

Table of Contents

Schwabach, Aaron. *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*. Burlington, Vt.: Ashgate, 2011. 177p. \$89.95.

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¶44 Works that draw on established settings and characters are a staple of literary traditions around the world. The Hollywood adaptation of a classic novel, a book sequel published long after the original, an amateur story based on a popular television show and posted online—each is a work of imagination, but none is truly original. Under modern intellectual property law, though, each example raises complex issues of copyright, licensing, adaptation, and fair use. Indeed, since the idea of creative works as commodities first emerged, questions surrounding the rights of creators and owners to control later uses of their intellectual property have grown more and more complicated.

¶45 One contemporary area of particular tension concerns *fan fiction*—frequently contracted to one word, *fanfiction*, or even further to *fanfic*—that is, creative work, generally a written narrative, that uses specific elements from a pre-existing story without explicit permission from the prior work's copyright holder. Scholars from fields outside of law have been looking at fan fiction for at least two decades,¹⁵ and the topic has seen some coverage in law review articles.¹⁶ However,

15. See, e.g., REBECCA W. BLACK, *ADOLESCENTS AND ONLINE FAN FICTION* (2008); *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* (Karen Hellekson & Kristina Busse eds., 2006); Henry Jenkins, "At Other Times, Like Females": Gender and Star Trek Fan Fiction, in JOHN TULLOCH & HENRY JENKINS, *SCIENCE FICTION AUDIENCES: WATCHING DOCTOR WHO AND STAR TREK* 173 (1995).

16. See, e.g., Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009); Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True*

Aaron Schwabach's *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* is the first book that attempts to summarize the full scope of the relationship between copyright law and fan fiction, to subject the topic to rigorous legal analysis, and to discuss specific areas of potential legal conflict between fan fiction authors and those who hold rights in underlying works of intellectual property.

¶46 The broad sweep of Schwabach's book is best reflected by its subtitle—*Outsider Works and Intellectual Property Protection*. Written fan fiction is not the only kind of work that the book covers, and copyright is not the only area of law. Yet, the author's real goal is not merely to survey such broad issues, but to resolve basic misconceptions about the links between copyright law and fan fiction. Schwabach begins in chapter 1 by introducing readers to the concept of fan fiction, to its history as a form of creativity, and to the reactions, both positive and negative, that it tends to provoke in authors and even other readers. This introductory material concludes by identifying a pair of fundamental issues that must always be addressed when thinking about fan fiction: "first whether the underlying work or element (such as a character) is protected by copyright and, second, if so, whether the fanfic or other fan work violates that copyright" (p.20). The bulk of Schwabach's analysis, found in the two chapters that follow, directly addresses these basic questions.

¶47 First of all, in chapter 2, Schwabach considers whether a conflict even exists—whether copyright law actually covers the preexisting elements used in a particular work of fan fiction. This calls for a brief and necessarily simplistic survey on changes to the term of copyright protection under U.S. law—from the Copyright Act of 1909 through the Copyright Term Extension Act of 1998—and for a significantly more in-depth treatment of how copyright principles operate when applied to individual characters in a work, rather than to the work as a whole. Although this latter discussion includes extensive analysis of relevant case law, most of the cases Schwabach cites involve disputes between competing authors or production companies, not between rights holders and fans. Nonetheless, the information adds important background that is valuable for further discussion of fan fiction concepts.

¶48 Chapter 3 deals with an issue that is more directly connected to the theme of the book as a whole. When, the chapter asks, does fan fiction actually constitute copyright infringement? Much of the analysis in this section revolves around the concept of *derivative works*—permitted only when authorized by the underlying copyright owner—and the far more complex idea of a *transformative work*—one that is based on a preexisting creation, but nonetheless qualifies as "a new, original work, commenting on and critiquing the original" (p.68). The author argues that understanding these concepts is critical to properly appreciating the relationship between works of fan fiction and the copyrighted material upon which they are based. He also extends his analysis in this chapter beyond written fan fiction to address other fan-created works, such as videos, illustrations, and songs.

and Logical Precedent, 33 HASTINGS COMM. & ENT. L.J. 159 (2011); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

¶49 From these general questions, the book moves into a more specific discussion of the conflicts that can arise between the creator of an original work and those who create fan fiction based upon it. This is probably the strongest of the book's five chapters, largely because Schwabach uses real-world disputes as examples to support his analysis. Unfortunately, two of these disputes never actually reached the litigation stage, and the third, although resolved in a reported decision, involved a fan-created work (*The Harry Potter Lexicon*) that strains the definition of fan fiction.¹⁷

¶50 Schwabach concludes his study with a speculative section—"Fanfic: The New Voyages"—on legal issues that fan fiction may face in the future, such as the possibility for conflicts between competing fan fiction writers and the blurring distinction between authors and fans. Three short appendixes (a G.K. Chesterton excerpt discussing parody, copies of the principal *United States Code* sections on copyright, and a very brief list of web sites relevant to fan fiction authors) accompany the main text. Lastly, the book offers an extensive bibliography of books and law review articles relevant to the subject matter.

¶51 Overall, *Fan Fiction and Copyright* is a very useful introduction to a marginal but emerging area of intellectual property law. A unique and relatively inexpensive book, it is definitely appropriate for most law school library collections, especially those that support research, teaching, or clinical programs in entertainment, publishing, intellectual property, or copyright law. Law firms with practices in these areas may also want to consider acquiring this title, though with the caveat that this is a monograph, not a practice guide. Readers will not find direct answers or practical guidelines for litigating cases that involve fan fiction and copyright issues. One final note: Schwabach seems to be a fan fiction enthusiast. This leaves him very familiar with the community and its language, but he occasionally gets carried away and veers off on tangents that, though interesting in and of themselves, do not really belong in a book on the legal aspects of fan fiction.