

2010

I Put You There: User-Generated Content and Anticircumvention

Rebecca Tushnet

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Rebecca Tushnet, I Put You There: User-Generated Content and Anticircumvention, 12 *Vanderbilt Journal of Entertainment and Technology Law* 889 (2010)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol12/iss4/8>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

I Put You There: User-Generated Content and Anticircumvention

Rebecca Tushnet*

ABSTRACT

This Article discusses recent rulemaking proceedings before the Copyright Office concerning the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA). During these proceedings, non-institutionally affiliated artists organized to assert their interests in making fair use of existing works, adding new voices to the debate. A proposed exemption for noncommercial remix video is justified to address the in terrorem effect of anticircumvention law on fair use. Without an exemption, fair users are subjected to a digital literacy test combined with a digital poll tax, and this regime suppresses fair use. The experience of artists (vidders) confronting the law illustrates both the perils of modern copyright lawmaking and the promise of greater artistic involvement and advocacy. Vidders and other fair users can use the rulemaking process to achieve at least partial access to the power of the law by forcing policymakers to confront the people whose speech is threatened by ever-greater copyright protection.

TABLE OF CONTENTS

I.	BACKGROUND: THE ARTISTS AND THE DIGITAL MILLENNIUM COPYRIGHT ACT'S ANTICIRCUMVENTION PROVISIONS	895
	A. <i>Vidding</i>	895
	1. <i>Vidding Basics: Remix and Reinterpretation</i>	895
	2. <i>High Fidelity: The Role of Technical Quality and Knowledge</i>	902
	B. <i>The Devil in the Details: Anticircumvention Law</i>	906
II.	2009: A PROPOSED EXEMPTION FOR NONCOMMERCIAL REMIX.	912

* Professor, Georgetown University Law Center. J.D., Yale University, 1998; A.B., Social Studies, Harvard University, 1995. Thanks to Julie Cohen, Francesca Coppa, Peter Decherney, Casey Fiesler, Sonia Katyal, Jessica Litman, Fred von Lohmann, Jessica Silbey, Tisha Turk, and Diane Zimmerman, and to my able research assistant Mara Gassmann.

A. <i>The EFF Proposal</i>	914
1. Video Remix as Fair Use	914
2. Video Remix in the Context of the Statutory Exemption Factors	918
B. <i>Opposition</i>	921
C. <i>Analysis: The Need for an Exemption</i>	926
1. The Illusory Alternatives to Circumvention: The Digital Literacy Test and the Digital Poll Tax	926
a. <i>Camcorders</i>	930
b. <i>Screen Capture</i>	933
3. Method or Madness: DVD Clipping and Comprehensible Laws	937
4. Summary: Bringing Fair Use into § 1201	940
III. CONCLUSION: WE PUT OURSELVES THERE	943

Video artists Laura Shapiro and Lithiumdoll took footage from the television show *Buffy the Vampire Slayer* and other sources to create a new narrative about a female fan's love for the character of Rupert Giles (played by Anthony Stewart Head). Using animation and creative editing, they added their new character to existing *Buffy* footage. They titled the resulting work *I Put You There*,¹ the "I" was the fan-author, and the "you" was Giles. The narrator, who stands in for fans of many stripes, claims control over the original text. The video enacts and comments on fans' propensity to appropriate and rework existing texts.² *I Put You There* is part of a long tradition of reworking mass media productions as a way of talking back to popular culture using its own highly persuasive images. Here, the form is known as "vidding," or fan video. Quotation is a basic part of the robust critique and discussion that the format creates, no less so because it takes place in the audiovisual realm rather than in the literary. In legal terms, the vid is a noncommercial, transformative quotation of fragments of *Buffy the Vampire Slayer*, and as such is a fair use.

But copyright law is not all that noncommercial remix artists have to fear: there is also anticircumvention law, which prohibits the use of certain technologies to capture digital footage.³ Technological protection measures on DVDs have imposed a digital literacy test and

1. The Vanity Project by Laura Shapiro, <http://www.laurasha.com/vids/> (last visited Apr. 7, 2010).

2. See Tisha Turk, *Metalepsis in Fan Vids and Fan Fiction* [hereinafter Turk, *Metalepsis*] (unpublished manuscript, on file with author).

3. 17 U.S.C. §1201 (2006).

a digital poll tax that suppress participation in analyzing and shaping popular culture, framing ordinary citizens' creative and critical work as illegitimate. Remix artists largely don't know about anticircumvention law, but it nonetheless affects the conditions under which they work, especially when they wish to assert fair use defenses against claims of copyright infringement. Anticircumvention law also poses obstacles to the general ability of remix culture to claim a place among legitimate art forms because the present regime makes some key remix tools unlawful. If the creativity and revisioning that *I Put You There* celebrates are to continue, then both fair use and the broader structure of copyright law need to accommodate new forms of art that average citizens make.

Jessica Litman's foundational study of copyright policymaking demonstrates that copyright law is drafted by private entities seeking their own best advantage, making deals that Congress then ratifies.⁴ User groups are rarely at the negotiating table, and those that are—libraries, educational institutions, electronics manufacturers, cable companies—tend to have specific interests that targeted, highly detailed statutory carve-outs from otherwise expansive copyright rights placate.⁵ Ordinary readers, viewers, and artists are not among those whose interests are directly represented. This has serious consequences. Copyright law's expansion tends to restrict individual freedoms more than those of specific represented industries. Even when exceptions or limits are preserved, they are often complex to the point of near-unintelligibility, so that only a well-advised institutional player can confidently take advantage of them.⁶

4. JESSICA LITMAN, DIGITAL COPYRIGHT 125-26, 135-36, 144-45 (2d ed. 2006); see also Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 135-38 (2006) (discussing the industry compromises, exclusion of the public interest, and acquiescence of Congress behind 17 U.S.C. § 1201); Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1013 (2007) (asserting that the DMCA "shamelessly sacrificed the public interest provisions of copyright law on the altar of" technological protection measures); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 538 (1999).

5. LITMAN, *supra* note 4, at 37, 127. This also occurs when businesses negotiate among themselves. See Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 399-400 (2009) ("[A]s the interests of copyright owners and service providers begin to merge (creating a shared revenue stream through the combination of the copyright owner's content and the service provider's user base and distribution system), no player is left to pursue the interests of individual users." (citation omitted)).

6. LITMAN, *supra* note 4, at 73-74; cf. Online: We Are Creators Too: Nina Paley (Public Knowledge 2009) (noting, at running time 7:10-8:23, that, with the current difficulty clearing music for film, only big companies can make film with music from 1923-1960s or later; although

This is a deeply unhealthy system, guaranteeing that citizens attempting to express themselves and participate in cultural and political dialogue can find themselves unexpectedly threatened or silenced by copyright claims. Even Marybeth Peters, the current Register of Copyrights and a strong proponent of major copyright owners' interests, recognizes that copyright cannot survive as both incomprehensible and all-pervasive.⁷ In the end, only respect can produce general legal compliance, and respectability will require the law to acknowledge the ways in which ordinary citizens, relying on fairness and common sense, make copyright-related decisions.⁸

What would it mean for individual artists—people producing what is often called “user-generated content”—to be represented in copyright policymaking? As Litman has noted, comprehensive reform of the complex and outdated copyright law will be difficult at best,⁹ yet there are ways in which so-called “users” (also known as citizens,

the technology exists for anyone to make a film, in practice “you’re not supposed to”), *available at* <http://www.publicknowledge.org/node/2657>.

7. See Joyce E. Cutler, *On Copyright's 300th Anniversary, Scholars Question Effectiveness of Current Formulation*, 15 ELECTRONIC COM. & L. REP. 641 (2010).

Copyright law is ‘out of balance’ and action must be taken to restore the public’s respect for copyright, Register of Copyrights Marybeth Peters said. . . . [W]e have lost the respect of the public in many ways,’ Peters said. . . . Copyright law should be understandable so that people will obey and respect it, Peters said. Further, the way copyright is viewed has changed, and there are lots of new players, including consumers, who Peters said ‘are really key in the copyright debate.

Id.

8. See *id.*

Pamela Samuelson, Berkeley, a law professor and director of the Berkeley Center for Law and Technology, agreed [with others] that the law should be understandable. ‘The complexities of copyright, the unreadability of most of the sections, really wasn’t so much of a problem when all it was doing was regulating inter-industry disputes that need to be resolved. But now it implicates the daily lives of everybody. We need something that speaks to a wider public,’ Samuelson said.

Id. (discussing Samuelson’s reform project to make copyright simpler and more consistent with the demands of justice).

9. Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249, 259-60 (2009); see also Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 556, 558-71 (2007) (explaining that comprehensive reform is currently “infeasible” but outlining the core components of a model copyright law); Jessica Litman, *Real Copyright Reform* 3 (Univ. of Mich. Law & Econ., Olin Working Paper No. 09-018, 2010) [hereinafter Litman, *Real Copyright Reform*], *available at* <http://ssrn.com/abstract=1474929> (“Copyright revision is lengthy and expensive, even in the best of circumstances. The number of interests affected by copyright is huge, and the complaints those interests have with the current regime are diverse. Overhauling the copyright statute took more than twenty years the last time Congress tried it, and there’s no reason to think it could happen more quickly today. These are not, moreover, the best of circumstances. The copyright bar, once a cozy sewing circle of plaintiffs’ lawyers, has grown intensely polarized over the past twenty years, and copyright discourse has become increasingly strident. That has nourished an atmosphere of profound distrust, which makes it harder to agree on terms.” (citations omitted)).

creators, and so on) might have an impact.¹⁰ For example, new interest groups such as Public Knowledge and the Electronic Frontier Foundation, as well as new media entities that highlight intellectual property issues, such as Slashdot, have increased attention to backroom copyright policymaking.¹¹ This Article discusses recent rulemaking proceedings before the Copyright Office concerning the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA). During these proceedings, non-institutionally affiliated artists organized to assert their interests in making fair use of existing works, adding new voices to the debate.

Part I of this Article explains the cultural and legal backdrop of the 2009 rulemaking. First, the Article briefly explains social practice of vidding. Then, the Article summarizes the adoption of anticircumvention legislation, codified at § 1201 of the Copyright Act, which makes it unlawful to use standard technologies to make short clips from DVDs. Fair use, theoretically available to vidders and other remixers, is in practice threatened by § 1201. As Part II explains, the Copyright Office is empowered to grant exemptions to § 1201's ban on circumventing access control technologies when that ban causes adverse effects on lawful uses, including fair uses. A proposed exemption for noncommercial remix video is therefore justified to address the *in terrorem* effect of anticircumvention law on fair use, especially when fair users discover too late that, even if their works do not infringe copyright, they still may be exposed to anticircumvention liability. The result is in essence a digital literacy test combined with a digital poll tax, and it suppresses fair use. In Part III, the Article concludes that the experience of vidders confronting the law illustrates both the perils of modern copyright lawmaking and the promise of greater artistic involvement and advocacy. Vidders and other fair users can use the rulemaking process to achieve at least partial access to the power of the law by forcing policymakers to

10. Litman, *Real Copyright Reform*, *supra* note 9, at 4 ("The prospect of upstart new copyright interests may be especially scary today because there are tens of millions of ordinary people whose use of YouTube and peer-to-peer file sharing networks gives them a direct, personal stake in the copyright law. Nobody has yet succeeded in mobilizing them into a significant political force, but the majority of them are over 18, and many of them vote. It's entirely possible that over the course of a multi-year, highly publicized copyright reform effort, the interests of ordinary voters could end up playing a more than a nominal role. One can imagine circumstances in which a new awareness on the part of Congress that voters care about copyright could move the law pretty far from where current players would like to see it go." (citations omitted)).

11. More than 8200 individuals, for example, signed the EFF's petition in support of cellphone unlocking. See Press Release, Elec. Frontier Found., Thousands Sign Petition to Copyright Office Demanding Cell Phone Freedom (Feb. 2, 2009), available at <http://www.eff.org/press/archives/2009/02/02-0>.

confront the people whose speech is threatened by ever-greater copyright protection.

The results of the 2009 rulemaking on § 1201 are still pending, and the prospects of a significant victory for fair use are slim to nonexistent, but policymakers at the Copyright Office are now more aware of the great variety of creators both enabled and hampered by copyright law. Moreover, the presence of user-creators in the debate is important to lay a foundation for further progress.

Although it would be overly optimistic to expect immediate success for these new participants in the copyright policy debate, their presence is a precondition for legal recognition that noncommercial, noninstitutional fair uses are in fact fair. Historically, new art forms (and new categories of artists producing them) have lost a few rounds in the courts before ultimately being recognized as legitimate forms of speech and creativity, protected by law.¹² As user-generated content becomes more important in social and economic life, it too will need to find a place in the law—not just in the grand concepts that animate fair use, but also in the details of legislation and of rulemaking. To the extent that present copyright law fails to recognize models of creative production other than those associated with large-scale content owners, it is in desperate need of change. Rulemaking, with

12. See RANDALL P. BEZANSON, ART AND FREEDOM OF SPEECH 1 (2009) (“From the earliest stages of First Amendment jurisprudence, artistic expression has often been excluded from constitutional protection. And with newly emerging aural and visual technologies, the U.S. Supreme Court has most often declined to apply the full force of constitutional protection, at least for a time, proceeding cautiously and in small steps with the mediums of radio, television, and film, and, most recently, electronic forms of communication. The Court’s caution has been particularly evident with the more artistic and emotionally powerful genres of expression such as dance, film, or video.”). Compare *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242-45 (1915) (rejecting free speech protection for movies, which were merely “business” and “spectacle”), with *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that movies are entitled to First Amendment protection); compare *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992) (holding that an artist’s artwork was not parody protected by fair use doctrine where artist was commenting on society at large rather than the work parodied and where the artist expected substantial profit), and *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 383-85 (S.D.N.Y. 1993) (following *Rogers* and holding that work was not fair use where the artist was parodying society at large and not the work copied), with *Blanch v. Koons*, 467 F.3d 244, 253-54 (2d Cir. 2006) (holding that because artist was involved in social commentary and the work’s commercial value was secondary, fair use doctrine protects the work). See generally Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1361-62, 1366-67 (1990) (discussing the artistic rise of postmodern art but the unfavorable state of obscenity law with respect to it). New distribution or transmission mechanisms such as player pianos, radio, and cable historically do well against copyright owners in the early rounds of litigation, but this Article is more concerned with a particular type of expression that may strike observers—as past artistic innovations have—as “not art” or “not speech” because of its unfamiliar content.

all its flaws, offers the possibility of being more flexible and accessible than lobbying Congress currently allows.

I. BACKGROUND: THE ARTISTS AND THE DIGITAL MILLENNIUM COPYRIGHT ACT'S ANTICIRCUMVENTION PROVISIONS

A. *Vidding*

The Organization for Transformative Works (OTW), a nonprofit on whose board I serve, participated in the 2009 Copyright Office exemption hearings in order to inform the Office about a practice community¹³ that relies heavily on both technology and fair use: vidders, who edit existing footage and add a soundtrack not present in the original, producing vids (also known as fanvids).¹⁴ This section introduces the basics of vidding, surveys its background and context as critical art, offers a few representative examples, and explains the pleasure and empowerment vidders take from their activities. Of particular note are the roles that technology and technical quality play in vidding. These elements aren't necessarily obvious from the outside, but they are vital to the form. Moreover, because anticircumvention law purports to regulate both technology and technical quality, and because artists don't generally expect law to govern technical aspects of the creation of their art, the ground is set for a collision between art and law.

1. Vidding Basics: Remix and Reinterpretation

"The purpose of vidding is to remix the source material in such a way as to provide a *new* narrative, usually commenting on or critiquing that source."¹⁵ As Francesca Coppa, director of film studies at Muhlenberg College, explains:

13. On the value of learning about the meaning of fair use within particular artistic practice communities, see Patricia Aufderheide & Peter Jaszi, *Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video*, 6 *US: J.L. & POL'Y FOR INFO. SOC'Y* 13 (2010).

14. See Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 *CARDOZO ARTS & ENT. L.J.* 647, 649 (2007); see also Turk, *Metalepsis*, *supra* note 2, at 2 ("[Vids] are short videos integrating repurposed media images with repurposed music. . . . [Vidders] synthesize these audio and visual elements into an original creation that interprets, celebrates, or critiques the original source.").

15. Letter from Rebecca Tushnet, Org. of Transformative Works, to U.S. Copyright Office, Library of Cong. 2 (Feb. 2, 2009) [hereinafter OTW Reply Comment], available at <http://www.copyright.gov/1201/2008/responses/organization-transformative-works-34.pdf> (reply comment in support of proposal by the Electronic Frontier Foundation); see also Tisha Turk, 'Your Own Imagination': Vidding and Vidwatching as Collaborative Interpretation 1 [hereinafter

Unlike professional MTV-style music videos, in which footage is created to promote and popularize a piece of music, fannish vidders use music in order to comment on or analyze a set of preexisting visuals, to stage a reading, or occasionally to use the footage to tell new stories. 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.¹⁶

Standard types of vids include: (1) rearranging a narrative to focus on secondary characters or subplots; (2) exploring generic conventions found in mystery, science fiction, police dramas, and the like; (3) evoking dramatically different reactions to familiar elements through the use of music and other methods of recontextualization; (4) exploring nonverbal dimensions of performance, such as body language, when separated from dialogue; (5) bringing repressed subtext to the surface; and (6) isolating one element, such as a look or a touch, and interpreting or providing new context for it.¹⁷ A vid might switch genres by taking characters from a police procedural or science fiction adventure story and constructing a romance between them, reinterpret marginal female characters' experiences as central to the narrative,¹⁸ turn a comedy into a serious piece, or rework a tragedy into a farce.

Though the fan video community is decades old,¹⁹ it has flourished online and has recently begun to intersect with other communities of video artists. Various technical developments have made vidding increasingly accessible to newcomers and increasingly engaged with other artistic traditions: non-linear editing software is

Turk, Vidding and Vidwatching] (unpublished manuscript, on file with author) ("Vids, like fanfiction, can be a way of simultaneously improving beloved but problematic commercial texts *and* creating new non-commercial texts expressly designed to fulfill a particular set of desires; they can also be a way of calling attention to the elements that need fixing, of registering anger or frustration." (emphasis in original)).

16. Francesca Coppa, *Women, "Star Trek," and the Early Development of Fannish Vidding*, 1 TRANSFORMATIVE WORKS & CULTURES 1.1 (2008), <http://journal.transformativeworks.org/index.php/twc/article/view/44/64>; see also Jesse Walker, *Remixing Television: Francesca Coppa on the Vidding Underground*, REASON, Aug./Sept. 2008, available at <http://reason.com/archives/2008/07/18/remixing-television> ("A vidder makes you see something. Like a literary essay, a vid is a close reading. It's about directing the viewer's attention to make a point." (quoting Francesca Coppa)).

17. See HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 223-49 (1992).

18. See, e.g., Commentary on "Glorious" by such_heights, § VI, http://community.livejournal.com/vid_commentary/11372.html (last visited Apr. 7, 2010).

19. See JENKINS, *supra* note 17, at 223-49 (describing earlier vidders, focusing on *Star Trek*); OTW Reply Comment, *supra* note 15, at 3-4; Coppa, *supra* note 16, at 1.4; In Media Res, Celebrating Kandy Fong: Founder of Fannish Music Video, <http://mediacommons.futureofthebook.org/imr/2007/11/19/celebrating-kandy-fong-founder-of-fannish-music-video> (last visited Apr. 7, 2010) (including video by Francesca Coppa).

now widely available; TV shows and film are readily available on DVDs for source footage; broadband Internet access and video-specific sites such as YouTube allow easier sharing of vids; and vids, along with technical advice, commentary, and recommendations, are simply easier to find—a simple Google search generally suffices—than when they were only shown at fan conventions and traded through the mail.²⁰ Given the greater ease of creation and sharing, the audience for vids has expanded, and now includes younger fans and even non-fans (people who do not generally participate in media fan cultures, but might watch a video online).²¹

Vidding has a number of characteristics that make it important to copyright and cultural policy; it is both a popular and an outsider art, combining mass culture with individual artistic visions from people who don't participate in the conventional art world. People create vids to share their views about some piece of culture that is important to them. Their desire to do so, along with the readily available technology that allows them to do so, prove that copyright policy cannot simply assume that all that ordinary people do with popular media is make pirate copies. Many vids are bad, of course, but then most of all art is bad.²² While it is easy to find aesthetically and critically powerful vids, much of the cultural force of vidding comes from its status as a way in which individuals can make new meaning out of what they see and hear, empowering them as creators regardless of whether anyone would ever praise the results as brilliant artworks.

Historically, remix comes disproportionately from minority groups: women;²³ gay, lesbian, bisexual, transgender, and queer people;²⁴ and racial minorities of all sexes and orientations.²⁵ "Talking

20. Turk, *Metalepsis*, *supra* note 2, at 3-4.

21. *Id.*

22. Cf. Wikipedia, *Sturgeon's Law*, http://en.wikipedia.org/wiki/Sturgeon%27s_Law (Theodore Sturgeon, noted science fiction author, argued that 90 percent of science fiction was "crud" because 90 percent of *everything* is crud; "science fiction conforms to the same trends of quality as all other artforms do.")

23. See Kristina Busse, *Introduction*, 48 *CINEMA J.* 104, 105-06 (2009); Francesca Coppa, *A Fannish Taxonomy of Hotness*, 48 *CINEMA J.* 107, 107 (2009); Posting of Micolé (*Women's Art and "Women's Work"*) to *Ambling Along the Aqueduct*, <http://aqueductpress.blogspot.com/2007/08/womens-art-and-womens-work.html> (Aug. 29, 2007, 11:15 EST).

24. Fan videos have been identified as a queer genre. See Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 *CINEMA J.* 125, 126 (2009) ("[Fan videos] celebrate, critique, and de- or reconstruct mass media in what Anne Kustritz calls a 'genre commensurate form,' engaging the source via its own images (along with their webs of intertextual connotation) and visual language. In many cases, they render queer dimensions of these sources visible by telling stories of same-sex romance (known as 'slash') through sophisticated viewing and editing techniques. Whatever their explicit themes and narratives,

back” to dominant culture using its own audiovisual forms is attractive to many disempowered speakers. For example, Robert Rogoyski and Kenneth Basin investigated remix video in China and found that it serves powerful political and social functions. Remix video allows average citizens who lack political power under China’s authoritarian regime to “appropriate and democratize their own cultural benchmarks, encouraging the kind of cultural participation that is vital to the development of ‘a just and attractive society.’”²⁶

Consistent with the general outsider status of remix, vidding in the U.S. is a female-dominated form, recontextualizing and critiquing

they represent a queer form of reproduction that mates supposedly incompatible parents (‘original’ media source and ‘original’ creativity) to spawn hybrid offspring.” (citation omitted)); cf. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461, 468-69 (2006) (discussing the role of “slash” in making queer meanings). And gay and lesbian culture has often relied on remixing and repurposing celebrity images to articulate and value queerness. See Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 376 (1992). More broadly, camp is, among other things, a form of remixing popular culture. See generally CAMP: QUEER AESTHETICS AND THE PERFORMING SUBJECT: A READER (Fabio Cleto ed., 1999) (canvassing the many uses and meanings of camp).

25. See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 561, 622 (2006); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1186 (2008); Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 588-89 (1992) (“The rap genre is based on and built up around digital sampling. Rap began, before sampling existed, by singing original lyrics over cassette tapes of songs or rhythm tracks.”); Olufunmilayo B. Arewa, *Seeing but Not Hearing Music: How Copyright Got (And Didn’t Get) the Blues* 55 (Oct. 14, 2008) (unpublished manuscript), available at http://law.scu.edu/hightech/file/Seeing%20But%20Not%20Hearing%20Music___by%20Olufunmilayo%20B_%20Arewa.pdf (rejecting “an unsupported assumption that poorer creators benefit more from copyright than do wealthier ones”). See generally K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) (chronicling the exclusion of African-Americans from the protections of copyright and arguing that musical borrowing did not concern courts until black artists were sued for it). As Arewa writes,

[I]ncumbent creators have been permitted to borrow from certain traditions, particularly traditions from groups such as African Americans, who historically have been at the bottom of most societal hierarchies of status and power. Many of these incumbents may then be able to use copyright to block borrowings from their works, despite the fact that such works borrow extensively. The operation of copyright as a property rule also disfavors certain aesthetics of cultural production, including those that use extensive borrowing, particularly when borrowing is undertaken by those with relatively low status, limited resources or less power relative to those from whom they borrow.

Arewa, *Seeing but Not Hearing*, *supra*, at 55 (citations omitted).

26. Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 258 (2009) (citation omitted). Making parodies allows Chinese youth to define themselves and find a broader world of activism, using a medium that is within their reach (online video) to target otherwise inaccessible traditional media. See *id.* at 258-59.

popular culture to make it more responsive to women's concerns.²⁷ Vidders, like other remixers, form communities that support and challenge each other, allowing participants to develop artistically, critically, and technically; both the substance and the form of the community-generated knowledge have valuable educational and cultural benefits.²⁸ "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, and video and image editing."²⁹

Because it allows people to demonstrably, physically rewrite culture, making a tangible intervention into the world of meaning, the simple experience of remixing is engaging and empowering. In the context of student video editing, Professor Christina Spiesel and her colleagues have noted that "[a]ll it takes is the experience of lifting a sound track from one clip and attaching it to another for students to know with certainty that everything on film is constructed and that they can be builders in this medium."³⁰

As one example of the transformative power of vidding, the OTW pointed to *Women's Work*, a vid about the cult TV show *Supernatural*. Though the show stars two ghost-hunting brothers,

the vid itself contains barely even a glimpse of the protagonists; instead, it cuts together images of women from countless episodes of the show, women who are shown only as eroticized, suffering, or demonized. One commentator described it as "a doctoral thesis in the misogyny of basic, unexamined story structures . . . the vid explicitly and viscerally demonstrates how so many of the stories we know and re-tell depend on the suffering of women." Indeed, the creators of "Women's Work" conveyed their message more succinctly and perhaps more effectively than a written thesis could have. One of these vidders, Sisabet, noted her intention to create a meta-critique limited not to *Supernatural* but encompassing the pervasive "torture-porn-a-thon" where "only mummies burn on the ceiling and daddies get to fall down dead" in popular media.³¹

27. U.S. COPYRIGHT OFFICE, PUBLIC HEARINGS: EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 0108.20-0111.15 (May 7, 2009) (statement of Francesca Coppa), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-7-09.txt>.

28. OTW Reply Comment, *supra* note 15, at 5-6 ("[Fan communities] 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." (citation omitted)).

29. *Id.* at 6.

30. Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 231, 252-53 (Anne Wagner et al. eds., 2005); see also *id.* at 253-54 ("[M]aking digital videos allows students to discover how easy it is to access and manipulate information today (it's all zeroes and ones), and how easy it is to represent reality in multiple ways. This in itself makes them more critical consumers of mass media. As students tell us: 'I'll never watch TV the same way again.'").

31. OTW Reply Comment, *supra* note 15, at 2 (citations omitted).

Another example sprang from the BBC's revived *Doctor Who*, ostensibly a children's show about a heroic, powerful and nearly immortal alien who loves and protects humanity while traveling with his human companions. The vid *Handlebars*³² analyzed the character of the Doctor, while commenting on the nature of power and responsibility generally:

The vid points out how, despite the best intentions, power corrupts. It begins with images that illustrate the Doctor's whimsical nature, showing his happy encounters with companions and moments of triumph after he's saved the world. It progresses through the more dangerous aspects of his adventures as well as his smaller exercises of power, finally ending with images of the violence and destruction at his hands (in the name of the greater good). The Doctor is the hero of his eponymous television show; the vid works as a powerful criticism of the show's moral blind spots by recontextualizing events viewers have already seen. The vid, in which the Doctor's acts are condensed to the most relevant and meaningful images, viscerally conveys its critique of the character, especially in the context of the matching song lyrics: "My cause is noble / my power is pure . . . And I can do anything with no permission . . . I can end the planet in a holocaust."³³

Nor are vidders limited to a single visual source in making their arguments. The vid *Wouldn't It Be Nice* surveys multiple sources in the "buddy cop" genre to make an argument about gay marriage, recontextualizing the scenes of homosocial—but never avowedly homosexual—camaraderie.³⁴ The vid highlights the contradictions of a culture that offers teasing images of male affection and has elevated "bromance" to a genre (current examples include the hit television show *House* and the recent films *Sherlock Holmes* and *I Love You, Man*), but still does not allow most major male characters to have actual romantic or sexual relationships with other men. Reframing the multiple source texts from teases to (fantasized) reality, *Wouldn't It Be Nice* offers a utopian vision of both freedom to marry and its representation in popular culture.

As these examples demonstrate, vids represent a type of art and cultural commentary independent of the academy and of high art circles. Nonetheless, traditional art-world gatekeepers are increasingly bringing vids into museums and other high art institutions.³⁵ *New York Magazine* singled one vid out as one of the

32. Organization for Transformative Works, Test Suite of Fair Use Vids: *Handlebars*, <http://transformativeworks.org/projects/vidtestsuite> (last visited Apr. 7, 2010).

33. OTW Reply Comment, *supra* note 15, at 10 (citation omitted).

34. Posting of Jonathan (*Wouldn't It Be Nice?*) to Political Remix Video, <http://www.politicalremixvideo.com/2009/02/18/wouldnt-it-be-nice/> (Feb. 18, 2009).

35. See Lim, Us, <http://blip.tv/file/2286307> (last visited Apr. 7, 2010) (used as part of ethnographer Michael Wesch's Anthropological Introduction to YouTube, http://www.youtube.com/watch?v=TPAO-IZ4_hU, and exhibited at the California Museum of Photography); Organization for Transformative Works, Test Suite of Fair Use Vids: *This Is How*

funniest of the 2007's online video, a "lush, hilarious" work that was the "best fan video of the year."³⁶ There is continuity between vids and the collage art and appropriation art found in major modern art museums.³⁷

Of special note is that the vidding community is organized around *transformation* rather than around a romantic notion of creating on a blank slate. Neither the benefits of the community nor the benefits of the critiques could exist without starting from, and reacting to, mainstream works: "[I]t 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."³⁸ Individually created footage wouldn't work as a substitute for existing footage because it wouldn't present the audience with the object of commentary. *Women's Work*, for example, is a critique of the sexualized violence that is really, in fact, shown on television. A made-up alternative would perhaps be satire, but would be vulnerable to the criticism that it was exaggerating the problem—and women historically have had trouble convincing other people of the existence of violence against them.³⁹ *Women's Work* succeeded because its target was recognizable and comparatively well-known, sparking a

It Works, <http://transformativeworks.org/projects/vidtestsuite> (last visited Apr. 7, 2010) ("One of Lim's other vids, 'Us,' is currently in an exhibition, Mediated, at the California Museum of Photography.").

36. *The Twenty (Intentionally) Funniest Web Videos of 2007*, N.Y. MAG., Nov. 11, 2007, available at <http://nymag.com/movies/features/videos/40663/index1.html>; Logan Hill, *The Vidder: Luminosity Upgrades Fan Video*, N.Y. MAG., Nov. 12, 2007, available at <http://nymag.com/movies/features/videos/40622/>.

37. See Adler, *supra* note 12, at 1363-64 ("[Post-Modernism] attacked the Modernist distinctions between good art and bad, between high art and popular culture, between the sanctity of the art context and real life."); *id.* at 1376 ("[V]ideo, performance art, and graffiti art, for example, do not depend on an art context for their current status as art in the eyes of the art world."); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1183 (2007) ("[A] key point . . . that is often lost in discussions celebrating the 'oppositonality' of 'appropriation art,' is that these modern variants are not fundamentally different from older forms of creative practice. Across the spectrum of creative practice, manipulation of preexisting texts, objects, and techniques figures centrally in processes of cultural participation.").

38. OTW Reply Comment, *supra* note 15, at 6; see also *id.* at 7 ("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." (citation omitted)).

39. See, e.g., Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 39-40 (1999) (discussing the role of denial in perpetuating violence against women).

conversation in the audience about representations of women on *Supernatural* and in popular media more generally.⁴⁰

Also important is that vids offer a specifically visual type of argument. Visuals often stand for truth in Western culture: we believe what we see, and the folk wisdom is that a picture is worth a thousand words.⁴¹ “By utilizing the actual source material, [a] vid is *obviously* a reinterpretation of that material. In that way, the comment or critique has a fundamental sense of truth about it that can be more powerful than written commentary.”⁴² The power of *Women’s Work*, then, comes from showing rather than telling, “expressing the nuances of *Supernatural’s* visual choices in a way that any amount of written word could not.”⁴³

2. High Fidelity: The Role of Technical Quality and Knowledge

Consistent with vidding’s use of visuals and music to construct argument, quality in the sense of technical fidelity is very important to vidders, just as it is to other artists. This explains why vidders need to turn to DVDs for source footage: “using the highest quality video available is frequently critical to the expressive message that

40. See *id.* at 2-3.

41. See, e.g., Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in CONTEMPORARY ISSUES IN THE SEMIOTICS OF LAW 231, 237 (2005) (“[V]isual stories use a different code for making meaning than do written texts or oral advocacy. . . . They are also rich in emotional appeal, which is deeply tied to the communicative power of imagery. This power stems in part from the impression that visual images are unmediated. They seem to be caused by the reality they depict.”).

42. OTW Reply Comment, *supra* note 15, at 11 (emphasis added); see also J. D. LASICA, DARKNET: HOLLYWOOD’S WAR AGAINST THE DIGITAL GENERATION 128 (2005) (“When we use a clip from a popular film, people tend to remember it better than if we just used an anecdote or story,’ [a reverend who uses DVD decryption software to create film clips for use in his sermons says]. ‘We live in a visual age.”); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 504 (2008) (noting that a fan remixer’s claim that he “merely showed ‘what [World of Warcraft’s] pixels imply” was “in one sense inarguable,” because his video “captured” rather than “created” images); cf. *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) (accepting Jeff Koons’ argument that his copying of a fashion photograph was fair use because, as Koons testified, “Although the legs in the [copied photograph from *Allure* magazine] might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. . . . To me, the legs depicted in the *Allure* photograph are a fact in the world, something that everyone experiences constantly By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to”).

43. OTW Reply Comment, *supra* note 15, at 3.

vidders are attempting to convey.”⁴⁴ In the words of one vidder, “[v]idders want to create immersive experiences, and they are highly invested in visual communication and aesthetics. Poor-quality source interferes with all of these, hence the community’s determination to use the best-quality source footage available.”⁴⁵ High aesthetic quality helps both arguments and artists get accepted; audiences are more likely to discount “amateurish” productions. For groups struggling to make their messages heard, artistic quality can help a critique avoid being dismissed out of hand.⁴⁶

Vids are often made in high resolution so that they can be shown at live gatherings on bigger screens. A vidder who shares her work online might offer a high-quality download that is substantially larger than an ordinary video file of the type shown on YouTube.⁴⁷ Some vidders will put a streaming version online, but others won’t because of the quality degradation. Even for those who do stream, streaming often serves merely as a preview for downloading the high-quality version.⁴⁸

A related reason that vidders are interested in high quality source footage is that, as a technical matter, the editing required to make a vid can render an image unrecognizable or meaningless if the vidder does not begin with high quality source. One highly technically accomplished vid, *This Is How It Works*, involved reworking almost every frame of the source as part of its argument about a character’s emotional makeup and scientific worldview.⁴⁹ Another work from the same vidder, *Us*, involved editing to “evoke the feeling of pencil drawings and paintings, and viewed on YouTube at a lower quality, it is very difficult to even make out the images.”⁵⁰

44. Letter from Fred von Lohmann & Jennifer S. Granick, Elec. Frontier Found., to U.S. Copyright Office, Library of Cong. 22 (Dec. 2, 2008) [hereinafter EFF Proposal], available at <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>.

45. *Id.* (citation omitted).

46. *Cf.* Jordan S. Gruber et al., *Video Technology*, 58 AM. J. TRIALS 481 § 38 (2009) (“Americans are accustomed to the excellent image quality and highly sophisticated production values of Hollywood-generated entertainment programming. Consequently, presenting video evidence with inferior image quality, sound quality, or production values may result in the juror’s boredom, dislike, or general disenchantment.”); *infra* note 168 and accompanying text (noting relationship between quality and authority).

47. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0163.18-0164.2 (statement of Francesca Coppa); OTW Reply Comment, *supra* note 15, at 4, 13-14 (discussing the importance of quality to vidding).

48. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0112.8-0112.14 (statement of Francesca Coppa).

49. OTW Reply Comment, *supra* note 15, at 7-8.

50. *Id.* at 13-14 (citation omitted).

Clarity is important because vidders strategize to draw the viewer's attention to things she wasn't supposed to see.⁵¹ In a copyright course, students might need to see a high-quality clip of Bruce Willis strapped to a chair in *12 Monkeys* and compare it to an image of a chair drawn by Lebbeus Woods to see the copyright infringement issue.⁵² In the case of vidding, it's often facial expressions or characters that the audience needs to see clearly. *How Much Is That Geisha in the Window?*, for example, is a vid about race and culture in the future as imagined by a science fiction show, *Firefly*. *Geisha* is an example of the way that vids often emphasize something that was not foregrounded in the original frame: things or people deliberately or unthinkingly shunted to the side. In *Geisha*, that means paying attention to how human beings are treated as exotica.⁵³ Likewise, by watching one-time-only characters from *Supernatural* edited into the foreground of *Women's Work*, viewers learn more about the ways in which the show uses women as cannon fodder, motivation for the heroes, and sexualized victims, but never as people.⁵⁴

The Electronic Frontier Foundation (EFF)⁵⁵ has given an extended analysis of one critically acclaimed vid to show the importance of quality:

Vogue, created by a vidder known as Luminosity, illustrates the importance of video quality to the expressive content of vids. *Vogue* sets a montage of expertly edited, visually arresting excerpts from the film *300* against the music of Madonna's hit song,

51. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0116.7-0116.12 (statement of Francesca Coppa).

52. See *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996). Showing students the allegedly infringing clip helps them evaluate issues such as substantial similarity and de minimis use, which are hard to learn without exposure to the actual works involved in the litigated cases. See Rebecca Tushnet, *Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials*, 52 ST. LOUIS U. L.J. 891, 893-94 (2008).

53. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0113.9-0113.21, 0116.17-0116.22 (statement of Francesca Coppa).

54. Organization for Transformative Works, Test Suite of Fair Use Vids: *Women's Work*, <http://transformativeworks.org/projects/vidtestsuite> (last visited Apr. 7, 2010).

55. As Christopher Moseng explained,

[t]he EFF is a rare interest group that represents the fair use interests of individuals (rather than members of a professional or other organization), and [in 2006] had an annual budget of two million dollars and a 23-person staff. The MPAA, just one of many industry groups representing the interests of copyright holders in the rulemaking, was reported in 2004 to have "annual budget of \$70 million and staff of 210."

Christopher Moseng, Article, *The Failures and Possible Redemption of the DMCA Anticircumvention Rulemaking Provision*, 12 J. TECH. L. & POL'Y 333, 356 (2007) (citations omitted). Moseng concludes that this resource disparity is structural, "[b]ecause most individual fair use is noncommercial in nature and does not generate revenue," meaning that fair-use groups will generally lack the resources of large copyright owners. *Id.*

Vogue, thereby commenting on both the film and the song. Comparing the YouTube version with the original makes the importance of video quality starkly obvious. Viewed in “full screen” mode, the high quality original has a clean, professional look that reminds viewers of the self-conscious visual extravagance of the original film, even as Madonna’s song reminds us that the film’s imagery is an exercise in sexual objectification and violence. Viewed in YouTube’s “full screen” mode, in contrast, the same video loses much of its visual impact and therefore fails to deliver its message with the same emotional force. In this context, it is plain that having access to high-quality video excerpts is “necessary to achieve a productive purpose,” namely to engage in effective criticism and comment.⁵⁶

As the OTW has noted, “The entire point of [*Vogue*] is visual impact; its message is to ‘puncture[] the violence of 300 by defiantly aestheticizing both the battlefield and the men on it.’”⁵⁷ Thus, vidders need high quality raw material to start with because the quality of the output depends on the quality of the input.

The final point relevant to the relationship between vidding, technology, and law is that vidders, like most amateur artists, are often technically, but not legally, sophisticated. As Francesca Coppa noted, “[t]he vidding community is a great source of technical and aesthetic mentoring, particularly for women who might not otherwise ever have thought of themselves as filmmakers, but it does not prepare them to deal with the legal questions.”⁵⁸ Most people don’t understand copyright law except in its general outlines; paracopyright law, regulating technologies in the service of preventing certain kinds of copying, is even less comprehensible and often entirely unknown. For nonexperts, to whom it is not obvious that (or why) law would make distinctions among the methods by which vidders obtain sources, anticircumvention law is so unrelated to the technical and artistic challenges of creation that it is simply meaningless.

56. EFF Proposal, *supra* note 44, at 23 (citations omitted); *see also id.* at 24 (“Examining the history of vidding, Professor Coppa finds a consistent focus on the part of vidders, who are predominantly female, on fleshing out marginalized (often female) perspectives that are implicit in television shows like *Star Trek* or *Quantum Leap*. A vid like *Vogue* is a direct exercise in cultural criticism—a stylish attack on the romanticized conjunction of violence and male sexuality in a major Hollywood film. Some vids (such as *Us* by the vidder known as Lim) can be far-reaching commentaries on vidding and fan culture itself, while other vids (like *Superstar* by the vidder known as here’s luck) serve the more modest (but equally fair) purpose of commenting on characters in a favorite TV show.” (citations omitted)). The lower-quality version is, at present, still available on YouTube. *See* Youtube – Vogue – 300, <http://www.youtube.com/watch?v=WR3a73o5o4k> (last visited Apr. 26, 2010).

57. OTW Reply Comment, *supra* note 15, at 13 (citation omitted).

58. EFF Proposal, *supra* note 44, at 32-33 (Appendix B: Nov. 18, 2008 Interview with Francesca Coppa); *see also* OTW Reply Comment, *supra* note 15, at 12 (“These are amateur artists, hobbyists who are making no money from these videos, 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. Many remix artists are reinventing the form for themselves; even if they eventually enter larger communities of practice, those communities are formed around art and commentary, not legal advice.”).

B. The Devil in the Details: Anticircumvention Law

Copyright law grants copyright owners exclusive rights over their works, with various limits and exceptions.⁵⁹ In order to enforce those exclusive rights, copyright owners sometimes go after entities that, while not themselves infringing, facilitate others' infringement. Traditionally, this was the province of secondary liability.⁶⁰ However, as digital technologies spread, copyright owners became increasingly concerned about copying technologies that were designed to defeat, or circumvent, anticopying technologies.⁶¹ Proponents of anticircumvention law often analogized copying technologies to lockpicks and other burglars' tools.⁶² Copyright owners maintained that traditional secondary liability doctrines didn't provide sufficient protection because the courts had held that technologies with substantially noninfringing uses were legitimate even if some end-users committed infringement.⁶³ Eventually, Congress responded to the concerns about the ease of defeating digital locks by enacting, as part of the DMCA, a paracopyright right against circumvention technologies.

The DMCA's § 1201 prohibits circumvention of "access controls"—technological measures that control access to works protected by copyright.⁶⁴ Section 1201 also bans the distribution and trafficking of two types of technologies: technologies that allow circumvention of access controls, and technologies that allow circumvention of "rights controls," which are technological measures that control the exercise of the rights granted to copyright owners, such as reproduction and public performance.⁶⁵

Although the statute sets up differences between access and rights controls, copyright owners routinely argue that the

59. 17 U.S.C. § 106 et seq. (2006).

60. *E.g.*, Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1346-47 (2004).

61. *See, e.g.*, WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 183-200 (1995) (expressing large-scale copyright owners' desires for legal protection against circumvention technologies), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

62. *See, e.g.*, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Allan Adler, Ass'n of Am. Publishers).

63. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442, 456 (1984).

64. 17 U.S.C. § 1201 (2006).

65. *Id.*

technological measures they employ are access controls.⁶⁶ They do this because access controls receive greater protection against circumvention: it is not a violation of the statute to circumvent rights controls, only to disseminate (or otherwise promote) a rights control circumvention technology.⁶⁷ Thus, a person who happens to be in possession of a rights control circumvention technology may circumvent the rights control subject only to the underlying commands of copyright law. Her acts may or may not infringe copyright—for example, if she engages only in private performance of the work, she infringes no right of the copyright owner. By contrast, it is an independent violation of the law to circumvent access controls, regardless of whether copyright infringement or fair use results.⁶⁸ In litigated cases, courts regularly agree with copyright owners' characterization and treat technological measures as access controls, thus rendering the rights control provision something of a dead letter.⁶⁹

Because of the access control provision, a fair user who takes clips from a DVD to make a fair use can violate the DMCA. The copyright owner need not even allege a copyright infringement to win a claim against her; the DMCA violation stands on its own. By contrast, if she downloaded an entire copy of a film from the Internet, made the same clips, and then discarded the full copy, she would not have violated the DMCA, and she'd have a strong defense for the downloading as an intermediate step in her ultimate fair use.

66. See R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003).

67. 17 U.S.C. § 1201(b) (2006).

68. See 17 U.S.C. § 1201(a)(1)(A) (2006); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346, 347 (S.D.N.Y. 2000).

69. See Reese, *supra* note 66, at 650-51; see also Letter from Martine Courant Rife, Researcher, Mich. State University, to U.S. Copyright Office, Library of Congress (July 10, 2009), available at http://www.copyright.gov/1201/2008/answers/7_10_responses/final-rife_response-to-questions-july-10-2009.pdf (response to Copyright Office post-hearing questions) (arguing that the Copyright Office should treat CSS, the technology that protects DVDs, as a rights control technology such that no exemption is required to allow individual circumvention of CSS); Neil J. Conley, *Circumventing Rights Controls: The Token Crack in the Fair Use Window Left Open by Congress in 1201 May Be Open Wider than Expected--Technically Speaking*, 8 CHI.-KENT J. INTEL. PROP. 297, 316 (2009) (arguing that classifying technologies as rights controls rather than access controls has undermined congressional intent to preserve fair use). This is not to say that § 1201 plaintiffs always win, but they don't lose on the ground that the technologies at issue are mere rights controls. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546-47 (6th Cir. 2004) (rejecting access control claim because the technology at issue did not control access to the relevant work); *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004) (rejecting access control claim because copyright law authorized access to the work at issue).

Under the DMCA, the Librarian of Congress must conduct a rulemaking proceeding every three years to consider exemptions to the ban on circumventing access controls.⁷⁰ Exemptions may be granted to users of particular classes of works if those users are (or in the next three years are likely to be) “adversely affected by the prohibition . . . in their ability to make noninfringing uses . . . of [that] class of copyrighted works.”⁷¹ The Copyright Office has put a heavy evidentiary burden on exemption seekers, requiring them to show precise and specific needs.⁷² The first two proceedings in 2000 and 2003 produced only extremely narrow exemptions—for example,

70. Because the Librarian delegates the rulemaking to the Register of Copyrights and the Copyright Office, I will refer to the Copyright Office as the relevant decision maker hereafter.

71. 17 U.S.C. § 1201(a)(1)(B)-(C) (2006). In greater detail:

(B) The prohibition [on circumventing access controls] shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress . . . shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [on circumventing access controls] in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

Id.

72. See Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong. 10-11 (Oct. 27, 2003), available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf> (“[T]he burden of proof for [the] proposed exemption [is] on the proponents of the exemption. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a *substantial* adverse effect on noninfringing uses by users of copyrighted works. . . . [A] proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses” (emphasis added) (citations omitted)); *id.* at 11 (maintaining that the proponent must show causal link “between the prohibition on circumvention and the alleged harm” (citation omitted)). These standards have been criticized as too stringent, even by other federal officials. See Woodrow Neal Hartzog, *Falling on Deaf Ears: Is the “Fail-Safe” Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use?*, 12 J. INTELL. PROP. L. 309, 338-42 (2005); Moseng, *supra* note 55, at 345-47; Diane Leenheer Zimmerman, *Adrift in The Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 282-83 (criticizing the narrowness of the rulemaking).

allowing circumvention of obsolete “dongles” controlling access to physical copies of software such as games on floppy disks.⁷³ Repeated requests for general “fair use” exemptions have been rejected, in part on the ground that an exemption needed to be defined by the class of works identified and not by the uses made of those works.⁷⁴

In 2006, Peter Decherney, a film professor at the University of Pennsylvania, convinced the Copyright Office that it could use the intersection of a class of works with a set of uses and users to grant an exemption.⁷⁵ This position is more consistent with the legislative history expressing concern for all lawful uses, including fair uses, which are not necessarily defined by the nature of the work but are assessed on more use-specific factors.⁷⁶ Using this standard, the Office granted media studies professors an exemption for circumventing DVD access controls in order to create clips for use in teaching, which the Copyright Office held would essentially always be a fair use.⁷⁷

73. The 2000 proceedings, relevant documents for which are available at <http://www.copyright.gov/1201/anticirc.html>, resulted in only two exemptions: “Compilations consisting of lists of websites blocked by filtering software applications; and . . . Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,562 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201). The 2003 proceedings, relevant documents for which are available at <http://www.copyright.gov/1201/2003/index.html>, resulted in four exemptions: a renewed filtering exemption, a decomposition of the 2000 obsolete software exemption into two separate exemptions, and an exemption for works distributed in e-book format when all e-book editions of the work prevent enabling of the read-aloud function. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,013-14 (Oct. 31, 2003) (codified at 37 C.F.R. pt. 201).

74. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. at 64,562 (exemptions had to be defined “primarily by reference to attributes of the [copyrighted] works themselves”); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. at 62,014-15 (adopting same rationale); Letter from Marybeth Peters, *supra* note 72, at 11-13.

75. See Christine Haight Farley et al., *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735, 741-44 (2008).

76. See Hartzog, *supra* note 72, at 332-35; Letter from John C. Vaughn, Executive Vice President, Ass’n of Am. Univs., to David Carson, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. (Dec. 18, 2002), available at <http://www.copyright.gov/1201/2003/comments/028.pdf> (response to Copyright Office notice of inquiry) (“[T]here is simply no reasonable support for the 2000 Final Rule’s conclusion that ‘classes of works’ cannot be further defined based upon attributes of users or environment of use. The type of user or use are core factors in determining the right of fair use, which is at the core of this rulemaking.”).

77. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473-74 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201). The exemption required that the media studies library at the professor’s institution must own the DVD at issue. *Id.* The relevant documents for the 2006 proceedings are available at <http://www.copyright.gov/1201/2006/index.html>.

For all of the academic angst over § 1201,⁷⁸ there has been little attention paid in the legal literature to exemption rulemakings,⁷⁹ which means that the work of monitoring the exemption-granting process has generally been left to advocacy groups and motivated citizens. From the viewpoint of those opposed to the seemingly infinite expansion of copyright rights, seeking an exemption is a structurally disadvantageous position, where fair users and people whose uses are otherwise exempt from copyright law (for example, those engaged in private performances) have to fight an uphill battle just to be allowed to do what copyright law supposedly already

78. There's been a lot. This footnote offers only a small sample of work defending and attacking § 1201, focusing on scholarship directed at non-software fair use and free speech claims (rather than at issues surrounding software and technical interoperability, though those issues have also generated significant scholarly attention). *E.g.*, Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1 (2008); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from The Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385 (2004); Robert C. Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Noninfringing Use*, 31 COLUM. J.L. & ARTS 209 (2008); Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11 (2005); Lev Ginsburg, *Anti-Circumvention Rules and Fair Use*, 2002 UCLA J.L. & TECH. 4 (2002); Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397 (2007); Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037 (2009); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111 (2005); Stephen M. McJohn, *Eldred's Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95 (2003); Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547 (2009); L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33 (2002); Samuelson, *supra* note 4; YiJun Tian, *Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 749 (2005); Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635 (2004); Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13 (2006); Corinne L. Miller, Article, *The Video Game Industry and Video Game Culture Dichotomy: Reconciling Gaming Culture Norms with the Anti-Circumvention Measures of the DMCA*, 16 TEX. INTELL. PROP. L.J. 453 (2008); R. Terry Parker, Note, *Sold Downstream: Free Speech, Fair Use, and Anti-Circumvention Law*, 6 PIERCE L. REV. 299 (2007); Derek J. Schaffner, Note, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL'Y 145 (2004); Rabeh Soofi, Note, *First Amendment Challenges to Copyright after Eldred v. Ashcroft: The DMCA's Circumvention of Free Speech*, 30 J. LEGIS. 169 (2003).

79. *But see* Farley et al., *supra* note 75, at 741-44 (discussing the lawyering behind Peter Decherney's successful proposal); Hartzog, *supra* note 72; Herman & Gandy, Jr., *supra* note 4; Aaron Perzanowski, *Evolving Standards & the Future of DMCA Anticircumvention Rulemaking*, 10 No. 10 J. INTERNET L. 1 (2007); Moseng, *supra* note 55.

permits and even encourages.⁸⁰ The institutional bias at the Copyright Office toward rightsholders makes this problem worse.⁸¹

It is still important to analyze and discuss the exemptions, if only to see what can be salvaged from anticircumvention law. The exemption process allows anyone who is willing and able to testify to speak directly to policymakers. Live testimony does require resources (among them, travel funds and, for those who do not work as advocates, the ability to take time off of work), and speaking in the idiom of copyright policy requires a certain amount of background knowledge. Nonetheless, the accessibility of the exemption rulemaking process contrasts favorably with other forms of policymaking, in which policymakers themselves—or the lobbyists working on them—decide who will get to speak in favor of and against policy proposals.

Furthermore, Copyright Office decisionmakers are generally smart and dedicated officials who are trying to do the right thing. Even though they are by default sympathetic to claims that what is good for large-scale copyright owners is good for America, that default can be changed, as Peter Decherney's success demonstrated. As administrators not directly beholden to major campaign contributors, they are freer than most politicians to listen to individuals testifying to the harms that anticircumvention has inflicted on creativity at the ground level.

None of this is to suggest that exemptions are easy to attain, even once a group has managed to establish a presence in the policy space. Strong advocacy is necessary to get even limited exemptions because the Office has been extremely cautious to date. Notably, the Office's 2006 change of heart on how exemptions could be defined

80. See Farley et al., *supra* note 75, at 741 ("By the time the 2006 rulemaking round arrived, many disenchanted public interest advocates had written off the rulemaking process as futile, and many of those who had earlier requested exemptions took a pass."); *id.* at 744 ("The sheer amount of work that these student lawyers and their clients invested to enable one small group of teachers to teach effectively also indirectly exposed the extensive harm done by the statute. Under the DMCA's exemption rulemaking, advocating successfully for the many teachers, archivists, historians, artists, and others barred from making otherwise fair uses of copyrighted works would be a massive undertaking.")

81. See LITMAN, *supra* note 4, at 74 ("Unfortunately, the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry's pocket."); *id.* ("The office has a limited budget, and relies on the goodwill of its regular clients. Copyright Office policy staff often come from and return to law firms that regularly represent copyright owners. Perhaps most importantly, the Copyright Office relies on the copyright bar to protect it from budget cuts and incursions on its turf."); *id.* ("[I]t is unsurprising that the Register has routinely given positions advanced by the content industry her enthusiastic endorsement."); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53-54 (1994); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 314-17 (1989).

allowed some loosening when it came to film and media studies professors who requested exemptions, but it also enabled other increased restrictions.⁸² For example, the Office added new user/use restrictions to an exemption previously granted solely on the basis of the type of work at issue: circumvention for the purpose of preserving obsolete computer programs and video games is now only allowed for someone maintaining a library or archive of such software.⁸³ Thus, the Office signaled that it would read proponents' evidence as narrowly as possible: exemptions based on one party's showing of need will be limited to those entities whose formal characteristics closely match that party.

This result puts a higher premium on participation in the exemption rulemaking proceedings, as only entities very similar to those represented in the proceedings will have their needs considered. The specific restriction imposed on "obsolete program" circumvention—that the beneficiary of the exemption must be maintaining a library or archive—illustrates the Office's general focus on the needs of specialized groups. This process is likely to result in exemptions that have no meaning for individual citizens. Instead, one must have substantial resources to claim an exemption, the wherewithal to maintain a library or archive, or the education and institutional support to become a media studies professor.⁸⁴

II. 2009: A PROPOSED EXEMPTION FOR NONCOMMERCIAL REMIX

After the 2006 media studies exemption succeeded, the stage was set for the next exemption rulemaking. In the October 2008 Notice of Inquiry, the Copyright Office stated that a proposed class of

82. See Moseng, *supra* note 55 at 349 ("By permitting the classification to refer to the user or intended use, the Copyright Office simultaneously made individual exemptions easier to obtain and reduced their general applicability." (citation omitted)).

83. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,474-75 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201); Moseng, *supra* note 55, at 350 ("In 2003, users asked for and were granted a general exemption after showing that the DMCA circumvention ban impaired their ability to make noninfringing uses of certain computer programs and video games. Following the 2006 rulemaking, the exact same works could only be accessed by certain people for certain reasons. . . . Nothing changed about the relevant facts, which in 2003 justified the broader exemption. Only the willingness of the Copyright Office to make reference to uses and users in classifying works changed." (citation omitted)).

84. See Moseng, *supra* note 55, at 351-52 (noting the advantage institutional players have in exemption proceedings, including their ability to develop a sufficient record, as compared to individual users and concluding that "[t]o the extent that noninfringing uses exercised by individuals are not represented by the institutional defenders of fair use, it is unlikely those unrepresented interests will enjoy exemptions under the Copyright Office's present implementation of the rulemaking procedure").

works exempt from the access circumvention prohibition must begin with reference to one of the categories of authorship enumerated in § 102 of the Copyright Act (literary works, audiovisual works, sound recordings, etc.). That class should then be further tailored to address the harm caused by § 1201's anticircumvention prohibitions.⁸⁵ Reflecting its hesitance to grant exemptions, the Office elaborated that, in some cases, the only appropriate way to further tailor the class would be to limit it by reference to particular uses or users—for example, audiovisual works used in class by “film and media studies professors”—in order to address the harm without creating an unduly broad exemption.⁸⁶ Formally, § 1201 holds out the possibility that a proven negative effect on a class of noninfringing uses—any class, including fair use—can justify an exemption. But the Copyright Office has yet to recognize a class of noninfringing uses in which an ordinary citizen/artist/speaker might want to engage.

In response to this Notice of Inquiry, the EFF proposed an exemption for audiovisual works on DVD where circumvention is undertaken for the purpose of extracting clips for inclusion in noninfringing, noncommercial video.⁸⁷ This differed from prior proposed “fair use” exemptions in that it identified transformative use—creation of a new work—as the proper goal of circumvention of DVD encryption, whereas past proposals had claimed broader rights to copy full DVDs in order to back up lawfully owned discs.⁸⁸

Key questions that the EFF's proposal raised included: What counts as harm for purposes of evaluating whether the DMCA has harmed fair use? If people are afraid to assert fair use rights for fear of being sued for circumvention, is that a sufficient harm even if the copyright owners have yet to file suit? More generally, who gets to make fair use? Does a fair user need pre-approval by some outside party such as the Copyright Office, either of her fair use or of the institutional setting in which she wants to make it? To what extent should we expect citizens to be aware of technical, counterintuitive features of law that make it *better*, legally speaking, to download a full unauthorized copy of a TV show or movie that is already “in the clear”

85. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 73 Fed. Reg. 58,073, 58,076-77 (Oct. 6, 2008) (codified at 37 C.F.R. pt. 201).

86. *Id.*

87. EFF Proposal, *supra* note 44, at 22.

88. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,479 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,015 (Oct. 31, 2003) (codified at 37 C.F.R. pt. 201).

than to pay for DVDs and take small clips from them in order to create a remix?

Allowing individual creators to enter the debate makes these questions highly salient by focusing attention on the real-world consequences of the DMCA. It therefore demonstrates the extent to which copyright law (and particularly paracopyright law in the form of the DMCA) has veered away from principles that laypersons can understand, even as copyright law has expanded to regulate the day-to-day behavior of these same laypersons.⁸⁹

A. The EFF Proposal

The EFF proposed a new exemption for “[a]udiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.”⁹⁰ The exemption rulemaking is intended to operate as a “fail-safe” to protect otherwise lawful uses—uses, that is, that copyright law allows and even encourages, but that paracopyright bars.⁹¹ The EFF began with the Copyright Office’s recognition that it was required to assess whether technological protections were “adversely affecting the ability of individual users to make lawful uses of copyrighted works.”⁹² The EFF relied on the fact that fair use is lawful use to make a case for an exemption for one particular type of fair use: video remix.

1. Video Remix as Fair Use

Though video remix has been around since early in the history of film, it is now exploding in popularity as the tools to manipulate video have become democratized.⁹³ According to the Pew Internet & American Life Project, nearly two-thirds of teenagers create content

89. See Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" To Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 244-45 (1997); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22-24, 38-39 (1996); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539-40, 543-48 (2007).

90. EFF Proposal, *supra* note 44, at 13; Letter from Fred von Lohmann & Jennifer S. Granick, Elec. Frontier Found., to U.S. Copyright Office, Library of Cong., available at <http://www.copyright.gov/1201/2008/responses/electronic-frontier-foundation-50.pdf> (reply comments).

91. EFF Proposal, *supra* note 44, at 2 (citation omitted); see also Exemption to Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,558 (Oct. 27, 2000) (using “fail-safe” language).

92. EFF Proposal, *supra* note 44, at 2 (citation omitted).

93. *E.g.*, EFF Proposal, *supra* note 44, at 14.

online, and one-quarter create remixes.⁹⁴ Empirical estimates are that between two thousand and six thousand remix videos containing footage likely taken from DVDs are uploaded to YouTube alone each day,⁹⁵ while tens of thousands of vids are uploaded elsewhere on the Internet.⁹⁶ One vid was in the top twenty most viewed videos of all time on YouTube, with over fifty-five million hits before it was removed due to an unadjudicated copyright claim,⁹⁷ and the numbers grow much larger when other forms of remix are considered. To take one example, an estimated ten thousand YouTube videos are dedicated to film analysis.⁹⁸ As the EFF concluded, this represents the output of an enormous group of creators in legal jeopardy.⁹⁹

This jeopardy is undeserved because noncommercial video remix should generally be recognized as fair use.¹⁰⁰ It is both socially beneficial—remix is a way of participating in culture, becoming competent as a citizen¹⁰¹—and legally transformative, taking the original work and making something new.¹⁰²

Transformative noncommercial video is everywhere. Even setting aside the vidding community, there is also political remix video,¹⁰³ including works that set the 2008 presidential debates in front of a panel of reality dance competition judges,¹⁰⁴ *Planet of the Arabs* (an extended survey of the stereotyped representation of Arabs in mainstream Hollywood film)¹⁰⁵ and numerous videos mocking the “Mighty Whitey” trope of a white savior rescuing “savages” from other

94. PEW INTERNET & AM. LIFE PROJECT, TEENS AND SOCIAL MEDIA 2-3 (2007), available at http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Teens_Social_Media_Final.pdf.pdf.

95. EFF Proposal, *supra* note 44, at 15.

96. OTW Reply Comment, *supra* note 15, at 5.

97. *Id.* (citation omitted).

98. EFF Proposal, *supra* note 44, at 24.

99. *Id.* at 15-16, 20.

100. *Id.* at 18-20; OTW Reply Comment, *supra* note 15, at 14-15.

101. See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 212-14 (2006); HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 245, 256-78 (2006); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 80-82 (2008); Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 965 (2004).

102. See Trombley, *supra* note 14, at 666-72 (concluding that the use of video clips in fan video is generally fair use).

103. Political Remix Video, About Political Remix Video, <http://www.politicalremixvideo.com/what-is-political-remix/> (last visited Apr. 7, 2010).

104. Posting of Jonathan (*So You Think You Can Be President?*) to Political Remix Video, <http://www.politicalremixvideo.com/2008/10/22/so-you-think-you-can-be-president> (Oct. 22, 2008).

105. Posting of Jonathan (*Planet of the Arabs*) to Political Remix Video, <http://www.politicalremixvideo.com/2007/06/01/planet-of-the-arabs/> (June 1, 2007).

white oppressors by combining footage from James Cameron's film *Avatar* with audio from the Disney film *Pocahontas* and vice versa.¹⁰⁶ Other examples include parody movie trailers, such as *Brokeback to the Future*, film analysis (using clips as part of a critical argument), movie mistakes (illustrating bloopers), comic remixes (such as remixes that repurpose a scene in the movie *Downfall* that showed Hitler's breakdown), political commentary (targeting public figures using popular culture, in the tradition of Walter Mondale's use of the Burger King slogan "Where's the Beef?"), and film criticism (such as a montage highlighting racism in Disney films).¹⁰⁷ Each of these adds new meaning or message to the original—often one of which the copyright owner would not approve—and serves a different purpose. These new meanings and messages are exactly what the fair use doctrine looks for when assessing whether a use is legally "transformative."¹⁰⁸

The broader cultural context is also important in assessing how transformative meanings appear out of remix. Peter Decherney and other film professors, recognizing the EFF proposal as an extension of their own work beyond the borders of the classroom, have pointed out that YouTube and other online video hubs have become so important to public discourse that the President and the Pope use them to communicate.¹⁰⁹ Any citizen can do likewise by setting up a free account. The explosion of remix video online is an important political and cultural phenomenon in itself and is also part of what film professors need to study: remixers need an exemption to do the kinds of things that film professors need an exemption to teach about.¹¹⁰ Video remix is now an important method of academic communication for students and teachers alike.¹¹¹ Education requires an idiom that students can understand, and video remix is a useful tool precisely

106. Posting of Jonathan (*Avatar Equals Pocahontas*) to Political Remix Video, <http://www.politicalremixvideo.com/2010/03/03/avatar-pocahontas/> (Mar. 3, 2010).

107. EFF Proposal, *supra* note 44, at 15-16.

108. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-611 (2d Cir. 2006).

109. See Letter from Peter Decherney et al., Univ. of Pa., to U.S. Copyright Office, Library of Cong. 9-10 (2009), available at <http://www.copyright.gov/1201/2008/responses/peter-decherney-university-pennsylvania-21.pdf> (reply comments).

110. *Id.* at 10 ("Online remix video has emerged as an important new cycle in the history of remixing, one that is of great interest to scholars of art, media, and culture. Books and articles are written about remix culture. Courses are taught on remix culture. And students are taught to make remix videos in classes. An exemption is necessary to allow this important form of expression to continue to develop unhampered by the ban on circumvention, which not only interferes with fair use in this case but also stifles the growth of an art form." (citation omitted)).

111. *Id.* at 11.

because it is now so easily perceived as a means of communicating new insights based on common culture.

Transformativeness heavily favors a finding of fair use,¹¹² especially when a remix uses only limited portions of the original,¹¹³ and when the new work is noncommercial, which is unlikely to harm the copyright owner's market.¹¹⁴ Indeed, transformative uses can actually expand markets. Vidders in particular tend to be good consumers, buying DVDs both because they are fans and because they want to make new art with them.¹¹⁵ In fact, some content owners recognize that noncommercial remixes are not an economic threat, and may even benefit them commercially by intriguing potential fans and boosting enthusiasm.¹¹⁶

Mizuko Ito, who has engaged in extensive research into online video remix, provides support for these conclusions in her study of Anime Music Videos (AMVs), a culture that is distinct from vidding in its history and aesthetics (though there are increasing areas of overlap).¹¹⁷ Ito's work tracks the growth of remix activity: the number of AMVs online doubled year after year until 2005, at which point tracking became impossible with the explosion of all kinds of content

112. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Blanch v. Koons*, 467 F.3d 244, 251-52 (2d Cir. 2006).

113. *See, e.g., Blanch*, 467 F.3d at 255 (accepting the need for the use of existing images to enhance the veracity and authenticity of artistic comment); *id.* at 257-58 (weighting transformativeness heavily); *Consumers Union, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983).

114. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449, 451 (1984); *see also* EFF Proposal, *supra* note 44, at 19 ("These videos will almost never be a substitute for the original works. In fact, in many cases, a remix video will be hardly comprehensible to someone who has not already seen the original video 'texts' from which the clips are drawn."). In *Campbell*, the Court rejected any presumption of unfairness based merely on the commerciality of the defendant's use, 510 U.S. at 590-91, but it did not disturb prior holdings with respect to *noncommercial* uses, which remain specially favored in the fair use analysis. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680, 701 (N.D. Tex. 2008).

115. *See, e.g., U.S. COPYRIGHT OFFICE*, *supra* note 27, at 0122.9-0122.19 (statement of Tisha Turk); Letter from Mizuko Ito, Research Scientist, Univ. of Cal., Irvine, to U.S. Copyright Office, Library of Cong. 3-4 (Feb. 2, 2009), *available at* <http://www.copyright.gov/1201/2008/responses/mizuko-ito-20.pdf>.

116. *See* Online: Why Viacom Ignores Mash-Ups of Its Copyrighted Content (Hoag Levins 2009), http://adage.com/video/article?article_id=134571; Viacom, Fair Use and Availability of Viacom Content on Authorized Websites, <http://www.viacom.com/news/pages/aboutfairuse.aspx> (last visited Apr. 7, 2010). Viacom General Counsel Michael Fricklas considers fair use to be a "sideshow," as compared to "exact copies with no substantial additional creativity." Levins, *supra*. For example, he wouldn't order a takedown of SpongeBob Squarepants video with a new soundtrack, even if he didn't think the use was fair. *Id.*

117. Letter from Mizuko Ito, *supra* note 115, at 1 ("AMVs are videos that involve the remixing of clips from Japanese animation (anime) with a soundtrack of the editors [sic] choosing, usually a popular song or the audio track from an advertisement or trailer.").

enabled by YouTube and other venues.¹¹⁸ The anime industry, recognizing the true economic benefits of a thriving creative fan culture, “has even gone so far as to commission commercial remixes by well-known AMV editors.”¹¹⁹

In order to get high quality source material, AMV makers, like live action vidders, need to use DVDs, rather than other sources, for their footage,¹²⁰ and that means they need to circumvent the technology used to protect DVDs. Even apart from quality, AMV makers need to use DVDs because most of their sources are not otherwise available—only a small percentage of anime is broadcast or otherwise distributed in non-DVD format in the United States.¹²¹ In addition, using DVDs for source is consistent with the ethical norms of the AMV community and the interests of copyright owners: people pay for DVDs and then clip them for use in new art, while non-DVD methods of acquiring source material lack any mechanism for paying the copyright owners.¹²² AMV makers emphasize that they are good customers for the commercial sector while they simultaneously create new art.¹²³

2. Video Remix in the Context of the Statutory Exemption Factors

The EFF argued that its proposed exemption was justified by the statutory exemption factors.¹²⁴ In evaluating proposed exemptions, the Copyright Office must consider four enumerated factors, and may consider any other relevant evidence. The nonexclusive statutory factors are:

118. *Id.* at 2.

119. *Id.*

120. *See id.* at 3.

121. *Id.* (“For the vast majority of anime, editors must turn to online sources or to DVDs, and do not have the option of analog capture.”).

122. *Id.* at 3 (“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.”).

123. *Id.* at 3-4 (“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. . . . [One editor says,] ‘We often ask people [at conventions] 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 DVDs.”).

124. EFF Proposal, *supra* note 44, at 20-27.

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; [and]
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works.¹²⁵

The first factor, availability, requires consideration of whether works are available in formats not protected by technological measures. Many recent works are only available on DVD, and even older works are often released with DVD-only special features. Moreover, in the context of video remix, because of the technical and legal problems explored in Part I.A.2 above, DVDs are the only *practical* source of clips for noncommercial creators.¹²⁶

The second factor is not applicable to the remix exemption, though the EFF pointed out that an exemption would do no harm to availability of works for nonprofit archival and like purposes.¹²⁷

The key justification for the exemption was founded on the third factor, the need to preserve criticism and comment for average citizens, as explained above.¹²⁸ The real negative impact of the current regime is its corrosive effect on the system of fair use: the inability of fair users to respond to takedown notices or infringement claims even when they have strong, or undeniable, claims on the merits of fair use. No actual lawsuit is required for such adverse effects to occur, just as lawsuits against media studies professors were not necessary for them to establish an adverse impact. Yet, the only chance a would-be fair user might have to make a case for fair use in court would be if an anticircumvention exemption was available.¹²⁹

125. 17 U.S.C. § 1201(a)(1)(C) (2006).

126. EFF Proposal, *supra* note 44, at 21.

127. *Id.* at 23.

128. *See id.*

129. *See id.* at 3 (“[I]f a proposed exemption involved an activity supported by a fair use argument that has yet to be addressed by the courts, and the exemption were denied, a court may never have the opportunity to rule on the question because a defendant may be unable to raise the fair use defense against a § 1201(a)(1) claim.” (citation omitted)); *id.* at 13 (“In the view of many rightsholders, once a creator circumvents CSS in order to obtain clips from a DVD, that creator cannot invoke the fair use doctrine in her defense against a claim brought under § 1201(a)(1). This short circuits the fair use inquiry, denies the creator her day in court, and dries up an important well of future fair use precedents to the detriment of remixers and rightsholders alike.”); *see also* Perzanowski, *supra* note 79, at 21 (“[U]nless circumvention occurs, courts may never have the opportunity to determine whether those particular uses are indeed noninfringing. Without an initial act of circumvention, many potentially fair uses will never occur and thus courts will be prevented from passing upon their legality.”).

Potential plaintiffs wouldn't even need to argue infringement and face a fair use defense when it would be so much easier for them to win a § 1201 claim, and competent counsel would tell any fair user that. Section 1201 thus deters remixers who want to respond to notices of claimed infringement. An exemption predicated on fair use would be available if and only if the underlying use enabled by circumvention was fair, thus allowing the continued development of fair use law in the courts.

The fourth and final enumerated factor in the statute is the effect of circumvention on the market. It is undeniable that circumvention technology is and will remain widely available, regardless of the exemption proceedings. Therefore, "if the widespread, free availability of CSS circumvention tools since the 2003 rulemaking has not dampened Hollywood's ardor for DVDs, authorizing remix video creators to circumvent CSS will hardly tip the scales."¹³⁰ Despite the pervasiveness both of circumvention technology and of in-the-clear, full copies of movies and television shows on the "Darknet,"¹³¹ the DVD market has remained robust, indicating that an exemption would have no marginal effect on copyright owners.¹³² Nor was there evidence of any harm from the 2006 media studies exemption, even though the copyright owners had claimed that any DVD exemption would harm them irreparably.¹³³ Indeed, an

130. EFF Proposal, *supra* note 44, at 25. The EFF elaborated:

Free, easy-to-use DVD ripping software has been continually available on the Internet for all major personal computer operating systems. DVD Shrink, Mac The Ripper, Handbrake, and dvd:rip are among the most popular DVD decryption solutions—all are available free-of-charge and have remained continually available since the 2006 rulemaking. . . . These tools have been readily accessible to mainstream personal computer users for many years. DVD ripping software, once the domain of a small band of enthusiasts, is now regularly reviewed in mainstream publications, including *USA Today*, *MacWorld*, *PC World*, *PCMagazine*, and the *Fort Worth Star Ledger*. In light of this reality, millions of Americans have had DVD circumvention tools at their disposal for many years.

Id. (citations omitted).

131. See Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 594-97 (2009).

132. *Id.* at 26-27.

133. *E.g.*, Letter from Gordon Quinn & Jim Morrisette, Kartemquin Educ. Films, Inc., to Robert Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office 2-3 (Sept. 8, 2009), available at http://www.copyright.gov/1201/2008/answers/9_21_responses/doc-flmmkrs.pdf ("Although these parties sounded similar warnings in previous rulemaking proceedings, there have been no allegations that the 2006 exemption for film and media studies professors has led to adverse consequences of any kind—even though that exemption does not contain any quantitative restrictions." (citation omitted)). In fact, the opponents themselves now acknowledge that they were wrong in their dire predictions three years prior. U.S. COPYRIGHT OFFICE, PUBLIC HEARINGS: EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 0260.10-0260.18 (May 6, 2009), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-6-09.txt> (statement

exemption would give vidders and other remixers an incentive to buy DVDs instead of acquiring source by other means.¹³⁴

B. Opposition

The copyright owners and DVD technology providers, aroused by Peter Decherney's unexpected success in 2006 and his request for a new exemption,¹³⁵ came out in force in response to the EFF's proposed exemption, warning that any exemption that took account of fair use would make § 1201 meaningless.¹³⁶ Conceding that DVD circumvention technology was readily available,¹³⁷ they nonetheless argued that circumvention should not be "legitimized" by exemptions that relied on fair use as a predicate for granting the exemption.¹³⁸ As

of Bruce Turnbull) ("[W]hile we were concerned about the film studies exemption three years ago, the limited nature of that exemption and the understanding of the pedagogical needs of the film studies professors was something that we have been able to get our minds around and understand and accept, and have found that it has not actually . . . resulted in the kinds of concerns that we might otherwise have.").

134. EFF Proposal, *supra* note 44, at 27.

135. See Letter from Peter Decherney et al., Univ. of Pa., to U.S. Copyright Office, Library of Cong. 4 (Dec. 2, 2008), available at <http://www.copyright.gov/1201/2008/comments/decherney-peter-university-penn.pdf> (comment).

136. See, e.g., Letter from Bruce H. Turnbull & Jaime S. Kaplan, Counsel, DVD Copy Control Ass'n, to U.S. Copyright Office, Library of Cong. 6 (Feb. 2, 2009) [hereinafter DVD CCA Reply Comments], available at <http://www.copyright.gov/1201/2008/responses/dvd-cca-inc-38.pdf> ("The DVD CCA fears that the new approach to the 'class of works' issue [in the media studies exemption] may result in an increase of exemptions specific to particular groups of users and uses and stray further afield from the statutory language and intent. Indeed, this possibility is evidenced by the comments submitted in connection with the present rulemaking, many of which seek to take advantage of the new approach to 'class of works,' enunciated in the 2006 rulemaking.").

137. E.g., U.S. COPYRIGHT OFFICE, *supra* note 133, at 0204.5-0204.7 (statement of Fritz Attaway) ("[T]he circumvention utility for CSS, which protects DVDs from copying, is readily available; that, we all understand that."); see also Litman, *Real Copyright Reform*, *supra* note 9, at 24-25 ("DRM has proved so far to be easy enough to hack to function as the sort of speed bump that is no impediment to deliberate infringers but still frustrates legitimate listeners when they try to play the music they bought on iTunes on their Palm Pre. Circumvention tools are widely available, and widely perceived as legitimate, despite the provisions in section 1201 of title 17." (citations omitted)).

138. U.S. COPYRIGHT OFFICE, *supra* note 133, at 0259.19-0260.5, 0261.2-0261.7 (statement of Bruce Turnbull) ("[Y]ou don't want to have the circumvention tool become something that is available and out there as in the legitimate marketplace. Now, we tried to prevent the circumvention tool from being available at all; that failed, but the notion that the tool itself is something that becomes ubiquitous and accepted as part of the legitimate marketplace is something that is a significant threat to the viability of the technology going forward. . . . [T]o have this proceeding become something that effective[ly] eviscerates the protection that's available under 1201, and was available, you know, in the development of this technology, it seems to me is not what this proceeding should be about.").

they had in prior proceedings,¹³⁹ they posited that exemptions would harm them economically.¹⁴⁰ At the same time, they argued that they had not to date sued individual remixers for § 1201 violations, so there was no adverse impact on fair use.¹⁴¹

The opponents did not spend much time on the EFF's proposal specifically, spending most of their energy arguing that any and all proposed DVD-related exemptions were unwarranted.¹⁴² An umbrella group of representatives of major copyright owners, known as the Joint Commenters, argued that the EFF's proposal was flawed in that the Copyright Office couldn't grant exemptions contingent on a later fair use determination by a court. Instead, an exemption would require an initial finding that all the conduct covered by an exemption was definitely fair use.¹⁴³ This was the appropriate rule, the Joint Commenters argued, even though the Copyright Office's fair use determination would not be binding in an infringement case against a party taking advantage of any exemption. Indeed, because the Office's ruling wouldn't get deference in court, the Joint Commenters argued that the Office *also* couldn't determine that something was a fair

139. U.S. COPYRIGHT OFFICE, PUBLIC HEARINGS: EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 55.23-56.2 (April 3, 2006), *available at* <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf> (statement of Bruce Turnbull); Letter from Ass'n of Am. Publishers et al., to U.S. Copyright Office, Library of Cong. 29-30 (Feb. 2, 2006), *available at* http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf (joint reply comments); *see* Letter from John Hoy, President, DVD Copy Control Ass'n, to David O. Carson, Gen. Counsel, U.S. Copyright Office, Library of Cong. 3 (Feb. 19, 2003), *available at* <http://www.copyright.gov/1201/2003/reply/028.pdf> (reply comments).

140. *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 27, at 0138.13-0140.7 (statement of Bruce Turnbull); Letter from Fritz. E. Attaway, Executive Vice President & Special Policy Advisor, Motion Picture Ass'n of Am., to U.S. Copyright Office, Library of Cong. 13 (Feb. 2, 2009) [hereinafter MPAA Comments], *available at* <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf>.

141. *Cf.* U.S. COPYRIGHT OFFICE, *supra* note 27, at 0177.2-0177.10 (statement of Bruce Turnbull) ("The purpose of 1201 was to enable the technology . . . to allow the content to flow and not to force [owners] to sue individual users . . . as some other industries have been forced to do. . . [If] we have exemptions that are broad enough that we wind up developing the jurisprudence [on] fair use, then we have just really undermined what 1201 was all about.").

142. *See, e.g.*, DVD CCA Reply Comments, *supra* note 136, at 7-10 (objecting both in general and specifically to the EFF's proposal by reiterating general objections and arguing the exemption would be impermissibly overbroad); MPAA Comments, *supra* note 140, at 13. Opponents in prior rulemakings have also tended to lump all proposed exemptions together and argue that the heavy burden of justifying them has not been met. *See* Herman & Gandy, Jr., *supra* note 4, at 161-62 (describing how opponents of the exemptions limited their arguments to procedure and burden of proof rather than respond to the EFF's proposal and policy claims).

143. *See* Letter from Ass'n of Am. Publishers et al., to U.S. Copyright Office, Library of Cong. 11-13 (Feb. 2, 2009) [hereinafter Joint Commenters], *available at* <http://www.copyright.gov/1201/2008/responses/association-american-publishers-47.pdf> (joint comments).

use.¹⁴⁴ The necessary result would be that no fair-use-based exemptions could ever be granted, no matter how much adverse impact on lawful use (of which fair use is a subset) was shown. Opponents also briefly questioned whether remix video was actually fair use, suggesting, for example, that because YouTube is a commercial venture and because some YouTube users (though not vidders) seek to monetize their videos, vids were therefore commercial.¹⁴⁵

The opponents did not suggest, as they had for the film studies professors in 2006, that licensing could substitute for fair use.¹⁴⁶ This is because even the opponents recognized that there is no licensing market for individual, noncommercial remix, and no present chance of creating one. Time Warner did argue in its submission that selected clips from some of its shows are available to “vidders” in restricted formats on specific websites.¹⁴⁷ Its discussion represented a severe misunderstanding of vidding, equating vids with “mash-ups” based only on whatever clips the content owner deigned to provide. These mash-ups, Time Warner stated, were intended to be put on a user’s social networking page¹⁴⁸ (and exploited as promotional tools by Time Warner), rather than existing as artistic works expressing a new message. Time Warner’s project invites consumers to become better consumers by highlighting aspects of shows that Time Warner selected for promotion, whereas vidding empowers citizens to give their own perspectives on copyrighted works, and Time Warner—like all the other major copyright owners opposed to exemptions—did not propose to allow the latter.

In any event, while copyright owners are generally willing to license public performances of entire films, the opponents never quite managed to explain when a license to create a clip would be available, or from whom. After all, creating a clip requires either active participation from the studios—not available to remixers¹⁴⁹—or use of

144. See *id.* at 13.

145. See *id.* at 66; Letter from Sandra Aistars, Assoc. Gen. Counsel, Time Warner Inc., to U.S. Copyright Office, Library of Cong. 15 (Feb. 2, 2009) [hereinafter Time Warner Comments], available at <http://www.copyright.gov/1201/2008/responses/time-warner-49.pdf>. On the argument that the use of a profit-seeking intermediary converts a noncommercial work into a commercial one for purposes of fair use, see Tushnet, *supra* note 42, at 513-14.

146. See, e.g., DVD CCA Reply Comments, *supra* note 136, at 20 (arguing that licenses are readily available to educational users).

147. See Time Warner Comments, *supra* note 145, at 15.

148. See *id.*

149. Compare DVD CCA Reply Comments, *supra* note 136, at 16 (referring to the studios’ “stated plans” to create an online clips service for film professors), and MPAA Comments, *supra* note 140, at 10-11 (asserting that an exemption is not needed because, within three years, the

circumvention technology, which the studios can't license and the technology providers won't license.

More broadly, the opponents argued that other proposed exemptions, which were limited to certain institutionally-defined groups (teachers and documentary filmmakers) were far too expansive.¹⁵⁰ An exemption for noncommercial remix was so far beyond the pale that its advocacy simply proved the need to reject the other exemptions. If documentarians and educators deserved fair use-based exemptions, the opponents contended, then other fair users would be able to make the same claims.¹⁵¹ The EFF's proposed exemption was the bottom of the slippery slope: the anticircumvention provisions would be useless if they didn't apply to fair uses by average citizens.¹⁵²

MPAA expects that it will launch a clips server for media and film professors, though it acknowledges the major movie studios have not agreed on parameters and clearances have not yet been obtained), and Time Warner Comments, *supra* note 145, at 9 (echoing other opponents' statement that film professors with an account will be able to access clips "as long as the film title is available on the Service"), and *id.* at 10 (stating that Time Warner provided one digital clip in response to an academic request, which proved that studio provision was a viable alternative to circumvention), with U.S. COPYRIGHT OFFICE, *supra* note 133, at 0113.1-0113.15, 0121.4-0121.9 (statement of Peter Decherney) (testifying that no Univ. of S. Cal. faculty member he contacted knew about the MPAA's described clips service, so the project was still too speculative to be a factor in the current rulemaking and, moreover, clips are needed by more than just media professors).

150. See, e.g., U.S. COPYRIGHT OFFICE, *supra* note 27, at 0046.3-0050.4 (statement of Steve Metalitz); U.S. COPYRIGHT OFFICE, *supra* note 133, at 0213.7-0217.18 (statement of Bruce Turnbull); Joint Commenters, *supra* note 143, at 27-35, 68-70.

151. See U.S. COPYRIGHT OFFICE, *supra* note 133, at 0304.5-0304.10 (statement of Fritz Attaway) (extending the exemption to students is "so far down the path that you are going to have a very hard time in three years [explaining], why did you stop at students; why not anybody else that's engaging in fair use?"); *id.* at 0307.14-0307.19 ("[T]he question still is, where do you draw the line? High school students have a legitimate need . . . to engage in commentary, and of all of these other fair use purposes. [So do individuals] whether they are in school or not."). Of course, Mr. Attaway is correct on this last point, which is reminiscent of the arguments of opponents of equal employment laws who attempted to derail that legislation by adding gender as a protected category, hoping that equal treatment for women would seem so ridiculous as to defeat equal treatment for African-Americans. See also DVD CCA Reply Comments, *supra* note 136, at 9-10 (arguing that the EFF's exemption "would effectively eviscerate the value of the DMCA circumvention prohibition in the process. The value of—and, indeed, a major purpose of—the DMCA is to allow technology to operate so that there do not have to be lawsuits against individual consumers").

152. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0177.8-0177.10 (statement of Bruce Turnbull); U.S. COPYRIGHT OFFICE, *supra* note 133, at 0261.10-0261.21 (statement of Fritz Attaway); Joint Commenters, *supra* note 143, at 66-67 ("Granting the proposed exemption could confuse even law abiding consumers by placing the stamp of the Librarian's approval on the 'darknet' marketplace. This would undermine copyright owners' confidence in the integrity of CSS as well as yet unreleased business models. . . . To approve such a proposal would be to slide far down the slippery slope of exempting, not particular classes of works, but particular uses or users." (citation omitted)); MPAA Comments, *supra* note 140, at 13 ("[S]uch a broad exemption would encourage massive disregard for the DMCA's prohibition against circumvention of

Nonetheless, the opponents appeared to concede (at least for purposes of argument) that substantial numbers of noncommercial remixes were fair uses.¹⁵³ The exemption opponents still argued that the EFF had failed to show harm to remixers, because the owners had not sued any identified remixer for violating § 1201.¹⁵⁴ Moreover, they claimed that a would-be fair user could merely point a properly tripod-mounted camcorder an appropriate distance away from a high-definition screen playing a DVD in a perfectly darkened room. The resulting recording, the opponents claimed, was *not* circumvention, and would suffice for fair use purposes, meaning that there was no need for a § 1201 exemption.¹⁵⁵

To the opponents, circumvention was mere convenience, and inconvenience was insufficient to justify an exemption.¹⁵⁶ This position was consistent with the opponents' general stance that the world is divided into two parts: a big audience, whose interests lie only in receiving content produced by professional creators licensing their

technical measures, create public confusion as to when circumvention is or is not permitted, and present copyright owners with insurmountable enforcement problems."); Time Warner Comments, *supra* note 145, at 15 (arguing that the EFF's exemption would undermine technological protection measures as a whole).

153. U.S. COPYRIGHT OFFICE, PUBLIC HEARINGS: EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 0084.21-.22 (May 1, 2009), *available at* <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-1-09.txt> (statement of Steve Metalitz); *id.* at 0087.2-.8.

154. *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 133, at 0142.19-0143.1 (statement of Steve Metalitz).

155. *E.g.*, U.S. COPYRIGHT OFFICE, *supra* note 133, at 0207.9-0209.19, 0213.22-0214.4, 0260.5-0260.10 (statement of Dan Seymour and Bruce Turnbull); Joint Commenters, *supra* note 143, at 67 ("[T]he interview with an anonymous vidder [in the EFF Proposal] states that vidders 'tend to spend a good deal of money on [creating videos], from souped-up computers and external hard drives to high-end professional editing and post-production software to the show [sic] DVDs and music [they] buy.' Thus, many of the vidders who particularly care about the quality of the videos they produce are likely willing to spend extra money to produce exceptional work product. Those vidders who are less interested in exceptional quality can obtain footage in less expensive ways while still sharing their work product with the online marketplace." (citation omitted)); *id.* ("Digital video recorders that can record material off the screen are more widely available, at lower prices, and with higher quality results, than ever before. These devices enable vidders to obtain high quality footage for their creations without ever circumventing CSS. While understandably some vidders would prefer to use circumvention to access material for copying, rather than using some form of screen capture technique, even a sincere dedication to quality is not a sufficient basis for circumvention when other reasonably substitutable measures are available."); MPAA Comments, *supra* note 140, at 9; Letter from Bruce H. Turnbull, Counsel, DVD Copy Control Ass'n, to Robert J. Kasunic, Principal Legal Advisor, U.S. Copyright Office, Library of Cong. 5 (July 10, 2009) [hereinafter DVD CCA Letter], *available at* http://www.copyright.gov/1201/2008/answers/7_10_responses/july-10-dvd-cca-ltr-to-r-kasunic.pdf.

156. *E.g.*, Joint Commenters, *supra* note 143, at 34; Letter from Steven J. Metalitz, Motion Picture Ass'n of Am., to U.S. Copyright Office, Library of Cong. 6 (Sept. 8, 2009), *available at* http://www.copyright.gov/1201/2008/answers/9_21_responses/mpaa.pdf; MPAA Comments, *supra* note 140, at 5, 8; Time Warner Comments, *supra* note 145, at 10.

works to existing distributors, and a small segment of producers (in theory, creative people, but in practice, businesses to whom creative people have transferred their copyrights or for whom they've created works for hire).¹⁵⁷ Creating new works outside the professional, hierarchical, and fundamentally industrial system controlled by these companies is simply beside the point—it is trivial, and at most a necessary casualty of making the money flow.¹⁵⁸

C. Analysis: The Need for an Exemption

1. The Illusory Alternatives to Circumvention: The Digital Literacy Test and the Digital Poll Tax

The opponents argued that fair uses could be made without using circumvention technology.¹⁵⁹ There are several problems with that position. The possibility that § 1201 would interfere too much with legitimate uses is precisely why Congress enacted the rulemaking procedure.¹⁶⁰ And that interference has occurred.

157. The initial sections of the comments of the major copyright owners went on for many pages about how much stuff they are willing to sell (or, increasingly, license) to audiences and advertisers, and about how that system is what the DMCA is intended to achieve. Joint Commenters, *supra* note 143, at 14-21; MPAA Comments, *supra* note 140, at 2-5; Time Warner Comments, *supra* note 145, at 3-7.

158. A spectacular statement of this viewpoint is found in an industry-friendly UK government report, which concluded that Great Britain should seek “a digital framework for the creative industries and a commitment to these industries grounded in the belief that they can be scaled and industrialised in the same way as other successful high-technology, knowledge industries.” U.K. DEP'T FOR CULTURE, MEDIA AND SPORT & U.K. DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, DIGITAL BRITAIN: FINAL REPORT 105 (June 2009), *available at* <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>; *see also* OTW Reply Comment, *supra* note 15, at 17 (“Remix artists, like vidders, are caught in the contradiction of a media culture that both encourages user-generated content and stigmatizes it.”); Posting of Michael Weinger (*UGC Is More than Just Hamsters on a Piano*) to Public Knowledge Policy Blog, <http://www.publicknowledge.org/node/2697> (Oct. 14, 2009, 17:54 EST) (“In every one of these conversations [about the future of broadband], no matter what the context, there is always a point where people start to discuss what the video actually will be. And in every one of these conversations, a dichotomy quickly emerges: there will be user generated content (UGC) and there will be ‘real’ or ‘studio’ or ‘professional’ content. On the ‘real’ side goes stuff from television networks and movie studios. On the UGC side goes stuff uploaded to YouTube.”).

159. The opponents of the exemption relied on *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), in which the court asserted that

[T]he DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.

Id. at 459.

160. I thank Jessica Litman for pressing me on this point.

Noncircumvention methods of getting clips from DVDs are technically flawed, prohibitively expensive, and legally uncertain in themselves. Worse, video remixers simply do not know about the prohibitions of the DMCA, which are counterintuitive in distinguishing one method of getting clips from a lawfully made DVD for fair use from another.¹⁶¹

The result is a digital literacy test, one that large content owners know that individual users will overwhelmingly fail, and that, like the classic literacy test, will therefore 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.¹⁶² Under the DMCA, the test proposed is that fair users understand that a 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, they are indistinguishable from other readily available technologies. The current regime is a trap for the unwary. Remixers without access to copyright counsel don't expect that it's better, for purposes of defending a remix, to download an unauthorized copy of the original from the Internet and make clips from that than to pay for the DVDs of the same work and make clips from those.¹⁶³ When they find out, it's too late:

161. EFF Proposal, *supra* note 44, at 13 (“Lacking access to sophisticated legal counsel to advise them, the vast majority of amateur remix video creators rely on DVD rippers to obtain the clips they need.”); OTW Reply Comment, *supra* note 15, at 12.

162. 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) (“[S]ome of the questions sought answers that could only be given by one who possessed knowledge of obscure historical facts. A selective example: 12.) What words are required by law to be on all coins and currency of the United States? 17.) Appropriation of money for the armed services can only be for a period limited to ___ years. 30.) Of the 13 original states, the one with the largest representation in the first Congress was ____.”).

163. EFF Proposal, *supra* note 44, at 17 (“[I]t will strike many laypersons as bizarre that relying on infringing copies taken from unauthorized Internet sources is preferable (from a circumvention point of view) to ripping a DVD that you have purchased. Similarly, many may find it hard to believe that taking the same excerpts by means of video capture (an alternative that requires additional equipment and expertise that many amateur vidders lack) carries different legal consequences than using a DVD ripper to accomplish the same thing.”); see also *id.* at 21 (“As applied to hobbyist creators engaging in noncommercial creativity, these legal distinctions amount to little more than a trap for the unwary. By taking the course that seems most fair and ‘legitimate’—namely, using your own DVD drive to take excerpts from a DVD you lawfully possess—these creators will have unknowingly violated § 1201(a)(1).”); OTW Reply Comment, *supra* note 15, at 12 (“[N]ot only are the majority of vidders unlikely to know about or consider [alternate] methods, to have the equipment necessary to implement them, or to be

Large media companies are delivering hundreds of thousands of “takedown” notices each month to online service providers who host and link to information posted by Internet users. While many of those notices target clear cases of copyright infringement, remix video creators have found themselves mistakenly caught in the takedown notice driftnet. Assuming the creator had ripped DVDs in order to obtain clips included in the video, she would face a difficult set of choices. If she were to insist on her right to “counter-notice” pursuant to 17 U.S.C. § 512(g) in an effort to have her video restored, she would be exposing herself to a potential circumvention claim from the copyright owner who sent the DMCA takedown demand. In other words, thanks to § 1201(a)(1)’s ban on circumvention, remix video creators are unable to take full advantage of the protections they would otherwise enjoy against having their noninfringing works improperly censored off the Internet.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶

Exemption opponents proposed using a camcorder as a noncircumventing alternative, while the Copyright Office was interested in the possibility that screen capture software could avoid the need for any DVD-related exemptions. Unfortunately, neither alternative works, and the result is a digital poll tax on fair use even for those who pass the literacy test.

The poll tax comes first in the degraded quality of the video source available through the suggested alternatives. In general, the law does not tell artists that they can only use paraphrases and never quotes, or crayons and never pencils, in order to protect other

willing to sacrifice the better quality that comes from obtaining the material straight from a DVD, but they have no idea that these methods are legally preferable. Paying for DVDs and then using widely available software to capture clips from the DVDs seems fair and reasonable. In fact, the most obvious alternative method is to download copies online, for example from Bittorrent sites.”)

164. EFF Proposal, *supra* note 44, at 20 (citation omitted); *see also* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 175-78 (2010) (describing how the threat of massive legal liability can deter even valid stances against copyright owners’ overreaching).

165. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0119.4-0120.4 (statement of Francesca Coppa). Having creative expression removed can be extremely painful for the creators, even when they are violating property norms; *cf.* ALISON YOUNG, JUDGING THE IMAGE: ART, VALUE, LAW 71 (2005) (“A signifying practice that is, for its practitioners, profoundly about identity and existence is viewed as something to be erased, something to be displaced, something *illegible and illegitimate*. The [interpretation of graffiti as mere lawbreaking] erases the writer’s identity, subjectivity and self; and the labour, pleasure and love that wrote the graffiti is replaced with blank space.” (emphasis in original)).

166. *See* U.S. COPYRIGHT OFFICE, May 7, 2009, *supra* note 27, at 0120.5-0120.17 (statement of Francesca Coppa).

copyright owners' interests.¹⁶⁷ Precision is itself an artistic tool. As noted above in Part I.A, quality is often important to the messages that vidders are communicating. Visual quality can be especially vital to cultural critics: if pop culture has luscious imagery, and critics have to speak in degraded and ugly forms, their already-marginal work is further hampered by looking incompetent.¹⁶⁸ As discussed further in the next subsection, the poll tax also comes in the literal financial expense of using the setup recommended by the opponents. In combination, the qualitative and financial burdens imposed by compliance with anticircumvention law erect profound barriers to effective participation in cultural life.

The reasoning behind the poll tax is inherent in the responses from the opponents of an exemption: their argument that camcorders somehow preserve anticircumvention technology inherently presumes that the camcorder solution is one that won't be used by fair users and therefore fair uses will be suppressed.¹⁶⁹ Yet, camcording allows all the harm that the opponents fear. Camcording produces results good enough to watch, meaning that camcording is the mode a commercially-motivated pirate without access to circumvention technology would use.¹⁷⁰

167. That is, anticircumvention law is justified as a way to protect copyright owners from "piracy," or wholesale copying. But circumvention technology also enables fair uses. In other cases, the existing laws haven't banned tools—photocopiers, pencils, typewriters, etc.—that can be used for both fair uses and foul ones.

168. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0120.18-0121.7 (statement of Francesca Coppa); NICHOLAS DIAKOPOULOS ET AL., REMIXING AUTHORSHIP: RECONFIGURING THE AUTHOR IN ONLINE VIDEO REMIX CULTURE 3 (2007), available at <http://smartech.gatech.edu/dspace/bitstream/1853/19891/1/GIT-IC-07-05.pdf> ("Production constraints such as the limitations of an authoring environment bound the full range of expression of an author and thus subvert her authority over the medium. Aesthetic factors can limit the author since in order to positively influence the perceived authority . . . texts must have high production value. Texts of low production value lose an element of expertise and authority."); cf. U.S. COPYRIGHT OFFICE, *supra* note 133, at 0249.1-0249.9 (statement of Dr. Martine Courant Rife) (testifying that teachers grade down remixes that have technical flaws).

169. One could, implausibly, posit that the set of fair users will mostly overlap with the set of people with access to camcording technology. But that wouldn't help the argument because the opponents claim that the mere *existence* of an exemption would somehow legitimize widespread infringement by non-fair users. Likewise, the *existence* of the camcording solution would logically legitimize widespread infringement—as, indeed, the MPAA's highly successful campaign to outlaw recording devices in movie theaters suggests already occurs. See *infra* notes 180-82 and accompanying text.

170. Of course this is hypothetical, as everyone has ready access to circumvention technology. The trafficking provisions of § 1201, in theory, put circumvention out of reach for all but the most adept programmers, since the exemptions only cover circumvention of access controls and do not lift the ban on trafficking. This is a conceptual difficulty for both sides of the debate, but the widespread availability of circumvention technology—which it is not a violation of § 1201 to possess, even if it is a violation of § 1201 to transfer—means that § 1201's trafficking provisions are not the practical equivalent of a literacy test. While the Copyright Office might be

The historical poll tax was unjust because it imposed a burden intended to keep citizens from voting.¹⁷¹ Opponents of exemptions, perhaps understandably, want fair use to be burdensome so that they can control, through licensing, exactly where and how even the smallest fragments of their “content” will appear, authorizing remix only where it will improve the bottom line and not where it might appear to threaten the brand.¹⁷² There is no good policy reason to accede to these desires, however, especially when the cost is the free speech of otherwise marginalized groups.

Political and legal reforms got rid of the literacy test and the poll tax because they deterred people from participating—people whose voices weren’t heard otherwise. These reforms were necessary even though some brave people defied the laws and persevered. A few even managed to register and vote.¹⁷³ The problem was all the people who didn’t have the time or the energy or the resources to persevere, and all those who looked at the costs and didn’t even bother to try. The same is true with respect to fair use in the digital age.

a. Camcorders

The exemption opponents proposed camcorders as a solution for would-be fair users. They conducted an elaborate demonstration in which a camcorder was set up on a tripod in a perfectly darkened room and aimed at a large high-definition television screen.¹⁷⁴ After

uncomfortable acknowledging the fact of such availability, which even the opponents conceded, other areas of the law facing analogous problems have tolerated and even relied on enforcement gaps, often on privacy grounds. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the state could not ban private possession of obscene materials even though it could ban the making and selling of such materials, and even though the defendant’s possession necessarily meant that someone else had violated the bans on making and selling).

171. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966) (“The principle that denies the State the right to dilute a citizen’s vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.”).

172. The producers of *Battlestar Galactica*, for example, ran a mash-up contest for fans. However, the clips provided were of establishing shots and action sequences, so that fans who wanted to focus on interpersonal relationships—or indeed almost any reinterpretation of the original storyline—couldn’t do so. *See Russo, supra* note 24, at 127 (“[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.”).

173. For a very brief history of disenfranchisement and registration, see Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 459-61 (2008).

174. U.S. COPYRIGHT OFFICE, *supra* note 133, at 0207.9-0208.1, 0209.8-0209.11 (statement of Dan Seymour).

some experimentation with distance, they were able to make a very watchable copy of a *Harry Potter* film, though a documentary filmmaker pointed out during his testimony that they chose a film as to which some of the usual deficiencies of camcorder use were less visible.¹⁷⁵

The opponents' paean to the camcorder skimmed over the need to purchase the proper equipment to create a second digital file without circumvention, adding a significant price tag to the digital poll tax. The Joint Commenters offered the prospect of using a nine-hundred-dollar camera, plus a several-hundred-dollar tripod, plus a large flat-screen TV, all in a large, completely darkened room.¹⁷⁶ However, the noncommercial artists who make vids are often pink-collar workers, and nine hundred dollars is regularly more than a month's housing costs for them. Even if they had the necessary space and darkness to get the recording reasonably well-focused, they could not afford such equipment.¹⁷⁷ As vidder and academic Tisha Turk testified, "Camcording . . . has adverse effects in that I can't do it."¹⁷⁸ 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.¹⁷⁹

175. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0031.6-0033.6 (statement of Jim Morrisette) (detailing the technical reasons that the *Harry Potter* demonstration did not prove an exemption was unnecessary and noting that the MPAA subsequently juxtaposed its camcorder copy with a Quicktime version of the film rather than with an actual DVD copy); *see also* U.S. COPYRIGHT OFFICE, *supra* note 133, at 0241.22-0242.10 (statement of Peter Decherney) (discussing problems with distortion, discoloration, blurriness, and lost detail).

176. U.S. COPYRIGHT OFFICE, *supra* note 133, at 0207.9-0208.1, 0209.8-0209.11 (statement of Dan Seymour). The camera was \$900 and the monitor \$300, while the witness did not price out the tripod. *Id.* at 0209.8-0209.11. Later, Fritz Attaway argued that vidders who can afford DVDs and editing software should also be able to afford a camcorder. *Id.* Of course, DVDs are an order of magnitude less expensive, and editing software is now standard on general-purpose computers. Nonlinear editing software, now the preferred method of vidding, is available at multiple price points, including free and open-source alternatives. *See* Wikipedia, List of Video Editing Software, http://en.wikipedia.org/wiki/List_of_video_editing_software (last visited Apr. 26, 2010).

177. *See* OTW Reply Comment, *supra* note 15, at 13.

178. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0130.20-0130.22 (statement of Tisha Turk).

179. *Id.* at 0131.1-0131.7. The Copyright Office has previously recognized resource constraints as a legitimate reason that alternatives to circumvention may not be sufficient. *See* Letter from Marybeth Peters, *supra* note 72, at 77 ("It has been argued by opponents of the exemption [for e-books that disable text-to-speech functions] that entities such as Bookshare.org can make text versions of all books accessible to the blind and visually impaired since anyone can scan a book and submit it to Bookshare.org. However, the fact that *any* book *might* conceivably be made available does not mean that *all* books *are* or *will be* made available through such organizations. Resources are limited." (emphasis in original)); *see also* Herman & Gandy, Jr., *supra* note 4, at 185-86 ("[W]hen a socially valuable noninfringing use is at stake, the Register can exempt certain classes of works merely because it makes such uses easier or

Vidders can't compensate for these expenses by raising their prices because they don't get paid for the works they create. This is not an investment for them. This is their free speech—if they are allowed to speak.

There is also a fair amount of irony in the opponents' repeated insistence that camcorder use is a perfect vehicle for fair use. Federal law makes it a felony to knowingly use an audiovisual device to make a copy of a copyrighted movie "from a performance of such work in a motion picture exhibition facility."¹⁸⁰ Unsurprisingly, the Motion Picture Association of America (MPAA) is a vigorous opponent of camcorder use as applied to movies in current theater release.¹⁸¹ In one case, for example, the MPAA's zero-tolerance policy for camcorders led a woman to be jailed for two days for filming her sister's birthday party, which involved a trip to see the blockbuster *New Moon*; her film captured a few minutes of the movie.¹⁸²

Moreover, if a remix exemption would "legitimize" circumvention technology for non-fair uses, then it is equally true that using a camcorder for fair uses will "legitimize" camcording for non-fair uses. The MPAA's proposal would mean that a camcorder in one place is illegal, but in another is the only allowable means of copying. This proposal draws an arbitrary line that, if adopted and enforced against the public, would certainly not encourage respect for the law. Finally, there is a nontrivial argument that using a camcorder to avoid DVD copy controls would also count as "circumvention" within the meaning of the law.¹⁸³

cheaper. This was true even when the alternative medium of access (in this case, print) was the dominant medium and the TPM-laden digital medium was in its infancy. In other words, the Register established the precedent that the mere existence of alternative means of access does not preclude the finding that the basic ban is harming otherwise noninfringing users in a way that justifies an exemption.").

180. 18 U.S.C. § 2319B (2006).

181. *E.g.*, Press Release, Motion Picture Ass'n of Am. & Nat'l Ass'n of Theatre Owners, Lights . . . Camera . . . Busted! (June 21, 2007), available at http://www.mpa.org/press_releases/anti-camcord%20posters%20release%206%2021%2007.pdf; Posting of David Kravets (*MPAA Helped Cops Nab Hundreds of Movie Pirates*) to Threat Level, <http://www.wired.com/threatlevel/2008/08/mpaa-helped-for/> (Aug. 18, 2008, 15:52 EST); see Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (criminalizing taping movies in a theater).

182. See Amanda Bell, *Charges Against Accused 'The Twilight Saga: New Moon' Pirate Dropped*, EXAMINER.COM, Dec. 11, 2009, <http://www.examiner.com/x-4908-Twilight-Examiner-y2009m12d11-Charges-against-accused-The-Twilight-Saga-New-Moon-pirate-dropped>.

183. See Letter from Martine Courant Rife, *supra* note 69, at 10-14.

The camcorder alternative is expensive and illogical. Unsurprisingly, then, for individual fair users, it is also unknown and illusory.¹⁸⁴

b. Screen Capture

The Copyright Office suggested a different alternative for fair users, one more readily available to ordinary users but no less problematic. Although screen capture software poses fewer purely economic barriers than camcorders do, the debate over screen capture nonetheless illustrates key aspects of the digital literacy test. First, technologies that are similar from a lay perspective may lead to shockingly different results. Second, the legal questions that would be posed to a lay user who happened to become aware of the DMCA are, in fact, so arcane and open-ended that even experts cannot offer a clear-cut answer.

The Copyright Office was interested in the possibility that screen capture software would be a noncircumvention technology that would produce reasonable results for would-be fair users, thus avoiding the need for an exemption. By recording the output of a DVD after it has been decrypted by an authorized player, screen capture appears to work around copy protection just like a camcorder, which does the same thing at a greater physical distance. Although screen capture software offers another reason that the copyright owners and technology providers have no marginal harm to fear from exemptions for fair use,¹⁸⁵ problems of quality and uncertainty prevent screen capture software from being a panacea for fair users.

Before analyzing the legal status of screen capture software, it's important to be clear about its technical limitations. Screen capture software does not work on many systems and with many DVDs.¹⁸⁶ Microsoft's latest versions of Windows already include a

184. EFF Proposal, *supra* note 44, at 22.

185. See Letter from Fred von Lohmann, Senior Staff Attorney, Elec. Frontier Found., to Robert Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. 2-3 (July 10, 2009) [hereinafter EFF Supplemental Answers], available at http://www.copyright.gov/1201/2008/answers/7_10_responses/eff-supplemental-answers-dvd.pdf ("Just as the widespread availability of DVD rippers has not dampened the market for DVDs, so, too, the availability of screen capture utilities has not done so. It is difficult to understand how the noninfringing activities of educators, documentarians, or noncommercial video remix creators would somehow tip the scales." (citation omitted)).

186. *E.g.*, U.S. COPYRIGHT OFFICE, *supra* note 133, at 0252.6-0254.13 (statement of Roger Skalbeck); see, *e.g.*, Letter from Roger V. Skalbeck, Vice-Chair Elect, Copyright Comm., Am. Ass'n of Law Libraries, to U.S. Copyright Office, Library of Cong. 2 (July 10, 2009) [hereinafter AALL Response], available at http://www.copyright.gov/1201/2008/answers/7_10_responses/aall-mla-sla-response-july10-2009.pdf ("As our research shows, several capture software programs do

variety of new technical protections for video content (Protected Media Path), intended to disrupt screen capture.¹⁸⁷ The continued spread of Microsoft computers and their dominance in the market thus prevents screen capture from being a workable alternative.¹⁸⁸

Even when it works, screen capture does not produce clips of sufficient quality to make the artistic point that artists want to make.¹⁸⁹ Tisha Turk testified that not all digital copies are created equal. She stated that, as a consumer, she doesn't always need highest quality for its own sake and will, for example, watch TV shows using Netflix's Watch Instantly service. That level of quality is good enough for certain kinds of cultural consumption. But when she is working as

not work to create functional clips from DVDs played back on computers under default configurations. Most did not produce clips of usable quality, even with significant adjustments to the settings." (emphasis in original)).

187. See U.S. COPYRIGHT OFFICE, *supra* note 133, at 0124.21-0125.5 (statement of Jonathan Band); EFF Supplemental Answers, *supra* note 185, at 3; cf. Microsoft, Media Foundation Architecture, [http://msdn.microsoft.com/en-us/library/ms696219\(VS.85\).aspx](http://msdn.microsoft.com/en-us/library/ms696219(VS.85).aspx) (last visited Apr. 8, 2010) (explaining that the technology underlying Protected Media Path is also present in the successor to Windows Vista, Windows 7); see also Letter from Motion Picture Ass'n of Am., to U.S. Copyright Office, Library of Cong. 3 (July 10, 2009) [hereinafter MPAA Supplemental Responses], available at http://www.copyright.gov/1201/2008/answers/7_10_responses/dmca-questions-6-09-mpaa.pdf ("[S]ome existing technological protection measures are designed to provide secure paths for unencrypted video content and that capture software that is designed to defeat those measures would run afoul of §1201.").

188. Just as neither institutions nor individuals should be expected to hang on to their VCRs forever in order to take advantage of obsolete technologies, neither should they be expected to hang on to old operating systems so that they don't fall prey to new mechanisms of defeating fair use.

189. See Letter from Peter Decherney, Professor of English, Univ. of Pa., to Rob Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. 1 (July 9, 2009) [hereinafter Decherney, Screen Capture], available at http://www.copyright.gov/1201/2008/answers/7_10_responses/decherney-reply-to-post-hearing-questions_1.pdf ("[S]creen capture software remains insufficient for use by anyone who needs high-quality images In my tests, using a powerful machine and the highest-quality settings, videos made using screen capture software consistently exhibit some combination of the following problems: noticeable pixilation, color distortion, sound flattening, and incorrect frame rate. These problems are enhanced when the images are enlarged, projected on a screen, or shown using a stereo sound system."); Letter from Rebecca Tushnet, Org. for Transformative Works, to Rob Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. 1-2 (July 10, 2009) [hereinafter OTW Response], http://www.copyright.gov/1201/2008/answers/7_10_responses/otwresponse.pdf ("Currently available screen capture software is insufficient to allow artists to communicate their messages or achieve intended artistic effects. Screen capture software, as demonstrated at the original hearings, presents two primary problems for a remix artist: reduced frame rate and increased pixellation." (footnote omitted)); Letter from Martine Courant Rife, *supra* note 69, at 22 n.2 (quoting software developer and expert, who noted that system settings could affect the quality of screen captures, but concluded that "with the typical consumer system, I think you're always going to have some loss of quality, however you adjust it").

a creator, not a consumer, quality is important because only high-quality footage *works*.¹⁹⁰

Much of the time Turk transforms the clips that she uses, which means altering the appearance of the video. She testified that she is not among the most tech-savvy vidders, but nonetheless—like many vidders—she routinely changes the speed of clips to match the music or to emphasize a particular object.¹⁹¹ A clip made with screen capture, however, can't be used for vidding because it is unpredictably jerky.¹⁹² The dropped frames that result from screen capture make speed manipulation unwatchable.¹⁹³ As Peter Decherney put it, "Jean-Luc Godard famously claimed that film is truth 24 times a second; screen capture video, with its missing frames, is something else."¹⁹⁴

Screen capture has other artistic flaws. The pixellation characteristic of screen capture can block reworking.

Loss of pixel data poses particular difficulties when transforming the source material: cropping the frame to re-focus a viewer's attention, zooming in on a visual element to emphasize it or to add visual interest . . . , altering the contrast or light balance of a clip, altering the color of a clip to contribute to a particular mood or to match the appearance of another clip, adding glow or other special effects."¹⁹⁵

The screen capture clips demonstrated at the Copyright Office hearings¹⁹⁶ had been desaturated, meaning that its colors had been

190. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0125.18-0126.18 (statement of Tisha Turk).

191. *Id.* at 0126.11-0127.4.

192. Frame rate, the most significant weakness of screen capture software, can be vital for critical understanding. See Decherney, Screen Capture, *supra* note 189, at 1-2 ("[T]he inconsistency of frame capture poses the largest problem. The frame rate is often reduced. Even when the frame rate is very high, the timing of the action can be distorted, creating staccato or jerky motion. More importantly, pieces of the video are simply missing. . . . It seems surprising that educators in any field would be asked to teach works with missing pieces. Imagine a rulemaking that prevented English professors from using every letter in a quotation. Perhaps students could still make out individual words, but the missing letters would certainly prove an impediment to close analysis and informed discussion. This analogy holds up when applied to film and video [T]he same logic holds for educators in many other fields, for filmmakers trying to tell a story, and for fan 'vidders' engaging in critical dialogue with media work.").

193. OTW Response, *supra* note 189, at 2.

194. Decherney, Screen Capture, *supra* note 189, at 2.

195. OTW Response, *supra* note 189, at 2-3.

196. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0127.5-0127.15, 0129.4-0129.16 (statement of Tisha Turk) (noting that Kasunic's clips shown the prior day were desaturated); U.S. COPYRIGHT OFFICE, *supra* note 133, at 0244.2-0244.21 (statement of Robert Kasunic) (showing clips he obtained via screen capture); see also Decherney, Screen Capture, *supra* note 189, at 1 ("[V]ideos made using screen capture software consistently exhibit . . . color distortion.").

muted. Yet filmmakers know that color profoundly affects mood and, therefore, meaning.¹⁹⁷

Turk characterized screen capture as producing “garbage” source, which would make many changes, and thus many new messages, impossible. With bad source, a face turns into a beige blur. Cropping a third of the frame to see more closely the fact that two characters are holding hands, or that something is off to the side, inherently diminishes the resolution of the video. If the vidder is not starting with high quality source, she may lose the image entirely. A typical example of critical effects produced by deploying editing techniques comes from *How Much Is That Geisha in the Window?*,¹⁹⁸ the critique of *Firefly*. *Firefly* is supposedly set in a future where Chinese and American influences are about equal. The video examines the details of the Asian setting, the constant references to Asian cultures, and the fact that there are nonetheless no Asian characters except in deep background. The critique would be meaningless if the viewer couldn’t tell why the artist was complaining: one pixelated person looks pretty much like another. One of the first rules of video editing is “garbage in, garbage out.”¹⁹⁹ Without high quality, people won’t watch the video, or, if they do, they won’t be able to see the vidder’s points.

Adjusting software and hardware settings can sometimes improve the outcome of screen capture, but that requires expertise beyond the ordinary user’s, and is no guarantee of success or quality.²⁰⁰ In general, artists should not be required to be experts in an entirely different field before they are allowed to create.

Screen capture is as deficient legally as it is technically. As the exemption opponents themselves told the Copyright Office, some of the best copyright lawyers in the business refuse to offer an opinion on whether one of the Copyright Office’s exemplars, SnagIt screen capture software, counts as circumvention,²⁰¹ and most artists lack the

197. See STEVEN ASCHER & EDWARD PINCUS, *THE FILMMAKER’S HANDBOOK: A COMPREHENSIVE GUIDE FOR THE DIGITAL AGE* 32-33 (2d ed. 1999).

198. Lierdumoa, Vid: How Much Is That Geisha in the Window?, <http://lierdumoa.livejournal.com/310086.html> (last visited Apr. 8, 2010).

199. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0129.4-0129.16, 0130.4-0130.5 (statement of Tisha Turk).

200. See, e.g., AALL Response, *supra* note 186, at 5-6.

201. See, e.g., MPAA Supplemental Responses, *supra* note 187, at 1 (“[I]t is impossible to make a categorical statement that use of ‘capture software’ is, or is not, a violation of §1201(a)(1).”). Because exemption opponents also maintain that CSS is not the only technical protection measure that controls access to DVDs, they do not concede that screen capture, which occurs after decryption of the content on a DVD, is not a circumvention technology. See, e.g., DVD CCA Letter, *supra* note 155, at 4 (“[W]ith respect to certain content protection technologies-

background to form a legal opinion of their own.²⁰² Moreover, the proposed legal distinction between screen capture software and decryption software has no practical meaning to amateur creators.²⁰³ As a result, even if the courts were to agree with a Copyright Office determination that screen capture is legal, it is likely that artists would not choose screen capture software, and would find out too late—when they wish to defend challenged uses as fair—that they picked the wrong technology.²⁰⁴

3. Method or Madness: DVD Clipping and Comprehensible Laws

Any distinctions between video files should make sense from the perspective of an ordinary user. The current regime, however, doesn't come close to making sense. Like historical literacy tests, which asked questions irrelevant to the capacity to vote,²⁰⁵ the issue of how to define and identify a circumvention technology has no relation to artistry or to fair use—nor even to deterring copyright infringement, given the alternatives discussed above. What is left to justify the current rule? The opponents to the EFF proposal fell back on the claim that using a camcorder was merely inconvenient and that inconvenience alone was no reason to grant an exemption.

-particularly newer and more advanced systems—circumvention analysis does not necessarily begin and end with whether content is captured after the point of initial decryption. Under such systems, content may be protected by effective technical measures after it is decrypted and as it is processed through playback devices.”).

202. See EFF Supplemental Answers, *supra* note 185, at 1 (“[I]t is impossible for educators, documentarians, or noncommercial remix creators to know how these products work, how they will continue to work in future revisions, or whether other screen capture utilities operate in the same manner. Without knowing this information, it is impossible to be certain whether the use of these products violates [§] 1201(a)(1).”); OTW Response, *supra* note 189, at 3-4; Letter from Martine Courant Rife, *supra* note 69, at 16 (“What I have ultimately tried to show in my response thus far is the absolute legal uncertainty present here no matter what method is used for copying CSS encrypted DVDs. Because of this legal uncertainty and possible legal liability, users are adversely affected.”).

203. See EFF Supplemental Answers, *supra* note 185, at 2 (“[Noncommercial video remix creators] lack the legal sophistication to appreciate the counter-intuitive distinctions that Section 1201(a)(1) potentially draws between technologies that all accomplish the same thing—extracting video clips from CSS-protected DVDs.”); OTW Response, *supra* note 189, at 3.

204. See OTW Response, *supra* note 189, at 4 (“Currently, the majority of noncommercial artists, because they believe that they are not violating the law if they are making fair use of excerpted material, create their works first and then find out about the DMCA’s anticircumvention provisions only if they are unlucky enough to have their work noticed and taken down by rightsholders. The question then is whether they will assert their rights to fair use if challenged—and our experience shows that the DMCA serves as a powerful deterrent for them to do so.”).

205. See, e.g., Rubarts, *supra* note 162, at 1018 n.12.

The idea that DVD clipping is simply a matter of convenience compared to other methods is deeply flawed as applied to noncommercial remix. As Turk testified, “I don’t want to rip DVDs because it’s convenient Nothing about what I do is convenient.”²⁰⁶ Clipping to create new works is difficult and time-consuming, especially compared to wholesale downloading.

Martine Courant Rife, a professor of writing who focuses on digital communication, distinguished in her testimony between methods that are inconvenient and methods that are *abnormal*.²⁰⁷ Forcing fair users to use inconvenient methods is not necessarily wrongful if it actually protects copyright owners’ interests. It’s *abnormal*, however, to distinguish between methods of getting a digital file, each of which poses inconveniences and technical challenges, and thus it’s no wonder that fair users don’t know that they’ve walked into a trap.²⁰⁸

Moreover, the camcorder arguments in particular make clear that the opponents do not expect people to actually use the alternatives. If they did, then every one of the arguments against “legitimizing” circumvention technology would apply to “legitimizing” camcorder use. It is impossible to avoid the conclusion that the opponents—accurately—don’t expect average fair users to know about or be able to afford the camcorder alternative. Languishing in obscurity, the possibility of camcorder use to avoid the DMCA’s constraints will not enable fair uses. But, of course, § 1201 itself is equally obscure. As an unknown provision of law, it does not by its lack of exemptions *delegitimate* circumvention technology. The opponents’ fear of legitimation mistakenly assumes a population as attentive to Copyright Office rulemaking as the MPAA itself.

Rather than distinguishing methods of obtaining files, vidders use a much more intuitive and fair calculus: “[T]he big legal line many vidders draw is between ‘paying’ and ‘not paying’ for source footage—vidders are likely to pay for DVDs, even to pay multiple times for multiple sets of DVDs, and to feel that they have the right to make art

206. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0129.4-7 (statement of Tisha Turk).

207. U.S. COPYRIGHT OFFICE, *supra* note 133, at 0191.6-0192.11 (statement of Dr. Martine Courant Rife) (arguing that teachers should not be forced to use “bizarre, abnormal, and unseemly work-arounds” in the digital age).

208. *E.g.*, EFF Proposal, *supra* note 44, at 37 (Appendix C: Nov. 18, 2008 Interview with Anonymous Vidder) (“Some vidders are fairly savvy on copyright issues in general, but as most of us are not lawyers, it doesn’t make sense to us to differentiate ripping from video capturing. And increasingly, vidding is being practiced by large numbers of young people who may have no roots in the traditional vidding community, who came of age with the Internet, and who have no sense of the legal restrictions that may affect their hobby. These are the people the rest of us tend to worry most about, in terms of potential legal liability.”).

from them.”²⁰⁹ An institution with substantial and varied technological resources might be able to figure out workarounds, but the individual citizens participating in these political, cultural, and artistic exchanges don’t have A/V departments.

Focusing on the output rather than the process by which the output was produced provides a workable rule, and one that does nothing to harm copyright rights. Ordinary artists are much more aware of copyright than of paracopyright, and they can more easily understand output-based rules. Transformative fair use is a reasonably intuitive concept, as is the distinction between transformation and pure copying. Indeed, American University’s Center for Social Media has also developed best practices for fair use in online video,²¹⁰ along with best practices for filmmakers.²¹¹ The last thing that copyright law needs is another rule that doesn’t match up with individuals’ understandings of reasonable copyright rights. One reason so many laypeople are dismissive of copyright law is because it is counterintuitive and arcane, resulting in seeming unfairness and futility.²¹² The DMCA’s complexity is part of the problem, not part of the solution.

209. EFF Proposal, *supra* note 44, at 35 (Appendix B: Nov. 18, 2008 Interview with Francesca Coppa).

210. Center for Social Media at American University, Code of Best Practices in Fair Use for Online Video, http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/ (last visited Apr. 8, 2010).

211. CTR. FOR SOCIAL MEDIA AT AM. UNIV., DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE (Nov. 18, 2005), *available at* http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

212. *See, e.g.*, LITMAN, *supra* note 4, at 195 (“The less workable a law is, the more problematic it is to enforce. The harder it is to explain the law to the people it is supposed to restrict, the harder it will be to explain to the prosecutors, judges, and juries charged with applying it. The more burdensome the law makes it to obey its prescriptions, and the more draconian the penalties for failing, the more distasteful it will be to enforce. The more people the law seeks to constrain, the more futile it can be to enforce it only sporadically. Finally, the less the law’s choices strike the people it affects as legitimate, the less they will feel as if breaking that law is doing anything wrong. In other words, if a law is bad enough, large numbers of people will fail to comply with it, whether they should or not.”); U.K. INTELLECTUAL PROP. OFFICE, © THE WAY AHEAD: A STRATEGY FOR COPYRIGHT IN THE DIGITAL AGE 24 (2009), *available at* <http://www.ipo.gov.uk/c-strategy-digitalage.pdf> (“Some stakeholders wanted the copyright system to be simpler in order to promote understanding and compliance. They saw the complexity of copyright as the main challenge to lawful use of works. In their view, the current situation online was too confusing to understand and as a result many people gave up trying. Even some long-time professionals in the creative industries indicated a lack of knowledge of all relevant copyright developments in their area.”). Even in Britain, where there are very limited exceptions to copyright and no general fair use right, citizens’ concepts of fairness call out for reforms to make the system more sensible and respectable. *See id.* at 27 (“The copyright system suffers from a marked lack of public legitimacy. . . . The system is often unable to accommodate certain uses of copyright works that a large proportion of the population regards as legitimate fair and reasonable. . . . The problems become more pronounced as people feel a sense of

While they encourage disrespect from some people, incomprehensible rules also deter risk-averse remixers who are vaguely aware of the DMCA from making fair uses. Even the ones who continue may find themselves unable to assert fair use defenses for fear of DMCA liability.²¹³ The OTW has encountered remixers who have received takedown notices and wanted to make fair use claims, but decided that they couldn't because they were unsure about the method they used to capture the clips.²¹⁴ The solution, as a British government report put it, is to "hid[e] the wiring"²¹⁵—to simplify copyright law so that it comes into better alignment with lay logic. A DMCA exemption tracking fair use would be a useful part of that process.

4. Summary: Bringing Fair Use into § 1201

Contrary to opponents' contention that the DMCA rulemaking does not allow the Copyright Office to consider fair use, the exemption process set forth in the statute inherently contemplates that the DMCA may interfere with fair use, or any other lawful use, to the point that an exemption should be granted. The statute requires proponents of an exemption to show an adverse effect on noninfringing uses.²¹⁶ Once that effect is shown, an exemption is on the table. The alternative is to say that some noninfringing uses, especially fair uses, just don't count. In fact, the situation is even worse than that, because the present legal regime poses a true Catch-22—the opponents say that an exemption would first require a judicial determination of fair use, but fair users can't get a judicial determination of fair use if they will inevitably lose under § 1201.

Especially given that the opponents conceded that DVD circumvention technology is widely available and widely used, such that deterrence arguments are simply implausible, it is arbitrary and even cruel to tell noncommercial fair users who want to fight for their

ownership or attachment to material in which the copyright is owned by others. Consumers may have strong ties to material . . . because of the time and effort they have devoted to it . . . or through emotional significance . . . but may not have any form of rights over it." (citations omitted)).

213. U.S. COPYRIGHT OFFICE, *supra* note 153, at 0074.12-0075.18 (statement of Fred von Lohmann).

214. U.S. COPYRIGHT OFFICE, *supra* note 27, at 0118.1-0118.16 (statement of Francesca Coppa).

215. U.K. INTELLECTUAL PROP. OFFICE, *supra* note 212, at 33 ("Calls have been made for solutions which lessen or remove a non-commercial consumer's need to understand copyright law. The analysis above would suggest that 'hiding the wiring' by simplifying the situation for users could help tackle some of the problems of the copyright system." (citation omitted)).

216. 17 U.S.C. § 1201(a)(1)(C) (2006).

uses that it is too late for them: they should have gone to law school (and earned enough to afford a camcording studio) before they started remixing. Moreover, even if deterrence were presently working, the EFF's proposal wouldn't affect it because the exemption would require an underlying fair use. No noncommercial creator would say, "I know my work isn't fair use, but the prospect of statutory damages isn't enough of a deterrent; only the additional prospect of DMCA liability is enough to prevent me from infringing."

The enforcement concern is mistaken in other ways, as well. Given the ubiquity of clear copies of television shows and movies on the Internet, the widely available circumvention technologies are not great ways to infringe. Instead, they're great ways to get clips. Downloading a seven hundred megabyte movie at two megabytes per second, which is a fairly standard broadband speed, takes roughly forty-five minutes. This is much less time than it takes to rip specially chosen clips, or even to rip a high-quality version of a whole movie if one were inclined to do so.

The reality of pervasively available circumvention software and pervasively available content returns us to the importance of making the law comprehensible to ordinary people. It is laughable to ordinary artists that downloading an entire movie or TV show is *less* problematic from a circumvention perspective than buying DVDs—providing the copyright owner with remuneration—and then making short clips.²¹⁷

The opponents feared that fair use exemptions would legitimize circumvention technology. That is, fair use had to be sacrificed because people cannot be trusted to distinguish between remix and wholesale copying (though they apparently can be trusted to make the same distinction with camcorders), and copyright law is an insufficient deterrent. By this logic, only narrowly defined expert groups should ever even be considered for exemption.

In fact, some of the discourse around proposed exemptions suggested that fair use is only for the elite and the educated.²¹⁸ This

217. See *supra* note 163 and accompanying text.

218. E.g., U.S. COPYRIGHT OFFICE, *supra* note 27, at 0011.2-0011.4, 0023.2-0023.11, 0026.17-0027.3, 0110.10-0110.11, (statement of Gordon Quinn) (testifying that most documentary filmmakers belong to at least one documentary organization, are relatively educated about what fair use is and isn't, and are unlikely to misuse an exemption because the community is professional, thoughtful, and responsible about fair use, as contrasted with opening up the barn door to random pirates); Letter from Gordon Quinn & Jim Morrisette, Kartemquin Educ. Films, Inc. et al, to Robert Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. 4 (July 10, 2009), available at http://www.copyright.gov/1201/2008/answers/7_10_responses/answers-to-doc-filmmaker-questions.pdf ("[W]e respectfully submit that our proposed limitation is optimal because it

is a pernicious conclusion. Fair use is a right, not a privilege that must be earned by membership in some institution or certification by some third party.²¹⁹

Art has historically not been created solely by those who have had formal art training or who have been paid for their work. Even professional artists generally begin as amateurs, working in their medium in order to learn and grow; it is a rare filmmaker these days who makes his or her first film in film school.²²⁰

Copyright, as a way of sustaining a robust sphere of creation independent of patronage or government support,²²¹ should be particularly wary of picking winners beforehand and deciding who is entitled to make art. Just as we do not require painters to show that they are accredited or attending art school before we allow them to buy paintbrushes, video artists need the tools of their trade without licensing.

The opponents of the EFF proposal expressed fear that considering fair use would be a slippery slope. But, because the proposed exemption requires a finding of fair use before the exemption would apply, an Article III judge would still have to decide whether a use was fair and therefore whether an unlawful circumvention had taken place. As slippery slopes go, this one is even ground. And an exemption would allow people with plausible fair use claims to assert them and make their arguments to a court, preserving the ability to litigate fair use and develop the law to respond to new forms of creation. As Eduardo Peñalver and Sonia Katyal have written, it is precisely these types of claims that can strengthen the law—for both owners and users—by forcing it to confront unsettled areas and clarify murky doctrines.²²²

targets the exemption toward a discrete and identifiable group of users who are directly affected by anti-circumvention provisions and who are regularly exposed to information about how to make fair use of copyrighted materials responsibly and how to identify public domain works.”).

219. Yoram Dinstein, *Cultural Rights*, 9 ISR. Y.B. ON HUM. RTS. 58, 76 (1979) (“Cultural life must be regarded as a benefit to which every member of the community is entitled. Culture must not be viewed as an esoteric activity of a superior social elite.”).

220. OTW Response, *supra* note 189, at 4.

221. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (“Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.”).

222. PEÑALVER & KATYAL, *supra* note 164, at 178 (“[DRM and the DMCA] have the undesirable effect of foreclosing judicial or legislative intervention. As a result, these measures prevent fair use defenses from keeping up with the changing needs of technology, thereby contributing to the undesirable ossification of intellectual property law. In other words, by foreclosing unauthorized uses, the law becomes frozen in time, wholly beholden to a private content owner’s determination of what constitutes allowable and unallowable use, and unable to shift to accommodate future uses that might in fact be legally protected. It may be more productive for the law to aim to preserve some of the signaling value of such unauthorized uses

The provisions of § 1201 put a new burden on people making noninfringing uses to identify the harm done to them by anticircumvention law. Once that harm is established, however, there are no statutory restrictions on who may receive an exemption. Furthermore, there is no reason to expect that courts will be unable to manage the fair use determinations they have historically made, even when those determinations also have implications for § 1201 exemptions.

III. CONCLUSION: WE PUT OURSELVES THERE

The creativity of remix culture comes from many far-flung individuals, some of whom invent or reinvent remix for themselves without even knowing about other remixers and others of whom work within existing communities, aware in varying degrees of the artistic traditions they are updating, continuing, and disrupting. But when it comes to dealing with the effects of law on creativity, individual creators need organized representation;²²³ otherwise, as copyright policymaking has repeatedly shown, their interests will simply be ignored.²²⁴

Unlike auteurs who (claim to) work entirely on their own,²²⁵ creating out of nothingness, fan vidders arise from and create work within a community context: a vid participates in an ongoing dialogue not just with the original but also with other fans.²²⁶ Vidders are

precisely in order to facilitate periodic adjustments, either through legislative, judicial, or private acquiescence.”).

223. See Herman & Gandy, Jr., *supra* note 4, at 153 (noting difficulty in substantive individual participation in exemption hearings); Moseng, *supra* note 55, at 372 (“The more effectively fair users can institutionalize the general effort to obtain exemptions from the Copyright Office, the more successful the efforts will be.”).

224. *E.g.*, LITMAN, *supra* note 4, at 125-27; see also Litman, *Real Copyright Reform*, *supra* note 9, at 4, 8 (“[C]opyright lobbyists engaged in protracted negotiations with one another to arrive at copyright laws that enriched established copyright industries at the expense of both creators and the general public. . . . The copyright statute has favored publishers, record labels, motion picture studios, and other distributors [at the expense of artists and creators], because Congress has, for the past century, encouraged lawyers for publishers, record labels, motion picture studios, and other distributors, to write themselves a law that worked for them.”).

225. Important questions remain about the dangers of reinscribing the myth of the individual creator in order to sustain fair use claims. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 567 (2004) (arguing transformativeness shouldn’t be the sole concern of fair use; non-auteurs deserve to claim the right to copy as part of the right to speak freely); Jessica Silbey, *Comparative Tales of Origin and Access: A New Future for Intellectual Property?*, at 9-11 (2009) (draft on file with author) (arguing that the free culture movement risks enshrining the individual genius as the source of creative value even though creativity exists only in context).

226. See Turk, *Metalepsis*, *supra* note 2, 6-7, 17; Turk, *Vidding and Vidwatching*, *supra* note 15, at 1 (“[I]n addition to being artifacts of participatory culture, vids represent critical

therefore positioned both to claim artistic legitimacy with the Copyright Office, which values authors over mere “users,” and to insist on the embeddedness of their creative practices within specific communities. Strategically, the appeal to individual genius is useful, but it must always be tempered with a recognition that no creator works in a vacuum. As creators who create because of and by means of existing works, vidders can speak both as authors and as audiences, adding important voices to the public debate over copyright.²²⁷

Henry Jenkins, a leading scholar on the interaction of corporate and individual creativity in the digital age, argues that fandom is “the experimental prototype, the testing ground for the way media and culture industries are going to operate in the future.”²²⁸ If so, then without anticircumvention reform, “testing ground” might be a far-too-apt metaphor, with the copyright industries trying out their best new heavy ordnance—technological and legal—on individual remixers. The future of culture of which Jenkins writes could be lived significantly underground. Noncommercial remix artists aren’t cavedwelling Morlocks, tearing apart the gentle Eloi for sustenance,²²⁹ but present copyright law seems to want to treat them that way.

Laura Shapiro and Lithiumdoll put Rupert Giles in a story of their own devising. Vidders are also putting themselves at the table, asserting the entitlement to speak and to advocate for their own interests. Self-conscious defense of individual, noncommercial

engagements that both encode and demand collaborative interpretation. Treating collaborative interpretation as a central fan activity allows us to understand why growing numbers of fans identify themselves as fans of vids and vidding as well as, or even instead of, specific television shows and films. As Henry Jenkins has argued, vids ‘articulate [. . .] what the fans have in common: their shared understandings, their mutual interests, their collective fantasies’ and ‘focus on those aspects of the narrative that the community wants to explore’; increasingly, those shared understandings and mutual interests transcend specific source material: vidders and vidwatchers are fans of particular ways of seeing, ways of reclaiming or talking back to mass media.” (citations omitted); cf. Kristina Busse, *My Life Is a WIP on My LJ: Slashing the Slasher and the Reality of Celebrity and Internet Performances*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 207, 214-15, 222 (Karen Hellekson & Kristina Busse eds., 2006).

227. See OTW Reply Comment, *supra* note 15, at 10 (“Vidding is an important extension of this shift [to interactive media] 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.” (emphasis in original)); cf. Litman, *Real Copyright Reform*, *supra* note 9, at 43 (“Focusing on specific reforms that might make copyright law more creator-friendly as well as more reader-friendly may give us a small wedge that will allow further conversation. One of copyright’s most important functions should be to facilitate connections between creators and readers, listeners and viewers. If creators and readers examine the ways the current copyright system fails to do this, both groups may question whether continuing to cede copyright lawmaking to copyright owners is wise.”).

228. Henry Jenkins, *Afterword: The Future of Fandom*, in *FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD* 357, 361 (Jonathan Gray et al. eds., 2007).

229. See H. G. WELLS, *THE TIME MACHINE* (1895).

creativity by the creators themselves is a new occurrence in copyright policymaking. Such participation will help copyright law evolve to reflect actual creative experiences and needs, even as it allows (and sometimes conscripts) vidvers to think critically about their own practices, understandings, and processes of making meaning.

