The Copyright Professor as Reader: Unauthorized Sequels, Copyright Law, and Trademark Concerns

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It is practically hornbook copyright law that an unauthorized sequel to a novel is an infringing derivative work. The same is true for “retellings” – reimaginings of the original work. While some authors may well tolerate, or even encourage, such sequels or "fan fiction," others aggressively pursue these second-comers. In many instances, neither a sequel nor a retelling involves much literal copying, and in either event the copying is quite a distance from wholesale appropriation. Instead, sequels and retellings spring from two sources: the popularity or salience of the original work, on the one hand, and, on the other hand, a new perspective on the characters, the plot, the setting, or the time in which the respective works were produced.

Imitation is, indeed, often the highest form of flattery, but many authors fail to see it in quite that way. Instead, they sue. In this essay, I conclude that that impulse -- though understandable -- ought to be rejected by copyright law. Having read a series of “original” works and later unauthorized versions, I suggest here that the impulse driving such suits (and the conclusion that unauthorized sequels and retellings are infringing) has two sources, neither of which should be vindicated by copyright law. One source is a natural rights/moral rights notion, which has been rejected by American copyright law, at least in theory. The other source is a market-based concern about unfair competition, and to the extent that this concern ought to be addressed, it ought to be addressed by trademark law. In other words, if unauthorized sequels and retellings are problematic, authors should turn to trademark law to police the marketplace. Alternatively, copyright’s fair use doctrine could take account of the trademark concerns, making a use more likely fair when there is no confusion concerning source or affiliation.