



## **Submission of the Organization for Transformative Works (OTW)**

### **This submission may be made public**

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 1.5 million registered users and receives an average of 26 million pageviews per day, including a significant proportion from Australia. In 2017, the OTW received over 1,700 donations to its nonprofit mission from Australia. Empirical research reveals that remix culture is a global phenomenon with similar characteristics around the world, including Australia.<sup>1</sup>

The OTW understands that the Australian Law Reform Commission (ALRC) and Productivity Commission (PC) have each recommended that Australia adopt a flexible fair use standard. The OTW agrees with those recommendations and submits this comment in support of adopting them. The OTW’s interest is in a flexible legal framework that leaves room for the rich, important work of noncommercial remix communities and the works they produce. In the OTW’s experience, fair use law provides such a framework. The OTW’s support for a flexible fair use standard 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 U.S. PTO/NTIA inquiry on similar issues. We believe that copyright policy will

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<sup>1</sup> See Kylie Pappalardo, Patricia Aufderheide, Jessica Stevens, & Nicolas Suzor, *Imagination Foregone: A Qualitative Study of the Reuse Practices of Australian Creators* 9, <https://eprints.qut.edu.au/115940/> (November 2017) (including “remix artists” in study of Australian creators); Aram Sinnreich & Mark Latonero, *Tracking Configurable Culture from the Margins to the Mainstream*, 19 J. COMPUTER-MEDIATED COMMUNIC. 798, 798 (2014) (“[o]ur analysis, based on results from thousands of adults around the globe, shows that. . . remixes, mashups, and other forms of ‘configurable culture’ [have] become mainstream phenomena”).

be improved by listening to these creators.<sup>2</sup> As those comments demonstrate, fair use has proven to provide robust protection for the ability to transform and remix content, which in turn provides incalculable benefits to remix creators and society.

We wish to be clear that while we advocate for the adoption of a fair use standard, we do *not* advocate for a narrowing of currently-existing exceptions and limitations (such as the existing limitations for parody, satire, criticism, or review). Australian creators already expect and rely on these exceptions and limitations. To the extent that existing exceptions might allow uses that the current U.S. interpretation of fair use would not (as we have suggested in a prior filing), we believe that such uses should still be permitted. The central principle underlying our argument is that “[r]espect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy.”<sup>3</sup> Adopting a fair use framework paired with explicit carve-outs for parody, satire, criticism, and review—and, indeed, even adding a carve-out for attributed non-commercial user-generated content that does not compete with exploitation of the market for the underlying work, as Canada has<sup>4</sup>—would be consistent with this philosophy and with providing robust incentives for commercial creators.

### **The Value of Remix Creation**

Historically, artists, composers, and authors have learned their arts by studying and copying preexisting works. The same is true for more recent arts; audio and video editors build and hone their skills by editing the works of others. This aligns with a 2017 study of Australian creators, which found that they saw themselves as “participating in a long and rich tradition of creative practice that draws on, refers to, adapts, remixes, samples, quotes and appropriates the creative and cultural works around them.”<sup>5</sup>

In addition, as studies from multiple disciplines have found and as described in detail in the OTW’s U.S. PTO/NTIA Comments,<sup>6</sup> remix plays a unique and positive role in society. The passion that brings fans together also provides emerging creators with supportive audiences who can help them grow. The noncommercial, make-it-yourself nature of fannish communities makes them easy to enter, even for people who lack economic resources. In addition, remixes provide

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<sup>2</sup> Comments of the Organization for Transformative Works, [https://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) (2013).

<sup>3</sup> Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 William and Mary L. Rev. 513, 539 (2009).

<sup>4</sup> *Copyright Act* 29.21.

<sup>5</sup> Pappalardo et al. at 36.

<sup>6</sup> Comments of the Organization for Transformative Works, [https://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) (2013).

particular opportunities for creators underrepresented in mass culture, who use remix to talk back to that culture, to identify what it leaves out and explain what they see, and to gain skills that will promote their advancement inside and outside their communities. These same underrepresented artists' activities are more likely to be disproportionately silenced by the time-consuming, burdensome, and potentially expensive “nightmare” of licensing and self-censorship described in the 2017 study,<sup>7</sup> while fair use frameworks enable them.

Australian fan creators have supplied the OTW with a plethora of personal accounts of the ways in which the ability to create and share transformative fanworks has enabled them to hone socially and professionally valuable skills; build creative communities; and engage in insightful and important political and personal expression. The following quotes, sent by Australian fanwork creators in response to an OTW “Call for Stories,”<sup>8</sup> demonstrate how important the ability to create and consume fanworks is to Australians:

“I think the art one can create and the skills one can learn through fanfiction are invaluable. I myself have reaped these benefits, both through consuming some of the best stories ever written and through developing my own writing skills by writing [fanfiction], but beyond that is the way habitually looking beyond art, learning to critically examine and reimagine the media I'm consuming has exponentially increased my enjoyment of the original work and indeed all the works I consume, and I think that's completely beautiful. The power of shaping and changing and expressing things in the way only fandom can is incredible; want to imagine YOU work at Jurassic World? Done. How would it affect Scout if Atticus Finch lost that trial? Who knows. What if Romeo had arrived just a little later? A good question, and while we're at it we'll put the cast of the Wire into the world of Firefly and see if something special happens. It might. Let's find out.”

“I have been a part of fandom for fifteen years and have honed my skills as a writer, artist and animator because of them - and have met a wonderful array of friends nationwide and worldwide. The pursuit of fan-created content, whether developing it myself or seeing it with others, is one of the most emotional and motivating things most teenagers and young adults encounter. To remove it or hinder it is to stunt generations of creative growth and suck the last parts of life and leisure out of a community/population that is being driven into depression and more/worse, due to circumstances of their personal, schooling and/or professional/work lives. Fan-creations SAVE PEOPLE - to allow self-expression and immense networking [around] other likeminded, supportive individuals.”

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<sup>7</sup> *Id.* at 20-21, 28.

<sup>8</sup> <http://www.transformativeworks.org/otw-legals-international-advocacy-and-you/>.

“[The ability to create and consume fanworks] has truly increased my quality of life. It has allowed me to express myself, read for pleasure, and be part of multiple communities that have brought me a lot of joy.”

“The communities in fandom with a pre-existing focus (ie. we enjoy a particular book, or movie and want to participate creatively with it) have made it easy for me to join a number of existing conversations and develop long standing relationships; as well as finding it easier to participate in local community groups, as I become invited to join them through people I’ve initially met online.”

“[Fandom] is a community built on love and sustained by love, by the hard work of fans who are determined to maintain a safe harbor for other fans to write about, critique and reinterpret existing media . . . having [the fanwork archive Archive of Our Own] as a place for me to express myself freely has helped immensely in the treatment of my mental illness. Please keep it going!”

“[Through involvement with fanworks,] I developed skills in relation to troubleshooting for my friends and larger communities where I participated, which has proven beneficial for starting my career in tech support. I was also motivated into learning web development skills starting with simple learning HTML and CSS to improve formatting; to learning about open source tools, how to install and set up, troubleshoot and modify website software . . . I’ve learned about aspects of image manipulation, animation, aspect ratios, saturation and layering to achieve technical effects; starting off from the simple motivation of wanted images to represent my mood / thought in particular situations.

“Despite being quite introverted, it’s become easier for me to speak in public as a direct result of online communication with other fandoms groups . . . Through the practice in “safe” environments and having pre-existing relationships which could help encourage and support me in larger environments; this has helped ease anxiety greatly and lead to being capable of speaking to a larger unknown audience. This is a skill I would not have believed I’d develop as a shy child.”

“Through the international aspect of online fandoms I’ve had great fun learning about cultures from a variety of places in the world and comparing my own Australian background with them. I’ve exchanged a number of travelling tips with pointing out some of the fun and interesting places to visit in Australia and learning in turn about other places overseas . . . Fandom has motivated me to learn a small amount of Japanese, and to improve my French reading skills.”

“I started writing [fanfiction] as it helps me deal with some issues I am dealing with from my childhood. You see I was diagnosed with clinical depression, severe anxiety and PTSD. I told my counsellor about my writing and she thinks it's good therapy for me to deal with things from the past . . . I also enjoy the contact I have with the people who read my fiction and it's good to know it also helps them with what happened to them as well. It nice to be able to help someone through my fiction as it has helped me. So I hope the Australian government sees how important this is.”

Furthermore, for these benefits to meet their fullest potential, it is crucial that remix creators be able to operate without needing to seek licenses or other permissions to make their work. This is true not only because licensing is often so expensive or burdensome as to deter underrepresented creators,<sup>9</sup> but also because, as various scholars have noted, “licensing breeds censorship.”<sup>10</sup> Commercial licensing options for user-generated content routinely retain the option to approve or disapprove of particular uses. Official fan communities want fans to “celebrat[e] the story the way it is,” not to explore ways in which it might be different. Nor could rights holders reasonably be expected to applaud uses of their works that transform characters and critique themes as remix often does. The most transformative and self-actualizing remix works—for example, those that fill gaps and flaws in a work’s representation, or challenge characters’ sexualities—are the same ones that rights holders would be least likely to permit if they were given the opportunity to approve or disapprove.<sup>11</sup> For these reasons, we advocate strongly against a fair use or fair dealing standard that hinges on whether a commercial license is available remix creators.

### **Benefits of a Flexible Fair Use Standard**

While the practice of building on existing works is ages-old, technological and cultural development now requires increased flexibility in the legal framework surrounding it. As technology provides tools to increasingly innovative user-creators, reactive laws cannot keep up, and a flexible legal framework will support creators of all kinds. The Copyright Modernization consultation paper itself demonstrates the challenges of adjusting fair dealing exceptions to the needs of creators and institutions: the “quotation” and “non-commercial private use” purposes identified in the consultation paper stem from the ALRC’s 2013 study, and even if they include (for example) quotation from audiovisual works for remix purposes, they cannot take into

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<sup>9</sup> See Andrew W. Torrance & Eric A. von Hippel, “Protecting the Right to Innovate: Our ‘Innovation Wetlands,’” MIT Sloan Research Paper no. 5115-13, 9 October 2013, <<http://ssrn.com/abstract=2339132>>/ (discussing the “major deterrent effect” that even relatively small innovation barriers can pose, especially for poorly-resourced individuals).

<sup>10</sup> Betsy Rosenblatt and Rebecca Tushnet, “Transformative Works: Young Women’s Voices on Fandom and Fair Use,” EGIRLS, ECITIZENS 401 (U. Ottawa Press, Jane Bailey & Valerie Steeves, eds.), 2015.

<sup>11</sup> *Id.*

account the full range of fans’ inventiveness in developing noncommercial transformative uses that existed before, or emerged after, the study was released. Notably absent from the discussion, for example, are fan practices of recreating or re-imagining fictional costumes (known as “cosplay”); or of using multiplayer video game environments as animation engines to create new works within games (known as “machinima”). Both cosplay and machinima involve the unlicensed use of copyrighted materials for transformative purposes without a license from the copyright owner, and like the uses described above, some of the most critically-valuable of these (for example, cosplay that experiments with characters’ races or genders, or machinima that explores the use of sex or violence in games) are also the most likely to be placed at risk by censorship-inviting schemes that rely on licensing or copyright-owner tolerance.<sup>12</sup> These are but two of countless examples.

Moreover, installing a flexible standard is preferable to continually revisiting a rigid one. In this respect, the U.S. experience is instructive. When enacting prohibitions on the circumvention of technological protection measures on copyrighted material, the U.S. Congress prohibited *all* circumvention, but authorized the U.S. Copyright Office to establish three-year exemptions to its anti-circumvention rules. The result is a burdensome, reactive, and resource-intensive process that consumes from nine to fifteen months of time every three years for proponents and opponents of exemptions, and for the staff of the Copyright Office. The process is frustrating for all involved, with constant revisions to processes and multiple rounds of comments and hearings—all in a futile attempt to keep up with changing technology and creative practices. In contrast, OTW research shows that a flexible fair use standard is well-suited to promoting transformative works and the fan cultures that support them.<sup>13</sup> The same is true of empirical research from 2017 focusing specifically on Australian creators including documentary filmmakers, authors, composers, musicians, and YouTube creators. The 2017 study found that despite Australia’s existing fair dealing framework, Australian creators were more comfortable

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<sup>12</sup> See, e.g., Games Workshop Limited Intellectual Property Policy, [https://www.games-workshop.com/en-US/Intellectual-Property-Policy?\\_requestid=1870389](https://www.games-workshop.com/en-US/Intellectual-Property-Policy?_requestid=1870389) (inviting users to “dress up as their favourite . . . characters at events” on the condition that they “avoid anything which may be prejudicial to the goodwill, reputation, image, or prestige of our IP”); Microsoft Game Content Usage Rules, <https://www.xbox.com/en-us/developers/rules> (providing that Microsoft can revoke permission to use game content “at any time and for any reason,” and that users cannot use game content to create an item that is “objectionable. Whether an Item is ‘objectionable is up to us”); Blizzard Video Policy, <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (requiring that any videos created using Blizzard games fit within a “T for Teen” rating and providing that Blizzard may terminate a user’s right to distribute or host a product without notice).

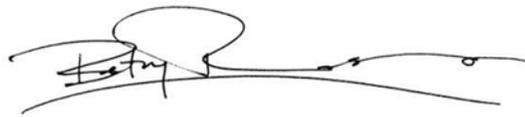
<sup>13</sup> Comments of the Organization for Transformative Works, [https://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) (2013).

with flexible standards than rigid rules, and their beliefs about appropriate use and attribution norms aligned more closely with fair use principles than existing fair dealing concepts.<sup>14</sup>

### Conclusion

The OTW applauds the Australian Government’s work to modernise copyright law, and encourages it to accept the recommendations of the ALRC and PC to adopt a flexible fair use standard incorporating ample room for noncommercial transformative creation.

Submitted July 2, 2018

A handwritten signature in black ink, appearing to read "Betsy Rosenblatt", with a large, stylized flourish above the name.

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<sup>14</sup> *Id.* at 16-18.