

Maybe Axanar Could Klingon To Its Fair Use Defense In A Parallel Copyright Universe

BY JAMES P. FLYNN OF EPSTEIN BECKER GREEN ON JANUARY 25, 2017

POSTED IN CASE STUDIES, COPYRIGHT, FAMOUS MARKS, PROTECTION & ENFORCEMENT, UNITED STATES



On January 3, 2017, in Paramount Pictures Corp. v. Axanar Productions, Inc. et al., a United States District Court held that Axanar could not rely on a fair use defense during the upcoming trial over whether Axanar infringed Paramount's copyright in the popular Star Trek television and motion picture franchise. Axanar has an existing twenty-one minute film Star Trek: Prelude to Axanar ("Prelude") and at least two trailers for a planned full-length feature film (the "Axanar Motion Picture," and, collectively with Prelude, the "Axanar Works"). Central to the Court's rejection of that defense was Axanar's inability to convince the Court that the Axanar Works had the characteristics of the sort of works, such as parodies, that are recognized as deserving of a fair use defense under 17 U.S.C. § 107, as further explained by the United States Supreme Court's decision in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). While seemingly a solid analysis under the applicable U.S. copyrights laws and cases, one perhaps should ask whether a different result could be supported in a parallel copyright universe. (This does, after all, involve Star Trek, where, since the Original Series episode "Mirror, Mirror" episode, examples of parallel universes have existed.) But to get to that parallel universe here, one need not experience a transporter malfunction, nor travel multiple parsecs—one perhaps need only look the United Kingdom (not to be confused with the United Federation) and Section 30A of its Copyright, Designs and Patents Act 1988. Understanding more fully the Axanar case and the Axanar Works will help the parallels emerge.

Here, Axanar set out to create a motion picture "prequel" to Star Trek *The Original Series*. Although the Axanar defendants wrote their own scripts for the Axanar Works, they used the copyrighted Star Trek source material "as a bible" in developing the script of *Prelude* and the final shooting script of the Axanar Motion Picture, each of which revolve around a human character known as Garth of Izar ("Garth," played by Steve Ihnat). Garth appeared in one episode ("Whom Gods Destroy") of *The Original Series* as a former starship captain famous among Starfleet officers for his exploits in the Battle of Axanar. Planet Axanar seems to be the namesake of Defendant Axanar Productions. The Axanar defendants intentionally used or referenced many elements similar to those in the Star Trek Copyrighted Works to stay true to Star Trek canon down to excruciating details. These defendants were "interested in creating alternative ways for fans to view Star Trek," and "expressly set out to create an authentic and independent Star Trek film that [stayed] true to Star Trek canon," especially in Axanar's use of Klingon and Vulcan characters. As the Court noted, "Star Trek fans love Defendants' faithfulness to the Star Trek canon" and the primary creator of the Axanar Works, Alec Peters, "considers himself 'the keeper of faith with fans.'" Far from discerning any criticism of the Star Trek franchise in the Axanar Works, the Court found that the "Defendants set out to create films that stay faithful" to the Star Trek series and "appeal to Star Trek fans." That finding became the death knell of any fair use defense under U.S. law.

That is because U.S. courts have protected parodies, but not imitations, as fair use under 17 U.S.C. § 107. Under the fair use test, parodies have been protected by first focusing on the "the purpose and character of the use" factor. That is because a true parody allows an affirmative response to the question of "whether and to what extent the new work is transformative," in other words, whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579. For the purposes of copyright law, however, parody must use some elements of a prior work *to create a new work that criticizes the substance or style of the prior work*. *Campbell*, 510 U.S. at 580 (emphasis added). "**The parody must target the original**, and not just its general style, the genre of art to which it belongs, or society as a whole." *Id.* at 597 (Kennedy, J., concurring) (emphasis added). "The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived." *Id.* at 582. Because the Axanar Works were a faithful homage to the copyrighted Star Trek franchise, the parody and criticism argument failed.

Need the critic always pan the original to come within the fair use exception? Or can the critic sometimes provide a glowing tribute while remaining protected? U.S. law just does not seem to extend fair use

protections to the homage:

Unlike parody, criticism, scholarship, news reporting, or other transformative uses, *The SAT* substitutes for a derivative market that a television program copyright owner such as Castle Rock “would in general develop or license others to develop.” [citation omitted] Because *The SAT* borrows exclusively from *Seinfeld* and not from any other television or entertainment programs, *The SAT* is likely to fill a market niche that Castle Rock would in general develop. Moreover, as noted by the district court, this “**Seinfeld trivia game is not critical of the program, nor does it parody the program; if anything, SAT pays homage to Seinfeld.**”

[*Castle Rock Entertainment v. Carol Publishing Group*, 150 F. 3d 132, 145 (2d Cir. 1998); *accord Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F. 3d 267, 278 (6th Cir. 2009) (holding that jury instruction that “an homage or tribute” is not fair use is “an accurate statement of the law”)s]

The law in the United Kingdom might, however.

Section 30A of the United Kingdom’s Copyright, Designs and Patents Act 1988 may represent that parallel universe where other outcomes and approaches are possible:

30A Caricature, parody or pastiche

1. Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.
2. To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable

As one reflects upon the possibilities presented by such provisions, one must pause for a consideration of language to note that “fair dealing” and “fair use” are not identical, though each amount to defenses to infringement. More importantly one must consider the import of the term “pastiche,” which is not discussed as defense under U.S. copyright law. (In fact a Lexis search of federal cases shows only one decision that includes the word “pastiche” and the phrase “fair use,” *Disney Enters. v. Hotfile Corp.*, 2013 U.S. Dist. LEXIS 172339, 2013 WL 6336286 (S.D. Fla. Aug. 28, 2013), and “pastiche” refers there to an assortment of collected evidence, not a defense).

But the word “pastiche” is implanted in the statute itself in the U.K. And importantly, the U.K. recognizes that “parody” and “pastiche,” connected in the statute by the disjunctive “or,” have independent meanings. See UK Intellectual Property Office, *Exceptions To Copyright: Guidance For Creators & Copyright Owners, October 2014*, page 6. Because that guidance says that the words of Section 30A shall have their ordinary meaning, at least one commentator quoted the very different definitions of parody, caricature, and pastiche, and stated after defining that last term (pastiche) that “[d]efined in this way, ‘pastiche’ would appear to extend well beyond ‘parody’” and that a “defen[s]e of ‘fair dealing for the purpose of pastiche’ may have a broad and controversial scope.” See Griffiths, “Fair Dealing after Deckmyn – The United Kingdom’s Defence for Caricature, Parody or Pastiche,” at 16, in M Richardson and S Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment, Edward Elgar, 2017, Forthcoming*; but compare to *Deckmyn v. Vandersteen*, where Court of Justice of the European Union interpreted “parody” in a similarly worded Belgium law but included dicta that might suggest that, as Griffiths noted, the concepts of parody and pastiche “cannot be usefully disaggregated.” Griffiths, at 16.

So what is “pastiche”? *Pastiche* is actually a French cognate of the Italian noun *pasticcio*, which is a pâté or pie-filling mixed from diverse ingredients. In American English it is defined, in the first instance, as an

artistic work in a style that imitates that of another work, artist, or period, and U.K. dictionaries note that includes a work made “in a professed imitation of the style of another artist,” as Griffiths notes at 16; the word’s secondary definition is “a musical, literary, or artistic composition made up of selections from different works,” as in “a potpourri.” (Run through the [Bing language translator](#) one sees that “pastiche” has no Klingon equivalent, though it may be printed in Klingon script as ; there is, however, a Klingon phrase written as in Klingon script and pronounced “mIllogh qonwI’ qoSta’ van Hov trek ‘e’ chaw’jaj neH” that, according to the Bing language translator, means “film tribute to Star Trek canon”). Importantly, it is a commonly understood aspect of the definition of the word “pastiche” that, “[u]nlike parody, pastiche celebrates, rather than mocks, the work it imitates.”

And therein lies the main difference between how the *Axanar* Works were analyzed by the U.S. federal district court in California applying American copyright law, and how it may have been looked at differently under a “pastiche-as-fair-dealing” test in the UK or elsewhere. (A number of other countries have adopted language similar to section 30A). Under a pastiche fair dealing test, *Axanar*’s faithfulness to the canon, detail work, and celebration would have been elements supporting its defense rather than complicating it. The *Axanar* Works clearly imitate the style of the so-called Star Trek canon, which itself is a Gene-Roddenberry-inspired potpourri mixing the art of numerous writers, directors, and actors from the Original Series through (i) additional series and movies to (ii) the 2003 novel, titled *Garth of Izar* and copyrighted by Paramount (a book that the *Axanar* court described as further developing the character), to (iii) the Four Years War at the Battle of Axanar (which is also described in a Paramount-licensed game including a supplement titled *Four Years War*). Under the parody fair use test, the evidence of such reverential treatment of the multiply-sourced inspirational and referenced material and stories just distanced *Axanar*’s creation from the parody cloak it sought to don as defense under U.S law. But parody was always an ill-fitting choice without much chance of working any longer than a jerry-rigged cloaking device stolen from Romulans in “[The Enterprise Incident](#)” episode and looking no more natural on the *Axanar* Works than did the pointy ears on Captain Kirk in the same episode.

So [Paramount Pictures Corp. v. Axanar Productions, Inc.](#) will now proceed toward trial, and Paramount’s Star Trek empire seems safe, however that single case resolves. A broadening of the parody fair use defense, or acceptance of a parallel fair-dealing-pastiche defense, would have challenged Paramount’s control over that empire, as the ever faithful, creative and driven Trekkies would doubtless have created an even fuller genre of new Star Trek works with the *in terrorem* effect of infringement suits removed or diminished. (In fact, some of these would-be contributors have expressly pondered Star Trek projects using the word “pastiche,” though some have not carried through on or been diverted to other projects; we have already seen as chapter 7 of [The Ultimate Star Trek and Philosophy: The Search for Socrates](#) the essay entitled “Klingons: A Cultural Pastiche,” an interesting analysis of Klingons as a “singularly intriguing [v]eritable pastiche—and motley conglomeration—of various human cultures” through the various appearance since first introduced in the Original Series’ first season episode entitled “[Errand of Mercy](#)”). But that parallel, pastiche-protecting universe is not ours, and maintaining the Star Trek empire, by its traditional tools, is paramount (pun intended) it seems. Indeed, the copyright owner has dictated restrictive rules for such films to carry out that control. As Mr. Spock said in “Mirror, Mirror,” “Terror must be maintained or the Empire is doomed. It is the logic of history,” ...and U.S. Copyright law... for now.

ILN IP Insider

Executive Offices
179 Kinderkamack Road
Westwood, NJ 07675
Tel: 201.594.9985/ Fax: 201.740.9765

About the ILN IP Specialty Group

Headed by Eddie Powell of Fladgate LLP, London, and Norman Zivin of Cooper & Dunham LLP, New York, New York, the ILN's Intellectual Property Group provides the platform for enhanced communication, enabling all of its members to easily service the needs of their clients requiring advice on cross-border transactions. Members of the group meet regularly at ILN conferences and industry events, and have collaborated on discussions and publications of mutual interest.

[Read More >](#)

STRATEGY, DESIGN, MARKETING & SUPPORT BY

LEXBLOG