

Fairness and Fandom

The Uncertain Relationship of Fanfiction and Canadian Copyright Law

While popular legal conception has long viewed fanfiction as unworthy of comment at best, and illegal at worst, review of the Canadian *Copyright Act* (CA), as well as Canadian and American scholarly works suggests that fanfiction has many qualities that render it worthy of legal recognition. Specifically, these resources suggest that fanfiction has a beneficial effect on literary culture and in many cases may be defensible under fair dealing principles. In this analysis I will outline the main points of these arguments and illustrate the questions that continue to emerge within this niche of legal analysis.

For the purposes of this discussion, I define “fanfiction” as derivative written works that are based on, or employ components of, copyrighted works. For instance, fanfiction writers will often use characters, settings, tropes, or plotlines from copyrighted works in their own stories. However, despite this definition fanfiction varies widely, as some fanfiction writers use fewer copyrighted components than others. Fanfiction can also vary in its purpose, as some works critique the copyrighted material, while others are written as tributes.

Betsy Rosenblatt and Rebecca Tushnet state that fanfiction has literary and societal benefits, particularly in its propensity amplify minority voices. These scholars note that most participants in online fanfiction forums are women, and their research shows that these women often use their platforms to respond to the patriarchal, white-centered, heteronormative narratives of mainstream media. Their work further notes that fanfiction allows these female writers to explore and validate their identities and hone their writing skills.¹

Moreover, many widely published commercial works have started as fanfiction. Ali Hazelwood’s contemporary romance, *The Love Hypothesis*, which began as a fanfiction centering Rae and Kylo Ren (Reylo) from the StarWars universe, in 2018, is a great example of this path to publishing. Additionally, rather than downplaying her work’s connection to StarWars, Hazelwood celebrates her books origins, as is evidenced in the resemblance of the characters her book’s cover to Reylo.²



¹ Betsy Rosenblatt and Rebecca Tushnet, “Transformative Works: Young Women’s Voices on Fandom and Fair Use,” in Jane Bailey and Valerie Steeves *Egirls, Ecitizens: Putting Technology, Theory and Policy into Dialogue with Girls’ and Young Women’s Voices* (University of Ottawa Press), 385 at 388-390 and 393.

² Lauren Arzbaeher “10 books you didn’t know started out as fan fiction from ‘Twilight’ to ‘Star-Wars’ inspired series,” (October 19, 2022) *Insider*, <https://www.businessinsider.com/guides/learning/fanfiction-books> (accessed November 20, 2022).

Yet, despite the increasingly important role fanfiction plays in literary culture, if the reasoning of the *Robinson v Cinar Films* case, which found that copyright can subsist in at least some fictional characters, is followed, a substantial amount of fanfiction appears to be prima facie infringing.³ Thus, it is necessary to contemplate whether this practice can be protected as a user's right.

The fair dealing factors first set out in *CCH Canadian Ltd v Law Society of Upper Canada* (*CCH*) and later codified as ss. 29-29.2 of the *Copyright Act* provides a potential defense for fanfiction. This defense has the potential to be even more applicable to fanfiction since the enactment of *The Copyright Modernization Act*, or Bill C-11, in 2012, prior to which the fair dealing categories were limited to research, private study, criticism, review, and news reporting. While the categories were meant to be "flexible and wide encompassing" fanfiction was left in a legal grey area by these categories, as much fanfiction is written as a non-critical tribute to the original work. Additionally, while fanfiction can be used for private study, or even research, it is not certain this argument would succeed in a court of law. Furthermore, even within these categories, the protection of any one fanfiction would be dependent on judicial analysis in light of the eight "fairness" factors. Two "fairness" factors that are particularly influential are whether the work is commercial or non-commercial in purpose, and how much of the original work is reproduced.⁴

Bill C-11 introduced the parody and satire purposes, as well as the User Generated Content (UGC) exception now found under s. 29.21(1) of the CA.⁵ Although recognition of parody and satire purposes increase the likelihood that critical fanfictions will fall within the fair-dealing categories, the controversial 2017 *United Airlines v Cooperstock* case has rendered the success of the parody defense uncertain.⁶

Likewise, the UGC exception, while promising, is not a sure defense for fanfiction. This exception, originally intended to protect Youtube mash-ups from copyright suits, allows for the use of copyrighted materials in original non-commercial works, in which copyright subsists. Because non-commercial fanfiction also uses copyrighted materials to make a new work, the principle of technological neutrality suggests they could be protected under this exception. Additionally, Rebecca Katz argues that due to the relatively low standard for originality in Canadian copyright law, as established in *CCH*, there is a strong argument that copyright could subsist in fanfiction itself. However, there remains ambiguity in interpretation of this exception, particularly in s. 29.21(1)(d) which states that the new work must not have "a substantial adverse effect financial or otherwise," on the exploitation of the existing work.⁷

³ Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12:1 *CJLT*, 73 at 82 [Katz].

⁴ Katz, *supra* note 2 at 84-86 and 88.

⁵ Katz, *supra* note 2 at 97-98.

⁶ Jonathan Festinger, "Users Rights" (November 6, 2022), slide 126-130.

⁷ Katz, *supra* note 2 at 96-102.

Furthermore, while the above reforms have the potential to create substantial protections for non-commercial fanfiction, commercial fanfiction remains in a legal grey area. Jacqueline Lipton's *Houston Law Review* article observes that in the field of commercial fanfiction, the emerging alternatives seem to be either extensive transformation, or licensing, and notes that this may affect the livelihoods of "smalltime self-published" commercial fanfiction authors. One example of the licensing system is Amazon's procurement of licenses from copyright holders for the purpose of allowing fanfiction writers to publish fanfiction on Amazon's KindleWords platform.⁸

While this example has the potential to protect commercial fanfiction writers from lawsuits, and appropriately compensate copyright holders for use of their works, it comes with several drawbacks. Chief among these drawbacks is the potential of licenses to state that copyright in the fanfiction authors' works will rest in the original copyright holder. Furthermore, by publishing on Kindlewords fanfiction authors make half the royalties that other self-published authors on Amazon would earn, and Amazon claims an "exclusive irrevocable license" in the created fanfiction works. Additionally, because licensing is likely not needed for all the commercial works, many of which may actually constitute fair dealing, making licensing the default may harm writers of commercial fanfiction who do not want or need to publish their works this way.⁹ Thus, by allowing international conglomerates to make these solutions, it must be acknowledged that the possible outcomes will likely disadvantage individual authors and stifle certain types of creative expression for the benefit of corporations.

Prior to engaging in this research, I had not thought of derivative works, like fanfiction, as particularly worthy of legal consideration or protection. However, after learning about the beneficial effects of fanfiction on literary culture and the possible legal defenses of fanfiction that exist, I believe this is an area where Canadian law has the opportunity to find solutions that will appropriately balance important user and creator rights.

⁸ Jacqueline D. Lipton, "Copyright and the Commercialization of Fanfiction" (2014) 52:2 *Hous L Rev* 425, pp 459-460 [Lipton].

⁹ Lipton, *supra* note 11 at pp. 461-464.