"It's Dead Jim!" - Fair Use in Fanworks Without Precedent

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“IT’S DEAD JIM!” – FAIR USE IN FANWORKS WITHOUT PRECEDENT

I. INTRODUCTION

“He’s dead, Jim!” is a phrase that was uttered numerous times by the character Leonard McCoy, “Bones,” in the Original Series of Star Trek, and is often used by fans of the series when something has come to an utter and complete end.1 The trial date for Paramount Pictures Corp. v. Axanar Productions (“Axanar”) was set for late January of 2017,2 shortly after filing suit Paramount released a highly restrictive guidelines for fan films,3 and Axanar Productions appeared prepared to fight for its right to create under the fair use doctrine.4 The attorneys working the case seemed hopeful and ready to take the case all the way to trial.5

Axanar was not the first time the copyright owners of Star Trek have been involved in a suit over the use of copyrighted material, but it is the first time that a fan funded film has gained so much attention from Paramount and CBS, the copyright holders of Star Trek, and the first time a judicial decision seemed more than just possible.6 However on Friday, January 20, 2017, a settlement

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was announced between Paramount and Axanar Productions, and \textit{Axanar} failed to join the less than 5\% of civil lawsuits that actually end in a judgment. With the settlement of \textit{Axanar}, what looked like a good opportunity for a judicial decision on the fair use defense for fanworks evaporated. As yet another fanwork lawsuit ends without establishing precedent, Bones’ famous phrase may soon be applied to the Fair Use Doctrine in the context of fanworks.

This article will discuss the background and applicability of federal copyright law to fan created works. It will give a brief history of fan created works and the current issues surrounding them. This article will also analyze the potential future implications to the fair use defense if precedent is not soon set regarding the fair use defense’s applicability to fanworks as well as restrictions such as Paramount’s Fan Film Guidelines on the creative fan community, and fandom backlash from these effects for copyright holders.

\section{BACKGROUND}

Fandoms can be found for nearly every story-based work in existence, although some fandoms are considerably larger than others. A fandom is a community of fans of a specific work or set of works, such as the X-Men Fandom, the DC Universe Fandom, or the Star Trek Fandom. While big names like Harry Potter and

\begin{thebibliography}{9}
\expandafter\bibitem\expandafter\uppercase\expandafter\bfseries\mdseries\url{http://www.axanarproductions.com/axanar-signs-winston-strawn-to-defend-cbsparamount-lawsuit/}.
\bibitem{NASA_1976} In 1976 NASA’s first space shuttle, the Enterprise, was actually named after the iconic U.S.S. Enterprise – due in large part to the letter writing campaign.
\end{thebibliography}
Batman come to mind when discussing fandoms, there are smaller fandoms in existence for lesser known works such as Wendy and Richard Pini’s *ElfQuest* comic books, where fans get together to discuss original content, theories, and even create story lines and characters of their own, sometimes interacting with those of the original creation and sometimes completely separate, creating locations and characters that have nothing to do with the copyrighted content except for the world in which they reside. Fans affectionately call these communities “Holts” in homage to the basecamp of the main characters in *ElfQuest*. Some copyright holders even interact with their fandoms, creating online gathering places where fans can discuss content and interact with each other. Generally, this article will refer to online fandoms and their creations, but the groups do exist offline as well. One of the largest gatherings of a fandom offline can be seen in the San Diego Comic-Con, where approximately 130,000 pop-culture fans descend upon San Diego and inject nearly $150 million into the local economy.

lead by a couple of die-hard Star Trek fans. Molly McArdle, *This is How Star Trek Invented Fandom*, GQ, (Sept. 21, 2016, 9:00PM), http://www.gq.com/story/this-is-how-star-trek-invented-fandom.


A. Fanworks

While the onset of the Internet has established new ways for people participating in fandoms to interact with each other, these communities are hardly new.16

Fandom has become linked with the Internet in the public consciousness, but fanworks are as old as creativity itself. Virgil's "Aeneid" was essentially a piece of "Iliad" fan fiction, focusing on a secondary character from that story. The Bible has inspired an active fandom, with John Milton's Paradise Lost serving as an early example of a Bible fanwork. Sherlock Holmes, inspired one of the earliest and most enduring fandoms and as such is a useful illustration of the development of fandom through the years.17

Original stories have inspired fans throughout the centuries to create works of their own, from creations that became classics in their own right, such as the Aeneid, to Internet sensations such as A

In 2015, the New York Comic-Con actually drew in 167,000 people, well above the average attendance for the San Diego Comic-Con, which is generally considered the largest event of the sort. Rob Sakowitz, How Many Fans?! New York Comic Con Sets Attendance Record, FORBES, (Oct. 15, 2015), https://www.forbes.com/sites/robsalkowitz/2015/10/15/how-many-fans-new-york-comic-con-sets-attendance-record/#1daac80c5514.
16 Stacey M. Lantagne, Sherlock Holmes and the Case of the Lucrative Fandom: Reimagining Fair Use In Copyright, 21 MICH. TELECOMM. TECH. L. REV. 263, 267.
17 Id.
One such example of this in the world of Star Trek is *Star Trek: Continues*, an online web series that follows and adds to the original five year mission that was the premise of the three seasons of the 1960’s *Star Trek Original Series*. Another example would be Titian’s ‘poesie’ paintings, arguably a set of commissioned fan art of Ovid’s *Metamorphoses* poems.

A consequence of modern technology and the Internet is that fanworks are far easier to share with other members of the fandom than ever before. There are entire websites dedicated to hosting and sharing fanworks. Where fanfictions, both written and filmed, and fan art once would have only reached a small group of people, they are now posted on the Internet, downloaded

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18 Id. See also, Team Starkid, *A Very Potter Musical*, YOUTUBE (July 5, 2009), https://www.youtube.com/watch?v=wMWMAKeMCk. Unlike the situation with Axanar Productions, the makers of *A Very Potter Musical* obtained a license from Warner Brothers to be able to produce the play on the condition that no money be made on the production. Brad, *Unauthorized Starkid Production Brings Wrath*, GEEKLY NEWS (JULY, 9, 2012, 10:16AM), http://www.geekynews.com/unauthorized-starkid-production-brings-wrath/. Still, the fact that it was produced and that Act I has nearly 13 million views goes a long way to show the popularity of fanworks in the community. Team Starkid, *A Very Potter Musical*, YOUTUBE (July 5, 2009), https://www.youtube.com/watch?v=wMWMAKeMCk. While *A Very Potter Musical* may have flown under the Copyright Radar even without a license with the help of parody, most fanworks do not parody or criticize the original works.


21 Lantagne, supra note 16, at 265.

by fans and enjoyed by anyone who cares to access them. For many fans creating fanworks, it is a way of filling in gaps left out of the original creator’s work that may give an explain to a particular part of a character’s backstory, or explore part of the fictional world that was mentioned but not developed; for others, fanworks are a way to pass the time until the next original work comes out or even soothe the pain of a canceled television show or a completed series. The works involved in Axanar are but one of many examples of this phenomenon occurring in Star Trek fandom. The Harry Potter fandom is also an excellent example of this phenomenon. Even though the seventh and final Harry Potter book came out in 2007, Harry Potter and the Deathly Hollows, there is a thriving and active fandom presence online.

B. Fan Relations and Copyright Holders

Star Trek, as a franchise, has relied on its fandom more than other franchises, which has created a special bond between the franchise and the fandom; consequently, this provides an excellent setting to analyze the relations between copyright owner

24 See Id. at 269. See also Id. at 270-75. See also Anupam Chander and Madhavi Sunder, Everyone’s A Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use, 95 Calif. L. Rev. 597.
Conventions pose another set of complications surrounding fandoms and copyright law that eventually deserves to be discussed, especially when dealing with fan-created merchandise, cosplayers, and Artist’s Alley.
http://www.deviantart.com/browse/all/?section=&global=1&q=harry+potter&offset=0.
and fandom. Discontent over how a copyright holder treats their fans can damage fan relations and discontent can spread until it has essentially destroyed a fandom’s relationship with the copyright holder, harming the copyright holder through lost revenues.

In order for the Star Trek franchise to continue to endure and thrive as it has up to today, Paramount and CBS must be cautious with how it handles situations like the one with Axanar Productions. Star Trek, more than other large franchises like Star Wars or Harry Potter, has a discernable dependence on its fans for its success due in large part to the fact that the original series of Star Trek was canceled after two seasons and brought back by a massive fan campaign for a third season. After the live action television show was canceled, the fandom kept itself alive and fostered interest in the original work until the animated series emerged in 1975, and a sequel series began in 1987. Without the support of its fandom, Star Trek would have died as a franchise in 1968 when the original series was canceled. Unlike Star Wars,

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27 See Molly McArdle, This is How Star Trek Invented Fandom, GQ, (Sept. 21, 2016, 9:00PM), http://www.gq.com/story/this-is-how-star-trek-invented-fandom.
28 See Stacey M. Lantagne, Sherlock Holmes and the Case of the Lucrative Fandom: Reimagining Fair Use In Copyright, 21 MICH. TELECOMM. TECH. L. REV. 263, 307. Lantagne describes one such instance in which an original content owner initially allowed and encouraged fanfiction within her fandom, but after an altercation with a fan she ultimately took the opposite stance and started banning all fanworks. Because of this crackdown the fandom died despite the continued production of original works and the books today are not widely regarded. Id.
29 McArdle supra note 92.
30 Id.
31 Id. In 1976, Gene Rodenberry, the creator of Star Trek, expressed his approval of fanfiction when he stated in the introduction to Star Trek: The New Voyages, that, “[e]ventually 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 own personal Star Trek things . . . . It was their Star Trek stories that especially gratified me. I have seen them in meticulously produced fanzines, complete with excellent artwork. Some of it has even been done by professional writers, or by those clearly on their way to becoming professional writers. Best of all, all of it
which was an instant hit with the public, it was Star Trek’s relationship with its fans that brought it popularity over the years and kept it alive.\textsuperscript{32}

\section*{III. FANFICTIONS AND FAIR USE}

Fanworks have existed for as long as stories have been created and passed from person to person, whether that be by word of mouth, written onto paper or captured on film.\textsuperscript{33} For the most part these stories have been passively permitted, and in some cases even encouraged by the original creators.\textsuperscript{34} There are, of course, some authors who take the exact opposite stance; Anne Rice, for example, author of the \textit{Vampire Chronicles}, is well known to quickly “kill” fanworks based on her original works.\textsuperscript{35} However, “[u]ntil recently, the unspoken rule when it came to fan art, fan fiction and other creations was that, if you weren’t making money from it, [rights holders] would typically tolerate it.”\textsuperscript{36} The general fear of rights holders seems to be that if fans start making things that are too profit-driven, it will detract from actual sales of the

\textsuperscript{32} Id.


copyrighted original works. This is certainty a fear that Paramount and CBS point to as a reason for their suit against Axanar Productions.

Those that hold tight to the general fear of copyright owners that fanworks will cut into their profits are missing a key consideration: Star Trek turned 50 last year. Through 50 years of fan fictions, fan films, conventions, and entire fan communities indulging in non-original works, Star Trek as a copyright protected original series is still profiting enough that the three Original Series seasons have expanded into twelve feature films, seven separate series and countless official products. The notion that fanworks will deprive the copyright holders of so much capital that it will cause the right holders of Star Trek to stop producing official content after 50 years of co-existence is, in the immortal words of Mr. Spock, “highly illogical.”

Despite this, Paramount and CBS, and copyright holders like them, still retain rights regarding the use of their copyright protected content. The fact that original and fan created content have co-existed for 50 years does not stop copyright holders from

37 Molly McArdle, *This is How Star Trek Invented Fandom*, GQ, (Sept. 21, 2016, 9:00PM), http://www.gq.com/story/this-is-how-star-trek-invented-fandom.
40 Which would have only been two, had it not been for a fandom led letter writing campaign. McArdle supra note 39.
42 See, McArdle supra note 39.
exercising their rights under federal copyright law, and the fact that a copyright holder may have chosen to act against only one infringer out of many does not affect those rights. The question then becomes one of defense. The most likely defense an alleged infringer would bring is that of fair use. However, the effectiveness of this defense is still unknown because no fanwork lawsuits have actually gone through trial.

A. Fair Use Defense

An alleged infringer will seek to defend its use of the copyrighted works by asserting fair use. Fair Use is a statutory defense that allows uses of copyrighted material that would otherwise be considered infringement in certain circumstances. Section 107 of the Copyright Act of 1976 provides:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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;

44 Id.
46 Joint Stipulation Regarding Defendants’ Motion to Compel Discover from Plaintiffs, 2.
The fair use defense thus enables would-be infringers to use copyrighted work in a specific set of circumstances which the court must analyze in order to avoid stifling the creativity that the Copyright Act is meant to foster.⁴⁹

The first factor of the fair use defense is an analysis of the purpose and character of the infringing work. A transformative use of an original work will generally satisfy the Copyright Act’s purpose of promoting science and the arts.⁵⁰ While it will generally weigh against a finding for the infringer in this analysis, even an explicitly commercial use can qualify as fair if the other factors of the statutory test are met.⁵¹ In the case of most fanworks, while the fan’s goal is not to necessarily enter into the commercial market, the character of the work is not often transformative as the fan is using the same world, characters and often plot and changing only minor elements. This may not be the case, however, if the fan writer creates an alternative universe (AU): a fanfiction that may include the same characters and potentially plot, but places those characters and events in a different world or time period. For example, The Lion King could be seen as an AU retelling of Hamlet, and O Brother Where Art Thou could be seen as an AU retelling of the Odyssey set in the Great Depression. If confronted with a fair use defense in the

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⁴⁸ Copyright Act of 1976, Section 107.
⁵⁰ Campbell, 510 U.S. at 579.
⁵¹ Id.
context of fanworks, a court would need to analyze the transformative aspects of each fanwork in question.\footnote{52}

In \textit{Salinger v. Colting}, the United States District Court for the Southern District of New York found infringement where a character was essentially copied from the pages of \textit{Catcher in the Rye} and placed in the modern world because he remained the same character with the exception of his age.\footnote{53} The Second Circuit affirmed.\footnote{54}

The second factor of the fair use defense involves an analysis of the nature of the copyrighted work used in the fanwork. The nature of the work copied in fanfiction relates, as the name suggests, primarily to fiction: the characters, events, places, organizations and events that the fanworks depict are often either "facts" within the fictional world of the original content, or derived from those facts.\footnote{55} "The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy," and as such a finding that the nature of the copyrighted work is fictional and not factual could weigh against a fanwork.\footnote{56}

The third factor of the fair use defense considers the amount and substantiality of the copyright protected work being copied. The Supreme Court stated in \textit{Campbell v. Acuff-Rose} that the third factor of the statutory fair use test is to be examined in context on a case-by-case basis and "must focus upon whether the extent of . . . copying is consistent with or more than necessary to further the purpose and character of the use."\footnote{57} When it comes to the amount of the original content used, "[t]he less you take, the

\footnote{54} Salinger v. Colting, 607 F.3d 68, 83-84 (2d Cir. 2010).
\footnote{57} Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (internal quotes omitted). Citation to Campbell v. Acuff Rose.
more likely that your copying will be excused as a fair use.” In the case of fanworks, the infringing creator will often make use of characters, concepts, events, cultures, organizations, and even the fictional history of the original works.

i. Effect of Fanworks on the Market

The fourth factor of the fair use defense is an analysis of the effect the fanwork will or may have on the market for the original work. The effects on the market prong of the fair use defense is likely where fanworks will find their saving foothold. The vast majority of fanworks, especially fanfictions, are made available for free to anyone who wishes to access them on a variety of online platforms. If a fan creator is able to convince the court that its minimal effects on the market outweigh the other factors of fair use that may be weighed against it, the fan creator may be able to successfully defend against the claim of copyright infringement using the fair use defense.

An effect on the market is presumed because of the longstanding belief that a copyright holder’s strongest incentive to prevent fanworks arises from potential economic strains placed on

60 Copyright Act of 1976, Section 107.
them by a competing market of infringers.\textsuperscript{63} However, as evidenced by the longstanding 50 year co-existence between original Star Trek works and fan created works, this does not seem to be the case.\textsuperscript{64} While an inability to prove damages does not bar a copyright holder from recovery, it does limit their damage recovery to the statutory rates—between $750 and $30,000 per infringement as determined by the court.\textsuperscript{65}

\section*{B. Fair Use and Axanar}

In early 2014, Axanar Productions announced that it planned to release a short film entitled \textit{Prelude to Axanar} as a teaser to a feature length film they would release at a later date titled \textit{Axanar}.\textsuperscript{66} Both films would focus on the last year of the fictional Four Years War and the Battle of Axanar which were mentioned, but never fully explored, in Star Trek the Original Series.\textsuperscript{67} Axanar Production’s works incorporate named Star Trek characters such as Garth of Izar, as well as races, ships and other copyrighted aspects of the Star Trek source works.\textsuperscript{68} The fan-run production company set a fundraising goal of $20,000 on Kickstarter for the short film, which it surpassed in three days.\textsuperscript{69}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{63} See Stacey M. Lantagne, \textit{Sherlock Holmes and the Case of the Lucrative Fandom: Reimagining Fair Use In Copyright}, 21 MICH. TELECOMM. TECH. L. REV. 263, 294-95.
\item \textsuperscript{64} See Molly McArule, \textit{This is How Star Trek Invented Fandom}, GQ, (Sept. 21, 2016, 9:00PM), http://www.gq.com/story/this-is-how-star-trek-invented-fandom.
\item \textsuperscript{65} 17 U.S.C. § 504(b); 17 U.S.C. § 504(c)(a).
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} See Paramount Pictures Corp. v. Axanar Prods., 2016 U.S. Dist. LEXIS 71651, at 2-3 (C.D. Cal. 2016).
\item \textsuperscript{69} For the purpose of this article, any reference to original content or source material is a reference to the copyrighted source works.
\end{itemize}
\end{footnotesize}
On July 26, 2014, Prelude to Axanar premiered at Comic-Con San Diego. After the premiere of the short film, Axanar Productions launched its Kickstarter for the full film on July 25th. By the 29th they had already reached their first fundraising goal. With the endorsement of Star Trek Original Series star, George Takei, and recognition from the indie and fan film community Axanar Productions ultimately raised $1.3 million to film Axanar from its fans’ donations.

CBS and Paramount filed suit against Axanar Productions at the end of that month for copyright infringement. In May 2016, the District Court for the Central District of California denied Axanar Production’s motion to dismiss. While the costs

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of a lawsuit would usually keep a small creator from taking the lawsuit to court, Axanar Productions obtained pro bono representation from a notable firm and had $1.3 million in the bank for the production of the film which they were willing to appropriate to satisfy whatever legal fees arose.76 Rather than immediately settle like many independent infringers are likely forced to do for monetary reasons, Axanar Productions seemed prepared to take its fair use defense to court.77 Even though fair use defenses must be analyzed on a case by case basis,78 even one judicial opinion would provide fan creators with valuable leverage if presented with a cease and desist letter or a lawsuit, and would equally serve copyright holders in helping to decide which instances of potential infringement to pursue, ultimately saving them time and money while preserving fan relations.

In Axanar, the purpose and character of Axanar Production’s use of the copyrighted materials did not focus strictly on the protected material. In the case of the Axanar works, the main character and central event of the Axanar and Prelude to Axanar films are both pulled from the Star Trek Original Series episode “Whom Gods Destroy.”79 While the Original Series does not go into depth about the “Battle of Axanar” in the way that the Axanar Productions works intended, Axanar Productions is taking characters and events from the original works and essentially coping them in a different time, just as the defendant in Salinger v.

77 See Danny Cowan, The Pokemon Company Demands $4K Settlement From Amateur Fan Party Planner, DIGITALTRENDS (Oct. 5, 2015, 12:46 PM), http://www.digitaltrends.com/gaming/pokemon-company-sues-fan-over-party/. (Fan sued by the Nintendo for copyright infringement states that he “just want[ed] it to be over with and not have it escalate further because [he] couldn’t pay 4k in 45 days.”).
Colting did with *The Catcher in the Rye*.\textsuperscript{80} In *Salinger*, the court found while focusing on the Purpose and Character of the Use that simply moving the same character 60 years in the future was not a transformative enough to constitute a critique on the book.\textsuperscript{81} Similarly, the events of the Axanar works take the same character and look twenty years into his past.\textsuperscript{82} However, in contrast, the story of the Axanar works surrounds characters who were not central to the original series or particularly well developed in the original content.\textsuperscript{83}

In *Axanar* the nature of the copyrighted work involving the Star Trek world, history, and characters, is fictitious. Despite the submission of an amicus brief written partially in Klingon, the Axanar Works do not copy hard facts.\textsuperscript{84} The Axanar Works take place in a world belonging to Paramount and CBS, even if they are happening over twenty years before the Original Series takes place. As evidenced by *Salinger v. Colting*, simply moving the decade of a character does not remove them from the protected world in which they exist, however, unlike in *Salinger*, the Garth of Izar is not a main character of Star Trek the Original Series and his character is not developed.\textsuperscript{85} Since fanfictions may often take

\textsuperscript{80} *Salinger*, 607 F.3d at 83.

\textsuperscript{81} Id.

\textsuperscript{82} *The Story, AXANAR PRODUCTIONS*, http://www.axanarproductions.com/about/the-story/ (last visited Nov. 10, 2016).

\textsuperscript{83} *The Story, AXANAR PRODUCTIONS*, http://www.axanarproductions.com/about/the-story/ (last visited Nov. 10, 2016).

\textsuperscript{84} Brian Fung, *Behold, A Legal Brief Written In Klingon*, THE WASHINGTON POST, https://www.washingtonpost.com/news/the-switch/wp/2016/04/29/behold-a-legal-brief-written-in-klingon/. The Language Creation Society submitted an amicus brief to the Court to try and show that the Klingon language has moved out of the realm of fiction and has become a living and breathing language, which they argue, takes it out of the protection of Copyright and moves it into the Public Domain. *Id*. Even if the Court found that Klingon has indeed become a living spoken language, the fact remains that the Axanar Works are still nearly entirely made up of copyrightable elements belonging to Paramount Pictures and CBS.

support characters and build out the details of their backgrounds, a decision on whether or not the Axanar works' use of Garth of Izar and a briefly mentioned fantastical historical event would benefit anyone invested in a court's interpretation of this aspect of the fair use doctrine as applied to fanworks.86

If the dispute had proceeded to trial, Axanar Productions may have had difficulty surmounting the amount and substantiality of the Star Trek protected content that they copied. In short, the largest Axanar Productions-created content is the plot, and even that is based in the original content. However, while the Axanar works most certainty have their roots in the Star Trek original works, they did not copy the "heart" of the work, which could be weighed in Axanar's favor.87 Arguably, the adventures of the crews in the original series would constitute the "heart" of Star Trek, whereas the Axanar works are based off of a side character. Garth of Izar, the main character of the Axanar works appeared in only one out of 700 Star Trek episodes.88

Even though the market effects factor appears to lean heavily in the favor of preserving fanworks, it is still challenging to predict what a court would consider an effect on the market without a judicial opinion on the matter. In Axanar, Axanar Productions requested in discovery:

[a]ll Documents that refer or relate to the commercial impact, if any, that the promotion, production, or release of fan films, including but not limited to fan films inspired by Star Trek, has had or might have on the value of the works from which the fan films are inspired, including

88 Defendant's Answer to First Amended Complaint and Counterclaim, 20.
but not limited to the Star Trek Copyrighted Works.\textsuperscript{89}

Assuming Paramount and CBS were unable to provide any evidence of market harm arising from the Axanar works, it would have been very valuable to learn how much weight a court would put on the final factor of the fair use defense in a fanwork case. This holds especially true given that the vast majority of fanworks provide their creators with no monetary gain, and often help to bolster the visibility of a copyright holder’s content.\textsuperscript{90}

IV. THE CONTINUING MISSION: FUTURE IMPLICATIONS AND THE NEED FOR PRECEDENT IN FANWORK FAIR USE

Under § 106 of the Copyright Act of 1976, an owner of copyright is granted certain exclusive rights over their original content: (1) the right to reproduce the copyrighted work; (2) the right to create derivative works based upon the copyrighted work; (3) the right to distribute copies of the copyrighted work; (4) the right to perform the copyrighted work publicly; (5) the right to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.\textsuperscript{91} While the rights granted under § 106 seem to mirror the all-important real property right of exclusion, intellectual property poses problems that are not found

\textsuperscript{89} Joint Stipulation Regarding Defendants’ Motion to Compel Discover from Plaintiffs, 8.


\textsuperscript{91} See 17 U.S.C. 106.
when dealing with real property. While real property is exhaustible and tangible, and thus easy to follow, intellectual property can be held, used, and manipulated at one time by many different people. One result of this is that an aspect of original copyrighted material may still belong in its entirety to the original owner, and yet be so bound up in a new user’s work that it has become something new, outside of the hands of the original owner.

In *Campbell v. Acuff-Rose*, the Supreme Court recognized this issue, stating that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts . . . .’ ” The Court recognizes that there are times where to support the Copyright Act’s goal of promoting science and useful arts, they must allow for the manipulation of content that might otherwise be protected under the Act. Fanworks are arguably protectable under this defense. However, as long as fanwork cases continue to settle outside of court, the fair use doctrine is not applied to potential cases of useful arts that it may otherwise protect. Whatever the reasons may be, (apathy, fear, or monetary concerns over a large and expensive lawsuit) if fanwork infringement cases continue to settle to avoid judicial decision, the fair use defense is not able to do its job and is essentially becoming vestigial as applied to this

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93 *Id.* at 460.
94 *Id.*
95 510 U.S. 569 (1994).
96 *Id.* at 575 (quoting U.S. Const., art I, § 8, cl. 8).
97 *Id.*
area of creation. If fair use is to mean anything in regards to fanworks, the courts must make it so.

V. PHASERS SET TO STUN: CROWD FUNDING AND THE EXAMPLE OF AXANAR PRODUCTIONS

John Van Citters, a Vice President of CBS, has stated that the increased use of crowd funding to support the production of fanworks has played a large part in Paramount and CBS’s sudden interest in a form of fan expression that they have been previously willing to ignore. First, Van Citters takes the view that the donor gifts offered by Axanar Productions to their contributors were problematic because it became more about the donation gifts for those donors than “about supporting a fan production for its own sake.” Van Citters also stated that Axanar’s works are “no longer in the spirit of fan fiction, and CBS doesn't want fans profiting off of its talent.” In other words, Van Citters’ concern is that crowdfunded projects like those undertaken by Axanar Productions will begin to take actors who have actually portrayed characters on original Star Trek works away from the original works.

100 Id.
101 Id.

Given that the Axanar works employs three such stars as well as two actors from other popular space operas, this fear may not be unreasonable. http://www.axanarproductions.com/about/cast/. However, there remains the question of if participating in fanworks damages the market for these actors.
A. Fan Funding Success

The initial fundraising goal set for *Prelude to Axanar* was only $10,000.103 Axanar Productions received a total of $101,171 on Kickstarter.104 The initial fundraising goal for *Axanar*, the feature length fan film that Axanar Productions had planned, was set to $100,000, a small fraction of what they actually received – $638,471 on Kickstarter and $574,434 on IndieGoGo.105 While Axanar Productions budget of just over $1.1 million is certainly sizable considering their original goals, it does not come close to the average cost of a Hollywood produced film which was just under $60 million nine years ago.106 With the help of Star Trek Original Series star, George Takei, and an impressive teaser called *Prelude to Axanar*, Axanar Productions managed to raise approximately $1.13 million from fans’ donations – well beyond their original goals through the crowd funding websites Kickstarter and IndieGoGo.107

This is not the first time a fan film has used Kickstarter or a similar crowd funding website to raise funds for the creation of fan

104 Id.
One of the first and most famous attempts at crowdfunding a fan film can be regarded as a very successful failure. The creator of the Veronica Mars television series pitched a movie after the show was cancelled that was ultimately shot down by potential producers. He decided to produce the film independently and to fundraise it through the support of fans, setting a budget of $2 million that was met within twelve hours; by the time it was all said and done, fans had raised $5.7 million towards a Veronica Movie.

On both Kickstarter and IndieGoGo, the two crowdsourcing websites that Axanar Productions used to solicit donations from fans interested in the realization of their works, the production group offered goods as thank you for donors at varying levels of contribution. Accordingly, this is why CBS and Paramount chose to set up their controversial Star Trek Fan Film Guidelines. Rule Six of the Guidelines attempts to address the fan film problem by prohibiting any commercialization of fan films. Additionally, the guidelines also place limitations on the duration, number of acts or sequels, how much can be spent on the fan film, and what type of people can participate in the making of the fan film.

While the implementation of guidelines and restrictions to
fan films is a fascinating outcome of a project like Axanar, what is far more concerning for those interested in copyright is how the rules will be implemented and what it implies for the future of fanworks. With sources like IndieGoGo and Kickstarter, more fans will be able to generate income to produce fan films, which may potentially lead to litigation which boldly goes where no one has gone before, and hopefully results in a judicial ruling on the place of the fair use defense alongside fanworks. 116

B. The Trouble with Tribbles and Mitigating Backlash

Rights holders must be very careful when pursuing litigation against fan creators, as fans may see the litigation as a betrayal of their relationship with the copyrighted works. In looking at Paramount and CBS’s actions surrounding the litigation with Axanar Productions, it becomes clear they were aware of this possibility and tried to avoid this eventual reality. 117

Paramount and CBS attempted to separate their suit against Axanar from their general tolerance over the last 50 years for fan works. Paramount and CBS argued that “[d]ocuments relating to fan films are irrelevant to this case given that Axanar is not a fan film. Further, even if Axanar were a fan film, which it is not, documents and information relating to other Star Trek fan films and Plaintiffs’ decision as to whether to pursue legal action against those fan films is irrelevant, contrary to Defendants’ argument.” 118

CBS and Paramount further stated that “[t]his case is about a commercial enterprise designed to take money from Star Trek fans,” and is adamant that the Axanar works should in no way be

116 Lantagne, supra note 109 at 282.
118 Joint Stipulation Regarding Defendants’ Motion to Compel Discover from Plaintiffs, 42.
seen as a fan production.119

Paramount and CBS stated that the Axanar works cannot be fan films because Axanar Productions, "repeatedly pronounced that they were creating a ‘professional’ and ‘independent’ Star Trek film, starring actors (that were paid for their services) that have portrayed roles on Star Trek television series, and produced with professional crew members."120 Essentially, Paramount and CBS see any production that pays any of the participants as a commercial endeavor as going beyond the scope of a fan film and entering into the commercial arena, that is to say, making a profit.121 This argument attempts to remove the Axanar works from the very definition of fan films so that it can be more easily shown by Paramount and CBS that Axanar Productions is making money that would otherwise go to the copyright holders.

In their Fan Film Guidelines, Paramount and CBS set out specifically what kinds of works they will consider true fan films, and what they will consequently not bring suit against.122 In Rule 5, the copyright holders state that “the fan production must be a real fan production, i.e., creators, actors and all other participants must be amateurs, cannot be compensated for their services, and cannot be currently or previously employees on any Star Trek series, films, production of DVDs or with any of CBS or Paramount Pictures’ licensees.”123 Other rules set time limits, funding caps, content restrictions, restrictions on who can act in a fan film, and copyright limitations for fan films.124 Paramount and CBS are careful to emphasize on the guidelines that they do not grant licenses and are free to revise or revoke the guidelines at any time.125 Paramount and CBS’s explicit retention of their copyrights, their refusal to issue licenses, and the fact that the

119 *Id.* at 4.
120 *Id.
121 *Id.
123 *Id.
124 *Id.
125 *Id.*
guidelines provide that Paramount and CBS are free to pursue litigation when and if they see fit most likely means that while the guidelines are comforting, they are not likely enforceable.126 To reiterate, the fan film Guidelines were created after the lawsuit with Axanar Production was commenced.127 These rules, as drafted, essentially place many already existing fan films into jeopardy of lawsuit.128

The fandom reaction to the Fan Film Guidelines has been tepid to say the least.129 One group, Project SMALL ACCESS, has pledged the following to push CBS specifically into altering the restrictive Fan Film Guidelines:

127 Defendant’s Answer to Plaintiff’s First Amended Complaint and Counterclaim, 22.
Put pressure on CBS to revise their horrific guidelines for fan films by taking the SUBSCRIPTION PLEDGE: "I pledge to only subscribe to CBS All Access in a COLLECTIVE of two or more people who split the monthly cost and watch Star Trek together.

In this way, fans can still see the new Star Trek TV series, but CBS could lose significant amounts in subscription revenue as multiple subscribers are turned into single subscribers.

[...]

This time, fans can make their voices heard directly by cutting off their dollars from the CBS cash register. It's not a boycott...fans still get to watch the new TV series without doing anything illegal. But by watching TOGETHER, every $6/month subscription is reduced...hitting CBS where it hurts.130

The members of Project SMALL ACCESS are not the only fans revolting against the restrictive Fan Film Guidelines, writers for Fan Film Factor, bloggers, and other members of Star Trek’s fandom have started discussing ways to inform CBS and

130 Project SMALL ACCESS, FACEBOOK, https://www.facebook.com/groups/smallaccess/.
Paramount about how displeased they are with the guidelines. Some, like Project SMALL ACCESS and Johnathan Lane of the Fan Film Factor, are advocating for people to watch the new *Star Trek: Discovery* series in groups rather than paying individually for subscriptions, others are turning a page back in time to Star Trek’s beginnings and launching another letter writing campaign.

While it is clear that the copyright owners feel they are doing what they must to protect their original content from what they see as abuses of fan films, it is even more clear that the fans themselves are not sympathetic to the CBS imposed restrictions. In order to keep their fans happy and their revenue flowing, CBS and Paramount will likely need to amend their Fan Film Guidelines to those considered more lenient from the perspective of the fans. Fans involved in Project SMALL ACCESS have gone through each of the ten rules in the Fan Fiction Guidelines and proposed changes to the Guidelines which are now being incorporated into the letter writing campaign. If Paramount, CBS and other franchise rights holders wish to avoid alienating their fans, they would be well-advised to take notice of a time honored Star Trek tradition and work with fans to help maintain the bond that has kept the content alive for fifty years.

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VI. CONCLUSION

While it was not the first fanwork to face a lawsuit, Axanar looked like it could be the first that might go all the way through trial and actually obtain a judicial decision on the fair use defense for a fanwork.133 Under § 107 of the Copyright Act, an infringing party is offered a full defense in certain circumstances depending on their use of the copyrighted material.134 There are numerous articles, including this one, that discuss the potential ability of fan creators to utilize the fair use defense.135 However this defense has never been tested in court for fanworks, and this is problematic, because as fans continue to share their love of their fandoms via the Internet and crowdsourcing allows fandoms to fund these creations, conflicts between fandoms and copyright holders over high quality fanworks are only likely to increase.136

As evidenced by Paramount and CBS's guidelines, some copyright holders may turn to other methods to both protect their copyrighted content and attempt to maintain relations with their fans, but the legality of these guidelines, which are expressly not licenses, is questionable at best and subject to change.137 A judicial ruling on the fair use defense for fanworks, however, would eliminate the need for flimsy guidelines that do little more than confuse and anger fan bases.

The Supreme Court and Congress have both recognized the necessity of allowing the fair use defense in order to promote the goals of the Copyright Act: the promotion of science and useful arts.138 If fanwork cases continue to settle outside of court,139 the

138 Id. at 575 (quoting U.S. CONST., art I, § 8, cl. 8).
fair use defense is not even given the opportunity to protect what could otherwise be considered a fair use in the promotion of useful arts. Clarification on the fair use defense for fanworks would benefit not only fan creators, but copyright holders as well, with some knowledge of what the fair use defense may protect, copyright holders will not have to turn to lawsuits or guidelines that may harm their relations with their fan bases.

*Morgan Drake*

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