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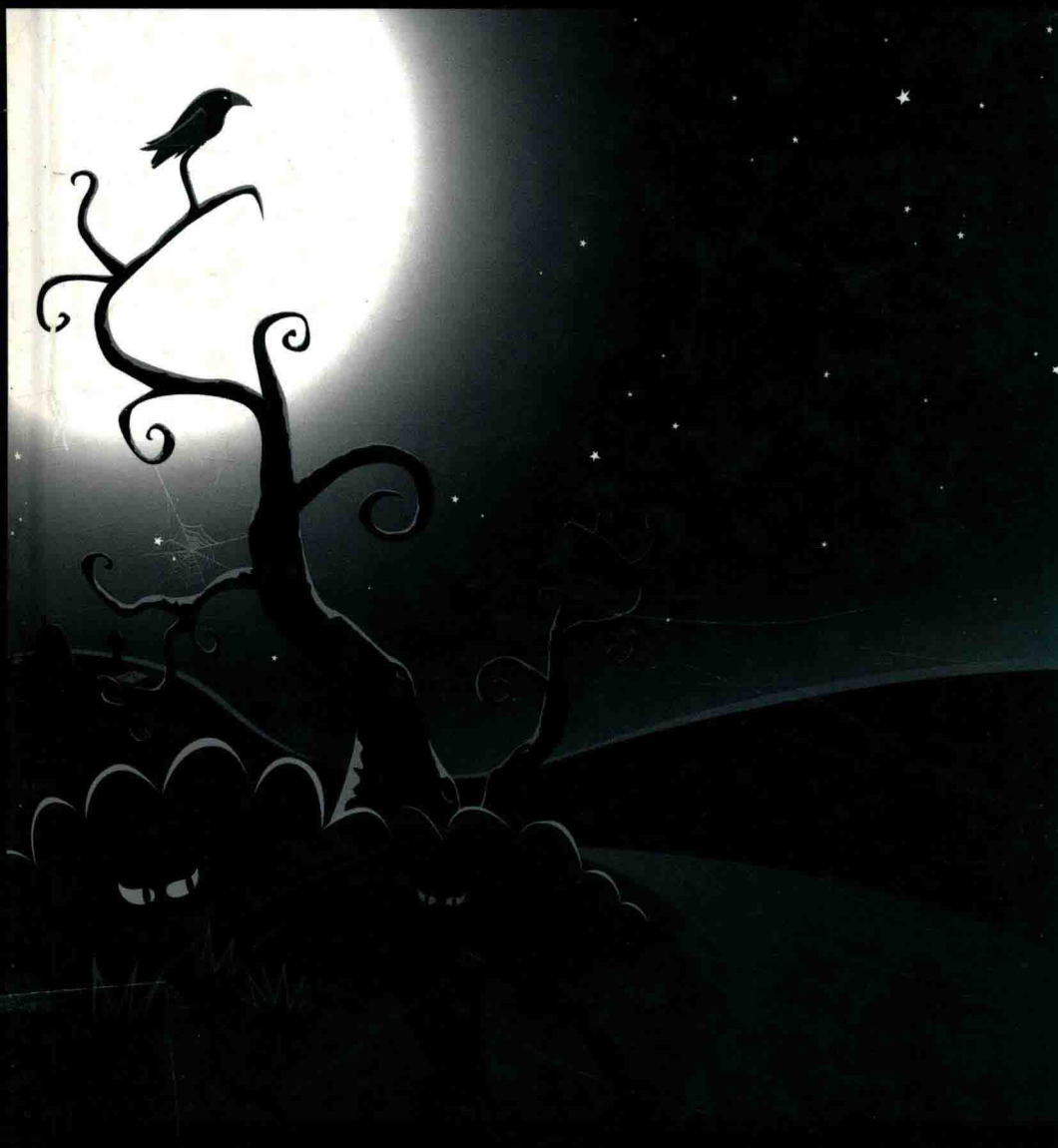

Fan Fiction and Copyright

Outsider Works and Intellectual Property Protection

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Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
Schwabach, Aaron.
Fan fiction and copyright : outsider works and intellectual property protection.
1. Fan fiction. 2. Copyright–Fictitious characters. 3. Law and literature.
I. Title
346'.0482-dc22

Library of Congress Cataloging-in-Publication Data
Schwabach, Aaron.
Fan fiction and copyright : outsider works and intellectual property protection / by Aaron Schwabach.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7546-7903-5 (hardback : alk. paper) – ISBN 978-0-7546-9786-2 (ebook)
1. Copyright–Fictitious characters. 2. Fan fiction–Law and legislation. 3. Copyright–Fictitious characters–United States. I. Title.
K1447.95.S39 2011
346.04'82–dc22

2010050760

ISBN 9780754679035 (hbk)
ISBN 9780754697862 (ebk)

Printed and bound in Great Britain by the
MPG Books Group, UK

FAN FICTION AND COPYRIGHT

For Jenny
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Introduction:
Who Owns Fandom?

Fan fiction, long a nearly invisible form of outsider art, has grown exponentially in volume and legal importance in the past decade. Because of its nature, authorship, and underground status, fan fiction stands at an intersection of issues of property, sexuality, and gender. This is a book about property; it looks at the various types of fan-created content, most of which are to some extent derivative works, and asks whether some or all of them can be protected as transformative uses. Among the more celebrated disputes over fan writings are a dispute between SF author Larry Niven and fan author Elf Sternberg over the latter's use in fanfic of a fictional species of alien beings created by the former; a dispute between SF author Marion Zimmer Bradley and fan author Jean Lamb over a work by the former that purportedly resembled a work by the latter; and the recent dispute between author J.K. Rowling and fan webmaster Steven Vander Ark over the Harry Potter Lexicon, which Rowling once praised and more recently succeeded, briefly, in suppressing, until the parties reached an accommodation.

Unlicensed fan fiction presents a dilemma for content owners: while fan fiction may infringe on the content owners' copyright and trademark rights, the fans who create and share it are the biggest, and for some genre works very nearly the only, market for the owners' works. Active enforcement of intellectual property rights may alienate consumers—fans—and harm future revenues. On the other horn of the dilemma, some rights-owners fear non-enforcement of those rights may result in their loss.

Fan fiction provides fans with an opportunity to enjoy, discuss, and most of all inhabit the canon texts in ways that would be impossible without it. Despite its essential role, though, fan fiction's legal status remains unclear. Many fans, including academic fans, believe that fan fiction is another type of information that just wants to be free: all or nearly all non-commercial fan fiction should be protected as fair use. In contrast to previous generations, today we live in a world of symbols and texts that are all, or nearly all, owned; fan fiction is a way of combating the inevitable alienation this produces.[1]

Balanced against this are the interests of copyright owners. U.S. copyright law protects some economic interests, but very few non-economic interests.

1 See generally, for example, Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. Rev. 1551, 1581 (2005) ("The destruction of this 'modern folk culture' should be contemplated with hesitancy"); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 Loy. L.A. Ent. L. Rev. 651 (1997).

Owners may object to fan fiction that alters the nature of the original work—the literary equivalent of scribbling mustaches on Grant Wood's *American Gothic* (which would earn the scribbler a quick trip to a Chicago jail cell), or perhaps of scribbling mustaches on a postcard of *American Gothic* (which is perfectly legal, if not original), but in the case of works of fiction on the page or on the screen, they are not likely to get very far: in the U.S. such rights in original works of art are protected by the Visual Artists' Rights Act, but there is no counterpart for works of fiction. Owners assert a more clearly economic interest when they object because fan fiction may anticipate elements of an author's own future works, precluding the author from publishing them. Although this, unlike the first, is an economic interest, it is not necessarily a protected one. But an owner may also object because a fan work borrows extensively from the author's own work; this may infringe the owner's copyright, although various limitations and exceptions exist.

The book that follows explores those limitations and exceptions, and attempts to address, as much as possible, the extent to which a safe space for fanfic has been defined and acknowledged, as well as the larger extent to which that space has been defined but not yet acknowledged by copyright owners. While there are some areas in which the law is unsettled, there are more in which it is settled but widely misunderstood by owners and fans alike. When, for example, the daughter of SF author Philip K. Dick threatens to sue Google for incorporating words from her father's work into its Nexus One cell phone and a writer for Wired.com responds "First, clearly ... copyright lengths should be reduced (PKD died in 1982, 27 years ago),"[2] lack of education is as much to blame as lack of clarity. "First, clearly," if the plaintiff has a valid claim (which seems unlikely) it is in trademark, not copyright—and even that seems pretty shaky. Second, it is true that Dick's work is currently in copyright under the current U.S. copyright term of life plus 70 years, but so would it have been under the older term of life plus 50 years—and so would it have been under the Copyright Act of 1909, with its 28-year renewable term: *Do Androids Dream of Electric Sheep*, the work allegedly infringed upon, was published in 1968. To find a copyright term short enough to leave *Do Androids Dream of Electric Sheep* currently out of copyright, we would have to roll back copyright law by over a century. This seems an ambitious project, especially as in this case it is unnecessary; the Dick estate owns no copyright in individual words.[3]

Copyright law has become a subject on which any web posting instantly generates a score of instant experts. With any luck, in the future those debating fan works and copyright law will be able to stay a bit more focused by referring to this book, which would not have been possible without the support and patience of

2 Charlie Sorrel, *Nexus: Did Google Dream of Electric Lawsuits?*, Wired.com, December 16, 2009, www.wired.com/gadgetlab/2009/12/nexus-did-google-dream-of-electric-lawsuits.

3 Nor is there much of a trademark argument here; it seems highly unlikely that Dick's use of the words in a story gave him trademark rights in the commercial use of those words in the cell phone industry.

my employer, Thomas Jefferson School of Law, and the help and input of a great many people, including Mary Cheney, Kevin J. Greene, Lev Grossman, Seiko Katsushima, Akiko Kikuchi, Brian J. Link, James Leggett, Kathleen Lu, Andrea Maestas, Flavio Nominati, Sumit Raghuvanshi, Heidi Tandy, Rebecca Tushnet, Molly Winter, Julie Cromer Young, Qienyuan Zhou, and Daniel, Deborah, Jennifer, Jessica, Jon, Karen, Robert, and Veronica Schwabach, as well as many others I apologize for overlooking, in many cases because we know each other only through online fandom and I am not sure quite what name to use. Thanks to all of you who helped and saved me from many errors; I'm sure I still managed to slip a few by you, though, and must claim all the credit for them.[4]

And a final thought for any fans reading this: we all have our fandoms, our likes and dislikes. It may become evident as you read this, for example, that I quite like Harry Potter but am not (to put it mildly) particularly fond of James Bond. Nonetheless, all of us in fandom share a common interest, and we should respect all fandoms equally—yes, even Twilight. So if James Bond is your thing, I respect your right to post your Bond/Q fanfic at www.fanfiction.net/movie/James_Bond, and urge all fans and fandoms out there to do the same. (That is, respect each other's fandoms, not post Bondslash, although that's okay too.) We're all in this together.

4 Except, as noted in note 108 to Chapter 4, where I must cede credit for the errors to Google Language Tools.

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Chapter 1
The World of Fan Fiction

Fandom and fan fiction

Some works of fiction create detailed imaginary worlds and acquire followings of fans who come to know these works as deeply as the "real" (or at least hyperreal) world—that is, the world known not through personal experience, but through text and other media. Much, possibly even most, of the pleasure these fans derive from the works comes not from reading the underlying texts or watching the underlying movies or television shows, but from discussing the works with others. Together these fans make up a community—a fandom. Part of any fandom's discussion may take the form of fiction, artwork, or videos based on characters, settings, or other story elements from the original work.

Much of the content of these fan works addresses the questions of "What if?" and "What next?" What happens after the credits roll, or after the last chapter? Is the Land of Oz really the seamless utopia L. Frank Baum presents, or does it have a darker side? How can Aragorn's government assimilate the displaced and disaffected populations who, voluntarily or otherwise, supported Saruman or Sauron during the War of the Ring? What is Holden Caulfield like as an old man?

Human beings being human, much, perhaps most, of this fan-created fiction addresses questions of love and sex. Will Ginny Weasley's marriage to Harry Potter last? Just how beautiful is the "beautiful friendship" between moody American exile Rick Blaine and effervescent French police chief Louis Renault? Do they ever acknowledge the romantic and erotic nature of their relationship? Do Holmes and Watson? Do Kirk and Spock?

Fandom and fan works pose special problems for the owners of copyrights and trademarks in the underlying works. Some fan works may infringe on these intellectual property rights, although rarely in a financially harmful way; yet enforcing intellectual property rights against fans can alienate the market for the protected works, with financially disastrous results. As a result, the most common state of affairs is an uneasy accommodation between fans and rights owners. Few authors want to risk poisoning their relationship with fans, and thus their livelihoods, unless the fans, through their works, are also threatening the author's economic well-being.

Occasionally the relationship between an author and fandom may turn toxic for other reasons. Some fans may develop a sense of entitlement, and chafe at delays in the release of the next installment in a series. After author George R.R. Martin had gone several years without releasing another volume in the Song of Ice and Fire series, some fans had grown sufficiently abusive that fellow author

Neil Gaiman wrote, in a blog post titled "Entitlement Issues," a counterattack, the central theme of which, in Gaiman's words, was that "*George R.R. Martin is not your bitch.*"[1] The tone is scolding, even confrontational; Gaiman can afford to chide Martin's fans as Martin himself could not. The central point is that there is no contract between authors and fans requiring the former to continue to entertain the latter, a point that is likely to be far more appealing to authors than to fans. It also breaks down at the margins; one wonders what might have happened had J.K. Rowling decided, after the sixth Harry Potter book, not to finish the series. While the fans would have had no legal remedy, it might, at the least, have been regarded as socially improper.

Changes in a series' direction may also alienate former fans. Laurell K. Hamilton's "Anita Blake: Vampire Hunter" novels began as a series of stories about vampires in a world that more or less resembles ours, save for a touch of the supernatural. The setting is familiar enough to fans of *Twilight*, *True Blood*, or *Buffy the Vampire Slayer* (although the first novel in the Anita Blake series predated *Twilight* and *True Blood* and the novels on which both are based, as well as the *Buffy* TV series, though not the movie). Anita Blake acquired a loyal fan following. About 10 novels in, though, the series took a sharp turn into erotic fiction, at the expense, in the opinion of many readers, of characterization, setting, and plot. These readers reacted with fury, venting their feelings on fan sites and in the Amazon reviews.

Sometimes the causes of the shift to toxicity are mixed. The vitriol heaped upon another vampire story, Anne Rice's *Blood Canticle*, might seem, at first glance, to be purely a reaction to the shift in the direction and underlying religious values of the Lestat series ("The Vampire Chronicles"), and perhaps to the deterioration in quality when an author has a guaranteed market for stories set in a milieu of which she's become rather tired. But the reaction can also be viewed through the lens of the relationship between Rice and fan authors. Rice has been more hostile to fanfic than many authors, and through her representatives has taken steps to have works based on her characters removed from fan sites. This, more than Rice's public espousal of religious values that many of her fans share, has served to alienate her fandom, causing them to view her as an opponent rather than an ally and thus to view her later works with hostility. (Admittedly Rice did not help matters when she, or someone using her name, published a long and defensive response to her critics in the review section of the Amazon listing for *Blood Canticle*.[2])

Other authors who have been hostile to fanfic have also generated some backlash. A "literary" (as opposed to "genre") author like Annie Proulx does

1 Neil Gaiman, Entitlement Issues ..., May 12, 2009, http://journal.neilgaiman.com/2009/05/entitlement-issues.html (last visited May 3, 2010).

2 Posting of Anne O'Brien Rice, From the Author to the Some of the Negative Voices Here, to Amazon.com (September 2, 2004). The review has since been removed from Amazon, but can be read at, among other sites, www.spiritus-temporis.com/anne-rice/amazon-incident.html (last visited May 3, 2010).

not depend on fandom for her commercial success, and can get away with more outspoken criticism of fanfic. Proulx, the author of the short story "Brokeback Mountain"[3] on which the 2005 film of the same name (with a screenplay by Larry McMurtry) was based, reacted unfavorably when fans sent her what she called "ghastly manuscripts and pornish rewrites of the story."[4] Apparently she was unfamiliar with the world of fanfic, in which, alas, ghastliness and pornishness are too rarely absent. Of the fans who write "Brokeback Mountain" fanfic, she said "They do not understand the original story, they know nothing of copyright infringement—i.e., that the characters Jack Twist and Ennis Del Mar are my intellectual property[.]"[5]

As we shall see repeatedly, her suggestion that the fanfic authors are violating her copyright is only partly right: the characters may be (and in this case probably are) her intellectual property, but her copyright in the characters does not mean that no one else can use them; they are protected but not untouchable. The exact limits of this protection are unclear, and neither Proulx nor the fanfic writers are to be blamed for not knowing exactly where they lie.

Genre writers depend less on mainstream media reviewers, book clubs, and Oprah, and more on word-of-mouth (or, more accurately, online) recommendations. The "Song of Ice and Fire" series is sold mainly not by television or magazine advertisements, but by readers who enjoy it and recommend it to their friends, the readers of their blog, the readers of the Amazon reviews, and anyone else who will listen. As more people read the books and share their impressions with other readers, a fandom coalesces; this fandom is the most powerful marketing tool a work of fiction can have.

But fandom can be fickle. The history of popular literature, music, and television is littered with works and artists suddenly abandoned by fans. Less dramatically,

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3 Annie Proulx, *Brokeback Mountain*, The New Yorker, October 13, 1997, at 74; Brokeback Mountain (Focus Features, Paramount Pictures & Good Machine 2005). The screenplay for the movie was written not by Annie Proulx but by Larry McMurtry and Diana Ossana.

4 Catherine Shoard, *Annie Proulx Bemoans Torrent of "Pornish" Brokeback Fan Fiction: The Pulitzer Prize-Winner Calls the Film Adaptation of Brokeback Mountain "A Source of Constant Irritation" as She's Bombarded with Pornographic Fan Literature*, The Guardian, September 17, 2008, www.guardian.co.uk/film/2008/sep/17/heathledger.porn; Robert J. Hughes, *Return to the Range: Annie Proulx Goes Back to Wyoming for Her New Short-Story Collection*, Wall St. J., September 6, 2008, http://online.wsj.com/article/SB122065020058105139.html. Proulx was also criticized for her response. See, for example, David Lister, *Stop Whingeing about Your Fans, Annie*, The Independent, September 20, 2008, www.independent.co.uk/opinion/columnists/david-lister/david-lister-stop-whingeing-about-your-fans-annie-936189.html; posting of SB Sarah, Ownership, Creativity, and What Fans Do, on Smart Bitches Trashy Books (September 25, 2008, 02:31 AM), www.smartbitchestrashybooks.com/index.php/weblog/comments/ownership-creativity-and-what-fans-do.

5 Hughes, *supra* note 4.

what was cool becomes less cool, and sales drop. While it is impossible to trace the extent to which fanfic and authors' responses to it are a factor, attacks or outright bans on fanfic seem to cost authors some credibility with fans. (It's worth noting that these bans are not necessarily legally enforceable, but major online fanfic archives, anxious to avoid litigation and confrontation with authors, tend to honor them.)

Fan fiction and other fan works

So what, specifically, is fan fiction? For purposes of this discussion it will be necessary to attach definitions to several terms that may not exactly accord with the definitions in use in some fandoms, especially as fandom and fan vocabulary are ever-evolving. As used here, though, a "fan" is someone who enjoys works set in a particular fictional world or about a particular character or set of characters. The fans of a particular world or set of characters are, in the aggregate, a "fandom." A "fan work" is any work by a fan, or indeed by anyone other than the content owner(s), set in such a fictional world or using such pre-existing fictional characters. Fan works may be fiction or nonfiction, and may be created in any medium. When such works are fictional, they are "fan fiction." Fan fiction includes all derivative fiction and related works created by fans, whether authorized or unauthorized by the author of or current rights-holder in the original work. Some fan fiction is commercially published; some is invited by the original author. The vast majority of fan fiction, however, is published only online (or, in pre-Web days, in fanzines), without the express permission of the author or other rights-holders, for an audience of fellow fans. Fan fiction of this sort is "fanfic." "Fanfic" is thus, in this discussion, a subset of "fan fiction," which is in turn a subset of "fan works."

Fanfic, at least for the purposes of this book, refers to works derived from other works currently protected as intellectual property, but not explicitly authorized and not commercially published. As we shall see, the absence of such authorization does not necessarily mean that the fanfic violates an intellectual property right. Fan fiction that is authorized (such as the many commercially-published Star Trek novels and short stories)[6] or that is based on works no longer in copyright and characters not currently protected as trademarks (the works of Jane Austen or William Shakespeare, for example) presents no legal problems; these works are often mined for source material for works that are published commercially.[7]

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6 See, for example, STAR TREK: THE NEW VOYAGES (Sondra Marshak & Myrna Culbreath, eds. 1976).

7 For fandom-related examples, see, for example, NICK O'DONOHOE, TOO, TOO SOLID FLESH (Wizards of the Coast, 1989) and *Star Trek: The Conscience of the King* (NBC television broadcast, December 8, 1966), both of which draw not only their titles, but also much of their content from HAMLET; and JANE AUSTEN & SETH GRAHAME-SMITH, PRIDE AND

Before the advent of the World Wide Web in the 1990s, fanfic reached relatively small audiences. It might be handwritten or typed and distributed to a few friends who might make copies and distribute them further. At the next higher level of formality and recognition, fanfic might be published in fan magazines (abbreviated to fanzine, and yet further to zine[8]). Some of these fanfics, or their authors, might attract the attention of commercial publishers. An important crossover moment for fanfic/fan fiction was the 1976 publication of *Star Trek: The New Voyages*, a collection of eight Star Trek short stories written by fans with introductions to each story written by actors from the cast of the television show.[9]

Star Trek: The New Voyages made fanfic respectable, or perhaps merely acknowledged that it had already become so. It also transformed the once mostly-male domain of fandom, to the subsequent enrichment of genre fiction as a whole:

> [T]o a whole generation of girls, *Star Trek* on television opened up the world of science fiction. And they had a new world to write about.
>
> * * *
>
> And, in a wave of amateur fiction completely unlike any phenomenon in science fiction history, these stories somehow got themselves published in amateur magazines. There were *hundreds* of them; or let me amend that; there were *thousands*, though I have read only a few hundred.
>
> * * *
>
> And some of these women … have gone on to write other things.[10]

The prevailing mood was one of bonhomie: Gene Roddenberry, creator of the Star Trek television series, wrote:

> Eventually we realized that there is no more profound way in which people could express what Star Trek has meant to them than by creating their own personal Star Trek things … It was their Star Trek stories that especially gratified me. I have seen them in meticulously produced fanzines, complete with excellent artwork. Some of it has even been done by professional writers, or by those

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Prejudice and Zombies (Philadelphia: Quirk Books, 2009); Jane Austen & Ben H. Winters, Sense & Sensibility & Sea Monsters (Philadelphia: Quirk Books, 2009).

8 Fan magazines have their own complex hierarchy, ranging from perzines (personal fanzines) to semiprozines (semi-professional fanzines), some of which may cross over into commercial territory and become prozines.

9 Star Trek: The New Voyages, *supra* note 6.

10 Marion Zimmer Bradley, *Introduction* to The Keeper's Price 10, 10–12 (Marion Zimmer Bradley, ed., 1980).

> clearly on their way to becoming professional writers. Best of all, all of it was clearly done with love.[11]

There is no sign that Roddenberry felt threatened by the fans' use of his intellectual property; rather, he welcomed and embraced it. And he was right: Star Trek fandom persisted, becoming the standard against which all other fandoms are measured, and eventually leading to the commercial publication of additional short stories and novels and an entire world of Star Trek movies, television shows, and merchandise. Roddenberry understood not only what Star Trek meant to the fans, but what the fans meant to Star Trek. One fan reports:

> In fact, there is a probably apocryphal story that George Lucas [creator of the Star Wars movies] once went to Gene Roddenberry to ask him what to do about all the copyright violations being perpetrated by fans. Roddenberry is supposed to have told Lucas "Leave them alone, they'll make you rich!"[12]

Regardless of whether Roddenberry actually made this suggestion, at first, Lucas followed it, albeit cautiously:

> At the height of the original Star Wars phenomenon, Lucasfilm was wary of giving its stamp of approval to the tremendous amount of fan fiction being published. Their solution … was to set up a no-fee licensing bureau that reviewed material and offered criticism about what might be considered copyright infringement. The ugliness of legal threats was avoided, and fans could still have their say.[13]

Many other authors and content owners were similarly relaxed about fanfic. But two developments were to upset this easy accommodation: slash and the Internet.

Slash

Much fan fiction explores romantic and erotic interactions between the characters. Fan fiction of this type is often referred to collectively as "slash," although other fans use the term to refer to the subset of romantic/erotic fan fiction that places male characters from the original work in same-sex romantic and/or erotic situations. The name comes from the punctuation mark used to divide the names of the characters, as in the archetypal slash pairing Kirk/Spock or the perennially popular Harry/Draco. Slash is subdivided into subcategories, a partial list of which

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11 Gene Roddenberry, *Introduction* to Star Trek: The New Voyages (Sondra Marshak & Myrna Culbreath, eds., 1976).

12 Fan Works Inc., Star Wars! Policy: No Commercial Gain, Doesn't Sully Image, www.fanworks.org/writersresource/?action=define&authorid=112&tool=fanpolicy (last visited May 3, 2010).

13 Ibid.

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