

Submission of the Organization for Transformative Works (OTW)

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to promote the acceptance of noncommercial fanworks as legitimate creative works, to preserve the history of fan culture, and to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new creative works based on existing media; outside media fandom, the term “remix” is often used. The OTW provides services to fans who need assistance when faced with related legal issues or media attention. Our website hosting transformative noncommercial works, the Archive of Our Own, has over 200,000 registered users and receives over 12 million pageviews per day, including a significant number from South Africa.

The OTW submits this comment to make the Government aware of the richness and importance of noncommercial remix communities and the works they produce, in South Africa and elsewhere. Empirical research reveals that remix culture is a global phenomenon, with similar characteristics around the world.¹ Our comments are directed at the proposed fair use language and the language regarding technical protection measures (TPMs).

The OTW’s support for fair use/flexible fair dealing is based on decades of research into communities that make transformative, noncommercial works and rely on fair use and fair dealing. Further details and citations, including the voices of individual remixers themselves, can be found in the comment the OTW submitted to the PTO/NTIA inquiry on similar issues.² We believe that copyright policy will be improved by listening to these creators.

Fair use has proven to be a robust protector of the ability to transform and remix content in the United States. Any reform should adhere to the basic principle that fair use/fair dealing does not

¹ Aram Sinnreich & Mark Latonero, Tracking Configurable Culture from the Margins to the Mainstream, 19 J. Computer-Mediated Communic. 798, 798 (2014) (“Our analysis, based on results from thousands of adults around the globe, shows that not only have remixes, mashups and other forms of ‘configurable culture’ become mainstream phenomena, but also that the attitudes surrounding their cultural legitimacy are shifting. While copyright industries still promote a binary theft/permission framework, many people acknowledge the validity of some appropriation, and are actively negotiating the law’s limitations.”).

² Comments of the Organization for Transformative Works, http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf (2013).

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require permission, and that a copyright owner cannot create a right to control a transformative use merely by being willing to accept payment for it.

The value of transformative, noncommercial works

Noncommercial remix cultures provide important benefits to participants and to society at large. Historically, painters have learned to paint by studying, and copying, the work of existing painters. By beginning with a clear model, painters develop their techniques and learn to create their own styles, both building on and diverging from what's gone before. Composers historically follow a similar arc; singers also regularly learn their craft from singing existing songs and learning from existing performers' styles. So too with writers, who often begin with pastiche as they master the relevant skills. And so too with more recent arts, including audio editing and video editing. Noncommercial remix is the foundation of much future creativity; suppressing it means suppressing a key step in many artists' paths.

Separately, as studies from multiple disciplines have found, remix plays a unique and positive role in society. Transformative uses provide people with an entry point into larger communities of creative endeavors. The passion that brings fans together also impels them to support each other's creations. A fannish creative community can provide a safe space for otherwise isolated creators to discover their own talents, sexual orientations, and political commitments. The noncommercial, make-it-yourself nature of fannish communities makes them easy to enter, even for people who lack economic resources. Because transformative fandoms thrive on variation and new works, they encourage even very beginning artists to experiment and find unique voices. This kind of support, predicated on shared interests, isn't readily available outside noncommercial remix communities.

Remixes produce valuable cultural and political commentary. They are particularly attractive to groups underrepresented in mass culture, who use remix to talk back to that culture, to identify what it's leaving out and explain what they see. Furthermore, remix cultures teach numerous skills and competencies that have value inside and outside their communities. These skills are

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particularly important for members of underrepresented groups, who can use them as alternate pathways to success when conventional, majority groups are unwelcoming.

Fair use/fair dealing protects these valuable creative ecosystems

Fair use or flexible fair dealing provisions are vital to noncommercial remix cultures. For reasons both practical and normative, fair use and fair dealing law is clear that a mere desire to licence transformative works is insufficient to justify a copyright owner's right to control licencing. Even when most remixes are left alone, suppression is a continuing risk, especially for the most transformative and critical works. Precisely because noncommercial remix is so common, a legal threat against one creator's work can be like a lightning bolt; the arbitrariness and unfairness in such situations harms respect for the law. Well-functioning, healthy communities should not be disrupted, whether deliberately or incidentally, for the prospect of some hypothetical future gain by making licencing a potential trump against a transformative use.

Copyright reform should therefore recognise and protect the conditions for noncommercial remix. The organic pathways through which noncommercial remix cultures have developed can be compared to natural wetlands, which have many recognised benefits to the environment as a whole that can't be replaced by planning and regimentation, such as follows from systematic licencing. If we allow copyright owners free rein to cut off the noncommercial pathways by which people traditionally discover their own creative talents and impulses, we will be threatening the future of creativity, with no demonstrated benefits even to existing business models, much less future ones.

Fair use/fair dealing should allow copying an entire work when that is appropriate to the purpose of the use

The current proposal is very promising, but should not exclude the possibility of a fair use that includes the entirety of a work, even a commercial fair use.³ The proposal's extra protection for noncommercial use is welcome, and consistent with the evidence that such uses are uniquely valuable. However, there are a number of cases in which a use of an entire work can be commercial and also fair. A work of art criticism, for example, or an analysis of a photograph, may well need to use an entire image in order to be understandable and to make its point, as numerous fair use cases in the United States have recognised. Separately, it is not a good idea to introduce the concept of the "entirety" of a work—experience in the United States has shown that copyright owners can manipulate the boundaries of a "work" in order to claim additional rights. *See, e.g.,* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 75 *Fordham Law Review* 575 (2005) (explaining how doctrinal uncertainties lead to unpredictable redefinition of what an entire "work" is).⁴ For example, courts may find copyright in characters; a copyright owner could argue that a recognisable image of Harry Potter copies the "entire" character. A few bars of music can be sold separately as a ringtone—but that does not make a work of criticism or news reporting that uses a few bars of music unfair.

Fair use always involves a consideration of the amount of the work that is being used. For large works such as books or movies, it is essentially impossible that fair use would be found for a commercial use that copied and shared a work in its entirety. Therefore, there is no reason to include this additional language, which may only generate confusion because of its difference from existing fair use/fair dealing provisions.

At a minimum, if the "entirety" language is to be retained for commercial uses, it should exclude images and other works that can be very small, and limit the restriction to the use of an entire audiovisual work or literary work that has been separately commercialised, apart from any other components, in order to limit the problem of "work" manipulation.

Licensing is not a substitute for fair use/fair dealing

³ The current draft provides that "the use of the whole copyrighted work for cartoon, parody or pastiche for commercial use shall require the issuance of licence."

⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870328.

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Licensing has routinely been posited as an alternative to fair use and fair dealing. However, for transformative uses, licensing will always remain an inadequate alternative, because of the limits imposed on licensees. Licensing regimes often have gaps in the works that are covered; potential licensors are usually unresponsive to small creators; and they always include censorious terms that suppress the most transformative and critical works. Furthermore, licensing regimes tend to support anticompetitive market structures, to the detriment of free competition and consumer welfare.⁵

Legal protection against circumvention of technological protection measures has a record of unintended negative consequences; new laws must be carefully calibrated to avoid past mistakes

Here too the Government can learn from the American experience, but as a profound cautionary tale. The United States recognized that legal protection for technological protection measures needed exceptions and limitations to protect both noninfringing uses of copyrighted works and uses that, though technically involving circumvention, had nothing to do with protecting copyright at all (e.g., law enforcement uses, privacy-protecting measures, and security research). However, the exceptions as written have proven far too narrow for ordinary use. Furthermore, after seventeen years in which protection for TPMs has been the law of the United States, no one except lawyers and security researchers with lawyers knows about these legal provisions, and thus they have no deterrent effect on infringement.⁶

One unexpected development since the U.S. enacted special protections for TPMs in 1998 has been the rise of the “internet of things.” Even machines that are not connected to the internet now routinely have computer chips in them, and thus software. Manufacturers whose business models do not depend on copyright have used technological protection measures to threaten others with legal liability for repairing and improving their own products, from printers to garage door remote controls to cars and medical devices. Copyright is not the right law to use to regulate machine repair and tinkering. As a result, any liability for circumvention of

⁵ See Rebecca Tushnet, All of This Has Happened Before and All of This Will Happen Again, 28 Berkeley Technology Law Journal 1447 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564535.

⁶ For detailed discussion of the empirical evidence on citizens’ knowledge of TPMs, as well as on other aspects of anticircumvention law, see Comments of Electronic Frontier Foundation & Organization for Transformative Works, Feb. 6, 2015, <http://transformativeworks.org/sites/default/files/2014-07%20EFF%20Remix%20Comments.pdf>.

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technological prevention measures should be tied clearly to actual facilitation of copyright infringement. This will ensure that circumvention undertaken to repair a machine such as a heart monitor or a tractor does not implicate the law at all, even if the repair involves access to or changes to a protected computer program.

In addition, after five three-year cycles for additional exemptions administered by the U.S. Copyright Office, several things have become clear: First, in the absence of a required link to copyright infringement, technological innovations will routinely arise requiring new exemptions for unanticipated, legitimate practices. Second, the three-year process of granting exemptions to U.S. anticircumvention law is badly broken. It is resource-intensive—consuming from nine to fifteen months of time for proponents of exemptions, opponents, and the staff of the Copyright Office—and frustrating, with constant revisions to processes and multiple rounds of comments and hearings. Especially where resources are limited, repeated exemption proceedings are a poor use of copyright experts' time and energy. The best solution, as noted above, would be to tie anticircumvention liability to facilitation of copyright infringement, avoiding the need for constant reargument about appropriate exemptions to facilitate noninfringing uses. At the very least, however, exemptions should be liberally granted and persistent, at least until a strong showing has been made that an existing exemption is facilitating infringement.

The proposed language stating that people who want to circumvent a TPM in order to engage in a permitted or exempted act must request the copyright owner's permission first should be clarified. As the U.S. Copyright Office has recognized several times, for many TPMs, circumvention technology is widely available regardless of existing legal prohibitions—in particular, software that allows consumers to copy DVDs and Blu-Ray discs is widely distributed. Anyone can “practically” circumvent a DVD in order to engage in fair use or fair dealing right now. If this additional provision means only that, where a TPM remains robust, a person may request assistance exercising her rights from a copyright owner, then it is not particularly problematic. However, many instances of fair use or fair dealing are time-sensitive, especially when they involve commentary on the politics or culture of the day. Moreover, copyright owners have repeatedly testified to the U.S. Copyright Office in the U.S. exemption proceedings that, because they don't control the encryption technology but only licence it, they

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have no procedure for enabling circumvention. They have no contractual authority or technical ability to assist in circumvention. At most, copyright owners in the U.S. will provide “no action” letters indicating that they will not take action against a particular use for copyright infringement, but those letters expressly disclaim any other representation about the legality of the use. Thus, people should not be required to wait for an answer that may never come (as this provision explicitly contemplates) before engaging in circumvention when the tools to do so are already readily available. Only when some additional assistance is necessary because no circumvention technology is yet available does the procedure set out in this provision—ask the copyright owner first, then turn to other people for assistance—make sense.

South Africans deserve to be secure in the benefits provided by noncommercial, transformative remix cultures

As part of the OTW’s attempt to document the voices of community members, South African fan Camilla Christie shared their experiences in detail. Christie’s story evokes a number of recurring themes in fans’ experiences creating and sharing fanworks: the unique encouragement they offer for learning new skills; the ways in which they allow people in marginalised positions to find communities and express their own experiences; and the ways in which creating works within a supportive community of fellow fans can be far more life-sustaining than the romantic myth of the artist working alone in a garrett:

I am the white child of two South African academics, and was privileged enough to receive a scholarship to one of the best schools in the country, Rustenburg Girls’ High. I continued my studies at the University of Cape Town on a full scholarship, where I studied Classics and Linguistics. I have recently completed my Master’s degree in Latin Language and Literature, and plan to spend the next few years studying and working in the archival and librarianship sector before embarking on a doctoral project....

I am both autistic and mentally ill My few attempts at initiating social interaction were curbed by my autistic tendencies – I would monologue for minutes at a time about Latin morphology or Greek historiography, steamroll over attempts at genuine debate with pedantic take-downs, draw incisive and very personal observations out loud without understanding how cruel I was being, and make odd or repetitive gestures with my hands. ... I fantasised, in those days, about being kind to people. All I wanted was to be able to make one person happy that I had interacted with them.

From childhood I had been obsessed with language It was Tolkien who showed me that I could, in fact, build a career out of this fascination, and Tolkien who drew me to the internet. Initial online discussions of the Silmarillion in 2004 branched out to conversations about all sorts of books, films, and manga. Typing was infinitely easier than speaking – I could review everything I wrote before I sent it in order to ensure that I had not said anything unkind or inappropriate, and could take my time parsing a friend’s reply in order to understand precisely what they had said. The very nature of the medium forced me to learn turn-based conversation, which I gradually began to be able to implement in real life.... I very quickly developed a keen sense of netiquette, the complex social rules of which were far more accessible to me than those of everyday life due to being couched in writing.

In 2005, at the age of fourteen, I began posting fanfiction on ff.net. It was terrible and embarrassing Beyblade slash, but it made me happy, and I loved finally being able to share my writing with others after years and years of hiding it. The first time I received reviews on a piece, I ran through the house giggling and whooping I researched Japanese classical literature in order to shore up my fictional themes, consciously included Latin narrative devices in my work, drew on Greek epic imagery. I learned pacing, characterisation, dialogue, and plot, all of which I incorporated into the original fiction at which I was still hard at work. I was developing my writing abilities at a phenomenal pace, and I was doing so in the comfort of a community that shared my interests and supported me....

I have no doubt that committing myself to the critical analysis of media from an early age fostered my ability to engage with the ancient Latin and Greek texts on which my professional scholarship has been founded. The sheer wealth of general knowledge amassed from my fandom interests cannot be overlooked – I have taught myself history, climatology, biology, and any number of languages in order to be able to ensure that even the smallest background detail in a fic is correct, and have gleaned fascinating tidbits of information from other authors....

More formally, in 2011 I took a fantastic undergraduate Classics course entitled Sex From Sappho to Cyber, which tracked the development of erotic literature from Ancient Greece to the internet age, and which included an excellent module on fanfiction taught by UCT’s inestimable Dr Jessica Tiffin; she encouraged me to submit an essay on the intersection of homoeroticism and vampirism in CLAMP’s Tsubasa: Reservoir Chronicle, which I still consider to be the most exciting and invigorating academic project of my undergraduate career. Throughout my postgraduate years my online friends consistently supplied me with support, insight, and often valuable recommendations of academic sources – I am friends with young linguists and Classicists all across the world thanks to fandom. In 2014 and 2015 I employed my knowledge of transformative media and the intersection of fiction and politics to demonstrate to the students in my Ancient Literature and Mythology classes how tropes and narratives handed down across centuries are still manipulated today as political statements, a topic which many of this year’s students found particularly relevant in the wake of #rhodesmustfall....

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Christie's story is only one of thousands. The OTW applauds the Government's work to modernise copyright law, and encourages it to assist Christie and other creators of noncommercial transformative works by protecting them against legal threats.