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## Are Fan-Made Texts Fair Use?

**ABSTRACT.** Written texts are able to qualify for copyright protections that help serve as legal protections and ownerships for the author. However, oftentimes these written texts can become an inspiration for another text derivative. These text derivatives are considered copyright infringement if they are interpreted as so by judicial courts under four factors. The precedent of these four factors are that they are treated differently by different courts as seen through court cases such as *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.* and *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books* where courts show compelling and yet different interpretations of the four factors. This article highlights how there should be a better understanding and a multi-tiered methodology for interpreting the four factors. Ultimately, derivative texts should be deemed transformative enough in nature regardless of whether it satisfies any of the other three factors and should be able to satisfy one of the remaining three factors. This helps protect the author(s) of the original copyrighted work while also allowing for creativity and profound benefits to society.

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## INTRODUCTION

Twenty years after its publication, the *Harry Potter* series by J.K. Rowling has sold five hundred million copies worldwide, in eighty languages, and in both print and eBook formats.<sup>1</sup> In the first half of 2020, Rowling made \$60 million on books, amusement parks based after the popular series, and other ventures made possible by the copyrights she retains.<sup>2</sup> Although it's been more than ten years since the last book's publication, the popular franchise is still profitable. Because of the large fan base and immense potential for profit, there are many who decide to make written fan-made works. Examples of such works include reference books, websites, blogs, etc., that can be used for both private and commercial purposes. These fan-made works, specifically those that are textual media, must follow specific copyright guidelines in order to ensure fair use of the original work. If they do not follow these copyright laws, the offender may face monetary punishments up to \$150,000.<sup>3</sup>

In order for works to qualify as fair use, they must meet four criteria that will be discussed in this article. The criteria are that they have to be of non-profit and/or educational use, be distinct from the original work, have an insignificant amount of the original text copied, and avoid undermining the monetary value of the copyrighted literary work. The fair use factor, also known as Factor One, or the factor of what is “transformative” in this article, is the most important when it comes to fan-made texts. This is because if the work is transformative, it is distinguished from the original copyrighted work and can be treated as its own work. This factor is often debated and compliance is determined based on each court's own interpretation.

Each case of copyright infringement is currently interpreted on an individual basis as the term “transformative” is vague. Even though there is some general consensus of what is “transformative,” as we will see in this article, there is still no concrete and better working system of what qualifies as “transformative” work.

In this article, we will reconstruct the “transformative” qualification into a more concrete idea that all derivative works such as fan-made ones can adhere to. We will do

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<sup>1</sup> *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>.

<sup>2</sup> *Profile for J.K. Rowling*, FORBES (JUNE 3, 2020), <https://www.forbes.com/profile/jk-rowling/>.

<sup>3</sup> Comment to *What are the consequences and penalties for copyright infringement?*, BYU LIBRARY (May 1, 2019), <https://lib.byu.edu/faq/244777/#:~:text=In%20general%2C%20anyone%20found%20guilty,to%20%24150%2C000%20per%20work%20infringed.>

so by first defining the concepts pertinent to the issue: fan-made work in Section I, and existing copyright conditions for derived works in Section II. In Section IV we outline the current four criteria and give examples of their applications, and in the rest of the article explain why there should be a new way of considering what is fair and legal use. We will conclude with the current four criteria and how to make them more cohesive and applicable to multiple diverse situations. This can be done by making the transformative factor the primary factor that must be satisfied and instead only having to satisfy one more criteria out of the remaining three.

## **I. WHAT IS FAN-MADE WORK?**

The term fan-made work does not necessarily mean that it has to be written by a “fan.” Rather, a fan-made work is a product of somebody who took inspiration from, copied, or manipulated, etc. aspects of an author’s copyrighted work, which may include but is not limited to, plot, words, chapters, characters, and so forth. These works can be for both commercial and/or private use. While private works may seem harmless, private uses can also be damaging to the author if they devalue their copyrighted work. In this article, we focus on text derivatives. Derivatives in this article refer to written words that are derived from another copyrighted source. The “amount copied or influenced” is a convoluted issue that we will discuss further in Section IV when discussing Factor Three. Movies, music, merchandising, etc. are not included in this analysis though they could possibly be applied.

## **II. COPYRIGHT PROTECTIONS**

Even though we focus on copyright terms in this article, trademarks are also sometimes relevant, especially when the characters or specific places are unique to the piece of literature. According to the United States Patent and Trademark Office, a trademark is applicable to “a word, phrase, design, or a combination that identifies your goods or services distinguishes them from the goods or services of others, and indicates the source of your goods or services” while “artistic, literary, or intellectually created works, such as novels, music, movies, software code, photographs, and paintings that are original and exist in a tangible medium, such as paper, canvas, film, or digital format” qualify for copyright. Federal protection for trademarks include protecting “the trademark from being registered by others without permission and helps you prevent others from using a trademark that is similar to yours with related goods or services.” Federal protection for copyrights protect “your exclusive right to

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reproduce, distribute, and perform or display the created work”, and prevent “other people from copying or exploiting the creation without the copyright holder’s permission.”<sup>4</sup>

The key difference between a trademark and a copyright is that a trademark refers to things that are not original in nature but are unique and distinct for a specific brand, company, image, etc., while a copyright refers to something originally created by the filer. Both are discussed when referencing derivative works and their legality.

In literature, an example of something that is able to be trademarked includes the characters, title of the text, etc. while the copyright applies to the verbatim of the work. How much of the verbatim that should be allowed to be copied will be discussed later on in this paper.

Understanding trademarks and copyrights is essential to understanding how a literary work may be deemed fair use or not. In literature, the work as a whole is subject to copyright but character names, places, etc. can be subject to trademarks. This makes it difficult for a lot of fan-made texts to be considered fair use as there are trademark protections on aspects of literary works such as certain characters and locations.

### III. COPYRIGHT INFRINGEMENT QUALIFICATIONS IN LITERATURE

The United States Copyright Office states, “As a general matter, copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.”<sup>5</sup>

In order to qualify for copyright protection, a piece of literature must be registered with the U.S. Copyright Office.<sup>67</sup>

Unless given permission from the copyright owner, no one can recreate the original work in any way. Books cannot be reprinted/reproduced without consent from the copyright-holding parties whether that is the authors themselves or publishing houses. Blogs and other reference books therefore cannot copy substantial amounts of the text

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<sup>4</sup> *Trademark, patent, or copyright*, UNITED STATES PATENT AND TRADEMARK OFFICE (Mar. 31 2021), <https://www.uspto.gov/trademarks/basics/trademark-patent-copyright>.

<sup>5</sup> *Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-definitions.html> (last visited Apr. 25, 2021).

<sup>6</sup> *Literary Works*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/registration/literary-works/> (last visited May 23, 2021).

<sup>7</sup> *Form TX*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/forms/formtx.pdf> (last visited May 23, 2021).

as the text falls under copyright terms. The amount allowed to be included based on fair use will be discussed later.

#### IV. FAIR USE OF LITERATURE

##### A. *ALA Fair Use Guidelines*

The American Library Association (ALA) details how fair use relates to literature through *The Librarian's Guide to Intellectual Property in the Digital Age: Copyrights, Patents, and Trademarks* by Timothy Lee Wherry.<sup>8</sup> In it, Wherry describes how normal copyright laws make it hard for works of literature to be used in educational settings, thus leading to specific "fair use" terms for literature.

In 1978, copyright protections were extended from 28 years to 47 years and had new copyright terms added. Then, the Digital Millennium Copyright Act (DCMA) was introduced in 1998 for fair use to be applied in the digital setting. The internet changed how things could be replicated and thus the need for new copyright terms ensued.

*The Librarian's Guide to Intellectual Property in the Digital Age: Copyrights, Patents, and Trademarks* also goes on to state that in order to use a copyrighted piece of work under fair use, it must apply to four factors. In all courts, these four factors are considered to determine whether or not a fan-made work of a copyrighted literary work falls under the fair use standard.<sup>9</sup>

##### B. *Restructuring The Four Factors*

This article will argue that instead of treating the four factors equally in the United States, courts should adopt a hierarchy of factors in which Factor One, the transformative factor, should be prioritized and required when making a derived work. The other three should be treated equally with the derived work's author only having to satisfy one of them. In summary, authors of derived work have to satisfy Factor One and then any one of the other three factors. While this hierarchy and pick-and-choose argument may seem restrictive, there are certain elements to this that we will show are

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<sup>8</sup> Timothy Lee Wherry, *Fair Use*, in *THE LIBRARIAN'S GUIDE TO INTELLECTUAL PROP. IN THE DIGITAL AGE: COPYRIGHTS, PATENTS, AND TRADEMARKS* 17, 17-21 (2002).

<sup>9</sup> *Id.*

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solved once the transformative factor is clearly defined by the authors themselves and placed on a higher level of importance.

Offering this concrete solution to the vague laws in place for copyrighted literature helps courts maintain a consistent stance on copyright that is both firm and easy to understand. It allows for both the author of the original copyrighted work or the author of the derived work to know exactly what type of protections they are entitled to. From both a legal and logical standpoint, having a more concrete definition of copyright helps create more dependable copyright policies on written text.

### *C. Factor One*

Most courts review copyright infringement on a case-by-case basis, with a lot of debate focusing on the nature of usage. This is because even though the four factors are supposed to be equal, courts often place a higher importance on some factors over others, ruling the copyright cases by the specific factors they choose for the case to focus on. Even if the author experiences monetary loss, other justification for the piece's purpose may still constitute it as being fair use. Wherry describes this factor as whether or not the piece of literature is used for educational purposes and is non-commercial. If it is used for educational purposes and not demeaning the author's original work, then the use should be considered fair use as long as it is also "transformative."

Works that are copied for educational purposes can include but are not limited to copying something already in the libraries' reserves or for the class to use one time. Wherry also mentions that if the professor incorporates the material into his curriculum and plans on using it for many terms, he must secure permission to do so from the author.

Something is considered transformative if it adds something new or serves a different purpose than the original work. This can include adding new characters, making satire pieces about it, etc. The term "transformative" is very broad and thus many defenses like to utilize it and debate on what "transformative" entails.

Having authors define what they would consider a transformative use of their work would not be unreasonable since authors already have to complete paperwork to obtain copyrights for their work in the first place. This means allowing authors to list out what they consider as not transformative use on their copyright paperwork may be feasible and allows for a firmer understanding of the contextual definition of transformative. This can come in the form of a short section in the paperwork where

the authors themselves must highlight what they consider fair use of their work and what is not. They can even choose to protect their work from being replicated and/or used in any shape or form.

Furthermore, this new format would allow for there to be more creative derivatives that can result from the original work while also maintaining the author's protection of their property.

Regarding the commercial usage possibilities of Factor One, most fan-made texts, such as blogs and free reference books, are made for private use among fans. However, they could start profiting off the blogs and selling the reference books. In that case, the nature of the text becomes commercial.

This factor should be the one that has to be satisfied because it is able to protect the original author's work by making sure no one else but them is profiting from their work. Furthermore, by having the original author list out their terms for what is not "transformative" use of their work, this solution allows derivatives to still be used for commercial purposes but none that would be considered too much of the original author's work to the extent where they feel as if they should be the ones profiting.

In the next few sections we will be using examples to explain why the transformative nature factor should come first and the derived work should only have to satisfy one of the remaining three factors.

### *1. Cases Regarding Transformative Nature*

In *The Author's Guild v. Hathitrust*, all four factors were considered. However, it was the argument that the work was transformative that secured its fair use status. Courts look at the other factors, but there is a precedent of emphasizing how transformative the work is. As mentioned in Part IV.C, if the authors themselves were allowed to interpret what transformative means for their work, that would eliminate the need to interpret the transformative status of a work. Furthermore, the continuous emphasis on how transformative a work is emphasizes the need to restructure the four factors into one, with Factor One being the main fair use guideline of literary works and the other three as supplementary factors, only having to satisfy at least one. With Factor One also being the same factor that the authors themselves have to specify on copyright applications, it would allow for a more specific interpretation that is still based on a case-by-case basis based on the original copyright application. By having to only satisfy one of the other factors, authors of fan-made works will be allowed more



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leeway of what they can make, while also making sure it is transformative and thus culturally important.

### 2. *The Author's Guild v. Hathitrust*

Hathitrust Digital Library (HDL) was a shared digital repository with digital copies of more than ten million books at the time of the case. Its members included eighty colleges, universities, and other nonprofit institutions.<sup>10</sup> Through the Hathitrust Digital Library, anyone was able to look up specific text from a work of literature. It also made literature more accessible to people of disabilities.

The courts ruled the ability to search up words of a text as “quintessentially transformative” because “[T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.”<sup>11</sup> They also determined that looking up words of a text also did not impose monetary losses towards the authors. This also takes on another form of transformative nature in which the use itself is different from what the original text was capable of.

The nature of using the database to print disability accessible texts was also determined by the courts as fair. The nature of how the database was being used was important to the court in determining their ruling because they cited the level of accessibility in the literature industry at the time. Furthermore, the courts also stated that use of such text can be invaluable and therefore important to society. For these reasons, Hathitrust’s uses were ruled as fair use.<sup>12</sup>

Fan-made texts also make texts more accessible for those that are unable to afford it. Literary books can be expensive and fan-made text can help dedicated fans without the monetary means to access certain aspects of the books. Furthermore, fan-made texts can be considered a monetary issue. However, blogs, reference books, and fanfiction help spread the literary franchises even more, resulting in monetary gain for the original author rather than the opposite.

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<sup>10</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/fair-use/summaries/authorsguild-hathitrust-2dcir2014.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> Rich Stim, *Summaries of Fair Use Cases*, STANFORD LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/cases/> (last visited Apr. 26, 2021).

The transformative use of the text can also be part of how a text can be transformative and therefore by the courts ruling this case as fair use,<sup>13</sup> we can infer that the usage itself being transformative can make the text fair use.

### 3. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*

Something can be transformative of the original literary work if it brings to light a new meaning of the work. For example, satire can change the perspectives that audiences have of the work, making it a transformative take on the original work.

In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, a book titled, *The Cat NOT in the Hat! A Parody* by Dr. Juice that told the story of the O.J. Simpson trials wanted to use some elements from the children's book *The Cat in the Hat* by Dr. Seuss.<sup>14</sup> *The Cat NOT in the Hat! A Parody* by Dr. Juice included the same rhyme schemes, thematic and narrative elements, and certain chief character identifiers such as the class red and white striped hat that the cat wears.<sup>15</sup> The court's main challenge was determining if unauthorized copying of an original work's artistic style, plot, themes, and certain key character elements qualified as fair use.<sup>16</sup> If it was considered fair use, it would be considered so only if such use was transformative.

Other than whether *The Cat NOT in the Hat! A Parody* by Dr. Juice was transformative, the Ninth Circuit found that it violated the other factors. Since the styling and nature of the work was so much like the original book by Dr. Seuss, it did not count as fair use. Many parts of the original book were also copied and the fan work itself was created for commercial use. All these factors led the decision to be not fair use alongside if the work was transformative or not.<sup>17</sup>

*The Cat NOT in the Hat! A Parody* by Dr. Juice was written as a parody but the courts deemed it satire (however, not one that would defame the character of Dr. Seuss) that used characters and plots from Dr. Seuss's works.

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<sup>13</sup> *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87 (2d Cir. 2014), U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/fair-use/summaries/authorsguild-hathitrust-2dcir2014.pdf>.

<sup>14</sup> *Dr. Seuss Enterprises, LP v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997).

<sup>15</sup> *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/fair-use/summaries/drseuss-penguinbooks-9thcir1997.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> Rich Stim, *Summaries of Fair Use Cases*, STANFORD LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/cases/> (last visited Apr. 26, 2021).

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The Ninth Circuit did not find the use transformative as it made “no effort to create a transformative work with “new expression, meaning, or message.”<sup>18</sup> The Ninth Circuit in this case specifically points out that in order to qualify as transformative, it must take on a new expression, meaning, or message. This case gives a clearer view on what can count as transformative as it could only rule on this factor. This definition helps set a precedent of what should count as transformative in all copyright cases moving forward. The Ninth Circuit finding a reason to define what transformative nature is further reflects the importance of a text being transformative and what that entails.

If a fan-made blogs or other posts that included similar structure to the original work but changed the context, it would be considered copyright infringement. Multiple posts made on social media may also fall under this protection. This is because that would not be considered transformative enough. However, the nature it is being used in is non-commercial and thus will still be ruled as fair if just considered under Factor One.

### 4. *Salinger v. Colting*

J.D. Salinger is the author of the popular book published in 1951, *The Catcher in the Rye*. An author had written a book called *60 Years Later: Coming Through the Rye (60 Years Later)* in England on May 9, 2009, and set its U.S. publication date for September 15, 2009. Since the books were considered very similar in many aspects such as character, setting, and style, the courts ruled that the author of *60 Years Later: Coming Through the Rye (60 Years Later)* was intentional of its use to use the book’s characters and other aspects of the book that also fall under Salinger’s copyright terms for *The Catcher in the Rye*.<sup>19</sup>

The use of characters from Salinger’s original literary work was considered infringement even though the character in *60 Years Later: Coming Through the Rye (60 Years Later)* was altered, made older, and even placed in a different time period. This case determines that changing the character’s features is still a violation of copyrights. If the purpose of copying the characters in any shape or form was intentional and does not add anything new to the original character, it can potentially alter the story, which would make it ineligible under the fair use standard. This can be used by authors to

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<sup>18</sup> Dr. Seuss Enterprises, LP v. Penguin Books, 109 F.3d 1394 (9th Cir. 1997).

<sup>19</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

prevent their works and characters from being copied as they can argue that simple alterations of their characters are still appropriate to their copyright.

In *Salinger v. Colting*, the new work was not transformative enough to be considered fair use. This case set precedent by highlighting what “transformative” actually entails. We know through this case that in order for a work to be considered “transformative” from the original, it must contain significant changes to the plots and characters even if the author is just using them as inspiration. Simple alterations like changing the time it took place and age of the characters does not make it transformative enough.<sup>20</sup>

This case can be applied to various fan-made texts such as fanfictions. Fanfiction is fiction written by a fan of something, putting what they are a fan of inside the fictional story. This would mean that fanfiction itself has to be completely transformative and unlike the original plot for it to qualify as fair use. Simply using the same characters and setting but in a different context would still subject fanfiction to copyright laws.

Some authors might view fanfictions as too close to their own work, since it borrows characters and sometimes plots from their copyrighted work. In this specific instance, the author being able to establish in the beginning of their copyright term what is not fair use will protect the authors from fanfiction it deems inappropriate while also allowing fans to make fanfiction that is truly “transformative” according to the author. If this was created during *Salinger v. Colting*, the idea of what is “transformative” would have already been established and it would be more clear if it was or isn’t fair use, which in this case, it wasn’t fair use.

#### *D. Factors Two Through Four Having Same Significance*

While there is an emphasis on Factor One in various Circuits of Appeal Courts, The significance of Factors Two through Four tends to be judged on a case by case basis. Furthermore, in some examples, although some of the works do not qualify as one of the factors, they are still considered fair use. This disproportionate valuing of what are supposed to be equal factors brings to light the need for a new system where creators of fan works only need to satisfy the first factor and one of the other three factors. We will further explore this concept by going into depth about factors two to four.

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<sup>20</sup> *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), US COPYRIGHT OFFICE, <https://www.copyright.gov/fair-use/summaries/salinger-colting-2dcir2010.pdf>.

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### *E. Factor Two*

How the work is designed to be used is important. Wherry argues,

Nonfiction works have received more leeway in fair use than fiction in court cases involving fair use. The issue seems to be that nonfiction simply relates facts whereas fiction reflects true creative inspiration. A health workbook with tear-out pages for doing assignments would not be a good candidate for fair use if a teacher made copies of the consumable pages. An article from a textbook would be a good candidate for fair use. Audiovisual works or software are not good candidates for fair use.<sup>21</sup>

When describing something as fair use or not, you must look at the transformative nature especially when it is a fiction copyrighted text. By using the transformivity factor as the most important, courts will be able to address this issue of the nature of usage as if it is not transformative enough, it will be considered a violation of the nature of usage as it will then be copying the creative inspiration that is owned by the original author. In this statement, Wherry explains that since nonfiction works are fact-based and are intended to be used for educational purposes or are designed to be copied and learned by the reader, their fair use terms are broader. However, since they are derived from someone's own ideas and creativity, they are subject to copyright protection.

How a piece of literature is used is also important and relevant to whether or not it falls under fair use. When we talk about the nature of usage, we are talking about how the intended literature piece is going to or is currently being used. Most courts review copyright infringement on a case-by-case basis, with a lot of debate focusing on the nature of usage. Even if there are monetary losses on the author, how the literary piece is being used may still constitute it as being fair use.

This factor is not used as much, as most cases that go to court do so because they concern literary works made for monetary purposes and the plaintiffs are suing for economic damages and incentives. As such, this factor should not be given equal importance as Factor One because it is rarely relevant. Furthermore, by addressing whether or not a text is transformative enough, already solves the issue of how much of nature of usage as if transformative enough, there is no need to discuss nature of usage

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<sup>21</sup> Timothy Lee Wherry, *Fair Use*, in *THE LIBRARIAN'S GUIDE TO INTELLECTUAL PROP. IN THE DIGITAL AGE: COPYRIGHTS, PATENTS, AND TRADEMARKS* 17, 17-21 (2002).

since it will be considered too different from the original work to be able to analyzed by how it is used and how much of it is.

Fan-made books are derivatives of books such as Harry Potter, which are fiction books that are made for profit. As we see later on in *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books*, authors of fan-made works get sued as they are seen as taking profit away from the author who wrote the book for profit-driven, non-educational reasons. Even so, *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books* still deemed the reference book as fair use as long as it didn't copy as much of the original text as it did. Even without the chapters RDR Books had copied in their reference book, it still should not have passed Factor Two as Harry Potter was written by J.K. Rowling for commercial use. This shows how certain factors are not given the same importance as other factors. As such, there should be a new restructuring of the importance of the factors. Furthermore, this case also shows how commercial use of fan-made text should be permitted as long as it satisfies Factor One of being transformative and satisfies one of the other factors, not copying substantial amounts of the original work.

#### *F. Factor Three*

Only a small portion of the entire work can be used. This includes use for educational purposes or other purposes listed in Factor One. This factor is not necessarily about the nature of the work being used but about how much is used and if that part used is important to the work itself. This means that while there is not a certain percentage/percentage ceiling of how much you can reproduce of literary works, one cannot reproduce a significant amount of the work. Sometimes, the part used can be considered an important part of the literary work, and thus fair use is not permitted.

This factor is often subject to the court's own discretion, as exemplified in *Cambridge University Press v. Patton*.

##### *1. Cambridge University Press v. Patton*

This case highlights how fair use of literature applies in educational settings and/or purposes. The Eleventh Circuit Court of Appeals in *Cambridge University Press v. Patton* set the precedent of copyrighted literature works being subject to "fair use." In

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*Cambridge University Press v. Patton*, the courts ruled that Georgia State University was not infringing on intellectual property in 70 out of 75 cases.<sup>22</sup>

The case explores the four factors described in Part IV and uses the second and fourth factor to determine that the majority of the works used was fair use as the nature of the work was subject to fair use. It also did not affect the monetary value of the works. The courts argued for fair use for educational purposes but that certain restrictions, such as not being able to copy the entire work, should be in place in order for there to be economic incentives for authors to produce and publish works of literature. The courts also ruled that in regard to the third factor, the amount of work used should be determined on a case-by-case basis and not based on an overall set amount. In this case, 70 out of 75 of the literature copied were not considered to have copied too much of the original work. This case set the precedent of works being used as fair use under educational settings as well as exploring the four factors equally.

*Cambridge University Press v. Patton* was significant because it evaluated the nature of the work being used. Since the nature of how the work was going to be used was for educational purposes and it was only excerpts of the original that was copied, it is considered fair use. The use of the works is benefiting society and thus the courts consider it fair use.<sup>23</sup>

In this instance, though they understood the potential monetary loss to the author(s), they ruled according to an emphasis on the nature of the work being used and why it is also just as important as monetary considerations. The courts also did not set an amount that can be copied from a literary work and fall under fair use but that it should be determined on a case by case basis.

As mentioned earlier, it is important to note that while all four factors are considered to be of equal importance, sometimes a certain factor can take precedence and set the courts to decide based on that factor alone. We see a case of this in this case as the monetary losses to the authors themselves is only briefly touched upon when discussing that authors should have economic incentives to publish works of literature. Even so, the courts still ruled in the school's favor.

This highlights how Factor One, the nature of the usage, is given more importance than the other factors already in courts, such as in the Eleventh Circuit Court of Appeals. By restructuring the factors where only Factor One and one of the other three

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<sup>22</sup> *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

<sup>23</sup> *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), AMERICAN ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/brief/cambridge-university-press-v-patton-769-f3d-1232-11th-cir-ga-2014>.

factors have to be met, it allows for more educational and socially beneficial uses of literature to be allowed.

2. *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books*

In *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books*, the United States District Court for the Southern District of New York argued on fair use of J.K. Rowling's character and text from the popular franchise Harry Potter in a RDR Book, "The Lexicon." "The Lexicon" was to be an encyclopedia about Harry Potter characters and contained a large number of text, characters, and ideas from the books. J.K. Rowling herself wished to publish a similar book and thus "The Lexicon" would cause financial damage to her. The courts ruled that reference guides and companion books about literary works are not considered an extension of the original literary work. However, since the books contained an extensive verbatim use of Harry Potter's texts where certain chapters were copied, it is considered copyright infringement of J.K. Rowling's property.

It was considered simply a reference book that retold the original and not a derivative book. This allows reference books to be published without the author's consent. However, once parts of the text are copied, it is infringement. Users can create books and other works of art influenced by and referencing copyrighted literary works but cannot copy a mass amount of the text (there is no specific amount specified by this factor but it is relative to how much of the work it is) that falls under copyright legislation.<sup>24</sup>

"The Lexicon" was considered "transformative" enough of the original work, Harry Potter, even though it included all the characters of the franchise as it placed these characters under one book which was never done before. However, this usage was not enough to satisfy all the other factors such as Factor Three. It can also be argued that since "The Lexicon" was published for monetary gains while containing a significant amount of J.K. Rowling's text, it would be infringement on J.K. Rowling's own intellectual property as she would not be compensated for the usage. This is one of the reasons that J.K. Rowling had mentioned in the original statement but was not used by the court in determining fair use or infringement. The commercial nature of

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<sup>24</sup> Warner Bros. Entertainment Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).



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usage ensured that the creator would receive monetary compensation while not giving any to J.K. Rowling would not.<sup>25</sup>

In this instance, both the nature of the usage and how “transformative” the purpose of “The Lexicon” was important in determining the decision. By using the same characters, plots, and most importantly text from the original Harry Potter books, it was not fair use. The court’s ruling of “The Lexicon” being transformative is important; it affirms that by repurposing the book in a different way, it is fair use.

This specific example highlights how reference books are allowed as long as it does not borrow too much from the original work. This case also affirms reference books are considered transformative as long as the authors themselves have not released one yet or do not intend on releasing one.

In *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books*, it was affirmed that “transformative” use of copyrighted and trademarked material in literary works must show the material in a new light that has not been done by the author themselves. Large parts of the work cannot be copied verbatim but the characters themselves and plots can be rearranged in a way that is new, like that of a reference book.

RDR later publishes “The Lexicon” after removing the parts of the book that were considered heavily copied.<sup>26</sup> This goes to show that while this factor, Factor Three about the amount of the book copied, is important, Factor Four, which deals with monetary values, is given less importance. Even though J.K. Rowling wanted to publish a reference book herself for monetary gain and thus the publication of RDR Books’ reference book would cause her monetary losses, the transformative nature of the book allowed for RDR Books to publish their reference book under fair use.

If J.K. Rowling was allowed to list out what is not a fair use of her own work under her copyright claim, this could have easily been avoided. On the other hand, this case shows how Factor One is considered way more significant than the other factors and should be the only factor that has to be required for fair use. While there is any argument that even though one factor is considered more significant than others, there is a fair argument to be made that certain factors such as the transformative usage of the work is a defining factor in whether or not it is copyright infringement and the degree of severity.

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<sup>25</sup> *Rowling v. RDR Books*, STANFORD UNIVERSITY, <http://cyberlaw.stanford.edu/our-work/cases/rowling-v-rdr-books> (last visited Apr. 25, 2021).

<sup>26</sup> *Id.*

*G. Factor Four*

It is not fair use if the use of the literature impacts the monetary value and/or profit of the piece of literature. If a teacher makes copies of a book or work that then results in loss of revenue for the book or text, that is considered a monetary loss and is subject to copyright terms.

*1. Sony Corporation of America v. Universal City Studios, Inc.*

This case describes how one work may be considered fair use even if it is copyrighted work because it was copied for private use and thus there was no monetary loss. This case is important in understanding Factor Four which is considered a greater emphasis than the others for its economic understanding of copyright terms.

In *Sony Corporation of America v. Universal City Studios, Inc.*, otherwise known as the Betamax Case, the Supreme Court ruled that since the television sets taped were not done for profit, it was to be considered noninfringement.

While Sony themselves argued that the videotape recorders were marketed to reproduce television programming, the courts argued that the main issue was how much VTR (view through rate) recording is an infringement and that itself was not a liability of Sony, who made the video recorders. VTR, view through rate, is when a video was viewed based on paying a set amount on each episode or sometimes by the minute. They also argued that private viewers are more likely to record things for their own use, thus not contributing to monetary losses for Universal. These recordings were to be used for personal matters and not shared or distributed.<sup>27</sup>

It is important to note that in this case the court also argued that private users can be recording public broadcasts who would not object to the recordings. These public broadcasts educate the public and are typically sponsored by the people themselves or the government, thus making them public property and subject to fair use. Regardless of whether it was a public or private broadcast, it most likely does not change the monetary value of the original broadcast.

As seen by this decision, most cases of work reproduction are argued on the basis of whether they cause monetary damage or change the value of that article of work. The

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<sup>27</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

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Supreme Court set a precedent that monetary damages are to be factored into fair use during a work's copyright length in order to constitute infringement.<sup>28</sup>

In this specific case, nothing was “transformed” but due to the lack of monetary loss for the creator it was considered fair use. The nature of the usage itself, which was for personal and not monetary reasons, was the main factor used to determine that it was fair use. While Universal had argued on behalf of monetary losses, Sony won the case based on the nature that the recordings were used. In this case, the nature of usage was tied into monetary damages and interpreted the nature of usage based on monetary valuing of the broadcasts themselves. *Sony Corporation of America v. Universal City Studios, Inc.* shows that if the nature of the usage is private and the author itself made it for public use or it is part of the public domain (see Section IV) then it can be considered fair use.

If fan-made texts cause monetary losses or are for commercial use, it would be considered copyright infringement. However, fan-made texts that are written for private and non-commercial use would be considered fair use under this factor. However, fan-made texts can also be sold for monetary value and considered fair use as we see in *Warner Bros. Entertainment Inc. v. RDR Books*. The two factors contradict courts in *Warner Bros. Entertainment Inc. v. RDR Books* decided to place disproportionate weight on the nature of usage.

In *Sony Corporation of America v. Universal City Studios, Inc.*, Factor One regarding the nature of use, and Factor Four were important. Even though some individuals could have recorded entire episodes, Factor Three was not considered important in this consideration. This highlights even more support for the need to restructure the factors into fair use being having to only satisfy Factor One and one of the other three.

Although the context of this case was not a literary work, the same conclusions can be applied to literary works because literary works like videos can be copied for both private and commercial use. This case makes it clear that private uses of copyrighted works are legal whereas commercial use would not be.

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<sup>28</sup> *Sony Corporation of America v. Universal City Studios, Inc.*, OYEZ, <https://www.oyez.org/cases/1982/81-1687> (last visited Apr 25, 2022).

*H. Conclusion On The Four Factors*

All four factors are supposed to be considered equal in determining fair use. In most cases, all four cases are not satisfied, but the fan-made work is still considered fair use. Wherry also states that damage awards in the form of money can only be awarded if there is proof of significant economic loss on behalf of the author or significant economic gain on behalf of the person who copied/used the copyrighted literary work. Therefore, there is not necessarily a punishment for all of the factors unless it ties into monetary concerns. The possible punishments for offending the other factors would be simply being told to stop and if there are any other legal costs.

By not having severe monetary penalties for violating the other factors, many works are copied and not viewed seriously by courts, leading to broad and different interpretations by different courts including the Supreme Court and circuits of appeals. A more concrete understanding of what is considered “transformative” by the author’s standards eliminates the need to view each case carefully and decide on a definition for transformative each time a copyright case is filed.

By making the transformative factor the main reason for copyright infringement, the issue of monetary damages to the copyrighted work’s author is factored in. According to their own copyright paperwork, the allowed transformative usage would be enough to satisfy the new work as a new piece of work and thus not of monetary value to the author. This also protects the authors of the new works because if they adhere to the copyrighted work’s specific transformative copyright guidelines as listed out by the author, it would allow for new interpretations of works that otherwise would have been ruled as copyright infringement due to monetary gains not given to the original author. It allows for new creations that could possibly be culturally impactful.

While this may seem like it is up to the court, I think placing the factors on a hierarchy such as a pyramid will allow courts to easily be on the same page about which factor to place a bigger emphasis on. As of right now, courts do not view the factors on a hierarchical scale but nonetheless courts and judges assign importance to certain factors over others. We see this in all the cases mentioned such as in *Warner Bros. Entertainment, Inc. and J.K Rowling v. RDR Books* where the courts assigned monetary value and the amount copied to be of the most important factor when analyzing copyright infringement. This hierarchy idea can also factor in how much each factor qualifies for infringement. The court should be able to look at each Factor One by one going down the pyramid, with the transformative factor on top, followed

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by if it violates one of the other factors. By placing the transformative factor on top, it would allow the court to easily process copyright infringement claims without having to look at all the factors and deciding if it violates one of the four and to what degree. If there is more of an emphasis on the transformative factor, most authors' concerns would be addressed. It also allows the authors to still be protected under the different factors only if the work is deemed not transformative. If the derived work is transformative, the other factors are not looked at. Even though the derived work might make money, it is creative and different enough to be the derived works author's own original work, therefore compensating them for their original work.

If it violates one more of the other factors, it should be considered copyright infringement as the others deal with monetary damages and that is the whole reason copyright exists. However, it should be that if it is transformative enough, the other factors do not matter as that would mean it is a completely different piece of text that does not affect the monetary value or gain of the author's copyrighted work. This is realistic as the author themselves must list what they define as transformative in their copyright application as well as provide a way for transformative nature to be quantified.

Furthermore, by putting more emphasis on the transformative factor, the fans would also be protected as then they are allowed to exchange derived works amongst themselves that help drive readership for the original work and also build community. The authors of the derived work would be able to continue exchanging these derived works without the threat of legal action against them while also still being able to create these works as long as they do not copy word for word the author's original work.

However, there should also be limitations to how much of an emphasis there is on just the transformative factor. If the work is transformative but does have monetary value, it should be addressed using the trademarks of the work.

### *I. Changes That Should Be Made To The Law*

Using the four factors as our main focal point, we will discuss how to further enhance these factors in order to protect both authors and their fans.

If authors of the original copyrighted work were able to include what they deem as not fair use of their work in their copyright claims, it would better protect the authors. Since there is already paperwork that has to be submitted to get a copyright filed, this could be something that is easily implemented. This will protect not only the authors

themselves and what they deem as appropriate but the fans and authors of derivative and influenced texts.

Furthermore, authors of derivative works should not have to satisfy all four equal factors of fair use, but the single one, if the derivative work is transformative and in what nature is it used and having to satisfy at least one of the other three factors. This is because most works are argued based on whether it is a “transformative” use, even if they do not satisfy another factor. As such, having specific guidelines by the author of what is fair use of his/her work and then ruling every case by whether it is “transformative” rather than whether it satisfies all four different factors, will result in better protection for both the original copyrighted work’s author and the fan-made texts’ authors.

This would prove to be of better protection as even though the other factors are still important, the transformative nature of the work is the utmost important criterion and being able to satisfy that requirement should allow others to recreate/reuse certain aspects of the work in order to benefit society and the world and fan base surrounding the original work, adding a new meaning to the original work.

## **V. TRADEMARKS OF CHARACTERS**

While the four factors briefly go into discussing the trademarks, the characters, name of the books, etc., I believe that as long as the trademarks themselves are not being abused in a way similar to violating the four factors, in which the author of the derived work is not profiting and/or devaluing the trademark holder’s work, they should be allowed to use the trademark under good conscience.

It is important to discuss when it is appropriate to use trademarked characters as they are what is most often used and repeated in derived works. While this may seem like it is contrary to what a trademark is intended to do, similar to the four factors already in place for copyright infringement and *Warner Bros. Entertainment, Inc. and J.K. Rowling v. RDR Books*, there is a very clear indication that if the work is transformative, the author should be able to sue for copyright infringement but should be able to if there is a strong use of their trademarks. For example, reference books such as RDR books, though ruled as not copyright infringement, I think should have been considered trademark infringement. The author of the reference book very clearly took characters that are owned by J.K. Rowling under trademark and as such authors should be protected from having pieces they do not want out there with their trademarks, especially when made for monetary gains.

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The statute for trademark literature works should be that if the piece is heavily based on trademarks from one specific book/franchise and also published for monetary gains, it should be subject to trademark infringement. This would also align with the four factors for copyrights as it deals with if it is transformative, for monetary gains, how much of it is copied, and if it impacts the monetary value of the author's original trademarked work.

While it may seem like a hassle to address copyright and trademarks separately, it is important to remember that they exist for different purposes. Furthermore, by making it more clear what is protected under copyright for derived texts from copyrighted text, you will have to separate the two concepts. If you are looking at copyrights as trademarks included, you create a broad and vague statute that does not address the two concerns concretely and with detail, leading to different interpretations.

### VI. WHY ALLOWING TRANSFORMATIVE WORK IS IMPORTANT

Some works under the new guidelines we have created would have been considered copyright infringement because of the monetary gains to the new author and not the one that holds the original copyright. In some cases, this could be harmful, but if it is a truly transformative work as it has to be under the new guidelines we created where the authors themselves have to indicate what is transformative on their copyright application, it can become culturally significant. We see instances of this in the public domain.

### VII. WHAT THE PUBLIC DOMAIN TEACHES US ABOUT FAIR USE

#### A. *What Is The Public Domain?*

The Stanford Libraries define the “public domain” as “creative materials that are not protected by intellectual property laws such as copyright, trademark, or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without obtaining permission, but no one can ever own it.”<sup>29</sup> Any work can enter the public domain after a set amount of time. Factors such as what the work is, where it was published (both the year and location), if it was published and registered, what nationality the creator is, can all affect the lengths of the time before

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<sup>29</sup> Rich Stim, *Summaries of Fair Use Cases*, STANFORD LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/cases/> (last visited Apr. 26, 2021).

the copyrights expire and it becomes part of the public domain. For example, if a work is published between 1926 through 1963 with a copyright claim filed, and the copyright was renewed, it is subject to copyright terms for 95 years after the publication date. However, if it was published during the same time frame, 1926 through 1963, with a copyright claim filed but the copyright was not renewed, it is now a part of the public domain.<sup>30</sup> Copyright terms have changed over the years, most recently in 1998 when a work's copyright claim was extended from 47 years to 95 years.

Many works, such as *The Great Gatsby* by F. Scott Fitzgerald, famously entered the public domain in 2021, resulting in transformative and new interpretations of the work of literature by fans.

The public domain and the works that have come out of it can give a glimpse into what unilateral fair use of literature would look like. This is specifically important when it comes to understanding how, when “transformative” usage is the only factor needed to determine fair use, “transformative” uses of copyright works can result in culturally significant pieces. An example of this would be *Frankenstein*.

### B. *Frankenstein*

Simply changing the age and timeline like in *Salinger v. Colting* does not qualify a work as transformative, but Universal Studios' own *Frankenstein* falls under copyright protection even though Mary Shelley's book it derives from is in the public domain.

Mary Shelley's *Frankenstein* is one of the most well-known pieces of literature. Since it was originally published in 1818, it is now part of the public domain and can be republished and reproduced including characters or ideas from the book. In 1931, Universal Studios came out with the movie, *Frankenstein*, bringing new light to the beloved classic. It was allowed to do so as *Frankenstein* was part of the public domain. Universal Studios' interpretation of *Frankenstein* is not allowed to be copied even though Mary Shelley's *Frankenstein* is part of the public domain. It is important to note that Universal Studios had made enough changes to their *Frankenstein* movie that it was considered distinguishable from Mary Shelley's, giving it independent copyright protections.<sup>31</sup> The look of *Frankenstein*, especially the way his face is constructed, is

<sup>30</sup> *Copyright at Cornell Libraries: Copyright Term and the Public Domain*, CORNELL UNIV. LIBRARY, <https://copyright.cornell.edu/publicdomain>, (last visited Mar 17, 2022).

<sup>31</sup> David Kluff, *Frankenstein and Copyright: 5 Things You Should Know*, TRADEMARK & COPYRIGHT LAW BLOG (2018), <https://www.trademarkandcopyrightlawblog.com/2018/10/frankenstein-and-copyright-5-things-you-should-know/>.



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considerably different from Mary Shelley's *Frankenstein* description in her book. In this instance, Universal Studios had created their own, essentially new, character that can be easily recognizable as Universal's and a cultural phenomenon that is easily recognizable in both appearance and references.

*Frankenstein* shows how "transformative" works of literature as described by factor 1 in section III.B, can lead to cultural phenomenons that bring new light and interpretations to works of literature that would have been easily forgotten. While works under copyrights may see such interpretations as subject to monetary value, Universal would have increased the monetary value of *Frankenstein* instead of decreased, had it still been under copyright terms.

*Frankenstein* also allows us to understand that "transformative" works can exist in a form that makes them entirely their own. If Mary Shelley's *Frankenstein* was still under copyright terms, it would probably not have allowed Universal Studios to come out with their version unless Mary Shelley was compensated. However, its transformative and cultural nature would make it an important addition to society. This is further emphasized by the fact that Universal Studios' version is considered so transformative that it falls under its own copyright terms that are relevant today.

Fans can look at Universal Studios' interpretation of *Frankenstein* as an example of what would make a copyrighted piece truly their own and protected under fair use while adding to a society's culture.

### C. *How Authors Of Copyrighted Texts Apply Fair Use*

By allowing free use, the author's works are interpreted in a new light that brings new meaning and value to the authors. Some authors do allow their copyrighted works to be used "freely" as many turn a blind eye to the fan-made texts of their literature work. They then only report works that are harmful to the monetary value of the work while allowing those that foster a fan base around their work to slide.

While this concept of turning a blind eye has been effective, as we saw throughout this article, it is not feasible if both the authors and courts are turning a blind eye and not agreeing on a singular response to copyright that is not vague and filled with loopholes for authors on both sides. Furthermore, this current process also means that authors themselves must invest substantial time and money towards deciding which work is devaluing their works and which ones are not.

Placing the transformative factor on top creates a concrete rule in which the author of the fan-made text is aware that their work must be different from the original and to

what degree. If the derived work is transformative enough from the original, it should not be able to devalue the copyrighted work as it would be considered a completely different piece of work.

## CONCLUSION

The fair use of literary works should be analyzed under a new system where Factor One, the nature of usage, whether for private or commercial use and if it is a “transformative” usage, should be given the most significance over the other three factors. Furthermore, only one of the other three factors should have to be satisfied. In order to make sure this is not abused, authors should be allowed and have to list out what they deem as not fair use of their works when filing their copyright. This is able to both protect the authors themselves and the fan-made work authors.

This allows for authors and publishers to continue being incentivized to create works of literature while allowing consumers to be able to discuss such works freely and however they wish to use them. As long as the use is non-commercial and private, it qualifies as fair use as we see through *Sony Corporation of America v. Universal City Studios, Inc.* and *The Author's Guild v. Hathitrust*. While one may argue that a fan-made text can sometimes cause economic losses, such cases can be argued under defamation laws.

In terms of analyzing if something is transformative, it must take on a new expression, meaning, or message. This means that simply repurposing characters and plots is not enough but instead the work has to be an entirely new piece that has its own identity separate from the literary work itself. Such an example of this would be the Frankenstein movie. While derived from Mary Shelley's book *Frankenstein*, Universal Studios's version of Frankenstein is distinct and unique to their interpretation and thus subject to its own copyright terms separate from Mary Shelley's.

Reference books such as “The Lexicon” are also considered transformative but such works can also be subject to copyright terms due to the specific trademarks and copyrights it violates such as the verbatim copied. If reference books do not include large amounts of verbatim from the original work, they should be allowed to be published even if it is for commercial purposes as its intent is to educate other fans.

In all of the cases mentioned in this article, we understand that “transformative” is a new identity from the original work. A work's characters and plot cannot simply be rewritten to fit a new circumstance—there has to be intentional and seeable effort into transforming a certain copyrighted work into something new to be determined as fair

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use. All of these terms must be satisfied in order for a work to be considered fair use. However, in some circumstances, certain important factors such as its effect on society may take precedence over the other such as if it is being used privately and non-commercially.

For a long time, fair use on the basis of what is considered transformative and how the work is used is highly dependent on the court it is being argued in. There seems to be a more shared view now that transformative must mean that there is a separate identity that makes a specific work transformative and recognizable on its own in conjunction with the original work. If the original work is vastly referenced, it is not transformative but a retelling that is subject to copyright terms.

In terms of using specific characters, if the character use is commercial and not transformative, it is considered copyright infringement. To be able to use a character under fair use, it must be reconstructed and has its own identity such as Frankenstein. However, reference books, as long as they do not result in monetary losses to the authors themselves, are fair use.

The subject of what is transformative and what is an important use to society is still different on a case-by-case basis. However, this article makes it clear that fans should be allowed to make texts such as blogs, fanfiction, reference books as they spread the author's books to new readers while keeping the books themselves alive while still adhering to specific copyright guidelines that protect both authors. Without an active community, these books would not have caused monetary gains to the authors themselves in the first place. These fan-made texts are just as important as the original books themselves.