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Fifty Shades of Transformation

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Fifty Shades of Transformation

Abstract

Danielle Meeks explores the recent trend of publishing fan fiction, brought to the forefront by the popularity of the *Fifty Shades* trilogy. Creating a work within another author's copyrighted fictional universe for profit is analyzed under the fair use doctrine and by comparing substantial similarities between *Fifty Shades* and the *Twilight* series to determine if the trilogy is transformative enough to survive a potential lawsuit.

Keywords

copyright, transformative use, fifty shades of grey, twilight series

FIFTY SHADES OF TRANSFORMATION

Danielle Meeks*

I. Introduction

Most authors write in anticipation and dream of the day when their work will be at the top of the New York Times Bestseller List. This became a reality for Erika Leonard, a British television producer, when her novel *Fifty Shades of Grey*, published under the pseudonym E.L. James, took the world by storm.¹ The series went on to sell upwards of 70 million copies worldwide in only nine months, greatly publicized through word of mouth.² The *Fifty Shades* trilogy has attracted a large number of readers – among them fans and critics. Fans describe the erotic novels as addicting, while critics have panned the trilogy as stilted and predictable,³ “mommy porn,”⁴ and distractingly riddled with British syntax and idioms.⁵ In response to criticism of her writing ability, over use of clichés, flawed plot development, and questionable

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¹ Julie Bosman, *10 Million Shades of Green: Erotic Trilogy Dominates Book Sales*, NEW YORK TIMES ARTS BEAT (May 22, 2012), <http://artsbeat.blogs.nytimes.com/2012/05/22/10-million-shades-of-green-erotic-trilogy-dominates-book-sales/>.

² Ron Charles, *Fifty Weeks of “Fifty Shades of Grey”*, WASHINGTON POST (Mar. 15, 2012), <http://www.washingtonpost.com/blogs/style-blog/wp/2013/03/15/fifty-weeks-of-fifty-shades-of-grey/>

³ Jessica Reaves, *Fifty Shades of Retrograde*, CHICAGO TRIBUNE (Apr. 14, 2012), http://articles.chicagotribune.com/2012-04-14/entertainment/ct-prj-0415-50-shades-grey-20120413_1_american-women-shades-execution.

⁴ Laura Barnett, *Mommy porn?: Fifty Shades of Grey by EL James: review*, THE TELEGRAPH (Apr. 13, 2012), <http://www.telegraph.co.uk/culture/books/bookreviews/9201010/Mommy-porn-Fifty-Shades-of-Grey-by-EL-James-review.html>.

⁵ *Fifty Shades of Grey: A Male Perspective on this Erotic Novel*, TAXAHOLIC (May 22, 2012), <http://taxaholic.com/2012/05/22/fifty-shades-of-grey-a-male-perspective-on-this-erotic-novel/>.

grammar, Leonard openly admits that she is awed by the amount of success the books have had and is forthcoming about its origins.⁶

Leonard's story began as a piece inspired by the *Twilight* series by Stephenie Meyer.⁷ Termed "fan fiction," these inspired stories about characters or settings are written by fans of the original work, rather than by the original creator, and are usually posted online for other fans to read.⁸ Leonard, an avid fan of the *Twilight* novels, wanted to read more fiction involving Bella Swan and Edward Cullen, but not necessarily a story about vampires.⁹ Leonard focused more on the carnal aspect of the main characters' relationship, expanding her piece into an alternate reality, where Bella was recast as a naïve college student and Edward as the unflinching CEO of his own company with a penchant for sexual domination.¹⁰

Leonard's published product, of course, is scrubbed clean of any verbatim mention of Bella and Edward and any other *Twilight* character.¹¹ However, other elements of a story are not so easily fixed with a search and replace function on a word processor. Fans and readers alike have noticed similarities in the character structures and relationship dynamics in the books.¹² In this age of technology where creative ideas about a favorite book can be fostered by a community of fans on the Internet, does a work that began as a piece of fan fiction owe anything

⁶ '50 Shades of Grey' Author's First Interview, ABC NEWS (Apr. 17, 2012), <http://abcnews.go.com/GMA/video/50-shades-grey-author-jamess-interview-16154474>.

⁷ Emily Eakin, *Grey Area: How 'Fifty Shades Dominated the Market*, NYR BLOG (Jul. 27, 2012), <http://www.nybooks.com/blogs/nyrblog/2012/jul/27/seduction-and-betrayal-twilight-fifty-shades/>.

⁸ Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

⁹ Eakin, *supra* note 7.

¹⁰ *Id.*

¹¹ E.L. JAMES, *FIFTY SHADES OF GREY* __ (2011).

¹² Amanda Hasaka, '50 Shades of Grey' and 'Twilight' Similarities: Will Any Legal Issues Affect the Making of the Film?, CELEBUZZ! (Jul. 2, 2012), <http://www.celebuzz.com/2012-07-02/50-shades-of-grey-and-twilight-similarities-will-there-be-legal-issues-when-making-the-film-video/>; Jane, *Master of the Universe versus Fifty Shades by E.L. James Comparison*, DEAR AUTHOR (Mar. 13, 2012), <http://dearauthor.com/features/industry-news/master-of-the-universe-versus-fifty-shades-by-e-l-james-comparison/>.

to its predecessor? Does creating an original work of authorship go beyond changing names and a few details?

II. Background: Relevant Copyright Law

A. General Copyright Law

Copyright law was developed to protect works of authorship, and is both vested in the United States Constitution and codified through the Copyright Act, though it has gone through numerous changes.¹³ The 1976 Copyright Act is the principle framework for copyright protection in the United States, though additions have since been made.¹⁴

Copyright protection applies to “original works of authorship fixed in any tangible medium of expression,”¹⁵ meaning that copyrighted material must be set into something that can be consumed, such as a book or a file that can be read on an e-reader. A protectable copyright contains copyrightable subject matter, which includes literature, art, sound, films, and computer programming, and has a threshold for protection, which consists of a “modicum of originality” fixed in “a tangible medium of expression.”¹⁶ Copyrights differ greatly from patent protection, as they do not require a search for prior art, the validity of the work is not examined for creativity or utility, and protection endures for a much longer amount of time.¹⁷

Similar to patent protection on inventions, copyright protection is given only to the expression of an idea, and does not extend to the idea itself.¹⁸ The idea-expression dichotomy is fully addressed in the landmark case of *Baker v. Selden*, which established that the explanation

¹³ David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004).

¹⁴ 17 U.S.C. §§ 101-801 (2006).

¹⁵ 17 U.S.C. § 102(a) (2006).

¹⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹⁷ ROBERT P. MERGES, ET. AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 434 (6th ed. 2012).

¹⁸ 17 U.S.C. § 102(b) (2006).

of an idea can be copyrighted, but the use of that idea cannot be.¹⁹ Explaining an idea in an author's own words is copyright protectable whether the idea is original or not.

The notion of the idea-expression dichotomy is further expanded in *Nichols v. Universal Pictures*, where the focus is distinguishing an idea from its expression.²⁰ In regard to fiction, Judge Learned Hand developed the abstraction test, noting that, "there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended."²¹ Any work of fiction, when boiled down to its essential elements, most likely resembles another work. Allowing an author to assert infringement when another copyrighted work bears similarity to an abstract idea in his original work would be an abuse of copyright protection.

In the same opinion, Judge Hand adds, "[i]t follows that the less developed the characters, the less they can be copyrighted; that is a penalty an author must bear for marking them too indistinctly."²² Specifically, an author cannot copyright a character, if that character is indistinct. The author bears the burden for writing a character distinct enough to be specifically copyrighted. This holding complies with the *scènes à faire* doctrine, which established that copyright protection does not extend to "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."²³ Because copyright protection of these elements would unduly burden authors, stock characters, archetypes, clichés, and stereotypes are not copyrightable material.

¹⁹ 101 U.S. 99 (1879).

²⁰ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

²¹ *Id.* at 121.

²² *Id.*

²³ *Atari, Inc. v. North American Philips Consumer Electronics*, 672 F.2d 607, 616 (7th Cir. 1982).

The duration of a copyright is limited to a certain amount of years depending on its authorship.²⁴ The protection usually endures for the life of the author plus seventy additional years after the author's death.²⁵ Written works become protected upon their creation, even if unpublished.²⁶ For example, as soon as an email is sent, the contents have become copyright protectable, as it has been set in a tangible medium of expression.

B. Substantial Similarity

To establish a prima facie case of copyright infringement, a plaintiff must demonstrate two factors: (1) "ownership of a valid copyright" and (2) "copying of constituent elements of the work that are original."²⁷ The plaintiff must establish actual copying by either direct or indirect evidence; then, the plaintiff must establish that the copying amounts to an improper or unlawful appropriation.²⁸ The plaintiff demonstrates that the copying is actionable by showing a substantial similarity between the copyrighted work and the work in question.²⁹

1. Qualitative & Quantitative Analysis

Under the substantial similarity test, the inquiry is whether the copying is "quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred" and that the copying is not simply *de minimis*.³⁰ In examining the quantitative aspect of the works, the court compares the quantity by which the two works are similar. For instance, in *Castle Rock Entertainment v. Carol Publishing Group*, the court determined that

²⁴ 17 U.S.C. § 302(a) (2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

²⁸ *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998).

²⁹ *Id.* at 137.

³⁰ *Id.* at 138 (quoting *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)).

copying 643 fragments from the television show *Seinfeld* to create a trivia quiz book crossed the quantitative copying threshold.³¹

In examining the qualitative component, the court looks to the “copying of the expression, rather than ideas, a distinction that often turns on the level of abstraction at which the works are compared.”³² In examining the qualitative aspect of the works, the court compares the overall quality of the works and the way that the ideas are expressed. For example, in *Castle Rock*, the court determined that a trivia quiz book about the television show *Seinfeld* was based on creative expression, not unprotected facts, as it asks specific questions based on fictitious expression to test “whether the reader knows that the character Jerry places a Pez dispenser on Elaine’s leg during a piano recital,” and “that Kramer enjoys going to the airport because he’s hypnotized by the baggage carousels.”³³ The quantitative component concerns the “amount of the copyrighted work that is copied, a consideration that is especially pertinent to exact copying.”³⁴

2. Other Tests

Other tests have been used to establish substantial similarity, such as the “ordinary observer” test and the “total concept and feel” test.³⁵ The “ordinary observer” test, set forth in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, advocates for copyright infringement to be analyzed on a case by case basis, looking to whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as

³¹ *Id.*

³² *Ringgold*, 126 F.3d at 75.

³³ *Castle Rock*, 150 F.3d at 139.

³⁴ *Ringgold*, 126 F.3d at 75.

³⁵ *Castle Rock*, 150 F.3d at 139-141.

the same.”³⁶ This test, applied to fabric patterns in the *Peter Pan* case, uses the opinion of a layperson with no prior knowledge of any differences between two copyrighted works to determine if he deems the defendant’s work identical to the plaintiff’s, and therefore infringing.

The “total concept and feel” test analyzes the similarities “in such aspects as the total concept, feel, theme, characters, plot, sequence, pace, and setting” of the defendant’s allegedly infringing work to the plaintiff’s copyrighted work.³⁷ Similarities must arise from copyrightable elements, otherwise the works will not be deemed substantially similar under this test.³⁸ This test was used in *Williams v. Crichton*, where Geoffrey T. Williams, creator and publisher of several children’s books about adventures “in an imaginary present day man-made animal park for dinosaurs,” claimed that Michael Crichton’s novel *Jurassic Park* and the subsequent movie based upon it, had infringed on his copyright.³⁹ The court determined that any similarity found between the two works stemmed from the unprotectable idea of a dinosaur zoo.⁴⁰

C. Derivative Works

The Copyright Act defines derivative works as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment condensation, or any other form in which a work may be recast, transformed, or adapted.”⁴¹ A work that consists of “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represents an original work of authorship” is also a derivative work.⁴² Derivative works are

³⁶ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

³⁷ *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996).

³⁸ *Id.* at 588-589.

³⁹ *Id.* at 582.

⁴⁰ *Id.* at 589.

⁴¹ 17 U.S.C. § 101 (2006).

⁴² *Id.*

works based on the original but in different forms or otherwise altered, such as translations or movies based on books. The independent development of a similar or even identical work is perfectly legal. A party needs direct proof of copying and if that is absent, the courts determine whether copying has occurred on the basis of the defendant's access to the plaintiff's work and the extent of the works being similar.⁴³

In *Campbell v. Acuff-Rose Music, Inc.*, the group 2 Live Crew wrote a parody of "Oh, Pretty Woman" by Ray Orbison.⁴⁴ Their parody was deemed to be a derivative work, as it was transformative, but was deemed legal under the fair use doctrine by the Supreme Court.⁴⁵ In *Suntrust Bank v. Houghton Mifflin Company*, Alice Randall, author of the book *The Wind Done Gone* was sued by the holder of the copyright for *Gone with the Wind*.⁴⁶ Randall's work was a derivative work, using original elements from *Gone with the Wind* to tell her version of the story.⁴⁷ Her work was framed as a parody and was deemed to be permissible under the fair use doctrine as well.⁴⁸

D. Fair Use Defense

The fair use doctrine is an exception to copyright protection and is an affirmative defense.⁴⁹ Codified in the Copyright Act, courts assess four factors when considering whether a work falls within fair use:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation

⁴³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁴⁴ *Id.*

⁴⁵ *Id.* at 594.

⁴⁶ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”⁵⁰

The doctrine is designed to “fulfill copyright’s very purpose, ‘To promote the Progress of Science and useful Arts.’”⁵¹ The heart of the fair use doctrine is to foster learning and advancement in the arts and sciences.

The first fair use factor considered is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁵² A commercial use “tends to weigh against a finding of fair use,”⁵³ meaning that if the allegedly infringing work has been produced for a profit, it is less likely to succeed on the defense of the fair use doctrine. The “central purpose” of this inquiry is to see if the new work “merely supersedes” the original work or if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message” and whether the new work is transformative.⁵⁴ It usually follows that the more transformative the new work is, the less significance there will be on other factors that will weigh against a finding of fair use.⁵⁵

The second statutory factor is “the nature of the copyrighted work,”⁵⁶ which recognizes that “some works are closer to the core of intended copyright protection than others.”⁵⁷ The scope of fair use in regard to fictional works is narrower than factual works.⁵⁸ This is congruous with the aims of the fair use doctrine and the Constitution regarding copyright, which is to promote learning and advance the arts and sciences.

⁵⁰ 17 U.S.C. § 107 (2006).

⁵¹ U.S. CONST. art. I, § 8, cl. 8.

⁵² 17 U.S.C. § 107(1) (2006).

⁵³ *Campbell*, 510 U.S. at 585.

⁵⁴ *Id.* at 579.

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 107(2) (2006).

⁵⁷ *Campbell*, 510 U.S. at 586.

⁵⁸ *Castle Rock*, 150 F.3d at 143.

The third factor regarding “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”⁵⁹ must be analyzed in context. The inquiry must focus upon whether the “extent of permissible copying varies with the purpose and character of the use.”⁶⁰ This factor examines the portion used under a quantitative and qualitative approach, similar to the substantial similarity analysis.⁶¹ In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the magazine *The Nation* had reprinted 300 words from a biography about President Ford.⁶² This was not a very large quantity, but the significance and substantiality of the quotations gave it a high amount of quality, and the excerpt was deemed “the heart of the book.”⁶³

The fourth factor addresses “the effect of the use upon potential market for or value of the copyrighted work.”⁶⁴ This factor must “take account ... of harm to the market for derivative works”⁶⁵ as well as “whether the secondary use usurps or substitutes for the market of the original work.”⁶⁶ The alleged infringing work could possibly be filling a market niche that the original copyright owner would have developed, such as in *Castle Rock*, where an unauthorized *Seinfeld* trivia quiz book would have served as a market substitute.⁶⁷ Market harm can also result where the secondary use replaces the original work, such as in *Harper & Row*, when the exclusive excerpt published in *The Nation* caused *Time* to renegotiate its deal for first serialization rights with *Harper & Row*, resulting in a major loss of revenue.⁶⁸

III. Fan Fiction

⁵⁹ 17 U.S.C. § 107(3) (2006).

⁶⁰ *Campbell*, 510 U.S. at 586-587.

⁶¹ *Campbell*, 510 U.S. at 587.

⁶² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539 (1985).

⁶³ *Id.* at 568.

⁶⁴ 17 U.S.C. § 107(4) (2006).

⁶⁵ *Campbell*, 510 U.S. at 592.

⁶⁶ *Id.* at 593.

⁶⁷ *Castle Rock*, 150 F.3d at 145.

⁶⁸ *Harper & Row*, 417 U.S. at 568-569.

Fan fiction, as a genre, is difficult to categorize. Loosely defined, the genre consists of fan created works of written creativity based upon published, copyrighted material, where authors borrow characters and settings from these original works.⁶⁹ Fan fiction is a genre that exists solely because the original work exists. Enthusiasts gather online in a variety of forums to discuss their favorite novels, films, television shows, comics, and any other types of media, and focus their interest into writing and reading stories based upon and inspired by these original characters and settings.⁷⁰ Some fans choose not to be “passive consumers of the cultural productions that have deeply affected them,”⁷¹ but instead choose to be active participants in these subcultures, imagining new situations for well-loved characters.

When asked why fans with a penchant for writing fiction just create original stories instead of heavily borrowing from already-established works, fans have responded that an original work does not have the kind of dedicated community that fan fiction automatically creates between the reader and the writer.⁷² Fans can express their passion and funnel their creativity into works that extend the story farther than the original author carried it, fill in moments that were “off screen” or “off page,” or take the original characters and place them into a new setting, further exploring the original author’s characters in an different way. Using their creativity in fan fiction rather than their own original works allows fans to create work that will likely be read by others with a shared interest – namely the fiction the work is based upon. Writers of fan fiction are essentially guaranteed a built-in audience. A few authors have spoken out against fan fiction,⁷³ however, other authors of extremely popular works, such as J.K.

⁶⁹ Tushnet, *supra* note 8.

⁷⁰ Eakin, *supra* note 7.

⁷¹ Tushnet, *supra* note 8.

⁷² *Id.*

⁷³ *Messages to Anne Rice Fans*, ANNERICE.COM, <http://www.annerice.com/readerinteraction-messagestofans.html> (last visited Apr. 18, 2013).

Rowling, author of the *Harry Potter* series, have embraced fan fiction to a certain extent, admiring the creativity and dedication of the fan base.⁷⁴

Fan fiction's place within copyright law is problematic. It does not involve verbatim copying, as the story is the writer's own creative invention. However, the story usually features the unique copyrighted characters from the original work. For example, Erika Leonard's story, *Master of the Universe*, was a work of fan fiction featuring the main characters from the *Twilight* series, Bella Swan and Edward Cullen.⁷⁵ Leonard used the settings and characters from the novel but constructed them around a story of her own invention, tweaking some details to fit her plot, namely the omission of vampires and the addition of an abundance of sexually explicit scenes.⁷⁶

IV. *Fifty Shades of Grey* Background

Leonard began her career as an author writing fan fiction based on the *Twilight* series and posting it on the Internet.⁷⁷ *Twilight*, by Stephenie Meyer, is about a high school girl named Bella Swan, who becomes the object of affection (and obsession) of Edward Cullen, a vampire.⁷⁸ In writing her story, Leonard borrowed characters and settings from the *Twilight* series, but modified a few details – specifically, turning the notoriously chaste relationship between Bella and Edward into one where Edward has a predilection for dominant-submissive sexual

⁷⁴ Darren Waters, *Rowling backs Potter fan fiction*, BBC NEWS (May 27, 2004), <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm>.

⁷⁵ Eakin, *supra* note 7.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See generally STEPHENIE MEYER, *TWILIGHT* (2005).

relationships.⁷⁹ This story, then titled *Master of the Universe*, became popular within the *Twilight* fan fiction community.⁸⁰

In early 2011, Leonard pulled *Master of the Universe* from her website.⁸¹ She then engaged in something that the fan fiction community refers to as “filing off the serial numbers,” which is when an author of a popular piece of fan fiction, in preparation for publication for profit, combs through the piece and removes any traces of the copyrighted work.⁸² The fan fiction community looks upon this practice negatively as most feel that fan fiction is for fun, and not for profit, and feel as though they have been used as a sample audience to test the waters, akin to guinea pigs.⁸³ Despite any misgivings from the fan community, after Leonard had scrubbed her story clean of overt references to the *Twilight* series, she published the *Fifty Shades* trilogy electronically, under the pseudonym E.L. James.⁸⁴

The books enjoyed the same popularity they did when they had been posted online in their fan fiction form. Vintage Books, an imprint of Random House, acquired the rights to the *Fifty Shades* trilogy for over one million dollars, published paperback copies, and the world saw the books rise to the top of the New York Times Bestseller List.⁸⁵ Despite the commercial

⁷⁹ Eakin, *supra* note 7.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Filing Off The Serial Numbers*, FANLORE, http://fanlore.org/wiki/Filing_off_the_serial_numbers (last visited Apr. 18, 2013).

⁸³ See Chris Meadows, *Twilight fanfic, pulling to publish, and the fandom gift economy*, TELEREAD. (June 19, 2012), <http://www.teleread.com/ebooks/twilight-fanfic-pulling-to-publish-and-the-fandom-gift-economy/>; *FYI: Publishing Fan Fiction*, TWILOG. (Mar. 10, 2011), <http://twilog.net/2011/03/fyi-publishing-fan-fiction/>; *This takes “change the names and it’s totally publishable” to a whole new level.*, TWANKHARDER. (Feb. 12, 2011), <http://twankharder.wordpress.com/2011/02/12/35/>; *Fan Fiction gets published: Brookelockart breaks it down*, LETTERS TO TWILIGHT. (Jan. 11, 2012), <http://letterstotwilight.com/2012/01/11/fan-fiction-gets-published-brookelockart-breaks-it-down/>.

⁸⁴ Eakin, *supra* note 7.

⁸⁵ *Id.*

success of the books, critics have panned the trilogy, identifying Leonard's writing as cliché ridden and stilted.⁸⁶

V. Legal Analysis

Fans of both series have remarked that there are stark similarities between Meyer's and Leonard's works.⁸⁷ Clearly, if Leonard had attempted to publish her original fan fiction, *Master of the Universe*, using the settings and character names from the *Twilight* books, it would be an indisputable violation of Stephenie Meyer's copyright. Fan fiction operates under the fair use doctrine, assuming writers are not looking to profit from their works and do not intend to take away from the market share of the original work.⁸⁸ Here the examination is focused on the legality of the finished product, the *Fifty Shades* trilogy. Since its roots are deeply embedded in another copyrighted work, has Leonard infringed upon another's work? Does it matter that Leonard's idea was developed fully within the context of another author's work? Is the fact that Leonard's profits are from another author's original characters and ideas relevant? Or perhaps characters cannot be copyrighted at all, and Leonard has only borrowed innocuous and common elements found in literature?

A. Substantial Similarity Analysis

Under a substantial similarity analysis, a court looks to establish first that the author asserting the infringement owns a valid copyright.⁸⁹ Here, Stephenie Meyer clearly owns a valid copyright in the *Twilight* series. The second prong of the analysis involves establishing that the

⁸⁶ *Id.*

⁸⁷ *The Many Shades of Similarities between 'Twilight' and 'Fifty Shades of Grey'*, GOOD READS, <http://www.goodreads.com/topic/show/939720-the-many-shades-of-similarities-between-twilight-and-fifty-shades-of>.

⁸⁸ Tushnet, *supra* note 8.

⁸⁹ *Feist*, 499 U.S. at 361.

author of the infringing work actually copied from the original author's work.⁹⁰ This prong can prove to be problematic, but given the unique circumstances of *Fifty Shades of Grey*'s origins, Leonard plainly copied from Meyer's work. This is proven through the fact that the story developed as a piece of fan fiction, using Meyer's characters, relationship dynamics, and settings.

The final prong, the actual substantial similarity test, seeks to establish the actual infringement.⁹¹ If it can be proven that the similarities between *Twilight* and *Fifty Shades of Grey* rise above the *de minimis* exception, and reach a substantial threshold both qualitatively and quantitatively, then *Fifty Shades of Grey* can be deemed substantially similar to *Twilight*. To determine if a work reaches this threshold, courts have used a dissection test, which requires paring a work down to only its copyrightable elements, while considering the *scènes à faire* doctrine and the idea-expression dichotomy.⁹² Under the abstraction test, the court must also keep in mind that when elements of a story become so far removed from their details, anything can sound similar.⁹³

Some specific similarities found in *Twilight* and *Fifty Shades of Grey* are character centric, which raises an issue regarding whether characters are copyrightable. Isabella Swan, better known as Bella, the protagonist of the *Twilight* novels, is described as a teenage girl with long brown hair, who thinks of herself as plain and is remarkably uncoordinated and clumsy.⁹⁴ Anastasia Steele, better known as Ana, the protagonist of the *Fifty Shades* trilogy, is described in the exact same way. She too has long brown hair, thinks of herself as unremarkable and plain,⁹⁵ and is established as uncoordinated within the first pages of the novel, when she immediately

⁹⁰ *Id.*

⁹¹ *Castle Rock*, 150 F.3d at 137.

⁹² *Id.*

⁹³ *Nichols*, 45 F.2d at 121.

⁹⁴ STEPHENIE MEYER, *TWILIGHT* 10 (2005).

⁹⁵ E.L. JAMES, *FIFTY SHADES OF GREY* 1 (2011).

trips into the office of the male protagonist.⁹⁶ Both Bella and Ana are inexperienced with relationships and men, despite the inordinate amount of romantic attention they receive.⁹⁷ Each protagonist is inexplicably drawn to their respective male counterparts, remarking that they have never experienced such attraction before, while expressing extreme disbelief that this attraction could be returned.⁹⁸ Ana and Bella spend a great deal of time fending off romantic advances from their male friends, most notably José and Jacob, but also Paul Clayton and Mike Newton, each of whom Ana and Bella work alongside at their jobs at Clayton's Hardware Store and Newton's Olympic Outfitters, respectively.⁹⁹

In addition, both Ana and Bella have very similar parental figures – their fathers are described as taciturn and have a love of fishing,¹⁰⁰ while their mothers are described as absent-minded and flighty, having recently relocated to the southeastern United States with their new husbands.¹⁰¹ The names of the parents in each series bear a striking resemblance to one another. Ana's mother is named Carla while Bella's father is named Charlie, and Bella's mother is named Renée while Ana's father is named Ray.¹⁰² Ray and Charlie both maintain friendships with José and Jacob's fathers, respectively.¹⁰³ Carla discusses Ana's relationship with Christian on the beach, echoing Renée's discussion with Bella about Edward, also on the beach.¹⁰⁴

Christian Grey, the male protagonist of *Fifty Shades of Grey*, also bears likeness to his *Twilight* predecessor, Edward Cullen. Although Christian is not a vampire, both he and Edward share many of the same traits, both in personality and physical appearance. The narrative in *Fifty*

⁹⁶ E.L. JAMES, *FIFTY SHADES OF GREY* 4 (2011).

⁹⁷ STEPHENIE MEYER, *TWILIGHT* 153 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 36-7 (2011).

⁹⁸ STEPHENIE MEYER, *TWILIGHT* 79 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 36 (2011).

⁹⁹ STEPHENIE MEYER, *TWILIGHT* 72 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 20 (2011).

¹⁰⁰ STEPHENIE MEYER, *TWILIGHT* 5 (2005); *id.* at 6; E.L. JAMES, *FIFTY SHADES OF GREY* 15 (2011); *id.* at 32.

¹⁰¹ STEPHENIE MEYER, *TWILIGHT* 4 (2005); *id.* at 466; E.L. JAMES, *FIFTY SHADES OF GREY* 15 (2011); *id.* at 32.

¹⁰² STEPHENIE MEYER, *TWILIGHT* 4 (2005); *id.* at 6; E.L. JAMES, *FIFTY SHADES OF GREY* 15 (2011); *id.* at 302.

¹⁰³ STEPHENIE MEYER, *TWILIGHT* 4 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 15 (2011).

¹⁰⁴ STEPHENIE MEYER, *ECLIPSE* 67-69 (2007); E.L. JAMES, *FIFTY SHADES OF GREY* 289 (2011).

Shades of Grey goes so far as to echo descriptors used in *Twilight* about Edward Cullen to describe Christian Grey – such as long, cool fingers,¹⁰⁵ a dazzling, crooked smile,¹⁰⁶ and disheveled copper or bronze colored hair.¹⁰⁷ In terms of their personalities, Edward and Christian are both controlling, manipulative, and overcome by an inexplicable and intense attraction to Bella and Ana.¹⁰⁸ Both characters happen to be talented pianists¹⁰⁹ and were adopted into loving families.¹¹⁰ Edward and Christian both express extreme disapproval at the dilapidated vehicles that their respective love interests insist on driving.¹¹¹ Notably, Bella's truck was purchased from Jacob's father and Ana's Beetle was purchased from the mother of *Fifty Shades'* Jacob counterpart, José.¹¹² Both Christian and Edward suggest that they would like to purchase Audis as replacements, much to the female protagonists' chagrin.¹¹³

Other secondary characters in the *Fifty Shades* trilogy bear an extreme likeness to their *Twilight* counterparts, as well. *Fifty Shades of Grey's* José clearly lines up with *Twilight's* Jacob, a family friend living on a Native American reservation close by, who has unrequited romantic feelings for Bella.¹¹⁴ José is not Native American in *Fifty Shades of Grey*, but is instead recast as Hispanic, which is made blaringly clear to the reader through clichéd invocations of Spanish phrases at random intervals throughout the novel.¹¹⁵ José attempts to romance Ana at several points throughout the series – each of his advances aligning with a similar occurrence in the

¹⁰⁵ STEPHENIE MEYER, *TWILIGHT* 20 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 28 (2011).

¹⁰⁶ STEPHENIE MEYER, *TWILIGHT* 44 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 51 (2011).

¹⁰⁷ STEPHENIE MEYER, *TWILIGHT* 18 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 4 (2011).

¹⁰⁸ STEPHENIE MEYER, *TWILIGHT* 167 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 52 (2011).

¹⁰⁹ STEPHENIE MEYER, *TWILIGHT* 325 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 90 (2011).

¹¹⁰ STEPHENIE MEYER, *TWILIGHT* 21 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 32 (2011).

¹¹¹ STEPHENIE MEYER, *TWILIGHT* 83 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 166 (2011).

¹¹² STEPHENIE MEYER, *TWILIGHT* 7 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 174 (2011).

¹¹³ STEPHENIE MEYER, *NEW MOON* 23-4 (2006); E.L. JAMES, *FIFTY SHADES OF GREY* 190 (2011).

¹¹⁴ STEPHENIE MEYER, *NEW MOON* 202 (2005); *id.* at 212-3; STEPHENIE MEYER, *ECLIPSE* 327 (2007); *id.* at 330.

¹¹⁵ E.L. JAMES, *FIFTY SHADES OF GREY* 16 (2011); *id.* at 119.

Twilight series.¹¹⁶ Additionally, it is revealed in the final installment, *Fifty Shades Freed*, that José's father is wheelchair bound – as is Jacob's father.¹¹⁷

Christian's parents, Grace and Carrick, are somewhat similar to Edward's parents, Esme and Carlisle in the respect that they adopted all of their children, although for different reasons.¹¹⁸ Both sets of parents are thrilled when the male protagonist has seemingly met his match, worried that he would never find someone and remarking to the female protagonist that he has never seemed happier.¹¹⁹

Apart from stark similarities in the characters, elements of the plots in the two series share many similarities. Generally, both series follow a structure of initial attraction between the two characters, the male protagonist attempts to convince the female protagonist to stay away for her own good, yet she stubbornly pursues him, discovering his dark secret and beginning a relationship.¹²⁰ The couple briefly part, reunite,¹²¹ marry, and soon after the female protagonist discovers that she is pregnant, to which the male protagonist reacts very negatively, but eventually comes around.¹²²

More detailed scenarios that move the plot forward in each series also bear similarity. While many of the plot devices and interactions between the characters can be attributed to scènes à faire and archetypal themes, a few examples are detailed enough to raise suspicion. In *Twilight*, Bella is nearly attacked by a group of rapists in an alley in Port Angeles, but is rescued by Edward at just the right moment.¹²³ In *Fifty Shades of Grey*, Ana is out at a bar in Portland,

¹¹⁶ E.L. JAMES, *FIFTY SHADES OF GREY* 42-3 (2011).

¹¹⁷ STEPHENIE MEYER, *TWILIGHT* 6 (2005); E.L. JAMES, *FIFTY SHADES OF FREED* 280 (2012); *id.* at 304.

¹¹⁸ STEPHENIE MEYER, *TWILIGHT* 107 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 32 (2011).

¹¹⁹ STEPHENIE MEYER, *TWILIGHT* 368-9 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 112 (2011); *id.* at 257.

¹²⁰ *See generally* STEPHENIE MEYER, *TWILIGHT* (2005); E.L. JAMES, *FIFTY SHADES OF GREY* (2011).

¹²¹ *See generally* STEPHENIE MEYER, *NEW MOON* (2006); STEPHENIE MEYER, *ECLIPSE* (2007); E.L. JAMES, *FIFTY SHADES DARKER* (2011).

¹²² *See generally* STEPHENIE MEYER, *BREAKING DAWN* (2008); E.L. JAMES, *FIFTY SHADES FREED* (2012).

¹²³ STEPHENIE MEYER, *TWILIGHT* 161-2 (2005).

when she heads outside for fresh air with her friend José, who attempts to make another romantic advance, despite the fact that she is about to vomit on the sidewalk.¹²⁴ Ana is rescued by Christian at just the right moment.¹²⁵ In addition, both male characters save the female character from a serious accident. In *Twilight*, Edward saves Bella from being hit by a van in the school parking lot,¹²⁶ and in *Fifty Shades of Grey*, Christian saves Ana from being hit by a speeding cyclist.¹²⁷ Soon after, both Edward and Christian tell each of their respective love interests that they cannot pursue a relationship, as it's too dangerous to the dismay of the female character.¹²⁸ This leads to both sets of characters later having a conversation over a meal, where the male protagonist admits that despite what he should do, he cannot stay away.¹²⁹

Less blatant in obvious similarity, each series features a female stalker motivated by a broken heart, Victoria in *Twilight*¹³⁰ and Leila in *Fifty Shades*,¹³¹ on a mission to hurt the female protagonist. Also featured is a male antagonist in both series, namely James in *Twilight*¹³² and Jack in *Fifty Shades*,¹³³ bent on destroying the main characters.

B. Fair Use Analysis

Under a fair use analysis, a court looks to see whether the defendant's work is a fair use of the original copyrighted work.¹³⁴ The first prong of the test looks to the purpose and character of the use, specifically if the work is being used commercially or if it is for nonprofit or

¹²⁴ E.L. JAMES, *FIFTY SHADES OF GREY* 42 (2011).

¹²⁵ E.L. JAMES, *FIFTY SHADES OF GREY* 43 (2011).

¹²⁶ STEPHENIE MEYER, *TWILIGHT* 56-8 (2005).

¹²⁷ E.L. JAMES, *FIFTY SHADES OF GREY* 33 (2011).

¹²⁸ STEPHENIE MEYER, *TWILIGHT* 64 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 35 (2011).

¹²⁹ STEPHENIE MEYER, *TWILIGHT* 88 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 52 (2011).

¹³⁰ STEPHENIE MEYER, *ECLIPSE* 552 (2007).

¹³¹ E.L. JAMES, *FIFTY SHADES DARKER* 309 (2011).

¹³² STEPHENIE MEYER, *TWILIGHT* 378 (2005).

¹³³ E.L. JAMES, *FIFTY SHADES FREED* 351 (2012).

¹³⁴ *Campbell*, 510 U.S. at 585.

educational purposes.¹³⁵ In this case, Leonard's work clearly is for profit and is of a commercial nature. In its original form, *Master of the Universe*, it could be argued that the unpublished work posted on Leonard's blog was not created to generate profits, but was simply just an expression of Leonard's affinity for writing and Meyer's novels. However, once Leonard took the requisite steps to publish her story, her work became commercial.

The second prong examines the nature of the copyrighted work, such as if the original work is factual or creative.¹³⁶ Meyer's *Twilight* series is clearly a published work of fiction and is a creative work.

The third prong analyzes the amount and substantiality of the portion used in the alleged infringing work.¹³⁷ Although *Fifty Shades of Grey* in its original form, *Master of the Universe*, was a *Twilight* fan fiction, it borrowed mostly names, settings, and characterizations. The main characters were not carbon copies of their *Twilight* forms. Most notably, Ana is a college student and Christian is the CEO of his self-made corporation, while Bella and Edward both attend high school.¹³⁸

Apart from the similarities to the original text, *Fifty Shades of Grey* is nearly identical to its predecessor, *Master of the Universe*. Analyzed by plagiarism software on turnitin.com, Leonard's *Twilight* fan fiction *Master of the Universe* is 89 percent identical to *Fifty Shades of Grey*.¹³⁹ *Fifty Shades of Grey* is essentially the same work as *Master of the Universe*, save for the names of the characters and other small details that constitute an 11 percent variance in the two texts. The question stemming out of this evidence is that if publishing *Master of the Universe* for profit would have clearly been copyright infringement, was replacing the names and

¹³⁵ 17 U.S.C. § 107 (2006).

¹³⁶ 17 U.S.C. § 107(2) (2006).

¹³⁷ 17 U.S.C. § 107(3) (2006).

¹³⁸ STEPHENIE MEYER, *TWILIGHT* 23 (2005); E.L. JAMES, *FIFTY SHADES OF GREY* 6 (2011).

¹³⁹ Jane, *supra* note 12.

tweaking a few details enough to avoid infringement, or at the very least constitute fair use?

Fifty Shades of Grey, in its published form, is still essentially the same work of fan fiction that was inspired by the characters and relationship dynamics of *Twilight*.

The fourth prong of the fair use analysis is the effect of the use upon the potential market for or value of the copyrighted work.¹⁴⁰ If it could be proven that the *Fifty Shades* trilogy was detracting from *Twilight*'s market share, there would be a clear issue here. However, it does not seem that Leonard's novels have detracted from or adversely affected the *Twilight* franchise. The final *Twilight* movie, *The Twilight Saga: Breaking Dawn - Part 2*, netted \$340.7 million worldwide during its opening weekend, making it the eighth largest opening for a movie for all time.¹⁴¹

VI. Conclusion

Stephenie Meyer herself has commented on the series, stating in an interview, "I haven't read it. It's really not my genre. Not my thing. ... I've heard about it, but I haven't really got into it much. Good on her, she's doing well, that's great," and when asked if *Fifty Shades of Grey* exists only because of *Twilight*, she said, "It might not exist in the exact form that it's in, but she obviously had a story in her and so it would come out in some other way."¹⁴²

It is likely that the publication of *Fifty Shades of Grey* has had little to no adverse effect on the *Twilight* franchise. It is also likely that had there been any copyright issues, given the amount of money in both franchises, a legal dispute would have been brought to the forefront. However, taking a closer look at the issue of profiting off of fan fiction will prove to be incredibly useful as technology progresses. Publishing a story that was originally a piece of fan

¹⁴⁰ 17 U.S.C. § 107(4) (2006).

¹⁴¹ *All Time Worldwide Opening Records at the Box Office*, BOX OFFICE MOJO, <http://boxofficemojo.com/alltime/world/worldwideopenings.htm> (last visited Apr. 18, 2013).

¹⁴² *Stephenie Meyer Speaks on Fifty Shades and Hunger Games*, MTV (May 26, 2012), <http://www.mtv.com/videos/movies/785287/stephenie-meyer-speaks-on-fifty-shades-and-hunger-games.jhtml?id=1685923>.

fiction carries a built-in audience that the author did not rightfully obtain on his or her own and is seen by some as morally wrong. Overall, the *Fifty Shades* trilogy seems transformative enough to survive a legal fair use analysis and does not infringe on *Twilight*'s copyright – but is it a fair use in a moral sense? It is decidedly a grey area.