
The YouTube Gaze: Permission to Create?

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In *The Wealth of Networks*, Yochai Benkler argues that the affordances of new media result in a shift in patterns of human behavior; people in a “networked information economy” assume a digitally creative life, unencumbered by cost or “alien bureaucracy” (137). Evidence of this digitally creative life is apparent from even a cursory glance at *YouTube*, *Facebook*, *Flickr* and even *Twitter*. And there are copious networked sites that are less prominent, such as *Leak.live*, *Stickam*, *ebaumsworld*, *Revver*, *Dailymotion*, *Vimeo* and *Tumblr*. However, undoubtedly one of the most frequently traversed sites in the terrain of the networked information economy is *YouTube*, whose infamous tagline “Broadcast Yourself,” gave rise to the now ubiquitous term, *user generated content*.

In the case of *YouTube*, however, this “alien bureaucracy” is, in fact, present; it is increasingly cumbersome, multifaceted and oppressive. Although the standards of practice are implied to be community based, *YouTube* deploys automated identification software to police content on behalf of media conglomerates such as NBC Universal, Warner Brothers Music Group and Viacom. Disabled video notices are rampant and often uncontested. The result is a seemingly arbitrary application of copyright infringement claims, one that bears little resemblance to the intent of copyright protection,¹ and one that ultimately becomes a form of surveillance and censorship. Michel Foucault notes the impact of surveillance on society, such that:

There is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorizing to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself. (155)

I suggest that under the scrutiny of the *YouTube* gaze, users start surveilling themselves and, once burned by its draconian content identification and dispute processes, producers begin to check themselves, censoring their digital expression. This system is, as Foucault concludes, “A superb formula: power exercised continuously and for what turns out to be a minimal cost” (155). The cost, however, may not be so minimal in the long run. It may be one of large-scale literacy as critical engagement with this huge media database wanes.

Even though the blogosphere was buzzing with the July, 2010 news of a summary judgment in favor of *YouTube*—or Google, its parent company—after a three-year court battle over copyright infringement claims, the victory is nebulous at best, and *YouTube* has stated that it will continue its use of content identification systems. *YouTube* instituted its content identification program in response to suits filed by several media entities who claimed the site had done too little to police copyrighted content. However, an August, 2008 ruling in the case of *Lenz versus Universal Music Corp.* decreed that content cannot be challenged until fair use has been investigated, putting the onus on content owners to curb their infringement claims. The *Lenz* case resulted from an infringement charge leveled at Stephanie Lenz for posting a video of her 13-month-old son dancing to a song by Prince, which played in the background.²

In their recent book on *YouTube*, Jean Burgess and Joshua Green illuminate the schizophrenic nature of media conglomerates' relationship to *YouTube* video: often the legal department moves to police content that its own marketing people have placed there. Viacom, in particular, has been "overzealous" in its patrolling, which has resulted in copious parodies and unrelated videos being claimed as violations (34). It should come as little surprise then, that rather than curbing frivolous takedown notices, *YouTube*'s automated content inspection, amplified by easily generated video removal notices, creates practices that presume guilt, with the accused responsible for proving his or her innocence.

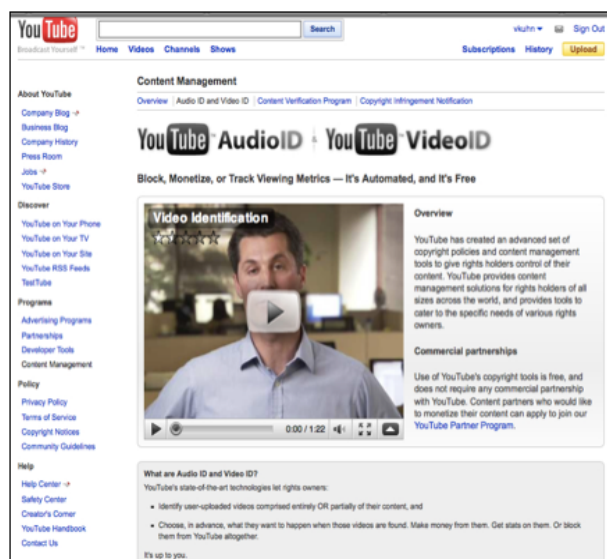


Figure 1: *YouTube* Content ID Overview

In other words, if a video is flagged by the algorithm as containing files similar to copyrighted content, the approach seems to be *issue takedown notices now, investigate fair use later*, and then only if the 'offender' has the knowledge and wherewithal to object. Moreover, the results of successful disputes seem temporary at best; videos are often taken down again with no notice, depending on the whims of *YouTube*'s "content partners" who have the right to "Block, Track or Monetize" alleged offenders' content or, in their words: "**Make money from them. Get stats on them. Or block them from *YouTube* altogether**" [Fig 1]. All information and processes associated with content identification, copyright infringement claims, and dispute procedures are obsequious to corporations, while intimidating to individuals who dare to comment on the hegemony that characterizes today's mass media. In *YouTube*'s overview of its Content ID System, they note that:

Rights holders with ongoing copyright management needs may apply to join *YouTube*'s Content Verification Program to expedite removal of infringing content. This enables requesting video removals in batch form. [Fig 2]



Figure 2: YouTube's Content ID and Content Partners

The content management information page describes “YouTube’s state-of-the-art technologies” to help content owners, and the sales-pitch type page contains the bolded large font subheading: “**Block, Monetize, or Track Viewing Metrics—It’s Automated, and it’s Free**” [Fig 2]. The 2008 ruling requiring fair use investigation is rendered completely impotent in this automated climate. By contrast, the system for disputing an infringement claim is onerous and begins with a yellow bar in which sits a triangle graphic with an exclamation point and the words “Pay attention: this is really important” [Fig 3]. The text on the page notes that there are “very few valid reasons for disputing a claim” followed by a bolded-font warning that says, “submitting an invalid dispute could result in penalties against your account” [Fig 5]. These “invalid reasons” come first and there are five, three of which actually touch on issues covered by fair use. The “valid reasons” listed include only three: misidentification (which is “rare but possible”), you have *written* permission (emphasis original) and, finally “fair use/fair dealing” [Fig 3]. In this latter case, the user is told that if he or she believes the use meets the legal requirements for fair use, a dispute may be launched. However, if one is not sure, he or she should “seek legal counsel *before* submitting a dispute” (my emphasis). The onus then, is completely on the user-creator and not the copyright holder. User-creators, then, feel the weight of the all-seeing gaze that not only monitors their video content, but also threatens to penalize them for disputing claims of infringement. It takes several clicks through such warnings to even get to the dispute form and once there, one must “certify” that one is not launching the dispute frivolously. The message in the *YouTube* world is clear: although copyright infringement can be “automated,” fair use requires not only manual effort, but also the professional efforts of an attorney.

Learn more about the dispute process

Pay attention: this is really important.

There are very few valid reasons for disputing a claim. Please review the information below, because submitting an invalid dispute could result in penalties against your account.

Invalid reasons to dispute a claim

- I own the CD / DVD or bought the song online.**
Buying a song, CD, DVD, or other piece of media doesn't give you authorization to post that content on YouTube. The content owner still has the right to choose where it is distributed.
- The content was only a part of my video.**
In almost all cases, you need written permission from the content owner to use even part of their work in your video. [Learn more about Copyright.](#)
- There are other videos on YouTube with the same content. Why can't I use it too?**
Copyright is all about the owner's right to decide who can use their content. Someone else's use doesn't give you permission.
- I gave credit in the description, isn't that enough?**
No. Giving credit does not give you authorization to upload the content.
- I'm not selling my video or trying to make money.**
Whether or not you benefit financially from using the content doesn't matter. Unless you have permission from the owner, it's not yours to use.

I still need more information. [Take me to the YouTube Copyright Help Center.](#)

Valid reasons to dispute a claim

- The content was misidentified.**
Your original content was misidentified; for example, your family picnic was mistakenly identified as a scene from *The Godfather*. Mistakes of this type are very rare but possible.
- You have the right to use the content online.**
You have written permission from the content owner to use the material on YouTube.
- Fair Use / Fair Dealing**
If you believe your use meets the legal requirements for exemption from copyright under appropriate law, you can dispute the claim. If you are unsure, you should seek legal counsel before submitting a dispute.

I have a valid reason to dispute this claim. [Take me to the dispute form.](#)

Figure 3: *YouTube's* Dispute Process

If a user's video is flagged by its 'fingerprint' program—one which seems mainly able to perform sound matches, although in typical Google fashion, the exact methods are tough to discover—that user is issued a notice that the video has been disabled at the behest of the owner. The notice details the claimant—Viacom, NBC Universal, Warner Brothers Music Group—lists the type of content at issue—video, audio or audio-visual—and the disposition—block, track or monetize—and then notes that "content partners" are allowed to review videos for "content to which they own the rights" and that these partners "may use our automated video / audio matching system to identify their content, or they may manually review videos" [Fig 2]. This seems to suggest that the surveillance of the flagged video may be human and, therefore valid. Just the suggestion that both humans and machines are tracking video renders the *YouTube* gaze more potent. However, it is a safe bet that Viacom executives do not manually view *YouTube* video, an estimated 24 hours worth of which is uploaded every single minute (Reuters). Indeed, Viacom once issued a batch of 100,000 videos and *YouTube* disabled them the next day. And this is problematic since the doctrine of fair use was written into copyright law in order to protect the proliferation of culture.

copyright entries within our Help Center.' Below this is a list of six bullet points: 1. 'If you taped it off cable, videotaped your TV screen, or downloaded it from some other website, it is copyrighted and requires the copyright owner's permission to distribute or can only be used within the limits of legal exceptions to copyright.' 2. 'If you give credit to the owner/author/songwriter-it is still copyrighted.' 3. 'If you are not selling the video for money-it is still copyrighted.' 4. 'If similar videos appear on our site-it is still copyrighted.' 5. 'If the video contains a copyright notice-it is still copyrighted.' 6. 'If you created a video made of short clips of copyrighted content-even though you edited it together, the content is still copyrighted.' At the bottom, it says: 'Please note, this material is provided for informational purposes only. It is not, nor is it intended to be, legal advice, or a substitute for legal advice.' and 'updated 12/10/2009'."/>

General Copyright Inquiries: A few guiding principles [Print](#)

YouTube respects the rights of all creators, and hope you will work with us to keep our community a creative, legal, and positive experience for everyone, including all creators. Posting copyright-infringing content can lead to your video being blocked from the site, the termination of your account, and possibly monetary damages if a copyright owner decides to take legal action. Below are some guidelines to help you determine whether your video may infringe someone else's copyright. You can also find [copyright entries](#) within our Help Center.

- If you taped it off cable, videotaped your TV screen, or downloaded it from some other website, it is copyrighted and requires the copyright owner's permission to distribute or can only be used within the limits of legal exceptions to copyright.
- If you give credit to the owner/author/songwriter-it is still copyrighted.
- If you are not selling the video for money-it is still copyrighted.
- If similar videos appear on our site-it is still copyrighted.
- If the video contains a copyright notice-it is still copyrighted.
- If you created a video made of short clips of copyrighted content-even though you edited it together, the content is still copyrighted.

Please note, this material is provided for informational purposes only. It is not, nor is it intended to be, legal advice, or a substitute for legal advice.

updated 12/10/2009

Figure 4: *YouTube's* Copyright Verbiage: much of it wrong, according to the doctrine of fair use.

The four pillars of fair use are as follows: the nature of the work, the impact on the market, the amount used and the intent of the work. Fair use then, covers the use of footage as an object of analysis, as well as re-editing footage to show some point that is not evident in the original, both of which are very traditional academic practices. Yet even as the verbiage on various *YouTube* pages that deal with copyright note that they are not qualified to advise users about fair use—and nowhere do they even mention the four tenets of fair use—they seem all too authoritative about copyright infringement. Their tips for avoiding infringement are, in some cases, simply wrong according to the doctrine of fair use, and combined, they set the stage for an extremely limited view of the critical commentary that one might create. One page offers “guiding principles” and lists scenarios for using any type of copyrighted content, answering each with the constant refrain, “it’s still copyrighted”; these include “if you give credit to the owner/author/songwriter,” and “if you created a video made of short clips of copyrighted content—even though you edited it together” [Fig 4]. It is interesting that the community guidelines note that *YouTube* encourages *free speech* (but will not tolerate hate speech), since free speech includes commenting on media and speaking with the images of a highly mediated world. Moreover, to restrict the use of short clips that are edited in a new way is tantamount to saying that one cannot use a word or phrase that another writer has already used. Consider how a short clip, say—30 seconds of a half hour nightly talk show (30 of 1800 seconds)—thirty seconds which are surrounded by 9 or so minutes (570 seconds) of filmic context that comments upon the 30 seconds in question, can ever be construed as a “copy” of the original. Yet this is the approach. Put another way, we might ask, *what is the smallest unit of filmic language?*

Copyright, Fair Use and Media Literacy

Media literacy necessarily includes critical engagement with the registers of sound, text and image so that one can cite a video-based text in order to comment on it, but also to engage it on its own terms. Using clips from the object of analysis constitutes viable citation practices that demonstrate the type of rigor one would expect when commenting on a textual argument. But words alone cannot convey the complex visual syntax of texts from *Fox news*, *The Daily Show*, *CNN*, *The 700 Club*, or even a documentary film: in the 21st century this is how we get much of our information. This broadcast content also finds its way onto *YouTube*, and having students engage such material in their own media production is a necessary part of literacy in the 21st century. The infrequent and very qualified mentions of fair use in these pages find *YouTube* repeatedly advising users to seek legal advice. It is not difficult to understand however, that while Viacom and NBC Universal have attorneys on staff, individuals have far less access to, and resources for legal advice.



Figure 5: *Remix America* site, now defunct.
Remix is an important form of free speech and critical commentary.

The doctrine of fair use is flexible to take into account individual cases, but this flexibility also means that contested uses could ultimately require litigation to decide, and this fact becomes prohibitive to those who understand the implications of a court case in both time and money. The rampant horror stories about individuals sued by groups such as the Recording Industry Association of America, who recently fined a student \$675,000 for sharing thirty songs,³ serve to keep individuals in check and censoring themselves. While most of these highly publicized cases actually deal with blatant ‘stealing,’ that is, downloading full songs or movies without paying for them for purely entertainment purposes, few academics feel equipped to distinguish the nuances of such cases.

In the strictest sense of the word, copyright protection deals with activities that reproduce or copy a protected work. In Web 1.0 days, this was a dicey notion since internet browsers technically made a copy of an accessed page, storing it on one’s local machine. But even in Web 2.0 applications where video content often streams, this “copy” does not exhaust the original, which complicates matters somewhat further. Since copyright law did not anticipate digital media, the Digital Millennium Copyright Act (DMCA) was enacted in 1998, and this produced its own barriers, which I will discuss momentarily.

A 2007 report from the Center for Social Media titled, *The Cost of Copyright Confusion for Media Literacy*, reveals that media literacy education is “compromised by unnecessary copyright restrictions” (Aufderheide et al). The authors add that these restrictions are “not only unfortunate but unnecessary, since copyright law permits a wide range of uses of copyrighted material without permission or payment.” Since the doctrine of fair use covers the majority of uses necessary for media education, these restrictions are often self-imposed. The report argues that this self-restraint stems from confusion about the tenets of fair use. However, I suggest that even when the threat of action is mitigated via knowledge of fair use, the impact of content identification programs and the strident processes by which they are enforced, serve to inhibit media literacy: I know better and yet I feel the full force of the *YouTube* gaze via the automated content matching programs.

All of my work remains premised on the notion that emergent technologies are amenable to images and allow individuals to ‘speak’ with them in unprecedented ways. And just as print literacy expanded to include the act of writing in addition to that of reading once writing implements became widely available (Baron, 1999), in the current cultural moment, one must both produce and consume images—still and moving—in order to be digitally literate. Further, given the sheer amount of video information that surrounds us daily, the ability to understand the complex visual and aural syntax it uses necessitates immersion in its production. The growing trend toward embracing remix as a scholarly pursuit recognizes that mastering this genre is necessary to be digitally literate (cf., Faden, 2008). Thus, though I recognize the importance of *The Cost of Copyright Confusion for Media Literacy*, I would extend its reach and argue that the cost is one of 21st century literacy period, and not simply *media* literacy—in other words, it is not a concern that ought to be relegated to media educators only, but rather an issue of broad public concern. Even as I am uncomfortable with the term “media literacy” (agreeing with Gregory Ulmer’s view that “media literacy” is analogous to “lettered orality”), in the absence of an alternative, I use the word literacy strategically, anachronistic though it may be, to invoke the type of abilities necessary for citizenship in a given historic moment.

The Center for Social Media also issued a code of best practices for documentary filmmakers, a best practices report for online video, and its latest, issued the same week as the *YouTube* vs. Viacom summary judgment (July, 2010), is a code of best practices for scholarly research in communication, done in collaboration with the International Communication Association. Two important issues arise in this latest code: First the authors note that the practices of specific communities carry weight in cases of fair use that are litigated, and so it is important for communities to band together and document their practices. Second, although each of these reports begins by stating its purposes in a section called “what this is,” after which there is a section labeled “what this isn’t,” in this latter section the authors note that this report:

does not address the problems created by the 1998 Digital Millennium Copyright Act, which created barriers to otherwise lawful fair uses of copyrighted materials that are available online in formats that incorporate technological protection measures (such as encryption).

This disavowal of the DMCA represents an important activist position, one not previously articulated. I cannot help thinking that the inclusion of Kembrew McLeod on the committee that authored the best practices for the field of communications influenced this language. McLeod's book, *Freedom of Expression ®: Overzealous Copyright Bozos and Other Enemies of Creativity* (2005), represents some of the most incisive thinking about fair use and in it McLeod condemned the DMCA several pre-*YouTube* years ago, calling it:

A law that is one of the biggest threats to free speech online since Internet Service Providers can only claim its 'safe harbor' if they immediately comply with "take down" requests from copyright holders, regardless of the fair use implications. (213)

Although McLeod admits that the DMCA was "well intentioned," it has been bastardized in practice and has numerous dangerous implications. He argues that "one of the unintended consequences" comes as companies try to use it to "squash competition on things such as garage door openers and aftermarket ink cartridges" (4). This latter case provides a very telling example as McLeod narrates the case of Lexmark. The DMCA makes it illegal to bypass "digital locks" which are written into software password defenses and in CD copy protection protocols. Lexmark added authentication procedures that allow its printers and ink cartridges to communicate. They then invoked the DMCA and claimed that less expensive off-brand cartridges are "hacking" Lexmark printers in order to corner the market on these highly profitable goods. It took "many months and many more thousands of dollars" for courts to decide that installing these cartridges did not constitute use of "illicit materials" (5). Although the Lexmark example may seem innocuous, McLeod argues that another outcome of the DMCA impacts the privatization of a wide variety of things including genetic material. His point is that this increasing privatization and ubiquitous trade-marking not only limits shared resources from reaching the public sphere, it also restricts the expression of ideas. McLeod's book was indeed prescient given that it was published in 2005 (and likely written well before), prior to *YouTube*'s ubiquity—the site's first video was uploaded on April 23, 2005.⁴ The most immediate problem of the DMCA with regard to the type of media literacy and digital pedagogy that I espouse, comes on two fronts: first, whenever I 'rip' footage from a DVD in order to incorporate some small clip to make a point, I am technically violating the DMCA.⁵ Second, regardless of how I acquired the clip (e.g. even if I did not violate DMCA to gain it), *YouTube* will disable any resulting video I upload. Their defense against Viacom's suit came by invoking the 'safe harbor' of DMCA is predicated upon their practice of immediately disabling videos flagged by Viacom. Thus, they cannot be held responsible for copyright infringing videos on their site. Disabling videos becomes a form of risk management for *YouTube* and they do not require any evidence that the rights holder has investigated fair use. *YouTube* claims to be a vehicle only, a type of Internet Service Provider, though this classification seems outdated given the type of vast networked repository that characterizes *YouTube*.

Responding to the *Viacom vs. YouTube* summary judgment, trademark attorney Erik J. Heels said:

I think the DMCA is a bad law. So even though this is a victory for users, for Google and *YouTube*, we're still left with a law that makes it far too easy for rights holders to take down information regardless of whether or not it's copyrighted and regardless of whether or not its use is fair. [16:56 – 17:01]

If the judgment sends a warning message to Viacom, this might be construed as a victory, although Viacom immediately announced its intent to appeal.⁶ If the ruling saves *YouTube* huge fines, this can also be considered a plus, particularly if the money saved goes toward increased functionality and site improvement (perhaps a fair use guide?). But this is certainly no victory for either users or for fair use. The real victory, it seems, is for the DMCA. Not only is the DMCA and its safe harbor the defense used by *YouTube* in this case, it is threatening to expand beyond US borders.

Video 1: Fair use, the DMCA and IP enforcement issues.

Victoria Espinel, Obama's "copyright czar" recently unveiled a "Joint Strategic Plan" on Intellectual Property Enforcement. *Wired* magazine reported Espinel's "big nod" to fair use, since the report says: "Strong intellectual property enforcement efforts should be focused on stopping those stealing the work of others, not those who are appropriately building upon it", but, as *Wired* also noted, the report is "pushing a DMCA-style notice-and-takedown process on the two dozen negotiating countries" (Masnick). The global digital village will undoubtedly only suffer from this move. The Joint Strategic Plan was accompanied by a press conference featuring both Espinel and Joe Biden. In the briefing, Espinel made no mention of fair use whatsoever, issuing only assurances to victims that they will be aided, and warnings to thieves that they will be penalized. Once the Vice President took the floor, he spoke of the huge cost of IP theft in terms of counterfeit tires and risky fake medicines, and then mentioned the entertainment industry's plea to stop the pirating of films. There seems to be no distinction between these material goods with false labels, and natively digital media, much less any awareness of the difference between stealing a movie and citing it. It is vaguely disturbing to hear Biden say that IP theft "stifles creativity" adding that America's "greatest export is our creative impulse" and that "our ability to move people from around the world through creativity works. It's been working. It's had dramatic impact on cultures. It's had dramatic impact on our interests but criminals are working every day to steal it from us." Biden then looks around the room and says, "we used to avoid saying this in this town: piracy is theft. Theft. Clean and simple. It's smash and grab" (4:44-6:07). The very colonizing language Biden uses notwithstanding, the notion that pirating movies—Hollywood blockbusters—saps American's creative impulse is fairly ludicrous. I would never sanction the theft of movies by any means, digital or otherwise, and yet the creative impulse of US citizens is far better fostered when they are digitally literate. Moreover, we ought be more concerned about a critical impulse and large-scale literacy rather than passive consumption of content created by a few media conglomerates.

Is all the fuss about pirating merely the manifestation of a hegemonic entertainment industry desperately clinging to old models in which they push content to submissive consumers?⁷ Several IP attorneys commenting on the Viacom vs. *YouTube* suit note that it is not up to *YouTube* to fix Viacom's broken business model (Heels). If the DMCA threatens free speech in this country, then imposing its distribution processes beyond its borders can only amplify this threat. China, for instance, is notorious for its government censorship, while Iran blocks access to many internet sites.⁸ And foreign content is also increasingly worrisome, as a recent court ruling set a dangerous precedent when it moved a work *out* of the public domain and back *into* copyright protection. In the "Golan case," a circuit court initially ruled against removing work—a symphony—from the public domain, but that ruling was overturned on appeal (Masnick). The court ruled that free speech would not be impacted by this decision because of the safety valve of fair use. Of course fair use is not always exercised, and this precedent, which destabilizes even safe content found in the public domain, will only heighten the fears of an already apprehensive professoriate. This ought to be of great concern for all universities, institutions where the free expression of ideas, via both scholarship and pedagogy, ought to be paramount.

Case in Point: IML340 The Praxis of New Media

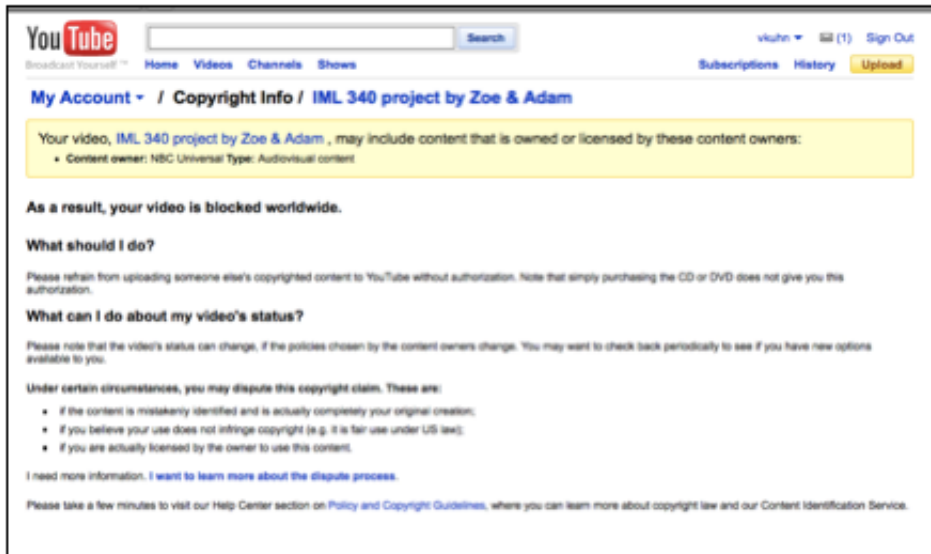


Figure 6: Dispute notice I received for a student project I'd uploaded to my account.

In October of 2008, one of my students' projects was disabled by *YouTube* on behalf of Viacom, because it used footage from *The Daily Show with Jon Stewart*. I disputed the claim, but was disturbed by the scrutiny from this faceless entity, this "alien bureaucracy." Although I cavalierly nudged the boundaries of fair use by creating and defending a digital dissertation in 2005—refusing to pay clearance for the images and film clips used in order to assert a model for writing with images—and weathering the eight months during which my doctorate was in question,⁹ when it came to possible exposure for my students, I felt the impulse to 'button down' the classroom, insulating it from outside (corporate) eyes. Upon receiving the dispute notice [Fig 8]. I felt paranoid and exposed, quickly checking to be sure that all references to students' last names were removed in order to prevent this from going on their "permanent record," as it were. I felt my authority disrupted by both *YouTube* and Viacom as I nervously disputed the claim, mandatorily swearing that I was dealing in "good faith" and not "abusing" the dispute process. The default then, was that most disputes are improper, that I was not correct, nor honest, nor acting in good faith. The disabled student project followed my assignment directions, which asked them to make a statement about the impending presidential election and its press coverage, using the genre of video remix and careful citation practices. Ironically, *The Daily Show* and its spinoff, *The Colbert Report*, are in large part responsible for popularizing "remix" as a mode of critical commentary as the shows' hosts critique broadcast news by knitting together footage of issues and events, juxtaposing clips in interesting ways that complicate their original context. These segments on both *The Daily Show* and *The Colbert Report* typically highlight the superficial nature of the press and the doublespeak of the politicians they seemingly fail to notice or question. As such, they serve an important role in the public sphere.



Figure 7: Screen shot from the disabled student project. A picture in a picture in a remix.

The remix assignment itself was a prelude to some larger work we were doing for an innovative, grant-funded course, in which students would produce research-based video arguments in response to issues raised in a documentary film created by my colleague, that dealt generally with US intervention in Iraq, and specifically with its impact on health care. This remix assignment then, was meant to provide both scaffolding and facility with video editing among a student group who arrived with varying levels of video proficiency. It was done in groups of two or three students so that those with more hands-on experience might learn from those with less, even as each could enlighten the other at a conceptual level. There are very few models for scholarly video work, which makes this pedagogy both challenging and time consuming.

Video 2: Student project annotated

The flagged video was one of a handful group projects that I had added to *YouTube* mainly as a matter of convenience; I posted them so they could be embedded into our course wiki, and streamed there, without taxing the system by housing large video files directly. But I also *was* a bit concerned about students posting under their own names and accounts due to FERPA (Family Educational Rights and Privacy Act) restrictions about privacy regarding specific course enrollment; a student ought not be identified as enrolled in a particular class where he/she might be found each week. My understanding of FERPA is that once the class is over—once the semester ends—this is no longer an issue. I did post the student author names in the descriptive text accompanying the video, along with the project's mandatory citation information, because I wanted them to be credited as authors but the thought of involving students in this dispute was unthinkable to me. The projects were created as contributions to the *Remix America* project, created by USC's Lear Center for Entertainment and uses Kaltura, the open source video editor that allow individuals to create new video by editing footage assembled there. As their home page notes, it is a "nonpartisan, nonprofit in-browser editing tool that allows citizens around the country to remix the great words and speeches of American History with the hot button issues of today."

Remix America launched in time for the 2008 elections and the creators hoped to engage young people in the debates surrounding them. Like other projects promoting the genre of remix, *Remix America's* creators understand that it is only by engaging the language of images on its own terms that one begins to understand the nature of the rhetorical choices that go into constructing a visual argument. At the same time, juxtaposing historical texts with current ones serves to see both in a new light. This awareness of history is also crucial to 21st century literacy. Unfortunately, the *Remix America* site is now defunct, reportedly due to financial constraints.

I submitted the student remix projects to my *YouTube* account, out of a concern for student privacy; I was not concerned about copyright infringement. We'd discussed fair use in class and the need to cite all sources as is academically appropriate, particularly since copyright law has yet to catch up with the practices engendered by digital technologies. In the dispute I submitted, I noted that I was the students' professor, that this video was a course assignment and that the students only used as much footage as required to make their point, citing all sources. The fact that this was not a commercial piece, nor would it compete with viewership of *The Daily Show* seems to render its fair use as a given. I knew this to be the case and felt confident that the video would be reinstated. It was. But a few weeks later, the same video was disabled on behalf of NBC Universal for yet another segment. This time, however, I received no notice and only discovered the disabled video much later. Needless to say, I had little desire to dispute it again. The disabled project analyzed gender issues, contrasting the coverage of Hillary Clinton in the primaries with that of Sarah Palin in the general election. Please see the accompanying video where I have added annotations to point out some of the academic aspect of the piece.

Alternatives to the *YouTube* Gaze

Where are academics to house video projects for the purposes of analysis, revision guidance and assessment?[10](#) If we use alternatives to *YouTube*, can we be sure they will persist? *YouTube* launched *YouTube EDU*, which might provide less commercial space. However, *YouTube EDU* presents its own 'alien bureaucracy'; there is only one site available to each university. For a large university like mine, which has thousands of faculty and more than thirty thousand students, the obstacles to freely using one *YouTube.edu* site are overwhelming to even imagine. And yet access to these pieces is critical if we are to promote this type of literacy both inside and outside of the classroom.



Figure 8: The *Internet Archive* is not only a rich repository, it is a space to house one's digital work.

The [Internet Archive](#), or "archive dot org" as its often called, is a project sponsored by the Library of Congress and it includes not only the Wayback Machine, one of the most comprehensive records of web pages, many of which are no longer live, but also houses the Prelinger Archives and several hundred thousand moving images,

audio recordings and over one million print texts. The *Internet Archive's* creator Brewster Kale and Rick Prelinger (creator of the eponymous archive), have been active in court battles over work in the public domain, adding an explicit media advocacy element to the site. While I had long used the *Internet Archive* as a place to gather assets for digital projects, the idea of using it as a place to store and stream video had not occurred to me. However, *Mediascape*, UCLA's online journal, streams their video articles from archive dot org but one would only notice this if paying close attention. Academics have no formal modes for distributing such knowledge.

I now use my archive dot org account for student projects, as well as my own digital scholarship. Certainly this is an appropriate place for such work and I will continue to use it. There are, however, some drawbacks to eschewing *YouTube* in favor of the *Internet Archive*: Video streaming via embed codes is somewhat problematic and takes some finessing, and there are no multi-video custom players. (For these I often use *Vimeo*.) There are also some missing functions, which are available on *YouTube* such as video annotation and captioning applications, and these are the best solution to date for deploying words in the service of critical readings of video-texts. I have found workarounds for this; mostly by uploading a piece to *YouTube* and using annotations there before ripping my own marked up video (as I've done for this piece), and uploading it to The *Internet Archive*, and it's also true that some functionality can be found in video sites such as *Vimeo*, which have less surveillance and are less likely to be disabled. But perhaps the most important reason to reform *YouTube* rather than avoid it lies in the impact it has on contemporary culture. It is unquestionably the best known and most used site used for video of all kinds. If academics do not use it, we are absent from the conversation and miss the chance to participate, assert our practices and shape the outcome of copyright infringement and fair use cases.

Lawrence Lessig's keynote at the 2009 EDUCAUSE conference challenged academics to be far more actively engaged in contesting current copyright law which was created in the context of analogue culture and no longer makes sense. Lessig, the Harvard law professor who has been a very vocal advocate of alternative forms of licensing such as [Creative Commons](#), remarked upon the sort of respect that faculty seem to have for copyright law, one that is decidedly not shared by law professors who must remain skeptical of all laws and work to ensure they make sense. Calling copyright the "extraordinarily large elephant in the room," Lessig cites Jessica Litman's work, which reveals that at the turn of the 20th century, copyright only impacted a very small group of people and things whereas now, due to technical innovation, "it touches everyone and everything" (1.02). Given the prevalence of copyright, then, it is of concern to anyone interested in democratic processes. Moreover, media production is part of a digitally creative life, and pushing the boundaries of what can be said with media ought to be a central concern of the university classroom. Automated content identification systems certainly impede this effort. Copyright law is impossible to automate—how does an algorithm judge context with any precision?—so this omnipotent gaze is powerful indeed. Still, as academics, we must be vigilant about complicating copyright law and making good claims for fair use.



Figure 9: *Critical Commons* is a MacArthur funded media advocacy site. One must share their annotated videos in order to use others'.

The importance of exercising fair use cannot be overstated and, as the Center for Social Media report argues, communities of practice can influence these issues. What better community than those in rhetoric and composition, a field whose emphasis is on pedagogy and student production of texts? Moreover, as the Center's attorney Peter Jaszi compellingly argues, "fair use is a right and like all rights, its reality depends on its exercise" (1:15-1:55). There are several ways we might exercise this right: We can license our own scholarship under *Creative Commons*; we can teach our students that academic protocols for citation are urgent and necessary regardless of the type of media referenced; we can spread the word about pieces like the Media Education Foundation's A Fair(y) Use Tale; we can support efforts like [Creative Commons](#), the media advocacy coalition, which fosters participatory and critical media use and education. Finally, we can and should engage *YouTube* content as well as its practices which privilege media conglomerates over average citizens, even if we have to deploy that critique by alternate means, such as The *Internet Archive*.

Final Thoughts: Institutions vs. Individuals

In an afterword to the recently published book, *DIY Media: Creating, Sharing and Learning with New Technologies*, Henry Jenkins drew distinctions between Web 2.0 and participatory culture, noting the former is a business model, one that sees users as consumers rather than participants, while the latter describes peer-based interactions that do not necessarily avail themselves of commercial portals. He notes that "[t]he more time we spend interacting with *Facebook*, *YouTube*, or *Live Journal*, the clearer it becomes that there are real gaps between the interests of management and consumers (8). By creating critical conversations about the interests of institutions and individuals—in words and images—we can help to shape the discourse surrounding the use of *YouTube* and its vast video archive. If we are passive in these endeavors, we essentially let Viacom and its ilk dictate what may be said. And real public discourse will suffer as digital creativity becomes simply internet memes, Lulz Cats and fierce chipmunks. And even these innocuous texts may not be immune. A recent fiasco found the National Pork Board issuing a cease and desist order to the web site, *Think Geek*, for a spoof product, posted on April Fools day, for Canned Unicorn Meat, claiming infringement of the slogan "the other white meat" ("Blurgh!"). This would be humorous if it were not for the twelve page "well researched" order issued, rendering the action ludicrous and, ultimately, sad in terms of digital literacy and corporate litigation.

The promise of Yochai Benkler's digitally creative life will be fulfilled only when we critically engage, when we disarm the *YouTube* gaze and intervene in issues of digital expression.

Notes

¹ For a historic look at copyright, see copyrighthistory.org as well as Larry Lessig's various works on Remix Culture.

² This happened to the Dutch as well: Dutch public television piloted *BitTorrent* (peer to peer content sharing) while the government outlawed *BitTorrent* search engines and trackers, as reported by *TechDirt's* Mike Masnick: <http://www.techdirt.com/articles/20100629/14224610007.shtml>

³ See Kelly Truong's Chronicle of Higher Education blog post where Kelly Truong reports that the fine was

reduced to \$67,500, an amount the student says is equally untenable for him to afford:

http://chronicle.com/blogPost/Judge-Reduces-Students/25459/?sid=pm&utm_source=pm&utm_medium=en

4 Although *YouTube*'s creators bought the domain on February 14, 2005, the first video was not uploaded until April 23, 2005: <http://gizmodo.com/5523416/its-been-five-years-since-the-first-youtube-video-was-uploaded>

5 On July 26, 2010 the Library of Congress announced an updated allowance for breaking digital locks for ripping media footage that would not be considered violating DMCA. This decision also covered mobile phone applications, and expanded its allowance, previously reserved for film studies educators, to include groups such as documentary filmmakers and vidders. Personally, I saw the ripping violation as similar to the threat found on mattress tags that removing them is a federal offense. Nonetheless, this is very good news:

<http://www.copyright.gov/1201/>

6 Viacom immediately announced its intention to appeal, which, according to Heels, will then take about 18 months and, if won, will only earn Viacom the right to go to trial which will likely take another three years. In other words, there will not be a resolution anytime soon.

7 The so-called "Hollywood Accounting" practices seem ominously familiar in the wake of Goldman Sachs and sub-prime mortgages. Basically studios pay themselves for film distribution, advertising and interest such that movies that take in many millions of dollars appear to have lost money on paper. Court cases are now penalizing studios, as a recent jury fined the television show "Who Wants to Be a Millionaire?" which cost Disney nearly \$270 million dollars according to The Hollywood Reporter:

http://thresq.hollywoodreporter.com/2010/07/millionaire-verdict-disney-loses-big.html?utm_source=twitterfeed&utm_medium=twitter

8 Not only are both of these countries frequently in the news for their censorship, my Chinese and Iranian students often remind me of this fact and their own frustrations.

9 The resulting publicity was helpful in pushing administrators to finally approve my doctorate. See, for instance, "Digital Scholars Make Their Own Rules" <http://www.usc.edu/uscnnews/stories/12400.html>

10 Many of the obstacles for housing natively digital texts are enumerated in webtext I recently published *Kairos: Journal of Rhetoric, Technology, and Pedagogy*. See "Speaking with Students: Profiles in Digital Pedagogy" <http://www.technorhetoric.net/14.2/interviews/kuhn/index.html>

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