U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS

In the matter of Exemption to Prohibition on Circumvention
of Copyright Protection Systems for Access Control Technologies Under 17 U.S.C. 1201

Docket No. 2014-07

Comments of Electronic Frontier Foundation and Organization for Transformative Works[1]

1.   Commenter Information:

Corynne McSherry   Elizabeth Rosenblatt
Mitch Stoltz   Rebecca Tushnet
Kit Walsh   Organization for Transformative Works
Electronic Frontier Foundation   2576 Broadway, Suite 119
815 Eddy Street   New York, NY 10025
San Francisco, CA 94109   (310) 386-4320
(415) 436-9333 x 122   Betsy_rosenblatt@post.harvard.edu
corynne@eff.org

The EFF is a member-supported, nonprofit public interest organization devoted to maintaining the balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating innovation, access to information and new creativity.

The OTW is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. "Fanworks" are new, noncommercial creative works based on existing media. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 400,000 registered users and receives over 4.8 million unique visits per month.

2.   Proposed Class Addressed

Proposed Class 7: Audiovisual works – noncommercial remix videos

Audiovisual works made available via DVDs, Blu-Ray discs, and online distribution systems, that are lawfully made and acquired and that are protected by Digital Rights Management schemes, where circumvention is undertaken for the sole purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.

---

[1] Multimedia evidence submitted under separate cover.

3.   Overview

Remix is a thriving genre of fair use, accessible to ordinary citizens and widely used for political and cultural commentary. The existing exemption removes a legal cloud that would otherwise hang over these important cultural projects, and allows remixers to assert fair use defenses and file counter-notifications when their uses are challenged pursuant to the Digital Millennium Copyright Act. Absent an exemption allowing remixers to get short clips for purposes of fair use, remixers will be subject to arbitrary suppression even if their works are plainly fair use. The exemption should be renewed and expanded to cover short clips taken from Blu-Ray discs as well.

4.   Technological Protection Measures and Methods of Circumvention

The vast majority of mainstream commercial works released on DVD use the Content Scrambling System (CSS) to encrypt the audiovisual work stored on the DVD. The Copyright Office and the courts have concluded that CSS is an "access control" within the scope of § 1201(a)(1).[2] Blu-ray discs are locked down by a combination of measures, principally the Advanced Access Content System process, which allows vendors to revoke compromised keys and distribute new keys through new discs. Blu Ray discs may also contain another layer of restriction, called BD+. Numerous tools exist to circumvent such restrictions.[3]

Although many major on-line media sites use no encryption at all, several of the most popular sites providing commercially-licensed television and motion picture content do encrypt some or all of their video streams.[4] RTMPE (Real Time Messaging Protocol Encryption) is an extension that adds an encryption layer to the Adobe-designed RTMP streaming media protocol. Adobe continues to maintain that third-parties are not supposed to implement RTMPE and other "secure RTMP measures," the details of which it has not published.

Along with the other technologies mentioned, Apple encodes video using its proprietary FairPlay DRM scheme. Various tools exist for overcoming FairPlay's restrictions, and to circumvent the other restrictions as well.[5]   For example, RTMPE has long since been successfully reverse-engineered by third parties, and several implementations have been produced that successfully

---

[2] *See, e.g., Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 919 (N.D. Cal. 2009); *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc*., 176 Cal. App. 4th 697 (2009); Recommendation of the Register of Copyrights in RM 2008-8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, June 11, 2010 at 66-68 ("2010 Recommendations"), at 44-46.

[3] *See, e.g.,* http://support.newagepcs.com/archive/index.php/t-27082.html; http://www.dvd-guides.com/guides/blu-ray-rip/256-remux-blu-ray-to-mkv http://www.dvd-guides.com/guides/blu-ray-rip/256-remux-blu-ray-to-mkv

[4] For example, Last.fm, Pandora, and Vimeo do not encrypt their video streams, while Hulu, Netflix, and Amazon do. Youtube uses access controls on some, though not all, of its services.

[5] Common means of DVD circumvention include programs such as MactheRipper, DVDDecrypter, and Handbrake. Common means of online video circumvention include programs such as FairUse4WM and Requiem. Common means of Blu-Ray circumvention include programs such as DVDFab and MakeMKV. *See, e.g*., http://support.newagepcs.com/archive/index.php/t-27082.html; http://www.dvd-guides.com/guides/blu-ray-rip/256-remux-blu-ray-to-mkv.

interoperate with Adobe's Flash Media Server.[6] These implementations have formed the basis of tools that help users acquire video from services that use RTMPE, such as Hulu and UnBox. SWF Verification is also quite easy to bypass, and a plethora of tools exist already to allow download from a Flash Media Server from a source that is not a whitelisted SWF player. In short, the situation is still essentially the same as it was in 2012,[7] when the Office concluded that many platforms and other vehicles for distributing content use technological protection measures than control access to that content, though we agree with the Office "the landscape for access controls protecting motion pictures offered via online distribution services is constantly changing."[8]

5.   Asserted Noninfringing Uses

The noninfringing uses at issue are primarily noncommercial fair uses of audiovisual works for the purposes of creating remix videos.

> A.   <u>Background</u>

The creative practice of "remixing" existing video content to create new original expression is a time-honored tradition stretching back to 1918 when Lev Kuleshov began splicing and assembling film fragments to tell new stories. Today, the ability to remix and share existing video content has been democratized to an unprecedented degree, thanks to the combination of inexpensive video editing tools and free, easy-to-use video hosting services such as YouTube.

Previous research indicated that between 2,000 and 6,000 original fair use videos that include clips from DRM-protected film or television sources are likely being uploaded to YouTube *each day*,[9] and current research confirms that the pace is only increasing.[10] According to one large, demographically representative study, 2.6% of U.S. internet users have produced remix video, which equates to roughly 6.5 million people.[11] These videos are valuable not only in themselves, but also because they help create the next generation of artists, who can gain skills and exposure otherwise unavailable to them.[12] Appendix A collects numerous specific examples of such videos, as well as more general discussions from experts in the field.

---

[6] For example, the first release of RTMPdump software was in 2008. It was able to work with RTMPE and SWF verification by April 2009 (http://rtmpdump.mplayerhq.hu/ChangeLog), just months after RTMPE and SWF verification started to become more widespread.

[7] Proponents note, however that case law is not settled as to whether fair use might be a defense to 17 U.S.C. §1201(a)(1). *Compare Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) with *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202-03 (Fed. Cir. 2004). In addition, it is not clear how best to describe CSS. *See* R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?,* 18 Berkeley Tech. L.J. 619, 643-47 (2003).

[8] Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, October 2012, ("2012 Recommendations"),126 n.731.

[9] *See* Communication from Michael Wesch, on file with OTW (Nov. 2, 2011)

[10] *See* Aram Sinnreich & Mark Latonero, *Tracking Configurable Culture from the Margins to the Mainstream*, 19 J. Computer-Mediated Communic. 798, 798 (2014).

[11] *Id.* at 805.

[12] *See* Org. for Transformative Works, Comments to the NTIA/PTO, 30 (Nov. 17, 2013), available at http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf ("OTW/NTIA"); Joseph Kahne et al., The Civic and Political Significance of Online Participatory Cultures among Youth Transitioning to

Remix has come to permeate our popular and political culture. A study of remix found that political remix videos that became hits were often from nontraditional political actors. Typical party-sponsored political messages got 55,000 views, while citizen-designed political messages averaged 807,000 views, and ads created by other entities, "mostly media companies, small news organizations, groups of bloggers, or small video production groups)," averaged over 2.5 million views; of the most viral videos, "only a fifth of them were produced by the campaigners, and in all cases they were not typical ads, but edited footage."[13]

Making fan/remix video is even a part of classroom learning.[14] For example, at the University of Houston, which has a high percentage of non-native English speakers, the Digital Storytelling project "has produced an extraordinary range of historical videos, created by students who research the story carefully, and select from archives of images and sounds the mix that best conveys the argument they want their video to make."[15]

Case Study: Vidding

Vids are fan-made videos that involve the re-cutting and remixing of footage from television shows or films, creating a video montage set to a new soundtrack. Vidders continue to be an instructive example of remixing creators because they have a history that predates digital video technologies, a strong sense of community arising out of that history and, as beneficiaries of the 2009 exemptions, can comment on its importance for their creative work.[16]

As Professor Francesca Coppa explains, "In vidding, the fans are fans of the visual source, and music is used as an interpretive lens to help the viewer to see the source text differently. A vid is a visual essay that stages an argument, and thus it is more akin to arts criticism than to traditional music video."[17] Indeed, vid may do traditional arts criticism one better. As scholars Kristina Busse & Alexis Lothian note, "vids offer condensed critiques of media texts that would take dozens of pages to unravel in academic analysis and whose impact would fall short of the emotional power of the vid."[18]

Adulthood 3 (2011) ("youth engagement in nonpolitical online participatory cultures may serve as a gateway to participation in important aspects of civic and political life, including volunteering, community problem-solving, protest activities, and political voice.").

[13] Limor Shifman, Memes in Digital Culture 125 (2014).

[14] Paul Booth, Fandom in the Classroom (syllabus), on file with OTW (Winter 2011); see also Catherine Burwell, The Pedagogical Potential of Video Remix, Journal of Adolescent & Adult Literacy (2013) (explaining how video remix can be used in classrooms as part of education about representation in popular media, creativity, and copyright).

[15] See Lawrence Lessig, Remix 81 (2008).

[16] Vidders are certainly not the only established community of remix video creators. Along with PRVs, the anime music video ("AMV") creator community has also received increasing attention as scholars begin documenting amateur creator communities that are arising around these new video technologies. And numerous people reinvent remix on their own every day.

[17] See Francesca Coppa, *Women, "Star Trek" and the Early Development of Fannish Vidding*, 1 Transformative Works & Cult. (2008), http://journal.transformativeworks.org/index.php/twc/article/view/44/64; *see also* Francesca Coppa, *An Editing Room of One's Own: Vidding as Women's Work*, 26 Camera Obscura 2 77: 123-130 (2011).

[18] See Kristina Busse & Alexis Lothian, *Scholarly Critiques and Critiques of Scholarship: The Uses of Remix Video*, 26 Camera Obscura 77: 139, 142 (2011).

A central characteristic of the vidding community is a commitment to creating transformative works. As one researcher noted: "There are certain traits, which vidders agree are important to a good vid, such as 'going somewhere' with the story or telling a narrative, saying something new about a character, relationship, or storyline from the television show, or recontextualizing a well-known song through interesting juxtaposition with the televisual source."[19] The OTW's Test Suite of Fair Use Vids offers numerous examples of these transformative works.[20]

Vidding is also a distinctly feminist practice. While men's participation generally outstrips women's in remix culture,[21] the specifically transformative practice of vidding is an exception in which women are the primary creators.[22] As a result, the vidding community has been particularly valuable "training ground" for women, offering a safe context within which to teach and learn technical skills: web design, coding, video and image editing, and filmmaking.[23]

Creators and consumers in the vidding community also engage with issues of race and representation in media culture and other cultural, artistic, and historical topics.   This is unsurprising, because "talking back" to dominant culture using its own audiovisual forms can be particularly attractive to disempowered speakers. Historically, remix disproportionately emerged from the work of minority groups: women; gay, lesbian, bisexual, transgender, and queer people; and racial minorities of all sexes and orientations.[24]

B.   Many Remix Uses That Require Circumvention Are Fair Uses

The videos contemplated by this exemption are quintessential fair uses. Indeed, the Office was correct in its 2009 and 2012 rulings that "a significant number" of the remix uses identified in those rulemakings fell "within the favored purposes referenced in the preamble of Section 107 and therefore are likely to be fair uses."[25] As the Office explained, "clips from motion pictures may make a point about some perceived theme or undercurrent in the subject works, for example, violence against women. In other situations, motion pictures clips may be used and remixed in order to make political statements about matters of public policy."[26] In other words, the works in question were highly *transformative*, because they added a new meaning, message, or purpose. Current case law has further reinforced the importance of transformativeness to the fair uses analysis. Thus, the first fair use factor weighs heavily towards fair use.

---

[19] Katharina Freund, *I Thought I Made a Vid, But Then You Told Me That I Didn't: Aesthetics and Boundary Work in the Fan-Vidding Community*, in Eduardo Navas et al., The Routledge Companion to Remix Studies 289 (2015) (also attached as Appx F); *see id*. at 292 ("In interviews, vidders commonly described their practices as a method of writing back, or against, the televisual source material as a way to critique or rewrite the text against the intentions of the (male) creators and writers.").

[20] *See* http://transformativeworks.org/projects/vidtestsuite.

[21] *See* Sinnreich & Latonero, *supra*, n. 10, at 813.

[22] *See* Katharina Freund, *"Fair use is legal use": Copyright Negotiations and Strategies in the Fan-Vidding Community*, 17 New Media & Society 1, 4 (2014) (in ethnographic research, over 90% of subjects identified as women).

[23] *See* Jesse Walker, *Remixing Television*, Reason Magazine, August/September 2008.

[24] *See* OTW/NTIA, 29-30, 52.

[25] *See* 2010 Recommendations; 2012 Recommendations at 127, 128 ("the record amply supports the conclusion that a substantial number of the proffered examples likely would be considered transformative")

[26] 2012 Recommendations, at 127.

The nature of the work weighs neither for nor against fair use. While many of the works used in remix are creative, that is generally true of transformative fair use, and as the Office recognized, the creative nature of the initial work therefore has little weight.[27] Moreover, remixes start with works that have been previously published and usually widely disseminated, favoring fair use.[28]

The use of short clips is also consistent with the third §107 factor, as the Office recognized.[29] Remixers use what they need to communicate their message. For example, as a reverend who uses DVD decryption software to create film clips for use in his sermons notes, "When we use a clip from a popular film, people tend to remember it better than if we just used an anecdote or story,' [because] 'We live in a visual age.'"[30] As the Second Circuit recently reinforced, "the law does not require that the secondary artist may take no more than is necessary. . . . The secondary use "must be [permitted] to 'conjure up' at least enough of the original" to fulfill its transformative purpose."[31]

With respect to market harm, the transformativeness of remix videos also makes market harm unlikely.[32] To the extent that any particular remix video changes the meaning or message of the original, or associates the original work with any political message or controversial subjects, it is unlikely that the copyright owner would license the remix. Courts have found that a fair use finding is appropriate where licensing is unlikely or impossible.[33] More generally, the presence of transformativeness establishes that there is no legitimate market for copyright owners to control, even when there is some connection to financial benefit.[34]

---

[27] 2012 Recommendations, at 128; *see also Campbell*, 510 U.S. at 598 (concluding that the second factor "adds little to the first" when the use is transformative); *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006)..

[28] *See, e.g., Kelly*, 336 F.3d at 820 ("Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred."); *Arica Inst. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (plaintiff's work was "a published work available to the general public," and the second factor thus favored the defendant).

[29] 2012 Recommendations, at 128 ("the evidence demonstrates that, in a great many noncommercial videos, not only is each relevant clip very short (rarely longer than a few seconds), but even multiple clips from the same motion picture, when used together, comprise an extremely small fraction of the entirety of the source material.") *see also Arrow Productions, LTD. v. Weinstein Co. LLC*, -- F. Supp. 2d – (S.D.N.Y. Aug. 25, 2014) (use of three scenes totaling 4 minutes from 61-minute movie favored fair use).

[30] *See* J. D. Lasica, Darknet: Hollywood's War Against the Digital Generation 128 (2005).

[31] *Cariou*, 714 F.3d at 710. *see also, e.g., Fox News Network, LLC v. TVEyes, Inc*, No. 13 Civ. 5315 (S.D.N.Y. Sept. 9, 2014) (the actual images and sounds "are as important as the news information itself –the tone of voice, arch of an eyebrow, or upturn of a lip can color the entire story, powerfully modifying the content").

[32] 2012 Recommendations, at 127-29.

[33] *Campbell*, 510 U.S. at 592-93.

[34] *See, e.g., Authors' Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) ("any economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work"); *see also id.* at 103 (even where use is nontransformative, market effect factor weighs in favor of fair use where market is so minimal that potential licensors usually don't bother to license or forego royalties when they do); *Arrow Prods., LTD. v. Weinstein Co. LLC*, -- F. Supp. 3d --, 2014 WL 4211350 (S.D.N.Y. Aug. 25, 2014) (copies of short portions of film *Debbie Does Dallas* were transformative fair use; alleged licensing market was not within copyright owner's legitimate market because uses were transformative).

The proposed exemption also comports with public expectations regarding fair use, enhancing respect for copyright law generally.[35] The general contours of fair use, particularly its preference for (1) noncommercial, (2) transformative works that (3) use limited portions of previous works, are readily understandable by creators.[36] As it stands, remixers turn to online sources such as iTunes in part because they can be confident that they have paid for the right to access the content. Dr. Coppa's observation that "for most vidders, the big legal (and ethical) line remains between 'paying' and 'not paying' for source footage" applies equally whether the compensation is in the form of a DVD sale or an iTunes purchase.[37] Remixers concerned about § 1201 liability, however, are likely to turn to unauthorized Internet sources that offer no means for compensating the rightsholder—a lose-lose proposition for everyone concerned.[38]

6.   Asserted Adverse Effects.

A.   Absent the Proposed Exemption, Remixers Will Face Renewed Legal Risk

Failing to renew and expand the existing exemption is highly likely to result in adverse effects. To begin with, it means 1201 is once again a legal sword of Damocles. Though remix creators generally have some notion of fair use, they are unlikely to appreciate the different (and counterintuitive) ways that § 1201(a)(1) treats the following scenarios:

- Ripping from a DVD, Blu-Ray, or download they lawfully possess, using widely available software in order to take short clips for remix (circumvention);

- Using a camcorder and flat screen TV in order to capture the same clips for the same purpose (not circumvention, though signs in movie theaters across the country indicate that doing the same thing in public would lead to arrest);

- Downloading a digital copy of a DVD or Blu-Ray disc from an unauthorized BitTorrent site, like those that can be found through The Pirate Bay, in order to excerpt the same clips for the same purpose (not circumvention).

Absent an exemption, creators who take the most intuitively legitimate course—using their own computer to take excerpts from a source they lawfully possess—will have unknowingly violated § 1201(a)(1).[39] Vidders, for example, are often young and unconnected to an organized group,

---

[35] *See* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law,* 21 Berkeley Tech. L.J. 651, 712-14 (2006) (discussing role of perceived fairness in consumers' choice to pay for authorized versions instead of unauthorized versions).

[36] *See generally* Peter Jaszi & Pat Aufderheide, Reclaiming Fair Use: How To Put Balance Back in Copyright (2011).

[37] *See* 2012 EFF Comments, at 42-43, 63; *see also* communication from luvtheheaven, on file with OTW (Oct. 10, 2014) ("many people like me would be willing to spend their money places like iTunes on TV shows they love, if that was a way to vid with an amazingly perfect quality copy of the episode.").

[38] *See* Lucas Hilderbrand, Inherent Vice: Bootleg Histories of Videotape and Copyright 79 (2009).

[39] *See* Ito Interview, Appx B 20-21 (75% of anime music videos remix artists "indicated that commercial DVDs are their first choice for anime source material in making their videos"); 2006 Recommendations at 12; *see also* Useful Software List, http://www.animemusicvideos.org/guides/avtech/software.html (last visited Feb. 4, 2015) (recommending DVDDecrypter and Smartripper).

which makes it particularly unlikely that they will learn §1201's complicated distinctions.[40] Indeed, there is general agreement from researchers and participants in the vidding community that vidders are rarely aware of §1201.[41] (This is consistent with evidence from other remix communities.)[42]

For example, as researcher Katharina Freund discovered: "The complexity of copyright law makes it very difficult for non-experts to understand, particularly, the anti-circumvention requirements of the DMCA. . . . The extent of knowledge on copyright laws . . . varied a great deal from vidder to vidder—several people interviewed had a complex understanding of the law, whereas others were generally unaware of the issue."[43] To be clear, a lack of familiarity with the nuances of copyright did not reflect disrespect for the law or the original authors:

> While vidders often see their work as resistant to media ownership, many vidders also have a set of ethical standards in regard to copyright. Abby, for example, makes sure that she has legally purchased her material before vidding:
>> I also strongly believe in paying for my media. . . . I always, always buy the media first, either by paying for cable, buying on iTunes, or buying DVDs. . .
> Most vidders try to support the musicians and television series that they utilize in their work, but also often need to circumvent DRM in order to access editable copies of their sources.[44]

Thus the central irony: "These attempts to act in an ethical manner (by ensuring they have paid for the media they use in their vids) for many years put vidders in more legal trouble (until the exemptions were granted in 2009)."[45]

What is more, many videomakers are not part of a creative remix community at all, but simply motivated to use video to make an argument about a current issue.[46] For example, Jon Autry was not a remixer until his faith impelled him to make remixes criticizing Ergun Caner's misrepresentations about his Muslim background:

> Fair use . . . enabled a blue collar guy like me to challenge a white collar evangelical leader in my Christian sect. What drew me to post was not so much his lies behind Christian pulpits, but that he had the audacity to lie to Marines on

---

[40] Francesca Coppa estimates that there are already tens of thousands of vids created by self-identified vidders elsewhere on the Web, a number that may climb into the millions when taking into account those who are not a part of any organized community. New vidders emerge every day, many of them "inventing" the form for themselves without first being connected to the broader vidding community, just as in previous generations budding writers and artists emerged from a variety of backgrounds. Coppa Interview, Appx G 51.

[41] *See* Gianduja Kiss Interview, Appx B at 28 (explaining that vidders, are generally unaware of the DMCA and need the exemption most when they receive a takedown notice or other challenge to works they believe are fair use).

[42] *See* Kriesinger Interview, Appx C; Horwatt Interview, Appx E.

[43] *See* Katherine Freund *"Fair use is legal use": Copyright Negotiations and Strategies in the Fan-Vidding Community*, 17 New Media & Society 1, 5 (2014).

[44] *Id*. at 6.

[45] *Id*. at 7.

[46] *See Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 972, 982-93 (C.D. Cal. 2012) (re-edited video critiquing original video was fair use).

a Marine base while he was training them for war. As the common man, I was able to challenge this audacity. There are many such men and women who need to be challenged.[47]

The same is true of the National Council of the American Indian, which made a video, *Take It Off*, as part of a campaign against the name of Washington's football team showing that it would remain the same team without its current trademarks. At any moment, remix can become one component of any speaker's repertoire. And that speaker will have no reason to know about §1201.

Further evidence of adverse effects likely to flow from the loss of the remix exemption comes from Eric Faden, associate professor of film and media studies at Bucknell University and creator of *A Fair(y) Use Tale*, which uses multiple Disney clips to explain and criticize copyright law.[48] He reports:

> I have had students in the past literally afraid to do a project. I know that sounds ridiculous. . . . [T]here is so much good that's come out of [having an exemption for noncommercial remix]. . . . And so what they're doing is really taking advantage of a rich media environment but they need to have that legal room to be able to do that.[49]

Remixers themselves agree that the exemption is helpful to preserve remix and vidding communities.[50] As Dr. Coppa explained, "The DMCA is a large part of that [increased] confidence: many vidders now understand that their use of the cultural material was fair and that they didn't break any laws by ripping their DVDs either. It is so crucial for vidders to have confidence in the legitimacy of their work and the validity of their speech, and I do believe that the DMCA exemption has given that to vidders."[51]

Similarly, political remix video (PRV) pioneer Jonathan McIntosh notes that the exemption has been "critically important" for PRV makers:

> Before the exemptions many remixers would be afraid of making a fair use video commentary with DVD footage even if they owned the disc(s). Some remixers,

---

[47] Communication from Jon Autry, on file with OTW (Jan. 22, 2015). *See Caner v. Autry*, 2014 WL 2002835 (W.D. Va. May 14, 2014). Autry was issued DMCA notices and sued over multiple videos, including his remix videos, though the court only ultimately ruled on one video. His videos were all remixes except for three speeches he posted in full, having downloaded them from links provided by Viddler. He also used a capture card to extract clips from DVDs. We note that, like screen capture, there is no way for remixers to tell whether capture cards "circumvent" CSS.

[48] Eric Faden, A Fair(y) Use Tale, The Center for Internet and Society (Mar. 1, 2007), http://cyberlaw.stanford.edu/do cumentary-film-program/film/a-fair-y-use-tale (viewed over 14 million times).

[49] Faden Interview, Nov. 20, 2011 (on file with OTW); *see also* Recut, Reframe, Recycle: An Interview with Pat Aufderheide and Peter Jaszi (Part Two), Feb. 8, 2008, http://henryjenkins.org/2008/02/recut_reframe_recycle_an_inte r.html ("The last lesson we want to teach young people as a society is that it is wrong to participate actively in one's own culture, and that the choice they face is between compliance and transgression.").

[50] Coppa Interview, Appx. G, 51; Gianduja Kiss Interview, Appx C, 28 ; Pogo Interview, on file with OTW (Nov. 16, 2011).

[51] Coppa Interview, Appx G, 51

including myself, would resort to using the bit torrent file sharing protocol to download DVDs ripped by others rather than decrypting the DVDs from our own home collections.[52]

A study of 13 different remix communities revealed widespread agreement on norms "very close" to the fair use factors, valuing noncommerciality, transformativeness and creativity (while insisting that success in making art or conveying a message should not be required);[53] but, like vidders, other remix groups didn't attempt to conform their behavior to the DMCA.[54] Meanwhile, major entertainment companies have repeatedly shown a willingness to file lawsuits against those who circumvent CSS or traffic in CSS circumvention tools.[55] Legal threats against purveyors of tools to circumvent Blu-ray encryption have driven some companies out of the market altogether.[56]

Absent an exemption, Section 1201 continues to represent a set of perverse incentives and traps for the unwary. Exemptions thus avoid the adverse effects on fair use remix that would otherwise occur, as the Office recognized by first granting, then renewing and expanding, the exemption in 2010 and 2012.[57]

In addition, the exemption helps empower remix artists who are targets of improper DMCA takedowns. While many DMCA notices target clear cases of copyright infringement, remix video creators have found themselves mistakenly caught in the takedown notice driftnet.[58] Without an exemption, the main effect of the anti-circumvention prohibitions on remixers was to surprise them when they received a takedown notice, believed they had a valid fair use defense, consulted a lawyer and discovered that the DMCA made that fair use defense irrelevant because of how they had acquired the footage they used. The OTW's experience under the 2010 and 2012 exemptions indicates that remixers are now able to successfully contest notices, asserting their fair use arguments under the DMCA as well as other dispute resolution mechanisms. None of the vidders

---

[52] McIntosh Interview, Appx H, 54.

[53] Mette Birk, *The Panopticon of Ethical Video Remix Practice*, in Routledge Companion, *supra* n.19 246, 248-49.

[54] *See also* Horwatt Interview, Appx E, 32 ("While many may be technically aware of the legal measures that the DMCA implies, most PRV makers believe their work falls under the umbrella of fair use, and thus trumps those restrictions implied by the DMCA.").

[55] *See, e.g., Universal v. Corley*, 273 F.3d 429 (2d Cir. 2001); *321 Studios v. Metro-Goldwyn-Myer Studios*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004)

[56] *See* Andy, *Countries Withdraw Blu-Ray Rippers Following DVDFab Lawsuit*, Torrent Freak (March 14, 2014), *See* https://torrentfreak.com/companies-withdraw-blu-ray-rippers-following-dvdfab-lawsuit-140314/

[57] Although the exemption process is de novo, the evidence previously submitted is still evidence the Office can take into account. *See* Mark Gray, *New Rules for a New Decade: Improving the Copyright Office's Anti-Circumvention Rulemakings*, 29 Berkeley Tech. L.J. 759 (2014).

[58] *See, e.g.*, Oday, *DMCA Double Jeopardy*, YouTomb (Oct. 31, 2009), https://web.archive.org/web/20140715082243 /http://youtomb.mit.edu/blog/; *see also* MG Siegler, *Hitler is Very Upset That Constantin Film is Taking Down Hitler Parodies*, TechCrunch (Apr. 19, 2010), http://techcrunch.com/2010/04/19/hitler-parody-takedown/ (reporting on the removal of the popular Hitler internet memes).

with whom the OTW has had contact who have counternotified or contested a YouTube Content ID match have faced further action from copyright owners.[59]

      B.   <u>Potential Alternatives Are Inadequate.</u>

The Register summarized the situation in 2012: "motion pictures are not widely and reasonably available in other formats not subject to technological protections. . . . [A]ll of the most popular forms of commercial distribution of motion pictures, including DVD, Blu-ray, and online distribution services, are protected by access controls."[60] This continues to be true.

      1.   Availability

Online-only sources. An increasing amount of content is available only through online services, whether iTunes or YouTube, making circumvention the only option.[61] For example, many anime series, such as the very popular Sailor Moon Crystal, never see authorized release in the U.S. except via online distribution mechanisms.[62] Likewise, the pro-choice video in *Northland* was available only on a website.[63] Often online sources are the first available sources, making them "the only sources that can be used in a time-sensitive manner."[64] DVD/Blu-Ray releases may be delayed so long that a speaker's message would be lost or become irrelevant in the time necessary to wait for them.[65] For cultural or political remixers, delay can mean no message at all. Therefore, video makers turn to online sources to obtain the audiovisual works they need. As Treon wrote, "As a vidder, I'm never able to wait for the DVDs - they can come out a year after a show aired. People want a reaction to an episode immediately…. if I'd waited for the DVDs, it would have been pointless."[66]

Courts have expressly recognized the importance of "timely" expression.[67] Vidder luvtheheaven explains how timely access both supports conversation and discourages infringement: "Fanvideo commentary on what is in viewers' very recent memory is an important part of the process of

---

[59] *See also* Katharina Freund, *"Fair use is legal use": Copyright Negotiations and Strategies in the Fan-Vidding Community*, 17 New Media & Society 1 (2014) (finding through ethnographic study that a group of knowledgeable vidders has successfully used the DMCA exemption to gain confidence to defend their fair uses).

[60] 2012 Recommendation at 131.

[61] *See, e.g.,* Adi Robertson, *Why Netflix sends 'Orange is the New Black' to the Library of Congress on videotape*, The Verge (Oct. 29, 2014), *See, e.g.*, http://www.theverge.com/2014/10/29/7101597/why-netflix-sends-orange-is-the-new-black-to-the-library-of-congress (Netflix shows are unavailable on physical media).

[62] *See Sailor Moon Crystal*, Hulu (last modified Jan. 17, 2015), http://www.hulu.com/sailor-moon-crystal; Maria Gonima, *Sailor Moon Returns*, Hulu Blog (May 19, 2014), http://blog.hulu.com/2014/05/19/sailor-moon-returns/.

[63] Deposition of Don Cooper, Document 47-1 at 60-61, *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, No. 11-cv-731 (filed Apr. 16, 2012).

[64] Comment on Tell Us Your Stories! (Oct. 7, 2014) https://archiveofourown.org/admin_posts/1358

[65] *See , e.g.* Killa Statement, Nov. 17, 2011, Appx I, 55. ("I was making a vid for a show that was currently airing. I owned the DVDs for the previous four seasons of the show, but needed clips from a recent episode. The vid was timely, and had to be presented immediately to have relevance to its audience, so I couldn't wait for the DVDs to be released if I wanted to make the artistic statement I envisioned. The vid was extremely well-received, thanks to that timeliness.")

[66] Communication from Treon Brevor, on file with OTW (Oct. 29, 2014).

[67] *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d. 1002 (9th Cir. 2003).

being a dedicated fan of a TV show nowadays. Waiting months and months for DVDs to come out is no longer acceptable . . . .”[68] PRV makers have the same timeliness concerns:

> The creation and publishing of a remix video may be extremely time-sensitive if it focuses on a current issue in the news cycle. Examples of time-sensitive remixes might include responding to statements by a celebrity or public figure, discussing a political campaign, or commenting on piece of legislation while its being debated.
> In these cases, online streaming/downloading can be the only option to gather footage if the physical DVDs are difficult to find locally or have gone out of print (as is often the case especially with older, independent or small scale documentary productions).[69]

Blu-Ray only sources. In some cases, Blu-Ray discs offer unique material or quality. As one remix artist noted:

> Very often, studios will release special extras, including behind the scenes footage and deleted scenes, only on blu ray - which can be critical for vidding, because it expands my options. This is particularly important for vids based on movie sources, where the total amount of footage is limited. Extras or deleted scenes might be necessary to round out the story I'm trying to tell.
> One quick example - in the *Avengers* series of films, Captain America/Steve Rogers fought in WWII before being placed in frozen suspended animation. He is then reawakened in 21st Century America. Much of his characterization is based on his difficulty adjusting to modern life. But many scenes demonstrating his isolation and loneliness did not make it into the *Avengers* movie, and were only distributed on blu-ray. Vidders have made extensive use of that footage when exploring Steve Rogers's characterization in vids.[70]

Vidder thuviaptarth reports a similar experience:

> I used Blu-Ray source to make "Hey Ho", a vid which argues that Marvel movies participate in the military-industrial complex by glorifying its results. Blu-Ray source was critical to the vid's argument because I used deleted scenes that were only available in the Blu-Ray editions of The Avengers and the Marvel Phase One box set. In particular, many of the people who have commented on the vid have cited the ending clips of a child handing Captain America his shield as having a deep emotional impact and effectively emphasizing the themes of the vid. These clips come from a deleted scene that is, to the best of my knowledge, available only with the Marvel Phase One box set of Blu-Ray discs.[71]

---

[68] Communication from luvtheheaven, on file with OTW (Oct. 23, 2014).
[69] McIntosh Interview, Appx H.
[70] Communication from Gianduja Kiss, on file with OTW (Sept. 14, 2014)
[71] Communication on file with OTW (Sept. 7, 2014).

Limited availability is also one reason licensing is not a viable option for ordinary remixers, today as in previous two rulemaking periods.[72] As this Office observed in 2012, "the scope of content offered through reasonably available licensing sources is far from complete."[73] There is no mechanism by which a noncommercial user, as opposed to a commercial entity, could select and receive high-quality clips of a range of television shows and movies (since remixers comment on many different sources) suitable for editing. Studios occasionally offer selected clips for fans to embed on their own sites or otherwise promote the official version, but that does not enable remix or commentary.[74]

In addition, as the Office acknowledged, licensing is not a reasonable alternative to fair use, in that "rightsholders do not have an exclusive right to markets for commentary on or criticism of their copyrighted works."[75] Licenses often reserve the right to control criticism or uses that the copyright owner does not think reflect well on its image—precisely the uses that are most highly critical and transformative, such as *It Depends on What You Pay* (cited by the Office in 2012[76]).

2. Quality.

In 2010 and 2012, the Office recognized that "certain uses require high quality in order for the purpose of the use to be sufficiently expressed and communicated."[77] Many remix artists take video quality very seriously, so many of them favor DVD and now Blu-Ray ripping for aesthetic reasons.

To be clear, it's a profound mistake, contrary to the very heart of copyright, to require artists to justify their artistic choices, especially to people unfamiliar with the art form.[78] The very reason an exemption is needed is to prevent the suppression or alteration of the artistic evolution of this popular art form. However, to avoid any confusion, we will explain why high-quality source makes a difference to the results of video editing.

As one scholar has explained:

> [V]idders are visual artists. They are deeply invested in aesthetics. They want to make smart vids that are also beautiful. And the better the source footage you start with, the more you can do to it, the "shinier" it looks. All vidders value aesthetics, though there are other factors involved in when and how the work is

---

[72] 2012 Recommendation, at 112.

[73] *Id.* at 131.

[74] *See, e.g.*, Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 Cinema J. 125, 126 (2009) (" [Official clips from *Battlestar Galactica* were] extremely narrow, notably excluding the character-based dramatic scenes that make up the majority of the show.").

[75] 2012 Recommendations, at 131 (citing *Campbell*, 510 U.S. 569 v. Acuff-Rose); see also Authors Guild, 954 F.Supp.2d 282.

[76] 2012 Recommendations, at 106.

[77] 2010 Recommendations, at 66; see also 2012 Recommendations, at 118-22.[].

[78] *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."), quoted in *Campbell*, 510 U.S. at 582 (applying nondiscrimination principle to fair use).

created. While some vidders might make a vid quickly, almost urgently, as part of a current cultural conversation about a television show or film, others can spend easily half a year working on a single video, often working on it frame by frame like a painting.[79]

In addition, video quality is a "critical" consideration:

> Vids are a visual art form; vidders work incredibly hard to get just the right colors, timing, movement, and flow—and all of that is disrupted when the source is fuzzy or degraded. The impact of the vid is lessened tremendously if you can't see the images clearly; you might just as well ask whether it matters to a photographer whether their shots are in focus. Like with a photograph, the vid isn't just the literal image that appears in the frame; it's about the overall aesthetics of the piece. Sometimes photographers might intentionally create a blurry picture, but when they do so, it's under circumstances that the photographers control. It's the same with vidding.[80]

Vidder rhoboat has also begun to use Blu-Ray in order to get the best quality: "it was most important from a technical standpoint in my James Bond vid Supremacy because I did some cropping and zooming for certain sections where the quality loss would have been more noticeable if I had used anything less than HD source. It was also important from a narrative standpoint of the vid to be able to see the lines in the actors' faces as aging was an important plot point."[81]

PRVs also need to mimic the qualities of the media sources on which the videos comment. As Dr. Horwatt notes:

> One of the most interesting aesthetic qualities of PRVs and a cardinal feature of the humour and incisiveness presented by PRV makers, is their capacity to mimic the qualities of commercial media. This means that editors are both able to imitate the vernaculars of commercial media (whether that be a cartoon, trailer, commercial or television program) but also to make work which looks like commercial media, with high quality rips of source material. Using high quality video of appropriated materials is instrumental to the success of a PRV.[82]

Quality is therefore a political tool as well as an artistic one, enabling remix artists to communicate on the same level as political campaigns and mainstream media productions.

---

[79] Coppa Interview, Appx G 51.

[80] Kiss Interview, Appx G, 38; see also Interview with Jackie Kjono, Appx K ("I was a late adopter of ripped source and was still using capture devices up until three years ago when we got the exemption… . Images are blurry and bright colors end up too bright while dark colors end up too dark.").

[81] Communication on file with OTW (Oct. 21, 2014).

[82] Horwatt Interview, Appx E,, 31; see also McIntosh Interview, Appx H, 52 ("[B]ecause of the standards set by Hollywood and professional media organizations, the use of high quality footage is important because it tends to add a sense of legitimacy to an audiovisual argument; for better or worse, higher quality video footage tends to be taken more seriously by the public."); Sabia Interview, Appx L (same).

Likewise, e-mob's popular remix *David Attenborough Observes Fangirls*[83] uses David Attenborough's iconic narration about animal behavior to make subversive observations about human behavior. As the creator explained, "[h]igh quality footage/audio was definitely important to me, because the whole point of the video was that it looked like a real Attenborough documentary (and actually convinced several people of that fact)."[84]

Small details from the original can be important. The creators of the anti-abortion video found to be fair use in *Northland* explained their need for accurate replication:

> [The Northland staffer's] consistent theme is the lie that abortion is "normal." Every aspect of her attire, demeanor, syntax, intonation, is calculated to reinforce this deception. The same with the flowers on her desk, the soft background music, and the framed art on her walls. The CBR Video rebuts all this duplicity with an accusatory literary quote in its introduction, jarring music in its score and sickening imagery in its video refutation. Every production decision CBR made was intended as an "abnormal" counterpoise to some corresponding production element in the Northland video.[85]

Likewise, NCAI's *Take It Off* required high quality source: "To execute [our] message we needed high resolution footage since the position of the branding on the helmets was blurry on low-resolution footage. We needed high resolution footage to show removing the offensive branding and replacing it with a white circle did not change the Washington Team. If we had used low resolution footage—replacing the offensive branding with a white circle would not have made as large an impact. In fact, it may have been missed all together."[86] Similarly, the students making videos for National History Day require high quality to make their presentations successful.[87]

Film criticism and analysis, such as Tony Zhou's meticulous work,[88] is another instance in which high quality is necessary to see the details being analyzed; variations in color, timing, and clarity have a profound effect on one's understanding of film. Peter Decherney's detailed report explains in further detail the quality differences that are important to fair uses even if not immediately apparent to outsiders.[89]

Moreover, as personal computers and home theater systems continue down the road to convergence, remix videos will increasingly be called upon to deliver their messages on large, high-definition screens. Remix artists also show their videos at conferences, museums, and other

---

[83] Emob, *David Attenborough Observes Fangirls*, Daily Motion, http://www.dailymotion.com/video/x23ky3l_david-attenborough-observes-fangirls-fangirlplanet_fun (last visited Feb. 3, 2015).

[84] Email from e-mob, on file with OTW (Jan. 10, 2015).

[85] Defendant Center for Bio-Ethical Reform's Answers to Plaintiff's First Set of Interrogatories, *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, No. 11-cv-731 (filed Apr. 16, 2012), Doc. 47-1, at 150.

[86] Communication from Rachel McIntyre, on file with OTW (Jan. 29, 2015) ("Replacing the offensive branding with a white circle (as well as branding beyond the helmets) required the use of highly specialized, expensive equipment and a uniquely skilled visual effects artist. It took the visual effects artist two weeks to remove the offensive branding from the helmets.")." *Id.*

[87] *See* Appx A, 6.

[88] *See* Appx A, 4.

[89] Letter from Prof. Peter Decherney to Copyright Office, Aug. 2. 2012, Appx M

gatherings, where display technology is likely to be much better than online.[90] As Professor Coppa notes, based on her attendance at numerous remix presentations, "many things that look okay on YouTube look TERRIBLE on big screens: vids typically look great, but other kinds of remix videos can't make the transition."[91] Many vidders also distribute high-quality versions of their works from their own Internet sites, demonstrating a commitment to video quality. In short, now as in 2012, meaningful access to modern media requires high-quality, full-resolution excerpts.[92]

Screen capture cannot produce that level of quality, for a variety of reasons, from technical features to new forms of advertising adopted by networks that distort the broadcast image. Vidder Vidyutpataka explains:

> As someone who's done a couple of videos I'll point out an obvious reason not to use screen capture, at least from a TV feed: because most TV networks brand their feeds with a "screen bug" . . . that continually occupies part of the screen. These bugs can be obtrusive or change, and if you're planning to use a clip of that feed that thing can really ruin your day. . . . That isn't even getting into those obnoxious animated graphics some stations add in just as the show comes back from commercial that dance around in the bottom left and inform you that Show You Don't Care About is Coming Up Next!! DVDs are really the only way to avoid these things.[93]

For online sources, screen capture is also "unreliable depending on video buffering and/or end user bandwidth speeds," which are not under the control of the individual.[94] It puts excessive demands on ordinary equipment, and frequently betrays the artist, as Ynitsa recounts: "I actually made a vid with screen capture recently, . . . and OMG never again. Capturing that length of footage in 10-minute increments (my computer/CamStudio couldn't handle more) was painful enough, but then not only was the framerate far too low . . . but it wasn't until after I'd rendered and posted that I realised you could see my mouse in over half of the vid, when I swear it wasn't visible while I was capturing."[95]

And as remix artist soda_jerk put it, "[I]f we were restricted to screen capture techniques we would be unable to continue the kind of transformative postproduction processes that we deploy in our sample-based video work. In order to capture footage that is compatible with the editing programs that are available (such as Final Cut Pro or Premiere) it's crucial that the video clips are formatted to the specific codecs required. We don't use screen capture techniques to acquire footage because it doesn't allow us to sufficiently determine and control video codecs."[96]

---

[90] *See* Appx A, 5
[91] Communication from Francesca Coppa, on file with OTW, Feb. 26, 2015
[92] 2012 Recommendations, at 133 ("Based on the video evidence presented, the Register is able to conclude that diminished quality likely would impair the criticism and comment contained in noncommercial videos.")
[93] Interview with Vidyutpataka, on file with OTW (Nov. 20, 2011).
[94] McIntosh Interview, Appx H.
[95] Communication on file with OTW (Nov. 20, 2011).
[96] Communication on file with OTW (Feb. 4, 2015).

As the Office has twice recognized, screen capture and camcording produce poorer quality footage by their very nature, distorting color, contrast, and framerate. The Office summarized the problems in 2012: "the evidence indicated loss of particular frames, occasional fuzziness, loss of sense of depth, and some degree of pixelation."[97] Because of the move through the "analog hole" required for these methods, no amount of technological improvement will change the degradation in quality and change in color that occurs. Another reason for problems with screen capture is that the software is not designed to output footage that can be used in nonlinear editing programs—the programs needed to create remixes.[98] Each type of editing—applying effects, filters, time changes, or even simply editing different clips together in a montage and then producing a final output file—necessarily degrades quality further.[99]

Vidders routinely apply the following effects to source footage, all of which inherently suffer from lower-quality source: Zooming in and out (to add internal motion to static footage, as well as to create the effect of intimacy and/or distance); extreme close-ups and/or cropping (to draw the spectator's attention to elements in the background; to reprioritize the hierarchy of images in the frame; to eliminate some unwanted visual piece); brightness and contrast adjustment (to make certain elements easier to see; change the emotional tone of a scene; to blend footage from disparate sources); saturation and hue adjustment (same); color correction (same, but also to create specific associations with or among images using color, where the color becomes symbolic or thematic); time adjustments (speeding up and slowing down, to change the rhythm of footage, to create urgency or draw attention to certain acts of internal motion, to score footage to the fixed beat of music or otherwise synopate image and sound); and overlays (to create narrative and visual depth; to layer images associatively, to juxtapose elements within the frame). Professor Faden's *A Fair(y) Use Tale*, for example, uses slowed-down footage, "scaled frames to highlight an individual character or gesture, sleight-of-hand speed changes," and other effects on "nearly every clip."[100] Soda_jerk performs the same kinds of manipulations to make its video art.[101]

Here's Luck has provided an extended analysis of her vid *The Test* to illuminate some of the technical choices involved, and Appendix A contains dozens of other examples of similar effects and why they were necessary.[102] Editing also matters as an artistic statement: the color correction and multiple effects found in many vidders' work serves as a signature and an instant indicator that the viewer is watching a vid, rather than an unaltered portion of a show or movie.[103] The Office should not override vidders' judgments about the necessary quality of their materials, any more than it should determine that a certain size of canvas is big enough for a painter.

---

[97] 2012 Recommendations, at 123; see also *id.* at 133 ("[S]creen capture images, while improved in quality since the last proceeding, are still of lower quality than those available by circumvention of access controls on motion pictures. The images available from screen capture technology are somewhat diminished in clarity and depth, and may exhibit some degree of pixelation."); 2010 Recommendations, *supra*, at 66.

[98] See Turk Statement Appx N., 101

[99] Statement of Akemi42, February 28, 2012, Appx J, 92.

[100] Eric S. Faden, *A Fair(y) Use Tale*, in Routledge Companion, *supra* n.19, at 487, 493.

[101] Appx A, 5.

[102] *See* Appx A.

[103] *See, e.g.*, dazzlme89 Channel, Youtube, http://www.youtube.com/user/dazzleme7 (using color correction to sharpen footage and increase saturation as a baseline effect).

A remix made with an initially watchable low-quality digital file can easily lose important details.[104] Each edit necessarily degrades the quality of the video, so unless a vidder starts with high-quality source, the output may be unwatchable or insufficient. Dr. Coppa explains: "Vidders typically want the cleanest, biggest clips their systems can handle, because they want to transform/rework the footage in various ways—changing speed, color, adding effects, creating manipulations, masking out elements—and the better the footage you start with, the more you can do with it."[105]

For vids such as *The Price*,[106] which contained footage from over thirty different sources, high quality source was required to integrate the varied sources with their different color palettes and frame sizes into a seamless story using effects, transitions, and other editing techniques. Other vids use close-ups to heighten the emotional effect of their narratives.[107] Without a high quality source, the cropping, zooming, and color correction to make the final product appear uniform can be impossible. But both screen capture and recording off of a screen produce distortions in frame rate, color, and other key features that interfere with *editing*, even if they may be able to produce watchable copies under specific circumstances.[108]

3. Screen capture is impractical

Separately, screencapture software may be incompatible with the user's operating system.[109] A requirement that a fair user buy an entirely new computer or suite of editing software is an unreasonable limitation on fair use (even if she were to know about it), and requiring fair users to choose particular computer systems does nothing to promote the legitimate interests of copyright owners. The Office has previously recognized that requiring individuals to use multiple technological solutions as a workaround is a negative impact justifying an exemption.[110]

4. Legal concerns

Alternatives such as recording a screen with a separate device or using screen capture software are also unworkable. First, there is significant uncertainty about whether or not they would nonetheless qualify as "circumvention" under 1201.[111] Neither proponents nor opponents of exemptions were able to get "under the hood" of screencapture programs to confirm how they worked. Opponents have been understandably unwilling to commit to identifying specific non-

---

[104] Library of Congress Rulemaking Hearing Section 1202, Testimony of Tisha, May 7, 2009, *available at* http://www.copyright.gov/1201/hearings/2009/transcripts/ [hereinafter Testimony of Tisha Turk].

[105] Coppa Interview, Appx G, 49; *see also* Turk Statement, Appx N (explaining technical requirements for editing).

[106] *See* 2012 Recommendations, 110 n.587.

[107] *See, e.g.,* Appx A, 15-21 (discussing need for effects and high quality); Sara K. Howe, (De)compose, Shape-Shift, and Suture: Toward a Monstrous Rhetoric of Fan Compositions (Ph.D. diss, U. Ariz. 2013), at 121 ("vids often focus closely on parts … , [paying] close attention to particular bodies, objects, and relationships"), 124, 127-28, 137 (discussing various *House* vids).), *available at* http://arizona.openrepository.com/arizona/bitstream/10150/299072/1/azu_etd_12855_sip1_m.pdf.

[108] *See, e.g.*, Appx J, 92 (Statement of Akemi42) (discussing difficulties with color, clarity, and flicker due to frame rate disparity).

[109] Turk Statement, Appx N, 106

[110] 2012 Recommendations, at 20 (footnotes omitted) (noting the "substantial costs" and "inefficiencies" associated with having to own multiple devices in order to deal with print disabilities in the absence of an exemption).

[111] 2012 Recommendations, at 124 & n. 721.

circumventing technologies, meaning that no legal certainty is available through the use of screen capture; nor could any concessions by the copyright owners participating in this proceeding prevent other copyright owners from arguing that screen capture "circumvents" an access control measure.[112] All that the wide availability of screen capture software does is demonstrate that the means to create entire copies of works is already widely available, and unaffected by this proceeding.[113]

Entirely separately, laypeople do not understand the arguable legal differences between technologies for capturing clips, because they have nothing to do with artistic considerations or fair use. By the time that any difference becomes relevant—when an artist is defending her particular work as fair use against a takedown or infringement claim—it is far too late to tell her that she used the wrong technology. That is not a matter of inconvenience. It is a matter of suppressing fair use. The statutory standard is interference with fair use, not whether alternatives are theoretically available to well-advised parties consulting with legal counsel before beginning their fair uses. And the record is clear, as it has been since 2008, that the noncommercial use exemptions serve a large population of remix artists who do not have access to counsel.

Thus, even if a vidder is willing to sacrifice significant quality, does not have timing constraints that will impact the content of her vid, and has access to the necessary equipment, it is unlikely that she will appreciate that other methods are legally preferable to extracting footage from a disc she owns or an online source to which she has access. As Dr. Coppa has pointed out, this legal regime has particularly damaging effects on members of marginalized groups who are already likely to be nervous about expressing themselves.[114] Female vidders have historically been reluctant to step up and claim cultural legitimacy, and uncertainty hinders both production of transformative works and vidders' ability to achieve mainstream recognition.[115] Without an exemption, vidders—especially the tens of thousands of young people who are inventing and reinventing the form for themselves, without an established connection to a larger community—risk becoming liable or having their fair uses suppressed.

7.   Statutory Factors

The statutory factors set forth in 17 U.S.C. 1201(a)(1)(C) favor renewing and expanding the existing remix exemption.

A.   The Availability for Use of Copyrighted Works

As the Register noted, CSS has not proven essential to the distribution of DVDs.[116] Just as DVDs became well-established in the marketplace despite the concededly wide availability of circumvention technology (including, arguably, screencapture software), so have Blu-Rays and online distribution mechanisms. The existing exemption for online sources, in particular, has had

---

[112] 2012 Recommendation, at 133 (noting "unsettled legal landscape" and prior litigation over similar methods).

[113] *See, e.g.,* Applian Technologies News Alerts, *Replay Video Capture is Ready For Some (Super Bowl) Football!*, Jan. 31, 2015 Appx N ("Stream it. Record it. Keep it.").

[114] Library of Congress Rulemaking Hearing Section 1202, Testimony of Francesca Coppa 0119.4-0120.4, May 7, 2009, *available at* http://www.copyright.gov/1201/hearings/2009/transcripts.

[115] *Id*. at 0120.5-0120.17.

[116] 2012 Recommendations at 135.

no effect on the massive expansion of online distribution mechanisms. The experience of DVDs demonstrates that a robust market can and will form even in the presence of easy circumvention. And 17 years on, §1201's prohibitions are still unknown to the vast majority of citizens, including noncommercial remixers unless and until they need to defend their work as fair use.[117] Even remixers who are generally aware of the DMCA tend to believe that fair use trumps it.[118] This widespread ignorance demonstrates that §1201 serves mainly as a trap for the unwary, suppressing the creation and use of noninfringing works.

B.   Nonprofit Archival, Preservation, and Educational Purposes

A remix exemption would have no effect on the availability of source works, as detailed above. However, remix videos themselves are now being archived and performed in museums and other cultural institutions, and used as objects of academic study. A renewed exemption allows their preservation and educational use by legally conservative, risk-averse institutions.[119] Professor Jane Tolmie notes that developing an ability to critique visual media is a critical skill for a generation of students that has been inundated with audiovisual works. Vids are a powerful means of teaching this skill:

> Exposure to a particular fanvid based on Joss Whedon's Firefly series taught the class about the unreflexive white privilege involved in producing a show in which the main characters all speak Chinese but there are no Asian actors. Exposure to a fanvid on the rebooted Star Trek franchise taught the students that the action movie, no matter how 'futuristic,' is still considered primarily a theatre for men. These lessons were all the more effective for being delivered as miniature and coherent visual spectacles, with the scenes and actions of the shows themselves being deployed to convey the key lessons.[120]

Remix videos are not only a vehicle for criticism and commentary; they are also a means for helping others develop the ability to do the same.

C.   Impact on Criticism, Comment, News Reporting, etc.

As the Register recognized, this factor "weighs strongly in favor of appropriately tailored exemptions to foster such uses."[121] For the reasons discussed above, failing to renew the exemption for noncommercial videos and expand to Blu-Ray would have a chilling effect on a

---

[117] For example, Library of Congress employees are apparently unaware of §1201's restrictions. See http://blogs.loc.gov/digitalpreservation/2014/08/dukes-legacy-video-game-source-disc-preservation-at-the-library-of-congress/ (describing moving image technician's use of circumvention technology to gain access to unreleased Sony game deposited with the Library of Congress).

[118] Horwatt Interview, Appx E.

[119] See, e.g., Dark Matter, http://nmwa.org/exhibitions/sodajerk-after-rainbow (remix video exhibited at National Museum of Women in the Arts); Lim, Us, http://mediacommons.futureofthebook.org/imr/2008/02/01/us-a-multivid-by-lim (exhibited at the California Museum of Photography); Spectacle: The Music Video, http://www.movingimage.us/exhibitions/2013/04/03/detail/spectacle-the-music-video/ (exhibition at the Museum of the Moving Image featuring vids).

[120] Letter from Jane Tolmie to Librarian of Congress, Appx O.

[121] 2012 Recommendations, at 136.

wide variety of remix video creators who are engaged in criticism and commentary and suppress video remix's use in education and scholarship.

D.   The Effect of Circumvention on the Market for or Value of Copyrighted Works

Free, easy-to-use DVD ripping software has been continually available in any event. And a pirate interested only in distributing full copies of a work can easily use a camcorder, another reason that the existing exemptions have been irrelevant to non-remix uses. After the 2009 exemption, opponents were unable to identify any harm to a legitimate market,[122] and the situation is no different today. There is no evidence that existing exemptions for DVDs and online video have harmed sales.[123] The MPAA accepts "the creation and dissemination of fan-made works" within current law, without indicating any economic concerns.[124] Prior concerns raised by opponents in previous rulemaking procedures have proven unfounded (as would be expected, given that both §1201 and its exemptions are mysteries to members of the general public until they have a direct encounter with the law). As vidders routinely testify, remix opens up new audiences and generates legitimate purchases, further enhancing the market.[125] Indeed, the *labor* of remix inculcates genuine respect for authorship in ways no lecture can.[126] Case law recognizes that transformative uses may have positive market effects, although they are of course not required.[127]

E.   Other factors

We address here the additional questions regarding this class identified in the NPRM. Initially, we note that these additional inquiries are not required by the statute, and proponents can meet the standard set out by the statute as we have in the past with evidence of actual negative effects on fair use, even if there are endless additional limitations that could be proposed.

---

[122] 2012 Recommendations at 129, 137. See *Sony*, 464 U.S. at 451 (presuming noncommercial uses not to harm legitimate markets); *Princeton Univ. Press*, 99 F.3d at 1385–86 ("The burden of proof as to market effect rests with the copyright holder if the challenged use is of a 'noncommercial' nature.").

[123] *See, e.g.,* Jacob Siegal, Digital movie sales are on the rise as rentals fall off the charts, http://bgr.com/2014/01/08/digital-movie-sales-up-47-percent/ (Jan. 8, 2014) (noting continuing surge in online sales; physical media sales have declined, but this is due to digital sales); Time Warner Annual Report to Shareholders 2013, at 16.

[124] Comments of the Motion Picture Ass'n of America, Nov. 13, 2013, http://www.ntia.doc.gov/files/ntia/motion_pict ure_association_of_america_comments.pdf at 4-5.

[125] *See* Freund, *supra*, at 5-7 (discussing how vidders find new artists and promote media through vidding); Ito Interview, Appx B (finding that remixing supports DVD markets).

[126] *See, e.g.,* Paul Booth, *Fandom In The Classroom: A Pedagogy of Fan Studies*, in Fan Culture: Theory/Practice, ed. Katherine Larsen & Lynn Zubernis, 174, 180 (2012) ("These mashup videos foster an understanding of copyright in the digital age because students get firsthand knowledge of video editing and theoretical knowledge of the difficulty such editing work can have."); Henry Jenkins et al., Confronting the Challenges of Participatory Culture: Media Education for the 21st Century 10 (2006) ("[Y]oung people who create and circulate their own media [including remixes] are more likely to respect the intellectual property rights of others because they feel a greater stake in the cultural economy.").

[127] *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 293 (S.D.N.Y. 2013) (noting that transformative uses enhance discovery and sales of original works).

We are concerned that the Copyright Office's may be contemplating discrimination based on the perceived artistic needs and practices of commercial as opposed to noncommercial artists.[128] Both commercial and noncommercial creators have messages; both have standards for their own work. To require some standard of gatekeeper demands from creators before affording them the protections of an exemption would be inconsistent both with copyright's nondiscrimination principle and with the First Amendment underpinnings of fair use: "The First Amendment's protections, advanced by the fair use defense, have never applied to some bizarre oligarchy of 'qualified' speakers."[129]

A vidder's artistic needs as perceived by an outsider should not be a factor. Not only is such judgment discriminatory, but it neglects the role of artistic beginnings. Today's bad vid may lead to tomorrow's work of searing cultural criticism. As one vidder explained, her first vid was "awful. But I was still pretty proud of it." She kept teaching herself, developing a style, and working until her videos became popular and she ultimately pursued a degree in Cinematic Arts and a career in editing as a result of her early efforts.[130] Had her efforts been stopped at her first "awful" vid, we would never have her mature contributions.

Independently, the Office should recognize the practical reality that noncommercial remix artists face: a lack of legal or technical knowledge sufficient to distinguish "circumvention" from "noncircumvention" technologies for making short clips. The Office has already recognized practical reality in other exemptions.[131] Based on the ethnographic research in remix communities, as well as our experience, an exemption that only protects artists who are conversant with §1201 is a cruel joke.

The Office specifically asked whether the exemption can be limited to: *(a) "motion pictures" as defined under the Copyright Act rather than extending to all "audiovisual works."* We do not oppose language of this sort, providing that it can be made clear to laypeople that "motion pictures" includes television and streaming video.

(b) uses of short portions or clips of motion pictures or audiovisual works. We not oppose language of this sort, providing that it can be made clear that "short" has no specific definition outside a comparison to the particular works at issue and the remixer's needs. A rule listing minutes, percentages or anything similar would not be appropriate. As numerous examples demonstrate and as the Office recognized in 2012, often remixes use several minutes from a full-length movie or a television series, representing a small fraction of the total.

---

[128] *See* Copyright Office, Notice of Proposed Rulemaking, Dec. 12, 2014, http://copyright.gov/fedreg/2014/79fr73856. pdf, at 15 (opining, in advance of evidence and contrary to findings of two previous rulemakings, that "distribution standards for commercial documentary films may require use of higher-resolution material than required for use in noncommercial remix videos").

[129] *Caner v. Autry*, 2014 WL 2002835, *9 (W.D. Va. May 14, 2014).

[130] Communication from Isabel H., on file with OTW (Oct. 3, 2013).

[131] *See, e.g.,* 2010 Recommendations at 65-66 (finding that gatekeepers would refuse to accept documentaries with low clip quality, even though no law of man or nature required this, and accepting this as a justification for an exemption); [print-disabled Recommendation] (finding that print-disabled people should not have to buy multiple devices in order to access the full range of works).

(c) uses for purposes of criticism, comment, or education, as opposed to other "noninfringing" or "fair" uses. We respectfully oppose any further slicing of fair use for exemption purposes. As explained above, the cases recognize that there are many paths to transformativeness.[132] Section 1201 operates equally on all forms of transformativeness using video clips, harming them all. There is no need to prejudge potential types of transformative fair uses, or to create an extra category that would need to be separately analyzed even after a factfinder determined that a remix was fair use. Rather, imposing such a requirement would create new uncertainties, mandating distinctions that courts have increasingly recognized they are unequipped to make.[133] Just as one man's obscenity is another man's lyric, one woman's criticism is another's truism.[134] Transformativeness recognizes the variety of interpretive contexts and wisely exempts the factfinder from having to identify a specific critical message or commentary—something that can be especially hard to reduce to words when it is expressed in sounds and images.[135] Indeed, courts routinely find fair use when there are multiple interpretations of the meaning of a use. Punishing or suppressing work that was transformative fair use, but not "critical" according to an outsider's view, would suppress artistic speech and artistic evolution.

The proposed exemptions do not change the underlying substance of copyright law, including the contours of fair use. They only make those contours possible to determine, rather than cutting off any inquiry because of the separate anti-circumvention prohibition. Thus, to the extent that individual remixes are not fair uses, copyright owners would retain the ability to take action against those uses.

(d) "noncommercial videos" as opposed to "primarily noncommercial videos." We respectfully oppose limiting the language of the exemption.[136] As the Office recognized previously, there are instances where an artist may be compensated for producing a noncommercial work promoting a political or social justice message.[137] A recent study of viral video revealed that the high-impact

---

[132] *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013); ("The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . identified in the preamble to the statute."; district court erred as a matter of law in requiring criticism or commentary).

[133] *See, e.g., Seltzer v. Green Day*, 725 F.3d 1170 (9th Cir. 2013).

[134] Sara Howe, (*De)Compose, Shape-Shift, and Suture: Towards a Monstrous Rhetoric of Fan Compositions, Dissertation*, Dept, of English, University of Arizona (May, 2013) at 102, avail. at http://arizona.openrepository.com/arizona/bitstream/10150/299072/1/azu_etd_12855_sip1_m.pdf ("[V]idding's rhetorical effectiveness is dependent upon its audience, but unique to these fan compositions is the need for a particular shared knowledge . . . ")

[135] *See Cariou*, 714 F.3d at 706-07; see also Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. & Lit. 20 (2013) (discussing relevance of interpretive communities); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 754-55 (2012) (discussing fair use and images).

[136] In the alternative, the Office could make clear that "noncommercial" follows the First Amendment's definition of the term. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (pointing out that most favored fair uses are in fact created with some hope of financial reward); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) ("A printed article meant to draw attention to the for-profit magazine in which it appears . . . does not fall outside of the protection of the First Amendment because it may help to sell copies.").

[137] 2012 Recommendations, at 129; *see also* McIntosh Interview Appx H, 52 (explaining that PRV makers sometimes work by commission).

PRVs of the last few years were often made by "interest groups and other nontraditional actors [that were] established organizations backed by financial and social resources."[138] These messages often require production resources. For example, the NCAI hired an outside firm to make *Take It Off*, and in *Northland*, a contractor made one of the remix videos on behalf of a nonprofit advocacy organization.[139] As the court recognized, the fact that the nonprofit lacked the in-house expertise to make its transformative fair use should not bar it from expressing its viewpoint in the most effective manner possible.[140] Moreover, advocacy groups often use their substantive advocacy to solicit donations, because their most powerful messages are also reasons to support them. While the *Northland* court characterized this activity as partially commercial,[141] it also recognized that the transformative aspects were more important.[142] Restrictive language could have stripped the *Northland* defendants of any defense against a §1201 claim, despite the plaintiff's clearly speech-suppressive motives. Thus, the exemption should have language indicating that noncommerciality is to be broadly construed.

Likewise, artists may engage in museum exhibitions that are primarily noncommercial. For example, Soda_Jerk is a two-artist collective whose work—displayed at the National Museum of Women in the Arts—involves video remix, such as editing Judy Garland films so that the actress is in dialogue with her younger self in *The Wizard of Oz*. Soda_Jerk creates similar remixes involving River Phoenix, Marilyn Monroe, and other well-known performers. Their work comments on "experiences of time and memory and how these can be mediated by moving image technologies. . . . By borrowing, re-sequencing, and manipulating clips from films and television, Soda_Jerk demonstrates how sampling can even serve as a kind of re-animation of the dead."[143] Soda_Jerk's work is plainly transformative and deserving of protection against §1201 liability, even if the museum provides compensation for their participation in the installation.

Moreover, the litigated cases finding transformative fair use from re-workings essentially all involve commercial uses in the sense that the fair user is not purely eleemosynary. The case law is quite clear that commerciality is of limited if any relevance when a use is significantly transformative and therefore does not interfere with a market the prior copyright owner has any right to control. Commercial uses are also equally vulnerable to suppression based on disagreement with a message. Thus, while noncommercial uses are even more favored in fair use analysis, contact with the world of money in some way is both common[144] and completely consistent with fair use, as the existing exemption for documentarians also recognizes. A definition that accommodates this reality avoids complicated parsing of the meaning of "commercial" (e.g., opponents have claimed that posting on YouTube is "commercial" because *YouTube* is operated as a business).

---

[138] Shifman, supra n.19, at 125.

[139] *See Northland*, 868 F. Supp. 2d at 967.

[140] *See* 2012 Recommendations, at 139 (recognizing importance of commissioned work to fair use by institutions); Sabia Interview, Appx L.

[141] *Northland*, 868 F. Supp. 2d at 978-79.

[142] *See, e.g., Campbell*, 510 U.S. at 579; *Perfect 10*, 508 F.3d at 1166; *Bill Graham Arch. v. Dorling Kindersley Ltd.*, 448 F.3d 605, 610 (2d Cir. 2006); *Hustler Mag. Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1152-53 (9th Cir. 1986).

[143] *See* Dark Matter, *supra* n. 118 (excerpt at http:/ /vimeo.com/55280845;); Dark Matter catalogue, Appx Q.

[144] *Cf. Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 584 (1994) (discussing common commercial fair uses).

(e) *with respect to works distributed online, those works that are not readily available on DVD and/or Blu-ray disc, and (f) with respect to Blu-ray discs, those works or content that are not readily available on DVD.* We respectfully oppose any such limitation. First, as the Office is aware from discussions over orphan works, the term "readily available" is a hotly contested phrase with no case law providing guidance as to its meaning for audiovisual works. It would needlessly complicate the exemption and make it extremely risky to use.

Second, this proposal misapprehends the nature of remix. To take just one of many examples, vidder Thuviaptarth explained that her work draws on clips from the *Captain America* movies as shown in theaters as well as clips from the extra materials on the Blu-Ray disc.[145] It is the contrast between those clips that helps form her message. Requiring vidders to buy multiple editions of films—the online version or the DVD for the version shown in theaters, then the Blu-Ray for the extras—is not only a significant additional expense, it is the type of counterintuitive requirement that traps the unwary, and could require the rejection of an exemption when a vidder *did* use the Blu-Ray extras, but (quite naturally) *also* used clips from the main movie taken from the Blu-Ray.

Third, this proposal has no relationship to fair use, artistic need for quality, or practical reality. A vidder who legitimately purchased a Blu-Ray disc or download has no reason to think that she can't make fair use of it even if there is also a DVD version. As a matter of aesthetics, vidders prefer to use the best quality available; online source is regularly used only when it's the only version available,[146] but no legal sanction is needed to make this artistic practice into a risky rule. Moreover, this proposal suggests that a vidder may make clips from a download when it is the only version presently available (as is now common windowing practice), but if she uses the same file to make the same clips months later, on the day the Blu-Ray version has been released, she will break the law, an even more bizarre and counterintuitive proposition.[147]

Fourth, the current exemption is not so limited, and has worked for remixers now able to assert fair use rights with confidence. Such a limitation would only make a legitimate exemption harder to use, in contradiction to the statutory command in 17 U.S.C. 1201(a)(1)(C) to consider the impact on "criticism, comment, news reporting, teaching, scholarship, or research."

The Office's remaining inquiries can be addressed quickly. The lack of viable alternatives to circumvention is discussed in detail above, at pp 11-19. As for adverse effects, as in 2012, there is no evidence that the remix exemption has had a negative effect on the legitimate marketplace for copyrighted works.[148] Exemptions for fair use remix will continue that record.

8.   Documentary Evidence

Please see Appendices.

---

[145] Communication on file with OTW (Sept. 7, 2014)

[146] *See, e.g.,* Kjono Statement, Appx K; Ito Comment, Appx B; Turk Statement, Appx N 101

[147] Cf. 2012 Recommendations, at 20 (concluding that people with print disabilities shouldn't have to pay for multiple platforms; noting NTIA's conclusion that this duplicate investment wasn't a reasonable alternative to circumvention).

[148] 2012 Recommendations, at 129.

Appendix A

Further Examples of Transformative Remix

I.   Overview of remix genres

There are a number of genres of short-form videos on YouTube that are popular among viewers and frequently depend on clips drawn from film or television sources. These genres include everything from movie trailer remixes to fanvids to supercuts ("A fast-paced montage of short video clips that obsessively isolates a single element from its source, usually a word, phrase, or cliche from film and TV.")[1] All these genres are transformative.

Academic research reveals that movie trailers, for example, serve as as exposés, parodies, and critiques of genre and movie marketing conventions.[2] Other genres include film analysis (film critics provide their commentary and criticism using voice-over or text in combination with clips taken from the films being analyzed);[3] movie mistakes (film buffs collect and comment on anachronisms, continuity errors, and other "mistakes" found in films and television programs); comic juxtaposition remixes (often humorous videos created by combining video clips from one film with audio clips from another source);[4] political commentary (videos intended to make a political statement that borrow clips from film or television to illustrate their message); political criticism of movies (videos that utilize clips in the course of explicitly criticizing the underlying themes or politics of a film); and even "YouTube Poop" (absurdist remixes that ape and mock the lowest technical and aesthetic standards of remix culture to comment on remix culture itself).

A.   Cultural and Political Criticism

Many popular online videos use remix to engage in commentary or criticism. In 2009-10, many remixers started creating "Downfall" parodies, or remixes of the bunker scene from the German film *Downfall: Hitler and the End of the Third Reich* (aka *Der Untergang*).   The parodies comment on everything from the misuse of DMCA to problems with new technologies and cultural events.[5]

Remix is a powerful way of engaging with important issues such as racial stereotypes. Numerous remixes, for example, mock the "Mighty Whitey" trope of a white savior rescuing "savages" from other white oppressors by combining footage from James Cameron's film *Avatar* with audio from the Disney film *Pocahontas* and vice versa.[6] Recently, the National Congress of

---

[1] *See, e.g.*, http://screencrave.com/2010-08-04/the-10-best-youtube-trailer-remixes-ever/; http://supercut.org. TV Guide recently created its own supercut of *Supernatural*. http://tvguide.tumblr.com/post/99992489200/relive-the-good-times-with-supernatural-bro-hugs.

[2] Nicola Maria Dusi, *Remixing Movies and Trailers Before and After the Digital Age*, in Eduardo Navas et al., The Routledge Companion to Remix Studies 154, 160 (2015).

[3] *See, e.g.,* Jim Emerson, In the Cut, Sept. 21, 2011, http://www.rogerebert.com/scanners/annotated-transcript-in-the-cut-part-i-shots-in-the-dark-knight.

[4] *See, e.g.,* https://www.youtube.com/watch?v=i4JZgUuy6G8 (contrasting histrionic song with sitcom *Community*).

[5] *See* Top 10 Hitler Downfall Parodies of All Time, Ranker, http://www.ranker.com/list/top-10-hitler-downfall-parodies-of-all-time/the-master (last visited Nov. 12, 2013).

[6] *See* http://vimeo.com/9389738/.

American Indians released "Take It Away," an ad that uses footage of Washington's football team, with its current trademarks digitally removed, to make the argument that the team will still be the same even if it changes its racially inflammatory name and mascot.[7] High-quality footage of the team playing was necessary to make the point that the team would be exactly the same without the trademarks. This ad is an example of the need that nonprofit groups have to be able to hire outside producers in order to make their political and social messages; it was produced by Goodness Mfg., a media agency, but it furthers the NCAI's nonprofit mission.[8]

Political remix videos (PRVs) engage with electoral and direct politics. These types of remixes predated the internet,[9] but now routinely circulate online. "At the heart of political remixing lies an impulse to rebut mainstream media and promote contemporaneous critiques of culture through alternative channels free from endemic corporate censorship in journalism."[10] PRVs are powerful and persuasive because they can take advantage of shared public knowledge while commenting on public issues. Millions of viewers have watched one or more PRVs.

Diran Lyons' political remix video, combining footage of Jake Gyllenhaal in a war movie with footage of President Obama, screened at Los Angeles Shorts Film Festival in Hollywood, the Athens Video Art Festival 2010, and the RE/Mixed Media Fest in Brooklyn, among other venues. It was the first political remix video ever to reach #1 on the Internet Movie Database's most popular short film.[11]

Another popular video, "The Rent is too Damn UP – A Remix," combines footage from Disney's animated film UP with audio from a New York gubernatorial debate featuring Jimmy McMillan, candidate for governor from the Rent is Too Damn High Party. McMillan was a sensation at the debate, and the remix helped keep attention on the issues he raised.[12]

"Fellowship of the Ring of Free Trade" adds subtitles to clips from the popular movie *The Lord of the Rings* to comment on the recent history of international free trade agreements and the efforts to oppose them, equating corporate power with the villain Sauron.[13] The Move Your

---

[7] *See* https://www.youtube.com/watch?v=QW__6RO_-N0.

[8] *See* Sam Thielman, Activist Ad Strips Away Redskins' Logo to Show 'It's Still Washington Football,' AdWeek, Jan. 23, 2015, http://www.adweek.com/news/advertising-branding/activist-ad-strips-away-redskins-logo-show-its-still-washington-football-162499.

[9] *See, e.g.,* Cultural Borrowings: Appropriation, Reworking, and Transformation, 76-91 (Ian Robert Smith ed. 2009), available at http://www.scope.nottingham.ac.uk/cultborr/Cultural_Borrowings_Final.pdf (describing a history of "found footage" culture on the internet); Jonathan McIntosh, *A History of Subversive Remix Video before YouTube: Thirty Political Video Mashups Made between World War II and 2005*, 9 TRANSFORMATIVE WORKS & CULTURES, (2012) http://journal.transformativeworks.org/index.php/twc/article/view/371/299.

[10] Cultural Borrowings, *supra* note 9, at 80. *See also* Olivia Conti, Political Remix Video as a Vernacular Discourse, Routledge Companion, supra, at 346, 346 (noting that PRVs have three common traits: they present political messages, they use copyright-protected video, and they use dominant media forms, emulating "the formal characteristics of their sources").

[11] *See* Desiree D'Alessandro & Diran Lyons, *Desiree D'Alessandro and Diran Lyons Bear Arms: Weapons of Mass Transformation [interview]*, 9 TRANSFORMATIVE WORKS & CULTURES (2012), doi:10.3983/twc.2012.0347 (2012) at [2.20] ("As an example of transformative storytelling, it directly takes poignant shots at Obama's duplicitous and malleable stance on war within the context of accepting the world's most prestigious peace prize.").

[12] *See* Joe Sabia, The Rent is Too Damn Up, Political Remix Video (Oct. 19, 2010), http://www.politicalremixvideo.com/2010/10/19/the-rent-is-too-damn-high-up-remix.

[13] *See* St01en Collective, Fellowship of the Ring of Free Trade, YouTube (Nov. 24, 2006),

Money project, which encourages citizens to move their bank accounts from the banks that received bailout funds, came to popular attention in part through a remix video created by documentary filmmaker Eugene Jarecki drawing on clips from *It's a Wonderful Life*.[14] Arab-"Homophobic Friends," by remixer Tijana Mamula, combines short clips from the popular TV show Friends to comment on homophobia in popular media.[15] As these examples demonstrate, "[a]t the heart of political remixing lies an impulse to rebut mainstream media and promote contemporaneous critiques of culture through alternative channels free from endemic corporate censorship in journalism."[16]

In one supercut, "The Price is Creepy," Rich Juzwiak uses short clips to call attention to the sexist behavior of famous TV game show host Bob Barker of *The Price is Right*.[17] Another supercut highlights just how many women have been killed in order to further male heroes' narrative arcs in story after story after story.[18] A video by 16-year-old vidder ImaginarySanity comments on sexism in popular culture by juxtaposing clips from *Star Trek* with Britney Spears' pop hit, "Womanizer."[19] Jonathan McIntosh mashes up *Buffy the Vampire Slayer* with *Twilight* to illustrate the criticism that the Twilight phenomenon celebrates female disempowerment and romanticizes male stalking, leading to over 4 million views, translation into over 30 languages, and even positive reactions from young *Twilight* fans.[20]

Further examples come from traditions of appropriation art. Desiree D'Alessandro explained:

> My remix "Woman Warrior Exposed (Sigourney Weaver Remix)" explores how Sigourney Weaver is represented as a female power icon in pop culture, though several roles from her filmography epitomize Laura Mulvey's notion of the male gaze, whereby Weaver is objectified and sexualized in the character personas she portrays. I utilized juxtapositions of the iconic horror narrator John Newland to draw public attention to the discord between Weaver's selective recollection and her actual cinematic record. The illusion that is presented through Weaver's testimony is dissolved in an illuminating montage that highlights her career of conflicting character personas. It received positive reception at the New York Chashama Film Festival and at the international 2011 European Media Art Festival premier.[21]

---

http://www.youtube.com/watch?v=vkmczhkrKYA.

[14] *See* Eugene Jarecki, Move Your Money, YouTube (Dec. 29, 2009), http://www.youtube.com/watch?v=Icqrx0OimSs.

[15] *See* Tijana Mamula, Homophobic Friends, Political Remix Video (July 11, 2011), http://www.politicalremixvideo.com/2011/07/11/homophobic-friends.

[16] *Cultural Borrowings,* supra note 9 (describing a history of "found footage" culture on the internet).

[17] *See* Jonathan McIntosh, The Price is Creepy-Bob Barker Supercut, Political Remix Video (Nov. 8, 2011) http://www.politicalremixvideo.com/2010/11/08/the-price-is-creepy/.

[18] *See* http://blogs.indiewire.com/womenandhollywood/watch-women-in-refrigerators-supercut-female-characters-killed-to-give-male-characters-depth-20140822.

[19] *See* Captain Kirk is a Womanizer, Political Remix Video (Mar. 7, 2009) http://www.politicalremixvideo.com/2009/03/07/kirk-is-a-womanizer/.

[20] *See* Jonathan McIntosh, Buffy vs. Edward Remixed, Rebellious Pixels (June 20, 2009) http://www.rebelliouspixels.com/2009/buffy-vs-edward-twilight-remixed (noting coverage in outlets ranging from NPR to the New York Post to Vanity Fair).

[21] D'Allessandro & Lyons, at 2.24.

Joe Sabia, a digital remix artist, video director, and creative consultant, likewise mixes cultural and political commentary in his work. Sabia's videos include not only *Prime Time Terror*, cited by the Office in 2012, but other works such as *Seven Minute Sopranos*, a first of its kind video recap of the entire Sopranos series, which inspired numerous other recaps and was cited as the reason for the launch of CBS's Eyelab, and a remixed timeline of cultural references in *The Office*.[22]

Nor are these solely individual productions; *Prime Time Terror* is just one example of remix created for an advocacy organization.[23] GreenPeace's OnSlaught(er) video remix was created to draw attention to the rainforests GreenPeace contends are being destroyed in order to extract palm oil used in Dove products, and has been viewed over 1.5 million times.[24]

B.   Film Criticism

Film criticism is another thriving genre, and is finding new forms as the tools for high-quality copying are increasingly available. The channel CinemaSins features a series that explains "Everything Wrong With" a number of films, in ten minutes or less, with explanatory footage.[25]

Flixcapacitor's work compares the color grading in select scenes from *Watchman* and edited versions, which reduced the blue tint of the original film in order to produce natural skin tones and reveal details about the set production designs that were inspired by the original comic book color palette.[26] Tony Zhou has created a number of detailed shorts focusing on, for example, the way that editing, framing, and blocking create comedy in Jackie Chan films[27]; using analysis of shot composition to explore a "new formal convention" arising as filmmakers learn to portray new modes of communication such as texting[28]; and analyzing the work of a director he dislikes to learn about visual perception and shot composition.[29] Other Zhou videos offer in-depth analyses of particular films, the work of particular directors, or particular types of shots.

Going in a different direction, Jamie Benning's work combines multiple sources, including deleted scenes, alternate takes, and interviews he conducts himself, in order to explore the

---

[22] *See* Joe Sabia, Remixes, The Internet Portfolio of Joe Sabia, http://www.joesabia.co/remix.html (last visited Nov. 11, 2013).

[23] *Prime Time Terror* explored "the kinds of narratives about the War on Drugs and the War on Terror that are being told in mainstream television and to assess how these stories reflect or reimagine reality." Lear Center, http://www.learcenter.org/html/projects/?cm=mcd/drugsterror (last visited Nov. 30, 2011). It used clips from multiple primetime TV episodes depicting the "war on terror" including NCIS, CSI, Law & Order and 24 to create a work that is physically and functionally different from the originals. Some of the clips are heavily altered by the inclusion of original graphics, voiceovers, and manipulation of the footage speed. The resulting product is a completely new work that provides critical commentary about how television both reflects and reimagines reality: a quintessential transformative fair use.

[24] *See* GreenpeaceVideo, Dove Onslaught(er), YouTube (Apr. 21, 2008), http://www.youtube.com/watch?v=odI7pQFyjso.

[25] *See* https://www.youtube.com/channel/UCYUQQgogVeQY8cMQamhHJcg.

[26] *See* http://vimeo.com/89269435.

[27] *See* http://vimeo.com/113439313.

[28] *See* http://vimeo.com/103554797.

[29] *See* http://vimeo.com/99798626.

4

sources and choices reflected in various significant films.[30] These "love letters" are, as the *New York Times* concludes, "meticulously crafted mashups, loaded with unusual facts and teeming with scraps of rare video and audio."[31]

       C.   <u>Video Art</u>

These days, many artists work in multiple genres, incorporating remix into broader artistic practices. Soda_jerk, a collective whose remix work was exhibited at the National Museum of Women in the Arts, explains: "For us sampling is a form of cultural warfare waged along those lines. It is a concrete means of getting our hands on the stuff of history, a radical strategy for contesting and recoding the cultural record of our time."[32]

Although Soda_jerk doesn't sell its work, it does participate in the artistic economy:

> As video art is our full-time career, we'd classify our video work as professional. Our video work is not available for commercial acquisition (we do not sell our work), but our practice does involve commercial opportunities such as exhibitions, screenings, lectures and workshops. We have also had video work commissioned by art institutions, film archives and underground film festivals (and have refused a number of video commissions from commercial brands).[33]

Because its work is often exhibited in large venues, high-quality source is extremely important for artistic integrity. When Soda_jerk does use lower quality footage, that is a deliberate artistic choice.[34] One reason for seeking out high quality is the nature of the editing process:

> There is a great deal of labor-intensive postproduction involved with our video work. This includes masking, compositing, tracking, morphs, 3D camera, time shifts, grain filters and color correction. The quality of the source clip has a huge impact on these effects. For instance, masking and tracking are extremely difficult processes to execute effectively when working with low resolution footage. Sometimes if a sample can not be found in a high enough resolution we will have to exclude it from the project on the basis that the required effect work would be impossible to carry off convincingly.[35]

This focus on artistic needs is common in the video art community, which generally does not have a detailed appreciation of laws like §1201: "[W]e are often asked for copyright advice by

---

[30] *See* http://filmumentaries.com/fullvideos/. *See* http://filmumentaries.com/reviews-and-coverage/ ("Mr. Benning's works are invaluable educational tools for my students at Clemson. His sense of structure, timing, & composition are superb. His 'filmumentaries' help show how good, practiced authors weave original sources, research, and voices into a magnificent peace of rhetoric") (Allen Swords, Senior Lecturer at Clemson University).

[31] *See* Erik Olson, A Film Fan's Love Letter to Jaws, N.Y.Times July 5, 2013, http://artsbeat.blogs.nytimes.com/2013/07/05/a-film-fans-love-letter-to-jaws/.

[32] Communication on file with OTW (Feb. 4, 2015).

[33] *Id.*

[34] *Id.*

[35] *Id.*

artists who are seeking to include sampled material in their work for the first time, and have usually been quite shocked by the lack of legal knowledge that they express."[36]

        D.   National History Day Documentaries

National History Day (NHD) is a national educational competition endorsed by the major history associations and sponsored by the National Endowment for the Humanities, among others. Students create historical presentations in various media, including individual and group documentaries.[37] Documentaries have won awards established by the Library of Congress, among numerous other institutions.[38]

According to an evaluation of the program, students who participate in NHD "perform better on high-stakes tests [not only in social studies, but in reading, science and math], are better writers, more confident and capable researchers, and have a more mature perspective on current events and civic engagement than their peers. Participants also show a greater ability to collaborate with peers, manage their time and persevere – all skills employers say are lacking in today's workforce."[39] NHD is particularly valuable for students who are 'slipping through the cracks' of our education system. For example, one special education student who'd been put into a program for kids "who could not learn." His NHD class was his only "regular" class. he produced a documentary that made it to the state finals. The next year, he took two "regular" classes and produced another documentary for NHD that made it to nationals. By the end of high school, he was enrolled in all honors classes.[40]

Documentaries often use existing videos as part of their presentations. Recent national winners that did so and that are featured on the main NHD site include The Turning Point in Deception: Top Secret Tactics for D-Day[41]; Maddie Pavek, Out of the Closet and Into the Streets: Frank Kameny and the Mattachine Society of Washington D.C.[42]; and The Gray Wolf Reintroduction: A Scientific Approach to Protect The Yellowstone Ecosystem.[43] More examples can be viewed at the NHD website.[44] The official NHD rules explicitly contemplate use of existing clips.[45] The rules direct students to consider fair use, but there is—understandably—no mention of the DMCA or its exemptions.[46] The rules encourage the use of high quality materials; clarity of presentation, including quality of visuals, is worth 20% of the evaluation.[47] As the NHD recognizes, historical arguments—like all others—are stronger when they are clear and well-done.

---

[36] *Id.*

[37] *See* http://www.nhd.org/CategoryDocumentary.htm.

[38] *See* http://www.nhd.org/2014_special_prizes.html#535.

[39] *See* National History Day Works, http://www.nhd.org/NHDworks.htm.

[40] *See* http://www.nhd.org/images/uploads/NHD1_KeyFindingsbrochureFINAL.pdf.

[41] *See* http://www.nhd.org/images/uploads/Bib%20and%20PP.pdf.

[42] *See* http://www.nhd.org/images/uploads/Process%20Paper%202013.pdf.

[43] *See* http://www.nhd.org/images/uploads/The%20Gray%20Wolf%20Reintroduction.pdf.

[44] *See* http://www.nhd.org/StudentProjectExamples.htm.

[45] *See* http://www.nhd.org/images/uploads/docrules.pdf.

[46] *See* Contest Rule Book, http://www.nhd.org/images/uploads/RuleBook14.pdf.

[47] *Id.* at 39.

E.   Vidding

There is immense diversity in vidding, which often partakes of the political and cultural criticism of other genres while focusing on specific media texts. For example, refocusing existing narratives to highlight minority characters can be a powerful transformative tool. One vidder of color, Talitha78, responded to debates over race in popular culture by creating a vid, "'White' and Nerdy," focused on an African-American character on the TV show *Psych*. She explained: "putting this together became a way of working through my issues with regard to [fan debates over race known as] RaceFail 2009. Like Gus, I am a nerd of color in a society where nerdiness is frequently coded as 'white.' With this vid, I want to subvert that stereotype ...."[48]

Fahrbotdrusilla's Telephone examines class structures in the films Watchmen (showing the struggles and ultimate failure of a poor man who wants to be a superhero) and Batman Begins (showing the struggles and ultimate success of a rich man who wants to be a superhero).[49] Vids focused on Avatar: The Legend of Korra show parallels between the supposed protagonists and antagonists[50] or argue that antagonists are the true heroes.[51]

Fall of Man by obsessive24 mixes footage from the television show *Supernatural* with clips from other apocalyptic media sources and iconic religious imagery including Michelangelo's "Creation of Adam."[52] Using imagery that is both haunting and divine, the vid examines an angel's changing attitude towards humans and god, as the apocalypse looms. The vid was used as a central discussion point in an article discussing the attitudes of young people in the millennial generation about religion and theology.[53] Alongside the religious themes discussed above, *Fall of Man* contemplates a romantic relationship between the angel featured in the video (Castiel) and one of the show's main characters (Dean Winchester). The vid's portrayal urges the audience to challenge *Supernatural*'s portrayal of Dean Winchester as a hypermasculine heterosexual and to explore alternative interpretations of the characters.

Another example of a vid that effectively demonstrates the value of showing versus telling is Gianduja Kiss's *Dollhouse* vid *It Depends on What You Pay*,[54] which was highlighted in the

---

[48] *See* talitha78, White and Nerdy, YouTube (Mar. 31, 2009), http://www.youtube.com/watch?v=Iquni9PMBMk; see also talitha78, Comment to New Psych Vid: "White" & Nerdy (Gus) (Apr. 23, 2009). http://talitha78.livejournal.com/191915.html.

[49] *See* http://fahrbotdrusilla.dreamwidth.org/139507.html

[50] *See* https://www.youtube.com/watch?v=n454GHQt6jE (paralleling struggles for control in hero and antagonist).

[51] *See* https://www.youtube.com/watch?v=qsH_In3xZZY. In this case, the designated antagonists were anarchists, and some fans disagreed with the political agenda of the creators in villainizing them. By pairing footage of them with a song promoting anti-authoritarian revolution, the vidder contributes to a political conversation through analyzing/critiquing the show. Since three of these four characters were killed in the Season 3 finale, and the fourth was written out of the story, this had to be released while it was topical, while only online versions were available, to have any effect.

[52] *See* Obsessive24, *new vid - "Fall of Man" - Supernatural - Castiel/Dean*, LIVEJOURNAL (May 18, 2009, 11:42 PM) http://obsessive24.livejournal.com/261525.html.

[53] *See* Louisa Ellen Stein, *What you don't know: Supernatural fan vids and millennial theology*, TRANSFORMATIVE WORKS AND CULTURES, no. 4 (2010) *available at* http://dx.doi.org/10.3983/twc.2010.0158.

[54] Gianduja Kiss, *It Depends on What You Pay*, MONSTERS FROM THE VIDS (uploaded April 25, 2009) http://www.giandujakiss.com/index.php?set=videos&category=Dollhouse.

7

2012 Recommendation.[55]   Many fans and critics of Dollhouse feel that although the show artfully portrays a terrifying idea, it does so in a misogynistic way. The vid weaves together scenes from Dollhouse with an unsettling yet upbeat song about rape featured in the 1960 off-Broadway musical The Fantasticks.[56] By blending the controversial song with cleverly cut images from the show, Kiss created a new work that poses intriguing questions about the show's portrayal of sexuality and personal autonomy. Together, the images and sound create a new transformative work that points out Dollhouse's failure to acknowledge a connection between rape and the apparently consensual encounters presented in the original.

At the time of the video's release in April 2009, *Dollhouse* was only legitimately available through online distribution services, not on DVD, so Gianduja Kiss purchased Amazon downloads for use in her vid. Season 1 was later released on DVD in July 2009, and season 2 was not released on DVD until November 2010. The use of clips obtained through circumventing access to online episodes of *Dollhouse* enabled her to comment on the show when it was on the air, participating in an ongoing conversation, rather than requiring her to wait months for the DVD release (at which point the show had been cancelled).

Gianduja Kiss has continued to engage in timely criticism, requiring access to a wide array of sources:

> It is very important that vidders have immediate high quality access to source material. Very often, vids are used to "comment" on a popular movie or storyline on a television show; waiting months for the DVDs to emerge would blunt the immediacy of the vidders' point, and perhaps force the vidder to miss deadlines for festivals or other gatherings where vids are shown en masse.

> For example, in my vid A Different Kind of Love Song, I wanted to celebrate the community of media fans of which I am a part, and I chose to do it by putting together a montage of fictional "fans" who appear as characters in popular media. For example, on the television show Hawaii 5-0, the character of Max is a Star Trek fan; Big Bang Theory features a series of characters who are comic book and science fiction fans.

> One common criticism of "nerds" or "geeks" as they appear in popular media is that they are overwhelmingly white men; people of color and women are shown to be fans of science fiction and fantasy far less often. This popular depiction of science fiction fans as overwhelmingly white and male has real world effects - there have been many public controversies about how women in particular are excluded from science fiction/fantasy communities.

> I am a woman who is a fan of science fiction and fantasy, and I am part of an online community of like-minded women; therefore, in my video, I wanted to make sure that women were represented as fans. And the video was being made for a particular purpose: I wanted it to be screened at Vividcon, an annual convention for (overwhelmingly female) vidders.

---

[55] 2012 Recommendation, 109 n.582.

[56] Although the song was featured in early productions of the musical, recent versions either remove it completely or replace it with a new song.

As I put together my vid, I found – unsurprisingly – that while it was relatively easy to find representations of white male fans in popular media, I had a much harder time finding women and people of color who were shown to be sci-fi/fantasy fans, at least in any kind of visual way that could be illustrated in vid form. Often I was forced to resort to focusing on background characters or extras merely to include representations of women.

Luckily, however, just before the deadline for submission to Vividcon, the television show Supernatural aired an episode that featured a woman computer programmer who was also a science-fiction and fantasy fan. She was shown to, among other things, have a Hermione Granger figurine on her desk, and drink from a Wonder Woman mug. These images were a godsend to me, given how hard it had been to find similar images.

In order to use those images, I purchased a copy of the episode from Amazon, and I circumvented the DRM. The vid was then submitted just in time for the Vividcon deadline. The day after it aired at Vividcon, I posted it online, where it was associated with other Vividcon vids. This occurred anywhere from 1-2 months before the DVDs were released. The vid was quite successful as compared to my other vids, and unquestionably received attention online because it was part of the Vividcon collection. Had I been unable to include the newer footage, I believe the vid would have suffered artistically.[57]

As she explains, such needs for timeliness are common in the community, as she discovered by running a popular vidding challenge:

I run an online annual "festival" for vidders called Festivids. Each participating vidder makes a vid in a source requested by another vidder. The sources used in Festivids are only those sources that are rarely used in vidding.

Vids must be submitted by a particular deadline in order to be included in that year's fest. Festivids' popularity has grown over the years, and vids included in Festivids tend to get far more attention than they otherwise would. And because participating vidders "request" different vids every year, the mix of eligible vids changes year to year - a vid that is appropriate to include in one year might not be eligible for inclusion in the following year.

I can see, as moderator of Festivids, that very often vidders need extremely new sources - such as the latest episodes aired on television - in order to complete their vids by the deadline while simultaneously fulfilling their artistic vision. Their vids might focus on a particular character, or relationship between characters, and a critical episode will air well before the DVDs become available, but before the Festivids submission deadline. If they did not have access to those episodes immediately, their vids would suffer artistically, or they would be forced not to include them in Festivids at all (which would mean that the vids would attract a much smaller audience).[58]

---

[57] Email from Gianduja Kiss, Feb. 2, 2015 (on file with OTW).
[58] *Id.*

Vidder Obsessive24's "Piece of Me"[59] uses a combination of DVD footage from Britney Spears' videos and other sources to

> analyze not only the tabloid version of the singer's story (divorce, custody battles, substance abuse, bad behavior, etc.) but also Spears's counternarrative of control…. [T]he song [Piece of Me] and its official music video both repress an additional connotation of the metaphor: that of breakdown and collapse. It is this repressed meaning—cracking up, falling to pieces—that Obsessive24 explores in her vid. Taken together, the video undercuts Spears's provocative poses and bravado, reminding us that two months after this 'cry of defiance' was released, Spears was taken away on a gurney and held for a seventy-two-hour involuntary psychiatric evaluation. While the official video to "Piece of Me" creates fake tabloid covers and paparazzi video, Obsessive24 uses the real thing to heartbreaking effect.[60]

The multi-fandom vid *On the Prowl* created jointly by vidders Sisabet and Sweetestdrain[61] uses images from over sixty different sources (e.g., *Star Trek, Twilight, Dexter, Supernatural*) to present a self-portrait of female fans who enjoy watching their favorite male characters suffer, both physically and emotionally. As the intensity of the music progresses, the pain that the male characters in the vid are enduring becomes more extreme. By featuring increasingly disturbing, rapidly cut images, the vidders invite the viewer to determine the point at which the suffering becomes "too much." In response to "On the Prowl," the vidding community examined whether fetishizing male pain—by the media and by vidders—can be problematic. The vid has been recognized in the community as a particularly thoughtful and evocative form of cultural critique.[62]

Akemi42 produced *God's Love* as a reaction to *Supernatural* Season 7 episode 2, which aired on September 30, 2011, and revealed the apparent death of a beloved character on the show.[63] The vidder relied on technology for circumventing encryption on Amazon Instant video to obtain the clips she needed to produce and release the work by October 1, 2011 in immediate reaction to revelation on the show. Without relying on the exemptions, the vidder would be unable to express her views about the source material in visual form.

Similarly, Emma_in_oz's Male Gaze, in the vidder's own words, "explores the question of whether the film theory of the male gaze can apply to a text like *Teen Wolf*,"[64] an MTV show that frequently features half-clothed young men.

---

[59] *See* http://transformativeworks.org/projects/vidtestsuite. Obsessive24, following accepted vidding practices, purchased Spears's videos on DVD in order to create the vid. Email from Obsessive24, Nov. 23, 2011.

[60] Francesca Coppa, *An Editing Room of One's Own: Vidding as Women's Work*, 26 Camera Obscura 123, 125, 127 (2011).

[61] *See* Sisabet, *New Vid!! VVC Challenge: Self Portrait*, LIVEJOURNAL (August 10, 2010, 2:35 PM) http://sisabet.livejournal.com/400014.html.

[62] *See* "On the Prowl" Fanlore Page, FANLORE (last updated November 26, 2011) http://fanlore.org/wiki/On_the_Prowl (describing "On the Prowl" as "an important vid that you need to watch even though it will be uncomfortable").

[63] *See* Akemi42, *God's Love*, AKEMI42 EXPERIMENTS IN VIDEO EDITING (October 1, 2011) http://www.akemi42.com/2011/10/01/gods-love/.

[64] *See* https://vidding.livejournal.com/3166344.html.

Vids can also communicate more personal messages. Vidder luvtheheaven makes vids that use clips from multiple TV shows to communicate personal—and also general human—truths. *Horrible Mothers & Their Daughters*[65] is, to her, "one of the clearest examples I have out of all of the fanvideos I've made that really show how vidding can be a true form of artwork, expressing the artist's personal emotions etc. The song is triumphant and the video was very cathartic for me to make, as I found examples of various mother/daughter moments on five different television series, plus one father/daughter relationship on a 6th series, that I strongly related to and that showed my story." The vid allows her to communicate her own history: "It serves as a useful way to explain what it was like growing up with my mom to my friends. It captures what it felt like in a way that simply telling them doesn't do as well. It makes it easier for them to understand and empathize with me."

Another of her vids is *All About *My* Sexual Orientation*,[66] which uses clips from Glee, Gilmore Girls, Skins UK, Grey's Anatomy, Everwood, Parenthood, Switched at Birth, Joan of Arcadia, House, Castle, Nashville, Gossip Girl, and Friday Night Lights. She used the vid "as an informative tool" to educate people about asexuality. Although she considers it less technically accomplished than her best, she was still happy to have made it: "I'm asexual, this is an identity that is important to me, and it is something I wish I had seen a fanvideo about years ago. I didn't figure out my own sexual orientation until I was 23 years old because of the lack of information out there. … I know many teenagers enjoy viewing fanvideos, and the fact that I've made this video now means that a teenager in the present time might be able to learn about the existence of their own sexual orientation sooner than I did. Also, I used the video to try to combat many misconceptions people have about asexuals."

Another vidder made a "deeply personal" multi-source vid about pregnancy and miscarriage.[67] "I've been pregnant five times, but I only have one child. The first time I miscarried I felt so alone, because no one I knew had ever talked about infertility or loss. It was like this dirty little secret that happens behind closed doors, a private grief that no one shares. … After my latest miscarriage, I went looking for a vid that would help my process my feelings, but all I could find were personal snapshots set to music, grainy soap opera clips, and other snippets of TV shows and movies. Nothing seemed to talk about what it felt like to see babies all over the place, from Facebook to grocery shopping to TV ads, when I was futilely trying so hard myself." The vid was her answer to that absence.

1. Case Study: The Price

Vidder Thingswithwings created *The Price*,[68] a carefully edited critique of standard media narratives of "manpain," in which a main character—typically a white male—undergoes trauma

---

[65] *See* https://www.youtube.com/watch?v=CoSxVQqMfGQ.

[66] *See* https://www.youtube.com/watch?v=vM8rIfoMEaU.

[67] https://grammarwoman.livejournal.com/171058.html.

[68] *See*

See Test Suite for Fair Use Fanvids, ORGANIZATION FOR TRANSFORMATIVE WORKS, http://transformativeworks.org/node/552 (last updated Aug. 2, 2012) (presenting a collection of several vids discussed in this Appendix including *The Price*) [*hereinafter* Test Suite].

and often reacts by exhibiting stereotypically masculine behaviors and attitudes.[69] Well-known examples of this trope featured in the vid include Harry Potter, Batman, and Frodo from *Lord of the Rings*. A more common and misogynist manpain trope involves harming a female character for the sole purpose of providing a motivation for the male character's storyline. The vidder used footage from over thirty different films and television shows,[70] overlaying images from one source on top of another source to show the trope in action. *The Price* ends with dramatic, tongue-in-cheek shots of the men crying. Some of the scenes include effects to stylize the tears, thereby making the point that, although it is very common in mainstream media, the manpain narrative is overdone and blasé.

Creating a work like *The Price* necessitates making use of the footage from the subject media sources. *The Price* is powerful precisely because it uses visual editing techniques to comment on a visual source and parallels nearly identical scenes from a variety of media, demonstrating, for example, how common it is for male characters to literally carry around their dead wives and girlfriends. Spectators are often shocked to realize how often a male character's journey is motivated by a woman's death.

To create this vid, Thingswithwings relied on two primary techniques for acquiring footage: (1) software tools that are capable of circumventing Content Scrambling System (CSS) encryption; and (2) software tools that are capable of circumventing encryption methods for online distribution services such as Amazon Instant Video and/or iTunes.[71] Access to high quality source material was critical for the vid to function as a convincing counterpoint to the traditional mainstream narratives. Without obtaining the source footage as described above, the vidder may have been unable to integrate the varied sources having different color palettes and frame sizes into a seamless story using effects, transitions, and other editing techniques.

The importance of the underlying source material is underscored by Thingswithwings commenting on the creation process and meaning of *The Price*:[72] "I needed to express the frustration I feel both with the ridiculous/terrible nature of these tired tropes AND with the entirely predictable (and often problematic) large-scale fannish reactions to those tropes." The vidding community was formed around this type of commentary on popular texts.

Fans use the vids as context for exploring and debating deeper themes within the media source material. One vidder notes how rewarding the tradition of creation and commentary in the vidding community can be as it provides an audience with tangible responses to her art.[73] "The Price" began a heated online discussion about manpain narratives in mainstream media that ultimately generated over 280 comments.[74]

---

[69] *See* FANLORE, http://fanlore.org/wiki/Manpain (last updated February 6, 2012) (explaining the definition and history of the term manpain).

[70] *See* Thingswithwings, *New Vid: The Price (Multifandom)*, DREAMWIDTH (January 16, 2011, 7:40 AM) http://thingswithwings.dreamwidth.org/145368.html.

[71] *See* Email from Thingswithwings dated November 29, 2011 (on file with authors).

[72] Thingswithwings, *some thoughts on manpain.um. many thoughts on manpain, actually.*, DREAMWIDTH (January 16, 2011, 10:01 AM) http://thingswithwings.dreamwidth.org/145564.html.

[73] *See* sockkpuppett, *New Vid – Women's Work (Supernatural)*, LIVEJOURNAL (August 14, 2007 03:13 PM) http://sockkpuppett.livejournal.com/442093.html.

[74] *See* Thingswithwings, *supra* (listing 287 comments as of February 26, 2012).

A vid initially attacked by opponents of the 2012 exemption as nontransformative[75] demonstrates the critical meanings that audiences familiar with the medium derive from vids. As film/literary scholar Francesca Coppa notes, "*Der Kommissar*, like all vids, uses music as an analytical tool to guide the spectator's eyes to particular elements in the source footage, here to more lighthearted and comical effect. For instance, in the opening moments of the video, [artist] Gianduja Kiss shows us a set of near-identical hat tosses (at :07, :08, and :09) from three different Bond films and then creates a montage of paralleled threats, as Bond whirls around to face a gun, an alligator, and the woman who would eventually become his wife. . . . [T]he spectator is asked to look at scenes across various Bond movies to observe, interpret, and, most of all, enjoy similarities in their formal and narrative elements."[76] Coppa points out that the vid highlights and recontextualizes Bond's conventional heterosexuality by pairing him with men as well as women, and by emphasizing "phallic symbols like snakes, lasers, machetes, and flaming sausages, as well as items associated with sexual kinkiness like dog-collars and whips."[77] (Gianduja Kiss is not alone in identifying the disturbing undercurrents linking sex and violence in the Bond films.[78])

Gianduja Kiss herself explained:[79]

> Contrary to what the opponents say, this vid was intended as a political/cultural commentary. These commenters seem to be unfamiliar with vids, so they aren't particularly skilled at reading and understanding them. Moreover, I'd been vidding for less than a year, and so the message doesn't come across as clearly as I'd have liked. I've learned a lot since then and I believe my skills, including my skills at communicating my messages, have improved since I made Der Kommissar.

> . . . [I]n my experience, "promotional" materials, such as trailers for Bond films, portray Bond as tough, competent, unbeatable, and sexually irresistible to women. In other words, they fetishize his (heterosexual) masculinity. My vid, by contrast, portrays Bond as hapless, vulnerable, bewildered, and often at the (sexual) mercy of the people around him. I don't consider it "promotional" at all.

> When I made Der Kommissar, I wanted to illustrate, in a humorous way, sexual anxiety in the form of sexualized violence in Bond films, in order to undermine some of the portrayals of masculinity in those films. So, the vid is dominated by images of Bond being beaten up and victimized, often in sexualized ways. Roger Moore slides down a banister and gets whacked in the crotch; there's the famous scene of Connery's crotch being menaced by a laser, a woman tries to knife

---

[75] *See* http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf.
[76] *See* Statement from Francesca Coppa, February 21, 2012 (on file with authors).
[77] *Id.*
[78] *See also, e.g.*, Paul Johnson, *Sex, Snobbery, and Sadism*, NEW STATESMAN, Apr. 5, 1958, available at http://www.newstatesman.com/society/2007/02/1958-bond-fleming-girl-sex; The Real James Bond, YOUTUBE, March 29, 2011, http://www.youtube.com/watch?v=y1uE5F9EnUA.
[79] Statement of Gianduja Kiss Appx J, 90-91

Connery's bond in the crotch after two previous scenes of unwanted kissing/sexual violence (Bond with a woman, and Bond with a man). A woman tries to kill Bond by wrapping her legs around his waist and crushing him while they're both mostly naked. And of course the vid features the infamous scene from Casino Royale in which Bond is tortured with genital whipping.

I played with images of gender and power in the vid. For example, the opening sequence shows James Bond repeatedly tossing his hat, except that in the final shot in the sequence, the hat is a frilly pink ladies' bonnet. He gets trapped in a bed by a woman, and in the opening, there's a sequence of shots of someone menacing Bond (with guns, with an alligator) that ends with Bond seeing a woman (Diana Rigg), to make the point that the woman was the most frightening/menacing to him. There's another sequence with people finding other people in their beds. First, Bond walks in to find women in his bed, then, a woman walks in to find Bond in her bed (positioning Bond as the woman), and finally, Robert Davi gets in bed with Bond. The implication of homosexuality is meant to undermine the hypermasculinity of Bond's image. (The vid generally uses standard shot-editing techniques to suggest a sexual relationship between Dalton's Bond and Robert Davi's villain.) A shot of Bond leering at a woman through binoculars is juxtaposed with a shot of Bond looking at a man through binoculars (I actually manipulated the shots there to create a lens view that wasn't in the original film). Bond hits several men and finally knocks a woman down on the bed; Bond then gets hit by several men, hit by a woman, and attacked with flaming sticks of meat, to illustrate the reversal from masculine power to masculine anxiety.

I had several images of a snake menacing Roger Moore, because snakes are a common phallic symbol. One time, women look on and smile while a snake drowns him. Once again, the idea was to show Moore essentially drowning in/menaced by male sexuality. That's why the tag line for the vid is "Why did it have to be snakes?": It's a reference to the snake/phallic images in the vid (and a jokey reference to the line from Raiders of the Lost Ark).

In a completely obvious pun, on the line "he's got the power" I show a villain stroking a cat (a signifier of feminine sexuality), and on the next phrase "and you're so weak" I show Bond being knocked out, drugged, falling, several times in succession.

Though I will be the first to admit that I wasn't as clear as I'd have liked in getting my point across, I know that at least some people who are adept at "reading" vids were able to perceive it. For example, in 2008, Thingswithwings posted an incredibly nice commentary on several of my vids. At the time, I'd had no prior contact with her at all, about my vids or anything else. Nonetheless, she accurately described Der Kommissar as "all about sexual violence."

I am submitting this statement to explain that I did intend a commentary and that the community that I was trying to reach could understand that commentary, even if not everyone would recognize it. In particular, I want the Copyright Office to recognize that protection can't and shouldn't turn on the vidder's skill.

II.   The Need for High Quality in Vidding

A.   Testimony from the Remix Community

As many artists will attest, remix works are much more effective if they can match the quality of the original works.

> Screen resolution is rising, and [low quality] source material that looked all right before now looks like pixelated crap. Vidding needs to be able to follow more or less the same arc of development as the multimedia it uses as source material . . . Like languages, art cultures need the ability to grow and develop and keep pace with the times in order to stay alive. If multimedia needs Blu-Ray, then vidders need or will need it for the same exact reasons.[80]

Further commentary regarding the need to match the quakity of the works upon which one is commenting may be found in the Comments.

In addition, remix artists often use a variety of effects to make their point. Those effects are difficulty to create if you do not start with high-quality source material. Francesca Coppa posted to the vidding forum on LiveJournal to ask about vids that used these effects and why they were necessary.[81] Within 24 hours, dozens of respondents had provided particular examples and explained the meanings of those effects:

> [Blaine Anderson, a Glee vid, contains:] "Colour adjustments to show past vs. present. Zooms and extreme close-ups (1:17) to show interiority: Blaine is lost in a memory; the surrounding world has been clipped out. Close-up also heightens emotion for the same reason: all there is to look at is his sad expression -- no distractions of clothing, background, etc. Slow motion adds a dreamy quality in certain places in addition to helping the visuals match the beat. . . . [T]he vidder bolted it together two days after a large percentage of the footage aired . . . [I]t's a prime example of our need for immediate access to HQ [high quality] source, so we can make our commentaries, our visual essays, while they're hot. This was right in the middle of all the swirling, raging discussion in the immediate wake of a very controversial episode. That hasn't been possible for any of my own previous fandoms, but it happens all the time now; it's becoming an increasingly sharp tool, and it's amazing to see. In several places there are masks cropping out a second person in the frame, repurposing footage to tell a different story. . . . "The past" is indicated by grayscale, but also a distressed film effect. In some

---

[80] Comment on Calling all fan video makers! Tell us about your work!, https://archiveofourown.org/admin_posts/1358
[81] Vidding Expertise, *supra* note **Error! Bookmark not defined.**.

places the corruption of the footage literalizes the corrosive effect of abuse and hate speech on Blaine himself. In other places, notably the assault scene, it lends a sort of heightened, old school horror movie feel. There are monsters here. The first zoom I mentioned (of Blaine's face) is for emotional impact, but there's a second one later, where Blaine is sitting in bed, wearing an eyepatch, and the vidder zooms in to focus on where he's holding hands with Kurt. This is similar to the vidder's use of masks: she needs us to focus on the information in one corner of the frame, so she simply removes the rest." --Stultiloquentia

I was going for a scrapbook kind of feel, so it needed a lot of really tight cropping and the jumbling effect of the overlays. - China Shop

What We Had by cherryice [is a Doctor Who vid that] uses ghosting [an editing technique that creates multiple images onscreen] wonderfully, especially at the start when Mickey, Martha and Jack are walking away from the Doctor and into the battlefield; they're leaving the safety and adventure of their travels and going heading out to the abyss, and with that leaving a piece of themselves behind. Also at the end, when the Doctor is holding the Master's body and Rose is crying at Bad Wolf Beach, Jack and Mickey and Martha are behind them, out of focus and in the background, and the vid zooms in, enhances the colours and makes us look at them instead. Because for all they've done for the Doctor, for all they've given up and suffered through, they're still just blurs in the background to the Doctor's great tragedy. –Stardust_rain

"My "Numb" Employs zoom and brightness adjustments. This is a commentary on Hutch's stresses and angst, particularly with Starsky at death's door. "Falling Slowly" uses sepia, for intimacy, quietness, and familiarity with another person, reflecting on times past. "Something to Talk About" using flash transitions to support the paparazzi photography theme. "Extreme Ways" using cropping closely to cutting parts of the central image off, showing intensity and rawness." --Laura McEwan

I tend to use many of those effects in all my vids. A recent vid Be With Me is a good example. Zooming/cropping is for focusing on a subject/character, speed adjustment for pacing and internal motion to fit the music. Colour correction. brightness, etc. is necessary on some of the source for clarity and uniformity. I do use a shift in saturation (from monochrome to colour) to illustrate a new beginning in a character's life. Overlays are used for showing parallels & mood. - Thedothatgirl

Here's what I can think of off the top of my head! bendtothesun's here I love you (White Collar) employs a series of colour effects throughout to create and amplify an emotional narrative - to create the sense of emotional distance, emotional epiphany, etc., and effectively creates a queer romance where there isn't one on the show. jesuit24's Steady As She Goes (Star Trek; youtube link) uses a glow effect of some sort to make Star Trek look more - weird and sweaty, I guess? And

it uses a TON of speed changes, forward-reversed-forward clips in order to get motion to repeat, and cropped closeups to give the whole show a feeling that the original footage doesn't have. Lots of examples of pretty much every effect you're looking for! My vid Here it Goes Back Again (Back to the Future) has a whole section where I fake "rewinding" and then "replaying" the video, in order to basically fix the crappy ending of the third movie...What's harder to demonstrate, and what I wish these folks would understand, is that speed changes/cropping and zooming/colour correcting/etc is often invisible after the fact, but necessary in order to highlight what you need to highlight in the time available. . . . Also, this isn't about ~great art~ or anything, but a lot of people who vid Community or Parks and Recreation, myself included, use a lot of zooming in order to cut out the (very intrusive) end credits, which play over parts of the show. Without high-quality footage, this is simply not feasible. If you want people to be looking at Troy and Abed being adorable instead of the credits, you need to zoom. Same thing when you're trying to cut out the rating labels or advertisements. – Thingswithwings

[For one vid, e]ach effect has a particular job to do in this vid. The closeups, zooming and cropping -- effects related to movement -- simply generate a sense of movement and flow throughout the vid, moving viewers from one section to the next fluidly. I also use these effects to emphasize certain aspects of a clip, or words. I used brightness, contrast, saturation, color corrector, and hue adjustment to blend the footage from different sources together more fluidly. I used hue adjustment for the black and white sections of the vid to provoke a sense of "voyeurism/a screen" and emphasize the notion that these characters were being viewed, or watched. . . . [For another,] Again, each effect has a job to do. The zooming, closeups and/or cropping again are used to sew the vid together into a coherent whole by use of movement. I also use zooms to emphasize important elements in a shot. I used brightness and contrast adjustment, saturation, color corrector and hue adjustment to weave disparate sources together and make everything seem coherent and like it belonged to the universe of the vid. I used time adjustments to fix timing issues at points. … I used a glowing effect to provoke a sense of warmth and comfort about 2/3 of the way through the vid. I was trying to convey Byron's particular affection for his half-sister by use of this effect, and by tweaking the coloring in that clip (warm, soft colors). – Mresundance

Small Blue Thing for incredibly smart and effective color work throughout, turning blue objects red … as well as overlays to draw connections between moments/people, especially the two in the first 10 seconds. Lay Me To Sleep … for color and saturation, overlays, light effects and other dreamy effects … , creating an effective contrast between the bright, surreal feel of the dreamy colors/lights and the intensely horrifying events and violence that are actually happening. One of mine maybe, Keepsake for overlays at the section beginning around 3:50 to both call back to past moments and highlight the reasons for the justified anger when the song and characters finally lose it and get angry. Or

17

Mercy Street for overlays throughout that connect two people who were often not in the same scenes, but shared many narrative parallels/juxtapositions, and to create intimacy. – Chaila43

[I]n Here We Come, On The Run! I use overlays in the choruses to link the central character with her military opponents in a visual way given they rarely appear on screen or on the battlefields themselves. … so say we all ii (It's All Part Of A Bigger Plan) … uses overlays constantly to highlight the repeating motifs of the show, while also[,] by using still as well as moving footage for the overlays, giving a stuttery, technological feel to the vid that fits with its themes about religion and technology, like a corrupted cascade of downloaded (divine) information. The overlays add to the sense of chaos and incoherency while, on closer inspection, [they] are always relevant to the underlying video. – Beccatoria

The White Collar vid Hot Mess uses glitch/distortion effects to underscore beats of the music and suggest a system, or person, on the edge of breakdown. Frequent zooms, plus a habit of cutting almost exclusively by fading quickly to white and then back, dial up the sense of emotional intensity and instability. I'm pretty sure the saturation's boosted in most of the vid, making everything that much more feverish, and the brief moments of grayscale add to the general chaos. Taken together, the effects help convey the idea that Neal Caffrey is, well, a hot mess. Luminosity, speaking of her (ahem) rather well-known 300 vid "Vogue" in an interview with New York Magazine, says: "I wanted to allude to the graphic novel, so I split the screens and tinted them with flat color." One example of the vid's use of saturation effects is the sequence between 4:15 and 4:23, which is in black and white except for a bar of full color that moves across the screen in time with the music. – Enemyofperfect

Anime music videos (AMV)[82] have the same features. As one community member explains:

"FOTOGRAPHIA La Soledad"(Sola) . . . required all kinds of effects I had never seen collected together before. … The vid may look like a straightforward pairing vid, but due to the source it's working with, it's actually engaging in a discussion about memory, death, belonging, love, and what is "real". The use of real footage, cutout overlays, and the camera+graffiti effect reenforce the idea of longing to be "real" and to live a normal life, and also reflect on the nature of how we remember or forget the dead much more effectively than the show did . . . As a counter-example, I would say that "Salva Hitomi" (Escaflowne movie) is severely hampered by being released in such low quality, especially in the parts where the saturation was changed or where there is a particularly light or dark background, because it's hard to tell what's happening on the screen. … I had to watch the vid 3 times to be able to catch what was happening, and I own this source and am very familiar with it. There is something to be said for visual clarity having a greater emotional and intellectual impact, allowing the message of a vid to come across more clearly to its audience. . . . Arefadedaway's "Fairy Tale" (Princess

---

[82] Ito Statement, Appx B, 22

18

Tutu, Utena). A feminist retelling of fairy tales using two classic feminist retellings of shoujo, illustrating why the two series were truly radical in the realm of storytelling because of their presentation of women's relationships with each other. I think this vid effectively refutes the idea that a simple series of clips is not revolutionary, or that it doesn't need clear images to work with. Even simple cuts can become visually distracting and reduce the power of a vid if they're done using badly encoded, downloaded video, because clear images process quicker in the human brain. – Briar_pipe

Another explains that AMVs "typically rely on digital editing more heavily than Western-source vids":

Skittles by Koopiskeva also relies heavily on digital editing . . . : The effects quite simply are the whole point of this vid; without them it would have no impact. Redona by Oro$hi combines images from multiple series in a single frame, does something to change the colors of some series and just generally edits heavily to produce a unified feel … An AMV About TV by Re-Evolution Studios combines different series into a single frame and uses some kind of editing (I am very much a layperson) to give a classic "tv-screen texture" to some scenes. There's a lot of editing in here -- the character reading a book had had her blush added and her book changed and obviously the scene where someone is watching an AMV on youtube is an edit. This is another one of those vids that wouldn't make any sense without the edits. . . . Moe Moe Rebellion by Asylum Studios has editing similar to that in An AMV About TV, and again that editing is essential to the sense of the piece. … Note that both Moe Moe Rebellion and An AMV About TV have jokes about series and about anime fandom that may be somewhat incomprehensible to non-fans, although the editing skill and transformativity should be obvious regardless. . . .-- Undomielregina[83]

AMV editors even work frame by frame, changing the original so that, for example, characters do a dance from a different series.[84]

        B.   <u>Case Study: The Need for High Quality in the Vid *The Test*</u>

Here's luck's provided an extended analysis of her need for high quality source material in her vid exploring narratives in *Star Trek* (2009).

---

[83] Vidding Expertise, *supra* note 67. Undomielregina's last point should be re-emphasized: in many cases, the meanings of vids won't be understandable without a background in the original. That doesn't make them non-transformative, any more than *The Wind Done Gone* was non-transformative because there are many people who've never read *Gone With the Wind*.

[84] Nostromo, *AMV-RunningMan*, Nostomo Official Webcave (uploaded March 12, 2011) http://www.nostro.fr/?p=642 .

CROPPING

Star Trek (2009) is shot in action-movie widescreen (aspect ratio 2.35:1); the original TV series (1960s) is shot in standard NTSC fullscreen (aspect ratio 4:3). In practical terms, the movie is 720x304 pixels while the original series is 640x480 pixels. This means that every single use of footage from the original series has to be 1) resized up to 720x540 to match the width of the movie frame, and then 2) cropped to 720x304 (that's 236 pixels -- more than a third of the image) to match the height of the movie frame. Starting from high quality source is thus especially important for the TV clips; if the starting image isn't absolutely clear, the enlarged image will lose considerable detail, and that detail is critical once the frame is cropped or the resulting image may not be recognizable as quickly as the vid requires.

COLOR MANIPULATION

The lighting and color palettes for the '60s TV show and 2009 movie are markedly different; the colors of the Starfleet uniforms, for example, are much more somber in the movie (they're crayon-bright primary colors in the series). In a vid that relies on juxtaposing characters from the two texts and representing the two worlds as contiguous, the color of the TV series has to be desaturated to match the movie. It's much more difficult to do this if the color information of either source has been compromised by capture methods that either desaturate the source (screen capture) or exaggerate the brightness and contrast (camcording). In addition, several shots from the movie were desaturated (to suggest memory) and/or overlaid (to suggest characters communicating with or thinking about each other). Desaturation only works by contrast -- if the footage is already desaturated, the effect can't happen -- and layering of images requires exceptional clarity of both or the result is a muddy mess.

THE "GLITCH" EFFECT

This effect is key to the vid; it's the most obvious one, the one that most of the meaning of the vid relies on, and the one that is most consistently cited by viewers in comments as a critical part of the vid's effectiveness. Some commenters have assumed that the effect is a way to mask quality deficiencies in the TV footage, but in fact the effect relies on pristine source: at several points in the vid, the TV footage is presented in its pristine form and then "fuzzed": static and glitches that imitate the effect of old VCR tape are gradually *added* to the source to create an impression of a once-clear signal losing strength and ultimately fading out. The success of this effect relies on the quality of both TV and movie footage. The effect relies on contrast: the old footage has to look like it's been degraded. But if it's too degraded, the viewer can't actually see what's going on (especially since the clips from the series are generally quite short). Thus, the movie footage has to be VERY clear -- clear enough that even a relatively minor glitch or fuzz effect will be noticeable -- and the TV footage does too, because otherwise the vidder can't control the degree of fuzz or quality degradation.

SPEED MANIPULATION

More than a third of the clips in the vid have had their speed altered (usually slowed down). In a few cases, such as when Kirk runs his hands down Spock's arms, the speed change is actually quite dramatic. Small changes are required to stretch a short clip a few frames longer or to land a particular frame on the beat; dramatic changes usually serve to heighten the sensuality of a clip, to draw attention to bodies in contact, which is important to the vid's implication of a sexual relationship between characters. That the small changes aren't noticeable and the large changes aren't jerky is entirely due to using DVD-ripped source, which has enough frames per second to absorb a wide range of speed alterations.[85]

---

[85] The audience understood how these effects mattered to the meaning of the vid, even without access to Here's Luck's explanations. Wingstar wrote:

> [O]ne great vid that came to my mind was The Test, by here's luck, which vidded the trope [in Star Trek: XI] where Spock!prime transfers some memories of TOS [the original series] Spock/Kirk slash to the rebooted Jim. It uses this fantastic "glitch" static effect to signal the difference between current events and memories (starting at 1:00). There's also some kind of overlay on top of the TOS clips that adds to the "memory" effect while simultaneously concealing any differences in source quality that might exist. And there's definitely some slow-mo and some close ups in the slashy TOS clips that help signal "ROMANCE" to the viewer. Then starting at 1:56 throughout the end of the vid, there are overlays of the TOS clips on top of reboot footage so that it appears as though reboot!Jim is re-experiencing those memories throughout the rest of the movie.

Help: Urgent Vidding Expertise Needed, LIVEJOURNAL (February 26, 2012, 9:57 PM), http://vidding.livejournal.com/2821305.html [hereinafter *Vidding Expertise*].

21

November 22, 2011

Comment submitted to the Library of Congress in support of the proposal for an exemption to prohibition of copyright systems for access control technologies, submitted by the Electronic Frontier Foundation

Submitted by:

Mizuko Ito
Professor in Residence
John D. and Catherine T. MacArthur Foundation Chair in Digital Media and Learning
University of California Humanities Research Institute
University of California, Irvine
4000 Humanities Gateway
Irvine, CA 92697-3350
mizukoi@uci.edu

I am a Professor at the Department of Informatics, Department of Anthropology, and the University of California Humanities Research Institute at the University of California, Irvine and specialize in the ethnographic study of digital media use. One of my areas of focus is remix video, and I have been studying amateur remix video communities for the past seven years. Between 2005-2008, I was lead researcher on a $3.3 million large-scale ethnographic study, funded by the MacArthur Foundation, which is the largest qualitative study to date of new media use by U.S. youth. The results of my study of video remix in the anime music video (AMV) community can be found at the following URL: http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528. A more extensive treatment will be published in an edited collection, *Fandom Unbound,* in January 2012, by Yale University Press.

AMVs are videos that involve the remixing of clips from Japanese animation (anime) with a soundtrack of the editors choosing, usually a popular song or the audio track from an advertisement or trailer. My study of the AMV community included a survey of 227 participants in animemusicvideos.org, and interviews with 20 AMV creators, conducted in 2006-2007. In addition, I co-chaired an event, "24/7: A DIY Video Summit," in February 2008 and a follow up event in April 2011, that involved extensive dialog with video remix artists and the curation of videos that were representative of a wide range of amateur video. As part of the curation of these events, I reviewed hundreds of remix video in a variety of genres.

Based on my research and my review of an extensive corpus of remix video, I would like to submit factual support and arguments in support of the proposed exemption.

1. Amateur and non-commercial remix will continue to grow as an everyday form of expression and communication.

As described in the EFF exemption proposal, the practices of video remix are becoming much more widespread due to the growing availability of low-cost video editing tools and Internet culture that use video in everyday communication. The proposal mentions some broad indicators of the growth of remix activity among youth and the growth of remix videos on YouTube. In addition, a closer look at one remix community can provide some sense of the vector of growth in historical perspective. Although the history of AMVs does not date as far back as the live action vidding community, there have been remixes of Japanese animation created in the US as far back as the early eighties. AMV screenings and competitions started appearing at anime conventions in the early nineties, and by the late nineties became an established part of almost all major anime conventions. The advent of low-cost video editing tools and widespread Internet access in the late nineties catalyzed a growth in AMV creation and the development on online communities. AMV organizers began connecting with one another in 1992 through Usenet, and then later through mailing lists. In 2000, animemusicvideos.org was founded for editors to share their videos, and this site continues to be one of the central sites for accessing AMVs. The growth in the number of videos cataloged on the site is one indication of the growth in the practice of AMVs:

2000: 1037
2001: 3860
2002: 7042
2003: 16443
2004: 29860
2005: 37990
2006: 30180
2007: 16164
2008: 9205

The numbers roughly double each year until 2005, when YouTube was founded. Since then, the AMV community has continued to grow, but the center of gravity has shifted from animemusicvideos.org to other video sharing sites. To say that the numbers have continued to double since 2005 would a conservative estimate given how much visibility AMVs have had in Internet culture with the broader publicity afforded by sites like YouTube.

Today, AMVs are well established and thriving part of the everyday creative production of anime fans, and they are shared on the Internet as well as in screenings and competitions at every major anime convention around the country. They represent a form of creative expression that was created by fans in the amateur, non-commercial sector, and these works have never been framed as competitive with the commercial anime industry. The anime industry has tolerated these forms of fan remixes for decades, and has even gone so far as to commission commercial remixes by well-known AMV editors.

2. AMVs are entirely non-commercial and largely involve non-infringing uses of video.

Almost all AMVs are fundamentally transformative, and are entirely non-commercial, except in the handful of cases where the animation industries have commissioned AMVs. The process of creating an AMV involves culling through a large corpus of video footage for a small number of clips that are edited together into a short video compilation that makes a focused creative statement. As one editor described it, he sees his videos as "synthesis, 1+1=3. I'm not sure… but you get something new, something different. You take two different elements and together they become something greater."

3. AMV editors rely overwhelmingly on DVD footage over other video sources for creative, practical, and ethical reasons.

In our survey of the AMV community, among 200 who reported that they were AMV creators, 75% indicated that commercial DVDs are their first choice for anime source material in making their videos.

One reason for this preference is the desire for high quality video. As one editor put it succinctly, "I buy the DVDs you know to get the best quality possible because I love the quality." In this, AMV creators are similar to their live action vidding counterparts. In addition, however, there are additional reasons for AMV editors to turn to DVDs for their source material. Unlike media that has been created primarily for the U.S. market, only a small proportion of anime is released via broadcast in the U.S. For the vast majority of anime, editors must turn to online sources or to DVDs, and do not have the option of analog capture.

In addition, the AMV community has historically operated based on a set of social norms and ethical guidelines that seek to support the anime industry. AMVs are predominantly "fannish" celebrations of anime culture, and editors see themselves as evangelists for anime in the English-speaking world. In animemusicvideos.org, this ethic is embedded into one of the site rules: "Thou shalt not use downloaded video footage, music, or pirated software to make AMVs." The organizers of the site, by banning the use of downloaded video are advocating for the use of DVD footage in order to generate revenue for the anime industry. Even as the industry has been transitioning to online forms of distribution, we see AMV editors continuing to rely on the highest quality source material available.

4. AMV creators actively support the U.S. DVD market in spirit and practice.

Most AMV creators I interviewed stated that they have large collections of anime DVDs for their own viewing and in order to get source material for their AMVs. Fans who become interested in AMV creation represent "hardcore" fans who are more likely to purchase DVDs than casual anime viewers. Legal barriers to AMV creation are thus likely to disproportionately impact the enthusiasm of those anime consumers who are among the most likely to purchase DVDs.

AMV creators also see themselves as supporters of the anime industry. Describing AMVs as "free promotion" was a frequent refrain among the editors I interviewed. One editor explains, "I don't understand how AMVs, which by and large come from personally bought items, hinder the [commercial] artists. If anything it magnifies them and spreads them far and wide on the web…That's free and beneficial advertising in my book." One editor describes the informal poling that he does at anime conventions about whether AMVs help to promote anime. "I've been on a few AMV panels. We often ask people if they've bought anime based on an AMV they've seen. Most hands go up." These experiences reflect the reality that fan communication, including AMVs, act as form of advertising for DVD. They also illustrate the stance among creators that they are working to support the DVD industry.

Conclusions

In summary, AMV editing is an entirely non-commercial practice representing largely non-infringing uses of video, and relying predominantly on the use of DVD source material. Further, AMV creation and viewing functions to support rather than detract from the U.S. DVD market. For these reasons, the case of AMV editing clearly supports the DMCA proposal exemption presented by EFF in proposed class 11A.

Although AMVs represent only one among many video remix genres that make use of DVD footage, the dynamics of amateur video editing span different video fan cultures. The anime community represents one of the more technically savvy communities that took to video remix early in it's evolution, relying on DVD releases of foreign media. As media from other countries increasingly flows into the US via DVDs, we are likely to see the dynamics witnessed among AMV creators replicated in among diverse media audiences.

Interview with Gianduja Kiss

1. Could you briefly describe what sets the vidding community apart from other clip-based video creators? Do vidders see themselves as different from many more recent creator communities who have been getting attention on sites like YouTube?

I'm not entirely sure what communities you're referring to. Vidders generally consider themselves part of remix culture, but we're a distinctive subset - vids are very different than, say, live action films (like fan films), requiring entirely different skills and different aesthetics.

When you're talking about the universe of content that involves setting clips from movies or television shows to music, trying to define a fanvid as distinct from other types of creations is a classic case of "I know it when I see it." I've engaged in online discussions with vidders about how to define fanvids, and those can get rather heated and people have very different opinions about it. My own view is that though some vids can be comedic or poke fun at the source material, vidding in general is different than some of the pure parody remixes that you can find on Youtube (like, Brokeback to the Future as a famous example) because vids tend to come from a place of greater personal engagement with the source material. And vids are certainly very different from pieces that combine clips together but don't include the music element, or only use the music as a kind of background - for a vid, music is an integral part of the piece, and an important part of the art is to coordinate the images with the music. (Although I always have to offer caveats, because, as I said, it's really hard to define "fanvid" as a category, and I've seen vids set to monologues instead of music or that use music in other unusual ways - but for most vids, what vidders generally think of when they think "fanvid," the mesh of music and visuals is critical).

2. Are most vidders amateurs in video editing? Are their activities generally noncommercial? Are there also "professional" vidders?

The vast majority of vidders that I know are amateurs. Some have formal arts training either at the undergraduate or graduate levels. A lot of them work with computers professionally, which probably gives them a leg up on using the software. Many are students. I do know a few vidders who are also interested in professional editing, but they're the exception rather than the rule. And even then, the vids themselves aren't "professional," in the sense that they don't earn money and aren't made in conjunction with the producers of the source material; the vids are simply a hobby and a chance to use one's editing skills.

Vidding itself is almost always noncommercial; there simply isn't a professional market for it. I've only ever heard of one instance of vids being used "professionally" - I believe that at one point, the creators of a particular television show showed an interest in including one vidder's work on a DVD set, but only vids that were set to music that was composed for the show. And that was an extraordinarily unusual situation; I've never heard of anything else like it before or since.

3. Is the quality of the video source still important to the vidding community?

It's critical. Vids are a visual art form; vidders work incredibly hard to get just the right colors, timing, movement, and flow - and all of that is disrupted when the source is fuzzy or degraded. The impact of the vid is lessened tremendously if you can't see the images clearly; you might just as well ask whether it matters to a photographer whether their shots are in focus. Like with a photograph, the vid isn't just the literal image that appears in the frame; it's about the overall aesthetics of the piece. Sometimes photographers might intentionally create a blurry picture, but when they do so, it's under circumstances that the photographers control. It's the same with vidding.

4. Do vidders continue to rip commercially-released DVDs in order to extract clips? Others rely on video capture from analog outputs. Is DVD viewed as superior to these alternatives?

DVD rips are generally considered to be the highest-quality source you can get - the picture is the clearest and most precise.

I'm actually not certain what you mean by capture from analog outputs. Certainly taking the broadcast footage - however obtained - is vastly inferior to DVDs because it has network logos, network ratings ("TV-14," etc), and these days, advertisements that pop up along the bottom of the screen. That sort of thing can render large swaths of footage unusable.

5. What other sources do they/you use? For example, YouTube, Hulu or Amazon UnBox? Would they/you choose these sources if the works were available on DVD?

I've used Amazon Unbox; I know people who use YouTube as well. To my knowledge, people only use YouTube for sources that are entirely unavailable in any other way - YouTube captures aren't very high quality. I personally only use Amazon Unbox when the source is not available on DVD; I even replace my Amazon Unbox source with DVD footage once the DVD becomes available. In general, I think most vidders would prefer to use DVD footage, and if they're using something else, it's because DVDs aren't available to them.

6. Could you make a rough order of magnitude estimate of the number of vids you have created?

I don't even have to be that rough - I've made 59 vids so far, with one currently in progress.

7. Do you think the vidding community has a clear understanding of what the DMCA prohibits?

As a whole? I doubt it. Some vidders know more than others, but most vidders have no legal training, a lot aren't in the U.S., and many are high school or college students. From what I've seen, people have a vague sense of the concept of fair use under US copyright law - and they

may or may not have a good idea of what counts as fair use - but I don't think most vidders know the ins and outs of how US copyright law functions, including the DMCA.

8. Do you think the 2009 exemption for noncommercial uses has been helpful to the vidding community? How?

I'm not certain how many vidders know about it - there are multiple online "spaces" for vidders to talk to each other and I don't know how widely the exemption was publicized. Among the people who did know about it, I don't think it changed anyone's actual practices. I mean, I'm pretty confident no one started ripping DVDs because of the exemption. Vidders rip DVDs because they consider it necessary to make vids; they did that before the exemption and they're going to continue to do it. But things *like* the exemption - or news articles that mention vidding, or online contests that acknowledge and encourage vidding, or even things like an actor or a professional TV critic linking to a favorite fanvid - I think they generally make vidders feel a bit safer about being open about what we do, more willing to talk about it and publicize our work. Like, once upon a time, vidding was incredibly undergound and secretive; with the creation of YouTube vidding began to come out of the shadows but a lot of vidders still feared publicity, and would only make their vids available in password-protected spaces or spaces that were not well known. That's changed a lot, but at the same time, many vidders are still quite wary. (When the OTW posted seeking comments from vidders, I know there were vidders who were afraid to give comments, even anonymously). I think things like the DMCA exemption help eliminate some of the fear.

I don't think most vidders generally have a clear idea of the difference between fair use and the DMCA/DRM issues. And that means that as a practical matter, these issues matter most when they get a takedown notice, or when (very often) YT blocks them from uploading their vids in the first place. The ability to challenge those decisions would have the most direct, practical impact on how vidders operate on a day to day basis.

Interview with Elisa Kreisinger
November 19, 2011

1. Could you briefly describe what sets the political remix community apart from other clip-based video creators? Do political remixers see themselves as different from other creator communities who have been getting attention on sites like YouTube?

Political remixers create DIY videos using appropriated main stream media texts without the permission of the copyright holder, in order to comment on, critique or subvert it's original intent in some way. The result is a transformative piece that seeks to enagage general audiences. What sets this community apart from others making online video is that there's a definitive goal to engage with the source material in a critical way; to examine its message and deconstruct its meaning to then turn it around and create a new, transformative work.

2. Are most PRV makers amateurs in video editing? Are their activities generally noncommercial? Are there also "professional" PRV makers?

PRV makers are pro-sumers: they have a working knowledge of, and access to, the software and tools but they probably don't make money as professional video editors. For political remix work to be professional it would be a delicate balance: Who would be willing to pay a remixer to dismantle their brand identity which they've spent millions on creating?

One example: Green Peace's OnSlaught(er) video remix[1] was created by professionals to draw attention to the rainforests destroyed by Dove. The vidoe went viral and forced Dove to make the appropriate changes in their practices. However, these were professional video editors working for/contracted by Green Peace, not hired remix artists.

From my experiences, remix enables financial compensation in other forms: lectures, visiting artist talks, remix workshops and other speaking engagements.

3. Is the quality of the video source still important to the PRV community?

While aesthetics are important to any visual medium, the message behind a PRV is typically more important than the quality of the footage.

4. Do PRV makers rip commercially-released DVDs in order to extract clips? Others rely on video capture from analog outputs. Is DVD viewed as superior to these alternatives?
Is the question analog vs DVD?

I prefer DVD for the high quality of source material; however, I encourage women and girls to capture from analog because they usually want to respond to the TV show, movie or news of the day quickly and inexpensively without waiting for the DVD box set to be released. Whichever method can get the creator the needed source footage quickly and easily is preferable.

---

[1] Accessible at <http://www.youtube.com/watch?v=odI7pQFyjso>

5. What other sources do they use? For example, YouTube, Hulu or Amazon UnBox? Would they choose these sources if the works were available on DVD? What about Blu-Ray?

YouTube, vimeo and blip since all three allow for easy download. The quality, of course, suffers but again, the goal in PRV is typically to create a subversive message, not a masterpiece.

Many PRV makers take footage from their DVRs.

DVD would be ideal but it's costly and requires more knowledge of ripping and hacking, skills that not every YouTube user has, or wants to have.

I've never used Blu Ray and it's always more expensive. I've never seen it at the library either.

6. Do you think the PRV community has a clear understanding of what the DMCA prohibits?

No - I had to look it up.

7. Do you think the 2009 exemption for noncommercial uses has been helpful to the PRV community? How?

Yes - it gave us a legal foothold we didn't have before. Also, it illustrated how vital the role of remix is to free speech and media literacy, something we all knew but needed some white dudes to verify.

Interview with Eli Horwatt
November 14, 2011

1. Could you briefly describe what sets the political remix community apart from other clip-based video creators? Do political remixers see themselves as different from other creator communities who have been getting attention on sites like YouTube?

The political remix video community engages in transformative editing to work rhetorically with video, the way essayists do with words. Political remixers recognize the centrality of moving images in contemporary culture and have elected to work with these images, as a medium, in an effort to speak through the prism of popular culture. Unlike other video creators online, political remix video-makers are invested in using existing video as a form of address to interrogate and critique the world we live in. The spirit in which they work, as thoughtful and critical observers of mass culture, exemplifies one of the very best features of artists, as self-reflexive observers able to make us see in new ways, that which we take for granted everyday.

2. Are most PRV makers amateurs in video editing? Are their activities generally noncommercial? Are there also "professional" PRV makers?

"Amateur," latin for "lover," refers to someone who does something for no other reason than for the love of doing it. In this sense, the word "amateur" represents the activities of PRV makers. But insofar as amateur implies dilettantism, it is inappropriate. As a student of all film, PRV makers stand in history as some of the most gifted editors the world has ever seen. A defining feature of PRVs is their free circulation online, and their use of exclusively free and open distribution. I am unaware of any commercial sale of PRVs nor am I aware of any "professional" PRV makers. PRV makers are not interested in appropriating copyrighted work for the purposes of personal financial gain. They operate well-within the purview of fair use doctrine.

3. Is the quality of the video source important to the PRV community?

One of the most interesting aesthetic qualities of PRVs and a cardinal feature of the humour and incisiveness presented by PRV makers, is their capacity to mimic the qualities of commercial media. This means that editors are both able to imitate the vernaculars of commercial media (whether that be a cartoon, trailer, commercial or television program) but also to make work which looks like commercial media, with high quality rips of source material. Using high quality video of appropriated materials is instrumental to the success of a PRV.

4. Do PRV makers rip commercially-released DVDs in order to extract clips? Others rely on video capture from analog outputs. Is DVD viewed as superior to these alternatives?

I am unaware of the practices of all PRV makers, but I am mostly aware of individuals ripping commercially-released DVDs in order to extract clips. DVD usually offers the highest quality materials.

5. What other sources do they use? For example, YouTube, Hulu or Amazon UnBox? Would they choose these sources if the works were available on DVD?

The often low-resolution from lossy video files on YouTube or other sources often makes PRV makers wish to use DVD. Still these sources are often used by remixers.

6. Do you think the PRV community has a clear understanding of what the DMCA prohibits?

I think the answer is no. While many may be technically aware of the legal measures that the DMCA implies, most PRV makers believe their work falls under the umbrella of fair use, and thus trumps those restrictions implied by the DMCA. To speak of these two doctrines in tandem is to speak of an enormous contradiction in American copyright law. On the one hand remixers are protected by the right to make derivative transformative works and on the other hand are legally rebuked for doing so based on the technological requirements involved. This is a contradiction that must be resolved by giving non-commerical remixers an exemption from the DMCA.

7. Do you think the 2009 exemption for noncommercial uses has been helpful to the PRV community? How?

Yes, it is always important to differentiate artistic works which are clearly protected speech from illegal activities done in the name of piracy. There is no debate around whether PRV makers are engaged in activities which inhibit, damage or circumvent the sale of copyrighted material. Clearly the activities of PRV makers works in the public interest and should be protected with legal exemption. Conflating art with piracy poses a clear danger to the continued protection of speech in the United States.

20

I THOUGHT I MADE A VID, BUT THEN YOU TOLD ME THAT I DIDN'T

Aesthetics and Boundary Work in the Fan-Vidding Community

Katharina Freund

> Holy crap, vids are serious business.
>
> Anonymous LiveJournal user, on Fail
> Fandom Anon, LiveJournal community, 2010

After attending VividCon, the holy grail of fan-vidding conventions held in Chicago in 2009, I returned home to Australia with a grin on my face. I had been enthralled by the friendliness and enthusiasm of the vidders I met, and felt like I had become part of a unique online community. Exhausted after many hours of vid-watching, panel discussions, dance parties, and interviews, I was shocked to discover that the online community of vidders on LiveJournal had erupted into discord during my travels home. Arguments and retractions, comments and private messages had flown around discussing the changing nature of the vidding community. Due to the egocentric organization of LiveJournal,[1] I only had access to sections of this debate: much of it occurred behind members-only discussions or in private messages or emails. But the debate swirled around the changing aesthetics of vids, and the changing membership of the vidding community in an event that later became known on LiveJournal as "Vid Fail 2009."[2]

This chapter explores the complex community negotiations which occurred as a result of this event. Based on two years of ethnographic research conducted in the online and face-to-face spaces of the vidders, it discusses how this community orients itself around the perception of a shared history and shared aesthetic traditions.

Introduction to Vidding Practices

Technically speaking, a fan video (or vid) is a type of remix that takes footage from film or television and edits it to music in order to tell a story about that film or television text. Many vids focus on romantic narratives about two characters from a particular text,

such as Harry and Hermione from *Harry Potter* or Bella and either Jacob or Edward (or both) from *Twilight*. A common subset of the theme, known as slash, involves homoerotic romances such as Kirk and Spock from *Star Trek*. Type any of those sets of names into YouTube and a bevy of videos will appear, all of which match the above description.

The act of vidding, however, is a lot more complex for the vidders I studied. There is a negotiation at play in the vidding community about who gets to be "in" and what types of videos fit their understanding of what makes a vid. These boundaries between what is and is not a vid, and who is and is not a vidder, reveal the complex social and artistic arguments occurring beneath the surface of a productive group of remixers. In the case of the vidding community, relying mostly on the social-networking and blogging site Livejournal.com, these community boundaries are based along aesthetic, historical, and gendered lines. According to my research conducted from 2009 to 2011, more than 90 percent of vidders on LiveJournal identify as female.

When I asked long-time vidder and "big name fan" Laura Shapiro to explain how anyone becomes a member of the vidding community, she detailed the multiplicity of vidding communities:

> First of all, I don't believe there is *the* vidding community, I believe that there are many vidding communities, most of which I probably have no idea about. I think it's a big mistake to refer to *the* vidding community, I think when people say that they're speaking from within a vidding community that I am a member of that is where vidding began, the community that grew out of vidding's origins with Kandy Fong and out of slash fandom.[3] What I'd call the traditional vidding community, and its offshoots. But even within *this* community, that people call *the* vidding community, that I call the traditional vidding community, there are many, many communities. And so defining—definitions are hard.[4]

Definitions are indeed difficult: The vidders themselves certainly cannot agree on what constitutes the core identity of this group. As noted by Bell, the term "community" functions as a descriptor, but it is also a normative and ideological term that carries a lot of baggage.[5] The early cyber-enthusiast Howard Rheingold is most commonly quoted for his definition of online communities as "social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient feeling, to form webs of personal relationships in cyberspace."[6] Later critiques of Rheingold often denounced online communities as inauthentic, compensatory, and somehow lacking: sure "community" could not be so easily applied to digital groups, as they were so vastly different from face-to-face, "authentic" communities.[7]

Raymond Williams notes that the term "community" is particularly problematic: Unlike other terms for social organization such as "nation" or "society," it is rarely used unfavorably and carries "warmly persuasive" connotations.[8] The positive associations are noted by Baym who chose to use it precisely for its "warm, emotional resonance."[9] According to Marshall, "The vagueness of the term is part of its power. It can unify because it is imprecise. Different people using the term may have different expectations, but they can all appear to be talking similarly."[10] As the term "community" represents an idea, its use to groups is obvious: It evokes commonality, support, and friendship, and it erases difference. The debates among vidders about just what constitutes their

community and the powerful arguments supporting different viewpoints take advantage of these positive-yet-vague elements of the term.

For the purpose of this chapter, I am not interested in what "community" may mean, but rather what it means to the vidders. Following Marshall again, I believe "it is fruitless to search for the essence of community, but it is useful to see what enables a particular group to be so classified by its members."[11]

Consider the following quotes from a questionnaire I conducted with the vidders during my ethnographic research:

Q: Please add any comments you'd like to make on the vidding community, your online and offline friendships, or anything else you'd like to share here.

R1: I have found the best friends of my adult life through vidding and fandom.

R2: YouTube quality is crap. *pukes* If a vid is posted on YouTube, I most likely will NOT watch it. I've made great friends online that I could never have met offline and those friendships mean the world to me.

R3: Vidders who care about quality and learning and constantly getting better are the only people I care about. The 12 year olds on YouTube are generally not in my orbit, and people who just throw crappy clips together and call it a vid or steal clips are not part of the vidding community I hang out in. I miss the days when it was smaller.

R4: There's a strong sense of community I don't see elsewhere.

Several of these respondents (R2, R3) define the vidding community in exclusionary and normative ways: by highlighting aspects of other, inferior vidding groups (namely, those on YouTube), the superiority of their vidding group is established. YouTubers are derided as young, frivolous, and unconcerned with quality, thereby setting up the LiveJournal (LJ) vidding community as mature, thoughtful, and serious about aesthetics and narrative standards.

This tension was obvious to many vidders, such as Australian vidder Boppy:

These are "centres" for vidding and people that "hang" in any of those places are members of the vidding community. However, I find these centres limiting as well. The truth is that many, many people vid completely separately—either on their own or in other communities online—and to pretend that the vidding community has clearly defined boundaries would be a lie.

After her LiveJournal page became the focal point of an argument about inclusion in the vidding community during Vid Fail 2009, Boppy reflected about where the boundaries lie and how she felt her work and the work of many of her friends was excluded by more traditional members:

I had fans who do not have me friended, probably have never even heard of me before, show up and throw their weight around about what "is" and "isn't" vidding. I honestly don't think they could see how their behavior came across but it's exactly this sort of thing that makes people feel excluded—whether it's because they're a guy and people are going on and on about vidding being a "female" tradition, or whether it's because they've made a vid that is reverential rather than "commenting on" the source and here are these famous, long-term fans telling them that that is "not vidding."

Figure 20.1 "I thought I made a vid, but then you told me I didn't" Internet meme

While the LiveJournal vidding community claims the term "vidding" as their own, Boppy and many of the commenters on her post pointed out that YouTubers and other remix artists commonly use the term to describe their own work. The message seen in Figure 20.1 was shared privately among many vidders and vid-fans during this debate.

When I used the terms "remix" and "new media" to define vidding on my LiveJournal, it caused significant disagreement in the comments. Traditional vidders argued that if the definition of the term was expanded to include other types of remixes made by other communities, it would constitute an erasure of the female-centered history. One such comment read:

> I think that it is not just the traditional/old school vidders who would object to "new media form"—you don't have to experience it first-hand to be proud and protective of vidding's long history. "Remix" is not only a word not used by vidders, it's a word that is going to make vidding seem much younger than its 30+ years.[12]

At the vidding conventions I attended, I was approached by several individuals who quizzed me on my knowledge of vidding history. I was taken aside, along with several other first-time convention attendees, and shown some of the oldest vids that still existed, and was taught about the "grandmothers" of vidding in hotel rooms and hallways.

The Origins of Vidding

To a large extent, the origins of vidding have become mythologized by the community through their own efforts to document the history of their practice. VividCon (VVC), the central face-to-face social event of the vidding community, opens every year ritualistically with a "Genealogy of Vidding" vid show, which Coppa refers to as "an annual recitation of our history" for everyone at the convention.[13] While there are usually two tracks of parallel programming at VVC, nothing is scheduled concurrently with the history vid show so that all the con-goers are able to attend. This event is one of self-conscious community building, where the vidders come together to recount their origins and introduce newer vidders and vid watchers to the mythic origins.

According to the canonized version of fan-vidding history, vidding was created in 1975 when a *Star Trek* fan named Kandy Fong converted footage from her favorite series into 35mm slides, and used a slide carousel to click through the images in time to music. These proto-vid slideshows were shown live at conventions and in fan club meetings around the United States during the course of several years. "Fong began to videotape her results, partly because [*Star Trek* creator Gene] Roddenberry wanted copies and partly because Fong herself became interested in creating records of fannish art."[14] Few of these slideshow vids are now accessible, although Fong's very popular vid *Both Sides Now* (first shown in 1980 and recorded in 1986) is often shown at conventions even today. It is probably the only slideshow vid that newer vidders are able to view because it has been made available online.[15]

These slideshow presentations inspired other fans to make similar works, so they turned to the VCR technology of the mid-1980s. As mentioned above, these early vids were often heavily influenced by slash fandom (such as Kirk/Spock in this period). This early VCR vidding period is covered extensively by Jenkins[16] and Bacon-Smith[17] and the vidders profiled in those works are now revered as the founders of contemporary vidding aesthetics. The members of the community during this time were mostly women. Many vids during the 1980s and 1990s were made by large groups of editors known as collectives, due to the high cost of VCR editing decks and the complexity of the technology. The process was incredibly time-consuming and required several people: stopwatches and log books were used to keep track of the timing of clips needed in relation to the song used, as the VCR numerical counter rarely corresponded to an actual amount of time.

Despite the trouble, VCR vidder Gwyn fondly recalled her experiences vidding together with her collective:

> So when you're vidding with VCRs, basically someone would sit in front of the TV and the editing decks and push all the buttons, and we would all sit on the couch and give thumbs up or thumbs down to the clip choices, and stuff our faces full of junk food, drink copious amounts of soda . . . It was a group activity, and we had these monthly bashes where we would do stuff other than vidding, just hang out . . . We were all very close-knit.

The VCR vidders are highly regarded for their tenacity in creating vids using such intricate methods, and these "good ol' days" are also romanticized through such narratives. Tales of this camaraderie are often told in the convention spaces where the VCR and newer, digital vidders come into contact to highlight the differences between them.

287

Appx. 37

VCR vidding was a friendly and communal creative practice, totally unlike that of modern vidders who work alone on computers that automatically process many of the elements that were formerly painstaking processes of manual labor.

By the time computer-aided vidding arrived in the late 1990s, VCR vidding was an established part of fandom culture, and had its own distinct discourse of aesthetics, analysis, and criticism (as explained in detail below). Despite the significant advantages digital vidding held over analog, the arrival of digital vids was not initially embraced. According to Melina, who was an early digital vidder:

> Doing things with computers that you couldn't do with a VCR was seen as flashy, and frequently unnecessarily flashy. It didn't serve the vid, you were just showing off that you had a computer. Some of this I think was valid, but obviously lots of it was not.

Throughout the early and mid-2000s, vidding began to expand as the community shifted to communicating primarily through mailing lists on the Web. As vids were now shared online and more easily accessible, it became common for people to stumble across a vid posted on the Internet without already being a member of fandom. More and more vidders from outside the United States began to appear: unable to attend the US-based conventions, these "feral" vidders interacted with each other solely online and were unaware of the accepted history of the community. It is interesting to consider the use of the term "feral": somewhat disparaging, it indicates that these new vidders were seen as uncivilized and wild by traditional vidders. Gwyn was, and indeed still is, apprehensive about these "newbie vidders":

Q: Who are these newbie vidders, when did they arrive?
Gwyn: [laughs] Well, it's anyone who started vidding on computer! It was YouTube—YouTube really didn't exist four years ago, and now it's taken over the world! And then there were all these people who were coming in to vidding who had no idea there was this culture, there was this history. They thought they had invented it.

The arrival of YouTube in 2005 popularized and mainstreamed the practice of watching streaming video on the Web.[18] New genres of remix, which also appropriated copyrighted media, appeared quickly throughout this period, such as machinima (films made using video game engines), trailer mashups (creating a parody movie trailer by altering the genre), political remix videos, and many more. The closest relative of the vid, the anime music video (AMV) also migrated on to YouTube while maintaining its own domain, animemusicvideos.org. And some of these remix videos looked just like the vids made by vidders: new editors were cutting clips of television footage to music and posting it on YouTube, entirely unaware of the existence of a vidding community which claimed a 30-year history. Many of these new editors were from different countries, backgrounds, and age groups than the traditional vidding community. There were also more men now creating remix videos they called "vids," and the vids themselves also began to change as the influx brought new music, new aesthetic concerns, and also new types of edited imagery.

A tug-of-war between the established "vidding aesthetic" and these new forms began. This tension is played out through vidding reviews and commentary, both online and

face-to-face at the vid review sessions during fan conventions. Most of the stylistic traits of LiveJournal vidding are flexible to an extent in the name of innovation and play. However, if a vid is seen to stray too far from the accepted traits, or includes faux-pas elements, then it is often critiqued as a "bad vid" or "not a vid."

The source text is usually, but not always, science-fiction, fantasy, or a cult television series: *Star Trek*, *The X-Files*, *Highlander*, *Buffy the Vampire Slayer*, *Supernatural*, and *Doctor Who* have all been heavily vidded, for example. Generally speaking, a traditional type of vid focuses on a relationship from the text (which can be part of the "canon" of the text, or constructed by fans) or on a particular character and their motivations and back story; these are the shipper vid and character study, respectively. Many vidders see this focus on characters and relationships as a particularly female way of understanding media texts, and as part of what makes vidding different from other types of remix videos. While some effects can be used, they should generally be in service of the story the vid is telling rather than just demonstrating a new visual technique.

There are certain traits, which vidders agree are important to a good vid, such as "going somewhere" with the story or telling a narrative, saying something new about a character, relationship, or storyline from the television show, or recontextualizing a well-known song through interesting juxtaposition with the televisual source.

The vid *Displaced* by Canadian vidder Milly is a good example of a classic type of vid. Using footage from *Heroes*,[19] the vid explores the actions and motivations of the character Claire, and alludes to self-harm in Claire's ability to heal from any wound. The vidder uses sparing special effects such as those shown in the frames represented by Figure 20.2, and the emphasis is on the character's development throughout the series.

The traits of a "bad vid" are much more concrete, but also less well-known, particularly by newer vidders. For example, including black screen in the vid or showing the characters lips moving without dialog (known as "talky-face") are agreed to be the hallmarks of a "bad vid." Including too many flashy special effects, such as tinting the footage with a monochrome hue like orange or purple, are seen as unnecessary. This particular stylistic concern hearkens back to the earliest days of digital vidding, where VCR vidders were skeptical of effects that could not be accomplished via the VCR, and were thus not part of the accepted aesthetic style of vidding at the time.

The vidder jescaflowne, who came to vidding from the closely related AMV community, took these gaffes to the limit in the vid *Another Sunday* (Figures 20.3 and 20.4). Using footage from *Stargate: Atlantis*[20] set to Jefferson Starship, jescaflowne uses every filter, cheesy effect, and slow-motion trick available. The vid was a surprise hit on the convention circuits for its over-the-top take on the source material.

Figure 20.2 Screenshots of *Displaced* by Milly (courtesy of Milly)

Appx. 39

Figure 20.3 Ronon Dex (Jason Momoa) sparkles in this screenshot from *Another Sunday* by jescaflowne (courtesy of jescaflowne)

Figure 20.4 The original shot of Teyla Emmagan (Rachel Luttrell) in *Another Sunday* is overlaid with a green color wash (courtesy of jescaflowne)

Interestingly, the fan-written wiki, Fanlore, points to the vidder's origins in AMV editing as part of the reason as to why it is different from traditional vids:

> *Another Sunday* is also representative of the anime music video [amv] aesthetic as applied to live action vidding; . . . Jescaflowne comes to live action by way of amvs, and brings a fast-cutting, highly spectacular, colorful and almost cartoon-ish style to live action footage.[21]

While the vid was wildly popular when it premiered, it is remembered for toeing the line between what is acceptable for vids and what is more common in other remix video communities.

Many newer vidders expressed confusion at the feedback they received in reviews, as the aesthetic rules they were breaking were not clear to them. For example, Keerawa premiered one of her first vids at VividCon in Chicago, and was surprised at the negative reaction to the inclusion of a voiceover she had recorded at the beginning and end of the vid: "I think I'm breaking some really big rule that I didn't even know existed." This was echoed by several other vidders, including Vinny who similarly felt like she was violating a rule that she had never heard of when she used the black screen in her first vid premiere at VividCon:

> I'm still struggling to get to know more about the genre, about the history of it. During the critique, one of the mentions was that apparently using lots of black footage is like breaking wind in an elevator! [laughs] Before this I had no idea that was a faux pas, I mean I'd read stuff in comments [on LJ] saying you shouldn't use lots of white flashes but I guess this is just telling me I still have a ton to learn.

One vidder known for pushing the boundaries of what is acceptable commented, "It's been said that I'm fearless, which is kind of true. But it's more that I don't realize when I should be fearful or resist."[22]

A long-time vidder, who had previously worked in the AMV community, pointed out that the vids that get roundly panned at the vid review panel at the conventions tend to be those that include aesthetic elements that the community is not familiar with:

> Chloe: I wouldn't say it's reluctant to change, because I don't think it is at all, it changes all the time, but it's a community that's very wide in ages, so you have those really young people who are probably exploring more and trying new things, and the community that's in a really safe place, where it doesn't really want to—I mean, it knows what it wants to do and it's willing to evolve in that line, but it takes a little probing to send them exploring.

This is also at work in the vidding community: I heard much discussion as to the differences between LiveJournal and YouTube vidders, and between LiveJournal vidders and AMV editors as well. In these discussions, vidding was said to be older, more critical, thoughtful, and less focused on special effects. In his work on the free software movement, David Berry analyzed the specific discourses that were being employed by different groups.[23] The use of terms such as "we" and "they" help the different software groups define their boundaries between the in-group and the out-group. When reading the

291

material published by these groups, he notes, "These subject positions are treated as a dichotomy and the reader is assumed to be supportive of the FSF [Free Software Foundation] objectives, a friend and colleague—or if not, an enemy."[24] He also points out that these groups spend a great deal of time explaining how they are different from other open source advocacy groups, even though they are quite similar and overlap in their membership. By defining themselves as the "first" remix video community, particularly as the first female remix video community, vidders are able to legitimize themselves as the most authentic, and therefore best type, of video remix in the face of newer, male-dominated ones.

With the rise of other forms of remix on YouTube in the beginning of the twenty-first century, vidding practices that had existed since 1975 found themselves in danger of "being written out of the history of remix," according to Francesca Coppa in her presentation at the DIY Video Summit in 2008.[25] She continued: "[The popular conception is] that guys have been remixing mass media since 1994, or 1991 if you're talking about machinima, so we really want to say, no, women have been remixing mass media since 1975."[26] This history of vidding is explicitly gendered. It is extremely important to the identity of this community to identify their origins as older than the other forms of remix, and specifically to point out that this is a *women's* practice.

As Gwyn explains:

> We [women] don't get to see the stories we want to see. Most TV and certainly movies are done for a male audience, eighteen to thirty-four . . . and they are not making the entertainments we necessarily want to see. We see all these other texts inside these things. So we have to take what is given to us and instead show the world how we see it; I'm going to make what I want to see.

Vidders resisted making broad generalizations about "women's vidding" and "men's vidding" and were quick to explain that vidding doesn't mean that the participants are only interested in romance. Gwyn herself pointed out that she likes making violent, action vids. But the emphasis on characters and relationships in vids, prominent vidder Laura Shapiro explained to me at VividCon, "are values associated with femaleness." In interviews, vidders commonly described their practices as a method of writing back, or against, the televisual source material as a way to critique or rewrite the text against the intentions of the (male) creators and writers. An increase in the number of male participants in the community has also led to fears that the women's space of fan-vidding conventions and LiveJournal circles may be changing.

Conclusion

There have been several calls out to the community to encourage more inclusivity in defining the anatomy of a vid, and characteristics of a vidder. In response to a convention panel entitled *What Do We Want From Vids Now?* one vidder wrote:

> The discussion had such a subtext of anxiety at certain points, a sense that we were in danger of losing something or losing control of something as vids become less an orphan art and expand out to meet a world of new media that is also rushing in to meet us. At least two people said, and said sincerely, that they were "not interested in policing the boundary between what is and isn't a

Appx. 42

vid," but I felt that there was a lot of repressed desire in the room to do so . . . I really wanted to ask: What is it we are anxious about? . . . Because change is coming to us whether or not we go out to meet it.

So what is it that vids that push the envelope make us fear? Loss of definition as an artform, as a community, when we can no longer clearly say what is a vid and what isn't? Invasion by hostile forces that don't understand (boys!) or that simply outnumber us, so that we get swamped and lost, when the boundaries between fanvidder and other new media artist blur?[27]

Most of the comments on this post were supportive of other new media forms of remix, but simultaneously protective of their particular community as a female-dominated and critical response to media texts. Or, as Australian vidder Boppy put it, "The LiveJournal—slash—female-dominated vidding community does not have a monopoly on vidding and the sooner they realize that the better."

Vidders are now more visible as they communicate online, and media participation through remix and editing has become a much more common practice. The appropriative elements of fan culture have spread with the development and dissemination of interactive, Web 2.0 technologies and platforms.[28] The community has also moved more into the open, and begun sharing vids using more public platforms such as YouTube, Tumblr, and Vimeo. These new spaces bring them into more and more contact with new types of vids. Despite many efforts to preserve traditional vidding styles, the genre changes every day and many contemporary vids would be unrecognizable to the early VCR vidders.

While vidding is a comparatively small fan practice, this study of amateur video producers has provided historical and cultural context of a community engaged in practices that are currently at the forefront of public attention in light of recent copyright battles between governments, media industries, users, and Web 2.0 service providers.

Vidders provide valuable insight into the historical origins of remix culture, and demonstrate that there has not been a paradigm shift in the role of the audience with the advent of digital media and participatory culture. Rather, new media formats, such as the remix video, did not arise unbidden, but represent the long-standing desire for audiences to participate in and personalize their media.

Notes

1 danah boyd, "Friends, Friendsters, and Top 8: Writing Community into Being on Social Network Sites," *First Monday* 11, no. 12 (2006).
2 The event changed from a straightforward debate about these topics to a "fail" after the debate turned to argument, and often became personal attacks which left the community in turmoil.
3 Kandy Fong and the origins of vidding in slash fandom will be discussed further below.
4 Unless otherwise indicated, all quotations from vidders or other communities members are based on personal interviews with the author conducted during ethnographic fieldwork.
5 David Bell, *An Introduction to Cybercultures* (London: Routledge, 2001), 93.
6 Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Reading, MA: Addison-Wesley Publishing Co., 1993), 5.
7 Kevin Robins, "Cyberspace and the World We Live In," in *The Cybercultures Reader*, ed. David Bell and Barbara M. Kennedy (London: Routledge, 2000).
8 Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford: Oxford University Press, 1976).
9 Nancy K. Baym, *Tune In, Log On: Soaps, Fandom, and Online Community* (Thousand Oaks, CA: Sage Publications, 2000), 2.

10 John Paul Marshall, *Living on Cybermind: Categories, Communication, and Control*, vol. 24, New Literacies and Digital Epistemologies (New York: Peter Lang, 2007), 214.

11 Marshall, *Living on Cybermind*, 275

12 This comment was collected anonymously during online ethnographic data collection.

13 USC School of Cinematic Arts, "Genealogy of Vidding with Francesca Coppa—'24/7 a DIY Video Summit'" (University of Southern California, 2009).

14 Francesca Coppa, "Women, *Star Trek*, and the Early Development of Fannish Vidding," *Transformative Works and Cultures* 1 (2008): para. 3.3.

15 Francesca Coppa, "Celebrating Kandy Fong: Founder of the Fannish Music Video," in *In Media Res*, 2007, http://mediacommons.futureofthebook.org/imr/2007/11/19/celebrating-kandy-fong-founder-of-fannish-music-video.

16 Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (New York: Routledge, 1992).

17 Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (Philadelphia: University of Pennsylvania Press, 1992).

18 Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Cambridge, MA: Polity Press, 2009).

19 *Heroes*, created by Tim Kring. NBC, 2006–10.

20 *Stargate: Atlantis*, created by Robert C. Cooper and Brad Wright, Sci-Fi Channel, 2004–09.

21 Fanlore, *Another Sunday*, http://fanlore.org/wiki/Another_Sunday.

22 This individual preferred to remain anonymous.

23 David M. Berry, *Copy, Rip, Burn: The Politics of Copyleft and Open Source* (London: Pluto Press, 2008).

24 Ibid., 167.

25 As a point of interest, Coppa is also a founding board member of the Organization for Transformative Works.

26 USC School of Cinematic Arts. "Genealogy of Vidding with Francesca Coppa—'24/7 a DIY Video Summit.'" University of Southern California, 2009.

27 The location of this post has been kept anonymous to protect the identity of the poster.

28 Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006).

Bibliography

Bacon-Smith, Camille. *Enterprising Women: Television Fandom and the Creation of Popular Myth.* Philadelphia: University of Pennsylvania Press, 1992.

Baym, Nancy K. *Tune In, Log On: Soaps, Fandom, and Online Community.* Thousand Oaks, CA: Sage Publications, 2000.

Bell, David. *An Introduction to Cybercultures.* London: Routledge, 2001.

Berry, David M. *Copy, Rip, Burn: The Politics of Copyleft and Open Source.* London: Pluto Press, 2008.

boyd, danah. "Friends, Friendsters, and Top 8: Writing Community into Being on Social Network Sites." *First Monday* 11, no. 12 (2006).

Burgess, Jean, and Joshua Green. *YouTube: Online Video and Participatory Culture.* Cambridge, MA: Polity Press, 2009.

Coppa, Francesca. "Celebrating Kandy Fong: Founder of the Fannish Music Video." In *In Media Res*, 2007, http://mediacommons.futureofthebook.org/imr/2007/11/19/celebrating-kandy-fong-founder-of-fannish-music-video (accessed August 10, 2014).

———. "Women, *Star Trek*, and the Early Development of Fannish Vidding." *Transformative Works and Cultures* 1 (2008).

Fanlore. "Another Sunday." http://fanlore.org/wiki/Another_Sunday (accessed May 1, 2014).

Jenkins, Henry. *Textual Poachers: Television Fans and Participatory Culture.* New York: Routledge, 1992.

———. *Convergence Culture: Where Old and New Media Collide.* New York: New York University Press, 2006.

Marshall, John Paul. *Living on Cybermind: Categories, Communication, and Control.* Vol. 24, New Literacies and Digital Epistemologies. New York: Peter Lang, 2007.

Rheingold, Howard. *The Virtual Community: Homesteading on the Electronic Frontier*. Reading, MA: Addison-Wesley Publishing Co., 1993.

Robins, Kevin. "Cyberspace and the World We Live In." In *The Cybercultures Reader*, edited by David Bell and Barbara M. Kennedy, 77–95. London: Routledge, 2000.

USC School of Cinematic Arts. "Genealogy of Vidding with Francesca Coppa—'24/7 a DIY Video Summit.'" University of Southern California, 2009. YouTube video. http://www.youtube.com/watch?v=aYdllH7jZxg (accessed August 8, 2014).

Williams, Raymond. *Keywords: A Vocabulary of Culture and Society*. Oxford: Oxford University Press, 1976.

Appx. 45

Interview with Professor Francesca Coppa

Muhlenberg College / Organization for Transformative Works

November 18, 2011

Professor Francesca Coppa is the founding Director of Film Studies at Muhlenberg College as well as a founder and current board member of the Organization for Transformative Works (OTW), a nonprofit organization dedicated to celebrating and preserving fanworks and fan practices, including vidding.

She has written and lectured extensively on vidding and directed a series of short films explaining vidding to middle and high schoolers for MIT's New Media Literacy project.[1] She is also the director of the OTW's "Vidding History" project, which is documenting the oral history of some of the first vidders. She is currently at work on a book called *Vidding: A History of Fan Music Video*. Her lectures and publications on vidding include:

"Pop culture, fans, and social media," in *Routledge Handbook of Social Media* (edited by Theresa Senft and Jeremy Hunsinger; forthcoming, 2012)

"An Editing Room of One's Own: Vidding as Women's Work" p. 123-130 and "How To Suppress Women's Remix" (co-written with Rebecca Tushnet) p. 131-138 in *Camera Obscura*, Duke University Press, Volume 26, 2011.

"A Fannish Taxonomy Of Hotness." *Cinema Journal, 48:4* Summer, 2009, p. 107 - 113.

"Vidding," for Women in Science Fiction and Fantasy: An Encyclopedia, ed. Robin Reid (North Carolina: Greenwood, 2008)

"Women, Star Trek and the Early Development of Fannish Vidding," for *Transformative Works and Cultures*. Issue 1, September 15, 2008.[2]

"A Brief History of Media Fandom," in *Fan Fiction and Fan Communities in the Age of the Internet*, ed. Hellekson & Busse, (MacFarland, 2006) p. 41-59.

Curator, In Media Res, an experiment in collaborative, multi-modal scholarship sponsored by Media Commons.

Public Talk, "Fair Use and Remix Culture: Transforming Consumers into Makers of Culture," *Yale Law Tech Speakers Series*, Yale University, September 21, 2011. [3]

Panelist, *Transmedia, Hollywood 2*: Visual Culture and Design, April 8, 2011. UCLA.[4]

Public Talk, University of Pennsylvania Cinema Studies Faculty Colloquium, Dec 1, 2010. Talk: "Remix Before YouTube: Analog Remix."

---

[1] Available at <http://techtv.mit.edu/tags/2522-otw/videos>.

[2] Available at <http://journal.transformativeworks.org/index.php/twc/article/view/44>.

[3] Available at <http://www.youtube.com/watch?v=yVzKgxhGdUc>.

[4] Available at <http://vimeo.com/25691436>.

Public Talk, "Fan Art as Counternarrative: Responding to Popular Culture." Cooper Union's Interdisciplinary Seminar, November 9, 2010.

Panelist, "Theory of Remix: Part I," at Open Video Conference, October 1, 2010.

Curator, with Elisa Kreisinger, Vidding Exhibition for Open Video Conference, October 1-2 2010.

Public Talk, Bard College: "Minority Report: Fan Works and Multicultural Voices." March 4, 2010.

Panelist, "Musical Literacy," in "Participatory Cultures: From Wikipedia to Vidding," *Digital Media and Learning*, MacArthur Foundation, Feb 19, 2010.

Public Talk, "Things We Don't Have in the Future…And How Fan Arts Can Help!" *ReMix, ReWrite, ReAct*, University of the Arts, September 23, 2009.[5]

Panelist, "Who Owns Pop Culture? Remix and Fair-Use in the Age of Corporate Mass Media," *Open Video Conference*, NYU Law School, June 20, 2009.

Co-organizer and presenter, *IP/Gender* interdisciplinary Spring 2009 conference, American University School of Law, April 23-24, 2009. Presentation: 'Swap Audio?' Theorizing Music in Fan Vidding." Moderator: "Is There A Text In This Work? Transformation Beyond the Written Word."

Panelist, "Women's Work" (with Rebecca Tushnet). Gender on the Frontiers: Confronting Intersectionalities. *Columbia Journal of Gender and Law Triennial Symposium*: April 10, 2009.

Invited Speaker, "Opening Roundtable on Mashup, User-Generated Content, and the Future of Cultural Production," and "Mashup as Political and Social Expression" at *Mashup: The Future of Cultural Production and Ownership.* March 12-13, 2009. The Ohio State University Moritz College of Law.

Panelist, "Media Cannibals: A History of Vidding Women," IP/Gender: Mapping the Connections (American University School of Law, April 4, 2008).

Speaker, "Media Fetish: The Vidshow," Beyond Queer: The Spectacle of the Performing Body (Brown University, April 6, 2008).

Panelist, "From Number One to First Lady: Trek's Christine Chapel and the Development of Fannish Music Video," Slash 3: The Final Cut (Leicester, UK; Feb 25, 2008).

Presenter, "Genealogy of Vidding," 24/7: A DIY Video Summit (February 8-10, 2008; School of Cinematic Arts, University of Southern California)[6].

Panelist, "'We are controlling transmission': Female Video Editors and the Literary Music Video," "Creative Transformation: Specificity and Continuity in Unofficial

---

[5]   Available at <http://blip.tv/francesca-coppa/things-we-don-t-have-in-the-future-and-how-fan-arts-can-help-3118672>.

[6] Available at <http://www.youtube.com/watch?v=aYdllH7jZxg>

Creative Authorship," MIT5: Creativity, Ownership, and Collaboration in the Digital Age (MIT, April 27-29, 2007).

Panelist, "Media Cannibals: A History of Vidding Women," Inside/Outside: The Gaze and PsychoAnalysis. Feminism(s): Film, Video, and Politics Symposium. (University of Hartford, April 21, 2007).

1. Could you briefly describe what sets the vidding community apart from other clip-based video creators? Do vidders see themselves as different from many more recent creator communities who have been getting attention on sites like YouTube?

Vidders, who are overwhelmingly female, differ from many other DIY video communities in their aesthetics and purpose. Many vidders create vids to analyze or supplement their mainstream film and television viewing, to draw out their preferred subtextual readings or otherwise reframe visual and narrative elements of mass media storytelling.

Vids are visual essays that respond to a visual source. Many vidders use music to create, extrapolate, or analyze the relationships between television and film characters, or to articulate a character's otherwise opaque interiority. (One of the first VCR vids ever made, in 1980, set the Who's "Behind Blue Eyes" to a single, wavering frame of Starsky from *Starsky and Hutch*--the best she could do—thereby imputing an interiority and emotional subjectivity to the Starsky character that the show never gave him.)

Vidders were making "user-generated content" long before the internet and the rise of digital culture. The organized vidding community dates their art form from the slideshows that Kandy Fong made in 1975, and there was a twenty-five year period where VCRs were the dominant technology. Many of the aesthetic and technical problems vidders face existed before the web and digital video. For example, vidders have always wanted the cleanest, sharpest source, to isolate the most beautiful frames, to be able to tint footage or otherwise create emotionally meaningful color palettes. They're now artists working with digital tools, but they're trying to solve technical problems and work to aesthetic standards that predate the digital world.

2. Are most vidders amateurs in video editing? Are their activities generally noncommercial? Are there also "professional" vidders?

Most vidders are amateurs, though in the years since the exemption I have seen more vidders studying filmmaking or digital film editing at school and who aspire to become, or do become, professionals. This reflects a change in high school and college curricula to include digital literacies; my college, Muhlenberg, added a film studies major with a production component to its offerings in 2006, when digital tools made video production affordable. It is also more and more common for people to know digital art programs like Photoshop and After Effects, which are both often used in vidding. That being said, historically many of the best vidders had art training (drawing, painting, graphic design), and others have, or also have, technical or computer backgrounds. This latter point is important: vidding women, then and now, tend to be women who are not afraid of technology, and they tend to see vidding as a series of technical and aesthetic challenges without being particularly aware of the legal issues associated with those technologies. The vidding community continues to be a great source of technical and aesthetic mentoring; it is also increasingly trying to help vidders navigate legal questions, though this is

still within a relatively small circle compared to the exponentially growing number of vidders and other remix artists in the post-YouTube era.

Vidding is, at the moment, still entirely noncommercial. Most vidders just want to share their work with like-minded fans, and so will stream their vids online, offer them for download, or give DVDs away at conventions. Some vidders charge for the cost of the DVD discs or for shipping. (I saw my first vids on VHS, on a tape that was mailed to me at cost.) This noncommerciality is both due to fandom's "gift culture," which is a culture of creative exchange, but also because historically, many vidders were convinced that their work was illegal.

That being said, noncommercial does not mean "not serious." Vidders take their art seriously, and there is a culture of public review and criticism modeled on the art review of art schools. There is a community that makes "Vidder Profiles" - documentary films that interview notable vidders and examine their artistic careers and preoccupations[7] – and a community devoted to doing "DVD Commentaries" of notable vids[8] as a form of analysis.

Moreover, vids are also being recognized as "art" outside the community. I have published my own work on vidding in film and media journals like *Cinema Journal* and *Camera Obscura*. Vids have appeared in gallery exhibitions (Lim's vid "Us" appeared in an exhibition entitled "Mediated" at the California Museum of Photography January 24, 2009 - April 4, 2009[9]) and been profiled by major national news outlets, including New York Magazine[10], Reason Magazine[11], and National Public Radio.[12]

3. Do vidders frequently rip commercially-released DVDs in order to extract clips? It sounds like some vidders use .avis downloaded from unauthorized BitTorrent sources (are all the source materials available that way? obscure shows?). Others rely on video capture from analog outputs. Is DVD viewed as superior to these alternatives? What about Blu-Ray?

Vidders want the best-looking footage available, and will rate "crisp source" highly when discussing a vid's merits. While there are some folks who still capture, capturing is more expensive, requires more technical expertise, and typically looks less good. Ripping from DVDs tends to get you better source than downloaded .avis, which are frequently recorded off broadcast television, and may be low-resolution or have bugs or other visual artifacts. Downloading is enabled by file compression, but vidders don't want compressed files, which can't withstand the processing that is now common with digital tools without breaking up or getting muddy.

So vidders typically want the cleanest, biggest clips their systems can handle, because they want to transform/rework the footage in various ways—changing speed or color, adding effects, creating manipulations, masking out elements, only using a portion of the frame—and the better the footage you start with, the more you can do with it. Vis a vis Blu Ray, my own sense is that,

---

[7] See their YouTube channel at http://www.youtube.com/user/vidderprofile.

[8] Vid Commentary community at <http://vid-commentary.livejournal.com/>.

[9] See the exhibition catalog at <http://www.forger.com/pdfs/MEDIATED-Catalog.pdf>

[10] Logan Hill, The Vidder, New York Magazine, Nov. 12, 2007, available at <http://nymag.com/movies/features/videos/40622/>.

[11] Jesse Walker, Remixing Television, Reason Magazine. August/September 2008.

[12] Neda Ulaby, Vidders Talk Back To Their Pop Culture Muses, NPR, February 25, 2009. <http://www.npr.org/templates/story/story.php?storyId=101154811>

at the moment, most vidders – who are, as I said, amateurs – simply don't have the computer processing power to handle Blu-Ray footage yet, though the few vidders who do are admired for the "shininess" of their source. I suspect, however, that this is only a matter of time: as computers get more powerful, vidders will inevitably begin to use Blu Ray because it is simply best to start any artistic manipulation with the largest, least compressed image available.

Vidders have always sought the best source available, even before DVDs. First generation broadcast tapes (VHS taped off television) were prized; in the days before everything was on DVD, you might only have seen an old show because someone had double-taped their tapes for you, so most vidders were working from tapes of tapes of tapes. Vidders raced to buy the first professional VHS sets of popular fannish shows like *Star Trek* and *Highlander* when they became available, though few TV shows made it to professional VHS. Vidders then bought the DVDs of those same shows when they became available, and are likely customers for anything with bonus footage or extended editions. (For example, the blooper clip version/easter egg clip of Yoda dancing that appeared on the *Star Wars* extended edition was featured in a vid; more recently, a first, unaired version of the pilot episode of the BBC's *Sherlock* which was on the DVD set has been used by vidders to extend the amount of available footage.) It is also worth noting that vidders tend to keep every version of a beloved source, so many Star Wars vidders are holding onto their VHS cassettes of *Star Wars* to vid with since Lucas changed the source in subsequent editions.)

4. What other sources do they use? For example, YouTube, Hulu or Amazon UnBox? Would they choose these sources if the works were available on DVD?

Vidders also use YouTube and Unbox (I don't personally know of any who use Hulu but then again, most vidders don't advertise what sources they use in their blurbs, so I only have knowledge of a relatively small sample of vidders whose work I've had the chance to discuss with them; I presume that some vidders have used Hulu.) I know that all of these are considered inferior to DVD in quality and would only be used 1) if nothing better was available, and it was important to make the vid sooner rather than later so as to be part of a critical conversation of the moment or 2) if "YouTube video" was itself the effect. An example of the first kind of vid is Giandjua Kiss's vid "It Depends On What You Pay," which uses Amazon Unbox footage of Joss Whedon's short-lived television *Dollhouse* to argue that the show's central conceit – of a woman with no memory who you can rent – is akin to rape. The show was soon cancelled, and so the vid's timeliness was an issue. An example of the second kind of vid is Obsessive 24's "Piece of Me,[13] which argues that Britney Spears is the victim of exploitation by the industry, her family, and the camera itself. Obsessive 24, one of the best vidders working, and one who typically produces vids with very high-quality visuals, chose in this video to contrast the glossy self-promotional DVD footage of Spears (she bought a DVD of Britney's Greatest Hits specifically to make this vid) with tabloid photography and pixellated YouTube videos, including user-generated videos by others ("Leave Britney Alone!" the tearful plea of internet celebrity Chris Crocker) and gossip show footage covering her various scandals and breakdowns.

---

[13] For more about "Piece of Me," see Coppa, Francesca. "An Editing Room of One's Own: Vidding as Women's Work" in *Camera Obscura*, Volume 26, 2011 p. 123-130.

5. Could you make a rough order of magnitude estimate of the number of vids that have been created by self-identified vidders?

By self-identified vidders, tens of thousands easily. That number goes into the millions if you look at YouTube and what organized vidders sometimes call the "feral" vidders—vidders who have been inspired by vids they've seen, or have just invented some version of the idea for themselves without becoming involved in an organized community of self-identified vidders.

6. Is the quality of the video source important to members of the vidding community?

Yes, very much so, see question four, above. I want to reiterate again that vidders are visual artists. They are deeply invested in aesthetics. They want to make smart vids that are also beautiful. And the better the source footage you start with, the more you can do to it, the "shinier" it looks. All vidders value aesthetics, though there are other factors involved in when and how the work is created. While some vidders might make a vid quickly, almost urgently, as part of a current cultural conversation about a television show or film, others can spend easily half a year working on a single video, often working on it frame by frame like a painting.

7. Do you think the vidding community has a clear understanding of what the DMCA prohibits?

The organization I helped found, The Organization For Transformative Works, has tried hard over the last two years to disseminate information about the DMCA exemption for noncommercial remixers, and we have had some success in the sphere of self-identified, organized vidders. However, we are a small nonprofit and there are many vidders out there; it is inevitable that our blog posts and outreach efforts have limited reach, especially when many are still receiving automated takedowns from YouTube and other sites. For most vidders, the big legal (and ethical) line remains between "paying" and "not paying" for source footage; vidders tend to feel that if they've paid for the DVDs, they have the moral right to make art out of them.

8. Do you think the 2009 exemption for noncommercial uses has been helpful to the vidding community? How?

Absolutely. We at the OTW have been cheered by blog comments and emails from vidders and other noncommercial remixers who have told us that the exemption emboldened them to counternotify in the face of a YouTube takedown and that their work has subsequently been restored. The DMCA is a large part of that confidence: many vidders now understand that their use of the cultural material was fair and that they didn't break any laws by ripping their DVDs either. It is so crucial for vidders to have confidence in the legitimacy of their work and the validity of their speech, and I do believe that the DMCA exemption has given that to vidders.

Interview with Jonathan McIntosh
November 17, 2011

1. Could you briefly describe what sets the political remix community apart from other clip-based video creators? Do political remixers see themselves as different from other creator communities who have been getting attention on sites like YouTube?

Political remix is a broad category of transformative works that focus on topics ranging from government policy and political elections to issues of race, sexuality and gender representations in mass media productions. Political remix makers may or may not overlap with other clip-based video communities. Certainly there exists a small subsection of dedicated video creators who see themselves primarily as political video remix creators but I would venture to say that the majority are simply simply feel strongly about a particular issue and are compelled to make an audiovisual statement about it. One thing that distinguishes political remix works is the tendency to be highly critical of and/or very unsympathetic towards the source media.

2. Are most PRV makers amateurs in video editing? Are their activities generally noncommercial? Are there also "professional" PRV makers?

Many political remixers start out as video editing amateurs inspired to create a remix because of their passion for an issue and a desire to engage in a public, media-based debate on that issue. They may learn the technology specifically to make their audiovisual commentary. That said, many quickly become experts in video making as they continue to make remix videos. While the majority of political remix video is noncommercial, some remixers do go on to create remix video works for companies, non-profits or political campaigns. More recently, non-profit organizations in particular have become interested in using fair use remix videos in their campaign strategies, which has increased the number and variety of politically-orientated transformative works being created.

3. Is the quality of the video source important to the PRV community?

Yes the quality of the video source is important for a number of reasons. First, because higher resolution sources, like HD and Blu-ray, allow for cropping, zooming and other video effects which can be essential to the audiovisual argument being made. The ability to crop or zoom in on the media source (without the distortion, blurring or pixelization that comes with lower quality web video sources) is a critical tool for remixers who wish to highlight or focus on one figure or element in a piece of video footage. These techniques are employed in a wide variety of ways by remixers, including: zooming in on a figure's lips as he or she speaks, cropping out other figures in the frame, focusing on one person in a group, highlighting reactions, gestures, actions or facial expressions, etc. Second, because of the standards set by Hollywood and professional media organizations, the use of high quality footage is important because it tends to add a sense of legitimacy to a audiovisual argument; for better or worse, higher quality video footage tends to be taken more seriously by the public. Third, if the remixed video work needs to be screened outside of a small web-based video box - for example, on larger tv screens or via video projection - higher resolution source media will make those transitions much better.

4. Do PRV makers rip commercially-released DVDs in order to extract clips? Others rely on video capture from analog outputs. Is DVD viewed as superior to these alternatives?

Political remixers collect clips from a wide variety of sources including from ripped DVD (and increasingly from HD/Blu-ray discs). The discs are superior because the remixer can get the original and best quality footage directly from the source. Discs allow remixers to pull or rip only the portions of the source footage they intend to use in their remix rather then download the entire film or series to their computer first. Disc ripping also allows remixers to control the quality, aspect ratio, frame-rate and codex used to import the footage into their video project (which can be important for matching other source footage from other sources). Additionally many remixers also make extensive used of DVD/Blu-ray disc extras in their mash-up video projects - these extras include deleted scenes, interviews, making of videos and trailers - many of which can only found on the actual commercially-released discs.

5. What other sources do they/you use? For example, YouTube, Hulu or Amazon UnBox? Would they/you choose these sources if the works were available on DVD?

Political remixers often rely on the fair use of news footage, TV show and Hollywood films clips as well as documentary films clips for much of their source media (in addition to the 24 hour news channels, shows like PBS's *Frontline* and Comedy Central's *The Daily Show* are popular sources). I and other remixers tend to use the best footage that is readily available: this includes downloading video source from YouTube, Hulu or iTunes-style services as well as stream-capturing/recording from Netflix or Amazon style streaming services. As a last resort, remixers will use screen-capturing tools but the results can be unreliable depending on video buffering and/or end user bandwidth speeds.

Online streaming/downloading can be the only option to gather footage if the physical DVDs are difficult to find locally or have gone out of print (as is often the case especially with older, independent or small scale documentary productions). Even when commercial DVDs are available for purchase, the creation and publishing of a remix video may be extremely time-sensitive if it focuses on a current issue in the news cycle. In these time-sensitive cases waiting for the physical disc to arrive via snail mail would mean the remixer might miss the window of public debate on the topic they wish the address in their remix so the ability to quickly acquire high quality footage directly from the Internet is critical. Examples of time-sensitive remixes might include responding to statements by a celebrity or public figure, discussing a political campaign, or commenting on piece of legislation while its being debated.

A great many of the popular news and commentary TV programs are simply not available on DVD and most likely never will be and so remixers can either try to record TV live which is expensive, time consuming and does not guarantee capturing the exact media moments they may want to comment on - or they can get search and gather the specific footage they need from online sources.

6. Could you make a rough order of magnitude estimate of the number of vids you have created?

Personally I have made about 25 transformative remix videos of various lengths and levels of complexity. Some have been ad or trailer spoofs while others are more in-depth narrative short film remixing projects. My remix videos have commented on issues of gender, foreign policy, race, economics, corporate power, elections, and mass media.

7. Do you think the PRV community has a clear understanding of what the DMCA prohibits?

My sense is that it varies from creator to creator. Certainly those of us who have been making critical remix videos for a number of years and have formed a small community around the practice are more familiar with the DMCA. Most often makers are simply interested in creating a video to add to the larger public debate on important or contentious topics of the day and only become aware of the DMCA after a takedown notice or other run ins with IP concerns.

8. Do you think the 2009 exemption for noncommercial uses has been helpful to the PRV community? How?

Critically important. Before the exemptions many remixers would be afraid of making a fair use video commentary with DVD footage even if they owned the disc(s). Some remixers, including myself, would resort to using the bit torrent file sharing protocol to download DVDs ripped by others rather than decrypting the DVDs from our own home collections.

Statement from Killa
November 17, 2011

Last year's decision regarding the DMCA's provision on copyright was extremely meaningful to me as a vidder and creator of remix art. I feel that our particular form of remix art is part of a vibrant and important conversation about mass media and mass entertainment. More than that, I think TV and movies are our popular literature, and that vidding is a form of artistic discussion that enriches my life, helps me create friendships, and gives me things to spend money on. I have purchased thousands of dollars in commercial DVDs that I would not have bought if I were not a vidder—sometimes for shows I've never even watched before, because the conversation of vidding means that I learn about new shows and movies and want to make them a part of my fannish experience. (I recently bought a four-season set of DVDs for the show Blake's 7, which aired when I was eight years old. I would never have heard of this show or had any interest in buying these DVDs if it were not for seeing vids made with them, and wanting to incorporate them in a vid I'm currently working on.)

At the present, I vid almost exclusively with DVD and Blu-Ray source. I have attempted to use screen capture to vid with source from Hulu.com, but without success. The quality was not sufficient for vidding purposes. Specifically, I was trying to capture the TV show *The Invisible Man*, which never had a season 2 DVD release. Because vidding is a largely visual medium, the quality and sharpness of the images are powerful tools in communicating my ideas to an audience. Color, motion, composition, and facial expressions, as well as other details, are all part of the piece. I have a Bachelor's in Fine Arts and am a professional graphic designer, so visual precision is extremely important to me in communicating ideas. (Incidentally, I purchased a membership to Hulu Plus in the course of attempting to capture the images I wanted. If the capture had worked, I would have remained a subscriber for the chance to obtain other source in the same way. This is another example of how vidding is an art form I am more than willing to invest money in, and how I am happy to support the content creators in any way I can in the pursuit of that art.)

In one case last year, I did use HD (high definition) source from iTunes. I was making a vid for a show that was currently airing. I owned the DVDs for the previous four seasons of the show, but needed clips from a recent episode. The vid was timely, and had to be presented immediately to have relevance to its audience, so I couldn't wait for the DVDs to be released if I wanted to make the artistic statement I envisioned. The vid was extremely well-received, thanks to that timeliness. I don't feel the vid would have been nearly as strong, or artistically sound, if it had had TV network logos on it, or the image had been small and pixelated.

Like many vidders, when DVDs for shows I use to vid become available, I purchase them to support the show's creator, and because I know that if I want to make future vids, the quality of the image would be vital and I would want to have the best

possible source.

My story is a small one, but very typical of those I've met in the vidding community. I hope that the provisions which protect the use of DVD source will be upheld, and that one day, content providers will understand that by trying to stifle all creative art, they are silencing their best customers and blocking their work from becoming part of a larger cultural conversation.

Appendix J

REPLY COMMENT OF

THE ORGANIZATION FOR TRANSFORMATIVE WORKS

This reply comment is submitted by Rebecca Tushnet and Rachael Vaughn on behalf of the Organization for Transformative Works (OTW) in support of the exemption proposal by the Electronic Frontier Foundation (EFF) for the following two proposed classes:

> ***Proposed Class #7B:*** *Audiovisual works on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use..*

> ***Proposed Class #7C:*** *Audiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use, and the works in question are not readily available on DVD.*

I.   Summary of Argument

The OTW supports Class 7B because the present exemption granted in 2010 has worked, and Class 7C because it is necessary to build on the success of Class 7B for works that are not presently available on DVD, which are equally subject to fair use.

The opponents of these exemptions[1] do not allege, much less provide evidence, that the present exemption has increased infringement. DVDs remain widely available, as do methods for

---

[1] Comments of the Advanced Access Content System Licensing Administrator ("AACS LA") in RM 2011-7, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, February 10, 2012, *available at* http://www.copyright.gov/1201/2012/comments/Bruce_H._Turnbull.pdf [*hereinafter* AACS LA

copying them wholesale; the exemption affects neither. Nor, indeed, do the opponents provide any evidence that the DMCA's prohibitions are well understood enough to affect the practices of the vast majority of noncommercial remixers unless and until they need to defend their work as fair use. The experience of DVDs, which includes the wide availability of circumvention technologies as conceded by the opponents in 2009 and again in this rulemaking proceeding, demonstrates that a robust market can and will form even in the presence of easy circumvention. Ripping DVDs or creating large, high-quality clips of an Amazon Instant Video are complicated endeavors compared to the alternatives, including the alternatives advocated by the opponents. Circumvention is useful to creators who have specific needs for high-quality footage, and largely irrelevant to people interested in acquiring full, good-enough-to-watch copies who can take advantage of the simpler alternatives. As a result, the marginal effect of the proposed exemptions will continue the current experience under the existing exemption.

II.   Statement of Interest

OTW is a nonprofit organization established by media fans in 2007 to promote the acceptance of fanworks as a legitimate creative activity, to preserve the history of fan culture, and to protect and defend fanworks from commercial exploitation and legal challenge. OTW believes that these noncommercial works that make creative use of existing copyrighted material are transformative, and that transformative works are legitimate under US copyright law. OTW provides free services to fans who need assistance when faced with related legal issues or media attention. This comment supports the proposed exemptions for noncommercial remix videos that do not infringe copyright. In filing this comment, OTW represents the interests of a large number of the creators of these videos. Fan-created videos, or vids, that include clips from popular television shows or film rework these clips in such a way that comments on or critiques the original source. As the Office found during the last proceedings, a substantial number of these

---

Comments]; Joint Comments of AAP, ASMP, BSA, ESA, MPAA, PACA, RIAA in RM 2011-7, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, February 10, 2012, *available at* http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf [*hereinafter* Joint Comments].

noncommercial remix videos have strong claims to fair use.[2] Nor do the opponents contest that the representative examples provided by the EFF for the current exemption are highly transformative, fair, and otherwise further copyright's objective of promoting progress. Accordingly, OTW supports EFF's proposed exemptions that would allow the extraction of clips from a DVD or online distribution services for inclusion in noncommercial remix videos that are found to be fair use.

The DMCA's contours are, to put it mildly, complex and not widely known by nonprofessionals. Without an exemption, the main effect of the anticircumvention prohibitions on remixers was to surprise them when they received a takedown notice, believed they had a valid fair use defense, and discovered that the DMCA made that fair use defense irrelevant because of how they had acquired the footage they used. The OTW's experience under the 2009 exemptions indicates that such remixers are now able to contest notices, asserting their fair use arguments, and that they have been able to successfully use counternotifications under the DMCA as well as other dispute resolution mechanisms such as those provided by YouTube. Rejecting the exemptions would subject users to unanticipated and unfair liability for uses that are otherwise fair under the Copyright Act.

III.   Overview of Vidding Culture and Illustrative Example of Vidding Practice

Vids are fan-made videos that involve the re-cutting and remixing of footage from television shows or films, creating a video montage set to a new soundtrack. Vids are usually rapidly cut, preserving little or none of the narrative structure of the underlying source. The purpose of vidding is to remix the source material in such a way as to provide a new narrative, often commenting on or critiquing that source.

---

[2] Recommendation of the Register of Copyrights in RM 2008-8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, June 11, 2010 at 66-68, *available at* http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf [*hereinafter* 2010 Recommendations].

3

For example, vidder Thingswithwings created *The Price*,[3] a carefully edited critique of standard media narratives of "manpain," in which a main character—typically a white male—undergoes trauma and often reacts by exhibiting stereotypically masculine behaviors and attitudes.[4] Well-known examples of this trope featured in the vid include Harry Potter, Batman, and Frodo from *Lord of the Rings*. A more common and misogynist manpain trope involves harming a female character for the sole purpose of providing a motivation for the male character's storyline. The vidder used footage from over thirty different films and television shows,[5] overlaying images from one source on top of another source to show the trope in action. *The Price* ends with dramatic, tongue-in-cheek shots of the men crying. Some of the scenes include effects to stylize the tears, thereby making the point that, although it is very common in mainstream media, the manpain narrative is overdone and blasé.

Creating a work like *The Price* necessitates making use of the footage from the subject media sources. Although Thingswithwings theoretically could have expressed her message in the form of a written essay, *The Price* is powerful precisely because it uses visual editing techniques to comment on a visual source. To create this vid, Thingswithwings relied on two primary techniques for acquiring footage: (1) software tools that are capable of circumventing Content Scrambling System (CSS) encryption; and (2) software tools that are capable of circumventing encryption methods for online distribution services such as Amazon Instant Video and/or iTunes.[6] Access to high quality source material was critical for the vid to function as a convincing counterpoint to the traditional mainstream narratives. Without obtaining the source footage as described above, the vidder may have been unable to integrate the varied sources

---

[3] *See* Test Suite for Fair Use Fanvids, ORGANIZATION FOR TRANSFORMATIVE WORKS, http://transformativeworks.org/node/552 (last updated December 1, 2011) (presenting a collection of several vids discussed in this reply comment including *The Price*) [*hereinafter* Test Suite].

[4] *See* FANLORE, http://fanlore.org/wiki/Manpain (last updated February 6, 2012) (explaining the definition and history of the term manpain).

[5] Thingswithwings, *New Vid: The Price (Multifandom)*, DREAMWIDTH (January 16, 2011, 7:40 AM) http://thingswithwings.dreamwidth.org/145368.html.

[6] Email from Thingswithwings dated November 29, 2011 (on file with authors).

4

having different color palettes and frame sizes into a seamless story using effects, transitions, and other editing techniques.

IV. Vidding is a Legitimate Artistic and Culturally Valuable Pursuit that Represents an Established and Growing Community

The vidding community is a longstanding community with a history of interacting with their favorite television shows, movies, and other visual media for over three decades.[7] MIT professor and media scholar Henry Jenkins wrote about the community in his 1992 book about participatory culture, *Textual Poachers*.[8] He described the art of vidding not only as an important form of cultural creation, but as a way of solidifying and maintaining the fan community, creating a source of pride and a means of articulating the commonalities of the group.[9]

Although existence of the vidding community predates digital video technology, vidders have successfully influenced and integrated into modern remix culture. With the tools for digital editing now accessible to the average computer user and means of wide dissemination at a creator's fingertips, the vidding community has seen the same growth as other, more visible forms of remix culture. This growth is largely due to the younger generation's familiarity with digital media, and it will only continue. Approximately 64 percent of online teens in the US have created content on the Internet and one in four young people have remixed content into their own artistic creations.[10]

Anthropologist Michael Wesch's research has suggested that there may be as many as 15,000 remix videos uploaded to YouTube each day, and academic Francesca Coppa estimates that there are already tens of thousands created by self-identified vidders elsewhere on the Web, a number that may climb into the millions when taking into account those who are not a part of

---

[7] Neda Ulaby, *Vidders Talk Back to Their Pop-Culture Muses*, NPR NEWS (February 25, 2009), http://www.npr.org/templates/story/story.php?storyId=101154811 [*hereinafter Vidders Talk Back*].

[8] HENRY JENKINS, TEXTUAL POACHERS, 223-249 (1992) [*hereinafter* TEXTUAL POACHERS].

[9] *Id.*

[10] JOHN PALFRY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES, 112-113 (2008) [*hereinafter* BORN DIGITAL].

any organized community.[11] As Professor Wesch has explained,[12] the use of remix remains at least as popular now as in 2009. New vidders thus emerge every day, many of them "inventing" the form for themselves without first being connected to the broader vidding community, just as in previous generations budding writers and artists emerged from a variety of backgrounds.

Many vidders eschew sites like YouTube due to the low resolution and overall digital quality of the videos in favor of distributing via high-quality downloads of individual vids. There is also a yearly convention held in Chicago, Vividcon, where vidders converge to share and discuss their work in the tradition of the pre-Internet fan gatherings.[13] Vidding is a recognized form of remix culture, and has been subject to increasing artistic and scholarly attention.[14] In addition, many newcomers are adopting cultural aspects from the traditional vidding community while simultaneously developing practices enabled by new technologies such as connection through online communities, social media interaction, and collaboration on long distance multi-editor projects.[15] Mainstream appreciation of vidding as an expressive art form has been recognized by content owners who have sponsored remixing of their footage.[16]

---

[11] Fred von Lohmann & Jennifer S. Granick, Comment of the Electronic Frontier Foundation, In the matter of exemption on circumvention of copyright protection systems for access control technologies, 29, 34 (2008).

[12] Comments of the Electronic Frontier Foundation in RM 2011-07, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, December 1, 2011 at 39, *available at* http://www.copyright.gov/1201/2011/initial/eff.pdf [*hereinafter* EFF Comments].

[13] Vividcon web site, http://vividcon.com/ (last visited February 25, 2012).

[14] *See, e.g.*, http://transformativeworks.org/projects/fan-video-bibliographies (listing substantial and growing body of scholarly work on vids); University of South Carolina Institute for Multimedia Literary, http://www.video24-7.org/overview/ (last visited February 25, 2012) (including vidding as one significant remix genre).

[15] *See, e.g.*, Anime Music Videos, http://www.animemusicvideos.org/home/home.php (last visited February 25, 2012); I'm Vidding It Message Boards, http://imviddingit.withme.us/forum (last visited February 25, 2012); Vidders Unite Twitter, https://twitter.com/#!/ViddersThings (last visited February 25, 2012).

6

The community may seem smaller than it actually is because it is less visible than other communities, and its artistic innovations may not be obvious to people unfamiliar with the original sources or with watching heavily edited footage, but that does not make the creators of these works any less worthy of fair treatment under copyright law. Moreover, many newcomers to vidding, especially younger fans, are not necessarily a part of the self-identified community of vidders. They are entitled to the same legal protection for their creative, transformative work, like any artists inventing for themselves a new language of reaction to the world around them.

V. Vidding is a Valuable Educational Tool

Communities of participatory culture have long since been recognized as potential environments for learning. Education Professor James Paul Gee calls these informal learning cultures "affinity spaces," and includes fan communities as an example along with scientific colleagues and networked teams of businesspeople.[17] Affinity spaces are sustained by common endeavors that cut across demographics, bringing participants together regardless of age, class, race, gender, or educational level. Unlike classrooms where students rarely teach each other, these communities encourage distributed knowledge, each member's skill set becoming a potential resource for others.[18]

The vidding community is a perfect example of this phenomenon. Even in the pre-Internet days of the art, fans held workshops to help teach techniques, and encouraged apprentice-like relationships where a new fan would learn tricks by working alongside a more experienced vidder.[19] Today, vidding technology has changed substantially, but it still involves learning complicated software and editing techniques. The Internet has also made it easier for vidders to maintain a community of practice and bring in new members. For example, on just one blogging community, Livejournal, the "Vidding Discussion" group has over 2200 members,

---

[16] *See, e.g.,* Candance Jackson, *Pixar-Sanctioned "Upular" Remix Lifts Spirits*, WALL STREET JOURNAL BLOG, http://blogs.wsj.com/speakeasy/2010/01/07/pixar-sanctioned-upular-remix-lifts-spirits/, January 7, 2010 (describing sponsorship of the work of remix artist Pogo).

[17] JAMES PAUL GEE, SITUATED LANGUAGE AND LEARNING, 87 (2004).

[18] *Id.* at 89.

[19] TEXTUAL POACHERS, *supra* note 8, at 247.

and there are also groups specifically for teaching and learning such as "Vidding Newbies."[20] Additionally, experienced vidders often post walkthroughs of their process and explanations of techniques for specific vids so that others can learn by example. In fact, the vidding community has been particularly valuable as a "female training ground," in that it has been valuable for teaching technical skills to women: web design, coding, video and image editing, and filmmaking.[21]

It is vital to recognize that it is the transformative nature of vids that undergirds these communities—it is interest in commenting on and reacting to the underlying source material that makes people excited to work on and help each other with vids. The importance of the underlying source material is underscored by Thingswithwings commenting on the creation process and meaning of *The Price*:[22] "I needed to express the frustration I feel both with the ridiculous/terrible nature of these tired tropes AND with the entirely predictable (and often problematic) large-scale fannish reactions to those tropes." Footage shot in a public park of people who are not the actors in the featured television shows and movies would not be a sufficient substitute because the video is a critique of the source material and the fan community's interaction with the source material. The vidding community was formed around this type of commentary on popular texts.

As noted above, remix culture is growing, and the technical savvy of those who have grown up with the Internet is a large part of that. The twenty-five percent of young people who remix content are exposed to a unique opportunity for learning, personal expression, and individual autonomy.[23] Participation in communities that foster shared interests, trust, mutual

---

[20] *See* Vidding Community Profile, LIVEJOURNAL,

http://community.livejournal.com/vidding/profile (last visited February 26, 2012) (listing 2212 members on March 2, 2012); Vidding Newbies, LIVEJOURNAL,

http://community.livejournal.com/viddingnewbies (last visited February 26, 2012).

[21] Jesse Walker, *Remixing Television*, REASON MAGAZINE, August/September 2008.

[22] Thingswithwings, *some thoughts on manpain.um. many thoughts on manpain, actually.*,

DREAMWIDTH (January 16, 2011, 10:01 AM)

http://thingswithwings.dreamwidth.org/145564.html.

[23] BORN DIGITAL, *supra* note 10.

support, and public narratives benefits both the participants and the resulting creative works.[24] Common interest in the underlying source provides new creators with an audience that shares their enthusiasm; the audience responds by helping the new creators learn how to do better. Transformation of existing material is the glue that creates the community—audience members volunteer to help creators improve because they want more commentary on their favorite sources.[25] Remixing video cultivates cultural literacy in regards to popular media, while also promoting technical literacy.

Fans use the vids as context for exploring and debating deeper themes within the media source material. One vidder notes how rewarding the tradition of creation and commentary in the vidding community can be as it provides an audience with tangible responses to her art.[26] "The Price" began a heated online discussion about manpain narratives in mainstream media that ultimately generated over 280 comments.[27] In addition to online discussion, creators and consumers in the vidding community also engage in facilitated discussion at conventions covering topics such as race and representation in media culture,[28] music theory and composition,[29] how hip-hop can inspire vidding,[30] comparing vidding to writing,[31] and video editing in Soviet Russia.[32]

---

[24] Gareth Schott & Darrin Hodgetts, *Health and Digital Gaming: The Benefits of a Community of Practice*, 11 J. HEALTH PSYCHOL. 309, 314 (2006).

[25] Rebecca W. Black, *Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community*, 49 J. ADOLESCENT & ADULT LITERACY 118, 123-24 (2005).

[26] sockkpuppett, *New Vid – Women's Work (Supernatural)*, LIVEJOURNAL (August 14, 2007 03:13 PM) http://sockkpuppett.livejournal.com/442093.html.

[27] *See* Thingswithwings, *supra* (listing 287 comments as of February 26, 2012).

[28] *See* VividCon 2010 Fanlore Page, FANLORE (last updated December 7, 2011) http://fanlore.org/wiki/Vividcon/Vividcon_2010#Con_reports.2C_Convention_Posts.2C_Panel_ Notes_and_Vid_Recs (describing talith78 and Deepa D.'s panel "Race and Representation in Vidding") [*hereinafter* VividCon 2010 Fanlore Page].

[29] *See* VividCon 2008 Fanlore Page, FANLORE (last updated February 1, 2012) http://fanlore.org/wiki/Vividcon/Vividcon_2008 (describing nestra's "Music and Composition"

9

The creation and dissemination of vids also stimulates discussion about these topics outside the vidding community. For example, *Fall of Man*, by obsessive24 mixes footage from the television show *Supernatural* with clips from other apocalyptic media sources and iconic religious imagery including Michelangelo's "Creation of Adam."[33] Using imagery that is both haunting and divine, the vid examines an angel's changing attitude towards humans and god, as the apocalypse looms. The vid was used as a central discussion point in an article discussing the attitudes of young people in the millennial generation about religion and theology.[34]

VI.   Vids Propose Alternative Readings and Realities

In addition to providing fuel for discussion about media studies and popular culture, vidding also encourages alternative readings and interpretations of mainstream narratives. Alongside the religious themes discussed above, *Fall of Man* contemplates a romantic relationship between the angel featured in the video (Castiel) and one of the show's main characters (Dean Winchester). The vid's portrayal urges the audience to challenge *Supernatural*'s portrayal of Dean Winchester as a hypermasculine heterosexual and to explore alternative interpretations of the characters.

---

panel) [*hereinafter* VividCon 2008 Fanlore Page].

[30] *See* VividCon 2007 Fanlore Page, FANLORE (last updated November 27, 2011) http://fanlore.org/wiki/Vividcon/Vividcon_2007 (describing Anna Tree's "Hip Hop Vidding" panel).

[31] *See* VividCon 2008 Fanlore Page, *supra* note 29 (describing a panel moderated by Blacksquirrel, KK, and Kat A. on the comparison between vidding and writing).

[32] *See* VividCon 2010 Fanlore Page, *supra* note 28 (describing hollywoodgrrl's panel "In Soviet Russia Vid Edits You").

[33] Obsessive24, *new vid - "Fall of Man" - Supernatural - Castiel/Dean*, LIVEJOURNAL (May 18, 2009, 11:42 PM) http://obsessive24.livejournal.com/261525.html.

[34] Louisa Ellen Stein, *What you don't know: Supernatural fan vids and millennial theology*, TRANSFORMATIVE WORKS AND CULTURES, no. 4 (2010) *available at* http://dx.doi.org/10.3983/twc.2010.0158.

10

Lawyers, in general, should not be in the business of evaluating or interpreting art; the copyright laws are not designed to protect only that which lawyers think is worthwhile expression. Nonetheless, the Joint Commenters, apparently conceding the highly transformative nature of works like Gianduja Kiss's *It Depends on What You Pay*[35] (and her numerous other highly regarded vids), instead reach out to attack a different remix video by the same artist. The Joint Commenters assert that *Der Kommissar* is "nothing more than four minutes of clips from *James Bond* films, with a soundtrack provided by popular recording artists *After The Fire*."[36] In actuality, the vid provides an alternative reading and critique of the James Bond character.

Of course, even if a single vid were not fair use, that would not rebut the EFF's showing that substantial numbers of noncommercial remix videos are fair uses, the standard the Office has adopted.[37] But the Joint Commenters are wrong about *Der Kommissar* as well. The artist has responded to this critique in an appended statement;[38] the OTW wishes to put the artist's response in its appropriate legal context. As film/literary scholar Francesca Coppa notes, "D*er Kommissar*, like all vids, uses music as an analytical tool to guide the spectator's eyes to particular elements in the source footage, here to more lighthearted and comical effect. For instance, in the opening moments of the video, Gianduja Kiss shows us a set of near-identical hat tosses (at :07, :08, and :09) from three different Bond films and then creates a montage of paralleled threats, as Bond whirls around to face a gun, an alligator, and the woman who would eventually become his wife.… [T]he spectator is asked to look at scenes across various Bond movies to observe, interpret, and, most of all, enjoy similarities in their formal and narrative elements."[39] Coppa points out that the vid highlights and recontextualizes Bond's conventional heterosexuality by pairing him with men as well as women, and by emphasizing "phallic symbols like snakes, lasers, machetes, and flaming sausages, as well as items associated with

---

[35] EFF Comments, *supra* note 12, at 58-60.

[36] Joint Comments, *supra* note 1, at 39.

[37] 2010 Recommendation, *supra* note 2, at 66-68.

[38] Statement from Gianduja Kiss, February 21, 2012, attached as Appendix I.

[39] Statement from Francesca Coppa, February 21, 2012 (on file with authors).

sexual kinkiness like dog-collars and whips."[40] (Gianduja Kiss is not alone in identifying the disturbing undercurrents linking sex and violence in the Bond films.[41])

In other words, even though the Joint Commenters did not understand the commentary, Gianduja Kiss had a message and the intended audience perceived that message. Courts routinely find fair use when there are multiple interpretations of the meaning of a use.[42] Moreover, fair use is not reserved for those whose commentaries succeed or match the fact finder's own opinions.[43]

Indeed, the fact that the Joint Commenters had to reach back to an early work of a developing artist to find an allegedly "nontransformative" work by her highlights the ways in which artistic development depends on freedom to experiment. One key reason that fair use doesn't require complete success in communicating its message to every viewer is that most art is not completely successful. In particular, punishing or suppressing early work would prevent artistic evolution and maturation. The highly transformative work Gianduja Kiss produces

---

[40] *Id.*

[41] The Real James Bond, YOUTUBE, March 29, 2011,

http://www.youtube.com/watch?v=y1uE5F9EnUA.

[42] *See Campbell v. Acuff-Rose Music*, Inc., 510 U.S. 569, 582 (1994) (framing the fair use analysis in terms of whether parodic or critical element can reasonably be perceived, and lawyers should not be the final judges of worth) [*hereinafter Campbell*]; *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266-1276 (11th Cir. 2001) (finding fair use where the commentary aspects of the work had numerous interpretations); *Blanch v. Koons*, 467 F.3d 244, 252-258 (2nd. Cir. 2006) (rejecting the lower court's characterization of the work as "banal rather than creative").

[43] See *Campbell*, 510 U.S. at 582 (refusing to evaluate the quality of a transformative use; quoting *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F.Supp. 267, 280 (S.D.N.Y.1992) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.")); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) ("While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection.").

couldn't exist if she had never been allowed to practice her art, and it couldn't exist without a community of practice that supported her experimentation.

In addition, of course, the proposed exemptions do not change the underlying substance of copyright law, including the contours of fair use. They only make those contours possible to determine, rather than cutting off any inquiry because of the separate anticircumvention prohibition. Thus, to the extent that individual remixes are not fair uses, copyright owners would retain the ability to take action against them—as they accept is sufficient for uses of footage captured without circumvention.

VII.   Vids Are Legitimate Forms of Cultural Criticism

Whether articulating a critique of a character trope common to many sources as in *The Price* or exploring a single character as in *Der Kommissar*, vids are a way to pull layers of meaning out of a media text, to comment on it in a nonconventional yet extremely effective way. There is no question that the role of media in society is changing, and that the current media environment encourages interaction on the part of viewers, blurring the line even more between consumer and producer. Vidding is an important extension of this shift because it demonstrates that these consumer/producers actually have something important to say about what they are watching. And fanvids allow them to do it most effectively: let me *show* you what I see, not tell you what I see.

An example of a vid that effectively demonstrates the value of showing versus telling is Gianduja Kiss's *Dollhouse* vid *It Depends on What You Pay*,[44] which was highlighted in the comments submitted by the EFF in support of proposed class 7C.[45] As explained in EFF's Comment, the vid poses intriguing questions about sexuality and personal autonomy by inquiring as to whether foundational concepts in *Dollhouse* can be equated to rape. Because many fans were not satisfied with the show's ability to address this issue, the vid served as an important centerpiece for a critical discussion.

---

[44] Gianduja Kiss, *It Depends on What You Pay*, MONSTERS FROM THE VIDS (uploaded April 25, 2009)

http://www.giandujakiss.com/index.php?set=videos&category=Dollhouse.

[45] EFF Comments, *supra* note 12, at 58-60.

13

Another illustrative example is the multi-fandom vid *On the Prowl* created jointly by vidders Sisabet and Sweetestdrain.[46] *On the Prowl* utilizes images from over sixty different sources (e.g., *Star Trek, Twilight, Dexter, Supernatural*) to present a self-portrait of female fans who enjoy watching their favorite male characters suffer, both physically and emotionally. As the intensity of the music progresses, the pain that the male characters in the vid are enduring becomes more extreme. By featuring increasingly disturbing, rapidly cut images, the vidders invite the viewer to determine the point at which the suffering becomes "too much." In response to "On the Prowl," the vidding community examined whether fetishizing male pain—by the media and by vidders—can be problematic. The vid has been recognized in the community as a particularly thoughtful and evocative form of cultural critique.[47]

VIII.   Most Vids Constitute Fair Use Under Copyright Law

The fair use provision of the Copyright Act has long since been considered as a means of protecting transformative uses of copyrighted content.[48] In the Copyright Office's 2010 Recommendations, numerous examples of vids featuring "extensive editing" were discussed.[49] Although the Office declined to engage in the exhaustive task of deciding whether the use of each individual clip in the named vids constituted fair use, the Office did highlight the value of providing such commentary on audiovisuals and authorized the proposed exemption.[50]

If one were to apply the four-factor statutory analysis to use of the copyrighted footage in fan vids, it is likely that such use would qualify as a fair use.[51] The first factor favors

---

[46] Sisabet, *New Vid!! VVC Challenge: Self Portrait*, LIVEJOURNAL (August 10, 2010, 2:35 PM) http://sisabet.livejournal.com/400014.html.

[47] *See* "On the Prowl" Fanlore Page, FANLORE (last updated November 26, 2011) http://fanlore.org/wiki/On_the_Prowl (describing "On the Prowl" as "an important vid that you need to watch even though it will be uncomfortable").

[48] *Campbell,* 510 U.S. at 569.

[49] 2010 Recommendations, *supra* note 2, at 66-68.

[50] *Id.*

[51] *See* Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 672 (2007) (applying the four factor test to conclude that fan vids constitute fair use)

noncommercial and transformative use,[52] both of which vids clearly are. As detailed in Part II(D), vids are regularly created for purposes of commentary or criticism, which is the same favorable use found in *Campbell v. Acuff-Rose*. Vidders generally do not sell their creations.[53] Moreover, the proposed exemption only applies to noncommercial videos, favoring fair use.

The second factor refers to the creative nature of the underlying work and whether the underlying work has been previously published; if the copyright owner has already disseminated the work widely, fair use is more readily found.[54] Courts do not weigh the creative nature of a work heavily against fair use in regards to transformative works such as parodies.[55] Because vids by their nature are based on work that is widely disseminated, the application of the second factor analysis also supports a finding of fair use.

The third factor considers the amount of the original work taken, which also favors vids. In the vast majority of vids, not only is each clip used very short (rarely longer than a couple of seconds), the amalgam of the clips for a single vid comprises an extremely small fraction of the entirety of the source material. For example, *The Price*, as a multi-fandom vid includes clips from over thirty sources, some of which are only a few seconds in length. Exemplary mono-fandom videos illustrating this point include *Fall of Man*, which is a several minute long creation based on four seasons of *Supernatural*, and *Handlebars*, which contains only three minutes and

---

[*hereinafter* Trombley].

[52] *Id.*; *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding fair use for noncommercial time-shifting).

[53] Trombley, *supra* note 51, at 662.

[54] *Arica Inst. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992).

[55] *Campbell*, 510 U.S. at 586 (creative works are usually the subject of transformative uses); *Kelly v. Arriba Soft Corp.*, 336 F.3 811, 820 (9th Cir. 2003) (published works are more likely to be subjects of fair use because "the first appearance of the artist's expression has already occurred"); *Arica Inst., Inc. v. Palmer*, 970 F.2 1067, 1078 (2d Cir. 1992) (fact that copied work was "published work available to the general public" weighed in favor of defendant on second factor).

twenty-seven seconds of material extracted from three entire seasons of the *Doctor Who* series (over thirty hours of content).[56]

The fourth factor in the fair use analysis considers any potential market harm of the new use. It is highly unlikely that a vid could be considered any kind of substitute for the underlying work.[57] Not only does it contain such a small fraction, but as explained above, the point of a vid is not to tell the same story as the original work, but to comment on it or to reinterpret it. It is well-established that copyright owners are unlikely to license critical or parodic works; there is and should be no market for authorizing critical commentary, whether in video form or in academic articles. Moreover, vids often make little sense to someone unfamiliar with the source material, or contain many different sources. For example, when watching *The Price* or *On the Prowl*, someone not intimately familiar with the cited shows may find it nearly impossible to even identify each of the sources. If anything, vids may actually help the market for the original by sparking a viewer's interest in the source material or encouraging vidders to purchase DVDs or access to online source material for the purpose of making vids.

It is not necessary for the Office to decide whether any individual vid is fair use. This exemption only applies to remix videos that are found not to be infringing, so it is sufficient to say that there are strong fair use arguments. In order for a court to be able to even address this claim, however, it is necessary for the proposed exemptions to be implemented.

Opponents to the proposed exemptions argue that they would permit "circumvention of DVD and online access controls for use of clips in virtually any audio-visual production, including infomercials, brand awareness efforts, and mainstream film releases."[58] OTW reiterates that the proposed exemptions apply *only* to videos that do not infringe copyright.[59]

---

[56] *See* Test Suite, *supra* note 3.

[57] Trombley *supra* note 51, at 669.

[58] Joint Comments, *supra* note 1, at 39.

[59] Although vids are not sold, the OTW also notes that the opponents misstate the scope of the proposed exemptions, which cover only noncommercial uses. Under the First Amendment, newspapers, movies, and other forms of non-advertising communication are fully protected—something the Joint Commenters strongly advocate for in every other forum and situation. *See,*

16

Accordingly, if a vid were found to constitute fair use, the techniques the vidder used to obtain the footage to make the vid would fall under the exemption. Alternatively, if another vid were not found to constitute fair use, then the vidder would not be exempt from § 1201 liability. Thus, the proposed exemptions will only serve to protect those who are making legal use of the copyrighted material.

IX. Without the Proposed Exemptions, the DMCA Has a Negative Impact on Vidders Who Make Legitimate Fair Use of Source Material

A popular art form among fans for three decades, vidding has existed without significant resistance from copyright holders, in much the same way as other fanworks such as fan fiction. However, in some cases, overzealous protection has blurred the line between wholesale copying and copying to create user-generated content (such as remix). Frequently the efforts of content owners aimed at preventing piracy have a chilling effect on fair uses. Since vidders and other remixers are not copyright lawyers, they do not distinguish between ways of creating digital files, unless and until they face takedown notices and wish to claim fair use; without an exemption, they then cannot assert even valid fair use defenses.[60] The Office's decision to grant

---

e.g., Brief of *Motion Picture Ass'n of America* as Amici Curiae Supporting Respondents*, Brown v. Entertainment Merchants Ass'*, 132 S.Ct. 81 (2011) (No. 08-1448). While infomercials and other forms of advertising are commercial speech, standard movies are not. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 n. 5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold, rather than given away."); *Cardtoons, L.C., v. Major League Baseball Players Association*, 95 F.3d 959, 970 (1996) ("The fact that expressive materials are sold neither renders the speech unprotected, nor alters the level of protection under the First Amendment. [Plaintiff] need not give away its trading cards in order to bring them within the ambit of the First Amendment.") (citations omitted); *cf. Campbell*, 510 U.S. at 584 (noting that most fair uses involve speech with an economic incentive).

[60] As much as we might like to believe that the DMCA exemption proceedings are matters of national import, they are not well known. Thus, the opponents' fears of "misunderstanding," AAP at 39, are simply misguided. They have not produced any evidence that the 2009 exemptions led to an increase in infringement, which should have resulted by their theory, and

17

the exemption proposed during the last rulemaking session for non-commercial videos helped to reverse such an effect.[61] It is important that copyright law continue to protect legitimate fair users.

X. Alternative Methods for Procuring Media Footage Are Not Available or Suitable for Vidders

As explained above in Part II, most vidders prefer to obtain footage by: (1) using software to rip DVDs that they own; or (2) using software to circumvent access controls for content that they have purchased. Some people do have access to other methods for obtaining television and film clips. For example, during the 2009 hearings, the MPAA demonstrated a process for obtaining film clips by pointing a camera at a flat screen television (known as "camcording").   This requires a large-screen TV, a perfectly dark room, and a high-quality digital video camera—often out of reach for noncommercial videomakers. In addition to camcording, it is possible obtain footage without circumventing access controls by using legacy hardware for analog video capture (which is also expensive and often unavailable) or digital screen capture software such as CamStudio (PC)[62] and CamTasia (Mac).[63] These methods are not suitable for the majority of vidders for a variety of reasons, including expense, counterintuitiveness, and lowered quality.

a. Alternative Methods Do Not Provide the Quality Needed for Vidding

---

the reason is that the existing exemption is neither understood nor misunderstood by most online creators: it is simply unknown.

[61] As noted in the introduction, the OTW's experience under the existing exemption is that it has enabled vidders to exercise their fair use rights when overbroad DMCA takedowns or other forms of content filtering wrongly identify their work as infringing. None of the vidders with whom the OTW has had contact who have counternotified or contested a YouTube Content ID match have faced further action from copyright owners.

[62] CamStudio Website, http://camstudio.org/ (last visited February 26, 2012).

[63] CamTasia Website, http://www.techsmith.com/camtasia.html (last visited February 26, 2012).

In 2010 the Office recognized that "certain uses require high quality in order for the purpose of the use to be sufficiently expressed and communicated."[64] For vids, the visuals are extremely important. For example, multi-fandom vids like "The Price" and "On the Prowl" require mixing dozens of different sources to create a seamless story. Without a high quality source, the cropping, zooming, and color correction to make the final product appear uniform can be impossible. But both screen capture and recording off of a screen produce distortions in frame rate, color, and other key features that interfere with editing, even if they may be able to produce watchable copies under certain specific circumstances.[65]

The opponents claim that alternatives to circumvention are sufficient for the purposes of noncommercial remixers, but fail to recognize the distinction between consumption (watching) and editing. As the Office recognized in 2010,[66] a lower-quality digital file such as that produced by digital screen capture or filming a screen may sometimes be watchable. However, both screen capture and camcording distort color and contrast. Moreover, each round of editing—applying effects, filters, time changes, or even simply editing different clips together in a montage and then producing a final output file—degrades quality further.[67] As a result, a remix made with that same low-quality digital file could easily lose important details or become unwatchable. Or, as scholar and vidder Tisha Turk succinctly noted in her 2009 commentary, "Garbage in, garbage out."[68] It is for this reason that an exemption is necessary, and also unlikely to interfere with any legitimate interest of copyright owners, since those interested in pure copying do not need circumvention tools to make or procure watchable copies for pure consumption.

---

[64] 2010 Recommendations, *supra* note 2, at 66.

[65] *See, e.g.*, Appendix II (Statement of Akemi42) (discussing difficulties with color, clarity, and flicker due to frame rate disparity).

[66] 2010 Recommendations, *supra* note 2, at 66.

[67] Statement of Akemi42, February 28, 2012, attached as Appendix II.

[68] Library of Congress Rulemaking Hearing Section 1202, Testimony of Tisha Turk, May 7, 2009, *available at* http://www.copyright.gov/1201/hearings/2009/transcripts/ [hereinafter Testimony of Tisha Turk].

19

Before introducing the perspectives of the vidders themselves, we want to be clear that it's a profound mistake, contrary to the very heart of copyright, to require artists to justify their artistic choices, especially to people unfamiliar with the artform. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."), *quoted in Campbell*, 510 U.S. at 582 (applying nondiscrimination principle to fair use). The very reason an exemption is needed is to prevent the suppression or alteration of the artistic evolution of this popular artform.   Screen-captured or externally recorded source, which has not yet gone through the extensive editing engaged in by vidders, may look acceptable to people who don't follow the art form. But that's no more relevant than the fact that people who aren't fans of popular music may think that an acoustic guitar is basically the same as an electric guitar. However, to avoid any confusion, we also want to explain why the high-quality source produced by circumvention makes a difference to the results of video editing.

Vidders routinely apply the following effects to source footage, all of which inherently suffer from lower-quality source:

- Zooming in and out (to add internal motion to static footage, as well as to create the effect of intimacy and/or distance)
- Extreme close-ups and/or cropping (to draw the spectator's attention to elements in the background; to reprioritize the hierarchy of images in the frame; to eliminate some unwanted visual piece)
- Brightness and contrast adjustment (to make certain elements easier to see; change the emotional tone of a scene; to blend footage from disparate sources)
- Saturation and hue adjustment (same as above)
- Color correction (same as above, but also to create specific associations with or among images using color, where the color becomes symbolic or thematic.)
- Time adjustments (speeding up and slowing down) (to change the rhythm of footage, to create urgency or draw attention to certain acts of internal motion, to score footage to the fixed beat of music or otherwise synopate image and sound)
- Overlays (to create narrative and visual depth; to layer images associatively, to juxtapose elements within the frame)

Here's Luck has provided an extended analysis of her vid *The Test* to illuminate some of

the technical choices involved:

CROPPING

Star Trek (2009) is shot in action-movie widescreen (aspect ratio 2.35:1); the original TV series (1960s) is shot in standard NTSC fullscreen (aspect ratio 4:3). In practical terms, the movie is 720x304 pixels while the original series is 640x480 pixels. This means that every single use of footage from the original series has to be 1) resized up to 720x540 to match the width of the movie frame, and then 2) cropped to 720x304 (that's 236 pixels -- more than a third of the image) to match the height of the movie frame. Starting from high quality source is thus especially important for the TV clips; if the starting image isn't absolutely clear, the enlarged image will lose considerable detail, and that detail is critical once the frame is cropped or the resulting image may not be recognizable as quickly as the vid requires.

COLOR MANIPULATION

The lighting and color palettes for the '60s TV show and 2009 movie are markedly different; the colors of the Starfleet uniforms, for example, are much more somber in the movie (they're crayon-bright primary colors in the series). In a vid that relies on juxtaposing characters from the two texts and representing the two worlds as contiguous, the color of the TV series has to be desaturated to match the movie. It's much more difficult to do this if the color information of either source has been compromised by capture methods that either desaturate the source (screen capture) or exaggerate the brightness and contrast (camcording). In addition, several shots from the movie were desaturated (to suggest memory) and/or overlaid (to suggest characters communicating with or thinking about each other). Desaturation only works by contrast -- if the footage is already desaturated, the effect can't happen -- and layering of images requires exceptional clarity of both or the result is a muddy mess.

THE "GLITCH" EFFECT

This effect is key to the vid; it's the most obvious one, the one that most of the meaning of the vid relies on, and the one that is most consistently cited by viewers in comments as a critical part of the vid's effectiveness. Some commenters have assumed that the effect is a way to mask quality deficiencies in the TV footage, but in fact the effect relies on pristine source: at several points in the vid, the TV footage is presented in its pristine form and then "fuzzed": static and glitches that imitate the effect of old VCR tape are gradually *added* to the source to create an impression of a once-clear signal losing strength and ultimately fading out. The success of this effect relies on the quality of both TV and movie footage. The effect relies on contrast: the old footage has to look like it's been degraded. But if it's too degraded, the viewer can't actually see what's going on (especially since the clips from the series are generally quite short). Thus, the movie footage has to be VERY clear -- clear enough that even a relatively minor glitch or fuzz effect will be noticeable -- and the TV footage does too, because otherwise the vidder can't control the degree of fuzz or quality degradation.

21

SPEED MANIPULATION

More than a third of the clips in the vid have had their speed altered (usually slowed down). In a few cases, such as when Kirk runs his hands down Spock's arms, the speed change is actually quite dramatic. Small changes are required to stretch a short clip a few frames longer or to land a particular frame on the beat; dramatic changes usually serve to heighten the sensuality of a clip, to draw attention to bodies in contact, which is important to the vid's implication of a sexual relationship between characters. That the small changes aren't noticeable and the large changes aren't jerky is entirely due to using DVD-ripped source, which has enough frames per second to absorb a wide range of speed alterations.[69]

As Thingswithwings notes below, these effects are "often invisible after the fact, but necessary in order to highlight what you need to highlight."[70] It's hard to explain in words why one image is worse than another; a person unfamiliar with the form might think that the first image has a slightly fuzzier background than the second, but that matters a great deal if the fuzzy

---

[69] The audience understood how these effects mattered to the meaning of the vid, even without access to Here's Luck's explanations. Wingstar wrote:

> [O]ne great vid that came to my mind was The Test, by here's luck, which vidded the trope [in Star Trek: XI] where Spock!prime transfers some memories of TOS [the original series] Spock/Kirk slash to the rebooted Jim. It uses this fantastic "glitch" static effect to signal the difference between current events and memories (starting at 1:00). There's also some kind of overlay on top of the TOS clips that adds to the "memory" effect while simultaneously concealing any differences in source quality that might exist. And there's definitely some slow-mo and some close ups in the slashy TOS clips that help signal "ROMANCE" to the viewer. Then starting at 1:56 throughout the end of the vid, there are overlays of the TOS clips on top of reboot footage so that it appears as though reboot!Jim is re-experiencing those memories throughout the rest of the movie.

Help: Urgent Vidding Expertise Needed, LIVEJOURNAL (February 26, 2012, 9:57 PM), http://vidding.livejournal.com/2821305.html [hereinafter *Vidding Expertise*].

[70] Laura Shapiro's *Hurricane*, for example, uses multiple techniques –zooms, cropping to remove other characters, masking, contrast adjustment, saturation adjustment, time adjustment, and a substantial amount of color correction—to combine footage from two shows to create a new, constructed narrative about two female characters. Because the color palettes of different shows and movies differ substantially, color manipulation is vital to create the impression that the two shows actually take place in the same world.

22

background is what you're working to bring into focus.[71] Editing also matters as an artistic statement: the color correction and multiple effects found in many vidders' work serves as a signature and an instant indicator that the viewer is watching a vid, rather than an unaltered portion of a show or movie.[72] Again, the OTW emphasizes that the Office should not override vidders' judgments about the necessary quality of their materials, any more than it should determine that a certain size of canvas is big enough for a painter.

Francesca Coppa posted to the vidding forum on LiveJournal to ask about vids that used these effects and why they were necessary.[73] Within 24 hours, dozens of respondents had provided particular examples and explained the meanings of those effects:

> [Blaine Anderson, a Glee vid, contains:] "Colour adjustments to show past vs. present. Zooms and extreme close-ups (1:17) to show interiority: Blaine is lost in a memory; the surrounding world has been clipped out. Close-up also heightens emotion for the same reason: all there is to look at is his sad expression -- no distractions of clothing, background, etc. Slow motion adds a dreamy quality in certain places in addition to helping the visuals match the beat. …. [T]he vidder bolted it together two days after a large percentage of the footage aired …. [I]t's a prime example of our need for immediate access to HQ [high quality] source, so we can make our commentaries, our visual essays, while they're hot. This was right in the middle of all the swirling, raging discussion in the immediate wake of a very controversial episode. That hasn't been possible for any of my own previous fandoms, but it happens all the time now; it's becoming an increasingly sharp tool, and it's amazing to see. In several places there are masks cropping out a second person in the frame, repurposing footage to tell a different story.… "The past" is indicated by grayscale, but also a distressed film effect. In some places the corruption of the footage literalizes the corrosive effect of abuse and hate speech on Blaine himself. In other places, notably the assault scene, it lends a sort of heightened, old school horror movie feel. There are monsters here. The first zoom I mentioned (of Blaine's face) is for emotional impact, but there's a second one later, where Blaine is sitting in bed, wearing an eyepatch, and the vidder zooms in to focus on where he's holding hands with Kurt.

---

[71] *See* 2010 Recommendations, *supra* note 2, at 66 ("One particular example of 'bringing the background to the foreground' was demonstrated in the vid, How Much Is That Geisha In The Window, by Lierdumoa.) Likewise, in Jonathan McIntosh's *Buffy vs. Edward*, which critiques the gender narrative of the *Twilight* series, McIntosh had to cut out significant portions of the frame to put Edward and Buffy in the same scene, which required higher-quality source.

[72] *See, e.g.*, dazzlme89 Channel, YOUTUBE, http://www.youtube.com/user/dazzleme7 (using color correction to sharpen footage and increase saturation as a baseline effect).

[73] Vidding Expertise, *supra* note 69.

This is similar to the vidder's use of masks: she needs us to focus on the information in one corner of the frame, so she simply removes the rest." --Stultiloquentia

I was going for a scrapbook kind of feel, so it needed a lot of really tight cropping and the jumbling effect of the overlays. - China Shop

What We Had by cherryice [is a Doctor Who vid that] uses ghosting [an editing technique that creates multiple images onscreen] wonderfully, especially at the start when Mickey, Martha and Jack are walking away from the Doctor and into the battlefield; they're leaving the safety and adventure of their travels and going heading out to the abyss, and with that leaving a piece of themselves behind. Also at the end, when the Doctor is holding the Master's body and Rose is crying at Bad Wolf Beach, Jack and Mickey and Martha are behind them, out of focus and in the background, and the vid zooms in, enhances the colours and makes us look at them instead. Because for all they've done for the Doctor, for all they've given up and suffered through, they're still just blurs in the background to the Doctor's great tragedy. –Stardust_rain

"My "Numb" Employs zoom and brightness adjustments. This is a commentary on Hutch's stresses and angst, particularly with Starsky at death's door. "Falling Slowly" uses sepia, for intimacy, quietness, and familiarity with another person, reflecting on times past. "Something to Talk About" using flash transitions to support the paparazzi photography theme."Extreme Ways" using cropping closely to cutting parts of the central image off, showing intensity and rawness." --Laura McEwan

I tend to use many of those effects in all my vids. A recent vid Be With Me is a good example. Zooming/cropping is for focusing on a subject/character, speed adjustment for pacing and internal motion to fit the music. Colour correction. brightness etc is necessary on some of the source for clarity and uniformity. I do use a shift in saturation (from monochrome to colour) to illustrate a new beginning in a character's life. Overlays are used for showing parallels & mood. -Thedothatgirl

Here's what I can think of off the top of my head! bendtothesun's here I love you (White Collar) employs a series of colour effects throughout to create and amplify an emotional narrative - to create the sense of emotional distance, emotional epiphany, etc., and effectively creates a queer romance where there isn't one on the show. jesuit24's Steady As She Goes (Star Trek; youtube link) uses a glow effect of some sort to make Star Trek look more - weird and sweaty, I guess? And it uses a TON of speed changes, forward-reversed-forward clips in order to get motion to repeat, and cropped closeups to give the whole show a feeling that the original footage doesn't have. Lots of examples of pretty much every effect you're looking for! My vid Here it Goes Back Again (Back to the Future) has a whole section where I fake "rewinding" and then "replaying" the video, in order to basically fix the crappy ending of the third movie...What's harder to demonstrate, and what I wish these folks would understand, is that speed changes/cropping and zooming/colour correcting/etc is often invisible after the fact, but necessary in order to highlight what you need to highlight in the time available... Also, this isn't about ~great art~ or anything, but a lot of people who vid Community or Parks and Recreation, myself

included, use a lot of zooming in order to cut out the (very intrusive) end credits, which play over parts of the show. Without high-quality footage, this is simply not feasible. If you want people to be looking at Troy and Abed being adorable instead of the credits, you need to zoom. Same thing when you're trying to cut out the rating labels or advertisements. –Thingswithwings

[For one vid, e]ach effect has a particular job to do in this vid. The closeups, zooming and cropping -- effects related to movement -- simply generate a sense of movement and flow throughout the vid, moving viewers from one section to the next fluidly. I also use these effects to emphasize certain aspects of a clip, or words. I used brightness, contrast, saturation, color corrector, and hue adjustment to blend the footage from different sources together more fluidly. I used hue adjustment for the black and white sections of the vid to provoke a sense of "voyeurism/a screen" and emphasize the notion that these characters were being viewed, or watched…. [For another,] Again, each effect has a job to do. The zooming, closeups and/or cropping again are used to sew the vid together into a coherent whole by use of movement. I also use zooms to emphasize important elements in a shot. I used brightness and contrast adjustment, saturation, color corrector and hue adjustment to weave disparate sources together and make everything seem coherent and like it belonged to the universe of the vid. I used time adjustments to fix timing issues at points. … I used a glowing effect to provoke a sense of warmth and comfort about 2/3 of the way through the vid. I was trying to convey Byron's particular affection for his half-sister by use of this effect, and by tweaking the coloring in that clip (warm, soft colors). – Mresundance

Small Blue Thing for incredibly smart and effective color work throughout, turning blue objects red … as well as overlays to draw connections between moments/people, especially the two in the first 10 seconds. Lay Me To Sleep … for color and saturation, overlays, light effects and other dreamy effects … , creating an effective contrast between the bright, surreal feel of the dreamy colors/lights and the intensely horrifying events and violence that are actually happening. One of mine maybe, Keepsake for overlays at the section beginning around 3:50 to both call back to past moments and highlight the reasons for the justified anger when the song and characters finally lose it and get angry. Or Mercy Street for overlays throughout that connect two people who were often not in the same scenes, but shared many narrative parallels/juxtapositions, and to create intimacy. – Chaila43

[I]n Here We Come, On The Run! I use overlays in the choruses to link the central character with her military opponents in a visual way given they rarely appear on screen or on the battlefields themselves. … so say we all ii (It's All Part Of A Bigger Plan) … uses overlays constantly to highlight the repeating motifs of the show, while also[,] by using still as well as moving footage for the overlays, giving a stuttery, technological feel to the vid that fits with its themes about religion and technology, like a corrupted cascade of downloaded (divine) information. The overlays add to the sense of chaos and incoherency while, on closer inspection, [they] are always relevant to the underlying video. – Beccatoria

The White Collar vid Hot Mess uses glitch/distortion effects to underscore beats of the music and suggest a system, or person, on the edge of breakdown. Frequent zooms, plus a habit of cutting almost exclusively by fading quickly to white and then back, dial up the sense of emotional intensity and instability. I'm pretty sure the saturation's boosted in most of the vid, making everything that much more feverish, and the brief moments of grayscale add to the general chaos. Taken together, the effects help convey the idea that Neal Caffrey is, well, a hot mess. Luminosity, speaking of her (ahem) rather well-known 300 vid "Vogue" in an interview with New York Magazine, says: "I wanted to allude to the graphic novel, so I split the screens and tinted them with flat color." One example of the vid's use of saturation effects is the sequence between 4:15 and 4:23, which is in black and white except for a bar of full color that moves across the screen in time withthe music. – Enemyofperfect

Anime music videos (AMV)[74] have the same features. As one community member explains:

"FOTOGRAPHIA La Soledad" (Sola) … required all kinds of effects I had never seen collected together before. … The vid may look like a straightforward pairing vid, but due to the source it's working with, it's actually engaging in a discussion about memory, death, belonging, love, and what is "real". The use of real footage, cutout overlays, and the camera+graffiti effect reenforce the idea of longing to be "real" and to live a normal life, and also reflect on the nature of how we remember or forget the dead much more effectively than the show did …. As a counter-example, I would say that "Salva Hitomi" (Escaflowne movie) is severely hampered by being released in such low quality, especially in the parts where the saturation was changed or where there is a particularly light or dark background, because it's hard to tell what's happening on the screen. … I had to watch the vid 3 times to be able to catch what was happening, and I own this source and am very familiar with it. There is something to be said for visual clarity having a greater emotional and intellectual impact, allowing the message of a vid to come across more clearly to its audience. … Arefadedaway's "Fairy Tale" (Princess Tutu, Utena). A feminist retelling of fairy tales using two classic feminist retellings of shoujo, illustrating why the two series were truly radical in the realm of storytelling because of their presentation of women's relationships with each other. I think this vid effectively refutes the idea that a simple series of clips is not revolutionary, or that it doesn't need clear images to work with. Even simple cuts can become visually distracting and reduce the power of a vid if they're done using badly encoded, downloaded video, because clear images process quicker in the human brain. – Briar_pipe

Another explains that AMVs "typically rely on digital editing more heavily than Western-source vids":

Skittles by Koopiskeva also relies heavily on digital editing … : The effects quite simply are the whole point of this vid; without them it would have no impact. Redona by Oro$hi

---

[74] Statement from Mizuki Ito, November 22, 2011, attached as Appendix H in EFF Comments, *supra* note 12.

combines images from multiple series in a single frame, does something to change the colors of some series and just generally edits heavily to produce a unified feel … An AMV About TV by Re-Evolution Studios combines different series into a single frame and uses some kind of editing (I am very much a layperson) to give a classic "tv-screen texture" to some scenes. There's a lot of editing in here -- the character reading a book had had her blush added and her book changed and obviously the scene where someone is watching an AMV on youtube is an edit. This is another one of those vids that wouldn't make any sense without the edits …. Moe Moe Rebellion by Asylum Studios has editing similar to that in An AMV About TV, and again that editing is essential to the sense of the piece. … Note that both Moe Moe Rebellion and An AMV About TV have jokes about series and about anime fandom that may be somewhat incomprehensible to non-fans, although the editing skill and transformativity should be obvious regardless …. -- Undomielregina[75]

AMV editors even work frame by frame, changing the original so that, for example, characters do a dance from a different series.[76]

Quality is also important to other remix communities, such as that of political remix artists. As artists like Jonathan McIntosh, Elisa Kreisinger, and Joe Sabia explained,[77] they are attempting to reach mainstream audiences and encourage them to rethink the meaning of popular culture. But, as they know from their own work, many in those audiences will ignore messages that seem crude and amateurish. Quality is therefore a political tool as well as an artistic one, enabling remix artists to communicate on the same level as political campaigns and mainstream media productions.

b. Alternative Methods Do Not Allow for Timely Commentary

As described in Part III(D), an important function of vids is to provide critical commentary about the source material featured in the vid or about media culture in general. Often, the timing for expressing such commentary is critical. Although most vidders prefer DVD as source, some turn to extracting clips from online distribution services when DVDs are not

---

[75] Vidding Expertise, *supra* note 67. Undomielregina's last point should be re-emphasized: in many cases, the meanings of vids won't be understandable without a background in the original. That doesn't make them non-transformative, any more than *The Wind Done Gone* was non-transformative because there are many people who've never read *Gone With the Wind*.

[76] Nostromo, *AMV-RunningMan*, NOSTOMO OFFICIAL WEBCAVE (uploaded March 12, 2011) http://www.nostro.fr/?p=642 .

[77] EFF Comments *supra* note 12.

27

available. For example, *It Depends on What You Pay* incorporates material from both seasons 1 and 2 of Dollhouse. At the time of the video's release in April 2009, *Dollhouse* was only legitimately available through online distribution services, not on DVD. Season 1 was later released on DVD in July 2009, and season 2 was not released on DVD until November 2010. The use of clips obtained through circumventing access to online episodes of *Dollhouse* enabled her to comment on the show when it was on the air, participating in an ongoing conversation, rather than requiring her to wait months for the DVD release (at which point the show had been cancelled).

Timing is also critical to a vidder when the vid serves as commentary concerning recent developments in the source material, as with the *Glee* example discussed above. Likewise, Akemi42 produced *God's Love* as a reaction to *Supernatural* Season 7 episode 2, which aired on September 30, 2011, and revealed the apparent death of a beloved character on the show.[78] The vidder relied on technology for circumventing encryption on Amazon Instant video to obtain the clips she needed to produce and release the work by October 1, 2011 in immediate reaction to revelation on the show. As of the date of this reply comment, *Supernatural* Season 7 is not available on DVD. Therefore without relying on the proposed exemptions, the vidder would be unable to express her views about the source material in visual form.

c. Alternative Methods Require Expensive Equipment and Software

Creating a clip via a smartphone, as suggested by the opponents, does not create a high enough quality file to allow editing, even assuming a creator knew that there was a legal difference between ripping and recording. Moreover, the proposed smartphone solution requires spending several hundred dollars on a phone, excluding 2/3 of Americans at the present time.[79] Recording via a separate device requires a high-end digital camera (whether separate or included in a smartphone) *and* a large flat-screen TV, all in a large, completely darkened room of the

---

[78] Akemi42, *God's Love*, AKEMI42 EXPERIMENTS IN VIDEO EDITING (October 1, 2011) http://www.akemi42.com/2011/10/01/gods-love/.

[79] *See* Christopher MacManus, Pew: One-third of U.S. adults own smartphones, http://news.cnet.com/8301-1035_3-20078528-94/pew-one-third-of-u.s-adults-own-smartphones/, July 11, 2011 2:15 PM PDT.

proper size to focus the camera on the TV output. Further, some of the screen capture programs with better functionality are prohibitively expensive.[80]

However, the noncommercial artists who make vids are often pink-collar workers. Even if they had the necessary space and darkness to get the recording reasonably well-focused, they could not afford such equipment. As Tisha Turk testified, "Camcording . . . . has adverse effects in that I can't do it."[81] She characterized using a camcorder as counterintuitive, impractical, and expensive, representing two months of her mortgage for the camera alone, and she was at the high-income end of creators. Though prices on cameras or smartphones may now be $300 instead of $900, that still represents a significant expense unavailable to many.

All these alternatives prove is that there is no prospect of harm from an exemption. Screen capture, smartphones, and other alternatives concededly produce results good enough to watch, meaning that camcording is the mode someone who simply wanted to copy—especially for commercial purposes—could easily use. The transformative uses described here, in contrast, uniquely depend upon the exemptions.

d. Alternative Methods Are Counterintuitive and Thus Won't Be Used

Even if a vidder is willing to sacrifice significant quality, does not have timing constraints that will impact the content of her vid, and has access to the necessary equipment, it is unlikely that she will appreciate that the methods discussed by the opponents are legally preferable to extracting footage from a DVD they own or an online source to which they have access. The result is a digital literacy test, that, like the classic literacy test, will discourage participation—here, participation in making meaning from and as part of culture.

Historically, the literacy test required prospective voters to interpret an often arcane provision of the law.[82] Under the DMCA, the test proposed is that fair users understand that a

---

[80] *See* CamTasia Website, *supra* note **Error! Bookmark not defined.** (listing an exemplary screen capture program for a license fee of $299).

[81] Testimony of Tisha Turk, *supra* note 68, at 0130.20-0130.22 .

[82] See, e.g., Bobby M. Rubarts, *Comment, The Crown Jewel of American Liberty: The Right to Vote; What Does It Mean Under the Amended Section 2 of the Voting Rights Act?*, 37 BAYLOR L. REV. 1015, 1018 n.12 (1985) (discussing the irrelevance of the questions asked in

29

digital file created in one way is illegal, while a nearly identical digital file created in another way is legal. The technologies at issue here are important because they are readily available to individuals. Furthermore, to laypeople, especially the artists who are inventing remix culture on the fly, and they are indistinguishable from other readily available technologies. The opponents' proposed regime is a trap for the unwary.

As Francesca Coppa has pointed out, this legal regime has particularly damaging effects on members of marginalized groups who are already likely to be nervous about expressing themselves.[83] Female vidders have historically been reluctant to step up and claim cultural legitimacy, and uncertainty hinders both production of transformative works and vidders' ability to achieve mainstream recognition.[84]

Paying for content and then using widely available software to capture clips seems fair and reasonable. In fact, the most obvious solution for avoiding § 1201 liability is to download a copy of the footage needed from an unauthorized source. The anticircumvention regime, absent the proposed exemptions, is completely counterintuitive to those who are not deeply familiar with the DMCA: how could it be better to download something illegally than to use footage that was legally purchased? These are amateur artists, not copyright lawyers; it is not unreasonable that they would be unfamiliar with a rule that seems contrary to a basic understanding of copyright law. Without an exemption, vidders—especially the tens of thousands of young people who are inventing and reinventing the form for themselves, without an established connection to a larger community—risk becoming liable or having their fair uses suppressed simply because they did what seemed like the fairest thing for the copyright owner and paid for a copy from which they could clip.

e. Alternative Methods May Not Exist in the Future

---

literacy tests to the substance of political participation).

[83] Library of Congress Rulemaking Hearing Section 1202, Testimony of Francesca Coppa 0119.4-0120.4, May 7, 2009, *available at* http://www.copyright.gov/1201/hearings/2009/transcripts.

[84] *Id*. at 0120.5-0120.17.

Although the tools for camcording and digital screen capture may be available today, this may not always be the case. To prevent piracy, many content owners are utilizing secure methods to restrict delivery of streams to video players.[85] Unfortunately, such methods also restrict access to consumers such as vidders who wish to extract screen captures of the content for the purpose of fair use. Further, as focus shifts from delivery of content on physical media toward streaming content (often delivered via portable devices), the demand for DVDs and other consumer-controlled media systems is decreasing. If the quality of footage recorded using a camera pointed at large flat screen television is not sufficient for editing vids, the quality of footage recorded from a camera pointed at a laptop or an iPhone will certainly prohibit the type of use contemplated by vidders.

f. Authorized Sources for Clips Are Unavailable

First, it should be noted that licensing is not a substitute for fair use as a matter of law: copyright owners cannot deprive transformative users of the right to make unauthorized uses by expressing a willingness to license.[86]

In any event, licensing is not an option for noncommercial remixers: the opponents do not offer evidence that there is any mechanism by which a noncommercial user, as opposed to a commercial entity, could select and receive high-quality clips of a range of television shows and movies (since remixers comment on many different sources) suitable for editing.[87] Studios

---

[85] *See e.g.*, Protect video content (Flash Media Server), Adobe Support, http://kb2.adobe.com/cps/405/kb405456.html (last updated May 24, 2010) (detailing the utility of Real-Time Messaging Protocol and SWF Verification for preventing screen capture).

[86] *See, e.g., Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 145 n. 11 (2d Cir.1998) ("by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets").

[87] Compare Reply Comments of the DVD CCA in RM 2008-8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 16 *available at* http://www.copyright.gov/1201/2008/responses/dvd-cca-inc-38.pdf , to Reply Comments of the MPAA in RM 2008-8, Rulemaking on Exemptions from

31

occasionally offer selected clips for fans to embed on their own sites or otherwise promote the optical version, but that does not enable remix or commentary.[88] Indeed, in the most widely discussed example of such authorized fan activity, the rebooted *Battlestar Galactica* franchise offered clips of ships fighting space battles for fan uses, but no clips featuring any characters.[89] Anyone interested in illustrating or discussing the show's treatment of race, gender, torture, or politics (just to take the most obvious examples) would have been unable to do so using these clips.

Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *available at* http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf at 16 (referring to the studios' then-stated plans to create an online clip service for film professors), and, at 10-11 (asserting that an exemption was not needed because, within three years, the MPAA expected that it would launch a clips server for media and film professors, though it acknowledged the major movie studios had not agreed on parameters and clearances had not yet been obtained). These promises for some indefinite future "fix" have changed, but still do not offer any recourse for ordinary, noncommercial creators. *See* AACS LA Comments, *supra* note 1, at 2-4. As testimony in the 2009 hearings indicated, many if not all studios have agreements with actors that generally prevent the grant of free or low lost licenses, which is why the best they can offer to professors is a letter promising not to assert their own claims – which, notably, does not enable the recipients to circumvent. *See, e.g.*, Library of Congress Rulemaking Hearing Section 1202, Testimony of Peter DeCherney, May 6, 2009, available at http://www.copyright.gov/1201/hearings/2009/transcripts/

[88] *See* AACS LA, *supra* note 1, at 8-9. What the DVD-CCA describes as "certain other limits" on use of unedited, embedded clips or playlists actually allow revocation of a license for any reason, including disagreement with the message being conveyed.

[89] Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 CINEMA J. 125, 126 (2009) ("[U]ser-generated advertising typically features a top-down arrangement that attempts, through its interface and conditions, to contain excessive fan productivity within proprietary commercial spaces. . . . [The Battlestar Galactica contest's] conception of sanctioned derivative filmmaking is extremely narrow, notably excluding the character-based dramatic scenes that make up the majority of the show.").

In addition, licenses always reserve the right to control criticism or uses that the copyright owner does not think reflect well on its image—precisely the uses that are most highly critical and transformative, such as *It Depends on What You Pay*. The copyright owners of *24* and *Law & Order* wouldn't let the Lear Center use them as centerpieces of an analysis of how popular media portray terrorism in *Prime Time Terror*, and they certainly wouldn't let individual artists create lesbian love stories (a popular *Law & Order* genre) or critiques of the American use of torture.[90]

XI.   Conclusion

The vidding community is one example of a group of artists harmed by the absence of EFF's proposed exemptions. Vids that comment on and critique popular media represent legitimate cultural contributions. Without the proposed exemptions, vidders have no appropriate alternatives available for extracting footage for use in their expressions. In the spirit of copyright law's dedication to promoting creative work, the OTW supports the proposed exemptions for non-infringing, noncommercial videos.

---

[90] *Cf.* AACS LA Comment *supra* note 1, at 9 ("the studio *reviews* the request and, *if the studio agrees* to the license, responds with a link to the desired clip") (emphasis added).

Appendix I: Statement of Gianduja Kiss (Vidder)
February 21, 2012

In the comments of Steven J. Metalitz et al., http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf, the opponents of the EFF's proposed exemptions identify an earlier vid of mine, Der Kommissar, as nontransformative. Contrary to what the opponents say, this vid was intended as a political/cultural commentary. These commenters seem to be unfamiliar with vids, so they aren't particularly skilled at reading and understanding them. Moreover, I'd been vidding for less than a year, and so the message doesn't come across as clearly as I'd have liked. I've learned a lot since then and I believe my skills, including my skills at communicating my messages, have improved since I made Der Kommissar.

The opponents describe Der Kommissar as "promotional." But, at least in my experience, "promotional" materials, such as trailers for Bond films, portray Bond as tough, competent, unbeatable, and sexually irresistible to women. In other words, they fetishize his (heterosexual) masculinity. My vid, by contrast, portrays Bond as hapless, vulnerable, bewildered, and often at the (sexual) mercy of the people around him. I don't consider it "promotional" at all.

When I made Der Kommissar, I wanted to illustrate, in a humorous way, sexual anxiety in the form of sexualized violence in Bond films, in order to undermine some of the portrayals of masculinity in those films. So, the vid is dominated by images of Bond being beaten up and victimized, often in sexualized ways. Roger Moore slides down a banister and gets whacked in the crotch; there's the famous scene of Connery's crotch being menaced by a laser, a woman tries to knife Connery's bond in the crotch after two previous scenes of unwanted kissing/sexual violence (Bond with a woman, and Bond with a man). A woman tries to kill Bond by wrapping her legs around his waist and crushing him while they're both mostly naked. And of course the vid features the infamous scene from Casino Royale in which Bond is tortured with genital whipping.

I played with images of gender and power in the vid. For example, the opening sequence shows James Bond repeatedly tossing his hat, except that in the final shot in the sequence, the hat is a frilly pink ladies' bonnet. He gets trapped in a bed by a woman, and in the opening, there's a sequence of shots of someone menacing Bond (with guns, with an alligator) that ends with Bond seeing a woman (Diana Rigg), to make the point that the woman was the most frightening/menacing to him. There's another sequence with people finding other people in their beds. First, Bond walks in to find women in his bed, then, a woman walks in to find Bond in her bed (positioning Bond as the woman), and finally, Robert Davi gets in bed with Bond. The implication of homosexuality is meant to undermine the hypermasculinity of Bond's image. (The vid generally uses standard shot-editing techniques to suggest a sexual relationship between Dalton's Bond and Robert Davi's villain.) A shot of Bond leering at a woman through binoculars is juxtaposed with a shot of Bond looking at a man through binoculars (I actually manipulated the shots there to create a lens view that wasn't in the original film). Bond hits several men and finally knocks a woman down on the bed; Bond then gets hit by several men, hit by a woman, and attacked with flaming sticks of meat, to illustrate the reversal from masculine power to masculine anxiety.

I had several images of a snake menacing Roger Moore, because snakes are a common phallic symbol. One time, women look on and smile while a snake drowns him. Once again, the idea was to show Moore essentially drowning in/menaced by male sexuality. That's why the tag line for the vid is "Why did it have to be snakes?": It's a reference to the snake/phallic images in the vid (and a jokey reference to the line from Raiders of the Lost Ark).

In a completely obvious pun, on the line "he's got the power" I show a villain stroking a cat (a signifier of feminine sexuality), and on the next phrase "and you're so weak" I show Bond being knocked out, drugged, falling, several times in succession.

Though I will be the first to admit that I wasn't as clear as I'd have liked in getting my point across, I know that at least some people who are adept at "reading" vids were able to perceive it. For example, in 2008, Thingswithwings posted an incredibly nice commentary on several of my vids. At the time, I'd had no prior contact with her at all, about my vids or anything else. Nonetheless, she accurately described Der Kommissar as "all about sexual violence." http://thingswithwings.livejournal.com/23647.html.

I am submitting this statement to explain that I did intend a commentary and that the community that I was trying to reach could understand that commentary, even if not everyone would recognize it. In particular, I want the Copyright Office to recognize that protection can't and shouldn't turn on the vidder's skill.

35

Appendix II: Statement of Akemi42 (Vidder)
February 28, 2012

An illustrative example of the practical differences associated with various methods for obtaining vidding footage involves my experience with the film *Watchmen*. I have used four different methods to extract clips in order to make my non-commercial fan videos.

Method 1: Using software to circumvent CSS encryption on a DVD copy that I purchased
- DVD Decrypter (free)
- Mac the Ripper (free)

Method 2: Using digital image capture software to capture images on the screen of my computer as they played on Amazon Instant video (also purchased)
- CamStudio (free)
- Hyperionics (free)
- CamTasia (free trial, $299 list price)

Method 3: Using a video camera to capture images on a television screen playing the Blue Ray disc according to the method suggested by the MPAA
- 40 inch flat screen television in my home
- Playstation 3 with Blu-Ray player (about $240)
- Canon VIXIA HF R20 Full HD Camcorder (about $350)

Notes on Logistics
Method 1 is relatively straightforward process that utilizes readily available software. I used both DVD Decrypter for the *Watchmen* footage, but I have also used Mac the Ripper for other vids. The whole process generally takes less than one hour.

I attempted Method 2 on a Windows-based PC using CamStudio and Hyperionics, but both programs stopped recording several times while the video was playing. At one point, I received an error message from Amazon indicating that I was attempting to play the film on more than two devices at the same time. Frustrated with these technical obstacles, I switched to a Mac running CamTasia, which was ultimately successfully in outputting a video file.

Method 3 required the most substantial amount of equipment including the television, video camera, a tripod, and a table to position the camera. In addition, I had to wait until night time to make the recording because the room in which my television is housed has large windows with no coverings. Once the equipment was set up, I did not experience any logistical errors.

Notes on Quality
Generally Method 1 provided the best quality clips for vidding purposes (e.g., enabling zooming, adjusting frame sizes, color changes). The clips that Method 2 produced were very difficult to manipulate in terms of zooming and crops. They also generally appeared less polished and clear. Due to the presence of the television in the picture, Method 3 required substantial editing on the front end. The brightness of the television also made any sort of color adjustment nearly impossible. In addition, the flicker of the images made the editing process very unpleasant.

Statement from Jackie Kjono
November 21, 2011

I was a late adopter of ripped source and was still using capture devices up until three years ago when we got the exemption. (Not quite as bad as the suggested method but problematic enough.)

Images are blurry and bright colors end up too bright while dark colors end up too dark. It is very hard to adjust them to get them to look anything like good what they should when you use capturing.

One of my biggest heartbreaks is a vid I made back in 2002 called "If You Were in My Movie." I spent six months putting it together. Part of the problem was that After Effects was ridiculously expensive back in the day and I was quite broke so I did the masking effects in Photoshop - frame by frame. Success was limited.

The captured source was another problem. The colors - especially reds - bled all over the place. This was a particular problem with the Lois & Clark/Spiderman sequence. Capturing tends to darken images so when I was capturing darker source (e.g. Silence of the Lambs), it was more difficult to tell what was happening in the clip. Brightening it would screw up the contrast and since I was putting my Silence of the Lambs footage against a hot pink Daria background, well, ick. I tried muting back the Daria colors which had ended up significantly harsher on the captured version than they had been on the television but, I was only moderately successful with that.

I will grant that I probably would have had serious color problems anyway, working from 49 different sources but, ripping would have given me a lot more flexibility when it came to fixing the problems than I had access to at the time.

The vid is available at www.triptychvids.com. I've been thinking of uploading some of my old vids to vimeo but, haven't gotten around to it yet. I'm still really proud of this vid as a vid concept and I really regret the the execution holds up poorly over time.

I have actually experienced vids made by the process suggested by the MPAA (setting up a separate camera to record your screen as it plays the source.)

Years ago, some British fans wanted to let their American friends know about a really great show called the Professionals. British PAL VHS couldn't easily be converted to American NTCS VHS and the producers of the show weren't interested in making it available to Americans so the die-hard Brit fans would get an American camcorder and hold it in front of their televisions creating what were known as "flicker copies" for their American friends. Some of those American fans used their VCRs to make vids from those flicker copies.

I have seen some of those vids. They seem to be about the adventures of two migraine-inducing smudges, one of whom is slightly taller than the other.

Interview with Joe Sabia
Digital Artist, Video Editor, Creative Consultant

1. Please write a biography describing your work including the types of projects you work on both commercially and personally. It might also be useful to include links to some exemplary videos.

I am a NYC based digital remix artist, video director, speaker, panelist, and creative consultant. I create conceptual videos that communicate unique and compelling stories. I have a heavy slant towards socially important videos which include a direct and honest message of making a difference.

Commercially, I've counted Google, Interscope Records, NOKIA, BBC America, AirBnb, HBO, and YouTube as corporate clients, as well as a dozen ad agencies I pitch and consult for.

Pro bono-wise, I am also the Chief Creative Officer for African-focused non-profit, Mama Hope. And I am the co-curator and co-host of Boing Boing Video on Virgin America Airlines.

Examples of videos include:

Seven Minute Sopranos - A first of it's kind video recap of the entire Sopranos series. Was the inspiration for Lost, Battlestar Galactica, and The Wire recaps, and cited as the reason for launch of CBS's Eyelab.

Tupac in Kazakhstan - A music video that sought to depict the culture of Kazakhstan by including 40 of its natives singing Tupac Shakur's "Changes".

Alex Presents Commando - A Tanzanian boy recaps the 1985 Schwarzenegger film "Commando". Kicked off the launch of the "Stop the pity. Unlock the Potential" campaign for Mama Hope.

Google Wave Fiction - The first "Infotainment Demo" created to feature at the time a new Google Product - Google Wave - by sound tracking its functionality to a famous scene from Pulp Fiction.

Obama Raps Kanye - Over 90 speeches given by Barack Obama, finding lyrics that match Kanye West's hit, "Stronger".

2. Can you explain how making *Prime Time Terror* helped convey the message of the academic research in the Lear Center's study? How did the video function differently than the written report in communicating the same information?

Primetime Terror sought to convey academic research in an engaging and entertaining way in the form of a video which effectively served as a Hollywood movie trailer for the research.

Why? Well, per tradition, the report was published in written format. Despite being open to the general public's consumption, this research most likely finds itself trapped in the realm of peer-reviewed academia. Not surprisingly, it doesn't break out into the public.

Typically, the only other life a written research will have is in the form of a panel presentation or keynote speech. But there's not much excitement in a 45-minute, single-take, grainy conference video. If that were uploaded on YouTube it might get a couple hundred hits, tops.

But by creating a remix video, you're creating art on top of the research. And with new art, you can control the pace, the mood, the tenor of the experience. It ends up injecting color into this normally drab research paper existence.

3. How did you obtain all of the different types of footage used in the *Prime Time Terror* video? Generally how do you obtain source material for other remix videos that you make? Do you view any particular type of source as useful or superior? If so, why?

For *Primetime Terror*, assets were derived from a flurry of apps, DVDs, and subscription based media services. The DVDs were ripped onto my hard drive using the free application HANDBRAKE for Mac. Once the episodes became files on my laptop, I dragged them into my editing software, Final Cut Pro.

The most useful type of extraction is always DVD ripping. Because DVDs allow for little to no loss of quality.

4. In producing remix videos, is the quality of your source footage important? If so, why?

The quality of the source footage is incredibly important. There's an innate prejudice in all of us to equate the integrity of the creation with the integrity of the footage. How would Lord of the Rings be received if it were shot with a flip phone? What would Two and a Half Men look like without proper stage lighting?

As a remixer, there's nothing more heartbreaking than realizing there are NO better alternatives to that one, down-rezzed, grainy YouTube video that is crucial to your

project. That's why when DVDs are available for executing the remix idea, it's a no-brainer.

5.   Do you think that you could have created the *Prime Time Terror* video without the clips from the various shows that were the subject of the report?

Sure I could have! I could have commissioned a cartoonist to animate Dr. House. I could have used animated lego figures to act out a crucial scene from "24". I could have filmed my friends doing theatrical NCIS interrogations in my basement.

But let's be real. These options are absurd. If the only focus of this research is on the television shows themselves, doesn't it make sense to use the television shows as the only visual accompaniment? When a weatherman is talking about where rain will fall over the next 5 days, he shows a map with moving precipitation. If the Lear Center is citing how there were fourteen forced entries during Primetime TV, then we show the scenes of forced entry. There's nothing more elegant and logical about the situation.

Primetime Terror - as an entertaining take on research - proves the importance in capturing the largest audience possible, if not for the health of public discourse and intellect, than for the purpose of shattering the often stodgy stereotypes of academia. Because reading is dead. No one can sit through an article in the Economist anymore, let alone most children's books. Our attention doesn't warrant the ability to process stolid, insipid and unmoving black words in plain white background. It mandates the presence of moving imagery. Fast clips. Exciting music. Don't just consume the data. *Experience* the data.

Academics are good at focusing. The general public isn't. Acquiring the public's attention requires creativity in doing much more than publishing a hundred pages of text.

6.   Do you think the remix artist community has a clear understanding of what the DMCA prohibits? How do you think intellectual property constraints are impacting the community?

It'd be naive to say the remix artist community knows the tenets of the DMCA inside and out. Artists are artists. There's a tendency to pay more attention to art than to laws.

But artists are creators. And to create means to not copy. The absolute least artistic thing an artist can do is upload a whole, unedited chunk of CSI: Miami. That person is a pirate with zero regard for creativity.

It's not so much an issue of how the artist community is affected by intellectual property constraints, but the fear I have is how society itself is impacted by constraints. This transmedia culture we live in requires a new, adopted literacy that most people over the age of 40 simply don't understand. This sharing, this mashing, provides a collaborative and essential form of communication that just doesn't warrant the luxury of time and resources to ask for usage permission that will ultimately be denied by unsympathetic Hollywood rights holders.

Constraints on fair use will simply stifle art and stifle a digital language of criticism, commentary crucial for a digital society. And the effects are broad. The fair-use friendly internet that allows me to screen record episodes for non-commercial research uses like in *Primetime Terror* is the same fair-use friendly internet that allowed a kid in his Harvard dorm to create the most impactful social networking site on the planet. Any chipping away at fair use is a slippery slope. Let's just leave the thing alone.

7.   Why couldn't the Lear Center do this itself? Why hire you? Why didn't you do it for free?

The Lear Center didn't create this itself because it was out of the scope of what they're really good at. They did the research, I communicated it in a fun way. Toyota is good at making cars. Its the ad agency that communicates the brand to its audience. There's not much of a difference.

I didn't do this for free because it took over 30 personal hours editing, alongside the efforts of a graphic animator, a musician, an audio engineer, and Steve Zirnkilton, the voice of Law & Order. All of this requires a budget to get people paid for their time. As with everything, there's an opportunity cost. And like the above ad agency analogy, time is paid for.

I chose not to do this for free because the Lear Center was able to muster up a budget, and that was hard to refuse. Was it a budget that I'd normally get from most clients? No. But because of the socially important aspect of the nature of the video, me and my colleagues undertook the project at a discounted rate. It's kinda like an artist-patron relationship. I like it a lot.

Penn
Arts & Sciences

Cinema Studies Program
209A Fisher-Bennett Hall
3340 Walnut Street
Philadelphia, PA 19104
Tel 215.898.8782   Fax 215.573.0262
cinemastudies.sas.upenn.edu

August 2, 2012

David O. Carson
General Counsel
U.S. Copyright Office
P.O. Box 70400
Washington, DC 20024

Re: Docket No. RM 2011-7
Exemptions to Prohibition on Circumvention of Technological Measures that
Control Access to Copyrighted Works
Proposed Classes 7 and 8

Dear Mr. Carson,

I have reviewed the screen captured *Star Trek* clip prepared by the DVD-CCA. I have also used the program Aiseesoft to "rip" that section of the Blu-ray version of the film. I have enclosed a copy of the ripped clip for your examination as well as a few frame grams. Below I compare the screen capture and ripped clips, and then I offer some reasons why the high quality clip is important for education.

1. Screen Capture v. Blu-Ray Rip

a. First, the DDV-CCA co-counsel made a number of mistakes while preparing the screen captured *Star Trek* clip. He played the film using the wrong aspect ratio, so all of the horizontal lines are compressed. The captain, for example, seems to have a long thin face in the screen captured version, when in fact he has a round face in the film (see figures 1 and 2). The fish bowl effect created by the anamorphic image makes the scene very difficult to analyze, since it is quite far from the look of the original film. The DVD-CCA co-counsel also left a news program playing on his computer while he made the clip, so we hear bleed through throughout. This is especially noticeable when the film soundtrack goes silent to capture the experience of an astronaut in space, and in place of the silence of empty space we hear news commentary saying, "domestic sales of just over 22 million…" But these are errors that could be corrected by a more experienced technician.

U N I V E R S I T Y *of* P E N N S Y L V A N I A

b. This example, however, also reveals a number of limitations of screen capture technology that cannot yet be overcome by any level of technical skill or equipment. The screen captured clip is much fuzzier and muddier. There is a significant decrease in the level of detail. Compare figures 5 and 6. In figure 5, we see the time traveling Romulan ship absorb the U.S.S. Enterprise. In the screen captured clip, the Enterprise enters a barely legible black mass. There is a cryptic, spooky feeling to the shot, which has its own series of connotations. But when we look at the ripped clip, we realize that that is not what the filmmakers intended. In fact, careful modeling of light reveals tremendous detail in the Romulan ship. It isn't the mystical black mass of the screen captured clip but a technological wonder with detailed mechanical parts and lights that suggest alien activity inside.

Similarly, if you look at images 3 and 4, you can see the discrepancy between the screen captured and ripped images. Focusing on the detail of the captain's eye, we can see how much more information is revealed in the ripped version. Among other details, we can see the light reflected in the captain's eye. Filmmakers place lights below main characters to achieve this effect, which is entirely lost in the screen captured version. The gleam in the captain's eye makes him appear alert and alive, and we respond to him. The washed out captain of the screen captured version, on the other hand, is passive, stunned by the experience rather than reacting to it, and our identification with him is hindered.

c. The fuzziness of the screen captured version also flattens the image. We loose the sense of space (more technically the depth of field) that is created by the light and detail apparent only in the ripped version. Compare figures 1 and 2 again. In the screen captured version, the captain and the background merge together, appearing almost on the same plane. In the ripped version, we realize that shot was taken using a camera setting designed to create a shallow depth of field. In the ripped version, the captain appears in crisp definition, making him pop out from the fuzzy background. This sense of depth is not only important because it is what the filmmakers intended us to see. It also helps create an immersive experience for the viewer, who feels the camera move through the deep space of the ripped clip rather than the flat space of the screen-captured clip.

2. So what? Why would students and professors need the high quality images for study and analysis? Aren't the muddy screen captured images good enough for teaching and learning?

a. We have discussed this many times, but the level of analysis rises and falls with the fidelity of the example. As I demonstrated above, the screen captured clip and the ripped clip are different representations of the same scene. The varying presentations of light, space, and detail will result in different interpretations of the scene. A student writing an essay on the screen captured version will not arrive at the same conclusions as a student watching the ripped version. They are different objects of study with very different properties. More practically, a student who relies on the unreliable screen captured version is in danger of getting it wrong, like an art history student who refuses to take off his dark sunglasses in the museum.

b. But what about a student who isn't engaged in aesthetic analysis? What about a student who is watching a clip in a history lecture or discussing a clip in a religion seminar? Does the diminished depth of field or the washed out light make a difference to her? The answer is yes, and there are two reasons why. First, the connotations created by the image affect our interpretation. Without the glint his eye, we read the captain's response to the situation differently. Without the detail in the Romulan ship, we mistake science for magic. God is in the details. And when the details are altered, as they are in the screen captured version, all analysis that follows is built on a shaky foundation.

Second, and equally important, is the affective response of the clip. I keep coming back to Mr. Carson's comments during the hearing. He said that his daughters are happy to watch movies on their phones. Well, most phones are capable of playing high definition video. Without an exemption to rip high definition images, professors and students are being asked to study images of far less quality than the ones they are accustomed to seeing in their living rooms or, indeed, on their phones. As my students have attested many times, showing historical events or important figures in high quality images brings the subjects to life. When video is shown in an educational context with the same quality as video shown for entertainment, the experience can erase the barriers of history or obscurity. And learning can take place.

Please let me know if you have any problems accessing the enclosed video clip and still images. And feel free to contact me with any additional questions.

Sincerely,

Peter Decherney
Associate Professor and Director, Cinema Studies Program

Statement of Prof. Tisha Turk
Associate Professor of English
University of Minnesota Morris

February 6, 2015

Overview

For a remix artist, video source, whether ripped or captured, must be usable within the nonlinear editing programs (Adobe Premiere, Final Cut, Ulead, Vegas, iMovie, Windows Movie Maker) needed to create remixes. Usable video is video that the artist can **import**, **edit**, **manipulate**, and **export** using that editing software. Screen-capture software is not designed to output footage for extensive editing, and in many cases it is incompatible with standard settings for nonlinear editing programs.

Ripping a DVD or Blu-Ray copies all the data from the disc onto the computer: every pixel, every frame. It's like attaching an image to an email: the recipient gets an exact copy of the original file. Ripped video source requires conversion and cleanup in order to be imported and edited, but the conversion-and-cleanup process is minimal and predictable, and the original file being converted and cleaned up has encoded the most possible information and is the closest to existing broadcast standards.

Other methods of capturing source produce inexact copies; the degree of inexactness depends on the method and the settings. It's like printing a digital image and mailing the printout to someone who has to scan the page to her own computer to have a digital copy. The content (mostly) reaches the recipient, but quality degradation is inevitable and the transfer process introduces a lot of points at which things can go wrong: what's the quality of the sender's printer? is one of the ink cartridges low? did the envelope get folded or otherwise damaged in the mail? how good is the recipient's scanner? Captured source is particularly susceptible to problems with aspect ratio, frame size, frame rate, interlacing, and dropped frames: it is harder to control these variables when dealing with an inexact copy than when dealing a file that has all the original information because an inexact copy is less predictable.

Technical and aesthetic problems do not necessarily make a video file unwatchable for normal viewing purposes, but they do compromise image quality and can make editing that file and exporting a remix video difficult or even impossible. Whether a remix artist can import, edit, manipulate, and export video depends primarily on three factors:

1. whether the video source complies with NTSC/ATSC distribution standards;
2. how the video source is encoded;
3. how much of the original visual information is preserved in the video source.

These three factors do not operate independently; for example, frame size and interlacing have implications for all three. It is possible, however, to make some distinctions. Importing and exporting are technical procedures affected mainly by standards compliance and encoding. Editing and manipulating are both technical and aesthetic procedures; they are affected indrectly by standards compliance and encoding (you cannot edit video that your software cannot import) and directly by the amount of visual information present in the source.

NTSC/ATSC distribution standards are reflected in editing software project presets, which are designed to ensure that an exported video can be correctly interpreted by a variety of screen devices, and in the default settings of video streaming sites. Correctly encoded video loads and exports without issue and can be edited with frame-level accuracy; incorrectly encoded video can crash the editing software when imported, prevent the artist from editing (or allow editing but prevent the artist from seeing what's she's doing, which is no better), and/or crash the editing software when she attempts to export the

1

remix she has created. Video with more visual information is subject to more manipulation. Some of the simplest and most common effects, such as crops, zooms, and slow-motion, are particularly unforgiving of quality problems. When cropped or zoomed, source that lacks fidelity to the original video quickly loses fine detail and becomes pixellated; when slowed down, it loses smooth motion and becomes jerky.

Technical Information

Aspect ratio and resolution

Aspect ratio is the proportion of width to height, expressed as w:h. The traditional almost-square-TV aspect ratio is 4:3; the new widescreen TV aspect ratio is 16:9; U.S. widescreen cinema aspect ratios are 1.85:1 (older) and 2.39:1 (current). Standard definition resolution for NTSC is 640x480 (4:3 aspect ratio) or 720x480 (16:9 widescreen aspect ratio). Standard resolutions for ATSC are 640x480 (4:3 standard), 704x480 (16:9 widescreen), 1280x720 (HD), or 1920x1080 (1080 HD).

DVDs are typically encoded anamorphically, meaning that a comparatively wide image is horizontally compressed to fit into a storage medium with a narrower aspect ratio; the video includes a digital "flag" that tells the player which aspect ratio to use when displaying the image. TV shows with a 4:3 aspect ratio are usually encoded to DVD at 720x480 resolution rather than 640x480 (which would leave black pillar boxes on each side of the screen) in order to maximize the number of pixels being used (and thus the amount of visual data included in the image). The resolution of Blu-ray video is high enough that it is not encoded anamorphically.

Because video ripped from DVDs and BDs has been encoded according to NTSC/ATSC standards, any encoding—anamorphic or not—is predictable: it is consistent from disc to disc. Resolution and aspect ratio conform to project presets available in most video editing software and can be correctly imported and interpreted by that software. In some cases, the artist needs to adjust the aspect ratio herself, especially when she is using multiple video sources that have different aspect ratios; for example, a remix video using source from both the original *Star Trek* TV series (4:3 aspect ratio) and the 2009 *Star Trek* reboot movie (2.39:1 aspect ratio) may, depending on the software used, require resizing both sources before import to account for anamorphic encoding, pixel aspect ratio (see below), and differences in aspect ratio. Other situations that might call for adjusting the aspect ratio prior to editing: older software that cannot adjust display resolution and pixel aspect ratio (see below); older hardware that does not have the processor power required to adjust aspect ratios on the fly. When video source is consistent and predictable, an artist can make these adjustments herself doing basic math. It's not fun, and it's not always simple, but it can be done.

Aspect ratio and resolution present the first of many potential problems with screen capture: Not all playback software respects anamorphic encoding flags (by default or at all), which means that it is easy to capture footage at the wrong aspect ratio—and, especially in combination with the other factors listed below, it may be wrong in a way that is not predictable and cannot be corrected by the remix artist without meaningful loss of quality.

Frame size

Frame size of digital video, including analog video (such as film) that has been digitized, is measured in pixels. A pixel is a small block of color information, the smallest controllable element of a picture represented on the screen. The more pixels are used to represent an image, the more detail that image can have.

Like aspect ratio, the frame size of video ripped from DVDs and BDs conforms to NTSC/ATSC

2

standards and is therefore predictable and consistent across discs: ripped DVDs have a frame size of 720x480, period. (Feature film, however, is wider and shorter than widescreen TV, and thus DVD versions of feature films are typically encoded with letterboxing, black borders at the top and bottom, in order to reconcile DVD frame size with feature film aspect ratio.)

The frame size of captured video, by contrast, is not necessarily consistent. First, most playback software allows users to adjust the frame size: to make the video twice as big or half as big, to re-size it in idiosyncratic ways using the corner handles of the display window, or to display it using the entire screen. If a player window has been resized in any of these ways, the frame size will be non-standard. Second, selecting the capture area presents problems. Even if the capture software can be set to capture a particular window, it may capture not only the video but the software frame: the border around the edges, the control panel at the bottom of the window. And even if the artist adjusts the capture area very carefully, it is still not only possible but likely that she will end up capturing video with a non-standard frame size of, say, 718x481. It is even more likely that, when capturing source from multiple discs (as she would if capturing from, for example, multiple episodes of a single TV show), she will end up with captured video at multiple slightly different frame sizes: some 718x481, some 721x482, some 722x479, and so on.

Non-standard frame size presents both technical and aesthetic problems for the remix artist. Video source with non-standard frame size may not import correctly into editing software—or, worse, it may produce *export* errors, meaning that everything seems fine right up until the very end of the process. Some software will import incorrect frame sizes but will either crop or scale the video to match the project settings; scaling, in particular, can compromise video quality because the artist often can't control what scaling algorithm the software uses, and different algorithms offer quite different trade-offs between efficiency, smoothness, and sharpness. (See http://en.wikipedia.org/wiki/Image_scaling for details and examples.)

Pixel aspect ratio (PAR)

Aspect ratio is further complicated by differences among pixels. The normal pixel aspect ratio is 1:1 (square pixels); this is the standard aspect ratio on computer monitors, for example. However, traditional NTSC TV screens have non-square (rectangular) pixels: the PAR is 10:11, usually expressed as .90. Displaying an image created with one pixel aspect ratio on a device with a different pixel aspect ratio results in an image that is unnaturally stretched or squashed either horizontally or vertically. This distortion, along with any anamorphic encoding, must be accounted for when preparing DVD source for editing. (Blu-ray source is generally encoded for square rather than rectangular pixels, though many Blu-ray extras are encoded at 720x480 with rectangular pixels, just like DVDs, and flagged so that the BD player will adjust the display.)

Frame rate

Frame rate, expressed as frames per second (fps), is the frequency with which a playback device displays consecutive still video images (frames) to produce the illusion of motion. Current standards in the U.S. are 24 FPS (for progressive, non-interlaced video) and 29.97 FPS (for NTSC TV), which is sometimes simplified as 30 FPS (even though it isn't really). However, DVDs are generally telecined (interlaced—see below) for viewing on standard TVs; after inverse telecining for editing purposes, DVDs are actually 23.976 FPS. Newer editing software is often able to treat 24 FPS and 23.796 FPS as interchangeable, but in general software works best when a) all video source files are the same frame rate, and b) the frame rate in the project settings exactly matches that of the video source. When frame rates don't match each other or don't match the project settings, jerky motion (because of dropped or repeated frames) is almost inevitable.

3

Screen capture software typically allows users to capture video at a wide range of frame rates, from 15 FPS (common, and perfectly acceptable, for video tutorials showing which buttons to click in unfamiliar software) to 30 FPS and sometimes above. This flexibility introduces unpredictability and further degrades quality when capturing video for remix purposes. First of all, it may not be at all clear what settings the artist should use. Is the video player playing back the raw video at 29.97 FPS? Is it deinterlacing the video but leaving it at 29.97 FPS? Is it inverse telecining the video so that it's 23.976 FPS? Is it altering playback slightly to the film rate of 24 FPS? Without knowing, the artist can't set the screen capture software to capture the same number of frames per second that the player is displaying. A mismatch between playback speed and capture speed can result in dropped frames, repeated frames, or blended frames ("ghosting"). Furthermore, if the artist chooses a frame rate like 25, which looks like a nice sensible multiple of five and is standard for PAL (used in the UK along with different standards frame size and resolution) but not NTSC, the frame rate *can't* match the video's original frame rate; the captured video will inevitably have quality problems and, importantly, won't match the NTSC presets in her editing software.

Dropped and repeated frames

Ripped source, by definition, does not drop frames: all the frames on the disc are transferred to the computer.

Screen capture of video, however, is prone to drop frames. Video playback is affected by anything else the computer is doing. If a computer starts a scheduled backup or virus scan, if Apple's automated update check for iTunes begins running, if the computer slows down for any reason, playback can glitch (skip frames) or hang (remain on a single frame for more time than it should). Even if new windows don't overlap with the video playback window being captured, the background processes can cause video playback to stutter—and the screen capture software will capture that stutter. Any frames dropped in playback will be missing from the captured video.

Compression

Raw, uncompressed digital video requires enormous amounts of data and thus enormous file sizes. Uncompressed 720x480 video requires 20-30 MB per second of video; uncompressed 1920x1080 video requires 119-158 MB per second of video (meaning that a single *minute* of video at Blu-Ray resolution requires 7.14-98.48 GB of storage space). To keep file sizes manageable, video is compressed: the video information is encoded using fewer bits than the original representation used. Video that has been compressed (encoded) for storage must be decompressed (decoded) for viewing; the appropriate codec (_co_der/_dec_oder) must be present in a program or device in order for it to encode or decode digital information correctly. Different codecs have different features; for example, they can emphasize color quality, motion quality, or small file size.

Compression can be either lossless or lossy. Lossless compression preserves more information; it leaves the original data intact but represents it more concisely. The resulting file is smaller than uncompressed video but still quite large. (See http://en.wikipedia.org/wiki/Data_compression#Lossless for details.) Lossy compression achieves much smaller file sizes by discarding data during the encoding process. Once that data has been discarded, it cannot be recovered.

Video on DVD and BD has been encoded using lossy compression, meaning that some of the original data has been sacrificed to decrease file size. It is therefore especially important for remix artists to be able to maintain video quality rather than losing any more of it to additional lossy compression: *every time* video is encoded using a lossy codec (even the same codec that has already been used), more data is lost. In any video editing project, including remix, the goal is to use a lossy codec only once: at the

4

very end of the process, when compressing the completed video for distribution.

Ripping DVDs and BDs allows remix artists to minimize data loss by copying data directly from disc to drive. Screen capture software works by decoding a disc and then *re-encoding it*. Most software does not make clear which codec is being used for this re-encoding, but the resulting image quality and file sizes suggest that the codecs are generally lossy codecs—which makes sense, given that the main purpose of screen-capture software is to create videos with small file sizes for online distribution.

Interlacing

From the point of view of remix artists, interlacing—or, for those who don't know the technical term, "that weird comb effect"—is a problem that can completely destroy a video on an artistic level. Here's the technical explanation:

Progressive (non-interlaced) video is transmitted line by line, in order. Interlaced video is transmitted line by line in two passes (called fields): the first pass displays all the odd-numbered lines, and the second pass displays all the even-numbered lines. Interlacing doubles the perceived frame rate of a video display without requiring any additional bandwidth. As of February 2015, U.S. over-the-air broadcast video is still interlaced, though satellite services transmit pay-per-view movies as progressive video. Blu-ray video is typically encoded as progressive, non-interlaced video, and some recent DVDs are as well, but some current and nearly all older DVD video is interlaced.

Interlaced video cannot be resized vertically without blending scanlines and producing a hideous mess. In addition, the interlacing itself is far more noticeable on computer monitors than it is on TV monitors, which are designed to account for it.

Film isn't originally interlaced at all—it's an analog medium. But when converted for DVD encoding, some film gets interlaced via a process called 3:2 pulldown, or telecining: an extra frame is inserted every four frames to shift the frame rate from 24 FPS to 30 FPS; two of those frames have the dreaded "comb effect," in which two frames' fields are stretched out over extra frames. For examples of interlacing, see the series of images submitted under separate cover as EFF Class 7A Appx N Exh. 1-5 and 10-14. To obtain these images I loaded the raw VOB file (what you get when you rip a DVD) into VirtualDubMod, copied individual frames to clipboard and loaded into Photoshop for saving as still images. (Which, incidentally, involved losing some color quality.)

Video source ripped from a DVD—an exact copy with all file information fully intact—can be inverse telecined. Inverse telecining reconstructs the original 4 frames, removes the comb effect, and deletes the extra frame to turn the source back into progressive video that can be cropped, resized, and zoomed without horrific results. To see the previous examples of interlaced video inverse telecined and reconstructed see the series of images submitted under separate cover as EFF Class 7A Appx N 6-9 and 15-18. To obtain these images I indexed the raw VOB file and wrapped it in an AVS script container. The AVS script lets editing software read the VOB (which it normally can't), but it doesn't change the VOB itself in any way: there's no converting or compressing, just interpreting; the VOB remains on the drive as a reference point, and the script won't work if the VOB is removed. Then I added the inverse telecine command to the script so it would reconstruct the original frames from the combed frames.

Captured footage cannot be inverse telecined. Depending on how the footage was played back for capture, the player may have removed the interlacing, but it may have done so by *deinterlacing* rather than inverse telecining. Deinterlacing doesn't actually remove the scanlines or the extra frames; it just attempts to disguise them by interpolating the pixels in between scanlines in the same field. This process takes quite a lot of processing power (which can cause jerky playback, pixelation, or other quality loss) and is inherently error-prone.

5

Notes on screen-capture software

<u>Compatibility</u>

Relatively few screen-capture programs offer cross-platform compatibility; most work on either Windows or Mac, not both.

<u>Purpose</u>

Most screen-capture software is designed and marketed for screencasting (creating tutorials and walkthroughs), not video capture; descriptions emphasize such features as "follow mouse" and "record keystrokes." While screen-capture software *can* capture the gist of a video, it is neither intended nor optimized to provide detailed visual fidelity or to enable more than minimal post-capture editing, such as adding captions or other text. Indeed, some software descriptions emphasize features that *eliminate* the need for post-capture editing. Such emphasis makes sense in context: many screencasts are not edited at all—the tutorial is recorded and uploaded, and that's it. But for a remix artist, video source that can't be edited is unusable.

<u>Problems</u>

Because it's intended for screencasting, most screen-capture software is optimized for small file sizes; programs achieve these small sizes through lossy compression and low frame rates. Lossy compression can result in, among other things, "grainy" video (see user comments on ScreenFlow, below); low frame rates require programs to discard whole frames of information—in some cases as many as half the original frames.

Some screen capture software also requires a great deal of processing power. Tim Schmoyer, the YT-certified video expert behind the Video Creators YT channel, explains this problem in his discussion of Quicktime in "The Best Free Screen Capture Recording Program" (http://youtu.be/CQedvNM-vRI): "It's simple, it's free, it's easy to use.... But I stopped using it because the problem I ran into with it is that it actually uses a lot of processing power on my computer, which makes it run really laggy. So if I'm doing even something basic like trying to screen-capture something that has a video, like on YouTube, running in it, then all of a sudden the video becomes really choppy and my computer just slows down. And I have a pretty decent computer—I edit on a Macbook Pro." While Schmoyer is discussing Quicktime specifically, this problem is common to screen-capture software generally.

<u>Software notes</u>

AShampoo Snap 7

https://www.ashampoo.com/

Windows only. Produces screencast-quality images meant for trimming and posting, not substantive editing. The PC Magazine review emphasizes its intended uses: "Snap 7 also has watermark options and video-capture capabilities, with numerous resolution and WMV/AVI options, that make creating tutorials and walkthrough clips a breeze." Having "numerous resolution options" is presented as a *good* thing—a sure sign that the intent is not to produce video that conforms to NTSC/ATSC standards and that therefore is suitable for importing, substantive editing, and exporting in true video editing programs.

CamStudio

http://camstudio.org/

Windows only. Free; widely reviled for its packaging of unwanted extras with the program: the

6

unprepared end up with all kinds of undisclosed software on their systems, including destructive malware. (Many user comments testifying to this problem can be found in the comments on to this effect on Tim Schmoyer's review video linked above.)

Camtasia Studio 8

http://www.techsmith.com/camtasia.html

Mac and Windows. Widely regarded as the best screen-capture software (and, at $299 for PC—though only $99 for Mac—priced out of the range of many students and other nonprofessionals); can be used for capture and basic cutting and cropping, though not sophisticated editing. I've used Camtasia for a video project: an academic project for which I needed to capture some animated .gifs on Tumblr. Capturing was deceptively easy; it's not at all clear how one ought to capture in order to be able to include the results in a standards-compliant video project, and so everything went fine until I tried to export the video... at which point the video would hang on export every time. Eventually I had to re-capture the three gifs in a different format, which was annoying but manageable. Recpaturing 200 clips for a vid would have been impossible. It's excellent software, but it's just not meant for what remix artists do.

Fraps

http://www.fraps.com/

Windows only. Bills itself as "real-time video capture & benchmarking" for people who want to "join the Machinima revolution." Fraps is intended for games and does not work for desktop recording.

iShowU HD

http://www.shinywhitebox.com/ishowu-hd-pro

Mac only. Recommended by Tim Schmoyer (see above), but it's not an option for PC users. The program is clearly meant for screencasting, not video capture: features include things like "follow mouse" and "record keystrokes." Description notes that the Pro version "includes built-in presets for Final Cut," but it is marketed to people who want to avoid using editing programs: "HD lets you specify your own capture area. Say goodbye to 'post cropping' of video."

Open Broadcaster Software

https://obsproject.com/

Mac and Windows. "Free, open source software for live streaming and recording." Captures for streaming, *not* exporting and editing; the overview guide doesn't even mention exporting.

Quicktime

Mac only. As noted by Tim Schmoyer (above), Quicktime's merits are offset by the demands it makes on the computer's processor, which make it unpredictable and inappropriate for extensive clipping.

ScreenFlow

http://origin.telestream.net/screenflow/

Mac only. Captures and edits for purposes of screencasting, not for export and editing: "ScreenFlow provides all the elements you need to create professional-looking App previews or software demonstrations. Record your iOS screen or computer screen, highlight areas of interest, add text, then edit the whole thing and save it as a video ready to be shared with the world." JaCGaming notes in a

7

comment on Tim Schmoyer's review of screen-capture software, "I have ScreenFlow and it works GREATLY! The only downside is for some reason, the video export is a little grainy... but other than that the features in it are awesome, and it functions really well." "A little grainy" is fine for many purposes, including, clearly, this user's, but it's not an acceptable compromise for remix video artists.

SnagIt

http://www.techsmith.com/snagit.html

Mac and Windows. From the same company that makes Camtasia. Similar to AShampoo Snap 7, though a bit more powerful. Another good-at-what-it's-meant-for program that produces screencast-quality images meant for trimming and posting, not substantive editing.

DEPARTMENT OF GENDER STUDIES

Mackintosh-Corry Hall
Kingston, Ontario, Canada K7L 3N6
Tel 613 533-6318
Fax 613 533-2824
www.queensu.ca/gnds

Dear Librarian of Congress,

I write in support of a circumvention mechanism for access to copyrighted material in the specific case of remixes and related forms of popular critique, including fan-vidding. Juxtaposition and close-reading are exceptional tools for political critique, and in my professional view as a professor of gender and cultural studies at a major research university, practices such as vidding are forms of creative expression with high educational value. They do not represent financial threats nor do they restrict the freedoms of other creative artists. Quite the contrary, they are forms of productive dialogue both around and within popular culture.

Perhaps some specific examples from my own teaching may be of assistance here. The current generation of undergraduate, and even graduate, students has been continuously exposed to visual media from birth. The ability to form and express critical opinions via visual media is thus an essential skill. Exposure to vids has been of immense value in teaching this skill, in particular in my 250-student lecture on gender, race and popular culture. Exposure to a particular fanvid based on Joss Whedon's *Firefly* series taught the class about the unreflexive white privilege involved in producing a show in which the main characters all speak Chinese but there are no Asian actors. Exposure to a fanvid on the rebooted *Star Trek* franchise taught the students that the action movie, no matter how 'futuristic,' is still considered primarily a theatre for men. These lessons were all the more effective for being delivered as miniature and coherent visual spectacles, with the scenes and actions of *the shows themselves* being deployed to convey the key lessons. The fanvidding community, in my experience, is unusually sensitive to issues of gender-based prejudice, ableism, racism and other forms of disenfranchisement broadly evident in popular media.

Timely, legal and high-quality access to copyrighted materials is necessary to the production of this sort of work, and I urge that it be considered what it is, a valid and legitimate mode of critical analysis. Academic criticism is becoming increasingly aware of this mode of critical analysis, with recent academic papers on this subject appearing in journals such as *Studies in Culture and Communication.*

Sincerely,

Jane Tolmie, Ph.D. Harvard, D.Phil.Oxon, Rhodes Scholar '98
Associate Professor of Gender and Cultural Studies, Cross-Appointed to English

Applian Technologies News Alerts cs@applian.zendesk.com via mail176.atl21.rsgsv.net   Jan 31 (1 day ago)

to me

applian
NEWS

Stream it. Record it. Keep it.

SUPER BOWL XLIX

Are You Ready For Some (Super Bowl) Football?!

Use Replay Video Capture 7 To Catch It

Whether you're a Patriot at heart or a "12th Man" Seahawk, tuning in for the 4.5 million dollar commercials or simply to see halftime with Katy Perry; this 2015 Super Bowl is gearing up to be a fun spectacle. And this year NBC is streaming the live feed online, which means you can record the event with Replay Video Capture 7.

Not sure if you have the latest version of Replay Video Capture? Go here to find out if you qualify for an upgrade.

Kickoff Time

Let's Be Friends

We want to hear what you think. Seriously! Come find us on your favorite lunch-break sites like Facebook, Twitter and YouTube. Come tweet us, write on our wall and check out our videos.

Get Out of the Box

Go Ahead, Just Stream Everything

With services like HBOGo, Netflix Streaming, Amazon Prime and Google Chromecast there is no better time than now to let go of your basic cable and move towards the future. Of course, we are here to help with your media recording needs.

Read More

CUT the CORD

Thanks for being a great customer

We're always happily surprised at how wonderful our customers are -- yes, that means you! Even when you're contacting support about an issue, we find ourselves happy to talk to those who make our company what it is.

So thank you, sincerely, for sticking with us and being awesome. We can't wait to tell you about all the next-big-things for this year!

Happy Capturing!
- Riki & The Applian Team

DARK
MATTER

Appx. 111

The Phoenix Portal, 2005

THE HEAVINESS OF LIGHT

I

In the closing scene of the 1961 film *The Misfits*, Marilyn Monroe sits beside Clark Gable on the bench-seat of a pickup truck. Monroe doesn't know it yet but she is about to speak the final line of the last film she will ever complete. Gable doesn't know it but two days after filming he will have a fatal heart attack. With the rear projection rolling behind them, the moment stretches out silently like the road.

With fear discernible in her voice, Monroe asks Gable: "How do you find your way back in the dark?" "Just head for that big star straight on," he says. "The highway's under it. It'll take us right home."

II

The night sky is not only a compass, but also a time machine. This is a cliché of the indie film: two characters on the cusp of becoming romantically involved philosophise about the starry night. One character tells the other that the light from a particular star has travelled hundreds of years to reach them. In fact it is possible, they say, that the star they are viewing has already been extinguished and they wouldn't even know it.

It's almost as though the actors are inexplicably drawn to this dialogue because they sense that they are the stars that they speak of. The light reflecting off their flesh, and into the camera lens, has already begun a journey toward a future in which they no longer exist. Appx. 112

After the Rainbow, 2009

III

Jan Oort first postulated the existence of dark matter in 1932 to account for the orbital velocities of stars in the Milky Way. While it is not possible to perceive dark matter directly, its presence can be inferred through the gravitational forces that it exerts on visible matter. Since 2005 we have been pursuing the speculative hypothesis that a form of dark matter pervades the star systems of screen culture. Beyond these familiar constellations of light is an oblique event horizon that weighs heavy on the spacetime of the screen encounter.

Jean Cocteau understood this. Cinema, he said, films death at work.

IV

It is no coincidence that the spiritualist movement of the late 1800s emerged concurrently with the development of recorded-media technologies. Like a spiritual medium channeling the supernatural through a séance, the recorded medium acts as a conduit for apparitions of the deceased.

V

By transcoding light into data, digital video short-circuits cinema's indexical connection to the past. Instead of embalming time, the digital image offers itself as an open source cipher that is hybrid, polymorphous and plastic. But this does not negate the past's relentless claims on the present. Digital media inherits the ever-expanding crypt of

The Time that Remains, 2012

recorded dead accumulated over a century of light years.

What is required of a cinematics of dark matter is to reconcile the quantum indeterminacy of the digital image and the spectral hauntology of the recording.

VI
Since its inception, recorded media has acted as a mutagen for the dispersal of self. Which is to say that the recordings we consume also take a record of us. Each time we watch a film the singularity of the encounter is encrypted into the recording – creating a dormant collapsar between a past and future self.

VII
Until recently the skin of the screen star remained anchored to a sense of chronology. But with their surgically taut exteriors, the contemporary actor has become further unstuck from time. The body clock of this new morphology is less about youth than an agelessness that is indeterminate and set adrift.

And perhaps everything that we now consider definitive of classical cinema will one day be eclipsed by an unforeseen historical significance: wrinkles in time. Viewers in a distant future will turn to the cinema of last century to once again look upon the inscriptions of age.

VIII
In *A Brief History of Time* Stephen Hawking writes that "spacetime is not flat as had been previously assumed: it is curved or

The Time that Remains, 2012

warped by the distribution of mass and energy in it." The *Dark Matter* series is a postulation of this principal within the matrix of screen culture. Resisting the flattening topography of ahistoricism, this research seeks a means of rendering virtual proximities between the past and preset that do not erase the weighty contours of personal and historical experiences of time.

IX
The phrase "I died" is an impossible utterance, yet this is precisely what the image of a deceased screen star says. This is why we shudder as we watch Marilyn, intuiting a future present to which we are ourselves anterior.

Soda_Jerk, 2013

ARTIST BIOGRAPHY

Soda_Jerk is a two-person art collective that works with found material to trouble formulations of cultural history. Taking the form of video installations, cut-up texts and lecture performances, their archival image practice is situated at the interzone of research, documentary and speculative fiction.

SODAJERK.COM.AU

WORK DETAILS

Dark Matter is an ongoing series of video works that are informed by research into the intersection of cinema and cultural theories of hauntology. Begun in 2005, each work in this cycle takes the form of a séance fiction where encounters are staged between the past and future selves of a deceased screen star. In the exhibition *Dark Matter*, all three works to date are exhibited together for the first time.

1. THE PHOENIX PORTAL (2005)

Single channel digital video
Dur: 4.56 mins
Colour, sound, 16:9
Materials: *Donnie Darko* (2001), *Explorers* (1985), *Hackers* (1995), *My Own Private Idaho* (1991), *Tron Legacy VFX concept test* (2009), *Videodrome* (1983), Buffalo Daughter - *303 Live*, Cornelius - *Magoo Opening*, Michael Andrews - *Manipulated Living*, Michael Andrews - *Ensurance Trap*, Trent Reznor - *Videodrones; Questions*.

A young River Phoenix from the film *Explorers* (1985) opens a wormhole to contact his older self in *My Own Private Idaho* (1991). Irrevocably haunted by the death of Phoenix in 1993, this work summons the paranormal power of recorded media to reanimate the dead.

2. AFTER THE RAINBOW (2009)

2-channel digital video
Dur: 5.42 mins
Colour, sound, 4:3
Materials: *Donnie Darko* (2001), *Easter Parade* (1948), *Judy, Frank and Dean: Once in a Lifetime* (1962), *The Manson Family* (2003), *Meet Me in St. Louis* (1944), *Twin Peaks: Fire Walk with Me* (1992), *Planet Terror* (2007), *Vertigo* (1958), *The Wizard of Oz* (1939).

Through a re-imagining of the initial sequence of *The Wizard of Oz* (1939), the fantasy world of cinema and the reality of Judy Garland's sad life collide. Instead of taking Dorothy to Oz, the twister transports a young, hopeful Garland into the future where she encounters her disillusioned adult self.

3. THE TIME THAT REMAINS (2012)

2-channel digital video
Dur: 11.56 mins
Black & white, sound, 4:3
Materials: *Humoresque* (1946), *Hush… Hush, Sweet Charlotte* (1964), *Jezebel* (1934), *Possessed* (1947), *Strait-Jacket* (1964), *The Letter* (1940), *What Ever Happened to Baby Jane?* (1962), Frédéric Chopin - *Nocturnes Op.9 No.2*, Overlook Hotel - *As Time Goes By*, Thomas Newman - *Mental Boy*.

Joan Crawford and Bette Davis perpetually wake to find themselves haunted by their own apparitions and terrorized by markers of time. Isolated in their own screen space, each woman must struggle to reclaim time from the gendered discourses of aging that mark her as fading and 'past her prime'.

Appx. 116

After the Rainbow, 2009

DARK MATTER
Soda_Jerk
30 July - 30 August 2013

Soda_Jerk acknowledges the generous expertise
and friendship of Maija Howe, Christopher Hanrahan,
Michael Moran, Sam Smith and Darren Tofts.

Soda_Jerk also warmly acknowledges the staff at
UTS Gallery and the support of the NSW Government
through Arts NSW and the Helen Lempriere Bequest,
managed by Perpetual.

Cover image: *Research Document #4 (Body Bag)*

UTS GALLERY

Lvl 4, Peter Johnson Bldg
702 Harris Street, Ultimo
NSW 2007 Australia

Open Mon-Fri 12-6pm

art.uts.edu.au/gallery
facebook.com/utsart

UNIVERSITY OF
TECHNOLOGY SYDNEY

UTS
ART

Appx. 118