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PERSPECTIVE

Will 'Star Trek' fan film live long and prosper?

By Todd Bonder

With the salacious Summer Redstone soap opera having now played itself out in Los Angeles probate court, another Viacom-related courtroom drama is airing up the street in federal court. Having been stunned, first by Viacom's Paramount and CBS Studios firing off a lawsuit for copyright infringement, followed by the district court's denial, with phaser-like precision, of their motion to dismiss, the creators of the \$1 million Kickstarter-funded "Star Trek: Axanar" face an uncertain future. Is resistance futile? Or will "Star Trek: Axanar" and its producers live long and prosper?

Betting on the latter outcome would be illogical.

Devoted fans have long been making films about the copyrighted characters and shows they love. Significant advances in recording, editing and distribution technology, along with reductions in the cost of each, have led to the proliferation in recent years of high-quality, unauthorized fan films.

The "Star Trek" franchise, which first aired on TV in 1966 and is best known for its six TV series and 12 movies, is no exception. There have been at least 18 unauthorized audiovisual "Star Trek" productions of note (some involving multiple episodes) plus seven audio-only productions. Most were ignored, or at least tolerated, by Paramount and CBS.

A number of the unauthorized "Star Trek" works are parodies of the original protected works. Were Paramount or CBS to object, such non-commercial parodies might well each qualify as a transformative "fair use" of the copyrighted material they utilize. Other works — such as the prequel that "Star Trek: Axanar" is reputed to be — that are not parodies conveying a different meaning or message than the originals but, instead, seek to be as faithful to the authorized works as possible while profiting with their own story amid the "Star Trek" universe created by

Gene Roddenberry. For those works, including "Axanar," the right granted exclusively to copyright owners to control the making and distribution of works derivative of the original makes things more problematic.

The 1976 Copyright Act identifies six illustrative purposes — "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research" — that are typically fair uses, and lists four non-exclusive factors to be considered when making the case-by-case determination of whether a particular use qualifies as "fair."

With fair use in all likelihood not a viable defense, Paramount and CBS's case against the producers of "Star Trek: Axanar" might turn on how much material entitled to copyright protection the producers borrow from the original.

One factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." Another is the nature of the copyrighted work. The more functional or informational a copyrighted work is or the less creativity involved, the more likely an unauthorized use of the work will be considered a fair one. The third and fourth factors are "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" and "the effect of the use upon the potential market for or value of the copyrighted work."

In *Campbell v. Acuff-Rose Music*, the U.S. Supreme Court considered 2 Live Crew's parody of Roy Orbison's, "Oh, Pretty Woman." In holding that the fair use defense applied, the court stated that the "central purpose" of the first fair use factor is whether "the new work merely supersedes the objects" of the underlying work or, alternatively, adds something new that has a different



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purpose or character than the original, thereby altering the underlying work with what amounts to new meaning or message. As the Supreme Court stated, the investigation to be conducted under the first fair use factor is "whether and to what extent the new work is 'transformative.'" In general, uses such as 2 Live Crew's use of "Oh, Pretty Woman" with altered song lyrics commenting on or criticizing the original message are fair uses through parody since they involve modification of the meaning or message conveyed by the original copyrighted work, thus being transformative in nature, and do not adversely affect the potential market for or value of the copyrighted work.

Works such as "Star Trek: Axanar" do not implicate any of the six illustrative purposes mentioned in the Copyright Act (or, for that matter, any purpose similar to the six) and do not appear to involve a modification of the meaning or message of the authorized "Star Trek" franchise of works. Adhering closely to the original by design, such productions are not transformative in nature. Moreover, the highly creative elements of the "Star Trek" franchise that have kept fans enthralled for generations, coupled with the potential adverse effect of uses such as that made by the producers of "Star Trek: Axanar" on the market for authorized "Star Trek" productions, also militate against a finding of fair use. In view of such matters, reliance upon the affirmative defense of fair use would be, to quote Mr. Spock, "highly illogical."

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a viable defense, Paramount and CBS's case against the producers of "Star Trek: Axanar" might turn on how much material entitled to copyright protection the producers borrow from the original. Were the characters that "Star Trek: Axanar" plucked from the authorized works sufficiently developed to enjoy copyright protection? Is the expression of the protectable traits of such characters as well as of other elements such as the depictions of Vulcans and Klingons, at least substantially similar? And what about the visual depiction of the starship Enterprise? (Unless specific phrases are repeated virtually verbatim, a claim of infringement by use of Klingon language appears to be a stretch.)

Ultimately, Paramount and CBS have the burden of proving substantial similarity. With the crowd-funded movie apparently still in development, the less the producers of "Star Trek: Axanar" ultimately take from the authorized works, the greater their chances will be of skirting a finding of copyright infringement. As it is, their chances of success appear slim.

With film and court proceeding each light years from completion, we will have to wait and see how both turn out. Stay tuned, Trekkies.

Todd Bonder is co-managing partner at Rosenfeld Meyer & Susman and chairs the firm's Intellectual Property and Litigation Groups. He focuses on intellectual property and general civil litigation, emphasizing entertainment, new media, trademark, copyright,



TODD BONDER
Rosenfeld Meyer & Susman

rights of publicity and privacy, and publishing matters, as well as unfair competition, trust, probate and contract disputes