Copyright & Fair Use: Application in the Digital Age

Christopher R. Learish

1. One year ago, I watched a cartoon called Infinity Train. I liked it so much that I decided to make an animated music video, or AMV, for the show. An AMV is typically made by editing short clips of your selected show or movie over a song of your choice. In this way, an AMV is created much the same way a traditional music video is, only instead of generating completely original music and video for the project, the creator is combining pre-existing media. This was the approach I took, along with the addition of syncopated onscreen lyrics and some original visual effects. However, the description of that process, I assure you, is easier said than it was done. It took roughly three months and a lot of tedious frame by frame editing, but it was all worth it when the video was complete. Proud of my creation, I posted the AMV to Youtube only to be confronted with what every Youtube content creator seems to make noise about: a copyright strike.

2. Sitting atop countless unread emails was a message from Youtube, notifying me that my video had been removed from the platform because it infringed the copyright of a company by the name of Turner EST, through my use of the footage of Infinity Train. Initially, I was outraged. “How evil could this company be to take down *my* video?” I thought. Immediately, I went into action to right this wrong. Thankfully, Youtube provides its users with an option to dispute copyright claims made against them, a tool I intended to use to get my video back up, however my ambitions were roadblocked when I came across the word “lawsuit”. I never thought something as harmless as a YouTube video could be justification to sue someone. All of a sudden it dawned on me that I had only ever heard about copyright infringement from YouTubers

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who were being wrongfully accused of it. In light of these events, I was now much more concerned that I might not know as much about this topic as I thought considering what was potentially on the line. What does it mean for a video to be copyright infringing? And did my video fit the bill?

3. As I would come to learn during my research into these questions, the discourse surrounding copyright law is often lacking in academic citation, and awareness of its historical roots, two things that Martine Courant Rife advocates against in his chapter of "Originality, Imitation, and Plagiarism: Teaching Writing in the Digital Age". In it, he "reviews current U.S. copyright law, and then briefly traces the concept of fair use from its inception... to its current interpretation in U.S. case law" (Rife 145), focusing mainly on how it impacts our educational system. Rife makes an effort to communicate the ambiguity which is built into copyright law, commenting "To say or write, 'I own the copyright in that piece' is vague. When I hear this, I wonder, which right of copyright?" (Rife 147). Evidently, there are multiple "rights of copyright" including the right to reproduce a copyrighted work, the right to perform a copyrighted work publicly, and the right to create derivative works of the original, among others. However, oftentimes, claimants simply claim ownership over a copyright.

4. Moreover, the simple wording used in the law leaves much room for interpretation, and many non specifications that prompt questioning. What constitutes the difference between public and private performance of a work? What does it mean for a work to be derivative of another? Or, as is begged in the Folsom V. Marsh case, which Rife brings up in his passage, is a derivative work that only uses a small amount of the original material still infringing? In the Folsom V. Marsh case of 1841, the defendant was being accused that his biography of George Washington, which had included many pages from Folsom's earlier biography of the same man, was infringing upon the previously existing biography's copyright. In Rife's words, "While the defendant had copied 353 pages of the plaintiff's multivolume work, the copied material amounted to less than 6 percent of the total. However, the court held for the plaintiff, finding that the defendant had copied the most important material in the plaintiff's earlier volumes" (Rife 148). This finding worried me. If presenting such a negligible amount of an original work even in a

distinct context than the original could be considered infringement, then maybe my video was indeed in the wrong. My video came out to be roughly 4.5 minutes to the show's total screen time of roughly 100 minutes, a similar ratio to the 6 percent of Folsom's original biography which Marsh used.

5. Still, it just felt wrong to me that a fan made video in celebration of a work of art should not be allowed to exist. So I kept digging. Upon further research, I would discover that the Folsom V. Marsh case was bordering on pioneering the interpretation of copyright law in the early 1800s. No other case like it had been held, and as such, the judge of the case, Joseph Story, had ample opportunity to interpret the law as he saw fit. And this, says L. Ray Patterson in his article, Folsom v. Marsh and Its Legacy, is what led the case to be "so poorly reasoned that it may be entitled to first place in the category of bad copy-right decisions" (Patterson 431). Patterson determined of Joseph Story through retrospective analysis "that his motive was to change the legal definition of infringement or piracy, as he called it" (Patterson 434) to encompass works that would, in the current age, easily be considered non-infringing. Patterson goes as far as to call Story's choices and reasoning "logically inapt".

6. To argue his stance, Story called upon the example of a reviewer who cites a large amount of an original work for the purposes of review and criticism, two factors that indicate a work to be non-infringing. However, Story claims, "if he 'cites the most important parts of the work, with a view, not to criticize but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy'" (Patterson 434). A modern day example of this hypothetical that Story is referring to would be internet movie review channels that show off footage from a film while interjecting their own commentary over it. Story claims that if the purpose of those review videos is to replace the movie that they are reviewing, copyright infringement has taken place. Patterson wastes no time explaining that the problem with this logic is that a review or criticism of a work is inherently offering a different experience than the work in question, "but apparently Story found it in English precedent" (Patterson 434).

7. All laws are subject to interpretation, but that description is obviously particularly applicable to copyright law, seeing as its

wording was once interpreted in a manner that would be considered ridiculous now. And since 1841 our understanding of what is the ideal way to deal with potential infringement has evolved massively. According to Rife, the most important variable to determining infringement currently is market harm to the original work. He writes, "any commercial use creates a presumptive harm to the copyright holder's market, and market harm is the single most important factor in current judgments" (Rife 152). This means that if a derivative work does not siphon revenue from the original it is likely to be considered fair use. Thus, even if that hypothetical internet movie reviewer was simply showing footage and audio from the movie with nothing meaningful added or changed, it is still more likely to be considered non-infringing if the video has a significantly smaller audience than the film it is "reviewing". It also helps the video's case very much if it is not monetized.

8. Both of these descriptions fit my video; it was being posted to a channel with barely four hundred subscribers and was not generating any revenue whatsoever. And that's to say nothing of the several other changes I had made to the source material. With all of this in mind, I became confident that my video was what the copyright world refers to as "fair use". Fair use is an exception to a copyright holder's power over a work that is derivative to their own. It pardons the derivative creator of the need to credit the original or ask permission to use elements of the original creator's work in their own, and it is applied to individual works on a case by case basis. The factors that improve a work's chance at being considered fair use are probably what you've come to expect. If a derivative work uses very little of the original it is likely fair use. If it serves to comment on or criticise the original it is likely fair use. And if it does not damage the market for the original, it is likely fair use. So if my video so clearly fell into this category on account of the fact that it fit many, if not all of the criteria for fair use, why did it still get taken down?

9. For once, I didn't have to look far to find the answer because this is precisely the problem that I had seen creators all over the internet claiming was happening to them. And it is not an exaggeration to say that nearly unanimously, the blame in these situations was placed on Youtube's Content ID system. Content ID is described very well by Tom Scott in his video which was "proofed and fact-checked by a team of legal experts" (Scott 0:27-0:32) called

YouTube's Copyright System Isn't Broken. The World's Is. In it, he described how "YouTube developed Content ID, which scans every video uploaded and checks it against an enormous database of copyrighted content" (Scott 22:31-22:40). When Content ID notices a match, it automatically places certain restrictions on the video which has been deemed infringing, which are determined by the copyright holder. These can range from demonetizing a video, having the video removed, blocking it in certain territories, or nothing at all. Most often though, a video which has been identified by Content ID will have its ad revenue redirected to the copyright holder because "with very, very few exceptions, they'll take the money from ads instead" (Scott 23:32-23:38). And this is a result that countless individuals who use the app have voiced displeasure with.

10. Surprisingly, as I would come to learn, the Youtube Content ID system might be even worse than the Youtube community makes it out to be. It took almost no time at all to uncover Taylor B. Bartholomew's comprehensive article, The death of fair use in cyberspace: YouTube and the problem with content ID, in which he describes one man's particularly negative experience with the Content ID system. That man goes by the online handle of "Angry Joe" and he reviews video games on Youtube for a living. However, in 2013 he "revealed that sixty-two of his videos had been "flagged" for alleged copyright infringement, instantly halting the income that he was deriving from them" (Bartholomew 67). Upon further inspection of the law and Joe's videos, Bartholomew determined that "each and every factor of the fair use analysis favors protection for Angry Joe's reviews" (Bartholomew 83), and yet, all sixty-two of these supposedly fair use videos were still claimed. Bartholomew concludes from this that "in its current iteration, Content ID cannot identify even clear cases of fair use like Angry Joe's reviews" (Bartholomew 83), an obvious flaw with the system that undermines the entire purpose of copyright law: to encourage and reward individuals for creating unique and innovative content.

11. I was satisfied with this information seeing as it identified why my video had been unjustly taken down, however I was surprised to find that Content ID's problems don't simply extend to fair use videos getting claimed when they shouldn't be. The system also has a substantial amount of clearly infringing content flying completely under its radar, a problem that D. Y. Zhang, Q. Li, H.

Tong, J. Badilla, Y. Zhang and D. Wang establish and combat in their article, "Crowdsourcing-Based Copyright Infringement Detection in Live Video Streams". In it, they claim "our empirical study showed that the ContentID failed to catch 26% of copyrighted videos[live streams] after they have been broadcast for 30 minutes and shut down 22% video streams that are not copyright-infringing" (D. Y. Zhang, et al). Imagine that. One out of every four infringing live streams on YouTube simply get missed by Content ID.

12. The group decided to create their own version of Content ID, called the crowdsourcing-based copyright infringement detection (CCID) scheme. Ultimately, the CCID was "more accurate… and efficient (detecting 20% more copyright-infringing videos within 5 minutes after the videos start) than the ContentID tool from YouTube" (D. Y. Zhang, et al), and it did so by analyzing information surrounding the footage being live streamed, rather than simply the video and audio files which were being uploaded. This includes the live chat, title, and description of the live streams, as well as "a supervised classification component to decide if the video stream is copyright-infringing or not" (D. Y. Zhang, et al). Worthy of consideration is the fact that this classification component is *supervised*. That means that it is overseen by people, and this is the critical distinction between the CCID and Content ID. Content ID can claim videos as infringing in a completely automated manner, and this is likely what leads it to make so many context based misidentifications. If all Content ID is doing is checking the footage and audio and looking for a match, how could it know if that footage was being used to analyze the contents within? Or as the punchline of an unrelated joke? Or as visual accompaniment to a song that was never intended to be played over it?

13. I knew I had to get my video in front of human eyes, so I decided to submit a counter notification to YouTube, letting them know that my video had been falsely claimed. If all went well, they would realise the mistake, forward the notification to Turner EST, and within 30 days my video would go back up. So I submitted my counter notification… and nothing happened. I received a response from YouTube informing me that my counter notification was not eligible to be forwarded to the claimant without any further elaboration. And despite my constant pestering of them on other social media and over Email for the next week, I was

unable to get any satisfactory explanation. I'd like to say that I'm alone in this experience, but unfortunately YouTube's lack of transparent communication towards its users is a widespread and well documented issue. And it was at about this point that I started wondering why this whole process was so nonfunctional. Why is it so easy for copyright holders to falsely claim a common social media users video? Why does that user have to risk opening themselves up to a court case that they could never finance in order to get that video back up? And why does that common user have to be the one to initiate every step of the process?

14. Ryan Wichtowski says in his article, INCREASING COPYRIGHT PROTECTION FOR SOCIAL MEDIA USERS BY EXPANDING SOCIAL MEDIA PLATFORMS' RIGHTS, that the answer lies in in the terms of service of social media platforms. He writes that on sites including Facebook, Instagram, Snapchat, Twitter, and YouTube, the terms of service all state that "individual users retain ownership of the content they create and share on the social media platform, but they grant a nonexclusive license to the social media platform to use their content" (Wichtowski 256). This means that Facebook, for example, can use, sell, market, and advertise anything you post on its site just like you can, but you still retain legal ownership of that picture you took of your dog wearing an Indiana Jones costume. And this system works very well when everyone is only posting completely original content, however, as Roy T. Englert, Jr establishes in his article, The Supreme Court of the United States, On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, "Improvements in the technology of search and recombination continue to expand the economic importance of new creation based upon old materials"(Englert 12). As long as the internet exists, users will continue to create, and with tools like photo editors, screen recorders, and simply the copy and paste commands accessible to anyone with a keyboard, sharing and remixing media will continue to be an integral part of that creation.

15. The problem is that with such tools being available to the public, theft is a clear concern, and when someone steals a work that you legally own, you have to be the one to fight to get it back. Unfortunately, as most anyone could gather, lawsuits are extremely expensive, to the extent that the average social media user couldn't even dream of defending their own copyright in court, a concept

Wichtowski dubs the "enforcement paradox". As he puts it, "those who can legally bring copyright infringement claims are economically unable to do so, and those who are economically equipped are legally unable to bring such claims. The practical effect of the paradox is that it leaves users' content unprotected" (Wichtowski 255). And taken with the fact that user generated media doesn't even have the questionable support of the Content ID system for protection, it is "the content that is most vulnerable to copyright infringement" (Wichtowski 257). As a result of the responsibility to fight copyright related battles being placed on people who are not experts in the field, nor do they have the capital to do so, we have created a landscape where hardly anything gets done to prevent copyright infringement, as well as respond to claims that are made on material that was never infringing in the first place.

16. Furthermore, not only is this, in all likelihood, why people such as myself have historically had such a hard time dealing with combating claims against our videos, but it undoubtedly has contributed to the slow speed at which our government has adapted the application of copyright law to the web. With so many people settling copyright infringement cases out of court, there still remains a lack of consensus on these issues which could massively affect how not just myself and other creators, but all social media users share copyrighted content over the internet, a sentiment shared by Craig C. Carpenter in his article COPYRIGHT INFRINGEMENT AND THE SECOND GENERATION OF SOCIAL MEDIA WEBSITES: WHY PINTEREST USERS SHOULD BE PROTECTED FROM COPYRIGHT INFRINGEMENT BY THE FAIR USE DEFENSE. In it, he argues for how content posted to "second generation social media platforms" such as Tumblr and Pinterest, should be interpreted by copyright law as non-infringing in nearly all circumstances. However, voices concern for the future of copyright law, saying that "If the law was interpreted to hold that users could easily be held liable for copyright infringement on social media websites, Pinterest would become a legal minefield and the second generation of social media platforms would effectively become obsolete" (Carpenter 5). Now, does this mean that fair use is doomed? No. Although Carpenter raised his concerns, his article ultimately concluded that "most of the copying on Pinterest is protected by the statutory fair use defense. This offers significant, but not absolute, protection to

age is yet to be determined. After all, Carpenter even states that, "the law in this area is still evolving" (Carpenter 5).

17. Until US courtrooms come to consensus on how copyright law should be interpreted and applied to the digital era of media, our best to stay safe as individuals is to know what the law defines as fair use, and be extra cautious to not breach any of those established guidelines. Use as little copyrighted content as possible, do not monetize any content that is derivative of a copyrighted work, and be as transformative as possible when using an existing work in your own. I've taken these precautions when creating AMVs since the one I tried so hard to get back up, and have been fortunate enough to have avoided getting infringement claims by and large. And when I do get them, often due to the automated Content ID system, I've been able to successfully dispute those claims. And with any luck, eventually, social media platforms will be not a place where its users run the risk of being falsely accused of theft, and where the lines between what is and isn't considered infringement are less blurry. But instead one where they may freely combine, adapt, and display existing works within the bounds of a unanimously understood definition of fair use.

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Instructor: Jared Gibbs (Instructor)

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