

TESTIMONY OF NAOMI NOVIK
Before the Subcommittee on Courts, Intellectual Property, and the Internet

I'd like to thank the House Judiciary Committee for inviting me to testify about fair use and its role in promoting creativity. I am not a lawyer, but as one of the creators and artists whose work is deeply affected by copyright law, I hope to explain how vital fair use is to preserving our freedom and enabling us to create new and more innovative work.

I urge Congress to not only preserve but strengthen fair use, to encourage still more innovation and creative work by more new artists. I would ask in particular that Congress consider improving protections for fair users, especially individual artists, who are threatened with lawsuits or DMCA takedowns.

I. Fair use is vital to developing artists and creative communities.

Today, I'm the author of ten novels including the *New York Times* bestselling *Temeraire* series, which has been optioned for the movies by Peter Jackson, the director of *The Lord of the Rings*. I've worked on professional computer games and graphic novels, and on both commercial and open-source software. I'm a founding member of the Organization of Transformative Works and served as its first President, and I'm one of the architects and programmers of the Archive of Our Own, home to nearly a million transformative works by individual writers and artists.

And I would have done none of these things if I hadn't begun by writing fanfiction.

In 1994, while I was still in college, I first came across the online remix community. Over the next decade, before I wrote one word of my first novel, I wrote fanfiction, built online computer games, wrote open-source archiving software, and created remix videos. I met hundreds of other artists creating their own work, and found an enthusiastic audience who gave feedback and advice and help.

I had no money for licenses or lawyers. Neither did my fellow artists. No one would have sold us one anyway. We weren't trying to make money off our work. We were gathering around a campfire to sing and tell stories with our friends. The campfire was just a bigger one, and instead of telling new stories about Robin Hood, we told new stories about Captain Picard, because that was who we saw on television every week.

Fair use gave us the right to do that. I'm not a lawyer. But I can tell you that for all of us, what we were doing felt like just that — *fair*. We watched Star Trek every week. We bought the t-shirts and the videotapes and the spin-off books, and when they started making DVDs, we bought those, too. Of course we were going to have our own new ideas about the characters, about the universe, about what might happen. Of course we wanted to share our ideas with each other.

When a previous generation watched The Lone Ranger on television and then ran outside to make up new adventures in their back yards, no corporations descended on them with cease-and-desist letters,

attempting to squash the storytelling impulse. Today the Internet is our shared back yard. It's where we make friends and meet to play with them, children and adults alike, and when we tell stories, that's where we tell them. It's how we share our enthusiasms and our opinions, our responses to the things that excite or disappoint or inspire us.

For many of us, it is more natural to write a story than a review. We didn't want simply to praise or complain about the original. We wanted to build upon it, the way that creators have always built upon the work of those before them.

Our work was transformative in every sense of the word. We weren't simply retelling the old stories — we were creating new stories, and ones that weren't being told. We transformed the original work, and we transformed ourselves by doing so. We learned to think of ourselves as writers, artists, programmers, as creators. We took our craft seriously and so did our audience, and that audience was invaluable.

In the remix community, I wasn't in a writers' workshop exchanging stories with five people, each of whom was more interested in their own writing than in mine, or in a creative writing class with one teacher with her own particular taste judging my work. Instead, I was sharing my work first with dozens and then with hundreds and then with thousands of readers, who told me what they liked, what made them laugh, what delighted them — and just as usefully, what annoyed them or even made them angry. They told me when I had the characters right or wrong, and when I'd done something that didn't make sense. They could tell me that, because we were all playing in the same sandbox.

And the more I learned from that feedback, the more confidence I developed, the more I built my skills and my craft, the further I was able to take my work, and in directions not constrained by existing genre divisions.

The *Temeraire* series is about dragons in the Napoleonic Wars. *Time Magazine* described it as “Jane Austen playing Dungeons & Dragons.” People often ask me how on earth I got the idea. But it was natural for me, coming from the remix community. Remix art is rife with mashed-up wildly transformative ideas like this. Buffy the Vampire Slayer meets Edward the vampire from *Twilight*. (Spoiler: it doesn't go well for Edward.) The ultra-violent movie *300* becomes a music video about dance and movement. The Avengers are transformed into the baristas and customers of a coffee shop.

I learned to explore ideas in the remix community, and see where they led me. And eventually, they led me to an idea that could be commercially published, and from there to ten novels of my own with more than a million copies in print and translated into thirty languages. Now other artists write fanfiction for *Temeraire*, and make fan films, and sometimes they even send me a stuffed Temeraire dragon to give to my daughter.

And I hope one day one of the fans writing Temeraire fanfiction will go on to write their own bestseller, or make their own movie or game, perhaps with an idea sparked by something I wrote.

We all build on the work and ideas of people who came before us — in fact that's the only way to innovate. There isn't a hard line between remix work and work that stands on its own. They exist on a

continuum.

Vincent van Gogh deliberately copied Japanese woodcuts so that he could find his own style. Shakespeare borrowed heavily from earlier sources. No one could deny that he transformed them. But imagine if the laws of his time had barred him from doing so. We wouldn't have Hamlet, we wouldn't have King Lear, we wouldn't have Romeo and Juliet. And if Leonard Bernstein hadn't borrowed from Romeo and Juliet, we wouldn't have West Side Story. Now if we prevent the next generation from borrowing from West Side Story, we cap the flow of creativity, we dam the river of innovation.

Right now, my three year old daughter is obsessed with *The Wizard of Oz*. Her favorite game is re-enactment. On a daily basis, my husband and I are assigned to play the Scarecrow and the Tin Woodman, and we are led down the Yellow Brick Road to see the Wizard, and if we say our lines wrong, you can bet we are called on it.

She's already however begun to take the first steps towards transformative work. The other day she decided that really, she wants Aunt Em and Uncle Henry to come with her to Oz, too.

It's a step from there to writing a story where you get to go to Hogwarts and make friends with Harry Potter, and it's another step from there to writing a story about what the wizarding world looks like here in the United States, and then it's another step from there to writing a completely new story about your own kind of wizards.

Original work, work that stands alone, doesn't just pop up out of nowhere. It is at the end of a natural spectrum of transformation. Fair use protects this spectrum, this incubator if you will. It's a space where artists can play with ideas and develop our skills, and share our work within a community and learn. I cannot overstate the importance this space has been in the development of my own career, and that of many other professional writers and creators that I know.

This past summer I had the opportunity to speak to a group of older teenagers in an intensive summer creative writing program called Shared Worlds. These students form groups to create a detailed encyclopedic description of a fantasy world, researching economics, history, politics, physics, and religion in order to make the world a consistent one, and they then write stories in that shared universe. Some of these students are surely future authors and television writers and playwrights and scriptwriters.

When I asked how many of them had previously written fanfiction, three quarters of the room raised their hands.

And furthermore, this creative space is one where all citizens, not just those who want to be professional artists, have a right to participate, and where we as a citizen body broadly benefit from their participation. A student who takes a part in their high school play can enjoy and learn from that experience even if they are never going to be a professional actor. They will bring the performance skills and confidence they gain to public speaking in whatever career they eventually pursue. A person can pick up a guitar and sing in the park with their friends on the weekend without ever wanting to be a professional musician. They still benefit from the social connections they make and gain more ability to

appreciate music by others. And the person who writes fanfiction in the evenings will bring the writing and editing skills they gain to virtually any field they enter.

II. Licensing is not a replacement for fair use

When I read about the claims by large corporate copyright owners that licensing is always an option, I know that they don't understand how noncommercial remix art works.

Licensing is not a realistic option for most artists and communities who rely on fair use. On the purely practical level, the vast majority of remix artists doing noncommercial work simply don't have any of the resources to get a license — not money, not time, not access. I wrote my first fanfiction story as a sophomore in college, while taking five courses, working a part-time job, doing page layout for the campus weekly, and occasionally calling my parents. If I'd had to pay someone and go through some complicated licensing process to get to the point of writing that story, I would never have done it.

And speaking as a copyright holder, licensing is not a realistic option for most of us on the other side of the problem either. Most artists are not large media conglomerates with substantial legal departments. I personally am delighted for other artists to make fair use of my work, as they are entitled to do. But I very much don't want the difficulty and legal risk and expense involved in coming up with a license and issuing one to everyone who would like to write their own story about becoming a dragon captain in the *Temeraire* universe.

And more importantly, licensing still doesn't work even if the practical considerations are removed, because licensing invariably stifles transformative work.

I know several authors who have written licensed tie-in novels for various media properties. The list of requirements and restrictions they deal with is enormous. They aren't allowed to change anything significant about the universe, and by the end of the book, they must generally bring everything back to the beginning. Characters can't change in any substantial way.

In short, the entire point of licensed work is to *avoid* transformation. And that is the natural tendency for any copyright holder when considering whether or not to grant a license. If you look at the licenses that are supposedly models for the future--Amazon's Kindle Worlds and YouTube's Content ID--they always allow suppression of anything the owner doesn't like.

Almost by definition, a transformative work is one that doesn't match up to the copyright holder's vision. Chances are it won't neatly fit a brand or a marketing message, and in some cases may make the copyright holder actively uncomfortable.

In particular I recall the case of Margaret Mitchell's estate trying (and, thanks to fair use, ultimately failing) to stop publication of *The Wind Done Gone*, which retold the story of *Gone With The Wind* from the perspective of one of Scarlett O'Hara's slaves, and was meant to highlight the racist and sexist elements of that book. I've also seen many copyright holders have a similar knee-jerk reaction to fanfiction works that were even much less critical of the original work, or not intended as critical at all.

As someone who is passionate about my own characters, I can sympathize with the emotional reaction of an author who sees them being altered by a new artist's hands, or who takes a critical work to heart. But I also have an emotional reaction when someone posts a one-star review of my book and says mean things about my work. That doesn't mean I should have the right to silence my critics, or to prevent other storytellers from telling stories I wouldn't tell myself. The more transformative a work, the further from the original it has gone, the more valuable it is as an addition to our shared public conversation.

Separately, some large copyright holders have begun treating licensing like a technical problem that could be solved if only remix artists would just publish on their proprietary sites, or with specific platforms who negotiate a deal with them.

But this is like someone showing up at your campfire singalong and telling you that you have to come to their theater and perform for an audience that has paid them. Free speech isn't free if you can only utter it on someone else's terms or in someone else's forum.

Amazon's Kindle Worlds is a recent attempt to monetize fanfiction. But it is a heavily restricted walled garden, and nothing like the community that has nurtured me and other new creators. The design of Kindle Worlds keeps fanfiction writers from growing. It confines their work strictly to Amazon — an author is literally not allowed to take down their own story once they have posted it. It forces them to charge for their works, which makes it harder to get useful feedback. This restricts their ability to share their work with a wider audience, the kind of invaluable audience that helped nurture me and so many other remix artists.

And there is no incentive to innovate, to add new elements. For one thing, copyright holders can set any limits they want on content, just as with tie-in novels, and can reject works at any time, and any work that pushes the boundaries is likely to be discarded. *The Wind Done Gone* would surely have been rejected at once. And by the terms of Kindle Worlds, any new elements effectively become the property of the copyright holder. If a Kindle Worlds writer creates new characters, they aren't allowed to take those new characters and write their own stories about them. If they do write a story that stands on its own, by publishing it in Kindle Worlds they have lost the right to make it commercially publishable separately, and they have lost the derivative rights. Kindle Worlds authors are better off if they stay carefully within the boundaries of the copyright holder's expectations and don't explore their own ideas.

I don't object to the existence of Kindle Worlds as an option: if a copyright holder chooses to open their world on strict terms, and a fanfiction writer goes into it with their eyes open, and treats it as a reasonable way to make some spare cash by writing tie-in work, there's nothing wrong with that, any more than there is with a fanfiction writer taking a contract to write a tie-in novel. But this is not remotely a replacement for fair use.

III. Congress should facilitate the exercise of fair use

I would ask Congress to make it easier for developing artists, who are often at a significant disadvantage currently, to exercise their fair use right.

I have never received a cease-and-desist letter. But some of my fellow remix artists have, despite the fact that their work was completely noncommercial and highly transformative. It drove several of them completely out of the community and caused them to stop sharing their work, or it stopped them creating it at all.

Virtually every remix video artist I know (including myself) has had their videos taken down from multiple platforms by automated systems that look for even minute fragments of copyrighted work. In order to restore them, if that's even possible, they have had to file counter-complaints in the face of terrifying automated warnings telling them that they could be fined enormous amounts of money, and making them feel like criminals.

I have gone hunting for stories and art and videos that were so good they stuck in my mind even years later, only to find out that they had been yanked down and were effectively destroyed.

None of this was because the work wasn't fair use, but because most of us didn't so much as know a lawyer, and didn't have the resources to defend ourselves against even the most frivolous lawsuit. Facing a massive media conglomerate as an individual is an alarming prospect, and when you are creating noncommercial work, not just without a profit but often at your own expense, it's hard to accept that risk for yourself and your family. Even if you are confident that your use was fair, what if the court disagrees with you?

Congress could give tremendous support to the incubator of remix art by making it less terrifying to take the chance of creating. Artists creating transformative work should not be asked to pay more in damages than they have earned from their work, so long as they acted in good faith. Copyright holders, on the other hand, who deliberately try to stifle the exercise of fair use with lawsuits and automated takedowns should be subject to damages.

Congress could also require platforms that create automated screening tools for copyrighted work to provide a straightforward way for artists to identify their work as transformative and make a claim of fair use. And Congress could add a specific exemption for noncommercial remix that would supplement fair use, the same way that libraries and teachers have specific exemptions that provide a clear safe harbor.

And finally, I strongly urge Congress to resist any suggestion of narrowing fair use, including by trying to replace it with licensing. It is central to our country's creative and technology industries.

Innovation starts with asking *what if?* What if we could build a machine that would fly? What if we could record and project a moving image? What if you crossed a cellphone and a music player? What if you could search the entire Internet? Those are big ones, ones we all know, and our entire world has been shaped by the answers.

Our country is the world leader in innovation because here we ask those *what if* questions, and we are free to imagine what the answers look like. We're encouraged to look around us at the things that exist and imagine how we could make them better, how we could take them to the next level, how we could transform them.

That is the spirit behind fair use. Fair use invites us to tinker and transform, and it frees us to explore ideas and share them with one another. It gives new artists and creators more tools to play with early in their careers and facilitates the evolution of genres and new forms.

Any narrowing of fair use is inimical to this spirit.