

Dear [Attorney],

Thank you for responding to my inquiry on the EFF list.

As I mentioned in my inquiry, I'm looking for advice about setting up a Tumblr alternative that would be explicitly friendly to transformative fanwork, including illustrated adult content that we believe to be legal in the US. Right now this project is an informal group of people and is not yet an incorporated organization, non-profit, or business. We're looking at the Organization for Transformative Works (http://www.transformativeworks.org/what_we_believe/) and Dreamwidth (<https://www.dreamwidth.org/legal/principles>) as potential models. Many of the people involved in the project would prefer a non-profit setup to a for-profit setup like a benefits corporation or a co-op, but part of what we would like advice on is what incorporation framework will allow us to meet other requirements. Below is a list of some of our questions right now.

We would like image hosting to be as permissive as possible as allowed under US law (and wherever we'll be able to get server space that meets our needs). Under Title 18 USC Section 2256, we understand US law to bar images of child sexual abuse and images which are indistinguishable from photographs or videos of real children. We of course intend to comply with all US law about barring and reporting images of child sexual abuse, and we intend to implement a system to scan user uploaded images against the National Center for Missing and Exploited Children's database of abuse images, as well as implement a reporting and moderation system. However, many fans produce illustrated art of underage fictional characters, like the characters from the Harry Potter series. We understand this content to be legal under 18 USC 2256, but *US v Handley* makes us wary of the legality of hosting even fictional content. Could you advise whether to err on the side of caution and bar illustrated sexual images of underage fictional characters in our terms of service, or what we would need to do to shield the organization from legal liability? Since the site would be accessible from Australia, Canada, and other places where illustrated fictional images which sexualize minors are illegal, do we need to take proactive steps to bar users in those jurisdictions from accessing content that is illegal in their jurisdiction?

Could you also advise us about a service provider's liability under 18 USC 2257 to keep records of age and identity of adults depicted in sexually explicit images? As a service provider rather than producer/photographer/publisher, would we be liable to obtain age and identity records if a user uploaded sexually explicit images of themselves or others to our services? What would our responsibility be with regard to this under GDPR requirements?

Under FOSTA/SESTA, are service providers required to take proactive steps to prohibit sex work on their platforms, and are there steps we would need to take in moderation or drafting the terms of service to comply with the law? Would hosting illustrated or photographic sexually explicit images open us to liability under FOSTA/SESTA?

We understand transformative fanworks like fanart and fanfiction to be legal in the US under fair

use, and we plan to implement a DMCA reporting system to comply with the DMCA safe harbor provision. However, many fans often link to their own Patreon, kofi, or other crowdfunding accounts or take commissions for fanwork, sometimes advertising these alongside their fanworks. One of our questions about setting up as a nonprofit, benefits corporation, or co-op is whether allowing users to link to these services would create liability for a nonprofit or for-profit organization? We would also like advice whether taking fees for service, like allowing users to purchase image hosting space, would open us to liability for hosting things like transformative fanart. Additionally, what would our liability be under EU Copyright Directive Article 11 and 13 if passed? Would a report and takedown system suffice or is there a proactive content policing requirement?

Regarding organizational structure, many of us are in favor of a nonprofit structure if at all possible, but it's unclear to us whether a mission like "preservation of transformative fanworks subculture communities" is a sufficient education/advocacy mission to meet 501c3 requirements, or if as I mentioned above, other requirements would conflict with 501c3 status. We've also looked at incorporation as a 501c7, but it's not clear to us whether it would be allowed to a) have some users with free accounts and give the option to pay for a more full-featured account or b) if free public internet access to user-created content would be allowed.

Right now we intend for the platform to be sustained on revenue from users, rather than advertising. One of our tentative thoughts for revenue is to allow users to post essentially "classified ads" for a small fee--our thought was that this would allow users to advertise second-hand items or commissions for original work. Some potential users have expressed interest in using this to look for a roommate at conventions, which seems like a potential liability under FOSTA/SESTA, as well as the possibility that users may use the classifieds system to advertise commissions of fanart. Could you advise whether posted ads from users would require moderation and screening before posting to comply with the law, or if the entire system would open us to too much potential liability?

If we get to the point of incorporating as a nonprofit or for-profit, would we be able to consult with you further about incorporation, drafting terms of service, or other issues? Or is there another attorney who you might be able to refer us to?

[Some other stuff about fee arrangements]

Again, thank you for your interest in the project,

A. Nonnie