The Chilling Tale of Copyright Law in Online Creative Communities

Online content creators are making decisions every day based on copyright laws that even judges have trouble interpreting. What impact does this confusion over the law have on our technology use and our creativity online?

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Think about all of the amateur creativity you've seen online today—image memes, viral videos, blog posts, collections of photographs, and social media status messages, just to name a few possibilities. Much of the user-generated content that you consume on a daily basis is 100 percent original, but how much of it isn't? We know from the block text in that meme that a cute cat MUST HAV FUD NAO, but does that cat's owner know how their photo is now being used? Did someone need to get permission to make their own remix of the Nyan Cat meme (see Figure 1)? What about your Facebook friend who is always expressing himself with song lyrics? The way we engage with copyrighted material has completely changed thanks to the Internet and digital technology. So does that mean that our online creative spaces are full of copyright criminals? Moreover, are legitimate creative expressions being "chilled" by the fear of criminal prosecution?

The truth is, copyright law is confusing. Many of us break rules without even realizing it, or find ourselves asking, "Is this okay?" As noted in the examples above, appropriation in online content creation is more and more common, and one of the most complicated parts of the law is fair use, governing how you can use a copyrighted work under certain conditions (for example, quoting a book in a book review, or parodying a song). Supreme Court Justice Storey once called this the "metaphysics of law," and that was back in 1891, in a case involving the use of some letters written by George Washington. Imagine how much more complicated the lines of legality become when dealing with half-second snippets of a sound recording or a three-minute remix video incorporating clips from 20 different movies. The U.S. Copyright Act was written in the 1970s, when thinking about permissible uses of copyrighted material didn't extend much beyond professional publishing and photocopies (see Figure 2).

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Now, anyone can be a publisher in seconds on websites like YouTube or Tumblr, and distribute an unlimited number of flawless copies. This has of course led to piracy, but also to amateur content creation on a massive scale—particularly creativity through appropriation, especially since the digitization of nearly all media making manipulating it an easy task for anyone with common computer software.

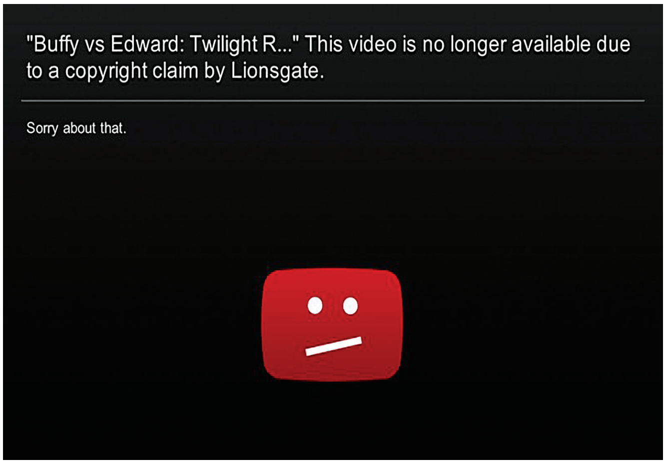
Consumers are now not only producers but remixers, using pre-existing content to make something new. This

Figure 1. Digital art inspired by the popular Nyan Cat viral video

Figure 2: Case law books—not in the libraries of most Internet users.

Figure 3: A frame from YouTube's "Copyright School" video

Figure 4: The YouTube removal notice for "Buffy vs. Edward."



means that this "metaphysics" problem of when the use of copyrighted work is permissible is relevant to a lot more people. Are you allowed to use that sound? That video clip? That character? Can you put it online? Can you sell it? Where is the line between fair use and infringement? Even if it's as simple as a meme shared on a Facebook wall, copyright law now touches ordinary people on a nearly daily basis.

Ironically, though this part of the law was already confusing when it was mostly of interest only to an elite group of copyright owners and attorneys, now that everyone else has to deal with it, it is even more so. Technological advances have only exacerbated these confusions. I spent three years in law school specializing in intellectual property, and when someone asks me if something is fair use, I usually cannot give them a satisfactory answer—partly because it is always decided on a case-by-case basis by a judge, and partly because past case precedent has yielded inconsistencies in application. In writing this article, I had to consider a fair use analysis of the YouTube screenshots in Figure 3. Critical commentary? Check. Transformative purpose? Check. Small amount used? Check. Lack of market harm? Check. Though unfortunately it isn't actually as simple as a checklist to follow. My dissertation research focuses on how people engage with copyright in online creative communities, and I can verify in many contexts, yes, people are very, very confused about the law. Yet, despite the fact that we wouldn't expect an Internet full of copyright law experts, something as simple as posting a YouTube video or clicking "share" requires decisions about what is or is not permissible.

This begs the question: As computer scientists, why should we care? I would argue any force that has the potential to limit what people do creatively with computers is relevant to those building the tools for creativity and spaces for sharing. Clearly, the cat meme is not in danger of extinction, but it is also true that both chilling effects and legitimate legal barriers do exist.

As a proponent of remix and transformative work it was both convenient and disheartening to have a perfect example of this handed to me on a silver platter less than a week before my dissertation proposal. Jonathan McIntosh, a remix video artist and "pop culture hacker," who has garnered attention for several projects—including mashing up Donald Duck

Figure 5: Participants at the Open Video Conference at NYU Law School watch a fanvid entitled "Kirk is a Womanizer" by vidder Imaginary Sanity.

with Glenn Beck,[1] and remixing the Google Glass promotional video to include ads[2]—got his start with a clever feminist mash-up of "Buffy the Vampire Slayer" and "Twilight." Posted to YouTube in 2009,[3] the video has more than 3 million hits and was featured in *Entertainment Weekly* and a number of other media outlets. It has been used in law school classes as an example of fair use, and McIntosh even screened the video for the U.S. Copyright Office during the hearings for a DMCA exemption concerning remix video. Three and a half years later, Lionsgate Entertainment (the rights owner of the "Twilight" film) filed a copyright claim with YouTube (see Figure 4).

In January 2013, McIntosh wrote extensively on his blog about the hoops he then had to jump through,[4] including his enlistment of the pro bono assistance of a lawyer. It was only after that post (and subsequent media attention) that "Buffy vs. Edward" was back on YouTube. The final result here may be "no harm done" (excepting of course the unnecessary time and stress for McIntosh), but this situation makes you wonder: For every Jonathan McIntosh who knows a great deal about the law and is willing to fight to keep his work online, how many others out there have simply taken their work down and deprived that community of their creativity?

In my work studying remix artists and how copyright affects their online activities, I interviewed one woman who, after receiving a takedown notice from YouTube for one of her remix videos, decided not to use YouTube at all anymore. Instead, she only posts her videos on her personal blog under password protection. She sounded genuinely sad when she told me that she wished she still had the larger audience that YouTube had generated for her, but that it wasn't worth the risk of getting in trouble for copyright infringement.

A "chilling effect" occurs when you decide not to do something that you probably should be able to do, for fear of legal sanctions. Unfortunately, YouTube provides a striking example of the potential for this effect with their "Copyright School" video, which explains (using a cartoon) their copyright policies.[5] With respect to remix, the message is clear: Fair use does exist, but you probably won't understand it, and if you think your video is fair use you might want to get a lawyer. Moreover, when explaining the counter-notification process (which is what McIntosh had to deal with when claiming that Lionsgate's copyright claim was wrongful), the emphasis is on the possibility of getting taken to court if you're wrong. "You would get in a lot of trouble," says the ominous cartoon voiceover. "That's how the law works." (See Figure 3.)

This rhetoric does serve a purpose. It is both logistically easier and legally safer for YouTube's policies to err on the side of being stricter rather than more permissive when it comes to identifying copyright infringement. However, particularly given that most people don't have a working knowledge of fair use, it is more likely that when confronted with a potentially wrongful takedown notice, someone will react like my interview participant rather than like McIntosh. For those times that we are dealing with legitimate fair uses, this is a chilling effect—and a situation in which copyright law together with the policy of an online community is stifling creativity.

YouTube isn't the only community where these types of tensions exist. My current work involves comparisons of norms and decision-making about copyright across different media types and online communities. Some confusion seems to be universal (such as common misconceptions about what determines fair use), and I've observed evidence of chilling effects among writers, visual artists, and musicians as well. The most common conversations about copyright in the forums of these creative communities boils down to "Can I do this?" or "Is this okay?"

In one thread on the discussion forums for National Novel Writing Month, someone asked whether fan fiction (stories written using existing characters and worlds) was legal. Forty-seven responses later, at least four completely different interpretations of the law had been put forth, some with complete confidence—and none of them had the law 100 percent correct. In the crafting community Etsy, discussions about appropriation in creative works can become quite heated—even resulting in some community members

1 http://www.nytimes.com/external/gigaom/2010/10/06/06gigaom-interview-how-right-wing-radio-duck-was-done-70752.html
2 http://www.theatlantic.com/video/archive/2012/04/googles-admented-reality-glasses/255495/
3 http://www.youtube.com/watch?v=RZwM3GvaTRM
4 http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate

5 http://www.youtube.com/watch?v=InzDjH1-9Ns

deciding to close up shop after being told that they might be breaking the law. A big part of the problem is that very often, the correct answer to "Is this okay?" would be unclear even to a legal scholar due to the complexity of the situation and/or the ambiguity of the law. Yet, these content creators still have to make a decision—do they share their work with the world and risk it not being "okay" legally, or do they keep it to themselves?

One challenge I sometimes face in explaining this problem of chilling effects is the need to defend why remixed or transformative works are worth protecting at all. Even inside these creative communities there can be tension over appropriation. In spaces where you find both original and remixed work, such as DeviantArt or Etsy, social norms sometimes skew toward recognizing work that uses appropriated material as less valuable. We have even seen these types of attitudes among kids (with presumably very little knowledge of copyright law) using the programming tool Scratch, where nuanced norms formed around ideas of attribution in the context of remix [1].

However, Scratch as a constructionist educational technology is a perfect example for one big part of the value of appropriation—the potential to create and share personally meaningful projects as a tool for learning. Particularly for kids, who are great at amassing a wealth of informal knowledge about something that interests them—being able to tap into that interest can be a great motivator. In discussing this phenomenon of "islands of expertise," Crowley and Jacobs used the example of a kid starting with "Thomas the Tank Engine" as a jumping off point for expertise about trains [2], but sometimes just the book (or movie, or cartoon) is enough. During one summer I spent as a camp counselor, one of my charges was a five-year-old girl who every day would insist on rattling off the names of all 150 Pokemon for me—in alphabetical order. If I wanted to teach that little girl about programming, then starting with animating a cartoon cat might pique her interest—but animating Pikachu probably more so.

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In fact, with one of the goals of the computing field being to encourage technology literacy and career paths among more women, there is something to be learned from fandom—predominantly female spaces where artistic appropriation comes in the form of fan fiction, fan art, and fanvidding. In fact, fanvids—in which clips from television shows or movies are set to music—are a form of remix video that trace back not just to the era of YouTube, but as far back as 1975. It is a "distinctively female visual aesthetic and critical approach" representing a stunningly high level of technical competency [3] (see Figure 5). Additionally, one of the largest predominantly female coded open source projects on the Web is a fan fiction archive.[6] I believe there is a great deal of value both educationally and culturally in engagement with personally meaningful material, and chilling effects in copyright laws and online community policies can result in lost opportunities for learning and art.

Unfortunately, there are no obvious solutions to this problem. Creative Commons founder Lawrence Lessig, among others, have made proposals for sweeping changes to copyright policy that might address some of these problems with overreach into fair use [4], but even under the best of circumstances the law is slow to change. I have previously proposed copyright holders might benefit from looking to the established social norms of creative communities as a guide for drawing the line between transformative work and infringement [5]—but this is perhaps too idealistic.

However, along with lawmakers, copyright holders, and the creators of these new works, there is a place among the stakeholders for those who build the technologies that facilitate creation and sharing. A positive example in this space might be Wikipedia, which scaffolds understanding of fair use with their image upload wizard. Imagine if YouTube had a similar system, prompting users for the pieces of a fair use rationale if they indicate the use of third-party content—especially if this rationale were then passed onto copyright holders before they can send a takedown notice. This would not do away with legal ambiguity, but would at least shift some of the balance of power in terms of knowledge to the content creator.

The function of fair use within copyright law is essentially to act as a safety valve between free speech and copyright—and indeed, it can be difficult to walk the fine line between protecting creativity and protecting against piracy and other misuses. However, thoughtfulness from designers about the potential for chilling effects can go a long way, and in the meantime, we will continue to create tools and online spaces that support creativity in all its many forms.

6 http://archiveofourown.org/

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Biography

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