

November 13, 2013

Department of Commerce
United States Patent and Trademark Office
National Telecommunications and Information Administration
1401 Constitution Ave NW,
Washington, D.C., DC 20230

Re: Request for Comments on Department of Commerce Green Paper:
Copyright Policy, Creativity, and Innovation in the Digital Economy
[Docket No. 130927852-3852-01]

DeviantART welcomes this opportunity to submit comments in the above referenced Request for Comment. We share the Department's concern whether "the creation of remixes is being unacceptably impeded" by the uncertainties found in copyright law.¹ Furthermore, we are concerned by the Green Paper's concept of "a digital copyright hub"² and its practicality particularly as applied to visual art. We are therefore pleased to see The Department of Commerce requesting comments on these topics. In this comment, we will (1) introduce deviantART and its role in the visual art world [Pages 2-5] (2) provide a short context for our concerns [Pages 5-9], (3) discuss the impact and value of remixes as defined by the Green Paper and as applied to visual works as well as how the current state of copyright law, particularly fair use, creates uncertainty for visual artists [Pages 9-22], (4) discuss the practical difficulties of a "digital copyright hub" and centralized licensing [Pages 23-32], and (5) offer our conclusion [Pages 32-33]. If we have one aim with our comments, it is to ask the Department of Commerce or other government

¹ *Green Paper* at 29.

² *Green Paper* at 98.

departments to the study of evolving social norms in the re-use and repurposing of content in the digital space.

I. DeviantART

Since 2000, deviantART has provided artists and art enthusiasts a home to find inspiration, entertainment and empowerment through its massive online community.³ DeviantART is an Internet-based platform, community and network whose registered members total more than 28 million users, who live in essentially every country of the world.⁴ It is consistently among the top 150 websites in the world measured by traffic.⁵ Its headquarters are in Los Angeles, California with employees located around the globe.

In almost 13 years of operation the members of the deviantART online community have produced and published to the platform - - one at a time - - more than 250 million pieces of art. Works on deviantART are in genres spanning essentially all known forms of visual artistic expression as well as literature and poetry. Many genres of art are represented on deviantART that did not exist prior to the introduction of digital production and sharing.

³ deviantART, <http://www.deviantart.com> (last visited Nov. 12, 2013).

⁴ deviantART, <http://www.about.deviantart.com> (last visited Nov. 12, 2013).

⁵ Alexa, the web information company, <http://www.alexa.com/siteinfo/deviantart.com> (last visited Nov. 12, 2013).

Members of deviantART span all demographic sectors and consist of both artists and those who are drawn to the arts. Only 40% of its traffic originates from North America despite its entirely Anglophone navigation. While deviantART's members include highly recognized leading artists in their fields, the median age of users is under 26 years old. Increasingly the visual arts and the businesses reliant on the visual arts are populated with people who were first introduced to the arts through this platform. The majority of entering classes at art schools and academies are members of deviantART. It is considered the largest art website on the Internet.

DeviantART provides its members with variety of services and tools:

- the ability to create an online profile with a unique url backed by personal galleries;
- the publication to deviantART of a member's artwork from almost any file format;
- an internal messaging system that permits users to comment on artworks, to send alerts to a user's followers within the community about the member's activity, to publish Journals to the community and to send private notes to individual members;
- separately accessible professional-grade portfolios (over 250,000 currently published, each also at a unique url);
- advanced creative tools (including the first HTML5 drawing application, deviantART Muro);

- a digital marketplace platform supported with a virtual currency through which commissions and digital files are offered and sold;
- an on-line facility for selling conventional prints both framed and unframed;
- the largest collection of free art tutorials (well over 500,000) covering hundreds of practices in the arts, particularly those using digital tools;
- each member of deviantART is provided with at least 2 gigabytes of storage for drafts and works in progress.

Membership to deviantART is free. Certain enhancements to site features are offered to paying subscribers, principally the ability to browse the site without advertisements. Much of the site can be viewed without membership or log-in.

While display and distribution of visual art for its members is a *core competency* of the deviantART platform, its *core value* is likely to be its massive audience and the conversation about art that occurs among that audience. Between 60 and 80 million unique visitors arrive at deviantART each month. More than 1.5 million comments to artworks and Journals are made each day. The site receives over 2.5 billion monthly pageviews. Roughly 12,000 new accounts are made each day.

Within less than thirty days, more people visit deviantART than the total worldwide annual attendance at all of the top museums in the world.⁶ The audience on deviantART is engaged with the arts on a level that extends far past the passive

⁶ *Visitor Figures 2012, Exhibition & Museum Attendance Survey*, The Arts Newspaper, (April 2013) available at <http://www.theartnewspaper.com/attfig/attfig12.pdf>

viewing of exquisite collections in great galleries. DeviantART accepts all artists, their work, and all who love art at every tier of its expression. Rather than selecting worthy works for a particular audience, deviantART has effectively aggregated thousands of niche interests with millions of participants in the arts.

Members and others who visit deviantART are makers and users and simultaneously artists and audience in a free flowing digital ecosystem. DeviantART's mission statement is to bring out the artist in everyone.

Internet entrepreneurs are admittedly prone to hyperbole and the numbers they toss around are so large that it is difficult to embrace them conceptually. But the unassailable fact remains that social networks such as deviantART result in a mass aggregation of users at a scale both unimaginable just a few years ago and, in any event, greater than ever experienced before.⁷

II. The Context for These Comments

Solutions to the serious and pressing issues raised by the Green Paper cannot be found in relatively minor adjustment to the existing scheme of copyright laws. Clearly the what, when and how of social communication and interaction have changed with digital technologies. The sheer size of the resulting conversation and

⁷ Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, 2 (Pew Research Center, 2013) (showing an increase of 8% of online adults using social networks in 2005 to 72% in 2013), available at <http://pewinternet.org/Reports/2013/social-networking-sites.aspx>

the types of content used to communicate impact many of the notional foundations of intellectual property.

Much of the focus for copyright reform and in calls for additional support from governments to support copyright industries come from traditional media companies. They face complex adjustments to their businesses forced by the new order of digital production and distribution. But the actual pressure on copyright comes from elsewhere.

Every 140 character tweet and every casual Instagram image is a copyrighted work which is redistributed, altered, stored and mined for data with a frequency that exceeds measurement.⁸ Most of the million-plus daily comments on deviantART, the billions of comments on Facebook, each 50 x 50 pixel avatar (an identifier first introduced on deviantART, by the way) are all potential copyrighted works as are all of the emails produced each day,⁹ most text messages, every blog entry, all forum posts, every line of code, every web page and even every compilation or collection placed into Tumblr or Pinterest accounts.¹⁰ None of these come from traditional copyright industries.

⁸ Statistic Brain, <http://www.statisticbrain.com/twitter-statistics/> (last visited Nov. 13, 2013) (number of Tweets per day is estimated at 58 Billion).

⁹ Email Statistics Report, 2013-2017, 4, (Sara Radicati, 2013) (stating that the number of emails sent in 2013 shall reach 182.9 billion), available at <http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf>

¹⁰ CTIA, Semi-Annual Year-End 2012 Top-Line Survey Results, 8, (2013) (stating that the number of text messages sent in the U.S. in 2012 was 2.19 Billion), available at http://files.ctia.org/pdf/CTIA_Survey_YE_2012_Graphics-FINAL.pdf.

The amount of digitally produced and digitally distributed business communications alone in a single day, all copyrighted content by and large, exceeds the combined catalogs of media companies.¹¹

All of these potentially casual works receive the full scope and weight of copyright protection just like a commercially exploited entertainment property. These works are stored and distributed (and oftentimes used) side-by-side with commercially exploited content. As a result, co-incident consumer behaviors develop towards lightly protected works and heavily protected works. Overlaps in intention and application develop. An episode of a television show may be shared with the same intention as sharing someone's photograph posted on Facebook. Online the action required for sharing is identical for both works. Sending your grandmother a photograph in the mail was never the same action as renting a videocassette. That has changed forever. Lines that were clear become fuzzier. Consumer and user behaviors, in some cases, have undergone radical transformations, some with very poor outcomes for businesses.

One clear dynamic is a resurgence of visual communication. Digital communication tools and the World Wide Web provide rich support for visual and audio/visual content with or without text. Communications in new media require visual assets to conduct conversation. The use of visual prompts and visual elements also enable cross-language transfer of information. If you are in Cairo telling people about a

¹¹ *Email Statistics Report*, *supra* n. 9 at 4 (stating that the number of business emails sent in 2013 shall reach 100.5 Billion).

street demonstration and if you know the potential audience is worldwide, it is likely you would choose a visual messaging format - - a YouTube post or an Instagram image - - rather than relying solely on text or speech. Visual speech, a tradition far deeper than text-based communication, is in ascendancy in the digital age and deserves attention with perhaps enhanced protection as an evolving social norm. Current copyright laws fail in accommodating this important development. The printing press ultimately liberated written communication from the constraints of religious and state control.¹² We built new laws around this. The digital revolution, still on-going, enables the whole of the world to participate in forms of speech that can only elevate world culture and, one would hope, lead to better understanding among all peoples.¹³ This potential is particularly strong through the arts. What laws and rules should we build around this?

If deviantART has a single purpose to this submission, it is to encourage objective market and behavioral research to determine how change is evolving in the area of cultural content.¹⁴ Facts trump opinion. In the current political climate of copyright there is simply too much divisiveness to produce from the private sector reliable studies freed from parochial interest. The divisiveness is unfortunate and completely unproductive. It is a very real impediment to sensible debate leading to

¹² Ronan, Deazley, *On the Origin of the Right to Copy* (2004); B. Kaplan, *An Unhurried View of Copyright* 23 n.5 (1967).

¹³ See H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 *Harv. J.L. & Tech.* 334 (2011) (discussing the various approaches to how copyright and fair use create social value).

¹⁴ See Alexandra Paslawsky, Note, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 *Fordham Int'l L.J.* 1485, 2012 (Providing an analysis of how governments attempts at conforming social norms of Internet users to existing or new legislation fail. Rather, the correct approach argued by the author is for governments to conform legislation around the social norms of Internet users.).

well-balanced reform.¹⁵ Accordingly, government-sponsored study would be most welcomed.

III. The Remix Questions:

The Green paper requests comment on a set of questions with respect to so-called remixes.¹⁶

Each digital tool made available for the production of essentially every form of digital work (from text messages to the most sophisticated design software used in industry) is equipped with the capability to edit, extract, manipulate, alter, re-distribute, re-purpose, re-format, sample, re-size, collect, store or reference an underlying work. Many of these actions are automatic functions, not even under the user's control. Advanced function tools, which are in use by elementary school children, permit manipulation of text, image and audio-visual files. All of the actions when applied to third party copyrighted content are likely infringing.

In conventional copyright terms, these tools are fully animated Swiss army knives of potential copyright infringement roaming the digital landscape. They cannot be pulled back. Their function is too ubiquitous and central to communication, business and all forms of cultural expression. They function with increasing perfection. From the point of view of the arts themselves, for whatever harm they may do particularly

¹⁵ See William Patry, *Moral Panic and the Copyright Wars* (2009).

¹⁶ *Green Paper* at 101.

to the integrity of works, these tools have immeasurably expanded the arts and democratized its production, distribution and access. The tools are the predicate source of remix culture.¹⁷

Although the vast majority of content placed by users on deviantART are singular original works, deviantART also hosts many works and genres of visual art that fit into the definition of “remix” used in the Green Paper.¹⁸

In addition to obvious forms of visual art that implicate “remix” practices such as photo manipulation, digital collage, mixed analog/digital collage, stock photography, stock illustration, fractals, multi-media, vectors files, digital wire frames, 3D renderings and many others, traditional art forms such as painting, drawing and sculpture increasingly rely on digital techniques to reference or incorporate other works. All of these forms and categories are found in great numbers on deviantART.

Digital imaging tool sets produced by companies such as Adobe,¹⁹ Corel,²⁰ Autodesk,²¹ Microsoft²² and Apple²³ as well as other open source digital imaging

¹⁷ Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?* (“UGC”), 11 Vand. J. Ent. & Tech. L. 1075, 1077 (2009) (“Digital tools are increasingly ubiquitous in our information-driven society, allowing just about anyone with a computer to reuse, recreate, and otherwise change all manner of literary and artistic works (including audio, video, text, photographs, software, and other creative “expressions”).

¹⁸ “[W]orks created through changing and combining existing works to produce something new and creative.” *Green Paper* at 28.

¹⁹ Adobe Creative Suite includes Illustrator, Photoshop, After Effects, Adobe Premier

²⁰ Corel products include CorelDRAW and Corel Painter

²¹ Autodesk products include Sketchbook Pro and Pixlr

²² Microsoft products include Microsoft Paint and Movie Maker

²³ Apple products include the iLife Suite (iPhoto and iMovie) and Final Cut

tools²⁴ encourage the use and combination of many images at a time and provide the means to manipulate almost any element within an image. In the visual arts, the activity of using and manipulating multiple sources of imagery for a blended result is so common that it has become absolutely normative behavior.²⁵

Of course, the images used by an artist in a multi-image manipulated work can all be original to the artist, which avoids any copyright law questions.²⁶

At the next layer of use, the artist can create content by rendering an unprotected physical resource - - such as making a still life drawing of an orange placed on a table or painting a portrait while the subject sits for the artist. Digital drawing and painting tools enhance these activities.

²⁴ Open Source tools include GIMP and Inkscape

²⁵ W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart, Marita Sturken, *Reflections on the Hope Poster Case ("Reflections")*, 25 Harv. J.L. & Tech 243, 288 (2012) ("Part of the training of young artists has been and continues to be the careful copying of the work of other artists, and techniques of copying have been employed in the reproduction of originals for commercial purposes since ancient times. Copies that are intended to be completely faithful to the originals are distinct from copies that depart intentionally from the originals to alter the original message. Literal copying has always been viewed as a craft, whereas interpretive copying can be the basis for new original work."). E. Kenley Aimes, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473, 1478(1993) ("Beginning late in the nineteenth century, authors, composers, and artists began to quote from existing works of fine art in creating their own. James Joyce's *Ulysses*, T.S. Eliot's *The Wasteland*, and Edouard Manet's *Olympia*, to name a few examples, all use fragments from existing artworks. By the middle of the twentieth century, incorporation of elements of popular culture, as well as prior artworks, into artistic works of various genres had become commonplace."); *Id.* at 1480 ("Roy Lichtenstein's work often uses commercial imagery, as does that of Claes Oldenburg, Robert Rauschenburg, Andy Warhol, and Larry Rivers. The work of the Neo-Pop artists active in the early 1980s, including Keith Haring, Kenny Scharf, and Susan Pitt, often uses copyrighted cartoon characters. Other postmodernist examples include David Salle, whose paintings often reproduce an appropriated image many times within a single work; Sherrie Levine and Richard Prince, who are each associated with rephotography; Mike Bidlo, who is known for mimicking the works of Pollock, Picasso, Brancusi, and Warhol; and Jeffrey Koons, in his pre-*String of Puppies* days, who exhibited commercial advertising materials on their own and without alteration.").

²⁶ *Reflections*, *supra* n. 25 at 292 ("Norman Rockwell developed a technique whereby he would first produce all of the graphic elements of a new work photographically, and then use a device called a Balopticon to project the photographic images onto his canvas as guides to his drawing and painting.").

Moving to direct use of third party visual content, the artist can “look” at a third party copyrighted work as a substitute for having the real thing in front of them such as a photograph of a mountain, a person, a nude figure, a car, or of a celebrity. The artist may avoid infringement, if the actual images used for this purpose are not copied directly. Digital tools and the content available through image search and otherwise on the Web greatly expand the scope of resources available for artists using this method.²⁷

Approaching an actual use of a third party work, an artist can “copy” elements of a third party work in such a way that the copied material is unrecognizable in the finished work. This used to be accomplished using light tables or overhead projectors to assist in tracing images. Now, with digital tools, the process is far more streamlined and infinitely more sophisticated. Some digital drawing tools, if desired, can automatically convert a photograph into a line drawing, for example. The technical term for this level of use is “reference.”²⁸

²⁷ *Id.* at 249-252 & 270-71 (describing Shepard Fairey’s process for creating the “Obama Hope Poster” from Mannie Garcia’s picture); *Id.* at 273 (“The Internet has further democratized both awareness of and access to images. Where a painting was once a singular, precious object, now facsimiles can be accessed and generated in seconds with a computer and printer. In short, images are abundant and easy to access, and building upon existing images has become part of the visual language.”).

²⁸ Pierre N. Leval, *Toward a Fair Use Standard (“Leval”)*, 103 Harv. L. Rev. 1105, 1109 (1990) (“[I]mportant areas of intellectual activity are explicitly referential.” “Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.”); *Reflections*, *supra* n. 25 at 272, (Shepard Fairey “At [Rhode Island School of Design] I was taught to draw from life, to draw from photo references, and to appropriate and re-contextualize imagery”); *Id.* at 273 (Shepard Fairey “I think reference is an important part of communication, and it has been common practice in the art world.”); *Id.* at 288 (“[T]o use as a reference image for the Hope Poster, Shepard Fairey was making use of the digital resources that have become essential to the creative process in the visual arts.”);

Finally, to lesser or greater degrees, many artists chose to incorporate parts or the whole of actual third party works into their new work - - a practice art commentators have come to call “appropriation” art.²⁹ Appropriation art can include traditional collage with source images that are photographs or printed materials and would also help characterize Marcel Duchamps’ famous painting of a moustache on DaVinci’s *Mona Lisa*.³⁰

With digital tools a source image can be given a new head or the sky over an image of a house can be turned into a post apocalyptic firestorm. More conventionally, a model’s nose can be fixed, the color of hair can be changed or a fancier car can be inserted in front of a house being placed for sale. The common term for these actions is a play on the trademark of the most widely used software for image manipulation: Photoshopping.

Complex tools can create sophisticated results. A finished, professional work in the graphic arts, such as a poster for a movie marketing campaign, can be comprised of

²⁹ See Brief for Amicus Curiae The Andy Warhol Foundation for the Visual Arts, Inc. In Support of Defendants-Appelants and Urging Reversal, *Cariou v. Prince* (“*Andy Warhol Foundation Brief*”), 714 F.3d 694 (2nd. Cir. 2013) (No. 11-1197), available at <http://cyberlaw.stanford.edu/briefs/CariouVPrinceWarholFoundationAmicusBrief.pdf>.

³⁰ MarcelDuchamp.net, L.H.O.O.Q – Marcel Duchamp – Mona Lisa – 1919, <http://www.marcelduchamp.net/L.H.O.O.Q.php> ; *Reflections*, *supra* n. 25 at 294, (“The first wave of direct appropriation of photographic images made by others was both made possible and inspired by the rise of photographically illustrated print mass media after the First World War. Artists of the German Dada movement coined the term “photomontage” to describe work that contained appropriated photographic imagery. Images were clipped directly from the pages of illustrated magazines or posters and incorporated into new works that communicated radically different, even contrary, messages from the original sources. The mechanical process of cutting and pasting photographic images from their original printed contexts into new works anticipated techniques of appropriation and reuse that have become ubiquitous in the digital age. The essential difference between then and now is that today any artist with an Internet connection has instantaneous access to a vast repository of source imagery that can be copied and repurposed easily with a few clicks of the mouse.”).

hundreds of “layers” rendered in a digital graphics tool. Each layer can apply a different digital manipulation to the whole or to a part of the final work. They are then merged for the final result.

Remix activity also occurs in collaborative settings. Digital tools have opened up enormous pools of collaborative activity in the arts. Collaboration by artists on traditional works presented challenges that have melted away with digital files and their ready transfer back and forth among artists. There is very little friction or delay in one artist concentrating on line drawing, another on color, another on backgrounds, still another on lead story elements while working together on the same piece. The artists can all be in different countries. The new frontier is real-time collaboration where artists are able to see the work of another instantly while they themselves also contribute.

Every artist participating on a digital collaboration can contribute content and every artist has the capability to remix another’s contribution. And, each artist has the potential of relying on third party content with or without implicating his or her national copyright laws.

All of the practices reviewed above, for lack of a better analogy, are physical remixes.

A “remix,” as used in the Green Paper,³¹ can also reach so-called Fan Art. Fan activity has exploded far past the simple request for a signed photo, writing a mash note to a writer or actor or buying fan magazines. Digital tools and some of the techniques mentioned above allow avid fans of popular culture to actively participate with intellectual properties by making their own versions.

Fan art can remix elements of other visual works but can also repurpose story elements, a character’s attributes and combine the canons of multiple popular properties.³² Fans make drawings of favorite characters perhaps in unique settings. Some make new movies from clips taken from popular video game play.³³ More conventional remix activity involves fan fiction in which the Star Trek crew might meet Hobbits from the Tolkien books. There is a near infinite variety of mixing, mashing and repurposing of elements from popular works all as an expression of passionate interest from fans.³⁴

DeviantART has million works that would qualify, on some level, as fan art. Fan art draws from and pays homage to thousands of popular works. Fan art can also be

³¹ “[W]orks created through changing and combining existing works to produce something new and creative.” *Green Paper* at 28.

³² For a practical discussion of the law, as applied to fan art, in a presentation to non-lawyers see deviantART, *Fan Art Law at Comic-Con*, YouTube (Sept. 10, 2012), <http://www.youtube.com/watch?v=xKBsTUjd910>.

³³ Machinima, Wikipedia, <http://en.wikipedia.org/wiki/Machinima>.

³⁴ One such practice is called “Shipping.” Shipping (fandom), Wikipedia, http://en.wikipedia.org/wiki/Shipping_%28fandom%29. “Shipping” involves creating a romantic relationship between two fictional characters where none existed. *Id.* See e.g. lindseylovesjesus777, *Bromance- Science Bros! Tony/Bruce, The Hulk/Iron Man!*, YouTube (Jul. 18 2013) <http://www.youtube.com/watch?v=9H8deTKq0bI>. KatrinDepp, *Sherlock song spoof I Sherlock BBC I crack!vid*, YouTube (Mar. 2, 2012) <http://www.youtube.com/watch?v=FI6FIPrUaVU>. For an example of “Mashups” see Eric Mc, *Assimilation2*, Tumblr (May 30, 2012), <http://eric-mc.tumblr.com/post/23796545151/assimilation2>.

found on other popular social media³⁵ such as Tumblr. Many advertisers on deviantART engage the community with fan art contests. Many producers and artists involved in the commercial works that generate fan followings participate themselves in fan art or carefully track fan art to find trends and interests among their audiences. Fan art activity provides extraordinarily deep consumer engagement of the kind avidly embraced by marketing departments.

Under current U.S. law, essentially any use for any purpose of a copyrighted work that ends in a “remix” (as defined in the Green Paper) when unauthorized by the copyright owner is an infringement. Remixes implicate the exclusive rights to copy,³⁶ create derivative works³⁷ and potentially distribution³⁸ and display.³⁹ Liability is saved only by a defense of fair use,⁴⁰ by an exclusion (such as works for the blind⁴¹) or by a compulsory license (which in some instances acts as an exclusion such as certain music performances in restaurants⁴² on certain types of apparatus.⁴³).

Unless we assume implied licenses in large areas of “remix” activity, such as fan art, or unless we rely on a very expansive application of fair use, current practices in the visual arts using these rich digital tool sets do not mesh with current law.

³⁵ *Id.*

³⁶ 17 USC § 106(1).

³⁷ *Id.* at § 106(2).

³⁸ *Id.* at § 106(3).

³⁹ *Id.* at § 106(5).

⁴⁰ *Id.* at § 107.

⁴¹ *Id.* at § 121.

⁴² *Id.* at § 110(5)(B).

⁴³ *Id.* at § 110(5)(A).

Only the most ardent copyright maximalists would suggest that fair use in American law is functional. Fair use presents a definitional matrix of no less than six and possibly many more factors to be balanced separately and together against the facts of the use.⁴⁴ The factors themselves are conceptually complex as opposed to on/off switches.

Fair use as a safety valve against the comprehensive scope of the copyright monopoly is hampered by an inability to define it with sufficient accuracy and reliability to produce predictable outcomes.⁴⁵ It is always a mixed question of law and fact. While there are many precedents, a statute and legislative history to provide guidance, only a highly trained lawyer can perform an analysis with any degree of accuracy (and even then, quite obviously, courts have disagreed frequently). No citizen/artist is effectively capable of applying fair use unassisted.⁴⁶

⁴⁴ Section 107 of the Copyright Act contains four enumerated factors, a preamble tantamount to separate factor and a coda setting out a factor to be considered with respect to unpublished works. In addition many consider the "transformative" test first discovered by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) as a separate factor. Arguably there is an eighth factor that trumps all of the others found in the legislative history. H.R. Rep. No. 94-1476 at 66 (1976) ("[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

⁴⁵ *Leval*, *supra* n. 28 at 1106-07 ("Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns."); *Reflections*, *supra* n. 25 at 299-304 (discussing the unpredictability in applying fair use); *Beyond Rogers v. Koons*, *supra* n. 25 at 1498-1507 (discussing the issues of fair use analysis as applied to appropriative art).

⁴⁶ See Michael C. Donaldson, *Clearance and Copyright: Everything You Need to Know for Film and Television* 29, 363-67 (3d ed. 2008).

Under current law the use of as little as two seconds of sound imported to a vastly larger original work was found to infringe a soundrecording copyright without qualification as to fair use.⁴⁷ This could be dismissed as anomalous.⁴⁸ But in fact it is not and has opened a threat of licensing demands where the degree of use is minimal even in non-commercial settings. At the other end of the spectrum (and in another region of the country), a wholesale appropriation of the entirety of multiple graphic works (by extraordinary artists for their genre) was held to be fair use when they were published as part of a commercially available biographical work.⁴⁹

In the visual arts, the application of fair use has been, at best, a very messy affair and surprisingly infrequent. The reported cases in the visual arts relating to fair use as

⁴⁷ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 & 805 (6th Cir. 2005) (holding that a two second sample of George Clinton Jr.’s “Get Off Your Ass and Jam” used in the film soundtrack of the film *I Got The Hook Up* constituted copyright infringement and fair use should not be considered). *Cf. Saregama India, Ltd. v. Mosley*, 687 F.Supp.2d. 1325, 1330 & 1338-41 (S.D.Fla. 2009) (holding that a one second sample of a song used in a hip-hop song was not substantially similar, and stating that *Bridgeport* took an overly expansive approach to sound recordings under §114).

⁴⁸ 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A][2][b] (2011) (*Bridgeport* “blithely discard[ed] substantial similarity” “had *Bridgeport Music* consulted Section 114’s legislative history instead of dismissing that history as irrelevant, it would have discovered that Congress explicitly noted ... that ‘infringement takes place whenever all or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced.”); Jennifer R.R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 Ind. L.J. 435, 442 (2006) (“The Bridgeport court’s fundamental misinterpretation of the law is contrary to all relevant case law, statutory language, and legislative history.”); Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 Tex. Intell. Prop. L.J. 93, 117 (2006) (the Bridgeport decision was illogical and contrary to Section 114’s legislative history); 3 William F. Patry, Patry on Copyright, 9:61 (2011) (*Bridgeport Music* was “disturbing,” “inexplicable,” and a misunderstanding of the U.S. Copyright Act’s structure); Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA Ent. L. Rev. 93, 104 (2007) (“The Bridgeport court misread Section 114(b) as an expansion, rather than a limitation on the exclusive right[s] of sound recording copyright holders.”).

⁴⁹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2nd Cir. 2006) (holding that a biographical book on the Grateful Dead that incorporated Grateful Dead posters was fair use). It is worth noting how these, seemingly, contradictory holdings affect different parts of the country. *Billy Graham Archives* was a Second Circuit decision affecting New York, Connecticut, and Vermont. *Bridgeport*, *supra* n. 47, was a Sixth Circuit decision affecting Tennessee, Kentucky, Ohio, and Michigan.

applied to remix activity are even fewer.⁵⁰ There are many more open legal questions in this field than in other media. Something as functional but beautiful and original as a base texture could be found to produce a follow through right into works made using the texture. It is altogether unclear whether the use of the texture rises to the level of using a copyrighted work, and if so, would the texture as used be a fair use in any event.⁵¹

This lack of clarity must, on some level, constrain and diminish expression and rubs against the explosion of creative and novel applications of imagery we disused in this submission including those involving digital manipulations.

In text-based communication, we have a general understanding that using the word “house” to describe a house is unprotectable. But using a photograph to describe a

⁵⁰ *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding a comic that portrayed Disney characters in debauched settings was not fair use); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F.Supp. 1031, 1036 (N.D. Ga. 1986) (holding that trading cards spoofing the Cabbage Patch Kids in noxious and disgusting settings was not fair use); *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F.Supp. 706, 715 (S.D.N.Y. 1987) (holding that a movie poster that drew its style from a *New Yorker* cover was not fair use); *United Feature Syndicate, Inc. v. Koons*, 817 F.Supp. 370, 384 (S.D.N.Y. 1993) (holding a sculptor’s use of the cartoon character “Odie” was not fair use); *Rogers v. Koons*, 960 F.2d 301, 309 (2nd Cir. 1992) (holding a sculptor making a visually altered sculpture out of a photograph was not fair use); *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1226 (S.D.N.Y. 1996) (holding that a movie poster that satirized a magazine cover engaged in fair use); *Mattel, Inc. v. Pitt*, 229 F.Supp.2d 315, 324-25 (S.D.N.Y. 2002) (holding that a doll maker who refurbished Barbie dolls in sadomasochistic costumes engaged in fair use); *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 806 (9th Cir. 2003) (holding that a photographer who shot nude Barbie dolls attacked by kitchen appliances engaged in fair use); *Blanch v. Koons*, 467 F.3d 244, 258-59 (2nd Cir. 2006) (holding a visual artist who incorporated an ad photo into a collage was fair use); *CCA & B, LLC v. F ± W Media Inc.*, 819 F. Supp. 2d 1310, 1324 (N.D. Ga. 2011) (holding that photographs of a Christmas elf doll in debauched situations was fair use); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690(7th Cir. 2012) (holding that a cartoon show parody of a viral music video was fair use); *Cariou v. Prince*, 714 F.3d 694, 712 (2nd Cir. 2013) (holding a visual artist who altered photographs engaged in fair use); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (holding a band that used a piece an augmented piece of street art as a video backdrop for one song in a three hour concert was fair use); *Kienitz v. Sconnie Nation LLC*, 12-CV-464-SLC, 2013 WL 4197454 (W.D. Wis. Aug. 15, 2013) (holding that a t-shirt with a digitally altered mayor’s photo was fair use).

⁵¹ *Cf. Newton v. Diamond*, 349 F.3d 591 (9th. Cir. 2003).

house immediately raises an issue of ownership over the image and infringement of the copyright in the image. Nonetheless, visual speech requires exactly this - - some image of a house in order to say house. In this example, fair use should protect casual speech using a photograph in a non-commercial setting on the Web; only possibly protects use of the photograph in a remix visual work incorporating the photograph of the house; might very well protect use of the photograph in a wholly commercial setting - - if the photograph has a biographical component related to the house or is purely descriptive and so forth. Still, the fair use question is up for grabs in each of these circumstances.

Fair use is also non-functional in applications which hope to filter for third party content. If the use is a fair use, then no license should be required. However, the best that filtering technology can do is to identify a use of a work. No machine could conduct a fair use analysis (until the singularity).⁵² As a result, licensing schema for Web based distribution of copyrighted works that depend on identification of those works must, by necessity, tag any use, fair or not.

A similar practical problem arises under DMCA takedown notifications.⁵³ As the law now stands, if an ISP receives a valid takedown notice it has no choice but to remove the work.⁵⁴ The copyright owner's representative is required to have only a

⁵² Perhaps as soon as 2045 according to Ray Kurzweil. Technological singularity, Wikipedia, http://en.wikipedia.org/wiki/Technological_singularity.

⁵³ 17 USC § 512(c)(3).

⁵⁴ *Id.* at § 512(c)(1)(C)

good faith belief that the work has been infringed.⁵⁵ Since a fair use analysis is so exquisitely complex, almost any potential fair use, certainly in the visual arts, can be authentically challenged thus producing the necessary good faith for the notice.

While the takedown can be challenged with a counter-notice,⁵⁶ the wherewithal to do so is completely outside the means of any casual user (and that of most artists on deviantART). In any event, the ISP itself has no standing to intervene unless it refuses to accept the validity of the notice at its peril.⁵⁷

The response to traditional copyright law on platforms such as deviantART tends to be sui generis. Every moment of deviantART's operations requires maintaining a delicate balance between those who make art, distribute art, sell art, own art, share their art for a variety of reasons and those who consume art, use art, reference art, communicate with art or are simply entertained by art. As an organic community, it has developed its own etiquette, its own rules and its own accommodations of external rules and laws.⁵⁸ Some mimic accepted intellectual property behaviors and others are idiosyncratic or mandated circumstantially. Other content rich Internet sites have similar evolving behaviors among users.

⁵⁵ *Id.* at § 512(c)(3)(A)(v)

⁵⁶ *Id.* at § 512(g)(3)

⁵⁷ DeviantART has a robust copyright policy posted by link at the bottom of nearly every page. <http://about.deviantart.com/policy/copyright/>. It includes a streamlined DMCA takedown notice procedure with an online form for copyright owners. <http://help.deviantart.com/dmca>. DeviantART responds to takedown requests within two business days.

⁵⁸ Moral rights with respect to attribution and integrity are much more of a community concern for the artist than a requirement for advance permission and license in a non-commercial use to do any of the actions found in the enumerated exclusive rights under Copyright.

Far from the assumption that these new communities seek to up-end the status quo of copyright protection, it may be surprising to learn how deeply they respect originators and the scope of rights they should enjoy. But it is also fascinating to observe how far the originators are willing to permit the use of their work. In all events, platforms such as deviantART represent an active, vibrant sociology from which potential learning can emerge for the revision of existing law.⁵⁹

IV. Licensing and Rights Ownership Databases

The public perception of wrong in matters of digital re-use and re-purposing of copyrighted content is likely tied to economic harm rather than to the fact of the use itself.⁶⁰ The copyright law establishes a wrong in any circumstance unless excused - commercial or non-commercial.⁶¹ The law apparently does not guide the public. As examples, many assume a right to repurpose existing works in classroom settings or in social media: situations that lack apparent permanence and have no commercial

⁵⁹ Daniel Perkel, Making Art, Creating Infrastructure: deviantART and the Production of the Web (2011) (Ph.D. thesis in information science), *available at* http://people.ischool.berkeley.edu/~dperkel/diss/DanPerkel-dissertation-2011_update.pdf.

⁶⁰ Joe Karaganis & Lennart Renkema, Copy Culture in the U.S. & Germany 11 (The American Assembly, Columbia University 2013) (survey found that commercial/non-commercial distinction remains important to public attitudes towards copying. Sharing with friends and family is approved as reasonable, while wholesale commercial copying is found to be unreasonable.) *available at* <http://piracy.americanassembly.org>.

⁶¹ 17 USC § 501(a).

motivation such as tweets or in-line commenting or blogs.⁶² Content may be superimposed over images, still photographs may be animated, film and television content can be re-edited for amusement and “there is an App” for most of these actions.⁶³ These forms of referencing are commonplace as social behaviors. Copyright rarely intrudes.

On deviantART, many members encourage third party use of their images and require no specific advance permission. Artists can elect at the time of submission to indicate that the image can be shared in other social media such as Facebook, Pinterest and Google+. Many artists go much further and encourage derivative works by indicating in text below the image that the work is available for use for free. Some allow use with a variety of conditions including non-commercial use, attribution or perhaps limiting the circumstances in which the work can be used by excluding use of the work in mature settings.⁶⁴

At the other end of the spectrum, a large number of artists on deviantART take active steps to warn others that they cannot re-use, re-purpose or re-distribute the work. Artists apply watermarks to dissuade digital re-use - - another of the options presented as part of the deviantART submission flow. Many artists actively police

⁶² *Copy Culture*, *supra* n. 59.

⁶³ There are dozens and dozens of applications that enable this form of use.

⁶⁴ A variety of re-use condition sets from artists on deviantART are found in The Appendix. Yuumei, one of the artists in the Appendix, is one of the most popular graphic artists on deviantART (and so, arguably, on the entire Web). She works in flash animation building graphic stories on the human condition. Her work has been viewed over 56,599,218 times as of November 8, 2013. Her profile page on deviantART has received over 10 million visitors. *See* Appendix.

both deviantART and other websites for unauthorized uses sometimes with the cooperation of other members.

These far different approaches are fully supported by the deviantART community. There is no polarization. Neither approach nor any shades of grey in between is favored, criticized, imposed or encouraged over others by either the community or by the administrators. They all happily co-exist.

In an open communication setting of peers, most authors when approached by another author will permit non-commercial uses of their works in remixes or otherwise. Many authors encourage robust quoting from their works. Though the activity has potential as infringement, one of the greatest compliments an artist can receive on deviantART is the presentation of fan art based on his or her work.⁶⁵

There should be no debate that an author should be able to refuse permission, perhaps even for the expression of admiration. The greater social issue is whether licensing schema for uses of copyrighted works on the Web should default to monetization of any use, fair or not, commercial or non-commercial, remixed or maintaining the original integrity of the work. At some level every seller is

⁶⁵ deviantART, *Comic-Con 2012 – Artists’ Alley Interviews*, YouTube (Oct. 24, 2012), <http://www.youtube.com/watch?v=MtYy7-I50Gw#t=85> (Interview with Kevin Eastman co-creator of *Teenage Mutant Ninja Turtles (TMNT)* discussing his appreciation of *TMNT* fan art starting at 1:20.); deviantART, *Fan Art with Brian Kesinger*, YouTube (May 29, 2013), http://www.youtube.com/watch?v=rdbLkc_xC7I (Interview with Disney and Pixar animator and story artist discussing appreciation of Disney and Pixar fan art).

concerned about the well being of the buyer. Licensing analysis must include user interests.

Involving the viewpoints of users is complicated. Commercial services do not necessarily act as adequate surrogates for either authors or consumers and almost never for casual participants of any kind.⁶⁶ But the digital revolution has precisely enabled casual use in a way that elevates those uses to a scale, in the aggregate, frequently far greater in mass than the size of commercial exploitation. If the sole solution is blanket and/or compulsory licensing that includes monetization of casual use, then we have seriously misunderstood the expectations of the public and so, to some extent, the task of reform. We may also be making false assumptions about how artists and original creators wish to have their works used.

Visual forms of speech require visual resource and access to a common vocabulary of visual content. If this can only be effected with a pay-to-speak model because of a predicate requiring licensing in the first instance, then we will have directly suppressed uses of works that have virtually no economic or reputational impact on the original and uses of works where the author specifically wants the work used freely in open visual or common discourse.

⁶⁶ For example, ASCAP and BMI are often considered surrogates for authors and composers of music. But, those societies represent just the non-dramatic performance rights. The business of music involves multiple licensing tiers, including the licensing of remixes and authors and composers frequently lack direct representation in those transactions.

We also should recognize that the lines representing creator and user have never been closer and are practically merging.

In the arts, almost every artist uses digital tools at some juncture in the development, production and distribution of their work and some part of that work immediately finds its way onto digital platforms accessible instantaneously to the world. One cannot conduct “business” in the arts without the use (as a point of reference or otherwise) of content that appears on YouTube, Flickr, Bandcamp, Soundcloud, Vimeo, iTunes, Tumblr, deviantART, or Google Images and other search tools and collections on the Web.

Though self-evident it is overlooked constantly: open, available content leads to greater access which in turns allows richer expression and greater participation in the use and production of cultural content.⁶⁷

For the visual arts the marketplace solutions are dynamic. So-called microstock businesses such as iStockphoto, Shutterstock and Fotolia are building billion dollar enterprises. They benefit from a combination of distribution, display, search and storage efficiencies in the digital space that permit scaled and complex licensing

⁶⁷ The J.Paul Getty Museum and Trust has just released high resolution scans of over 10,000 master works held in the museum collection including works by Raphael, Bernini, Tiepolo, van Gogh, Millet, Turner, Titian, Dürer, Cézanne, Rubens, Fragonard, and Monet. This collection includes hundreds of rare, arguably unpublished for copyright purposes, fully illuminated medieval manuscripts and detailed photographs of the Getty Bonze. The museum makes them available for download for any use, commercial or otherwise - period. For free. “The Getty makes available, without charge, all available digital images to which the Getty holds the rights or that are in the public domain to be used for any purpose. No permission is required.” The J. Paul Getty Trust, <http://www.getty.edu/about/opencontent.html> (last visited Nov. 13, 2013).

choices generating per use royalties to authors.⁶⁸ They respond to a novel and robust demand for visual content from web applications and from digital artists. As a market for visual content these companies never would have existed at scale without the Internet.

Microstock businesses are expanding rapidly into video, audio-video and a variety of graphic resource file types such as vectors and wire frames. Some pricing variables are based on the size of an image and other variables can be based on rights. They offer very affordable pricing at times at micro-payment levels for simple web-only licenses as well as more expensive pricing for more traditional applications such as printed advertising or product packaging. Almost every license permits the creation of derivative works using the licensed image. As a result, holding an account with one or more microstock providers is an essential part of working as a digital artist.

On deviantART and other digital platforms with art content and resources, artist/owners can offer direct licensing or sale of their own content as long as the delivery is of a digital file download. The payment to the artist is processed for a fee but the artist remains in control of marketing the availability of the work and typically can also set pricing at any desired level. The artist can insert any form of

⁶⁸ GettyImages is the leading company licensing stock photographs. Their licensing models cover both individually negotiated fees for commercial uses of single images as well as subscription models that license multiple works at micropayment levels for simple web-based uses. An overview of some of its models with links to its actual license agreement form is available here: Getty Images, http://www.gettyimages.com/Corporate/LicenseInfo.aspx?isource=usa-en_home_ftv_userAssistance_licensing (last visited Nov. 13, 2013).

agreement for the sale or license of the work or rely on default terms.⁶⁹ There can be no more immediate involvement and control from the artist's point of view.

There are very few licensing agents even for top line commercial artists such as professional photographers and graphic artist working at the peak of their profession.⁷⁰ The assumption that the work of these artists flows to corporate owners who can act as surrogates is false. Most works in the visual arts are not works made for hire. Licensing of these works remains non-uniform.⁷¹

YouTube's content identification system linked to an associated advertising model with revenue sharing is an extraordinary organic marketplace response on the Web. It is very complex and very expensive. It requires registration of works, digital fingerprinting and a constant review and frequent interdiction of incoming user generated content. Some estimates of the cost of building this system exceed \$1.5 billion just for the music component. It hopefully goes without saying that very few enterprises can afford this approach. The technology required to (i) store metadata, (ii) identify works at nanosecond speeds, (iii) seamlessly execute on permission sets after identification, (iv) place advertising inventory in front of the work and finally

⁶⁹ deviantART, <http://heidi.deviantart.com/journal/Premium-Content-Platform-313614186>, (Last visited Nov. 13, 2013) (describing deviantART's Premium Content Platform); deviantART, <http://dadigitalcontent.com/selling/>, (last visited Nov. 13, 2013) (instructing deviantART users on how to sell their works through deviantART).

⁷⁰ For example, paparazzi, who are almost always independent, license their own images one at a time either to an intermediary agency or directly to publishers. The price for their images vary by subject, event, rarity, exclusivity, quality and controversy. The prices range from \$50 to \$150,000 for a single image. This genre of photography is widely distributed on the Web.

⁷¹ Graphic Artists Guild Handbook, Pricing & Ethical Guidelines (13th ed. 2010) (The Handbook contains over 350 pages of licensing information).

(v) generate a revenue share payment to the copyright owners reflects a level of engineering excellence also beyond the reach of most enterprises.⁷²

Image recognition software can currently identify any clean reuse of an image within its database. Google image search uses a variant of this capability. Technology should soon be available to identify images used in many remix settings. Accordingly there is some potential to use smart machines to perform similar heavy lifting to that on YouTube throughout the Web.

Conceiving a mass licensing structure for the use of visual works on the Web is certainly possible. But scale matters and there are literally hundreds of millions of images and audio-visual works in use on the Web. Other media do not suffer from this scale.

For example, licensing commercial use of musical works requires a registry of far less than one million works . The number is in a similar range for movies and television programs and for works of literature. These media are backed by large commercial enterprises that have aggregated collections of works, maintain databases for many purposes and can effectively coordinate and communicate rights ownership information. Individual artists in these media are frequently left

⁷² The greatest drawback of the YouTube process is that copyright owners license YouTube only. The license does not “pass through” to the user who generated the work and who may have created a derivative work. The user remains an infringer while the re-distribution becomes licensed. The approach is not without practicality. But it creates confusion in intention.

behind or use intermediaries. But accommodations in registries can be made at that scale. In addition, these media are accustomed to complex licensing administration.

In the visual arts, circumstances are quite different. Any one of the microstock companies previously referenced hold millions of images though only a low percentage of the images receive regular licensing activity. Still, the millions of images are registered. They can be searched. Unauthorized uses on the Web can be found if identical to the base image. But their combined catalogs represent only a very small slice of the visual content actually in use on the Web, particularly with respect to casual uses.

The 250 million plus images on deviantART that grow at a rate of 140,000 new ones each day represent a fraction of the total images produced by its community alone.

It is not just a matter of numbers. Metadata is not available on most images flying around the Web. There are multiple file types for images on the Web in multiple sizes. Images are put to many more uses than are commercially distributed media properties raising multiple tiers of licensing value. Ownership information is difficult to resource. For example, registration of graphic works and photographs with the Copyright Office is often done in collections or in bulk without unique titles to identify single images in the group. Given the term of copyright protection, researching the ownership of images for licensing after the death of the artist is daunting and time consuming. A single arts registry has never been compiled. The

Hermitage Museum in St. Petersburg has no idea what it holds in its storage facilities or if it would have licensing rights to them. That's a major institution. Hundreds of other museums around the world face the same challenge and lack the resources to fund participation in a registry.

Interjecting global licensing schema, unitary registry systems and blanket licensing practices resonates to an idealized fluid access to content with fair compensation. It is an aspiration. In the music businesses, the one sector of copyrighted content headed to this model, they are far from perfecting it despite nearly a century of good work towards it.⁷³ There remain many detractors on both the author and user sides within the music business itself. Adaptation of a similar model to audio-visual commercial content may be possible, but those businesses may not want it and may prefer direct licensing models.

We have already seen a sharp contrast in the way the music business and the film business approach unauthorized uses of their works on the Web. Those differences should be respected. And the notion that a governmental entity or that a private-government partnership could build, manage and maintain an even larger content licensing capability and registry than Google's YouTube is a plan that is off by as much as a full century.

V. Conclusion

⁷³ Public performance rights in music were first licensed on a collective basis in France around 1870. ASCAP, the first performing rights society in the U.S., was formed in 1914.

The reality is that the digital revolution is still on us. Everything remains in flux. Inserting a better definition here, a compulsory license there, a registration requirement for this and that, in all instances will create unintended consequences on a market that is fluid and ultimately responsive.

It does not mean that no effort is needed in reform of copyright. That process should be encouraged. But the specifics of reform should be based on agreements about policy. Those policy decisions should be made only after careful study of the way in which copyrighted works are produced and used today. The process of determining policy should be mindful of audience, of creators at every tier and stage of contribution, of free speech interests, of commercial distribution patterns, of the inexorable advance of technology but above all it should accommodate the modernity of the digital context and recognize its very special contribution to the *progress of science and the useful arts*.

We applaud the Department's efforts in this area, and look forward to continued engagement on this topic.

Respectfully Submitted,
DeviantART, Inc.

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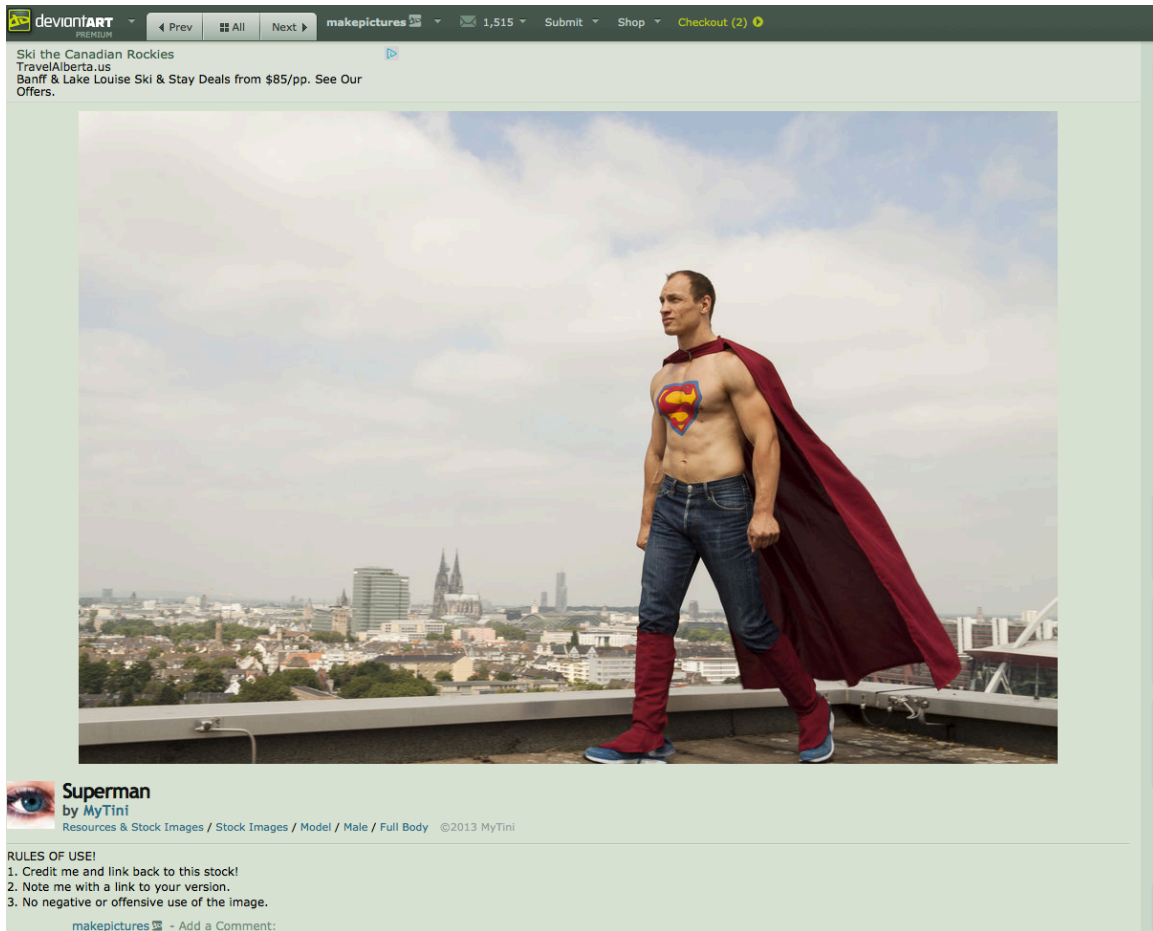
Rom Bar-Nissim

JD
Gould School of Law, University of Southern California

APPENDIX

1. deviantART user “MyTini” setting forth conditions for reuse below the picture.

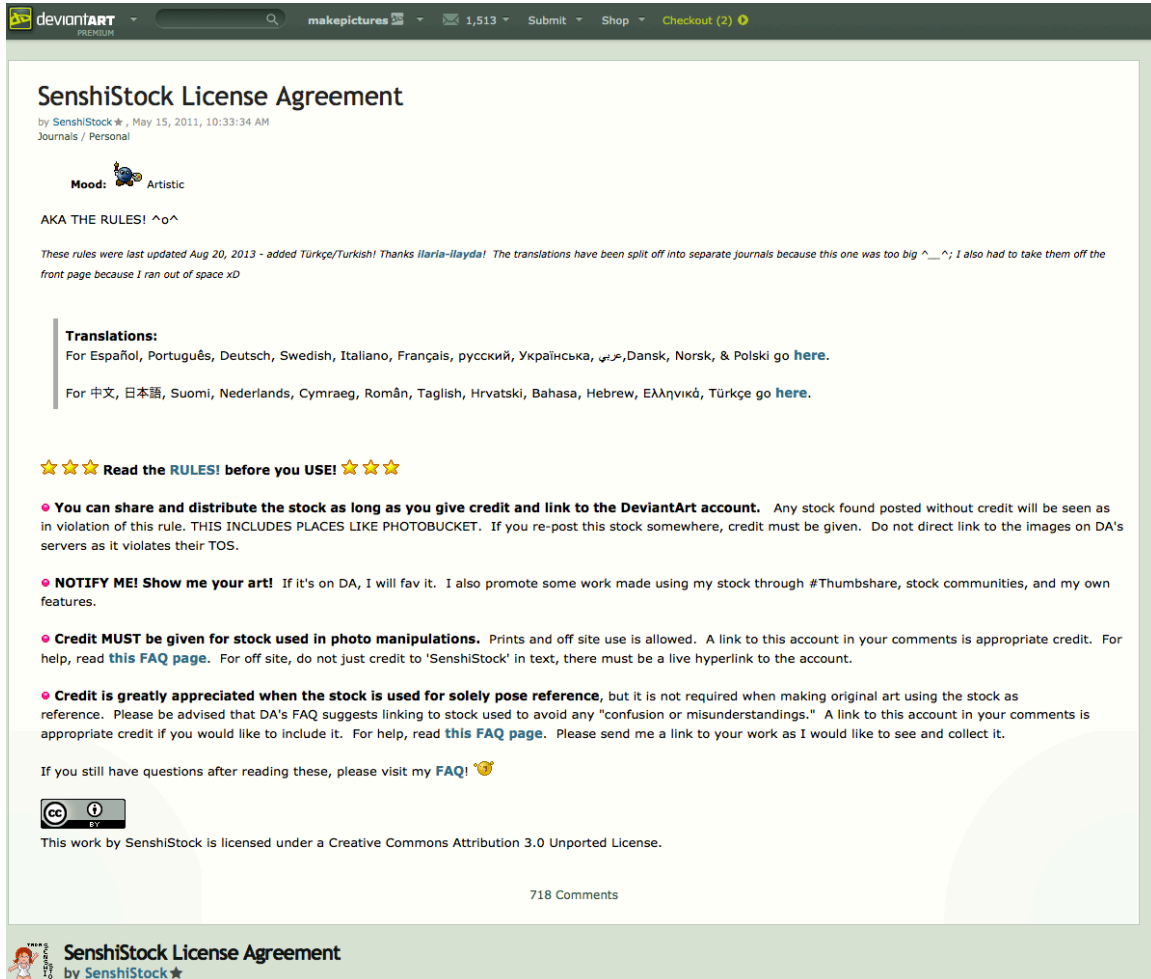
<http://www.deviantart.com/art/Superman-407570547>



The screenshot shows a deviantART gallery page. At the top, there is a navigation bar with the deviantART logo, a search bar, and various utility icons. Below the navigation bar, there is a promotional banner for "Ski the Canadian Rockies" with a link to "TravelAlberta.us". The main content area features a large image of a man dressed as Superman, standing on a rooftop with a cityscape in the background. Below the image, there is a caption that reads "Superman by MyTini" and a copyright notice "©2013 MyTini". Underneath the caption, there are "RULES OF USE!" listed as follows: 1. Credit me and link back to this stock! 2. Note me with a link to your version. 3. No negative or offensive use of the image. At the bottom of the page, there is a comment section with the text "makepictures - Add a Comment:".

2. deviantART user “SenshiStock” posting a License Agreement on user page.

<http://www.senshistock.deviantart.com/journal/SenshiStock-License-Agreement-240581233>



The screenshot shows a deviantART journal page for 'SenshiStock License Agreement'. The page header includes the deviantART logo, a search bar, and navigation links for 'makepictures', '1,513', 'Submit', 'Shop', and 'Checkout (2)'. The journal title is 'SenshiStock License Agreement' by SenshiStock, dated May 15, 2011. The mood is 'Artistic'. The text begins with 'AKA THE RULES! ^o^' and a note about updates. It lists translations for various languages with links. A section with five stars reads 'Read the RULES! before you USE!'. Below are four bullet points detailing sharing rules, notification requirements, photo manipulation credits, and pose reference credits. A Creative Commons Attribution 3.0 license icon is shown, along with the text 'This work by SenshiStock is licensed under a Creative Commons Attribution 3.0 Unported License.' and '718 Comments'.

SenshiStock License Agreement
by SenshiStock ★, May 15, 2011, 10:33:34 AM
Journals / Personal

Mood: Artistic

AKA THE RULES! ^o^


These rules were last updated Aug 20, 2013 - added Türkçe/Turkish! Thanks ilaria-ilyada! The translations have been split off into separate journals because this one was too big ^__^; I also had to take them off the front page because I ran out of space xD

Translations:
For Español, Português, Deutsch, Swedish, Italiano, Français, русский, Українська, العربية, Dansk, Norsk, & Polski go [here](#).
For 中文, 日本語, Suomi, Nederlands, Cymraeg, Român, Taglish, Hrvatski, Bahasa, Hebrew, Ελληνικό, Türkçe go [here](#).

☆☆☆ **Read the RULES! before you USE!** ☆☆☆

- **You can share and distribute the stock as long as you give credit and link to the DeviantArt account.** Any stock found posted without credit will be seen as in violation of this rule. THIS INCLUDES PLACES LIKE PHOTOBUCKET. If you re-post this stock somewhere, credit must be given. Do not direct link to the images on DA's servers as it violates their TOS.
- **NOTIFY ME! Show me your art!** If it's on DA, I will fav it. I also promote some work made using my stock through #Thumbshare, stock communities, and my own features.
- **Credit MUST be given for stock used in photo manipulations.** Prints and off site use is allowed. A link to this account in your comments is appropriate credit. For help, read [this FAQ page](#). For off site, do not just credit to 'SenshiStock' in text, there must be a live hyperlink to the account.
- **Credit is greatly appreciated when the stock is used for solely pose reference,** but it is not required when making original art using the stock as reference. Please be advised that DA's FAQ suggests linking to stock used to avoid any "confusion or misunderstandings." A link to this account in your comments is appropriate credit if you would like to include it. For help, read [this FAQ page](#). Please send me a link to your work as I would like to see and collect it.

If you still have questions after reading these, please visit my [FAQ!](#) 🙄

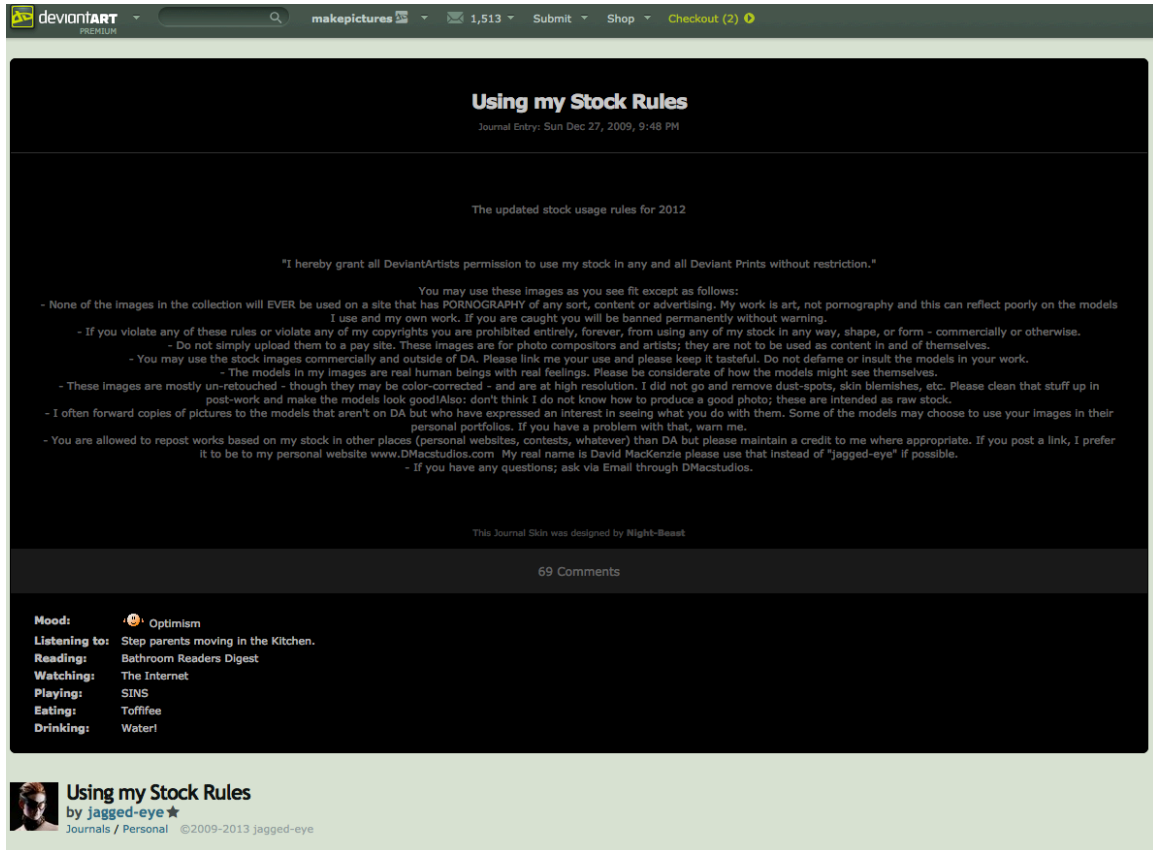

This work by SenshiStock is licensed under a Creative Commons Attribution 3.0 Unported License.

718 Comments

SenshiStock License Agreement
by SenshiStock ★

3. deviantART user “jagged-eye” setting forth conditions for using his stock on a separate page.

<http://www.jagged-eye.deviantart.com/journal/Using-my-Stock-Rules-229040195>



The screenshot shows a deviantART journal entry. At the top, the deviantART logo and navigation links are visible. The journal title is "Using my Stock Rules" with a sub-header "Journal Entry: Sun Dec 27, 2009, 9:48 PM". The main content is a text-based document with the following structure:

- A title: "Using my Stock Rules"
- A sub-header: "Journal Entry: Sun Dec 27, 2009, 9:48 PM"
- A paragraph: "The updated stock usage rules for 2012."
- A quote: "I hereby grant all DeviantArtists permission to use my stock in any and all Deviant Prints without restriction."
- A section: "You may use these images as you see fit except as follows:"
- A list of rules:
 - None of the images in the collection will EVER be used on a site that has PORNOGRAPHY of any sort, content or advertising. My work is art, not pornography and this can reflect poorly on the models I use and my own work. If you are caught you will be banned permanently without warning.
 - If you violate any of these rules or violate any of my copyrights you are prohibited entirely, forever, from using any of my stock in any way, shape, or form - commercially or otherwise.
 - Do not simply upload them to a pay site. These images are for photo compositors and artists; they are not to be used as content in and of themselves.
 - You may use the stock images commercially and outside of DA. Please link me your use and please keep it tasteful. Do not defame or insult the models in your work.
 - The models in my images are real human beings with real feelings. Please be considerate of how the models might see themselves.
 - These images are mostly un-retouched - though they may be color-corrected - and are at high resolution. I did not go and remove dust-spots, skin blemishes, etc. Please clean that stuff up in post-work and make the models look good!Also: don't think I do not know how to produce a good photo; these are intended as raw stock.
 - I often forward copies of pictures to the models that aren't on DA but who have expressed an interest in seeing what you do with them. Some of the models may choose to use your images in their personal portfolios. If you have a problem with that, warn me.
 - You are allowed to repost works based on my stock in other places (personal websites, contests, whatever) than DA but please maintain a credit to me where appropriate. If you post a link, I prefer it to be to my personal website www.DMacstudios.com. My real name is David MacKenzie please use that instead of "jagged-eye" if possible.
 - If you have any questions; ask via Email through DMacstudios.

Below the rules, it says "This Journal Skin was designed by Night-Beast".

There are 69 comments.

Mood: Optimism

Listening to: Step parents moving in the Kitchen.

Reading: Bathroom Readers Digest

Watching: The Internet

Playing: SINS

Eating: Toffifee

Drinking: Water!

At the bottom, there is a small profile picture and the text: "Using my Stock Rules by jagged-eye ★ Journals / Personal ©2009-2013 jagged-eye"

4. deviantART “yuumei” setting forth conditions for the use of her flash video.

<http://www.yuumei.deviantart.com/journal/Fisheye-Placebo-Images-411147326>

FISHEYE PLACEBO IMAGES

I saw this awesome Fisheye Placebo music video by Linda Neumann and realized that it would probably be easier for music video editors and language translators to have a textless version of all of the panels so here it is www.dropbox.com/sh/64jcondrsyl...

Feel free to download the images for any class projects, music videos, translations, etc. Please credit and remember that I drew these for everyone to read for free, so do not try to sell or profit from my work in anyway. If I find people charging others for translated versions of this story, or selling copies of my work, I will be very angry :)

That aside, check out the cool video! She did a wonderful job editing everything

[Fisheye placebo] You are (not) free.

273 Comments

Fisheye Placebo Images
by yuumei
Journal / Personal ©2013 yuumei