Introduction:

Who Owns Fandom?

Fan fiction, long a nearly invisible form of outsider art, has grown exponentially in volume and legal importance in the past decade. Because of its nature, authorship, and underground status, fan fiction stands at an intersection of issues of property, sexuality, and gender. This is a book about property; it looks at the various types of fan-created content, most of which are to some extent derivative works, and asks whether some or all of them can be protected as transformative uses. Among the more celebrated disputes over fan writings are a dispute between SF author Larry Niven and fan author Elf Sternberg over the latter’s use in fanfic of a fictional species of alien beings created by the former; a dispute between SF author Marion Zimmer Bradley and fan author Jean Lamb over a work by the former that purportedly resembled a work by the latter; and the recent dispute between author J.K. Rowling and fan webmaster Steven Vander Ark over the Harry Potter Lexicon, which Rowling once praised and more recently succeeded, briefly, in suppressing, until the parties reached an accommodation.

Unlicensed fan fiction presents a dilemma for content owners: while fan fiction may infringe on the content owners’ copyright and trademark rights, the fans who create and share it are the biggest, and for some genre works very nearly the only, market for the owners’ works. Active enforcement of intellectual property rights may alienate consumers—fans—and harm future revenues. On the other horn of the dilemma, some rights-owners fear non-enforcement of those rights may result in their loss.

Fan fiction provides fans with an opportunity to enjoy, discuss, and most of all inhabit the canon texts in ways that would be impossible without it. Despite its essential role, though, fan fiction’s legal status remains unclear. Many fans, including academic fans, believe that fan fiction is another type of information that just wants to be free: all or nearly all non-commercial fan fiction should be protected as fair use. In contrast to previous generations, today we live in a world of symbols and texts that are all, or nearly all, owned; fan fiction is a way of combating the inevitable alienation this produces.1

Balanced against this are the interests of copyright owners. U.S. copyright law protects some economic interests, but very few non-economic interests.

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Owners may object to fan fiction that alters the nature of the original work—the literary equivalent of scribbling mustaches on Grant Wood’s *American Gothic* (which would earn the scribbler a quick trip to a Chicago jail cell), or perhaps of scribbling mustaches on a postcard of *American Gothic* (which is perfectly legal, if not original), but in the case of works of fiction on the page or on the screen, they are not likely to get very far: in the U.S. such rights in original works of art are protected by the Visual Artists’ Rights Act, but there is no counterpart for works of fiction. Owners assert a more clearly economic interest when they object because fan fiction may anticipate elements of an author’s own future works, precluding the author from publishing them. Although this, unlike the first, is an economic interest, it is not necessarily a protected one. But an owner may also object because a fan work borrows extensively from the author’s own work; this may infringe the owner’s copyright, although various limitations and exceptions exist.

The book that follows explores those limitations and exceptions, and attempts to address, as much as possible, the extent to which a safe space for fanfic has been defined and acknowledged, as well as the larger extent to which that space has been defined but not yet acknowledged by copyright owners. While there are some areas in which the law is unsettled, there are more in which it is settled but widely misunderstood by owners and fans alike. When, for example, the daughter of SF author Philip K. Dick threatens to sue Google for incorporating words from her father’s work into its Nexus One cell phone and a writer for Wired.com responds “First, clearly … copyright lengths should be reduced (PKD died in 1982, 27 years ago),” lack of education is as much to blame as lack of clarity. “First, clearly,” if the plaintiff has a valid claim (which seems unlikely) it is in trademark, not copyright—and even that seems pretty shaky. Second, it is true that Dick’s work is currently in copyright under the current U.S. copyright term of life plus 70 years, but so would it have been under the older term of life plus 50 years—and so would it have been under the Copyright Act of 1909, with its 28-year renewable term: *Do Androids Dream of Electric Sheep*, the work allegedly infringed upon, was published in 1968. To find a copyright term short enough to leave *Do Androids Dream of Electric Sheep* currently out of copyright, we would have to roll back copyright law by over a century. This seems an ambitious project, especially as in this case it is unnecessary; the Dick estate owns no copyright in individual words.

Copyright law has become a subject on which any web posting instantly generates a score of instant experts. With any luck, in the future those debating fan works and copyright law will be able to stay a bit more focused by referring to this book, which would not have been possible without the support and patience of

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3 Nor is there much of a trademark argument here; it seems highly unlikely that Dick’s use of the words in a story gave him trademark rights in the commercial use of those words in the cell phone industry.
my employer, Thomas Jefferson School of Law, and the help and input of a great many people, including Mary Cheney, Kevin J. Greene, Lev Grossman, Seiko Katsushima, Akiko Kikuchi, Brian J. Link, James Leggett, Kathleen Lu, Andrea Maestas, Flavio Nominati, Sumit Raghuvanshi, Heidi Tandy, Rebecca Tushnet, Molly Winter, Julie Cromer Young, Qienyuan Zhou, and Daniel, Deborah, Jennifer, Jessica, Jon, Karen, Robert, and Veronica Schwabach, as well as many others I apologize for overlooking, in many cases because we know each other only through online fandom and I am not sure quite what name to use. Thanks to all of you who helped and saved me from many errors; I’m sure I still managed to slip a few by you, though, and must claim all the credit for them.4

And a final thought for any fans reading this: we all have our fandoms, our likes and dislikes. It may become evident as you read this, for example, that I quite like Harry Potter but am not (to put it mildly) particularly fond of James Bond. Nonetheless, all of us in fandom share a common interest, and we should respect all fandoms equally—yes, even Twilight. So if James Bond is your thing, I respect your right to post your Bond/Q fanfic at www.fanfiction.net/movie/James_Bond, and urge all fans and fandoms out there to do the same. (That is, respect each other’s fandoms, not post Bondslash, although that’s okay too.) We’re all in this together.

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4 Except, as noted in note 108 to Chapter 4, where I must cede credit for the errors to Google Language Tools.