

Fan Fiction in the Canadian Regime

The doctrines of fair use (in the United States) and fair dealing (here in Canada) permit, to some extent, copyright users to infringe upon or ‘borrow’ a copyright holder’s intellectual property for certain purposes. The Canadian doctrine is codified under s. 29 of the *Copyright Act*, RSC 1985, c. C-42, and lays out a number of exceptions including criticism and review (s. 29.1), news reporting (s. 29.2) and non-commercial user-generated content (s. 29.21). Fan fiction, which Marian Hebb defines as “written storytelling by fans based on a work by another author and making use of characters, settings and plot elements from that work in the fan fiction author’s new work,”¹ generally falls within this last category of non-commercial user-generated content. Fan fiction is non-commercial because, in most cases, it is never commercially published and typically only distributed on websites such as fanfiction.net and archiveofourown.org.

There have been notable ‘exceptions’ to non-commercial uses of user-generated work such as fan fiction, however. The *Fifty Shades* series by E.L. James, for example, began as a fan fiction published on fanfiction.net before it was adapted into a series of novels. The characters’ names and other features altered to avoid any copyright infringement, such that s. 29.21 no longer applies since they are no longer ‘using’ the original copyrighted work within the meaning of the *Copyright Act* although the works are still technically derivative, at least in their origins. Other works which could be described as fan fiction are published a significant duration after the original work, such as Seth Grahame-Smith’s *Pride and Prejudice and Zombies*. Derivative works also exist

¹ Marian Hebb, “UGC and Fan Fiction: Rethinking Section 29.21” (2014) 26:2 IPJ at 239.

in other mediums, such as the film *10 Things I Hate About You*, a work based on William Shakespeare's *The Taming of the Shrew*.

Scholars like Marian Hebb have argued that the s. 29.21 provision on user-generated content (UGC) carves out protected fair dealing space for not-for-profit derivative and fan works in the Canadian regime, fan fiction included. The exception is a broad one, with only four limiting conditions: (a) the new work is used “solely for non-commercial purposes”, (b) “the source of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so,” (c) “the individual has reasonable grounds to believe that the [original] work ... was not infringing [another, existing] copyright” and (d) that its use “does not have a substantial adverse effect, financial or otherwise” on the original work, both “financial or otherwise ... or on an existing or potential market for it.”² Hebb suggests that the non-commercial limitation is less of an issue than it might seem; some authors write and physically publish books and “direct their royalties irrevocably to a charity or other cause.”³ The provision does not prevent intermediaries—such as publishers or web sites—from disseminating the works in such a way that enables them to make a profit, potentially making it even broader of an exception. Section 29.21(1)(d) provides what Hebb argues is a reasonable protection of copyright, in that it attempts to prevent any negative or detrimental effect to the existing, original work.

Numerous scholars across Canada and the United States defend (non-commercial) fan fiction and other derivative or fan work as harmless to existing works, or even beneficial—both to the existing works and society as a whole. Rebecca Katz

² Copyright Act, RSC 1985, c. C-42, s. 29.21 (1) (a)–(d).

³ Hebb, *supra* note 1 at 240.

points out that “fans who enjoy a franchise enough to write their own unauthorized interpretations or sequels are often the most devoted followers and consumers of the original franchises,” and are typically not attempting to “serve as direct substitutes for the canon texts they draw upon”⁴ but are rather expanding upon or transforming the work in some way. She also argues that fan fiction may have a public benefit in enabling “consumers-turned-creators to empower themselves and to rewrite culturally significant texts in ways that speak to their own values or experiences,”⁵ or create spaces for social commentary.

These scholarly arguments, however, all assume a not-for-profit, non-commercial use of fan fiction and other derivative work. Other voices have advocated for the commercialization of fan work, and not in the aforementioned sense where the copyrighted material is stripped from it. Abigail De Kosnik notes that, in the past, attempts at commercializing fan fiction have been made—a prominent example was a company called FanLib, which ultimately shut down in 2008 and was criticized for being a predatory business scheme rather than a community, user-created approach.⁶ De Kosnik also points out that commercialization still takes place in other areas of fan culture, such as fan films and video game mods, and that there may be a gendered aspect to this resistance towards commodifying fan fiction; authors of fan fiction are predominantly women, whereas (at the time) prominent fan filmmakers were predominantly men. Other countries and legislative regimes have permitted

⁴ Rebecca Katz, “Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada’s Copyright Reforms” (2014) 12:1 CLJT at 77.

⁵ Ibid.

⁶ Abigail De Kosnik, “Should Fan Fiction Be Free?” (2009) 48:4 Cinema Journal at 119.

commercialization of fan works broadly, such as the profitable fan-made comics market in Japan.⁷

Here in Canada, the protections afforded to copyright holders and other owners of intellectual property present a clear barrier to the commodification of fan work such as fan fiction. In addition, De Kosnik notes that there are less obvious issues with the commodification of fan fiction, including its sexually explicit and nonheteronormative nature⁸ and the risk of becoming overly sanitized or the theft of author's labour for corporate benefit. As a result, any profit obtained by fan fiction authors remains largely underground, rather than openly commodified, ensuring that authors themselves reap the rewards of the labour.

⁷ Ibid. at 120-21.

⁸ Ibid. at 123.

Works Cited

Copyright Act, RSC 1985, c. C-42, s. 29.

Marian Hebb, "UGC and Fan Fiction: Rethinking Section 29.21" (2014) 26:2 IPJ

Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12:1 CLJT at 77.

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