

October 2015

Distinguishing Literary Ideas and Expressions with Elements of Alternate Worlds

Joshua Jeng

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Recommended Citation

Joshua Jeng, *Distinguishing Literary Ideas and Expressions with Elements of Alternate Worlds*, 23 J. INTELL. PROP. L. 61 (2015).
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DISTINGUISHING LITERARY IDEAS AND EXPRESSIONS WITH ELEMENTS OF ALTERNATE WORLDS

*Joshua Jeng**

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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 millions of derivative works, occasionally with great marketability.² *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 and spawned a movie adaptation that grossed over \$560 million worldwide over a \$40 million production budget.⁴ Whatever the book's title 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* began as an unauthorized derivative work, and numerous commentaries detail how *Fifty* is "crazy similar" to its source material,

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 eighteenth 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 (Mar. 18, 2011), <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html>.

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

⁴ BOX OFFICE MOJO: FIFTY SHADES OF GREY (2015), <http://www.boxoffice Mojo.com/movies/?id=fiftyshadesofgrey.htm>.

even after the revisions.⁵ What does this mean under copyright law? Unfortunately, given the ill-defined state of law on infringing literary works, especially in the realm of derivative material, the answer is unclear.

This Article 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 original and any potentially infringing work be determined by 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 clearly marks the boundaries of derivative works. Defined in 17 U.S.C. § 101, a derivative work is anything "based upon one or more preexisting 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 The Act further specifies that individual components of the copyrighted work can also be protected, meaning that taking even parts of a preexisting work can result in infringement.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:

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>.

⁶ 17 U.S.C. § 101 (2010).

⁷ *Id.* § 106(2).

⁸ *Id.* § 3.

⁹ *Id.* § 103(a).

¹⁰ *Id.* § 103(b).

1. If the work is based upon any part of preexisting material, the work is derivative.
2. If the work was not authorized by the original author, the deriving work is unlawful and thus, there is no copyright protection for that work.
3. If the work is authorized, there is protection for any 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? Read broadly, a work that gets any sort of inspiration from an original work, even broad concepts and ideas can be considered “based upon” that work:

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

Such an expansive reading cannot be what Congress intended in writing the Act, as copyright law aims 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 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 to protect the individual expression of an idea, not the idea itself.¹³ While the distinction between expression and idea 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: where should that line of resemblance be drawn?¹⁴

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

¹² U.S. CONST. art. I, § 8, cl. 8.

¹³ Mazer v. Stein, 347 U.S. 201, 217 (1954).

¹⁴ Caffey v. Cook, 409 F. Supp. 2d 484, 496 (S.D.N.Y. 2006) (detailing the challenges of evaluating derivative works).

B. PROBLEM OF THE IDEA-EXPRESSION DICHOTOMY

In some cases, the distinction between idea and expression 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." Instead, the court found that it 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. However, Atari had done so in a particular way, and it was that particular way that required protection.¹⁶

Similarly, the court found no independent expression by Durham Industries when it used Tomy Corp.'s 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."¹⁷ 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 distinctive qualities in its designs absolved Durham Industries of liability.¹⁸

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 Corp.*, Judge Learned Hand compared the original work—a play called *Abie's Irish Rose*—to the subsequent motion picture *The Cohens and The Kellys*.¹⁹ 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.²⁰ However:

[W]hen the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of

¹⁵ Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 618 (7th Cir. 1982).

¹⁶ *Id.* at 619.

¹⁷ Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980).

¹⁸ *Id.* at 905.

¹⁹ Nichols v. Universal Pictures Corp., 45 F.2d 119, 120 (2d Cir. 1930).

²⁰ *Id.* at 121.

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.²¹

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.²² To do so would be to invite a monopolization of ideas which would stifle creativity, not promote it.²³ However, courts have never properly articulated where on this spectrum of ideas and expressions this change falls for 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, the “total concept and feel” test has been widely adopted. Introduced in *Roth Greeting Cards*,²⁴ the standard was adapted for literary works in *Sid & Marty Krofft Television Products, Inc.* as a standard that considers all creative aspects of each work, determines whether they are protected, and asks whether an ordinary person would look at the works and say that they look and feel similar enough to find misappropriation.²⁵ In *Sid & Marty Krofft Television Products, Inc.*, plaintiff H.R. Pufnstuf claimed that a McDonald’s advertising campaign had copied from its own copyrighted Saturday morning cartoon. The defendant corporation pointed out various differences between the two works, such as how the advertisement’s mayor wore a diplomatic sash versus the cartoon mayor’s choice of cummerbund. The court rejected this argument in favor of finding that “the defendant had

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

²⁵ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1177, 1164 (9th Cir. 1977).

captured the ‘total concept and feel’ of the Pufnstuf show.”²⁶ What led the court to determine that the “total concept and feel” had been taken, however, remains unclear.

In the end, the standard is vague and becomes more so when considering that it emerged from 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 *Atari* and *Durham Industries*. Both courts spent very little time discussing concepts and feelings in the works and instead focused largely on the notable visual similarities between original characters and the infringing copies.²⁷ Authors of literary works, however, have no physical representations of characters or scenes, but must instead rely on a description, or “word portraits”²⁸ to convey the subject’s appearance. 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. One could argue that the words themselves are what should be considered in literary copyright cases. However, this narrow reading reduces protection to exact wording, a standard easily circumvented by the use of altered names 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 test is the idea of similarity derived from *Nichols*.²⁹ In its analysis, the Ninth 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. . . .”³⁰ However, rather than elaborating on exactly what the audience would notice, the court found that the two works were “substantially similar” without much explanation.³¹ Other courts have tried to give this phrase meaning, but beyond the suggestion that it must be something “beyond the level of generalized ideas or themes,”³² there is a lack of judicial guidance.

²⁶ *Id.* at 1167.

²⁷ *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 618 (7th Cir. 1982); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980).

²⁸ *Silverman v. CBS Inc.*, 870 F.2d 40, 50 (S.D.N.Y. 1986).

²⁹ *Sid*, 562 F.2d at 1163.

³⁰ *Id.* at 1167.

³¹ *Id.*

³² *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 (2d Cir. 1982).

The problem with this standard is that without sensory elements, literary work is limited to its words, which by their very nature will *always* be substantially similar. According to one theory, all stories fall within one of seven basic plotlines, each of which follows the same overarching meta-plot.³³ Distinctions arise within these seven plotlines, but remain similar due to genres forming when writers discover that certain literary tones and techniques work best for a specific type of story. 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.

The concept of the archetype, or stock character, was discussed as early as 319 B.C. when Theophrastus, student of Aristotle, wrote “The Characters” and discussed the thirty prototypical characters one found in the literature of his day.³⁴ Similar concepts are born out in the modern day. For example, Jungian psychology exemplifies the archetype in an even narrower list of twelve distinct personalities with various predictable traits.³⁵ In this light, the character looks much more like an idea, which is why courts have explicitly stated that the “stock figure” is not eligible for copyright protection.³⁶ Of course, the argument can always be made that an author can combine different traits to make unique characters,³⁷ 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,³⁸ and behavioral psychology exist. If authors wish to make believable characters—and indeed they must, as the section on internal consistency will discuss—then they must write in believable ways. Thus, a believable character becomes predictable as certain traits naturally go hand in hand with others.

³³ The meta-plot is a list of stages inherent to a plot: an anticipation stage where the story begins, a 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) (describing these stages in depth).

³⁴ INTERNET ARCHIVE: FULL TEXT OF “THE CHARACTERS OF THEOPHRASTUS,” http://archive.org/stream/charactersoftheo00theorich/charactersoftheo00theorich_djvu.txt (last visited Apr. 26, 2015).

³⁵ See J.J. JONAS, *THE TWELVE ARCHETYPES* (University of Texas at Austin, 2014).

³⁶ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

³⁷ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

³⁸ 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).

From plotlines to genres to archetypal characters, literature is rife with similarities to the point where it would be more difficult to prove a story is original than similar to others. 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 similarities in concept and feel. Both stories center on psychologically-troubled masters of martial arts and guerilla warfare who employ a wide variety of weapons in vigilante wars in crime-ridden cities after being inspired by the violent deaths of loved ones. Both publications center their most famous storylines on dark narratives³⁹ to create grim, gritty atmospheres in contrast with many other mainstream heroes.

Based on these descriptions, The Punisher comics, which were published after Batman,⁴⁰ could be considered infringing works even though actual readers would consider them so different as to be incomparable, even without visual elements. This is precisely where the lack of guidance afforded by the “total concept and feel” standard, with its reliance on substantial similarity, becomes even more problematic. In finding substantial similarity, an observer must consider elements of each story to reach a conclusion. However, which elements should be given weight and how much? Is it significant that The Punisher uses handheld 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 helps them from time to time?

The total concept and feel test provides no guidance on how much weight to give each element, if any at all. In fact, subsequent cases have explicitly rejected distinguishing between protected and unprotected elements so as not to disrupt a factfinder’s consideration of the work as a whole.⁴¹ Though this can be justified as granting protection to unique combinations of unprotected elements,⁴² a factfinder gains the freedom to decide on anything or nothing at all. If a factfinder decides that the total concept and feel comparison between Batman and The Punisher hinges on the fact that both characters wear black and have a penchant for scaring people, legal theory would be hard pressed to

³⁹ 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*, 417–20 BATMAN (1988) (showing how Batman lures an assassin into an underground room, locks it, and leaves him to die).

⁴⁰ Bill Finger & Bob Kane, 27 DETECTIVE COMICS (1939); Gerry Conway et al., 129 THE AMAZING SPIDERMAN (1974).

⁴¹ *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 619 (7th Cir. 1982).

⁴² *Emerson*, 8 F Cas. at 619 (stating that “every author of a book has a copy-right 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”).

refute that conclusion, even though it is a conclusion that equally applies 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.⁴³

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, the discussions have assumed that there are in fact similarities in the broader concepts and feelings that allow for comparison. As such, the traditional total concept and feel cases can be generally described as situations comparing works with broad similarities and minor differences. This is why McDonald's focus on minor detail changes still resulted in a loss.⁴⁴ In contrast, derivative works often destroy this assumption because by and large, fan creations reverse the situation by producing works that share minor details, but differ drastically in the broader sense.

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.”⁴⁵ 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 like tone and feel. In fact, there is a distinct incentive not to; the freedom to take beloved characters and places and create completely different scenarios not contemplated 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 why one can find Disney Princesses cast as survivors in post-apocalyptic zombie

⁴³ Elliott M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMPLE L. REV. 133, 147 (1988).

⁴⁴ See *Sid & Marty Kroft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

⁴⁵ FAN FICTION, http://en.wikipedia.org/wiki/Fan_fiction (last visited Sept. 27, 2015).

wasteland⁴⁶ and grizzled military veterans introduced to the saccharine-sweet atmosphere of a children's cartoon centered on colorful, pastel ponies.⁴⁷ While creativity benefits from the increased freedom, the legal analysis becomes nearly impossible under the total concept and feel test because these derivative works are what courts set out to protect: works of very different macro issues with similarities in the details.

Of course, such a conclusion would neglect existing law recognizing protection for individual story elements, the most important being characters. Courts have recognized that fictional characters have incredible value and should be protected in accordance with the purpose of copyrights.⁴⁸ Thus, courts have attempted to find various ways of qualifying what a character is and how far protection should extend.⁴⁹ For example, the *Nichols* court recognized that characters should be protected separately from the plot, but only extended such protection to “sufficiently delineated” characters: “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”⁵⁰ Later cases then introduced a comparative element in saying that only substantially similar characters would gain copyright protection.⁵¹

As a result, a two prong test for character comparison developed. In the first prong, the original character is examined to see whether it is suitable for copyright protection based on how well defined it is. If it passes muster, then the question becomes whether the derivative character has taken anything beyond the abstract.⁵² Here, courts have differentiated mere character resemblance—i.e., characters that stir one's memory—from the substantial similarity requirement of the infringement analysis.⁵³ 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

⁴⁶ John Farrier, *The Walking Disney: Princesses and Princes in a Post-Apocalyptic World*, NEATORAMA (Mar. 24, 2014, 4:00 PM), <http://www.neatorama.com/2014/03/24/The-Walking-Disney-Princesses-and-Princes-in-a-Post-Apocalyptic-World/>.

⁴⁷ Gentleman], *When the Man Comes Around*, FIMFICTION (July 4, 2012), <http://www.fimfiction.net/story/11813/when-the-man-comes-around>.

⁴⁸ See generally *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982).

⁴⁹ *Id.*

⁵⁰ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

⁵¹ 1-2 MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.12 (1999). See also *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1176 (9th Cir. 2003) (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).

⁵² NIMMER & NIMMER, *supra* note 51.

⁵³ *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983).

these criteria are 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. The first prong requires the author to sufficiently delineate his or her characters from existing concepts.⁵⁴ The second prong, however, requires the author to make the characters as indistinct as possible in order to meet the substantially similar standard. 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 many as to make differentiation easy. By incentivizing authors towards 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.

In the world of literature where characters are only defined by word portrait, establishing 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.⁵⁵ 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 or significant change? Though the two adjectives are often used synonymously,⁵⁶ beautiful is defined as "having pleasure producing qualities"⁵⁷ while handsome is defined as having an "imposing appearance suggestive of health and strength."⁵⁸ Similarly, the nouns they describe are likewise synonymous, yet can draw to mind significantly different age ranges for

⁵⁴ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁵⁵ 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).

⁵⁶ THESAURUS.COM: BEAUTIFUL, <http://www.thesaurus.com/browse/beautiful?s=t> (last visited Apr. 27, 2015).

⁵⁷ DICTIONARY.COM: BEAUTIFUL, <http://dictionary.reference.com/browse/beautiful?s=t> (last visited Apr. 27, 2015).

⁵⁸ DICTIONARY.COM: HANDSOME, <http://dictionary.reference.com/browse/handsome?s=t> (last visited Apr. 27, 2015).

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 consensus is why “[m]ore than one commentator has noted the irony that literary characters, often considered creatively and intellectually superior to ‘mere cartoons,’ have less protection.”⁵⁹ Add on the fact that removing a character from its original context via derivative work can alter much of what makes the character distinct, and the analysis completely falls apart.

D. CONCLUSION

Copyright law has clearly defined goals: for works of fiction, courts want to keep the ideas intrinsic to storytelling in the public domain while protecting an author’s unique expression. The problem lies in demarcating that line as courts have spoken on the subject numerous times with various interpretations that have yet to provide clear guidance on where the line is drawn. The following sections of this Article aim to clarify this issue by proposing a new standard: instead of viewing stories as vague, indistinct masses, courts should instead focus on the elements of the story that can be distinctly linked to each author’s independently created world.

III. COPYRIGHT FOR LITERATURE: STORIES ARE ALTERNATE WORLDS

While copyright law is designed for uniform application over various industries and subject matters, certain forms of expression require more nuanced discussion than others. Literature is one such form. 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 previously, the proposal of this Article is to consider the elements supposedly taken from an original work—a character, a setting, a scene etc.—not as an indistinct mass in totality, but as components crafted by the author’s independent expression to serve as the building blocks of a cohesive world. From there, courts would only find infringement when the supposedly borrowed elements are distinct enough to the original author’s literary world

⁵⁹ Helfand, *supra* note 55, at 631.

that it could be specifically identified as an element of said world. Thus, the key to this rule becomes understanding the concept of literary 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.”⁶⁰ While this is more literally applicable to topics like geography, ecology, and history, the same concept is exactly what authors do in 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.⁶¹

Though this passage was written specifically about realistic fiction, the importance of believability, appropriateness, and above all consistency, spans all genres because they 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.⁶² This idea of “poetic faith”⁶³ was later refined by J.R.R. Tolkien⁶⁴ 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 word. For this to be possible, the writer absolutely had to create a world with internal consistency.⁶⁵

When a reader believes in what they are reading, characters become real enough to incite empathy.⁶⁶ From here, the author can use that connection to trigger the desired emotions in the audience: sadness at a tragedy, rage at an

⁶⁰ WIKIPEDIA: WORLDBUILDING, <http://en.wikipedia.org/wiki/Worldbuilding> (last visited Apr. 27, 2015); see JOHN HAMILTON, *YOU WRITE IT: SCIENCE FICTION* 8–9 (ABDO Publishing, 2009).

⁶¹ K. Bucher & M.L. Manning, *Characteristics of Good Realistic Fiction*, EDUCATION.COM (Apr. 30, 2014), <http://www.education.com/reference/article/characteristics-good-realistic-fiction/>.

⁶² SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA* 145 (Wipf and Stock Publishers, 2005).

⁶³ *Id.*

⁶⁴ Andrew O’Hehir, *The Book of the Century*, SALON (June 4, 2001, 7:29 PM), http://www.salon.com/2001/06/04/tolkien_3/.

⁶⁵ J.R.R. TOLKIEN, *ON FAIRY STORIES* 12 (HarperCollins, 2008).

⁶⁶ Mary Jacobsen, *Looking for Literary Space: The Willing Suspension of Disbelief Re-Visited*, 16 RESEARCH IN THE TEACHING OF ENGLISH 21, 22–23 (1982).

injustice, joy in a happy ending, and so on. However, in order to do so, the author must write well. Supposing that an author's aim in writing is to elicit emotional reactions from their readers, it then becomes imperative that characters, events, and even the rules and logic of the story remain consistent and believable so that the reader can fully invest and connect.⁶⁷

This is why worldbuilding is so important to writing. It is through 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.⁶⁸ To do this, authors 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 literary 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.⁶⁹

For example, the death of Albus Dumbledore in the Harry Potter series is considered by some to be one of the top ten most dramatic deaths in literature, alongside other famed classical characters such as Anna Karenina of titular novel and Catherine Earnshaw of *Wuthering Heights*.⁷⁰ 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.⁷¹ 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 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.

⁶⁷ L.G. Estrella, *The Importance of Internal Consistency*, FOR THE LOVE OF WRITING (Sept. 28, 2015), <https://lgestrella.wordpress.com/2015/01/21/the-importance-of-internal-consistency/>.

⁶⁸ Eva Shaper, *Fiction and the Suspension of Disbelief*, 18 BRITISH J. AESTHETICS 31, 35 (1978).

⁶⁹ Estrella, *supra* note 67.

⁷⁰ Rachel Thompson, *The 10 most dramatic deaths in fiction*, TELEGRAPH (Oct. 19, 2013, 7:00 AM), <http://www.telegraph.co.uk/culture/books/booknews/10389476/The-10-most-dramatic-deaths-in-fiction.html>.

⁷¹ J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* 710–11 (Bloomsbury 2003).

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 requires affirmative actions by the author. For the world to take shape, the author must establish the world's canon through the setting forth of words, which is the literal definition of expression.⁷² If the author's thoughts and feelings are the sort of expression that copyright aims to protect, a workable definition of protectable subject matter is easily created.

This begs the following question: what constitutes an idea beyond the protection of copyright law? The answer comes from comparing the authors' worlds. Each author's writings is a parallel universe, an alternate world that contains similarities to, but exists independently and separately from all others. For example, consider various fictional versions of New York City. 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.⁷³ According to authors Stan Lee and Steve Ditko, New York City has an arachnid-based adolescent swinging between skyscrapers to battle with arch villains and angst.⁷⁴ 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 Turtles' world, nor do the Ninja Turtles inhabit Spiderman's. Though these characters inhabit the same exact city, they will never meet because they exist in alternate literary realities.

From this comparison, the distinction between idea and expression becomes clearer. New York City is an idea, fact, or concept—something that is free for all to use—which is why it can be linked to so many stories and yet defines none of them. The respective casts, however, are independently-created expressions that exist only because of distinct acts of authorship. 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.

⁷² DICTIONARY.COM: EXPRESSION, <http://dictionary.reference.com/browse/expression> (last visited Apr. 27, 2015).

⁷³ KEVIN EASTERMAN & PETER LAIRD, *TEENAGE MUTANT NINJA TURTLES #1* (Mirage Studios 1984).

⁷⁴ STAN LEE & STEVE DITKO, *AMAZING FANTASY #15* (Marvel Comics 1962).

C. EXAMPLE APPLICATION OF THE RULE WITH FAMILIAR WORKS

The Harry Potter universe serves as an example to further clarify this standard. As is known, 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.⁷⁵ While each of these elements constitutes part of the Harry Potter universe, not all of them directly identify this universe as the source. The real setting of modern day Great Britain cannot be tied solely to Harry Potter since it can just as easily be tied to BBC's Sherlock and Doctor Who.⁷⁶ The fictional Hogwarts castle, however, with its ghost-haunted hallways, living paintings, moving stairs, and enchanted rooms, only exists in Harry Potter's Great Britain because without the author's writings, it would not exist. By sufficiently developing the castle through her writings, J.K. Rowling 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 unscrupulous individuals to free-ride on J.K. Rowling's creativity by calling a new setting Bogwarts would be uncommonly silly. Though the world element standard is not definite since reasonable minds can disagree on degrees of similarity, it still provides some guidance in cases like this by only holding the subsequent author liable if his or her castle could be identified as one taken specifically from the Harry Potter universe. After all, Hogwarts is not just a magical castle, but the *specific* castle that Harry, Ron, and Hermione had their adventures in throughout the series. 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 remains open for a reason. By remaining flexible, authors actually benefit because they have more freedom in how they differentiate their works. For example, an author could simply add or remove details to create distinction. Including a central courtyard and other architectural features that do not appear at Hogwarts would help in

⁷⁵ See generally J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (Scholastic Press, 1st Am. ed. 1998).

⁷⁶ *Sherlock*, IMDB <http://www.imdb.com/title/tt1475582/> (last visited Jan. 1, 2016); *Doctor Who Spin Off: Class*, BBC ONE, <http://www.bbc.co.uk/blogs/doctorwho/entries/953c5b1f-3cc8-4db9-8184-f1b6567260f1> (last visited Jan. 5, 2016).

distinguishing other castles, as would subtracting distinctive features like the squid-and-mermaid-filled lake.⁷⁷

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 a concept in itself), 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 with a new atmosphere despite its shared elements. Of course, readers will always be able to draw connections between the two, and in abstract, those similarities will always exist. However, 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 McGonagall to round the corner at any moment, the two remain separate.

At this point, the question arises as to how this method 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. The key distinction is that small but significant changes could still violate this new test, where they would not violate total concept and feel. The problem with the undefined total concept and feel test is its under inclusiveness, especially for derivative works where authors can change the total concept and feel yet still steal a world element. For example, the same hostility of the ghosts described above could be created if a derivative author wrote stories twenty years later 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, but if such a work decided to use a grim, gritty reboot of Hermione Granger as the protagonist, it would undoubtedly be derivative despite the difference in concept and feel.

Finally, a literary world's rules—though difficult to define—are particularly valuable as a distinguishing element. 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 can be. In Harry Potter, magic must be cast through a wand, and

⁷⁷ J.K. ROWLING, *Hogwarts*, POTTERMORE, <https://www.pottermore.com/explore-the-story/hogwarts> (last visited Jan. 5, 2016).

wands must be constructed from a specified list of woods and magical cores.⁷⁸ 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.⁷⁹ Except for incredibly dire circumstances, the Aurors rely on non-lethal spells to incapacitate the offending dark wizard and bring them in for trial.⁸⁰ Punishment, which takes place in a court of wizarding 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.⁸¹

In comparison, Tim Butcher's universe encompassed by the *Dresden Files* shares many similarities to the Harry Potter world: magic exists, it must be conducted through special items, it is regulated by an overseeing body, and it is 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 include a rune-carved staff, an enchanted duster coat, a shield bracelet, and even the occasional revolver or shotgun (tools that exist in the Harry Potter universe, but are never used and only referenced as a joke).⁸² Furthermore, the *Dresden* universe's nation-spanning White Council is far less forgiving than the Ministry of Magic, as it arms its enforcing branch of Wardens with swords, magic and the authority to enact capital punishment for various violations with no need for trial.⁸³

The purpose of this comparison 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. A future author may readily describe a wizarding world that utilizes wands, but not with the

⁷⁸ J.K. ROWLING, *Wands*, POTTERMORE, <https://www.pottermore.com/explore-the-story/wands> (last visited Jan. 5, 2016).

⁷⁹ J.K. ROWLING, *The Ministry of Magic*, POTTERMORE, <https://www.pottermore.com/writing-by-jk-rowling/ministers-for-magic> (last visited Jan. 5, 2016); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 104 (Scholastic Press, Arthur A. Levine Books, 2000) [hereinafter ROWLING, HARRY POTTER AND THE GOBLET OF FIRE].

⁸⁰ ROWLING, HARRY POTTER AND THE GOBLET OF FIRE, *supra* note 79, at 340.

⁸¹ *Id.* at 141.

⁸² *Harry Dresden*, WIKIPEDIA, https://en.wikipedia.org/wiki/Harry_Dresden (last visited Jan. 5, 2016); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 31 (Arthur A. Levine Books, 1st American ed., 1999).

⁸³ 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 RITES, at ch. 25 (Roc Paperback 2004).

specific parameters of 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 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 their own dynamic set of rules, characters, and settings. Many of the elements are the same, but these similarities do not drive the analysis. Instead, the focus remains on what authors do to make concepts distinct in their own particular universe.

D. BENEFITS OF ADOPTING THE WORLD ELEMENT ANALYSIS

Adopting this rule would create numerous benefits. In particular, it broadly applies as a useful distinction between ideas and expressions, it removes conflicting incentives, it covers issues that did not fit in the traditional analysis, and perhaps most importantly, it is consistent with existing case law.

1. *Broadly Applicable, Useful Distinction.* The first major benefit of the world element analysis is how it provides a usable distinction between ideas and expressions for fictional works. As discussed earlier, ideas are the general concepts that exist in any and all stories not attributable 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 can be distinctly attributed to a specific fictional world. Expressions must be created, and since a literary world only exists so far as the author writes it, using the created world elements naturally fit within the goals of the Copyright Act.

In a way, this distinction is similar to trademark law. However, instead of distinguishing between manufacturers (i.e., the authors),⁸⁴ each world element considered identifies the fictional world it came from, which also removes the issue of attribution if copyrights are transferred. Thus, the key in any infringement case under the world elements test is to ask if the allegedly taken elements could be definitely tied back to a preexisting world.

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

⁸⁴ 15 U.S.C. § 1127 (2014).

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 and better. A more expansive world with deeper lore, a greater cast of developed characters, and more adventures produces more world elements that could distinguish the author’s universe, thus increasing the expanse of copyright protection. Consistent with the constitutional intellectual property mandate,⁸⁵ authors are incentivized to do more with their world by granting 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 be defined as anything that uniquely identifies a specific fictional world as qualified for protection, this rule avoids the need for legal rationalizing and rhetorical gymnastics. For example, in *DC Comics v. Towle*, a federal court found a copyright infringement when Gotham Garage produced a car based on the Batmobile.⁸⁶ While the court conducted standard analysis of the physical similarities between the vehicles, the opinion took a strange turn as it attempted to define the Batmobile, a non-sentient 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 reins,” shivering “as its supercharged motor throbs with energy . . . and an instant later it tears after the fleeing hoodlums.” . . . 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.⁸⁷

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 it focuses on tracing the component in question back to a preexisting world. Since the Batmobile has appeared

⁸⁵ U.S. CONST. art. I, § 8, cl. 8.

⁸⁶ *D.C. Comics v. Towle*, 989 F. Supp. 2d 948 (D.C. Cal. 2013).

⁸⁷ *Id.* at 967 (internal citations omitted).

numerous times over the course of several years,⁸⁸ 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, perhaps the greatest benefit of this standard is that despite its novelty, it is actually in line with an unspoken intuition already espoused by various courts. The Second Circuit, in dicta, touched on the concept underlying the world element test in its comparison of Superman to Ralf Hinkley, *The Greatest American Hero*: “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.”⁸⁹

Intuitively, the court considered separate fictional worlds in asking whether this new hero was Superman, an element of an already existing world 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. Separate worlds were likewise discussed in the case of *Hopalong Cassidy*, which 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.”⁹⁰ Though the court did not fully articulate this idea, it hit upon the world element analysis in asking whether something was created in a new world or simply taken from another.

Whether an element was created or taken depends on its 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 copyright protection.⁹¹ The court ruled that Tarzan was independently protected, and the logic supporting this conclusion proves truly insightful: “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.”⁹²

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

⁸⁸ DOUGLASS ALASTAIR & PHIL JIMENEZ, *THE DC COMICS ENCYCLOPEDIA: BATMOBILE* 32 (London: Dorling Kindersley 2008).

⁸⁹ *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 243 (S.D.N.Y. 1983).

⁹⁰ *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60, 64 (S.D.N.Y. 1981) (emphasis added).

⁹¹ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981).

⁹² *Id.* (emphasis added).

indefinite article ‘a’ or ‘an.’”⁹³ Furthermore, the court went so far as to use a reflexive statement to define the character according to its own characteristics rather than relying on any outside descriptions or external references. While this may not be the most enlightening 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 unique, identifiable persona 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? The fact that one test focuses on overlapping similarities while another test focuses on distinctiveness seems irreconcilable. The better interpretation, however, is to view the world elements test as a more targeted application of the total concept and feel test. In the “total concept and feel” cases, the court’s intuition was that something had been unfairly taken from the original author, though it could not say what.⁹⁴ If these cases are read to hold that the courts sensed a taking of some distinctive elements created by the Pufnstuf cartoon and simply not articulated which elements they were, then the “total concept and feel” standard is precisely in line with the world element test. 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 to focus on individual, distinctive elements. The end result is that instead of viewing the two tests as contradictory, this theory fits into the existing model as a clarifying expansion; infringement occurs when something is substantially similar to a distinctive element of the original author’s work and thus, takes the total concept and feel of that specific element.

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 not perfect, the world element analysis provides a definite goal that incentivizes creativity and quality in writing while safeguarding against unauthorized use.

⁹³ DICTIONARY.COM: THE, <http://dictionary.reference.com/browse/the> (last visited Sept. 29, 2015).

⁹⁴ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (explaining copyright infringement of works that capture the “total concept and feel” of other works).

IV. FIFTY SHADES OF GREY—A DISTINCTLY DIFFERENT WORLD

With the parameters of the world element standard established, the following sections will compare *Twilight* and *Fifty Shades of Grey* by considering the five main elements of a story: the characters, setting, plot, conflict, and theme.⁹⁵ In the end, 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 parts of a fictional world to protect because the existence of archetypes muddles the substantial similarity inquiry.⁹⁶ 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 with copper/bronze hues to their hair. Both are inordinately wealthy, play the piano, enjoy baseball, and lavish outlandishly overt compliments on their respective love interests. Each has a dark and troubled past, is adopted into amazing families and considers himself a monster (literally and figuratively, respectively). Finally, both also share similarities in more unique aspects, such as tendencies for stalking and ensuring that their love interests eat well.⁹⁷

However, 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, a Byronic hero is described as “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.”⁹⁸ The dark and tragic elements are important not only because they set the man apart from normal society, increasing worth through exclusivity, but also because they add complexity to the character. Thus, many similarities between Cullen and Grey can be directly attributed to their shared roles as a specific, domineering archetype.

In much the same way, Anastasia Steele and Bella Swan share multiple similarities due to their prospective roles as blank slate protagonists. In contrast

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

⁹⁶ See *supra* notes 26, 53, 90–91.

⁹⁷ E.L. JAMES, *FIFTY SHADES OF GREY* 155 (Vintage Books 2011); STEPHANIE MEYER, *TWILIGHT* 166 (Hatchett Book Group 2005).

⁹⁸ MICHAEL BENTON, *LITERARY BIOGRAPHY: AN INTRODUCTION* 54 (Wiley-Blackwell, 2009) (quoting Christiansen).

to the Byronic hero, which is a preset 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.⁹⁹ 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 because people would rather be the hero through self-insertion than watch a hero from their seats.¹⁰⁰ To this end, Swan and Steele share numerous traits that young women identify with—clumsiness, insecurity with body-image, social isolation, intellectual superiority, inexperience with love, etc.—yet remaining incredibly vague on further details. For example, whenever Cullen and Grey are asked why they are so drawn towards Swan and Steele respectively, the answers are never descriptive.¹⁰¹ Passages of the books aimed at establishing Swan and Steele as 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.¹⁰²

So are the characters substantially similar? Of course they are. Swan and Steel are designed to fulfill the same role of blank slate within the same genre of romantic, wish-fulfilling literature. Both novels target young women through the common method of creating general, relatable template characters and pairing them with ideal males, ones who possess all the desirable characteristics of the time. Cullen and Grey are completely unattainable by others, yet completely smitten with heroines devoid of any actual defining characteristics that would shatter the self-immersion. As a result, similarities abound, raising suspicion about how closely some of the characteristics are mirrored.¹⁰³

Once again, the world element standard focuses not on how many similarities can be drawn between two sources, but whether any element of the

⁹⁹ 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.

¹⁰⁰ *Id.*

¹⁰¹ “There’s something about you, though, and I’m finding it impossible to stay away.” JAMES, *supra* note 97, at 72. “Trust me just this once — you are the opposite of ordinary.” MEYER, *supra* note 97, at 210.

¹⁰² JAMES, *supra* note 97, at 3.

¹⁰³ 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.

subsequent story can be traced specifically back to the original story's world. Between *Fifty Shades of Gray* and *Twilight*, the answer is “no.” Regarding characters, no reasonable reader could ever mistake the protagonist from *Fifty* for the protagonist of *Twilight*. They are, without a doubt, different casts of characters from different literary worlds.

In particular, the *Fifty* cast is plagued by what I call “Schrödinger Syndrome.” Deriving its name from Erwin Schrödinger’s famous thought experiment, this syndrome describes the paradox in which literary characters are known to exhibit a characteristic, yet at the same time, do not. Steele, for example, is described as clumsy, yet only displays the characteristic in two specific instances to advance the plot;¹⁰⁴ after this point, a hundred and fifty pages pass before the trait is even mentioned again, and even then, it is only to insist that the trait remains with no events in the story to support it.¹⁰⁵ She is likewise described as shy, yet has no qualms about sharing her opinions with anyone, even making openly rude remarks to people who supposedly intimidate her.¹⁰⁶ Grey is also described as unromantic, yet indulges in numerous stereotypically romantic gestures, and he claims to love Steele as she is while expressing how he would like her to change, all within the same page.¹⁰⁷ 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 at every opportunity, then his character is at best widely inconsistent, as is that 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, a common trope is known as the “Word of God,” where an ultimate authority is recognized regarding the universe and what this authority says is held as fact.¹⁰⁸ 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 and 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 holds that what is written cannot

¹⁰⁴ JAMES, *supra* note 97, at 10, 48.

¹⁰⁵ *Id.* at 215.

¹⁰⁶ *Id.* at 6, 8.

¹⁰⁷ *Id.* at 48, 288 (contradictions in romance); *id.* at 195 (on changing).

¹⁰⁸ TVTROPES: WORD OF GOD, <http://tvtropes.org/pmwiki/pmwiki.php/Main/WordOfGod> (last visited Sept. 27, 2015).

simply be disregarded. Thus, despite the contradictions between what the author says through narration and what actually occurs, both must 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 without outside observation to collapse this superposition,¹⁰⁹ the paradox simply exists.

By comparison, the characters of *Twilight* are the definition of coherence because both protagonists act exactly as they are depicted: typical hormonal teenagers. When Swan is describe as clumsy, she trips in tide pools and fears taking hikes.¹¹⁰ She is also an 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 are in conjunction with narrative declaration. When Cullen is described as hungry for blood, he struggles with the feeling at multiple times throughout the story.¹¹¹ He is also a constant worrier who enjoys fast cars, admires his adoptive father, and greatly enjoys teasing the object of his affection.¹¹² 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. Schrödinger 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 vampires—*Fifty* does not construct a distinctive world for itself, but does show how the world is separate from that of *Twilight*. In that sense,

¹⁰⁹ Erwin Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik (The present situation in quantum mechanics)*, 23(49) NATURWISSENSCHAFTEN 807, 810 (1935).

¹¹⁰ *Id.* at 57–58.

¹¹¹ *Id.* at 10, 34, 83, 86.

¹¹² *Id.* at 45, 144, 174, 204.

the lack of distinctive world elements and reliance on only unprotected elements means that the setting was not unfairly taken.

C. PLOT AND CONFLICT

Once again, *Fifty* takes the limiting approach by removing distinctive elements to distinguish itself rather than add new expression. *Twilight*'s plot involves the discovery of vampires, navigating a relationship that balances young infatuation with potential death, 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, solely revolves around Steele's decision to pursue a physical relationship with Grey. The meta-plot of rising action, climax, and resolution is blunted because when genuine issues do arise—i.e. abuse and kidnapping—*Fifty* dismisses them as unimportant or even internally lauds them as desirable despite their hazardous implication.¹¹³ By reducing conflict to the bare minimum, *Fifty* successfully differentiates itself from *Twilight* to avoid misappropriation.

D. THEME

This section can largely be summed up in one word: innocence. Steele is called innocent throughout *Fifty*, but only in the Schrödinger Syndrome sense since the statements are contradicted by events.¹¹⁴ The innocence theme also plays out in *Twilight* as Cullen describes vampirism as a corruption he does not wish to pass on to Swan. Accordingly, their physical relationship does not extend beyond kissing.¹¹⁵ By contrast, Grey and Steele's relationship is almost purely physical from early on in the story.¹¹⁶ One possible explanation is that the sado-masochistic themes of *Fifty* demonstrate Grey's corruption passing to Steele. However, the fact that *Fifty* treats sexual acts casually while *Twilight* remains reserved on the subject shows distinctly different atmospheres that reasonable readers would not confuse.

¹¹³ See Amy E. Bonomi et al., *Fiction or Not? Fifty Shades is Associated with Health Risks in Adolescent and Young Adult Females*, 23 J. WOMEN'S HEALTH (2014).

¹¹⁴ Despite having no experience in the matter, Steele exhibits almost savant-like abilities in pleasuring the male anatomy. JAMES, *supra* note 97, at 137–38.

¹¹⁵ MEYERS, *supra* note 97, at 186.

¹¹⁶ John Harlow, *Fifty Shades Leaves Other Adult Films Looking Limp*, THE SUNDAY TIMES, Feb. 1, 2015, available at http://www.thesundaytimes.co.uk/sto/news/uk_news/Arts/article1513861.ece (estimating that twenty minutes of the movie's one hundred minute runtime were focused on sexual content, measured in scenes involving nudity).

Furthermore, themes in these works differ not only 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. Both are courted by numerous suitors and the adoptive families of the male protagonists instantly take to the new romantic interests. However, while Swan is admired by a normal mix of high school students, Steele is pursued only by a desirable individual.¹¹⁷ While Swan has people who disapprove of her relationship, few characters express concern over Grey despite knowing about his criminal stalking.¹¹⁸ Furthermore, Steele's wish-fulfilling characteristics are taken to extremes that render her a genuine Mary Sue.¹¹⁹ For example, every indication is that Steele is incredibly attractive despite her own protests, greatly desired by publishing houses as a new hire despite having only a bachelor's degree, and completely uninfluenced by even the most lavish gifts. As a result, while both books explore ideal scenarios, it is actually *Twilight*, with its vampires and werewolves that appears more realistic, and it is the delusions of perfection in *Fifty* that make any confusion with *Twilight* misguided.

E. CONCLUSION

In the end, how do the elements of each world compare? As a general matter, *Fifty* minimizes each of the story elements in order to maximize the wish-fulfillment factor: characters are caricatured, plot is blunted, and themes are reduced. By doing so, *Fifty* removes any elements that could be definitively tied to another work. There are certainly similarities, especially regarding the characters, but not enough so that a reasonable reader would believe that a world element of *Twilight* has appeared in *Fifty*. Because *Fifty*'s world lacks enough distinctive features to definitively link back to *Twilight*, it 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. However, it is not for the courts to determine whether any work is deserving of

¹¹⁷ JAMES, *supra* note 97, at 15, 18.

¹¹⁸ *Id.* at 210, 288.

¹¹⁹ H. THOMAS MILHORN, WRITING GENRE FICTION: A GUIDE TO THE CRAFT 55 (Universal Publishers 2006).

protection or not based on its financial success.¹²⁰ Regardless of *Fifty*'s commercial success or literary merits, the question remains whether it has taken another author's protected expression. Drawing the distinction between inspiration and copying is a difficult topic in any copyright dispute, but it is most difficult in literature where the interpretation 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 substantially similar, but requiring a distinctive link properly focuses the inquiry of each author's individual expression. Did an 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, infringement becomes more readily identifiable. Each author is then incentivized to expand and deepen his or her own world, as more distinctive world elements equals greater protection. As such, this rule will help both authors and courts draw the line so that an *ex ante* determination on whether a work is derivative or not can in fact be made.

¹²⁰ *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”).

