

‘SOMETHING NEW AND SOMETHING BORROWED’: INTERPLAY OF FANFICTIONS AND COPYRIGHT LAW IN INDIA

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ABSTRACT

People who write fanfiction do so to explore, sustain, and add to content with which they have an emotional connection— a body of work that is typically protected by copyright. The legal status of fanfiction in relation to copyright law is murky, but fanfiction is widely seen as transformative. Regardless matter how a court views fanfiction, writers put time, effort, and love into works that can often be longer than a traditionally published novel. While fanfiction is currently a hot topic in the legal world, fanfiction plagiarism is often overlooked. Similarly, there is currently no actual regulation of plagiarism in the fanfiction community other than social pressure, such as online shame. The paper highlights the defences available to a fanfiction author and the regime that may or may not afford protection of copyright to the fanfiction based on several criterions.

Keywords: Fair Use, Fanfiction, Transformative Work, Derivative Work, Copyright, Infringement, subject matter of copyright.

INTRODUCTION

Literature worldwide has always served one purpose – imagination, whether that imagination leads to political uprisings, fantasies, lover’s spat, vivid dreams, nightmares, inspiration, art, or any other physical manifestation. All of the aforementioned start with words on the paper. One of the most popular manifestations in this digital era is fan fiction, commonly abbreviated by their readers and patrons as “fanfics”. The purveyors of this culture have been the linchpins of queer liberation, feminist wants and portraits, and the general merriment of young adults and teenagers.

Among the young adult (*hereinafter* ‘YA’) fiction literary circles, the name of Cassandra Claire (or Claire) would most certainly ring a bell. Her published work of the “*Mortal Instrument*”¹

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series garnered cartage of adorners and was well received both by readers and critics. It is believed that the series was influenced by many popular fandoms, however, major inspiration was collected from the *Harry Potter* series.² In the early 2000s, i.e., 2000 to 2006, she was quite in vogue in the online *Harry Potter* fandom³ with her *Draco Trilogy*⁴ comprising *Draco Dormiens*, *Draco Sinister*, and *Draco Veritas* adding up to approximately 1 million words.⁵ The trilogy offers an alternate universe from that of J.K. Rowling, where Draco Malfoy, the Machiavellian antagonist of the *canonical* novel series, was the protagonist.⁶ This fame didn't last very long when the accusations of plagiarism befell her.⁷ Readers discovered that the action scenes and dialogues were stolen, and soon after, the hosting website banned Claire and took down her work.

The rabbit hole of divergence from the author's work is well-known, diverse, and contemporaneous. E. L. James' series titled "*Fifty Shades of Grey*" is another instance or example of fanfiction adored by many. The novel series, later adapted into a movie franchise, was inspired by *Twilight*.⁸ The history of fanfiction can be traced back to science fiction magazines from the 1920s and 1930s however, traces and links can be sourced to the oral and mythic traditions as well.⁹ Fanfictions signal an alternate universe delineated by fans based on the plot line and character of the original work of the author and may be sourced and inspired from a single work and/or novel, or it may be a product of an aggregate of work.¹⁰ The narrative

¹ Cassandra Clare, *City of Bones* (Simon & Schuster 2007); Cassandra Clare, *City of Ashes* (Simon & Schuster 2008), Cassandra Clare, *City of Glass* (Simon & Schuster 2009).

² Namera Tanjeem, '50 Shades and More: 11 Published Fanfiction Books' (*Book Riot*, 12 September 2019) <<https://bookriot.com/published-fanfiction-books/>> accessed 8 June 2022.

³ Kristina Busse and Karen Hellekson (eds), *Introduction To Fan Fiction and Fan Communities in the Age of the Internet: New Essays* (McFarland & Company 2006).

⁴ Narisa Bandali, 'I Wrote This, I Swear!: Protecting the "Copyright" of Fanfiction Writers from the Thievery of Other Fanfiction Writers' (2019) 101(2) J Pat & Trademark Off Society 274 <<https://jptos.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=626&cntnt01showtemplate=false&cntnt01returnid=97>> accessed 8 June 2022.

⁵ 'Draco Trilogy' (*Fandom*)<https://harrypotter.fandom.com/wiki/Draco_Triology> accessed 8 June 2022.

⁶ Cassandra Claire, 'Draco Dormiens' (*Broom Cupboard*) <<http://www.broomcupboard.net/fanfiction/DracoDormiens.pdf>> accessed 9 June 2022; Cassandra Claire, 'Draco Sinister' (*Wattpad*) <<http://broomcupboard.net/fanfiction/DracoSinister.pdf>> accessed 9 June 2022.

⁷ Avocado, 'The Cassandra Claire Plagiarism Debacle' (*Fanlore*, 4 August 2006), <https://fanlore.org/wiki/The_Cassandra_Claire_Plagiarism_Debacle> accessed 9 June 2022.

⁸ Hayley C Cuccinello, 'Fifty Shades Of Green: How Fanfiction Went From Dirty Little Secret To Money Machine' (*Forbes*, 10 February 2017) <<https://forbes.com/sites/hayleycuccinello/2017/02/10/fifty-shades-of-green-how-fanfiction-went-from-dirty-little-secret-to-money-machine/?sh=9d679cf264cf>> accessed 8 June 2022.

⁹ Bronwen Thomas, 'What Is Fanfiction and Why Are People Saying Such Nice Things about It?' (2011) 3 *Storyworlds: A Journal of Narrative Studies* 1.

¹⁰ *ibid.*

is a cultural currency and takes the original plot or “*canon*” to another dimension or changes the plot or character imaginatively.¹¹ It is fluid and takes shape based on several extraneous factors such as sexuality, gender identity, the trauma of the author, issues related to work or personal lives, relationships, and may even extend to fetishes and sexual innuendos/overtones. However, the common thread between all the fan work is that it democratises literature and plays a crucial role in disseminating emotions, passion, and work of several people based on the original author’s work, which *ipso facto* gets promoted and collects attention. Albeit colourful and vivid, fanfiction is not considered “professional writing”¹² and is generally understood as an expression of a person exploring the canon and reimagining the original author’s work or providing it with an alternate ending.¹³ Therefore, there may not be a requirement for the fanfiction author to venture into the superstructure of the plot arc, character presentation, contexts, and publicity while also being creative.¹⁴

The plagiarism scandal of Claire opens the domain of fanfiction to several legal issues – one of them being plagiarism.¹⁵ It must be noted that fanfictions walk the tight line between transformative work of art, fair use, and infringement.

INTERSECTIONAL ANALYSIS OF FANFICTION WITH COPYRIGHT REGIME

A book or a novel is ordinarily composed of the following elements – theme, setting, character, and plot. An author of fanfiction creates a narrative derived from the *canon* that may be the character, world of the *canon*, and setting and may either reimagine and reexplore the plot or may change the plot by making distinguishable variations in theme or character or providing alternate possibilities.¹⁶ The contention may be that the *canon*’s author is the source and the fanfiction, though an independent work is derived from the *canon* literature, including but not

¹¹ Samantha S Peaslee, ‘Is There a Place for Us: Protecting Fan Fiction in the United States and Japan’ (2015) 43 Denv J Int’l L & Pol’y 199, 199; Meredith McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 BU J SCI & TECH L 433, 435.

¹² Meredith McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 BU J SCI & TECH L 433, 435.

¹³ Viktor Mayer-Schonberger and Lena Wong, ‘Fan or Foe? Fan Fiction, Authorship, and the Fight for Control’ (2013) 54 IDEA 1.

¹⁴ *ibid* [277].

¹⁵ ‘Plagiarism’ (*Fanlore*) <<https://fanlore.org/wiki/Plagiarism>> accessed 8 June 2022.

¹⁶ Kate Romanenkova, ‘The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright’ (2014) 18 Intellectual Property Law Bulletin 183.

limited to the theme, character, and other essential elements of the work created. Therefore, since the source is the foundation, it is protected by copyright, including the individual elements that provide it with its personality. Ergo, any reproduction or appropriation would impinge on the exclusive economic rights of the *canon* author.

In a general sense, a fanfiction author borrows from the world of the *canon* work, their characters (either their name or their characterisation, or both), and the setting of the character, placed in a different plot which may be the same theme or not. The author of the *canon* would fortiori have copyright protection over the entire work since it is an expression of an idea. However, the contention could be that every element of *canon* is also an expression cumulating the grand narrative and, therefore, also amenable to the subject matter of copyright protection.¹⁷ Therefore, protection must be afforded to individual elements from appropriation and reproduction.

The question of whether themes and/or ideas are copyrightable has already been answered by the Hon'ble Apex Court in *R. G. Anand v. Delux Films*¹⁸ that copyright protection does not extend to themes, plots, or facts – legendary or historical. The protection was afforded to how the elements are arranged and utilised by the author and how the resultant expression appears, and the manner of presentation. The Division Bench of Delhi High Court further held along the same lines that the primary purpose of copyright was not to protect ideas and themes but to protect the resultant expression, which is the fruition of imagination, creativity, and effort.¹⁹ The contrariety between idea and expression was extrapolated by the Calcutta HC in *Barbara Taylor Bradford v. Sahara Media Entertainment Limited*,²⁰ that law protects only well-delineated expression of an idea and not the central idea (theme) of the work. The law plays a balancing effect between two different interests – that of the author and of the general public. The law must protect the author and the originality of their work, prevent unfair appropriation, and provide an exclusive bundle of rights. While on the other hand, this protection must not translate to overprotection, whereupon any future creativity would be curbed. The Court held as follows:

“...If plots and ordinary prototype) characters were to be protected by the copyright law, then soon would come a time in the literary world, when no author would be able to write anything at all without infringing copyright... an intending author, instead of concentrating upon the literary

¹⁷ Jiarui Liu, ‘Copyright Reform and Copyright Market: A Cross-Pacific Perspective’ (2016) 31 Berkeley Technology Law Journal 1461.

¹⁸ *R G Anand v Delux Films* AIR 1978 SC 1613; *ChatrapathyShanmugham v S Rangarajan* 2004 (29) PTC 702 Mad.

¹⁹ *Time Warner Entertainment Company v RPG Netcom* 2007 (34) PTC 668 Del.

²⁰ *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* 2004 (28) PTC 474 Cal.

merit of his expression, would be spending his life first determining whether he is infringing the copyright of the other authors who have written on this topic or that. The law of copyright was intended at granting protection and not intended for stopping all literary works altogether by its application.”

WHETHER APPROPRIATION OF CHARACTER FROM CANON LITERATURE AMOUNTS TO INFRINGEMENT?

It can be concluded with the assurance that themes, ideas, and subject matter are not afforded protection under the copyright regime in India. However, whether characters (individual or collective) of the *canon* are protected under the regime is a major source of the brouhaha. It is understood that general themes, ideas, and plots cannot be afforded protection under the law, however, what is the recourse if the characters are not general themes or ideas but rather well-defined expressions?²¹ Since fandoms appropriate the characters, the copyrightability of individual elements such as a character becomes a pertinent issue.²²

Character, understood in common parlance, is a caricature painted by words not just describing physical traits but also actions, emotions, and context of the character's development. Therefore, the character is not apparent but depends upon the imagination of the reader and their interpretation of the literature.²³ A prime contemporary example of this ought to be Mr. Darcy of Jane Austen's *Pride & Prejudice*. Mr. Darcy, the lead protagonist, has been a specimen of much feminist literature studying textual and cinematic masculinities. A superficial reading may suggest a polished and genteel Victorian man but an 'Austenian' interpretation suggests a hint of a man lacking perfunctory courtesies but rather tethered to femininity and desires thereto. The effort of the reader to interpret Fitzwilliam Darcy harkens to the reader's desires and trepidation *vis-à-vis* masculinity. The cinematographic representation of Darcy provoked a split opinion. However, the same was a result of "*seeing the old from a new perspective, in viewing [him] in a new context that opens up possibilities previously overlooked*".²⁴

²¹ *ibid.*

²² *ibid.*

²³ SKD Biswas, 'Copyrightability of Characters' (2004) 9 Journal Of Intellectual Property Rights 148, 149.

²⁴ Gina MacDonald and Andrew MacDonald (eds), *Jane Austen on screen* (Cambridge University Press 2003).

The Courts are wary and cautious in granting protection to characters and need to be satisfied to a great threshold that the characters are “*well delineated*”.²⁵ In the case of *Warner Brothers Pictures v. Columbia Broadcasting System*,²⁶ it was held that characters are not extended the protection of copyright law unless it was described in great detail with precision and critical to the story being told rather than simply a mode of storytelling. The character of ET was given protection under the copyright regime since it was a distinct character and instrumental to the movie in the case of *Universal City Studios v. Kamar Industries*.²⁷ Kerala High Court has also concurred with this position insofar as well-defined and delineated characters are afforded protection under the Copyright law.²⁸

However, a fanfiction author, while using a character of the *canon*, does so by attributing new personality traits and by changing the character arc to provide an alternate universe plot.²⁹ Therefore, it may be argued that changing features essential to *canon* literature and the character contained in it would change the ‘basic structure’, thereby creating a new character and a story. The character as pictured by the readers is a portrayal of words describing the character, their personality, physical appearance, context, behaviour, and how such a character is viewed by other characters in the *canon*. Changing dialogues, speech patterns, interaction with other characters, character’s motivation, and behaviour (to alter the character arc) delineates a different character altogether and therefore does not infringe the exclusive rights of the *canon* author.

What remains an issue is the degree of ascertaining what constitutes an infringement of character. From the aforementioned settled law, character copyright and infringement thereof would be reduced to a question of fact.

“BUT WHY AM I FAMOUS, HAGRID?”: PUBLICITY RIGHTS AND FANFICTIONS

The factions of literati often resign to the fate that their characters are personalities in themselves, thus copyrightable. The exploitation of personalities and intangible values therein

²⁵ Dr VK Ahuja, *Law Relating to Intellectual Property*, (Lexis Nexis 2017) 35.

²⁶ *Warner Brothers Pictures v Columbia Broadcasting System* 216 F 2d 945 (9th Circuit, 1954).

²⁷ *Universal City Studios v Kamar Industries* 1982 Copyright L Decisions (CCH) 25, 452 (SD Tex. 19); *Arbaaz Khan Production Private Limited v Northstar Entertainment Pvt Ltd* 2016 (67) PTC 525.

²⁸ *V T Thomas v Malayala Manorama* AIR 1989 Ker 49.

²⁹ Fanfic, ‘Writing a Character Arc for a Canon Character’ (*Wattpad*) <<https://wattpad.com/583676438-how-to-write-fanfiction-writing-a-character-arc/page/2>> accessed 10 June 2022.

was founded upon the personhood approach of Kant and Hegel.³⁰ It was opined that work product is a reflection of personalities, therefore, protection of intellectual property is to essentially protect self-expression.³¹ Personality of the character (fictional or not) would incorporate the emotional and moral values, temperament, cadence, and other reflections found in the author. It goes without saying that literature is a product of cogitation and would thus be ingrained with the timbre of personalities and turmoil of the author. Therefore, while expression provides the author of *canon* exclusive economic rights over the words, the author parallelly exploits the personality of the expression – the intangible value that adds texture to the expression.

However, publicity rights of one's personality extend to limits set by Section 38 of the Copyright Act, 1957,³² i.e., performers' rights. Albeit protecting the rights of performance, the same would not extend to fictional characters³³ owing to the definition of a "*performer*"³⁴ and "*performance*".³⁵

Even if publicity rights are extended to fictional characters and compared to famous personalities and celebrities, inspired (or mimicked) performance, imitation thereof is not actionable per se. *Bloom & Hamlin v. Nixon*³⁶ was one of the first cases that settled this position. The defendants were producers wherein an artist mimicked the singer of 'The Wizard of Oz' song – *Sammy*. Plaintiff, the copyright holders of *Sammy*, brought an action of copyright infringement. The Court, holding that there was no copyright infringement, opined the following:

"...what is being presented are the peculiar actions, gestures, and tones of Miss Faust; which were not copyrightable... It is the personality of Lotta Faust imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. No doubt, the good faith of such mimicry is an essential element... Fay Templeton does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of

³⁰ Garima Budhiraja, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' (2011) 6 NALSAR Student Law Review 7.

³¹ Robert C Bird and Lucille M Ponte, 'Protecting Moral Rights in United States and United Kingdom: Challenges and Opportunities under UK's New Performance Regulations' (2006) 24 BU ILJ 213, 216.

³² Copyright Act 1957, s 38.

³³ *Star India Pvt Ltd v Piyush Agarwal* 2014 (58) PTC 169 (Del) 173-174 and 176; Copyright (Second Amendment) Act 1994; Copyright Act 1957 ss 38, 39, 39A.

³⁴ Copyright Act 1957, s 2(qq).

³⁵ Copyright Act 1957, s 2(q).

³⁶ *Bloom & Hamlin v Nixon* 125 F 977 (CCED Pa 1903).

the imitation. This is a distinct and different variety of the historic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before the court has in any way interfered with the legal rights of the complainants."³⁷

*Bloom & Hamlin*³⁸ was later affirmed by *Savage v. Hoffman*³⁹ and *Murray v. Rose*.⁴⁰ Providing immunity for inspired performances or mimicry becomes especially pertinent for the entertainment and comedic domain. Such an immunity, though available, would generally not be required for fanfictions. The objective of fanfiction is to create literature that may not be commercially viable and is an experiment of themes, alternate superstructures of stories, and asserts narratives that don't fit with the ideal tastes of the market.⁴¹ Creating such deviations fit for the consumption of particular niches makes a different expression and/or art.

OWNERSHIP AND ORIGINALITY OF FICTIONAL CHARACTERS AND COPYRIGHT ACT, 1957

At this juncture, exploring ownership of a character becomes pertinent when exploring the rights of such characters. Copyright subsists in the expression of ideas such as literary, dramatic, or artistic work.⁴² "*literary work*" under Section 13 of the Copyright Act is inclusive and broad. It includes poetry, prose, and anything in between that is in writing and is original, notwithstanding the quality and "*aesthetic merit*".

Ownership subsisting in fictional characters has been discussed in the case of *Star India Pvt. Ltd. v. Leo Burnett*.⁴³ The plaintiff herein sought an injunction against the defendant for using a character being telecasted on television that was comparable to the plaintiff's character. The Court held that such protection and ownership could only arise where the character has attained an original identity independent of the show or movie and has acquired public recognition.⁴⁴

³⁷ *ibid.*

³⁸ Copyright Act 1957, s 2(q).

³⁹ *Savage v Hoffman* 159 F 584 (SDNY 1908).

⁴⁰ *Murray v Rose* 30 NYS2d 6 (1941).

⁴¹ Henry Jenkins, 'Gender and Fan Studies (Round Five, Part One): Geoffrey Long and Catherine Tosenbeger', (*Henry Jenkins*, 28 June 2007) <http://henryjenkins.org/blog/2007/06/gender_and_fan_studies_round_f_1.html> accessed 28 June 2022; Rebecca Tushnet, 'All of This Has Happened before and All of This Will Happen again: Innovation in Copyright Licensing' (2014) 29 Berkeley Technology Law Journal 1447.

⁴² Copyright Act 1957, s 13.

⁴³ *Star India Private Limited v Leo Burnett* 2003 (27) PTC 81 Bom.

⁴⁴ *Arbaaz Khan Production Private Limited v Northstar Entertainment Pvt Ltd* 2016 (67) PTC 525.

While analysing the ambit of “*literary work*” under the Act, the test of originality requires attention. Originality under the Act does not require the work product to be inventive or novel. The copyright regime in India is rarely ever concerned with the originality of idea. It only concerns itself with the originality of expression of the idea.⁴⁵ Therefore, ‘originality’ concerns itself with the input of a certain amount of skill, labour, and judgment. Such a display of creativity creates a derivative work, thus acquiring originality.⁴⁶ The broad and inclusive definition would not contain characters (products or expressions) that display substantial or sufficient differences from the character in question. The only caveat is that subsisting of copyright in derivative work would require a much higher degree of creativity than in the case of primary work/literature. Thus, originality, a *sine qua non* of the copyright regime, is overcome by fanfictions in most cases.⁴⁷

INFRINGEMENT AND FANFICTION: A DILEMMA

Copyright is a bundle of rights that an author is entitled to exploit. The author is conferred with this ‘monopoly’ as a reward for their skill, judgment, and labour. It is to encourage more creativity. Such a right is both positive and negative. It is positive insofar as the author of an original expression can economically exploit it themselves or license its use commercially. However, a negative right connotes that such a right exists in exclusion of everyone else. Trespass in the exclusive rights conferred and protected by law without the author’s consent is called infringement.⁴⁸ Therefore, what is an exclusive right of the author must be understood by Sections 14(a) and 14(b) of the Copyright Act. Any unauthorised distribution and circulation of work for profit or any act that unfairly prejudices the author would be considered an infringement.

On the issue of fanfictions, the plea of infringement on the grounds of copying would be raised. Copying may be direct or indirect. A work will be considered “*copied*” if it is substantially similar to the contended work. There must be a substantial degree of resemblance,⁴⁹ and it must

⁴⁵*Rediff India v E-Eighteen.com Ltd* 2013 (55) PTC 294 (Del).

⁴⁶*Dr Reckeweg & Co GMBH v Adven Biotech Private Limited* 2008 (38) PTC 308 (Del).

⁴⁷ Catherine Tosenberger, ‘Potterotics: Harry Potter Fanfiction on the Internet’ (*University of Florida Digital Collections* 2007) <<http://ufdc.ufl.edu/UFE0019605/00001>> accessed 1 September 2022.

⁴⁸*Bobbs-Merrill Company v Isidor Straus and Nathan Straus* 210 US 339.

⁴⁹*Cunniah & Co v Balraj & Co* AIR 1961 Mad 111.

create an implication of being the original work in the reader's mind.⁵⁰ The test of substantial resemblance or similarity depends on the quality of the derived work rather than the quantity.⁵¹ Indirect copying is copying by changing the form of work into another form of work. Since fanfictions are literary expressions like the *canon*, this type of infringement would not be applicable in the present case.

There is no thumb rule to ascertain the substantiality and quality of the derived work and the *canonical* literature. Reproducing a basic idea or a superstructure alone cannot be considered an infringement. Since there is no settled law prescribing a degree of resemblance that is requisite to establishing infringement, it is left to Courts to exercise discretion. However, this discretion should be exercised within the context of 'similarity'. Two work products would be called substantially similar if it produces the same effect on the mind of the reader, and the reader would be deceived on the issue of which one is original. The discretion must not decide based on individual characteristics but on the 'total look and feel'.⁵²

FAIR USE EXCEPTION

Fair use is instrumental in the academic world where teachers, professors, and students use scholarly work and textbooks to impart or undertake education and, in certain instances, quote such work as well.⁵³ Fair use is an exception to the exclusive right provided to the author of the work, which, if absent, would amount to infringement. Such permitted uses are listed under Section 52 of the Copyright Act of 1957.⁵⁴

Notwithstanding the changes made to the *canon* by the fanfiction author, there is an obvious possibility of overlap of certain elements that may be the same. Elements that are essential to the *canon* are often not altered to cater to the fanbase, albeit creatively placed in the work. This can be argued as making fanfiction a 'copied work' which may amount to infringement.

Madras HC in *Blackwood and Sons Ltd. v. A.N. Parasuraman*⁵⁵ interpreted what constitutes "fair" in "fair dealing". The Court firstly held that to constitute unfairness, the work must be

⁵⁰*Mishra Bandhu Karyalay v Shivratanlal Koshal* AIR 1970 MP 261.

⁵¹*Ladbroke v William Hill* (1964) 1 WLR 273 276.

⁵²*R G Anand v Delux Films* AIR 1978 SC 1613.

⁵³ AMLEGALS, 'Virtual Teaching and Copyright: How Fair is Fair Use?' (*Mondaq*, 19 June 2020)

<<https://mondaq.com/india/copyright/955608/virtual-teaching-and-copyright-how-fair-is-fair-use>> accessed 10 June 2022.

⁵⁴ Copyright Act 1957, s 52.

⁵⁵*Blackwood and sons Ltd v AN Parasuraman* AIR 1959 Mad 410.

authored with an intention to compete in the market with the author and derive profit from such authorship. Secondly, the animus of the infringer must be proved to be improper to constitute unfair dealing. The intention element is not a necessary requirement and can be ignored if the Court comes to a finding that the infringing work is substantially similar to the original body of work. The key element herein can be distilled to profiteering and drawing away from the author's exclusive monopoly over the market without consent. Ascertaining fair use is a question of fact, degree, and overall impression carried by the court.⁵⁶

TRANSFORMATIVE WORK PRODUCT AND FANFICTIONS

Using the copyrighted work and building upon it for a different purpose is christened as transformative use. The entire premise of fanfictions is based on the 'transformative' character of the product. What is 'transformative' is a question of opinion and not an issue of fact and objective truth. Thus, the transformative character is dependent on the interpretations of counsels and recognised by courts.

Chinese Supreme Court in 2002 interpreted that if the work products are of the same theme but are "*creative and independently completed*", then they enjoy independent copyright,⁵⁷ and there is no case of infringement.⁵⁸ Fanfictions primarily draw from subsisting copyrights and elements of the *canon*. Although, the unoriginality of fanfiction would seem difficult to assert since most fanfictions stray away from the *canon* to explore the different identity of the literature and alter several elements of the original literature. The general rule here is that the greater the deviation from *canon*, the more the transformative and non-infringing character of the fanfiction. Independent copyright can thus be claimed by the fanfiction author insofar as it does not unfairly prejudice the author of the *canon*.

The present opinion of the copyright regime of the United States is that fanfictions constitute infringement since they demonstrate "*literal similarity*".⁵⁹ Industry experts are also of a similar opinion that fanfictions are "*most likely substantially similar to the original works*".⁶⁰

⁵⁶*Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd* 2011 (45) PTC 70 (Del).

⁵⁷ Copyright Law of the People's Republic of China (2010 Amendment), art 10 (14).

⁵⁸Zuigao Renmin Fayuan Guanyu Shenli ZhuzuoquanMinshiJiufenAnjianShiyong Falv Ruogan Wenti De Jieshi [Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright] (promulgated by the Supreme People's Court Oct. 15, 2002) (China), <<https://digitalcommons.law.uw.edu/wilj/vol25/iss1/6/>>.

⁵⁹*Anderson v Stallone* 11 USPQ2D (BNA) 1161; Copyright L Rep (CCH) P22, 665.

In arguendo, it is a case of infringement, the Court ought to consider other qualified exceptions of infringement, such as study, research, or criticism. This becomes especially imperative and more than just lunchtime chinwag owing to several administrative and governmental inclinations towards censorship and prevailing societal perceptions of gender and sexual norms. This is especially the case in conservative countries in East and South East Asia and the Middle East. Fanfiction is an escape from the heteronormative and commercially viable structures that don't often approve of homosexuality or nonnormative femininity, among various other themes. Courts must take an approach that bypasses such impediments and promote creativity in every theme and domain.⁶¹ The Court must place heavy reliance on the intent of the author of fanfiction and whether the animus possesses the elements of creating a transformative work.⁶² Such an approach can be noted in the case of *Blanch v. Koons*⁶³. The defendant in the case created a collage that contained four pairs of women's legs, one of which was appropriated from a famous photograph shot by the plaintiff. The Court dismissed the claim of infringement on the ground that the defendant had altered size, colour, proportions, and background, therefore, providing the viewer with an entirely new perspective and conclusion making it an entirely new work capable of independent copyright protection.

CONCLUSION

Intellectual property and law related thereto seems impervious to and lacking pejoratives against any social biases and stigmas and thereby attaining a status of rational neutrality. However, such a regime has only one purpose – commercial and economic viability. Most mainstream authors create works of literature suited to the consumption of society and cater to cultural hegemonies. Fan-based activities provide a much-needed reprieve in this literary vacuum, catering to niches by departing from the original piece of literature and exploring sexualities, gender roles, alternate realities, and endings of the *canon*, among other themes drawing elements from the *canonical* source.

This locus serves as a cesspool of speculations and is a legal grey area. Owing to the origin of fanfiction, question *vis-à-vis* infringement of the original work and independent copyright of the

⁶⁰ Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction' (2005) 58 SMU Law Review 1551, 1554.

⁶¹ *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* 2004 (28) PTC 474 Cal.

⁶² *Castle Rock Entertainment Ltd v Carol Publishing Group Inc* 150 F 3d 132 (2nd Cir 1998).

⁶³ *Blanch v Koons* 467 F 3d 244 253 (2nd Cir 2006).

fanfiction *dehors* of the *canon* notwithstanding its foundation on *canonical* themes and characters. On one end, the law is required to protect the originality of the author and provide them with exclusive economic exploitation rights excluding all others. While on the other end, the law must also play a balancing effect so as to not limit all future work that may be inspired by previous existing literature. Fanfictions lie in the grey area between these two camps of reasonable expectations. The status of fanfiction in the domain of intellectual property law remains a matter of subtle and subjective judgment and not of an objective and cognizable truth. It can be deduced from the abovementioned authorities that fanfictions can be independently protected by the copyright law provided the adaptation does not bear a great degree of resemblance, does not create deception in the mind of reader to be original, and is not substantially similar. Infringement of literary work by fanfictions can generally be claimed on the grounds of the theme of the literary work or *canon* or characters of the *canon*. Most fanfictions are not a substantial replication of the literary work, and thus nothing needs to be said on communication and commercial exploitation of the literary work itself.

It has been settled through a catena of judgements that themes and superstructures of literary works are not copyrightable. The copyright of the literary work subsists in the expression of themes and ideas, more specifically on the arrangement and usage of the theme and facts. However, such themes don't attain monopoly, and the general theme of the literary work is not protected. The Court has interpreted this balancing effort to not impose an absolute embargo on the usage of themes and development of future literary works.

The character of the literary work, a well-defined expression and product of the imagination and creativity of the author, is often central to the storytelling and can be copyrighted provided it is well delineated. Thus, appropriation of characters may importune the legality of the fanfiction. The sanctum to fortify the literary work lies in one non-negotiable factor – the quality of it being transformative. Authorship of character is a rather unique phenomenon. Literary works describe the characters and abdicate the duty of interpretation to the reader, unlike cinematography. The quandary of authorship of characters provides a broad spectrum of deviation and transformation by altering physical appearances, temperaments, and responses to external stimuli. In as much as fanfiction manifests substantial dissimilarity by way of adding creativity, imaginative value, and transformation of the *canonical* character, it would be protected by the copyright regime independent of the original literary work. Since fanfiction explores alternate realities of the

characters and themes and accommodates several elements generally unexplored by the original literary work, the resultant product would satisfy the test of originality. The more fanfiction divorces the *canon*, the less likely it is to be established as infringement.

The copyright law rests on one leg – accrediting the author an exclusive market and conferring a bundle of rights in exclusion of others. Therefore, the similarity of elements between *canon* and fanfiction is nugatory if two basket factors are met. The first and primary basket of factor is that the fanfiction must show sufficient transformative value. The second basket further buttresses the protection and is a bundle of factors such as market substitution (intent and/or innocent occurrence), profit, degree of similarity, etc. The second basket of factors constitutes the fair use exception and is not imperative if the quagmire of the degree of similarity and input of ingenuity is overcome.

It is necessary that Courts take a liberal approach than browbeat the domain of fanfiction. Fanfiction emerged as a response to existing hegemonies. The flourishing of fanfiction ensures literary creativity and also an exploration of issues that are not culturally tasteful or commercially viable. Fanfictions require a pragmatic and permissive interpretation given its wealth of queer creativity and outlet of emotions and ideations. It creates a world within a world and democratises mainstream literature.