

The Paradox of Devotion: Fair Use in the Production, Distribution, and Sale of Fanart at Comic Conventions in the Canadian Context

Shows of devotion through artistic form can be a powerful binding agent for social cohesion around particular cultural values, and fan devotion can even challenge institutionalized status quo. In fact, members of society may begin to affirm their fundamental “right” to show fan devotion to popular symbols and icons. In classical times, Zeus and Athena, for example, were not characters known as original creations of particular individuals and so their image and representation in art belonged to everyone - and everyone had a right to make an offering to them. Today, there is a “paradox of devotion” for fans where society’s cultural heroes have original creators and the right to represent them is controlled by individuals or corporations that own those rights through copyright, patent, and trademark. Humanity’s Ares has become Disney’s Darth Vader, and the people’s Pied Piper of Hamelin has become Sony’s Walter White. Today, the fan can show devotion freely, but only in licensed ways. Hence, there is a paradox in the act of devotion being one that implies unbridled freedom affectively and culturally, yet fan expression becomes limited legally via capitalist economic pressures based in postmodern industrial prerogatives, mandates, regulations, and practices.

Fanart is a prime example of how elevated cultural values collide with economic and industrial bottom lines to cause fraying and tears in the fabric of networked social ties; individuals, groups, or corporations can become disabled in their social mobility and

hampered in their accumulation of cultural capital when relationships between fans and IP holders break down. For the purposes of this policy brief, I will limit my review of issues to the policies and regulations which control the function of fan devotion through fanart at comic book conventions in Canada (specifically, FanExpo, which is held annually in Toronto). A philosophical debate exploring the paradox of devotion is not within the scope of this piece, but it is worth noting that “comicon” culture has now grown to include film, television, games, fiction, and other popular media forms.

Intellectual Property holders are put in the tricky position of having to protect the economic viability of their product without alienating their fan base; the cultural development of their product is based in both popularity (fan devotion) and sustainability (economic viability). There are a number of pros and cons regarding the production, distribution, and sale of fanart at comic conventions, and I will propose a potential solution for how Canadian convention organizers might maintain the enrichment of culture through the proliferation of popular artwork inspired by fan devotion (i.e. fanart) while protecting the rights of artists (professionals and amateurs), convention organizers, and the corporations who own the intellectual property rights for the fanart works.

The legal status of fanart in Canada is covered by the Copyright Act of Canada, and statutory exception for a user’s right to copyright infringement must be defended as an instance of fair dealing¹. The exception is defensible when the use of copyright is for the purposes of research, private study, education, parody, satire, criticism/review, and news

reporting (s. 29, 29.1, 29.2). Commercial use of the infringed copy is examined carefully on a case-by-case basis where detrimental impact on the market is a primary consideration². When perusing the aisles of “Artists Alley” at FanExpo in Toronto (usually held around Labour Day), guests will encounter hundreds of illustrators, painters, and artisans displaying original artworks that feature familiar characters, settings, and themes from popular comic books, movies & TV, literary fiction, and video games – intellectual property content protected under copyright.

During each FanExpo event (usually held over four days), scouts and editors from the largest comic book publishers mill about the convention hall and hold private appointments for artist portfolio submissions and review. Convention organizers also survey the setups in Artist Alley usually making sure that there aren’t dangerous obstructions or crowding. What scouts, editors, publishers, and organizers rarely seem to be doing is requesting proof of licenses from artists for the work which they are selling that clearly infringes copyright.

In a talk given at the 2012 San Diego Comicon (the world’s largest such convention), advisor-in-chief at DeviantArt and former deputy and acting general counsel of Paramount Pictures, Josh Wattles, explained that fan activity is a “perfect ecosystem”³. According to Wattles, fan devotion drives the success of a product and fans are the perfect customer. However, he notes that owners must control the flow of money generated from their work and that this leads to a paradox for fanart in particular. Fanart

is one way to show devotion but it can also cause dissonance because the fanart may challenge the original artist in such a manner that the canon is undermined or the mark is disparaged.

Seth C. Polansky is a contract lawyer who specialises in art and IP issues internationally and in an interview with BleedingCool.com's Rich Johnston in 2016⁴, Polansky revealed that he has a dog in the "fanart at comicons" fight. Polansky is alarmed that copyright infringement is so liberally flaunted by publishers, artists, and consumers, but he blames ignorance and lack of proper education about the law as the primary cause for the rampant infringement by artists. Polansky recognizes that artists rely on sales at comicons to survive and therefore the artists turn a blind eye to the legality of their actions, and meanwhile convention organizers waive their liability through the contracts they have with the artists; IP rights holders don't enforce their rights through often costly takedown notices, cease-and-desist letters or litigation, and consumers don't seem to realize that they are implicated as willing participants in illegal sales of unlicensed products.

From the perspective of the rule of law Polansky is a hardline idealist and he recommends that convention organizers crack down on the sale of infringing items and that attendees refuse to purchase those items. Naturally, this is anathema to the spirit of fan devotion which pulls guests into the convention halls in the first place. I would suggest that fan devotion is not a subdued feeling generating sophisticated expression over a lifetime of

interaction with a symbol or icon, but is instead a volatile and visceral feeling of exuberance relying on the mental faculties of memory and tapping into other complex emotional states such as nostalgia, happiness, and love. However, it could be argued that there is no excuse for destroying an owner's opportunity for success with their property by allowing their property to be violated for the commercial exploitation of others who only invested their emotional-based fan devotion in that property. Therefore, the most important questions to ask are: who is most at risk with copyright infringement at comicons, and what protections can be made?⁵

During my survey of dozens of posts at DeviantArt.com and Reddit.com on the topic of legal status of fanart at comicons, I discovered that roughly half of the commenters on the original posts (mainly started as general queries), believed that fanart was fine despite being illegal because copyright holders do not enforce their rights through the law and that this would imply that they don't care⁶. The other half of the commenters understood the fallacy of that reasoning and countered with arguments to the effect that fanart requires important checks and balances for production, distribution and sale, and that to date convention organizers, IP holders, artists, and consumers have been acting irresponsibly in such a way that has caused original artists, content creators and property owners to lose revenue due to the proliferation of infringing copies⁷. These threads at the popular social networking websites suggest that indeed the artists and consumers are confused about legal status of copyrighted works.

Fan devotion is often referenced as a legitimate “defense” for creating (and selling) fanart, and some commenters were openly defiant of the law claiming that the property “belongs” to the fans. In fact, in the recent lawsuit launched by Paramount and CBS against Axanar Productions, some industry professionals revealed their ideological bent for supporting fan devotion freedoms above all else. Axanar had created a fan film for the Star Trek universe which property owners, Paramount and CBS, found to infringe their rights, however the director of one of the official Star Trek movies (Star Trek Beyond, 2016), Justin Lin, took to Twitter to publish a statement saying that the lawsuit was “ridiculous” and that he supports the fans, and that Star Trek “belongs to all of us”⁸. In an epoch of emotional outrage driving individual and collective political ideology, it might be very costly for property owners to undermine the devotion of fans and circumvent the “needs” of the fans.

Those who are most at risk with respect to fanart at comicons are likely the original artists contracted by corporations to produce artwork that they then lose the IP rights to through the work-for-hire contracts they sign. At comicons, these original artists are not legally allowed to sell copies of their own work, yet artists infringing their work can make money from unlicensed copies, just a few booths over. This unfair marketplace undermines the hard work of the original artists and de-incentivizes the most energetic, talented, and accomplished artists from pursuing careers in the specific fields in question. Tim Lundmark was a vendor at the Minneapolis Comicon who was selling unlicensed prints of work created by artists who also had booths at that show⁹. The original artists

were irate to see the charlatan making a profit on work that the artists themselves were not legally allowed to sell. Lundmark was removed from the convention after numerous complaints were lodged, but unfortunately he is a single case in a more widespread problem¹⁰.

I took an afternoon during the 2015 FanExpo weekend to go through Artist Alley and say hello to friends and artists who have worked with me on character concept pieces for my own creative projects in the comic book industry. I asked them how their sales were and the responses were typically the same – artists would point out to me which of their pieces was very popular and selling well. It was clear to me through the artists' surprise that they would have had a difficult time predicting ahead of the show which pieces would be their best-sellers. Many artists took pride in letting me know that a single piece had sold well enough to cover their costs for the booth. In addition, many of these artists will book appointments with scouts and editors to show their portfolios and perhaps share stories about their successes with particular art pieces sold at their booth during the show. In this way, the publisher may learn that an artist is adept at rendering a specific character or set of characters, and this may lead to contract work down the road.

The publishers do not seem interested in stopping the production, distribution, and sale of fanart at comicons despite it undermining many of their contracted artists who are also in attendance (worth noting is that most expenses are covered for contracted professionals, including travel and the cost of the booth)¹¹. The convention organizers at

FanExpo waive their liability to enforce copyright through their Exhibitor Contract, where item 4 of the 2015 contract states, “exhibitor is responsible for payment of fees, royalties, or fines for use of any third party work that is protected by copyright, patent or trademark”¹².

The current state of things is that overall a lack of copyright enforcement for infringing fanart at comicons benefits many publishers who want fans to show devotion and who also want to learn which new artists are adept at rendering popular versions of their IP. Fans have their devotion freed and unencumbered by guilt or legal restriction while convention organizers shirk their responsibilities through contracts for the event and are then able to maximally satisfy the needs of the fans attending the conventions. The amateur artists are able to create unlicensed copies of others’ IP and print freely in order to foster fan devotion for their work or art style, as well as being afforded financial opportunity to make the cost of their trip to conventions not burdensome. It is professional, contracted artists who get the short-end of the stick when it comes to fanart copyright infringement and this is where balance must be recalibrated in the operation of comicons¹³.

I would recommend that FanExpo initiate a new program for showcasing fanart with a new limited license extended to amateur and professional artists. Before each show, artists who are confirmed for Artist Alley would send to the convention organizers a digital sheet of thumbnails featuring the artwork they intend to produce, distribute, and

sell at the convention. These sheets would be made readily available to all IP holders who would then be given the opportunity to identify particular fan artworks that they approve for showcase. This fanart would then be showcased at several booths operated by, and staffed by, the convention organizers and placed in highly visible locations, including the entrance to the main floor of the show. This fanart would produce revenue mainly for IP holders, with enough of a cut going to convention organizers to make the management of the showcase booths and administration duties for the process worth it, and with the fanart artist getting a small royalty as well. The showcased fanartist would be able to advertise that they were showcased at the convention and they could also be listed in a feature page of the official FanExpo printed program which each guest receives upon entering the convention hall. However, the fanartist would not be able to sell copies of the showcased piece at their booth. In fact, convention organizers would be encouraged to go through Artist Alley and remove fanart for particular copyrighted characters that are showcased at the convention¹⁴. In exchange, professional contracted artists would be permitted a limited license at FanExpo to make print copies for work they had done featuring those characters also featured in the showcase.

To provide an example, Marvel/Disney might decide that since a new Spiderman movie is releasing before the end of the year that they want to create hype for the popular and beloved superhero character. They would mark several fanart pieces for Spiderman in the thumbnail sheets received in advance of the show. Those pieces would be showcased around the convention at the special sale booths. Marvel/Disney would make a profit

from sale of prints, the fanartist would receive some royalties while also receiving important recognition, and the organizers would turn a profit on the initiative. There would be a moratorium on the sale of all Spiderman fanart throughout Artist Alley, but professional contracted artists who had worked on Spiderman comics or movies for Marvel/Disney would be granted a limited license to make copies of that work and sell it at the show. It is true that this initiative would hamper sales for fanartists, but it would become a more equitable experience overall, it would bring back important control for IP holders, and it would educate wayward artists and confused fans about the legality of fanart. Fans would still be able to show devotion through the purchase of professional works and showcased works, while convention organizers would provide artists in Artist Alley with the list of showcased characters so that artists could recognize ahead of the show which of their pieces should be the ones to make more printed copies of. It might happen that in 2019, Spiderman is showcased but Deadpool is not, in which case fanartists could produce a surfeit of fanart for Deadpool. This may even lead to IP holders such as Marvel/Disney discovering important information about their property; if Deadpool fanart outsells Spiderman showcased art, perhaps it is time for a new Deadpool movie sequel or comic series.

This initiative, which could be implemented by FanExpo convention organizers, would not only serve to put teeth back into copyright law at comicons, but it would provide a more equitable experience for professional contracted artists in attendance, as well as empowering IP holders who cannot afford the luxury of letting revenue for their property

go unaccounted for. Additionally, an initiative such as this would not hamper the fans' ability to show devotion to any of their favourite cultural icons and symbols, nor would it preclude fanartists from creating fanart for any particular IP. Finally, this "showcase fanart" initiative would do much in the way of educating consumers and amateur artists about the legal status of fanart. Such an initiative may even have a positive cascading effect whereby Canada could become a leader in the development of legal fanart sale and FanExpo's example could be borrowed and reworked at other comicons around the world. There may even be productive adaptations for online marketplaces such as, Etsy, Society6, RedBubble, and Ebay.

¹ Copyright Act, R.S.C. 1985, c c-42. Retrieved at Laws-Lois.Justice.gc.ca

² Rebecca Tushnet is a professor at Georgetown University Law Center and board member at the Organization for Transformative Works – a non-profit organization that promotes, support, and provides legal advocacy for fan works. Tushnet explains in an interview with Lauren Davis of io9, that the strongest case for fair use involves fan works that are non-commercial and transformative while borrowing a little as they require from the original works and that do not compete with the original works in the marketplace. Derivative work is not copyright protected which a California Central District court decision held in the *Anderson v. Stallone* case regarding a fan script for Rocky IV. (Davis, Lauren (2012, August 12). Art Fan Fiction and Fan Art Legal? Retrieved from io9.Gizmodo.com)

³ Wattle, Josh (2012, September 10). Fan Art Law At Comic-con. Retrieved from YouTube.com

⁴ Johnston, Rich (2016, June 10). Artists Alley, Art Theft and Copyright Law – A Lawyer Speaks to Bleeding Cool. Retrieved from BleedingCool.com

⁵ In a blog article at Nerd For A Living, Adron Buske, advocates for a "coalition of publishers, corporations and creators that can draw up, present and maintain a common set of rules for industry adoption." However, the issue of costliness for enforcement would remain and likely the coalition at best would draft principles (as opposed to rules) regarding a suggested or ideal cultural sensibility to be adopted by individuals for understanding fairness in the use of fanart (Buske, Adron (2013, December 13). Protecting Artist Alley: The Tricky Business of Convention Art Sales. Retrieved from NerdForALiving.com)

⁶ Polansky notes that fanartists and fans often misconstrue comicons as a kind of "magic circle" space, where the analog prints are fair dealing but online sales of digital copies would not be because of the greater scale (Johnston, June 10, 2016)

⁷ An artist known as "WereMole" at DeviantArt commented about stricter enforcement of copyright law at comicons for fanart, "this is a good thing overall. It encourages original work and keeps away the bootleg and pop art huckster booths that can be a scourge on conventions and often peddle plagiarized artwork." (Retrieved from DeviantArt.com)

⁸ Pedraza, Carlos (2016, March 22). Everything you need to know about the current state of the Axanar Lawsuit. Retrieved at TrekMovie.com

⁹ Johnston, Rich (2016, May 8). Buzz sends Tim Lundmark Packing at Wizard World Minneapolis Comic Con. Retrieved from BleedingCool.com

¹⁰ Crackdowns on unsanctioned printing is a rare proceeding at comicons currently, however WonderCon organizers in 2016 issued a letter to all exhibitors warning that infringement was taken seriously by the convention organizers and that violators risked arrest and prosecution for bootleg items and unlicensed merchandise. Heidi MacDonald, reviewing the news item at ComicsBeat.com, commented that the convention organizers were likely more interested in stopping the proliferation of bootleg movies and animated series as opposed to going after artists in Artist Alley for unlicensed print posters (MacDonald, Heidi (2016, March 18). Tolja! WonderCon cracking down on copyright violators. Retrieved from ComicsBeat.com

¹¹ In an interview with BleedingCool.com, former head of publicity at Marvel, Gary Guzzo, commented that publishers were once vigilant but now don't seem to care about copyright infringement at comicons. Guzzo reasoned that the publishers feel loses are negligible but also noted that original artists (contracted professionals) were losing important sources of income (Johnston, May 8, 2016)

¹² Referenced from my own 2015 Exhibitor Contract with FanExpo

¹³ Wizards of the Coast/Hasbro recently recognized that contracted professional artists require more incentives and a more equitable experience with the commercial exploitation of their work. The company changed their rules for Magic the Gathering playmats such that artists can now reproduce their work for playmats and suggest the framing of the artwork for those mats when printed through the official company (Ultra-Pro) that handles playmat printing (Johnston, June 10, 2016)

¹⁴ This seems to be in line with FanExpo convention organizer's mandate given that they understand Artist Alley to already be a place for meeting "rising stars and the people who work the front lines of the industry". A showcase initiative would only further the mandate of making rising stars more visible at the show (Retrieved from ComiconToronto.com)