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The World of Carry on and Dojinshi: An Analysis in Light of Copyright Issues

by

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ABSTRACT —*Fanfictions are works that are based on existing creative content with modifications and new inputs. There are plenty of such works; for instance, many books are derived from epics such as Mahabharata or Ramayana. Yet, such works do not raise any copyright issues for they are inspired from works in public domain. The legal issues arise when the work in question is based on a work that enjoys copyright protection. This article seeks to examine concerns pertaining to fanfictions that contain a similar plot as a copyrighted work, but are distinct in terms of the characters and the settings by focusing a book titled Carry On. Further, a new perspective on this concept is presented by examination of the dojinshi market. It is concluded that as a major premise, fanfictions that put characters which are sufficiently delineated in different settings are likely to be infringing works; however, the practice of dojinshi acts an exception to this major premise.*

INTRODUCTION

The term fanfiction, which was coined by Lawrence Lessig, can be explained as “any content created using existing creative content.”¹ Works of fanfiction can potentially conflict with one of the exclusive rights held by authors: derivative works. In the United States of America, derivative works are defined as “works based upon one or more pre-existing works, such as 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.”²



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It is not difficult to find works that are based on existing creative content. Various Disney movies, such as *Snow White*, *Cinderella*, *Alice in Wonderland* are based on public domain works of the nineteenth century; it is not difficult to find instances of such works in India as well, the current best-selling books in Indian writing, as reported on Amazon, includes Amish Tripathi's *Sita*, which is a fantasy fiction based on the Hindu epic *Ramayana*.³ Yet, the abovementioned movies or books, though are derivative works, do not raise any copyright issues for they are based on works that are in public domain. The problem arises when a fanfiction is based on original works that enjoy copyright protection.

As the world of fanfiction is vast and the copyright issues it presents are numerous, the main objectives of this article are three-fold: First, to examine a category of fanfiction, where the theme and the storyline of a literary work bears astonishing resemblance to a copyrighted work, but the names of the characters and settings differ. Second, to examine the legality of *dōjinshi* to the extent the works use characters of a copyrighted work, and to probe the bearing a commercial motive of a fanfiction has on the defence of fair use. Lastly, to make suitable suggestions and post analysis of the above factors.

CASE STUDY: DISSECTING THE LEGALITY OF THE NOVEL 'CARRY ON'

Being an avid Harry Potter fan, a book that caught my attention was *Carry On*. This book authored by Rainbow Rowell appears to be the author's take on the Harry Potter series. The story of *Carry On* is described as follows on a popular website:⁴

"CARRY ON is a spin-off with the fantasy characters whom author Rainbow Rowell created for her protagonist Cath to obsess over in Fangirl. An ode to Harry Potter, it's the story of Simon Snow, the most powerful young wizard of his age -- a "Chosen One", prophesied to defeat the mysterious Insidious Humdrum, a force that creates deadspots (places where no one can perform magic) throughout the magical world of the United Kingdom. In addition to having no idea if he will survive his destiny, Simon must deal with his brilliant but worried best friend Penelope; his mostly absentee mentor, the Mage; his overwhelmed girlfriend, Agatha, the prettiest girl at Watford School of Magicks; and his roommate and nemesis, Baz -- who drives him crazy."



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The following are the similarities between Harry Potter and *Carry On*: a wizard who is the "Chosen One" to defeat a powerful and dangerous villain; an opponent with unprecedented magical powers; existence of a prophecy that predicts that neither one can live while the other survives; a brilliant but bossy/troubled/difficult best friend; presence of an object that enables performance of magic; a fantasy based on the world of wizards and an ethereal magic school; existence of a distinct classes in the magical community; and, an elusive godfather/mentor.

It is not difficult to spot these similarities, and thus it is no surprise that the publication of the book was subject to immediate (and mixed) reactions from the Potterverse.⁵ Yet, there are some differences between the two as well, for instance in *Carry On*: one of the main leads is a homosexual; presence of a Draco-like character named Baz, whom the main lead (Simon Snow) is attracted to; the focus of the book is on the relationship shared between Baz and Simon, while romance has a small space in the Harry Potter series; difference in the rules of magic and the magic taught in school, a wand is not the only magic object to perform magic.

In order to determine if *Carry On* violates the copyright enjoyed by J.K. Rowling, it is important to ascertain the protectable elements of a literary work.


Infringement of a derivative right in a literary work

There are different types of fanfiction; while some choose to continue to place the characters of a copyrighted work in different settings than the original literary work, others may choose to provide a sequel or a prequel. The legality of such works is examined in the next section. This section is primarily concerned with the legality of works such as *Carry On*, *Fifty Shades of Grey* (inspired from the Twilight saga) that are clearly based on a concept prevalent in a literary work, but have different characters and settings.

The test of infringement

In a suit for infringement, a plaintiff must prove that he owns the right or rights in issue and that the defendant's conduct infringes one or more of these rights. To prove that the defendant's conduct infringes, the plaintiff must show that: first the defendant has copied from the plaintiff's work, and second) the elements copied amount to improper appropriation. In order to prove the first point, the plaintiff can prove that the defendant had plaintiff's work in mind or had copied it. And to constitute as improper appropriation, it must be proved that the copied elements constitute (a) protectable

subject matter, and (b) that

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audiences will find the copied elements in the defendant's work to be similar to the protectable elements in the plaintiff's work.⁶

This is important because, for works to be “derivative” and thereby violate “exclusive rights” of an author, it should borrow original and expressive content from another work as well as transform, recast and adapt such works without the consent of the author. Thus, in case a work takes inspiration from non-protectable elements of a work, it will not qualify as a derivative work and thus, it will not violate any exclusive rights held by the author.⁷ The protection given to literary works is not a right to use certain words or a right over some ideas alone; rather, it exists in arrangement of words that the author has selected to express his ideas. This is to prevent granting of protection to scenes-a-faire. In cases involving literary works, the courts mainly focus on the improper appropriation of protectable elements test and give lesser weight to the audience test.⁸

Protectable Elements in a Literary Work

In literary works, plot/plot devices, theme, stock characters, and setting constitute the work's non-protectable elements. In *Reyher v. Children's Television Workshop*,⁹ it was held that the defendant's story did not infringe the plaintiff's children's book. Although the two works had the same plot elements, similar titles and scenes a faire, the court found no infringement because the two works differed in setting, mood, detail, characterisation and total feel.¹⁰ Similarly in *Warshawsky v. Carter*,¹¹ in a suit for infringement, the facts of the case were as follows: In both these stories a woman is nominated as a Vice President candidate despite the objections of the party leader; in one, the woman becomes the president after his death and in another after his mental incapacitation; in both, the party leader initially opposes the new president, but gives up later; the plaintiff's president brings a war to an end, while the defendant's makes progress toward the enactment of welfare legislation. Yet, the court dismissed the suit for infringement.

Thus, a parallel can be drawn between these cases and *Carry on*: the works in question contain plot similarities, with like characters and incidents as a prior work. The broad theme is of a young wizard who has to fight a powerful wizard. Further, to illustrate, as stated in a New York Times review of *Carry On*: “It's a powerful, politically minded allegory about sexual, ethnic and class identity - with a heady shot of teenage lust”¹²—that Harry Potter

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touches on similar (and more) conflicts with the help of allegories¹³ is no coincidence. But the fact that the characterisation, emphasis, mood and total feel of *Carry On* is distinct from that of *Harry Potter*— due to the presence of a lot a more romance, focus on homosexual relationships, and portrayal of a sillier version of Harry James Potter (as Simon Show) along with a sexualised version of Draco Malfoy (Baz) — is what works in Rainbow Rowell's favour.

In novels and stories, the author can build on theme, plot, incident and character at length and through a distinctive prose style. Thus, the courts identify protectable expression with stylistic details and excuse a work that is structurally and thematically

similar but lacks similar details.

CASE STUDY II: THE WORLD OF DOJINSHI

Elizabeth Bennet, Sydney Carton, Holden Caulfield, Sherlock Holmes (and I must add: Draupadi, Frodo Baggins, and Atticus Finch) are the first names that appear on a 'most iconic literary characters' Google search.¹⁴ It is often common for a reader to *emphasise* and *relate* to characters, leading to a connection between the reader and the novel.¹⁵ It seems like copyright law recognises the significance held by these characters; let us consider two cases: First, the case *American Visuals Corp v. A. Holland*¹⁶, where it was held that defendant's more polished booklet infringed plaintiff's manuscript booklet because it contained *same characters*, incidents and message. Second in *Detective Comics Inc. v. Bruns Publications Inc.* where a work was said to be infringed when every detail of Superman other than his blue-coloured uniform was copied,¹⁷ but no infringement was found when only the attribute of Superman, namely that of fighting the evil, was copied.¹⁸

Prime facie, there appears to be a higher chance of succeeding in a suit where the *same* characters from a protected work are placed in different settings as opposed to a one involving *alike/similar* characters. However, names of characters do not enjoy copyright protection.¹⁹ This section examines the protection of characters of literary works with the help of *Doujinshi*.



Copyright Protection to Literary Characters

The credit to extend independent copyright protection goes to Justice Hand, for in *Nichols v. Universal Pictures Corp* he offered protection to characters that are distinctively delineated, and stated that "*the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.*"²⁰ This test has been applied subsequently by courts to uphold copyright in literary characters.²¹ Thus, the characters that have received copyright protection have displayed consistent, widely identifiable traits.²²

Paul Goldstein stated that in order to judge if a motion picture infringes derivative rights present in a literary work, it must be seen if the sufficient characterisation and plot present in the literary work is shown in an actor's acting.²³ Similarly, if there is characterisation and plot beyond stock elements such that there is sufficient elaboration, then there can be an infringement even in fanfiction. To illustrate, in a fanfiction based on James and Lily Potter, the characterisation given by Rowling of the two are as follows: Lily is kind, beautiful, intelligent, courageous, and is a muggle-born, while James is a pure blood, rich, sporty, popular youth, and both fight against the dark forces along with their friends. If a fanfiction uses this characterisation to establish a prequel to the Harry Potter series, where the romance between the two is delved into it can constitute as infringement if we apply the test laid down in the *Nichols case*.

However, there might be a contrary finding if we apply the "story being told" test. In *Warner Bros Pictures Inc. v. Columbia Broadcasting System Inc.*, it was held that if "the character is only the chessman in the game of telling the story then he is not within the area of protection afforded by copyright."²⁴ It was observed that copyright would extend to cases where the character really constitutes the story being told.²⁵ If we apply this test, then since James and Lily Potter are secondary characters, they do not constitute the story being told. However, this test has been subsequently rejected.²⁶

Parody as a Fair Use and the Commercial Aspect in a Fair Use

Although the commercial aspect was held to be an essential one,²⁷ a contrary decision has been taken by courts on several occasions.²⁸ In the *'Gone with the Wind'* case, the court granted protection to a work that narrated *Gone with the Wind* from the servant's point of view, on the basis that the secondary use transformed the original novel and provided a critical statement that "seeks to rebut and destroy the perspective, judgments, and mythology" of the original novel."²⁹

Likewise, there have been mixed responses from the courts about the commercial aspect of a secondary work. In a case involving legality of a website named Lexicon, an online Harry Potter encyclopaedia,³⁰ it was held that secondary authors should not be permitted to use the work without paying the customary price "*lest original authors lose incentive to create new works that will also benefit the public interest.*" It was also observed that the website used too much information from the series, through verbatim copying. Post making this observation, the court held that the Lexicon, which was an encyclopaedia of the series, was illegal.

Similarly, JD Salinger sued Fredrik Colting who wrote *60 Years Later - Coming Through The Rye*, inter alia, on the basis that Colting had reproduced Holden Caulfield in an unlicensed work. The court refused to recognise the work as a fair use as it was found to have only a transitive value and to not be a transformative fair use of the work. Also, it was observed that the commercial nature of the work "*cuts against Defendants on the 'purpose and character of the use' factor.*"³¹

Thus, it appears that commercial gain of a secondary work is not deemed to be a principal concern of the court, and the *Catcher in the Rye* and *Lexicon* decisions had more to do with the creative nature of the secondary work.³² Paul Goldstein has opined that "*the principal problem with the commercial-non-commercial distinction, and the reason it should have limited procedural or substantial consequence is that the distinction has little direct bearing on either the benefits or the losses produced by a defendant's use.*"³³ This view

has been shared by the courts³⁴ and by the scholars on the 3-factor test³⁵ given under the Berne Convention, to argue that the "*second step requires to take into account non-economic as well as economic normative considerations.*"³⁶

Dojinshi³⁷ as Fair Use: the Commercial Aspect and is it A Arody?

Shinzo Abe issued a statement in favour of *dojinshi* during the Trans-Pacific Partnership, where he stated that: "*Doujinshi don't compete in the market with the original works and don't damage the original creators' profits, so they are shinkokuzai.*" He further stated *dojinshi* must be treated more like parodies (in a legal sense) and not as pirated works.³⁸

The term *dojinshi* refers to Japanese *manga* written by authors using the well-known characters of another, more famous, author.³⁹ Such works are available at conventions,⁴⁰ chain book stores and the internet and the manga industry. Often, many reasons are offered as to why this practice is tolerated and celebrated in Japan. Cultural reasons (the popular manga comic character Son Goku of the Dragon Ball Z is based on the character

of Monkey King, from Ramayana), source of new talent, mutual benefits to the manga and *dojinshi* markets, and fear of public backlash are often some of the reasons.⁴¹ Often, these works place straight male characters in gay romance. Other *dojinshi* may be prequels, sequels or embellishments on characters from popular *manga* or *anime* series such as *Neon Genesis Evangelion*, *Naruto* or *Trigun*.⁴² With respect to the commercial profits generated by the industry, it is estimated that it incurs \$553 million.⁴³

Dojinshi also raises question on the moral rights held by the author, for it often involves portraying a sexual version of a character. The rights of the author to preserve the 'identity of work' by protecting against distortion of the storyline's development and alteration of the image of the character of the



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hero has been recognised.⁴⁴ If we apply the *Nicholas case*, *dojinshi* that are based on characters that are sufficiently delineated will be held to be infringing derivative works, while the ones based on stock characters will not. This will apply even if there is an inexact copy a character with important identical details.⁴⁵ Further, with respect to *dojinshi* that are infringing in nature, authors are believe that it will not constitute as fair use under the four-factor test for it does not qualify as a 'parody',⁴⁶ despite Shinzo Abe defending it on similar grounds.⁴⁷ However, the author is of the opinion that the *dojinshi* that borrow main characters can be a fair use of the original work if it is, and if it is based on stock characters, the question of infringement does not arise.

Although the Japanese courts have upheld copyright protection to fictional graphic characters,⁴⁸ authors of the original *manga* still hesitate to sue for copyright infringement. Salil Mehra attributes the survival of *dojinshi* to fear of litigation in Japan, due to institutional barriers to litigation and low amounts of damages even in a successful infringement proceeding. Thus, other modes of dispute resolution are preferred.

CONCLUSION

In conclusion, it appears that fanfictions, such as *Carry On*, which share similarities in plot and theme with a copyrighted work are likely to be held as a non-infringing work on application of the total concept and feel test. While, secondary works that put characters in different settings/incidents are likely to fail in infringement proceedings provided the character in question is sufficiently delineated. The peculiar example of *dojinshi*, which can be categorised as a separate niche in itself, is an exception to this premise.

In India, it is uncertain if fanfiction of a literary work will fall as an exclusive right of an author, for though there exists a right to make an adaptation⁴⁹ of a literary work, it is restricted to the conversion of the work into a dramatic work by way of performance in public or otherwise.⁵⁰ Fanfictions that comment on the original work should be protected under the the concept of fair use as parody. However, fanfictions that do not comment on the work or criticise it, but rather use the characters in different situations should not enjoy protection for they will fail to have any creative value which deserves protection. However, the requirement of a work to be 'transformative' differs



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in the context we look at. For the purpose of fair use, the main consideration is whether the work is transformative enough to deserve protection for its creativity; while for the purpose of derivative rights held by an author, the court will be see whether it, *inter*

alia, abridges, condenses, transforms a work.

Coming to fanfictions, and particularly *dojinshis*, the author believes that moral rights is one of the important considerations that should be considered in a suit for infringement, for often fanfictions depict characters in a sexualised setting, for instance: a fanfiction named *Squish* is a saga of sexual torture inflicted on Draco Malfoy by Lucius Malfoy.⁵¹ Having said that, an important take-away from the successful co-existence of the *manga* and *dojinshi* industry is that it questions if more protection really leads to more innovation. A recent development in this regard is the Kindle World, where Amazon Publishing on acquiring licenses to different worlds, publishes “*fan fiction inspired by popular books, shows, movies, comics, music, and games.*”⁵² Interestingly, Amazon on its website has invited persons to submit their *original works* (works of fanfiction) for publications, and authors of fanfiction can earn royalties as well.⁵³ This mechanism bears some strong resemblance to the *dojinshi* system, for it envisages a system where fanfiction co-exists with the copyrighted work and is also welcomed, encouraged, and profitable.

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² The Copyright Act, 1976, s. 101.

³ ‘*Amazon Bestsellers*’ (Amazon) <www.amazon.in/gp/bestsellers/books/1890195031> accessed 15 March 2018.

⁴ Sandie Angulo Chen, ‘*Book Review of Carry On*’ (Common Sense Media) <www.commonsemmedia.org/book-reviews/carry-on> accessed 15 March 2018.

⁵ Natalie Zutter, ‘*Rainbow Rowell's Harry Potter-Inspired Carry On is the Ultimate Fanfiction Remix*’ (Tor.com, 16 November 2016) <www.tor.com/2015/11/16/carry-on-harry-potter-fanfic-remix/> accessed 15 March 2018.

⁶ Paul Goldstein, *Goldstein on Copyright* (3rd edn, Aspen Publishers Online 2005).

⁷ *Mirage Editions Inc. v. Albuquerque ART Co.*, 856 F 2d 1341 (9th Cir 1988).

⁸ Paul Goldstein, *Goldstein on Copyright* (3rd edn, Aspen Publishers Online 2005).

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¹⁰ *Stromback v. New Line Cinema*, 384 F 3d 283, 297 (6th Cir 2004).

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¹³ Anita Singh, ‘*Harry Potter and the Deathly Hallows Part 1: First Review*’ (The Telegraph, 12 April 2018) <www.telegraph.co.uk/culture/harry-potter/8127505/Harry-Potter-and-the-Deathly-Hallows-Part-I-first-review.html> accessed 15 March 2018.

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¹⁶ *American Visuals Corp v. Holland*, 261 F 2d 652, 655 : 199 USPQ 482 (2nd Cir 1958).

¹⁷ *Detective Comics Inc. v. Bruns Publications Inc.*, 111 F 2d 432 : 220 USPQ 101 (2nd Cir 1940).

¹⁸ *Warner Bros v. American Broad Companies*, 720 F 2d 231 : 220 USPQ 101 (2nd Cir 1983).

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- ²¹ *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F Supp 1287 (CD Cal 1995).
- ²² *Rice v. Fox Broadcasting Co.*, 330 F 3d 1170, 1175 (9th Cir 2003).
- ²³ Paul Goldstein, *Goldstein on Copyright* (3rd edn, Aspen Publishers Online 2005).
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- ²⁵ *Ibid.*
- ²⁶ *Columbia Broadcasting System Inc. v. DeCosta*, 377 F 2d 315, 320 (1st Cir 1967).
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⁵⁰ The Copyright Act, 1957, s. 2(a)(ii).

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⁵³ *Ibid.*

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