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Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video

PATRICIA AUFDERHEIDE* AND PETER JASZI**

I. EXECUTIVE SUMMARY

This article discusses the intertwining of creative and copyright practices, as demonstrated by the emergence and evolution of standards to assess fair use in online video from 2007-2009. The development of such standards demonstrates the effectiveness of community-based standards to expand the utility of fair use and the importance of practice in affecting the interpretation of law. This process demonstrates the relationship between copyright practice and creative practice.

II. CREATIVE AND COPYRIGHT PRACTICES

The project described in this article is grounded in the link between copyright and creativity. How people interpret and understand copyright law has a profound effect on how they express themselves as they navigate new possibilities. Changing cultural habits have had a profound effect on changes in legal practice as well. The link between cultural and legal practice in intellectual property has been discussed historically by, among others, Jaszi and

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Woodmansee.¹ It has also been analyzed theoretically in relation to today's ownership-heavy copyright policy by, among others, Bollier,² Boyle,³ Lessig,⁴ McLeod,⁵ Netanel,⁶ Samuelson,⁷ and Vaidhyanathan.⁸ These discussions were supported with anecdotal evidence from cultural practice.

The *Code of Best Practices in Fair Use for Online Video*⁹ forms part of a much larger project to expand the utility of fair use within copyright law. The underlying theory of that project has been described elsewhere.¹⁰ Briefly, however, the work is premised on the observation that over time, courts have tended to defer broadly to the views of practice communities about what constitutes reasonable and appropriate unlicensed use of copyrighted materials in their own fields of activity.¹¹

¹ THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., Duke Univ. Press 1994).

² DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH (2002).

³ JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (Yale Univ. Press 2008).

⁴ LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (Penguin Press 2004); LAWRENCE LESSIG, CODE: VERSION 2.0 (Basic Books 2007).

⁵ KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY (Doubleday 2005).

⁶ NEIL W. NETANEL, COPYRIGHT'S PARADOX (Oxford Univ. Press 2008).

⁷ PAMELA SAMUELSON, BERKLEY CTR. FOR LAW & TECH., UNBUNDLING FAIR USES (2009), <http://repositories.cdlib.org/bclt/lts/65>.

⁸ SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (New York Univ. Press 2001); SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM (Basic Books 2004).

⁹ CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2008), http://www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf.

¹⁰ Peter Jaszi, *Copyright, Motion Pictures and Fair Use*, 2007 UTAH L. REV. 715 (2007).

¹¹ CTR. FOR SOCIAL MEDIA, *supra* note 9, at 4.

Research produced by Aufderheide and Jaszi, conducted with U.S. documentary filmmakers, demonstrates a close link between practitioners' creative decisions and their understanding of cultural policy.¹² However, this link was often obscure to the practitioners themselves, who had naturalized their understanding of copyright policy to a large extent.¹³ As copyright holders with a clear and direct economic investment in those copyrights, they had also seen the limitations they accepted as a tradeoff for holding ownership rights.¹⁴

Documentary filmmakers routinely avoided topics that involved copyrighted material from large subject areas, such as history, popular music, popular film, and politics.¹⁵ They routinely altered the reality they filmed by turning off radios and televisions, taking down pictures and posters, removing copyrighted and trademarked items from scenes, and asking subjects to recreate in altered form scenes that involved copyrighted material (such as singing the song *Happy Birthday*).¹⁶ Finally, in post-production, they substituted cheaper or more accessible licensed material for copyrighted material that might prove difficult to license (e.g. Major League Baseball material shown on a television in the room).¹⁷

Once made aware of the creative consequences throughout the field of their individual choices, filmmakers worked with Aufderheide and Jaszi to develop the *Documentary Filmmakers' Statement of Best Practices in Fair Use*,¹⁸ which had a dramatic effect on documentary creative and business practice. Filmmakers utilized "fair use" to create works that otherwise could not have been created, to document more authentically the reality they captured, and to leave copyrighted

¹² PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOCIAL MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

¹³ *Id.* at 22.

¹⁴ *Id.*

¹⁵ *Id.* at 17.

¹⁶ *Id.*

¹⁷ *Id.* at 18.

¹⁸ CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (Nov. 18, 2005), http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

elements in the work for viewers to see in the finished product. Broadcasters and insurers accepted fair use terms within normal business practice.¹⁹

The link between creative practice and copyright understanding in the community of media literacy educators was also demonstrated by Aufderheide, Jaszi, and Hobbs with similarly in-depth research.²⁰ Educators routinely deformed their educational mission in a variety of ways. Some hid their work from administrators and peers in enclosed classrooms, making it extremely difficult for them to share successful strategies with others, and making it difficult for students to display or share work produced under such circumstances.²¹ Others hyper-complied with rigid restrictions, severely limiting their ability to analyze popular culture.²² This community's creation of the *Code of Best Practices in Fair Use for Media Literacy Education* was liberating for educational practice, and is currently being incorporated into school district standards.²³

The advent of the YouTube platform in 2005 to showcase online video created a new opportunity to widely and easily share videos created by amateurs, students, and professionals alike. It also opened up new exposure to copyright liability. Aufderheide and Jaszi hypothesized that in this environment, one might see the same link between creative practice and copyright understanding that was evident in the documentary filmmakers' and media literacy educators' communities.²⁴ In a small study of college-level communications students who had created original online videos using copyrighted

¹⁹ PATRICIA AUFDERHEIDE & PETER JASZI, INTELL. PROP. TODAY, FAIR USE AND BEST PRACTICES: SURPRISING SUCCESS, a (Oct. 2007), <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>.

²⁰ RENEE HOBBS, PETER JASZI, & PATRICIA AUFDERHEIDE, CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., THE COST OF COPYRIGHT CONFUSION FOR MEDIA LITERACY (Sept. 2007), http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf.

²¹ *Id.* at 14.

²² *Id.* at 15.

²³ CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION (Nov. 2008), http://www.centerforsocialmedia.org/files/pdf/Media_literacy.pdf.

²⁴ PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT (2007), http://www.centerforsocialmedia.org/files/pdf/good_bad_confusing.pdf.

material, researchers found that students demonstrated familiar patterns. Some avoided uploading videos for fear that they would violate the law.²⁵ Others believed that they had no copyright liability because they were producing outside the marketplace (an erroneous belief).²⁶ Still others believed that they were doing something wrong by uploading new work that incorporated copyrighted material, but believed that the risk was very low.²⁷ Thus, at the origin of this new opportunity for expression, early adopters were already showing familiar behavior: avoidance resulting in lack of circulation of cultural products, perceived recklessness in a private or semi-private setting, and anxiety and fearfulness.

At the same time, copyright advocate organizations such as Electronic Frontier Foundation and Public Knowledge alerted the public to the possibility that in responding to “take-down” notices generated by copyright owners under 17 U.S.C. § 512, online video platforms might fail to discriminate between videos that made fair use of preexisting materials and those that merely reposted them.²⁸ If so, Aufderheide and Jaszi hypothesized, a partial cause might be the absence of reliable information about what constituted fair use in this significant new media environment.²⁹

III. ONLINE VIDEO

Since 2005, online video has rapidly become a nearly ubiquitous viewing practice, with almost 80 percent of the U.S. public viewing videos in April 2009. According to industry source comScore, more

²⁵ *Id.* at 5-6.

²⁶ *Id.* at 8.

²⁷ *Id.* at 6.

²⁸ Letter from Fred von Lohmann, Senior Intellectual Property Attorney, Electronic Frontier Foundation, to Louis Briskman, Executive Vice President & General Counsel, CBS Corp.; Randy J. Morell, Executive Vice President & General Counsel, Christian Broadcasting Network; Rita Tuzon, Executive Vice President & General Counsel, Fox Network; and Rick Cotton, Executive Vice President & General Counsel, NBC Universal (Oct. 20, 2008), *available at* http://www.eff.org/files/filenode/ip_freespeech/letter+to+networks.pdf.

²⁹ AUFDERHEIDE & JASZI, *supra* note 24, at 9.

than seventy percent of those that watched online videos watched videos on YouTube.³⁰

Online video is a lively site of emergent popular culture. As cultural studies scholar Henry Jenkins noted in *Convergence Culture*, technological possibility is triggering a creative tsunami.³¹ Yesterday's fan culture is now today's popular culture, as evidenced by much-shared videos like the impassioned plea by Chris Crocker in *Leave Britney Alone*,³² or the many home-made variations on the *Saturday Night Live* appearance by Justin Timberlake singing "*Dick in a Box*" ("*Box in a Box*," "*Puppet Dick in a Box*").³³ Such videos have themselves proliferated into mini-genres.

Online video has also become the latest marketing tool for large and small business enterprises. For instance, in *The Wall Street Journal*,³⁴ the maker of a child's bulletproof backpack claims to have sold one thousand packs within weeks of launching his homemade YouTube video, which was his only marketing tool.³⁵

Online videos also play large and sometimes decisive roles in political battles. Consider the "macaca" video³⁶ that derailed George Allen's Senate campaign and the broad use of online video to recruit, train, and energize supporters of the Obama presidential campaign.

Online videos can even become vehicles for nonprofessionals to engage others in what until now has been the preserve of marketers and political consultants, as popular election sites such as

³⁰ Press Release, comScore, *Americans Viewed a Record 16.8 Billion Videos Online in April Driven Largely by Surge in Viewership at YouTube* (June 4, 2009), http://www.comscore.com/Press_Events/Press_Releases/2009/6/Americans_Viewed_a_Record_16.8_Billion_Videos_Online_in_April.

³¹ HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* (New York Univ. Press 2006).

³² ItsChrisCrocker, *LEAVE BRITNEY ALONE!*, YOUTUBE, Sept. 10, 2007, <http://www.youtube.com/watch?v=kHmvkRoEowc>.

³³ *Saturday Night Live* (NBC television broadcast Dec. 16, 2006), available at http://www.nbc.com/Saturday_Night_Live/video/clips/d-in-a-box/51523.

³⁴ Raymund Flandez, *Lights! Camera! Sales! How to Use Video to Expand Your Business in a YouTube World*, WALL ST. J., Nov. 26, 2007, at R.1.

³⁵ mjsafetysolutions, *Bullet Blocker – My Child's Pack*, YOUTUBE, Aug. 10, 2007, <http://www.youtube.com/watch?v=t1iJRDffNMc>.

³⁶ zkman, *George Allen introduces Macaca*, YOUTUBE, Aug. 15, 2006, <http://www.youtube.com/watch?v=r9ozOPMnKwI>.

10questions.com suggest.³⁷ The political importance of participatory culture has barely begun to be imagined, notes legal scholar Yochai Benkler in *Wealth of Networks*.³⁸

Online video making is part of a much larger process in which the people formerly known as “audiences of mass media” or “consumers of popular culture” assert themselves as participants in culture-making. This is a profound role shift, as Jenkins and many others have noted,³⁹ and is one that is being welcomed in many arenas because it is creating enormous new business opportunities (as well as challenges).

More and more, video creation and sharing depend on the ability to use and circulate existing copyrighted work. Until now, that fact has been almost irrelevant in business and law because broad distribution of nonprofessional video was relatively rare. Historically, people circulated their work within a small group of family and friends, but digital platforms make work far more public than it has ever been. Because of digital media, cultural habits and business models are developing. As practices spread and financial stakes are raised, the legal status of inserting copyrighted work into new work will become important for everyone.

While creative practices are nascent at this early stage in online video production, decision-makers are shaping the emergent environment with private regulation and legal actions. They are doing so largely without information about creator practices in this unprecedentedly participatory popular culture.

IV. FAIR USE

Online video, like much new digital creation, has drawn upon and incorporated segments of surrounding popular culture. This practice

³⁷ 10 Questions, <http://www.10questions.com> (last visited Dec. 16, 2009).

³⁸ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale Univ. Press 2006).

³⁹ JENKINS, *supra* note 31; BENKLER, *supra* note 38; ALLISON FINE, *MOMENTUM: IGNITING SOCIAL CHANGE IN THE CONNECTED AGE* (Jossey-Bass 2006); DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (Allen Noren & Mary Brady eds., 2004); DAVID WEINBERGER, *EVERYTHING IS MISCELLANEOUS: THE POWER OF THE NEW DIGITAL DISORDER* (Times Books 2007); CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (Hyperion 2006).

is legal if it falls within the definition of “fair use,”⁴⁰ although this doctrine and its applications are not well known among new makers.

Fair use, an important part of copyright law for more than 150 years, is a right to reuse copyrighted works without a license in some circumstances—most broadly, when the value to society is greater than the value to the copyright owner. This feature of the law is grounded in the purpose of U.S. copyright law itself: to encourage the production of culture. Thus, new cultural production can be encouraged both by providing incentives, such as limited ownership rights, and by providing exemptions such as fair use. The Supreme Court has made it clear that fair use reconciles the copyright system with First Amendment freedom of expression.⁴¹ Today, fair use is the primary way that new makers can get unlicensed access to the cultural production of their own society.

The provisions of the Copyright Act codifying fair use were intentionally made nonspecific, an acknowledgement of the constantly changing state of cultural production. The statute refers to four considerations that should, at a minimum, be taken into account: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect on the potential market for or value of the copyrighted work.⁴²

As the duration and intensity of copyright protection have expanded, courts have come to a new understanding of the importance of the fair use doctrine. Over the last fifteen years, they have placed particular emphasis on the “transformative” quality of the use.⁴³ Moreover, court decisions rely on an understanding of the four “factors” referred to in the Copyright Act as they are understood within the specific cultural practice in which the use occurs.⁴⁴

Courts analyze fair use on a case-by-case basis after the fact, but communities of cultural practice can and do make predictive

⁴⁰ 17 U.S.C.A. § 107 (West 2009).

⁴¹ *Jaszi*, *supra* note 10, at 717 (citing *Kalen Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911)).

⁴² 17 U.S.C.A. § 107 (West 2009).

⁴³ *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (relying substantially on a determination of “whether and to what extent the new work is ‘transformative.’”).

⁴⁴ *E.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006) (treating the context of the quoted material as significant to the determination of its transformative character).

judgments on a more systematic basis. Thus, over time each community evolves a shared understanding of fair use for its own practices—powerful testimony to the power of interpretation of fair use by a creative community.

Fair use may be far more relevant than has previously been assumed in discussion of user-generated content, even though the community of online video makers is sprawling and protean. In some cases, these creators use copyrighted material in ways that have long been seen in filmmaking as fair use: for media critique; for short illustration; or when copyrighted material is incorporated into a moment being documented for another purpose. In other cases—in mash-ups, remixes, and vids (re-editing of popular programs to make a commentary, celebrate the work, or re-imagine the popular culture)—video makers may quote extensively. Even extensive uses may well be legal and within fair use under certain circumstances, if analyzed within context. For example, it is possible to argue that since most online videos are not produced for profit, their quotations should be dealt with leniently in fair use analysis. However, most video comes to the audience's attention on commercially supported, ad-sponsored sites, which compromises this argument.

Although fair use is legally available to makers of new videos that use copyrighted works, they now find themselves unintentionally entangled in content providers' longstanding concerns about piracy and theft. The Digital Millennium Copyright Act requires "takedowns," or removals from the site, of material to which a copyright owner objects.⁴⁵ This tactic has not proven sufficient to allay the concerns of copyright holders about the proliferation of unlicensed copyrighted works online.

In the attempt to address unauthorized copying, content providers and online video platform providers have established guidelines that articulate how platform providers can accommodate content providers' piracy concerns through filtering of content.⁴⁶ These provisions acknowledge, but leave vague, how to address or assess fair use. At the same time, nonprofit organizations led by the Electronic Frontier Foundation have asserted alternative guidelines intended to leave room for new content creation using copyrighted works while

⁴⁵ 17 U.S.C.A. § 512 (West 2009).

⁴⁶ User Generated Content Principles, <http://www.ugcprinciples.com> (last visited Dec. 16, 2009).

honoring the concerns of copyright holders.⁴⁷ These guidelines, however, do not yet have industry support. Although both sets of guidelines acknowledge and seek to protect fair use, neither attempts to define it in this new media context.

Recognizing how new creators are quoting copyrighted works, and for what purposes and uses, clarifies the difference between quoting for new cultural creation and simple piracy. It also clarifies the significance of the legal doctrine of fair use within the online environment.

V. EMERGING CREATIVE PRACTICE IN ONLINE VIDEO

Aufderheide and Jaszi conducted an environmental scan of online video practices between September and December 2007 in order to assess the range of ways in which creators were employing copyrighted material to make new work.⁴⁸ They used the definition of “user-created content” espoused in a study by the Organisation for Economic Co-operation and Development (OECD),⁴⁹ which includes: (1) content made publicly available over the Internet, which (2) reflects a certain amount of creative effort, and which (3) is created outside of professional routines and practices.⁵⁰

Researchers in the Aufderheide and Jaszi study identified major video platforms—including YouTube, Revver, Google Video, Current, Live Video, MySpace, GodTube, Bebo, and Searchles—and manually sampled freely within them, looking for works that used copyrighted material. They viewed about seventy-five web sites and thousands of web links, searching for them using key phrases, random generation tools, and regularly updated “most popular” lists to search and sort through the massive amount of available online video.⁵¹ They also

⁴⁷ Press release, Electronic Frontier Foundation, Fair Use Advocates Issue Principles for Protecting Online Videos (Oct. 31, 2007), <http://www.eff.org/press/archives/2007/10/31>.

⁴⁸ PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., RECUT, REFRAME, RECYCLE: QUOTING COPYRIGHTED MATERIAL IN USER-GENERATED VIDEO (Jan. 2008), http://www.centerforsocialmedia.org/files/pdf/CSM_Recut_Reframe_Recycle_report.pdf.

⁴⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARTICIPATIVE WEB AND USER-CREATED CONTENT: WEB 2.0, WIKIS AND SOCIAL NETWORKING (2007), <http://213.253.134.43/oecd/pdfs/browseit/9307031E.pdf>.

⁵⁰ *Id.* at 18; AUFDERHEIDE AND JASZI, *supra* note 48, at 4.

⁵¹ AUFDERHEIDE AND JASZI, *supra* note 48, at 4.

benefitted from links contributed by the Electronic Frontier Foundation and by Revver.com senior staff, who regularly search out quotations of copyrighted works and analyze them for fair use.⁵²

The researchers' focus was on the minority of the user-generated video that they encountered. They noted the predominance of videos online that use no discernible copyrighted material. Among those that do use copyrighted material and can be identified without elaborate or software-assisted searches, many appear to be simple copying in order to make available entertaining material online—a so-called “DVR to the world” approach. Finally, however, there was a significant body of work that incorporated copyrighted works into new creations.⁵³

They identified hundreds of such videos between mid-October and mid-November 2007 and inductively established a set of likely purposes, described below. They then selected examples of works that they believed best exemplified each type of purpose for which creators quoted copyrighted works.⁵⁴

VI. TRENDS

The makers whose work surfaced in this study demonstrated a comfortable, and often seemingly unconsidered sense of ownership over the meanings that popular cultural performances and products created in their lives. This was expressed in the wide range, as well as the sheer volume, of videos quoting copyrighted works. It was also expressed in comments surrounding the videos. Authors often expressed pride and pleasure in showing their work or their discoveries to their networks and the wider Internet viewership. Viewers' posts, whether sentimental or raucous, also bespoke an active sense of participation in the popular culture referenced in online videos.⁵⁵

This is, of course, a result of the way culture becomes “popular.” It comes to have meanings beyond its immediate utility, and is used by the people once known as consumers to express their own identities through association and transformation. Thus, it is no surprise that in order to use and express the meanings and associations popular

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

culture has come to have in their lives, online video creators turn to its performances and products. These copyrighted works have effectively become a part of these makers' vocabularies.⁵⁶

At the same time, makers often seemed to revel in the opportunity to gain agency in the creation of popular culture by commenting on it. The mash-up, a common video phenomenon in which two or more kinds of copyrighted works are mixed to create new meaning, often features an obstreperous or impudent attitude toward the copyrighted popular culture from which it draws. Mash-ups commonly feature improbable combinations that may provide political or social commentary that is not only pungent, but funny. Other mash-ups add new value not by commenting on existing culture, but by adding new, personal meaning to it. Mash-up creators thereby express a zest for participation in culture-making.⁵⁷

This participatory spirit explains the transformativeness that marks so much quoted copyrighted material. Most online video makers incorporating copyrighted works (as opposed to those simply copying them) do not seek to replicate the services provided to them by mainstream media providers. They are sampling in order to comment, critique, illustrate, and express. They are salvaging, rescuing, celebrating, heralding, and bonding. They are expressing vital connections both to popular cultural expressions and also to others who share their passions and the meanings that they have created around those expressions.⁵⁸

A summary of some of the most popular kinds of uses follows, with a brief analysis of the relationship of each category to the fair use doctrine of copyright law.

VII. TYPES OF PURPOSES

A. SATIRE AND PARODY

One of the most common uses of copyrighted works within new works, Center for Social Media ("CSM") and American University's Program on Information Justice and Intellectual Property ("PIJIP") researchers found, was for parody or satire. This may genuinely be one of the most common uses, or simply an artifact of the fact that

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

because of their popularity, such videos easily garner attention on video web sites. Makers, some of them enthusiastically experimenting with digital tools that permit the altering of existing works, used this approach to poke fun at popular mainstream media, popular celebrities, and politicians. These videos were often highly rated and found in the “most popular” sections of platform web sites. Some also circulate widely via e-mail. They point to a popular current phenomenon of using digital media to not only react to, but also to diminish the perceived mass media power of mainstream media and celebrities.⁵⁹

Parodies and satires spoof popular mass media in ways that demonstrate makers’ power over the material. In *Lord of the Rings Was Too Long*,⁶⁰ interpolated scenes rewrite a key moment in the story. In this version, the men refuse to listen to the sensible suggestions of a young woman and doom themselves to a long tortuous adventure rather than resolving the ring problem efficiently. In *24 Seconds*, the image of Jack Bauer, the lead character of the TV show *24*, is used in a skit showing him getting arrested for drunk driving.⁶¹ Sometimes the parody is done to amuse by contrast. A parody of the song “Baby Got Back” is made in the video *Baby Got Book*,⁶² a Christian video suggesting that Bible-reading girls are sexy. In *Star Wars with the Sopranos*,⁶³ the images of popular television and movie figures are posed on animated popsicle sticks, where they complain about their declining position as mass-media icons now that online video is rising in popularity. The video satirizes popular mass media through some of its most well-known icons.

In other cases, parodies and satires sometimes make political comments. In *Bush vs. Zombies*,⁶⁴ a video of former President George

⁵⁹ *Id.* at 6-7.

⁶⁰ jackbenny, *Lord of the rings was too long*, YOUTUBE, Apr. 22, 2007, http://www.youtube.com/watch?v=CJb9UV_HUWA.

⁶¹ Carmen20006, *24 Seconds*, YOUTUBE, Sept. 26, 2007, <http://www.youtube.com/watch?v=QpTuez-kJow>.

⁶² momentumchurch, *Baby Got Book (OFFICIAL)*, YOUTUBE, Feb. 14, 2007, <http://www.youtube.com/watch?v=tTYr3JuueF4>.

⁶³ Carmen20006, *Star Wars with the Soprano's - Popsicle Politics ep 2*, YOUTUBE, July 19, 2008, <http://www.youtube.com/watch?v=4a4NLcWKTkk>.

⁶⁴ MyEverythingdotcom, *Bush Vs. Zombies*, YOUTUBE, July 26, 2007, <http://www.youtube.com/watch?v=IoXgRtDysLY>.

W. Bush at a press conference is re-edited, with added comments from a fake journalist to make it seem as though Bush is talking about zombies instead of terrorists. Genuine press conference footage is re-edited into a parody of a press conference in order to make a political criticism of the former president. In *Victory in Iraq*,⁶⁵ the movie *Star Wars* is quoted to evoke the notion of empire, employing movie footage to satirize the administration. This movie footage is mashed up with altered video from President Bush's "mission accomplished" speech on the Iraq invasion. *If Dick Cheney Was Scarface*⁶⁶ combines Cheney press conference news footage with the voice and images of Al Pacino in order to satirize the vice president as a criminal.⁶⁷

In conventional copyright law, parody is among the most common and uncontroversial examples of "transformative" fair use. It is also near the core of the fair use doctrine as an enabler of free expression. When a parodist quotes existing text, image, or music to comment upon it, this practice is really nothing more than criticism carried on by other means. Many of the mass media spoofs researchers found for this study would easily pass a lawyer's scrutiny as fair use.⁶⁸

Satire (the use of media content to poke fun at other objects, such as politicians) is also eligible for fair use consideration, although not as readily as parody. But if the essential hallmark of transformativeness is the repurposing of existing content (thus adding value to it), then many satiric uses—such as occur in the online videos researchers found here—should also qualify as fair use.⁶⁹

B. NEGATIVE OR CRITICAL COMMENTARY

Also common was video quoted in critique, whether political or cultural. For instance, a DailyKos entry, *Fox News: Oil and Adventure in the Arctic!*, includes embedded videos in its criticism of

⁶⁵ minitrucom, *Victory in Iraq!*, YOUTUBE, Oct. 11, 2006, <http://www.youtube.com/watch?v=BCWEw6xZEUo>.

⁶⁶ gaikokujinkyofusho, *If Dick Cheney was Scarface*, YOUTUBE, Dec. 20, 2005, <http://www.youtube.com/watch?v=th4suiNDuog>.

⁶⁷ AUFDERHEIDE & JASZI, *supra* note 48, at 7.

⁶⁸ *Id.* at 8.

⁶⁹ *Id.*

the Fox News coverage of the melting ice caps.⁷⁰ The blog post excoriates Fox News for its current and past coverage of global warming. A liberal blogger carefully documents how Bill O'Reilly misrepresented a segment quoted from the *Colbert Report* by showing both segments side by side in *Fox News Edits a Democrat to Make Him Look Worse*.⁷¹ *Fred Thompson Stammers* edits together segments in which the presidential candidate hesitates, implying his unreadiness for public speaking and, potentially, public office.⁷² In *Coffee With Chou: First Paris Hilton Interview After Jail!*, a Paris Hilton interview is woven into a video where a pet rabbit is asking questions about her promiscuity and lack of intelligence.⁷³ Thus, the maker provides an implicit commentary about Hilton's celebrity-worthiness.

Another common form of critique is the mash-up that quotes copyrighted works in order to create a meta-commentary. For instance, in *Clint Eastwood's "The Office,"* clips from the TV show *The Office* and the movie *Evan Almighty* are used to show, in the movie preview format, what *The Office* would be like if it had been directed by Clint Eastwood.⁷⁴ Thus, the maker offers a simultaneous analysis of several cultural products and demonstrates his or her mastery of their implication.

Makers also create works that make far less direct kinds of critique or commentary. In *Re-Inventing Culture*, a video artist mixes clips from twenty-four artists' music with hundreds of images drawn from popular culture sources—such as classic films, music videos, television performances, scientific films, and advertisements—to make a comment about popular culture and its creative capacities.⁷⁵

⁷⁰ Plutonium Page, *Fox News: Oil and Adventure in the Arctic!*, DAILYKOS, Oct. 8, 2007, <http://www.dailykos.com/story/2007/10/8/14332/8935>.

⁷¹ LiberalViewer, *Fox News Edits a Democrat to Make Him Look Worse*, YOUTUBE, July 23, 2006, <http://www.youtube.com/watch?v=oGqPxn7njqM>.

⁷² David Waldman, *Grandpa Fred: Do you really have this kind of time to waste?* DAILYKOS, Oct. 12, 2007, <http://www.dailykos.com/storyonly/2007/10/12/122438/24>.

⁷³ nquixote, *Coffee With Chou: First Paris Hilton Interview After Jail*, GTCHANNEL.COM, June 27, 2007, <http://www.gtchannel.com/content.php?cid=3232>.

⁷⁴ allithedude, *Clint Eastwood's The Office*, YOUTUBE, Oct. 21, 2007, http://www.youtube.com/watch?v=gPwmG3VuO_E.

⁷⁵ dizzywizard, *Re-Inventing Culture*, REVVER.COM, May, 24, 2007, <http://revver.com/video/278400/re-inventing-culture>.

In some cases, online creators commented directly on the media objects they quoted. Critique need not be overt, however. Reframing or juxtaposing content can make a powerful point by implication. Whatever the form of commentary, use of unauthorized copyrighted material for this purpose has longstanding legal recognition as fair use. A similar analysis may apply to other videos in this category that use existing media material to aim a critique elsewhere (for example, at a politician or public figure, as in *Fred Thompson Stammers*). Here, too, creators repurpose the borrowed clips and add significant value to them—the two characteristics that are the hallmarks of “transformativeness.”

C. POSITIVE COMMENTARY

This kind of work, including fan tributes, shows the flip side of negative or parodic impulses toward popular commercial culture, while evincing the same desire to participate, contribute, and make one's mark upon it. *Internet People* is a celebration of online video creations themselves.⁷⁶ The celebrated *7 Minute Sopranos* (eventually blessed by HBO, which also hired its creator) provides a punchy, condensed version of the dark, twisted plot lines of the TV series.⁷⁷ *A Tribute to Ghostbusters* assembles choice moments from the popular film, with the title song as a soundtrack. It has been removed from YouTube, however, other examples of Ghostbusters exist.⁷⁸ *Ain't No Other Man* uses a relevant but otherwise unrelated popular song as soundtrack for a tribute to the male actors in recent movies based on Jane Austen novels.⁷⁹ *Not So Innocent: A new approach to Animaniacs*⁸⁰ also uses popular music to accompany its re-imagining

⁷⁶ ChannelFrederator, *Internet People! – The Meth Minute 39*, YOUTUBE, Sept. 5, 2007, <http://www.youtube.com/watch?v=2pPCkhYMQgY>.

⁷⁷ palgy83, *7 Seven Minute Sopranos – a "whacked out" refresher*, YOUTUBE, Mar. 29, 2007, http://www.youtube.com/watch?v=Tz_Ees_-kE4.

⁷⁸ Mikkim51, *Ghostbusters Tribute*, YOUTUBE, Jan. 17, 2009, <http://www.youtube.com/watch?v=Swg-JAdajUU>; knight_2000, *Two Dozen Ghosts: A Tribute to Ghost Busters*, DAILYMOTION.COM, Oct. 19, 2007, http://www.dailymotion.com/video/x38wz8_two-dozen-ghosts-a-tribute-to-ghost_street.

⁷⁹ HeathDances, *Ain't No Other Man*, YOUTUBE, Aug. 20, 2006, <http://www.youtube.com/watch?v=d-FZ3Ax7RiI>.

⁸⁰ Not So Innocent: A New Approach to Animaniacs, <http://www.fanpop.com/spots/animaniacs/videos/252020/title/not-innocent-new-approach-animaniacs> (last visited Dec. 16, 2009).

of once-popular children's cartoon characters as grown-ups (accomplished by manipulating scanned images from various copyrighted sources); as does the *Steve Irwin Fan Tribute*, which quotes from shows and celebrity photos of the wildlife television star, upon the occasion of his accidental death.⁸¹

Unauthorized quotation of copyrighted material for celebratory purposes may be just as defensible under fair use as it has been in analogous environments, depending most importantly on transformativeness. Thus, videos offering comments motivated by fan enthusiasm, celebration, mourning, or admiration are easier to understand within traditional fair use terms than those that merely provide collections of "best of" moments, at least if those moments are intended solely for the enjoyment of those moments. One common technique presents a challenge to traditional fair use analysis—use of unrelated third-party music to accompany a video. Copyright law discourages unauthorized uses that compete with a core market of the copyright owner, and licensing of soundtrack represents such a market for music publishers. In these latter situations, fair use claims are likely to turn on the degree to which the videos can convincingly be characterized as noncommercial.

D. QUOTING TO TRIGGER DISCUSSION

Many makers quoted clips from or entire segments of copyright material without altering it. Rather, they framed it within a web site where the creators provided a commentary and solicited other comments to start a discussion. Video of a new, government-sponsored sexual abstinence public service announcement was posted on the blog Feministing, for example, within a critical discussion of federal legislation and policy.⁸² Launched with the word "Yuck," it spurred a vigorous discussion with much condemnation of the video and one comment in support.

Many makers drew viewers by posting "worst ever" videos, promising both a laugh at ridiculous video and the chance to offer an opinion. For instance, *Worst Music Video Ever* quotes in full a music video that appears to come from Scandinavia, featuring bland pop

⁸¹ thesacremment, *steve irwin tribute*, YOUTUBE, Sept. 4, 2006, <http://www.youtube.com/watch?v=QgsE9SQ1iCA>.

⁸² Posting of Samhita to *feministing.com*, <http://www.feministing.com/archives/007878.html> (Oct. 09, 2007, 2:16 AM) (video portion removed by YouTube).

music with quaint choreography.⁸³ The post drew a wide range of comments. At the Swing State Project, a political blog site, a weekly open thread was titled *Worst Political Ads Ever?*⁸⁴ The blogger embedded two examples of badly conceived political ads and requested readers to contribute more examples. The readers then posted dozens of additional candidates.

Under existing fair use precedents,⁸⁵ this popular strategy is problematic. The admittedly meager case law is marked by skepticism about how much value really was added by posting copyrighted material to electronic bulletin boards where they could be discussed by others. Some of that judicial doubt, however, was related to the fact that the postings in question were both extensive and systematic, and done without any judgment on the quoted work by the poster.

Creators who copy work occasionally to start discussion, however, still may be able to claim that their use is transformative, and therefore fair. To do so effectively, they need a reason why it is important to post the work in question as a whole, rather than just a quotation from it. Finally, they may be able to claim that they are making a comment (much like the negative or positive commentators) by their quotation. To the extent that a posting expresses its own judgment on the material it offers for comment by others (as researchers found the work in this category typically does), the media maker's fair use position is likely to be stronger.

E. ILLUSTRATION OR EXAMPLE

The use of copyrighted material for illustration or as an example is pervasive in all kinds of videos. In some cases, quotation for illustration was at the core of the video's meaning. For instance, *Internet People*, an animated montage of every major viral video that acts as tribute to online video itself, quotes many online videos (as well as animating some) to chart online video history. *Evolution of Dance* quotes popular music from a succession of fads, matching them

⁸³ Worst Music Video EVER, <http://video.google.com/videoplay?docid=-8610362188397291938> (last visited Dec. 16, 2009).

⁸⁴ Posting of James L. to Swing State Project, <http://www.swingstateproject.com/diary/923> (Oct. 12, 2007, 11:14 PM EDT).

⁸⁵ See, e.g., *Los AngelesTimes v. Free Republic*, 54 U.S.P.Q.2D (BNA) 1453, 1460-1462 (C.D. Cal. 2000).

with dance styles of that moment.⁸⁶ All the quoted music in *Evolution* is quoted as illustration of the maker's point about the evolution of popular music over time. *The 10 Most Ridiculous Things about the Beyoncé Experience* quotes throughout from Beyoncé's performances and advertisements to illustrate the argument.⁸⁷

In other cases, images and video are used to illustrate independent arguments of some kind. For instance, one man's rant against Oprah Winfrey's choice of other online video makers (rather than himself or his favorites) to feature on her television show, *What the Buck—to Oprah with Love*, includes photographs of Oprah, other celebrities, and related images captured from YouTube to illustrate his remarks.⁸⁸

One of the contributions of the Documentary Filmmakers' Statement of Best Practices is its assertion that, in appropriate circumstances, "quoting copyright works of popular culture to illustrate an argument or point" can be fair use.⁸⁹ Since 2005, this general proposition has been borne out in court.⁹⁰ Documentary filmmakers also noted that illustrations should be no longer or more ample than is necessary to make the point, that attribution should be given wherever possible, and that examples should be drawn from a range of different sources where possible. The same considerations should be relevant in online video.

F. INCIDENTAL USE

Copyrighted material sometimes appears in online videos that record something else. For instance, *Let's Go Crazy #1* is a video of an eighteen-month-old child dancing to Prince's song "Let's Go Crazy"⁹¹

⁸⁶ judsonlaipply, *Evolution of Dance*, YOUTUBE, Apr. 6, 2006, <http://www.youtube.com/watch?v=dMHobHeiRNQ>.

⁸⁷ richfofo, *The 10 Most Ridiculous Things about the Beyoncé Experience*, YOUTUBE, Mar. 23, 2008, http://www.youtube.com/watch?v=xia_gu356Pk.

⁸⁸ WHATTHEBUCKSHOW, *To Oprah – With Love*, YOUTUBE, Nov. 5, 2007, <http://www.youtube.com/watch?v=K3UQoOuQLhs>.

⁸⁹ CENTER FOR SOCIAL MEDIA, *supra* note 18, at 4.

⁹⁰ See e.g. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609-610 (2d Cir. 2006) (involving the unauthorized reproduction of concert posters in a book about the career of the Grateful Dead).

⁹¹ edenza, *"Let's Go Crazy" #1*, YOUTUBE, Feb. 7, 2007, <http://www.youtube.com/watch?v=N1KfJHFWlhQ>.

(this video, incidentally, became the subject of a takedown notice and then a counter-lawsuit). Another example of incidental quoting is *Fat Cat watching TV SITTING on the couch*.⁹² A fat cat sits like a person on a couch and watches television; the viewer can hear the soundtrack to several commercials. The online environment abounds with the incidental use of the copyrighted song “Happy Birthday,” as families celebrate the occasion (for instance, *My Birthday Party/Moonbounce*). Sometimes copyrighted material is deliberately quoted in order to make another point. For instance, in *Loud Neighbors*, a disgruntled apartment dweller grimly records the music emanating from her upstairs neighbors’ apartment, commenting, “The people above me are CLUELESS!”⁹³

For such uses, the Documentary Filmmakers’ Statement has once again clarified acceptable fair use. Documentary filmmakers asserted that “capturing copyrighted media content in the process of filming something else” can be fair use—something that long has been clear to copyright specialists but seems to have been disputed among practitioners. Documentarians stipulated that the quoted material should not have been prearranged by the film’s director, and that they also expected attribution. To the extent that online makers who include incidental copyrighted material are working within the framework established by the documentary filmmakers, the resulting videos would be strong candidates for fair use.

G. PERSONAL REPORTAGE OR DIARIES

One common use of online video is sharing the recording of an event in which the maker participated in some way. Typically, such a video provides value, not as evidence of the event as such, but as a reflection of its meaning for the individual maker—a part, so to speak, of his or her video scrapbook. For instance, in *Me on Stage with U2...AGAIN!!*, the maker proudly shows how Bono pulled him onstage and allowed him to play piano with the band.⁹⁴ *I Was on American Idol* is a plea for viewers to vote for the maker’s friend; the maker was

⁹² apesandbabes, *Fat Cat watching TV SITTING on the couch*, YOUTUBE, Apr. 6, 2007, <http://www.youtube.com/watch?v=qXkw3L7oxwk>.

⁹³ catmac, *Loud Neighbors*, YOUTUBE, Nov. 1, 2006, <http://www.youtube.com/watch?v=P2OPrIGmbA4>.

⁹⁴ mikeisi, *Me on stage with U2...AGAIN!!*, YOUTUBE, Jan. 30, 2007, <http://www.youtube.com/watch?v=YKgJa7HnyLk>.

present in the audience when his friend was a contestant, as we see in clips from the TV show.⁹⁵ *Me and Madonna* is the recording of a fan's encounter with Madonna, in which he testifies to her importance in shaping his identity.⁹⁶

Videos in this category share the characteristic that they are not primarily about whatever material they quote. Instead, they are concerned with the personal experiences of the maker. They use copyrighted content to set the scene or establish the context for those experiences. As a result, many such uses of copyrighted material can be seen as transformative. This would, obviously, not be true of a video that is nothing more than a passive and uninflected record of a cultural event that the maker merely attended.

H. ARCHIVING OF VULNERABLE OR REVEALING MATERIALS

In some cases, makers clip out sections of or reproduce entire works in online video as an act of rescue, because the makers believe that unavailability of this material is effectively an act of censorship or is simply wrong. For instance, most of British journalist Adam Curtis's documentary *The Power of Nightmares*,⁹⁷ which otherwise has been unavailable in the United States, has been uploaded in a variety of places (which Curtis has encouraged with this and other work of his, including *The Trap*).⁹⁸ The documentary, which draws connections between the rise of neoliberals in the United States and Muslim extremists worldwide, was originally shown on the BBC after an internal controversy. It has been taken up as a *cause célèbre* by some critics of U.S. and British geopolitics surrounding the Iraq war. Similarly, after journalists criticized comedian Stephen Colbert's performance at the White House Correspondents' Dinner, copies of segments of C-SPAN's video coverage of the performance appeared in

⁹⁵ thesampler, *I was on American Idol (feat. Blake Lewis)*, YOUTUBE, Mar. 15, 2007, <http://www.youtube.com/watch?v=OGna-ONNullA>.

⁹⁶ guidopunk, *Me and Madonna*, YOUTUBE, Oct. 19, 2006, http://www.youtube.com/watch?v=lle_wj_umsc.

⁹⁷ ArachiD, *The Power of Nightmares*, YOUTUBE, Sept. 25, 2006, <http://www.youtube.com/watch?v=Qk1WkmioQvA>.

⁹⁸ ilikeclubsoda, *The Trap - Adam Curtis documentary - BBC*, YouTube, Mar. 13, 2007, http://www.youtube.com/watch?v=uAluyt5_kic.

many places online.⁹⁹ Many people posted clips of performer Kanye West's post-hurricane Katrina indictment of President Bush after his accusation, "George Bush doesn't care about black people," became news.¹⁰⁰ In other cases, people post material that is revealing or scandalous in some way. For instance, *Bush Gives the Finger* circulates feed video of President Bush making a crude hand gesture to the camera before a television appearance.¹⁰¹

Often, media material is endangered precisely because no copyright owner cares enough to bother about it. In such instances, a copyright challenge to the sort of guerrilla archiving that occurs online is unlikely as a practical matter. Online archivists may in some cases be able to invoke the public interest in cultural progress against the strong rights of copyright holders. In general, online archivists are exposing the grey zone that analog archivists have been in for some time. Conventional archiving has occurred mainly beneath the radar of copyright, going unnoticed or unchallenged by copyright owners (although archivists often do not know how much access they can provide to such materials). In the online setting, because of its greater susceptibility to linking and copying, copyright owners could choose to press the issue of whether simple copying of material can sometimes nonetheless be transformative fair use.

I. PASTICHE OR COLLAGE

Much contemporary pastiche is "blank parody," largely devoid of critical bite.¹⁰² Thus, online media makers often imitate or reproduce and remix material in their videos without any clear intent to comment on the original. Instead, they express their own identities by advertising their frames of cultural reference and affinity.

One common use of copyrighted material in online video is as soundtrack to personal performance of some kind. For instance, in *Me singing 'Unwritten' by Natasha Bedingfield*, a young woman

⁹⁹ petec587, Speech at the White House Correspondent's Dinner (2006) p1, YOUTUBE, Apr. 26, 2007, <http://www.youtube.com/watch?v=qa-4E8ZDj9s>.

¹⁰⁰ shockroc1, *Bush Doesn't Care About Black People*, YOUTUBE, Apr. 16, 2006, <http://www.youtube.com/watch?v=zIUzLpO1kxI>.

¹⁰¹ chaoscampus, *Bush Giving the Finger*, YOUTUBE, Mar. 23, 2006, <http://www.youtube.com/watch?v=YVynnbx1XSc>.

¹⁰² FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 17 (Duke Univ. Press 1991).

uninhibitedly sings a copyrighted song to display her own singing talent, apparently for an online audition (the woman has since been offered a recording contract).¹⁰³ In *enC-girls - dance on pussycat dolZ - Dont cha*, the Pussycat Dolls' song "Don't Cha" appears to have been selected as the song to which a nine-year-old girl dances, perhaps for family and friends or perhaps to attract talent scouts.¹⁰⁴ The music is popular with pre-teens and thus may have been chosen because it had meaning to her; it may also have been chosen simply with an eye to show off her talents. *Daft Hands* entertainingly uses finger gestures (with words written on the fingers) to accompany the song "Harder, Better, Faster, Stronger."¹⁰⁵ This video showcases the skill of the performer while making positive reference to the song itself.

In some fan videos, entire songs are used as soundtracks to evoke the viewer's relationship with the material. For instance, in *Apple Commercial*, images of an Apple iPod Touch are mixed with a song to make a fan pastiche, which was posted on YouTube (Apple discovered it and liked it so much that the company purchased it from the creator). In another video,¹⁰⁶ a tribute to characters in the TV show *The Office* is accompanied by the tune "The Very Thought of You."¹⁰⁷ In some mash-ups, music and sound effects are freely quoted in order to create or enhance meaning. For instance, in one of the most widely viewed online mash-ups, the five-second *Dramatic Chipmunk* video of a prairie dog (itself copied out of a children's television program) is accompanied by horror movie music to create an audio-visual joke.¹⁰⁸ The maker Buffalax has made more than a dozen videos based on

¹⁰³ esmeedenters, *Me Singing "Unwritten" by Natasha Bedingfield*, YOUTUBE, July 12, 2007, <http://www.youtube.com/watch?v=cndPHeBiM3s>.

¹⁰⁴ 11INC11GIRLS, *enC-girls - dance on pussycat dolZ - Dont cha*, YOUTUBE, Apr. 21, 2007, <http://www.youtube.com/watch?v=P5yO1zIw7JU>.

¹⁰⁵ FrEckleStudios, *Daft Hands – Harder, Better, Faster, Stronger*, YOUTUBE, June 6, 2007, <http://www.youtube.com/watch?v=K2cYWfq--Nw>.

¹⁰⁶ njhaley, *iPod Touch Ad – Nick Haley*, YOUTUBE, Sept. 11, 2007, <http://www.youtube.com/watch?v=KKQUZPqDZbo>.

¹⁰⁷ Robin Good, *Video Publishing: Fair Use and Copyright Analyzed - Recut, Reframe, Recycle*, MASTERNEWMEDIA.ORG, Jan. 25, 2008, http://www.masternewmedia.org/news/2008/01/25/video_publishing_fair_use_and.htm.

¹⁰⁸ cregets, *Dramatic Chipmunk*, YOUTUBE, June 19, 2007, <http://www.youtube.com/watch?v=a1Y73sPHKxw>.

foreign programs or advertisements (including *Crazy Indian Video—Buffalaxed!*),¹⁰⁹ typically using English subtitles with often scatological lyrics that sound like the original language.

These quotations may then multiply as a video becomes an online meme. When Chris Crocker posted his tearful reaction to the backlash against Britney Spears, it inspired hundreds of YouTube videos reworking his presentation. *Dramatic Chipmunk* (a.k.a. *Dramatic Prairie Dog*) has also inspired hundreds of isomorphic variations. The song “Chocolate Rain” was mimicked in dozens of videos, featuring other Internet stars such as Chad Vader.¹¹⁰

Storytellers often add sound effects, soundtrack elements, or both to enhance their performances. An example is an advice segment on enjoying Halloween, *Hollow’s Eve*, by the widely viewed youthful videographer DaxFlame.¹¹¹

There cannot be a “one size fits all” approach to fair use analysis of videos in this category. Some collage or pastiche videos may imply critique of the quoted material. Other rationales for fair use may apply as well, depending on the video. Pastiche and collage videos that cleverly recombine existing elements to produce new meaning will be defensible even if their approach to preexisting material is respectful rather than a transgression. On the other hand, extensive quotation that does little or nothing to reframe quoted material is certainly vulnerable to copyright infringement claims unless it can be justified on the grounds that it is strictly private and noncommercial.

VIII. CREATING A CODE OF BEST PRACTICES

The research executed in 2007 led to a project in 2008, again led by Aufderheide and Jaszi, to create a Code of Best Practices in Fair Use for Online Video (“the Code”). An earlier convening of lawyers, legal scholars, and industry actors at American University had resulted in strong recommendations for such a code.¹¹² The Code was

¹⁰⁹ buffalax, *Crazy Indian Video . . . Buffalaxed!*, YOUTUBE, Aug. 18, 2007, <http://www.youtube.com/watch?v=ZA1NoOOaNw>.

¹¹⁰ blamesocietyfilms, *Chocolate Rain by Chad Vader*, YOUTUBE, Aug. 14, 2007, <http://www.youtube.com/watch?v=P6dUCOS1bMo>.

¹¹¹ Daxflame, *Hallow’s Eve*, YOUTUBE, Oct. 30, 2007, <http://www.youtube.com/watch?v=DJ9wY5yBS34>.

¹¹² PATRICIA AUFDERHEIDE & PETER JASZI, UNAUTHORIZED: THE COPYRIGHT CONUNDRUM IN PARTICIPATORY VIDEO6 (2007) (on file with the Center for Social Media, School of

seen as particularly timely by that group because of the coalescing of industry interest in online video. YouTube had been purchased by Google, and Viacom had sued Google for copyright infringement. Meanwhile, online video platforms were receiving increasing number of “take-down” demands of posted material. Legal and industry professionals concerned with cultural innovation feared that industry practice could limit fair use rights, especially of amateur and novice creators.

Deciding on the body to shape the code was a challenge. Codes of best practices function well because they represent a common understanding in a community of practice (rather than, say, the opinion of a group of “expert” lawyers or a negotiated treaty of sorts with organizations invested in copyright ownership). But online video practice was only emerging, and no business models yet existed to establish how and who would be rewarded commercially. So no stable, broad-based associations of practitioners had yet arisen, although it was inevitable that they would emerge. Early adopters tended to disregard or even disdain the entire question of copyright ownership, often choosing to believe that their nonprofit practice was outside the purview of copyright.

Eventually, and as a result of consultation with professionals who had been involved in the study and in earlier projects, Aufderheide and Jaszi decided to form a high-level interdisciplinary committee of experts in two areas: popular culture and copyright law. The scholars of popular culture understood first-hand both the kind of work being created in this participatory environment and the motivations behind it, often sympathizing passionately with new media makers. Legal scholars (with one entertainment industry lawyer, Michael Donaldson) understood the recent history of fair use practice and litigation and the historical arguments justifying fair use in an analog, professional media environment. Aufderheide and Jaszi reasoned that these two groups would be able to educate each other, and would be mutually invested in creating a document that would encourage new makers to use their rights without encouraging them to take unnecessary risks. They also believed that the group's credibility was enhanced by the fact that no one in it had a direct market investment in the outcome.

The group met both via conference calls and email, using a common web platform on Basecamp, over a period of four months. Initially, some of the lawyers struggled to fully grasp what the new

media environment involved. In certain cases, however, the group was able to find analogies with more traditional media, or to describe on-line video practice in terms that allowed consideration of how it could be transformative. Differences arose between cultural studies experts and legal experts over how the law might accommodate practices that—often on the Darknet (closed, private web sites)—went beyond conventional, established interpretations of fair use. In some cases, the group eventually agreed that such practices might fall beyond a code of best practices (but not necessarily beyond the doctrine of fair use).

The Code of Best Practices in Fair Use for Online Video¹¹³ described fair use reasoning, stressed the importance of demonstrating good faith (for instance by attribution), and organized the presentation according to situations in which fair use questions typically emerge in current practice. These situations were drawn from the *Recut, Reframe, Recycle* report¹¹⁴ but in-group deliberation were collapsed from the nine report categories into six new categories:

- Commenting on or critiquing of copyrighted material;
- Using copyrighted material for illustration or example;
- Capturing copyrighted material incidentally or accidentally;
- Reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon;
- Copying, reposting, and recirculating a work or part of a work for purposes of launching a discussion;

¹¹³ CENTER FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 3-9 (2009), available at http://www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf.

¹¹⁴ AUFDERHEIDE & JASZI, *supra* note 48, at 6-15.

- Quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements.

Each category is described and provided with a general fair use principle with appropriate limitations. Thus, users can apply the doctrine of fair use within a practice context, and within the situations in which questions arise.

IX. RESULTS

The Code of Best Practices in Fair Use for Online Video was downloaded tens of thousands of times within the first two months, and was referenced on a variety of websites, including those of Revver,¹¹⁵ Boing Boing,¹¹⁶ and leading remix practitioners such as Jonathan McIntosh. The Code was brought to the attention of lawyers at Google as well. This contact resulted in Google funding the production of a video about the Code— *Remix Culture: Fair Use Is Your Friend*.¹¹⁷ There have been no industry critiques of the Code, other than a non-lawyer's disparagement of it on the website of the Copyright Alliance (funded by large copyright holders).¹¹⁸

X. CONCLUSIONS

The culture that is emerging can be channeled, encouraged, even deformed, but it cannot be cut off. Tomorrow's makers will continue

¹¹⁵ Revver.com, Copyright Information, <http://revver.com/go/copyright> (last visited Dec. 16, 2009).

¹¹⁶ Cory Doctorow, *HOWTO Make online videos without getting sued*, BOINGBOING, July 7, 2008, <http://www.boingboing.net/2008/07/07/howto-make-online-vi.html>.

¹¹⁷ Center for Social Media, *Remix Culture: Fair Use is your Friend*, May 2009, http://www.centerforsocialmedia.org/videos/remix_culture_fair_use_is_your_friend; *The Fair Use Project, Remix Culture: Fair Use is Your Friend*, YOUTUBE, June 9, 2009, <http://www.youtube.com/watch?v=tCpBhU16TzI>.

¹¹⁸ Patrick Ross, *The Remix Culture*, COPYRIGHT ALLIANCE, Jul. 7, 2008, <http://blog.copyrightalliance.org/2008/07/the-remix-culture>. Google lawyer William Patry responded acerbically, critiquing Ross' ignorance and bravado as "chutzpah." William Patry, *Patrick Ross and Fair Use*, THE PATRY COPYRIGHT BLOG, Jul. 8, 2008, <http://williampatry.blogspot.com/2008/07/patrick-ross-and-fair-use.html>.

to use the popular culture they interact with as raw material for their own work. It is important for video makers, online service providers, content providers, and lawyers to understand the legal rights of makers of new culture as policies and practices evolve. Only then will efforts to fight copyright “piracy” in the online environment be able to make necessary space for lawful, value-added uses. It is critical that legal scholars understand and teach the relationship between creativity and copyright, and between fair use and cultural innovation, when they teach copyright law. The success to date of codes of best practices demonstrates the powerful affirmative effect that the public assertion of practice can have on policy.