

Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy

Docket Number:

130927852-3852-01

This comment is submitted on behalf of Wattpad (www.wattpad.com), the world's largest online community of readers and writers. Wattpad is a website and mobile app which was created over seven years ago so writers could publish and share their stories with readers around the world.

Wattpad hosts "original" stories that are set in the world of an author's creation. Hundreds of Wattpad stories are read every second and tens of thousands of stories are added every day by millions of people from around the world. The platforms' users range from literary legends like Margaret Atwood to teenagers writing between classes at school. Wattpad democratizes storytelling by letting anyone, anywhere in the world, read and write stories for free from their phone, tablet or computer. Wattpad gives people around the world access and voice.

Along with original fiction, Wattpad also has organically grown to host millions of works of fanfiction inspired by pop culture; stories set in worlds created by others that tell of alternate realities of their favorite celebrities, missing scenes from their favorite films and novels and continuations of television series that were cancelled four, ten or thirty years ago.

Under U.S. Copyright law, fanfiction generally should and does fall into the category of transformative works. Rulings under the Copyright Act that transformative uses/works are noninfringing have been reiterated by courts numerous times since *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). Just this year, the Ninth Circuit ruled that the show *Jersey Boys* made a transformative and thus noninfringing use of a seven-second clip from *The Ed Sullivan Show*; the court held that the transformative usage was fair use. *Sofa Entertainment Inc. v. Dodger Productions Inc.*, 9th Cir., No. 10-56535 (9th Cir., Mar. 11, 2013).

But there are many individuals and organizations that do not believe in transformative works, even though they have been enshrined into federal law both statutorily and via the courts. We at Wattpad are concerned that changes to the Copyright Act will negatively impact the protections granted to transformative works and the standards that exist for determining whether a work is protected under fair use.

Such a step would be inherently detrimental to our business, but more than that, it would be a disaster to the millions and millions of creative teens, young adults and Americans who have developed and shared fantastic creative writing by remixing the written word via Wattpad and other fanfiction and fan-creativity themed communities.

Fan fiction is a form of commentary and criticism of the source text, sometimes by positing what could have happened, or what should have happened, or what might have really happened, or

how things would go if the story happened today, in Sherwood Forest, under the sea or in space. As Margaret Atwood wrote recently in *The New York Times* piece about modern technology and storytelling, telling a story based off of someone else's world is a fascinating way to tell a new story:

Rewrite Edgar Allan Poe's story "The Purloined Letter," using present-day communications technology. In the original, a "letter," made of "paper," written in "ink," and bearing a "seal," was disguised as an inferior letter and hidden in plain view. The letter needed to be invisible to searchers, but close at hand so it could be quickly produced when needed. Go to it. I'm sure there are a hundred brilliant solutions to the puzzle of "The Purloined E-Mail."

<http://www.nytimes.com/2013/11/03/books/review/writing-bytes.html>

At Wattpad we are witnessing the next generation of writers learn their craft. We have hundreds of firsthand examples of readers becoming writers through the supportive and creative global community we're building at Wattpad. Our platform helps develop literacy and fosters a love of both reading and writing through immersive, long form narrative fiction. Many aspiring on Wattpad actually take their first steps through the genre of fanfiction.

For example, when someone sets out learning to play an instrument, they start by practicing songs from their favorite singers or bands before composing their own music. For millions and millions of young people around the world fanfiction is how they practice and develop the skills necessary to start creating their own narrative storyworlds.

Millions of other Wattpadders are writing simply to express themselves and for the pure love for their fandoms. On Wattpad this is experience magnified through the social feedback of connecting with other fans through the stories they expanding on. The diversity of this type of writing is incredibly expensive and we can literally witness social storytelling at a global scale. On Wattpad fanfic is enabling creativity in storytelling and is an important, additive piece of the fan art universe.

Fiction from fans comes in so many formats. Books, TV shows, music, movies, games, apps, YouTube celebrities, toys and even musicals all serve as the inspiration for the explosion of creative writing that is both entertaining and connecting fans from around the world. This content is social, collaborative and viral, all fueled by the power of remix culture.

But all these situations, experienced by Wattpad's users, are fraught with the worry that someday, someone could take it away.

If the Copyright Act is changed to limit or recharacterize Fair Use and transformative works in a more restrictive manner, it will destroy fan communities. However, if the Copyright Act changes to better codify protections for those who create transformative works (for commercial and noncommercial purposes) and for platforms like Wattpad that host those works, the United States stands to be at the forefront of protecting creative works and encouraging the creation of

new, inventive, dynamic and fascinating stories in every medium.

Part of that expansion could be a simple legislative clarification that criminal penalties cannot apply if the work in question is arguably transformative and does not take all or substantially all of the content of another work (even if the second work is entirely made of works done by third parties, as that is the cornerstone of audio and video-based remix culture). At present, if a court decides that a work that was created to be transformative actually isn't, even if the artist or writer intended it to be, civil penalties and attorney's fees can bankrupt the artist or writer, or the website hosting their work. Even going through the process of litigation can be so expensive that someone might instead opt to pay a large settlement and delete or destroy their creative works, even if they were actually completely noninfringing.

More than that, we've even encountered people reluctant to share their stories or images because they are afraid of being accused of criminal infringement, when all they're doing is remixing a story or song or film and creating something entirely unique. We live in a world where it is relatively easy to share a creative or inventive work where the author was inspired by another's story, and pass that new tale freely to friends and the general public, but where writers young and old worry that their story will be treated the same as an upload of an entire film that's still in movie theaters, the steps of creating and sharing a work are chilled.

The entities behind this Green Paper have the ability and opportunity to make it clear to writers, artists, editors, videographers, librarians, teachers, parents, documentarians, educational institutions, site hosts and businesses large and small that transformative works are not piracy. They are not - and should not be - treated as such copyright infringement, and they are an enlivening, fascinating, educational and ever-expanding creative part of our society. "Fair use is a lawful use of copyright." (*Lenz v. Universal*) The Copyright Act should not be modified to say otherwise.

Even before the publication of the worldwide bestseller *50 Shades of Grey*, which was well known to be derived from a Twilight-inspired fanfic series that E.L. James posted online, mainstream media as well as publishing industry, tech and social media coverage, have reported on fan fiction, as a genre of storytelling. Novelists like Meg Cabot candidly discuss writing fanfic for films like *Star Wars* in their younger days (before there was an internet to post on) and TV stars like Darren Criss of *Glee* become famous for writing and/or performing in fanworks based on the *Harry Potter* series.

As novelist and *TIME Magazine* writer Lev Grossman wrote, books, films and tv shows are our shared culture and narrative. A few years ago, he asked: Is art about making up new things or about transforming the raw material that's out there? Fanfiction writers and those who have transmogrified the fanfic they have written into popular, inventive or shared "original" stories or series often and regularly do both.

As the Task Force looks to the "legal framework for the creation of remixes" we ask the Task

Force to look beyond remixes as mashups of visual and audio content. A significant portion of Wattpad's focus and content relates to text (with and without art) as transformative works. While much of the focus by the Task Force and mainstream media have been on "remix" culture that pertains to audio and video, it is vital that going forward, definitions of transformative works, remixed content and works created pursuant to Fair Use include, incorporate, cover and pertain to works that are primarily text (or audio readings of text) or visual/graphic arts.

Recently, Orlando Jones, who was a writer and actor on *MADtv* and now stars on the new hit *Sleepy Hollow*, said this:

[The] Digital [World] lets us have this conversation and make it as awesome as we want. Why can't I share fan-fiction? Those fans are artists too, I'm not more or less of an artist than the people who are writing that, or drawing fan art. I've believed that for a while...

Remixers, fanfiction writers, fanartists, vidders, vloggers and webseries creators are all artists; Mr. Jones is not the only one who recognizes it.

Accordingly, we ask that legislative process look to the impact of legislation on text-based mashups, remixes and transformative works including but not limited to fanfiction and fanart that includes images and text, as well as audio recordings of fanfiction. It would be unjust to leave writers, and those who host their works, out of the policy development process, and it would be potentially damaging to such online and mobile platforms if written works were not given the same consideration and discussion given to other types of remixes and transformative works.

Since the Digital Millennium Copyright Act was codified nearly 20 years ago, the Internet has grown, developed and changed, and it continues to do so daily. While cases have, in the interim, stated explicitly that sites must look to whether a work that someone claims is infringing is actually noninfringing because of the doctrine of Fair Use, this aspect of copyright law should continue to adapt to changes in technology -- while clearly establishing transformative uses as fair use and non-infringing.

So many copyright holders believe that they own all of the rights regarding any use of their work and can prevent it from being used by third parties who wish to discuss it, comment on it, criticize it or otherwise transform it. The law says they cannot hold such a monopoly on discussion of their work, and because of that, the factors used by courts in looking to whether a second work makes "fair use" of a copyrighted work are longstanding and solid.

However, the current "Safe Harbor" provision under the Digital Millennium Copyright Act does not work comprehensively on the Internet that currently exists, and it is only reasonable to project that the elements of the DMCA will become more and more differentiated from the way that apps, websites, networks, blogs, forums, comment sections, discussions and interactions actually work. Formalizing the Safe Harbor for platforms that reasonably believe fair use vests in a transformative work that is not entirely a copy of substantially all of another work would go a long way to protecting platforms of all types that host transformative works.

A site, blogger, curator, writer, podcaster or vlogger should know that they are free to curate content and quote material visually, textually, auditorilly or in another form without leaving the shelter of the DMCA Safe Harbor. Were the Safe Harbor to protect platforms large and small that engage in the creation of curated lists, or where they utilize bots, staffers, users or volunteers to create compendiums of site-generated and site-promoted works, said site should be allowed to remain within the DMCA Safe Harbor provisions for for site-hosted content in general, and even regarding the hosted works included in said curated lists/compendiums. When a platform exists to host, promote or allow the sharing of transformative works it should never be treated the same as a site that exists to host unauthorized copies of copyright-protected films, books, tv shows or music.

As it stands now, site operators are protected by DMCA Safe Harbor provisions when it comes to content uploaded or submitted by users. However, Wattpad would like to feel that it can rely on the DMCA even for user-submitted content that it highlights on the site. In other words, if a user uploads fanfiction to Wattpad, and one of Wattpad's staffers reads the story, likes it and highlights it on a curated list of "recommended stories", Wattpad should not worry that such an action would make it impossible for it to use the DMCA Safe Harbor if someone claims that said story is infringing. Curation is a service that sites like Wattpad provide to users of its site, and other sites that include and embed Wattpad's recommendations, because it allows Wattpad to let the public know what stories are particularly good, interesting, well-written, funny, etc. Curation should not void the protections a site operator can obtain via the DMCA, and it certainly should not strip the DMCA protections regarding all of the content on a website.

Clarification by the Copyright Office would be beneficial and given the changes to caselaw regarding transformative works since the DMCA was codified into law about fifteen years ago, as well as the changes in the discovery, archiving and distribution and marketing of digital files, this issue could be addressed in legislation to expand the DMCA Safe Harbor as well.

If the DMCA is to be revisited, we ask that the Task Force and Legislature recognize that a site that hosts a Fair Use-protected fanwork *is not* the same as a site that hosts a rip of a Blu-Ray film and all its extras. A transformative work is not an exact copy of a novel or magazine. A remix is not an MP3 of a hit song.

Fair use is a lawful use of a copyright, and this fact needs to remain an element of U.S. copyright law.

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