



DESTROYING THE MARKET WITHOUT MAKING A DIME: HOW FANS ARE RISKING COPYRIGHT PROTECTION BY ABANDONING ORIGINAL CREATORS

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INTRODUCTION

J.K. Rowling’s worth was estimated at a billion dollars as early as 2004, making her one of five self-made female billionaires and the first author worth more than a billion dollars.¹ By 2008, she topped the Forbes

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1. Julie Watson & Tomas Kellner, J.K. Rowling and the Billion-Dollar Empire, FORBES (Feb. 26, 2004, 3:31 PM), https://www.forbes.com/maserati/billionaires2004/cx_jw_0226rowlingbill04.html.

list of highest-paid authors by making more than 300 million dollars in that year alone.² In 2017,³ and again in 2019,⁴ *Forbes* ranked Rowling number one again, with earnings surpassing ninety million in each annual ranking. While her success might not have appeared out of thin air, it was created by *magic*.

Rowling's *Harry Potter* series follows young wizard Harry Potter as he fights alongside his friends against dark forces—specifically notorious wizard Lord Voldemort—who want to rid the wizarding world of people considered unworthy to practice magic.⁵ Nine publishers rejected the first book in the series, likely because Rowling was a first-time author at the time.⁶ When the first book in the series, *Harry Potter and the Sorcerer's Stone*, was finally picked up by an American publishing company and released in the United States in 1997, the book sold more than twenty-three million copies.⁷ Over twenty years and six books later, half a billion *Harry Potter* books have been sold around the world.⁸

In some circles, Rowling's once undeniably impressive reputation for creativity and success has recently deteriorated into notoriety.⁹ This downward spiral began in 2019 when Rowling voiced her support on Twitter for a woman who was fired from her job for tweets that denied

2. *The World's Best Paid Authors*, FORBES (Oct. 1, 2008, 12:30 PM), https://www.forbes.com/2008/10/01/books-publishing-media-biz-media-cx_lr_1001authors.html?sh=5800dbd7ce2f.

3. Hayley C. Cuccinello, *World's Highest-Paid Authors 2017: J.K. Rowling Leads with \$95 Million*, FORBES (Aug. 3, 2017, 10:07 AM), <https://www.forbes.com/sites/hayleycuccinello/2017/08/03/worlds-highest-paid-authors-2017-j-k-rowling-leads-with-95-million/?sh=7bccb9d52669>.

4. Hayley C. Cuccinello & Ariel Shapiro, *World's Highest-Paid Authors 2019: J.K. Rowling's Back on Top with \$92 Million*, FORBES (Dec. 20, 2019, 9:40 AM), <https://www.forbes.com/sites/hayleycuccinello/2019/12/20/worlds-highest-paid-authors-2019-rowling-patterson-obama/?sh=19f8b93f733a>.

5. See Miral Sattar, *J.K. Rowling's Harry Potter Series, Book 1: Harry Potter and the Sorcerer's Stone*, TIME, http://content.time.com/time/specials/packages/article/0,28804,1637886_1638263_1638259,00.html (last visited Nov. 22, 2022); Julie Beck, *The Psychology of Voldemort*, ATLANTIC (Sept. 23, 2015), <https://www.theatlantic.com/entertainment/archive/2015/09/the-psychology-of-voldemort/406162/>.

6. *Harry Potter and the Triumph of Scholastic*, FORBES (May 9, 2002, 12:00 PM), <https://www.forbes.com/2002/05/09/0509harrypotter.html?sh=5706503c56f7>.

7. *Id.*

8. *500 Million Harry Potter Books Have Now Been Sold Worldwide*, WIZARDING WORLD (Feb. 1, 2018) <https://www.wizardingworld.com/news/500-million-harry-potter-books-have-now-been-sold-worldwide>.

9. See Hannah Yasharoff, *How Trans 'Harry Potter' Fans Are Grappling with J.K. Rowling's Legacy After Her Transphobic Comments*, USA TODAY (Dec. 13, 2021, 9:39 AM), <https://www.usatoday.com/story/entertainment/books/2020/07/31/harry-potter-fans-grapple-j-k-rowling-transgender-remarks/5471834002/> ("I do think that giving her any sort of platform is potentially life-threatening and dangerous.").

the ability of transgender women to change their biological sex.¹⁰ A few months later, Rowling posted on Twitter again, criticizing an article that referred to “people who menstruate.”¹¹ Her response was critical of the article’s lack of use of the word “women” in favor of the more inclusive phrase.¹² The response to her tweet was enormous. Her fans, other celebrities, and even the cast members of the *Harry Potter* movies took to the internet to express their distaste for what they considered transphobic comments.¹³ One person even responded to Rowling in a tweet admitting she had “written so many, but these are the words [she] will be remembered for.”¹⁴

Despite the criticism, Rowling doubled down on her views of gender and biological sex in a lengthy essay that she posted on her website.¹⁵ Notably, she confessed that she “read all the arguments about femaleness not residing in the sexed body, and the assertions that biological women [do not] have common experiences, and [she found] them . . . deeply misogynistic and regressive.”¹⁶ Her stance on these issues continued most recently in the aftermath of International Women’s Day 2022, where she criticized a British politician because the politician “told the British public [she] literally [could not] define what a woman is” and asked if the politician planned to “lift up random objects until [she found] one that rattles.”¹⁷

Fans applied equal pressure to Rowling’s response and many of them decided they no longer needed to support Rowling to continue to enjoy

10. J.K. Rowling (@jk_rowling), TWITTER (Dec. 19, 2019, 7:57 AM), https://twitter.com/jk_rowling/status/1207646162813100033?s=20&t=yOXxzDsWQDRPULWnYWkkiw; see also Jenny Gross, *Daniel Radcliffe Criticizes J.K. Rowling’s Anti-Transgender Tweets*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/07/arts/Jk-Rowling-controversy.html>.

11. See J.K. Rowling (@jk_rowling), TWITTER (June 6, 2020, 5:35 PM), https://twitter.com/jk_rowling/status/1269382518362509313?s=20&t=yOXxzDsWQDRPULWnYWkkiw.

12. See *id.*

13. See Ellise Shafer, *Emma Watson, Daniel Radcliffe, Sarah Paulson and More Condemn J.K. Rowling’s Anti-Trans Tweets*, VARIETY (June 10, 2020, 4:00 PM), <https://variety.com/2020/film/news/emma-watson-daniel-radcliffe-sarah-paulson-condemn-jk-rowling-anti-trans-tweets-1234630870/>.

14. Scarlet Envy, (@ScarletEnvyNYC), TWITTER (June 6, 2020, 7:20 PM), <https://variety.com/2020/film/news/emma-watson-daniel-radcliffe-sarah-paulson-condemn-jk-rowling-anti-trans-tweets-1234630870/>.

15. J.K. Rowling, *J.K. Rowling Writes About Her Reasons for Speaking Out on Sex and Gender Issues*, J.K.ROWLING.COM (June 10, 2020), <https://www.jkrowling.com/opinions/j-k-rowling-writes-about-her-reasons-for-speaking-out-on-sex-and-gender-issues/>.

16. *Id.*

17. J.K. Rowling (@jk_rowling), TWITTER (Mar. 8, 2022, 3:01 PM), https://twitter.com/jk_rowling/status/1501287100343361537?s=21.

Harry Potter and its wizarding world.¹⁸ Some fans took Rowling's views on transgender issues a step further and extrapolated them out to also explain her books' wholesale lack of LGBTQ+ representation.¹⁹ There are no LGBTQ+ characters explicitly written in the *Harry Potter* series, but in 2007, Rowling claimed one of the main characters was a gay man.²⁰ Fans were highly skeptical of this response and considered it an ingenuine attempt to retroactively change the sexuality of her characters without including true representation in the books themselves.²¹ In light of their heightened criticism, many fans have started to look inward to the fandom for further *Harry Potter* material in a show of direct defiance toward Rowling's views.²²

Despite their best efforts, fans cannot completely rid themselves of Rowling and her legacy. Rowling enjoys a limited monopoly by way of copyright law for the books she wrote and the characters she created.²³ Without any sort of legal protection, the incentive to craft creative work for public consumption would be lost for creators like Rowling. Juxtaposed to author protection is the protection extended to fans. Fair use is an exception to an author's exclusive right to their copyrighted material.²⁴ Fans can engage with copyrighted material under the

18. Yasharoff, *supra* note 9 (“Potter,’ at this point, has a life completely beyond its creator . . .”).

19. See, e.g., Drace Domino (@Drace_Domino), TWITTER (Dec. 13, 2021, 12:08 PM), https://twitter.com/drace_domino/status/1470440386791411721?s=21 (“[Rowling’s] recent transphobic hot take the day before a new trailer [is not a] coincidence . . . From the day Dumbledore became gay in the name of false camaraderie to the new wave of rabid TERFdom, [she has] ONLY ever seen queer people as a means of self-elevation.”).

20. Lisa Respers France, *J.K. Rowling Responds to Gay Dumbledore Controversy*, CNN (Feb. 2, 2018, 6:57 AM), <https://www.cnn.com/2018/02/01/entertainment/jk-rowling-dumbledore-gay/index.html>.

21. See, e.g., roller skate villain (@redemptionarcs), TWITTER (Mar. 6, 2022, 9:34 PM), <https://twitter.com/redemptionarcs/status/1500661144217960450?s=21> (“JKR saying [D]umbledore is gay and had 3 movies to solidify that as canon but actively chose not to while vilifying the queer community is a good example as to why you should take ‘actor and writer words for it with no canon confirmation’ as headcanon at best.”); Ashley Poston (@ashposton), TWITTER (Jan. 31, 2018, 1:07 PM), <https://twitter.com/ashposton/status/958763595893964800?s=20&t=3V4uB2F1fPdymB54gx3gPw> (“JK Rowling: Oh yeah, Dumbledore is gay! Just [did not] put it in the books. . . . Director: No, [he is] just gay off-page and off-screen. [He is] gay in your hearts.”).

22. Yasharoff, *supra* note 9 (“As fans move to become more critical consumers, many have found comfort in making up their own ideas about what that world might look like, be it writing fan fiction for online audiences or daydreaming about how the wizarding world might be more inclusive than the real one.”).

23. See W. Michael Schuster, *Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction*, 55 S. TEX. L. REV. 529, 535–36 (2014); 17 U.S.C. § 106.

24. See *id.* § 107.

protection of the fair use doctrine in order to further their own creative efforts.²⁵ However, the line between acceptable fair uses and those that infringe on the copyright owner is not always clear. Courts evaluate fair use defenses on a case-by-case basis, relying on a multi-factor test.²⁶ Notably, one of the “most important factor[s]” of the court-fashioned test is the market effect.²⁷

This Note analyzes the behavior of fans within the *Harry Potter* fandom and how their recent outright refusal to support Rowling, coincided with their increased interest in the world she created, could bring an end to copyright protection currently enjoyed by fan-made work. Part I explains the origins and activities of fandoms, including a discussion on recent trends in *Harry Potter* fandom behavior. Part II discusses the legal and extralegal protection extended to certain works created by fans. Part III gives an overview on what legal responses the fandom can expect if modern trends continue and how the law’s current approach fails to properly balance the rights of fans with the rights of the original author.

I. THE *HARRY POTTER* FANDOM

A. *Understanding Fanfiction and Its Developments*

When a group of friends watch a movie together and they talk amongst themselves about what would happen if certain facts were altered in the story, like an alternate ending or an unexplored couple pairing, the group is engaging in fanfiction in its most literal sense. This is perhaps the more mature version of the childhood pastime of acting out pretend scenes with toys or action figures. Taking this hypothetical common experience one step further, when the same friends explore their “what if” questions by writing out the way they think the story could have or should have gone in a piece of literature disseminated amongst their friends, or posted online, they are engaging in the type of fanfiction that is at the heart of the current issue.

A fandom is a community of fans who share their experiences with creative material and deepen their attachment to the work in the process.²⁸ They study the worlds created by the material intently and

25. Schuster, *supra* note 23, at 539.

26. *Id.* at 539–40.

27. *Id.* at 540–41 (“[I]f an alleged fair use supplants the market for the copyrighted work, it disfavors the finding of fair use.”).

28. Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 394 (2009); see Rebecca Tushnet,

“come to know them as deeply, as the ‘real’ world—that is, the world known not through personal experiences, but through text and other media.”²⁹ Naturally, works of fiction and fantasy serve as the breeding grounds for most fandom activity.³⁰ However, almost anything can generate a fandom. Some of the largest fandoms are for more popular forms of media, like movies or books, but even YouTube videos can cultivate a following.³¹ Fandom activities can range from discussing or writing about the material in an online forum to attending fan conventions.³²

Fanfiction is one of the ways fandoms can engage with their favorite work by putting “their own twist on the original work and shar[ing] it with other fans.”³³ Fanfiction can be defined as “any kind of written creativity that is based on an identifiable segment of popular culture . . . and is not produced as ‘professional’ writing.”³⁴ Some scholars claim fanfiction was written as early as the 1800s during the *Sherlock Holmes* series, while others claim fanfiction writing did not begin until *Star Trek* aired in the 1960s.³⁵ Regardless, original early fanfiction was compiled into magazines and only reached a limited audience without the advantage of the internet.³⁶

B. *The Modern Impact of Fan Activities*

The advent of the internet gave finite fanfiction operations a worldwide platform.³⁷ As the internet advanced, discussion boards eventually gave way to platforms created exclusively for fandom communities to interact with each other.³⁸ These platforms also provided

Note, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 657 (1997).

29. Schwabach, *supra* note 28, at 388.

30. *See id.*

31. *See* Kate Romanenkova, Note, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 198 (2014).

32. *Id.*

33. Brian Link, Note, *Drawing a Line in Alternate Universes: Exposing the Inadequacies of the Current Four-Factor Fair Use Test Through Chanslash*, 33 T. JEFFERSON L. REV. 139, 144 (2010).

34. Tushnet, *supra* note 28, at 655.

35. Compare *id.*, and Link, *supra* note 33, at 144, with Narisa Bandali, *I Wrote This, I Swear! Protecting the “Copyright” of Fanfiction Writers from the Thievery of Other Fanfiction Writers*, 101 J. PAT. & TRADEMARK OFF. SOC’Y 274, 280 (2019), and Schuster, *supra* note 23, at 532.

36. *See* Link, *supra* note 33, at 144; *see also* Bandali, *supra* note 35, at 280–81.

37. Schuster, *supra* note 23, at 529–30.

38. Bandali, *supra* note 35, at 281.

a space for writers to post their fanfictions.³⁹ With a franchise as large and successful as *Harry Potter*, “*Harry Potter* fan fiction was inevitable.”⁴⁰

A Google search for *Harry Potter* fanfiction yields millions of results.⁴¹ FanFiction.net yields more than 608,000 results for Hogwarts fanfiction,⁴² and Ao3 yields more than 340,000 results for *Harry Potter* fanfiction.⁴³ These numbers are no small feat. In fact, one of the most popular *Harry Potter* fanfictions has more than two million reads,⁴⁴ and popularity like this does not go unnoticed. *Harry Potter* fanfiction authors who garner this level of interest sometimes go on to publish their own original work.⁴⁵

A mutually beneficial relationship typically exists between authors or other owners of copyrighted works and fandoms. Fans who create and share fanfiction “are the biggest and, for some genre works, very nearly the only, market for the owners’ works.”⁴⁶ Recognizing this reality, Rowling gave her blessing to *Harry Potter* fanfiction years ago.⁴⁷ Her approval might have meant something to fans in the years leading up to her scandal. Today, the cancelled-author’s blessing mainly falls on deaf ears.

A lot of fans did not share the views that Rowling expressed about sex and gender.⁴⁸ Rather than abandon the series, fans decided to take

39. See *id.* at 281–82.

40. Link, *supra* note 33, at 146.

41. Type “Harry Potter Fanfiction” into the text box and click the search button. GOOGLE, <https://www.google.com/> (last visited Nov. 22, 2022).

42. FANFICTION.NET, https://www.fanfiction.net/book/Harry-Potter/?&srt=1&r=103&_v1=447 (last visited Nov. 22, 2022). Hogwarts is the magic school attended by Harry Potter and his friends in the original series. Sattar, *supra* note 5.

43. ARCHIVE OF OUR OWN, https://archiveofourown.org/tags/Harry%20Potter%20-%20J*d%20K*d%20Rowling/works (last visited Nov. 22, 2022).

44. See Lovesbitca8, *The Right Thing to Do*, WATTPAD, <https://www.wattpad.com/story/244907256-the-right-thing-to-do> (last visited Nov. 22, 2022) (showing 2.8 million people read the fanfiction).

45. See, e.g., Olivie Blake, FANFICTION.NET, <https://www.fanfiction.net/u/7432218/olivieblake> (last visited Nov. 22, 2022) (cataloging writer Olivie Blake’s seventeen *Harry Potter* stories and later original works); Marissa Locati (@_HomebrewDM_), TWITTER (June 21, 2021, 1:31 AM), https://twitter.com/_homebrewdm_/status/1406848681962217476?s=21 (“I can’t wait to graduate from one of my favorite fanfiction stories to an exciting original adventure by such an exceptional author! @OlivieBlake I am already a huge fan!”).

46. Schwabach, *supra* note 28, at 387.

47. Schuster, *supra* note 23, at 533.

48. See Yasharoff, *supra* note 9 (“With the book series complete, the rest of the franchise . . . doesn’t really need Rowling and therefore isn’t necessarily doomed by her public perception. . . . [M]any . . . are left wondering how they can love something created by someone they can no longer support.”).

back *Harry Potter* and make it their own.⁴⁹ As this Note will demonstrate in the following Parts, fans seeking to engage with original source material, without supporting the author, are supplanting the market the author is entitled to under copyright law. This behavior could lead to a total reshaping of copyright law and the fair use doctrine.

II. COPYRIGHT LAW AND THE FAIR USE EXCEPTION

A. Purpose of Copyright Law

The United States Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”⁵⁰ Pursuant to this enumerated power, Congress passed the Copyright Act.⁵¹ The Copyright Act “confers a bundle of exclusive rights to the owner of the copyright.”⁵² The bundle includes the sole right of the original author to publish, copy, and distribute their work.⁵³ The limited monopoly granted to authors has dual importance. Without any sort of protection from the theft of original work and marketing by others, incentive to publish original work for public consumption would be completely lost.⁵⁴ In turn, the creative motivation generated by copyright protections grants the public increased access to original work.⁵⁵ The entire “purpose of copyright is to create incentives for creative effort.”⁵⁶

49. See, e.g., Jess McConnell (@Jess_Mc_Connell), TWITTER (Dec. 19, 2019, 6:25 PM), https://twitter.com/jess_mc_connell/status/1207804105676197888?s=21 (“Harry Potter belongs to the fanfic writers now.”); shin lastname (@scarfboyfriends), TWITTER (Mar. 14, 2021, 4:35 AM), <https://twitter.com/scarfboyfriends/status/1371017076144414724?s=21> (“[T]hat [B]ritish transphobe may have let me down but drarry fanfic writers never will.”); mare (@bunnygenders), TWITTER (Sept. 14, 2020, 8:20 PM), <https://twitter.com/bunnygenders/status/1305662770206179330?s=21> (“[N]o more supporting jk rOwling [sic] no more buying harry potter merch . . . only read fanfic[tion] . . . in which no profits will [e]ver go to the . . . transphobe.”).

50. U.S. CONST. art. I, § 8, cl. 8.

51. 17 U.S.C. §§ 101–810; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546–47 (1985).

52. *Harper & Row*, 471 U.S. at 546.

53. *Id.* at 547.

54. *Cf. id.* at 546 (explaining copyrights assure contributors are rewarded for their labor).

55. *Id.*

56. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

Copyright protections extend to both “original works of authorship”⁵⁷ as well as “compilations and derivative works.”⁵⁸ A derivative work is defined as:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, . . . 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.”⁵⁹

To simplify, derivative works use copyrighted aspects from the original work without copying directly.⁶⁰ Sequels are a popular example of derivative work.⁶¹ Authors have exclusive legal authority to create derivatives of their original work.⁶² In addition to original and derivative work, certain elements of a story, like original characters, may also be protected under copyright.⁶³

Anyone who violates the exclusive rights of a copyright owner is considered an infringer and can be sued for their infringement.⁶⁴ Consequences of being found guilty of infringement can include an injunction,⁶⁵ damages,⁶⁶ and even criminal penalties.⁶⁷

B. Infringement and the Fair Use Exception

A copyright infringement analysis requires a multi-step approach.⁶⁸ Plaintiffs must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original” to establish

57. 17 U.S.C. § 102(a).

58. *Id.* § 103(a).

59. *Id.* § 101.

60. Casey Fiesler, Note, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 737 (2008).

61. See Jacqueline D. Lipton, *Copyright and the Commercialization of Fanfiction*, 52 HOUS. L. REV. 425, 443 (2014).

62. Fiesler, *supra* note 60, at 737.

63. Schwabach, *supra* note 28, at 397.

64. 17 U.S.C. §§ 501(a)–(b).

65. *Id.* § 502(a).

66. *Id.* §§ 504(a)(1)–(2).

67. *Id.* § 506(a).

68. Schwabach, *supra* note 28, at 395.

copyright infringement.⁶⁹ The first element can be satisfied easily by providing evidence of registration certificates from the Copyright Office.⁷⁰ The second element can also be easily satisfied by showing instances of verbatim copying.⁷¹ However, the second element can also be proven through less definitive evidence reflecting substantial similarity.⁷² Some courts evaluate substantial similarity through a qualitative or quantitative analysis.⁷³ The quantitative analysis considers instances of verbatim copying as well as copying of other protectable expressions from the original work.⁷⁴ The qualitative analysis considers whether the copied text is the original expression of the author.⁷⁵ As opposed to real-world facts, made-up characters or creatures and the actions they undertake in a story are examples of an author's original expression.⁷⁶ After proving both elements—valid ownership and copying—a prima facie case of infringement is established.⁷⁷

Fanfiction easily satisfies the two elements. Even though fanfiction does not directly copy original work, it “takes familiar story elements and combines them in unfamiliar ways.”⁷⁸ By taking characters or story elements from the original, fanfiction is the epitome of a derivative work,⁷⁹ and only authors have the right to create derivative work.⁸⁰ When asked if fanfiction is legal or illegal at this stage, the correct answer is illegal.⁸¹

However, a finding of copyright infringement is not the end of the story for fanfiction and similar derivative works. Fair use is a defense that can possibly protect fanfiction.⁸² Fair use limits the exclusive rights of the original author and is even thought to promote the values embodied in the Copyright Act.⁸³ Another multi-factor approach is used

69. Warner Bros. Ent. v. RDR Books, 575 F. Supp. 2d 513, 533 (S.D.N.Y. 2008).

70. *Id.*

71. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548–49 (1985).

72. Warner Bros., 575 F. Supp. 2d at 534–35.

73. *Id.* at 534.

74. *Id.* at 534–35.

75. *Id.* at 536.

76. *Id.*

77. *Id.* at 533.

78. Schwabach, *supra* note 28, at 397–98.

79. See *id.* at 398; Fiesler, *supra* note 60, at 737; Romanenkova, *supra* note 31, at 185.

80. Fiesler, *supra* note 60, at 737.

81. *Id.* at 738.

82. *Id.*

83. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (explaining how fair use fulfills copyright's purpose by promoting progress).

to evaluate fair use claims.⁸⁴ Section 107 of the Copyright Act outlines considerations to help determine whether a use is fair as:

- (1) [T]he 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.⁸⁵

Instead of bright-line rules, the fair use doctrine compels a case-by-case analysis where no factor is given superior weight over the others.⁸⁶ A rare case where Rowling took someone to court for copyright infringement exemplifies how courts evaluate these factors.

To date, no court has ruled on where fanfiction falls on the fair use spectrum.⁸⁷ However, Rowling litigated a fair use case in 2008 that involved a *Harry Potter* Lexicon website.⁸⁸ The website established an encyclopedia of information from all the *Harry Potter* books on one platform.⁸⁹ Problems arose when a publishing company approached the creator of the website with an interest in turning the Lexicon encyclopedia (“Lexicon”) into a published book.⁹⁰

After establishing the prima facie case of infringement by satisfying the necessary elements, the court went on to consider if the Lexicon was a fair use of Rowling’s work.⁹¹ The court found the crux of the first factor depended on whether the work was transformative.⁹² The court found the Lexicon was transformative because it used the original story for a

84. *Id.* at 576–77.

85. 17 U.S.C. § 107.

86. *See Campbell*, 510 U.S. at 577–78.

87. *See Romanenkova*, *supra* note 31, at 184.

88. *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); Babak Zarin, *In the Restricted Section: Harry Potter and Unauthorized Sagas*, 9 ELON L. REV. 459, 481–82 (2017).

89. *Warner Bros.*, 575 F. Supp. 2d at 519–20.

90. *Id.* at 519, 522–23.

91. *Id.* at 539.

92. *Id.* at 540.

practical purpose.⁹³ While Rowling created *Harry Potter* to entertain and tell a story about the characters, the Lexicon used the material not to create its own story, but to compile and synthesize the fictional facts to create a reference guide.⁹⁴ Thus, the Lexicon did not supplant the purpose of the original *Harry Potter*.⁹⁵

However, Rowling published two short books to “expand[] on the fictional facts that unfold[ed]” in the original series.⁹⁶ One book explains the history of an imaginary sport played by the *Harry Potter* characters, while the other lists and describes the imaginary creatures featured in the original series like an encyclopedia.⁹⁷ The court found that unlike the original series, the Lexicon’s transformative purpose was minimal in relation to the companion books.⁹⁸

The court went on to lump the second and third factors together for their next analysis.⁹⁹ This involved comparing the Lexicon’s use as a reference source and the reasonableness of the amount of copyrighted work it took to effectuate its purpose.¹⁰⁰ Coupled with an understanding that “fictional works are close to the core of copyright protection,” the court found the substantial amount of copied material weighed against a finding of fair use.¹⁰¹

Lastly, the court considered the fourth factor by asking if the Lexicon served as a market substitute for reading the original *Harry Potter* books.¹⁰² While finding the Lexicon and original books were enjoyed for different purposes, the court determined that the Lexicon could impair Rowling’s companion books.¹⁰³ The Lexicon took the information presented in both companion books and condensed it into one resource.¹⁰⁴ When coupled with its limited transformative value, the court found that the Lexicon was likely to supplant the market for the companion books.¹⁰⁵ After finding that most factors weighed in favor of the plaintiffs, the court

93. *Id.* at 541.

94. *Id.*

95. *Id.*

96. *Id.* at 519.

97. *Id.*

98. *Id.* at 548–49.

99. *Id.* at 546.

100. *Id.*

101. *Id.* at 548–49.

102. *Id.* at 549–50.

103. *Id.* at 550.

104. *Id.*

105. *Id.*

held that the fair use defense was inadequate.¹⁰⁶ The defendants were prevented from publishing the Lexicon and ordered to pay damages.¹⁰⁷

C. Extralegal Approaches

Despite the litigation that unfolded in the *Warner Bros.* case, authors typically hesitate to turn to the courts for help when dealing with potentially infringing fans.¹⁰⁸ These are usually the author's most enthusiastic consumers.¹⁰⁹ Authors oftentimes recognize this reality and act accordingly.¹¹⁰ Some authors not only tolerate fan-made work, but they even encourage it.¹¹¹

Initially, Rowling was supportive of the Lexicon website at issue in the case described above.¹¹² Like many fanfiction writers, the creator of the website was a fan of the original books.¹¹³ While reading the books, he took personal notes which provided the information he later used to create the website.¹¹⁴ The source proved valuable for fans and the author herself.¹¹⁵ Rowling admitted to checking the Lexicon when she did not remember certain facts about her own story.¹¹⁶

Even though the Lexicon creator pushed the bounds of what copyright allowed by trying to publish the Lexicon, he still acted hurt when Rowling came after him in court.¹¹⁷ During questioning, the creator was asked if he considered himself a part of the *Harry Potter* fandom, to which he responded that he “*did.*”¹¹⁸ This past-tense response is likely due to the intensity that Rowling and her publishers went after the defendant with at trial. The plaintiffs even went so far as to describe

106. *Id.* at 551.

107. *Id.* at 554.

108. Fiesler, *supra* note 60, at 746.

109. *Id.*

110. See Stacey 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, 307–08 (2015).

111. Schwabach, *supra* note 28, at 420–21 (“Rowling has said that she has read and enjoyed fanfic and has made no attempt to suppress it . . .”).

112. See *Warner Bros.*, 575 F. Supp. 2d at 542.

113. *Id.* at 520.

114. *Id.*

115. *Id.* at 521.

116. *Id.*

117. Anemona Hartocollis, *Sued by Harry Potter's Creator, Lexicographer Breaks Down on the Stand*, N.Y. TIMES (Apr. 16, 2008), <https://www.nytimes.com/2008/04/16/nyregion/16potter.html>.

118. *Id.* (emphasis added).

some of the creator's Lexicon as "errant nonsense."¹¹⁹ The trial judge who handled the case, on the other hand, suggested it should not have gone to trial.¹²⁰ Litigating copyright claims preserves the owner's rights, but it produces a negative externality to the fandom that is usually not worth the cost. However, this cost analysis is only true when the people on the other side of the copyright owner are acting under "a labor of love."¹²¹

III. ANTICIPATING HOW LEGAL AND EXTRALEGAL APPROACHES TO FANFICTION WILL CHANGE IN RESPONSE TO FANS

A. *Addressing Arguments in Support of a Fanfiction Exception*

Scholarship on fanfiction typically takes the stance that fanfiction should be allowed under the fair use doctrine for various reasons. One scholar, Professor Rebecca Tushnet, argues fanfiction should fall under fair use because of the additional creative labor put into fanfiction, and because it is mostly nonprofit.¹²² When considering the first factor of fair use, Professor Tushnet finds that fanfiction is transformative.¹²³ She believes that while fanfiction borrows copyrighted elements, it only borrows what it needs to create an entirely new story.¹²⁴ Even when a story's characters are independently protected under copyright law, fans can still take the characters and develop them in ways the official text failed to explore.¹²⁵ "Transforming" copyrighted characters in new environments or bestowing them with new personalities involves "elaboration . . . [and] the addition of much time and effort."¹²⁶ Accordingly, Professor Tushnet finds this effort alone categorizes fanfiction as fair use.¹²⁷

Even more relevant is Tushnet's supporting argument on the market effect of fanfiction. She starts off with the strong proposition that the market for original work is benefitted from fanfiction because fanfiction

119. *Id.*

120. *See* Schwabach, *supra* note 28, at 428.

121. *See* Romanenkova, *supra* note 31, at 184.

122. Tushnet, *supra* note 28, at 654.

123. *Id.* at 665.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 654, 686.

generates additional interest in the original.¹²⁸ Further, fanfiction generally explores situations the copyright owner neglected so the likelihood of market interference is limited.¹²⁹ In fact, the author points to “historical evidence that less-than-absolute copyright does not hurt copyright owners. . . . The entertainment industry is profitable and will survive without the need to suppress fan fiction.”¹³⁰ Each of these arguments support the author’s conclusion that fanfiction is fair use.¹³¹

Even when scholars have addressed the possibility of fanfiction’s ability to impact the market for original work, it does so through the lens of commercial fanfiction.¹³² Commercial fanfiction is unlike what has been discussed so far in the sense that commercial fanfiction has monetary motivations that are absent from the world of regular fanfiction.¹³³ In one article, the author highlights the commercial shift by acknowledging that best-selling books like *Fifty Shades of Grey* started out as a fanfiction before being published commercially, as well as Amazon’s creation of a fanfiction licensing scheme.¹³⁴ Both examples demonstrate the recent steps fanfiction has taken into the commercial sphere.¹³⁵ The author notes that it cannot be said with certainty that this type of commercial fanfiction would not be allowed.¹³⁶ However, commercial fanfiction involves marketing the work as original.¹³⁷ Thus, a finding on this sort of commercialization would not likely have tremendous influence on the fate of typical fanfiction.

Despite the arguments made in support of fanfiction, its legal status remains unclear.¹³⁸ Scholars who argue that fanfiction is fair use mainly focus on its transformative nature, originality, and lack of profit-making. Yet these arguments fail to adapt to current circumstances and recognize the quantifiable effect noncommercial fanfiction can have on the market, notwithstanding its increasingly transformative nature.

128. *Id.* at 669.

129. *Id.* at 670.

130. *Id.* at 672.

131. *See id.* at 686.

132. Lipton, *supra* note 61, at 431.

133. *Id.* at 437–38.

134. *Id.* at 439.

135. *Id.*

136. *Id.* at 465.

137. *Id.* at 458.

138. Fiesler, *supra* note 60, at 737 (describing how fanfiction is in a gray area of copyright law).

B. Legal and Extralegal Response to Cultural Shifts

Scholars once believed “there [was] no evidence to suggest that [fanfiction] negatively affects the market for the original work or its official derivative works. If anything, fan fiction is capable of . . . expanding the market for the original properties.”¹³⁹ The positive impact on the market explains why many authors allow or encourage fanfiction and other fandom activities.¹⁴⁰ Positive reinforcement occurs when authors let fanfiction slide. By allowing fans to create noncommercial derivatives of the original work, attention is also drawn to the work it was based on.¹⁴¹ However, the positive-reinforcement loop between fans and authors can only exist when the cultural values between authors and fans align.

Fans are taking a huge risk when they outwardly advertise their work as a substitute for a copyrighted work because not all authors are as accepting of fandom activities as Rowling is.¹⁴² While some authors may embrace its market reinforcement, they are quick to strike when it gets in the way of their own creative efforts.¹⁴³ Even Rowling herself has shown her willingness to go to court when fan-made work risks compromising her profit margins.¹⁴⁴

Rowling might also become particularly motivated to litigate fanfiction infringement cases depending on the fanfiction’s content. It is ultimately the copyright owner’s decision to decide who they want to enforce their rights against.¹⁴⁵ Rowling could “abuse [her] enforcement authority to arbitrarily discriminate amongst users.”¹⁴⁶ One way she could do this is by choosing only to litigate against fanfiction authors that write about content she disagrees with, such as LGBTQ+ issues. Rowling could police this content even when her chances of winning these cases

139. Jane M. Becker, Note, *Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet*, 14 CONN. PUB. INT. L.J. 133, 135–36 (2014) (alteration in original).

140. See Lantagne, *supra* note 110, at 307–08.

141. See *id.*

142. *Id.*

143. Schwabach, *supra* note 28, at 414–18, 428.

144. See *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008) (exemplifying a copyright case brought by J.K. Rowling for copyright infringement).

145. Mark Peterson, Note, *Fan Fair Use: The Right to Participate in Culture*, 17 U.C. DAVIS BUS. L.J. 217, 218 (2017).

146. *Id.*

in court are low,¹⁴⁷ and could consequently limit the creative expression of *Harry Potter* fans in the process.¹⁴⁸

Despite the lack of cases exemplifying her disapproval, she has always forbid fanfiction that is sexually explicit, even though she permits fanfiction in general.¹⁴⁹ She did once, however, effectuate her stance when she sent a takedown notice to the administrators of a fanfiction website that posted sexually graphic material.¹⁵⁰ It is plausible that her attitude towards sexually graphic fanfiction could extend to fanfiction that explores her characters' sexuality and gender in ways she (quite publicly) disagrees with when she, if she has not already, becomes aware of its existence and popularity.¹⁵¹ In the alternative, she might also feel inclined to litigate cases against fanfiction writers who condemn her position on sexuality and gender, and promote their work on the basis that they do not agree with her views.¹⁵² A court is unlikely to find fair use in a landscape filled with fans acting in bad faith if Rowling ever decides to bring a case against any of them for infringement.

If a copyright infringement case came across a court's desk under the current circumstances, it is unlikely they would find fair use. The doctrine of fair use is troublesome because it demands that courts

147. *Id.* (“A study done by UC Berkley suggests that as many as 30% of DMCA takedown notices are of questionable validity.”).

148. *Id.* (explaining how takedown notices are problematic to creativity on the internet by using, as an example, YouTube videos being taken down before a true infringement examination).

149. Becker, *supra* note 139, at 144.

150. Brittany Johnson, Note, *Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law*, 100 MINN. L. REV. 1645, 1659–60 (2016).

151. Notably, there are more than 400 results when a user searches “Trans Harry Potter” on fanfiction website Ao3. ARCHIVE OF OUR OWN, <https://archiveofourown.org/tags/Trans%20Harry%20Potter/works> (last visited Nov. 22, 2022). The two most popular relationship filters on Ao3 yield more than 80,000 results collectively for either a pairing between Draco Malfoy and Harry Potter, or Sirius Black and Remus Lupin, all of which are male characters. ARCHIVE OF OUR OWN, <https://archiveofourown.org/works> (choose “choose a fandom”; then choose “Harry Potter - J.K. Rowling”; then choose “Relationships”; then choose “Draco Malfoy/Harry Potter” or “Sirius Black/Remus Lupin”; then choose “Sort and Filter”) (last visited Nov. 22, 2022). There are also more than 180,000 results when a user searches “Harry Potter” on Ao3 and filters it to include either relationships between two males or two females. ARCHIVE OF OUR OWN, <https://archiveofourown.org/works> (choose “choose a fandom”; then choose “Harry Potter – J.K. Rowling”; then choose “Categories”; then choose “M/M” or “F/F”; then choose “Sort and Filter”) (last visited Nov. 22, 2022).

152. See, e.g., Shadow (@the.anon.shadow), TIKTOK (Oct. 10, 2021), https://www.tiktok.com/@the.anon.shadow/video/7017284651114974469?is_from_webapp=1&sender_device=pc&web_id=7144382591597954606 (explaining how the user-author writes LGBTQ+ fanfiction hoping it will anger Rowling).

consider a list of factors without guidance on how the result of that consideration translates to a decision.¹⁵³ The case-by-case analysis conducted in fair use cases is how so many scholars can explore the legality of fanfiction in its various forms.¹⁵⁴ Although all four factors are weighed together,¹⁵⁵ the effect on the market is usually viewed as the most important element of fair use.¹⁵⁶ A negative market effect could easily tip the scales in the author's favor.¹⁵⁷

Even fanfiction made for the purpose of ousting Rowling from the *Harry Potter* universe could arguably satisfy three of the four factors of fair use. The most critical inquiry for the first factor is if the new work transforms the original work in some way, such as by adding a new meaning or insight.¹⁵⁸ Courts recognize a secondary work's transformative value when it "combines copyrighted expression with original expression to produce a new creative work."¹⁵⁹ The first factor also contemplates any commercial purpose for a secondary work.¹⁶⁰

Harry Potter fanfiction always takes copyrighted material and explores it in ways the author neglected.¹⁶¹ This can include focusing on underdeveloped or side characters, a new couple pairing, placing the characters in an alternate universe, an alternate ending, or any combination of the above.¹⁶² Fanfiction writers "pride themselves on the transformative aspects of their work."¹⁶³ The noncommercial nature of most fanfiction will also lend itself to the first factor analysis.¹⁶⁴ A court is therefore still likely to find *Harry Potter* fanfiction transformative. Since transformative "works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright," the first factor will not weigh against a finding of fair use.¹⁶⁵

The second and third factor could also weigh in favor of the fanfiction writers. The second factor considers the nature of the copyrighted

153. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475–76 (1984).

154. *See, e.g.*, Romanenkova, *supra* note 31, at 184.

155. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

156. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

157. *See Campbell*, 510 U.S. at 593.

158. *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513, 540–41 (S.D.N.Y. 2008).

159. *Id.* at 541.

160. *Campbell*, 510 U.S. at 584.

161. *See Schwabach*, *supra* note 28, at 397–98; Tushnet, *supra* note 28, at 657.

162. *Cf. Schwabach*, *supra* note 28, at 397–98 ("[F]anfic[tion] takes familiar story elements and combines them in unfamiliar ways.").

163. Romanenkova, *supra* note 31, at 202.

164. *See Lipton*, *supra* note 61, at 428, 446.

165. *See Campbell*, 510 U.S. at 579.

work.¹⁶⁶ Courts recognize “fictional works are generally more deserving of protection than factual works” because “[s]uch highly imaginative and creative fictional works are close to the core of copyright protection.”¹⁶⁷ However, fanfiction’s use of fictional material can be offset by its transformative characteristics.¹⁶⁸ Courts recognize the “limited usefulness [of the second factor] where the defendant’s work is ‘transformative’ in nature.”¹⁶⁹ The third factor complements the second factor because it addresses the amount and substantiality of original material used by the secondary user.¹⁷⁰ Being deemed transformative necessarily implies there is limited direct copying in the secondary work.¹⁷¹

At face value, fanfiction typically violates the second factor because it uses characters and storylines at “the core of the Copyright Act’s protective purposes.”¹⁷² However, its transformative nature, discussed under the first factor, dilutes this conclusion.¹⁷³ Fanfiction also passes muster under the third factor because it does not substantially copy from the original work.¹⁷⁴ To do so would completely contravene the purpose of fanfiction writing generally.¹⁷⁵ What it does copy is likely allowed because courts allow secondary work to “take whatever is necessary in pursuit of a transformative purpose.”¹⁷⁶

Ironically, these factors could weigh even more heavily in favor of certain fanfiction authors in today’s hostile landscape. For example, one fan encouraged writing a fanfiction “of a kid going up the ‘wrong’ staircase in their [h]ouse dorm and it not rejecting them because the magic knows what they are.”¹⁷⁷ Another fan described how Rowling might react negatively to a fanfiction where a transgender character uses

166. 17 U.S.C. § 107.

167. Warner Bros. Ent. v. RDR Books, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008).

168. See *id.* at 548–49.

169. Warren Publ’g Co. v. Spurlock, 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009) (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)).

170. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 497 (1984) (Blackmun, J., dissenting).

171. See *Warren Publ’g Co.*, 645 F. Supp. 2d at 424.

172. See *id.* at 422.

173. *Id.* at 423.

174. See Bandali, *supra* note 35, at 287–88.

175. See Lantagne, *supra* note 110, at 276.

176. Bandali, *supra* note 35, at 288.

177. Spooky Scary Skeledavid! (@theinkedknight), TWITTER (Dec. 19, 2019, 12:49 PM), <https://twitter.com/theinkedknight/status/1207719623141052417?s=20&t=0zd6YqdGnwByg8ySxALJKg>. The wrong staircase meaning, for example, a student who is biologically a male but identifies as a female being accepted into the girl dormitories at Hogwarts.

a potion that changes their appearance to make them “feel more comfortable in their body.”¹⁷⁸

If a court was receptive to the transformative value of fanfiction with this type of LGBTQ+ representation, it is possible that it could outweigh the other factors.¹⁷⁹ When evaluating the transformative value of a song parody on a case of first impression, the Supreme Court found that the first factor analysis depended on if the parody involved:

the use of some elements of a prior author’s composition to create a new one that . . . comments on that author’s works. [Or] [i]f, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh¹⁸⁰

Like parody, fanfiction authors who believe *Harry Potter* lacks LGBTQ+ representation and want to include it in their own writing as a way to criticize Rowling for its absence “need[] to mimic [the] original to make [their] point.”¹⁸¹ Courts would likely view authors who do so more favorably in light of Rowling’s disapproval of this inclusive content.

It is important to note that not all fanfiction authors who disagree with Rowling’s views also include LGBTQ+ representation in their own work.¹⁸² The fans whose writing does not reflect their attitudes toward Rowling’s views would not benefit as heavily from this consideration.¹⁸³ Courts are more likely to think these authors are “avoid[ing] the drudgery in working up something fresh” with less transformative value than fans writing more inclusive content.¹⁸⁴

178. jackson dickert (@SwagXMcNasty), TWITTER (July 7, 2020, 12:40 PM), <https://twitter.com/SwagXMcNasty/status/1280542123100692481?s=20&t=0zd6YqdGnwByg8ySxALJKg>.

179. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

180. *Id.* at 580 (citations omitted).

181. *Id.* at 580–81.

182. See Sque Morgan (@adreamingone), TWITTER (Mar. 10, 2022, 10:30 AM), <https://twitter.com/adreamingone/status/1501943668998950917?s=20&t=0zd6YqdGnwByg8ySxALJKg> (explaining how fans can enjoy fanfiction written by and for transgender people without supporting Rowling).

183. Work that retells the original story without LGBTQ+ representation might not “provide [as much] social benefit, by shedding light on [the] earlier work, and, in the process, creating a new one.” *Campbell*, 510 U.S. at 579.

184. *Id.* at 580.

The fourth factor could cause all modern *Harry Potter* fanfiction to lose its once widely speculated fair use protection. The fourth factor evaluates the effect the secondary work has on the market of the original work.¹⁸⁵ Courts sometimes consider the fourth factor “the single most important element of fair use.”¹⁸⁶ The inquiry considers both the harms to the market for the original work and its potential derivatives,¹⁸⁷ as well as if letting the allegedly infringing conduct go unrestricted would substantially and adversely impact the original work’s market.¹⁸⁸ All a copyright holder needs to do is establish a connection between the infringement and a loss of revenue to prove a prima facie case of the secondary work’s market harm.¹⁸⁹ In effect, this factor asks if the secondary work will act as a substitute for the original work.¹⁹⁰

An appreciable segment of the *Harry Potter* fandom outwardly advertises their own work, and the work of other fanfiction authors, as substitutes for Rowling’s *Harry Potter*.¹⁹¹ Many fans even consider one of the more popular fanfictions titled *Isolation* as “canon” and advertise it as a replacement for the seventh and final *Harry Potter* novel.¹⁹² When fans claim that certain fanfiction is canon, they are saying it is the accepted and authoritative source.¹⁹³ Fans are at least implying *Isolation* should be read instead of Rowling’s work when they label it as canon. Notably, *Isolation* does not contain any LGBTQ+ representation,¹⁹⁴ making it both a likely candidate for litigating because of its popularity

185. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

186. *Id.*

187. *Id.* at 568.

188. *Campbell*, 510 U.S. at 590.

189. *Harper & Row*, 471 U.S. at 567.

190. *Campbell*, 510 U.S. at 591–92.

191. See, e.g., Neon any prns! (@neon_heartbeat), TWITTER (Sept. 22, 2021, 8:23 PM), https://twitter.com/neon_heartbeat/status/1440834106632269827 (stating that the highlight of her writing career was being complimented for ridiculing Rowling in her fanfiction); sara david (@SaraQDavid), TWITTER (July 5, 2020, 10:39 AM), <https://twitter.com/SaraQDavid/status/1279786931321278465> (“[S]ociety has progressed past the need for [Rowling]: [Harry Potter fans] should simply organize, demanding she resign and relinquish all canon and royalties to democratically elected fanfic[tion] writers.”).

192. See, e.g., juls (@swiftkjn), TWITTER (Jan. 11, 2018, 9:40 AM), <https://twitter.com/swiftkjn/status/951463956991766533> (admitting she considers *Isolation* so similar and well written that it replaces *Deathly Hallows*).

193. See *Canon*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/canon> (last visited Nov. 22, 2022).

194. See generally ARCHIVE OF OUR OWN, <https://archiveofourown.org/works/23461513> (last visited Nov. 22, 2022) (displaying *Isolation* and tagging its solely heterosexual relationship pairings).

and a poor candidate for fair use due to its restricted transformative value.

As the saying goes, people should not always believe what they read on the internet. It is not always the case that trending topics on Twitter represent the opinions of the majority. Tweets and other social media posts from *Harry Potter* fans that criticize Rowling and promote fanfiction replacements are not dispositive of market harm. However, at least this time, these outspoken fans might be indicative of overall market behavior.

Rowling did not experience the same growth in sales as the rest of the publishing industry during the summer of 2020.¹⁹⁵ During this time, many parents turned to books to occupy their children when schools closed at the start of the pandemic.¹⁹⁶ The result was a 31.4% rise in overall sales for fiction books.¹⁹⁷ Rowling's sales, by contrast, only increased by 10.9% during this time.¹⁹⁸

Underperforming market sales in 2020 were atypical for Rowling because her sales outperformed the rest of the market during the previous year.¹⁹⁹ The explanation for the anomaly likely relates to "the first week of June" when Rowling "incurred widespread criticism after she began repeatedly expressing contentious views on transgender identity."²⁰⁰ It is more than plausible that fans who wanted to continue consuming *Harry Potter* material without supporting Rowling started writing or reading fanfiction instead.

Rowling need only show this correlation with reasonable probability, and she would be well on her way to showing "a causal connection between the infringement and a loss of revenue" to sufficiently prove the routinely dispositive fourth factor.²⁰¹ At first glance, it seems counterintuitive for courts to resolve the infringement analysis in fans' favor. When fans outwardly advertise their work as market substitutes, courts should assume they were successful in satisfying the demand for the original.²⁰² The fourth factor is oftentimes the most important because it "goes to the underlying economic incentives for creating and

195. Adam B. Vary, *J.K. Rowling's Book Sales Lagging Despite Industry Boom in June*, VARIETY (July 16, 2020, 3:20 PM), <https://variety.com/2020/film/news/jk-rowling-book-sales-harry-potter-1234708777/amp/>.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566–67 (1985).

202. See Lipton, *supra* note 61, at 450.

distributing copyrighted works.”²⁰³ Resolving the fourth factor against fans is essentially a death note for their fair use defense.

It still feels like a misstep for courts to find against fans in an infringement case based on market harm of this nature, especially considering the transformative aspects of fanfiction overall, and particularly for fanfiction that includes LGBTQ+ representation. Aside from the express purpose of protecting economic incentives, the spirit of copyright laws is to encourage creativity.²⁰⁴ Perhaps allowing fans the freedom to participate in the culture they identify with when the work they produce is so “highly transformative of the original work”²⁰⁵ is more compatible with the underlying principles of copyright protection. The fair use analysis is always evolving.²⁰⁶ It is arguably more appropriate to emphasize the transformative nature of the work, as opposed to market harm, in the case of fanfiction writers who write to avoid supporting original authors. To approach this issue otherwise could bring an end to all fanfiction produced in spite of the original creator.

CONCLUSION

The law has not addressed the legality of fanfiction to date. However, strong arguments exist for allowing it to operate under the fair use doctrine. Relying on the transformative and non-commercial nature of most fanfiction, scholars predict fanfiction would likely be protected under fair use if a case ever came before the courts. Until recently, these arguments were merely speculation because authors are unlikely to litigate against their biggest fans for copyright infringement. Those who write fanfiction are not only usually the biggest fans of the original work, but they also help market it.

It is likely a fanfiction case is on the horizon due to the unprecedented controversy surrounding J.K. Rowling. Rowling has already shown her willingness to sue when fan-made work threatens her income. The endless resources available to further fandom activity in today’s internet-age make it easy for fans to take original material and make it their own when their views do not line up with those of the original author. On a small scale, this defiance would not warrant setting off alarms. However, when there is a fandom-wide revolution occurring, as is the case for

203. *Id.*

204. Tushnet, *supra* note 28, at 684-85.

205. Lipton, *supra* note 61, at 457.

206. Peterson, *supra* note 145, at 248.

Rowling, copyright holders could see a quantifiable effect on their market even without fanfiction writers making a dime.

Authors experiencing this type of market harm could turn to the courts for a remedy and likely succeed because of the weight given to that element in the fair use analysis. However, from a policy standpoint, it is not clear that this is the proper approach. That is, copyright law is intended to promote the progress of ideas and to afford people who do so protection in those ideas. It would negate the spirit and purpose of copyright law to refuse to protect transformative fanfiction that takes the original in a direction its author refuses to do herself, but progressive society demands, and to fail to award marginalized groups true literary representation.