

Book review

Fan fiction and copyright: Outside works and intellectual property protection, by Aaron Schwabach

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Aaron Schwabach. *Fan Fiction and Copyright: Outside Works and Intellectual Property Protection*. London: Ashgate, 2011, hardcover, \$89.95 (184p) ISBN 978-0754679035.

[1] In law, there are few easy answers. The answer to almost any legal question you might wish to ask is frequently a carefully reasoned and hedgingly delivered "it depends." So, too, in Aaron Schwabach's impressively thorough new book, *Fan Fiction and Copyright: Outside Works and Intellectual Property Protection*, which sets out to answer the question "Do fan-created works—fan fiction as well as fan vids and fan art—infringe on the copyright of the works on which they are based?" Eminently readable and engaging, bringing a depth of analysis that has so far been lacking in other shorter treatments of this issue, and littered with helpful examples and illustrations, the book reaches a typically legal conclusion: fan works probably don't infringe copyright, but, well, it depends. The value in this book, as with most legal analysis, isn't in the answer so much as in the reasoning that gets you there. This book's value in that respect is considerable.

[2] Schwabach is a professor of law at Thomas Jefferson School of Law. He has published on a wide variety of topics, including intellectual property law.

His list of publications include several articles about Harry Potter (Hall et al. 2006; Schwabach 2010). As Schwabach writes, "We all have our fandoms" (3), and Harry Potter appears to be one of his. This is important to keep this in mind while reading this book. Schwabach strives admirably for—and mostly achieves—objectivity and a balanced analysis, but he also writes with a knowing affinity for the fan creators. This is not a criticism. The book benefits from its deeper and more detailed understanding of fandom's interests, motivations, and mores. Copyright holders, usually possessing more money and more lawyers than fans, can often shout loudly enough to drown out opposing positions. This book's sympathy for the fan creators' side of the argument actually increases its instructiveness, gathering in one place disparate arguments that are otherwise scattered all over the Internet in cozy fandom pockets. The insider tone to the book also adds an authoritative gloss to the apocryphal legends of fandom history related in the book.

[3] While fan works' copyright implications have been examined in a number of law review articles (Tushnet 1997; Chander and Sunder 2007), they have not yet been treated to many book-length analyses. This book ably fills that gap. The full complexities of the central question flourish in the longer medium, presenting a much clearer picture of the many moving parts of the analysis, all in one neat package for ease for the curious fan—or copyright holder. This is a book aiming beyond merely fellow intellectual property professors, with appendices containing excerpts of relevant US statutes and Web site resources for fan creators. It never drags into an overly long, esoteric discussion but does an excellent job relaying the nuances of complicated copyright law in such a way as to make the topic seem less intimidating. At the same time, the book is academically sound, dotted with helpful (and sometimes snarky) footnotes, and it never loses sight of the fact that the question it is seeking to answer is complicated.

[4] The book is divided into five chapters of decent length—long enough not to feel rushed or shortchanged, but short enough not to feel heavy or overwhelming. Schwabach walks well the careful tightrope of being informative without being condescending, useful for an outsider and nonetheless interesting for an insider. For those with no familiarity with

fandom, intellectual property law, or both, the book goes into enough detail to provide context. For those familiar with these topics, the book manages not to get mired in definitions. Its pace is brisk, but not brusque.

[5] The opening chapter is a crash course in both fandom and intellectual property law that provides just enough background. Those comfortable with the topic could probably skip the first chapter, but it is lively enough to be enjoyed even by experts, and it serves as a nice introduction to the friendly and appealing authorial voice of the book.

[6] The meat of the book is contained in its second and third chapters, where Schwabach steps through the legal analysis that must be applied to all fan works. First, he focuses on the copyrightability of the underlying works upon which fan works are based. This is a topic that some disputes ignore altogether. Few people would argue about whether Harry Potter is copyrighted. Indeed, most content owners take this fact for granted. When they attack fan works, they make broad statements regarding their ability to control their characters and worlds. However, there are no easy answers in law. Characters—normally the link between the original work and the fan work—are only copyrightable if they fulfill one of two tests that courts have developed: first, they must either constitute the "story being told," or second, they must be "sufficiently delineated." Not all characters pass these tests. For instance, courts have found the character of Tarzan to be copyrightable, but not the character of Sam Spade. The fact that some characters aren't copyrightable and some are immediately introduces unpredictability into the infringing nature of any given fan work. Is fan fiction about Sam Spade's early life okay, but not fan fiction about Tarzan's last days? Schwabach agrees that Harry Potter is probably copyrighted, but what about the myriad minor characters in the Harry Potter series? Severus Snape? Lily Potter? Stan Shunpike? How minor does a character have to be not to be copyrighted? What about setting? Can you use all your own characters but just stick them in Hogwarts? What about Sam Spade in Hogwarts? All of these valid questions are difficult to answer succinctly. Schwabach does an admirable job of examining them without simplifying them.

[7] If the fan work in question is about a copyrighted character or place, the inquiry has not yet ended. Under US copyright law, copyright holders control the right to "derivative works," which are works "based upon one or more preexisting works" (59–60). Therefore, a fan work, even about a copyrighted character or place, would have to be a derivative work to be infringing. After a brief discussion, Schwabach concludes that most fan fiction probably would be considered derivative—but again, as always, it depends.

[8] However, even if a derivative fan work about a copyrighted character exists, the question remains whether that work is infringing, because that fan work is noninfringing if it qualifies as a fair use. Fair use is a complicated and fact-intensive inquiry, requiring an examination of at least four factors: "(1) the purpose and character of the [fan work]...; (2) the nature of the [original] work; (3) the amount and substantiality of the portion [of the original work] used in relation to the [original] work as a whole; and (4) the effect of the [fan work] upon the potential market for or value of the [original] work" (63). The outcome of a fair use analysis is almost impossible to predict in the best of circumstances (note 1). Rendering the predictive nature even more challenging in the fan work context is the fact that a dearth of precedent exists. There has been little litigation and even fewer published decisions. In reaction, Schwabach skillfully incorporates British court cases as well as disputes that never even reached the courts into his analysis, and he thoroughly mines them for all the information they can give. This is a tricky proposition: the rest of the world often views copyright very differently than American law does, and disputes that have never become public record suffer from mainly being gossip. However, Schwabach does a commendable job, extracting what's useful while acknowledging its shortcomings.

[9] The fourth chapter of the book is devoted to the space where the interests of the original authors conflict with the interest of their fans. It is, debatably, a curious place to put this chapter. Having established what fandom is in the first chapter, it might have made more sense to explain there how fandom has come to be an area of such great debate before going on to analyze whether that debate is deserved. However, this is a minor quibble. The chapter also works where it's placed: having just determined

through his analysis that most fan works are not infringing, it does make sense to look at why copyright holders might not like to hear that.

Schwabach identifies and discusses three reasons why: (1) the copyright holder may not like the way fan works portray the original material; (2) the fan work may be too similar to a work the copyright holder intended to publish in the future, preventing the copyright holder from publishing said work; and (3) the fan work "borrows too extensively" from the original work (93). As he does throughout the book, he illustrates the copyright holders' interests with helpful, real-life examples from fandom disputes.

[10] Schwabach's final chapter is a sort of catchall for topics that didn't quite fit in the previous chapters. For instance, Schwabach examines the copyrightability of the fan works themselves and whether there might be future litigation around infringement of them. He concludes that some fan works may themselves have copyrightable elements, but that litigation is probably unlikely as a result of the lack of money involved. However, in stark contrast to the thoroughness characterizing the analysis in the rest of the book, Schwabach's discussion here feels brief and perfunctory, merely skimming the surface of the question. The book's focus is on the legal relationship between fan works and the original works. A discussion of the copyrightability of fan works themselves (a different question than whether they are infringing) deserves its own more in-depth analysis and feels out of place and shoehorned here.

[11] The book does have some weak points. For instance, Schwabach spends a great deal of time on the Harry Potter Lexicon case, in which Warner Bros. sued a Harry Potter fan who was planning to publish an encyclopedic guide to the Harry Potter books. Schwabach's focus on the case is understandable: It is one of very few existing court precedents in which a copyright holder directly attacked a fan work. However, the case is actually of little value when it comes to the more common fan works of fan fiction, fan vids, or fan art, which are otherwise the main focus of this book. The Harry Potter Lexicon was a fact-based guide to a fictional work, and as such, precedent existed to guide the analysis (note 2). It is a very different beast from, for instance, a piece of fan fiction about Harry Potter's future marriage to Draco Malfoy. A preliminary examination of the fair use factors illustrates

this: The purpose and character of the fan fiction is quite different from the informative encyclopedia. The amount of the original work used in a fan fiction is also different from the amount used in an exhaustive guide. Fan fiction has a different impact on the market and value of the Harry Potter books. Perhaps most importantly, the Harry Potter Lexicon was about to be published and sold for profit, unlike the vast majority of fan fiction about Harry and Draco. Therefore, although the Harry Potter Lexicon case is interesting, it is probably easily distinguishable—a fact that Schwabach does not adequately address.

[12] Schwabach also glosses over some other difficulties impacting the analysis. For instance, he barely mentions the havoc that the widespread misunderstanding of copyright law has already wrought in fandom, limiting references to it to brief, undeveloped asides. But fan creators' common belief that only profitable works can infringe copyright spurs resentment for copyright holders who may be defending legitimate rights, just as copyright holders' assertions that they unquestionably own their characters and can prevent all use of them spurs resentment for fan creators who may be engaged in legitimate transformative uses. The misperceptions of the law lead to emotional showdowns that do nothing more than cloud the law even further. Maybe Schwabach is attempting to keep his book's focus on the knowable legal aspects of the problem rather than hot-tempered and uncertain accusations, but the effect of legal misunderstanding on the feeble precedents that exist should be considered. In addition, Schwabach dismisses the extension of copyright terms as irrelevant. While this may be true, the continuing expansion of copyright holders' rights in this way at least suggests an attitude toward copyright that is at odds with Schwabach's conclusion that fans can legally create vast numbers of derivative works.

[13] Schwabach's final plea in the book is for marketplace acceptance of fan works. He makes a good case for it. After all, a flourishing fandom, complete with the fan works it brings, makes the copyright holders money: "Fans who might have spent a few dollars on books—or taken the books out of the library—became fans who spent thousands of dollars on books, movie tickets, DVDs, and merchandise" (16). Lawrence Lessig (2008) has also tried to promote marketplace acceptance of fan works under his theory of the

hybrid economy, in which he posits that the Internet has created an interplay between a sharing economy (such as fan creators) and a more traditional commercial economy (such as copyright holders) that should be encouraged as profitable for both. As a practical way to support such abstract acceptance, Lessig has set forth the concrete idea of Creative Commons licenses—a proposal that is curiously never mentioned in Schwabach's book (note 3). Nonetheless, this marketplace acceptance will doubtless be slow to come. Schwabach himself relates several stories about previously fandom-friendly authors whose relationships with fandom broke down spectacularly.

[14] The point of this book, however, is not to arrive at a solution. Schwabach's great achievement is to finally gather together in one place the many precedents—both court cases and out-of-court disputes—that scholars can use to make their own arguments and draw their own conclusions. The book is stripped of the hysterical emotion that often permeates this topic on Internet forums. It sets forth, as logically and simply as possible, the implications of the question of whether fan works infringe copyrights. This is a book that should serve as a valuable resource for fan creators and copyright holders alike, even if they may not like its main lesson: There are no easy answers.

Notes

1. Compare, e.g., *Suntrust v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1377 (N.D. Ga. 2001) with *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001) (reaching different conclusions on the fair use status of the same work). The Supreme Court has cautioned that the analysis is "not to be simplified with bright-line rules." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).
2. See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (concerning a trivia book); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993) (concerning a fan guide to a television series).

3. The Creative Commons licenses (<http://creativecommons.org/>) permit copyright owners to keep their copyright while allowing people to copy, distribute, and modify the work, so long as proper credit is given. The licenses can be personalized, so each copyright owner can choose the conditions under which copying, distribution, and/or modification will be permitted, if at all.

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