

# ARTICLES

## PRETENDING WITHOUT A LICENSE: INTELLECTUAL PROPERTY AND GENDER IMPLICATIONS IN ONLINE GAMES

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“It beats playing with regular Barbies.”<sup>1</sup>

### I. INTRODUCTION

According to media accounts, it is only in the past decade or so that video-game designers begun to appreciate the growing female gamer demographic.<sup>2</sup> Though the common strategy for targeting these consumers

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<sup>1</sup> A statement by 9-year-old Presleigh, who would rather play with dolls on a website called Cartoon Doll Emporium. Matt Richtel & Brad Stone, *Logging On, Playing Dolls*, N.Y. TIMES, June 6, 2007, at C1.

<sup>2</sup> E.g., Tina Arons, *Gamer Girls: More females flocking to video games*, DAILY

seems to be to make pink consoles and games about fashion design,<sup>3</sup> there is a growing recognition of trends that indicate gender differences in gaming style. The most prevalent among these is that women tend to prefer games with social and role playing components, such as Massively Multiplayer Online Role Playing Games (MMORPGs).<sup>4</sup> However, this is not a new phenomenon, and actually extends beyond the pixelated world of video games. In fact, many of the elements that attract women to these kinds of games are common in other types of participatory culture, particularly predominantly female fan activities such as fan fiction.

Social role-playing games did not begin with Ultima Online, nor with the early Multi-User Dungeons (MUDs) or even the Internet.<sup>5</sup> The exemplar

TREADOR (Nov. 17, 2008), <http://www.tmcnet.com/usubmit/2008/12/03/3830940.htm> (noting that though video games are often considered male-dominated, researchers believe that the number of female gamers will continue to grow); Mike Musgrove, *Game Changers; The Ever-Growing Number of Female Players is Altering the Video Game Experience*, WASH. POST, Sept. 14, 2008, at N01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/09/11/AR2008091103105\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/11/AR2008091103105_pf.html) (“[W]ith [video] games software sales at \$9.5 billion last year, companies are paying closer attention to the titles women seek out.”); Jason Ashley Wright, *Game industry finally notices girls: Design, baby-sitting video games target a growing market*, TULSA WORLD (Jan. 13, 2009), available at 2009 WLNR 651656 (quoting the director of development for a game studio as noting the “higher influx of female gamers”).

<sup>3</sup> See, e.g., G. Beato, *Girl Games*, WIRED, no. 5.04, 1997, available at [http://www.wired.com/wired/archive/5.04/es\\_girlgames\\_pr.html](http://www.wired.com/wired/archive/5.04/es_girlgames_pr.html) (“[I]nitial attempts at creating girl games amounted to little more than painting traditional titles pink. . . .”); Margaret, *Want Video Games to Appeal to Women? Make ‘Em Pink & More Child-Like*, JEZEBEL (Sept. 4, 2008), <http://jezebel.com/5045534/want-video-games-to-appeal-to-women-make-em-pink--more-child-like> (noting a “stereotype-laden plot” to appeal to female gamers with “children’s games and a pink, bedazzled Nintendo DS . . . .”); see Wright, *supra* note 2 (using as an example of companies that create games for girls Imagine, whose games involve “fashion, interior design, baby-sitting, even acting”).

<sup>4</sup> See generally Mikki H. Phan, Jo R. Jardina, Sloane Hoyle & Barbara S. Chaparro, *Examining the Role of Gender in Video Game Usage, Preference, and Behavior*, PROCEEDINGS OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY 56<sup>TH</sup> ANNUAL MEETING (2012), available at <http://pro.sagepub.com/content/56/1/1496> (presenting results that female gamers over male gamers prefer social games); see also, Beato, *supra* note 3 (quoting game developer Brenda Laurel, who said, “Girls enjoy complex social interaction” and that girls “have an interest in acting out other lives.”); Musgrove, *supra* note 2 (noting that “virtual-world games have always had a larger share of womenplayers than other games [because they are about] “collaborating as a team . . . .”); *Sony Online Entertainment Out to Expand MMO Game Market with ‘Free Realms,’* CONSUMER ELECTRONICS DAILY (Sept. 29, 2008), available at LexisNexis (quoting John Smedley of Sony as “noting research showed female gamers tend to like combat less than males”); Tan Weizhen, *More Women Game for Cyber Action*, THE STRAITS TIMES (Aug. 12, 2008), available at 2008 WLNR 15019254 (noting that women enjoy different games than men, particularly role-playing games in virtual worlds).

<sup>5</sup> Before the early 1970s, games generally did not have a noticeable connection to story, but this changed with games like *Colossal Cave* and *Dungeons & Dragons*. Greg Costikyan, *Games, Storytelling, and Breaking the String*, in *Second Person: Role-Playing and Story in Games and Playable Media 5* (Pat Harrigan & Noah Waldrip-Fruin, Eds., 2007). MUDs were the first computer games that allowed players to play together. 25 *Smartest*

of the genre is Dungeons & Dragons, and one could conceptualize the tabletop role-playing game as branching off into two sub-genres that emphasize different elements of the game—structured combat and storytelling.<sup>6</sup> The former evolved electronically into MUDs and MMORPGs, and the latter into the collaborative-writing-based role-playing games that are largely the focus of this Article. Moreover, as advancing technology facilitates increasing levels of control and creation in virtual worlds, participants who favor storytelling are able to bring this less structured playing style into digital environments that look more like our common conception of computer role-playing games.

In simplified terms, the above distinction is one of degree of creative control: for example, the weaving of a story between battles in Dungeons & Dragons versus a roll of the dice to determine the damage from a blow. Naturally, intellectual property issues appear more prominently when players have more freedom of creative expression, both with respect to a player's original creative input, and what a player can do with pre-existing, copyrighted elements. The latter issue is the primary focus of this Article, particularly as it applies to role-playing games (RPGs) that have their roots in fan culture.

"Fanworks," as defined by legal scholar Rebecca Tushnet, are created by fans who "tell[] stories featuring their favorite characters."<sup>7</sup> RPGs are just one more medium for telling these stories, and traditionally, as with other fanworks, the majority of the players/writers who are stepping into the roles of borrowed characters and collaboratively spinning complex narratives are women.<sup>8</sup> Though pushing the boundaries of what would

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*Video Game Moments: Roy and Richard Play in the MUD*, GAMESPY.COM, July 25, 2003 available at <http://web.archive.org/web/20030724183537/http://www.gamespy.com/articles/july03/25smartest/index.shtml>. *Ultima Online* is considered the first commercially successful MMORPG. Steven L. Kent, *Alternate Reality The History of Massively Multiplayer Online Games*, GAMESPY.COM, Sept. 23, 2003, available at <http://web.archive.org/web/20090129105259/http://archive.gamespy.com/amdmmog/week1/index.shtml>.

<sup>6</sup> See Erik Mona, *From the Basement to the Basic Set: The Years of Dungeons & Dragons*, in *SECOND PERSON: ROLE-PLAYING AND STORY IN GAMES AND PLAYABLE MEDIA* 25-30 (Pat Harrigan & Noah Waldrip-Fruin, Eds., 2007) (noting that *Dungeons & Dragons* is the most popular and financially successful role-playing game that introduced millions to the concept). Whereas the game is structured in terms of the rules of combat, it encourages players to "dramatize the adventure as much as possible," including describing scenery and speaking in appropriate character voices. *Id.* at 29. There has long been an industry "clash between those who view[ed] games as formal systems and those who view[ed] them as storytelling media." Costikyan, *supra* note 5 at 6.

<sup>7</sup> Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 502 (2008).

<sup>8</sup> See Henry Jenkins, *Star Trek Rerun, Reread, Rewritten*, in *FANS, BLOGGERS, AND GAMERS* 37, 43 (2006) ("Media fan writing is an almost exclusively feminine response to mass media texts.") [hereinafter Jenkins, *Star Trek Rerun*]. Despite the predominance of male characters in the *Lord of the Rings* books, the members of the online fandom appear to

commonly be considered “games,”<sup>9</sup> this medium is an answer to a predominantly female style of play that begins with a child playing with paper dolls and Barbies. Is dressing a paper doll as Harry Potter’s Hermione Granger any different than making a Second Life avatar in her image? What about writing a blog from her point of view? Similarly, if a child can dress as Spider-Man for Halloween, then should he be able to dress his MMORPG avatar the same way?<sup>10</sup> As the Electronic Frontier Foundation’s Fred von Lohmann once mused, “Should parents be policing their kids, lest they be caught ‘pretending without a license’?”<sup>11</sup>

This Article discusses fan-based role-playing activities in the context of this copyright quandary, and suggests that the gender divide in role-playing style that manifests itself in these predominantly female games in effect delegitimizes the female version of what has historically been a male-dominated hobby. Part II discusses these kinds of games in more detail, both in the context of other female fan activities and traditional role-playing games. Part III sets out the legal issues commonly associated with fanworks, and how they might apply to RPGs. And Part IV looks to the future, suggesting that the direction in which gaming and virtual-world technology is moving will lead to even more intellectual-property complications.

## II. PRETENDING AND STORYTELLING IN BORROWED WORLDS

There is a rich tradition of drawing elements of pre-existing worlds into new works of fiction. From Shakespeare to Star Wars, creative minds have built upon ideas in the collective archive.<sup>12</sup> The genres of science

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be mostly women. See e.g. Thevina, *Does Gender Matter? Women, Tolkien and the Online Fanfiction Community* (April 4, 2004), <http://www.henneth-annun.net/stories/chapter.cfm?stid=1485>; see also Francesca Coppa, *Women, Star Trek, and the Early Development of Fannish Vidving*, 1 TRANSFORMATIVE WORKS & CULTURES (2008) at Section 5, available at <http://journal.transformativeworks.org/index.php/twc/article/view/44/64> (describing the fan practice of “vidding” as a predominantly female activity).

<sup>9</sup> There have been a wide variety of different definitions for “game” over the years, though it nearly always involves something about “rules” and a “quantifiable outcome;” however, this automatically excludes role-playing games (and other popular “games” such as *The Sims*) that have “emergent quantifiable goals but usually no single overriding outcome.” Pat Harrigan & Noah Wardrip-Fruin, *Introduction*, in *SECOND PERSON: ROLE-PLAYING AND STORY IN GAMES AND PLAYABLE MEDIA*, xiii-xiv (Pat Harrigan & Noah Wardrip-Fruin, Eds. 2007).

<sup>10</sup> In 2005, Marvel sued NCSOFT, the producers of *City of Heroes*, claiming trademark infringement due to players’ ability to create characters that look like Marvel’s trademarked superheroes, such as Spider-Man. Second Am. Compl. at 1, *Marvel Enterprises v. NCSOFT Co.*, 2005 WL 878090 (C.D. Cal 2005)(No. CV 04-9253 RGK(PLAX)).

<sup>11</sup> This statement was made in response to the Marvel lawsuit. Fred von Lohmann, *Et tu, Marvel?*, LAW.COM (Dec. 3, 2004), <http://www.law.com/jsp/article.jsp?id=1101738490342>.

<sup>12</sup> Ryan McKittrick, *How Romeus Became Romeo*, AMERICAN REPERTORY THEATER

fiction and fantasy especially rely heavily upon “thick text,” a saturation of references and allusions to lend depth and breadth to the invocation of the fantastic.<sup>13</sup> In *Lord of the Rings*, for example, one of the most detailed and well-known fictional worlds, Tolkien incorporated ideas from mythology, such as elves and orcs.<sup>14</sup> Others then came along afterwards and appropriated elements from his work—like the Halflings in *Dungeons & Dragons*.<sup>15</sup> Even courts have noted this phenomenon,<sup>16</sup> and in recent years with the rise of remix culture on the Internet, creativity rooted in appropriation has become more accepted.

Moreover, this history of cultural appropriation is not limited to professional creators, but common among the creativity of ordinary people, and even children.<sup>17</sup> In addition to borrowing ideas for the purpose of new works, these consumers of fiction and art often find ways to inhabit and add to these existing worlds simply for the love of the original rather than a drive to create something new. Media scholar Henry Jenkins writes about “making texts real” in the context of the story of the Velveteen Rabbit—if you invest enough in something, you give it meaning unanticipated by its creator.<sup>18</sup> He is referring primarily to the creative work of fans, those who creatively expand upon source material because of their investment in it. Although generally thought of as creative writing that borrows characters and settings that the author did not create, the term “fan fiction” implies a

NEWS, Jan. 2006, at 4 available at [http://www.amrep.org/articles/4\\_3a/romeus.html](http://www.amrep.org/articles/4_3a/romeus.html) (“When Shakespeare sat down to write *Romeo and Juliet* around 1596, he wasn't starting from scratch. While he was working, Shakespeare was looking at a copy of a wordy 3,020-line narrative poem by Arthur Brooke titled ‘The Tragical History of *Romeus and Juliet*.’”).

<sup>13</sup> Tanya Krzywinska, *World Creation and Lore: World of Warcraft as Rich Text, in DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRAFT READER*, 123 (Hilde G. Corneliussen & Jill Walker Rettberg, Eds. 2008).

<sup>14</sup> Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CALIF. L. REV. 1, 15 (2004); see also *Orcs*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Orcs> (last visited Apr. 4, 2013).

<sup>15</sup> The tabletop role playing game *Dungeons and Dragons* uses “Halflings” as a race in the game, changed from “hobbits” for legal reasons. *Halflings*, Sources and influences on the development of *Dungeons & Dragons*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Sources\\_and\\_influences\\_on\\_the\\_development\\_of\\_Dungeons\\_%26\\_Dragons](http://en.wikipedia.org/wiki/Sources_and_influences_on_the_development_of_Dungeons_%26_Dragons) (last visited April 4, 2013).

<sup>16</sup> See e.g. *White v. Samsung Electronics*, 989 F.2d 1512, 1413 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (“Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.”).

<sup>17</sup> See Anne Haas Dyson, *Folk Processes and Media Creatures: Reflections on Popular Culture for Literacy Educators*, 51 THE READING TEACHER 392, 393 (“[T]he social processes through which children appropriate these ever-changing media figures are very old, rooted in the folkloric processes of face-to-face interaction and group solidification through appropriated and transformed stories.”).

<sup>18</sup> HENRY JENKINS, *TEXTUAL POACHERS* 51 (1992) [hereinafter Jenkins, *Textual Poachers*].

more specific set of characteristics—for example, that it is not produced as professional writing and is based on an identifiable segment of popular culture.<sup>19</sup> However, the basic phenomenon can be traced back to well before the Star Trek stories traded between fans in the sixties.<sup>20</sup> Consider the fan societies for Jane Austen and Sherlock Holmes in the 1920s, or Tom Stoppard’s *Rosencrantz and Guildenstern are Dead*—or even earlier, John Lydgate’s 1421 continuation of *Canterbury Tales*, or the multitude of reworkings of fairy tales and myths.<sup>21</sup> Copyright issues aside (since Shakespeare is long since in the public domain), there is fundamentally no difference between Stoppard’s exploration of the story of the two minor characters in *Hamlet*, and a modern fan writer’s exploration of the story of Harry Potter’s Draco Malfoy; both are intended as an expansion of the original world rather than a replacement for it.<sup>22</sup>

However, though new works, like fan fiction, that borrow both characters and world from the original may be an easy example of appropriation, this certainly isn’t the only way of investing in a fictional setting. RPGs are often based on pre-existing worlds, such as *Lord of the Rings Online* (based on Tolkien’s novels), *Call of Cthulhu* (based on Lovecraft’s myths), *Serenity* (based on the *Firefly* television show), and even *World of Warcraft* (based on the *Warcraft* universe of the popular video-game series).<sup>23</sup> Moreover, collaborative-writing-based RPGs that exist as part of fan culture expand upon source material in the same manner as fan fiction.

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<sup>19</sup> Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 731 (2008) [hereinafter Fiesler, *Everything I Need to Know*].

<sup>20</sup> Many understand fan fiction to be a product of the fan cultures of the late sixties, starting with *Star Trek* fanzines, but others consider mythology to fall into the same category. Abigail Derecho, *Archonic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET*, 62 (Karen Hellekson & Kristina Busse, Eds. 2001).

<sup>21</sup> *Id.*

<sup>22</sup> A popular example of high quality fan fiction is *The Draco Trilogy*, a work of nearly a million words by a New Yorker who wrote under the pseudonym Cassandra Claire. Matthew Syed, *What the Doctor Did Next*, THE TIMES (Dec. 24, 2005), available at [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/books/article782039.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/books/article782039.ece) (referring to the trilogy as a “gem of such superlative quality that it enhances one’s appreciation of the original”); see also Cassandra Claire, *The Draco Trilogy*, FANLORE WIKI, [http://fanlore.org/wiki/The\\_Draco\\_Triology](http://fanlore.org/wiki/The_Draco_Triology) (last visited October 20, 2013).

<sup>23</sup> THE LORD OF THE RINGS ONLINE, <http://www.lotro.com/> (last visited Dec. 16, 2008); *Call of Cthulhu: Fantasy Role Playing in the Worlds of HP Lovecraft*, AMAZON.COM, <http://www.amazon.com/Call-Cthulhu-Fantasy-Role-Playing-Lovecraft/dp/093363515X/> (last visited Apr. 4, 2013); *Serenity Role Playing Game*, Amazon.com, <http://www.amazon.com/Serenity-Role-Playing-Jamie-Chambers/dp/1931567506> (last visited Apr. 4, 2013); *Introduction to World of Warcraft*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/guide/> (last visited Apr. 4, 2013).

### A. Role Playing in the Sand

Fan writers often use the metaphor of a sandbox to describe their relationship to their source material—i.e. we don't own the sand, but we're having fun making castles in it.<sup>24</sup> Disclaimers (common in fanworks even though they carry no legal weight)<sup>25</sup> in front of stories sometimes include language along the lines of “I don't own this; I'm just playing in their sandbox.”<sup>26</sup> Even some professional writers have admitted writing fan fiction on occasion. Neil Gaiman noted in his blog that “it's fun to head over into someone else's playground,” but draws the line at commercial exploitation,<sup>27</sup> which is also the line that most fans draw.<sup>28</sup>

As noted above, not all RPGs take place in someone else's sand, but many do. Often these types of games are particularly problematic for a definition of not only “game,” but also “role-playing game.”<sup>29</sup> Sometimes the use of the term is particularly narrow, requiring “turn-based” combat and a statistical leveling system (harkening back to *Dungeons & Dragons* but also fitting modern MMORPGs).<sup>30</sup> Sometimes the term also encompasses “storytelling” games, such as *Vampire: The Masquerade* (which emphasizes narrative rather than game mechanics),<sup>31</sup> and at least for those who play them, goes so far as to include the play-by-post and play-by-email games that are really more collaborative writing.<sup>32</sup>

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<sup>24</sup> John C. Bunnell, About Fanfic, SFE NET <http://sff.net/people/jcbunnell/aboutfic.htm> (last visited Apr. 4, 2013) (describing fanfic writers as “happy to stay in the fanfic sandbox” and suggesting that unless an author posts a “Sandbox Open” sign, writers should leave the universe alone); Abbie Weinberg, *Abbie Weinberg on Fanfic – Part 1*, <http://elizabethwillse.com/2008/11/11/guest-post-abbie-weinberg-on-fanfic-part-1/> (last visited Apr. 4, 2013) (describing the “idea of playing in another's sandbox” as “taking a universe and characters that have been established in a published book, TV show or movie, and writing your own stories in and about it”).

<sup>25</sup> See generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 678 [hereinafter Tushnet, *Legal Fictions*] (discussing the legal ineffectiveness of disclaimers but noting their important non-legal functions).

<sup>26</sup> Due to the legal issues associated with fanworks and for the privacy of the writers and players, this article will not provide direct links to specific fanworks such as fan fiction or roleplaying games.

<sup>27</sup> Neil Gaiman, *Monday, April 8, 2002*, NEIL GAIMAN'S JOURNAL, [http://journal.neilgaiman.com/2002\\_04\\_01\\_archive.html](http://journal.neilgaiman.com/2002_04_01_archive.html) (last visited April 4, 2013).

<sup>28</sup> Fiesler, *Everything I Need to Know*, *supra* note 19, at 745-52 (describing the social norm of noncommercial use in fan fiction communities).

<sup>29</sup> *Supra* note 9 and accompanying text.

<sup>30</sup> MATT BARTON, DUNGEONS & DESKTOPS: THE HISTORY OF COMPUTER ROLE-PLAYING GAMES 5-6 (2008).

<sup>31</sup> Will Hindmarch, *Storytelling Games as a Creative Medium*, in SECOND PERSON: ROLE-PLAYING AND STORY IN GAMES AND PLAYABLE MEDIA, 47 (Pat Harrigan & Noah Wardrip-Fruin, Eds. 2007).

<sup>32</sup> *Play-by-post role-playing game*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Play-by-post\\_role-playing\\_game](http://en.wikipedia.org/wiki/Play-by-post_role-playing_game) (last visited Apr. 4, 2013).

For the purposes of this Article, the dictionary definition of role-playing game will suffice: “a game in which players take on the roles of imaginary characters, usually in a setting created by a referee, and thereby vicariously experience the imagined adventures of these characters.”<sup>33</sup> However, the phrase “take on the role” is construed somewhat narrowly so that it does not, for example, encompass someone having the “role” of Professor Plum when playing the board game *Clue*. And “experience” is construed somewhat broadly, requiring an assignment of point-of-view but not necessarily identity. RPGs also must, to some degree, involve storytelling (even in MMORPGs, the character has to undertake “quests” that unravel some story in order to advance in levels). “Players” is an essential part of the definition, in that an RPG in this context must be a social activity. This differs from some single-player computer games that are considered “role playing” by virtue of narrative structure rather than any actual role playing or acting in-character on the part of the player.<sup>34</sup> Of less importance is the “referee,” as although the participants do play within a shared world, the extent to which there is a “director” varies from game to game<sup>35</sup>—and moreover, the world may not be created by any of the players themselves but rather pulled from some common source material.

In order to place our RPGs firmly in the sandbox—as the legal issues associated with MMORPGs such as *World of Warcraft* and *Star Wars Galaxies* are varied and fascinating but largely irrelevant in this context<sup>36</sup>—an additional element to the definition involves a “borrowed” world, that is, the use of copyrighted characters and/or worlds. Though the majority of these games are played through collaborative writing and therefore usually fall into the “play-by-post role-playing game” category, the fact remains

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<sup>33</sup> Esther MacCallum-Stewart & Justin Parsler, *Role-play vs. Gameplay: The Difficulties of Playing a Role in World of Warcraft*, in *DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRAFT READER*, 226 (Hilde G. Corneliussen & Jill Walker Rettberg, Eds. 2008) (quoting the *Oxford English Dictionary*).

<sup>34</sup> BARTON, *supra* note 30 at 10-11.

<sup>35</sup> For example, whereas *Dungeons & Dragons* requires a “game master,” and MMORPGs such as *World of Warcraft* are constrained by the software limitations imposed by the creators, many of the collaborative-writing-based games (discussed *infra*) are much more of a level, collaborative effort. Though it should be noted that nearly every game of this sort does require some sort of moderator in order to maintain basic order.

<sup>36</sup> This is because players are *invited* to these games to role play. Whether the world was created for that purpose (e.g., *World of Warcraft*) or exists in an officially licensed form (e.g., the *Serenity* roleplaying game), the mere act of a player creating inside that world generally raises no copyright concerns. It is only when the problem of who owns what has been created, or when the player tries to take something *out* of the context of the game, that problems arise. For discussions of some of these issues, *see, generally*, DAVID BOLLIER, *BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE* 76-79 (2005); Susan P. Crawford, *Who’s In Charge of Who I Am? Identity and Law Online*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* (Jack M. Balkin & Beth Simon Noveck, Eds. 2006); Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 *IND. L.J.* 261 (2007).



that play-by-post games do sometimes involve original settings, and that role playing with borrowed characters and worlds can now take place in virtual environments such as *Second Life*, thereby no longer requiring the “post.” I therefore propose the term “fan-based role-playing game” (FRPG), placing the genre alongside other fanworks that tell stories involving favorite characters.<sup>37</sup> This would include, for example, text-based RPGs or play-by-email games, in which players write third-person narratives that are posted to a mailing list or blog,<sup>38</sup> “collaborative fiction blogs” or Twitter games where each player takes on the persona of a specific character and creates a blog or Twitter account for that character,<sup>39</sup> and the re-creation of fictional settings or characters in virtual worlds<sup>40</sup>—so long as they are based on pre-existing, or “borrowed,” settings or characters.

This is not an arbitrary distinction, since—as with fan fiction—the shared cultural and media knowledge is what brings together members of the community. Even with children, popular media is important cultural capital,<sup>41</sup> as well as tool in developing literacy.<sup>42</sup> Moreover, this idea applies even more to role playing, where the activity is necessarily collaborative (as opposed to fan fiction or fanvids, in which the community aspect derives from feedback and discourse rather than the creative act). The borrowed source material provides the required common point of reference for

<sup>37</sup> See Tushenet, note 7 and accompanying text.

<sup>38</sup> Sarah Wanenchak, *Tags, Threads, and Frames: Toward a Synthesis of Interaction Ritual and Livejournal Roleplaying*, GAME STUDIES 10(1) (2010) available at <http://gamestudies.org/1001/articles/wanenchak>; Casey Fiesler, *Imagined Identities: Harry Potter, Roleplaying, and Blogs*, in THE WITCHING HOUR COMPENDIUM 146, 147-48 (The Witching Hour Programming Team, ed., 2007) [hereinafter Fiesler, *Imagined Identities*].

<sup>39</sup> Fiesler *Imagined Identities* at 148. Rachel M. Magee, Melinda Sebastian, Alison Novak, Christopher M. Mascaro, Alan Black, & Sean P. Goggins, *#TwitterPlay: a Case Study of Fan Roleplaying Online*, at 200 CSCW '13 COMPANION (2013) available at the ACM Digital Library.

<sup>40</sup> One example is the long-running role playing community based on the *Chronicles of Gor* books in the virtual world *Second Life*. PAUL CARR & GRAHAM POND, THE UNOFFICIAL TOURISTS' GUIDE TO SECOND LIFE 93 (2007). Another is the possibility of creating copyrighted characters in MMORPGs—such as Marvel's comic book characters in *City of Heroes*. See von Lohmann, *supra* note 11.

<sup>41</sup> See, e.g., Anne Haas Dyson, *Cultural Constellations and Childhood Identities: On Greek Gods, Cartoon Heroes, and the Social Lives of Schoolchildren*, 66 HARV. EDUC. REV. 471, 472 (noting that knowledge of symbolic material, such as the “stuff of Saturday morning cartoons” helps situate the child storyteller or actor in their social world); Karen E. Wohlwend, *Damsels in Discourse: Girls Consuming and Producing Identity Texts Through Disney Princess Play*, 44 READING RES. Q. 57, 62 (2009) (“[C]hildren use the play to form affiliations in the local peer culture where they strategically use popular media as cultural capital.”).

<sup>42</sup> See, e.g., Jackie Marsh, *Batman and Batwoman go to School: Popular Culture in the Literacy Curriculum*, INTERNATIONAL JOURNAL OF EARLY YEARS EDUCATION (1999) (describing a case study of the introduction of popular culture themes into a role play area in order to judge effects on children's literacy).

players,<sup>43</sup> which is particularly important in an FRPG which, being fan-created as opposed to a mass-marketed product like an MMORPG, is smaller and relies on the cultural reference to attract potential players. After all, unlike an original short story or novel, which the creator could post on the Internet and potentially entice some readers to spend a few minutes or hours engaging with, it would likely be considerably more difficult to gather players for a completely original RPG that would require a significant investment of time and energy. Even “original” MMORPGs or tabletop games like *Dungeons & Dragons* are generally based on familiar tropes, the “thick” text of science fiction or fantasy.<sup>44</sup> So whereas it is possible to step out of the sandbox, once there, you may not have anyone to play with.

### B. Women in the Sandbox

Though the draw of building with someone else’s sand can originate from communities of shared experience as well as an intense investment in the original work (hence the origin of the word “fan” in “fanatic”),<sup>45</sup> it may also be a wider phenomenon. Some have suggested the existence of a cultural entitlement to inject popular characters into social dialogue, encouraging people to appropriate and recode original works.<sup>46</sup> For example, shortly before the release of the last *Harry Potter* book, the *New York Times* ran an op-ed piece where four authors shared their versions of how the book should end.<sup>47</sup> And some feel that fan work is just an extension of the tendency of humans since the spoken word to share and build upon the natural archive of existing texts, and that it should not be considered “appropriative” or even “derivative” at all, but rather “archontic”—without regard to property rights or the relative merits of the new and underlying work.<sup>48</sup>

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<sup>43</sup> This is also likely the catalyst for childhood pretending with borrowed characters. *See id.* (“Popular culture generally crosses racial, ethnic, linguistic and socio-economic boundaries and so work on television and popular culture can be a means of drawing upon some of the cultural experiences of all children in a class.”); Wohlwend, *supra* note 41, at 62 (“[C]hildren also create their own insider practices by using play spaces to produce nexus that are valued by other children . . . . Children who value the same toys and who choose to play together based upon their common interests create an affinity group through their shared preferences and activities . . . . for example, to produce play performances . . . with one’s knowledge of *Little Mermaid* lore.”).

<sup>44</sup> *See* Krzywinska, note 13 and accompanying text.

<sup>45</sup> JENKINS, *TEXTUAL POACHERS*, *supra* note 18, at 12-15 (describing the origin of “fan” and the general perception of early fan culture).

<sup>46</sup> Jacqueline Lai Chung, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 905-06 (2007).

<sup>47</sup> *Five Ways to End Harry Potter*, N.Y. TIMES, Jul 8, 2007, available at <http://www.nytimes.com/2007/07/08/opinion/08potterintro.html>

<sup>48</sup> Derecho, *supra* note 20 at 64 (“A literature that is archontic is a literature composed

Others prescribe a gendered explanation to the lure of the sandbox. Henry Jenkins has considered research suggesting a socialization of different reading styles between men and women and applied it to the media-fan-writing community.<sup>49</sup> He notes that while men tend to focus primarily on narrative organization and authorial intent, women focus on reconstructing the fictional world and understanding the characters, and generally feel freer to play with story content, seeing outside the lines of the text.<sup>50</sup> Jenkins posits this as a motivation behind fan writing, the compulsion to speculate about characters and story events beyond those textual boundaries.<sup>51</sup> To extend a metaphor, many women are not content to dig for buried treasure in the sand; if they cannot find what they are looking for, they start building their own treasure out of the sand itself.

This gender divide affects not only how men and women interact with a narrative, but also what holds their attention and what they seek to get out of a story. This may be partly due to actual reading materials, and in particular, early encounters with fiction. After all, especially for younger children, institutional practices tend to segregate fictional works into gender-specific categories—like publishers who commission romance stories for girls and science fiction for boys.<sup>52</sup> Moreover, just as other gender-role behaviors and attitudes are formed during childhood, so may be a preference for literary tropes.<sup>53</sup> Therefore, girls grow up reading about romance and character relationships, and as adults may still read for these things in stories generally, regardless of genre.<sup>54</sup> Though this theory manifests itself most clearly in fan writers who actually put forth creative energy to tell the story of a romance outside textual boundaries, it is not so limited; one finds that women tend to care more about which potential romantic relationships in a story will work out in the end.<sup>55</sup> Though just as many boys as girls read the *Harry Potter* books,<sup>56</sup> it is likely that the girl readers invested more in whether Hermione and Ron would be married by

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of texts that are archival in nature and that are impelled by the same archontic principle: that tendency toward enlargement and accretion that all archives possess.”)

<sup>49</sup> Jenkins, *Star Trek Rerun*, *supra* note 8, at 43.

<sup>50</sup> *Id.* at 43-44.

<sup>51</sup> *Id.*

<sup>52</sup> JENKINS, TEXTUAL POACHERS, *supra* note 18, at 113.

<sup>53</sup> *Id.* (citing Elizabeth Segal, *As the Twig is Bent . . . Gender and Childhood Reading*, in *Gender and Reading: Essays on Readers* 165 (Elizabeth A. Flynn & P.P. Schweickart, Eds., 1985)).

<sup>54</sup> *Id.* at 114.

<sup>55</sup> See, e.g., *id.* at 112 (noting the differences in male and female interests in the television show *Twin Peaks*; men tended to embrace the narrative complexity and mystery whereas women were particularly interested in the friendship between two of the characters).

<sup>56</sup> Yankelovich, 2008 Kids & Family Reading Report 49, available at <http://www.scholastic.com/aboutscholastic/news/readingreport.htm> (providing data that 59% of boys and 57% of girls ages five through seventeen have read the *Harry Potter* books).

the end. For those who favored Hermione and Harry, some may have gone on to write their own stories in which that pair ended up together instead.<sup>57</sup>

Many of these ideas about how women experience narrative apply particularly well to the phenomenon of role playing. One study which asked college students to comment on or retell literary stories found that “[w]omen enter the world of the novel” as if it were “an atmosphere or an experience.”<sup>58</sup> Ordinary women simply in the context of reading devoted a great deal of energy to understanding the world and characters, in effect stepping *inside* the story, and when taken to the next level this activity becomes role playing—especially when considering, as noted earlier with respect to video games,<sup>59</sup> women tend to be drawn toward social experiences with respect to narrative. Traditionally in women’s literary culture, women explore their feelings and ideas about texts through both discourse and collective writing projects.<sup>60</sup> And the Web has exponentially increased the opportunities for finding like-minded people with which to discuss and collaborate, particularly with respect to devotion to television series, movies, books, or even individual characters, as well as allowed these media to survive well beyond the time of their original broadcast or publication.<sup>61</sup> Though other fan activities such as fan fiction and vidding are very much about community, FRPGs are even more so since they are by definition collaborative.

Moreover, role playing, as well as most fan-based activities generally, mirror much of the traditional play of young girls. Whereas dolls may have once served a largely instructional function, teaching girls to be useful within a family by developing sewing skills and intuitions about childrearing,<sup>62</sup> this purpose became increasingly obsolete as dolls became more splendid. In particular, by the turn of the twentieth century, dolls and the stories girls created around them were more about fantasy than practicality.<sup>63</sup> And today, dolls based on popular culture are ubiquitous. For example, during my childhood, Barbies were based on careers, ethnicities,

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<sup>57</sup> Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL’Y & L. 273, 301 (2006) [hereinafter Tushnet, *My Fair Ladies*] (noting that “[f]an fiction offers hundreds, even thousands, of versions of the same story—how Harry Potter and Hermione Granger finally got together, or how Harry and Draco Malfoy did.”)

<sup>58</sup> See Jenkins, *Star Trek Rerun*, *supra* note 8 at 43 (citing David Bleich, *Gender Interest in Reading and Language*, in GENDER AND READING: ESSAYS ON READERS, TEXTS AND CONTEXTS 239, 256 (Elizabeth A. Flynn & P.P. Schweickart, eds. 1986)).

<sup>59</sup> See *supra* note 4 and accompanying text.

<sup>60</sup> Jenkins, *Star Trek Rerun*, *supra* note 8, at 44.

<sup>61</sup> Josh Stenger, *The Clothes Make the Fan: Fashion and Online Fandom when Buffy the Vampire Slayer Goes to eBay*, 45 CINEMA J. 26, 26 (2006).

<sup>62</sup> Miriam Formanek-Brunell, *The Politics of Dollhood in Nineteenth Century America*, in THE CHILDREN’S CULTURE READER 363, 363, 371 (Henry Jenkins, ed., 1998).

<sup>63</sup> *Id.* at 376.

or other categories (e.g., Air Force Barbie or Brazilian Barbie) that would allow children to assign specific identities to them. Today, even Barbies can be media tie-ins with pre-assigned identities (e.g., Batgirl Barbie or Kimora Lee Simmons Barbie). Toys based on popular media *encourage* children to play out familiar scenarios and character roles.<sup>64</sup>

Education researcher Karen Wohlwend, after conducting a study of how girls interact with Disney Princess dolls, proposed an expanded definition of toys as literacy objects: “a text to be read, performed, and consumed with meanings suggested by its materials and its history of attached story lines and practices” that also allows children to “improvise new meanings through play.”<sup>65</sup> This harkens back to literacy research that suggests a feminine tendency to experience narrative as an atmosphere, with perceived freedom to improvise new story content.<sup>66</sup> Wohlwend also draws a conclusion about the ubiquity of other tie-in products that relates to role playing:

The pervasive availability of consumer products associated with the Disney Princess films blurs the line between play and reality, allowing children to live in-character: One can be Cinderella all day long, sleeping in pink princess sheets, eating from lavender Tupperware with Cinderella decals, and dressing head to toe in licensed apparel, from plastic jewel-encrusted tiara to fuzzy slipper-socks.<sup>67</sup>

In effect, copyright owners encourage role play by providing children the means with which to *become* the characters, or at the very least, to create their own stories. So the little girl playing with her *Harry Potter* dolls today may someday find herself facing claims of copyright infringement simply for taking this play online—something that is becoming increasingly common, even with girls and dolls.<sup>68</sup>

### C. *Building Virtual Sandcastles*

As with girls and dolls moving online, the social and role-playing aspects that women tend to find satisfying in games have lent themselves particularly well to a move from playgrounds and dollhouses to online

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<sup>64</sup> See Wohlwend, *supra* note 41, at 60.

<sup>65</sup> *Id.* at 60.

<sup>66</sup> Jenkins, *supra* note 49, at 43-44; *see also supra* text accompanying notes 49-51.

<sup>67</sup> Wohlwend, *supra* note 41, at 58.

<sup>68</sup> See, e.g., Richtel & Stone, *supra* note 1 (describing the “Not-Ready-for-MySpace Girls” who play with virtual dolls on sites like Cartoon Doll Emporium: “It beats playing with regular Barbies, said [9-year-old] Presleigh.”).

communities and virtual worlds.<sup>69</sup> Similarly, technology has revolutionized the way that women experience narrative socially through discourse and collaborative writing,<sup>70</sup> and has been complicit in the creation and dissemination of fanworks and fan discourse. Before the transition to the Internet in the early 1990s, media fans interacted through mailed newsletters and zines, face-to-face clubs, and conventions. Fan artifacts were physical, passed on person-to-person, and limited by geographical boundaries.<sup>71</sup> However, the move online changed what was largely a one-to-one exchange to a one-to-many exchange, where fans could post fanwork without knowing who would be consuming it or consume these artifacts without ever interacting with other fans.<sup>72</sup> Online fan discourse began largely on Usenet groups, but as new technology became available, fans would adopt it.<sup>73</sup> By the mid-to-late 1990s, this discourse was taking place most commonly on email lists and message boards, and these were fairly concentrated, with a few accounting for most of the traffic in a given fandom.<sup>74</sup>

FRPGs also followed this progression of technology, becoming more popular with the widespread availability of email listserv technology. Play-by-email games attracted fans who enjoyed the narrative part of role playing that was somewhat lacking in MUDs, where the experience of *Dungeons & Dragons* had moved online.<sup>75</sup> These games, largely collaborative-writing projects, extracted the “story” out of tabletop role playing; generally each player would take on the role of a character, emailing back and forth with other players, creating third-person narratives that were posted to the listserv upon completion.<sup>76</sup> These were RPGs in that players took on specific roles, but the artifact that resulted was essentially collaboratively written fan fiction. Indeed, this was basically the first kind of role-playing game to *have* artifacts, with perhaps the rare exceptions of audio-recorded tabletop games or video-recorded live-action RPGs. Even though these artifacts were not necessarily intended for public consumption, email posts were sometimes available publically on an archive of the listserv, on a message board, or on the game’s website. Still, these games maintained many of the structural elements of tabletop games, particularly

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<sup>69</sup> See *supra* note 4 and accompanying text.

<sup>70</sup> See *supra* note 4 and accompanying text.

<sup>71</sup> Karen Hellekson & Kristina Busse, *Introduction, in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 5, 13 (Karen Hellekson & Kristina Busse, eds., 2001).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Rebecca Lucy Busker, *Livejournal and the Shape of Fannish Discourse*, 1 TRANSFORMATIVE WORKS & CULTURES (2008).

<sup>75</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 147.

<sup>76</sup> *Id.* at 147-48.

the leadership of a Game Master (GM), who makes decisions about plot elements in much the same way as the roll of a dice in *Dungeons & Dragons*.<sup>77</sup>

However, as technology moved on, so did much fan activity. At the turn of the millennium, fandom expanded into the blogosphere, which had a significant impact on both the nature of fan discourse and on FRPGs.<sup>78</sup> Rather than the single-topic focus of listservs and message boards, blogs were a mix of not only all types of fan topics, but also completely different topics; blogs were not necessarily *about* fandom, but simply written by people who were fans.<sup>79</sup> Moreover, blogging *communities*, most notably Livejournal, formed interconnected spaces where fans could choose what to discuss and what not to discuss by creating individual lists of both other fans' blogs and single-focus communities.<sup>80</sup> In a way, Livejournal (and communities like it) both focused and broadened fandom, by (1) organizing and facilitating dialogue, particularly by way of feedback to fanwork<sup>81</sup>; and (2) increasing awareness of multiple fandoms with the creation of reading lists that would inevitably cross fandom lines. As one commentator put it:

[There was] a desire for a space that allowed not only for explorations, but also for discussions of themes and issues that crossed fandoms. Livejournal not only allows these discussions, but in many ways actively promotes them. . . . The impact of this shift has been profound, and in many ways it has served to take the focus off of the source and put it on the fan, and in turn, on fandom. . . . To say that this change in the medium of fannish discussion has had an impact on the content of fannish discussion would be an understatement.<sup>82</sup>

The impact of this shift to blogging communities with respect to FRPGs was also quite profound, in that it put a focus on the *role* in role playing. As with play-by-email games, players take on the roles of individual characters; however, blogs afford a deeper immersion, allowing

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<sup>77</sup> *Play by Email (PBEM) in a Larger Perspective*, PBEMPLAYERS.COM (Dec. 28, 2005), <http://www.pbemplayers.com/articles/running-your-own-pbem-game/play-by-email-pbem-in-a-larger-perspective>.

<sup>78</sup> See Hellekson & Busse, *supra* note 71, at 14.

<sup>79</sup> *Id.*

<sup>80</sup> Busker, *supra* note 74.

<sup>81</sup> Whereas email lists promote more general group discussion, Livejournal allows simultaneous individual and public dialogue. This is particularly useful with respect to feedback on works such as fan fiction, since an author can post the work to a personal journal or community, and then respond directly to feedback. See Fiesler, *Imagined Identities*, *supra* note 38 at 148.

<sup>82</sup> Busker, *supra* note 74.

the player to essentially step into the shoes of that character by creating a journal for him or her.<sup>83</sup> Role playing can take place in several different ways in these games: (1) individual journal entries from the point of view of the character, to which other characters may or may not be able to respond;<sup>84</sup> (2) correspondence between characters (for example, a string of comments in a blog using the conceit of a telephone conversation or an exchange of letters); and (3) narrative (usually in third person) that switches point of view back and forth between characters.<sup>85</sup> This last type of narrative is usually accomplished through emails between players, instant-message sessions, or strings of comments in a public journal post.<sup>86</sup> In many ways, these new blog-based FRPGs were very different than the email-based ones, particularly with respect to the lack of structure, emphasizing cooperative play rather than mechanics.<sup>87</sup>

The source material often determines the most popular medium for an FRPG. As with fandom in general, this would depend partly on when the fandom became popular in the timeline of technology. For example, *Star Trek*, one of the earliest fandoms, has a fairly small Livejournal presence, but still maintains a presence on Usenet, whereas fandoms such as *Harry Potter*, *Supernatural*, and *Buffy the Vampire Slayer* use Livejournal as a major gathering place.<sup>88</sup> Accordingly, *Star Trek* FRPGs are nearly exclusively through email, message boards, and chat, whereas the most common type of FRPG on Livejournal is likely *Harry Potter*,<sup>89</sup> and even newer fandoms, such as *Hunger Games*, are found in newer social media spaces such as Tumblr or Twitter.<sup>90</sup> Another factor can be affordances of the storyline or concept of the source material. For example, *Star Trek* is well-suited to the more structured, GM-based FRPGs due to the organizational structure, in which the GM can take on the role of the starship Captain with other players in lesser positions; similarly, *Harry Potter*, which takes place in a school (albeit magical) lends itself to the conceit of networked journals.<sup>91</sup> Additionally, the multiple-fandom affordances of Livejournal have made “panfandom” FRPGs quite

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<sup>83</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 148.

<sup>84</sup> Many games even use the conceit of real journals or blogs; for example, a *Harry Potter* game may describe them as magically linked journals or books. Ginger Stampley, *Journal Gaming Guide for PBEM Players*, PBEMPLAYERS.COM, (Aug. 21, 2007) <http://www.pbemplayers.com/articles/running-your-own-pbem-game/journal-gaming-guide-for-pbem-players>.

<sup>85</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 148-49.

<sup>86</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 149; accord Wanenchak, *supra* note 38 (describing this type of role playing).

<sup>87</sup> Stampley, *supra* note 84.

<sup>88</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 148.

<sup>89</sup> *Id.*

<sup>90</sup> Magee, *supra* note 39, at 201.

<sup>91</sup> *Id.*



common—in these games, characters come from across multiple media sources and converge in a single world. One well-known example boasts characters from over 300 fandoms—from the popular (sixty-nine characters from *Star Wars*) to the obscure (two from the video game *Portal*) to the *really* obscure (one from the children’s book *Harold and the Purple Crayon*).<sup>92</sup> Each of these characters, from these hundreds of different (with exceptions) copyrighted sources, all interact in a single copyrighted world—the bar in Douglas Adams’s *The Restaurant at the End of the Universe*, where “you can meet and dine with a fascinating cross-section of the entire population of space and time.”<sup>93</sup> As one observer noted, “Remember *Cheers*, the bar where everybody knew your name? Well, this is the bar where everybody read the book you were in. Or saw the movie. Or watched the television show. Or heard the song.”<sup>94</sup>

However, Millway’s demonstrates one particularly interesting fact about blog-based FRPGs: the players are predominantly female. In a survey of Millway’s players in 2005, 83% were women—and this statistic is very representative of the majority of these kinds of games.<sup>95</sup> One player, on the differences between email- and blog-based games, wrote:

[C]ompared to tabletop or even email gaming, journal games are highly female-oriented. I’ve seen games with no men in them at all. This tends to skew the types of play to heavily social games and put a heavy emphasis on relationships (romantic, friendship, and familial).<sup>96</sup>

This distinction is actually intuitive based on typical gender differences in storytelling and gaming style. Blog-based games tend to remove an extra layer of distance between the player and character. As one commentator noted, “Unlike more traditional RPGs, the players of [a Livejournal-based *Harry Potter* game called Nocturne Alley] embody their characters, rather than perform them, as their ‘real’ identities are erased by a number of game restrictions.”<sup>97</sup> These games also follow the gender

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<sup>92</sup> As of November 2013, this game had 908 characters in 362 different fandoms.

<sup>93</sup> Thomas L. Strickland, *A Different Kind of Game: The Phenomena of Millways Bar*, Jive Magazine, Mar. 22, 2005, available at <http://www.grabbingsand.org/wordpress/2011/01/06/a-different-kind-of-game-the-phenomena-of-millways-bar-a-jive-re-post>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* See also Fiesler, *Imagined Identities*, supra note 38, at 149. This publication is an abridged version of the results of a longer research project, and more detailed information about the gender breakdown of participants in several blog-based FRPGs is on file with the author.

<sup>96</sup> Stampley, supra note 84.

<sup>97</sup> Lyndsay Brown, *N\_A & NrAged: When RPGs Go Fannish*, GAMEOLOGY (June 6, 2006), [http://www.gameology.org/alien\\_other/n\\_a\\_and\\_nraged](http://www.gameology.org/alien_other/n_a_and_nraged).

distinction in literary theory of the female reading of narrative for experience and world and the male reading for plot and authorial intent, as well as the feminine focus on relationships:

Nocturne\_Alley could be called an RPG novel, as the structure is being used to tell a story—many at once, as each character has a number of arcs, but the overall story is Harry’s relationship with Draco—even the war with Voldemort takes a back seat. This fact distinguishes the RPG from more goal-oriented games: though Harry is on a quest, that quest is a decided subplot to everything else that occurs, and its outcome is determined by his player’s actions, rather than by anything Harry himself does—the ultimate goal is storytelling, not winning the war.<sup>98</sup>

Also, the social aspect of a game like this one is more prominent, as multiple interactions can take place simultaneously and publically.<sup>99</sup> Moreover, blog-based FRPGs often gather communities *around* them, as opposed to just the circle of players. Other fans of the source material follow the game as if it were a soap opera, “watching the character interactions unfold just as if reading an ongoing fan fiction.”<sup>100</sup> Before it ended, Nocturne Alley had over 800 Livejournal “watchers,” and even a special community in which they could post comments about the game or ask questions of the players.<sup>101</sup> These watchers see the players more as actors rather than writers (or even as the characters themselves),<sup>102</sup> which makes the game a sort of “fandom within a fandom,” facilitating an engagement with source material that would rarely be possible with a commercial media product.<sup>103</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Stampley, *supra* note 84 (noting that it is much easier to manage large group events in journal rather than email games).

<sup>100</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 149.

<sup>101</sup> *Id.* For more information about the watcher community, NrAged, *see* Brown, *supra* note 97.

<sup>102</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 149.

<sup>103</sup> Brown, *supra* note 97:

A driving impulse behind fannish behavior is not only a fascination with engaging these characters on an emotional level as they are, or as we wish them to be, but a desire for more—a perpetual proliferation of Harrys, of scenarios in which Harry is saved from the abuse of the Dursleys by Snape, who then becomes his adopted father and mentor, of sexual encounters with Draco which leave the two boys more and better people due to their ability to love one another, etc. The key here is, of course, the *et cetera*—no story is ever satisfying enough, as it elides, ignores, or simply cannot contain the true richness fans crave, and no fan production can simultaneously supplement the lack perfectly and attain the legitimacy of being a suitable replacement.

Interestingly, the FRPGs that tend to gather audiences are nearly exclusively written for and by adults, and though a group of adults will generally produce more elaborate, better written narratives, they are also more inclined to insert “adult things” into this writing, such as sexual situations and profanity.<sup>104</sup> Players often appreciate the “freedom or sexual expression” or “romance novel quality” of role playing imaginary relationships.<sup>105</sup> This follows much of the literature on women and media fandom, particularly with respect to the eroticization of text and the “slash” sub-genre of fan fiction (which deals with romantic and often sexual relationships between male characters).<sup>106</sup> FRPGs, particularly the adult-content ones, are often “slash-heavy,” with much of the predominantly female cast of players taking on the roles of male characters.<sup>107</sup> And more generally, women tend to describe romance reading (in particular, romance novels) as a form of escape, a form of “vicarious romantic fulfillment” of a sort that they may not receive in their own lives.<sup>108</sup> With respect to vicariousness, it stands to reason that women would get more out of the relationship of a character while playing a role than from the more detached position of fan fiction writer.

A further implication of the FRPG as consumable fan fiction is the creation of a very public artifact. Though email-based games do sometimes have artifacts, they are not as visible, and rarely read by anyone other than the players.<sup>109</sup> Therefore, in terms of distribution, the latter is more like the personal exchange of narrative over a tabletop RPG, whereas the former is more like a live television show—the personal exchange of the actors during creation as well as the simultaneous distribution to an audience. Though both are fixed, the issue of wider dissemination makes these kinds of FRPGs—those favored by women—more problematic with regard to copyright.

### III. PRETENDING WITHOUT A LICENSE

#### A. *Fanwork and Copyright*

Fanwork, particularly fan fiction, has long been in a precarious legal position, even before the Internet allowed for its wide dissemination.<sup>110</sup>

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<sup>104</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 149.

<sup>105</sup> *Id.*

<sup>106</sup> See generally Jenkins, TEXTUAL POACHERS, *supra* note 18.

<sup>107</sup> Stampley, *supra* note 84. See also Brown, *supra* note 97 (on the focus at Nocturne Alley of the relationship between Harry and Draco).

<sup>108</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 149-50 (citing JANICE RADWAY, *READING THE ROMANCE* (1984)).

<sup>109</sup> See *supra* notes 76-**Error! Bookmark not defined.** and accompanying text.

<sup>110</sup> See, e.g., Tushnet, *Legal Fictions*, *supra* note 25, at 678-80.

Though there is no dearth of case law with respect to the appropriation of copyrighted ideas, most of the findings of infringement are with respect to (1) commercial new works, and (2) ideas stolen without attribution to the original source.<sup>111</sup> Of course, it is also true that fanworks necessarily *must* clearly use the copyrighted characters or setting—no matter how different the “levels of plot, characters, themes, mood, pace, dialogue, or sequence of events” may be,<sup>112</sup> the absence of any tie to the original would defeat the purpose.<sup>113</sup> Additionally, although neither of these factors goes directly to a finding of infringement, there are highly ingrained social norms within fandom against commercial use and for attribution.<sup>114</sup>

The attitudes of copyright holders toward the creative works of fans have stretched across the spectrum, from approving to tolerant to litigious. Some actively encourage it,<sup>115</sup> perhaps recognizing the positive impact that the fans can have on the marketability of the source material.<sup>116</sup> After all, the more “fanatical” people are about a television show, movie, or book, the more likely they are to buy all of the related tie-in products—such as the Disney Princess merchandise.<sup>117</sup> Should a content owner invite maximum engagement with that content through over-commercialization and then

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<sup>111</sup> See, e.g., *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478 (1961). The court found that a television play had lifted characters and plot from Ray Bradbury’s books, and thus constituted an infringement; the defendant claimed that he had never read nor had knowledge of *Fahrenheit 451*, which the court found “unworthy of belief.” *Id.* at 481.

<sup>112</sup> *Funky Films, Inc. v. Time Warner Entertainment Co.*, 461 F.3d 1072, 1078 (9th Cir. 2006) (with respect to a screenplay that defendants purported took copyrighted elements from a television show, the court found that though “at first blush” they appear significant, the two series with respect to those elements had “more significant differences and few real similarities.”).

<sup>113</sup> As noted, the common point of reference within the community is essential. *Supra* Part II(A).

<sup>114</sup> For a detailed discussion of these two norms, see Fiesler, *Everything I Need to Know*, *supra* note 19, at 745-46.

<sup>115</sup> See, e.g., Malene Arpe, *Television’s Afterlife*, TORONTO STAR, May 22, 2004 at J01 (quoting Joss Whedon: “I love it. I absolutely love it. I wish I had grown up in the era of fan fiction. . . . That’s why I made these shows. I didn’t make them so that people would enjoy them and forget them; I made them so they would never be able to shake them.”). George Lucas famously gave fan fiction writers permission to publish stories as long as they were non-erotic and not for profit. JENKINS, CONVERGENCE CULTURE 150 (2006) [hereinafter JENKINS, CONVERGENCE CULTURE] (noting that George Lucas gave permission for fan fiction as long as the stories were not pornographic or for profit).

<sup>116</sup> For example, *Star Trek* fan fiction writers in the early 60s and 70s organized the first *Star Trek* conventions; these same fans were responsible for the letter-writing campaign that saved the show from cancellation after the second season. The continuation of the franchise since then, spawning three spin-off series and ten films, has obviously made a great deal of money for Paramount. See generally Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 41, 45-48 (Karen Hellekson & Kristina Busse, eds. 2006) (describing the history of *Star Trek* fandom).

<sup>117</sup> See *supra* note 67 and accompanying text.

essentially punish such engagement if it has a social aspect?<sup>118</sup> Perhaps not, but many copyright holders have made their distaste for fan fiction clear,<sup>119</sup> and some have gone so far as to take legal action against fans.<sup>120</sup> However, the more common position is tacit tolerance by simply ignoring the issue.<sup>121</sup> It should be noted, however, that this tolerance in particular operates under the assumption that fanwork is non-commercial.<sup>122</sup> As soon as fans begin profiting from the use of “borrowed” material, not only do the owners lose their tolerance,<sup>123</sup> but so does the rest of the fan community.<sup>124</sup>

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<sup>118</sup> Though not an issue of copyright infringement, consider the problem with fanvids and the DMCA anti-circumvention laws. In the absence of the current DMCA exemption for noncommercial remix videos, even if the video clips in a fanvid were a fair use of the underlying television show or movie, it would be a violation of the DMCA to rip them from a DVD. This may encourage vidders to download illegally uploaded copies of this content rather than legally purchasing the DVDs and thus putting more money in the content owner’s pocket. Moreover, as fanvids are noncommercial, they essentially serve the same function as music videos or film trailers—free advertisement. In the last round of exemption rulings, there were a number of large content owners arguing against the remix video exemption.

<sup>119</sup> Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 537, 551 (2011) at 550 (citing author Anne Rice’s distaste for fan fiction “It upsets me terribly to even think about fan fiction with my characters... it is absolutely essential that you respect my wishes.”). See also, e.g., Robert J. Hughes, *Return to the Range*, *WALL ST. J.*, Sept. 6, 2008, at W2 (describing the constant irritation felt by Annie Proulx, author of the short story *Brokeback Mountain*, from fans who send their derivative manuscripts).

<sup>120</sup> See, e.g., JENKINS, *CONVERGENCE CULTURE*, *supra* note 115 at 151-52 (describing Viacom’s crackdown on fanzines); *id.* at 185-88 (describing Warner’s attempts to shut down *Harry Potter* fan sites); *Authors/Publishers Who Do Not Allow Fan Fiction*, *MEDIA MINER.ORG*, <http://www.mediaminer.org/blog/index.php?archives/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html> (last visited Mar. 2, 2009) (maintaining a list of “authors or publishers who have made statements on their websites or have filed Cease and Desist notices against fan fiction writers”).

<sup>121</sup> See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 *U. PA. L. REV.* 1869, 1887-91 (2009) (describing the norm among copyright holders of toleration of non-commercial use). See also, e.g., MELISSA ANELLI, *HARRY, A HISTORY* 92-93 (2008) (quoting J.K. Rowling, author of the *Harry Potter* books, as stating, “I felt that we needed to be hands off, accept it as flattering . . . . I’ve never read any fanfiction online. I know about some of it. I just don’t want to go there. It is uncomfortable for the writer of the original work . . . .”)(emphasis in original).

<sup>122</sup> Hetcher, *supra* note 121.

<sup>123</sup> When asked why he allowed fan fiction of his work, author Neil Gaiman replied, “Because fan fiction is fan fiction. I don’t believe I’ll lose my rights to my characters and books if I allow/fail to prevent/turn a blind eye to people writing say *Neverwhere* fiction, as long as those people aren’t, say, trying to sell books with my characters in [them].” Gaiman further stated that his attitude is not “particularly uncommon among authors.” Neil Gaiman, *Thursday, June 4, 2004*, *NEIL GAIMAN’S JOURNAL*, [http://journal.neilgaiman.com/2004\\_06\\_01\\_archive.html](http://journal.neilgaiman.com/2004_06_01_archive.html) (last visited October 20, 2013).

<sup>124</sup> For example, the case of Lori Jareo who self-published her novel *Another Hope* and listed it on Amazon. She was heavily criticized by the fandom community, to the point where it likely affected her reputation as an original author. Fiesler, *Everything I Need to Know*, *supra* note 19, at 749-50. The rarity of fan fiction writers attempting to profit from their work is probably due just as much to the fear of sanctions from the community as the fear of legal sanctions. *Id.* at 757. However, it should be noted that that “[h]istorically, fan

Of course, the opinion of most legal theorists who have taken up the question of fan fiction and copyright infringement is that the majority of it would be considered fair use.<sup>125</sup> However, this is far from a settled issue, as no cases on the subject have been litigated.<sup>126</sup> The two cases that allow perhaps the closest analogy are *Suntrust v. Houghton Mifflin* and *Warner Bros. v. RDR Books*. *Suntrust* involved the novel *The Wind Done Gone*, which rewrote the story of *Gone With the Wind* from the point of view of a slave; however, the decision in favor of *The Wind Done Gone* turned on its value as a parody and racist critique.<sup>127</sup> Whereas some fan fiction could arguably be considered critiques of or comments on the original work, the vast majority probably would not. A more recent case, *Warner Bros.* (better known as the “Rowling” case), involved an actual fan-created work, *The Harry Potter Lexicon*.<sup>128</sup> The Lexicon began as a Web-based encyclopedia that meticulously detailed the *Harry Potter* universe. Neither J.K. Rowling nor Warner Bros. (who own the rights to the films) took issue with the

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fiction ha[s] been proven to be a point of entry into commercial publication for at least some amateurs, who were able to sell their novels to the professional book series centering on the various franchises.” JENKINS, CONVERGENCE CULTURE, *supra* note 115 at 152. For example, the previously mentioned author who wrote *The Draco Trilogy* leveraged her fame as a fan fiction writer to sell her original novels. *Supra* note 22.

<sup>125</sup> See generally, e.g., Hetcher, *supra* note 121; Tushnet, *Legal Fictions*, *supra* note 25; Fiesler, *Everything I Need to Know*, *supra* note 19; Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 451 (2006). But see Grace Westcott, *Friction over Fan Fiction*, LITERARY REV. OF CAN., July/August 2008, available at <http://lrc.reviewcanada.ca/index.php?page=Friction-Over-Fan-Fiction>:

The idea that cultural works build upon their predecessors is incontrovertible. We do want a flourishing public domain to allow creators to build on the ideas contained in the works of others. But in obvious contrast with mythology and folklore is the commercial nature of the works on which fan fiction is based: the fact that identifiable authors or creative teams within media companies created them and are presumably trying to earn a living from them for the limited (although, many believe, not limited enough) time the copyright allows. . . . [There is a] view that considers fan fiction to be insufficiently transformative [to be fair use]. Although the characters may be harnessed to a different story vision, or even set in an alternative universe, fan fiction is essentially a narrative reworking with key fictional elements of the original; a derivative work, not a critical work, unlike a book review. In this view, copyright owners are entitled to protect their characters against fans’ distortions.

<sup>126</sup> See, e.g., JENKINS, CONVERGENCE CULTURE, *supra* note 114, at 188 (“After several decades of aggressive studio attention, there is literally no case law concerning fan fiction.”); Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 441 (2003) (“[N]ot a single fan fiction case has appeared on a court docket, although this distinct absence of litigation may not continue indefinitely.”).

<sup>127</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (holding the book to be a fair use).

<sup>128</sup> *Warner Bros. Entertainment, Inc. v. RDR Books*, 757 F. Supp. 2d 513 (S.D.N.Y. 2008).

website itself; it was only when the creator decided to publish a book version that the lawsuit ensued. The court held that the book did *not* fall under fair use, though this decision turned largely on the use of materials from the *Harry Potter* companion books which in themselves had an encyclopedic purpose.<sup>129</sup> However, the Lexicon was not a fanwork in the traditional sense, in that it was not creative (the court did not even consider it to be a derivative work),<sup>130</sup> and so the outcome likely has little applicability to fan fiction.<sup>131</sup> Moreover, both *The Wind Done Gone* and *The Harry Potter Lexicon* were commercial endeavors; though there is very little case law concerning non-commercial copyright infringement, this favor would likely weigh heavily in favor of fair use.<sup>132</sup>

The relevance of the legality of fan fiction with respect to most FRPGs is, of course, the associated artifacts. In the eyes of the law (or a copyright holder), a narrative created by a role-playing session is no different than a narrative created by a single fan-fiction author when posted to Livejournal or on a website. Though in general, most FRPG content might fare slightly better than traditional fan fiction under a transformativeness analysis. This is because many FRPGs involve either (1) original characters (for example, games that take place in the *Harry Potter* universe but in different time periods or locations than the books), or (2) an amalgam of many different fandoms, such that a character is either in an original setting or a setting from different source material—such as the

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<sup>129</sup> *Id.* at 520. However, the court did note that while the Lexicon contained a substantial amount of the copyrighted material, the acts of “condensing, synthesizing and reorganizing” such material did not merely recast the plaintiff’s narrative in a different medium; rather, it gave the plaintiff’s copyrighted material another purpose, which was to guide the reader through the “voluminous” fictional world created by Rowling. *Id.* at 539..

<sup>130</sup> *Id.*

<sup>131</sup> Casey Fiesler, *Harry Potter and the Doctrine of Fair Use*, FIREFOX NEWS (Sept. 22, 2008), <http://firefox.org/news/articles/1969/1/Harry-Potter-and-the-Doc-trine-of-Fair-Use/Page1.html>:

What does all of this mean for fans? Actually . . . probably not a whole lot. Though it did involve a fan, this case wasn't about a "fan work" in the usual sense, since the defendant was a publisher looking to capitalize on Rowling's success. The decision does not mention the potential legality of the Lexicon website at all, since that wasn't part of the complaint. Neither does the decision seem to set any sort of precedent that could be applied to fan fiction. After all, it was mostly the Lexicon's overuse of Rowling's original language that was its downfall, and this is not an issue for the majority of fan fiction. Though the verdict is unfortunate for those fans who wanted a print version of the Lexicon for their own use, it shouldn't spell gloom and doom for the future of fair use and fan work.

<sup>132</sup> Though it should also be noted that with respect to the fourth factor (market harm), the question is also one of the potential harm to *derivative* markets. See Hetcher, *supra* note 121, at 1911.

“panfandom” game sited earlier.<sup>133</sup> FRPGs also usually fly farther under the radar, as the content produced is for the most part only being consumed by the participants.

And just as in the early days of fan fiction when content owners began to take notice, they began to set up legal obstacles, the same may be happening with FRPGs. For example, when a group of fans of the AMC television show *Mad Men* began using the micro-blogging platform Twitter to role play the characters from the show.<sup>134</sup> However, their Twitter accounts were disabled due to DMCA takedown notices sent by AMC; as one of the disenfranchised role players noted, “It’s all fun and games until someone calls the lawyer.”<sup>135</sup> This is perhaps an illuminating example as to why many fans prefer to remain under the radar. Just as fanvids existed for decades without much legal trouble or public notice but then suddenly similar videos created by those outside the fan community on YouTube drew attention to the practice, media coverage of the *Mad Men* game implied that this was a new phenomenon.

It is also worth noting that FRPGs face many of the same non-copyright legal issues as fan fiction, particularly with respect to adult content. As previously noted, many FRPGs contain adult content,<sup>136</sup> which has proven to be a problem for some fan fiction writers and websites.<sup>137</sup>

<sup>133</sup> See Strickland, *supra* note 93.

<sup>134</sup> Bud Caddell, *Becoming a Mad Man*, <http://wearesterlingcooper.org/becoming-a-mad-man.pdf> (last visited November 26, 2013).

<sup>135</sup> *Id.*

<sup>136</sup> See *supra* Part II(C).

<sup>137</sup> Both J. K. Rowling and George Lucas, the owners of the *Harry Potter* characters and the *Star Wars* characters respectively, have explicitly expressed the view that they are particularly opposed to pornographic uses of their works by fans. See Letter from Theodore Goddard, Attorneys for J.K. Rowling, to unnamed *Harry Potter* adult fan fiction illustrator, CHILLING EFFECTS, (Jan. 22, 2003) (on file with the Chilling Effects Clearinghouse), available at <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=534> (reprinting a cease-and-desist letter sent to a website dedicated to adult *Harry Potter* fan fiction on behalf of Rowling’s literary agency, expressing concern that children may come across the sexually explicit content); JENKINS, CONVERGENCE CULTURE, *supra* note 126, at 150 (describing warnings by Lucasfilm to fans in the early 1980’s to not publish erotic *Star Wars* stories). Though Rebecca Tushnet implies that this may actually make the work in question *more* transformative:

*Campbell* may be more convincingly read as implying that fan fiction is transformative and thus fair use (and implicitly that fair use protects ‘new art,’ not merely work that courts deem socially beneficial). . . . From alternate universes to poetry to new adventures to *erotica*, fan fiction contains much that is ‘otherwise distinctive.’ (emphasis added)

Tushnet, *Legal Fictions*, *supra* note 25, at 665-66. This idea is also supported by the fact that courts sometimes seem more likely to find fair use in cases where a license definitely would *not* have been granted. For example, one of the strengths of the case of *The Wind Done Gone* was its portrayal of Ashley Wilkes as a homosexual, which was something that Margaret Mitchell’s estate strictly forbade in authorized sequels. Tushnet, *My Fair Ladies*, *supra* note 57, at 294-95; see also, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).



Moreover, particularly in fandoms such as *Harry Potter* that cross age boundaries, there is the potential of unknowingly role playing adult situations with someone underage; for this reason, players in adult-content games tend to be very careful about who they allow to join them, as well as take precautions to put warnings about the nature of the game's content in the manner of legal disclaimers common in fan fiction.<sup>138</sup>

### B. *The Problem with Play*

The debate over whether various types of game play can be copyrightable has existed for years, from baseball<sup>139</sup> to chess<sup>140</sup> to, more recently, video games.<sup>141</sup> With respect to the legal implications of FRPGs, this is in effect the other side of the coin—not whether the activity is infringing, but whether it can itself be copyrighted.

Intuitively, the kind of “play” involved in an FRPG would be much closer to a “work” in a copyright sense than traditional videogame play, or even player activity within an MMORPG.<sup>142</sup> Because the final product of the role playing is a tangible, fixed creative expression, it seems more like a work of authorship than a game of baseball. And though that outcome is not necessarily a simple one, it does mean that in these types of games, it is at least more likely that ownership issues among *players* with respect to the creative output might potentially arise.

Legal scholar Jane Ginsburg pointed out in the early days of cyberspace that it raises novel ownership questions with respect to works created on electronic networks.<sup>143</sup> The example she uses is that of an author

<sup>138</sup> Fiesler, *Imagined Identities*, *supra* note 38, at 150.

<sup>139</sup> In 1986 the Seventh Circuit held that a game of baseball is copyrightable—both the telecast *and* the underlying performance. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 667 (7th Cir. 1986). This decision, however, has been criticized with respect to whether the individual performances are sufficiently creative to be considered copyrightable. *See, e.g.*, MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* 2.09 (2005).

<sup>140</sup> *E.g.*, Arne Moll, *Copyright on Chess Moves: Shadows on the Wall?*, *CHESS VIBES*, (Mar. 3, 2009), <http://www.chessvibes.com/columns/copyright-on-chess-moves-shadows-on-the-wall/>.

<sup>141</sup> *E.g.*, W. Joss Nichols, *Painting Through Pixels: The Case for a Copyright in Videogame Play*, 30 *COLUM. J.L. & ARTS* 101 (2007).

<sup>142</sup> It should be noted that commentary on copyrightability in virtual worlds tends to focus on actual objects created or obtained in them as opposed to the actions of the player. *See, e.g.*, Lastowka & Hunter, *supra* note 14. (“In virtual worlds, such instincts [about ownership] assert themselves in conflicts about who owns these assets and who can claim their value. Is the owner of a virtual world's physical server also the owner of virtual castles created on that server, or does the castle belong to the person who spent years of her life building it brick by virtual brick? Such disputes have been the subject of real-world litigation and posturing.”)

<sup>143</sup> Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”*: *Authors, Exploiters, and Copyright in Cyberspace*, 95 *COLUM. L. REV.* 1466, 1469 (1995).

writing the beginning of a story and posting it to an electronic bulletin board where others can compose endings; she then asks whether the original author could publish the beginning she had written along with fifty of her favorite endings.<sup>144</sup> She posits several theories for how the work as a whole might be considered under copyright law, including joint works, transfer of rights, and compilations.<sup>145</sup>

This scenario is arguably similar to the creative process in an FRPG, appropriation issues aside. Though it is unlikely that such a situation would arise, as even in the world of fan fiction there are powerful social norms against commercial publication, there have been instances of attempts to publish fan fiction novels.<sup>146</sup> Could the creators or moderators of an FRPG attempt the same thing with compiled and edited role-playing logs? It simply adds another layer of ownership complexity to a complicated situation. I would argue that an FRPG should be considered a joint work among all of the players in the game, but this is not a simple question, and beyond the scope of this Article.<sup>147</sup>

### C. Paper Doll Princesses and Virtual Castles

With respect to cultural and literary issues (particularly gender distinctions), FRPGs have much in common with both fanworks and traditional RPGs.<sup>148</sup> Thus it is not surprising that the same is true for intellectual-property issues. Along with the common problems faced by fan fiction,<sup>149</sup> FRPGs may also encounter some of those more common to MMORPGs and virtual worlds generally.

Imagine the little girl described earlier, dressed in her Disney-licensed clothing,<sup>150</sup> playing with *Cinderella* paper dolls, using them to act out her own stories about the characters, while her brother swoops around the room in a red cape fashioned out of a bed sheet pretending to be Superman. Should they be sued for copyright or trademark infringement? What if the girl writes down the stories in her diary and the boy makes a home movie of himself in his cape? What about if the girl posts her stories to a website, and

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<sup>144</sup> *Id.* at 1469-70.

<sup>145</sup> *Id.* at 1470-75.

<sup>146</sup> See, e.g., Fiesler, *Everything I Need to Know*, *supra* note 19 (describing Lori Jareo's self-published *Star Wars* novel); redpatterndress, *Russet Noon: A Tribute to Twilight or Copyright Infringement?*, BUZZNET (Mar. 25, 2009, 15:01), <http://www.buzznet.com/musicnews/russet-noon-tribute-twilight-copyright-j3905001/> (describing the potential publication of a *Twilight* fan fiction novel).

<sup>147</sup> One area of inquiry would be what is the copyrightable "work": the game as a whole, each individual role-playing session, or each individual contribution by each player within a role-playing session.

<sup>148</sup> See *supra* Part II.

<sup>149</sup> See *supra* Part III(A).

<sup>150</sup> Wohlwend, *supra* note 41 and accompanying text.

the boy puts his movie up on YouTube? Or finally, what if a book titled *The New Adventures of Cinderella* and a DVD titled *The Next Superman* suddenly appear for sale on Amazon?

Most people would agree that there is a line to be drawn somewhere,<sup>151</sup> but where that line should be is a bit more difficult. Surely we don't need to make sure that our kids aren't "pretending without a license"?<sup>152</sup> Courts also generally agree that the original activities of the girl and her brother are not breaking any laws: "[T]he consumer may experiment with the product and create new variations of play, for *personal enjoyment*, without creating a derivative work" (emphasis added).<sup>153</sup> However, the problem seems to arise when people start to share these new variations, and moreover, when they start to profit from them. After all, copyright infringement does require *copying*, and the bits and bytes flying across the Internet when someone "pretends" in a virtual world falls into this category in a way that the boy swooping around his bedroom does not.

In 2005, Marvel Comics sued NCSOFT, the producers of the MMORPG *City of Heroes* (based on comic-book tropes but not pre-existing characters), claiming trademark infringement due to players' ability to create characters that look like Marvel's trademarked superheroes, such as Spider-Man.<sup>154</sup> The suit eventually came to an undisclosed settlement, but sparked debate about whether Marvel was going too far.<sup>155</sup> Were players who wanted to pretend to be Spider-Man really hurting anyone? Marvel's primary concern seemed to be market harm, due to (1) potential consumer confusion, and (2) the possibility of producing their own MMORPG populated by Marvel characters at some point in the future.<sup>156</sup> *City of Heroes* currently has an official policy against creating replicas of trademarked characters, but that does not make it any more difficult for players to actually do so.<sup>157</sup> However, since the case did end in settlement rather than a victory for NCSOFT, there is the potential for other rights holders to make similar threats to the online game community, or for the fear of such to have a chilling effect on what should be allowable

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<sup>151</sup> Media fans would probably agree that the line should be before the last scenario, based on the non-commercial norm, avoiding cases like Lori Jareo's *Star Wars* novel. See *supra* note 124.

<sup>152</sup> Von Lohmann, *supra* note 11.

<sup>153</sup> *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1291 (N.D. Cal. 1991), *aff'd* 964 F.2d 965 (9th Cir. 1992).

<sup>154</sup> Second Am. Compl. At 2, *Marvel Enter. v. NCSOFT Co.*, 2005 WL 878090 (C.D. Cal 2005)(No. CV 04-9253 RGK(PLAX)[hereinafter *Marvel Complaint*].

<sup>155</sup> See generally von Lohmann, *supra* note 11.

<sup>156</sup> *Marvel Complaint*, *supra* note 154, at ¶¶14-22.

<sup>157</sup> See e.g., *Marvel in City of Heroes (lookalikes)*, YOUTUBE.COM, <http://www.youtube.com/watch?v=pYNU970Vpo4> (last visited Nov. 8, 2008); *How to Create Skeletor in City of Villains*, YOUTUBE.COM, [http://www.youtube.com/watch?v=bz\\_8snSJBk](http://www.youtube.com/watch?v=bz_8snSJBk) (last visited Nov. 8, 2008).

pretending.<sup>158</sup> Imagine the outcome for role players if a court had returned a verdict in Marvel's favor:

[I]f players wanted to create an avatar based on an existing copyrighted character, they would have to seek permission or a license from the copyright owner first. Seeking consent from copyright owners first (which players may not receive) would burden and slow the creation process. Such an effect greatly curbs the creative decision-making ability of players . . . Moreover, it may lead to premature, excessive restraint on a medium that is still nascent and burgeoning, so that it may be difficult for virtual worlds to reach their full potential.<sup>159</sup>

Of course, the Marvel/NCSOFT example is fundamentally different from FRPGs in that it is a commercial pursuit, and trademark as opposed to copyright is about products rather than ideas.<sup>160</sup> Marvel was going after not the players, but the company, the one who is profiting from the "use" of trademarked characters.<sup>161</sup> The real problem with respect to RPGs is *secondary* liability, but this does not mean that it doesn't have an effect on the players themselves. It might leave the role players out of the courtroom, but it may also leave them out of their Spider-Man costumes as well. Videogame companies like NCSOFT might very well proceed overcautiously in order to avoid being held contributorily or vicariously liable for infringement;<sup>162</sup> though it is important that they keep their players happy, it is also important to keep the company (and thus the game) from going bankrupt from lawsuits. Thus, the solution becomes, as it seems to be for most intellectual-property problems in virtual worlds, to simply contract around the player's rights,<sup>163</sup> effectively policing their pretending. So, yes,

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<sup>158</sup> Daniel Terdiman, *Faux Hulks Can Keep Fighting Evil Online*, ZDNET NEWS (Dec. 14, 2005), [http://news.zdnet.com/2100-1040\\_22-146046.html](http://news.zdnet.com/2100-1040_22-146046.html).

<sup>159</sup> Andrea W.M. Louie, *Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?*, 11 J. INTERNET L. 3, 7 (2007).

<sup>160</sup> And for example, another kind of "pretending" that is intuitively relevant but not so much with respect to copyright as it is completely commercial, is that of costumed characters, particularly birthday party performers. Companies such as Marvel and Scholastic have been notorious about going after costume companies for unauthorized uses of their characters, to the point where they make the characters "forty percent different" to avoid legal problems. As one owner told an angry mother who was disappointed by a sub-par version of Dora the Explorer, "You can't have the real Dora. If you want the real Dora, call Nickelodeon." Katherine Rosman, *Trademark Infringement Rains on Children's Birthday Parties*, WALL ST. J., July 23, 2008, <http://www.pantagraph.com/articles/2008/07/23/news/doc4885fd649bf56306563238.txt>.

<sup>161</sup> Louie, *supra* note 159, at 6.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* See generally Julian Dibbell, *Owned! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State Or, How I Learned to Stop*

you could indeed get in trouble for pretending without a license (or at least potentially kicked out of the virtual world)—and moreover, you don't have any way to actually obtain a license if you wanted one.

How does this problem apply to FRPGs, and in particular, women who role play? The relevance of the Marvel lawsuit isn't necessarily that this is the specific danger to role players, but rather an indication that copyright owners *do* pay attention to what is happening in virtual worlds, and do care about the use of their characters.

The best way to make games appealing to women, advised a panel of female experts at a gaming convention, is to provide the ability to play “recognizable characters like Harry Potter and Spiderman.”<sup>164</sup> Whereas this might be good news for games created by content owners like *Lord of the Rings Online* or even the fabled Marvel MMORPG, it is bad news for fans who create and maintain their own, smaller games with neither permission from the content owner nor any profit motive. Based on the Marvel lawsuit, conceivably *any* copyright holder could decide to go after Linden Lab, the company behind the virtual world *Second Life*. After all, *Second Life* gives inhabitants the means to create not just superheroes, but anything they can imagine. There have been intellectual-property disputes with respect to *Second Life*, but because of the virtual world's very real economy, the disputes (like the costume companies) involve direct commercialism on the part of the players.<sup>165</sup>

However, *Second Life* is also a forum for (non-commercial, at least on the part of the people who create, maintain, and play in them) RPGs, many of them based on copyrighted source material. For example, Hogwarts Reborn, the biggest *Harry Potter* fan group in *Second Life*, created a meticulously detailed model of the Hogwarts castle from the book, where fans could go to role play.<sup>166</sup> Aside from the medium, the game sounds much like any other FRPG, including an original narrative based in the *Harry Potter* world:

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*Worrying and Love the End-User License Agreement*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS*, 137-145 (Jack M. Balkin & Beth Simon Noveck, Eds. 2006); Reuveni, *supra* note 36.

<sup>164</sup> Margaret, *supra* note 3.

<sup>165</sup> See, e.g., Benjamin Duranske, *Rampant Trademark Infringement in Second Life Cost Millions, Undermines Future Enforcement*, *VIRTUALLY BLIND* (May 4, 2007), <http://virtuallyblind.com/2007/05/04/trademark-infringement-vws/> (May 4, 2007) (describing the “misappropriation of major corporations’ trademarks” that is “so ubiquitous, so safe, and so immensely profitable”); Eric Reuters, *SL Business Sues for Copyright Infringement*, *REUTERS/SECOND LIFE* (July 3, 2007), <http://archive.is/ahq1V> (describing the case of a *Second Life* entrepreneur suing another *Second Life* player for copyright infringement for allegedly selling an item copied from one of his virtual products).

<sup>166</sup> Curious Roussetot, *Classes Start at Hogwarts*, *ALPHAVILLE HERALD* (May 21, 2007), available at [http://foo.secondlifeherald.com/slh/2007/05/classes\\_start\\_a.html](http://foo.secondlifeherald.com/slh/2007/05/classes_start_a.html).

The year is 2007 by Muggle reckoning. Hogwarts is reopening classes in the summer term. . . . Just before the formal start of the term, a terrible fire ripped through the building—obviously magical, it tore through the school’s formidable magical defences, causing untold damage. . . . But be that as it may, the students are turning up eager to begin their lessons and worried in case it will effect their grades.<sup>167</sup>

Like other FRPGs, Hogwarts Reborn was created entirely by fans, simply for the joy of immersing themselves in the world. And whereas Warner Bros. couldn’t accuse the players of selling a product, they could potentially argue that the existence of the *Harry Potter* setting in *Second Life* harms their future market for a derivative work. After all, a *Harry Potter* MMORPG has been rumored for years.<sup>168</sup> But could a fan-made game ever really compete with a commercially produced game? And moreover, is it fair to ask these fans to wait years for something that may or may not happen when they can “play pretend” all on their own? Of course, it is unlikely (as with Marvel) that the company would go after the actual creators of the game, but if they accused Linden Labs of contributory or vicarious infringement, then it would be a simple task for Linden to wipe the RPG content from the virtual world to mitigate the risk. This may be completely hypothetical, but it is representative of the problems that remix culture in general currently faces.<sup>169</sup> It may have been around a lot longer than YouTube or virtual worlds, but fan fiction is user-generated content just as much as a remix video or an object in *Second Life*, and so is the narrative created by an RPG.<sup>170</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> There have even been rumors that the game is secretly under development at Turbine, the creators of *Lord of the Rings Online*. Dan O’Halloran, *Is the World of Harry Potter Turbine’s Next MMO Project?*, MASSIVELY (June 8, 2008), <http://massively.joystiq.com/2008/06/08/is-the-world-of-harry-potter-turbines-next-mmo-project/>.

<sup>169</sup> See Hetcher, *supra* note 121; see also Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 Vand. J. Ent. & Tech. L. 893, 912-14 (2008) (discussing the problem of illegal user-generated content in virtual worlds).

<sup>170</sup> Even in virtual worlds. Most MMORPGs force the player to contract away all rights in the content she creates while playing the game. For example, *World of Warcraft’s* EULA provides:

All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, *characters*, *character names*, *stories*, *dialog*, *catch phrases*, locations, *concepts*, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, *storylines*, *character likenesses*, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard (emphasis added).

*End User License Agreement*, WORLD OF WARCRAFT (August 22, 2012). <http://www.worldofwarcraft.com/legal/eula.html>).

## IV. THE FUTURE OF PRETENDING

After the Marvel lawsuit, many legal scholars and others with an interest in virtual worlds were concerned that a bad precedent could chill creation not just in games, but in “other arenas where users can create content that could be considered infringing.”<sup>171</sup> This concept of “other arenas” is particularly striking when considering the prediction of some that a great deal of our leisure activity will be making the move to virtual worlds.<sup>172</sup> This presents some unique intellectual property issues when traditionally female forms of “play” make the move as well.

A. *Virtual Paper Dolls*

As noted previously, the common practice among young girls of playing with dolls is both increasingly moving to Internet venues and increasingly involving copyrighted characters. For example, the popular Star Doll website consists essentially of virtual paper dolls—virtual versions of celebrities with different clothing available to dress them in.<sup>173</sup> One of these celebrity dolls is Daniel Radcliffe, star of the *Harry Potter* films. Publicity rights aside, there may be copyright issues with his appearance on the site, as the clothes available for dressing him up are Hogwarts robes complete with the school crest, and a cartoon version of the house elf Dobby.<sup>174</sup>

Though perhaps unlikely, there is nothing to indicate that Star Doll does not have a licensing deal with Warner Bros., and as with Marvel and NCSoft, any problems arising from the use of *Harry Potter* would be directed at the maintainers of the site, not the users. However, not all virtual paper doll sites are so structured, and may give the users more creative control.<sup>175</sup> With the ever-growing popularity of fashion design games, it is entirely possible that little girls becoming more tech-savvy will be able to create impressively rendered versions of copyrighted characters with virtual paper dolls.

This all may seem very hypothetical, but consider the previous example of the Hogwarts model within *Second Life*. The issue of

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<sup>171</sup> Terdiman, *supra* note 158, at 37.

<sup>172</sup> See EDWARD CASTRONOVA, EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY 45-77 (2007).

<sup>173</sup> *Dress Up Games for Girls*, STARDOLL, <http://stardoll.com> (last visited November 26, 2013).

<sup>174</sup> *Dress Up Daniel Radcliffe*, STARDOLL, [http://www.stardoll.com/en/dolls/657/Daniel\\_Radcliffe.html?dsearch](http://www.stardoll.com/en/dolls/657/Daniel_Radcliffe.html?dsearch) (January 24, 2014).

<sup>175</sup> Another example is Diva Doll; though the players cannot make their own clothes for the dolls, they are not based directly on celebrities. See MyDivaDoll: Attitude, Fashion & Interior Design” available at <http://web.archive.org/web/20081216003516/http://www.mydivadoll.com/>.

trademarked content appearing in the game has already arisen,<sup>176</sup> and it would certainly be just as easy to create Harry Potter in the game as to create his school. Part of the question is, when does the re-creation of a character sound in copyright rather than trademark? At what point does “pretending” become more like a story and less like a costume? If more activity is moving into virtual worlds, then could we even draw the distinction between a virtual FRPG and virtual cosplay?<sup>177</sup> After all, “dressing up” is not an activity limited to little girls, and indeed is becoming increasingly important as a form of adult play.<sup>178</sup>

### B. Virtual Sandboxes

A related inquiry concerns more traditional role-playing games, such as MMORPGs, and how much ownership a player has in the original characters that he or she creates. Again, as girl gamers do tend to focus more on the role playing aspects of the game, this is an issue that more prominently arises for those players. The mechanics and structured goals of an MMORPG do not typically require much creative expression, but is rather an element added by the player. For example, one female *Everquest* player wrote about her contribution to the creation of her character:

What the computer will not and cannot do though is create a role for Nep set in the Norrathian history and geography, nor can it give her personality, speech, connections and relationships. I am her creator and it is both my play and pleasure to develop those aspects for her in game and to more thoroughly solidify her existence through the use of the traditional role-play tools of background stories, current tales of adventures, art, poems, etc.<sup>179</sup>

Though complicated by issues of End-User License Agreements,<sup>180</sup> the question of what, if any, ownership rights a player may have in a character in an MMORPG is also a problem that could potentially affect more female than male players. And such a problem is not entirely

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<sup>176</sup> See *supra* note 165.

<sup>177</sup> For an in-depth discussion of dress-up with respect to gender, and particularly in virtual worlds, see Janine Fron et. al., *Playing Dress-Up: Costumes, Roleplay, and Imagination* WOMEN IN GAMES, April 19, 2007, available at <http://lmc.gatech.edu/~pearce3/PearcePubs/LudicaWIG07FINAL.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> Nepenthia, *Roleplay and Intellectual Property*, Otherworld Express, Oct. 17, 2000, available at <http://web.archive.org/web/20020326181136/http://express.stratics.com/Issue144/intproperty.htm>.

<sup>180</sup> Indeed, this is a much more complex issue than implied by this cursory discussion, though it is one I have taken up in a separate paper.



theoretical, as there have already been copyright issues related to fan fiction written about original role-playing characters.<sup>181</sup> Rather than an issue of taking elements from the offline sandbox and bringing them online, this problem is one of what one can take out of a virtual sandbox.

## V. CONCLUSION

Though it is not the case that women play games only for socializing and role playing and men only for killing monsters, there are gender differences in self-identified motivations. It was not the intention of this Article to prescribe stereotypes to why or how women play, but rather to illuminate general trends that do exist and draw some inferences from this. It is at least true that just as the majority of fan fiction writers, fan vidders, and fan artists are women, so are the players in FRPGs. And just as fan fiction writing is sometimes not considered “real” writing, so are these types of games often not considered “real” role playing. Moreover, even within more traditional type of RPGs, the desire to use copyrighted characters or to appropriate elements from the game itself may very well be more prevalent among female players.

The example of the *Mad Men* game encountering legal trouble may represent the tip of the iceberg, an indication that FRPGs may become more noticeable to the owners of the source material from which role players draw their inspiration. As with other fan work, it is unfortunately a misunderstood practice. As one of the *Mad Men* players noted, with respect to the media coverage of the game, “We’ve been called obsessives. We’ve

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<sup>181</sup> In 2000, an *Everquest* user going by the name of Mystere posted a piece of fan fiction to a (noncommercial) website neither owned nor operated by Sony. The content of the story was volatile, involving the graphic rape of a character “in her 14th season.” When this story came to the attention of *Everquest*’s producers three months later, they deleted Mystere’s account and had the story pulled from the site. T.L. Taylor, *Whose Game is this Anyway? Negotiating Corporate Ownership in a Virtual World*, 227, 235 INTERNATIONAL COMMUNICATION ASS’N (Marriott Hotel, San Diego, CA, May 27, 2003), available at [http://www.allacademic.com/meta/p111739\\_index.html](http://www.allacademic.com/meta/p111739_index.html). Originally, *Everquest* representatives stated that they had the right to refuse service to anyone in order to provide an “enjoyable gaming environment” for everyone else. Jessica Mulligan, *She Talked Dirty*, available at <http://web.archive.org/web/20020207034437/http://www.happypuppy.com/features/bth/bthvol928.html>. However, Sony’s lawyer also issued a statement suggesting that the reason was an intellectual property violation: “If this story were about Luke Skywalker or Mickey Mouse, you’d certainly expect Lucas or Disney (respectively) to resort to their legal rights to protect their valuable good property and good name; this is nothing different.” Sandy Brundage, *Stripping the “Dark” from “Dark Elf” in EQ*, GAMERS.COM (Oct. 9, 2000), available at [http://www.gamegirladvance.com/mmog/archives/2002/10/21/stripping\\_the\\_dark\\_from\\_dark\\_elf\\_in\\_eq.html](http://www.gamegirladvance.com/mmog/archives/2002/10/21/stripping_the_dark_from_dark_elf_in_eq.html). The CEO was asked in an interview to describe where he drew the line between established fantasy conventions and copyrighted materials; he responded, “In this case, the copyrighted materials included names created by us. We aren’t trying to claim we created dwarves or elves, but there was some EQ-specific stuff.” GameSpot, Verant Q&A, Oct. 10, 2000, <http://www.gamespot.com/news/2638977.html>.

been described as running amok. You should just consider us fans.”<sup>182</sup>

With role playing is becoming increasingly mainstream, games like *World of Warcraft* still bring to mind for most people the stereotypical male gamer. It is unfortunate, then, that the types of games that many women enjoy are seen as “running amok” with copyrighted content. This depiction by the media, as well as the practice of content owners of initiating legal battles with fans, in effect delegitimizes the female version of a traditionally male hobby. And as girls move their Barbies and paper dolls online, it would be a sad outcome indeed if the chilling effect often associated with fan fiction moved to “pretending” as well.

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<sup>182</sup> Caddell, *supra* 134.