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### Fair Use in the News: Is Mockumentary Transformative?

In December 2015, Paramount Pictures and CBS Studios filed a lawsuit in the Central District Court of California, alleging that the makers of the crowdfunded fan films *Prelude to Axanar* and *Axanar* have infringed upon various copyrighted elements of the *Star Trek* TV series and motion pictures. *Prelude to Axanar* is a short film available for streaming at no cost on Youtube, and *Axanar* is a feature-length film still in production. During the fundraising stage, the defendants pitched both works to donors as *Star Trek* tributes, even incorporating the words “Star Trek” in the title of their Kickstarter and Indiegogo webpages. Accusing the defendants of using copyrighted elements from *Star Trek*, such as settings and characters, plaintiffs allege that the *Axanar* works do not “constitute fair use of the Star Trek Copyrighted Works” (Paramount v. Axanar, “Complaint” 11). In February 2016, the defendants responded that they “intend to vigorously defend their use (if any) as a fair use” (Paramount v. Axanar, “Motion” 24). As of this writing, the case is still in litigation.

While both sides have alluded to the fair use principle of copyright law at various points during their legal back-and-forth, neither has presented a detailed analysis of why a fair use defense may or may not apply in this case. What follows is a closer look at each of the four non-exclusive fair use factors in order to determine whether the use of copyrighted elements from *Star Trek* by the makers of *Axanar* constitutes fair use.

## Purpose and Character of Use

There are two elements to consider when applying the “purpose” factor in a fair use analysis; the first is whether the use of copyrighted material is of a commercial nature or not. While it could be assumed that most cinematic works of fiction made on *Axanar*’s scale are commercial in nature, it is not so obvious in this case. The defendants have raised a combined \$1 million for their projects through crowdsourced fundraising campaigns (Gardner, “Crowdfunded” 1), however, the defense could argue that the funds are not meant for commercial gain or to generate profit. The Indiegogo crowdfunding webpage for *Axanar* makes it clear that DVDs will be produced for fans that donated to the production of the film, but there is no indication that the defendants seek to profit from the sale of the discs. In other words, the defendants could argue that the funds raised were used only to produce and distribute the film, with no profit motive. The plaintiffs could counter that if the court rules in favor of fair use, the defendants may very well exploit the *Axanar* works for profit in the future. Therefore, the commerciality of the works, or rather the defendants’ plan to profit from their creation, is not fully evident—an indication that this element of fair use does not clearly favor either side.

The second element to address when considering the “purpose” factor, is whether the use of copyrighted material is either transformative or parodical. While the austere and somber tone of *Prelude to Axanar* strongly suggests that the works are not parodical, whether they are transformative is less clear. The works *are* borrowing a substantial amount of creative content from *Star Trek*, but the defendants are also presenting them as mockumentaries, with characters “giving both a historical and personal account of the war” (*Axanar Productions* 4). Much of *Prelude to Axanar* lacks the high-powered science-fiction action of *Star Trek*, featuring instead, quiet scenes of talking heads-style interviews about fictional events. The *Star Trek* works are

generally works of straight-forward narrative fiction, and the mockumentary aesthetic of the *Axanar* works could enable the defendants to argue transformative use.

### **Nature of the Copyrighted Work**

This factor of the fair use principle suggests that the use of more creative copyrighted works is generally less helpful to a fair use defense than borrowing from more factual, less creative material. The collective *Star Trek* universe, stretching from 1966 to present day, includes a wide variety of creative works. The defendants in this case would be hard-pressed to argue that the highly creative nature of the *Star Trek* material utilized in *Axanar*, would favor their fair use argument; nor could they argue that the material borrowed is not at the heart of the copyrighted work, as the settings, themes, and characters of *Star Trek* are essential components of the series. Defendants could argue that their task of transforming the series into a mockumentary form required them to utilize creative material at the heart of the original to make the homage clear. But if the case for their transformative use is deemed weak, this factor would favor CBS and Paramount.

### **Amount**

Fanfiction unabashedly emulates the object of its admiration; it is not surprising then, that a substantial amount of copyrighted material from the original would be used in a homage. While defendants could argue that the dialogue, style, and plots of the *Axanar* works are not direct copies, many other elements, including sets, make-up, and costumes, are clearly inspired by or taken directly from *Star Trek*. Once again, like the “nature” factor, this portion of the doctrine favors the plaintiffs unless transformative use is accepted as solid ground for the defendants to

stand on, in which case they may have an argument that the amount of material used for their mockumentary homage was necessary to place the story in the *Star Trek* universe.

### **Market Effect**

Of all four factors in the fair use doctrine, “market effect” weighs most heavily in favor of the defendants in this case. *Star Trek* is a cultural phenomenon with a remarkably passionate fan base; the ability of the defendants to raise the sum of money that they did is a testament to this. The creation of an independent, high-profile, crowdfunded work that fans enjoy is more likely to keep their interest in the evolving universe of *Star Trek* alive than it is to deter them from watching the professional films and TV shows produced by Paramount and CBS. While it is unlikely that either side will be able to provide evidence of a market shift influenced by the *Axanar* works at this point, the defense could argue that the popularity of *Axanar* is akin to positive press for *Star Trek*, and could potentially expand their market by bringing new fans into the fold and keeping current fans embroiled in the evolving universe.

### **Conclusion**

The defendants have clearly used many creative elements from the *Star Trek* works for their sincere mockumentary homage; the crowdfunding campaign for *Axanar* featured phrases like: “the first fully-professional, independent Star Trek film,” and “a return to the type of Star Trek all of us grew up on” (Peters 1), leaving no doubt as to the source of their inspiration. Whether the mockumentary form of the *Axanar* works is a sufficiently transformative use of *Star Trek* to justify the amount of copyrighted material used in their creation is the main question that the court faces in this case. Since the fair use doctrine is meant to promote the ideals of free speech and aid in the creation of new works, the defendants would have a case if mockumentary

was deemed transformative, considering that the commerciality and market effect factors are either neutral or slightly in their favor. It is very likely however, that the defense's strong dependence on this single argument will not work out in their favor in a fair use defense.

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## Fair Use in Film Archives

A film archive could invoke fair use to defend the copying a moving image work, of which the archive holds the original nitrate negative, from the highly flammable and unstable film stock onto more stable polyester film stock to prolong its useful life. Fair use is at the heart of copyright law to make sure of the “progress of science and useful arts.” The disappearance of a unique film negative, a physical item lawfully possessed by the archive, due to the instability of its carrier, could result in a work of art being lost forever; this stands in complete contrast to the purpose of copyright law to promote creation. Therefore, the archive that chooses to preserve such a work is arguably utilizing the strongest reasoning provided in the law for a fair use claim.

An analysis of the four factors of fair use is also necessary to fully justify such an action. First, the copying of the film, while by no means transformative, is also not commercial, since the goal of the archive is preservation rather than distribution and exhibition for profit. The second factor depends somewhat on nature of the content of the film in question; copying a creative work of narrative fiction would not favor the archive’s fair use defense as much as the copying of filmed news event would. The third factor, the amount of copyrighted material in question, does not necessarily favor the archive’s fair use defense either; since the whole film is being copied from one stock to another, all copyrighted aspects of the original are being copied. The fourth, and one of the most crucial, factors, falls squarely on the side of the archive as there is no market for a film that is not being utilized by its creator, nor will there be a future market for a work that might be unwatchable soon. The first and fourth factors being generally the more important two in fair use cases, coupled with the fact that the archive’s inaction could result in the permanent loss of a piece of “useful art,” makes it likely that the film archive in question would succeed in using a fair use defense in court.