NOTE

COPYRIGHT AND YOUTUBE: PIRATE'S PLAYGROUND OR FAIR USE FORUM?

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I. INTRODUCTION

On September 27, 2006, an ailing 86-year-old World War II veteran named Martin Harris began sharing his wartime experiences with the world on the video-sharing site YouTube. Less than a month later, he was dead.

His widow, in a video eulogy, celebrated Martin's brief time with the YouTube community:

> One of the things that YouTube did for Martin, for me, and for his family, was that he spoke about the Second World War in a way that he had never spoken about it before. . . . He was really in a lot of pain, and the pain ultimately got to his heart. . . . I thank YouTube for giving him the opportunity to have a little bit

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> of fun in this past week or two when it was just not easy for him at all.[1]

YouTube has been described as "the future of movie-marketing"[2] by some, and an "illegal free-for-all" by others.[3] It has thousands of users generating ad revenue for its parent company Google, but has also faced daunting legal challenges from media giants like Time Warner,[4] Fox,[5] Viacom,[6] and the RIAA.[7]

The business model is simple. Users upload videos that can be viewed for free and commented on by anyone visiting youtube.com. These videos can also be "embedded" in other websites to complement outside content.[8]

The legal conflict is equally simple. "Academics and media executives" estimate 30–70% of YouTube's content consists of unauthorized material like sound recordings, and TV and movie clips.[9] Many content owners argue YouTube is nothing but a giant clearinghouse for copyright infringement, and have responded with lawsuits and hundreds of thousands of demands to remove videos.[10] Meanwhile, the legitimate fair use

1. Good Bye Martin, http://www.youtube.com/watch?v=CXQO9ypnou0 (last visited Oct. 30, 2007).

2. Laura M. Holson, *Hollywood Asks YouTube: Friend or Foe?*, N.Y. TIMES, Jan. 15, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D0DEEDE1030F936A25752C0A9619C8B63.

3. Verne Kopytoff, *Copyright Questions Dog YouTube*, S.F. CHRON., Oct. 27, 2006, at D-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/27/BUGHQM01KV1.DTL.

4. Daniel B. Wood, *The YouTube World Opens an Untamed Frontier for Copyright Law*, THE CHRISTIAN SCI. MONITOR, Dec. 18, 2006, http://www.csmonitor.com/2006/1218/p01s03-usju.html.

5. Nicholas Carlson, *Fox Offloads Suit Against YouTubers*, INTERNETNEWS.COM, Mar. 5, 2007, http://www.internetnews.com/bus-news/article.php/3663671 (Fox "referred the case to law enforcement" and delayed a civil action, but stated that it intended "to pursue all available legal remedies against those who infringed our copyrights.").

6. *See* Candace Lombardi, *YouTube Takes Down Comedy Central Clips*, CNET NEWS.COM, Oct. 30, 2006, http://news.com.com/YouTube-takes-down-Comedy-Central-clips/2100-1030_3-6130868.html.

7. Eric Bangeman, *YouTube, Google Videos Latest Targets of RIAA's Wrath*, ARS TECHNICA, June 15, 2006, http://arstechnica.com/news.ars/post/20060615-7065.html.

8. Sharing YouTube Videos, http://youtube.com/sharing (last visited Oct. 30, 2007). Embedding allows a visitor to "insert the video player directly into" an external website, such as a blog. *Id.*

9. Holson, *supra* note 2. A March 2007 study by vidmeter.com estimated that 9.23% of YouTube videos were removed "due to reported copyright violations." These removed videos represented just 5.93% of YouTube traffic. Vidmeter.com, *Analysis of Copyrighted Videos on YouTube.com*, http://www.vidmeter.com/i/vidmeter_copyright_report.pdf.

10. *See, e.g.,* Eric Bangeman, *Viacom Demands YouTube Pull Its Videos Down*, ARS TECHNICA, Feb. 2, 2007, http://arstechnica.com/news.ars/post/20070202-8756.html; Complaint, Robert Tur v. YouTube, Inc., No. CV 06-4436-GAF (FMoX) (C.D. Cal. July 14, 2006).

arguments of YouTube users have gone largely undiscussed, despite the transformative, non-commercial nature of their use of the content.

YouTube, for its part, has been careful to take steps to reduce its potential liability. It has removed hundreds of thousands of videos at the demand of copyright owners in order to comply with the Digital Millennium Copyright Act safe harbor requirements.[11] It has also struck licensing deals with content owners such as CBS and Universal Music Group to authorize the use of select content and funnel ad revenue to the content owners.[12] In addition, it announced a "Claim Your Content" filtering feature which will "automatically identify copyright material so that it can be removed."[13]

The entertainment industry has a history of framing new technology as piracy that threatens its very existence, regardless of the potential benefits of the technology or the legal limits of copyright rights.[14] In the case of YouTube, copyright owners' attempts to retain content control negatively impact the public's ability to discuss culture in an online world. This implicates the basic policy behind fair use: to prevent copyright law from "stifl[ing] the very creativity which that law is designed to foster."[15]

The internet has become a powerful medium for expression. It is a vital tool in today's world for sharing original works, but is equally important as a forum for discussion of existing works. YouTube blurs the

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11. *See, e.g.,* Bill Belew, *YouTube Deletes 29,549 Videos at Request of Japanese Broadcasters*, RISING SUN OF NIHON, Oct. 21, 2006, http://www.risingsunofnihon.com/2006/10/youtube_deletes_29549_videos_a.html; Bangeman, *supra* note 10.

12. *YouTube Strikes Content Deals*, USA TODAY, Oct. 9, 2006, http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm.

13. Greg Sandoval, *Schmidt Says YouTube 'Very Close' to Filtering System*, CNET NEWS.COM, Apr. 16, 2007, http://news.com.com/2100-1026_3-6176601.html. A successful filter may make it impossible for YouTube users to make fair use of copyrighted material, and may seem to render this Note moot. Even if that happens, however, I believe it is important to establish the social importance of video-sharing and to put forth the arguments that such use should be protected, whether it take place on YouTube or some future clip-sharing website. Exerting market pressure in order to block the purpose of § 107 is an inappropriate remedy that primarily burdens the general public.

14. In the 1981 Congressional hearings about home video recording, MPAA President Jack Valenti testified that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R.. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary*, 97th Cong. 1-3 (1982) (testimony of Jack Valenti, President, Motion Picture Association of America). By 2007, the revenue from home video sales was an estimated $25 billion, "nearly triple the roughly $9 billion in theatrical sales." Russ Britt, *Home Video Comes of Age at this Year's Oscars*, MARKETWATCH, Feb. 20, 2007, http://www.marketwatch.com/news/story/home-video-comes-age-years/story.aspx?guid=%7BE8DF9B3F-D8E0-4768-94EF-F1513C1AA332%7D.

15. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

line between publication and everyday conversation. It enables the sharing of culture, ideas, and debate in ways previously impossible, and therefore plays an important and progressive role in our society.

In Part II, I will explain how YouTube works, how potential copyright infringement affects the website and its users, and describe the basics of the fair use defense. In Part III, I will argue that YouTube's open method of content distribution is important to our culture, and argue that fair use needs to be a flexible standard that protects the majority of YouTube content as non-infringing.

II. BACKGROUND AND HISTORY

A. *YouTube*

YouTube launched in 2005 as a website where users could "easily upload and share video clips . . . across the Internet."[16] In November, 2006, YouTube was purchased by Google in a $1.65 billion stock-for-stock deal.[17] Now, more than 72 million monthly visitors view more than 100 million videos per day.[18]

To share clips, users from all over the world create free accounts and upload digital video files, which must be smaller than 100MB and less than 10 minutes long, to the YouTube website.[19] Video files created by users on camcorders, cellphones, and other video capture devices are then converted by YouTube to allow them to play in YouTube's Flash media player.[20] The content is either displayed on YouTube.com or "embedded" on other websites and can be viewed by anyone with internet access regardless of whether they have a YouTube account.[21] Although

16. About YouTube, http://www.youtube.com/t/about (last visited Oct. 31, 2007).

17. Press Release, Google, *Google to Acquire YouTube for $1.65 Billion in Stock* (Oct. 9, 2006) http://www.google.com/press/pressrel/google_youtube.html.

18. *YouTube Users Could Share in Ad Revenues*, THE DAILY MAIL, Oct. 10, 2006, http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=409544.

19. How Long/Large Can My Video Be?, http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527 (last visited Oct. 31, 2007).

20. *See, e.g.,* What Video File Formats Can I Upload?, http://www.google.com/support/youtube/bin/answer.py?answer=55744&topic=10526 (last visited Oct. 31, 2007); The Videos Won't Play—What's Wrong?, http://www.google.com/support/youtube/bin/answer.py?answer=56115 (last visited Oct. 31, 2007).

The Adobe Flash player is a multimedia player that is embedded in the website; it allows viewers with the Flash plug-in to view multimedia content directly on the webpage in question. *See* Adobe.com, Flash Player SDK: FAQ, http://www.adobe.com/products/flashplayer_sdk/productinfo/faq/ (last visited Dec. 2, 2007).

21. *Sharing YouTube Videos*, *supra* note 8.

YouTube does not allow viewers to download content,[22] there are several unauthorized utilities and workarounds that allow YouTube videos to be downloaded and stored offline.[23]

Three types of content can be found on YouTube. (1) "Original content" is either specifically made for or primarily distributed via YouTube. Examples include short cartoons,[24] personal reflections,[25] custom content from major copyright owners,[26] and home videos.[27] (2) "Derivative content" is derived from non-trivial alterations to preexisting works. This category includes mashups,[28] videos of people lip-synching to famous songs,[29] and parodies of popular works.[30] (3) "Clip content" refers to relatively unaltered clips of preexisting works from around the world,

22. Can I Download Videos to Watch Later?, http://www.google.com/support/youtube/bin/answer.py?answer=56100 (last visited Oct. 31, 2007).

23. *See, e.g.*, VideoDownloader 2.0, http://javimoya.com/blog/youtube_en.php (last visited Oct. 31, 2007); Download YouTube Videos, http://www.downloadyoutubevideos.com/ (last visited Oct. 31, 2007); YouTube Video Download Tool, http://www.techcrunch.com/get-youtube-movie/ (last visited Oct. 31, 2007); YouTubeX, http://www.youtubex.com/ (last visited Oct. 31, 2007). On the same day Google announced the finalization of its YouTube acquisition, YouTube's lawyers sent a cease and desist letter to at least one of these utilities' developers demanding the tool be disabled. In later correspondence, YouTube counsel explained that "YouTube is a streaming-only service. . . . we are considering revisions to our Terms of Use to avoid any further confusion." Michael Arrington, *Huh? YouTube Sends TechCrunch a Cease & Desist*, TECHCRUNCH, Nov. 15, 2006, http://www.techcrunch.com/2006/11/15/huh-youtube-sends-techcrunch-a-cease-desist/ (scanned letter is dated Nov. 13, 2006); Michael Arrington, *Google Closes YouTube Acquisition*, TECHCRUNCH, Nov. 13, 2006, ("Google announced today that they have completed the previously announced acquisition of YouTube."); *See also* Chilling Effects, *YouTube Threatens Legal Action Against Host of Download Tool*, http://www.chillingeffects.org/weather.cgi?WeatherID=571 (last visited Oct. 31, 2007).

24. *See, e.g.*, Kiwi!, http://www.youtube.com/watch?v=sdUUx5FdySs (last visited Oct. 31, 2007).

25. *See, e.g.*, Web 2.0 . . . The Machine Is Us/Ing Us, http://www.youtube.com/watch?v=6gmP4nk0EOE (last visited Oct. 31, 2007).

26. *See, e.g.*, BBC's Videos, http://www.youtube.com/profile_videos?user=BBC (last visited Oct. 25, 2007).

27. To celebrate this kind of content, YouTube recently held its inaugural YouTube Video Awards. Categories included "Best Music Video," "Best Series," and "Best Commentary." YouTube Video Awards, http://www.youtube.com/ytawards (last visited Oct. 25, 2007).

28. Mashups can be thought of as the combination of one or more sources of content, and can take many forms. One high-profile example of a video mashup is the insertion of a campaign speech of Democratic presidential candidate Hillary Clinton into Apple's famed "1984" advertisement. Matt Egan, *Hilary [sic] Clinton, Apple Ad Storms YouTube*, PC ADVISOR, Mar. 20, 2007, http://www.pcadvisor.co.uk/blogs/index.cfm?entryid=800&blogid=4.

29. *See, e.g.*, Chinese Backstreet Boys, http://www.youtube.com/watch?v=N2rZxCrb7iU (last visited Oct. 25, 2007).

30. *See, e.g.*, Parody of a Part of MacBeth, http://www.youtube.com/watch?v=R2ZLk3Gx5R8 (last visited Oct. 25, 2007).

such as Saturday Night Live sketches, TV show theme songs, classic TV shows, news broadcasts, music videos, movie trailers, and more.[31]

Videos are organized by category, easily searchable, and can be marked by users as "favorites" to make them easy to find again. Featured videos, selected by YouTube editors, are prominently displayed on the front page of the "Videos" section. Users can also subscribe to a specific uploader's "channel" in order to have that uploader's content linked to from a single page on YouTube.

Not surprisingly, YouTube has not gone unnoticed by large copyright owners. In October, 2006, YouTube deleted nearly 30,000 videos at the demand of the Japanese Society for Rights of Authors, Composers, and Publishers.[32] Also in October, 2006, it removed almost every clip showing cable network Comedy Central's content.[33] In February, 2007, it deleted approximately 100,000 videos in response to a takedown demand from Viacom, owner of MTV, BET, and other media outlets.[34]

Although YouTube provides numerous warnings to users about not infringing copyrights[35] and complies with properly submitted takedown requests, some copyright owners claim not enough is being done. In July, 2006, YouTube was sued by videographer Robert Tur for the unauthorized performance of his footage of the O.J. Simpson car chase and the beating of Reginald Denny during the L.A. riots.[36] The company was also sued by Viacom in February, 2007, for allegedly hosting and displaying "more than 150,000 unauthorized clips . . . that had been viewed an astounding 1.5 billion times."[37] By fall 2007, six complaints had been filed against YouTube, including a class action suit involving several plaintiffs.[38]

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31. Some, but not all, clip content is posted to YouTube without the authority of the copyright owner. I will discuss the implications of this below. It must be recognized, however, that many authors of pre-existing works upload content to YouTube for promotional purposes. *See, e.g.*, White & Nerdy, http://www.youtube.com/watch?v=-xEzGIuY7kw (last visited Oct. 25, 2007); BBC's Videos, *supra* note 26; TheWeinsteinCompany's Videos, http://www.youtube.com/profile_videos?user=TheWeinsteinCompany (last visited Oct. 25, 2007); CBS's Videos, http://www.youtube.com/profile_videos?user=CBS (last visited Oct. 25, 2007).

32. Belew, *supra* note 11.

33. Lombardi, *supra* note 6.

34. Bangeman, *supra* note 10.

35. *E.g.*, Copyright Tips, http://www.youtube.com/t/howto_copyright (last visited Oct. 25, 2007).

36. Complaint of Plaintiff Tur, *supra* note 10.

37. Complaint at 3, Viacom International, Inc. v. YouTube, Inc., No. 1:07CV02103 (S.D.N.Y. *filed* March 13, 2007).

38. Robert Tur v. YouTube, Inc., *summary judgment denied*, No. CV 06-4436-GAF (FMoX) (C.D. Cal. June 20, 2007) (Tur has since joined the Premier League class action suit); Viacom International, Inc. v. YouTube, Inc., No. 07CV2103 (S.D.N.Y. *filed* March 13, 2007); Football Association Premier League et al. v. YouTube, Inc., No. 1:07-cv-03582-UA (S.D.N.Y. *filed* May 4, 2007) (class action brought by U.K. professional soccer league; plaintiffs include

Not all copyright owners see themselves at odds with YouTube. The website has signed licensing deals with media giants like CBS, NBC, Universal Music Group, BMG Music Entertainment, and Warner Music Group.[39]

While the exact ratio of authorized content to unauthorized content is hotly debated (and YouTube refuses to discuss statistics), there is no question that a great deal of YouTube content is non-infringing. All original content is, by definition, non-infringing, but even a great deal of derivative and clip content is authorized. The CBS channel on YouTube, for example, regularly uploads clips of its shows for all YouTube users to view. Within two months of its launch, more than 35,000 users had subscribed to the channel, and the official clips had been viewed more than 30 million times. CBS reported a corresponding increase in the ratings of its "Late Show with David Letterman" and "Late Late Show with Craig Ferguson."[40]

While CBS and other content owners have come to an uneasy truce with YouTube, there remains concerns about the public's use of the website as a place to upload videos which make use of preexisting works. It is the unauthorized derivative and clip content that is challenged as infringing, and that is the focus of this Note.

B. *YouTube's Legal Liability*

Section 106 of the Copyright Act reserves certain exclusive rights in the work to copyright owners. These rights include the right to reproduce,[41] the right to prepare derivative works,[42] the right to

other European sports leagues, Cherry Lane Music Publishing, National Music Publishers' Association, X-Ray Dog Music, Knockout Entertainment Ltd., Seminole Warriors Boxing, videographer Robert Tur, and author Daniel Quinn); Grisman et al. v. YouTube, Inc., No. 3:2007cv02518 (N.D. Cal. *filed* May 10, 2007) (mandolinist sued YouTube over unauthorized distribution of performance footage; Plaintiff has since joined the Premier League class action suit); New Jersey Turnpike Authority v. YouTube, Inc., No. 2:2007cv02414 (D.N.J. *filed* May 22, 2007) (involving footage of a fatal car accident caught by Turnpike Authority cameras; Plaintiff has since joined the Premier League class action suit); Cal IV Entertainment, LLC v. YouTube, Inc. et al., No. 3:2007cv00617 (M.D. Tenn. *dismissed* July 10, 2007) (Plaintiff has since joined the Premier League class action suit).

39. *See, e.g.*, *YouTube Strikes Content Deals*, *supra* note 12; Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, N.Y. TIMES, Oct. 19, 2006, at C-1, *available at* http://select.nytimes.com/gst/abstract.html?res=FA0F13FB34540C7A8DDDA90994DE404482; Sara Kehaulani Goo, *NBC Taps Popularity of Online Video Site*, WASH. POST, June 28, 2006, at D-01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/27/AR2006062701750.html.

40. Wood, *supra* note 4.

41. 17 U.S.C. § 106(1) (2007).

42. 17 U.S.C. § 106(2) (2007).

distribute,[43] the right to publicly perform,[44] and the right to publicly display.[45]

YouTube users may be liable for violating the Section 106(1) right to reproduce as a result of uploading unauthorized, copyrighted content to YouTube's servers.[46] Because YouTube converts each uploaded file, as described in section II.A, it necessarily creates a copy of each work and also potentially infringes the Section 106(1) right to reproduce.[47] Once the file is uploaded, each time it is accessed by a user may be considered a public performance in possible violation of the Section 106(4) right to perform.[48] In Viacom's 2007 complaint, Viacom also argued that YouTube violated the Section 106(5) right to display because users would receive search results that included small thumbnail pictures of the first frame of the video.[49] YouTube is also potentially vulnerable to allegations of vicarious infringement, contributory infringement, and inducement.[50]

This infringement concern is more than academic. As discussed in section II, YouTube has been sued by several companies and individuals for copyright infringement.[51] Although there have been no lawsuits so far against individual YouTube users, much of their behavior is still characterized by the content industry as piracy. This has resulted in hundreds of thousands of takedown notices from content owners and leaves open the possibility of an RIAA-style string of lawsuits against individual infringers.

The landslide of infringement liability is not as insurmountable as it may first appear. YouTube has a plausible argument that it qualifies for the DMCA's safe harbor for "information residing on systems or networks at direction of users."[52] This provision, codified at Section 512(c), limits the liability of online server providers for copyright infringement, so long as the provider adheres to certain guidelines.[53] Among other requirements it must adhere to, YouTube must respond expeditiously to takedown requests that provide the website actual knowledge of infring-

43. 17 U.S.C. § 106(3) (2007).
44. 17 U.S.C. § 106(4) (2007).
45. 17 U.S.C. § 106(5) (2007).
46. 17 U.S.C. § 106(1) (2007).
47. *Id.*
48. 17 U.S.C. § 106(4) (2007).
49. Complaint of Viacom, *supra* note 37, at ¶ 53; *See also* 17 U.S.C. § 106(5) (2007).
50. In fact, each of these causes of action was included in the 2007 Viacom lawsuit. Complaint of Viacom, *supra* note 37.
51. See the full list of cases, *supra* note 38.
52. *See* Fred von Lohmann, *YouTube's Balancing Act: Making Money, Not Enemies*, ALLBUSINESS, July 10, 2006, http://www.allbusiness.com/services/legal-services/4464576-1.html; *See also* 17 U.S.C. § 512(c) (2007).
53. 17 U.S.C. § 512(c)(1) (2007).

ing material.[54] The question of whether YouTube has adequately complied with the requirements of Section 512(c) may well be determined by a court, but it is outside the scope of this Note.

YouTube users, by contrast, are not "service providers" and do not have access to the Section 512 safe harbors or any similar provision. In addition, since its initial 1790 incarnation, the Copyright Act's scope has grown dramatically, often at the expense of the public. More media is protected,[55] duration has expanded,[56] and protection is easier to get due to the removal of registration and other formalities.[57] This expansion is not surprising, given that the drafting of the law, as described by Professor Jessica Litman, was the result of "compromises negotiated among those with economic interest in copyright."[58] Notably missing from these compromises was the general public.[59]

Without safe harbor protections, the public can only rely on the limitations the Copyright Act places on copyright owners' rights. Most of these limitations, however, are extremely narrow and apply only to specific circumstances like reproductions made by libraries[60] or materials prepared for the blind.[61] Worse, argues Professor Michael Madison, these limitations "have come under such sustained attack that they are widely viewed, in practical terms, as unimportant."[62] As a result, the flexible (and inconsistent) fair use doctrine may be considered YouTube users' only line of defense against alleged infringement.

54. 17 U.S.C. § 512(c)(1)(A) (2007).

55. Protection was extended to paintings, musical compositions, photographs, drawings, and more in the 19th century. JULIE E. COHEN ET. AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 24 (2d ed. Aspen Publishers 2006). Newspapers, lectures, and more were added by the 1909 Act. *Id.* at 24–25. Over the next hundred years, copyright protection would extend to films, merchandise labels, sound recordings, software, and more. *Id.* at 25.

56. In 1976, Congress extended properly-renewed copyrights by 19 years. 1976 Copyright Act, ch. 3, Sec. 302–04, 94 P.L. 553 (1976) (codified at 17 U.S.C. §§ 302–04 (2007)). In 1998, Congress extended the duration of all copyrights by 20 years. Sonny Bono Copyright Term Extension Act, Sec. 102(b), 112 Stat. 2827 (1998) (amending 17 U.S.C. § 302).

57. *See generally* COHEN, *supra* note 55, at 140–44. The 1976 Copyright Act removed the publication requirement. *See* 1976 Copyright Act, *supra* note 56. The requirement of giving notice of copyright was removed in 1988. Berne Convention Implemention Act of 1988, Sec. 7, 100 P.L. 568 (codified at 17 U.S.C. §§ 401–06 (2007)).

58. Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 879 (1987).

59. *See generally, id.*

60. 17 U.S.C. § 108(a) (2007).

61. 17 U.S.C. § 121(a) (2007).

62. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT L.J. 391, 392–93 (2005).

C. *Fair Use*

In the subsections above, I discussed the background and history of YouTube and copyright infringement. In this subsection, I will describe the basic workings of the fair use doctrine YouTube users must rely on.

Fair use was adapted in 1841 from an English doctrine that allowed people to "fairly adopt part of the work of another."[63] It was further developed in American common law. Although the doctrine's breadth has been fiercely debated, the Supreme Court in *Campbell v. Acuff-Rose* held that fair use "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[64]

In the landmark *Folsom v. Marsh* decision, Justice Story argued that fair use should not allow a new work to "supersede the use of the original work,"[65] and laid out factors for determining fair use.[66] The factors would later be codified as Section 107 of the 1976 Copyright Act:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[67]

63. Cary v. Kearsley, 170 Eng. Rep. 679, 680 (K.B. 1803).

64. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

65. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

66. *See id.*

67. 17 U.S.C. § 107 (2007).

Judicial interpretation of these factors has been inconsistent to the point of incomprehensibility,[68] but the Court has recently clarified that Congress "eschewed a rigid, bright-line approach to fair use."[69] As a result, it is understood that the four factors must be examined individually, and that the doctrine includes no presumptions for or against any type of use.[70]

III. FAIR USE AND YOUTUBE

A. *Why Fair Use Should Protect YouTube*

In section II.A, I described the tumultuous history of YouTube, including its many conflicts with copyright owners. In section II.B, I explained the potential for copyright infringement inherent in the YouTube business plan, and that users were not privy to the same broad defenses as YouTube itself. In section II.C, I explained that fair use is intended to avoid the "stifling" of creativity that could result from overbroad copyright protections, and that the Supreme Court has held that no single factor creates a presumption for or against a finding of fair use. In this subsection, I will explain how YouTube has made our culture more accessible to the general public, and why it should not be seen as a medium for piracy but as a forum for authorship and discussion.

YouTube is the current posterchild for the general public's passion for copyright infringement, yet its importance as a medium for creativity and cultural discussion is widely misunderstood.

Over the past several decades, the tools of authorship have become increasingly accessible to the general public. Audio cassettes, popularized in the 1970s, allowed individuals to record radio broadcasts and

68. The issue of commercial use provides a useful example. In 1985, the Supreme Court wrote that "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting Sony Corp. of Am. v. Universal City Studies, Inc., 464 U.S. 417, 451 (1984)). Less than ten years later, the Court held that "the commercial . . . purpose of a work is only one element of the first factor enquiry." *Campbell*, 510 U.S. at 584. This is merely an example of the sort of complications that inspired the Second Circuit to describe the fair use issue as "the most troublesome in the whole of copyright . . . ." Dellar v. Samuel Goldwyn, 104 F.2d 661, 662 (2d Cir. 1939).

69. *Campbell,* 510 U.S. at 584 (quoting *Sony*, 464 U.S. at 449, n.31).

70. *See, e.g.*, *Campbell*, 510 U.S. at 584–85; Michael Frey, *Casenote: Unfairly Applying the Fair Use Doctrine: Princton University Press v. Michigan Document Services*, 66 U. CIN. L. REV. 959, 966 (1998) (the Supreme Court "has recently stressed that fair use disfavors bright line rules and favors individualized analysis based on the 107 factors as applied to the facts of each case.").

amateur music.[71] Home video cameras and video cassettes, popularized in the 1980s, similarly allowed the public to record TV broadcasts and amateur video.[72] The following decades witnessed a dizzying explosion of the "professional amateur" market, thanks to the increasingly low price of high-quality production equipment.[73]

This increase in the ability to engage in authorship was eventually complimented by the internet's revolutionary methods of distribution. Blogs—online journals where authors write about topics ranging from technology and politics to entertainment and personal life—exemplify the impact of internet distribution. At the beginning of 2007, there were approximately 75 million unique blogs in existence, with approximately 1.3 million blog posts published each month.[74] Similar revolutions in distribution can be seen in music[75] and photography.[76]

Until YouTube, the "democratic" distribution of video lagged behind other media due to bandwidth concerns. YouTube, for the first time, gave the general public the ability to affordably distribute video works to a worldwide audience. This huge increase in the number of authors and works echoes copyright's ultimate purpose: to promote "the Progress of Science and the Arts"[77] by encouraging the creation and enabling the distribution of new works.[78] Yet many incumbent content owners view the public's distribution power as a market threat, and use copyright as a weapon to shut down public discussion and innovation. In light of the tremendous cultural benefits to be gained by increased authorship and

71. *See generally*, Charles Leadbeater & Paul Miller, THE PRO-AM REVOLUTION: HOW ENTHUSIASTS ARE CHANGING OUR SOCIETY AND ECONOMY (Demos 2004).

72. *Id.*

73. *Id.*

74. The exact number is notoriously difficult to calculate. In February, 2006, blog ranking company Technorati tracked approximately 30 million blogs. Frank Ahrens, *30 Million Blogs and Counting . . .*, WASHINGTON POST, Feb. 26, 2006, at F07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/25/AR2006022500229.html. In February, 2007, Technorati tracked 73 million blogs. About Us, http://technorati.com/about/ (last visited Oct. 25, 2007). In late 2006, technology analysts Gartner estimated there will be 100 million blogs by the middle of 2007. *Blogging 'Set to Peak Next Year'*, BBC NEWS, Dec. 14, 2006, http://news.bbc.co.uk/1/hi/technology/6178611.stm.

75. *See generally,* MySpace, http://www.myspace.com (last visited Oct. 25, 2007); Mathew Ingram, *mp3.com and Linspire Founder Sued Again*, WEBPRONEWS.COM, Nov. 12, 2007, http://www.webpronews.com/topnews/2007/11/12/mp3-com-and-linspire-founder-sued-again (describing the rise and fall of mp3.com and its MyMp3 service).

76. *See, e.g.*, Flickr, http://www.flickr.com (last visited Oct. 25, 2007).

77. U.S. CONST. art. 1, § 8, cl. 8.

78. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("Copyright's purpose is to promote the creation and publication of free expression."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (the "ultimate aim" of copyright is "to stimulate artistic creativity for the general public good.").

distribution, the public needs the protection of a strong and flexible fair use limitation now more than ever.

Some argue that legitimate uses on YouTube are far outweighed by unauthorized content, but there are few numbers that support this stance. For example, a recent Vidmeter.com study found that less than 10% of YouTube videos were removed for reported copyright violations.[79] The exact numbers are irrelevant, however, since the majority of unauthorized derivative and clip content should be protected by fair use.

Twenty years ago, viewers had in-person discussions about what they watched on TV the previous night. Two-hundred years ago, readers discussed books or articles. YouTube provides a natural expansion and enhancement of this discussion of shared culture. Clip content—copies of small portions of preexisting works—allows users to refer directly to video as easily as they would have referenced the title of a show 15 years ago. YouTube allows us to recapture the shared experience of American media.

This ability to share and discuss clips is more than just for fun; it is crucial for expanding important cultural discussion into cyberspace. For example, many entities share videos online for political purposes.[80] Others may incorporate copyrighted content in order to review films online.[81] Even those who simply set out to share a piece of content they find interesting often spark debate and discussion, as explained in Section III.B.1.a below. For YouTube users, the expansion of cultural debate onto the internet is a completely natural, and non-threatening, progression. Faced with growing public participation in the creative process and the use of pre-existing clips to enrich cultural discussion, strict enforcement of copyright threatens to shut down emerging works and important contributions to our culture.

Neglecting to extend fair use to many unauthorized clips would be especially harmful when content is controversial. A recent comment by radio host Don Imus, in which he referred to members of a women's basketball team as "nappy-headed ho's,"[82] is not likely to be celebrated and distributed by the content owner. A quick search on YouTube for

79. Vidmeter Copyright Report, *supra* note 9.

80. The Parents Television Council organizes letter-writing campaigns to the FCC in order to protest sex, violence, and swearing on television; to inform their members, they provide clips of questionable content. *See* Parents Television Council, 24 Advertiser Campaign, http://www.parentstv.org/PTC/campaigns/24/main.asp (last visited Oct. 30, 2007). Similarly, a quick search on YouTube for political issues (such as "tv violence" or "fox news bias") will reveal thousands of videos which incorporate unauthorized content to make their arguments.

81. A search on YouTube for "film review" yields more than 3,000 results.

82. *See, e.g.*, David Carr, *Networks Condemn Remarks by Imus*, N.Y. TIMES, Apr. 7, 2007, at B7, *available at* http://select.nytimes.com/gst/abstract.html?res=F50D15F93C5B0C748CDDAD0894DF404482.

"imus nappy" shortly after the controversy yielded 16 results, including unaltered clips of the original remarks, clips of Imus's apologies, and YouTube user commentary on the controversy. To argue that these distributions should be condemned as infringement is to say that the copyright owner's interest in a 60-second clip of a live radio show outweighs the public's interest in a free and full debate of issues of racism and insensitivity.[83]

B. *Applying the Fair Use Analysis to YouTube Users*

In section II, I explained the background and history of YouTube and explained the basics of infringement and fair use. In section III.A, I argued that YouTube's dual function as a distributor and facilitator of important cultural debate should not be destroyed by overbroad interpretations of copyright infringement, and that fair use is the only limitation flexible enough to protect users. In this subsection, I will analyze the four fair use factors in the context of YouTube, and explain how the policy arguments I made in section III.A are supported by the law.

As discussed in section II.B, Section 107 lays out four factors for determining fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[84] The Supreme Court clarified in 1994 that there is no "rigid, bright-line approach to fair use," and that all four factors must be analyzed individually.[85]

Although the outcome of these factors is highly fact-sensitive, I will attempt to evaluate the applicability of the defense to derivative content and clip content. Where important facts may vary from video to video, I will attempt to identify those variations and the effect they might have on the analysis.

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83. I agree with Professor Glynn S. Lunney, Jr.'s framing of fair use as a doctrine designed to balance two competing public interests: (1) the societal benefits created by an increase in the "supply and variety of original works available," and (2) the societal benefits created by expanding public access to existing works. Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 981–82 (2002). Although courts have rejected the argument that "newsworthy" works should not be protected by copyright at all, some have explicitly held that such First Amendment concerns are "relevant in determining whether the purpose of copying a work and the nature of the work copied militate in favor of finding a given use of a particular work to be a 'fair use,' for which no liability should be imposed." L.A. News Service v. Tullo, 973 F.2d 791, 795 (9th Cir. 1992).

84. 17 U.S.C. § 107 (2007).

85. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984)) (internal quotation marks ommitted).

1. Purpose and Character

The first factor that must be examined under Section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[86] This factor is often split into two elements. First, whether the use is "transformative," that is, whether it "'supersede[s] the objects' of the original creation,"[87] and second, whether the use is "commercial."[88] I will examine each of these elements separately.

Along with the fourth factor (evaluating effect on the potential market for the work), this factor tends to dominate many fair use analyses. This tendency even briefly resulted in a presumption against commercial use,[89] but the presumption was rejected by the Court's holding in *Campbell*.[90]

a. Transformative vs. Consumptive Use

The concept of transformative use can be traced back to Justice Story in the 1800s, who held that new works "with a view, not to criticize, but to supersede the use of the original work" should be "deemed in law a piracy."[91] Story, who never made explicit a "purpose and character" factor, raised the superseding use problem in his discussion of uses which "prejudice the sale, or diminish the profits" of the original work.[92] Modern courts continue to rely on this language in their inquiry into the "effect of the use upon the potential market or value of the original work," but also rely on it to determine whether a use is transformative.[93] The result of this duplication of language is a dangerous temptation to conflate the first and fourth fair use factors.

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86. 17 U.S.C. § 107 (2007).

87. *Campbell*, 510 U.S. at 579 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. Mass. 1841)).

88. *See, e.g., id.* at 584 (in which Justice Souter refers to the commercial purpose of a work as "only one element of the first factor enquiry into its purpose and character").

89. In the 1985 *Harper & Row* decision, the Supreme Court wrote that "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. at 562 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. at 451 (1984)).

90. *Campbell*, 510 U.S. at 584.

91. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

92. *Id.* at 348.

93. In the *Campbell* decision, Justice Souter held that the "central purpose" of the "purpose and character" factor is to determine "whether the new work merely 'supersede[s] the objects' of the original creation." *Campbell*, 510 U.S. at 579. Later, in his discussion of the fourth factor, Souter wrote that "when a commercial use amounts to mere duplication of the entirety of an original, it clearly 'supersede[s] the objects' (citation omitted) of the original and serves as a market replacement for it." *Id.* at 591 .

To avoid the circular logic that so often plagues fair use analyses, I will rely on a more recent definition. A transformative use, according to Justice Souter, is one that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message."[94] Concerns about market effect will be appropriately reserved for the fourth factor.

Derivative content on YouTube should generally hold up well to the transformative use inquiry. Consider a recently popular homemade music video in which characters from the Megaman video game franchise dance to the song "Harehare Yukai."[95] Images of characters and backgrounds were copied, but the creator "adds something new" by altering many of the animation sequences to make it appear the characters were dancing.[96] This new animation was then synchronized to a completely unrelated song, resulting in a music video which undoubtedly serves a different purpose and is of a "different character" than a video game.[97]

Skeptics of this analysis may point to the Second Circuit's *Castle Rock* decision, in which the publishers of a "*Seinfeld* Aptitude Test" book (posing trivia questions about the popular sitcom) were found not to have sufficiently transformed the original work.[98] The court held that the first factor failed because the book did not seek "to educate, criticize, parody, comment, report upon, or research *Seinfeld*, or otherwise serve a transformative purpose."[99] In this analysis, however, the court comes dangerously close to treating Section 107's illustrative uses as an exhaustive list, an interpretation that has been rejected by the Supreme Court.[100]

A second example of derivative content on YouTube is "Sad Kermit," a video in which a drug-addicted and depressed Kermit the Frog is depicted singing a cover version of Nine Inch Nails' "Hurt."[101] As stated by the *Campbell* court, "parody has an obvious claim to transformative value" if it has "critical bearing on the substance or style of the original composition."[102] Like 2 Live Crew's parody of Roy Orbison's "Pretty Woman," "Sad Kermit" "reasonably could be perceived as commenting

94. *Id.* at 579.

95. YouTube.com, March 29 Top 20 Videos (on file with author).

96. Harehare Yukai—ROCKMAN Version, http://www.youtube.com/watch?v=DvHu7ENQFbM (last visited Oct. 31, 2007).

97. *Id.*

98. Castle Rock Entertainment v. Carol Publishing, 150 F.3d 132, 142 (2d Cir. 1998).

99. *Id.* at 142–43.

100. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. at 561 (1985) (in which the Court holds that "this listing was not intended to be exhaustive . . . or to single out any particular use as presumptively a 'fair' use.")

101. Sad Kermit—Hurt, http://www.youtube.com/watch?v=uLQRv0RjBBM (last visited April 19, 2007).

102. Campbell v, Acuff-Rose Music, Inc., 510 U.S. 569, 579-80 (1994).

on the original or criticizing it,"[103] by making light of the melodrama of the original song and the wholesome image of The Muppets.

Clip content, in contrast to derivative content, seemingly has no significant changes. The clips themselves, after all, are edited out of existing works and uploaded as is. In fact, there are three ways most clip content could be considered transformative: (1) clips can be thought of as "video thumbnails" which have a different context and purpose from the original works; (2) clips consist of original selections; and (3) clips are surrounded by user discussions, video responses, and are embedded in outside commentaries, and should therefore be considered as merely the foundation for a larger, collaborative work.

First, YouTube clips are limited to 10 minutes in length and are displayed at a significantly lower quality than the original work.[104] As rough, incomplete representations of the original work, they resemble the image thumbnails dealt with in the 9th Circuit's 2003 *Kelly v. Arriba-Soft* decision.

In that case, Arriba operated an image search engine which displayed "the results of a user's query as 'thumbnail' images."[105] Although the court conflated the first and fourth factors,[106] it held Arriba's display of thumbnails served "a different function than Kelly's use" and was "more than merely a retransmission of Kelly's images in a different medium."[107]

Like the Arriba thumbnails, YouTube clips are "more than merely a retransmission . . . in a different medium."[108] Although they often retain the core purposes of the original works—such as entertaining or informing—they serve the additional purpose of "improving access to information on the internet" by enhancing online discussions and allowing clips to be embedded in outside commentaries.[109] This difference in purpose is reflected, as it was in *Arriba-Soft*, by the use of "smaller, lower-resolution" videos.[110]

103. *Id.* at 583. This analysis of "Sad Kermit" is of course purely academic. In reality, the video was removed pursuant to a DMCA takedown notice from the Jim Henson Company—making "Sad Kermit" an excellent example of how the theory and practice of fair use are becoming increasingly divergent. Sad Kermit—Hurt, *supra* note 101.

104. For a more expansive discussion of these technical limitations, see section III.B.3 on "Amount and Substantiality."

105. Kelly v. Arriba-Soft, 336 F.3d 811, 815 (9th Cir. 2003).

106. In its discussion of transformative use, the court stated that the thumbnails "are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals." *Id.* at 820. This language is a clear reference to the thumbnails' market effect, which should have been relegated to the fourth factor.

107. *Id.* at 819.

108. *Id.*

109. *Id.*

110. *Id.* at 818.

Second, as discussed in the Supreme Court's *Feist v. Rural Telephone Service Co.* decision, "selection, coordination, and arrangement" on its own can significantly alter a preexisting work.[111] It is therefore reasonable to say that the simple act of selecting and uploading a clip, separated from its original context, has meaningful transformative value.

Third, clip content can be incorporated into criticism or commentary on the original work, either by inclusion of a text description on YouTube.com or by being embedded into an outside website.[112] In this context, posting an unaltered clip of a TV show looks a great deal like quoting the text of a book in a book review, often considered the quintessential fair use.

Some clips, however, were not uploaded with commentary and were not initially embedded in outside commentary. Although the original work would not seem to be meaningfully altered, we must consider the entire context of the clip. Clips on YouTube are not posted in a vacuum; they are accompanied by discussion sections and links to the websites that embed them.

For example, in the discussion section of a recent unauthorized clip from FX's "Dirt" in which Courtney Cox kisses Jennifer Aniston, YouTube users fought about the social acceptability of homosexuality.[113] Icp2o wrote: "that is actually disgusting, god damn, people think gay is actualy [sic] normal now." Xecutey responded: "Duh, That [sic] is because it is."[114] Whatever we think of the level of this discussion, it is vital to remember that even unaltered, unauthorized clips on YouTube often add to larger cultural debates and concerns.

A clip on YouTube should therefore be thought of as more than just a clip. It should be thought of as a communal work, consisting of the foundation clip, user discussion, video responses uploaded by other users, and outside commentary which embeds the clip. Looked at this way, clip content certainly "alter[s] the first [work] with new expression, meaning, or message";[115] each comment, each embedding, and each video response creates an entirely new context for the foundation clip. This conforms to Judge Leval's description of transformative use: "if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is

111. *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv, Co., Inc., 499 U.S. 340, 358 (1991). This language, stemming from Section 101's definition of "compilation," relates to the copyrightability of compilations.

112. The importance of embedding is unquestioned. Even Viacom argues that "the embed function has contributed significantly to the explosive growth in YouTube's popularity, network, and enterprise value." Complaint of Viacom, *supra* note 37, at 12.

113. Top 20 Videos, *supra* note 95.

114. YouTube.com, Comments to Dirt Excerpt (on file with author).

115. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

the very type of activity that the fair use doctrine intends to protect for the enrichment of society."[116]

This conclusion is contrary to that reached in the *L.A. Times v. Free Republic* case, decided in the Central District of California. In that case, in which users uploaded entire newspaper articles to a discussion board, the court explicitly rejected the theory that users' ability to "add comments and criticism concerning the articles" was sufficiently transformative.[117] "Since the first posting of an article to the Free Republic site often contains little or no commentary," the court wrote, "it does not significantly transform plaintiffs' work."[118]

The *L.A. Times* court's focus on the transformative nature of the "first posting," without the context of the resulting conversation, is traditional but misguided. In a constantly changing collaborative environment like YouTube, the nature of the first posting becomes increasingly irrelevant as the transformative process takes place.

Imagine a website which allows users to post paragraphs from existing short stories as the foundation for a collaborative writing project. The first posting may not be transformative, but once the rewriting process is underway, significant portions of the story would be deleted, rewritten, and altered sufficiently to create a new, transformative work. Refusing to extend the fair use doctrine to such a situation would only serve to prevent the authoring of transformative material—clearly not the purpose of fair use or copyright. Similarly, an unauthorized, unaltered clip posted to YouTube might not be transformative if there is never any discussion or commentary added to it. The same clip, however, should be considered transformative if it is repeatedly discussed, responded to, and embedded in outside commentaries.

b. Commercial vs. Noncommercial Use

The second inquiry of the first fair use factor is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[119] This factor has been particularly central to many courts' analyses, culminating in an explicit presumption against

116. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

117. L.A. Times v. Free Republic, 54 U.S.P.Q.2d (BNA) 1453, 29 (C.D. Cal. 2000). The court did, however, recognize that "the primary purpose of the postings to the Free Republic site is to facilitate discussion, criticism, and comment." *Id.* at 35. This suggests that their finding of no transformative use was based heavily on the commercial nature of the Free Republic's usage, as well as the fact that entire articles were copied, and the fact that Free Republic's copies impacted the potential market for the originals because they were posted the same day. *See id.* at 36.

118. *Id.* at 30.

119. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

commercial use.[120] Although this presumption was later rejected,[121] commercialism "is a separate factor that tends to weigh against a finding of fair use"[122] and is generally still treated by courts as being especially important.

In this inquiry, although the overall context of the website may be commercial, the vast majority of YouTube users post videos as a hobby and have absolutely zero commercial purpose. Some may upload videos in order to embed them into a website which generates advertising revenue, but even most of those do not make enough money for it to be relevant to the analysis.

Those users who do upload videos to YouTube for promotional (and thus commercial) purposes are most likely to be posting authorized and original content. As discussed in section II.A, major content owners like CBS and BBC post videos to YouTube. The commercial nature of these videos is irrelevant, because there is no underlying infringement to bring us to a fair use analysis in the first place.

2. Nature of the Copyrighted Work

The second fair use factor inquires into the nature of the original work. The "scope of fair use" is greater for works that are "primarily informational rather than creative,"[123] because "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[124]

The outcome of this factor will vary widely from work to work. News clips, which are common on YouTube, are factual and thus this favor would factor the user.[125] Many clips, of course, are of fictional shows and this factor would consequently favor the copyright owner.

120. In the 1985 *Harper & Row* decision, the Supreme Court wrote that "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Id.* at 562 (quoting Sony Corp. of Am. v. Universal City Studies, Inc., 464 U.S. 417, 451 (1984)).

121. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

122. *Id.* at 585 (quoting *Harper & Row*, 471 U.S. at 562).

123. New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 157 (2d Cir. 1990) (quoting Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983)).

124. *Harper & Row*, 471 U.S. at 563.

125. The Ninth Circuit has held that First Amendment concerns, such as the ability to quote and discuss newsworthy works, "are relevant in determining whether the . . . nature of the work copied" favors a finding of fair use. L.A. Times v. Free Republic, 54 U.S.P.Q.2d (BNA) 1453, 795 (C.D. CA 2000).

3. Amount and Substantiality

The third fair use factor questions "whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying."[126] The inquiry takes into account "the quantity of the materials used," but also examines "their quality and importance" to determine if they "go to the 'heart' of the original."[127] This factor attempts to protect uses like quotations (the classic fair use) while blocking any uses that seem to simply duplicate the original work.

Despite the variety of videos available on YouTube, three general observations can be drawn.

First, YouTube has capped the allowable length of videos to 10 minutes. This encourages the posting of shorter clips and makes it burdensome—both for the uploader and the viewer—to copy most full-length works.[128] This means that most YouTube videos are short and include significantly less than the entire original work. For example, the clip of FX's "Dirt," discussed in section III.A, represented less than two and a half minutes of a show with a 60 minute running time, or 3% of the show (assuming 10 minutes of commercials in the aired version). This compares favorably to quantities found by courts to support a finding of fair use.[129]

Second, the YouTube conversion process discussed in section II.A compresses each video file, resulting in a significant loss of quality. This loss of quality impacts the market effect factor, discussed below, but it also represents a significant decrease in the number of pixels being copied. This is somewhat analogous to viewing a painting that is missing every third square inch: a viewer can get the gist of the painting, but what is being viewed is far from whole.

Third, users uploading clips tend to cherry-pick scenes and moments that people want to see. Courts may therefore be tempted to assume these clips represent "the 'heart' of the work," but this is not necessarily true. For example, Professor Wendy Seltzer uploaded the NFL's description of its copyright policy, a clip that represented just 33 seconds of the

126. *Campbell,* 510 U.S. at 586 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

127. *Id.* at 587–88.

128. Some users still upload full works by posting a series of 10-minute segments. Most TV shows would have to be uploaded and viewed as either 3 or 5 separate clips, depending on the running time of the show. As a result, this serial copying approach does not represent a significant portion of YouTube videos.

129. For example, the Second Circuit held that an L. Ron Hubbard biography that took "only a miniscule amount of 25 [works], 5-6% of 12 other works and 8% or more of 11 works" was "not so much as to be unfair." New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 158 (2d Cir. 1990).

2007 Super Bowl broadcast.[130] Although she picked a very specific clip and posted it with the expectation that people would be interested to see it, the pre-kickoff copyright warning is obviously not the "heart" of the Super Bowl broadcast.

In most cases, therefore, this factor is likely to weigh in favor of the uploading user. The technical limitations of YouTube, combined with users' idiosyncratic selection of clips, mean that the majority of videos take a relatively small quantity of the original work and few can be said to take "the heart" of the work.

4. Effect on the Value of the Copyrighted Work

The fourth and final fair use factor is an examination of "the effect of the use upon the potential market for or value of the copyrighted work,"[131] and has been described by the Supreme Court as "undoubtedly the single most important element of fair use."[132]

This factor was explained by Justice Story as an inquiry into the degree to which the new work "supersede[s] the objects" of the original work.[133] More recently, the Supreme Court has described it as solely concerning "the harm of market substitution" for those markets the "creators of original works would in general develop or license others to develop."[134] Courts also take into account even those potential markets copyright owners have decided not to exploit.[135]

While this factor is simple enough when dealing with established markets—everyone accepts that screenplay adaptations or novelizations are markets that copyright owners "in general develop or license others to develop"—it provides significantly less guidance for emerging markets. For example, in *Perfect 10 v. Google*, Google Image Search's inclusion of thumbnail versions of Perfect 10's nude model photographs was held to "harm the potential market for the downloading of Perfect 10's reduced-size images onto cell phones."[136] It was seemingly irrelevant to the analysis, except to support the claim that the "market is grow-

130. Wendy Seltzer, *NFL: Second Down and Goal?*, WENDY'S BLOG: LEGAL, Apr. 5, 2007, http://wendy.seltzer.org/blog/archives/2007/04/05/nfl_second_down_and_goal.html.

131. 17 U.S.C. § 107 (2007).

132. *Harper & Row*, 471 U.S. at 566.

133. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

134. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592–93 (1994).

135. In *Campbell*, the Supreme Court held that a rap parody could have impacted "the market for a nonparody, rap version" of the song, despite the fact that no interest had been shown in producing such a version. *Id.* at 593 (the Court remanded the case to fill "the evidentiary hole" on this issue). Similarly, the *Castle Rock* court held that the "Seinfeld Aptitude Test" trivia book "substitutes for a derivative market that . . . Castle Rock 'would in general develop,'" despite the fact that "Castle Rock has evidenced little if any interest in exploiting this market." Castle Rock Entm't v. Carol Publ'g, 150 F.3d 132, 145 (2d Cir. 1998).

136. Perfect 10 v. Google, 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006).

ing,"[137] that Perfect 10 only licensed the cell phone images after litigation had started and distributed them only in the United Kingdom.[138]

In YouTube's case, this factor is confused by YouTube's licensing schemes with several major content owners.[139] These licensing schemes make it clear that content owners are beginning to develop a market, of sorts, for YouTube clips. Additionally, official short video websites such as Comedy Central's Motherload support the conclusion that there is a nascent market for short clips. This does not end the analysis, however.

We must first clarify precisely what market is being considered. Although YouTube itself may be signing licensing agreements,[140] no such market has developed or is being developed for individual licensing of clip content. If, for example, an amateur television critic wishes to post a 15 second clip of a TV show on his or her website in order to illustrate his or her critique, there is no market in existence or on the horizon that will realistically allow him or her to license a short digital clip. Any determination of this factor based on the existing short clip market runs the risk of unrealistically importing the market options of a massive company like Google onto individual users. Even more importantly, the lack of licensing agreements by the amateur critic's bigger media counterparts, such as film critics Ebert & Roeper, suggests that consideration of such a market is improper in the first place.

The confusion that stems from emerging markets is well explained by the dissenting opinion in *American Geophysical Union v. Texaco, Inc.*: "There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument . . . but, under the statutory test, we cannot declare a use to be an infringement unless . . . there is a market to be harmed."[141] Professor Paul Goldstein argues that as technology increases copyright owners' capacities to commodify every possible use of an original work, "the perceived need for fair use and other statutory exemptions from liability" will recede.[142] I agree with Professor Goldstein that some aspects of fair use "are there, not because of transaction costs, but because certain uses and users serve socially valuable ends."[143]

137. *Id.*

138. *Id.* at 832.

139. *See, e.g., YouTube Strikes Content Deals*, *supra* note 12; Sorkin, *supra* note 39; Goo, *supra* note 39.

140. Most likely as a strategy to avoid costly litigation rather than an acknowledgment that the licensing fees are legally required.

141. American Geophysical Union v. Texaco, Inc., 37 F.3d 881, 904 (2d Cir. 1993) (Jacobs, Circuit Judge, dissenting).

142. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 21–23 (rev. ed. 2003).

143. *Id.* at 207–08.

The only way to keep this factor from becoming hopelessly circular is to acknowledge there are certain markets that are necessarily not exclusive to the copyright owner. The *Campbell* Court held there is "no protectible derivative market for criticism" or parody.[144] Thus, any perceived damage to these markets would be irrelevant in the analysis of market effect. Given my discussion of transformative use in section III.B.1.a and my discussion of the policy behind protecting YouTube in section III.A, I believe the vast majority of clips are being used for purposes for which there is "no protectible derivative market."

We do not allow copyright owners to successfully argue that they have an exclusive right to license text quotations to book reviewers, because such a market is not considered legitimately protectible. Similarly, we cannot allow them to successfully argue that the posting of video clips, which otherwise pass the fair use analysis, damage the market for those clips. To decide otherwise would turn the fourth factor into a permanent anchor around the ankles of those who would use emerging technology to make fair use of existing works.

IV. CONCLUSION

The business model of the video-sharing website YouTube has raised significant controversy, but YouTube users' interests in making fair use of copyrighted materials is often overlooked in the debate.

I have argued that, just as the increased availability of tools of authorship resulted in an explosion of "professional amateur" works, the increased ability of the general public to distribute works should be encouraged. This is true whether the distribution method is used for new works or for portions of preexisting works which are used in accordance with the fair use doctrine of Section 107. YouTube users who upload derivative content and unaltered clip content are spreading important cultural debates into cyberspace, and their rights to make fair use of works should not be more limited than the rights of those in any other medium.

Section 107 lays out four factors for determining fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted

144. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994). The Court reasoned that "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market," suggesting that it is only market failure that keeps this market from being exclusively exploited by the copyright owner. *Id.*

work.[145] The Supreme Court clarified in 1994 that there is no "'rigid, bright-line approach to fair use,'" and that all four factors must be analyzed individually.[146] In Section III.B, I argued that the analysis of these four factors should weigh in favor of the vast majority of YouTube users.

The "purpose and character" factor, based on the degree to which the new work is transformative and commercial, should strongly support most YouTube users. The vast majority of YouTube users have zero commercial motivation. Derivative content, by its very nature, makes significant alterations to the original work. Unaltered clips are transformative due to their unique selection, their use as video thumbnails in a new context, and their foundation of a larger, collaborative work of discussion, criticism, and creativity.

The outcome of the "nature of the copyrighted work" factor will vary significantly from clip to clip. Factual works, such as news clips which are popularly posted on YouTube, more easily support a finding of fair use.

The "amount and substantiality" factor strongly favors YouTube users. The technical limitations of YouTube severely restrict the length and quality of the uploaded works, which automatically limits the amount of the original work copied. Additionally, users' idiosyncratic selection of clips indicates that few can be said to take "the heart" of the work.

Finally, the "effect of the use upon the potential market for or value of the copyrighted work" factor also should be seen to favor YouTube users. First, there is not yet a market in existence allowing the general public to license short clips for the sort of uses made possible by YouTube, so any discussion of market harm is purely speculative. Second, the Supreme Court has held that there is "no protectible derivative market for criticism" or parody.[147] The communal nature of YouTube is, I believe, an indication that there is similarly "no protectible derivative market" for the majority of the clips in question. Whether the content owners could theoretically charge for these clips is irrelevant, just as it is irrelevant that they could theoretically charge for the use of quotations in book reviews.

On balance, this analysis of the fair use factors indicates that many YouTube users should be considered as having a strong fair use defense. Although this is of little practical importance due to the procedural crippling of the general public's access to fair use, it establishes YouTube as something other than a community of pirates. It also should serve as a

145. 17 U.S.C. § 107 (2007).

146. *Campbell*, 510 U.S. at 584 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984)).

147. *Id.* at 592.

reminder of the balance of public interests that should be struck by the Copyright Act. Fair use "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster"[148] and is essential to the Copyright Act's basic purpose of promoting the "Progress of the Science and Arts."[149] It is critical that it survive the natural and important transition to online media.

148. *Id.* at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).
149. U.S. CONST. art. 1, § 8, cl. 8.