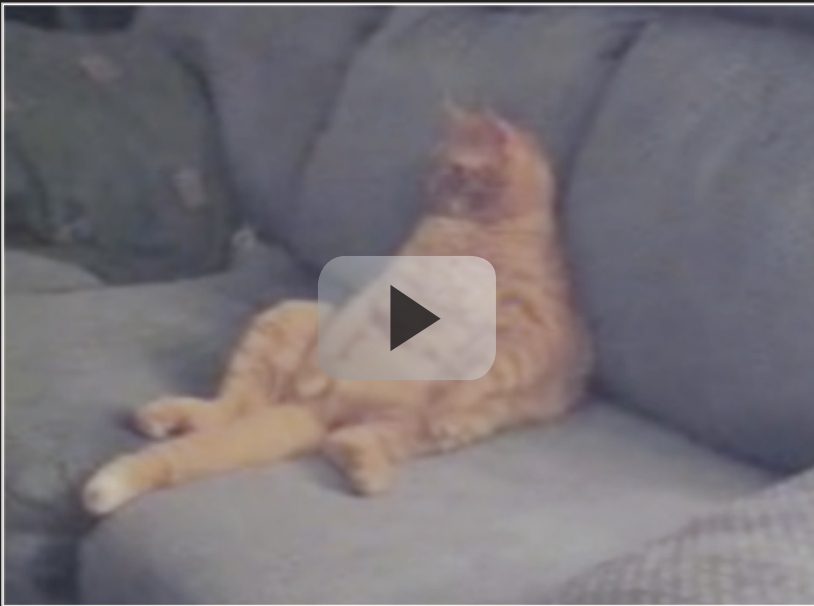




# Recut, Reframe, Recycle:

Quoting Copyrighted Material in User-Generated Video



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## EXECUTIVE SUMMARY

As online video burgeons, so do questions about what kinds of uses of copyrighted works are legal online. Inevitably, those questions will be settled at least as much by practice and private negotiation as by legal action. Recent discussions of filtering and monitoring practices for platform providers show the importance of identifying lawful uses, while meeting industry concern to limit unauthorized use of copyrighted material. This study showcases user practices in use of copyrighted works within their own online videos at the dawn of this process. It identifies nine common kinds of re-appropriation practices, including satire and parody, criticism, and video diaries. It shows that a substantial amount of user-generated video uses copyrighted material in ways that are eligible for fair use consideration, although no coordinated work has yet been done to understand such practices through the fair use lens.

Thus, a significant set of creative practices is potentially both legal and at risk of curtailment by currently discussed ways to control online piracy and theft of copyrighted works.

## INTRODUCTION

Short-form, streaming video is growing rapidly on a variety of digital platforms and being interwoven into the fabric of daily life, politics, and commerce. According to the measurement company comScore, by May 2007 nearly three-quarters of American Internet users were watching online video, averaging 2 ½ hours' worth a month—about two short videos a day. Perhaps the most-watched online video ever, *The Evolution of Dance*, has been watched almost 70 million times.



*Evolution of Dance*

Online video is a lively site of emergent popular culture. As cultural studies scholar Henry Jenkins recently noted in *Convergence Culture*,<sup>1</sup> technological possibility is triggering a creative tsunami. 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*, 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")—themselves proliferating into mini-genres. Online video has also become the latest marketing tool for large and small business

enterprises. For instance, the maker of a child's bulletproof backpack claims, in the *Wall St. Journal*, to have sold a thousand packs within weeks of launching his home-made YouTube video, which was his only marketing tool. Political online videos play large and sometimes decisive roles in political battles—consider the “macaca” video that derailed George Allen's Senate campaign.



*Dick in a Box*

Online videos could 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 10questions.com suggest. The political

importance of participatory culture has barely begun to be imagined, as legal scholar Yochai Benkler notes in *Wealth of Networks*.<sup>2</sup>

While creative practices are nascent at this early moment 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.

## FAIR USE

Online video has, like much new digital creation, drawn upon and incorporated segments of surrounding popular culture. This practice is legal if it falls within the definition of fair use, 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 copyright itself in U.S. law: to encourage the production of culture. Thus, new cultural production can be encouraged both by providing such incentives as limited ownership rights and such exemptions as fair use. The Supreme Court has made it clear that fair use reconciles the copyright system with First Amendment freedom of expression.<sup>3</sup> Today, fair use is the major 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: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect on the potential market for or value of the copyrighted work. As the duration and intensity of copyright protection have expanded, courts have come to a new understanding of the importance of the doctrine. Over the last 15 years, they have placed particular emphasis on the “transformative” quality of the use. Moreover, court decisions rely on an understanding of the four “factors” referred to in the copyright statute as they are understood within the specific cultural practice in which the use occurs.

Courts analyze fair use on a case-by-case basis after the fact, but communities of cultural practice can and do make predictive judgments on a more systematic basis. Thus, each community evolves over time a shared understanding of fair use for its own practices. For instance, in more traditional, television-oriented documentary video production, where great care is typically taken to observe copyright law, the establishment of a community-designed code of practice—the *Documentary Filmmakers’ Statement of Best Practice in Fair Use*<sup>4</sup>—has made it relatively easy to assess what uses are fair. Documentary filmmakers, who are peers with other content producers in many ways, but with particular needs motivated by the particulars of their craft, established shared principles, with limitations, to guide their choices for fair use. They identified the needs of their creative practice and protected them, while distinguishing those needs from laziness and cost-cutting. The fact that their statement has proven persuasive with lawyers, broadcasters, cablecasters, and insurers<sup>5</sup> is 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 example, or when copyrighted material is incorporated into a moment being documented for another purpose, or for short illustration. In other cases—in mashups, among others—video makers may quote extensively. Even extensive uses may well be legal and within fair use under certain circumstances, if analyzed within context. (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. But this resort 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<sup>6</sup> that articulate how platform providers can accommodate content providers' piracy concerns through filtering of content. 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,<sup>7</sup> intended to leave room for new content creation using copyrighted works while honoring the concerns of copyright holders. 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.

Finding out how new creators are quoting copyrighted works, 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.

## METHODS

American University's Program on Information Justice and Intellectual Property (PIJIP) and Center for Social Media (CSM) conducted an environmental scan of online video practices between September and December 2007.<sup>8</sup> Researchers used the definition of user-created content in an Organisation for Economic Co-operation and Development (OECD) study:<sup>9</sup>

- i) content made publicly available over the Internet
- ii) which reflects a certain amount of creative effort, and
- iii) which is created outside of professional routines and practices.

Researchers 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 75 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. They also drew upon existing practice, benefiting

from links contributed by Revver.com senior staff, who regularly search out quotations of copyrighted works and analyze them for fair use, and by the Electronic Frontier Foundation.<sup>10</sup>

The researchers' focus was on a 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. These were the focus of the researchers' attention and this report.

They identified hundreds of such videos between mid-October and mid-November 2007 and established inductively a set of likely purposes, described below. They then selected examples that they believed best exemplified each type of purpose for which creators quoted copyrighted works. Highlights from their searches are available in the Appendix, and a fuller list of examples is available at [centerforsocialmedia.org/recutvideos](http://centerforsocialmedia.org/recutvideos).

## TRENDS

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 are asserting themselves as participants in culture-making. This is a profound shift in role, as Jenkins and many others have noted, and one that is being welcomed in many arenas, since it is creating enormous new business opportunities as well as challenges.

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 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.

### TYPES OF USES OF COPYRIGHTED WORKS IN ONLINE VIDEOS

- Parody and satire
- Negative or critical commentary
- Positive commentary
- Quoting to trigger discussion
- Illustration or example
- Incidental use
- Personal reportage or diaries
- Archiving of vulnerable or revealing materials
- Pastiche or collage

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 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.

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 mashup, 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. Mashups commonly feature improbable combinations that may provide not only pungent but funny political or social commentary. Other mashups add new value not by commenting on existing culture but by adding new, personal meaning to it. All their makers express thereby a zest for participation in culture-making.

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, express. They are salvaging, rescuing, celebrating, heralding, 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.

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.

## **TYPES OF PURPOSES**

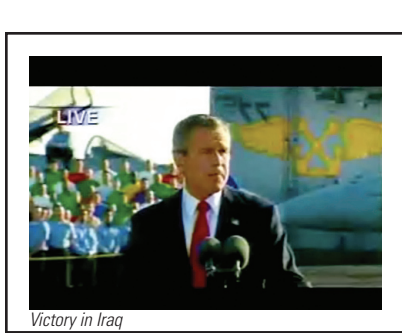
### **Satire and Parody**

One of the most common uses of copyrighted works within new ones, CSM/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 because of their popularity such videos easily rise to 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 circulate widely on e-mail. They point to a popular current phenomenon of using digital media, not only to react to, but to diminish the perceived mass-media power of mainstream media and celebrities.

Parodies and satires spoof popular mass media in ways that demonstrate makers’ power over the material. In *Lord of the Rings Was Too Long*, 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 *Twenty-four 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. 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*, a Christian video suggesting that Bible-reading girls are sexy. In *The Soprano Wars*, 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. the*



*Zombies*, video of President 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 president. In *Victory in Iraq*, 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 Pres. Bush’s “mission accomplished” speech on the Iraq

invasion. *If Dick Cheney Was Scarface* combines Cheney press conference news footage with the voice and images of the mouth of Al Pacino, in order to satirize the vice president as a criminal.

In conventional copyright law, parody is among the most common and uncontroversial examples of “transformative” fair use. It also is 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 uses.

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—also should qualify as fair use.

### 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 the Fox News coverage of the melting ice caps. The blog post excoriates Fox News for its current and past coverage of global warming. A liberal blogger carefully documents how a Fox news anchor 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*. *Fred Thompson Stammers* edits together segments in which the presidential candidate hesitates, implying his unreadiness for public speaking and, potentially, public office. 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. Thus the maker provides an implicit commentary about Hilton's celebrity-worthiness.



Another common form of critique is the mashup 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. 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 24 artists' music and 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.

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.”

### 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,



Steve Irwin Fan Tribute

and make one's mark upon it. *Internet People* is a celebration of online video creations themselves.

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. *A Tribute to Ghostbusters* assembles choice moments from the popular film, with the title song as a soundtrack. *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. *Not So Innocent: A new approach to Animaniacs* also uses popular music to accompany its re-imagining of once-popular children's cartoon characters as grown-ups (accomplished by manipulating scanned images from various copyrighted sources). The *Steve Irwin Fan Tribute* quotes from shows and celebrity photos of the wildlife television star, upon the occasion of his accidental death.

Unauthorized quotation of copyrighted material for celebratory purposes may be just as defensible under fair use as it has been in analog environments, depending most importantly on its 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.

### Quoting to Trigger Discussion

Many makers quoted clips from or entire segments of copyright material without altering it, but framing 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. 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 music with quaint choreography. 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?* 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,<sup>11</sup> this popular strategy (“worst” is a keyword that yields riches online) 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.

So creators who copy work occasionally to start discussion 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 those making positive or negative comments) by their quotation. To the extent that a posting expresses its own judgment on the material it offers for comment by others (as the work researchers found in this category typically does), the media maker's fair use position is likely to be stronger.

### **Illustration or Example**

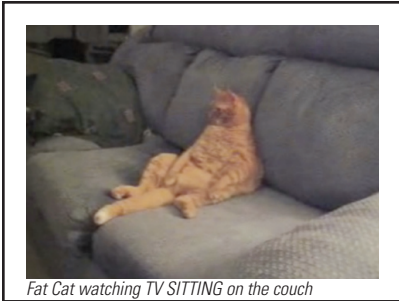
The use of copyrighted material for illustration or as an example was pervasive in all kinds of videos. In some cases, quotation for illustration was at the core of the video's meaning. *Internet People*, for instance, an animated montage of every major viral video that acts as tribute to online video 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 with dance styles of that moment. 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 *The Beyoncé Experience* to illustrate the argument.

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.

One of the contributions of the *Documentary Filmmakers' Statement of Best Practices* is its assertion that, in appropriate circumstances, "quoting copyrighted works of popular culture to illustrate an argument or point" can be fair use. Since 2005, this general proposition has been borne out in court.<sup>12</sup> Documentary filmmakers also noted that illustrations should be no longer or more ample than is necessary to make the point, that wherever possible attribution be given, and that examples where possible be drawn from a range of different sources. The same considerations should be relevant in online video.

### Incidental Use

Copyrighted material sometimes appears in online videos that record something else—for instance, *Let's Go Crazy #1*, a video of an 18-month-old child dancing to Prince's song “Let's

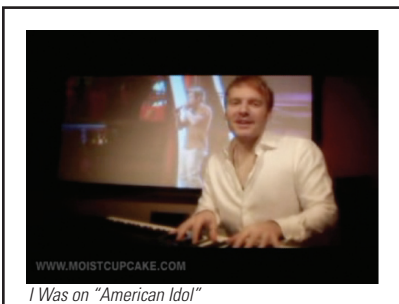


*Fat Cat watching TV SITTING on the couch*

Go Crazy.” (This video 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*. 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!”

For such uses, once again the *Documentary Filmmakers’ Statement* has 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 as 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 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.



*I Was on “American Idol”*

### Personal Reportage or Diaries

One common use of online video is sharing the record 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. *I Was on “American Idol”* is a plea for viewers to vote for the maker’s friend; the maker was in the audience when his friend was—as we see in clips from the TV show—a contestant. *Me and Madonna* is the record of a fan’s encounter with Madonna, in which he testified to her importance in shaping his identity.

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.

### 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*, which otherwise has been unavailable in the United States, has been uploaded in a variety of places (a practice Curtis has encouraged with this and other work of his, including *The Trap*). 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 around 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 many places online. Many people posted clips of performer Kanye West’s post-Katrina indictment of George Bush, after his accusation that “George Bush doesn’t care about black people” became news. In other cases, people post material that is revealing or scandalous in some way. For instance, *Bush Gives the Finger* circulates feed video of Pres. Bush making a crude hand gesture to the camera before a television appearance.

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.

### Pastiche or Collage

Much contemporary pastiche is “blank parody,” largely devoid of critical bite.<sup>13</sup> 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.



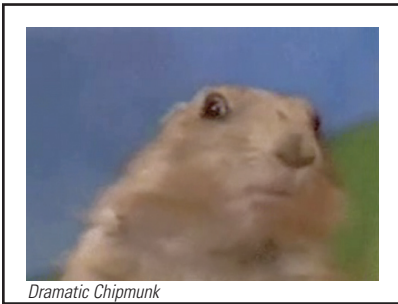
Daft Hands

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 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.)

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. 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.” 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 iTouch 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.) A tribute to characters in the TV show *The Office* is accompanied by the tune “The Very Thought of You.” In some mashups, music and sound effects are freely quoted in order to create or enhance meaning. For instance in one of the most widely viewed online mashups, the 5-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. The maker Buffalax has made more than a dozen videos based on foreign programs or advertisements (including *Crazy Indian Video... Buffalaxed!*), typically using English subtitles with often scatological lyrics that sound like the original language.



*Dramatic Chipmunk*

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. One Web site dedicated to hosting the different versions ([dramaticprairiedog.com/category/dramatic-prairie-dog-videos](http://dramaticprairiedog.com/category/dramatic-prairie-dog-videos)) contains 92 versions. The song

“Chocolate Rain” was mimicked in dozens of videos, featuring other Internet stars, such as Chad Vader.

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.

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 transgressive. 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.



## CONCLUSIONS

The culture that is emerging can be channeled, encouraged, even deformed, but it cannot be cut off. The people formerly known as the audience are not returning to their previous state. Tomorrow's makers will continue to use the popular culture they interact with as raw material for their own work.

Certain online video uses of copyrighted works can be assessed according to conventional fair use doctrine as it applies to criticism and commentary. This is so despite the fact that many videos that incorporate copyrighted work range far from conventional media critiques. Some are the enthusiastic, adulatory work of fans, who have traditionally had a contentious relationship with mainstream media critics. Some embed their criticism or comment within a new work that materially builds on the work commented upon. Some comments are little more than a gesture—a verbal equivalent of finger pointing (“Yuck”). In this new environment, many creators add meaning without bringing the copyrighted material itself under critical scrutiny, but instead by quoting selectively and purposively from the preexisting work. Some of these practices also fit comfortably into the evolving pattern of fair use jurisprudence. By contrast, other video makers appropriate material wholesale and without context or comment, in ways that clearly are not fair use. In all these cases, informed judgment on fair use, following established precedent, should be relatively straightforward. Many times, however, for instance within the category that our researchers called “pastiche or collage,” creators are developing practices that are at or near the boundaries of contemporary fair use analysis. Traditional fair use analysis would neither definitively exclude nor include them—at least until there is a better understanding of motive, context, circulation, and use of the new works. Since fair use doctrine evolves with creative practice, these borderline cases provide important areas for future research and analysis.

## NEXT STEPS

It is important to clarify the application of fair use to online video making if this new medium is to continue contributing to our collective social and cultural life. As always, it will be important to keep the doctrine's flexibility while doing so, so that clarifications do not become rigid limits on future cultural expression. We suggest three interlocked activities:

- This report's typology can act as a springboard for a wider discussion of ways to understand creators' behaviors within a fair use analysis, both by creators and by corporate representatives concerned with regulating creators' behavior. The discussion itself, propelled among other places at the Center for Social Media's fair use blog ([centerforsocialmedia.org/blogs/fair\\_use](http://centerforsocialmedia.org/blogs/fair_use)), will inform future work.
- In addition, a survey of social scientific and participant-observation research of online user practices, as well as further interview-based research with creators (such as previous work by these authors has modeled on a small scale<sup>14</sup>) will inform next steps.
- Finally, a code of best practices around fair use in online video needs to be articulated, both to educate new makers and to provide guidance for regulators private and public. Some creative communities have been able to establish best practices in fair use themselves. By contrast with filmmakers, musicians, or teachers, however, online media makers do not represent a mature, bounded community of practice. Thus, online video creators cannot develop a community consensus on fair use—at least not in these early days of the practice. Nor are corporations struggling with the challenge of maintaining and creating business models motivated to investigate fair use implications of today's anarchic practices. Legislative intervention to re-tailor the delicate fabric of fair use could do more harm than good. And yet guidance on fair use, both for makers and for businesses, is a critical tool to nurture expression within law.

In these circumstances, a deliberative body, made up of practicing lawyers, legal scholars, and scholars in communications, sociology and related fields may be able to provide needed guidance. They would be tasked to provide best practices on fair use, grounded in law and precedent but also supportive of emerging free-speech practices. This “blue ribbon” group's recommendations could then help to shape regulatory practices, both private and public, for a participatory media era.

The effervescence of this moment at the dawn of participatory media should not be mistaken for triviality. The practices of today's online creators are harbingers of a far more interactive media era. Today's makers—feckless, impudent, brash, and extravagant as they often are—in fact are the pioneers of an emerging media economy and society. Recognition of the importance of fair use, within the copyright law toolkit for cultural creation, is both prudent and forward-looking for those concerned with maintaining an open society.

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- 1 NYU Press, 2006.
  - 2 Yale University Press, 2006.
  - 3 Peter Jaszi, "Copyright, Fair Use and Motion Pictures," 2007 Utah L. Rev. 715.
  - 4 [centerforsocialmedia.org/resources/fair\\_use](http://centerforsocialmedia.org/resources/fair_use).
  - 5 Pat Aufderheide and Peter Jaszi, "Fair Use and Best Practices: Surprising Success," IP Today, October 2007, available at <http://wwwcenterforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>.
  - 6 <http://www.ugcprinciples.com/>
  - 7 <http://www.eff.org/press/archives/2007/10/31/>.
  - 8 The research team was coordinated by Center for Social Media fellow Neil Sieling, and included Ashley Gordon, Alison Hanold, Colleen Mulcrone, and Winn Phillips. The research forms part of the PIJIP-CSM joint project, Copyright and Fair Use in Participatory Media. It follows PIJIP and CSM's April 2007 convening *Unauthorized: The Copyright Conundrum in Participatory Video* ([centerforsocialmedia.org/resources/publications/unauthorized/](http://centerforsocialmedia.org/resources/publications/unauthorized/)) and builds on the two organizations' success in coordinating best practices for fair use by documentary filmmakers ([centerforsocialmedia.org/fairuse](http://centerforsocialmedia.org/fairuse)).
  - 9 Participative Web: User-Created Content, Organisation for Economic Co-operation and Development, April, 2007 ([oe.cd.org/documentprint/0,3455,en\\_21571361\\_38620013\\_39428648\\_1\\_1\\_1\\_1,00.html](http://oe.cd.org/documentprint/0,3455,en_21571361_38620013_39428648_1_1_1_1,00.html))
  - 10 [www.eff.org/pages/UGC-test-suite/](http://www.eff.org/pages/UGC-test-suite/)
  - 11 Especially *L.A. Times v. Free Republic*, 54 U.S.P.Q.2D (BNA) 1453 (CD Cal. 2000).
  - 12 A prime example is *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir.), involving the unauthorized reproduction of concert posters in a book about the career of the Grateful Dead.
  - 13 The term is from Frederic Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Durham: Duke UP, 1991).
  - 14 Pat Aufderheide and Peter Jaszi, *The Good, the Bad and the Confusing: User-generated Video Creators on Copyright*, Center for Social Media, April 2007, 20 pp.

## APPENDIX

### RESEARCHERS' TOP FIVES

#### Parody and satire

Baby Got Book  
 Bush vs. the Zombies  
 George Bush Don't Like Black People  
 The Soprano Wars  
 Victory in Iraq

#### Negative or critical commentary

Metallica Sucks  
 Fred Thompson Stammers  
 Fox News Edits a Democrat to Make Him  
 Look Worse  
 Clint Eastwood's "The Office"  
 Coffee with Chou: First Paris Hilton  
 Interview After Jail!

#### Positive commentary

Internet People  
 7 Minute Sopranos  
 Steve Irwin Fan Tribute  
 Ain't No Other Man  
 Not So Innocent: A new approach to  
 Animaniacs

#### Quoting in order to start a discussion

Abstinence PSA on Feministing  
 She Wants It  
 Open Thread Ron Paul on the War in Iraq  
 Worst Political Ads  
 Worst Music Video Ever

#### Illustration or example

Evolution of Dance  
 What the Buck? To Oprah – With Love  
 Internet People  
 The 10 Most Ridiculous Things About the  
 Beyonce Experience  
 Britney Is Bald

#### Incidental Use

Prisoners Dance to Thriller  
 Let's Go Crazy  
 Fat Cat watching TV SITTING on the  
 couch  
 My Birthday Party/Moonbounce  
 Documentary  
 Loud neighbors

#### Personal reportage/diaries

Me on stage with U2..AGAIN!!!  
 Arcade Fire - Wake Up pt. 2 - Porchester -  
 01/02/07  
 I Was on American Idol  
 Me on Letterman!  
 Me and Madonna

#### Archiving of vulnerable or revealing materials

Power of Nightmares  
 Stephen Colbert's speech at the Whitehouse  
 Correspondence Dinner  
 Bush Doesn't Care About Black People  
 Bush Gives the Finger  
 The Trap

#### Pastiche or collage

Dax Flame's Hallow's Eve  
 Me Singing "Unwritten" by Natasha  
 Bedingfield  
 Daft Hands  
 Apple Commercial  
 Crazy Indian Video... Buffalaxed!

**Links to these videos and others  
 discussed in the report are available at  
[centerforsocialmedia.org/recutvideos](http://centerforsocialmedia.org/recutvideos).**



**The Program on Information Justice and Intellectual Property**, led by Professor Peter Jaszi, promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C.



**The Center for Social Media**, led by Professor Patricia Aufderheide, showcases and analyzes media for social justice, civil society and democracy, and the public environment that nurtures them. The center is a project of the School of Communication, led by Dean Larry Kirkman, at American University in Washington, D.C.

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