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Literature's Idea-Expression Distinction: Drawing a Line with Distinctive Elements of Alternate Worlds

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I. INTRODUCTION

One night after finishing his studies, a university student watches the movie *Frozen* and loves it. In fact, he loves it so much that he decides to write stories continuing Anna and Elsa's adventures. In a departure from the plot and setting of the movie, the author sends the sisters on an adventure to a land far removed from Arendelle in order to defeat a dragon. In a departure from the characters, he tweaks the personalities of the two, changes the gender of one, and even removes the relationship of sisterhood. Then, in the final departure, the author changes the name of all involved and begins to sell the story as an independent publication.

This raises a question: did the work, which clearly started as a derivative, ever become a separate, independent work?

Fans of various movies, stories, and television shows have always taken existing material and given them their own creative spin.¹ From artwork to new stories, the traditional one-directional flow of media content from company to consumer is rapidly changing as hundreds of thousands of users produce literally millions of derivative works,² occasionally with great marketability. *Fifty Shades of Grey*, originally a *Twilight* fanfiction known as *Master of the Universe*,³ was published as an independent novel that has sold over 100 million copies worldwide (as the book's cover ensures we remember) and spawned a movie adaptation that grossed over \$560 million worldwide over a \$40 million production budget.⁴ Whatever the book may be called, it is certainly fair to call it a lucrative, commercial success.

One question that does remain, however, is whether *Twilight* author Stephanie Meyer deserves to share in that commercial success. There is definitive evidence that *Fifty* started out as an unauthorized derivative work, and numerous commentaries detail how *Fifty* is "crazy similar" to its source material, even after the revisions. But commentary and opinion aside, what does this mean under copyright law?⁵ Unfortunately, given the ill-defined state of law on infringing literary works, especially in the realm of derivative material, the answer is unclear.

¹ See Ewan Morrison, *In the beginning, there was fanfiction: from the four gospels to Fifty Shades*, THE GUARDIAN (Aug. 13, 2012, 12:34 PM), <http://www.theguardian.com/books/2012/aug/13/fan-fiction-fifty-shades-grey> (explaining how the advent of the novel and cheap printing in the 18th century immediately led to the publication of unauthorized, derivative works).

² As of March, 2011, fanfiction.net, the largest central repository for fanfiction, had over 6.6 million individual titles registered. *Fanfiction Demographics in 2010: Age, Sex, Country*, FAN FICTION STATISTICS – FFN RESEARCH (March 18, 2011), <http://ffnresearch.blogspot.com/>.

³ Jane Litte, *Master of the Universe versus Fifty Shades by E.L. James Comparison*, DEAR AUTHOR, (March 13, 2012), <http://dearauthor.com/features/industry-news/master-of-the-universe-versus-fifty-shades-by-e-l-james-comparison/>.

⁴ BOX OFFICE MOJO: FIFTY SHADES OF GREY, <http://boxofficemojo.com/movies/?id=fiftyshadesofgrey.htm> (last visited April 27, 2015).

⁵ Marah Eakin, *Holy crow! Fifty Shades Of Grey is crazy similar to its Twilight origin story*, A.V. CLUB (Feb. 12, 2015, 3:09 PM), <http://www.avclub.com/article/holy-crow-fifty-shades-grey-crazy-similar-its-twil-215185>.

This paper aims to clarify that divide. In order to provide a useful guideline that incorporates existing copyright law with the logic inherent to literature, I propose that the divide between original and derivative works, and indeed between an original and any potentially infringing work, be determined on whether the subsequent works took literary expression as defined by elements that are distinct to the original author's literary "world". The following sections will outline the current state of law on copyright infringement for literature, elaborate on the proposed rule with example applications of its logic, and finally, conduct an analysis of the various literary elements to determine the relationship of *Twilight* to *Fifty Shades of Grey*.

II. LAW ON DERIVATIVE LITERARY WORKS

A. General Derivative Works Copyright Law

In a broad sense, the Copyright Act of 1976 is clear on the boundaries of derivative works. Defined in 17 U.S.C. § 101, a derivative work is anything “based upon one or more pre-existing works.”⁶ Copyright protection for derivative works means that the owner of the copyright has the exclusive right to prepare derivative works based upon said copyrighted work, subject to various exceptions outlined in § 107-122.⁷ Regarding the work, the Act further specifies that any protected component of the copyrighted work is also protected, meaning that taking even parts of a preexisting work can result in infringement as well.⁸ Finally, the Copyright Act lays out the boundaries of protection for the derivative works by stating that (1.) copyright protection does not extend to any material that has been used unlawfully,⁹ and (2.) the author of a lawful derivative work can gain copyright protection for the derivative work, but only for material contributions, not the preexisting material used that makes the work derivative.¹⁰ In short, derivative work law can be summarized as such:

1. If your work is based upon any part of preexisting material, the work is derivative.
2. If the work was not authorized by the original author, your deriving work is unlawful and thus, you gain no copyright protection for that work.
3. If the work is authorized, you gain protection for your material contributions.

While these are useful rules that any fanfiction author should know, the law is unfortunately silent on the most important part of the analysis: what does it mean for one work to be “based upon” another? If read to its broadest terms of one work being a source of inspiration for another, then:

“There are few, if any, things which, in an abstract sense, are strictly new and original throughout.... Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton [...] would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.”¹¹

This broad reading cannot be what Congress intended in writing the Act, as copyright law is designed to “promote the progress of science and useful arts,”¹² a purpose that would undoubtedly be hindered if the first person to express a broad concept could then preclude any

⁶ 17 U.S.C. § 101 (2010).

⁷ 17 U.S.C. § 106(2) (2010).

⁸ 17 U.S.C. § 3 (2010).

⁹ 17 U.S.C. § 103(a) (2010).

¹⁰ 17 U.S.C. § 103(b) (2010).

¹¹ *Emerson v. Davies*, 8 F Cas. 615, 619 (D. Mass. 1845).

¹² U.S. CONST. art. I, § 8, cl. 8.

other author from using that concept. This brings us to the idea-expression dichotomy, one of copyright's oldest dilemmas. Recognizing the difference between an abstract concept and the concrete way an individual could express that concept, copyright was crafted not with the intent of giving exclusive rights to authors for using an idea, but for how they individually expressed that idea.¹³ Though how much is creative and how much is concept remains unclear, the law developed to say that the more substantially a subsequent work resembles the original, the more likely a court is to find infringement. Thus, the key question still remains on where that line of resemblance should be drawn.¹⁴

B. Problem of the Idea-Expression Dichotomy

In some cases, the distinction is far easier to draw than others. When North American Philips Consumer made its K. C. Munchkin game based on Atari's Pac Man, the court found that they had copied more than just the concept of a "gobbler," but had incorporated "several blatantly similar features, including the relative size and shape of the 'body,' the V-shaped 'mouth,' its distinctive gobbling action (with appropriate sounds), and especially the way in which it disappears upon being captured."¹⁵ The court understood that there are many ways to use the concept of a character who travels around a game level eating objects, but Atari had done so in a particular way, and it was that particular way would be protected. Similarly, the court found no independent expression by Tomy Corp. when it used Durham Industries' Disney toys as the templates for its own toys because there was "no independent creation, no distinguishable variation from preexisting works, nothing recognizably the author's own contribution that sets Tomy's figures apart from the prototypical Mickey, Donald, and Pluto."¹⁶ With characters representing the basic idea, Tomy Corp. had to find some unique way to express those characters, such as a particular pose or facial expression, and the lack of any unique quality lead to a finding of infringement.

However, the issue becomes increasingly difficult to resolve as the taken subject matter becomes less well defined, an issue most clearly seen in the subject of literary works. In the seminal case of Nichols v. Universal Picture Group, Judge Learned Hand compares the original work – a play called *Abie's Irish Rose* – to the subsequent motion picture *The Cohens and The Kellys*. In this comparison, he notes that certain issues of infringement such as taking specific scenes or excerpts of dialogue can be dealt with under a substantiality analysis based upon the doctrine of fair use.¹⁷ However:

“[W]hen the plagiarist does not take out a block in suit, but an abstract of the whole, decision is more troublesome. Upon any work, and especially

¹³ *Mazer v. Stein*, 74 U.S. 201, 217 (1954).

¹⁴ *Caffey v. Cook*, 409 F.2d 484, 496 (S.D.N.Y. 2006).

¹⁵ *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 618 (7th Cir. 1982).

¹⁶ *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2nd Cir. 1980).

¹⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2nd Cir. 1930).

upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [T]here 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. Nobody has ever been able to fix that boundary, and nobody ever can.”¹⁸

The court understood that at various levels of generalities, stories inevitably start to resemble one another and at some point, these similarities reach a level of abstraction where they fall into the category of ideas and are thus no longer protected. To do so would be to invite a monopolization of ideas which would stifle creativity, not promote it. However, where on the spectrum of ideas and expressions this actually occurs has never been properly articulated regarding similar works of literary fiction. Even between independently produced works, the line is vague, and with derivative works like fanfiction that openly take elements of preexisting works while altering many others, the lack of guidance makes the confusion even worse.

C. Existing Law Does Not Help with Literary Works, Especially Derivative Ones

Not to say that courts have neglected to develop the field. In the never ending struggle with this nebulous concept, one standard that has been widely adopted is the total concept and feel test. Introduced in the Roth Greeting Cards case,¹⁹ the standard was adopted for more literary use in Sid & Marty Krofft as a standard that considers all aspects of each work, whether they are protected or not, and asks whether an ordinary person would look at the works and say that they look and feel enough alike to say that the subsequent work misappropriated (aka. violated the copyright) from the original work.²⁰ The test arose from this case when plaintiff H.R. Pufnstuf claimed that a McDonalds advertising campaign had copied from its own copyrighted Saturday morning cartoon. Defendant McDonalds pointed out various differences between the two, such as how the advertisement’s mayor wore a diplomatic sash versus the cartoon mayor’s choice of cummerbund, but the court rejected the argument in favor of finding that “they had captured the ‘total concept and feel’ of the Pufnstuf show.”²¹ What led the court to determine that the concept and feel had been taken, however, remains unclear.

Simply put, the standard is vague and becomes more so when we remember that it was created in a case involving television, a medium with a strong visual element. The importance of visuals cannot be understated in cases on copyright infringement as illustrated by cases Atari, and Durham: both courts spent very little time talking about concepts and feelings in the works and instead, focused largely on the notable visual similarities between original characters and the

¹⁸ *Id.*

¹⁹ Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).

²⁰ Sid & Marty Krofft Television Prods., Inc. v McDonald’s Corp., 562 F.2d 117, 1168 (9th Cir. 1977).

²¹ *Id.* at 1167.

infringing copies.²² In contrast, authors of literary works have no physical representations of characters or scenes, but must instead rely on a description, or “word portrait”²³ to convey suggestions of what the subject looks like. Good writing is descriptive, to be sure, but no matter how skilled the author, the actual image created by the description is as infinitely variable as the number of readers and the number of interpretations each reader comes up with. An argument could be made that the words themselves are what should be considered in literary copyright cases, but this narrow reading reduces protection to exact words selected, a standard easily circumvented by the use of name changing and a good thesaurus. Perhaps it is for this reason that the total concept and feel test seems suitable for literary works since it is a broader and more encompassing rule, but it is actually this breadth that creates the greatest problem.

1. Substantial Similarity is the Key, but It Does Not Fit the Literary Lock

Underlying the total concept and feel is the idea of similarity derived from Nichols.²⁴ In its analysis, the 9th Circuit disregarded specific details about the advertising campaign such as the characters clothing, colors, features, and mannerisms because they did not believe that “the ordinary reasonable person, let alone a child, viewing these works will even notice...”²⁵ However, rather than continuing to elaborate on exactly what it was that the audience would notice, the court decided the matter on a finding that the two works were “substantially similar” without much in the way of explaining what this meant.²⁶ Other courts have tried, but beyond the suggestion that it must be something “beyond the level of generalized ideas or themes,”²⁷ a likewise vague explanation, we are still left without much in the way of actual guidance.

The problem with this standard is that without visual or other sensory elements, the literary work is limited to what is put down in words, and by their very nature, collections of words that form certain stories will *always* be substantially similar. At its very broadest, it is theorized that all stories fall within one of seven basic plotlines that each follows the same overarching meta-plot.²⁸ Within these plotlines, distinctions follow, but still leads to similarities in the formation of genres as writers find that certain literary tones and techniques better portray certain kinds of stories than others. Finally, even the individual components that make up the content of the story can be found as substantially similar since even the characters, perhaps the most important and distinctive part to any story, are also subject to generality.

²² *Atari*, 672 F.2d at 618 & *Durham*, 630 F.2d at 911.

²³ *Silverman v. CBS Inc.*, 870 F.2d 40, 50 (S.D.N.Y. 1986).

²⁴ *Sid*, 562 F.2d at 1163.

²⁵ *Id.* at 1167.

²⁶ *Id.*

²⁷ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 (2nd Cir. 1982).

²⁸ The meta-plot is a list of stages inherent to a plot: an anticipation stage where the story begins, an dream stage where initial success leads to hope for the future, a frustration stage where those hopes are dashed, a nightmare stage around the story’s climax, and the resolution stage, where the ending is reached. See CHRISTOPHER BOOKER, *THE SEVEN BASIC PLOTS: WHY WE TELL STORIES* (Continuum, 2004).

The concept of the archetype, or stock character, was discussed as early as 319 BC when Theophrastus, student of Aristotle, wrote “The Characters” and discussed the thirty prototypical characters one found in the literature of his day.²⁹ Similar concepts are born out in the modern day as Jungian psychology exemplifies the archetype in an even narrower list of twelve distinct personalities with various predictable traits.³⁰ In this light, the character looks much more like an idea, which is why courts have explicitly stated that the “stock figure” was not eligible for copyright protection.³¹ Of course, the argument can always be made that an author can combine different traits to make unique characters,³² but this is precluded by the need for authors to be believable. People behave in predictable ways given their personalities and temperaments, which is exactly why archetypes, literary tropes,³³ and the entire realm of behavioral psychology exists. If authors wishes to make believable characters – and indeed they must, as we will discuss later in the section on internal consistency – they must write in believable ways, and believable characters are in large part predictable as certain traits naturally go hand in hand with others.

From plotlines to genres to archetypal characters, literature is absolutely rife with similarities to the point where it would be harder to prove a story is not similar than is. For example, a comparison of the adventures of Batman and The Punisher, removed from their visual elements and described solely as literary works, reveals many elements that lend to similarities in concept and feel. Both stories center on psychologically troubled masters of martial arts and guerilla warfare who employ wide varieties of weapons in vigilante wars on crime-ridden cities after being inspired by the deaths of loved ones in brutally violent methods. Both publications center their most famous storylines on dark narratives³⁴ to create grim, gritty atmospheres in contrast with many other mainstream heroes.

By these descriptions, The Punisher comics, which were published after Batman,³⁵ could be considered copyright infringement, though actual readers of either comic would say that even without the visual elements, the character storylines and developments are so different as to be incomparable. However, this is where the lack of guidance afforded by the total concept and feel standard, with its reliance on substantial similarity, becomes even more problematic. In saying what is substantially similar, there must be elements of each story an observer considers in reaching a conclusion. However, which ones should be given more weight or less or ignored

²⁹ INTERNET ARCHIVE: FULL TEXT OF “THE CHARACTERS OF THEOPHRASTUS”, http://archive.org/stream/charactersoftheo00theorich/charactersoftheo00_theorich_djvu.txt (last visited April 26, 2015).

³⁰ See J.J. JONAS, THE TWELVE ARCHETYPES (University of Texas at Austin, 2014).

³¹ *Nichols*, 45 F.2d at 122.

³² *Emerson*, 8 F Cas. at 619.

³³ Originally referring to a piece of figurative language, the more recent (and now referenced) definition of tropes refers to recurring literary/rhetorical devices, motifs, and clichés in creative works. J.A. Cuddon & C.E. Preston, *The Penguin Dictionary of Literary Terms and Literary Theory: Trope* 948 (London: Penguin, 4th ed. 2000).

³⁴ Garth Ennis, *The Slavers*, 5 PUNISHER MAX (2006) (giving readers detailed descriptions of sex trafficking and the Punisher’s visceral responses); Jim Starlin & Jim Aparo, *Ten Nights of The Beast*, 417-420 BATMAN (1988) (showing how Batman lures an assassin into an underground room, locks it, and leaves him to die).

³⁵ Bill Finger & Bob Kane, 27 DETECTIVE COMICS (1939); Gerry Conway et. al., 129 THE AMAZING SPIDERMAN (1974).

altogether? Is it significant that The Punisher uses hand held firearms while Batman does not even though both use missiles and other explosives? Is it significant that Batman has sidekicks while The Punisher works alone despite both having outside counsel that help them from time to time? The total concept and feel test provides no guidance on what elements should be considered or how. In fact, subsequent cases have explicitly rejected distinguishing between even protected and unprotected elements so as not to disrupt a factfinder's consideration of the work as a whole.³⁶ Though this can be justified under granting protection to unique combinations of unprotected elements,³⁷ the result is still that a factfinder has the freedom to decide on anything or nothing at all. If a factfinder decided that total concept and feel comparison between Batman and The Punisher hinged on the fact that both characters wear black and have a penchant for scaring people, legal theory would be hard pressed to refute that conclusion, even though it is a conclusion that is equally applicable to *A Nightmare Before Christmas's* Jack Skellington. Though widely used since its conception, the popularity of the total concept and feel test seems to be less about useful analysis and more about its ease of use:

“The task of the fact-finder is simplified because it can examine the work in its entirety, and decide, without much analysis, whether a subsequent author took “the heart” of the original work. There is no need for a careful, refined separation of fact and expression. Moreover, a ‘totality’ approach allows a fact-finder to respond to a visceral feeling that something unfair was done.”³⁸

Whatever the total concept and feel test does with its reliance on substantial similarity, providing meaningful guidance in cases of literary infringement is clearly not one of them.

2. For Derivative Works, the Analysis Completely Falls Apart

Thus far, all of our discussions have been under the assumption that there is some sort of similarity in concept and feel that allows comparison to begin with. The traditional total concept and feel analysis cases can be construed generally as situations where works with broad similarities and minor differences are compared. This is why the McDonalds defendant's focus on minor detail changes still resulted in a loss.³⁹ In contrast, derivative works often destroy this assumption because by and large, fan creations reverse the situation by producing works that are similar on minor details, but vary drastically in the broader sense.

³⁶ *Atari*, 72 F.2d 607 at 617.

³⁷ *Emerson*, 8 F Cas. at 619 (stating that “every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance.”).

³⁸ Elliott M. Abramson, *How Much Copying Under Copyright? Contradictions Paradoxes and Inconsistencies*, 61 *TEMPLE L. REV.* 133, 147 (1988).

³⁹ See *Sid*, 562 F.2d.

By definition, a fanfiction is “fiction about characters or settings from an original work of fiction, created by fans of that work rather than by its creator.”⁴⁰ However, an unspoken key to this definition is the understanding that when a derivative author lifts an element from an existing story, there is absolutely no need to keep the same macro aspects, such as tone and feel, of the original work. In fact, there is a distinct incentive not to; the freedom to take beloved characters and places to spin completely different scenarios one would never see produced by original authors is a large part of the appeal in creating derivative works. This means that the total concept and feel is precisely what is changed, which is how one can find Disney Princesses cast as survivors of a post-apocalyptic zombie wasteland⁴¹ while grizzled military veterans are introduced to the saccharine-sweet atmosphere of a children’s cartoon centered on colorful, pastel ponies.⁴² This of course is wonderful for increasing creativity, but the legal analysis in such situations becomes nearly impossible under the total concept and feel test because derivative works such as these would be exactly what courts set out to protect: works of very different macro issues with differences in the details.

Of course, such a conclusion would neglect existing law that recognizes protection for individual elements of the story, the most notable of which is the story’s characters. Courts have understood that fictional characters have incredible value and should be protected in accordance with the purpose of copyrights.⁴³ Thus, courts have attempted to find various ways of qualifying what a character is and how far protection should extend. The *Nichols* court recognized that characters should be protected separate from the plot, but would only extend such protection to “sufficiently delineated” characters: “the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”⁴⁴ Later cases then introduced a comparative element in stating that only characters that were substantially similar would gain copyright protection.

The result of these was a sort of two prong test for character comparison. In the first prong, the original character is examined to see whether it is suitable for copyright protection.⁴⁵ If the character is well defined, then the question becomes whether the second character has taken anything beyond the abstract.⁴⁶ Here, courts have differentiated “stirring one’s memory,” or what may more generally be described as resembling a character, to the substantially similar

⁴⁰ FAN FICTION, http://en.wikipedia.org/wiki/Fan_fiction (last visited April 27, 2015).

⁴¹ John Farrier, *The Walking Disney: Princesses and Princes in a Post-Apocalyptic World*, NEATORAMA (March 24, 2014, 4:00 PM), <http://www.neatorama.com/2014/03/24/The-Walking-Disney-Princesses-and-Princes-in-a-Post-Apocalyptic-World/>.

⁴² GentlemanJ, *When the Man Comes Around*, FIMFICTION (July 4, 2012), <http://www.fimfiction.net/story/11813/when-the-man-comes-around>.

A. ⁴³ *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982).

⁴⁴ *Nichols*, 45 F.2d at 121.

⁴⁵ MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.12 (1999). See also *Rice v. Fox Broad. Co.*, 148 F.2d 1029, 1056 (C.D. Cal. 2001) (finding that a magician wearing a mask and revealing how tricks were performed was not a sufficiently delineated character because costumes and settings were generic).

⁴⁶ *Nimmer*.

requirement that must be reached in order to find infringement.⁴⁷ Note, however, that while “sufficiently delineated” and “substantially similar” have been set as the rules, cases still provide no guidance to lower courts or to authors on when either of these criteria is met, creating a test just as nebulous as the total concept and feel standard. After all, one can hardly clarify substantial similarity if the clarification uses the exact same words.

Furthermore, the combination of these rules actually creates a paradox where an author is incentivized against developing his or her characters to the fullest. On the first prong, the author is called to sufficiently delineate, which can be interpreted as creating a completely unique character or, more easily, creating a unique, original combination of already existing concepts.⁴⁸ On the second prong, however, the author is also called to make the character as indistinct as possible in order to make the substantially similar comparison to other characters easier to reach. If an author makes a truly original and distinctive character where every feature is integral to the character’s persona, then changing even small aspects of the character removes the protection of the character and undermines the value of the author’s work. In this sense, the two rules work against each other and push all authors towards a middle ground: add just enough features to ensure that characters are more than an abstract, but not so much as to make differentiation easy. By incentivizing authors to head toward this middle ground, the current law actually reduces the amount of creativity as only characters that straddle this line will have full copyright protection, if they even get it at all.

Remember that in the world of literature where characters are only defined by word portrait, reaching any sort of substantial differentiation can be difficult, if not outright impossible. Courts do recognize that there must be protection beyond simply copying the text as plagiarists could avoid liability with immaterial variations.⁴⁹ Once more, the question of what is significant enough to cross this threshold remains unanswered and becomes incredibly murky in light of the importance of even a single word. For example, if an original character is described as a “beautiful young woman,” would describing another character as a “handsome girl” be an immaterial change or significant? Though the two adjectives are synonymous with each other,⁵⁰ beautiful is defined as “having pleasure producing qualities”⁵¹ while handsome has a connotation of “imposing appearance suggestive of health and strength.”⁵² Similarly, the nouns they describe are likewise synonymous,⁵³ yet can draw to mind significantly different age ranges for pronouncedly different effects. The fact is that a change can be immaterial or significant depending on how one interprets each written word, and this lack of easy-to-find consensus is why “[m]ore than one commentator has noted the irony that literary characters, often considered

⁴⁷ Warner Bros., Inc. v. American Broadcasting Cos. Inc., 720 F.2d 231, 242 (2d Cir. 1983).

⁴⁸ *Emerson*, 8 F Cas. at 619

⁴⁹ Michael Todd Helfand, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 Stan. L. Rev. 623, 632 (1992).

⁵⁰ THESAURUS.COM: BEAUTIFUL, <http://www.thesaurus.com/browse/beautiful?s=t> (last visited April 27, 2015).

⁵¹ DICTIONARY.COM: BEAUTIFUL, <http://dictionary.reference.com/browse/beautiful?s=t> (last visited April 27, 2015).

⁵² DICTIONARY.COM: HANDSOME, <http://dictionary.reference.com/browse/handsome?s=t> (last visited April 27, 2015).

⁵³ *Supra* note 50.

creatively and intellectually superior to ‘mere cartoons,’ have less protection.”⁵⁴ Add on the fact that removing a character from its original context for the sake of a derivative work can alter much of what makes the character distinct, and the analysis completely falls apart.

D. Conclusion

In its current state, copyright law has its goals clearly laid out. Regarding works of fiction, the courts aim to keep the ideas intrinsic to storytelling free for all to use while protecting an author’s works when those ideas find a unique form of expression. The problem is in demarcating that line, and though courts have spoken on the subject numerous times with various interpretations of the standard, these interpretations have yet to provide clear guidance to the governed parties on where the line is drawn. The following section of this paper aims to add clarity to this question by proposing a new standard: instead of comparing stories as vague, indistinct masses, we should instead focus on the elements of the story that are distinct to that story’s world as created by the author.

⁵⁴ Helfand at 631.

III. COPYRIGHT FOR LITERATURE: STORIES ARE ALTERNATE WORLDS

At this point, I would like to depart from the world of case law and statutes in order to consider this issue from a literary perspective. While copyright law is designed for uniform application over various industries and subject matters, we have already seen how certain forms of expression require more nuanced discussion than others, and literature is an area where this nuance is sorely needed. The following sections will explain how fictional literature generally functions, how various limitations on writing define the idea-expression dichotomy, and how understanding this function can aid in legal analysis.

A. The Concept of Worldbuilding and Internal Consistency

As stated in the introduction, the proposal of this paper is to consider the elements supposedly taken from an original work – a character, a setting, a scene, or so on – not as an indistinct mass to be considered in totality, but as components crafted by the author’s independent expression to serve as the building blocks of a cohesive world. From there, infringement would only apply if what is allegedly taken is distinct enough to the original author’s literary world that it could be specifically identified as an element of said world. The key to this rule then becomes understanding the concept of worldbuilding.

Originally used in the context of science fiction, the term worldbuilding applies to all fictional work as “the process of constructing an imaginary world, sometimes associated with a whole fictional universe.”⁵⁵ While this is more literally applicable to topics like geography, ecology, and history, the concept is exactly what authors do with their writing. Worldbuilding is a cornerstone of what many would consider “good writing” because it is necessary for an interesting story:

“At its core, a good realistic fiction novel is about people, their problems, and their challenges. The characters in the novel should be believable and their language and actions should be appropriate for the setting of the story and reflective of the culture and social class in which they live.”⁵⁶

Though this passage was written specifically regarding the genre of realistic fiction, the importance of believability and appropriateness spans all genres because these are required for the suspension of disbelief. Coined by Samuel Taylor Coleridge in 1817, the idea was that with sufficient believability, a reader could suspend judgment on a story’s implausible elements and thereby more fully engage with the story.⁵⁷ This idea of “poetic faith”⁵⁸ was later refined by

⁵⁵ WIKIPEDIA: WORLDBUILDING, <http://en.wikipedia.org/wiki/Worldbuilding> (last visited April 27, 2015); See JOHN HAMILTON, *YOU WRITE IT: SCIENCE FICTION 8-9* (ABDO Publishing, 2009).

⁵⁶ K. Bucher & L. Manning, *Characteristics of Good Realistic Fiction*, EDUCATION.COM (April 30, 2014), <http://www.education.com/reference/article/characteristics-good-realistic-fiction/>.

⁵⁷ SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA* 145 (Wipf and Stock Publishers, 2005).

J.R.R. Tolkien, author of the favorite book of the last millennium,⁵⁹ in his essay “On Fairy-Stories.” Instead of believability with reality, Tolkien espoused the concept of secondary belief, where the reader needed to be able to believe in the secondary reality of the fictional world and that this sort of belief required, above all, internal consistency.⁶⁰

When a reader can believe in what they are reading, characters become real enough to the audience so as to incite empathy.⁶¹ From here, the author can use that connection in order to trigger the desired emotions in the audience: sadness at a tragedy, rage at an injustice, joy in a happy ending, and so on. However, in order to do so, the author must write well. If we suppose that authors aim to write in a way as to get emotional reactions from their readers, then it becomes imperative that characters, events, and even the rules and logics of the story being written, remain consistent and believable.⁶²

This is why worldbuilding is so important to writing. It is through this internal consistency that readers can engage with a story, and it is through that engagement that genuine responses may come and emotions arise from the experience.⁶³ To do this, they must establish the personas of various characters and have them act according to those personas throughout the stories. They must establish the laws of their world and say what can or cannot be done. This way, when the hero encounters an obstacle, the struggle is real enough to the reader that the method of overcoming the obstacle becomes a “eureka” moment rather than a point of confusion.⁶⁴ For example, though the books are not yet considered classics, the death of Albus Dumbledore in Harry Potter series is considered by some to be one of the top ten most dramatic deaths in literature alongside other famed characters such as Anna Karenina of titular novel and Catherine Earnshaw of *Wuthering Heights*.⁶⁵ This success came about because J.K. Rowling spent years establishing Dumbledore as a kind, wise mentor that many readers personally connected with. At the same time, she established that even though the world of Harry Potter contained magic and fantasy, death was still an absolute.⁶⁶ Thus, when Dumbledore died not at the hands of his arch nemesis Voldemort, but Severus Snape, the man Dumbledore had expressed unwavering faith in for so many years, it hurt. It was a moment of personal loss and betrayal that carried weight because even in a world of magic, an event like this could not be

⁵⁸ *Id.*

⁵⁹ Andrew O’Hehir, *The book of the century*, SALON (June 4, 2001, 7:29 PM), http://www.salon.com/2001/06/04/tolkien_3/.

⁶⁰ J.R.R. TOLKIEN, *ON FAIRY STORIES* 12 (HarperCollins, 2008).

⁶¹ Mary Jacobsen, *Looking for Literary Space: The Willing Suspension of Disbelief Re-Visited*, 16(1) RESEARCH IN THE TEACHING OF ENGLISH, 21, 22-23 (1982).

⁶² L.G. Estrella, *The Importance of Internal Consistency*, FOR THE LOVE OF WRITING (January 21, 2015), <https://lgestrella.wordpress.com/2015/01/21/the-importance-of-internal-consistency/>.

⁶³ Eva Shaper, *Fiction and the Suspension of Disbelief*, 18(1) THE BRITISH JOURNAL OF AESTHETICS 31, 35 (1978).

⁶⁴ Estrella.

⁶⁵ Rachel Thompson, *The 10 most dramatic deaths in fiction*, THE TELEGRAPH (Oct. 19, 2013, 7:00 AM), <http://www.telegraph.co.uk/culture/books/booknews/10389476/The-10-most-dramatic-deaths-in-fiction.html>.

⁶⁶ J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* 710-711 (Bloomsbury, 2014).

reversed. Putting words on paper is simple, but it is only when an author's fictional world creates personal, unbroken connections with its readers that a story really comes together.

B. Making World Elements the Legal Standard and Its Benefits

If worldbuilding can be understood as an important core concept of literature, then the issue becomes how to translate this concept into a relevant legal standard. Indeed, it seems most effective to set this concept as the dividing line between expression and idea. As stated before, worldbuilding is something that an author must *do*. In order for the world to take shape, the author must write the world into being since beyond the words used to establish the world's canon, nothing exists. In this sense, the author engages in the process of making known her thoughts or feelings, which is the literal definition of expression.⁶⁷ If we then take it that the author's thoughts and feelings are the sort of expression that copyright aims to protect, we have a relatively straightforward definition of what to protect.

On the converse, we have to ask what constitutes ideas and should not be protected. For this, we rely on comparisons of one author's world versus another. To this end, think of each author's writings as a parallel universe, where there can be many similarities, but each universe is distinct from the other and has no interaction with anything but itself. For example, take various fictional New York Cities. According to authors Peter Laird and Kevin Eastman, New York City has a sewer system inhabited by anthropomorphic reptile ninjitsu masters with a penchant for Italian food and Renaissance naming structures.⁶⁸ According to authors Stan Lee and Steve Ditko, New York City has an arachnid-based adolescent swinging between skyscrapers in never ending battles with arch villains and angst.⁶⁹ Both worlds are set in New York City and thus share many substantial similarities, but they are also completely distinct from one another. Spiderman does not exist in the Ninja Turtle's world, nor do the Ninja Turtles inhabit Spiderman's. Though they inhabit the exact same city, they will never meet because they exist in alternate literary realities.

From this comparison, we can begin to see the distinction between idea and expression. New York City is an idea, fact, or concept, something that is free to use for all, which is why it can be linked to so many stories and yet defines none of them. The respective casts, however, are expressions because each exists only when a particular author wrote them into being. The key distinction between two works thus hinges not on the amount of similarity that exists, but on the unique elements crafted by different authors to make their worlds distinct.

⁶⁷ GOOGLE: EXPRESSION, https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1CHFX_enJP589JP589&ion=1&espv=2&ie=UTF-8#q=expression (last visited April 27, 2015).

⁶⁸ KEVIN EASTERMAN & PETER LAIRD, *TEENAGE MUTANT NINJA TURTLES #1* (Mirage Studios, 1984).

⁶⁹ STAN LEE & STEVE DITKO, *Amazing Fantasy #15* (Marvel Comics, 1962).

C. Example Application of the Rule with Familiar Works

In order to further clarify this standard, let us turn once more to the Harry Potter universe for more examples of this standard in action. As we all know, Harry Potter is a novel turned movie series that takes place in modern day Great Britain and features a set of characters who engage in the practice of magic. Now while each of these elements is definitely part of the Harry Potter universe, not all of them directly identify this universe as the source. Once more, the real setting of modern day Great Britain cannot be tied directly to Harry Potter since it can just as easily be tied to BBC's Sherlock Holmes, Doctor Who, or any number of other fictional worlds. The fictional Hogwarts castle, however, with its ghost-haunted hallways, living paintings, moving stairs, and enchanted rooms, only exists in the Harry Potter universe's Great Britain because without the author's writings, it would not exist. By sufficiently developing the castle through her writings, J.K. Rowling has successfully created a world element identifiable to her universe and should, under copyright law, be able to exclude others from unauthorized use of that particular castle.

Now, Hogwarts castle may be protected, but magical castles in general are not, and the question then becomes where this distinction lies. Protection cannot lie solely in the name, of course, as allowing an unscrupulous individual to free ride on J.K. Rowling's hard work by calling a new setting Bogwarts would be uncommonly silly. Though the world element standard is not definite since reasonable minds can always disagree on degrees of similarity, it still provides some guidance in cases like this by only holding the subsequent author liable if another castle could be pointed as one taken specifically from the Harry Potter universe. After all, Hogwarts is not just a magical castle, but the *specific* castle that the individuals Harry, Ron, and Hermione had their adventures in through the course of the author's writing. Whether or not this identification occurs depends largely, if not entirely, on the subsequent author's creativity.

Stating that the issue depends on author creativity may seem like yet another undefined standard, but it is left so for a reason. By remaining flexible, authors actually benefit because they have more freedom in how they choose to differentiate their works. As a simple method, an author could add or remove details to create distinction. A central courtyard and other architectural variations to the castle that do not appear at Hogwarts would help in distinguishing other castles, as would subtracting distinctive features like the squid and mermaid filled lake. More creative authors could even use the exact same elements of Hogwarts castle, but in a unique manner for distinction as well. Hogwarts is known for its living paintings and wandering ghosts (each concepts in themselves), but the atmosphere is friendly and safe. If another author reinterpreted the living paintings as enchanted prisons for unwilling hosts and the ghosts as malevolent spectres to be avoided at all costs, similarity to Hogwarts is substantially diminished by changing the atmosphere of shared elements. Of course, readers will always be able to draw connections between the two, and in abstract, those similarities will always exist. Remember, though, that the issue is not how similar they are, but rather if any element of the new world can be traced to another one. This new castle may remind readers of Hogwarts, but unless that

similarity rises to the point where readers start to expect Professor McGonagle to round the corner at any moment, the two remain separate.

At this point, the question may arise on how this scenario is different from the total concept and feel test as the major change here seems to be a transition of open and friendly feelings to completely hostile ones. While this change did occur, the key distinction is that it is not a defining change that must occur, but merely one option that may occur. The problem with the undefined concept and feel test is its under inclusiveness, especially for derivative works as an author could change the total concept and feel yet still be stealing a world element. For example, the same hostility of the ghosts could be created if a derivative author wrote stories twenty years in a dystopian future where wizards were being hunted by Muggles and dark magic had corrupted the once happy halls and twisted them into something macabre. The themes, concepts, and overall atmosphere may be completely different from the Harry Potter novels (e.g. survival of the fittest as opposed to good versus evil), but there is no question that such a work is derivative despite the difference in concept and feel. Thus, it would still be unfair for another author to write such a story and thereby free ride on the world J.K. Rowling put into creating the original world.

Finally, I would like to address a more esoteric, but equally important element that can serve to distinguish worlds: the rules. In the Harry Potter world, magic is central to many aspects of the story, and while the general concept of magic cannot be protected, various ‘laws’ – both physical and legal – that are specific to that universe are. In Harry Potter, magic must be cast through a wand, and wands must be constructed from a specified list of woods and magical cores by certain specific persons, the most famous of which is Mr. Ollivanders. The actual use of such magic is governed by the Ministry of Magic, a British organization which enforces its laws through the Auror police force. Except for incredibly dire circumstances, the Aurors rely on non-lethal spells to incapacitate the offending dark wizard and bring them in for trial. Punishment, which takes place in the court of law, is by some standards humane: even the greatest taboo of killing someone with Avada Kevadra, one of the three unforgivable curses, only results in a lifetime prison sentence, albeit with dementors as the guards.

In comparison, Tim Butcher’s universe encompassed by the *Dresden Files* shares many similarities: magic exists, must be conducted through special items, is regulated by an overseeing body, and enforced by a special organization. However, the actual application of these shared and substantially similar concepts create completely different worlds. Titular character Harry Dresden relies on tools to cast his magic, but not wands. His weapons of choice are a selection of often personally crafted items, such as a rune-carved staff, an enchanted duster coat, a shield bracelet, and even the occasional revolver or shotgun (tools that exist as facts in the Harry Potter universe, yet never referenced, let alone used, except with condescension). Furthermore, the Dresden universe’s nation-spanning White Counsel is far less forgiving than the Ministry of

Magic, as it arms its enforcing branch of Wardens with sword, magic and the authority to enact capital punishment for various violations with no need for trial.⁷⁰

The purpose of these comparisons is to show that even within a shared concept, there is significant room for variation, and it is the unauthorized taking of another author's particular variations that creates the issue. An author can readily talk about wizard wands, but not with parameters like it being a thirteen inch hickory wand with a core of unicorn hair: the former is a general concept, but the second is a specific methodology created by J.K. Rowling and iconic to her universe of writing. Similarly, the concept of a governing body to regulate the use of magic is general, but lifetime imprisonment with soul-sucking guards for violating a killing spell, a torture spell, and a mind control spell would not be: the former is once again, a concept, while the second is a unique combination of factors created by J.K. Rowling in her writings. The key distinction remains identity: other authors like Tim Butcher are free to use the broad concepts in their own writings. When successful, completely separate worlds like the Dresden universe are formed with its own dynamic set of rules applied out with new characters and new settings. Many of the elements are the same, but the key is not looking for similarities in broad concepts, or even in narrow concepts. Instead, the focus should be what specific authors have done to make that concept distinct to their own particular universe.

D. Benefits of Adopting the World Element Analysis

Adopting this rule has numerous benefits, namely how it broadly applies a useful distinction between ideas and expressions, removes conflicting incentives, covers issues that did not fit in the traditional analysis, and perhaps most importantly, can be adopted under existing case law.

1. Broadly Applicable, Useful Distinction

The first major benefit of the world element analysis is how it makes a usable distinction between ideas and expressions regarding fictional works, whether it be literary or otherwise. Ideas are the general concepts that exist in any and all stories, meaning that they cannot be attributed to any particular author. Expressions, however, are elements of a story – the characters, settings, rules inherent to the world, specific interactions that constitute a scene, etc. – that are can be distinctly attributed to a specific fictional word. While mediums with visual elements such as motion pictures will have a simpler time with this rule, literary works are not precluded from consideration. Since a literary world only exists so far as the author writes it, distinctive world elements naturally lend themselves to distinction as the expressive components the Copyright Act aims to protect.

⁷⁰ It is only through the intervention of Ebenezer McCoy that Harry Dresden avoided execution. Instead, both were put under the Doom of Damocles, a rule stating that if Dresden ever violated another Rule of Magic, both he and McCoy would be executed. JIM BUTCHER, *BLOOD RIGHTS*, Chapter 25 (Roc Paperback, 2004).

In a way, this distinction is exactly like Trademarks law, only that instead of having the trademark used to distinguish between manufacturers (i.e. the authors),⁷¹ each world element considered would have to identify the fictional world it came from, which removes the issue of attribution should rights be transferred. Thus, the key in any infringement case here on out would be to ask if the allegedly taken items could be definitely tied back to a preexisting world, regardless of what medium it embodies.

2. No More Conflicting Incentives

The second major benefit of the world element analysis is that it avoids the incentive paradox created by the current two step analysis. While the previous “substantially similar” consideration motivates authors to find a balance between distinction and broad relatability for maximum coverage, the world element analysis simply motivates authors to write more. A more expansive the world with deeper lore, a greater cast of developed characters, and more adventures gone on mean that there are that many more world elements that could distinguish the author’s world and thus, more items that would receive copyright protection. In line with the original intellectual property mandate,⁷² authors are incentivized to do more with their world by giving them protection for every distinctive piece of that world they create.

3. Covers Troublesome Topics Under Traditional Law

The third advantage of this system is the broad definition of a world element. Since an element can count anything that uniquely identifies a specific fictional world as qualified for protection, this rule avoids the need for legal rationalizing and rhetorical gymnastics. Case in point, DC Comics v. Towle saw a federal court find copyright infringement when Gotham Garage produced a car based on the Batmobile. While the court proceeded to do a standard analysis of the physical similarities, the opinion took a strange turn as it attempted to define the Batmobile, a nonsentient piece of mechanical equipment, as a character:

“Other than its physical features, the Batmobile is depicted as being swift, cunning, strong and elusive. For example, in the comic book *Batman # 5*, the Batmobile “leaps away and tears up the street like a cyclone[,]”[...and] is analogized to an “impatient steed straining at the reigns,” shivering “as its supercharged motor throbs with energy ... and an instant later it tears after the fleeing hoodlums.” *Id.* at 76.[...] The comic books portray the Batmobile as a superhero. The Batmobile is central to Batman's ability to fight crime and appears as Batman's sidekick, if not an extension of Batman's own persona.”⁷³

⁷¹ 15 U.S.C. § 1127 (2014).

⁷² U.S. CONST. art. I, § 8, cl. 8.

⁷³ DC Comics v. Towle, 989 F.2d 948, 967.

Besides the major issue of defining the character in broad and generic terms that bear far stronger resemblance to ideas than expressions, the case struggles to qualify an object as a character when it does not fit the definition. The world element analysis, however, avoids this need to shoehorn items under any specific definition because the only critical point is tracing the component in question back to a preexisting world. Given that the Batmobile has been given numerous appearances over the course of several years,⁷⁴ the car would easily be seen as tying back to the world of Batman, and thus, the taking would qualify as an infringement.

4. Adoptable Under Existing Case Law

Finally, the benefit of this standard is that even though it is proposed in consolidated form for the first time, the idea itself is actually in line with an unspoken intuition that various courts have already touched upon. In the comparison of Superman to Ralph Hinkley, *The Greatest American Hero*, the court discussed in dicta the very concept embodied in the world element genre in a hypothetical situation:

“If a second comer endowed his character with Superman's general appearance, demeanor, and skills, but portrayed him in the service of the underworld, a jury would have to make the factual determination whether the second character was Superman gone astray or a new addition to the superhero genre.”⁷⁵

Intuitively, the court was considering separate fictional worlds in asking whether this new hero was Superman, an element of an already existing world and now being passed off under a different name, or whether a separate fictional world had been created and populated with its own cast of characters. The line between the two was likewise discussed in the case of *Hopalong Cassidy*, where the case hinged on whether the character in a motion picture based on books “appear[ed] to the ordinary observer to be substantially similar to, *and to be taken from*, the Hopalong Cassidy Books.”⁷⁶ Though the court did not fully articulate the idea, it hit upon the core of the world element analysis in asking whether something was created in a new world, or simply taken from another.

Whether something was created or taken depends on the issue of distinctiveness, and once more, existing case law supports the use of this concept. In *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, the court was tasked with determining whether Tarzan as a character deserved

⁷⁴ PHIL JIMENEZ & DOUGLASS ALASTAIR, *THE DC COMICS ENCYCLOPEDIA: BATMOBILE* 34–35 (London: Dorling Kindersley, 2008).

B. ⁷⁵ *Warner Bros. Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 243 (S.D.N.Y. 1983).

⁷⁶ *Filmvideo Releasing Corp. v. Hastings* 509 F. Supp. 60, 64 (S.D.N.Y. 1981) (emphasis added).

copyright protection.⁷⁷ The court decided that Tarzan was independently protected, but the key to this case is not in the conclusion, but the logic that underlies the conclusion:

“Tarzan is *the* ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He *is* Tarzan.”⁷⁸

Note that the court used the article “the,” “which has a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article ‘a’ or ‘an.’”⁷⁹ Furthermore, the court went so far as to use a reflexive statement to define the character according to itself rather than relying on any outside descriptions or external references. While this may not be the most enlightening as a structure for future analysis, the court’s intuition is incredibly informative. Something about the character Tarzan was set apart from the general concepts and ideas used to describe him. Through the stories that established his character, he took on a persona separate from those like him, and thus, attained distinctiveness. It is this distinctiveness, the defining aspect of the world element analysis, that decided this case.

But what about the substantial similarity requirement under the total concept and feel standard? In a simple reading, the fact that one test focuses on overlap while another test focuses on distinctiveness seems to make the two irreconcilable. But what if, instead of being opposites, one was merely a more focused analysis of the other? In the total concept and feel cases, the intuition of the court was that something had been unfairly taken from the original author, though they could not say what.⁸⁰ If we read these cases as holding that the courts had sensed a taking of some distinctive element that the Pufnstuf cartoon had created, then indeed, the total concept and feel standard is precisely in line with the world standard. Thus, rather than reading them in conflict, a court could read that a substantial similarity analysis may be applied to a work as a whole or it may be narrowed down and focused on individual, distinctive elements. Thus, rather than saying the two contradict, we can use this theory to target the old and say that when something is substantially similar to a distinctive element of the original author’s work, thereby taking the total concept and feel of that specific element, then misappropriation has occurred in violation of copyright law.

E. Conclusion

There are definite benefits to using the world element analysis for copyright protection: it follows the inherent motivations of authors, provides a helpful distinction between ideas and expressions, and avoids a variety of other issues tying to questions of copyright protection. While

⁷⁷ *Burroughs v. Metro-Goldwyn-Mayer, Inc.* 519 F. Supp 388, 391 (S.D.N.Y. 1981).

⁷⁸ *Id.*

⁷⁹ DICTIONARY.COM: THE, <http://dictionary.reference.com/browse/the> (last visited April 27, 2015).

⁸⁰ *Supra* note 21.

not a completely full-proof standard, the world element analysis provides a definite goal that incentives creativity and quality writing while still safeguarding against unauthorized use.

IV.FIFTY SHADES OF GREY – A DISTINCTLY DIFFERENT WORLD

Now that we have established the parameters of the world element standard, the following section will run through a comparison of *Twilight* and *Fifty Shades of Grey* along the five main elements of a story: the characters, where we will spend most of our discussion, setting, plot and conflict, and theme.⁸¹ Through this comparison, it should become clear that *Fifty* is in fact a completely independent work and not a derivative or copy of *Twilight*.

A. Characters

Though given the most discussion in the context of copyright law, characters are one of the most difficult, if not outright impossible parts of a fictional world to protect because of the issue of substantial similarity (as stated before). Repeatedly cited as the standard in numerous cases,⁸² the issue with characters is that they will inevitably meet this requirement due to the existence of the archetype.

In the case of *Twilight* and *Fifty*, the male protagonists Edward Cullen and Christian Grey do share many similarities. Both are described as incredibly attractive, specifically with copper/bronze hues to their hair, inordinately wealthy, play the piano with incredible proficiency, enjoy baseball, lavish outlandishly overt compliments on their respective “love interests,” have dark and troubled pasts, end up being adopted into amazing families and consider themselves to be monsters (literally and figuratively, respectively), though such self-directed revulsion seems to not apply to their unrepentant penchant for stalking, nor their strange domineering insistence that their “love” interests eat.⁸³

And yet, despite these and more similarities, it is important to note that many of these similarities stem from their roles as “Byronic heroes.” A specific variant of the Romantic hero archetype, Byronic heroes are described as “[men] proud, moody, cynical, with defiance on his brow, and misery in his heart, a scorner of his kind, implacable in revenge, yet capable of deep and strong affection.”⁸⁴ The dark and tragic elements such as their pasts are important not only because they set the man apart from normal society and thereby increase worth through exclusivity, it also add depth to avoid an overly simplistic and boring character. Though more will be said on the reason for selecting such a character, at this point, it is sufficient to say that the similarities between Cullen and Grey are due in large part to a shared archetype.

In much the same way, Anastasia Steele and Bella Swan share multiple similarities due to their prospective roles as blank slate characters. In contrast to the Byronic hero, which is a preset

⁸¹ 5Important Elements of a Short Story, <http://ecc.pima.edu/~ppalazzo/Elements%20of%20a%20Short%20Story.htm> (last visited April 27, 2015).

⁸² *Supra* notes 21, 47, 76, and 77.

⁸³ E.L. JAMES, *FIFTY SHADES OF GREY* 155 (Vintage Books, 2011); STEPHANIE MEYER, *TWILIGHT* 166 (Hatchett Book Group, 2005).

⁸⁴ Michael Benton, *Literary Biography: An Introduction* 54 (Wiley-Blackwell, 2009) (quoting Christiansen).

list of complementary characteristics recognized in literature, the “blank slate protagonist” is a character that has no particularly defining features so that the audience can project itself into the hero’s role and vicariously live out the experience.⁸⁵ Though it may seem strange to intentionally write a character with no characteristics, contemporary media critics have noted that many of the most successful media franchises rely on a central, blank slate character to some degree or another because people would rather be the hero through self-insertion than watch a hero from their seats. To this end, Swan and Steele share numerous traits that young women identify with – feeling clumsy, looking incredibly average, being socially outcast, exhibiting intellectual superiority, having no experience with love, and so on – yet remaining incredibly vague on further details. A prime instance of this is that whenever Cullen and Grey are asked why they are so drawn towards Swan and Steele respectively, the answer often lacks understanding and always lacks description.⁸⁶ Other passages of the book aimed at establishing that Swan and Steele are unique likewise remain vague so that specifics will not inhibit the goal of serving as a projectable surface for the reader. In fact, *Fifty* goes so far as to only describe Steele’s physical appearance with one line in the very first page and outside the necessity during sexual encounters, never revisits the topic again.⁸⁷

So in the end, are the characters substantially similar? Of course, because they are designed to fulfill specific, archetypal roles within the same genre of “literature,” namely that of the romantic, wish-fulfillment novel. Both novels are aimed at young women through a common method: the stories create a general, relatable template character and pairs her with an ideal male, one who has all the desirable characteristics of the time, is completely unattainable by others, yet completely smitten with the heroine without the issue of actual character flaws or differences that could create genuine problems that shatter the self-immersion. The similarities abound as a result, and in many cases, do garner suspicion at how closely some of the characteristics are mirrored.⁸⁸ However, despite these abundant similarities, I once again reiterate that the standard is not how many similarities can be drawn between two sources, but whether any element of the subsequent story can be traced specifically back to the original story’s world. To this, the answer is no because regarding characters, no reasonable reader could ever mistake the protagonists from *Fifty* for the protagonists of *Twilight*: they are, without a doubt, different casts of characters from different literary worlds.

In particular, the *Fifty* cast is plagued by something I must call Schrodinger Syndrome. Deriving its name from Erwin Schrödinger’s famous thought experiment, this syndrome describes the paradox where literary characters are known to exhibit a characteristic, yet at the

⁸⁵ After Hours, *The Horrifying Secret ‘The Matrix’ Reveals About Humanity*, CRACKED (Oct. 21, 2013), http://www.cracked.com/video_18662_the-horrifying-secret-the-matrix-reveals-about-humanity.html.

⁸⁶ “There’s something about you, though, and I’m finding it impossible to stay away.” James at 72. “Trust me just this once – you are the opposite of ordinary.” Meyer at 210.

⁸⁷ James 3.

⁸⁸ Both Edward Cullen and Christian Grey play the piano. While the piano has the advantage of being a respected instrument in both classical and contemporary music as well as requiring a high level of skill to play, one could ask why Grey *had* to share specific detail with Cullen, among others.

same time, do not. Steele, for example, is described as clumsy, yet only displays the characteristic in two specific instances that advance the plot;⁸⁹ after this point, a hundred and fifty pages pass before the trait is even mentioned again, yet it is only to insist that the trait remains with no events in the story to support it.⁹⁰ She is likewise described as shy, yet has no qualms about sharing her opinions with anyone, even openly rude remarks to people the book claims intimidate her. Similarly, Grey is described as domineering and incredibly controlling, yet is inexplicably pleased whenever Steele challenges him. He is also described as unromantic, yet indulges in numerous stereotypically romantic gestures, and loves Steele just the way she is while expressing how he would like her to change, all within the same page.⁹¹ Unless Grey is in fact an unrepentant psychopath who uses acute observational skills on par with Sherlock Holmes and the superficial charms of Don Juan in order to give a target exactly what she wants for some convoluted sense of personal amusement, his character can only be described as inconsistent, as is the character of Steele.

Furthermore, the problem with this state is not just that the characters behave inconsistently, which can be expected of irrational, emotional beings, but that the state is irreconcilably inconsistent. In writing, there is a trope known as the Word of God, where an ultimate authority is recognized regarding the universe and what this authority says is held as fact.⁹² In literature, this authority is invariably the author, and barring some external statement to the contrary, what is written in the work is considered canon. In *Fifty*, author E.L. James writes both the narration that establishes a character's traits, yet at the same time, writes the dialogue and events that contradict them. Both aspects of the story are true, and yet neither can be true while the other exists. For legal analysis, this creates an even greater conundrum because like the Word of God trope, the traditional textualist argument is that what is written cannot simply be disregarded. Thus, despite the contradictions between what the author says through narration and what actually occurs, both must both be given weight. As such, the reader is left in the strange position of not knowing exactly what sort of character they are dealing with, and with no outside intervention like observation to collapse this superposition,⁹³ the paradox simply exists.

By comparison, the cast of *Twilight* is the definition of coherence because both protagonists act exactly as they are depicted: typical hormonal teenagers. When Swan is described as clumsy, she trips in tide pools and fears taking hikes. She is also observant but introverted girl who enjoys reading and sunshine, takes care of her father, and occasionally shows moments of clever thought, all events that occur throughout the story in conjunction with narrative declaration. When Cullen is described as hungry for blood, he struggles with the feeling at

⁸⁹ James at 10, 48.

⁹⁰ James at 215.

⁹¹ James at 287.

⁹² TVTROPES: WORD OF GOD, <http://tvtropes.org/pmwiki/pmwiki.php/Main/WordOfGod> (last visited April 27, 2015).

⁹³ Erwin Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik (The present situation in quantum mechanics)*, 23(49) NATURWISSENSCHAFTEN 807, 810 (1935).

multiple times throughout the story. He is also a constant worrier who enjoys fast cars, admires his adoptive father, and greatly enjoys teasing the object of his affection. The end result is that the Twilight pair features two distinct renditions of particular archetypes, while the Fifty cast is inconsistent at best and confusingly contradictory at worst. Schrodinger Syndrome thus becomes the means by which such inconsistencies are reconciled. It recognizes that though a trait is there, it is in fact not there either, meaning it cannot be given substantial weight in identifying its source world because it technically can't exist. In short, the *Fifty* characters do not take any world elements of Twilight because they are too abstract to have taken anything in the first place.

B. Setting and Rules

Since both stories are set in the real setting of Washington state, neither can claim that the setting definitively links to their story. However, various other aspects of the fictional world are relevant. In *Twilight*, vampires and other supernatural forces (not merely set pieces, but elements integral to the plot and conflict) exist as a clear demarcation from actual reality. *Fifty*, on the other hand, occupies a mundane world. By shedding a defining characteristic – the existence of magic – *Fifty* does not construct a distinctive world for itself, but does show how the world is separate from that of Twilight. In that sense, the lack of distinctive world elements and reliance on only unprotectable elements means that the setting was not unfairly taken.

C. Plot and Conflict

Once again, *Fifty* takes the limiting approach by not adding expression to create a distinctive world, but by removing distinctive elements to distinguish itself. Twilight's plot involves the discovery of vampires, navigating a relationship that balances young infatuation with potential death in a bloody feeding frenzy while keeping it a secret from family and concerned friends, dealing with differences in age, socio-economic status, and basic physiology, and eventually the escape and defeat of other vampires bent on devouring Swan. *Fifty*, on the other hand, involves Steele's question on whether she wants to pursue a carnal relationship with Grey through five hundred pages of internal musing. That is it. There really is nothing in the way of rising action, climax, or struggle. Whenever Steele wants something, the universe somehow ensures that she gets it. When something is wrong with Grey, a few choice words from her instantly resolves the issue. The lack of anything resembling a story arc renders *Fifty* little more than a sequence of improbable events interspersed with physically and mentally dangerous erotica.⁹⁴ As such, *Fifty* avoids taking any plot or conflict elements that would definitively link to *Twilight* by avoiding having a plot or conflict altogether.

⁹⁴ See Amy E. Bonomi, et. al., *Fiction or Not? Fifty Shades is Associated with Health Risks in Adolescent and Young Adult Females*, 23(9) J. OF WOMEN'S HEALTH (2014).

D. Theme

This section can largely be summed up in one word: innocence. Steele is called innocent throughout *Fifty*, but only in the Schrodinger Syndrome setting since the statements are never really backed up with events.⁹⁵ The real innocence theme plays out in *Twilight* as Cullen describes vampirism as corruption he does not wish to pass on to Swan. This theme is then played out as while the two are passionate in their affections, their physical relationship does not extend beyond kissing. In contrast, *Fifty* has rampant sexual encounters within the first quarter of the book and continue nonstop throughout its entire course.⁹⁶ While it could be said that the sado-masochistic themes of *Fifty* are what convey the concept of Grey's corruption being passed on to *Steele*, the fact that it treat sexual acts casually while *Twilight* is distinctly reserved on the subject shows at the very least distinctly different atmospheres, and ones that no reasonable reader would confuse any time soon.

Furthermore, there is the issue of themes that differ not by quality, but by quantity. As stated before, both *Twilight* and *Fifty* are wish-fulfilling romances for young women. Despite the authors' numerous assurances that Swan and Steele are Everyman characters, they are always perceived as lovely and lovable by the characters around them. Swan has Mike, Tyler, and Jacob fawning over her, while Steele has Jose and Paul, and both adoptive families has an instant liking for the new romantic interests. However, while Swan is liked by a normal mix of high school students, Steele is pursued by desirables: one man who is described as incredibly attractive kindred spirit,⁹⁷ and the other is a Princeton graduate from a well-to-do family. While Swan has people who disapprove of her relationship, literally no character except jilted love interests express anything but unbridled optimism in the new relationship, despite knowing full well of Grey's criminal stalking.⁹⁸ Furthermore, in continuation with Steele's Schrodinger Syndrome, her character's wish-fulfilling properties are taken to extremes that render her a genuine Mary Sue⁹⁹ – every indication is that Steele is incredibly attractive despite her own protests, technically flawed, though her shortcomings are never actually detrimental, greatly desired by publishing houses as a hire despite having only a bachelor's degree in the modern recession, and depicted as having impeccable moral fiber by treating even the most lavish gifts as nothing but nuisances because she's no "ho."¹⁰⁰ As a result, while both books explore ideal scenarios, it is

⁹⁵ Despite having no experience in the matter, Steele exhibits almost savant-like abilities in pleasuring the male anatomy. James at 137-138.

⁹⁶ John Harlow, *Fifty Shades leaves other adult films looking limp*, THE SUNDAY TIMES (Feb. 1, 2015), http://www.thesundaytimes.co.uk/sto/news/uk_news/Arts/article1513861.ece (estimating that 20 minutes of the movie's 100 minute runtime were focused on sexual content, measured in scenes involving nudity).

⁹⁷ This character also suffers from Schrodinger Syndrome in that as soon as the plot demands, he changes from the best of friends to a would-be rapist that whines when neither assault nor advance gains affection.

⁹⁸ Two particularly egregious examples include Steele's best friend and her own mother.

⁹⁹ H Thomas Milhorn, *Writing Genre Fiction: A Guide to the Craft* 55 (Universal Publishers 2006).

¹⁰⁰ The fact that the author could not even write out the entire word, but had to resort to a juvenile abbreviation to avoid any semblance of actual conflict was, to put it simply, painful to read.

actually the novel with vampires and werewolves that does it in a much more realistic setting, and it is the delusions of perfection in *Fifty* that make these books almost impossible to confuse.

E. Conclusion

In the end, how do the elements of each world compare? As a general practice, *Fifty* strips each of the areas discussed of any defining features so that it can increase the wish-fulfillment factor up to maximum proportions. This renders the characters incoherent, the setting bare, the plot nonexistent, and the themes at odds with the original source material. However, in doing so, it also removes any elements that could be definitively tied to its source of inspiration. Yes, the characters do share many similarities, but none that would cause readers to think that one is actually a *Twilight* character being passed under a different name. Most, if not all similarities can be tied to the archetypes and functions that come part and parcel with a wish-fulfillment novel aimed at a specific demographic. Because of that lack of distinctive identity in any elements of the original authors world, *Fifty* should not be considered a derivative work, but an independent work unto itself.

V.CONCLUSION

The conclusion that *Fifty* is not a derivative work of *Twilight* may strike some as unfair given the numerous similarities they share and the profits it has made. Regarding economics, it must be remembered that it is not for the courts to determine whether any work is deserving of protection or not.¹⁰¹ Regardless of *Fifty*'s economic success or 'literary merits', the question is simply whether it has taken another author's protected expression. Drawing the distinction between inspiration and copying is a difficult topic in any copyright subject, but most difficult in literature where the interpretability of words complicates the issue. To this end, the world element analysis aims to simplify the consideration by asking whether the elements taken in question can be directly linked to another author's world.

With genres and archetypes, many elements of various stories can be said to be substantially similar, but by requiring a distinctive link, we turn our attention away from generalities and to the author's individual expression. Did this author, through virtue of the words written down, paint a picture clear enough that a reader could recognize that character even under a different name or setting? By interpreting expression as the world an author creates in distinction to others, we can more easily determine copyright infringement in hard to define concepts by seeing if the source can be identified. Thus, each author is incentivized to expand and deepen his or her own world as more distinctive world elements equals greater protection. Hopefully, this rule will help both authors and courts to draw the line so that we can determine *ex ante* whether a work is derivative or not.

However, if *Fifty* has distinguished itself by being so abstract as to avoid any distinguishing elements, then its own copyright protection will be extremely limited, meaning that subsequent authors could take significant aspects of the book with no issue of infringement. If then, the result of applying this rule is that more books like *Fifty* will be published, then perhaps it might be wise for courts to avoid using this rule after all.

¹⁰¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (stating that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits").