



## COPYRIGHT PROTECTION OF FAN FICTIONS IN INDIA: A STUDY

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### ABSTRACT

Fanfiction has transpired itself into a popular form of creative expression, giving authors an arena to redefine and reinvent the fictional characters and narrations in their own unique style. It gives them a platform to express their distinctive ideas and thoughts thereby promoting creativity and innovation, aligning with the objectives of the Copyright legislation of various jurisdictions. Regardless of the transformative nature of fanfiction, it is often considered to violate the economic and moral rights of the creators because of its employment of the pre-existing copyright protected characters. The paper attempts to examine whether fanfiction is entitled to copyright protection or is it viewed as a copy of copyrighted work. It firstly looks into the legal protection offered to fanfiction in different jurisdictions, particularly the UK and US and then examines the legal standing of fanfiction under the Indian Copyright Act 1957. It contends that while fanfiction does offer creative freedom and has a transformative utility, its legal recognition specifically depends upon its non-commercial usage and its application under the narrow contours of the fair dealings' exceptions given under the Copyright Act. It thereby highlights the need of a clear legal structure to balance the interest of copyright holders and the promotion of the advancing framework of transformative innovativeness.

### I. Introduction

Certain fictional characters have become very popular in recent times. Fans borrow characters and elements from a previous work and create a 'new story.' This new story is unique and creative in itself. In many cases it is a homage of a fan.<sup>1</sup> Fan fiction usually entails fitting familiar characters in unconventional scenarios, or present them with different obstacles that was not previously used. Fan fiction allows 'creative experimentation' and also allows 'expression of distinct interpretations of fans.'

Copyright laws grant exclusive rights to the owners of copyright, but the 'ownership lines are blurred by the transformative nature of fanfiction.' Thus, fanfiction has many copyright considerations.

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<sup>1</sup> Kiran Mary George, "The Murky World of Fan Fiction and Copyright", *available at*: <https://spicyip.com/2015/01/14526.html>. (last visited on November 30, 2023).

Different jurisdictions in the world treat fan fiction differently; some countries have given protection to fan fiction while others have not. Thus, it becomes important to find out if fan fiction which is a derivative work can be given an independent copyright. The paper attempts to look into the copyrightability of fan fiction. The important question is (i) if fan fiction could be given copyright protection or (ii) it is considered to be a copy of copyright work. The paper focuses on the Indian copyright position so far as fan fiction is concerned.

## II. Legal Issues Surrounding Fan Fiction

One of the chief concerns surrounding fan fiction is the question of whether characters can be copyrighted and if yes, then aren't the fan fictions copyright infringed works? Or can we consider fan fictions to be transformative work capable of copyright protection. A work is considered "transformative if it adds something new to the original, with a further purpose or different character, and does not merely substitute for the original work."<sup>2</sup> It essentially means that "the new work has transformed the content in such a way that it imparts a new meaning or message, differing from the original. Both transformative and derivative works involve changes to the original copyrighted work, but derivative works mostly expand upon the original work in such a way that it is not transformative necessarily. To cite an example, a sequel to a novel will be considered to be a derivative work, however, it might not be transformative until and unless it imparts a new message or a new meaning which is different from the original work."<sup>3</sup> The other legal issue is if we can consider fan fictions under fair use/ fair dealing provisions.

## III. Protection of Fan Fiction in other jurisdictions

### Position in the United Kingdom

In UK, the CDPA 1988 is the legislation dealing with copyright. The question whether fan fiction will be considered infringement or non-infringement has to be judged from the perspective of whether it comes within the 'fair dealing' provisions of UK or whether transformative works are given independent protection in UK.

Coming first to the 'fair dealing' provisions, fair dealing as per the UK legislation includes an enumerated list of what constitutes exception to copyright or fair dealing. Fair dealing as per the UK legislation includes acts of use of copyright works for "making of

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<sup>2</sup> "Copyright Transformative vs Derivative", *available at*: <https://bytescare.com/blog/copyright-transformative-vs-derivative> ((last visited on November 30, 2023).

<sup>3</sup> Jupi Gogoi, "Fair Use Controversy' Revisited: Can Copyright Exist in Works Relating to Mathematics and Science?", *JILI* (2025).

personal copies for private use, research and private study, making temporary copies for transient or incidental uses, making of copies or data analysis for non-commercial research, criticism, review or reporting of live events, caricature, parody or pastiche, various uses of the copyrighted work in educational institutions, library exceptions in certain cases, exceptions in context to artistic works, use by authorized or statutory bodies, certain incidental uses, broadcasting related exceptions, exceptions for disabled persons etc.”<sup>4</sup> Thus, if the fan fiction comes within the category of parody or pastiche, it will come under the fair dealing provision.

The UK legislation does not explicitly include transformative work within its provisions. However, “UK copyright law includes a ‘substantial part’ doctrine, which on some views allows transformative work. UK copyright law restricts acts of copying to the work as a whole or any substantial part of it. Where the subsequent work does not retain a substantial part of the prior work, the secondary work is protected: as long as what has been taken from a prior work has been changed enough so that no ‘substantial part of the plaintiff’s work survives in the defendant’s work’, a defence will stand.”<sup>5</sup>

Moreover, in addition to the lists provided under the Fair Dealing provisions, the UK courts have applied the Fair Use principle to ascertain if certain acts can be exempted from infringement of copyright. Thus, UK “courts are said to examine the ‘object and purpose’ of the use of a work, thus protecting the fair use of a copyright work.”<sup>6</sup> Hence, with the fair use concept being brought in, transformative work may be considered as non-infringement. Thus, if a fan fiction falls within the understanding of transformative work, then it would not be considered infringement.

### **USA Approach to Fan Fictions**

In USA too, fan fiction has to be looked through the lens of originality of transformative work (thus being an independent copyright work) or fair use provisions. Coming to fair use in USA, “originally Fair Use was a common law doctrine but it got a statutory recognition when the U.S. Congress passed the Copyright Act of 1976 and included it in 17 U.S.C § 107.”<sup>7</sup> Under section 107 of the US Copyright Act, “in determining whether the use of a prior work constitutes fair use under copyright, it asks courts to look to four factors: 1) the character of the

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<sup>4</sup> UK Copyright, Designs and Patents Act 1988, Chapter III.

<sup>5</sup> Kim Treiger-Bar-Am, “Copyright, Creativity, and Transformative Use”, *available at*: <https://lawexplores.com/copyright-creativity-and-transformative-use/> (last available at January 31, 2024).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* note 3.

use; 2) the nature of the work; 3) the substantiality of the use; and 4) the market effect of the use.”<sup>8</sup> In a leading case *Campbell v. Acuff-Rose* in USA pertaining to the parody of Roy Orbison's "Oh, Pretty Woman" by 2 Live Crew, the SC “ruled that the law favours transformative use, even if the modified version is commercial. The inquiry pertains to whether the novel work solely supplants the objects of the initial creation or introduces novel elements with a distinct objective or character, thereby modifying the original work with fresh expression, significance, or communication.”<sup>9</sup> The Court in this case analysed the "purpose and character of the use. It acknowledged that parody, which involves the utilisation of the heart of the work may not be detrimental to the defendant, as the art of parody is rooted in the interplay between an established original and its parodic counterpart.”<sup>10</sup> However, the SC recommended that “the courts at the local level should still scrutinise whether the derivative work utilised an excessive amount of the original material beyond what was essential for its intended purpose.”<sup>11</sup>

Also, in America whether fan fictions are infringement or not will be decided based on the other conditions given under section 107. For example, if the nature of the fan fiction is different from the actual one, like in the form of a parody it is easier to determine fair use. Similarly, the question of portion of use and possible effect on market could be other factor to determine fair use.

When we look into the question of whether fan fiction can be given an independent copyright or not, the question of originality plays a crucial part. Since fan fictions are also a type of derivative work, originality always plays an important role when judging derivative works. “Even for derivative works which might infringe other previous copyrighted works, if their original parts could reach the requirement of originality, these parts could be protected as well. For derivative works, if they could show substantial differences while being compared with former works, they could be considered original.”<sup>12</sup> Thus, to gain copyright protection, fan fiction should be transformative enough. It has to have sufficient degree of originality to have a copyright. For “fan writers who want to gain copyright protection, they must add a

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<sup>8</sup> *Supra* note 4.

<sup>9</sup> Saharsh Dubey, “Expounding the Relationship Between Fan-Fiction and Copyright Laws: A Study”, Unpublished LLM Dissertation, NLUJAA.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Chenxuan Li, “Originality to Derivative Works: How to Use “Transformative” Rules to Judge Them”, 12(4) *International Journal of Social Science and Humanity* 303-309 (2022). Also available at: doi: 10.18178/ijssh.2022.12.4.1107 (last visited on January 31, 2024).

considerable degree of creation to their re- creations. In theory, if these new-creating things are not trivial, they could be protected.”<sup>13</sup>

#### **IV. Can Fan Fiction be allowed in India as permissible use of copyrighted works? Issues and Concerns in India**

The Indian Copyright Act lacks specific provision so far as fan fiction is concerned which has resulted in ambiguity. Hence, similar to the other jurisdictions fan fiction has to be looked from the angle of being an independent copyright subject matter in itself or whether copyright is an infringed work or can it come within fair use/ fair dealing doctrine.

##### **Originality concept**

Coming to the first question of being capable of copyright protection, the Indian copyright Act allows literary, dramatic, musical and artistic work to be copyright protected only when it is original. In case of films, it is considered to be a copyright work ‘if a substantial part of the film is not an infringement of the copyright in any other work’ and in case of sound recording, it will be granted copyright protection if the literary, dramatic or musical work based on which the sound recording is created is not infringed. The concept of originality has been interpreted by the Indian judiciary<sup>14</sup> through leading judgment that to be original, it should not be a slavish copy of another or that the work should be substantially different from the existing work. Coming to derivative works, the supreme court in the case of *Eastern Book Company v. D.B. Modak*<sup>15</sup> said that, “the Copyright Act is not concerned with the original idea but with the expression of thought.....Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author.”<sup>16</sup> Thus, in this case, the supreme court said that minimal creativity is too strict a test for copyright protection and mere investment of labour and capital is too less to give copyright protection. Thus, the supreme court applied the skill and judgment test and said that, “the derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Agarwala Publishing House v. Board of High School, Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd.*

<sup>15</sup> 2008 (36) PTC SC

<sup>16</sup> *Id.*, para 38

delivered by the court.”<sup>17</sup>It is this distinguished features and flavour to raw texts that will be given copyright protection.<sup>18</sup>Thus, although unlike America, transformative work is not as such recognised and the judgments only refer to derivative work, it is quite complicated to understand what is the Indian position. Transformative work differs from derivative work as it transforms the work to an extent that it gives a new meaning altogether. Thus, referring to the *Eastern Book Company* case, the portion of the fan fiction that gives a distinguish features and flavour can be given independent copyright. However, the clouds of doubt still remain as *Eastern Book Company* entailed use of judgments of supreme court whereas fan fiction can be based on existing copyright work.

### **Are fan fiction infringed works or can Fan Fiction come under exceptions to Copyright law?**

#### *Infringement of copyright work*

When it comes to infringement of copyright protected work, the utilisation of the ‘lay observer test’ or ‘doctrine of fading in memory’ has been adopted by the Indian Courts as a mechanism to ascertain potential instances of copyright infringement. This assessment is based on the observation of a layman of reasonable intellect and imperfect recollection. This test examines “if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”<sup>19</sup>

#### *Fair dealing/ Fair use of copyright work*

There are certain uses of the copyrighted works which are permitted during the subsistence of the copyright law. Such permitted uses are called fair use in certain regimes and fair dealing in others. Fair use and Fair dealing do not connote the exact same thing. Fair use

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.*, para 42 of judgment, “The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read.....Making paragraphs in a judgment could not be called a mechanical process. It requires careful consideration, discernment and choice and thus it can be called as a work of an author..... The said principle (skill and judgment) would also apply when the editor has put an input whereby different Judges’ opinion has been shown to have been dissenting or partly dissenting or concurring, etc. It also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilize the same.”

<sup>19</sup> *R.G.Anand v. Deluxe Films*

was a concept that was developed in America. Along with certain purposes which are allowed that includes “teaching, scholarship, research, news reporting, comment and criticism”, the American position lists out a four-factor test to determine if a use is a fair use or not. The four-factor test includes: “i. the purpose and character of the use, including whether it's of a commercial nature or for nonprofit educational purposes; ii. the nature of the copyrighted work; iii. the amount of the copyrighted work used in relation to the copyrighted work as a whole, and iv. the effect of the use upon the potential market for or value of the copyrighted work.”<sup>20</sup> The Fair Dealing position which is followed by United Kingdom and India is basically consists of an elaborate list of acts which are permitted. Broadly, in India, the fair dealing provisions which are included in section 52 contains: “Permitted Reproduction;<sup>21</sup> Permitted Publications;<sup>22</sup> Permitted Performance;<sup>23</sup> Exceptions in case of sound recording and films;<sup>24</sup> Library exceptions;<sup>25</sup> Exceptions in case of Artistic work;<sup>26</sup> Architectural work exceptions;<sup>27</sup> Exceptions in case of Computer works;<sup>28</sup> Exceptions for benefit to specially abled persons<sup>29</sup>etc.” Examining the aforementioned grounds given in section 52, it will be very difficult to fit it in any of the grounds. Two of the grounds however are criticism or review<sup>30</sup> of the work but fan fiction cannot be strictly called criticism or review but rather it is an “inspirational” work.

There are many works that are largely influenced or inspired by another work. The later work can be accused of being infringing work. Adaptation rights are given within the bundle of rights to the copyright owner. Thus, to adapt a work, consent of the copyright owner is required. Else, it will be considered to be infringement. However, in many regimes, “transformative works” are allowed and are not considered to be infringement.

Although in India fan fictions are not mentioned but if ‘the fan fiction’ can be considered to be transformative work, it may be permitted. In the Rameshwari photocopy<sup>31</sup>

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<sup>20</sup> 17 U.S. Code § 107.

<sup>21</sup> Indian Copyright Act, 1957, s. 52 (1)(d), (e), (f), (i), (m), (p), (q).

<sup>22</sup> *Id.* at s. 52 (1) (h), (r), (s), (t).

<sup>23</sup> *Id.* at s. 52 (1) (j), (za), (g), (l).

<sup>24</sup> *Id.* at s. 52 (1) (k), (u), (y).

<sup>25</sup> *Id.* at s. 52 (1) (n), (o).

<sup>26</sup> *Id.* at s. 52 (1) (v), (w).

<sup>27</sup> *Id.* at s. 52 (1) (x).

<sup>28</sup> *Id.* at s. 52 (1) (aa), (ab), (ac), (ad), (b), (c).

<sup>29</sup> *Id.* at s. 52 (1) (zb).

<sup>30</sup> *Id.*, s. 51(1)(a)(ii).

<sup>31</sup> RFA(OS) No.81/2016

case, the supreme court said, “It is true that there has to be fairness in every action, and irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use, and especially when a person’s result of labour is being utilized by somebody else, fair use must be read into the statute.”<sup>32</sup> In the instant case relating to the debate of photocopying by students as fair use, the court further said, “A plain reading of clause (i) would show that the legislature has not expressly made fair use a limiting factor while permitting reproduction by a teacher or a pupil during course of instruction. Therefore, the general principle of fair use would be required to be read into the clause and not the four principles<sup>33</sup> on which fair use is determined in jurisdictions abroad and especially in the United States of America.”<sup>34</sup> Thus, fairness of use has been recognised as a ground of permitted act in India although the meaning of fair use is not limited to the four principles of USA.

Thus, if fan fiction although a derivative work is transformed to an extent that it does not normally interfere with the work or is different from the nature of the original work and thus be considered ‘fair, it can be considered to be a non-infringing work.

### **Can fan fiction be called fair dealing in India?**

The legal doctrine of fair-dealing allows for the limited use of copyrighted material for specific purposes such as critique, commentary, research, or educational pursuits. The assessment of fair-use is “contingent upon a multitude of considerations, encompassing, albeit not restricted to, the intention, essence, quantity, and effect on the market of the primary work.”<sup>35</sup> Transformative works refer to a category of artistic creations that involve altering or expanding upon an existing work in order to generate a novel and unique piece of art. as the nature of the work is different.

In the *R.G.Anand v. Deluxe Films*<sup>36</sup> case, it was mentioned by the court that, “a derivative work that is inspired by an original work may be considered fair-dealing if it substantially modifies the original work and presents new perspectives or insights.”<sup>37</sup>In another case *Blackwood v. A.N. Parasuraman*, the Court held that “in order to constitute fair dealing, there must be no intention on the part of the alleged infringer to compete with the copyright

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<sup>32</sup> *Id.*, para 31.

<sup>33</sup> the purpose and character of your use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and, the effect of the use upon the potential market.

<sup>34</sup> *Supra* note 31 at para 31

<sup>35</sup> *Supra* note 9.

<sup>36</sup> AIR 1978 SC 1613

<sup>37</sup> *Ibid.*

holder of the work and to derive profits from such competition. Further, the motive of the alleged infringer in dealing with the work must not be improper.”<sup>38</sup>In another case, *Civic Chandran v. Amminu Amma*,<sup>39</sup> there was a dispute that a particular drama was a copyright infringement of another drama as “substantial portions of the work including a reproduction of the characters” was there in the later drama. The Court in this case after examining the facts and by analysing scene by scene came to the conclusion that the intention behind the second drama was to criticise the first drama and hence declared it to be non-infringing. The Kerala High Court also laid down “a three condition test, referred to as the Substantiality Test, to determine the legality of parodies as follows, i) determine the quantum and value of the matter taken in relation to the comments or criticism; ii) the purpose for which it is taken, and iii) the likelihood of competition between the two works.”<sup>40</sup> Hence as per the High Court “if a work is copied to criticise it, it is not infringement and can be considered to be fair dealing.”<sup>41</sup>In another case<sup>42</sup> pertaining to parody the Patna High Court allowing the parody stated that not allowing it would be a violation of freedom of speech and expression.

A gist of the aforementioned discussions indicates that a transformative work be, be it a parody or a fan fiction would be considered to be fair if it is not in competition with the copyright protected work. If the second work is not a substitutable or competitive work as the nature is different, it can be considered to be a fair use.

## V. Conclusion

Fanfiction is a unique genre of creativity. If the creator of fan fiction utilises the previous work after the copyright has expired then there is no concern so far as infringement of economic rights (copyright) is concerned. During the subsistence of copyright, if permission/ consent is given there is no concern. Concern comes when fan fiction is created during the subsistence of copyright and the permission is not taken.

Creation of a copyrighted work entails hardwork, dedication, creativity, labour and capital. Others cannot be given a ‘piggy back’ ride on the hard work and creativity put in by the original creator. However, saying that, fan fiction is unique. It allows fans to imagine in an entirely different way. With the increase of prevalence of fan fiction, ‘there is a conflict

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<sup>38</sup> AIR 1959 Mad. 410

<sup>39</sup> 1996 PTC 670 (Ker HC)

<sup>40</sup> *Id.* para 9.

<sup>41</sup> *Id.*, para 23.

<sup>42</sup> *Shri Ashwani Dhir v. The State of Bihar*

between fan communities and copyright holders.’ Thus, solving the legal issue becomes crucial.

In the Indian scenario, if we look at independent copyright protection to fan fiction, it is only possible for those fan fiction which are based on non-copyright or copyright expired work and that too only to the portion which adds distinguished features and flavours to the existing work.<sup>43</sup> Further, coming to the question of infringement, making fan fiction without permission of fan fiction would be considered infringement in most cases barring cases which could come within the fair dealing provisions under section 52.

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<sup>43</sup> Refer to Part III of this paper.