the scope of exceptions to the author's monopoly remains difficult and unlikely. For fanfiction writers, that means they shall still be dependent on the degree of tolerance of the original author or the copyright holder with a major risk of a lawsuit.

Perhaps, the solution should be approached on a larger scale and from a long-term perspective. Indeed, it is admitted that intellectual property rights, including copyright, are not absolute and have limitations. For instance, the right of property has quickly evolved last decades. Ownership no longer means the owner can do whatever he wants with his property (building, lands,...). More regulations and situations are increasingly restraining the use and exploitation of properties due to multiple considerations, such as urbanistic, environmental, health, or public order concerns.

Intellectual property rights likely shall be treated the same way with increasing restrictions, exceptions, and limitations. In the current digital age, with the new forms of creative works, such as online fanfictions, Youtube/TikTok videos, e-books, 3D Printing ... and their massive spread online, the copyright rules, which were generated decades ago, are perhaps unadapted to meet the current needs of author protection, in one hand, and the quick dissemination of knowledge, on the other hand.

For instance, copyright law should probably be amended to shorten its duration of protection according to the type of creative work concerned. Is providing exclusive rights to the author for 70 years after his death still legitimate when people perform and quickly consume creative works?

## VII. CONCLUSION

Fanfiction is defined by Henry Jenkins as “*original stories and novels which are set in the fictional universes of favorite television series, films, comics, games or other media properties*”<sup>236</sup>.

It is admitted now that there is nothing new in reproducing original work and stories to provide alternative plots or complete gaps left by the author. Such an intellectual process has happened since mankind began creating tales and artifacts.

The fanfiction practice has significantly evolved through the 20<sup>th</sup> Century with one of the first media fandom, “Star Trek.,” and the entrance to “the age of the internet”, where fans got more options for interacting with each other on their fandom. As summarized by Coppa, we have entered a time where “*people could just google their favorite show, join the available lists, or start reading fiction – even erotic fiction – on a public online archive*”<sup>237</sup>.

An increasing number of writers are eager to build upon existing characters and plots, using their creative ideas to further imagine new scenarios, characters, or situations involving the universe they admire. The development of universal online platforms, created by the fans for the fans, has strongly contributed to transforming this underground literary movement into a global phenomenon where fans proactively produce an alternative culture.

Despite its success, fanfiction keeps having a negative connotation because considered as “copying”, “cheating, and “plagiarism” of the original creative works<sup>238</sup>. As noticed by Jessica Hautsch, Fanfiction is frequently depicted as being juvenile, perverted, and bad writing<sup>239</sup>.

Yet, the legitimacy of Fanfiction is unquestionable regarding its significant contribution to popular culture. By reappropriating original works, fanfiction writers and readers have

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<sup>236</sup> H. JENKINS, “ How Fan Fiction Can Teach Us a New Way to Read Moby-Dick (Part One), [http://henryjenkins.org/blog/2008/08/how\\_fan\\_fiction\\_can\\_teach\\_us\\_a.html](http://henryjenkins.org/blog/2008/08/how_fan_fiction_can_teach_us_a.html)

<sup>237</sup> F. COPPA, A Brief History of media fandom. In: Hellekson, K., Busse, K. (Ed.). *Fan Fiction and Fan Communities in the Age of the Internet*, 2006, Jefferson: McFarland.

<sup>238</sup> D. FESENMEIER, *op.cit.*, p.3.

<sup>239</sup> J. HAUTSCH, *op.cit.*, p.29.

confirmed Barthes' theory that once a work reaches consumers, it is "*out of the author's hands*", and "*the author loses control over its interpretation*"<sup>240</sup>.

Fanfiction writers have disclosed to the public the concealed multiple faceted original creative works beyond the initial storytelling of the author. This literary move brought to human literature the interpretations, critiques, and variable meanings encrypted in those original works. The fandom, including the source text and the derivatives, has become an "archontic" that may not be possessed since these texts "*are not delimited properties with definite borders that can be transgressed*"<sup>241</sup>.

However, despite Barthes' assertions, the author is not dead, and many authors felt that "*these new stories encroach on their property rights*"<sup>242</sup>. With the acceleration of fanfiction' spread through the internet, copyright holders had to react to protect their works against these unauthorized derivative works that were swarming the digital world.

Indeed, strict application of copyright law would make fanfiction practice unlawful due to the similarity between the original materials and the fanfiction writings; copyright holders will nearly always have a prima facie case for copyright infringement.

However, lawsuits against fanfiction writers are very rare. Most authors tolerate Fanfiction, such as J.K. Rowling, who conditioned such practice. It would be tempting to deduct that authors have been convinced by the intertextuality of their literary works and the fact that, as proclaimed by Barthes, they do not belong to them anymore but do belong to the community of fans.

Nevertheless, this position among authors is justified because they know that most fanfiction works are done by real fans willing to express their admiration for the canon for a noncommercial purpose. To some extent, in these conditions, it is reasonable to say that authors have partially accepted that they have lost control of their creation and that this latter also belongs to their fans. They do not own all aspects of their stories anymore<sup>243</sup>.

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<sup>240</sup> P. KALINOWSKI, *op.cit.* p.666.

<sup>241</sup> A. DERECHO, *op.cit.*, p.64.

<sup>242</sup> M. CHATELAIN, *op.cit.*, p.201.

<sup>243</sup> N. H. MONTANO, *op.cit.*, p. 705.

Besides managing their relations with their fans, it is also undoubtful that authors do hesitate before suing fans because, in the United States and some other countries, they have the benefit of the fair use defense. Indeed, most fanfictions are protected by the doctrine of fair use<sup>244</sup>. In this case, it is possible to say that they really have lost control of their creations since the fair use defense has entitled the true fans to reappropriate the work and express their creativity through it.

Due to the absence of fair use doctrine in Belgium, the situation would be theoretically more risky for fanfiction writers. The current state of the law does not provide a sufficient safe harbor to fanworks. However, this thesis has demonstrated that several solutions are available, even if they would enlarge the legal uncertainty of the copyright holders.

It is yet undisputable that Fanfiction practice does deserve such a clear and delimited safe harbor to foster this enrichment of modern literature.

Moreover, the law should adapt itself to the evolutions of society, and fanfiction is one of them. As mentioned before, most authors have already accepted fanfictions as a legitimate player of the literature game because they do not ignore that this practice is intrinsically and emotionally evidencing an unstoppable affection for the original work. It is, in essence, the result of the very human desire to explore, know more and fill the gap of ignorance. The fanfiction writer is first a reader of the original work trying to understand what he reads.

It is therefore urgent for legislators to follow the trend and take the necessary measures to allow, as claimed by Barthes, “the birth of the reader”, however, without requiring “the death of the Author”...

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<sup>244</sup> M. CHATELAIN, *op.cit.*, p.270.

## **BIBLIOGRAPHY**

### **Internet Sources**

\_ BDCEST, Harry Cover, <https://www.bedetheque.com/serie-12386-BD-Harry-Cover.html>

\_ Cambridge Advanced Learner's Dictionary & Thesaurus, <https://dictionary.cambridge.org/dictionary/english/fanfiction>

\_ Fancyclopedia 3, [https://fancyclopedia.org/Fan\\_Fiction](https://fancyclopedia.org/Fan_Fiction)

\_ The Pros and Cons of Fanfiction, <https://theactdiary.wordpress.com/2016/01/13/the-pros-and-cons-of-fanfiction/>.

\_ Fanlore Website <https://fanlore.org/wiki/Fanfiction>

\_ The Space Monkey's SG-1 Fanfic, <https://thespacemonkey.tripod.com/id1.html>

### **Author's sources**

\_ BAHORIC K., SWAGGERTY E., *Fanfiction: Exploring In- and Out-of-School Literacy Practices*, Effective Writing Instruction, Colorado Reading Journal — Summer 2015.

\_ BARTHES R., *The death of the author*, Fontana, London, 1977.

\_ BAXTER M. C., "The Challenge of Happily Ever After: How Once Upon a Time Fanfic Fairy Tales Model Strategies for Ordinary Life Challenges", Theses and Dissertations. 4128, (2014), <https://scholarsarchive.byu.edu/etd/4128>

\_ BERENBOOM A., *Le nouveau droit d'auteur*, 3<sup>ème</sup> Ed, Larcier, Bruxelles, 2005.

\_ BLACK R. W., *Language, Culture, and Identity in Online Fanfiction*, E-Learning, Volume 3, Number 2, 2006.

\_ BOOG J., "The Lost History of Fifty Shades of Grey". Media bistro <https://www.adweek.com/galleycat/fifty-shades-of-grey-wayback-machine/50128?red=as>

\_ BRISTOL J., (1944), *Fancyclopedia*, The Fantasy Foundation, 1944.

\_ BRODIE C., *Motivation and Fanfiction: The Key to Promoting Literary Development and Enthusiasm*, Harvard Graduate School of Education, Spring 2016.

\_ BRONWEN T., "What Is Fanfiction and Why Are People Saying Such Nice Things about it?," *Journal of American Studies* 3 (2011).

\_BUCCAFUSCO C., *A Theory of copyright authorship*, Virginia Law Review Association, 2016.

\_CABAY J. and LAMBRECHT M., *Remix prohibited – How rigid EU copyright laws inhibit creativity*, JIPLP, 2015.

\_CAI X., *Fanfiction and Copyright issues*, available at <https://biblio.uottawa.ca/omeka2/linking-cultures/fanfiction-copyright-xiaofan>

\_CARON C., *Droit d'auteur et droits voisins*, 6<sup>e</sup> édition, Paris : LexisNexis, 2020.

\_CARVALLO A., *Analyzing Network Effects on a Fanfiction Community*, 2019, [https://www.researchgate.net/publication/335689802\\_Analyzing\\_Network\\_Effects\\_on\\_a\\_Fan\\_fiction\\_Community](https://www.researchgate.net/publication/335689802_Analyzing_Network_Effects_on_a_Fan_fiction_Community)

\_CHARITY A. FOWLER, *Rewriting TV: Fan Fiction as Fair Use*, available at [https://www.academia.edu/5152526/Rewriting\\_TV\\_Fan\\_Fiction\\_as\\_Fair\\_Use](https://www.academia.edu/5152526/Rewriting_TV_Fan_Fiction_as_Fair_Use)

\_CHATELAIN M., *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, TUL. J. TECH. & INTELL. PROP., Vol. 15.

\_CHINUA A., *Things Fall Apart*, First Anchor Book Edition, 1959.

\_COMANDINI G., *writers against fanfictions: the dark times of fandoms*, Set 9, 2019 <https://www.cercatoridiatlantide.it/en/writers-against-fanfictions/>

\_COPPA, F., "A Brief History of media fandom" In Hellekson, K., Busse, K. (Ed.). *Fan Fiction and Fan Communities in the Age of the Internet*, 2006, Jefferson: McFarland.

\_DERCLAYE E (ed) "A model copyright/design interface: not an impossible and undesirable task?" in *The copyright/design interface: past, present and future*, Cambridge University, Press, Cambridge, 2018.

\_DERECHO A., "Archontic Literature A Definition, a History, and Several Theories of Fan Fiction" in K.HELLEKSON and K.BUSSE, *Fan Fiction and Fan Communities in the Age of the Internet: New Essays*. Jefferson, McFarland & Company, Inc, 2006.

\_DERRIDA J., *Archive Fever. A Freudian impression*. Trans. Paul Patton. New York: Columbia University Press, 1995.

\_DE VISSCHER F. et MICHAUX B., *Précis du droit d'auteur et des droits voisins*, Bruxelles, Bruylant, 2000.

\_DUGGAN J., *Who Writes Harry Potter Fan Fiction? Passionate Detachment, 'Zooming Out,' and Fan Fiction Paratexts on AO3*, 2020, *Transformative Works and Cultures*, no. 34. <https://doi.org/10.3983/twc.2020.1863>

\_ECKS M., *A History of Television Fan Fiction*, WRITERS UNIVERSITY.

- \_FESENMEIER D., "Legitimacy of Fan Fiction," *Line by Line: A Journal of Beginning Student Writing*: Vol. 1: Iss. 2, Article 6, 2015, Available at <http://ecommons.udayton.edu/lxl/vol1/iss2/6>
- \_GERBER M., *Barry Trotter and the Shameless Parody*, Bragelonne ; October 2004.
- \_GROSSMAN L., *The Boy Who Lived Forever*, TIME, Jul. 07, 2011.
- \_GÜLDENPFENNIG P., *Fandom, fan fiction and the creative mind*, Tilburg University, 2011.
- \_HAUGEN E., *The Analysis of Linguistic Borrowing* p 211, Published By: Linguistic Society of America. Vol. 26, No. 2 (Apr. - Jun., 1950).
- \_HAUTSCH J., "One of your little pop culture references": Argument, Intertextuality, and Literary Affordance in *Buffy the Vampire Slayer* Fanfiction in *Understanding Fanfiction : Fan Practices and Theoretical Frameworks*, *Slayage: The Journal of Whedon Studies*, 16.1 [47], Winter/Spring 2018.
- \_HAWKINS G., *The Art of Fanfiction: Exploring the Social, Cultural and Creative Contributions of Fanfiction for the Creative Writing Classroom*, University of Bedfordshire, September 2022.
- \_HAWLEY J., *The Rivalry is Hot: Shakespeare, Harry Potter, and the Magic of Fanfiction*, Undergraduate research for Humanities, [https://www.researchgate.net/publication/342753458\\_The\\_Rivalry\\_is\\_Hot\\_Shakespeare\\_Harry\\_Potter\\_and\\_the\\_Magic\\_of\\_Fanfiction](https://www.researchgate.net/publication/342753458_The_Rivalry_is_Hot_Shakespeare_Harry_Potter_and_the_Magic_of_Fanfiction)
- \_HELLEKSON K. and BUSSE K., *Fan Fiction and Fan Communities in the Age of the Internet: New Essays*. Jefferson, McFarland & Company, Inc.
- \_HETCHER S. A., *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L.REV., 2009.
- \_HOWARD B. ABRAMS, *Originality and Creativity in Copyright Law*, 55 *Law and Contemporary Problems*, 1992.
- \_JAMISON A., *Fic: Why Fanfiction is Taking Over the World*, Smart Pop, 2013.
- \_JENKINS H., *Textual poachers : television fans & participatory culture*, Routledge, 1992.
- \_JENKINS H., *Digital land grab*, Technology review, 2000.
- \_JENKINS H., *Fans, bloggers, and gamers: Exploring participatory culture*. New York, 2006.
- \_JENKINS H., "Transforming Fan Culture into User-Generated Content: The Case of FanLib," posted May 22, 2007, [http://henryjenkins.org/2007/05/transforming\\_fan\\_culture\\_into.html](http://henryjenkins.org/2007/05/transforming_fan_culture_into.html)

\_JOHNSON C., "Austen cults and cultures". *The Cambridge Companion to Jane Austen*, 1997.

\_KAHANE A., "Fan Fiction, Early Greece, and the Historicity of Canon." *In The Classical Canon and/as Transformative Work*, 2016, edited by Ika Willis, special issue, *Transformative Works and Cultures*, no. 21. <https://doi.org/10.3983/twc.2016.0681>

\_KALINOWSKI P., *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 (2014).

\_KOCIC-ZÁMBÓ L., "Resounding Words: Fan Fiction and the Pleasure of Adaptation", in *Travelling Around Cultures: Collected Essays on Literature and Art* (eds. Gabriella Moise & Zsolt Győri), 2017.

\_KRISTEVA J., "Word, Dialog and Novel", ed. Toril Moi, *The Kristeva Reader*, New York: Columbia University Press, 1986, p. 37 and J. KRISTEVA. *Séméiotikè*. Paris, Éd. du Seuil, coll. « Points», 1969.

\_KRISTEVA J., *Desire in Language: A Semiotic Approach to Language and Art*. Trans. Thomas Gora, Alice Jardine and Leon S. Roudiez, ed. Leon S. Roudiez. New York: Columbia University Press, 1980.

\_LANTAGNE S. M., *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV, (2015).

\_LAURENT, P., *Logiciels libres et droit d'auteur: naissance, titularité et exercice des droits patrimoniaux*. Dans *Les logiciels libres face au droit*. Cahiers du CRID, Numéro 25, Académia Bruylant, Bruxelles.

\_LÉGER P., *La recherche d'un statut de l'œuvre transformatrice : contribution à l'étude de l'œuvre composite en droit d'auteur*, Issy-les-Moulineaux : LGDJ une marque de Lextenso, coll. Bibliothèque de droit privé, 2018.

\_LIPTON J. D., « Copyright and the Commercialization of Fanfiction », *Houston Law Review* [en ligne], 2014, vol. 52, n° 2.

\_LIPTON J.D. and TEHRANIAN J., *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, *Northwestern University Law Review*, Vol. 109, No. 2.

\_LORENTE J. E., *Appreciation Or Abomination? A Study Of Fanfiction As Literature*, 2020.

\_MARSHALL A. LEAFFER, *Understanding Copyright Law*. Carolina Academic Press, 1989.



\_MCCARDLE M., Fan Fiction, Fandom, and Fanfare: What's All The Fuss?, B.U. J. SCI. & TECH. L., Vol. 9:2, 2003.

\_MCKENZIE J. C., "Fanworks, Marion Zimmer Bradley". Fanworks.org

\_MONTANO N. H., Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fiction, 11 Nw. J. Tech. & Intell. Prop.

\_NORMAN LIPPERT G., James Potter and the Hall of Elders Crossing, 2007,  
[https://jspotter.fandom.com/wiki/James\\_Potter\\_and\\_the\\_Hall\\_of\\_Elders%27\\_Crossing](https://jspotter.fandom.com/wiki/James_Potter_and_the_Hall_of_Elders%27_Crossing)

\_ORR M., Intertextuality, Debates and Contexts, Cambridge: Polity Press (in association with Blackwell), 2003.

\_PAULAS R., The Bible Is Nothing but Fan Fiction for Jesus, 1<sup>st</sup> April 2013, Vice,  
<https://www.vice.com/en/article/8gvpj5/the-bible-is-nothing-but-jesus-fan-fiction>

\_PIRIOU F-M., Légimité de l'auteur à la propriété intellectuelle, Diogène 2001/4 (n°196).

\_POUILLET E, Traité théorique et pratique des dessins et modèles de fabrique, 2<sup>nd</sup> Ed. Marchal and Billard, 1884, Paris.

\_PRUCHER J., "fan fiction". Brave New Words: The Oxford Dictionary of Science Fiction. New York: Oxford University Press, Inc., Ed. (2007).

\_PUCCI and THOMPSON, Jane Austen and Co.: Remaking the Past in Contemporary Culture. Albany, New York: State University Of New York Press, 2003.

\_PUGH S., The Democratic Genre. Fan Fiction in a Literary Context, Glasgow, Seren, 2005.

\_RITU P., Intellectual Property Rights: A Utilitarian Perspective (May 9, 2021). Available at SSRN: <https://ssrn.com/abstract=3842429> or <http://dx.doi.org/10.2139/ssrn.3842429>.

\_ROLLO M., Influences Between Tv Series, New Technologies, Territory And User Generated Content A Practical Approach, POLYTECHNIC UNIVERSITY OF TURIN, Thesis.

\_ROSATI, CJEU rules that copyright protection for designs only requires sufficient originality, JIPLP 14(12), 2019.

\_STENDELL L., Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction, 58 SMU L. Rev. 1552 (2005).

\_STROWEL A., « Droits d'auteur et droits voisins », Les droits intellectuels, 2e ed., Bruxelles, Larcier 2013.

\_TOSENBERGER C., Mature Poets Steal: Children's Literature and the Unpublishability of Fanfiction. Children's Literature Association Quarterly 39, 2014.

\_TUSHNET R., Legal Fictions: Copyright, Fan Fiction, and a New Common Law, Georgetown University Law Center, 17 Loy. L.A. Ent. L.J., 1997.

\_TUSHNET R., « Payment in Credit: Copyright Law and Subcultural Creativity », Law and Contemporary Problems, 2007, vol. 70, n° 2.

\_VERSTEEG R., Defining "Author" For Purposes of Copyright, The American University Law Review, Vol. 45.

\_WOLTERS K., Why We Need Femslash, Master's thesis Book and Digital Media Studies University of Leiden.

\_YATRAKIS C., "Fan fiction, fandoms, and literature: or, why it's time to pay attention to fan fiction" (2013). College of Liberal Arts & Social Sciences Theses and Dissertations.

\_ZWAAN, K., L. DUITTS and S. REIJNDERS, The Ashgate Research Companion to Fan Cultures, Farnham: Ashgate, 2014.