



Fan Fiction and The Copyright Dilemma

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By: Ursula Renee

I. Introduction

Everyday, as a result of the Internet, people around the world are meeting others with whom they share the same interests. One of the things the cyberfriends may have in common is their enjoyment for a particular movie, television show, or book. They communicate their interest with one another by designing webpages, posting on boards, joining chat groups and writing stories about the work to distribute amongst each other.

The literary creation used to express interest in a particular work is called fan fiction. Currently, there are over 50,000 websites on the Internet that contains works written by fans.¹ Besides the websites, fanzines are published and distributed through the mail and at conventions.

Even though this is a popular method of expressing an enjoyment for a work, there remains the question of the legality of fan fiction. This paper will discuss the history of fan fiction, whether or not it is an infringement, the concerns and actions of the copyright owners and the legal rights of the fan fiction author.

II. The Popularity of Fan Fiction

Fan fiction, which can be defined as "fiction written by fans, for fans, often without a thought for financial gain", is a derivative of a movie, television show, and, in some cases, a book.² Fans use it as a way of honoring a work that has been entertaining. "[It] is generally an

expression of the admiration that the secondary author has for the originator of the stories so imitated.³

The roots of fan fiction can be traced back to the 1960s, when fans of the television series *Star Trek* wrote and distributed stories. Eventually, some of these stories were collected by Sondra Marshak and Myrna Culbreath and published in a collection, *Star Trek: The New Voyages* and *Star Trek: The New Voyages 2* with the permission of Paramount Pictures which owned the rights to the show. Gene Roddenberry's, *Star Trek's* creator, approval of the collection was expressed in the preface of the former book: "Eventually we realized that there is no more profound way in which people could express what *Star Trek* has meant to them than by creating their very own personal *Star Trek* things...This is the highest compliment and the greatest repayment they could give us."⁴

Fan fiction grew in popularity with the emergence of the World Wide Web. Because it is an inexpensive means in which authors can distribute their creations to a mass audience, many individuals have taken to writing the stories and posting them on their own websites, on other fansites, or on a site which collects and archives fan fiction. One such archived site is FanFiction.net, which maintains a vast collection of stories that deal with not only movies, television and books, but comics, cartoons, musical groups, etc.

Some may consider writers of fan fiction as obsessed people who do not have lives of their own. They may be considered lazy and lack the ability to create original work. However, studies have shown that many fan fiction authors are females under the age of 40, who are educated and come from middle class backgrounds."⁵

When asked why they like to write fan fiction, authors state that it "lets us explore a lot of things the show didn't...it's fun to see what would have happened if some things on the show were changed, or there were different circumstances" (Aimee); it allows for the exploration of "other avenues of the show and the characters that they, [the original writers] wouldn't have allowed" (Jennifer); and it gives "the fans a chance to have some control over the characters and situations in which they find themselves" (Mary).⁶

The fiction is also popular because "it seems to conclude things where the show stopped" (Dee); "it's a way for something I loved to live on a little...For shows currently on the air, it's a way to fit in missing scenes [or] get a different viewpoint on a character or plotline" (Cass); it answers the questions: what else happened, before, after and in between, and how did the characters really feel? (Katta).⁷

Some individuals who plan to explore a career in writing find that writing fan fiction helps to enhance their imagination since they must constantly create new storylines to attract and retain their audience, and it also gives them the opportunity to work on their writing skills. "I get practice in developing a storyline and characters...since I started writing fan fic, I have seen how my writing style has changed and developed, partly from practice and pushing myself to write about different things" (Aimee)⁸

The creative nature of fan fiction allows authors not to "adhere particularly closely to the original works" but utilize "a combination of new and old characters, settings and plot details."⁹ They are able to develop characters and explore details that the original creators ignored, i.e., instead of focusing on the main characters, a minor character may be explored, his role enhance,

his presence explained, and/or he/she may become the hero in a story. Authors may also choose to fill-in events in a character's life or develop relationships (friendships, romances, etc.) further.

One sub-genre of fan fiction is alternative universe. Here, the original creator's plot is basically ignored and the fiction writer chooses to create a story that satisfies her, i.e. characters that were killed are brought back to life or shattered relationships are mended.

Another sub-genre is crossovers, which explore how the characters on one show would interact with the characters on another show. In this area, imaginations can make it possible for *Buffy the Vampire Slayer* team up with the characters from the *X-Files* or members of *The Young Riders* will meet the *Highlander*.

Finally, there is slash, which graphically deals with the relationship between two characters of the same gender. In these stories, the friendships between James Ellison and Blair Sandburg of *The Sentinel* or James T. Kirk and Mr. Spock of *Star Trek* can be taken to another level.

However, despite the creativity that is involved with the writing of fan fiction and its growth in popularity, there is still the issue of the legality of this form of fiction.

III. Fan Fiction and Copyright Infringement

Writers of fan fiction are aware that they are using someone else's material to create a new story. Because of that, many authors give credit to the original creators of the story and the copyright owners by adding disclaimers to their works. A typical disclaimer can read: "*The Young Riders* is the creation of Ed Spielman, and the property of Ogiens/Kane productions in

association with MGM/UA television...These stories are for entertainment purposes only, no infringement intended" are included with the fiction.¹⁰ However, even with the insertion of these acknowledgements, there are still question of the legality of fan fiction.

In determining the legality of fan fiction, it is necessary to examine The Copyright Act of 1976. The law is a revision of The Copyright Act of 1909, which was established to promote the arts by giving authors the exclusive rights to original works that are arranged in a tangible form. The works include, literary, musical and dramatic pieces; pictures, graphics and sculptures; and motion pictures and other audiovisual pieces.¹¹ Ideas, facts, and concepts, however, cannot be copyrighted.

Once a work is copyrighted, the owner is given the exclusive right to prepare a derivative of the material. As defined by the law, a derivatives is:

"a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".¹²

When a derivative is created without the authorization of the copyright owner this is considered an infringement. A further explanation of this is presented in the House Records on the Copyright Act of 1976. "To be an infringement the 'derivative work' must be 'based upon the copyrighted work'....the infringing work must incorporate a portion of the copyrighted work in some form."¹³

Television series, i.e. *The Young Riders*, are copyrighted. Therefore, if a story called *Entries* is created based on the show it can be considered a derivative.¹⁴ As in a typical fan story does, this work 'borrows' the characters (Buck, Cassie, Lou, Kid, etc.) and the setting (Rock

Creek) and refers to incidents that occurred in several of the episodes from the series in order to create the fiction. Since the author did not receive authorization from Ogiens/Kane productions to write a story based on their show, she would be in violation of Section 106(2) of the copyright law and the work would be an infringement.

After taking into consider the actual wording of the copyright law and analyzing the previous example, it can be concluded that the fan fiction infringes upon copyrighted material. Therefore, the owner of the copyright would be within his right to take action against the authors of such work.

IV. Concerns and Actions of Copyright Owners

Even though fan fiction is an infringement of the work it is based on, there has never been a case law against a fan fiction writer. Over the years, copyright owners have been tolerated the stories. And, in some cases (i.e. Paramount Pictures' authorization of the publication of *Star Trek: The New Voyages*) the owners encourage the writing of fan fiction.

The absence of lawsuits does not indicate total acceptance of fan fiction. Some copyright owners may tolerate fan fiction, but may request authors to refrain from distributing their works until after a movie is no longer in the theaters, a television show is in syndication, or a book is no longer on the best seller's list. Others may request that writers refrain from creating adult stories.

In a letter to fanzine publishers, Lucasfilm stated that:

Lucusafilm Ltd. does own all rights to the Star Wars characters and we are going to insist upon no pornographic. This may mean no fanzines if that measure is what is necessary to stop the few from darkening the reputation our company is so proud of....Since all the *Star Wars* Saga is PG rated, any story those publishers

print should also be PG...You don't own these copyrights and can't *publish* anything about them without permission.¹⁵

Some companies feel that fan fiction can limit the stories that can be created for a particular show by the company's writers. There are concerns of lawsuits filed by a fan fiction author who claim that an episode was based on a plot he/she created. If an infringement case goes to before a judge, the claimant would have to prove that the defendant had access to his/her material. This is difficult to prove when with unsolicited manuscripts that are mailed to companies, since most return the material back to the author unopened. However, when a story is posted on a website, the claimant can more easily prove that the company had access to the work, since the virtually anyone can get on the site.

The refusal to visit the fansites is a safeguard against potential lawsuits. Lucasfilm, which offers free webspace to *Stars Wars* fans, protects themselves by informing the fans that all fiction posted on the site becomes the property of the company.

"...Lucasfilm must request that you not create any derivative works based on the Star Wars Universe for anything other than personal, noncommercial purposes in connection with your use of the site. If you do create any works which are based on or derived from the Star Wars Universe, they will become part of the Star Wars Universe and will be treated as "Submissions"...We hope you will understand that it is the intent of this policy to avoid the possibility of misunderstandings when projects developed by Lucasfilm might seem to others to be similar to their own creative work."¹⁶

Aside from the fear of lawsuits, some copyright owners do not like fan fiction because they are very possessive of the characters and settings which they worked hard to develop and do

not relish the idea that others are "borrowing" their creations. Anne Rice expresses her dislike of fan fiction in a posted message on her official website:

I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.¹⁷

When copyright owners, who are against derived stories, find fan fiction by on their works has been published in a fanzine or on the Internet they usually insist through a letter from their lawyers that the infringer cease and desist all activity that is in violation of the law. Requests for the removal of material posted on a website are also made.

The Digital Millennium Copyright Act allows the copyright owner to inform an ISP that material posted on their server is an infringement. The ISP will not be held accountable for what was posted if they act quickly and shutdown the website.

Though no cases have been presented in court, the shutting down of fansites is common. However, it must be noted that these sites usually contain copyrighted pictures, graphics, and logos, which the copyright owners are more concerned with. In a "Statement From Fox Regarding Fan Websites," Fox explained that they were not planning to "shut down bona fide websites created by fans devoted to [their] programs. However, [they] require all websites using copyrighted and trademarked materials to comply with guidelines that protect the creative integrity of the programs they represent."¹⁸ Fox then goes on to list examples of they copyright and trademark infringement that they would not tolerate.

Paramount Pictures has also posted a letter on their website to clear up confusion about the actions they have taken against websites. In their message, they insist that they "understand

fans' desire to communicate and share information about *Star Trak* and [they] support fan-created Web sites."¹⁹ Neither company, however, addresses the issue of fan fiction in their letters.

The letters to cease and desist have gone unchallenged in court, even though there have been organized protests on the Internet regarding these actions. One of the reasons fans do not disregard the letters is that even though they may not be aware of the fact that their work is an infringement, they do respect the copyright owners. Henry Jenkins suggests that another reason authors comply is that, "most of the people being caught in these battles lack the financial resources to take on a major corporation in court."²⁰

If a case dealing with fan fiction is presented in a court, a claimant proves infringement by establishing that the defendant had access to the original work, that there are similarities between the original and the new material, and that his/her copyright is registered.

Once these factors have been determined, the court may order an injunction against the infringed work, which basically orders the infringer to cease the publication and distribution of the material. All copies of the fiction and any material (i.e. masters, disks, etc.) can then be seized and disposed of or destroyed. Finally, the copyright owner may be awarded actual damages and profits or statutory damages.

Actual damages cover the loss of revenue the copyright owner experienced due to the infringement. In this case, any profit the infringer made from the distribution of the material may also be awarded. It would be unlikely, though, for this type of award to be made in a case of fan fiction.

As mentioned earlier, fiction is written by fans to explore relationships, explain situations that are briefly covered in the original material, and/or enhance the role of an underused character. These stories are not intended to draw audiences away from the original, but give them a little something extra. Therefore, loss of revenue is rare, since the fans continue to support the movie or television show or buy books. Finally, since fan fiction is usually posted on websites and offered to the public for free or published in fanzines and sold for a monetary amount that only covers the cost of printing and distribution, no profits are made from the sell of these stories.

An exception can be made in the case of adult fan fiction. As Lucasfilm stated in the letter to the fanzines, pornographic stories can "darken the reputation" of the company.²¹ If people associate an adult situation with a company, they may be hesitant to watch the original movie or television show or buy the book, which will result in a loss of potential revenue for the copyright owner.

Since revenues are not lost and profit is not made, it would be more probable for statutory damages to be sought in a fan fiction case. This award can be between \$750 and \$30,000 if the owner chooses to peruse this avenue instead of proving willful intent to infringe. However, if he does prove that the infringement was done willfully, a judge can award up to \$150,000 in damages.

In addition to actual damages and profit or statutory damages, the judge can order the infringer to pay the claimants' court costs. The cost for the copyright owners' attorney may also be included in the final decision. Therefore, in the final outcome in a fan fiction case can be very

costly to the infringer if the courts agree that this fiction is indeed an infringement of the original work.

V. The Rights of Fan Fiction Authors

Although fan fiction is an infringement of an original work under the current law, experts who have studied of fan fiction generally agree that this work can fall under the category of fair use. This limitation on the exclusive rights allows for works to be used without the permission of the owner under certain circumstances, like parody, which is permitted because without the fair use clause, most owners would not give their authorization to have a parody of their work made, thereby not encouraging the growth of the arts.

Whether a work can be considered fair use, the following must be determined:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²²

In her article, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law," Rebecca Tushnet argues that "fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder's characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work."²³

Another right authors of fan fiction may have is protection of their work by copyrighting. According to Olwyn Mitchell, "authors of fan fiction make no bones about their use of copyright

material, or material they believe to be copyright...yet at the same time, and rather hypocritically they expect full and detailed copyright protection."²⁴ Authors usually include copyright notices on their stories and/or disclaimers stating that there should be no use of the work without his/her permission. However, "the question of ownership of copyright of fan fiction is involuted."²⁵

According to Section 103(a) of The Copyright Act of 1976,

"protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."²⁶

In the House Report to the Copyright Act of 1976, it is further explained that

"the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of a copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized"²⁷

Since it has been determined that fan fiction does infringe on the original's copyright, then what was "borrowed" can not be protected. However, new characters and fictional setting that were created and the plot may be eligible for copyright protection. Lucasfilm's agreement that fan fiction may be copyrightable is evident in the term of service that states authors will voluntarily give up their rights to their work when they post it on the free webspace offered by the company so there will be no "misunderstandings" if a movie bears similarities to the work.²⁸

Since there is confusion associated with whether this fiction can be copyright, Tushnet offers as a solution that "the law could allow fan authors to copyright their writings and hold that the original copyright holder has a unique privilege or implied license to use them."²⁹

However, it is worth repeating that fan fiction has not been addressed in case law. The fair use defense has yet to be tested and its use is only a suggestion. Also, the opinions as to whether or not fan fiction can be copyrighted vary.

VI. Conclusion

Since the growth in the popularity of fan fiction has made it evident that it is not going away anytime soon, the current law should be reexamined and directly address works by fans. Under the current law, these works infringe on the copyright of the material it is based on. However, since fan fiction does not affect the market of the original work and it is not created for financial gain, it should be declared fair use and the authors should be permitted to copyright the fiction.

Notes

¹ Number was determined by conducting a search on the Internet using Alta Vista (www.altavista.com) on December 8, 2000.

² Dave Green, "Connected: Star Trek: the vexed generation Old science fiction never dies – it just mutates into something stranger. *The Daily Telegraph* (August 12, 1997), p. 8.

³ Olwyn Mitchell, *The Internet and Electronic Copyright: Fanfiction and the unacknowledged use of copyright material*, University of Aberystwyth, 1995. MSc dissertation at members.aol.com/olwynm/fanfic1.htm (visited December 8, 2000).

⁴ Ibid.

⁵ Amy Harmon, "The TV's Dull Summer Days, Plots Take Wing on the Net" *The New York Times* (August 17, 1997).

Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture* (1992) p. 18.

⁶ Responses to the question "Why do we write and read fan fiction?", posted by Ursula Renee on The Young Riders Express Message Board at <http://www.insidetheweb.com/mbs.cgi/mb854398> and The Travis Fine Message Board at <http://www.insidetheweb.com/mbs.cgi/mb958691>. (visited December 10, 2000).

⁷ Ibid.

⁸ Response from message board, see 12.

⁹ Mitchell see 3.

¹⁰ See Ursula Renee, *Entries* at <http://home.earthlink.net/~ushand/entries.html> (visited December 8, 2000).

¹¹ 17 U.S.C. 106 (2000)

¹² 17 U.S.C. 101 (2000)

¹³ H.R. Rep. No. 94-1476 (1976)

¹⁴ Ursula Renee see 10.

¹⁵ Portion of "Open Letter to *Star Wars* Zine Publishes" by Maureen Garrett (August 1981), printed in Jenkins, p. 31.

¹⁶ Terms of Service for Website offered by Lucasfilms at <http://fan.starwars.com/~site/TermsOfService> (visited December 8, 2000)

¹⁷ Message Posted on The Official Site of Anne Rice at www.annerice.com (visited December 8, 2000)

¹⁸ 20th Century Fox, "A Statement From Fox Regarding Fan Websites," at www.foxfilm.com (visited December 8, 2000).

¹⁹ David Wertheimer's Letter to *Star Trek* fans at www.paramount.com/openletter (visited December 8, 2000)

²⁰ Henry Jenkins, "Digital Land Grab," *Technology Review* (March/April 2000) at www.techreview.com/articles/ma00/viewpoint.htm (visited December 8, 2000)

²¹ Garrett, see 15.

²² 17 U.S.C. 107

²³ Reprint of article by Rebecca Tushnet, "Legal Fiction: Copyright, Fan Fiction, and A New Common Law" *Loyola of Los Angeles Entertainment Law Journal* Vol. 17 at <http://users.erols.com/tushnet/law/fanficarticle.html> (visited November 1, 2000)

²⁴ Mitchell, see 9.

²⁵ Ibid.

²⁶ 17 U.S.C. 103. (2000)

²⁷ H.R. Rep. No. 94-1476 (1976)

²⁸ See 16.

²⁹ Tushnet see 23.

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