

TZE PING LIM

**WRITING FAN FICTION AND COPYRIGHT INFRINGEMENT
UNDER NEW ZEALAND LAW**

A case study perspective

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Abstract

It may seem straightforward to show that writing fan fiction constitutes copyright infringement, because fan fiction authors copy the fictional characters and worlds of copyright owners to write fictional stories, and it is an infringement of copyright to make an unauthorized copy of a substantial part of a copyright work. The paper seeks to rebut that proposition in two ways using a case study. The case study assesses whether a particular Harry Potter fan fiction infringes JK Rowling's copyright in one of her Harry Potter books. Firstly, the copyright infringement analysis can be complicated when the fan fiction is derivative of several copyright works, because copyright infringement only looks at whether one work is infringed. Secondly, even if that fan fiction is infringing, there is a good case to argue that the author has done fair dealing for the purposes of criticism and review, and so is a permitted act.

Keywords

New Zealand copyright law, copyright infringement, fair dealing, fan fiction.

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I Introduction

In March 2008, a writer by the pseudonym of Lady Altair writes and uploads a story called *Cauterize* onto the Harry Potter fan fiction section of FanFiction.net.¹ *Cauterize*'s protagonist is Dennis Creevey, an extremely minor character from the bestselling Harry Potter books by JK Rowling. Readers of the books may be more familiar with his older brother Colin Creevey, who was known for frequently being seen with a camera in hand. Unfortunately, Colin dies in the final battle at Hogwarts in the last Harry Potter book, *Harry Potter and the Deathly Hallows*.²

Cauterize begins days after Colin's death, Dennis finding Colin's camera in his room. Dennis leaves the camera alone. It is only years later that Dennis returns for the camera. The older Dennis then proceeds to take portraits of around twenty other Harry Potter characters for a post-war exhibition. Many bear physical scars, such as Lady Altair imagining that Katie Bell has grievous scars marring half of her face. Many bear emotional scars. George Weasley's scar is suggested by the vacant spot next to him in his photo: his dead brother Fred Weasley. Harry Potter and his lightning bolt scar is photographed. The climax of the story occurs when despite much uproar, Dennis decides to include a photo of Draco Malfoy and his Death Eater scar. *Cauterize* is a story about the secondary characters of Harry Potter and the tragedies they carry. Although less than 2,000 words long, the story has proven very popular amongst online readers, receiving over a thousand user comments since publication.³

Stories like *Cauterize* are often referred to as 'fan fictions'. Broadly speaking, a fan fiction can be understood to be a fictional story where the author has taken the pre-existing characters and/or world(s) of another to write that story.⁴ Nowadays, many people like Lady Altair write stories based on their favorite books, comics, movies and

¹ See Lady Altair *Cauterize* (25 March 2008) FanFiction.net <<http://www.fanfiction.net>>.

² JK Rowling *Harry Potter and the Deathly Hallows* (Bloomsbury, London, 2007) at 556.

³ See Lady Altair, above n 1.

⁴ Hellekson and Busse observe that the term fan fiction has been understood in a variety of ways, and so can have broader and narrower definitions depending on use. However, all of their listed definitions define fan fiction as having a derivative characteristic, which this paper's definition emphasizes: Karen Hellekson and Kristina Busse *The Fan Fiction Studies Reader* (University of Iowa Press, Iowa City, 2014) at 5; for a similar definition to the one used in this paper, see: Aaron Schwabach *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate, Farnham, 2011) at 4.

television shows and upload them online, free for anyone who cares to read them. Fan fiction authors are prolific. The largest online archive FanFiction.net currently hosts over 1.5 million fan fictions.⁵ Despite the popularity of this activity, fan fiction writing is often tinged with an air of legal greyness. It is not uncommon for fan fiction authors to write disclaimers for their stories. One of Lady Altair's disclaimers for an earlier Harry Potter fan fiction she wrote reads, "No characters or settings are mine. They belong to JKR and she is wonderful."⁶ TV Tropes and Fanlore wiki both report that one reason for the use of disclaimers is the perception that using them might block copyright infringement lawsuits.⁷

This paper seeks to explore the question of whether writing fan fiction can constitute copyright infringement through a case study. The case study assesses whether Lady Altair by writing *Cauterize* is likely have infringed JK Rowling's copyright *Harry Potter and the Deathly Hallows*.

Writing fan fiction can often implicate an author's copyright in a book due to the derivative nature of fan fiction. The Copyright Act 1994 gives an owner of copyright in a work the exclusive right to copy the work.⁸ It is an infringement of copyright if someone other than the owner makes an unauthorized copy of the whole or substantial part of the work.⁹ Lady Altair has copied specific characters from Rowling's Harry Potter books to write *Cauterize*. Defendants to a copyright infringement claim often deny that they have copied anything from the plaintiff's work. In contrast, by labelling a story a Harry Potter fan fiction, Lady Altair and other Harry Potter fan fiction writers like her, essentially admit to copying from the Harry Potter book series by JK Rowling. One might think therefore, that it is relatively straight forward to show that writing fan fiction like *Cauterize* is copyright infringing. This paper seeks to rebut that proposition

⁵ Calculated by aggregating the story counts next to each fandom heading under the categories of Books, Movies etc on Fanfiction.net <<https://www.fanfiction.net>>, last accessed on 28 June 2015.

⁶ Lady Altair *One Last Lullaby* (3 August 2007) FanFiction.net <<https://www.fanfiction.net>>.

⁷ "I do not own" (19 August 2015) TV Tropes <<http://tvtropes.org>>; "Disclaimer" (27 January 2015) Fanlore Wiki <<http://fanlore.org/wiki>>.

⁸ Copyright Act 1994, s 16(1)(a).

⁹ Section 16(1)(a); s 29(1).

in two ways. It is not as easy to show that a fan fiction like *Cauterize* is copyright infringing as one might think.

Firstly, what makes the copyright infringement analysis less straight forward is that Lady Altair has copied from many Harry Potter books to write her fan fiction, not just one. However, copyright law only looks at whether a single copyright work has been infringed, not a series of works.¹⁰ As a result, the copyright analysis becomes one of filtering out irrelevant Harry Potter material. A complicating factor is the fact that *Deathly Hallows* is itself derivative of earlier Harry Potter books. This makes it harder to assess what original material Lady Altair has copied from *Deathly Hallows*, as this is what Lady Altair needs to copy in order to copy a substantial part of *Deathly Hallows*. Ultimately, this paper concludes that Lady Altair has likely copied a substantial part of *Deathly Hallows* mainly through her detailed copying of characters from *Deathly Hallows*.

The Copyright Act provides a list of acts which do not amount to copyright infringement, even if otherwise they might do.¹¹ Section 42(1) provides that one type of permitted act is fair dealing done with a work for the purposes of criticism or review. The big issue is whether the phrase ‘criticism or review’ can cover the writing of *Cauterize*. At first glance, a fan fiction like *Cauterize* may not look like the sort of thing that amounts to criticism or review. It does not look like a book review or a literature essay, things commonly thought of as pieces of criticism or review. Nevertheless this paper argues that Lady Altair can make a good case that *Cauterize* comes under the scope of s42(1). This constitutes the second reason why it is not so easy to show that writing fan fiction like *Cauterize* amounts to copyright infringement: it might be a permitted act.

II Copyright Ownership

In order for there to be copyright infringement Rowling must first show that she owns a copyright work, for example *Deathly Hallows*, for Lady Altair to infringe.

¹⁰ See s 29(1) which states that copyright infringement occurs when a “work” is infringed, not ‘works’.

¹¹ See Part 3.

A General ownership matters

The Copyright Act 1994 gives copyright protection to original literary works,¹² which are defined as being written works.¹³ English case law suggests that the function of a literary work is to afford another pleasure in the form of literary enjoyment.¹⁴ Literary works must also be recorded in writing or otherwise to be protected,¹⁵ as well as meeting the Act's qualification requirements.¹⁶ Works qualify for copyright protection not only if the author is a New Zealander,¹⁷ but also if the author is the citizen of a country which is party to an international copyright agreement.¹⁸ The work's author owns copyright in the work¹⁹ and can bring action for copyright infringement.²⁰ Copyright for literary works expires 50 years after the author's death.²¹

Deathly Hallows clearly is a literary work, being a book. It is a fictional fantasy story about Harry Potter that is intended to give its readers literary pleasure. *Deathly Hallows* can qualify for copyright protection even though it is a foreign work. This is because JK Rowling is likely a United Kingdom citizen and the United Kingdom is a party to many international copyright agreements, such as the Berne Convention. For reasons given below, *Deathly Hallows* is probably an original work. Since Rowling is the author of *Deathly Hallows*, she likely owns copyright in *Deathly Hallows*. It seems she can bring action for copyright infringement against Lady Altair.

In a real set of legal proceedings, Rowling would likely want to bring copyright infringement claims for all seven of her Harry Potter books. Rowling has to bring several separate claims because it is very unlikely that all seven books can ever be seen

¹² Copyright Act 1994, s 14(1)(a).

¹³ Section 2, definition of "literary work".

¹⁴ *Exxon Corpn and others v Exxon Insurance Consultants International Ltd* [1982] Ch 119 (CA) at 143, citing *Holinrake v Truswell* [1894] 3 Ch 420 at 427-429.

¹⁵ Copyright Act 1994, s 15.

¹⁶ Copyright Act 1994, s 17.

¹⁷ Section 18.

¹⁸ Section 18(2); s 2, definition of "prescribed foreign country"; s 230, s2, definition of "convention country".

¹⁹ Section 21(1)

²⁰ Section 120.

²¹ Section 22.

as a single copyright work.²² This case study looks at a claim for one book, *Deathly Hallows*. Prima facie *Deathly Hallows* seems to be the book which has the most likely prospect of giving Rowling a successful infringement claim. This is because it seems to have the most relevance to *Cauterize*: *Cauterize* is set during the events of *Deathly Hallows* and refers to a lot of events that occur in *Deathly Hallows*. This case is hypothetical and so lacks a lot of the evidence from Rowling, Lady Altair and expert witnesses that would be present in a real court case. As a result, it is not possible to be entirely conclusive. However, a good idea of where a real court case might go can be still be grasped by examining the text of the two works *Cauterize* and *Deathly Hallows* themselves and making inferences about the features such works have.

B Law on Originality

It is unlikely going to be an issue that *Deathly Hallows* is an original work. However, because what parts of *Deathly Hallows* are original affect whether its copyright is infringed, it is important to understand what makes *Deathly Hallows* an original work.

Originality is not concerned whether a work is novel or not.²³ Originality requires that the work has originated from the author²⁴ and is used in the sense that the author has expended a sufficient degree of skill, labour or judgment in producing the work.²⁵ The originality requirement for copyright subsistence does not have a high threshold.²⁶ Originality is not concerned with whether the work is novel.²⁷ The relevant expended skill, labour or judgment that originality looks at are the efforts that go into the manner the author has expressed his or her ideas, as opposed to the ideas themselves.²⁸

²² Even when the seven books are sold together as a collection whether as hard copies or in eBook format, they are still advertised as seven distinct works within that collection: see “Harry Potter Paperback Boxed Set: Books #1-7” Book Depository <<http://www.bookdepository.com>> and “The Complete Harry Potter Collection Kindle Edition” Amazon.com <<http://www.amazon.com>>.

²³ *Henkel KGaA v Holdfast New Zealand* [2006] NZSC 102 at [40].

²⁴ At [37].

²⁵ *University of Waikato v Benchmarking Services* (2004) 8 NZBLC 101, 561 (CA) at [27]; see also *Henkel*, above n 21, at [37], citing *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] WLR 273 (HL) at 287.

²⁶ *University of Waikato*, above n 22, at [27].

²⁷ *Henkel*, above n 21, at [40].

²⁸ *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 (CA) at 664.

The Act states that a work is not original to the extent it is a copy of another work.²⁹ Nevertheless, a person can still copy existing works to create an original copyright work. Derivative works can be copyright works. The originality test is the same, but is just applied in a fact-sensitive manner. There must be a sufficient degree of labour, skill and capital that imparts to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.³⁰

C Deathly Hallows as an original work

Deathly Hallows is a sequel, being the seventh and last book in the Harry Potter series by Rowling. It is a derivative work. Unsurprisingly, many of the fictional characters, themes and world features introduced and developed earlier Harry Potter books are reproduced in *Deathly Hallows*. There is still a character called Severus Snape, or Harry Potter. Hogwarts is still a school of witchcrafts and wizardry. The list of reproduced material is extremely long.

However, Rowling can be said to have developed the material from her older books in *Deathly Hallows* in ways that greatly add to the content of those earlier books. For example, the mere appearance of a character named Severus Snape is not by himself original, but what is original is how Rowling develops Snape in *Deathly Hallows*, describing his childhood and relationship with Lily Potter. *Deathly Hallows* adds a lot of important events to the Harry Potter fictional world through its description of Harry Potter's last adventure against Lord Voldemort, the villain of the Harry Potter series. Many conflicts occur in the book, some of characters even dying or being wounded. Although Rowling would have to give evidence herself, all of these features in the book suggests that Rowling would have expended a lot of time, skill, labour and judgment in creating *Deathly Hallows*. This is more than sufficient to confer the status of originality on the work.

D Conclusion

Rowling will have no problems in showing that she owns copyright in *Deathly Hallows*. What makes *Deathly Hallows* original is not its re-use of existing Harry Potter material

²⁹ Copyright Act 1994, s 14(2).

³⁰ *Macmillan & Co Ltd v Cooper* (1923) 40 TLR 186 at 188; see also *InterLego AG v Tyco Industries Inc* [1989] AC 217 (PC) at 263.

from earlier books, but all the material Rowling adds to the Harry Potter world as a result of expending her skill, labour and judgment.

III Copyright Infringement

The tricky part of the case study is explaining how Lady Altair has infringed Rowling's copyright. As the copyright owner of *Deathly Hallows*, Rowling has the exclusive right to copy *Deathly Hallows*.³¹ It is an infringement for Lady Altair to make an unauthorized copy of a whole or substantial part of that work.³²

It is technically impossible for Lady Altair to have reproduced the whole of *Deathly Hallows* through writing *Cauterize*. *Cauterize*'s word count of 1,648 words³³ is dwarfed by *Deathly Hallows*' word count of approximately 198,000 words.³⁴ Lady Altair can only have infringed Rowling's copyright in *Deathly Hallows* if she has made an unauthorized copy of a substantial part of *Deathly Hallows* by writing *Cauterize*.

The test for establishing copyright infringement by copying in New Zealand has been set down by the Court of Appeal in *Wham-O*:³⁵

- a) The reproduction must either be of the entire work or of a substantial part
- b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof
- c) There must be some causal connection between the copyright work and the infringing work. The copyright work must be the source from which the infringing work is derived.

As there is not any one correct order for applying the *Wham-O* test³⁶ this paper will address the causal connection limb first, seeing as it is easily satisfied by the case study's facts. The objective similarity limb will then be considered and then finally, the substantial part limb.

³¹ Copyright Act 1994, s 16(1)(a).

³² Section 29.

³³ See Lady Altair, above n 3.

³⁴ See Rowling, above n 2.

³⁵ *Wham-O*, above n 25, at 666; test applied in *Napier Tool & Die Ltd v Oraka Technologies Ltd* [2013] NZSC 86 at [4].

³⁶ *Napier Tool*, above n 40, at [4].

A *Causal Connection*

As suggested in the introduction, Rowling proving a causal connection between *Cauterize* and *Deathly Hallows* will be an easy task. *Cauterize*, being published in the Harry Potter books section of Fanfiction.net, identifies itself as a Harry Potter fan fiction. It is explicitly derivative of the Harry Potter books which would include *Deathly Hallows*.

B *Objective Similarities*

Cauterize has objective similarities to many of the Harry Potter books but the copyright infringement box mandates that the only relevant similarities are those in relation to *Deathly Hallows*. If there was only one Harry Potter book, the objective similarity limb would be easy to assess. Any Harry Potter-related feature would likely come from that one book. However, for source material Lady Altair has available to her a wealth of Harry Potter material found in many other Harry Potter books, as well as Harry Potter movies, and also a miscellany of other material written by Rowling.³⁷ As a result, the amount of Harry Potter related features in *Cauterize* can be misleading.

The court has to sift through *Cauterize*, carefully looking for only *Deathly Hallows* similarities. For example Draco is described as having pale skin and white hair in *Cauterize*. *Harry Potter and the Philosopher's Stone* describes Draco as being pale.³⁸ However that is not the work in issue. *Deathly Hallows* is. *Deathly Hallows* never describes Draco as being pale or anything like it so Draco's paleness in *Cauterize* is not objectively similar to anything in *Deathly Hallows*. Nevertheless, there are many other features in *Cauterize* which are objectively similar to *Deathly Hallows*.

1 *Characters*

Cauterize appears to have used 20 *Deathly Hallow* characters. The first 17 characters appear in both works. Most of these characters get these photographs taken by Dennis Creevey, who ironically does not appear in *Deathly Hallows* himself. The characters

³⁷ The miscellany of other material would include articles about the Harry Potter world by Rowling published on Pottermore: see Pottermore <<https://www.pottermore.com/>>.

³⁸ JK Rowling *Harry Potter and the Philosopher's Stone* (Scholastic Press, New York, 1998) at 60.

are: Lavender Bell,³⁹ Katie Bell,⁴⁰ Anthony Goldstein,⁴¹ George Weasley,⁴² Charlie Weasley,⁴³ Harry Potter,⁴⁴ Andromeda Tonks,⁴⁵ Teddy Lupin,⁴⁶ Neville Longbottom,⁴⁷ Hannah Abbott,⁴⁸ Molly Weasley,⁴⁹ Arthur Weasley,⁵⁰ Parvati Patil,⁵¹ Padma Patil,⁵² Draco Malfoy,⁵³ Astoria Greengrass,⁵⁴ and Scorpius Malfoy.⁵⁵ 3 Harry Potter characters that appear in *Deathly Hallows* are referred to in *Cauterize*. They are Colin Creevey,⁵⁶ Fred Weasley⁵⁷ and Fenrir Greyback.⁵⁸

Of the 20 *Deathly Hallows* characters used 18 of the characters are identified by their names in both works, either the full name like “Katie Bell”⁵⁹ been reproduced in both works or sometimes the first name only like “Harry”.⁶⁰ The two remaining characters, Astoria and Scorpius, are not given names in *Deathly Hallows*. For most of the characters that is the extent of the objective similarities between them in the two works. This is because most characters only appear in *Cauterize* briefly and Lady Altair

³⁹ Lady Altair, above n 3; Rowling, above n 2 at 465.

⁴⁰ Lady Altair; Rowling at 485.

⁴¹ Lady Altair; Rowling at 466.

⁴² Lady Altair; Rowling at 553.

⁴³ Lady Altair; Rowling at 586.

⁴⁴ Lady Altair; Rowling at 11.

⁴⁵ Lady Altair; Rowling at 416.

⁴⁶ Lady Altair; Rowling at 416.

⁴⁷ Lady Altair; Rowling at 459.

⁴⁸ Lady Altair; Rowling at 499.

⁴⁹ Lady Altair; Rowling at 589.

⁵⁰ Lady Altair; Rowling at 33.

⁵¹ Lady Altair; Rowling at 589.

⁵² Lady Altair; Rowling at 470.

⁵³ Lady Altair; Rowling at 16.

⁵⁴ Lady Altair; Rowling at 605.

⁵⁵ Lady Altair; Rowling at 605.

⁵⁶ Lady Altair; Rowling at 556.

⁵⁷ Lady Altair; Rowling at 513.

⁵⁸ Lady Altair; Rowling at 519.

⁵⁹ Lady Altair; Rowling at 485.

⁶⁰ Lady Altair; Rowling at 11.

describes them doing things they never did in *Deathly Hallows*, such as getting their photographs taken.

A few of the *Cauterize* characters share more than just names with their *Deathly Hallows* counterparts. They also share characteristics. Both works describe George Weasley as having a missing ear⁶¹ and Charlie Weasley having muscled, burned arms.⁶² In both works Harry is described as having a scar,⁶³ green eyes⁶⁴ a burn mark on his chest,⁶⁵ as well being suggested to be famous as an adult.⁶⁶ In both works the older Draco Malfoy has a wife and child.⁶⁷

2 *Fictional World*

Both works seem to be set in the fictional Harry Potter world. The practice of owl messaging appears in both works.⁶⁸ Both Dumbledore's Army, referred to as "DA" in both works,⁶⁹ as well as The Order of the Phoenix, referred to "The Order" in both works,⁷⁰ exist in the fictional worlds of both works. The Weasley's family home "The Burrow" exists in both works.⁷¹ The 20 characters with their corresponding characteristics mentioned above also exist in both works' fictional worlds.

3 *Conclusion*

Even after objective similarities in relation to other Harry Potter works are filtered out, a court would still likely find that there is a sufficient degree of objective similarity between *Cauterize* and *Deathly Hallows*. There is an overwhelmingly amount of objective similarities in terms of characters and world between the two works.

⁶¹ Lady Altair; Rowling at 62.

⁶² Lady Altair; Rowling at 102.

⁶³ Lady Altair; Rowling at 93.

⁶⁴ Lady Altair; Rowling at 528.

⁶⁵ Lady Altair; Rowling at 283.

⁶⁶ Lady Altair; Rowling at 607.

⁶⁷ Lady Altair; Rowling at 605.

⁶⁸ Lady Altair; Rowling at 14.

⁶⁹ Lady Altair; Rowling at 466.

⁷⁰ Lady Altair; Rowling at 499.

⁷¹ Lady Altair; Rowling at 46.

C Law on Substantiality

Mere proof of copying and objective similarities by itself is not enough to prove copyright infringement via copying. Lady Altair can copy Rowling's copyright work *Deathly Hallows* as long as what is copied is not a 'substantial' part of *Deathly Hallows*. Determining the dividing line between lawful and unlawful copying is often the most difficult question in copyright infringement cases.

1 A qualitatively important part

Assessing substantiality is a question of fact and degree.⁷² The key principle that applies to whether a substantial part has been taken from a copyright work is that substantiality depends on whether a qualitatively important part has been taken, as opposed to a quantitatively important part.⁷³ The qualitatively important part has sometimes been described as the essence of the plaintiff's copyright work.⁷⁴ Frankel gives a helpful explanation of the difference between quality and quantity:⁷⁵

Consider a short story... of, say, 12 pages. One page may have the climax of the plot, where most of the story is resolved. Copying half of that page is quantitatively small, but qualitatively important to the story as a whole.

What makes that half-page qualitatively important is because it contains the essence of the story: the climax and resolution of the story. In the English case of *The Newspaper Licensing Agency Ltd* Lord Hoffman stated that the qualitatively important parts of a work can often be identified by reference to the original parts of the work – the parts which are the reason why the work was given copyright protection in the first place.⁷⁶ This in turn explains why Gault J in *Bleiman* stated the test of substantiality as the following:⁷⁷

Consider whether the effort, skill and judgment of the copyright owner in the making of his original work has been taken in the

⁷² *Bonz Group (Ptd) Ltd v Cooke* [1994] 3 NZLR 216 (HC) at 226.

⁷³ *Henkel*, above n 21, at [44], citing *Ladbroke*, above n 22, at 276.

⁷⁴ *Henkel*, above n 21 at [44], citing *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 (CA) at 678.

⁷⁵ Susy Frankel *Intellectual Property Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 267.

⁷⁶ *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2003] 1 AC 551 (HL) at 559.

⁷⁷ *Bleiman*, above n 63, at 678.

making of what appears, on a realistic assessment, to be a reproduction of a substantial part.

As discussed earlier on, the originality of a work is based on the effort, skill and judgment the author has expended in making the work allegedly infringed.

2 *Protecting a novel's non-literal elements*

A literary work can be classified as having literal and non-literal elements.⁷⁸ The literary work of a novel's literal elements would be the actual words of the novel. The novel's non-literal elements are elements abstracted from the actual words, the novel's literal elements. These include things like the novel's plot, characters, and fictional world. Courts have recognized that both the taking of literal elements⁷⁹ and the taking of non-literal elements⁸⁰ can each amount to taking a substantial part of a copyright work. However, the taking of non-literal aspects of a work raises issues concerning the ideas/expression dichotomy. The ideas/expression dichotomy provides copyright does not protect the expression of ideas but the ideas themselves.⁸¹ Non-literal elements of a novel can be said to be mere ideas when expressed in the very abstract. This would be things like the general storyline of two lovers being reconciled or the general character of a brave young man.

Whether the copying a non-literal element of a work amounts to taking a substantial part of a work depends on two factors. The first factor relates to the degree of particularity with which the non-literal element is expressed in the copyright work that is allegedly infringed. As Lord Hoffman said in *Designers Guild*, originality tends to lie in the details with which an idea has expressed.⁸² This explains why in *Plix Products* Prichard J stated that when a basic idea is expressed in a crude or simplistic form, a potential infringer can come very close making an exact reproduction of the copyright work without infringing. However when the expression is very ornate, complex or detailed, the infringer must keep his or her distance.⁸³

⁷⁸ *Karum Group LLC v Fisher Fisher & Paykel Financial Services Ltd* [2014] NZCA 389 at [99].

⁷⁹ For an example of a case where defendants infringed plaintiff's copyright by copying word-for-word the plaintiff's reports of speeches see: *Walter v Lane* [1900] AC 539 (HL).

⁸⁰ See *Baigent v Random House Group Ltd* [2007] EWCA Civ 247 at [141] per Mummery LJ.

⁸¹ *Karum Group*, above n 75, at [86].

⁸² *Designers Guild*, above n 66, at 2423.

⁸³ *Plix products v Frank M Winstone* (1984) 3 IPR 390 (HC) at 419; see also *Henkel*, above n 21, at [41].

The second factor relates to the degree of particularity that the potential infringer copies the non-literal element in question. For example, even if the plaintiff writes a very detailed plot, if all a defendant copies from the plaintiff is the general storyline of lovers being reconciled then it is unlikely that a substantial part has been copied. All that is taken is an idea. However, if the defendant copies not just the general storyline of lovers being reconciled, but also all of the plaintiff's events and incidents that detail how those lovers are reconciled, then it is more likely that a substantial part has been copied. The particular way the author has expressed his or her idea has been taken.

Finally as Tipping J in *Bonz Group* stated, in cases where the plaintiff's copyright subsists in an arrangement of features that are by themselves unoriginal, the defendant to infringe must copy the arrangement itself, or a substantial part of the arrangement.⁸⁴ The originality of non-literal elements of a novel may often lie in such an arrangement being done. For example, an original character can be seen as the original arrangement of lots of different characteristics that might otherwise be unoriginal. This means that a defendant who takes unoriginal parts of a work, such as an 'unoriginal character description' can still be liable for infringement if he takes the plaintiff's original arrangements of those parts, such as the description in combination with the character's name.

D Lady Altair's reproduction of a substantial part

1 Copying of unoriginal parts

A fair amount of what Lady Altair has taken from *Cauterize* is likely to constitute unoriginal parts of *Deathly Hallows* when viewed individually. These would be 17 of the Harry Potter character names (all of them bar the name "Teddy"), the world-related terms of "The Burrow", "DA" and "the Order", as well as the character descriptions of Harry having green eyes and a scar. This is because these features are all features that have appeared in earlier Harry Potter books. The effect of this is that Lady Altair could argue that the taking of these features individually do not amount to taking the skill, effort and judgment that went into creating *Deathly Hallows*. By the time Rowling got round to writing *Deathly Hallows* she already had these features to use. It might have taken skill, effort and judgment to create those features when she was writing her earlier

⁸⁴ *Bonz Group*, above n 69, at 220.

works, and this may in fact suggest Rowling has a viable claim for those earlier works, but they are not the works in issue.

2 *Copying of Characters*

Lady Altair has reproduced a lot of characters from *Deathly Hallows*: 20 of them. However for most of these characters, 14 of them, their names is all that Lady Altair has reproduced from *Deathly Hallows*. As was discussed above, taking such names only amounts to taking unoriginal parts of *Deathly Hallows*. Furthermore, Lady Altair reproducing a character's 'appearance' in *Deathly Hallows* in *Cauterize* has no meaning once that character is divorced from its *Deathly Hallows* context and Lady Altair doesn't replicate the context where that character appeared. The new characters Lady Altair has reproduced as Astoria, Scorpius and Teddy. Rowling likely expended some skill, labour and judgment creating these characters for *Deathly Hallows*.

In copying characters like George and Charlie Weasley, Harry and Draco Malfoy, Lady Altair took key descriptions of them. These descriptions can be said to be part of the skill, effort and judgment Rowling has expended in creating *Deathly Hallows*. These descriptions can be seen as arrangements of otherwise unoriginal features. For example, the name 'George Weasley', having been copied from a previous Harry Potter book is not original by itself, nor is the mere description of a 'missing ear'. However, it is Rowling's combination of these two things that are part of what makes *Deathly Hallows* original: that the specific character George Weasley should have a missing ear. The same goes for Rowling's arrangements that gave Charlie Weasley his burned, muscled arm and gave Harry a burn on his chest, or continued his fame as an adult.

George's Weasley's missing ear is very important because George losing his ear made him one of the first casualties' of *Deathly Hallows* conflicts. It made the book's war feel real. George's family and Harry was shocked and devastated when they found out about the injury. Rowling had to expend a lot of judgment in deciding this feature: she had a great number of characters she could choose to suffer an injury, but she chose George. Lady Altair did not have to make this judgment call for herself but just follow Rowling's lead. The older Draco having a wife and child is also particularly important because it shows where Draco, an important Harry Potter character, ends up as an adult. Rowling herself has stated that showing where Harry Potter characters end up is one of

the important aspects of *Deathly Hallows* to her.⁸⁵ Harry's burn on his chest is significant because it is where one of Voldemort's Hocruxes' burnt him. Charlie Weasley's burned, muscled arm is a description that helps to make Charlie visually distinct as a character. Lady Altair did not come up with any of the aforementioned character descriptions by herself but appropriated Rowling's efforts and simply copied them very closely. She did not take the mere general characteristics of a Harry Potter character, but very specific Harry Potter characters with their specific characteristics.

3 Overall Assessment

On a realistic assessment it seems that Lady Altair by taking all the characters she has and their descriptions has taken such an amount of Rowling's skill, effort and judgment in creating *Deathly Hallows* that she has taken a substantial part of *Deathly Hallows*. Characters are an important to *Deathly Hallows* they are part of what gives the book vibrancy and depth. Taking as much as Lady Altair did amounted to taking a qualitatively important part of *Deathly Hallows*, taking the essence of the book.

It seems that Lady Altair's copying of the fictional world from *Deathly Hallows* is not of much significance because much of what Lady Altair copied was not very original, but mostly reproduced material from earlier Harry Potter books – such as *The Burrow*, *The Order* and so on.

E Conclusion

All three limbs of the *Wham-O* test has been satisfied: there is causal connection and a sufficient degree between *Cauterize* and *Deathly Hallows* and a substantial part of *Deathly Hallows* has also been reproduced. By writing *Cauterize* Lady Altair has likely copied a substantial part of *Deathly Hallows*, a copyright work owned by Rowling. She is likely to have infringed Rowling's copyright in *Deathly Hallows*.

IV Permitted Acts: Fair dealing

A Law on fair dealing for criticism or review

Even if the defendant has infringed copyright, s42 of the Act provides an exception: fair dealing with a work for the purposes of criticism or review does not infringe the

⁸⁵ Marvelous Marvolo and Jimmi Thøgersen "'Harry Potter and Me' (BBC Christmas Special, British version), BBC, 28 December 2001" Accio Quote! <<http://www.accio-quote.org/>>.

work's copyright if such fair dealing is accompanied by sufficient acknowledgment.⁸⁶ Sufficient acknowledgement requires the identification of the work by its title or other description, and the work's author.⁸⁷ The acknowledgment does not need to be literal.⁸⁸

Copyright Licensing Ltd held that meanings of criticism or review should be close to their ordinary meanings: criticism includes the “art of practice of estimating the qualities and character of literary or artistic works.”⁸⁹ New Zealand's dictionary meaning approach matches the approach of Australian courts.⁹⁰ It is also consistent with the English Court of Appeal in *Pro Sieben*. There the Court maintained that criticism or review are expressions that should be interpreted liberally, not being limited to criticism of style but also to ideas found in a work and its social or moral implications.⁹¹

Whether something is done for the purpose of criticism or review is an objective test not a subjective one.⁹² This means that a court will not stand for a defendant who tries to justify his work as criticism, but when he or she is viewed in an objective light the court finds that he or she has no such critical purpose in mind. The strong concern is that bona fide or genuine criticism is has been done, not just something dressed up in the guise of criticism.⁹³ This strong concern can be illustrated by the treatment of parodies by courts in Australia and Canada. Parodies are similar to fan fictions in the sense that both are types of derivative works. Parodies work by imitating and exaggerating the characteristics of artists or the work they create for comic effect.⁹⁴ Authors of parodies are prone to being liable for copyright infringement because it may often be necessary for a substantial part of the target work to be replicated in order for

⁸⁶ Copyright Act 1994, s42.

⁸⁷ Copyright Act 1994, s2, definition of “sufficient acknowledgment”.

⁸⁸ See *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 (CA) at 618.

⁸⁹ *Copyright Licensing Ltd v University of Auckland* [2003] 3 NZLR 76 (HC) at [32].

⁹⁰ See *TCN Channel Nine Pty Ltd v Network Ten Ptd Ltd* [2002] 190 ALR 468 (FCAFC) [*The Panel*] at [98]; see also *De Garis v Neville Jeffress Pidler Ltd* (1990) 18 IPR 292 (FCA) at 299.

⁹¹ *Pro Sieben*, above n 78, at 614.

⁹² *Media Works NZ Ltd v Sky Television Network Ltd* CIV-2007-404-5674 (HC) at [45], citing *Pro Sieben*, above n 78 at 614.

⁹³ *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc* (1993) 28 IPR 459 (CA) at 468; *Copyright Licensing Ltd v Unviersity of Auckland* [2003] 3 NZLR 76 (HC) at [35].

⁹⁴ *World Encyclopedia* (2014, online ed, Phillips) Parody.

the parody to work.⁹⁵ However arguments that the fair dealing defence for criticism or review covers the defendant's parody have not been very successful.

Often the courts seem to be skeptical that genuine criticism has been done, regardless of whether what was done was called a parody or not. For example, in *'The Panel'* case the Australian court found that only some of the defendant's use of the plaintiff's news clips was for the purposes of criticism. The rest of their use was just for entertainment purposes, even though the defendant argued their use was parodic or satiric.⁹⁶ In the Canadian case of *Avanti*, the Quebec Court of Appeal rejected the defendant's argument that its pornographic film was a parody of the plaintiff's TV series and so constituted fair dealing for the purpose criticism or review: his purpose was not to criticize or even parody the TV series, but just exploit the TV series' popularity for its own benefits. Nevertheless, the court accepted a parody could possibly constitute fair dealing for criticism or review.⁹⁷

Whether there is fair dealing is a question of fact, degree and impression.⁹⁸ One important factor is the degree to which the challenged use competes with exploitation of copyright by the copyright owner. Another factor is the extent of the use, its relevance depending on the particular circumstances.⁹⁹ *Copinger* has suggested that a useful test is: was it necessary to use as much as the defendant did for the relevant purpose?¹⁰⁰ Lastly, the inquiries of whether fair dealing has been done and whether the defendant's acts were done for criticism or review can overlap.¹⁰¹ For example, finding that the defendant did not copy the plaintiff's work to make genuine criticism may suggest that there was no criticism, and also no fair dealing. The ultimate question is whether there has been fair dealing done for the purposes of review or criticism.

⁹⁵ For examples of English cases where the court found that the parody had reproduced a substantial part see: *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors* [1965] 109 SJ 107, *Schweppes Ltd and others v Wellingtons Ltd* [1984] FSR 210 (Ch D), and also *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97.

⁹⁶ *The Panel*, above n 90.

⁹⁷ *Productions Avanti Ciné-Vidéo Inc v Favreau* [1999] RJQ 1939 (QCCA).

⁹⁸ *Media Works*, above n 83 at [58], citing *Pro Sieban*, above n 78, at 613.

⁹⁹ At 613.

¹⁰⁰ K Garnett, G Davies, G Harbottle (eds) *Copinger and Skone James on Copyright* (16th ed, Sweet & Maxwell, London, 2011) [*Copinger*] at [7-25].

¹⁰¹ *Media Works*, above n 83, at [44].

B Lady Altair's fair dealing for criticism or review

It will not be much of a problem for Lady Altair to meet the sufficient acknowledgment requirement. *Cauterize* does not literally identify *Deathly Hallows* or Rowling as its source work or author. However, it does identify itself as a Harry Potter fan fiction which means it acknowledges its derivation from the Harry Potter book series by JK Rowling.

1 Fictional Stories as criticism

As mentioned in the introduction, a fan fiction story like *Cauterize* may at first not seem like a piece of criticism or review. Nevertheless as suggested by the courts' approach to parodies what seems to be important is not so much whether the criticism is given the label of criticism or not, but whether that criticism is actually genuine criticism.

Fictional stories can be seen as constituting criticism of other pieces of literature. For example, Capello describes *Wide Sargasso Sea* by Jean Rhys as a novel that rewrites a canonical imperial text, *Jane Eyre* by Charlotte Bronte, from a minority perspective.¹⁰² Bertha Mason, who was just the mad Creole wife in *Jane Eyre*, is now the main character of *Wide Sargasso Sea*. In it, her real name is revealed to be Antoinette. Mr Rochester, representing European power and culture, is the one who gives her the name Bertha Mason when he marries her. *Wide Sargasso Sea* estimates the qualities of *Jane Eyre* and finds something lacking its European perspectives. *Wide Sargasso Sea* critiques *Jane Eyre* by confronting the possibility that there is another side to the story.¹⁰³ As one reviewer of *Wide Sargasso Sea* aptly puts it:¹⁰⁴

This book taught me that it was possible to critique the classics; I didn't have to agree with them or accept their versions of their stories. I realized that every book was leaving something out – that there was almost always some other story to explore....

These statements resonate with Jenkins' argument that most fan fictions involve some form of criticism of the original texts upon which they are based.¹⁰⁵ His perspective is

¹⁰² Silvia Cappello "Postcolonial Discourse in *Wide Sargasso Sea*: Creole Discourse vs European Discourse, Periphery vs Center, and Marginalized People vs White Supremacy" (2009) 6:1 *Journal of Caribbean Literatures* 47 at 48.

¹⁰³ At 48.

¹⁰⁴ Kaulie Lewis "A Degree in Books" (15 2014) *The Millions* <<http://www.themillions.com>>.

¹⁰⁵ Henry Jenkins "Fan Fiction as Critical Commentary" (27 September 2006) *Confessions of an Aca-Fan The Official Weblog of Henry Jenkins* <<http://henryjenkins.org/>>; for a more detailed discussion of the idea of fan fiction as criticism see Henry Jenkins *Textual Poachers* (Routledge, New York, 1992).

that fans write fan fiction because they want to share insights that they have into the characters and world of the original text. They write stories because they want to entertain alternative interpretations or examine new possibilities that would otherwise not get expressed through the canonical material. To Jenkins, the difference between a literary essay and a fan fiction is that the essay uses nonfictional argumentation to support its interpretation of the text. A fan fiction uses fictional argumentation, such as referencing key bits of dialog from the original text to support its interpretation.

2 *Cauterize as criticism*

Cauterize, in a similar spirit to *Wide Sargasso Sea*, tells another side of the story of *Deathly Hallows*. *Deathly Hallows*' epilogue describes a scene where Harry Ron and Hermione send their children off to school. It finishes by telling the reader that Harry's scar has not pained him for nineteen years. When *Deathly Hallows* was first published, the epilogue received a fair amount of criticism for both its relatively sunny tone and lack of answers about what happened to many characters.¹⁰⁶ *Cauterize* addresses and embodies these criticisms.

Cauterize questions the tone of normalcy presented in *Deathly Hallows*' epilogue, rejecting the epilogue's perspective on the post-war Harry Potter world for its own darker, grittier interpretation. In support of this *Cauterize* tells a story of many secondary Harry Potter characters who are heavily damaged and grief stricken by the scars they carry from the conflicts in the Harry Potter books. *Cauterize* often makes references to characters deaths and other events that have occurred in *Deathly Hallows*. Furthermore, *Cauterize* also swings the spotlight away from Harry Potter and puts it on the minor characters. *Deathly Hallows* never concerned itself with Dennis Creevey's grief for his older brother, but *Cauterize* does. Many of *Cauterize*'s online readers have also picked up the criticism this paper describes *Cauterize* making.¹⁰⁷ Just like *Wide Sargasso Sea* is a criticism of *Jane Eyre*, *Cauterize* is a criticism of *Deathly Hallows*.

¹⁰⁶ For examples of fan criticisms of the *Deathly Hallows* epilogue, see the discussion in GrrlScientist "What Did You Think of The Harry Potter Epilogue?" (23 July 2007) ScienceBlogs <<http://scienceblogs.com>>.

¹⁰⁷ For example one reviewer commented, "For all the happiness and joys of the life after the war, all the children and futures and hope from the epilogue, you've captured the other side, the scars, visible and invisible which will never fade and should also be remembered": Cassandra147 "Reviews for Cauterize" (1 Jan 2013) FanFiction.net <<http://www.fanfiction.net>>; see also Spfuzz "Reviews for Cauterize" (5 Jun 2015) FanFiction.net <<http://www.fanfiction.net>>; see also mumlock "Reviews for Cauterize" (13 Dec 2013) FanFiction.net <<http://www.fanfiction.net>>.

Cauterize's criticism also appears to be genuine. Lady Altair engages deeply with *Deathly Hallows*, given the amount of references she makes to the book's material in *Cauterize*. Lady Altair can be distinguished from the defendant's pornographic film in *Avanti* because she is not benefitting commercially nor publicity-wise from her Harry Potter fan fiction story. Firstly, her story is free. Secondly, although Harry Potter characters are popular hundreds of Harry Potter fan fictions are published online every day that hardly anyone reads. The fact that *Cauterize* has been very popular seems more a testament to Lady Altair's writing, then the fact she wrote a story about popular characters.

3 Fair dealing

Lady Altair also seems to have done fair dealing for the purposes of criticism or review. Lady Altair's writing of *Cauterize* is unlikely to compete with Rowling exploiting her copyright in *Deathly Hallows*. *Cauterize* does not reproduce any of Rowling's plot from *Deathly Hallows*, nor seek to tell an alternate storyline to *Deathly Hallows*. As a result, it is unlikely that people would avoid buying *Deathly Hallows* and read *Cauterize* as a substitute. Furthermore, understanding *Cauterize* is dependent on the reader having read *Deathly Hallows*. Thus, *Cauterize* can potentially encourage a reader to buy *Deathly Hallows*, and so advance, not compete with Rowling's interests. Lady Altair's writing of *Cauterize* also helps to sustain interest in *Deathly Hallows*, both for Lady Altair herself, but also for other Harry Potter fans who read *Cauterize*. When there is sustained interest in a work, there is a better chance that the work will continue to be bought.

Lady Altair has taken a substantial part of *Deathly Hallows* in writing *Cauterize*, and so has appropriated a lot of Rowling's skill, judgment and effort in making *Deathly Hallows*. However, it was necessary for Lady Altair to copy the exact same Harry Potter character names because if she had not copied them, it would be very difficult to identify *Cauterize* as a story about *Deathly Hallows* characters. If identification is lost, so too is *Cauterize's* criticism be. Some key character details also had to be copied so that *Cauterize* could be faithful to Rowling's characters. Lady Altair also provided a lot of her own material, such as imagining up the scars that mar the Patil twins or Katie Bell.

One objection to the fair dealing requirement being satisfied is that Lady Altair could have just made up her own characters and story instead of appropriating Rowling's work, and then wrote a '*Cauterize*' in response to that story. The problem with this is that all authors have blind spots. It is highly unlikely that the author will find his or her own blind spot out. What is needed is another author to come along and point the first author's blind spot out, such as Lady Altair pointing out what Rowling has missed through *Cauterize*. Another objection is that Lady Altair could have limited her fan fiction criticism to works in the public domain, like *Pride and Prejudice*. The problem with this approach is that it means that only someone from a much later generation can write a piece of creative criticism in the manner of *Cauterize* on a literary work. Voices from the author's same generation who want to express their criticism in a creative way in the manner of *Cauterize* are silenced. Sometimes these voices can also represent the minority voices of that author's generation.¹⁰⁸

4 Conclusion

For all of these reasons Lady Altair has a good case to argue that she falls under s42(1)'s scope because she has done fair dealing with *Deathly Hallows* for the purposes of criticism or review and given sufficient acknowledgment. Nevertheless, whether a court would accept Lady Altair's case for a s42(1) exception is another story. Parodies are similar to fan fictions but the s42(1) case law on this sort of activity has never been settled.¹⁰⁹ This is despite the fact that parodies are generally seen as a culturally appropriate way to criticize works.¹¹⁰ Fan fictions have yet to even gain this status and so are in an even weaker position than parodies. As a result although Lady Altair has likely infringed Rowling's copyright in *Deathly Hallows*, it is little bit more speculative whether her fan fiction writing would also fall within s42(1)'s exception.

V Reflections

It can be said that in New Zealand copyright infringement comes in the shape of a box. When a plaintiff wants to allege copyright infringement, he or she has to try to fill the

¹⁰⁸ For example, Katyal argues that writing slash fan fiction empowers its authors, often women, to rework traditional narratives between men: Sonia K Katyal "Slash/ing Gender and Intellectual Property at 8 A View from Fan Fiction" (December 15, 2014) *Diversity in Intellectual Property* (edited by Irene Calboli and Srividhya Ragavan) (forthcoming); see also Graham Reynolds "The Impact of the Canadian Copyright Act on the Voices of Marginalized Groups" (2010) 48 *Alta L Rev* 35 at 36.

¹⁰⁹ See Frankel, above n 72, at 354.

¹¹⁰ At 354.

box with all the material the defendant has allegedly copied from the plaintiff's copyright work. When the box is 'full' (a substantial amount has been taken) the defendant is deemed an infringer of copyright. However, that box is very much a 'one copyright work' box. It can only analyze whether one copyright work is being infringed at a time. A plaintiff cannot try to fill that copyright infringement box with material the defendant copied from multiple copyright works of the plaintiff.

The 'one-work' requirement of the copyright infringement box can be said to be a little problematic. One can imagine a situation where the fan fiction author has taken an insubstantial part of each of the Harry Potter books, but enough such that if all those parts are put together, those parts would probably amount to taking a substantial part of the Harry Potter books if the books could collectively be seen as one work. In this sort of situation, the fan fiction author will have taken a substantial Rowling's skill, labour and judgment in making of her copyright works, though not any work in particular. This fan fiction author will be deemed non-infringing, even though another fan fiction author who arguably has taken the same amount of Rowling's skill, labour and judgment in the making of one work, will be deemed infringing. The distinction between the two authors can seem a little artificial.

New Zealand copyright law does not really protect fictional characters because they are 'characters' but only to the extent that certain parts of them described in in a single copyright work go towards making a substantial part of that work. In this case study it meant that Rowling had to slice up the Harry Potter character into different bits to make him 'fit'. In trying to fill the copyright law box and show Lady Altair took a substantial part of *Deathly Hallows*, Rowling had to throw away Harry's green eyes and black hair – they weren't the original parts of *Deathly Hallows*- but she was allowed to stuff the burn on Harry's chest into the box. New Zealand copyright law has a low recognition of fictional characters as 'characters'

Under Jenkins conception of fan fiction as criticism, all of the interpretations Lady made through writing *Cauterize* on all the various Harry Potter character she used would amount to criticism. This would extend to Lady Altair's portrayal of Lavender Brown and Charlie Weasley starting a romantic relationship in *Cauterize* even though the two characters never even make contact in *Deathly Hallows*, let alone other Harry Potter books. Lady Altair's criticism through *Cauterize* on a basic level is that Lavender and Charlie's characters are romantically compatible. However, this sort of criticism

was not brought up in the case study because although the criticism is directed at Harry Potter characters, it seems harder to say the criticism is directed at *Deathly Hallows* or any Harry Potter copyright work. Section 42 requires fair dealing with a “work” in order to become applicable. In this way, the copyright law box’s fixation with a copyright work affects even the application of s42 and continues to affirm the low recognition New Zealand copyright law seems to have of fictional characters.

VI Conclusion

This paper’s case study examined the way that New Zealand’s copyright infringement box deals fan fiction derivative of a series of copyright works. The case study assessed whether Lady Altair infringed Rowling’s copyright in her book *Deathly Hallows* by writing the Harry Potter fan fiction *Cauterize*.

It was no issue that Rowling owned copyright ownership in *Deathly Hallows*, nor that there was a causal connection between *Deathly Hallows* and *Cauterize*. Factually the analysis became a little more complicated when the objective similarities limb was considered. Material *Cauterize* had derived from non-*Deathly Hallows* books had to be ignored, but nevertheless there was more than a sufficient degree of objective similarities between *Cauterize* and *Deathly Hallows* in relation to the characters and fictional worlds in both works. *Deathly Hallows*, being a sequel and last book in the Harry Potter series had a large amount of unoriginal material that was reproduced from earlier books. Lady Altair reproducing the unoriginal material, which included many Harry Potter character names, did not amount to taking a substantial part.

However, Altair reproducing new characters as well as key character descriptions of important characters like Draco Malfoy and George Weasley meant that Lady Altair did reproduce a substantial part of *Deathly Hallows* by writing *Cauterize*, and so would be prima facie liable for copyright infringement. The copyright infringement analysis was one of constant filtration, trying to ensure that only original *Deathly Hallows* went into the copyright law box. The amount of filtration needed during the analysis showed that it was not so straightforward to prove that writing fan fiction like *Cauterize* is copyright infringement.

The next part of the case study presented an argument that Lady Altair’s writing of *Cauterize* could amount to fair dealing of *Deathly Hallows* for the purposes of criticism or review, and so fall under s42(1)’s statutory exception. One of the requirements,

sufficient acknowledgment, was easily made out through *Cauterize*'s self-acknowledged Harry Potter fan fiction status. The main issue was whether 'criticism or review' could cover the writing of *Cauterize*. This paper argued that such words could. *Cauterize* constituted a piece of genuine criticism of *Deathly Hallows* telling another side of the book's story, that from the perspective of its secondary characters whose burdens and tragedies had largely gone unnoticed by *Deathly Hallows*'s epilogue. Lastly, this paper also argued that fair dealing had been done. Given the non-commercial nature of *Cauterize*, it was unlikely to compete with Rowling exploiting her copyright in *Deathly Hallows*. Even though Lady Altair had reproduced a substantial part of *Deathly Hallows*, a lot of what she took was necessary for the purposes of identifying her story as being about *Deathly Hallows*. Objections that Lady Altair could have made up her own characters or targeted a non-copyright work were refuted. Although Lady Altair had good reasons why her writing of *Cauterize* could fall under s42(1), it was more speculative as to whether a court would accept her arguments. Nevertheless, the fact a good case could be made out also again showed that whether writing fan fiction like *Cauterize* constitutes copyright infringement is not such a straightforward affair. Lots of issues are raised by the writing of fan fiction.

The relationship between writing fan fiction and copyright infringement in New Zealand is not an altogether straightforward one. This partially is because there is a mismatch. Fan fictions like *Cauterize* work by copying characters that are developed over a series of copyright works. However, the copyright infringement box in New Zealand looks at whether a single copyright work is copied, blindsided to the existence of the fictional character the fan fiction is more concerned with. Nevertheless, it may be possible that even fan fictions like *Cauterize* that are likely to be infringing, can escape the copyright infringement box by being deemed fair dealing for the purposes of criticism or review.

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Word Count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,844 words.