

**REPLY COMMENT OF
THE ORGANIZATION OF TRANSFORMATIVE WORKS**

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

Audiovisual 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.¹

I. Statement of Interest

OTW is a nonprofit organization established by media fans in 2007 to promote the acceptance of fanworks as a legitimate creative activity, to preserve the history of fan culture, and to protect and defend fanworks from commercial exploitation and legal challenge. OTW believes that these noncommercial works that make creative use of existing copyrighted material are transformative, and that transformative works are legitimate under US copyright law. OTW provides free services to fans who need assistance when faced with related legal issues or media attention. OTW's board includes professors, lawyers, authors, and moderators of fan communities.

This comment supports a proposed exemption for noncommercial remix videos that do not infringe copyright. In filing this comment, OTW represents the interests of a large number of the creators of these videos. Fan-created videos, or vids, that include clips from popular television shows or film rework these clips in such a way that comments on or critiques the original source. Known as "vidding," this method of grassroots filmmaking generally relies on footage digitally copied from DVDs. OTW, and the vidders it represents, believe these works to be transformative and a legal use of

¹ OTW believes that the Copyright Office intended to designate this as Class 11A, though the summary description available on the Copyright Office's website includes descriptions of both of the EFF's proposed exemptions. See <http://www.copyright.gov/1201/2008/comments/lohmann-fred-summary.pdf>.

the source material under the fair use provision of the Copyright Act, and that there should therefore be no legal prohibition on the process by which this source material must be extracted. Accordingly, OTW supports EFF's proposal for an exemption that would allow the extraction of clips from a DVD for inclusion in noncommercial remix videos that are found to be fair use.

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

Vids are fan-made music videos that involve the re-cutting and remixing of footage from television shows or films, creating a video montage set to a new soundtrack. Though resembling a movie trailer without a voiceover, vids are usually more rapidly cut, emulating the quicker pace of music videos and therefore preserving little or none of the narrative structure of the underlying source. The purpose of vidding is to remix the source material in such a way as to provide a *new* narrative, usually commenting on or critiquing that source.

For example, the much-discussed vid "Women's Work" is based on *Supernatural*, a television series about two ghost-hunting brothers.² However, 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."³ 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: "it all just leads to sitting down and wanting to

² Available at <http://transformativeworks.org/node/552>, along with other vids discussed in the text of this reply comment.

³ Posting of Micole (*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).

at least point out some of it.”⁴ Her work represents not only a large amount of creative effort, but also a meaningful cultural criticism.

Making the criticism in this way, of course, necessitates making use of the source material. The power of “Women’s Work” is that it *shows* rather than tells, expressing the nuances of *Supernatural*’s visual choices in a way that any amount of written word could not. The clips extracted from the DVDs of the television show are, therefore, essential to the art. The vid is highly transformative, as well as an obvious critical comment on the material on which it relies, a use that the test set forth in *Campbell v. Acuff-Rose* would almost certainly recognize as fair use.⁵ However, it is not necessary for the purposes of this proposal to consider this whether vid, or any other, is actually a fair use. The proposed exemption applies only to videos that *do not infringe copyright*; so if one video were found to be fair use, the techniques the vidder used to make it would fall under the exemption, whereas if another video were *not* found to be fair use, then the vidder would not be exempt from § 1201. This exemption will only serve to protect those who are making legal use of the copyrighted material.

A. The Vidding Community is a Substantial Contribution to the Growing Remix Culture.

The vidding community is a longstanding community of practice whose existence predates digital video technology. For early vidders using VCRs for the task decades ago, the art was a labor of love. And for all of their hard work, distribution was difficult as well, many only having the opportunity to premiere vids at small fan gatherings. Despite these difficulties, the community developed and flourished. MIT professor and media scholar Henry Jenkins wrote about the community in his 1992 book about participatory culture, *Textual Poachers*.⁶ He described the art of vidding not only as an important form of cultural creation, but as a way of solidifying and maintaining the fan

⁴ Posting of sisabet (*New Vid! Women’s Work*) to Livejournal, <http://sisabet.livejournal.com/365275.html> (Aug. 15, 2007, 00:29).

⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding fair use to favor transformative uses, particularly critique of or commenting on the source, where a work “can provide social benefit, by shedding light on an earlier work, and in the process, creating a new one.”).

⁶ HENRY JENKINS, *TEXTUAL POACHERS* 223-249 (1992) [hereinafter JENKINS, *TEXTUAL POACHERS*].

community, creating a source of pride and a means of articulating the commonalities of the group.

In fact, fan communities in general were the predecessors to today's explosion of user-generated content. Though the Internet has allowed remix culture to thrive, its appearance was a boon for a community of creators that already existed. The organized distribution of fan writings and art can be traced back to the *Star Trek* webzines of the 1960s, and evidenced by Jenkins' book, fanwork was the subject of academic study over a decade before anyone even dreamed of YouTube.

With the tools for digital editing now accessible to the average computer user and means of wide dissemination at a creator's fingertips, the vidding community has seen the same growth as other, more visible forms of remix culture. This growth is largely due to the younger generation's familiarity with digital media, and it will only continue. Approximately 64 percent of online teens in the US have created content on the Internet, and 1 in 4 young people have remixed content into their own artistic creations.⁷

Having been already well-established since the mid seventies, well before the Internet, or MP3s, or YouTube, before the idea of "remix" became mainstream, the vidding community has kept something of a low profile. Moreover, vidders may eschew sites like YouTube due to the low resolution and overall digital quality of the videos, in favor of distributing via high-quality downloads of individual vids. There is also a yearly convention held in Chicago, Vividcon, where vidders converge to share and discuss their work in the tradition of the pre-Internet fan gatherings. Vidding is a recognized form of remix culture, and is part of a three day summit on DIY or "Do It Yourself" video at USC's School of Cinematic Arts in February, 2008; other featured genres include activist documentary, youth media, machinima, political remix and video blogging.⁸

The community may seem smaller than it actually is because it is less visible, but that does not make the creators of these works any less worthy of fair treatment under copyright law. Indeed, vidders have recently been featured in popular magazine articles,⁹ and the creation of OTW itself is a demonstration of the organization of the fan

⁷ JOHN PALFRY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 112-113 (2008).

⁸ See <http://www.video24-7.org/overview/>.

⁹ See, e.g., Logan Hill, *The Vidder*, NEW YORK MAGAZINE, Nov. 12, 2007; Jesse Walker, *Remixing Television*, Reason Magazine, August/September 2008.

community. Moreover, many newcomers to vidding, especially younger fans, are not familiar with its history. Though they are not necessarily a part of the self-identified community of vidders, they are entitled to the same legal protection for their creative, transformative work, like any artists inventing for themselves a new language of reaction to the world around them.

Given the general spread of user-generated content, use of video in transformative works will only increase and become more prominent. As of this writing, there is a vid in the top twenty most viewed videos of all time on YouTube, with over 55 million hits.¹⁰ And though YouTube is not the most popular forum for all vidders, there are still countless vids on the site, some with millions of views.¹¹ Anthropologist Michael Wesch's research has suggested that there may be as many as 15,000 remix videos uploaded to YouTube each day, and academic Francesca Coppa estimates that there are already tens of thousands created by self-identified vidders elsewhere on the Web, a number that may climb into the millions when taking into account those who are not a part of any organized community.¹²

B. Vidding Is a Valuable Educational Tool.

Communities of participatory culture have long since been recognized as potential environments for learning. Education Professor James Paul Gee calls these informal learning cultures "affinity spaces," and includes fan communities as an example along with scientific colleagues and networked teams of businesspeople.¹³ Affinity spaces are sustained by common endeavors that cut across demographics, bringing participants together regardless of age, class, race, gender, or educational level. Unlike classrooms,

¹⁰ Available at http://www.youtube.com/watch?v=v3ARyAb_1Bs. As of Jan. 19, 2009, the vid is 18th in the Most Viewed of All Time list, and has 55,453,888 hits. It is a series of clips from *Spongebob Squarepants* set to the song "Soulja Boy."

¹¹ See, e.g., Moonlight Shadow (*Doctor Who*), <http://www.youtube.com/watch?v=8YyiFhfzQRA> (1,066,864 views); Prison Break (*Prison Break*), <http://www.youtube.com/watch?v=H0DnfS7dg9g> (3,431,111 views); Soulja Boy Pooh (*Winnie the Pooh*), <http://www.youtube.com/watch?v=316BF17k5d8> (12,094, 377 views);.

¹² Fred von Lohmann & Jennifer S. Granick, Comment of the Electronic Frontier Foundation, In the matter of exemption on circumvention of copyright protection systems for access control technologies, 29, 34 (2008).

¹³ JAMES PAUL GEE, SITUATED LANGUAGE AND LEARNING 87 (2004).

where students rarely teach each other, these communities encourage distributed knowledge, each member's skill set becoming a potential resource for others.¹⁴

The vidding community is a perfect example of this phenomenon. Even in the pre-Internet days of the art, fans held workshops to help teach others technique, and even encouraged apprentice-like relationships where a new fan would learn tricks by working alongside a more experienced vidder.¹⁵ Today, vidding technology has changed substantially, but it still involves learning complicated software and editing techniques. The Internet has also made it easier for vidders to maintain a community of practice and bring in new members. For example, on just one blogging community, Livejournal, the "Vidding Discussion" group has over 1600 members, and there are also groups specifically for teaching and learning such as "Vidding Newbies."¹⁶ Additionally, experienced vidders often post walkthroughs of their process and explanations of techniques for specific vids so that others can learn by example. In fact, the vidding community has been particularly valuable as a "female training ground," according to Coppa, in that it has been valuable for teaching technical skills to women: web design, coding, and video and image editing.¹⁷

It is vital to recognize that it is the *transformative* nature of vids that undergirds these communities—it is interest in commenting on and reacting to the underlying source material that makes people excited to work on and help each other with vids. Footage shot in a public park would not be a sufficient substitute, because the community forms around commentary on popular texts. *Women's Work*, for example, was created because the authors wanted to react to what they saw presented to them uncritically on their television screens, and other people watched the vid and reacted to it because they knew the underlying source.

It is empirically true that remixing existing work is vital to sustaining communities of artists and artists-in-the-making; exemptions to the DMCA should recognize both the fact of these practices and their benefits. Communities of creative

¹⁴ *Id.* at 89.

¹⁵ See JENKINS, TEXTUAL POACHERS, *supra* note 6 at 247.

¹⁶ Vidding – Community Profile, Livejournal, *available at* <http://community.livejournal.com/vidding/profile> (listing 1682 members on Jan. 19, 2009); Vidding Newbies, Livejournal, *available at* <http://community.livejournal.com/viddingnewbies/>.

¹⁷ Walker, *supra* note 9.

practice such as the ones created by vidders can be especially valuable for young people. As noted above, remix culture is growing, and the technical savvy of those who have grown up with the Internet is a large part of that. The twenty-five percent of young people who remix content are exposed to a unique opportunity for learning, personal expression, and individual autonomy.¹⁸ Psychologists have suggested that participation in communities that foster shared interests, trust, mutual support, and public narratives can enhance health, and that we should encourage these kinds of social institutions for youth.¹⁹ Similarly, literacy experts have recognized that appropriating elements from preexisting stories is an important part of the process by which children develop cultural literacy, and some educators have suggested using fan fiction writing in a classroom context.²⁰ 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.²¹ Remixing video cultivates cultural literacy in regards to popular media, while also promoting technical literacy.

1. Vidding Promotes Both Technical Ability and Creativity.

The vid “This is How it Works” by Lim is one example of the use of complicated technique.²² It is composed nearly frame-by-frame with the source footage not only re-cut but reworked visually using the image editing software Image Ready and Photoshop. One innovative technique is an ongoing animation of numbers that pulse to the rhythm of the background music; this is a necessary element to the vid’s message about the dual nature of *Stargate Atlantis* character Rodney McKay, a scientist who wanted to be a

¹⁸ PALTRY & GASSER, *supra* note 7.

¹⁹ Gareth Schott & Darrin Hodgetts, *Health and Digital Gaming: The Benefits of a Community of Practice*, 11 J. HEALTH PSYCHOL. 309, 314 (2006).

²⁰ HENRY JENKINS, CONVERGENCE CULTURE 177 (2006); *see, e.g.*, Margaret Mackey, *Pirates and Poachers: Fan Fiction and the Conventions of Reading and Writing*, 42 ENGLISH IN EDUCATION 131 (2008).

²¹ Rebecca W. Black, *Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community*, 49 J. ADOLESCENT & ADULT LITERACY 118, 123-24 (2005).

²² Available at <http://transformativeworks.org/node/552>.

musician. After sharing the vid, Lim wrote up extensive notes on her process, detailing step by step how she created the effects.²³

“This is How it Works” displays not only technical skill but also artistic sensibility. In her notes, Lim wrote, “When I think about certain concepts, especially strong emotions and memories, I often experience them aurally or rhythmically. . . . for me everything is about the music and movement. I am not a storyteller, naturally. . . . I’m more like an interpretive dancer.”²⁴ In addition to the musical interpretation, Lim’s manipulation of these *Stargate Atlantis* clips endowed them with an entirely new visual aesthetic. One reviewer noted, “[T]his isn’t simply a vid—it’s art, pure and simple.”²⁵

Vidding, and indeed any kind of video remixing, can be an ideal artistic outlet for those with an eye for aesthetics, or with a feel for the flow and movement of music. Those who have a genuine interest in film editing have found the perfect field for practice. Writers need a pen and paper and painters need a canvas and paints; film editors hone their craft on film, but they are unlikely to have a full cast and crew to do their bidding. Vidders are regular people, many with amazing artistic and technical abilities that would never be able to be appreciated without this artform. As Michael Wesch pointed out in his “An Anthropological Introduction to YouTube” video, in the comments to one vid, a viewer gushed about how amazing it was, noting that the creator should do that for a living and asking if she was an artist—to which the vidder responded, “Nope, I’m a housewife.”²⁶

Many forms of digital media are becoming increasingly appreciated for their artistic value, and the creators benefit from the creative thinking as much as from practicing technical skills. One vidder (who says that she started learning how to make vids because she was looking for a form of creativity that wasn’t writing fiction) listed in an interview some of the things that she has learned: how motion can connect images, how color can set mood, how literalism can evoke humor, how what characters in a story

²³ How I Made My Vid, available at <http://www.kekkai.org/lim/notes/tihw.html>.

²⁴ *Id.*

²⁵ Posting of marecagee to Livejournal (*won't you be my neigh-bor?*), <http://marecagee.livejournal.com/21414.html> (July 31, 2006 20:52).

²⁶ Posting of Michael Wesch to Digital Ethnography (“*An anthropological introduction to YouTube*” video of Library of Congress presentation), <http://mediatedcultures.net/ksudigg/?p=179> (July 29, 2008).

are doing can be even more important than what they are saying, and most overarching, how to convey ideas in a new medium.²⁷

2. The Vidding Community Facilitates Intellectual Discussion in the Field of Media Studies.

Of course, learning to create is not the only educational opportunity in the community. Fans use the vids as context for exploring and debating deeper themes within the media source material. That same vidder pointed out how both consuming and producing within the community creates a sense of dialogue that she values, and how rewarding it is to have an audience and tangible responses to her art.²⁸ Indeed, these vids do not exist in a vacuum; the reward comes from sharing the message with other fans. Many vids, when posted, receive hundreds of comments from viewers, many of them beginning dialogues with the creator and other viewers and adding to the body of criticism of the media source. For example, “Women’s Work,” though routinely praised for its artistic quality, sharply polarized female fans of *Supernatural* due to its message. After one of the creators, Sisabet, posted the vid in her blog, it sparked a debate about the gender divide in the horror genre that evolved into a highly nuanced discussion of visual cues and camera angles in the depiction of violence.²⁹ It was the sort of debate that one might expect to see in a graduate-level media studies course.

C. Vids Are Forms of Legitimate Cultural Criticism.

Whether articulating a serious, cross-media critique as in “Women’s Work” or exploring the nuances of a single character as in “This is How it Works,” vids are a way to pull layers of meaning out of a media text, to comment on it in a nonconventional yet extremely effective way. There is no question that the way we look at media is changing,

²⁷ Posting of heresluck to Livejournal (*vidding in the Buffyverse and elsewhere*), <http://heresluck.livejournal.com/162208.html> (June 2, 2006 14:02); Posting of heresluck to Livejournal (*vidding questions and answers*), <http://heresluck.livejournal.com/218728.html> (Feb. 18, 2007 14:19).

²⁸ *Id.*

²⁹ Posting of sockkpuppett to Livejournal (*New Vid – Women’s Work (Supernatural)*), <http://sockkpuppett.livejournal.com/442093.html?thread=4893421#t4893421> (Aug. 13, 2007 03:13).

that the industry itself—from voting-based reality shows that have become collective choose-your-own-adventures to shows that are expanding into virtual worlds—encourages interaction on the part of viewers, blurring the line even more between consumer and producer. Vidding is an important extension of this shift because it demonstrates that these consumer/producers actually have something important to say about what they are watching. And fanvids allow them to do it most effectively: let me *show* you what I see, not tell you what I see.

In his discussion of early vidding, Henry Jenkins recognized some of the common critical forms: rearranging narrative to privilege secondary characters or subplots, exploring the generic conventions of popular media, purposely evoking dramatically different reactions to familiar elements, exploring the nonverbal dimensions of performance, bringing repressed subtext to the surface, and isolating an element and interpreting or providing new context for it.³⁰ The message does not necessarily have to be a complex one; often it is as simple as illuminating a sub-textual relationship between two characters.

Another excellent example of a vid as a means of character study is Seah and Margie's "Handlebars," an examination of the character of the Doctor in *Doctor Who*, as well as a more general comment on the nature of power and responsibility.³¹ 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

³⁰ JENKINS, TEXTUAL POACHERS, *supra* note 6.

³¹ Available at <http://transformativeworks.org/node/552>. See also Posting of flummery to Livejournal (*new vid! Doctor Who, Handlebars*), <http://flummery.livejournal.com/26300.html>. (Aug. 18, 2008 22:43).

holocaust.” In fact, another popular vidder used the same song for a vid set to clips from the *Iron Man* film, showcasing the same progression in the character of Tony Stark;³² across the two vids there also emerged a commentary on the God complex as a common theme among heroic characters.

As Jenkins pointed out in his discussion of “Closer,” a *Star Trek* vid that eroticizes violent encounters between Kirk and Spock, “[s]uch works certainly interpret the original series but not in a sense that would be recognized by most Literature teachers. They are not simply trying to recover what the original producers meant. They are trying to entertain hypotheticals, address what if questions, and propose alternate realities.”³³ Indeed, the opening title to “Closer” asks “What if they hadn’t made it to Vulcan on time?” before the vid itself goes on to explore a fictionalized scenario in response to this question. It is a disquieting vid for many fans, but it is meant to be. It draws parallels between sexual violence and the violation of mind-reading and also mirrors some of the more controversial themes in the fan fiction that has emerged from the *Star Trek* episode “Amok Time” for decades. By utilizing the actual source material, the 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.

III. Without the Proposed Exemption, the DMCA Has a Negative Impact on Vidlers Who Make Legitimate Fair Use of DVD Source Material.

A popular art form among fans for three decades, vidding has existed quietly and seemingly with tacit toleration (and in some cases, approval) from copyright holders, in much the same way as other fanworks such as fan fiction. However, in some cases, overzealous protection has blurred the line between wholesale copying (piracy) and user-generated content (such as remix). Therefore, it is important that copyright law continue to protect legitimate fair users. It is reasonable that movie and television studios would want to prevent DVD ripping for the purpose of illegal file-sharing. The proposed

³² Available at <http://transformativeworks.org/node/552>.

³³ Posting of Henry Jenkins to Aca-Fan (*How to Watch a Fan-Vid*), http://www.henryjenkins.org/2006/09/how_to_watch_a_fanvid.html (Sept. 18, 2006 00:00).

exemption at hand, however, would do nothing to hamper those efforts, and in fact, would not prevent § 1201 liability for any remix videos that *are* infringing. Because the exemption *only* applies to videos that are found to be non-infringing, there is no danger of its misuse in regards to infringing content. In effect, it would not be harmful for the content owners—but without it, there is definite harm to the creators of vids and other noncommercial remix videos.

A. Vidders Are Unlikely to Use Alternative Methods for Procuring Media Footage.

Some people do have access to other ways of obtaining television and film clips that do not involve ripping DVDs—for example, using a camcorder to videotape from a flat screen TV, or using analog video capture. However, not only are the majority of vidders unlikely to know about or consider these methods, to have the equipment necessary to implement them, or to be 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. The anticircumvention regime, absent an exemption, is completely counterintuitive to those unfamiliar with the DMCA: how could it be better to download something illegally than to use a DVD that was legally purchased? 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.

The point is not simply that the rules, in the absence of an exemption, are counterintuitive. It is that the anticircumvention provisions do not, and cannot, have any deterrent effect on people who do not understand them. They serve only as a trap for fair users (since unfair users are already subject to copyright's prohibitions).

One of the reasons that the vidding community has expanded so dramatically in the past few years is increased accessibility. Nearly all new computers come with DVD drives and video editing software (either Windows Movie Maker for PCs or iMovie for Macs), and DVD ripping software such as DVD Shrink or Handbrake are freely available for download. The days of connecting two VCRs and dubbing footage manually are over; to use an analog method of obtaining footage would be a step backwards, if the equipment is even available.³⁴ And these alternate methods require additional equipment such as camcorders. As hobbyists who are not making any money from their work, vidders most often do not have the resources to buy additional equipment. Moreover, the quality of the product—particularly with the camcorder method—is markedly inferior to that obtained from DVD ripping.

In considering remix videos generally, it may not be obvious that video quality is important, since many of them are posted on YouTube, where the quality of videos after they are uploaded and compressed is quite poor. However, many vidders avoid YouTube altogether, or at least use it as only one of several methods of distribution (though even YouTube is responding to demands for higher quality by allowing better versions). The site iMeem (which allows better quality uploads) is popular for vidders who want streaming versions of their vids available,³⁵ and even then they usually provide downloadable full-size versions. For vids, the visuals are extremely important. Consider, for example, Luminosity's vid "Vogue" (singled out by *New York* magazine as one of the best of all web videos of the year).³⁶ The entire point of the piece is visual impact; its message is to "puncture[] the violence of 300 by defiantly aestheticizing both the battlefield and the men on it."³⁷ Additionally, vids with complicated visual effects such as "This is How it Works" would be difficult to create with lesser-quality material. Perhaps a better example is "Us" by the same vidder; the frames are altered to evoke the

³⁴ If the equipment is even available. The standalone VCR, for example, is now no longer being manufactured. See Darren Murph, *Standalone VCR party finally ends, JVC shuts the door as it leaves*, Engadget, Oct. 27, 2008, 4:35 PM, <http://www.engadget.com/2008/10/27/standalone-vcr-party-finally-ends-jvc-shuts-the-door-as-it-leav/>.

³⁵ <http://www.imeem.com/>.

³⁶ Available at <http://slumslashcity.com/lum/eyecandy/multi/vogue-xvid.zip>.

³⁷ http://www.imeem.com/francescacoppa/video/FROkKkC8/by_luminosity_vogue_shortfilm_video/

feeling of pencil drawings and paintings, and viewed on YouTube at a lower quality,³⁸ it is very difficult to even make out the images.

The aesthetic traditions that have developed in vidding over the past forty years have taken advantage of advancing technology as it has allowed better quality. Technology has enabled advances in media studies that the Copyright Office agreed in 2006 should not be choked off by the absence of an exemption for the use of clips in teaching. Likewise, technology has also enabled advances in artistry, with the same claims for protection when copyright law would recognize a fair use.

B. Most Vids Fall Under the Fair Use Provision of Copyright Law.

The OTW reiterates that, under the proposed exemption, the Copyright Office need not opine on the fair use status of any particular video. The proposed exemption first requires a finding of fair use before it operates to protect a fair user from additional liability under the DMCA. This discussion merely illustrates the proposition that there are, at present, many fair uses that will be benefited by the proposed exemption.

The fair use provision of the Copyright Act has long since been considered as a means of protecting transformative uses of copyrighted content.³⁹ The copyrighted footage that appears in vids would very likely fall under this provision, according to the four-factor analysis. The first factor favors noncommercial and transformative use,⁴⁰ both of which vids clearly are. As detailed in Part II(C), vids are regularly created for purposes of commentary or criticism, which is the same favorable use found in *Campbell v. Acuff-Rose*.⁴¹ Moreover, the proposed exemption only applies to *noncommercial* videos, favoring fair use. The second factor refers to the creative nature of the underlying work and whether the underlying work has been previously published; if the copyright owner has already disseminated the work widely, fair use is more readily found. Courts do not weigh the creative nature of a work heavily against fair use in regards to transformative works such as parodies, and vids by their nature are based on works that

³⁸ Available at http://www.youtube.com/watch?v=_yxHKgQyGx0.

³⁹ See *Campbell*, 510 U.S. 569.

⁴⁰ *Id.*; see also *Sony v. Universal*, 464 U.S. 417 (1984) (finding fair use for noncommercial time-shifting).

⁴¹ *Campbell*, 510 U.S. at 579.

have already been widely disseminated.⁴² The third factor considers the amount of the original work taken, which also favors vids. In the vast majority of vids, not only is each clip used very short (rarely longer than a couple of seconds), the amalgam of the clips for a single vid comprises an extremely small fraction of the entirety of the source material. For example, “Handlebars” contains only three minutes and twenty-seven seconds of material out of an entire three seasons of *Doctor Who* (over thirty hours of content).

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

All of the above factors considered together suggest that many, if not most, vids would be considered fair use. However, it is not necessary for the Office to decide whether that is the case. Whether any individual vid is fair use would be up for a court to determine, on a case-by-case basis. This exemption only applies to those that are found *not* to be infringing, so it is sufficient to say that there are plausible fair use arguments. In order for a court to be able to even address this claim, however, it is necessary for this exemption to be implemented.

C. Without an Exemption, Vidders Are at Risk of Unforeseen Liability.

⁴² *Id.* at 586 (creative works are usually the subject of transformative uses); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (published works are more likely to be subjects of fair use because “the first appearance of the artist’s expression has already occurred”); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (fact that copied work was “published work available to the general public” weighed in favor of defendant on second factor).

As noted above, most vidders do not have access to legal counsel. Moreover, most do not understand the nuances of the DMCA. It is counterintuitive that both copyright law and the DMCA regulate clips obtained from DVDs, whereas only copyright law governs acquiring clips from other sources, such as Internet downloads. For those who *do* understand the law, it may have a chilling effect on the creation of these non-infringing videos, and for those who do not, there is a risk of unforeseen legal liability, or an inability to assert an otherwise valid fair use defense. Though (as discussed in Part II(B)) the vidding community has grown, facilitating communication on issues such as these, not every vidder is involved with that community, especially outside of the context of discussing individual vids. Additionally, like many communities, vidders do not form a single group (and indeed the universe of vids is really too large to be one community), but rather are splintered into smaller groups across different social spaces on the Web. These communities are self-generating rather than being centered around any single source. Even technically sophisticated artists do not necessarily understand the nuances of a counterintuitive legal rule, and even in an affinity space of distributed knowledge there must be some source of that knowledge.

The real problem of wholesale unauthorized copying has led to large media companies often taking sweeping measures to protect their content. Many of them send large batches of takedown notices to online service providers, and these may be based on simple search queries rather than individual consideration of each targeted video. Vids and other types of non-infringing videos are often caught up in the sweep. For example, in 2007 a home movie of a baby dancing to a song on the radio, a video that was clearly a fair use of the copyrighted song, was taken down from YouTube pursuant to a DMCA notice.⁴³ A court subsequently clarified that it is the duty of the copyright holder to consider the potential applicability of the fair use doctrine to a use of any copyrighted material *before* sending a DMCA takedown notice.⁴⁴ However, as currently written, § 1201 in effect strips this requirement in regards to remix videos. Content owners may guess that *any* use of a film or television clip required DVD ripping in order to extract that clip, and therefore is a violation of the DMCA even without regard to whether it is an

⁴³ Lenz v. Universal Music Corp., 572 F. Supp. 1150, 1152 (N.D. Cal. 2008).

⁴⁴ *Id.* at 1155.

infringement of copyright. Like the mother who posted the video of her baby dancing, most vidders are unaware that their video is at risk until it is too late, and on YouTube, once a video is taken down due to a copyright violation, it cannot be retrieved by the creator, who may then lose countless hours of work. Moreover, the DMCA removes the creator's remedy for an unfair takedown, since if she pursued a "counter-notice" to have her video restored, she would be exposed to a circumvention claim. Again, those with knowledge of the provision would probably be chilled from exercising the right to counter-notice, and those without, who legitimately consider their video to be fair use, would be opening themselves up to additional liability without even realizing it. The OTW is committed to helping fan creators who know to ask for help, but as noted above, usually that knowledge does not come until it is too late. Moreover, these creators should not be expected to go through a rigorous legal process to protect a hobby for which they receive no kind of commercial benefit.

Remix artists, like vidders, are caught in the contradiction of a media culture that both encourages user-generated content and stigmatizes it. Does creating a noncommercial remix video make you *Time Magazine's* Person of the Year,⁴⁵ or does it make you a criminal? In his recent book, copyright scholar Lawrence Lessig warns of the dangers of the latter characterization, especially in regards to children.⁴⁶ Do we really want to stigmatize artists in that way? Vidding is far from illegal file-sharing. It is vital to distinguish between wholesale copying and legitimate remix.

Lessig also points out that removing legal barriers to legitimate fanworks will encourage more fans to participate.⁴⁷ Lower barriers for fans may well mean more fans, and more fans means more revenue for the content owners. After all, these fans are the ones who are consuming that content, buying DVDs, seeing films multiple times, etc. Fan communities and fanworks help build many popular franchises, including *Star Trek*, which was kept alive for years by creative fans, ultimately enabling the copyright owner to reap huge rewards.⁴⁸ Vidders especially, as part of the overall fan community, tend to

⁴⁵ In 2006, Time's Person of the Year was "You," referring to user-generated content. Lev Grossman, *Time's Person of the Year: You*, Time Magazine, Dec. 13, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

⁴⁶ See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008).

⁴⁷ *Id.* at 259.

⁴⁸ See generally Jacqueline Lichtenberg et al., *Star Trek Lives!* (1975).

be extremely respectful and grateful towards the creators of their source material. They are happy to legally purchase DVDs in order to remix that material, and we should encourage rather than discouraging them to do so.

Additionally, since vidders make no money from their creations, the only compensation that they receive is the joy of the craft and the recognition and appreciation of those who enjoy their work. Without this exemption, the § 1201 provision is a method of pushing vidders farther underground; if there is fear of legal liability, they will be less likely to take credit for their creations. Yet vids receive critical acclaim and public recognition for their artistic value and cultural contribution. For example, when Luminosity was featured in *New York Magazine*, she could only use her pseudonym.⁴⁹ Most vidders are diligent about attributing the source material of their work to the appropriate content creators. They should be able to take credit for their fair uses as well.

IV. Conclusion

The vidding community is one example of a group of artists harmed by the absence of EFF's proposed exemption. Vids that comment on and critique popular media and fall under fair use in regards to copyrighted material represent legitimate cultural contributions. In the spirit of copyright law's dedication to promoting creative work, OTW supports the acceptance of this exemption for non-infringing, noncommercial remix videos.

⁴⁹ Logan Hill, *supra* note 7.