

FOCUS

ON

Intellectual Property

'Transmedia' a copyright GREY AREA

Fifty Shades of Grey, the erotic novel written by author E.L. James, is a runaway bestseller and a popular phenomenon, but as Barbara Amiel recently pointed out: "There are some greyish (no pun intended) areas of copyright hovering about the trilogy." Indeed, it's a promising legal subject—*Shades* raises a host of complex transmedia legal issues.

The novel originated as a piece of online fan fiction titled *Masters of the Universe*, which, in turn, was based upon characters from the *Twilight* series of vampire novels written by Stephenie Meyer. Therefore, the author and publisher of the *Shades* trilogy must have satisfied themselves that nothing in the trilogy's "chain of title" infringed the copyright in these other works.

While some may dismiss *Shades* as lowbrow (Amiel describes it as "bog standard"), they may be missing the point. When fans upload, tweet, post or pin online their sub-stories, mash-ups, artwork and videos (with or without authorization), they become content co-creators, simultaneously pushing their "play and pleasure buttons" by participating in a method of storytelling that engages audiences across various multimedia platforms.

According to transmedia expert Henry Jenkins, this multiplatform story-telling method, where each story element makes its own unique contribution to the whole, is what is known in the entertainment industry as "transmedia."

In shared story worlds or transmedia projects, fans are often encouraged to create title, character or story-based fan boards, games, videos or other content based on their favourite video game, movie or television series. Is this considered copyright infringement? Although some may consider this a legally grey or shadowy area, it is clear that under Canadian copyright law, authors have the exclusive right to control the reproduction and adaptation of their works

into new formats and media.

Accordingly, fans who use a substantial amount of a copyrighted work to create fan fiction, should (but almost never do) obtain permission from the copyright owner of the original underlying work, unless the adapted work qualifies under one of the *Copyright Act's* very limited "fair dealing" exceptions: criticism and review, research and private study, or news reporting. Ideally, a waiver of the copyright author's "moral rights" should also be obtained since moral rights protect an author's right to be credited (or remain anonymous) and to maintain the integrity of his or her work.

The issue will soon become more complex when the *Copyright Modernization Act* becomes law later this year. Bill C-11 will expand "fair dealing" under the *Copyright Act* to include fair dealing for the purposes of education, satire and parody. More importantly, the bill contains a provision that, according to the Government of Canada's backgrounder, will permit Canadians to incorporate existing copyrighted materials in the creation of new works, such as Internet "mash-ups", as long as:

- it is done for non-commercial purposes;
- the existing material was legitimately acquired;
- the work they create is not a substitute for the original material, and does not have a substantial negative impact on the markets for the original material, or on the creator's reputation.

The flip side of this issue is: if a transmedia producer wishes to use, reproduce and/or exploit story or character elements that are the same or very similar to user-generated, co-created content, will they be risking a law suit for copyright infringement? This depends upon how the IP rights are managed.

For example, website terms of service should require content co-creators to represent that they own or have the necessary rights to



TARA PARKER



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upload content to the site. The terms of service also should grant transmedia producers the exclusive or non-exclusive (shared) right to reproduce, edit and use the uploaded content on, for example, a "worldwide," "irrevocable," "perpetual," "royalty-free basis," in certain listed media formats or, alternatively, in "any and all media now known or later developed."

When it comes to complying with applicable privacy laws, producers can reduce the risk of privacy claims by allowing users to control their personal account or privacy settings. For example, if a transmedia project makes use of material from users' Facebook accounts, user-controlled privacy settings or another means of online consent (such as clicking "I agree") may be used to confirm that users consent to the proposed use (e.g., to post messages, photos and videos)

of their personal information.

As the ways of building stories, content and audiences continue to adapt to new technological trends, entertainment lawyers need to make corresponding adjustments to their advice, focusing in particular on the benefits and risks of maintaining and/or ceding control of IP in this collaborative transmedia environment.

To do otherwise may risk exposing their clients to legal liability, negative publicity, or, to use the ominous words of John Robertson, creator of interactive video *The Dark Room*: "You may get the game you deserve." ■

Tara Parker is a partner in the Entertainment Law Group of Goodmans LLP in Toronto. Her practice focuses on film, television and transmedia productions.

Author E.L. James holds a copy of her book *Fifty Shades of Grey* at a signing in Coral Gables, Fla., April 29. The popular trilogy originated as online fan fiction and raises complex transmedia legal issues.