

Copyright Tools for a Digitized, Collaborative Culture





You

Tube



Disruptions in the copyright area are being fueled by digitization, the democratization of technology tools, and the rise of the internet as a distribution platform. Copyright disruption is not trivial, as it has the power to transform and reshape our global economy.

By Laura Gordon-Murnane

A collaborative and participatory digital culture, where everyone is both a content creator and a publisher, adds a new dimension to the perception of copyright. Content is borrowed and shared with anyone and everyone on YouTube, blogs, Tumblr, Instagram, Pinterest, Flickr, Facebook, and Twitter. The content we use in our remixes and mashups are the building blocks of our ideas—they inspire and shape our creative reinterpretations and expressions.

But hold on here. Taking unauthorized copyrighted materials for our mashups, remixes, fan fiction, videos, music, photos, and blogs challenges and strains a copyright system that has yet to adapt easily to the realities of how content is created, viewed, monetized, and consumed today. One woman's creative remixing is another man's infringement. How do we reconcile these two views?

REALITIES OF CONTENT CREATION

Today's copyright laws and enforcement actions are seen by many as inhibiting their creativity and innovation. Conversely, rightsholders feel infringement is rampant and stronger copyright laws should be enacted to protect their rights. We need a copyright system that is both flexible enough to support rightsholders as well as the content creators of today and tomorrow.

What legal and innovative tools exist that work within copyright but allow rightsholders their due while also providing users the legal means to use copyright materials without fear of lawsuits or harsh penalties? Fair use, Creative Commons, and the development of commercial solutions offered by third parties can help solve the copyright conundrum of today, at least in the U.S. Other countries' laws differ. What is under copyright in the U.S. may be out of copyright elsewhere.

We need a vibrant and welcoming copyright ecosystem that inspires and motivates everyone. In the absence of congressional action, the online marketplace has stepped up and is trying to solve these problems. Not all will work, not all do work, but it is important that we have innovative organizations (commercial and noncommercial) trying to offer solutions that will make copyright work for all us.

FAIR USE

Fair use is a legal doctrine codified in Section 107 of the Copyright Act of 1976. The law stipulates copying materials that are under copyright for the "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an

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infringement of copyright” (copyright.gov/title17/92chap1.html#107; accessed Aug. 31, 2015).

The importance of the fair use doctrine cannot be underestimated. As the Department of Commerce’s Internet Policy Task Force wrote in its 2013 Green Paper, “Copyright Policy, Creativity, and Innovation in the Digital Economy” (uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf), fair use is “a fundamental linchpin of the U.S. copyright system.” It balances “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”

The advantages of fair use are many because, as the Task Force puts it, the “doctrine is highly adaptable to new technologies and has already played an important role in the online environment.” For example, the federal courts have ruled that search engines can cache webpages and offer thumbnail images in search results all because this falls under the fair use doctrine.

Furthermore, fair use is an important driver of the U.S. economy, accounting for trillions of dollars in revenues, employing millions of workers, and contributing billions of dollars in exports, according to a 2011 report from the Computer & Communications Industry Association by Thomas Rogers & Andrew Szamoszegi (“Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use”; ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011).

Fair use is always decided by the courts on a case-by-case basis. The Copyright Act of 1976 requires that the court consider four factors when making a determination of fair use: What is the character and purpose of the use? (What are you doing with the material? Is it educational, noncommercial, or commercial? Is it transformative?) What is the nature of the copyrighted work? (Did you use factual information or

did you use the creative expression of the copyright owner?) How much did you take and is it the core part of the work? What’s the effect on the market value of the work? Your answers to these questions will help guide you in determining how the courts could rule.

Fair use, though, has some problems which make it difficult to rely on it as a defense against copyright infringement. Since issues regarding fair use are decided on a case-by-case basis, predicting a favorable ruling can be difficult or risky because the outcome depends on the individual judge or jury assigned to the case. This uncertainty, coupled with potentially severe remedies for copyright infringement, leads some content creators to stay away from fair use, opting instead to seek a license or leaving the content out altogether.

However, fair use remains an important component of the copyright ecosystem—it can be used in many different situations. The Copyright Office has created the Fair Use Index (copyright.gov/fls/fl102.html), a searchable database of court opinions on fair use rulings and cases that shows which fall under fair use.

Although its role is important, fair use is not the only option that can assist today’s creative communities in using copyrighted materials without fear of infringement lawsuits.

CREATIVE COMMONS

Creative Commons, founded in 2001 by Lawrence Lessig, Hal Abelson, and Eric Eldred, with funding from the Center for the Public Domain, reacted to the threat of a shrinking public domain by creating Creative Commons licenses to build a digital commons. Think of Creative Commons as an alternative public domain that fulfills the promise of the internet and contains content that can be reused, copied, distributed, edited, remixed, and built upon. Best of all, Creative Commons’ licenses all work within “the boundaries of copyright law.”

Creative Commons provides an answer to dealing with a cultural environment that relies on tools that make copying, remixing, and posting content to the web easy but, by its very ease, threatens the rights of copyright owners. Looking at it in another way, Creative Commons allows copyright holders to share their content with others by developing a set of tools that range from “All Rights Reserved” to “Some Rights Reserved” and “No Rights Reserved.” The licenses “provide a simple, standardized way to give the public permission to share and use your creative works—on the conditions of your choice” (“About Creative Commons”; creativecommons.org/about). You can choose one of the six licenses (creativecommons.org/licenses) or a tool that allows you to dedicate your work to the public domain (creativecommons.org/publicdomain).

Creative Commons’ licenses have become an important work within copyright law. Google, Yahoo, and Bing all provide a usage rights filtering option which can assist your search for Creative Commons works. Look for this tool in the advanced search option in Google; Bing and Yahoo offer this filtering option in their image databases. Flickr has

Creative Commons: You can choose one of the six licenses (creativecommons.org/licenses)

created a section just for Creative Commons photos (flickr.com/creativecommons) that makes it easy to find and identify reusable photographs. Creative Commons' licenses are used worldwide by organizations, governments, museums, and individuals (creativecommons.org/examples). These examples let you sample the different kinds of content made available by today's artists, writers, photographers, and bloggers.

INNOVATIONS FROM THIRD PARTIES

In the absence of congressional action on reforming copyright law to adjust to the realities of a digital, remix world, third-party organizations have developed their own solutions to allow end users the ability to use, easily and legally, copyrighted materials while at the same time providing payment or licensing options to the rightsholders of that content. It should come as no surprise that Google and Amazon, two of the biggest and most transformative internet companies, are trying to develop tools to figure out how to make this work.

When Google bought YouTube in October 2006 for \$1.65 billion, copyright issues loomed large. In March 2007, Viacom sued YouTube and Google for copyright infringement

and sought more than \$1 billion in damages. Google, however, purchased YouTube with its eyes wide open regarding copyright issues, and in a blog post ("The State of our Video ID tools," June 14, 2007; googleblog.blogspot.com/2007/06/state-of-our-video-id-tools.html), Steve Chen revealed Google had developed a content management system designed to address these copyright issues. In October 2007, almost a year after Google purchased YouTube, Google launched Content ID—a system that identifies and manages material posted to YouTube ("Latest Content ID Tool for YouTube"; googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html).

CONTENT ID

With Content ID, copyright owners register their video and audio works with YouTube and Google scans all uploaded video and audio content for matches. When a video is posted to YouTube, it is scanned. If a match or partial match occurs, copyright owners have these options: They can decide to mute audio that matches their music; block a whole video from being viewed; monetize the video by

Code of Best Practices in Fair Use and Research Guide

The Code of Best Practices in Fair Use for Academic and Research Libraries

cmsimpact.org/sites/default/files/documents/code_of_best_practices_in_fair_use_for_arl_final.pdf

The Code of Best Practices in Fair Use for Media Literacy Education

mediaeducationlab.com/sites/mediaeducationlab.com/files/CodeofBestPracticesinFairUse_0.pdf

The Code of Best Practices in Fair Use for Online Video

cmsimpact.org/sites/default/files/online_best_practices_in_fair_use.pdf

The Code of Best Practices in Fair Use for OpenCourseWare

cmsimpact.org/sites/default/files/10-305-OCW-Oct29.pdf

The Code of Best Practices in Fair Use for Poetry

cmsimpact.org/sites/default/files/documents/pages/fairusepoetrybooklet_singlepg_3.pdf

The Code of Best Practices in the Fair Use for Visual Arts

cmsimpact.org/sites/default/files/best_practice_rfnl.pdf

Documentary Filmmakers' Statement of Best Practices in Fair Use

cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use

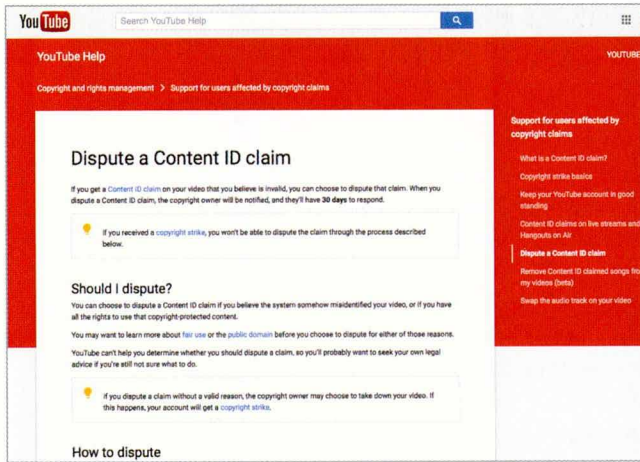
Fair Use Under Copyright Law: Fair Use Books, Websites and Database Search Results

guides.temple.edu/fair-use

Statement of Best Practices in Fair Use of Orphan Works for Libraries & Archives and Other Memory Institutions

cmsimpact.org/sites/default/files/documents/pages/orphanworks-dec14.pdf





To address YouTube fair use issues, Google has implemented a dispute-resolution system.

running ads against it; or track the video's viewership statistics ("How Content ID Works"; support.google.com/youtube/answer/2797370?rd=1&hl=en).

YouTube's transformative global video platform allows amateurs as well as professionals to distribute creative video and audio works around the world with ease and dispatch. YouTube's Content ID system has been embraced (not without some kicking and screaming) by more than 5,000 copyright partners, including "network broadcasters, movie studios, music publishers, songwriters, and record labels, and they are collectively making hundreds of millions of dollars by using Content ID's tools to monetize these videos," according to comments Google filed reacting to the Department of Commerce Green Paper (ntia.doc.gov/files/ntia/google_comments.pdf).

In its comments, Google also states that Content ID is a major "win-win-win solution for YouTube, copyright owners, and YouTube users. The system has created a new source of revenue for copyright owners, as well as for YouTube." Google views Content ID as a useful innovation in the quest to find an efficient, effective online marketplace that does not rely on compulsory licensing and maintains that Content ID allows content creators to post videos that use copyrighted materials "without having to independently seek out licenses for it."

The Green Paper itself offers support for Google's Content ID "as a less risky alternative to relying on fair use" because it allows content creators (not the copyright holder) to "post remixes that may be monetized by the relevant right holders. Under this system, however, it is the right holder's decision whether to allow the posting."

Content ID, however, is not perfect. Many content creators post videos to YouTube that fall under fair use but find their videos flagged, removed, blocked, or monetized based on false or inaccurate Digital Millennium Copyright Act (DMCA) claims. To address these problems, Google has implemented a dispute resolution system ("Dispute a Content ID Claim"; support.google.com/youtube/answer/2797454?hl=en&

[vid=1-635763757021388186-4043566837](https://support.google.com/youtube/answer/2797454?hl=en&vid=1-635763757021388186-4043566837)). It can take up to 30 days for a rightsholder to respond to a counter-claim.

In May 2015, the Electronic Frontier Foundation congratulated Google and YouTube on its 10-year anniversary, but it also encouraged Google to fix some of the problems experienced by content creators incorrectly flagged by Content ID ("Congrats on the 10-Year Anniversary YouTube, Now Please Fix Content ID"; eff.org/deeplinks/2015/05/congrats-10-year-anniversary-youtube-now-please-fix-content-id).

Although Content ID offers one solution, it is not a solution that can scale for the internet. Google reported that it cost approximately \$30–\$60 million and required more than 50,000 engineering hours to set up Content ID. It is just too costly for a company, even the size of a Google with its deep pockets, to undertake such a solution for the entire internet. If we want something like Content ID for the entire internet (I'm not sure if this is what we really want or need), it would need to be a government undertaking.

FAN FICTION

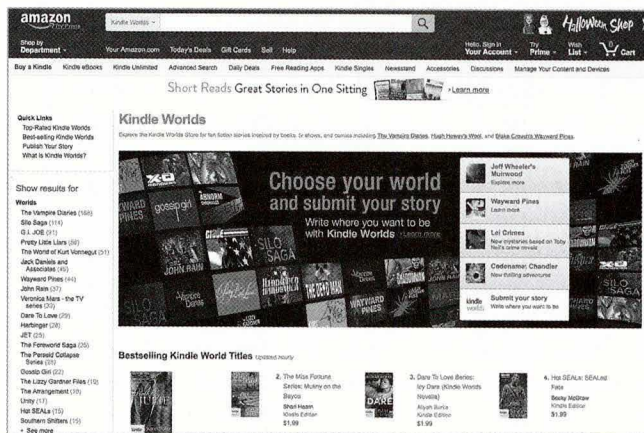
When E.L. James published *Fifty Shades of Grey* in 2011, publishers came face-to-face with the growth and success of fan fiction. James' book originally began life as an erotic alternative to the Stephanie Meyers' *Twilight* saga. James posted her fan fiction story "Masters of the Universe" on FanFiction (FanFiction.net). Later she removed the story and reworked it by changing the characters from Edward and Bella to Christian and Anastasia. The rest is publishing history.

Fan fiction writings are noncommercial stories based on popular culture—books, movies, television shows, comics, music; posted to places such as FanFiction, Wattpad ([wattpad.com](https://www.wattpad.com)), or Archive of Our Own (archiveofourown.org); and readily shared with fans around the world ("The Weird World of Fan Fiction"; [wsj.com/articles/SB10001424052702303734204577464411825970488](https://www.wsj.com/articles/SB10001424052702303734204577464411825970488)).



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But fan fiction is not new. Folktales, myths, fables, and books have all been reinterpreted, reused, and retold many times. James' success, however, led traditional publishing houses, previously hostile or uninterested in fan fiction, to look to it as a way to save the publishing industry ("Why Fan Fiction Is The Future of Publishing"; thedailybeast.com/articles/2015/02/09/why-it-is-crucial-that-the-publishing-industry-embrace-fan-fiction.html).

KINDLE WORLDS

Sensing an opportunity to tap into the popularity of fan fiction, Amazon Publishing launched Kindle Worlds in May 2014 (amazon.com/b/?node=6118587011). In a press release, Amazon characterizes it as "the first commercial publishing platform that will enable any writer to create fan fiction based on a range of original stories and characters and earn royalties for doing so" (phx.corporate-ir.net/phoenix.zhtml?ID=1823219&c=176060&p=irol-newsArticle).

Kindle Worlds is an attempt to find a solution that allows fans and writers a legal way to create derivative works from existing copyrighted materials and to monetize their reinterpretations without the fear of copyright infringement and lawsuits. The reception by amateur writers has not been enthusiastic—many would rather post on FanFiction, Tumblr, Wattpad, or Archive of Our Own. Unlike Kindle Worlds, these other platforms offer a vibrant and active social community, useful feedback and interchange, and freedom from restrictions imposed by Amazon—no profanity, no drugs, no explorations of sexuality in all its degrees, and participants must be 18 years old.

Many fan fiction writers have different needs than those offered by Amazon's Kindle Worlds. The disconnect between the goal of Kindle Worlds and fan fiction writers is that Amazon looks at fan fiction as an opportunity to monetize new content but for the problem of copyright infringement. Fan fiction writers are less interested in monetizing their creative efforts. According to a 2014 article by Rebecca Tushnet, "All of This Has Happened Before and All of This Will Happen

Again: Innovation in Copyright Licensing," *Berkeley Technology Law Journal*, Vol. 28, 1447–1488: (scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2471&context=facpub), they write fan fiction to express their creativity and love of the characters while being protected by fair use. For those fan fiction writers who want to move from noncommercial to commercial, Kindle World's might be a solution. However, noncommercial fan fiction writers will find that Kindle World's is probably not going to work for them.

As long as Congress does not act, we need a full toolbox—legal, licensing, and third-party solutions that allow rights-holders to receive financial recompense but also allow content creators to express themselves using the rich content offerings of yesterday and today. The solutions offered by fair use, Creative Commons, Content ID, and Kindle Worlds are the current examples of how to deal with the problems of copyright and a digitized collaborative social culture. They all have strengths but also have weaknesses.

Right now there is no perfect solution. The tools mentioned here are not the only ones being offered. Getty Images (gettyimages.com/resources/embed) provides access to 50 million images that can be embedded into your web content. Another company, Legitmix (legitmix.com), offers one solution to music remixing. And just recently, iCopyright announced the release of an enhanced iCopyright Toolbar Plug-in for WordPress bloggers (icopyright.com/blog/new-icopyright-toolbar/repubhub-wordpress-plugin-and-new-content-sources). Expect to see more companies offering their own solutions to the problems of copyright and remix culture.

What we really need, though, is for Congress to enact meaningful copyright reform that takes into account the realities of today but builds in a flexible system that can adapt to changes in technology and economic and social practices. In a 2013 speech published in the *Columbia Journal of Law & the Arts*, Register of Copyrights Maria A. Palante talked about the requirements for the next great copyright act (copyright.gov/docs/next_great_copyright_act.pdf).

In August 2015, the Computer & Communications Industry Association published a research paper, "Copyright Reform for a Digital Economy" (ccianet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf), that called for Congress to recognize that technological innovation shouldn't transform every consumer into a copyright infringer. It also wants more certainty concerning fair use, first sale doctrine, and transparent licensing and copyright ownership, particularly as they affect businesses not part of the "content industry."

Reforming copyright has been under consideration for some time, but not much has happened at the congressional level. Reform is no easy task, for sure, but it is absolutely necessary.

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