1-1-2017

Will Fan-Fiction Live Long and Prosper?: Exploring the New Relationship Between Entertainment Companies and Their Audiences

Zachary Fialkow

Follow this and additional works at: https://scholarlycommons.law.emory.edu/ecgar-perspectives

Recommended Citation
Available at: https://scholarlycommons.law.emory.edu/ecgar-perspectives/18

This Perspective is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Corporate Governance and Accountability Review Perspectives by an authorized administrator of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.
WILL FAN-FICTION LIVE LONG AND PROSPER?:
EXPLORE THE NEW RELATIONSHIP BETWEEN
ENTERTAINMENT COMPANIES AND THEIR AUDIENCES

INTRODUCTION

It is a good time to be a *Star Trek* fan. A new movie, *Star Trek Beyond*, was just released, a new television show is in production, and multiple comic book series are currently being published. In the United States, where content is king, *Star Trek* is thriving and fans should be cheering. However, recent litigation between creators of a *Star Trek* fan-film and *Star Trek* co-owners CBS and Paramount ("CBS") has thrown the corporation-fan relationship into disarray.

In 2015, CBS sued Alec Peters and Axanar Productions, Inc. ("Defendants") for promoting their *Star Trek* fan-film *Axanar*.1 Conceived as a prequel to the Original Series (which featured Captain Kirk and Spock), *Axanar* used crowdfunding to boldly go where no fan-film has gone before: Defendants raised over $1 million from two separate crowdfunding sites to create a “fully-professional, independent Star Trek film.”2 Unfortunately for Defendants, resistance was futile and the California District Court ruled that *Axanar* shares “substantial similarity” with CBS’ copyrighted property and that Defendants would not be allowed to use a “fair use” defense.3 With the case set to continue to a jury trial, Defendants and CBS settled the case,4 but not before some lasting legal rules were laid down.

This perspective will first explore how the Court’s ruling affects future fan-film litigation and will then step back from the legal dispute, discussing the general merits of controlling fan-films. Ultimately, this perspective concludes that CBS was in the right, but fan-films will not become a thing of the past.

---

4 *Id.*
I. NEW LEGAL PARAMETERS DEVELOPED WITHIN TWO FAN-FILMS

As the first fan-film law suit to go this far in the litigation process, and with no possibility of appeal, the California District Court ruling in Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *4 (C.D. Cal. Jan. 3, 2017) has effectively laid the groundwork for future similar infringement cases to come. First, the Court used a discussion of “characters” to lay out how far copyright protection extends to franchises like Star Trek. The Court’s ruling on what relevant parts of Star Trek were protectable stemmed from the Ninth Circuit Court of Appeals case, DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015). This case was about a dispute between DC Comics, who owns Batman, and a company building replica Batmobiles, Batman’s signature vehicle. The Ninth Circuit established a three-part test to find whether “a character in a comic book, television program, or motion picture is entitled to copyright protection.” This test requires a character to “[1] have ‘physical as well as conceptual qualities’ . . . [2] be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears . . . [and 3] be ‘especially distinctive’ and ‘contain some unique elements of expression.’” Amusingly, this test led the Ninth Circuit to conclude that the Batmobile, a fictional car, was indeed a character for the purposes of copyright protection.

Following from Towle, the Axanar Court applied the test not only to the character Garth of Izar, Axanar’s protagonist, but also to the fictional alien species Vulcans and Klingons. The Court quickly concluded that Garth of Izar was protected, since he appeared in an episode of the original series “as a live

---

5 Of course, the ruling is not binding on other district courts. However, the case is likely to be cited in future fan-film cases.
6 Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *4 (C.D. Cal. Jan. 3, 2017) (determining whether copyright infringement occurred involves, first, an extrinsic and objective test administered by a court, and second, an intrinsic and subjective test, performed in a jury trial. For the extrinsic test, the court looks at the work as a collection of individual elements, “disregards unprotectable elements,” and compares the rest with “their counterparts in the allegedly infringing work.” See id. at *3).
7 DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).
8 Id. (citing Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978)).
9 Id. (citing Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003)).
10 Id. (citing Halicki Films, LLC v. Sanderson Sales and Mktg., 547 F.3d 1213, 1224 (9th Cir. 2008)).
character,” and was given distinctive qualities embodied in his designation as a war hero in the Star Trek universe.11

The Court then held that the alien species Vulcans also deserve protection, despite not necessarily being individual characters.12 Defendants argued that a species like Vulcans amounted to “an (unprotectable, unoriginal) bowl hairstyle, a pair of (unprotectable, unoriginal) pointed ears, [and] the (ancient Roman) word ‘Vulcan.’”13 Yet, the Court rejected this framing.14 The Court explained that these elements, “taken together,” along with Vulcans’ tendency to favor logic over emotion and Vulcans’ advanced technology, render the fictional species as a whole “entitled to copyright protection.”15 This ruling acts as an extension of Towle and should put future fan-filmmakers on notice as to how easy it is to infringe upon another’s work.

Lastly, after finding that Axanar did, in fact, “use copyright protected elements,”16 the Court turned its attention to the fair use defense. In perhaps the most far-reaching part of the opinion, the Court, in part, ruled on how crowdfunding can affect fair use claims.

One of the most vital parts of the fair use determination is “whether [the infringing] use is of a commercial nature.”17 Defendants argued that they were entitled to fair use since they “[did] not profit directly from distributing

11 Axanar, 2017 WL 83506, at *4. Starfleet applicants should know that Garth of Izar’s “exploits are required reading in the Star fleet Academy,” since “he charted more planets than any other Starfleet captain.” Id.
12 Id.
13 Id.
14 Id.
15 Id. The Court also held that the Klingon species were characters entitled to protection, pointing to their “ridged foreheads, dark hair and skin, and upward sloping eyebrows.” Id.
16 Id. at *5. Unsurprisingly, the Court agreed with CBS that “Defendants expressly set out to create an authentic and independent Star Trek film that [stayed] true to Star Trek canon down to excruciating details.” Id. The Court pointed out that, “Star Trek fans love Defendants’ faithfulness to the Star Trek canon; Peters considers himself ‘the keeper of the faith with fans.’” Id. This part of the decision led one copyright lawyer to say, referring to Axanar, “[y]ou got sued because you are too good . . . it’s a compliment.” Gardner, supra note 1.
17 Axanar, 2017 WL 83506, at *7 (citing 17 U.S.C.A. § 107(1)). There is a common misconception that fair use is solely dependent upon whether the infringing use is employed to make a profit. In fact, the fair use test involves four factors, and not one of them is purely determinative: Purpose and character of the use, nature of the infringed upon work, amount and substantiality of the portion used, and the effect on the potential market. See generally id. at *7–*8. What’s more, the commercial/non-commercial question is only part of the first factor, though an important one. Fan-filmmakers (and other artists using copyrighted properties) best be aware that their liability does not end at refraining from selling their work.
However, somewhat counterintuitively, “commercial nature” does not simply refer to monetary profit. The Court countered that Defendants “stood to gain at least indirect commercial benefit . . . for example, other job opportunities.” This finding and reasoning alone raises the bar for fan-films to stay liability-free. However, the Court went further, contemplating the effects of Axanar’s two crowdfunding campaigns on the fourth fair use factor: the effect of the infringing use on the potential market. The Court found that crowdfunding weighed in Plaintiff’s favor, for Axanar prompted fans to spend their money on the crowdfunding campaign, “instead of ‘dumping hundreds of thousands of dollars a year on . . . cable channels’ on which the Star Trek Copyrighted Works are shown.”

One could argue that the Court’s ruling is unfair. After all, should people not be allowed to use their money how they wish? Perhaps, but CBS pointed out that the availability of backer rewards in crowdfunding campaigns makes the system appear more like a sales transaction. Instead of supporters paying money for just the film, backers were incentivized to pay varied amounts of money in exchange for Star Trek-themed rewards such as fake military patches, Star Trek costumes, and actor autographs. CBS’ Vice President of Product Development, John Van Citters, explained that, “[f]or many [fans] it became more about the item that you were donating to get than it was about supporting a fan production for its own sake.”

II. DOES CBS HATE ITS FANS?

While the discussion above explains how CBS was legally in the right in its lawsuit, a broader question remains: Should CBS have brought the lawsuit in the first place? The answer to this question hinges on how entertainment companies like CBS should interact with fans of their own properties.

On one end of the spectrum, people can argue that the Axanar suit is disrespectful to fans and, ultimately, not beneficial to CBS. Indeed, in their

18 Id. at *8.
20 Id. at *8.
21 Id. at *9.
24 Alexander, supra note 22.
reply in support of their motion for summary judgment, Defendants argued that “Plaintiffs have reaped substantial benefits from precisely the type of fan-created non-commercial work that Axanar exemplifies,” presumably based on a theory that greater exposure to the Star Trek property can generate new interest, though Defendants left this argument unsupported. In addition, J.J. Abrams and Justin Lin—who directed the first two and third Star Trek “reboot” films, respectively—proclaimed that “[the lawsuit] was not an appropriate way to deal with the fans” and pushed for the suit to be dropped.26

However, CBS clearly wants to protect its intellectual property, and it has a right to do so. Plaintiffs pointed out in their reply in support of their motion for summary judgment, “[u]nder the Copyright Act, Plaintiffs have a right to control the reproduction of their copyrighted characters and works, and also to control the market for derivative works.”27 Yet, CBS likely faces an increasingly difficult battle for control as new technology and accessible distribution methods make professional-caliber content easier and cheaper to create.

In the hopes of controlling the ensuing flood of infringing fan creations, CBS laid out a set of guidelines for fan-filmmakers to avoid a legal battle.28 These guidelines seem to have been written in reaction to Axanar, requiring fan-films to be under 15 minutes in length and no more than two episodes; include the phrase “A Star Trek Fan Production” in the works’ subtitle; use amateur and uncompensated “creators, actors, and all other participants;” and limit crowdfunding campaigns to $50,000.29 Though promulgating these guidelines may come off as CBS attempting to legislate, it is important to note that deviating from these guidelines does not ensure a Star Trek fan-filmmaker

---

29 Id.
would automatically lose a lawsuit, just that he or she would be more likely to get sued. These guidelines also send a message that CBS has no intention of eliminating fan-films. To the contrary, the rules act as a sort of loophole allowing fan-film to continue in a way that prevents confusion with the “real thing.”

CONCLUSION

In the end, CBS faced its own Kobayashi-Maru, or no-win scenario. CBS had to make a choice between pleasing the tens of thousands of fans who donated to Axanar and wanted to see it come to fruition and the ability to control the property it rightfully owns. Instead, CBS took a cue from Captain Kirk and “changed the conditions of the test.” After the guidelines and settlement, Axanar will still see the light of day, just in a way more amenable to CBS. Fans should recognize that these guidelines are a tacit acceptance of fan-films, but also follow them to retain this new status-quo. To paraphrase Mr. Spock, it is only logical.

ZACHARY FIALKOW*

---

30 A CBS representative stated that CBS “has no plans . . . to actively chase down new fan-films that just slightly violate the [guidelines],” but instead will pursue “mega productions” like Axanar. Alexander supra note 22.

31 STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982).

32 Christopher Mele, ‘Star Trek’ Copyright Settlement Allows Fan Film to Proceed, N.Y. TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/movies/star-trek-axanar-fan-film-paramount-cbs-settlement.html?_r=0 (discussing settlement terms that allow Axanar to be “no more than two . . . films of a maximum of 15 minutes each,” and, if distributed on YouTube, be ad-free to prevent revenue).

* Emory University School of law, J.D. Candidate, 2018; Writing Specialist, Emory Corporate Governance and Accountability Review; Vice President, Emory Intellectual Property Society; Top 10% Oralist; Spring 2016 Oral Arguments, Introduction to Legal Advocacy; B.A. Political Science, Tufts University. This paper is dedicated to Seaver and Oatie, my troublesome tribbles.