



Center for Social Media



**Unauthorized:
The Copyright Conundrum in Participatory Video
A Convening Report
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INTRODUCTION

The Program on Information Justice and Intellectual Property in the Washington College of Law and the School of Communication's Center for Social Media, both at American University, hosted a convening April 10-11, 2007, of online video platform providers, scholars and think tank experts. Participants discussed management of copyright, particularly copyright infringement, in the emerging open spaces on the Internet for video.

As the lawsuit launched by Viacom against Google/YouTube in March demonstrates, media and content companies are highly concerned about potential revenue loss from these open environments. At the same time, the rapid growth of these environments evidences an enormous enthusiasm and burgeoning activity on the part of creators, many of whom have never entered video spaces before. This rush of energy into video expression is being seized upon by entrepreneurs exploring new business opportunities and models.

This explosion of expression also demonstrates an important new realm of activity for public speech acts. Addressing the copyright conundrum is as important for freedom of speech as it is to promote the broadest possible range of new businesses and business models.

The shared problem addressed by the group was how to manage concerns of copyright holders—including new creators posting video to online sites—while also protecting the fledgling form of expression. Hyperstrict measures to restrict use of copyrighted materials, participants argued, would squelch an emerging phenomenon that is full of potential both for businesses and for democratic civil society. Ignoring the question of how to manage copyright might not only put new businesses at risk from lawsuits, but

also fail to participate in creating the terms of participation in the new online universe of expression.

BALANCE IN COPYRIGHT

Finding solutions to managing copyright demands depends on a core feature of U.S. copyright law. The law balances the needs of copyright owners for protection with the needs of new creators for access to copyrighted material in making their new works. In many circumstances, new creators have the right to use copyrighted material without permission or payment. Limitations on term, exemptions to such those for education and libraries and, pre-eminently, fair use are balancing features of copyright law.

Fair use, broadly put, is the right to use copyrighted material if the cost to the copyright holder is less than the value to society. More specifically, a use of copyrighted material is deemed fair if it adds value and uses the material differently than the original work did (a so-called “transformative” use), if the use is limited to the portion that is needed for the new use (this could be a mere smidgen or 100 percent of the material, depending on circumstances), and if the use does not create a market substitute for the original work. Definitions of fair use are deliberately vague in the law, to accommodate changing creative practice. In many communities, however the doctrine is well established and widely relied upon—for instance, in the documentary filmmaking community, which has articulated its own best-practices guidelines, and among public affairs broadcasters, who have depended on fair use for decades

In the case of online platforms, Section 512 of the Digital Millennium Copyright Act also acts as a safety valve of sorts. This section of the law does not require Internet service providers to share in the creator’s copyright responsibility, under certain conditions. The members of the convening were agreed that online UGC platforms are almost certainly ISP’s within the meaning of the law. Thus, in order to claim this exemption, the platform providers are responsible to copyright holders to take down material that violates copyright law, upon appropriate notice.. Counter-notices leading to the replacement of materials also are possible, where the takedown was done because of a mistake. The Section 512 provisions make it possible, at the moment, for new practices such as mashups and remixes to reach new audiences on the Web, whether or not they constitute legitimate fair uses. And in many cases, copyright holders simply do not protest.

Thus, there are two strong features of copyright law that can be used to balance the rights of copyright holders.

RESEARCH RESULTS

Research prepared for the meeting focused the discussion. *The Good, the Bad and the Confusing* summarizes results of research with university-age creators of online video. These creators, many of whom were making their first or second work, demonstrated enormous good faith about their nearly universal use of copyrighted material. They also, however, showed great confusion about how to meet their copyright obligations and

about their rights to use unauthorized material. In fact, the core concept of balancing rights under copyright seemed entirely unfamiliar to them.

Participants also were provided with a survey of the terms of service of online video providers. This research showed that almost universally—Revver was the big exception—providers did not provide basic copyright information to users. Almost all sites cautioned uploaders to make sure that they owned the material they uploaded, but did not explain to them anything about how to meet any obligations or whether they had any rights to use copyrighted material without authorization. They did not explain the option of fair use to uploaders, for instance.

DISCUSSION

Participants repeatedly returned to the question: How should we imagine the phenomenon? Rhetorical choices also point to conceptual maps. For some, the environment in which participatory video is now flourishing might be seen as a proto-public media zone, or at least an area that might foster such a zone. It might also be seen as “outlaw” territory or a frontier zone. For others, spatial metaphors are less important than focusing on behaviors, which might range from stealing to sharing to building collaboratively-produced identities. Most participants found the baseline term *user-generated content* inexpressive of the creative phenomenon. Other and related terms included *intellectual wealth*, *participatory video*, *public media (or expression)*, *participatory media*, and *citizen journalism*.

Discussion of copyright issues centered on two modes of creating limited space within copyright for unauthorized use of protected material: fair use, and Section 512 of the DMCA. They are seen, as one participant said, as both complementary and reinforcing. Participants agreed that, in the participatory video environment, fair use has been until now dormant, although it has potential. Meanwhile, use of section 512 has been liberatory of emerging creative practices, but is now at some risk because of litigation that challenges its applicability to this context.

Fair Use

Fair use is valuable for its unique ability to permit unauthorized uses for a broad range of new creative practices; its limitation is that the boundaries around acceptable practices are fuzzy even for established creative acts, while in any emerging form it is even less clear what acceptable fair uses will be.

Participatory video is an emerging form. Although participants made clear that there is more to fair use analysis than transformativeness, the discussion returned frequently to the question: In this new media environment, what’s transformative? Transformativeness is a key consideration in the fair use case law of the past 15 years. But the online video environment is spurring new kinds of services, such as translation services, which raise copyright questions in new ways. New behaviors are also springing up. For instance, on social networking sites, people share copyrighted material as part of their creation and

maintaining of an identity within a friendship network. On platforms such as Youtube, people are clipping out sections from talk shows and other entertainment, such as inappropriate remarks by comedian Michael Richards or ex-talk show host Don Imus, in acts that might be seen as implied critique, or simply as part of an ongoing electronic conversation. . Mash-ups and remixes reuse material to make a new product, in ways that have not been foreseen in previous thinking about unauthorized use of copyrighted material.

In other contexts, fair use has been successfully localized to particular practice environments through the Best Practices approach. How could best practices emerge in an environment in which new creators and practices appear every day, and the potential pool of creators is everyone? If there were to be a discussion of best practices, who would take part? Participants agreed that online video providers play an important institutional role in establishing practice, and have a potentially healthy balance of interests for copyright protection and unauthorized use; however, given their divergent interests, platform providers are not completely reliable proxies for creative communities, even though in this case the term “community” may be premature.

It is possible that, as the new environment emerges, platform providers may increase the amount of filtering they perform, either because they are required to do so, or because they chose this course as a way of staving off potential liability. With strong best practices guidelines, it might be possible, some participants thought, to develop filtering programs that do not trample on new creators’ rights to use unauthorized copyrighted material. New creators might be able to be informed “at the front end” of the process about their rights and obligations, and filtering might “strain out” inappropriate uses on the back end.

However, participants also believed that some filtering and automated self-politicking schemes could impair fair use, a concern that is discussed more fully below. And they expressed concern that settlements of lawsuits may involve economic arrangements that simply trump fair use issue.

512

Section 512 has been especially valuable in creating spaces in which unauthorized uses that may not be, under any interpretation, fair (such as simply copying of entire works) are still available to the public, either for the time it takes takedown holders to issue copyright notices, or indefinitely, when they chose not to do so. There are potentially many copyright holders for whom such uses are either good news—because they serve some business model—or are not enough trouble to complain about.

Participants believed that the 512 take-down system functioned best when decisions about which uses to tolerate and which to contest are made by well-informed human beings. They agreed that the growing trend toward automation in takedowns, which depends on audio (and soon, video) fingerprinting or other pattern recognition, raises concern about taking down creative new speech acts that may also be legal (for example,

fair) of unauthorized material. It also threatens to take individual user decision-making out of the process. “When it’s ‘My bot will speak to your bot,’ what happens to the end user?” asked one participant.

In general, participants broadly believed that the 512 “safe harbor” was a healthy protection for emerging speech behaviors, but that content providers may see it as too “handcrafted” an approach to copyright management. The group also expressed concern that current litigation may threaten the ISP exemption from copyright liability. They also believed that the DMCA may be revisited with legislative actions that could impair the functionality of 512 to manage unauthorized use. Finally, international actions may affect both interpretation and revisions of the DCMA; if it succeeds in Parliament, the European IPR Criminal Enforcement Directive may pass expand criminal sanctions for platform providers, and (meanwhile)WIPO may soon be revisiting ISP liability. None of these developments need affect the situation in the U.S., but the risk is present.

Other approaches

The group mentioned other approaches for managing unauthorized use, but found them to be, at best, uncertain in their promise. Currently, for example, some platforms do license some content from large copyright owners, but it is unclear how much this will benefit participatory media makers. If successful, larger scale public licensing initiatives, such as the Berkman Center’s NOANK concept, might offer more support for new creativity. Implementation of such a scheme in the U.S., however, may be some time away. The ASCAP/BMI model of blanket licensing offers some promise, should rights holders find this helpful to them, but it requires enthusiasm from rights holders. A project to pretest uploaded videos and offer creators a link to Creative Commons-licensed content as a substitute for copyrighted material was regarded with some skepticism, partly because it precludes fair use and partly because it was seen as discouraging: “The more hoops you make people jump through, the more you kill off this content.” However, it was also seen as a potential tool to reduce copyright holder anxiety. Some participants favored stronger resistance to copyright owners’ claims, but they do not have the way to implement such a critique.

The group came back repeatedly to the issue of education, and to the lack of means for the vast majority of Americans—all of them potential participatory video creators—to learn even rudimentary facts about appropriate use of copyrighted materials.. Among the institutions targeted were:

- **Universities.** It is important, participants noted, that universities take a free speech position on video expression, properly informed by an understanding of the balancing features of copyright, and not simply accede to stringent and sometimes overreaching demands of content providers.
- **Media literacy teachers.** Throughout K-12, as well as in after-school programs, media literacy teachers are a first-line source of information about copyright management. A project is underway to develop best practices in fair use within this community, and this project may have important ramifications in the K-12 environment.

- **Online video providers.** Currently all platforms have terms of service, which almost never include any information about the balancing features of copyright. These are important gateways for any emerging participatory video producer.
- **Creative communities.** The role of documentary film organizations in creating best practices in fair use was critical. As participatory media practices grow, so will organizations that can articulate the free-speech function of participatory media and the importance of unauthorized use.

CONCLUSION AND RECOMMENDATIONS

The group found common points of agreement:

- Participatory video is a vigorous new phenomenon that is promising both for free speech and for new business opportunities; however, it is in its embryonic stages and needs to develop.
- Existing copyright management techniques are either poorly exploited (fair use) or imperiled (section 512).
- Finding successful ways to manage unauthorized use is critical to keeping existing spaces for new opportunities for public expression and for business growth.

To that end, the group found a range of potential activities, focusing again on fair use and section 512.

Fair use

The emerging range of creative practices that are being generated by new media opportunities needs to be better understood. Such understanding, in turn, would foster a conversation about the implications of copyright policies for cultural creativity. A typology needed; the group imagined a spectrum of activity ranging from the “DVR to the world” approach (posting Saturday night’s TV on Sunday morning), through criticism/analysis/tribute, to solo content creation. This research is basic to any discussion of transformativeness in this emerging environment.

Fair use in areas of established practices also needs to be better understood, and better explained by new creators. Existing knowledge needs to be consolidated so that, as new habits and customs develop, they also depend on solid established practice such as is articulated in the Documentary Filmmakers’ Statement of Best Practices in Fair Use. Such knowledge could be spread through institutions ranging from online platforms to media literacy websites, and viral videos would be one means of doing so. A dynamic process where each decision adds to the body of knowledge would be enormously helpful and appropriate to the medium.

Litigation possibilities include asking for declaratory judgments on behalf of participatory media makers whose practices are threatened, although there are significant legal roadblocks in the way of this strategy.

512

Educating new creators about their opportunity to issue counter-takedowns (counter-notifications) through Sec. 512(g) is an important balancing feature to current use of the takedown option by content providers.

Educating rights holders about best practices in issuing takedowns is also possible. Some suggested approaches include:

- A “dolphin hotline” that could provide expedited measures for unauthorized uses that could be considered fair use or otherwise acceptable;
- A guarantee of human review of clips before takedown;
- A commitment to avoid demanding take-down of transformative and other creative uses.

Litigation can be used challenge unreasonable use of takedowns, and some of the best practices just described might emerge as such lawsuits are resolved..

Finally, those who see the free speech issues and emerging business opportunities as important need to prepare for the possibility that both fair use and 512 will come under attack by overzealous content providers and their allies. They need to develop a political plan for action in the event of such attack.

Participant List

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