



Written Comments of Rebecca Katz, Organization for Transformative Works
In Re: Review of the Copyright Act

Introduction

I am submitting the following comments on behalf of the Organization for Transformative Works (“OTW”), a U.S. based non-profit with international membership. I am a Canadian citizen and a member of the OTW's Legal Committee. The OTW is a nonprofit organization established in 2007 that protects and defends 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 information 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 (“AO3”), has over 1.5 million registered users and receives an average of 26 million page views per day; in addition to having many Canadian users, the OTW also has several hundred Canadian members/donors, who have significant interests in preserving a balanced copyright regime in Canada. In keeping with the OTW’s mission, I will focus on intellectual property issues that touch upon fair dealing and remix culture.

Balanced copyright, fair dealing, and new copyright exceptions

I would like to add my voice, and that of the OTW, to other Canadian experts who have praised the growing recognition of balance as an objective in intellectual property law, and to urge Parliament to maintain this balance in all future copyright reforms. Balanced copyright law that facilitates remix and other forms of user-generated content (“UGC”) is vital to the digital and creative economy,¹ and can be instrumental in exercising Charter rights, notably freedom of expression.²

¹ See, for example, Pamela J. McKenzie et al, “User-generated online content 1: Overview, current state and context” (2012) 17:6 First Monday, online: < <http://firstmonday.org/ojs/index.php/fm/issue/view/366>>; see also Michael B. McNally et al, “User-generated online content 2: Policy implications” (2012) 17:6 First Monday, online: < <http://firstmonday.org/ojs/index.php/fm/issue/view/366>>. The relevance of user-generated content platforms and fair use to the US economy has also been the subject of several studies: see, for example, Computer and Communications Industry Association (CCIA), *Fair Use in the U.S. Economy* (Washington, D.C.: CCIA, 2017), online: <<https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>>; see also Re:Create

The OTW's Canadian creators have supplied the OTW with a plethora of personal accounts of the ways in which the fair dealing categories for parody and satire and the exception for non-commercial user-generated content in s. 29.21 of the Copyright Act have enabled them to hone socially valuable skills of critique and commentary; build creative communities, especially among underrepresented voices; and engage in insightful and important political and personal expression. The following quotes, sent by Canadian fanwork creators in response to an OTW "Call for Stories"³, demonstrate how important fanworks are to Canadians:

"The feelings of community and the consumption of fanworks have helped me through the hardest parts of my life. I am sixteen years old and live in Grand Forks, BC, Canada, which is currently facing a disastrous flood. This week alone, AO3 has been a haven, to help calm me from the distress my town is facing [...]"

"Transformative fanworks have truly transformed my life. [...] Fanfiction helped me discover that I identified as LGBT and I found comfort in knowing others, such as fellow content creators, felt the same- and that the badass characters I loved could be LGBT and still have amazing story arcs!"

"I am a Canadian creator and consumer of fanworks. I've written lots of mainstream fiction, but I never felt I had found my true home until I started writing fanfiction. I believe fanworks have a literary precedent that predates copyright. William Shakespeare and Christopher Marlowe created variations of existing stories for new audiences. Unlike Elizabethan playwrights, fanwork authors do what they do gratis, motivated by love for the original work. That love benefits the creators of the copyrighted works. Fanworks keep the fanbase engaged with the original material, make them feel included if they feel underrepresented by commercial fiction. Fanworks generate additional excitement around new copyrighted works, and whatever positive feelings the reader has for fanworks they associate with the original material."

"Without the fanfiction community, my writing would have stayed on my word processor, unread and withering. I'm from a rural part of Canada, one without any sort of creative writing class or outlet. Writing for the fanfiction community has given me that which I have wanted since I was a small child – a creative voice."

"Fanworks [...] have given me ways to explore the kind of person I already am, the kind of person I want to grow into, both by telling stories I'm only just (and barely just) now starting to see reflected in the mainstream media. It has also built up my skill sets as an artist and a cultural producer. Directly because of what I've learned as a fan creator and organizer (mod) in fandom, I recently did a performance at Theatre Passe-Muraille, a popular mid-sized theatre in Toronto.

Fandom has also made art more accessible to me as a disabled person. I'm frequently house-bound and fandom is an invaluable creative space and support community to me even when I can't leave home. [...]"

"Creating fanfiction has taught me a number of important skills. As a teenager, it taught me how to write, which eventually prompted me to go on to do both an MA and a PhD in English Literature.

Coalition, *Unlocking the Gates: America's New Creative Economy* (Re:Create Coalition, 2018), online: <http://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-Creative-Economy-Study-Report.pdf>.

² Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" ("Towards a Right") in Michael Geist, ed, *From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010).

³ Organization for Transformative Works, 'Are you Canadian? OTW Legal wants your stories', (2018), online: https://archiveofourown.org/admin_posts/10512.

Collaborative writing projects have taught me how to work with others, something that has stood me in good stead in both my academic and professional lives [...]"

These are but a few among dozens of powerful stories that we received describing how creating fanworks and belonging to fan communities literally saves lives, builds skills, and builds markets for the underlying works on which fans base their creations. One OTW member described receiving a commercial licensing deal for some video game merchandise, which the member initially made and sent to the game studio for free. Balanced copyright thus produces works of value not only to their creators and to society at large, but also to other copyright holders.

As the personal statements above make clear, Canadian creators have used balanced copyright in ways that are demonstrably beneficial to society. Remix empowers new creators and allows them to develop skills and build creative communities.⁴ It offers a particularly valuable tool for underrepresented speakers to provide political and cultural insights, and enables speakers to engage in compelling political and personal expression.⁵ The OTW has documented multiple ways in which participating in communities that create transformative, noncommercial works has enriched, enlightened, and even saved the lives of people who found their voices in responding to others.⁶ At a minimum, Canada's balanced copyright regime, including fair dealing categories for parody and satire and the non-commercial user-generated content provision, should be maintained.

Additionally, Parliament should consider clarifying certain aspects of s. 29.21. The provision states that "the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes".⁷ As other commentators have noted⁸, much user-generated content is disseminated on sites, such as YouTube or blogging platforms, which carry some monetization potential even if most UGC creators do not derive significant (or any) revenue from their creations. Commercial purposes do not drive the creation of such works, and thus providing proper incentives and protection for them requires treating them as noncommercial, distinct from the platform on which they reside. Content distributed on such sites can further important public debates and engage Charter freedom of

⁴ Reynolds, "Towards a Right"; see also Graham Reynolds, "The Impact of the Canadian Copyright Act on the Voices of Marginalized Groups" ("Impact") (2010) 48 *Alta L Rev* 35.

⁵ *Ibid.*

⁶ NAT'L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, COMMENTS OF ORGANIZATION FOR TRANSFORMATIVE WORKS ("OTW") 72–73 (Nov. 13, 2013), available at http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf

⁷ Copyright Act, RSC 1985, c C-42, s. 29.21(1)(a).

⁸ See e.g. Sam Trosow, "Copyright as a Barrier to Creativity: The Case of User-Generated Content" in B. Courtney Doagoo et al, eds, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law, 2014).

expression concerns.⁹ Restricting s. 29.21 to content published on platforms with no monetization capabilities would unduly limit creators' ability to distribute their content to audiences on mainstream sites. Further, such a restrictive interpretation is contrary to Parliament's repeated references to the provision as the "YouTube exception" in 2012.¹⁰ The provision as worded also raises questions about the legality of UGC which begins its existence in a purely non-commercial context, but may later 'go viral', attracting significant views and, potentially, revenue.¹¹ It seems strange that UGC in such a situation may initially qualify for the exception, but later become unable to do so because of its ultimate reception. These questions should be clarified in a manner that reflects the large and liberal interpretation the Supreme Court requires for user rights.¹²

Furthermore, Parliament should consider eventual reforms that would make Canada's fair dealing regime more flexible and more comparable to US fair use. The availability of US fair use to users meeting certain criteria regardless of the category or purpose of the use may offer US creators and innovators an advantage over their Canadian counterparts. Canada's fair dealing regime allows fair dealing falling within a statutorily limited number of purposes, i.e., research, private study, education, parody or satire, criticism or review, and news reporting. However, innovation—both technological and artistic—may come from multiple sources, which can often be unanticipated. A closed list of purposes may be inadequate to accommodate dealings that are fair, but unanticipated at this time, based on current technology and practice. The American notion of transformative use, which receives favourable treatment in a fair use analysis because such use adds new meaning, message, or purpose to the original work and thereby fosters discourse while being unlikely to substitute for the underlying work, is an example of the type of open-ended flexibility that could further benefit Canadian law. Canada's user-generated content exception represents some progress in this direction, but the provision is narrowly drawn and may be subject to restrictive interpretations. Ultimately, economic and cultural progress may benefit from greater flexibility in this regard.

Chilling effects and the abuse of IP rights

In addition, the OTW appreciates the Government's recent recognition in its IP strategy that abuses of intellectual property law can harm the public and its pledge to counter IP abuses, such as making it explicit that settlement demands

⁹ See e.g. *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395.

¹⁰ See, for example, sponsor Christian Paradis' comments when moving that Bill C-11 be read a second time, House of Commons Debates, 41st Parl, 1st Sess, No 31 (18 October 2011) at 1030 (Hon Christian Paradis); see also House of Commons Debates, 41st Parl, 1st Sess, No 51 (22 November 2011) at 1714 (Elizabeth May).

¹¹ Trosow, *supra* note 6.

¹² *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

do not comply with the Notice and Notice regime¹³. The OTW wishes to highlight that similar abuses occur in other contexts as well. For example, rights holders may overstate the scope of their rights when they demand that non-infringing uses of their works that are likely to be fair dealing be stopped. These abuses chill free, non-infringing expression and hinder the development of vibrant digital and cultural markets. The OTW applauds Canada's recent recognition of this challenge, and urges Parliament to build similar measures into all aspects of copyright law.

Anti-circumvention measures and fair dealing

Finally, Parliament should seriously consider revisiting its anti-circumvention or digital lock provisions. Canada's Copyright Act prohibits the circumvention of technological protection measures ("TPMs"), except in limited circumstances. However, no exception exists for circumventing a TPM in order to exercise important user rights, including rights under fair dealing or under section 29.21. The lack of a fair dealing exception may disadvantage users wishing to take advantage of their fair dealing rights in digital, as opposed to analog, media. This oversight may also endanger the important balance between owners' and users' rights. Furthermore, because US law has actually been expanding the circumstances under which a user may circumvent a TPM, including to create remix videos drawing on clips from DVDs, Blu-Rays, and digital sources,¹⁴ Canadian content creators and innovators may be at a disadvantage compared to their US counterparts. The Government should consider addressing this disparity and developing flexible anti-circumvention measures, including for fair dealing and s. 29.21.

Summary and conclusions

In conclusion, the OTW regards Canada's commitment to balanced copyright and its recent fair dealing expansions as progress toward meeting the needs of Canadian content creators and innovators. At a minimum, Parliament

¹³ Government of Canada, *Intellectual Property Strategy* (Ottawa: Innovation, Science and Economic Development Canada, 2018), online: <<http://www.ic.gc.ca/eic/site/108.nsf/eng/home#tab3-content>>.

¹⁴ See 37 CFR Part 201 [Docket No. 2014-07], Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. Ordinary citizens can now intervene in important cultural and political debates by using remix video: see, e.g., Mary Beth Quirk, "Fairly Used: Why Schools Need To Teach Kids The Whole Truth About Copyright", *Consumerist* (Feb. 26, 2016), online: <<https://consumerist.com/2016/02/26/fairly-used-why-schools-need-to-teach-kids-the-whole-truth-about-copyright>> (discussing media education programs that use video to teach students to analyze and critique media). For example, artist Dumbfoundead edits himself into iconic movie scenes to highlight the absence of Asian male protagonists in Hollywood films: see Dumbfoundead, *SAFE* (YouTube, May 26, 2016), online: <<https://www.youtube.com/watch?v=mmvqb9Uzu8k>>. On a similar theme but with a different technique, Dylan Marron creates "Every Single Word Spoken By a Person of Color" in various classic and current Hollywood films, cutting 120 minutes down often to less than a minute, creating powerful testimony about the invisibility and, especially, the voicelessness of people of color in popular film. Dylan Marron, online: <<https://www.youtube.com/user/dylanmarron/videos>>. Likewise, Vidder Eruthros recently created *Field Work*, a remix of the Indiana Jones films that highlights the cultural imperialism and destructiveness of the titular hero: see Eruthros, *Field Work*, online: <<https://eruthros.dreamwidth.org/342017.html>>.

should maintain its balanced copyright regime, including fair dealing categories of parody and satire and the non-commercial user-generated content provision. The OTW also hopes that Parliament will consider clarifying that the potential for trivial commercial implications does not affect the availability of s. 29.21. It may also be helpful if, in eventual further copyright reforms, Parliament were to explore a fair dealing regime that is more flexible than the current closed list of allowable purposes. Similarly, the Government has taken an important public stance in recognizing the potential harms of IP abuse. Parliament should build on this recognition, and should adopt similar measures in all areas of copyright law. Finally, Parliament should consider revisiting anti-circumvention provisions in the *Copyright Act* to clarify that it is not an infringement of copyright to circumvent a technological protection measure to exercise rights under fair dealing or s. 29.21, or to engage in purposes which are otherwise not infringing.

Date: June 2, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Karty". The signature is written in a cursive, slightly slanted style.