

PLEASE IDENTIFY YOURSELF:

Name:

Organization for Transformative Works.....

.....

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

- If you are a Registered organisation, please indicate your Register ID number below. Your contribution will then be considered as representing the views of your organisation.

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- If your organisation is not registered, you have the opportunity to [register now](#). Responses from organisations not registered will be published separately.

TYPE OF RESPONDENT (Please underline the appropriate):

End user/consumer (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) **OR Representative of end users/consumers**

→ for the purposes of this questionnaire normally referred to in questions as "end users/consumers"

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, noncommercial creative works based on existing media; outside media fandom, the term "remix" is often used. As of January 1, 2014, nearly 18 % of the OTW's financial supporters come from Member States: our donors come from Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

Like other large online sites, both our authors and our audiences are global. Our archive of transformative, noncommercial works hosts roughly one million works of authorship, a number growing by hundreds of thousands per year. As of late 2013, roughly 26% of unique visits—approximately 12.8 million visits per week—come from individuals in Member States. On average, over 2600 people in Member States are using the archive at any given minute, around 20% of them from the United Kingdom, and the rest distributed throughout the Member States in smaller percentages. As a result, the OTW has a substantial interest in uniform exceptions and limitations that protect the ability of individuals to create noncommercial, transformative works.

Our members and users are usually spoken of as "consumers," but they are also creators. Because of the heterogenous interests we represent, we have checked multiple boxes for "type of respondent."

Institutional user (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**

for the purposes of this questionnaire normally referred to in questions as "institutional users"

Author/Performer OR Representative of authors/performers

The people who use our services create new works, drawing as all authors do from existing materials, and they also are audiences for existing commercial works and for other noncommercial transformative works.

Publisher/Producer/Broadcaster **OR** **Representative** **of publishers/producers/broadcasters**

the two above categories are, for the purposes of this questionnaire, normally referred to in questions as "**right holders**"

X Intermediary/Distributor/Other service provider (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry)
OR Representative of intermediaries/distributors/other service providers

for the purposes of this questionnaire normally referred to in questions as "**service providers**"

One of the OTW's projects is a free, nonprofit website hosting transformative noncommercial works, the Archive of Our Own. The Archive has over 200,000 registered users, but registration is not required to participate on the site, nor is membership in the OTW. The Archive receives over 49.5 million unique visits per week.

I. Limitations and exceptions in the Single Market

13. *Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?*

YES – Please explain by referring to specific cases

As presently constituted, the variety of national laws makes it extremely difficult to aid our users or other transformative authors seeking guidance about what they may or may not do, even when their works are plainly both creative and noncommercial. The lack of uniformity with respect to ‘user-generated content’/remix in particular hinders the development of the internal market, especially online.¹

Extensive research and experience demonstrates that the creation of noncommercial works based on existing works has profound benefits for individuals and for creative communities. Artists have always learned by both copying and altering existing art, and this practice continues in the modern world. Empirically, creating noncommercial transformative works motivates people—especially young people—to learn new languages; improve their skills in their native languages; learn artistic techniques; learn video editing; learn other 21st-century skills; and develop a respect both for intellectual property law and its legitimate limits.² The techniques of remix are valuable educational tools both inside and outside of formal educational settings, implicating individuals’ rights to education. To these skills must be added the valuable critical content of the transformative works themselves, which offer new perspectives and meanings. Remix is particularly useful and attractive to members of subordinated groups, who regularly use it to challenge dominant narratives.³

By its very independence from the incentives of formal markets, noncommerciality signals the presence of expression tied to a creator’s personhood, which deserves special consideration and sensitivity to free expression concerns (and also raises consumer protection issues, as individuals react to works they have been invited to experience). Currently, consumers are often unable to make reasonable uses of parts of existing works to further their own self-expressive purposes with any legal certainty. However, these creative uses are in practice widespread, because it is so natural and intuitive that noncommercial, creative uses should be legitimate; the result is that consumers are vulnerable to enforcement efforts that seem to come at random or, worse, are exercised when a consumer is making a legitimate criticism of a copyrighted work. The rights of consumers to express themselves and copyright owners are out of balance, and internal harmonization could improve the balance.

14. *Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?*

YES – Please explain by referring to specific cases

Given the necessarily international scope of online uses—where noncommercial transformative works are most prevalent, because the technology readily supports making works freely available—there is a great need for harmonization of exceptions and limitations.

¹ The OTW’s own crossborder membership and activities are described above under “Type of Respondent.”

² See generally Comments of the Organization for Transformative Works <http://transformativeworks.org/sites/default/files/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>, at 38-61.

³ Ibid. at 17-37.

15. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

There is a great need for an exemption that would protect transformative works, particularly noncommercial, transformative works. Either a flexible exemption of broader scope that covered transformative uses or a specific exemption for noncommercial, transformative works could provide the necessary certainty for internet-based communities of authors and audiences. Communities of transformative creators, such as *Harry Potter* fans who make “wizard rock” or engage in political activism, routinely cross international borders and need more uniform protections.⁴

Making this type of exception mandatory furthers the interests of both users and future creators, and at the same time helps to foster expressions of culture within the EU. This scenario, in turn, complies with the integration clauses of the Treaty on the Functioning of the European Union (TFEU), particularly arts. 12, 167(4) and 169(2), which mandate the EU to take into account cultural aspects and consumer protection in EU legislation.

16. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

YES – Please explain why

In the internet age, it has become plain that innovation—both technological and artistic—comes from multiple sources, often unanticipated. A closed list of narrow limitations and exceptions is inherently unable to accommodate reasonable but unanticipated uses. (This is particularly true with respect to noncommercial activities, whose participants generally lack legal advice and can be inadvertently suppressed by measures aimed at commercial activities.⁵)

It is for this reason that many nations around the world are considering measures to improve flexibility, including most recently the Australian Law Reform Commission’s recommendation that Australia adopt a flexible fair use exemption, which it determined was consistent with national interests and international obligations.⁶ As the ALRC explained, flexibility has numerous benefits, and its alleged uncertainties should not inhibit its adoption: “The standard recommended by the ALRC is not novel or untested. Fair use builds on Australia’s fair dealing exceptions, it has been applied in US courts for decades, and it is built on common law copyright principles that date back to the eighteenth century. If fair use is uncertain, this does not seem to have greatly inhibited the creation of films, music, books and other material in the world’s largest exporter of cultural goods, the United States.”⁷

By contrast, currently, copyright owners’ rights in the EU are, in effect, fully harmonized at a high level, while in the field of exceptions the 2001 INFOSOC Directive stopped well short of harmonization, on the one hand, and imposed significant limits on the ability of member states to adopt open, flexible exceptions on the other. The result is that rights are out of balance with exceptions in the EU – and this imbalance threatens the future of cultural production in the EU.

⁴ Henry Jenkins, *From Culture Jamming to Cultural Acupuncture 6* (forthcoming 2014) (explaining how Harry Potter fans created new works and entire new genres, including new political campaigns); Henry Jenkins, ‘Cultural Acupuncture’: Fan Activism and the Harry Potter Alliance, *Transformative Works and Cultures*, no. 10, doi:10.3983/twc.2012.0305 (2012).

⁵ See Andrew W. Torrance & Eric A. von Hippel, *Protecting the Right to Innovate: Our ‘Innovation Wetlands’* (9 October 2013), available at SSRN: <http://ssrn.com/abstract=2339132> or <http://dx.doi.org/10.2139/ssrn.2339132>.

⁶ Copyright and the Digital Economy (ALRC Report 122), 12 February 2014, available at http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf.

⁷ *Id.* at 22.

17. *If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.*

As noted above, the primary advantage of a flexible exception is that it would be able to accommodate unanticipated uses that were nonetheless similar in spirit and effect to existing excepted uses. This would provide built-in protection and help establish a functioning internal market for copyright goods and services (provided that such exception is made mandatory, as suggested above). This flexibility can be obtained while also honoring existing international commitments.⁸ Although an exception limited to noncommercial transformative uses would not have the same positive economic significance, it would nevertheless make a significant indirect contribution to the development of the EU creative sector.

18. *Does the territoriality of limitations and exceptions, in your experience, constitute a problem?*

YES – Please explain why and specify which exceptions you are referring to

Some noncommercial, transformative uses may qualify for particular national limitations protecting commentary, criticism, and other forms of response to existing works, including quotation rights. However, the lack of uniformity means that creators online have minimal certainty, because their works are available everywhere. For noncommercial works, online distribution is usually the only option, but it exposes creators to multiple, potentially conflicting regimes.

19. *In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of “fair compensation” be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)*

For noncommercial transformative works, from which the creator by definition neither expects nor receives profit, there should be no required payment; the OTW has no opinion on appropriate payment schemes in other instances.

⁸ See Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law* (18 November 2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356619.

F. User-generated content

40. (a) [In particular if you are an end user/consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?

YES: As explained above, creators in Member States are vulnerable to suppression in many ways. Communities, whether formal or informal, cannot take advantage of the benefits of remix cultures without threats of suppression. For example, the OTW has recently dealt with several copyright owners who claimed the right to suppress noncommercial, transformative works of fan fiction. In the US, we have been able to protect noncommercial creators because of the broad scope of fair use law.

Licensing does not and will not offer a plausible solution, because the organic, noncommercial communities that create transformative remixes cannot be moved into the commercial sector without being fundamentally altered and diminished.⁹ The market changes what it swallows. The evidence indicates that noncommercial production in a digital economy is not just detached from monetary exchange. It can be subject to crowding out—noncommercial motives can be eliminated when money is on offer, leading to less overall creativity and less social benefit.¹⁰

People who can pay to participate in licensing schemes are less likely to be young, relatively poor, female, or otherwise part of culturally devalued groups, since cultural and economic power are often related. The experience of American hip-hop shows a decline of experimental and political art as the industry converted to an always-license model.¹¹ Copyright's incentivizing virtues come with costs, and so we should protect diverse sources of support for creativity—including voluntary expression, distinct from the sphere of market exchange.

Even aside from the special role of noncommerciality in shaping communities and the content of transformative works, there are two key reasons that voluntary licensing schemes cannot

⁹ See OTW Comments, *supra*, at 62-75; Henry Jenkins, Afterword: Communities of Readers, Clusters of Practices, 231, 239, in *DIY Media: Creating, Sharing and Learning with New Technologies* (Colin Lankshear & Michele Knobel eds., 2010) (“Many web 2.0 sites provide far less scaffolding and mentorship than offered by more grassroots forms of participatory culture. Despite a rhetoric of collaboration and community, they often still conceive of their users as autonomous individuals whose primary relationship is to the company that provides them services and not to each other.”).

¹⁰ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 94-95 (2006) (“Across many different settings, researchers have found substantial evidence that, under some circumstances, adding money for an activity previously undertaken without price compensation reduces, rather than increases, the level of activity.”); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 *Yale L.J.* 273, 323-24 (2004) (“A simple statement of this model is that individuals have intrinsic and extrinsic motivations. . . . Extrinsic motivations are said to “crowd out” intrinsic motivations because they (a) impair self-determination—that is, a person feels pressured by an external force, and therefore feels overjustified in maintaining her intrinsic motivation rather than complying with the will of the source of the extrinsic reward; or (b) impair self-esteem—they cause an individual to feel that his internal motivation is rejected, not valued, leading him to reduce his self-esteem and thus to reduce effort.”); Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 *Am. Econ. Rev.* 746, 746 (1997)

¹¹ Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip-Hop?*, *Atlantic* (Sept. 18, 2013), <http://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/>.

substitute for protection for noncommercial, transformative works. First, licenses will never be comprehensive, leaving many remix creators out in the cold, especially noncommercial users.¹² It is notable, for example, that even the extremely vague and general promises regarding ‘user-generated content’ in the ‘Licences for Europe – ten pledges to bring more content online’¹³ covered only a tiny fraction of the creative industries, whereas remix cultures regularly bring in text, audio, video, and visual arts. Second, licenses will always retain censorship rights, thus always leaving creators of transformative noncommercial works at risk of suppression—and the works that will be suppressed are precisely those that are most expressive, critical, and necessary.¹⁴ The experience of Jonathan McIntosh, who created a remix that criticized the *Twilight* series for its regressive gender stereotypes, shows that copyright owners will attempt to use licenses to prevent criticism—and his case is only unusual because he managed to get publicity and legal representation to establish that he was protected by the U.S. fair use doctrine.¹⁵

Finally, licensing models are anti-competitive. Individual users have neither the knowledge nor the ability to negotiate licenses. Instead, licensing schemes presuppose that some larger entity will negotiate with rightsholders. YouTube’s Content ID, often identified as a model for licensing, is a system put in place by a currently dominant market participant, as is Amazon’s Kindle Worlds (which allows some highly limited, commercial use of several existing media properties). But we do not know what markets will look like in ten years. Neither the Kindle nor YouTube have yet been around for a decade. To conclude that current intermediaries have solved the problem of licensing poses significant risks on both sides—on the one hand, the licensing model risks entrenching YouTube’s and Amazon’s near-monopolies on the market because other competitors don’t have access to the same licensed content;¹⁶ on the other, if the market changes and either entity goes the way of AOL’s walled garden, Blackberry, MySpace, Alta Vista, and many other formerly dominant digital entities, their licensing “solutions” will disappear with them.

41.

(b) [In particular if you are a service provider:] Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?

YES(b)– Please explain

The Archive of Our Own provides creators with a textual (tag-based) architecture to identify the works on which their fanworks are based. When uploading a new work, creators identify the relevant fandom or fandoms, to ensure proper attribution.

42. *(b) [In particular if you are a service provider:] Do you provide remuneration schemes for users publishing/disseminating the works they have created (on the basis of pre-existing works) through your service?*

¹² See OTW Comments, *supra*, at 67-69 (discussing unavailability of licenses for many forms of content, such as art and photography, and for many specific works even within genres in which licensing schemes allegedly exist).

¹³ http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

¹⁴ *Ibid.* at 69-71.

¹⁵ *Ibid.* at 72-73.

¹⁶ Cf. Jeff Macke, E-Book Ruling Cements Amazon’s Virtual Monopoly, July 11, 2013, <http://finance.yahoo.com/blogs/breakout/e-book-ruling-cements-amazon-virtual-monopoly-150844210.html> (noting Amazon’s increasing monopoly over ebook content).

NO(b)– Please explain

As a purely noncommercial, nonprofit service, the Archive of Our Own does not allow commercial activity, including remuneration schemes, because of the detrimental effects commercialization would have on fan activities. The OTW notes that ‘adequate’ remuneration is a relative term, taking into account competing rights and social aims; this constraint is particularly important when transformative uses are noncommercial and thus not motivated by any attempt to seek profit but rather by self-expressive aims.

43. If there are problems, how would they best be solved?

As noted above, protection for noncommercial transformative works would avoid the difficulties posed by inevitably futile attempts at pervasive licensing, and would allow commercial industries to focus on wholesale copying and unauthorized, illegitimate commercial uses that compete for revenue.

44. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

As noted above, the OTW supports legal protection for transformative works, particularly noncommercial transformative works. A flexible exception could provide the necessary protection. In the alternative, a clearly and relatively categorical noncommercial transformative works exception could also address the issues faced by noncommercial artists.¹⁷

¹⁷ See Graham Reynolds, Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression, in Michael Geist, ed, From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda 395 (2010) (discussing the new Canadian exception allowing noncommercial transformative works).