

Capitalizing on Tragedy? Redbubble.com Permits Sale of Humboldt Broncos Art

July 12, 2018 by Elias Rabinovitch

At first glance, art-marketplace websites like Redbubble and Society6—which print original designs uploaded by users on various consumer products—seem like ideal platforms for an artist to make some extra cash. However, a recent piece of artwork honouring the Humboldt Broncos, uploaded to Redbubble by a non-artist, raises moral and copyright issues with the commercial validity of these promising online marketplaces.

On April 6, 2018, a bus carrying the Humboldt Broncos junior hockey team [collided](#) with another vehicle *en routeto* a playoff game. Fifteen people were killed, including seven members of the team. Residents [across Saskatchewan](#) and [throughout Canada](#) were deeply disturbed by the tragedy and expressed their overwhelming sadness at the loss of so many lives in such a horrific accident.

Responses to the tragedy have ranged from [vigils](#) to tributes at [hockey](#) and [basketball games](#). One reaction, which became widely circulated soon after the incident, was a simple yet powerful [editorial cartoon](#) by *Halifax Chronicle Herald* illustrator Bruce MacKinnon. The cartoon depicts the province of Saskatchewan, personified in green hockey gear, injured and being escorted off the ice by other provinces dressed in red. The illustration communicates the importance of mutual aid and empathy to our collective Canadian identity. However, soon after MacKinnon's cartoon was printed, Redbubble.com, an Australia-based online store that manufactures consumer products based on user-submitted artwork, [began selling T-shirts](#) featuring the illustration without the artist's permission.

Not only is MacKinnon livid his artwork is being used without his consent, the artist is also [incredulous that Redbubble.com would permit profiting from a tragedy](#). MacKinnon did not submit his own art to the website: someone else did, and would have, therefore, wrongly received royalties from any sales of the T-shirt by Redbubble.

While Redbubble removed the shirts once the *Chronicle Herald* threatened a lawsuit for copyright infringement, dozens of memorial T-shirt designs [remain listed on the store](#). Moreover, while [there is a small section of Redbubble's FAQ](#) indicating that artists may set up their designs to benefit charities, there is no evidence this is the case with any of the Humboldt Broncos merchandise.

Redbubble.com is one of many platforms that produce specialized consumer products like T-shirts, throw pillows, and bed-sheets based on user-submitted designs. Others include Design By Humans, Society6, and Teepublic. For struggling artists and cost-conscious consumers alike, these websites offer a novel way to disseminate original creative ideas around the globe while providing compensation to artists for their hard work. However, the Humboldt Broncos cartoon controversy demonstrates the drawbacks such websites have for artists. Because websites like Redbubble are open platforms based on user-submitted content, these companies exert little control over what users upload unless the sites are informed that the submitted design(s) is infringing an existing copyright.

Such companies often put the onus on users to ensure that submitted content does not infringe copyright or other intellectual property (IP). For example, the [Redbubble website states](#):

"Ultimately, you take full responsibility for the works you upload and display on Redbubble. This is reflected in the [Redbubble User Agreement](#). Use of the Redbubble website indicates continued acceptance of this Agreement. So please do us all a favour and if someone has created or owns the rights to a picture, painting, photograph, logo, story, poem or any other work, copyright, trademark or publicity right [...] obtain consent before you use that work."

As inspiring as many of the opportunities afforded by these sites may be, the potential remains for the work of artists—who do not wish to have some, or all of their creative productions commercially reproduced on a pack of coasters—to be misappropriated for the benefit of others.

There is nothing wrong with artistic adaptations, where, for example, another artist wishes to create a downstream interpretation of a previous artist's work, transformative in nature, and then uploads that metamorphosed piece to be printed on T-shirts and bedsheets. This is firmly within the boundaries of [fair use in the United States](#), if not [fair dealing](#) in Canada. We live in a visual culture of appropriation and both explicit and implicit creative dialogue. The Supreme Court of Canada acknowledged this concept in *Théberge v Galerie d'Art du Petit Champlain (2002)*, wherein Justice Ian Binnie stated, "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."^[1] From my angle, this may mean that, for better or for worse, artistic dialogue could involve being inspired by works manufactured in the spirit of a completely different creative objective than what the original artist might have intended.

The current form of web-based art marketplaces, like Redbubble, seems ill suited to prevent verbatim copying. As the uploading of MacKinnon's cartoon indicates, certain people's intentions may not be particularly honourable. It may be that the design in question was uploaded by a single person seeking to create a T-shirt for themselves—but this detracts little from the reality that these art platforms can be used by opportunistic individuals with morally questionable motives. Perhaps it is time for these websites to develop methods of concretely verifying a piece of art was created by the artist uploading it, rather than simply allowing people to sign up and upload as they please and dealing with copyright infringement issues only as they arise.

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[1] *Théberge v Galerie d'Art du Petit Champlain, Inc.*, 2002 SCC 34 at para 30, [2002] 2 SCR 336.

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One Response to "Capitalizing on Tragedy? Redbubble.com Permits Sale of Humboldt Broncos Art"

Elias Rabinovitch, on [July 29, 2018 at 10:41 pm](#) Said:

Just wanted to clarify the following: "This is firmly within the boundaries of fair use in the United States, if not fair dealing in Canada." (second last paragraph)

Generally speaking, if a specific usage of a copyrighted work is considered to be "transformative" in nature under part (1) of the four part U.S. fair use test, this militates heavily in favour of a finding that the usage is fair [see *Campbell v. Acuff-Rose Music (92-1292)*, 510 U.S. 569 (1994)]. For more information on "transformative" uses see the following link: <https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html>.

The American doctrine of "transformative" uses has been explicitly denied by Canadian courts considering fair dealing cases (see *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at paras 24-25, [2012] 2 SCR 326). Also, unlike fair use, fair dealing requires that the dealing meet a specific statutory category as outlined in s 29 of the Copyright Act before it may be considered whether the dealing is "fair," rendering it potentially more complicated to predict whether commercial dealings that do not meet any of the enumerated statutory categories will be considered "fair."

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