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Review of Information and Exclusion by Lior Jacob Strahilevitz

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¶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.

Strahilevitz, Lior Jacob. *Information and Exclusion*. New Haven, Conn.: Yale University Press, 2011. 255p. \$50.

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¶52 Exclusion is fundamental to the concept of property—to own a thing is to enjoy the right to keep others from using it. Eliminating the idea of exclusion is as impossible as eliminating property. However, the strategies of exclusion employed by property owners vary widely, ranging from the subtle to the overt, from the permissible to the proscribed. Society would benefit by privileging strategies based on reliable information over those that depend on rumor, innuendo, or prejudice. In his new book, *Information and Exclusion*, University of Chicago Law School professor Lior Jacob Strahilevitz examines the link between the availability of information about people and the methods used to exclude or include them in a variety of social arenas. His goal is to investigate ways in which society might actually become

17. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

more just through the wider dissemination of information that is conventionally considered private.

¶53 In the first portion of the book, Strahilevitz lays the groundwork for his ideas by identifying three fundamental strategies of exclusion and coining three new terms to describe them. Some property owners simply wield their “bouncer’s right” (p.4), invoking principles of trespass to keep certain people out while allowing others in. A nightclub owner can select who is admitted to dance in the club and who must remain behind the velvet rope. Likewise, Google can disregard job applicants who do not ace its test of I.Q. and computational skill, and Trump Tower can reject a would-be tenant based on a suboptimal credit report. Other owners use subtler means to exclude. Some use design and marketing to imbue their property with “exclusionary vibes” (p.4) meant to discourage disfavored applicants from seeking entry. Thus, a bar owner might keep out suburbanite patrons by promoting the establishment as a haven for bikers. Even more subtly, owners sometimes attach “exclusionary amenities” (p.5) to their property in an attempt to exclude those with no use for these features. Anyone can live here, says a building’s owner, but those who do so must contribute for the upkeep of a day care center, an evangelical chapel, or a bowling alley. Nonparents, atheists, or those who hate bowling will probably stay away.

¶54 In the middle section of his book, Strahilevitz briefly describes how the choices property owners make between these strategies are influenced by the amount of information generally available about the private thoughts, inclinations, and personal histories of potential entrants. Under a regime in which information of this sort is plentiful—perhaps because the privacy of arrest records or credit reports is unprotected—owners exercise their bouncer’s right and exclude or include as the data dictate. When this information is scarce—where the privacy of such records is protected by law—subtler, less justifiable, and more difficult to regulate exclusion strategies prevail.

¶55 Strahilevitz devotes the final and most interesting part of the book to discussing some quite unexpected ways that information can discourage or promote exclusion strategies. He presents the “reputation revolution” (p.6), the ever-increasing ubiquity of easily obtainable and endlessly concatenated online reputation information, as a solution to the problem of improper racially and culturally motivated exclusion. African Americans, he argues, are often discriminated against in employment decisions because misguided employers use skin color as a proxy for such undesirable characteristics as a criminal background, indebtedness, or inferior education. If, rather than protecting the privacy of job seekers, government promoted absolute transparency and provided access to reliable information about the criminal history, financial status, and educational attainment of applicants, employers would be able to make confident hiring decisions based on actual risk factors instead of historically disfavored proxies like race, gender, or age. Or, government might provide trial lawyers with a deep file of conventionally private information about prospective jurors prior to voir dire, thus encouraging attorneys to stop issuing challenges on the basis of race and to exclude would-be jurors, instead, on the basis of actual, justifiable facts. Leave it to an acolyte of law and economics like Strahilevitz to propose a solution to the problem of discrimination

that takes advantage of the inherent human tendency to discriminate. Though we may wish that the law would teach us to love our fellow man, perhaps the best it can do, Strahilevitz suggests, is help us to hate more fairly.

¶56 *Information and Exclusion* is not a work of present-tense practicality, but rather one firmly embedded in the realm of provocation, elaboration, and forward-looking abstraction. No present government will act on the book's insights, sacrificing citizens' cherished privacy protections in order to foster bouncer's rights. Nor does Strahilevitz suggest that governments should do so. His mission is to question familiar assumptions, not to prescribe. This book belongs in an academic collection, not a law firm or court library. Legal scholars will find it pleurably counter-intuitive and mind expanding, but the text holds little value for firm and court librarians looking for materials to support practicing lawyers. Strahilevitz's ideas may very well influence future legal doctrine, but the speculative and hypothetical nature of his book suggests that it is best suited to the legal academic market.