

Fan-Fiction as User Generated Content: Free Ride or a Free Right?

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When it comes to fan-fiction, it seems that the new [User-Generated Content \(UGC\) exception](#) to copyright infringement endorses the common cliché that imitation is the finest form of flattery. J.K Rowling certainly felt [flattered](#) when thousands of fans used the characters in Harry Potter to publish their own stories online. The late J.D Salinger, on the other hand, did not feel as enamored when Holden Caulfield, the teenage protagonist in his famous novel, *Catcher in the Rye*, was [depicted in a fan-fiction novel](#) as an elderly man fleeing from a nursing home. Despite an author's preference to keep their characters frozen in time or kept alive through exploratory recreations, section 29.21(1) of the [Copyright Act](#) may be the saving grace for super fans engaging in fan-fiction works in Canada. However, it also raises serious concerns with respect to issues of misappropriation, fair compensation, and tensions between moral and economic rights.

Since the UGC provision is the first of its kind, its interpretation in the context of litigation has yet to be seen. It is therefore imperative to open up a dialogue between creators of copyright-protected works, users, and lawyers with respect to the scope and limitations of the UGC exceptions. The IP Osgoode symposium on *User-Generated Content Under Canadian Copyright Law* provided a forum for panelists to do just that.

What Rights Should the Authors of an Existing Work Have? Toward a Private Model for UGC

What rights, if any, do authors of an existing work have in relation to a fan-fiction creation? On the one hand, a fan-fiction creation can be understood as a derivative work, finding its origin only in relation to the existence of a previous work. However, it can also be argued that both works are distinct and original under Canadian Copyright law.

In her presentation on the legal aspects of fan-fiction, lawyer [Marian D. Hebb](#), suggested that the UGC provisions should strive to reflect the Act's pre-existing policy by limiting reproduction for private purposes to "only for the individual's private purpose" as seen in [section 29.22](#). In her proposed private UGC framework, dissemination of a UGC work (such as fan-fiction) would only be possible if the copyright holder initially authorized the distribution of the new work and received fair remuneration from intermediaries.

The idea of creating a private model of the UGC exceptions is a worthwhile idea to consider, especially in light of the complications which arise under [section 29.21\(1\)\(d\)](#). Guarding the (potential) market of an existing work could be made possible by preventing fan-fiction creations (which compete against or deplete the commercial value of an existing work) from being distributed.

Moreover, this arrangement would encourage greater communication between authors and users at the outset of dissemination, thereby ensuring that creators of fan-fiction stay within the limitations of UGC and do not overstep the boundaries of the exception.

What About the Rights of Fan-Fiction Creators and Users?

While granting authors the right to control the distribution of fan-fiction works may achieve the goals of fair compensation (particularly in situations where a fan-fiction author financially benefits from the labour and skill of another), the interests of the public are nonetheless at stake.

Browsing www.fanfiction.net reveals that fan-fiction is not only an opportunity for fans to share new stories and recreations of their favourite characters, but it also serves as an imaginative platform for a diverse fan community. The dissemination of knowledge and intellectual creations, flowing from both authors and users, is therefore essential to the world of fan-fiction. When considering a private model to UGC exceptions, we must ensure that the goals of the free and public knowledge are met and that fans will still be able to meaningfully contribute to the works of authors.

We should therefore be wary of giving the considerations of authors too great a role in interpreting UGC exceptions as this may run the risk of granting copyright holders an inappropriately broad gate-keeping role with respect to user access of the s.29.21(1) provisions. (This is better left to the Canadian [moral rights framework](#).)

A move toward a private model of UGC, whereby an author has the initial right to preclude the dissemination of a fan-fiction work may tip the balance disproportionately in favour of author rights. We should perhaps consider by starting off with a scheme of remuneration whereby creators of fan-fiction and intermediaries that have received financial success must compensate authors of existing works.

This approach may help strike a fair balance between the rights of users to enjoy artistic creations and build upon them, and the rights of authors to be appropriately remunerated. After all, while it may be flattering for authors, it is still tough work to have thousands of fans standing on their shoulders.

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