Copyright in the Participatory and Online Video Environment

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Introduction

Participatory and online video practice, once the wild west of audio-visual expression, is swiftly becoming a mainstream phenomenon. Such practice has been incorporated into everything from class assignments to advertising. In the process, the policies and customs of traditional mass-media culture are leaking into participatory and online video practice, and copyright has become a controversial area.

The sprawling, amorphous phenomenon of participatory digital culture is expressed in many forms. It is seen in subcultural practices such as that practiced by vidders (a feminist community producing videos that edit popular culture in order to make a gendered commentary on it) (Tushnet, 2011), in the work of fans who devote websites to their favorite popular culture (Jenkins, 2006), and in the explosion of memes online tracked on such websites as Know Your Meme and The Daily What. It is seen in the daily work of software designers, who for decades have not only worked collaboratively and remotely to accomplish their goals but also created an open-source culture that encourages anonymous and continuous participatory creation, with figures such as Richard Stallman and Eben Moglen vociferous (and contentious) spokesmen, It is
seen as well in educational practice, where open-access and digital publishing has encouraged ever greater iteration of work, with rapid feedback, group deliberative process and a culture of constant improvement.

Such practice flexes longstanding parts of copyright law that have not been prominent in public awareness, particularly the exceptions to limited monopoly rights that permit copyrighted work to be re-used without permission or payment in some circumstances. These exceptions include fair use (U.S.), fair dealing (Commonwealth nations), the right of quotation (many European nations), and a host of other venerable, tailored provisions created by national governments to provide an escape hatch from the limited monopoly rights of owners.

Without a vigorous employment of legal exceptions to rights holders’ limited monopoly rights, the emerging audio-visual culture, both in education and in the wider culture, in which recombinant practices are routine, will be stifled. This is because in order to recombine existing culture to make new work, creators typically need to quote copyrighted material. They often have clear rights under their laws to do so, but may not always be aware of their rights.

In this chapter I first discuss the nature of copyright exceptions to the limited monopoly rights of copyright holders, which exist in all copyright regimes. I then discuss why a grasp of copyright exceptions is central to the evolution of participatory and online video environments, including the existence of a range of common expressions that employ copyrighted material and also the clash between copyright policy’s recognition of authorship as rooted in individual practice and emerging collective culture. I then discuss the historical underpinnings of unbalanced copyright policy, and how challenging attempts to rebalance it have been. In that light, the success of practice-related rebalancing efforts has been remarkable. These rebalancing efforts are of
particular interest to participatory and online video creators and users, who can both make use of their successes and translate their techniques into the copyright regimes of their own national environments. Finally I argue that such participation in rebalancing copyright will be critical to the evolution of participatory and online video culture.

Copyright Exemptions across International Boundaries

All copyright regimes have some exceptions to limited monopoly in copyright. The most flexible and powerful exception is the U.S. fair use policy, which in Sec. 107 of the Copyright Act broadly and vaguely asserts the right to use copyrighted material if the benefit to society (e.g., the creation of new culture) is greater than the private loss. Considerations include the nature of the original work, the nature of the new work, the amount taken or used, and the effect on the market (beyond mere loss of a licensing fee). The application of fair use, like many exceptions, is on a case-by-case basis, and given recent case law, in practice involves two simple questions: Is the use transformative, or different from the original material? Was the appropriate amount taken to match the new use—not too much or too little? These questions are raised on a background of cultural practice; such questions are always raised with consideration of what is needed, within a set of cultural practices, to be able to create new culture.

Internationally, a wide range of exceptions exist, all of them far more targeted and specific than fair use, limited to a particular medium or a particular kind of user or both. (Aufderheide & Jaszi, 2011) These exceptions are a key, if often understated, aspect of all copyright regimes. The monopoly rights of copyright holders are always limited in some way, although the logic by which policies limit them differs from country to country. By limiting the monopoly rights of copyright owners, such limitations and exceptions effectively protect freedom of speech. They
limit the private censorship capacity of copyright owners, who otherwise could forbid anyone to use their material without their permission.

They can permit a wide range of activities that are common in participatory video (and other forms of expression as well), such as:

- Commenting or critiquing a copyrighted work (for instance, critiquing misogynistic music videos);
- Illustrating or showing an example (for instance, incorporating a picture of a public official in charge of housing in a video documenting poor management of a public housing facility);
- Capturing copyrighted material incidentally or accidentally (for instance, showing your toddler dancing to recorded music);
- Reproducing, reposting or quoting to preserve or rescue an experience, event, or cultural phenomenon (for instance, recording a clip of a concert demonstrating that the video’s maker was present at a concert; uploading a controversial moment from a television show; posting a work that is otherwise out of circulation and in the poster’s eyes worthy of note and discussion);
- Copyright, reposting, and recirculating a work or part of a work to launch discussion (for instance, the Media Matters for America website’s reposting of a Fox News report criticizing Pres. Obama, to trigger discussion of bias in Fox’s coverage);
- Intermixing (remixing or mashing up) several elements, in order to make a new work (“Bush Blair Endless Love,” in which television news material of Pres. George Bush and
Prime Minister Tony Blair is recut to make them appear to be singing “Endless Love” to each other. (Aufderheide et al., 2008)

Participatory and Online Video and the Romantic Construction of the Author

Makers who work particularly in a participatory environment—perhaps in a classroom setting, where iterative work refines a concept, or perhaps in a public setting where new work elaborates a “meme” or a trope that is developed iteratively—find themselves confronted, from a copyright perspective, with the fact that collective authorship is difficult to acknowledge under the law. The author is construed as an individual or individuals (e.g. Fred Gross); collectivities (e.g. the Bristol Flower Club) are not typically recognized in copyright law. Therefore, when work is iteratively or collectively created, the individual copyrights of prior authors apply, and exceptions may govern access to the work.

This commitment to individual authorship flies in the face of longstanding understanding of creative practice, which ever more often involves an iterative and collective creation of work that exists in a state of constant reformation. It conforms with a Romantic understanding of the genius of the individual creator, as has been explored by Saunders (Saunders, 1992), from one perspective, and by Jaszi and Woodmansee (Woodmansee & Jaszi, 1994), from another. These scholars invoke traditions of iterative and collective creation of meaning around works, which has reverberations in the current environment’s cultivation of fan culture (Jenkins, 2006) and participatory digital culture (Benkler, 2011). The daily practice of software engineers and developers routinely confounds the assumption of individual authorship. Such collectively-produced culture eagerly participates in and contributes to cultural expression that is manifestly not individual alone. And yet, it must however awkwardly work within a copyright policy that
acknowledges only individual authors. Thus, understanding of the limits of those authors’ monopoly rights becomes paramount to the evolution of participatory culture. *Participatory Culture and the Unbalancing of Copyright, Legally and Technically*

These exceptions are also particularly important at this moment because copyright law has, especially in the last decades, been dramatically tilted in most Northern nations toward copyright owners (Bollier, 2002; Boyle, 2008; P. Bernt Hugenholtz, 2000; McLeod, 2005). This tilting then limits the amount of cultural expression that is free of copyright. Copyright is typically default (everything in a fixed medium is copyrighted, including your shopping list); terms are extremely long, typically 70-90 years after the death of the author; and derivative rights apply (the owner has the right not only to the novel but the play from the novel, the comic book, and the musical). So everything in the culture, effectively, is copyrighted. Anyone who wants to create something new will, whether they want to or not, draw from that culture in some way. And when that work can freely and visibly circulate digitally, makers need to know, with an even greater urgency than in the analog era, what their rights to use material without permission are.

The copyright challenges facing makers of participatory video are increased by technical overrides on their rights. Online video sites such as YouTube use automated programs to detect any use—legal or not—of copyrighted work, which then triggers removal of the video from the site. This behavior stems from policies that, while different in different countries, share common characteristics. They exempt Internet service providers (such as platforms for online video) from shared copyright infringement liability if they pre-emptively remove material that is flagged by a copyright owner. While users can petition to restore their videos, and may be entirely in the right and within the law, sites such as YouTube block users’ accounts after repeated detection for any
reason. Some national laws harshly penalize those who have been found to use copyrighted material online. (Haber, 2011)

The terms of service of social media sites also constrain users. If a social media site preemptively claims ownership over material on the site, or if a social media site requires users to forego their right to use exceptions (e.g. “you may only post here material that you created”), the terms of service can override the rights given under copyright law. (Fairfield, 2008)

There is very little actual litigation to guide any individual’s judgment. In the case of Internet takedowns, at least one user whose work was taken down, Stephanie Lenz, has responded (with the help of the Electronic Frontier Foundation, which maintains current information about the lawsuit on its website) with a lawsuit against Universal, the corporation whose work incidentally and accidentally appeared in her home video of her toddler dancing. The lawsuit has spent years in court with interim victories for Lenz, and meanwhile no other U.S. copyright holder has prosecuted a videomaker who incorporated copyrighted material. (Attempts to Address Unbalanced Copyright via Policy)

Scholars and legal policy activists have approached the problem of unbalanced copyright in a digital era in various ways. Legal scholar Lawrence Lessig, long a critic of “tight copyright,” wrote a book directed mostly at large copyright holders, pleading for the realization that copyright practices designed for a mass-media era were inappropriate for a remix era (Lessig, 2008). In fact, he argued, mass media companies were putting an entire generation (that of Lessig’s own child) at risk of criminalizing their daily lives. Large copyright holders, currently the most powerful and agenda-setting stakeholders, have remained unmoved, and there has been no movement of protest inspired by Lessig’s book. For instance, large media industry
stakeholders demonstrated, in 2011, the strength of their former convictions by massive support for two “anti-piracy” bills in the U.S. Congress, which would permit the U.S. government to take down international websites as well as domestic sites where infringing material appears. (This legislation was tracked closely by public interest organizations such as Public Knowledge and the Electronic Frontier Foundation, whose sites form a record of the debate.) So it is unrealistic to expect stakeholders traditionally invested in a maximalist approach to copyright to suddenly loosen their grip voluntarily.

Others have directed their concern to policymakers. For instance, the think tank and advocacy organization Public Knowledge advocates reforming U.S. copyright law to clarify when fair use—the limited right to use copyrighted materials without permission or payment—applies. European scholars Hugenholtz and Senftleben have proposed copyright reform that would incorporate some of the flexibilities of U.S.-style fair use at a European Union-wide level (B. Hugenholtz & Senftleben, 2011). However, new copyright legislation will be frozen until large stakeholders figure out where their best advantage lies, which will require stabilization of new business models. There is very little political weight, in any country, on the side of those who want exceptions to flourish.

This may change, with the growing participation in policy discussions of newer Internet-based businesses such as Google and the awareness of equipment manufacturers in consumer desire for participatory creation. Certainly the 2011 open discussion in Britain of the possibility of considering fair use in copyright reform, which culminated in the Hargreaves report (Hargreaves, 2011), is an indication of the economic significance of exceptions. Although the report rejected incorporation of fair use, it recommended exceptions honoring the transformative concept that informs U.S. fair use. It also noted that several earlier reports were now functioning as doorstops,
however. Copyright reform internationally suffers from the same deer-in-headlights problem of stakeholder uncertainty as in the U.S.

*Rebalancing Copyright in Practice*

Still others have experimented with rebalancing copyright at the grassroots, with education that can invest users with both creative and political agency. For instance, legal scholar Rebecca Tushnet formed, with film studies professor Francesca Coppa and others, the Organization for Transformative Works to assert the fair use rights of people who make fan fiction and other work that uses copyrighted material transformatively; its website documents and archives its work.

Working in the vein of addressing imbalance in copyright with education, the legal scholar Peter Jaszi and I have conducted research designed to explore the relationship between copyright understanding and creativity. We have discovered, over seven years and many projects summarized in our book *Reclaiming Fair Use* (Aufderheide & Jaszi, 2011), a close and disturbing relationship between a muddled copyright understanding and self-censorship.

Filmmakers fear undertaking projects that would involve quoting movies, music or television (Aufderheide & Jaszi, 2004); middle school media literacy teachers feel they have to smuggle in commercials they recorded off-air in order to teach about persuasion (Aufderheide, Hobbs, & Jaszi, 2007); college students are afraid to upload material that includes copyrighted material (Aufderheide & Jaszi, 2007). These findings disagree with the unresearched but constant rumble of alarm from large copyright holders such as media and software companies, which impute a feckless disregard for copyright to the general public (Gillespie, 2009).

As a result of discovering these patterns, and in conjunction with practitioner groups whose members’ mission and work was impaired by copyright confusion, Jaszi and I facilitated the
creation of codes of best practices in fair use. Such codes now exist for documentary filmmakers, media literacy teachers, dance archivists, film scholars, communication scholars, librarians, poets, and makers of online video, and are all discoverable at centerforsocialmedia.org.

These codes interpret for communities of practice how to use the exception of fair use—the most flexible and powerful of all exceptions internationally. Interpretation is necessary because the exception itself is extremely vague, moldable to any community’s use but also difficult to interpret on an individual basis. The fact that the U.S. policy, almost alone, allows extremely high statutory damages to punish infringers means that, in principle, taking a risk could be prohibitively expensive.

*Effectiveness of practice-oriented rebalancing of copyright*

The approach of educating communities of practice to their rights under the law, and working with them to shape a legally sturdy non-legal document interpreting their rights, has been successful in ways that took many by surprise. For instance, U.S. documentary filmmakers, who once lived in a “clearance culture” in which all copyrighted material they excerpted was licensed, increasingly asserted their rights and employed fair use where appropriate. But they still had to convince insurers, who had not insured against fair use claims for two decades, to accept their claims. Documentary films without errors and omissions insurance cannot enter festivals, or be shown on television or in theaters, and garnering insurance is the filmmaker’s responsibility. Once they read and employed the documentary filmmakers’ code, the insurers were able to assess risk more easily. They universally decided, within a year of the issuance of the code, to accept fair use claims for uses that fell within the code. The policy reversal was a direct result of the creation of the Documentary Filmmakers’ Statement of Best Practices in Fair
Use, accessible at centerforsocialmedia.org/fair-use. Participatory and online video makers’ needs may be slightly different than those most often identified by documentary filmmakers, however. The Code of Best Practices in Fair Use for Online Video (available, like all the Codes of Best Practices, at centerforsocialmedia.org/fair-use), facilitated by the Center for Social Media and the Washington College of Law’s Program on Information Justice and Intellectual Property, describes how to make a fair use judgment in the six categories of uses mentioned above. Those six categories are drawn from an extensive 2008 study of popular uses of copyrighted material in online video (Aufderheide & Jaszi, 2008). The code has since provided a range of online video creators—teenagers in after-school programs, schoolchildren, political remix artists, vidders (makers of critical work on popular culture, usually from a feminist perspective) and others—to use their rights confidently. The work of Jonathan McIntosh, displayed at the Rebellious Pixels website, is a good example. In one case, McIntosh employed excerpts from more than a hundred episodes of a popular satirical news program, The Daily Show, and remixed it with a popular song to make a sharp criticism about gender inequality on the program.

To illustrate the nature of the Code, here is one of the six situations addressed by it:

**QUOTING IN ORDER TO RECOMBINE ELEMENTS TO MAKE A NEW WORK THAT DEPENDS FOR ITS MEANING ON (OFTEN UNLIKELY) RELATIONSHIPS BETWEEN THE ELEMENTS**

**DESCRIPTION:** Video makers often create new works entirely out of existing ones, just as in the past artists have made collages and pastiches. Sometimes there is a critical purpose, sometimes a celebratory one, sometimes a humorous or other motive, in which new makers may easily see their uses as fair under category one. Sometimes, however,
juxtaposition creates new meaning in other ways. Mashups (the combining of different materials to compose a new work), remixes (the re-editing of an existing work), and music videos all use this technique of recombining existing material. Other makers achieve similar effects by adding their own new expression (subtitles, images, dialog, sound effects or animation, for example) to existing works.

**PRINCIPLE:** This kind of activity is covered by fair use to the extent that the reuse of copyrighted works creates new meaning by juxtaposition. Combining the speeches by two politicians and a love song, for example, as in "Bush Blair Endless Love," changes the meaning of all three pieces of copyrighted material. Combining the image of an innocent prairie dog and three ominous chords from a movie soundtrack, as in "Dramatic Chipmunk," creates an ironic third meaning out of the original materials. The recombinant new work has a cultural identity of its own and addresses an audience different from those for which its components were intended.

**LIMITATIONS:** If a work is merely reused without significant change of context or meaning, then its reuse goes beyond the limits of fair use. Similarly, where the juxtaposition is a pretext to exploit the popularity or appeal of the copyrighted work employed, or where the amount of material used is excessive, fair use should not apply. For example, fair use will not apply when a copyrighted song is used in its entirety as a sound track for a newly created video simply because the music evokes a desired mood rather than to change its meaning; when someone sings or dances to recorded popular music without comment, thus using it for its original purpose; or when newlyweds decorate or embellish a wedding video with favorite songs simply because they like those songs or think they express the emotion of the moment.
Note that for each situation, there is a definition, a principle established, and limitations to that principle articulated. This provides clear guidance on how to reason about applying the powerful U.S. exception of fair use, within the cultural experience of participatory and online video users.

Participatory and online video makers and educators may also learn from the experience of open courseware designers. These designers take curriculum produced by professors in institutions of higher education, and make those materials available on the Internet, worldwide. Until recently, the designers had to exclude all third-party copyrighted material from their curriculum, because they were unsure of how to apply the fair use exception. Further, they worried that if they did employ the exception, they would impair the ability of the materials to be used and recombined in the way that other learners would see fit. (The curriculum is all made available through Creative Commons licenses, which permit copyright holders to establish terms looser than the default for reuse of their works.)

They discovered that unless they employed fair use, they would have to exclude entire courses from their curriculum because so much of the learning material was copyrighted. They deliberated together and, with the help of the Center for Social Media and the Program on Information Justice and Intellectual Property, developed an understanding of how to interpret fair use for their needs. They created their own Code of Best Practices in Fair Use for Open CourseWare. They understood that when they employed third-party copyrighted material, including audio and visual elements, they would limit its redeployment. Others could recombine their materials freely, but they could only use the fairly used materials as consumers (although it would not matter where they were in the world, since copyright is “territorial,” meaning that the law of the land where culture is created, not consumed, is the law used). They accepted this limitation on an open educational resources ideal because they wanted the curriculum to
circulate. Within one year of creating the code, the Massachusetts Institute of Technology had launched 31 new courses, all of which would have been impossible to launch without the confident employment of fair use.

Thus, educators who strive to offer open educational resources for a recombinant educational environment find that exercise of the fair use exception is essential to accomplishing their goal.

Finally, the experience of understanding and more vigorously using fair use rights, in the U.S., has led entire groups of creators to more vigorously push back against the technological limitations they confront. In the U.S., the Digital Millennium Copyright Act of 1998, incorporated into the Copyright Act, permits criminal penalties for de-encrypting digital material (such as from a DVD), even if such de-encrypting is done to employ fair use. However, every three years it is possible to petition the Library of Congress for an exemption from this section of the law.

Since the codes of best practices were created, representatives of several communities of practice have successfully won such exemptions. Noncommercial video makers such as vidders won a broad exemption for all noncommercial work, an exception that dramatically benefited teachers. Documentary filmmakers won an exception. Librarians also appeared to encourage such exemptions. These exemptions, however, must be regranted every three years, and therefore require continuous engagement of constituencies. (The Copyright Office lodges information on the status of these exemptions at copyright.gov/1201/.)

*Implications of Fair Use Expansion for the International Environment*

The U.S. experience is valuable to international creators. In practical terms, since the U.S. has the harshest penalties for infringement, clearing the fair use bar is usually good enough for many
commercial distributors internationally. The logic of fair use is entirely different from the exceptions of other nations. The core principle of freedom of expression applies to all, however, and many of the same options are available to users, even though for different legal reasons.

The U.S. example has already proved inspirational. As a result of the achievements of U.S. documentary filmmakers, filmmakers under other copyright regimes in other countries have also explored, sometimes with scholarly help, the opportunities to make the most of exceptions under their law. South African filmmakers have probed the possibilities of more aggressively employing right of quotation, especially in the effort to document the history of apartheid (Flynn & Jaszi, nd. [2009]). Norwegian filmmakers have also discovered that right of quotation appears to be a far more ample exception than they have heretofore exploited (Larsen & Nærland, 2010).

These policy victories and successes in expanding creative practice demonstrate that creators who are aware of their rights can take creative action, and also take political and policy action to defend them. They can both innovate in their field and support innovative policy. They also provide a small but sturdy challenge to the overreach of large copyright holding stakeholders, who typically discount the value of copyright exceptions. Nonetheless, such actions remain demonstration cases in a much larger contest between those who hope to expand the monopoly rights of owners and those who want to increase the flexibility for use of existing culture in the creation of new culture.

Conclusion
Makers of participatory and online video, and educators who teach and support them, currently participate willy-nilly in the contest between those who wish to unbalance copyright and those who are struggling to rebalance it. They are examples of innovators, and they participate in an undefined, emergent culture, which cannot develop and grow without access to copyright exceptions. In order to explore their environment and create new culture, these creators have been forced to confront the imbalance of copyright policy.

Creators in this participatory, online environment need to understand and use the relevant exceptions to limited monopoly rights under copyright. Doing so can not only permit them creative range of action, but can enable them to exercise and defend their free speech rights. Users who are aware of their rights and see the way those rights change what they can do can also be active participants in shaping their copyright policy.

Users should be active participants in that discussion, which is lively and ongoing. Copyright policy will adapt to a more participatory creation environment, but the least adaptive of the 20th century business forces driven by monopoly rights in copyright will continue to be powerful voices. Therefore, work in legal literacy will be be important. This work, particularly making people aware of their free speech rights, must be done within the legal framework of each nation. While legal clinics, legal scholars, and pro bono lawyers can help, ultimately teachers of content, critical thinking and media literacy need to co-own the agenda of legal literacy. Legal experts can assert what the limits and terms of current law are, but this is merely the skin of practice. As has been proven by the vast changes in fair use practice in the U.S., practice creates practice; use changes the contours of law.
We can expect to see attempts on the part of large copyright holders to influence copyright policy in ways that further unbalance it. Some examples include: extending copyright terms even further; developing legislation that cripples Internet transparency in the name of limiting “piracy” (which usually means P2P downloading); demanding treaty terms that “harmonize” across national boundaries to further unbalance copyright. Members of an emergent, participatory digital culture have every reason to need a balanced copyright policy, and also to argue to policymakers that such rebalancing is in the national interest.

References


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