

FAN OR FOE? FAN FICTION, AUTHORSHIP, AND THE FIGHT FOR CONTROL

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Through *Harry Potter*, a series of books about a fictional young boy wizard, J. K. Rowling introduced a generation of children to a literary world of wizardry and witchcraft.¹ Weaving complex plots about Harry Potter and his friends as they faced the evil Lord Voldemort, Rowling's series has generated billions of dollars and has become a franchise that encompasses successful filmic incarnations, a themed amusement park, and countless varieties of merchandise.² However, in 2007 and 2008, Rowling received widespread attention for something else: suing one of her most devoted fans.

Starting in 2000, former middle school librarian Steven Vander Ark devoted much of his personal time to maintaining a website called "The Harry Potter Lexicon." The *Lexicon* is an encyclopedia of the *Harry Potter* world and is a detailed account of the series, including its

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¹ See generally J.K. ROWLING, HARRY POTTER AND THE PHILOSOPHER'S STONE (1997); J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (1998); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (2003); J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005); J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

² The Wizarding World of Harry Potter is part of the Universal Studios amusement park in Orlando, Florida, see THE WIZARDING WORLD OF HARRY POTTER, <http://www.universalorlando.com/harrypotter/> (last visited Nov. 16, 2012). Examples of merchandise include replicas of characters' wands, clothing, and magical objects from the series, see THE OFFICIAL STORE OF WARNER BROS. STUDIOS, http://www.wbshop.com/category/wbshop_brands/harry+potter.do (last visited Nov. 16, 2012).

characters, plotlines, and spells. The website has enjoyed a large following of Potter fans from around the world. In 2004, J.K. Rowling gave the website one of her coveted Fan Site awards and confessed to frequently using the website as a reference herself while writing her books.³ However, when a relatively unknown publishing company called RDR Books announced, in 2007, that they were going to sell print copies of the *Lexicon*, Warner Bros. (who owns the rights to the Harry Potter movie franchise) and Rowling sued Vander Ark and his publisher for copyright infringement and plagiarism, demanding that they cease publication of the *Lexicon*.⁴ Rowling and Warner Bros. won their case, and the court blocked publication of the *Lexicon* in its form at the time of the trial in 2008.⁵

Warner Bros., however, is remarkable not so much for its outcome as for the change in rights holders' copyright litigation strategies that it signifies. Rowling and Warner Bros. not only went after a huge fan of Rowling's, who had helped her and her book sales, but did so by arguing that authors should maintain near complete control over their fictional characters, thus essentially negating the very idea of fan fiction.

Rowling and Warner Bros. could have easily won the case on its factual merits. After all, Vander Ark did not deny plagiarizing from some of Rowling's works, and publishing the *Lexicon* could have had a negative economic impact on Rowling's future plans of releasing her own *Harry Potter* encyclopedia. But that is not what Rowling focused her attention on in her testimony. Rather, her argument that "the

³ David B. Caruso, *Harry Potter case illustrates blurry line in copyright law*, THE ASSOCIATED PRESS (Apr. 20, 2008 at 12:01 AM), http://usatoday30.usatoday.com/life/books/2008-04-20-harrypotter-lawsuit_N.htm.

⁴ See *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 517 (S.D.N.Y. 2008).

⁵ *Id.* at 554. In 2009, The *Lexicon* was published after revisions implementing the decision in *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); the new version included more critical commentary and followed fair use guidelines, see "New Harry Potter Encyclopaedia on sale in January," THE TELEGRAPH (Jan. 02, 2009, 8:03 AM), <http://www.telegraph.co.uk/culture/books/4074421/New-Harry-Potter-encyclopaedia-on-sale-in-January.html>. See also STEVE VANDER ARK, THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS (2009).

characters she created are as dear as her children”⁶ and that she felt “intensely protective, firstly, of the literary world [she] spent so long creating and, secondly, of the fans who bought [her] books in such large numbers”⁷ seem like the opening salvo by rights holders waging a war against the burgeoning world of fan fiction. To make the point even clearer that the lawsuit was about something more than money, Rowling explicitly stated: “[W]e all know I’ve made enough money. . . [t]hat is absolutely not why I’m here”⁸ before accusing Vander Ark of having committed a “wholesale theft of 17 years of [her] hard work,”⁹ in an act of betrayal.¹⁰

Rowling’s is an important voice in a growing chorus of authors whose main worry with regards to fan fiction seems to be not about economics, but about control.¹¹ Fan fiction — written extensions of popular works of fiction created by their fans — has always existed, but the digital age has paved the way for its dramatic growth and

⁶ David Caruso, ‘*Harry Potter*’ fan testifies in trial and weeps, THE ASSOCIATED PRESS (Apr. 15, 2008), http://www.foxnews.com/printer_friendly_wires/2008Apr15/0,4675,HarryPotterLaw_suit,00.html; see also Transcript of Record at 49-2, Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

⁷ Catherine Elsworth and Nigel Reynolds, *JK Rowling in court to stop Harry Potter encyclopaedia*, THE TELEGRAPH (Apr. 15, 2008, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1895675/JK-Rowling-in-court-to-stop-Harry-Potter-encyclopaedia.html>.

⁸ Transcript of Record at 103-4, Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); see also Larry Neumeister, *Rowling: Potter encyclopedia is ‘wholesale theft’*, THE ASSOCIATED PRESS (Apr. 16, 2008, 6:22 PM), http://usatoday30.usatoday.com/life/books/news/2008-04-13-rowling-lawsuit_N.htm.

⁹ Transcript of Record at 129-18, Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); see also Neumeister, *supra* note 8.

¹⁰ Transcript of Record at 55-18, Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); see also Elsworth and Reynolds, *supra* note 7.

¹¹ Examples of other authors who have asserted control over their literary worlds include Anne Rice, see Megan McCardle, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH L.LAW 443, 446 (2003), and Robin McKinley, see ROBIN MCKINLEY, http://www.robinmckinley.com/faq/faq.php?q_id=20 (Last visited Nov. 16, 2012).

costless global distribution.¹² Reasserting control over their works is seen as their best strategy forward. But, as we will argue, these assertions of control come at the expense of the very creativity that copyright law is supposed to protect.

This article examines the validity of the control argument and its underlying premises. We begin by laying out the reasons why fan fiction is prompting authors to push for control.¹³ We then examine the validity of the control argument in light of the concept of “authorship.”¹⁴ Assessing the concept of “authorship” from multiple dimensions, we argue that courts are ill advised to assent to the control argument, for one legal and one structural reason.

I. FAN FICTION AND THE PUSH FOR CONTROL

Fan fiction has been loosely defined as “any prose retelling of stories and characters drawn from mass-media content”¹⁵ or “any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”¹⁶ It is one of the predominant means for fans to continue interacting with literary worlds to which they feel a particular connection.¹⁷

Fan fiction has a number of distinct characteristics. First, the premise of fandom is a person’s personal connection to a text, whether

¹² Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of the Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1557, 1557 (2005). For an overview of fan behavior from early documentation to the digital age, see Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 41 (Karen Hellekson & Kristina Busse eds., 2006). For an analysis of the effects of fan fiction during the digital age (particularly in young Harry Potter fans), see HENRY JENKINS, *Why Heather Can Write*, in CONVERGENCE CULTURE 169 (2006). For one of the first examinations of online fan fiction and copyright law, see Rebecca Tushnet, *Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1996).

¹³ *Infra*, Section I.

¹⁴ *Infra*, Section II.

¹⁵ HENRY JENKINS, CONVERGENCE CULTURE 285 (2006).

¹⁶ Tushnet, *supra* note 12, at 655.

¹⁷ *Id.*

that be a film, television show, book, play, or otherwise.¹⁸ This emotional involvement is akin to the relationship a child may have with his favorite toy, where meaning “comes not from its intrinsic merits or economic value but rather from the significance the child bestows upon the commodity through its use.”¹⁹ While a normal person might interact with a text by reading or watching it, fans actively nurture their relationships with a text through various fan practices; writing fan fiction is one of them.

Secondly, fan fiction is completely dependent on the original work from which it is derived. Each piece of fan fiction revolves around a ‘canon’ — the “original work[s] from which the fan fiction author borrows”²⁰ or “the events presented in the media source that provide the universe, setting, and characters”²¹ for the new work that a fan creates. In other words, “[a] known author or scriptwriter creates a ‘sandbox’ full of characters and story lines and his fans can’t wait to ‘play’ in it.”²² Thus, fan fiction stories are written with the assumption that those reading it already understand the “world” of a text including its characters, settings, and past events — those who read and write fan fiction do not need further descriptions of the “sandbox” because they are already in it. For example, a story about *Harry Potter* would not have to describe at length who Harry Potter, Hermione Granger, or Ron Weasley are or what “Hogwarts” is.²³

However, despite the connection between the original text(s) and a piece of fan fiction, many fan fiction authors believe that “[e]ach subsequent tale concerns a moment of real life surrounding the prior

¹⁸ Henry Jenkins writes, “the difference between watching a series and becoming a fan lies in the intensity of their emotional and intellectual involvement.” HENRY JENKINS, *TEXTUAL POACHERS* 56 (Taylor & Francis 2013).

¹⁹ *Id.* at 51.

²⁰ See McCardle, *supra* note 11, at 446.

²¹ KAREN HELLEKSON AND KRISTINA BUSSE, *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 9–10 (2006).

²² Elizabeth Burns and Carlie Webber, *When Harry Met Bella*, 55 *SCH. LIBR. J.* 26, 26 (2009).

²³ Harry Potter is a fictional boy wizard and the lead character of the *Harry Potter* series. Hermione Granger and Ron Weasley are his best friends and main supporting characters. Hogwarts is the wizarding school that all three characters attend. See *Harry Potter* books cited *supra* note 1.

work and reweaves the context of tale, ultimately changing it.”²⁴ Some media scholars have even argued that both the fan text and the original story become part of a larger body of knowledge rather than belonging to a hierarchy that places priority on the original text.²⁵ Fan fiction stories are not mere copies of an original tale, but are reinterpretations or extensions of an existing story involving people, places, and things from that story’s world. While their writings explicitly build upon another’s text(s), authors of fan fiction often feel that their stories exist as original works and, in doing so, contribute to the “fanon” — the body of fan-created works that help to contribute to the community’s growing understanding of the source text.²⁶

Some fan fiction simply extends a plotline from the original text, writes an alternate ending, or proposes a potential sequel, as with “She’s Not Dead Romeo,” a fan fiction piece that proposes what would have happened if Friar Laurence — from William Shakespeare’s *Romeo and Juliet*²⁷ — had been able to stop Romeo before he committed suicide.²⁸ Stories can expand on existing romantic relationships within a story, or put forward alternative

²⁴ Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 423 (2006).

²⁵ One academic even argued that labeling fan fiction should be called “archontic,” which by definition implies that “[n]o archive is ever final, complete, closed.” This definition is considered preferable to words like “derivative” or “appropriative” works, because doing so “signifies a ranking of the two texts according to quality and classifies the secondary text as the lesser one. Similarly, *appropriative* connotes ‘taking’ and can easily be inflected to mean ‘thieving’ or stealing.” See Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 61, 64 (Karen Hellekson & Kristina Busse eds., 2006).

²⁶ See Deborah Kaplan, *Construction of Fan Fiction Character Through Narrative*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 134, 136 (Karen Hellekson & Kristina Busse eds., 2006).

²⁷ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* (1597).

²⁸ Pageturner96, *She’s Not Dead Romeo*, FANFICTION.NET (Jun. 13, 2012), <http://www.fanfiction.net/s/8214046/1/She-s-Not-Dead-Romeo>. Another illuminating twist on a classic story is the fan fiction piece “Sunny Disposish,” which follows Alice (from LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* (1865)), as she makes a return to a Wonderland no longer controlled by the Queen of Hearts. See Valadilenne, *Sunny Disposish*, FANFICTION.NET (Apr. 30, 2007), <http://www.fanfiction.net/s/3515609/1/Sunny-Disposish>. More fan fiction can be found at FANFICTION.NET, <http://www.fanfiction.net/> (last visited Feb. 6, 2013).

relationships. Some stories, which occupy a subgenre of fiction called “slash,” take this one step further and “posit a same-sex relationship, usually one imposed by the [fan fiction] author and based on perceived homoerotic subtext.”²⁹ Popular slash relationship examples include Captain Kirk and his first officer Spock from *Star Trek* or Harry Potter and his nemesis Draco Malfoy from the *Harry Potter* series.³⁰ Fan fiction stories can even be “crossovers” that put characters from different source texts into one story. “Fate’s Hand,” a highly ranked story on FanFiction.net, is a slash crossover piece that describes a love story between Harry Potter and vampire Edward Cullen from the *Twilight* series.³¹

Another distinct characteristic of fan fiction is that it is communal in nature. One important reason why fans create fan fiction is because they want to share it with a larger community of people with similar interests. Therefore, fans at once contribute to and depend on the communities to which they belong. Though not all fans are writers — some are only observers who read fan fiction — these

²⁹ Busse and Hellekson, *supra* note 21, at 10; *see generally* Elizabeth Woledge, *Inimatopia Genre Intersections Between Slash and the Mainstream*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 97 (Karen Hellekson & Kristina Busse eds., 2006). For an examination of fan fiction from a legal perspective, *see* Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461 (2006). Though often controversial, slash fiction has also allowed authors to reveal interesting truths about their characters: in part as a reaction to slash fiction about the topic, J.K. Rowling admitted that the Hogwarts Headmaster Albus Dumbledore was, in fact, homosexual, *see* Catherine Tosenberger, “Oh my God, the Fanfiction! Dumbledore’s Outing and Online Harry Potter Fandom,” 33 CHILD. LITERATURE ASS’N Q., ASSOCIATION QUARTERLY 200 (2008).

³⁰ *See Popular Pairings*, SLASHFIC.ORG, <http://slashfic.org/popular.php> (last visited Feb. 6, 2013). Media scholar Henry Jenkins postulates that Kirk/Spock was the first slash relationship in this history of slash fiction, *see* Henry Jenkins, *How to Watch a Fan-Vid*, CONFESSIONS OF AN ACA-FAN, http://henryjenkins.org/2006/09/how_to_watch_a_fanvid.html (last visited Feb. 6, 2013). For a detailed analysis of Harry Potter slash fiction, and the influence of the Kirk/Spock slash relationship on current fan fiction, *see generally* Catherine Tosenberger, *Homosexuality at the Online Hogwarts: Harry Potter Slash Fanfiction*, 36 CHILD. LITERATURE ASS’N Q. 185 (2008).

³¹ *See* Idika, *Fate’s Hand*, FANFICTION.NET (Apr. 23, 2009), <http://www.fanfiction.net/s/5014299/1/Fates-hand>. Other examples of crossover fan fiction can be found in the crossover section of FanFiction.Net, *see* Crossovers, FANFICTION.NET, <http://www.fanfiction.net> (last visited Feb. 6, 2013).

fan communities are built on interactions with and interpretations of a specific text. In this sense, fandom can be thought of in the same way as folk culture, in which a particular relationship to a narrative “constructs a group identity, articulates the community’s ideals, [and] defines its relationship to the outside world.”³²

Yet, communities play another role for fan fiction writers: they serve as self-governed regulatory bodies. Since fans understand that their writing exists in a legal gray area, most do not want to draw negative attention to themselves. “[F]an fiction writers are internally policed through the ‘many slight and sometimes forceful sanctions that members of [the] community impose on each other.’”³³ These terms for fan fiction writers are not necessarily explicit rules, but are instead social norms that are enforced by the communities themselves.³⁴ As Ranon writes, “[f]an fiction operates within certain cultural norms that make it acceptable to write such fiction as long as one does not make money from it and is not claiming credit for work that is not her own. The standard disclaimer at the head of most fan fiction tells the reader clearly that the author does not own any of the characters she is borrowing.”³⁵

For authors whose works are celebrated on these websites, the proliferation of fan works is both a blessing and curse. On one hand, fan practices bring extra publicity to a work; giving it an extended lifespan after it hits the shelves. On the other hand, fan fiction reinterprets an author’s original work — potentially creating new

³² Jenkins, *supra* note 18, at 273.

³³ Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 734 (2007).

³⁴ See *Id.* at 730-32 (discussing fans’ condemnation of a fan who tried to sell copies of her *Star Wars* fan fiction on Amazon.com, which then drew attention and a lawsuit from LucasFilms). See generally Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 1575 U. PA. L. REV. 1869 (2009).

³⁵ Ranon, *supra* note 24, at 423.

plotlines or shifts in character that might not align with the author's original intent.³⁶

Fan fiction is not a new phenomenon, but the ability to distribute fan fiction globally through the Internet with ease and speed has made authors and rights holders increasingly worried about the digital proliferation of fan fiction. Although fan fiction existed well before the digital age, its impact was very limited as it was only distributed to small niches through fanzines and fan clubs.³⁷ But the Internet has allowed these fan practices to reach a scale unseen before. Fan practices are no longer only localized projects; many official and unofficial fan websites, like FanFiction.net or the Harry Potter Pottermore³⁸ network, are truly global in their reach.³⁹

In the past, much of free, transformative fan fiction remained virtually unconstrained, albeit with limited impact. It was a truce that in many ways suited both sides: fan fiction authors could continue to create and share their works with other fans, even if limited by geography and distribution costs, and rights holders tolerated fan fiction — and perhaps even benefitted from it — as it did not negatively impact their ability to succeed in the marketplace.

It is this balance that authors believe has come undone because of the Internet. In the Internet age, digital copies of fan fiction are not only easily and cheaply distributed around the world, they also are easy to search for and find, reducing the significant search costs in the

³⁶ Historically, sexualized fan fiction can cause tension between the fan fiction writers who write about homoerotic relationships between characters and the original authors who protest these subversive relationships, *see* the discussion about Larry Nevin's "kzinti" characters in Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 403-07 (2009).

³⁷ McCardle, *supra* note 11, at 441. *See generally* Coppa, *supra* note 12, at 441.

³⁸ POTTERMORE: A UNIQUE ONLINE HARRY POTTER EXPERIENCE FROM J.K. ROWLING, <http://www.pottermore.com> (last visited Feb. 28, 2013).

³⁹ As an example of the globalization of fan fiction, a search for *Harry Potter* stories on FanFiction.net, yields thousands of stories in different languages. Examples include a 19-chapter German fan fiction story called "Harry Christmas Everyone," *see* Glasschmetterling, *Harry Christmas Everyone*, FANFICTION.NET (Nov. 26, 2008), <http://www.fanfiction.net/s/4678096/1/Harry-Christmas-Everyone>, and "Heterochromia Iridium," which is written in Indonesian, *see* Rochro, *Heterochromia Iridium*, FANFICTION.NET (Sep. 20, 2013), <http://www.fanfiction.net/s/9701091/1/Heterochromia-Iridium>.

analog age to close to zero. As a consequence, even the most creative piece of free fan fiction today is seen by authors as a potential threat to a rights holder's economic position and creativity.

In the past decade, several authors have issued strong statements explicitly voicing their disapproval of fan fiction and asserting much stricter authorial control over their works. For example, Anne Rice, author of several vampire-inspired fantasy books, such as *Interview with the Vampire*, posted recently on her website: "I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters."⁴⁰ Similarly, and in spite of the fact that most fan fiction is non-commercial, Orson Scott Card, author of popular science fiction series *Ender's Game*, was quoted saying that, "fan fiction, while flattering, is also an attack on my means of livelihood. It is also a poor substitute for the writers' inventing their own characters and situations. It does not help them as writers; it can easily harm me; and those who care about my stories and characters know that what I write is 'real' and has authority, and what fans write is not and does not."⁴¹

Recently, much media coverage has surrounded the adult romance trilogy *Fifty Shades of Grey*, which constitutes a case of fan fiction success. Today, the books are bestsellers. The books have even reached the top spot of the New York Times bestseller list in spring 2012, after having sold a quarter of a million mostly electronic copies, and later surpassed *Harry Potter* to become the United Kingdom's best-selling book of all time.⁴² But the books, by author E.L. James⁴³ were created originally as fan fiction of the *Twilight* book series, authored by Stephenie Meyer, then reworked before being published as an original work.⁴⁴ Meyer was not amused.⁴⁵ She previously

⁴⁰ McCardle, *supra* note 11, at 470.

⁴¹ Yoda Patta, *Questions for a Research Paper*, HATRACK RIVER — THE OFFICIAL WEB SITE OF ORSON SCOTT CARD (1997), <http://www.hatrack.com/research/interviews/yoda-patta.shtml>.

⁴² Tony Jones, *Fifty Shades of Grey outsells Harry Potter. The 'mummy porn' novel breaks another record and outsells all SEVEN J K Rowling books on Amazon*, DAILY MAIL (Oct. 10, 2013, 12:26 PM) <http://www.dailymail.co.uk/femail/article-2182618/Fifty-Shades-Grey-outsells-SEVEN-Harry-Potter-books-Amazon.html>.

⁴³ This is a pseudonym.

⁴⁴ Jones, *supra* note 42.

stated, in connection with the leak of a manuscript of an unreleased *Twilight* novel called *Midnight Sun*, “As the author of the *Twilight* Saga, I control the copyright Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. . . . This has been a very upsetting experience for me, but I hope it will at least leave my fans with a better understanding of copyright and the importance of artistic control.”⁴⁶ And, as we mentioned, J.K. Rowling in Warner Bros. argued likewise.⁴⁷

These actions are not only remarkable, but also risky departures from the past. By suing those who write fan fiction, rights holders run the risk of alienating some of their most devoted fans and wiping out an entire genre of writing that often helps to promote their works. Aaron Schwabach describes this dilemma: “[W]hile fan fiction may infringe on the content owners' copyright and trademark rights, the fans who create and share it are the biggest and, for some genre works, very nearly the only, market for the owners' works.”⁴⁸ The result is that those perceived to be a threat to rights holders are very often the same people who are target customers. This strategic dilemma is compounded by the fact that most fan fiction is not-for-profit: no monetary gain accrues in the pockets of fan fiction authors, and potential monetary losses caused by customers reading fan fiction instead of works from the original author are hard to gauge.

Some authors and rights holders have addressed this dilemma through radical, if unconventional responses. For example, George Lucas, director and creator of the *Star Wars* movie trilogy, and his business group, Lucasfilms, at first issued a statement denouncing salacious *Star Wars* fan works for undermining the company's

⁴⁵ See generally Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 3 (2010). See also Margaret Eby, ‘*Twilight*’ author Stephenie Meyer won't read ‘*50 Shades of Grey*,’ NY DAILY NEWS (Aug. 10, 2013, 1:39 PM), <http://www.nydailynews.com/blogs/pageviews/2013/08/twilight-author-stephenie-meyer-wont-read-50-shades-of-grey> (discussing how the author refuses to read *50 Shades of Grey* because it is “too smutty” goes against the “innocence” of her series).

⁴⁶ Lipton, *supra* note 45, at 3.

⁴⁷ See *supra* notes 9–12.

⁴⁸ Schwabach, *supra* note 36, at 387.

“‘family values’ orientation.”⁴⁹ But upon further realization that fans could actually help his enterprise, Lucas and his business group revised their statements and created their own official online fan portal.⁵⁰ There, fans could upload their works to share with a wider *Star Wars* community — but with one large caveat: these fans would have to agree to a contract explicitly stating that if they “create any derivative works based on or derived from the Star Wars Properties, such derivative works shall be deemed and shall remain the property of Lucasfilm Ltd. in perpetuity.”⁵¹ In short, Lucas chose the most controlling route of all: devising a way where he could legally own all of it and do with it as he pleased — forever.

But such a strategy, as absolutist as it may look at first blush, is fraught with perils. When authors and rights holders sue authors of freely available fan fiction (that is to a significant extent original) they run the very real legal risk of losing the case because fan fiction creations could pass the existing four-prong fair use test.⁵² Therefore, unsurprisingly, authors worried about the downward economy for sales of their books are searching for alternative ways to establish their reign over the world of fan fiction. That is precisely what the argument of control, advanced by Rowling, Rice, and Meyers, among others, is aiming to do — shift from stopping pirated works to crusading against the “kidnapping” of fictional characters.⁵³

This control argument, however, rests on a particular and problematic notion of authorship.

⁴⁹ Stendell, *supra* note 12, at 1556; *see also* Henry Jenkins III, “*Star Trek*” *Rerun, Reread, Rewritten*, 5 CRITICAL STUD. IN MASS COMM. 85, 90 (1988).

⁵⁰ *See* Jenkins, *supra* note 12, at 152, 156-57 (stating “In 2000, Lucasfilm offered Star Wars fans free Web space (www.starwars.com) and unique content for their sites, but only under the condition that whatever they created would become the studio’s intellectual property.”).

⁵¹ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 245 (2008).

⁵² 17 U.S.C. § 107 (2006).

⁵³ *See* Elizabeth F. Judge, *Kidnapped and Counterfeit Characters: Eighteenth-Century Fan Fiction, Copyright Law, and the Custody of Fictional Characters*, in ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 22, (Reginald McGinnis ed., 2009).

II. THE ROLE OF AUTHORSHIP

In support of the control argument, authors assert that they are the sole and true creators of their intellectual works, and thus they (and only they) are permitted to retain and exercise intellectual control over the fictional characters, contexts, and worlds they have created. Conceptualizing the original author's power with such breadth is the core of the control argument and necessary for the control argument to succeed in its sweeping reach. By the same token, however, this argument has two major weaknesses.

The first challenge to the control argument is historical. Literary and copyright experts have shown that the idea of the author as a singular point of creative genius is a product of the Romantic era of the late 18th and early 19th century and its distinct ideas and contexts.⁵⁴ It is a “culturally, politically, economically, and socially constructed category rather than a real or natural one.”⁵⁵ Before then, writing was seen as a largely derivative process in which authors built upon ideas and works that preceded them — and the concept of authorship reflected that.⁵⁶ Only with the Romantic age came the notion that writing was the manifestation of flashes of genius channeled through a solitary author — and so spread the popularity of the concept of authorship that is still espoused by literary authors today.⁵⁷ It was also in this period that authors began to desire control

⁵⁴ Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'* 17 EIGHTEENTH-CENTURY STUDIES 425, 427 (1984).

⁵⁵ Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459 (1991).

⁵⁶ Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15, 17 (Martha Woodmansee Jaszi et al. eds., 1994) (stating, “From the Middle Ages right down through the Renaissance new writing derived its value and authority from its affiliation with the texts that preceded it, its derivation rather than its deviation from prior texts.”).

⁵⁷ See Woodmansee, *supra* note 54 (stating, “‘Inspiration’ came to be explicated in terms of *original genius*, with the consequence that the inspired work was made peculiarly and distinctively the product — and the property — of the writer.”).

not only over the composition of words that they published, but over the specific ideas — characters, places, etc. within their works.⁵⁸

The evolution of the use of the quotation mark provides a salient example of the shift of viewing authorship as a derivative process to one of solitary genius. In the Middle Ages, quotation marks were initially used to highlight important or interesting utterances by authoritative classical or patristic sources.⁵⁹ “[R]ather than cordoning off a passage as property of another,” writes De Grazia, “quotation marks flagged the passage as property belonging to all — ‘common places’ to be freely appropriated (and not necessarily verbatim and with correct authorial ascription). Not until after the seventeenth century did quotation marks serve to enclose an utterance as the exclusive material of another.”⁶⁰ In contrast, starting with the Romantic period, quotation marks “privilege[d] and protect[ed] words belonging to the individual who produced them.”⁶¹ Simultaneously with the shift from communal authorship to an emphasis on the individual, the quotation mark began to change to denote exclusivity rather than communalism.⁶²

Similarly, if the meaning of “authorship” is in fact temporally and socially contingent, and thus changing over time, is it likely that the meaning of “authorship” in the U.S. Copyright Act would remain static, and linked to the romantic idea of authorship across the more

⁵⁸ One example of this is Cervantes, author of *Don Quixote*, using his own characters to make a claim that the original author alone should have the right to decide on extensions, including “second-parts” (sequels) of his characters’ stories. Judge, *supra* note 53, at 48-49 (providing a detailed analysis of the historical roots of these assertions of authorial control).

⁵⁹ Margreta de Grazia, *Sanctioning Voice: Quotation Marks, the Abolition of Torture, and the Fifth Amendment*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 281, 288 (Martha Woodmansee Jaszi et al. eds., 1994).

⁶⁰ *Id.* at 289.

⁶¹ *Id.*

⁶² *Id.*

than a dozen revisions over two hundred years?⁶³ Fervent advocates of the control argument may suggest that the late 18th century notion of authorship does survive under a strict originalist interpretation of the U.S. Constitution and the original Copyright Act. They may also suggest that the Founding Fathers fixed much of the meaning of authorship when they drafted the Constitution, and gave Congress the power to give to authors exclusive rights for a limited period of time “to promote progress of Science and the useful Arts,”⁶⁴ which influenced Congress to pass the original Copyright Act in 1790.

But the trouble with such a line of argument is that both the Constitution and the Copyright Act do not conceptualize the author in romantic terms. Rather, and in stark contrast to author’s rights in continental Europe, both the U.S. Constitution and the Copyright Act clearly aim to strike a pragmatic balance between empowering authors and enabling fair use, so as to create incentives for creative production as well as mechanisms for making use of creative works.

Eminent scholars have provided us with a much more nuanced historical view of the function of copyright in general and the meaning of authorship in particular. In their writings, authors aiming to assert more control over their works to counter the perceived threat of fan fiction will find little support for their viewpoint.⁶⁵

Yet another counterargument to this narrow view of authorship is one that has received less attention in the legal literature so far, but is equally important and particularly applicable to the context of fan fiction. It focuses on the logical inconsistencies of a unitary meaning of authorship, and differing *practices* of authorship and control.

⁶³ United States copyright law was based on the Statute of Anne, *see* Copyright Act of 1790, 1 Stat. 124 (1790). It was revised in 1831, *see* Copyright Act of 1831, 4 Stat. 436 (1831); 1870, *see* Copyright Act of 1870, 16 Stat. 212 (1870); 1909, *see* Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 25, 35 Stat. 1075, 1081 (1909) ch. 320, 35 Stat. §§ 1075-1088 (1909); 1976, *see* Copyright Act of 1976, Pub. L. No. 105-278, 112 Stat. 2827; in 1998 with the Sonny Bono Act, *see* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); and in 2006, *see* Section 115 Reform Act (SIRA), 17 USC § 115 (2006).

⁶⁴ U.S. CONST. art. I, § 8, cl. 8.

⁶⁵ *See generally* Jaszi, *supra* note 55; LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Woodmansee, *supra* note 56; THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee et al., eds., 1994).

A. Academic Authorship and Control

In arguing that they should have full control over the worlds that they create, authors assert that control is central to the practice of creative production. That is not true. In fact, a very large field of authorship exists, which includes many features of fan fiction, and has thrived for many decades *without* authors requesting tighter controls. It is the field of academic works.

Academics take published ideas of others and expand them, apply them to different contexts or genres, test them, rephrase and reframe them, even reinterpret them. All of that is done without the original author having any control of how their original narrative is being used and reshaped, *as long as* the original work is being correctly referenced and cited. And all of that is done not primarily to make economic gains, but to enlarge the body of knowledge (and perhaps enhance one's own scholarly reputation). Put differently, one professor once wrote a disclaimer on an academic work that, "[t]his essay of mine, though it will be added to the inventory of my own intellectual capital, my *curriculum vitae*, and hopefully will count toward enhancing my academic status and income — is still a gift, to be consumed and circulated in the gift culture of research and scholarship; no one will pay me for writing it and I will not sell it."⁶⁶

Fan fiction is conceptually similar. Most, if not all, fan fiction authors reference the original author, often with a level of respect and reverence rarely seen in academia. Most fan fiction takes existing narratives and ideas, and puts these in different settings, novel contexts, or gives them very different twists. As with academia, fan fiction writers form an interpretive community where "[m]anifestos on characterization, reactions to individual moments in the source text, community in-jokes rooted in the source text and the community's reactions to it, and creative fan works such as fan fiction, artwork, and vids all contribute to a shared understanding of the source text."⁶⁷ In the same way that academic authors seek to augment a body of knowledge with their writing, so do fan fiction authors hope to contribute their interpretations and analysis to a narrative growing in richness.

⁶⁶ Jim Swan, *Touching Words: Helen Keller, Plagiarism, Authorship*, in *THE CONSTRUCTION OF AUTHORSHIP* 57, 75 n. 61 (Martha Woodmansee Jaszi et al., eds., 1994).

⁶⁷ Kaplan, *supra* note 26, at 135-36.

Some academic authors may bemoan the fact that they have no control over their ideas, and often not even over the concrete narrative through which they present them. But most accept that a work building on theirs may get them more readers and greater impact — as long as their original work is properly cited. No credible academic would want others to stop applying a methodology she has developed so that she can retain complete control over it, neither would she want total control over how her ideas, her arguments, and her narrative is being received, further developed, enhanced, and perhaps even fundamentally changed by others.⁶⁸

In short, within academic authorship there already exists a large and burgeoning field of intellectual production in which, much like with fan fiction, authors do not assert intellectual control beyond accurate referencing of the original. With such a *precedent of practice* in place, how can fiction authors argue successfully that they are entitled further controls over the use of the characters and other narrative elements in their works?

B. The Unitary Meaning of Authorship

Authors of fiction, of course, may suggest that their authorship is different from that of academic, non-fiction authors. They may suggest that having a fan fiction author write about a character modeled after Harry Potter, but putting him in a very different context — within a different culture or with an alternative attitude for instance — is a much more direct and very different violation of an author's control over her intellectual offspring when compared to the dry (but duly referenced) appropriation of ideas in a complicated academic paper.⁶⁹

⁶⁸ Corynne McSherry describes the academic “gift” economy as such: “Once accepted for publication, an article can garner recognition and status for the giver, and the more recognition the gift (and therefore the giver) receives, the greater the value of the original and subsequent gifts from that person. The community, in other words, determines value . . . Community ties are further affirmed through repayment in the form of reciprocal papers, citations to the work, financial support (in the form of research funding) for the creation of new ‘gifts.’” CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 76 (2001) (citations omitted).

⁶⁹ Cf. Chip Scanlan, *What is Narrative, Anyway?*, POYNTER (Sept. 29, 2003, 7:48 AM), <http://www.poynter.org/how-tos/newsgathering-storytelling/chip-on-your-shoulder/16324/what-is-narrative-anyway>.

When examined closely, however, there is no fundamental difference between fiction and academic non-fiction. Consider for a moment this description of a famous piece of writing: “[It] is obviously a narrative, a tale of conflict, [with] competing characters, resolution, and a ‘happy’ ending.”⁷⁰ From this description, one might intuitively guess that the statement is about a work of fiction and make any number of guesses, from *Pride and Prejudice* to *Harry Potter*, about what work it might be. However, this description is in fact about the seminal 1953 paper by Dr. James D. Watson and Dr. Francis H. C. Crick entitled “Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid.”⁷¹ Far from a fictional work about an imaginary world, it laid out the theory of the very building blocks of human kind and was the first to identify the double-helix structure of DNA.⁷² Drs. Watson and Crick applied the same creative processes – finding ways to engage their audience, weaving salient points into a cohesive narrative, and developing a satisfying conclusion for their tale – that are usually attributed only to writers of fiction. And they are not alone. All non-fiction authors advance a narrative. At times, it may have different elements, and different features compared with a fictional narrative, but it aims to achieve the same ends: to be persuasive and compelling.

History, too, may seem like a collection of facts that need only to be laid out chronologically for a discerning reader to appreciate, but it is actually a series of interpretations written by specific authors. Academics in the field are ultimately crafting history through what, in essence, is storytelling — advancing an engaging and convincing narrative. Sociologists and anthropologists engage in similar forms of storytelling when they take their observations of different cultures and attempt to craft explanations for how certain cultural traditions came into place. Much like a fan fiction writer might interpret a source text to produce another narrative, so must historians and sociologists turn their interpretations of different cultures into written word. “Every

⁷⁰ Walter R. Fisher, *Narration, Knowledge, and the Possibility of Wisdom*, in *RETHINKING KNOWLEDGE: REFLECTIONS ACROSS THE DISCIPLINES* 169, 181 (Robert F. Goodman et al., eds., 1995).

⁷¹ JD Watson and FH Crick, *Molecular structure of nucleic acids; a structure for deoxyribose nucleic acid*, 171 *NATURE* 737 (1953).

⁷² See generally JAMES D. WATSON, *THE DOUBLE HELIX: A PERSONAL ACCOUNT OF THE DISCOVERY OF THE STRUCTURE OF DNA* (Touchstone 1996) (1968).

reading,” Czarniawska writes, “is an interpretation, and every interpretation is an association: tying the text that is interpreted to other texts, other voices, other times, and places.”⁷³ These academics, much like literary authors such as Rudyard Kipling or Salman Rushdie, take in the nuances of other cultures and then instill meanings into these interpretations by writing about them for readers to absorb.⁷⁴

What holds for the social sciences, like anthropology or sociology, is even more prevalent in the humanities. Academics who work in the field of English literature predominantly write papers based on close readings of certain works — parsing out themes and motifs, providing deep psychological readings of a character’s motives, and so on — in an attempt at adding to a wider body of knowledge about that source text. A quick search on JSTOR for academic articles about Shakespeare’s *Romeo and Juliet*⁷⁵ produces results that are not all too different from a FanFiction.net search for the same text. Much like there exists Benvolio and Mercutio slash fiction,⁷⁶ scholars have written articles deeply analyzing potentially homoerotic relationships in the text.⁷⁷ Similar to a piece of crossover fan fiction, one academic wrote a lengthy discussion of the relationship and intersections between Shakespeare’s *A Midsummer Night’s Dream* and *Romeo and Juliet*.⁷⁸

⁷³ BARBARA CZARNIAWSKA, *NARRATIVES IN SOCIAL SCIENCE RESEARCH* 135 (2004).

⁷⁴ See generally VICTOR TURNER AND THE CONSTRUCTION OF CULTURAL CRITICISM: BETWEEN LITERATURE AND ANTHROPOLOGY (Kathleen M. Ashley ed., 1990). A famous example of cultural anthropology is Clifford Geertz’ studies of rural Indonesian culture and writings about the importance of interpretation, see CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE* (1973). Geertz’s writings can be contrasted with the types of cultural descriptions found in literary novels like Kipling’s *The Jungle Book* or Rushdie’s *Midnight’s Children*. See RUDYARD KIPLING, *THE JUNGLE BOOK* (1894); SALMAN RUSHDIE, *MIDNIGHT’S CHILDREN* (1980).

⁷⁵ SHAKESPEARE, *supra* note 27.

⁷⁶ NaiveLove, *Unnatural*, FANFICTION.NET (July 21, 2012), <http://www.fanfiction.net/s/8344243/1/Unnatural>. More *Romeo and Juliet* fan fiction can be found at FANFICTION.NET, <http://www.fanfiction.net/book/Romeo-and-Juliet/> (last visited Feb. 6, 2013).

⁷⁷ Luis M. Garcia Mainar, *Shakespeare’s Romeo and Juliet and Male Melodrama*, 20 ATLANTIS 27, 27 (1998).

⁷⁸ Samuel B. Hemingway, *The Relation of A Midsummer Night’s Dream to Romeo and Juliet*, 26 MOD. LANGUAGE NOTES 78 (1911).

While *Romeo and Juliet* might not be the most popular source text for fan fiction, one can easily see the strong correlations in themes and subject matter that occur in both fan fiction and academic writing. Furthermore, just as a fan fiction writer would in the same process, academics also write from the assumption that their readers already understand the characters and events from the source text, and argue their analysis through a skillfully crafted narrative.

At its very core, then, writing — whether it is academic, literary, or fan fiction — is storytelling. And all authors are storytellers — regardless of the genre to which their writing belongs. There is simply no reason why one should award a particular cast of authors — writers of “original” fiction — with a level of control over their intellectual creations that other authors do not enjoy.

The notion of equality in authorship, incidentally, is also the spirit of U.S. copyright law, which in itself does not differentiate among authors based on whether they produce fiction or non-fiction. Copyright law very clearly affords the same type of protection to every author, irrespective of genre.⁷⁹ Treating all authors similarly — irrespective of what they write about — is one of its foundations.⁸⁰ Any argument to the contrary, any suggestion that differential treatment based on genre can be discerned from the very unitary definition of authorship in the Copyright Act would have to be exceptionally persuasive and based on a compelling factual basis — something that the authors arguing for more control so far have failed to provide.

III. CONCLUSIONS – CONSEQUENCES FOR THE TREATMENT OF FAN FICTION

In this essay, we looked at the validity of the “control” argument that authors and rights holders have advanced to restrict fan fiction. We analyzed the specific qualities of fan fiction, and its relationship to “original” authorship. We suggested that even though the very concept of authorship is socially and temporally contingent,

⁷⁹ The U.S. Copyright Act does differentiate between certain types or categories of authors; in fact it does not include a definition of “author” in its list of definitions, which implies that it has not set boundaries on what an author should be. *See* 17 U.S.C. § 101 (2011).

⁸⁰ *See id.*

legal authorship is universal, irrespective of the type of work written or the genre to which it belongs.

Based not only on a formal legal argument grounded in the U.S. Constitution and the Copyright Act, our paper traced well-accepted authorship norms in the academic community and grounded our argument in the *practice of authorship*. Authorship, we argued, was the art of writing persuasive and compelling narratives — whether this meant scholarly work, fictional novels, or fan fiction stories. Bestowing higher power to the authors of one type of work would mean ignoring the universality of the U.S. Constitution. As a consequence, at least in the U.S. context, literary authors' extensive claims of control over their intellectual works should be resisted.

By the same token, this does not leave authors without protection. If and when a work of fan fiction turns commercial or otherwise morphs into a significant threat, authors can advance conventional copyright claims against fan fiction authors, and will likely be relatively successful.

That may constrain some of the most entrepreneurial fan fiction authors. But it will likely leave the vast majority of non-commercial fan fiction, which has a very contained impact, unrestrained. Moreover, it gives courts that have been asked to adjudicate borderline cases a chance to develop pragmatic rules of delineating permissible fan fiction from clear copyright violations without having to resort to expansive authors' rights of control. Such an approach is not only consistent with a unitary view of authorship; it also is consistent with existing copyright law.