Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights

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ABSTRACT

User-generated content is a term used to describe the division between culture produced as a commodity for consumption and the culture that is generated by people acting as creative beings without any market incentive. While under current copyright law all types of creativity are protected, the laws of copyright exist primarily to protect commercial forms of expression, not the non-commercial ones that form the foundation of user-generated content. The disconnect between what current copyright law protects and how most people create generates tensions that must be addressed. This Article presents an argument for broader protection of all creative work, including creative work built upon the work of others. It recognizes that authors exist outside the commercial sphere of the culture industry and that works of authorship, broadly conceived, are built upon the works of others. It is time to demand change to our copyright policy—change that facilitates a type of self-expression that has been mislabeled “user-generated content.”

Part I of this Article sketches the evolution of the term “user-generated content” in order to identify the politics inherent in the definition and how technology has changed our relationship with

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entertainment and information. Part II deconstructs the assumptions behind the term “user-generated content” in order to clarify its political economy. Part III maps the “problem” of user-generated content by focusing on the example of YouTube in order to highlight the flow of ideas that are inherent in culture, and argues that the problem is not the user, but the over-commodification of culture. Part IV offers several recommendations for policy changes, and Part V concludes by arguing that it is time to strike a new balance between commercial interests and the public at large.

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“The social condition of global interconnection that we call the Internet makes it possible for all of us to be creative in new and previously undreamed-of ways. Unless we allow ‘ownership’ to interfere.”

—Eben Moglen, Anarchism Triumphant: Free Software and the Death of Copyright.¹

A specter is haunting the United States—the specter of massive copyright infringement. All the old powers have aligned

together to eliminate this specter—the RIAA, the MPAA, the BSA, ASCAP, BMI, and, most importantly, the USA. Where is the local technology start-up, the DJ, the mashup artist, or the twelve-year-old fan that has not been labeled a pirate, deemed a criminal, and ordered to “cease and desist”? Where is the new service provider, be it YouTube, Flickr, Napster, or Grokster, that has not been issued a takedown notice under the DMCA or destroyed altogether?

Two things result from these facts:

- User-generated creative works are already acknowledged to be a power—a culture of the masses taking control of technology and making culture instead of consuming it.

- It is high time that users and the copyright critics supporting this movement openly and in the face of the whole world publish their views, their aims, their tendencies, and meet this nursery tale of the specter of copyright infringement with a manifesto for the rights of user-generated content.

To this end, this Article sketches a manifesto. It is time to strike a new balance within copyright law, and the term “user-generated content” helps us understand why this new balance is necessary. While the culture industry ignores the basis for its own appropriation, the “free” culture that exists outside the commodity form, it uses copyright as a club to ensure that creative permutations of commercial works remain under commercial control. The trajectory for consumer culture is toward more concentrated

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2. These acronyms stand for the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), the Business Software Alliance (BSA), the American Society of Composers, Authors and Publishers (ASCAP), Business Music, Inc (BMI), and the United States of America (USA). There are, of course, others that could be added to this list.


ownership, despite the fact that most products produced by the culture industry pull freely from non-commodified sources;\(^5\) however, these origins are often forgotten when profit motives take over.

This Article is an argument for broader protection of all creative work, including creative work built upon the work of others. It recognizes that authors exist outside the commercial sphere of the culture industry and that works of authorship, broadly conceived, are built upon the works of others. It is time to demand change to our copyright policy—change that facilitates a type of self-expression that has been mislabeled "user-generated content." User-generated content is in reality authorship and creative work, but also work that generally disrupts the commercial paradigm.

Part I of this Article sketches the evolution of the term "user-generated content" in order to identify the politics inherent in the definition and how technology has changed our relationship with entertainment and information. Part II deconstructs the assumptions behind the term "user-generated content" in order to clarify its political economy. Part III maps the "problem" of user-generated content by focusing on the example of YouTube in order to highlight the flow of ideas that are inherent in culture, and argues that the problem is not the user, but the over-commodification of culture. Part IV offers several recommendations for policy changes, and Part V concludes by arguing that it is time to strike a new balance between commercial interests and the public at large.

**I. THE ORIGINS OF USER-GENERATED CONTENT**

Instead of taking the concept of user-generated content as a given, it seems appropriate to think about the evolution of the term and what it means. As will become clear, the term is used to describe activities engaged in by those typically seen not as cultural producers but cultural consumers. This section will describe the origins and evolution of the term, while the next section will take up the political implications.

The scope of user-generated content includes many problematic connections to copyright law.\(^6\) User-generated content can be found on wikis, blogs, Twitter feeds, YouTube, Facebook, and pirate websites, as well as in virtual worlds, reactions to news stories, reactions to others’ reproductions of news stories, and ratings for products or

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ratings for seller reputations—not to mention many more places yet to be described or envisioned. They are part of emerging social networks of self-expression that are the foundation of our online political and social culture. All these networks, sites, and virtual worlds raise issues of creativity, ownership, collective authorship, and illegal appropriation of previously copyrighted works.

The history of the term “user-generated content” is not a long one, with the earliest articles using it appearing in 1995. Deborah Bogle’s 1999 essay is one of the first to suggest that user-generated content could replace professional content and make the once “all-powerful editor/producer type . . . just another content provider.” Bogle tells the story of a colleague saying, “Well, they can just f..k off, all these users. We need that money!” As a result of technological changes, Bogle acknowledges that experts will have to work harder and the focus will shift to filtering, not producing, content. Professionals will have to become more “flexible” as the line blurs between them and passive “users.”

7. Id.; see also INTERACTIVE ADVER. BUREAU, PLATFORM STATUS REPORT: USER GENERATED CONTENT, SOCIAL MEDIA, AND ADVERTISING – AN OVERVIEW 1-5 (2008), available at http://www.iab.net/media/file/2008_ugc_platform.pdf. John Quiggin and Dan Hunter also provide an excellent description of user-generated content including “modding”—modifying open source video games to create new games. See John Quiggin & Dan Hunter, Money Ruins Everything, 30 HASTINGS COMM. & ENT. L.J. 203, 215-27 (2008). Universities will also have to become attuned to the transformations made possible in a user-generated world or be made irrelevant by open systems such as WikiUniversity. Brenda Gourley, It’s Time to Adapt—and Quickly—If We’re to Survive in the User-Generated Content World, INDEPENDENT (London), May 1, 2007. As Vice Chancellor of The Open University, Brenda Gourley asks, “Why would a student forgive a lecturer a pedestrian lecture and coverage of content when that student can get a much better service on the Internet?”

8. See Hetcher, supra note 6.

9. Using a LexisNexis search, the earliest article I found that references ‘user generated content’ was a 1995 piece by Dana Blankenhorn reporting on litigation holding the web service Prodigy liable for defamation by a user. Cf. Dana Blankenhorn, Judge: Prodigy is Liable for User-Generated Content, INTERACTIVE AGE, June 5, 1995, at 35.

10. Deborah Bogle, Consumer Revolution – Online, AUSTRALIAN, Sept. 30, 1999, at M12; see also Sandy Plunkett, Good Guys, or Just Another Mob of Yahoos?, SYDNEY MORNING HERALD (Australia), July 5, 1999, at 40 (reporting on the controversy generated by Yahoo!’s policy to expand their ownership of copyright to content generated by users); User-Generated Content: Monetizing the People, 5 MIN’S NEW MEDIA REP., June 21, 1999 (reporting on companies profiting from user-generated content).

11. Bogle, supra note 10 (alteration in original).

12. Id. But see Walt Crawford, User-Generated "Content": This Is the Promised Land?, ECONTENT, Oct. 31, 2001, at 50, available at http://www.econtentmag.com/Articles /Column/DisContent/User-Generated-%22Content%22-This-is-the-Promised-Land-
The term “user-generated content” began to gain momentum in 2005 and 2006 when the Web 2.0 phenomenon became a more prominent news subject.13 The online business environment and attitudes toward user-generated content have also evolved considerably, as has the impact of user-generated content on product information,14 as well as on news generation,15 policing,16 and business models.17 Users had also changed. Modern users want more connectivity, more user control, and more new technologies.18

1028.htm (claiming that user-generated content cannot replace “manufactured content,” or content produced by professional writers).

13. “Web 2.0” is a term used to suggest that a second Internet revolution has arrived—one driven by participatory culture. See Scott Kirsner, Champions of Web 2.0 See a Shift to More Participation by the Public, BOSTON GLOBE, Oct. 10, 2005, at F1 (describing the Web 2.0 conference and its concept); see also Marie Griffin, Generating User Content: Having Web 2.0 Tools Doesn’t Mean Your Audience Will Automatically Participate, MEDIA BUS., Nov. 1, 2007, at 30, available at http://www.btobonline.com/apps/pbcs.dll/article?AID=/20071108/MEDIABUSINESS/71031021 (noting that even with the option of allowing user-generated content on your website, content still takes work to develop and manage).


15. See John Naughton, Writers Who Work for Nothing: It’s a License to Print Money, OBSERVER (England), Mar. 11, 2007, at 16 (arguing that individuals with cameras and phones on the scene of a newsworthy event can post their photos of news events to websites faster than professional journalists and photographers who were not present at the scene and that this trend creates a sharecropping system by appropriating user content for free); see also Mathew Ingram, Content Generators Transforming More Than Just the Web, GLOBE & MAIL (Canada), Dec. 21, 2006, at B9 (arguing that the generation of massive content by the people who have traditionally been users creates new business opportunities while disrupting traditional media outlets).

16. The police shooting of Oscar Grant in Oakland, California is one of the most recent examples: video footage of the shooting was taken by at least two different people on their cell phones. See J.D. Tuccille, Oakland Police Shooting of Oscar Grant Made a Story by Citizen Journalists, EXAMINER.COM, Jan. 9, 2009, http://www.examiner.com/x-536-Civil-Liberties-Examiner~y2009m1d9-Oakland-shooting-of-unarmed-man-made-a-story-by-citizen-journalists (arguing that this story was driven by cell phone video clips posted to YouTube and suggesting that authorities responded by trying to confiscate all the cell phones used to capture the incident); see also Todd Chretien, Anger Building over Oakland Police Murder, SOCIALISTWORKER.ORG, Jan. 8, 2009, http://socialistworker.org/2009/01/08/anger-building-over-police-murder (reporting that police tried to confiscate the cell phones and claimed the security cameras in the area had not been working).

17. See Ed Charles, Crowd-Sourcing Really Rocks, AUSTRALIAN, Aug. 29, 2008, at 8. Today, businesses are working to profit from “free” user-generated content by “crowd-sourcing” revenue while retaining control over traditional content. Id. An IBM study suggests that four different business models, ranging from those that tightly control
All in all, much has changed in the past fifteen years as the Internet has evolved. User-generated content has become both an opportunity and a concern. Part I looked at the history of the term as it has been used. Part II will look at the political economy of the term within the context of mass culture.

II. DECONSTRUCTION OF USER-GENERATED CONTENT

Mass society is commercialized and driven from the top down by profit-oriented models of cultural consumption. In other words, U.S. mass culture is commercial culture where culture is a commodity, like shoes or luxury cars. The paradigm of consumer culture requires that one take as “truth” a series of starting assumptions. First, the most widely discussed assertion regarding creative use is the assumption that within commodity culture no one creates for free; all artists, no matter their genre, create to make money.20 According to this logic, nobody gives away their creative work, or their “intellectual property,” as it has come to be called, because to do so would go against the very principles of an ideology based in private property.

The second “truth” is that culture is produced by professionals, defined as those who make a living from their work.21 The
professionalization and commercialization of consumer culture has traditionally privileged those who monopolize the means of creative production—movie studios, music studios, publishing houses, and other venues associated with the production of mass culture and control.22 Control over the means of creative production and the avenues of distribution allow for top-down creative control.

Third, articulating the cultural arena as one dominated by professionals is premised upon the myth of the romantic and original artist.23 Within the culture industry, the profit motive drives production while concealing an industrial model behind the "author effect."24 Important to the industrial model is that in almost all cases the work itself becomes the “property” of the company and not the original author.25 A different way to look at the argument about original authors that helps highlight the illusion of the author effect is to see the culture industry structurally—no movie, album, book, fashion design, painting, or other creative work exists because of a single author. It is possible to subvert the ideology of the original author by endorsing values of attribution, inspiration, appropriation, and exchange instead. Furthermore, these differences do not break down along the lines of professional and amateur, as the user-generated content debates would suggest.26

22. Adorno, supra note 4, at 61-106. Adorno’s critique of the culture industry is uncompromising because he feels it eliminates the possibility of liberation. Id at 61-106. See ECONOMISING CULTURE: ON ‘THE (DIGITAL) CULTURE INDUSTRY’ (Geoff Cox et al. eds. 2004) (providing a digital version of the monopolization of culture via the commodity form).


26. In the context of open-source software, Quiggin and Hunter state, “Any discussion of amateur content production should, therefore, not assume that amateur production necessarily precludes commercial development around the production of the content. It simply means that the content will be generated for noncommercial reasons.” Quiggin & Hunter, supra note 7, at 219.
Only by understanding these assumptions does the phrase “user-generated content” make sense. These assumptions generate a landscape where culture is produced in an assembly-line fashion by the “original” few and sold to the uncreative masses, who spend their days consuming culture (or, in the digital age, pirating it). In the context of the consuming masses, user-generated content disrupts a distribution monopoly. Computer technology in the hands of the masses has made available software programs that can create music, documents, and art just as well as expensive studios did in the past. This democratization of technology disrupts the monopoly on the creative means of production. The world of amateur production also demonstrates that many are motivated by noncommercial reasons. By using the term “user-generated content,” the structure of the narrative implicitly undermines the value that can be placed on the original work of “users” and implies that professional contributions are somehow superior.

In the past, it was far more difficult to see the creativity of thousands, if not millions, of people. The social networking platforms at the heart of the Web 2.0 revolution have changed this. Web 2.0 technologies brought broader visibility to the creative self-expression of the average person, and in doing so reproduced already-existing forms of everyday cultural creation. In the non-commodified world, user-generated content is not a new concept, and in some cases the communities built around it had already developed their own sets of norms. Ironically, the web itself is the product of user-generated content. Furthermore, important aspects of our culture—from quilts to recipes to scrapbooks to music and poetry—are all generated by “users,” given that the term “user” is simply another way to describe

27.  See id. at 230.


29.  The example here would be fan fiction, which precedes the Internet but has gained a new and vibrant life because of the Internet. See Rebecca Tushnet, Legal Fictions: Copyright, Fan Fiction, and a New Common Law, 17 LOY. L.A. ENT. L. REV. 651, 664 (1997) (providing examples of claims made by fans regarding their work and how they seek to avoid copyright problems); see also Casey Fiesler, Note, Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content, 10 VAND. J. ENT. & TECH. L. 729 (2008) (arguing that the current controversy over UGC could learn something from fan fiction).

30.  Bob Greenberg on Web 2.0's Impact, ADWEEK.COM, Jan. 1, 2007 (describing the current user-generated content issue and suggesting that content providers need to focus more on quality to compete with user-generated content).
non-professionals who allow their creative energies to be part of a gift, or uncommodified, culture.

The user-generated world can and does play with the commodified products of the culture industry, appropriating common cultural symbols and remaking them as personally meaningful connections. In a world of commodities, there are few other options except to remix already existing cultural products. This remix behavior is widespread. So what is the problem created by user-generated content?

III. THE “PROBLEM” OF USER-GENERATED CONTENT

Corporate concern surrounding user-generated content highlights the sea change we are witnessing today. As a cultural critic and editor, Matt Mason argues, “When pirates start to appear in a market it’s usually an indication that it isn’t working properly.” Where once there existed the relatively stable world of the culture industry in which concentrated control over film, music, literature, and art was easy, the technology of modernity has shifted control into the hands of consumers of culture. Stable control over the culture industry was possible because commodity culture de-skills people as creators, in the same way that industrialization de-skilled the artisan and craftsperson while turning them into fodder for the industrial machine.

This means that as the tools for re-skilling creative people emerge, the industrial model of creativity will falter. Consumers with access to technology become creators in a more democratically accessible world. From the perspective of the culture industry, consumers become thieves, but instead of luddites destroying the machinery of their oppression, these actors are taking over the technologies of production and turning them toward their own personal uses.

Technology makes it much easier to produce your own music or films as well as download the works of others. The existence of mass

32. MASON, supra note 5, at 66.
33. See generally NICOLS FOX, AGAINST THE MACHINE: THE HIDDEN LUDDITE TRADITION IN LITERATURE, ART, AND INDIVIDUAL LIVES (2002) (describing the impact of industrialization on artisans and craftspeople as they were integrated into the industrial labor pool).
34. See HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 23 (2006) (arguing that new technologies change participation and highlighting future concern about a “participation gap”).
culture, dominated by command and control organizations, is threatened by the shift to the re-skilled creative agent. In response to the breakdown of control, the culture industry polices its property more closely because it is easier to share more readily.35 Besides concern about direct copying, most of the focus is on how others create derivative works with copyrighted materials, although, ironically, the culture industry does not acknowledge its own works as derivatives of the surrounding culture.36 Derivative works created by users are problematic because they threaten control over the owned content. In a world where everything is branded, this control is essential.

While the Digital Millennium Copyright Act (DMCA) is the public law establishing rules to balance content-owner concerns with service-provider concerns,37 private initiatives are under way to shore up content ownership in the digital age. Media companies, including CBS, Walt Disney, Sony Pictures, and Viacom, met with Internet service providers (ISPs) to formulate a set of principles for user-generated content in October 2007.38 Key players, including Google, were absent, but also missing were actual users and public interest groups. These absences highlight the political nature of the debate in which users are ignored because corporate players will set standards and users will be required to play by the resulting rules.

The primary concern articulated in the principles is the need for a system through which commercial interests can halt the uploading and distribution of content that infringes commercial copyrights.39 The principles assume that “user” activity inevitably infringes.40 They outline fifteen objectives for regulating content online that include, among other things, shifting the burden for identifying infringing content to the services that provide platforms for user-generated content; assuming that the copyright owners act in “good faith” and actually own the material they seek to block; and

35. See James Boyle, The Public Domain: Enclosing the Commons of the Mind 42-53 (2008) (arguing generally that we have witnessed an “enclosure” movement as copyright law has expanded in scope); see also Halbert, supra note 23 (arguing generally that the recent history of copyright has been marked by the expansion of the law).

36. See Halbert, supra note 23, at 122-59 (using the example of a single song to demonstrate the flow of ideas and the often ironic assertion of copyright over creative expression); see also text accompanying notes 73-82 (discussing YouTube derivative works).


39. See User Generated Content Principles, supra note 38.

40. See id.
developing complex surveillance and technological locks to assure that infringing content is removed.\textsuperscript{41} In return, the content industry assures the ISPs that litigation will not be their first line of defense and that, despite failing to clarify, they will “accommodat[e] . . . fair use.”\textsuperscript{42}

The principles have ramifications for users because they were not intended to strike a balance between fair use and ownership, but rather to solidify ownership.\textsuperscript{43} The principles will make it more difficult for an ISP to side with a user over a content owner, which could cause a shift to more direct infringement cases against users, impacting creative work that falls well within the fair use guidelines.\textsuperscript{44} The recent case involving Stephanie Lenz and her twenty-nine-second YouTube video, depicting her baby son dancing along to Prince’s “Let’s Go Crazy,” is one such example of how far copyright owners will go to police their work, as well as the ways in which the current system requires ISPs to side with the content owners in order to avoid becoming infringers themselves.\textsuperscript{45} Using YouTube’s counter-notification procedures, Lenz was able to challenge the takedown of her video,\textsuperscript{46} but not all users will do so, nor feel they are on firm enough ground to offer up a challenge.

The Lenz case offers an example of fair use being trampled by an over energetic copyright policing effort; however, the continuum of possible infringement is broad, and where to draw the line between what should be allowed and what should be removed needs to be

\textsuperscript{41} Id.

\textsuperscript{42} Id.


\textsuperscript{44} See Note, The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance, 121 Harv. L. Rev. 1387, 1407 (2008). Fair Use is outlined in § 107 of the copyright act and includes: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2000).


\textsuperscript{46} Lee, supra note 45.
reconsidered. To problematize the relationship of creativity, self-expression, and commodity culture, I will examine the continuum of user-generated content found on YouTube, which has in a few short years become one of the most popular user-generated websites in the world and a site of considerable social and political value.47

YouTube has catapulted into prominence as the site upon which to watch videos, with tens of thousands of uploads and millions of viewers each month.48 It has become a complex area of original work, videoblogs, discovered talent, as well as unauthorized video content.49 In other words, it is a content owner’s nightmare in terms of controlling what is available.50 To police the copyright violations made possible by YouTube, for example, NBC Universal has a staff of three employees browsing for violations and has sent over one thousand notice and takedown requests.51 Viacom, as claimed in its lawsuit against YouTube, asserts over 150,000 copyright violations.52

The remainder of this Part does two things. First, it discusses the scope of possible copyright infringement on YouTube from direct copying to derivative works, and second, it argues that virtually everything the site offers should be considered a fair use.53

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47. See Branwen Buckley, SueTube: Web 2.0 and Copyright Infringement, 31 COLUM. J.L. & ARTS 235, 235-39 (2008) (providing a general discussion of YouTube’s success). Furthermore, many of YouTube’s initiatives have been politically oriented. For example, the company is developing channels to cover both houses of Congress. See Miguel Helft, YouTube Teams with Congress to Show Lawmakers at Work, N.Y. TIMES, Jan. 12, 2009, at B2. In addition, YouTube is turning into a reference tool for the Internet savvy. See Miguel Helft, At First, Funny Videos. Now, a Reference Tool, N.Y. TIMES, Jan. 18, 2009, at BU4. YouTube is also helping to shape access to news, as the recent conflict in Gaza demonstrates. See Yigal Schleifer, Blogs, YouTube: The New Battleground of Gaza Conflict, CHRISTIAN SCI. MONITOR, Jan. 23, 2009, at 4.


49. Id. at 237-38.

50. See Kurt Hunt, Note, YouTube: Pirate’s Playground or Fair Use Forum?, 14 MICH. TELECOMM. & TECH. L. REV. 197, 198 (2007) (“Academics and media executives’ estimate [that] 30 to 70 percent of YouTube’s content consists of unauthorized material like sound recordings, and TV and movie clips.”).


52. Id. at 239.

A. Copyright Infringement or Cultural Flows—Tracing Appropriation on YouTube

YouTube offers uploads of entire copyrighted works, some of which are licensed from the copyright owner, but many of which are uploaded without permission. For example, the entire thirteen minutes and forty-one seconds of Michael Jackson’s “Thriller” has, as of March 2009, been viewed over thirty-four million times and has generated over eighty thousand comments. This is the “official” version, and is viewable next to the announcement of the twenty-five-year anniversary edition of the Thriller album. The song is iconic for more than one generation of music listeners and fully integrated into our cultural lives. For example, the movie Thirteen Going on Thirty includes a scene where the lead character, played by Jennifer Garner, adds life to a dead party by getting everyone to do the dance from “Thriller.” This movie clip has been viewed over seven hundred thousand times and has generated over eight hundred comments, many discussing how difficult and fun it is to learn the dance sequence from Thriller.

It is almost certainly the case that the upload for the clip from Thirteen Going on Thirty was done without permission, though, given the length of the clip in the context of the entire movie, the three minutes and thirty-four seconds might be interpreted as a fair use given that it was reproduced for non-commercial reasons and is only a short clip from a much longer movie. Additionally, while the Thriller music video cited above is the “official” version, there are unofficial versions put up by fans that can be viewed, as well as multiple derivative versions. Often the commentary by viewers makes claims about the creativity of the original or how much they like the clip.

57. Id.
58. See You Tube – KerolBr’s Channel, http://www.youtube.com/user/KerolBr (last visited Apr. 21, 2009). A thorough fair use analysis would require a separate paper, but please see supra note 44 for the criteria for fair use. Given its non-commercial intent, short duration, and the fact it most likely does not interfere with the market for the original, an argument can be made for why this is a fair use.
59. A general search for “Thriller” turns up over eighty-seven thousand hits. See YouTube, Results of Search for “Thriller,” http://www.youtube.com/results?search_type=&search_query=thriller&aq=f (last visited Apr. 21, 2009). While most are probably not
While these videos are possibly copyright violations, how these clips harm the commercial viability of the original “Thriller” is less clear. On a purely commercial level, most people who want a copy of “Thriller” the song have it (and they could not download it from YouTube anyway). If consumers are seeking the video for “Thriller,” it is not generally available for purchase and the quality of a YouTube version is relatively poor, thus YouTube cannot be understood as a viable substitute for the commercial copy, even if it were easily available. The clip of the dancing from Thirteen Going on Thirty is not a replacement for the entire movie, and it is difficult to imagine a YouTube viewer watching the entire movie in five or ten-minute increments when they can rent the entire copy easily and cheaply. The movie scene works because the video for “Thriller” provides a connection between otherwise disparate individuals and creates an important cultural moment that can be shared. Contemporary viewers comment on both the original, the derivative found in the romantic comedy, and their own personal versions. Such is the cultural flow of creative work.

1. YouTube Direct Appropriations Should Be Considered Fair Use

Direct appropriations, such as the examples above, fall into a substantive gray area when it comes to copyright infringement and fair use. Because no effort to transform the original has been made, it is almost guaranteed that if the copyright owner sought to have these videos taken down, they would be.

60. See YouTube – “Thriller” on Thirteen Going on 30, supra note 56; see also YouTube – Michael Jackson – Thriller, supra note 54.

61. See, e.g., Jake Swearingen, MUSIC Directors’ Cuts, WIRED, Oct. 2008, at 102, available at http://www.nytimes.com/2009/04/18/technology/internet/18iht-copy.html?_r=2&pagewanted=1&ref=global-home. As an interesting side note, YouTube has been attributed with saving the music video from extinction. Id. Young music-video producers are moving their music videos to YouTube, thus further conflating the professional/amateur divide as well as the commercial/noncommercial divide. Id. Given that the outlet for videos going direct to music fans exists on YouTube, it is not the case that all music available on the site has been pirated.

62. However, if they wish to watch the entire movie in ten-minute increments, it is currently available. See 13 Going on 30, available at http://www.youtube.com/watch?v=2nHTJRCnndU. (last visited Apr. 20, 2009). The person uploading the video in segments, “789456Anita,” seems aware that her actions are at least against YouTube’s policy, but also demonstrates some level of understanding about copyright. She notes, “I have no idea what to write so youtube won’t get it off . . .” Id. She then goes on to place the disclaimer that “Copyright belongs to Columbia Pictures.” Id.
types of clips removed, YouTube would take them down. It is also likely that the people posting clips from copyrighted sources would not seek to have them reinstated because they would be unclear about the fair use options available to them, if they know that the concept of fair use exists at all. While it would seem that the time limit imposed by YouTube could be considered a default fair use standard, there is no grounding in the law for such an interpretation. Instead, the existence of movie clips, videos, and other copyrighted work on YouTube is contingent upon how carefully copyright owners police their works. However, even when a popular copyrighted work is taken off YouTube, that same content can be back up quickly: fans may replace the missing piece, or multiple versions may already exist that the copyright owner has not yet sought to remove.

2. Social Value of Direct Appropriation Exists

The propensity of copyrighted works to reemerge on YouTube helps demonstrate the social value of these clips. These clips are tributes to important cultural moments—with the exception of the official Michael Jackson channel, no one is trying to profit from putting these videos on YouTube (ignoring YouTube’s interests for the moment); instead, YouTube opens up a platform for sharing of our most common cultural products: commercial culture. In the process,

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64. In a submission to the U.S. Copyright Office during the recent Digital Millennium Copyright Act rulemaking procedures, the Electronic Frontier Foundation pointed out that creators of remix videos are unlikely to have access to legal counsel, to understand the nuances of copyright law, or to exercise their rights to YouTube counter-notices. Response of the Electronic Frontier Foundation to Exemption to Prohibition on Circumvention of Copyright Protection Systems, 73 Fed. Reg. 58083 (proposed Oct. 6, 2008) (to be codified at 17 U.S.C. § 1201(a)) (asking the Library of Congress to exempt certain classes of works from the prohibition on the circumvention of access control technologies for the period between 2009 and 2012), available at http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf.

users decommodify these cultural moments and give them authentic meaning—meaning that cannot exist without the shared value contributed by the people who are linked through a common cultural experience. These video clips generate a dialogue among people and produce a cultural flow that in many cases even crosses international boundaries. According to Rosemary Coombe, “Everywhere individuals and groups improvise local performances from (re)collected pasts, drawing on foreign media, symbols, and languages”; forces of global capitalism have created a situation of late modernity that is “‘decentered, fragmented, compressed, flexible, refractive,’ and meanings are fashioned with materials from diverse cultural lifeworlds.”

Not only do people make meaning from “diverse cultural lifeworlds”; I would argue that only when a commodity achieves a cultural flow does it gain value at all. In fact, culture industry products only become successful in the first place when people find social meaning in a work that transcends market value. If Thriller had not been so popular we certainly would not be celebrating its twenty-fifth anniversary, but instead it would be resigned to the dustbins with so much other 1980s music that did not catch the public’s attention.

Despite the possibility of copyright infringement, the social and political value of providing a forum in which to discuss these directly copied works should not be underemphasized. For example, when Steven Colbert roasted President Bush at the White House Correspondents’ Association dinner, his speech was considered a disaster in the mainstream media. However, it became required watching on YouTube. The speech was almost immediately taken off of the site as a copyright violation, but has since made its way back, with one version posted a year ago generating over one million views and over 3,000 comments. As one viewer pointed out,

This whole thing is interesting, because he’s not playing to the crowd who was in that dinner hall that night. He was playing to the people at home and those (like us) who would watch it on the Internet later. WE were the ones who found it

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67. See Michael Scherer, The Truthiness Hurts, SALON.COM, May 1, 2006, http://www.salon.com/opinion/feature/2006/05/01/colbert/ (providing one account of the press reaction regarding many who were uncomfortable with Colbert’s approach; it was not what they expected)).

hilarious. Not just because of what he said, but because the crowd there TOTALLY DIDN'T.69

Not only is there political value in having access to this speech, but the ways in which a video such as this can go viral and beyond the control of the copyright owners is an important mechanism for communication in a world where our primary cultural references are visual instead of text-based.

Posting an entire segment of a news clip, humorous program, or music video creates a way of viewing media never experienced before. Prior to YouTube (and other services like it), if you missed the show, did not know to videotape it, or did not know someone with a copy, you simply had to rely upon the filtered versions provided by the major news outlets or a friend’s relayed interpretations. The only media items making it to video stores used to be feature-length movies, although they now carry television series on video as well. All other interesting stories simply had no secondary market after the first televised showing.

YouTube has changed this, as has webstreaming and other Internet technologies that allow for instant replay and multiple viewings. They place previously tethered entertainment and news into the wild—and, in the process, transform the conversations that we can have about our political figures, socially relevant events, and culture industry artifacts. Colbert understood that his remarks would reach an entirely different audience than the one controlled by the press corps and the president’s office.70 The new media environment allows for many to see the event in its entirety; it allows for multiple replays and discussion. Old-format media failed to see the significance of the event, now viewed by millions via YouTube, as a viral political tool, and instead sought to keep it off of the Internet using copyright.71 However, YouTube allows for a disintermediated,


71. C-SPAN owned the copyright to the video and requested that YouTube take it down. Web Sites Yank Colbert Video, CHI. TRIB., May 9, 2006, at C15.
and thus more authentic, political experience. You can see it for yourself—and instead of being forced to listen to blathering political pundits, you can become your own. Direct copying, then, has a legitimate social and political function that puts it at odds with copyright law.

3. Transformative Works on YouTube Should Be Considered Fair Use

Aside from direct copying, there is also a vast array of multiple and diverse transformative works available on YouTube. These include fan videos, the reappropriation of characters used in different and often deviant contexts, machinima, and home videos set to music. For example, it is unlikely that the 1,500 inmates at the Cebu Provincial Detention and Rehabilitation Center in the Philippines who have reproduced the choreography for “Thriller” did so with authorization. However, this video is wildly popular, having been viewed over 21 million times. Other versions of the “Thriller” choreography are available, including one created in the virtual world Second Life, all using the song and choreography from the original music video. As numerous situations like these continue to arise, legal commentators have begun to map out the importance and complexity of transformative works.

72. There are YouTube videos where the Sesame Street characters are engaging in all sorts of non-kid-like behavior. See, e.g., YouTube — Bert and Ernie Are on the Drugs, http://www.youtube.com/watch?v=hhVeDYdRgr0 (last visited Apr. 21, 2009); YouTube — Bert and Ernie Parody — Ernie I’m Horny, http://www.youtube.com/watch?v=MqWaU5Hv0lE (last visited Apr. 21, 2009).


74. Id. You can follow the “related videos” to watch the prisoners line dance to “Do the Hustle.” See YouTube — “Do the Hustle” (The Dance), http://www.youtube.com/watch?v=u-FhczpCZ84http://www.youtube.com/watch?v=u-FhczpCZ84&feature=related (last visited Apr. 17, 2009).


76. Rebecca Tushnet has done so for fan fiction. Tushnet, supra note 29. Greg Lastowka has done so for virtual worlds. See Greg Lastowka, User-Generated Content and Virtual Worlds, 10 VAND. J. ENT. & TECH. L. 893 (2008) (recognizing that user-generated content can create value but that the world of user-generated content is not entirely positive). Some content owners, especially of video games, are recognizing the importance of user-generated content and the interactive experience that needs to be provided, and are redesigning their products to integrate Web 2.0 interactivity into the video game environment. Steve Boxer, Power to the People: User-Generated Content is Transforming Gaming into a Communal Experience, DAILY TELEGRAPH (London), Oct. 20, 2007, at 19.

Sony's PlayStation Home is one example of users and producers converging around the creation of content. Id. As Peter Edward, the director of PlayStation Home says, “Giving people semi-ownership of the game itself is great for building up the bond between the games and the gamer, rather than it just being a commodity that you use and, once it's
When fans take culture-industry products and make them into something that has social value for them, where commercial compensation is neither sought nor demanded, they are engaged in what could be considered an important political act in a market-dominated world. I argue that they are decommodifying culture by taking it out of its profit-oriented platform and transforming it not only into a derivative work under copyright law, but also into something that has cultural meaning that goes beyond monetary value. For example, in the non-networked world, anyone who has sat around quoting lines from a Monty Python skit can understand how a product of the culture industry cements relationships and allows for cultural meaning to be produced that goes beyond the actual “product,” in effect decommodifying the object. We have always interacted with our cultural products; we just did not do it virtually before. However, box office numbers and advertising dollars are the only way commercial culture has to measure success.

Despite the creative energy associated with commodities being “decommodified” and placed within the cultural flow of human life, copyright renders illegal an enormously varied range of creative products by making all works related to the initial copyrighted work the “property” of the original author and criminals out of those who create these works. These derivatives include the remake of *Raiders of the Lost Ark* lovingly put together over years of hard work by Chris Strompolos, Eric Zala, and Jayson Lamb when they were kids, the

expired, you move onto the next thing. It’s great, because it gives longevity to games, which was a very difficult thing to do before.” Id.

77. Derivative works are “recast, transformed, or adapted” from “preexisting” works. 17 U.S.C. § 101 (2000). (defining a “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted,” or “[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship”).


79. As kids, Strompolos, Zala, and Lamb used their summers to shoot their own back-yard version of *Raiders of the Lost Ark*, painstakingly reenacting every scene. The final product was shown once locally, but fears of copyright kept the actors (once adults) from sharing their creation more widely. J. D. LASICA, *DARKNET: HOLLYWOOD’S WAR AGAINST THE DIGITAL GENERATION* 7-11 (2005).
home videos depicted in the recent movie starring Jack Black, *Be Kind Rewind*, and footage in many documentary films.

Commercial culture causes problems for those inspired by the predominant cultural form we have today—we are trapped in a commodity culture but not allowed to use the intellectual property of commercial creators to imagine our own worlds and scenarios. From a corporate perspective, the problem is that, as Rebecca Tushnet points out, “imagination trumps ownership,” and transformative work is difficult to stop because it is the manifestation of the cultural conversation we all engage in as social beings. From a fan perspective, “imagination trumps ownership” as well, and this is a positive outlet for our self-expression. The conversation about our cultural artifacts facilitates connections, but making connections and allowing for this conversation to lead to something new is contingent upon the transformative aspect of art and thus rendered highly problematic under current copyright law.

4. Appropriation of Soundtracks for Personal Use

One other popular YouTube genre is the home video appropriating copyrighted music as a soundtrack. The Lenz case discussed earlier in this section demonstrates that copyright owners can take even the smallest appropriation of their songs for personal videos quite seriously. These home productions often copy an entire song or significant parts of one to develop their narrative. Climbing videos, for example, use music to accentuate the action of the video

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80. In *Be Kind Rewind*, when all the videos in a struggling video store are accidentally erased, the employees decide to remake the movies themselves and rent them as “sweded” versions of the originals (with sweded being a term invented by the employees). They are ultimately shut down by the FBI and all their remade videos are destroyed. In conjunction with the movie release, Jack Black issued a “competition” for “sweded” movies like the ones found in *Be Kind Rewind*, and, as a result, you can now find a plethora of reappropriations of feature films, remade by everyday people on YouTube. See Playlist for Sweded, available at http://www.youtube.com/results?search_type=&search_query=sweded&q=f. The copyright implications of these productions are interesting. See *Be Kind Rewind* (New Line Cinema 2008).

81. The Center for Social Media has worked to address this problem by defining best-practices for fair use and by advocating for legislation over orphan works. See Fair Use & Copyright – Center for Social Media at American University, http://www.centerforsocialmedia.org/resources/fair_use/ (last visited Apr. 21, 2009); see also Angus MacQueen, *The Revolution Must Be Televised: Instead of Being a Threat, User-Generated Content is an Exciting Opportunity that Can Revitalise the Art of Documentary Film-Making*, GUARDIAN (London), Oct. 30, 2006, at 8 (arguing that user-generated content is producing innovative and talented work that should be supported).


83. See supra notes 46-48 and accompanying text.
such as the May 5, 2008 upload by “Lolobrenda.” This YouTube video is an eight-minute and four second-long creation encapsulating a climbing trip, complete with scene and music changes. Such unauthorized uses of music, even music legally purchased by the video creators, violates the law.

A more complex example is “Zac Sands Climbing No Redemption 5.13 Red River Gorge.” This two-minute and fifty-seven second-long video, viewed over sixteen thousand times, was produced and uploaded by “victorypro,” a twenty-four-year-old man named Spencer who lists his occupation as “video productions” and his company as Victory Productions. The footage of Sands climbing is set to Weird Al Yankovic’s “White & Nerdy.”

A literary interpretation of the video might suggest that “victorypro” is offering a social commentary on a white guy doing something that seems far from nerdy. However, it is much more likely that he just liked the song. The Zac Sands video highlights yet again the complexity of cultural exchange. The Yankovic song is a parody of Chamillionaire’s “Ridin’,” and it took Weird Al into the Billboard Top 10. Yankovic released the music video of “White & Nerdy” on the Internet, making it one of the most popular YouTube hits available, having now been viewed over 47 million times. Despite parody being

85. It has been viewed 314 times—up from 188 views in November—which still suggests its purpose was to document the trip and to share the adventure with friends. Id.
86. The video includes music by Amy Winehouse, Bonobo, Dubble D, and Whitest Boy Alive, all credited at the end of the video. No information on the site suggests that the songs were licensed, though the Amy Winehouse song, “Back to Black” is linked to the iTunes store. Id.
88. Views for this video went up from just over 13,000 in November to over 16,000 in April of 2009. Id.
91. I emailed him to inquire about the song choice, but he has not replied.
92. See YouTube – Chamillionaire – Ridin’, http://www.youtube.com/watch?v=S7noJEFuSw (last visited Apr. 21, 2009). The “Ridin’” version has been viewed 10 million times. Id.
94. YouTube – “Weird Al” Yankovic – White & Nerdy, supra note 90. In November 2008, the video had been viewed 37 million times. According to Wikipedia, the video was
an acceptable fair use, Yankovic splits profits with, and gets permission from, the original artist. However, his work is in itself an incredibly labor-intensive form of creation—one might argue that it is even more difficult to create than the original because it requires comic timing and the clever rewording of a song’s lyrics. Weird Al’s songs do not only accompany climbing videos; it is possible to find living room performances of them on YouTube, thus turning parody into tributes to parody.

One such appropriation of the parody is “White and Nerdy in Lego,” a video in which “jrdmovimkr” has painstakingly choreographed the song with Lego action figures. He asks that viewers read his info blurb about the video first, which states:

Some people have questions about my video, and a lot of them are answered here:

Special thanks to lasered97 for the neat weird al trippy with my lego version! Go see all of his videos!!! I made a video off of Weird Al’s music video to “White and Nerdy” . . . but it’s in LEGO!!! Hope you like it!!! It took me a LOOOOOOONG time to make it, but it was a lot of fun!! (Ok, it took me a week to make it) This is my very first film that I have made in 16 frames per second. I also used Windows Movie Maker to put the pictures together. The “effects” like the (ping pong ball) were all done in Microsoft Paint. Please comment!! :) Don’t take this video and post it as your own!!!!

The commentary is illustrative of the culture of sharing and innovation that exists on YouTube. The author understands his own position in the cultural flow of objects, but he also wants to highlight the labor he has invested in the Lego version, as well as suggest that norms of plagiarism still apply. This creator is not attempting to pass off the song as his own, but instead building upon it to create something different and hopefully entertaining.

These videos, all of which take substantial portions of the songs involved, are more egregious violations of copyright than Lenz’s dancing baby. Thus, they are targets for removal, especially those productions that might be deemed commercially driven. However, it is not at all clear how these videos harm the music’s copyright owner,
especially if the songs included can be linked to immediate download and purchased via iTunes or Amazon MP3. Certainly, the copyright owner may not be able to control all possible uses of their product, but should a balanced public policy allow cultural products to be so rigidly owned in the first place thus making future generations of creative work more difficult and expensive? Instead, the cultural flows that make climbing videos and lego versions of popular songs possible, suggest the ways in which creative talent is inspired and remade by interaction with the work of others. Videos like Victorypro’s enrich our cultural lives. The user-generated content for which YouTube provides a platform allows us to see the humor, innovation, and self-expression of our fellow human beings.

One final example of music and cultural transformations takes us into the world of parkour, a “user-generated” urban movement. Parkour (according to yet another user-generated platform, Wikipedia) involves urban kids executing physically demanding and acrobatic movements. The word comes from the French term for the obstacle course method of military training—parcours du combatant. For those who practice parkour, the urban environment is the obstacle course. The roots of this youth movement come from pre–World War I visits by Europeans to Africa. YouTube is host to many parkour videos, but the copyright violations associated with Parkour YouTube videos should be understood in the context of the cultural appropriation of parkour itself.

The culture industry can take the idea of parkour, which was created as a form of individual self-expression, and use it for its own purposes—an act that constitutes a cultural appropriation with no legal consequences. The commercial appropriation of parkour almost destroyed it before it could develop as part of urban youth culture. As Matt Mason notes, “IIt was a real movement, but it was turned into a corporate circus almost instantly.” Once something becomes a commercial entity where even Madonna is doing it, “it is difficult for a movement to gain grassroots appeal.” For Mason, who

101. Id.
102. Id.
103. Id.
105. One example where parkour has been commodified is the use of it in the opening scenes of Casino Royale. See CASINO ROYALE (Sony Pictures 2006).
106. MASON, supra note 5, at 223.
107. Id.
traces virtually all cultural innovation from the grassroots to commercial culture, youth culture is forced to go even further to the edge in search of something authentic.\textsuperscript{108} As he puts it, “New youth cultures can’t be as safe as those of days gone by, because if they stay within socially acceptable limits, marketers pounce, and before long they are just another branded spectacle.”\textsuperscript{109} It is a one-way street as far as the culture industry is concerned. Film producers and musicians can mine the underlying culture for new products, but these products cannot be shared by users without violating the “rights” of property owners.

5. Fan Fiction and Derivative Works

Another way in which people use YouTube is to post videos that take place in cultural worlds created by the culture industry. Because characters and fictional worlds belong to their creators, any unauthorized transformations can be stifled to protect intellectual property rights of the author.\textsuperscript{110} One \textit{Harry Potter} fan included a claim—“FAN-MADE VIDEO, NOT FOR PROFIT NO INFRINGEMENT INTENDED”\textsuperscript{111}—to her adaptation of different clips from the \textit{Harry Potter} movies dubbed to the audio of the trailer for the movie \textit{Pride and Prejudice}. While this particular fan has produced a number of different fan videos, her declaration of intent will not be sufficient to save her from a legal dispute if one were to be forthcoming.\textsuperscript{112} The \textit{Harry Potter} universe has not been friendly to its fans, with cease-and-desist letters being a popular method of controlling the brand.\textsuperscript{113} J.K. Rowling recently won a copyright suit against the man who tried to publish a commercial version of his fan-written \textit{The Harry Potter Lexicon}, the online version of which Rowling had admittedly used herself while writing the final books in the series.\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
    \item[108.] Id. at 225.
    \item[109.] Id. at 225.
    \item[112.] See Tushnet, \textit{supra} note 29, at 678-81 (discussing the prominent use of disclaimers in fan fiction despite their lack of legal relevance).
    \item[113.] See, e.g., Chilling Effects Clearing House – Harry Potter in the RestrictedSection, http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522 (last visited Apr. 21, 2009). Henry Jenkins points out that while Rowling herself has been fairly lenient about fan fiction, Warner Brothers, who owns the film rights, tends to very vigorously enforce what it perceives to be its property rights. See JENKINS, \textit{supra} note 34, at 185-86.
\end{enumerate}
\end{footnotesize}
Star Wars has also created a fictional universe populated by fans and derivative works. Many are familiar with the Chad Vader videos, where a character that speaks and acts like Darth Vader manages a grocery store, the first of which has been viewed over eight million times. Another Star Wars derivative parodies Cops using Imperial Storm Troopers. This clip has been viewed over 650,000 times and includes scenes taken from the Star Wars movies interspersed with acting and action scenes by amateur actors. Yet another video, viewed over six million times, combines Star Wars Lego figures with a voiceover of comic Eddie Izzard’s standup routine about Darth Vader going to the canteen on the Death Star.

Star Wars works hard to maintain the purity of its brand and employs an individual named Leland Chee full time to maintain the integrity of the Star Wars universe. All products associated with the Star Wars brand have been licensed since the late 1970s, when George Lucas recognized the possibilities of a branded universe. However, in a press release following the successful lawsuit of a
British man accused of producing unauthorized Imperial Stormtrooper outfits, Lucasfilm, the company founded by George Lucas and owner of the Star Wars brand, sought to assure fans that while the company will protect their brand against unauthorized commercial actions, they seek to retain a space that allows for imagination and flexibility by fans:

[M]any Star Wars fans around the world produce replicas of Star Wars costumes for their own personal use and enjoyment, an activity to which Lucasfilm Ltd. has no objection. One such group, the “501st Legion” of Stormtroopers, is a global organization that has often worked with Lucasfilm and its partners. “We appreciate that Star Wars has sparked the imaginations of fans around the world,” [Howard Roffman, President of Lucas Licensing] said. “We would never want to discourage fans from showcasing their enthusiasm for the movies. However, anyone who tries to profit from using our copyrights and trademarks without authorization crosses the line; they become an infringer and we will go after them.”122

Other fan bases and transformative works have not been so lucky.123 Such a declaration by Lucasfilm, while helpful, is not sufficient.124 First, they can change their minds at any time and, given the expansive ownership over characters in the Star Wars universe, could decide that mashups using Star Wars characters that do not fit within the acknowledged “official” world will be banned. Even if Lucasfilm is generally supportive of their fan-made works, because fan uses raise fair use questions that would be dealt with legally on a case-by-case basis, the territory for legitimate creativity is

122. Press Release, Lucasfilm Ltd., Lucasfilm Ltd. Wins Major Copyright Infringement Lawsuit Against Star Wars Stormtrooper Pirate (Oct. 11, 2006), available at http://www.lucasfilm.com/press/news/news20061011.html (reporting an award of damages and a permanent bar from “copying, reproducing, importing, licensing, marketing or displaying” in the United States). However, in England, Lucasfilm was not as lucky. See Rachel Williams, UK Designer Wins Star Wars Court Battle, GUARDIAN (London), Aug. 1, 2008, at 5, available at http://www.guardian.co.uk/film/2008/aug/01/starwars.design. Andrew Ainsworth, who makes and sells the Stormtrooper costumes in the UK, can continue to sell his version in all countries but the United States, according to Justice Mann, also in the UK. Id. Ainsworth has not yet paid the $20 million in damages ordered by the American court. Id. It is also important to note that Ainsworth worked on the first Star Wars film. Id.

123. Fans of Buffy the Vampire Slayer, Star Trek, Anne McCaffery’s Dragonslayer book series, and Harry Potter have all received cease-and-desist letters from the parent corporations who own the copyrights. Chilling Effects Clearinghouse, Fan Fiction: Cease and Desist Notices, http://www.chillingeffects.org/fanfic/notice.cgi (last visited April 20, 2009). The Chilling Effects website is compiling these letters in an effort to “[m]onitor the legal climate for Internet activity.” Id.

124. Jenkins notes that Lucas allows for participation only on his terms. See JENKINS, supra note 34, at 15. For example, the fanzines publishing Star Wars erotica have not been well received. Id.
very unclear. The line between commercial uses and noncommercial uses is also not clear-cut.

The Star Wars Lego skit, discussed earlier, offers further complexities. Not only is it based upon the Star Wars universe, but it also reproduces a televised standup routine by Eddie Izzard, which means copyrights exist in the televised version of the comedy routine and, if written down, in the text of the standup routine itself. This transformative work might be in danger of being taken down—not only because it plays with the Star Wars universe in a way that the Star Wars franchise might disapprove, but also because it appropriates the televised broadcast of the routine of a well-known comic. While a fair use argument could be made, and the Lego version could be read as a parody of the stand up routine and of Star Wars, the work exists in an unprotected zone, and remains in danger of being eliminated.

6. The Digital Millennium Copyright Act and Safe Harbor

Fan videos demonstrate the love some people have for a fictional world. However, the use of the Digital Millennium Copyright Act’s notice and take down procedures to enforce copyright over cultural products demonstrates that while fans may not be interested in profit, corporate owners are interested in tightly controlling what they consider to be their property. Yet another story that combines a Star Wars fan with media appropriation illustrates how some copyright holders attempt to assert total control over their copyrighted works, even when their work is appropriated from others. Christopher Knight produced a series of campaign ads in 2006 when he ran for the North Carolina Rockingham County Board of Education. His ads showed him using a light saber and also depicted the Death Star blowing up a school as the voiceover critiqued the No Child Left Behind legislation. Knight allegedly put his

125. See Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. PA. L. REV. 549, 552-54, 622-23 (2008) (arguing that we lack any systematic way to view cases that include a fair use claim, and concluding that we cannot assume that judges will follow “leading cases” or that they carry “prescriptive force”).

126. See 17 U.S.C. 106(4), (5) (2000) (describing exclusive rights, including the right to perform and display these works in the case of dramatic or choreographic works or other audiovisual works).

127. See YouTube – Christopher Knight for School Board TV Commercial #1, http://www.youtube.com/watch?v=nLi5B0Iefsk (last visited Apr. 21, 2009).

128. Id. See also Joetta Sack-Min, “What about NCLB?” 196 AM. SCH. BOARD J. 26 (Feb. 2009). No Child Left Behind is officially called the Elementary and Secondary Education Act (ESEA). Initially passed in 1965, the legislation became an important part of
commercials on YouTube to share with family and friends. While his homemade commercials were not sufficient to get him elected, they did bring him to the attention of the VH1 program Web Junk 20, where Knight’s video was lampooned by host Aries Spears.

Web Junk 20 uses YouTube videos without permission (according to Knight), adding humorous commentary. It is the new generation of America’s Funniest Home Videos, but viewers do not have to submit videos because they are already available online. When the Web Junk 20 video was brought to Knight’s attention, he liked it so much that he put it on YouTube to share with his family and friends. However, Viacom saw Knight’s video as their intellectual property because they had included a few seconds of additional commentary. Under the notice and takedown procedures of the Digital Millennium Copyright Act (DMCA), YouTube was ordered to remove the video, which it proceeded to do. Viacom argued that the inclusion of commentary and the image of Aries Spears transformed the original commercial by Knight into their copyrighted material, despite never gaining permission from Knight to use his video. Knight argued that his commercial was also copyrighted and VH1 had created a derivative work. After Knight filed a DMCA counter-

the Bush Administration’s agenda Id. The act, which seeks to establish national achievement benchmarks is currently up for reauthorization. Id.  
130. Id.  
131. Since 2006 there have been business initiatives to capitalize off user-generated content by placing creative work done by every-day people on television. See Peter Grant, Invasion of the Hamster Video; Comcast and Verizon Test Market for Putting Homemade Videos on TV, GLOBE & MAIL (Canada), Nov. 8, 2006, at B13. The content generated by users is seen as the raw materials that can be used to make a product that will be profitable. Id. Grant does not discuss the ways in which users might be personally compensated for the commercialization of their videos. See id.  
132. Chris Marlowe, VH1, iFilm unspooling Web Junk,’ THR.COM., Dec. 28, 2005, available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?nu_content_id=1001738403. (last visited Apr. 20, 2009) (reporting on the new series, Web Junk 20, which will collect videos spreading virally over the Internet and use them for the television show. Id. The goal is to have a democratic “viewer-generated” show. Id. No mention is made that permission will be sought to replay the videos.  
134. Posting of Chris Knight (Viacom Hits Me with Copyright Infringement for Posting on YouTube a Video that Viacom Made by Infringing on My Own Copyright!) to The Knight Shift, http://theknightshift.blogspot.com/2007/08/viacom-hits-me-with-copyright.html (Aug. 29, 2007, 00:29 EST).
notification claim and blogged about the case, Viacom chose not to proceed.135

While engaged in this dispute with Knight, Viacom published a statement to the Electronic Frontier Foundation (EFF) claiming that it did not challenge “users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy, or transformative use of a limited excerpt for noncommercial purposes.”136 However, the Knight case and the ongoing litigation against YouTube demonstrate the hypocrisy, if not complete dishonesty, of this statement.

In its ongoing lawsuit against YouTube, Viacom claims that “YouTube’s brazen disregard of the intellectual property laws fundamentally threatens not just Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy,” and that YouTube has done nothing to halt “massive infringement.”137 Viacom’s complaint further argues that YouTube is directly liable because it is YouTube, and not users, that “commits the infringing duplication, public performance, and public display of Plaintiffs’ copyrighted works, and that infringement occurs on YouTube’s own website, which is operated and controlled by Defendants, not users.”138 In other words, the platform itself is the infringer, not the people making the content. Furthermore, the complaint wants us to assume that the alleged 150,000 violations do not include possible fair uses.139


137. Complaint for Declaratory and Injunctive Relief and Damages at 2, 3, Viacom Int’l Inc. v. YouTube, Inc., No. 07-CV-02103 (S.D.N.Y. Mar. 13, 2007), available at http://news.findlaw.com/nytimes/docs/google/viacomyoutube31307cmp.html; see Alexis Allen, Comment, Battling in the Name of Balance: Evaluating Solutions to Copyright Conflict in Viacom International v. YouTube, 2007 BYU L. REV. 1023 (providing a legal analysis and predicting that too much is at stake on both sides and that a settlement is therefore likely); see also Kim, supra note 63 (tentatively suggesting that YouTube should prevail but that it is difficult to fully determine).


139. See id. The complaint alleges that Viacom has found over 150,000 unauthorized clips viewed 1.5 billion times. Id. at 3. Issues of fair use are not mentioned, as can be expected in the complaint. See generally id.
In its response dated April 30, 2007, YouTube argued that the DMCA was designed to balance owner rights with protection of the new form of communication made available by the Internet. Viacom, according to YouTube and Google, “threatens the way hundreds of millions of people legitimately exchange information, news, entertainment, and political and artistic expression.”

YouTube claims they are protected under the safe harbor provision of the DMCA. Furthermore, YouTube outlines a series of defenses that go well beyond fair use and opens the space to have a conversation over cultural appropriation and exchange.

If Viacom succeeds, the creative world that YouTube provides will be essentially destroyed because there will be an even stronger burden to take down potentially infringing works. As the case is structured now, it seems unlikely that YouTube will make a detailed articulation of fair use or the value of derivative and transformative works because their strategy is to argue that they meet the requirements established by the DMCA, instead of entering into a protracted argument about fair use. Instead, following the evolving legal analysis in the courts, which tends to favor old media companies against new ones, it is likely that a settlement that ignores the cultural generativity of the people using YouTube, but protects YouTube’s interests, will be reached. Thus, substantive issues that may shape the possibilities of new cultural forms in the future will be held hostage to commercial expectations.

Viacom’s strategy is to control all uses of its property without engaging in a discussion of fair use if possible. However, as the
examples above demonstrate, there are gray areas where Viacom may claim a copyright violation when legitimate fair use might be at play. Furthermore, social networking sites have transformed the space for cultural communication, and copyright law now hinders communicative exchange. For example, what should happen to the post by “LiberalViewer” that takes clips from *The Daily Show* and offers commentary on how Fox News edited news to favor McCain over Obama? Is this mini-documentary a fair use, or a copyright infringement because it takes the full segment of a Jon Stewart joke to make its political point? While the video is a commentary, the case-by-case analysis required of fair use may at the very least mean that the video will be taken down at Viacom’s request and then go through the arduous process of counter-notification in order to be reposted.

7. Encouraging Public Discourse

How should one consider the commentary that users attach to each YouTube video? Numerous copyrighted clips appear on YouTube where they generate discussion about the content, provide a quick way for friends to link an important topic to others, and generally help form a community around the content. The clip itself is not transformed, but the dialogue it generates seems important to consider. Steven Colbert’s speech to the press corps is an example. The viral viewing habits of people watching these videos lead to a new form of public discourse that copyright now hinders.

Being able to review clips of important political and cultural events and then engage in an online discussion is socially valuable. As Rebecca Tushnet notes, “[D]emocracy requires more than democratically elected rulers; it requires democratic culture.”

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150. See, e.g., Hunt, *supra* note 50, at 299 (arguing that sharing videos serves important political purposes).

Withdrawing relevant social and political commentary for copyright reasons is a form of censorship, an issue of some concern to those who study the intersection of copyright and the First Amendment.\textsuperscript{152} When copyright makes it more difficult to convey one’s message or engage in a political dialogue, this suggests that property rights have been accorded too much weight and that the public good that comes with political and cultural conversation is limited. Shifting focus towards protection of property instead of free speech strikes a balance that is too distorted to support.\textsuperscript{153}

8. Seeking a New Balance for Fair Use Analysis

Ultimately, the problem is not the advent of massive copyright infringement spawned by user-generated content, but instead the balance the system has struck between public access to creative work and the protection of this work as the property of the copyright owner. Generally, the ability to access copyrighted works is governed by fair use which allows future content creators to use portions of a work, “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”\textsuperscript{154} Despite the codification of fair use criteria, the lack of clarity regarding what is and is not a fair use and the bias of copyright law towards commercial interests often means fair use, while providing for some public commentary, does not go far enough towards protecting public uses of copyrighted materials.\textsuperscript{155} When courts do make decisions related to fair use, the standards seem far more sympathetic to commercial interests and towards protecting the commercial function of a work instead of a possible public benefit.\textsuperscript{156}

\textsuperscript{152} See Note, Recoding and the Derivative Works Entitlement: Addressing the First Amendment Challenge, 119 HARV. L. REV. 1488, 1491-94 (2006) (discussing the idea of “censorship misuse” and the tension between censorship, the First Amendment, and copyright law as found in \textit{SunTrust Bank v. Houghton-Mifflin Co.}, 268 F.3d 1257 (11th Cir. 2001)).


\textsuperscript{155} See Laura L. Mendleson, Comment: Privatizing Knowledge: The Demise of Fair Use and the Public University, 13 Alb. L.J. Sci & Tech. 593, 600-603 (2003) (arguing that fair use in the digital environment is threatened by increase privatization, limited access to content, and controls placed upon content).

\textsuperscript{156} Id. at 602. (“The tendency in the last several years has been for courts to look at fair use as a relic of print culture, unworkable in a digital environment.” Mendleson makes this argument in the context of commercial entities increasingly privatizing works). \textit{See also} Steven D. Smit, \textit{Make a Copy for the File….}: Copyright Infringement by Attorneys, 46 BAYLOR L. REV. 1, Winter 1994, at 10 (arguing that while fair use is decided in a case-by
Of the four fair use criteria, both the first factor, investigating the purpose of the work for commercial uses, and the fourth standard, dealing with the effect on the market of the original work, demonstrate the priority placed on protecting the market.\textsuperscript{157} While most YouTube videos are not made for commercial use and thus may be protected by the first criteria, courts have tended to place the most emphasis on the first and fourth criteria,\textsuperscript{158} meaning that possible harm to commercial uses are considered seriously. Finally, fair use is applied in a case-by-case manner so that no bright lines exist and continued confusion is the result.\textsuperscript{159}

The problems of copyright infringement will continue to grow. The principles advocated by content owners to govern user-generated content\textsuperscript{160} and the trend toward more “tethered” technologies, those using additional regulatory controls to limit the ways users use their products, suggest that a new balance needs to be struck.\textsuperscript{161} To that end, it is not user-generated content that is the problem, but the fact that copyright law itself strikes a balance that favors commercial interests too much. The law has always been written to protect the interests of the entrenched against the interests of future technologies, as Jessica Litman argued in 2001.\textsuperscript{162} As Litman noted, current copyright law leaves the public interest unprotected,\textsuperscript{163} something that needs to change.

\textsuperscript{157} 17 U.S.C. § 107.


\textsuperscript{160} \textit{See} User Generated Content Principles, supra note 38.

\textsuperscript{161} \textit{Jonathan Zittrain, The Future of the Internet and How to Stop It} (2008) (arguing that the trend towards “tethered” technologies limits the generative potential of the Internet).

\textsuperscript{162} Jessica Litman, \textit{Digital Copyright} 47 (2001) (arguing that the act of making new law is controlled by present interests against future interests).

\textsuperscript{163} \textit{Id.} at 70-74.
As with any good manifesto, this one ends with a series of demands. These demands take the form of proposals for revisions that strike a balance not between commercial entities, but between a public that has been given the tools of cultural production and the culture industry that has secured a monopoly over these tools for too long. The YouTube examples demonstrate that originality, authorship, and creative work are more complex than our legal system allows for and that people desire to be creative and socially connected outside an economic paradigm.\textsuperscript{164}

It is time the law is changed to reflect the habits and actions of everyday people. The lines between inspiration, appropriation, creativity, and theft form a blurry continuum instead of a clear set of bright lines.\textsuperscript{165} Congress needs to revise copyright to facilitate cultural flow without focusing too exclusively on commercial interests. The following are proposals for changes to the existing law.

IV. TOWARD A BETTER COPYRIGHT BALANCE AND A CULTURAL BILL OF RIGHTS

The online behavior of most people suggests that they do not know or care about copyright in their work or the work of others until the law makes them. Thus, the law does not reflect a social consensus regarding the use or production of creative work. Instead, what needs to be written into the law is a space for non-commodified goods to be created, circulated, and enjoyed without the threat of sanction. These new regulations should go beyond the fair use guidelines currently enshrined in the Copyright Act. As professors John Quiggin and Dan Hunter put it, “If public policy is to help rather than hinder, it must be designed to take into account the particular nature of the amateur modality.”\textsuperscript{166}

The most important demand this manifesto makes is that the law must be changed to allow for the maximum creation of derivative

\begin{footnotes}
\item[164.] There is a growing literature suggesting that what is called piracy is actually a vital part of economic development; that “crowdsourcing” is the wave of the future; and that we live at the cusp of a new technological convergence. See, e.g., Jenkins, supra note 34 (investigating the mash-ups of new media and the controversies this causes with old media); Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (2004); Mason, supra note 5; Clay Shirky, Here Comes Everybody: The Power of Organizing Without Organizations (2008) (arguing for the possibilities of new technologies to remove the barriers to collaborative social action outside a traditional economic paradigm); Cass R. Sunstein, Infotopia: How Many Minds Produce Knowledge (2006).


\item[166.] Quiggin & Hunter, supra note 7, at 239-40.
\end{footnotes}
works. Derivatives are cultural contributions that demonstrate labors of love and the fun of creativity. To film an entire music video using action figures just for the fun of it, even while appropriating the cultural references of the original, is still a creative act. Derivative works should be respected in their own right. Once a creative work becomes part of the cultural conversation, thus creating value for the owner, derivatives should be a legally acceptable option.

This legal change will not disrupt ownership in the original work. Furthermore, commercial derivatives will remain under the protection of the copyright owner. For example, if someone authors a book, he will retain control over movie adaptations. However, art inspired by the book and produced by fans should be an acceptable fair use so long as distribution remains noncommercial in purpose. Other permutations on the theme of the book, multiple story lines, and character developments would all be considered acceptable transformations so long as the commercial/noncommercial distinction exists.

The new balance between ownership and inspiration would create a public space for derivative works for noncommercial purposes. All items not produced commercially would be legal—amateur remakes of films, home videos with soundtracks, and so on—even when publically available via YouTube, and even if they become popular. Ultimately, commercial culture should not exert so much control over cultural products. Cultural and literary theory recognize the extent to which texts are disassociated with authors once they become part of the public sphere; it is time the law recognizes this fact as well.

A second key area of law is the function of the platform for exchange of creative work. If commercial sites benefit from the exchange of non-commodified cultural flow over their channels, that fact should be irrelevant to the creation of a non-commercial cultural flow. While the DMCA provides a procedure that requires service providers to become involved in copyright infringement cases, the platforms upon which noncommercial derivative works are published should be understood primarily as neutral actors. Platforms are just


168. See Tushnet, supra note 151, at 513.
that—platforms. It is difficult to conceive of the analog equivalent where the platform has been held liable for contributory infringement. Take, for example, a paper company that makes the paper used to reprint copies of a Harry Potter book or an art supply company whose supplies are used to plaster public spaces with graffiti—the platform is not liable for the illegal actions of the user.

The closest analog reached by the courts is Basic Books, Inc. v. Kinkos Graphics where the court held that photocopying discrete book chapters to create a new anthology for educational purposes was not a transformative use. However, while Kinkos was held liable for copyright infringement, the comparison is not exact because Kinkos compiled and sold the resulting coursepacks whereas service providers such as YouTube are not selling the videos, but instead providing a vehicle for users to share their creations with others. Peer-to-peer platforms like YouTube have had a transformative affect on our cultural dialogue by allowing many-to-many communication. Their commercial success is not built upon selling the videos (like the coursepacks), but by providing a space within which a public conversation can be held. To the degree that the culture industry feels the need to initiate legal action, it should engage directly with the person who posts the content.

Third, if corporations insist upon notice and takedown procedures that target works, there should be consequences for too aggressively asserting property rights against free speech rights. Aggressive notice and takedown procedures that harm free speech should be met with punishment equal to that of a copyright violation. For example, when Viacom initiates blanket notice and takedown procedures that sweep the good with the bad, then there should be an equal punishment for their actions against free speech. The law should strike a balance that allows for more commentary—including the type of comments that appear below YouTube videos.

There are also important acts of direct copying that still need to be considered. As Tushnet notes,

A cutback in the derivative works right wouldn’t help decide whether the Free Republic website infringed by copying whole newspaper articles and then letting people annotate them to reveal the mainstream media’s liberal biases or whether full-scale sculptures made from a postcard in order to highlight the banality of

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169. 758 F. Supp. 1522 (S.D.N.Y. 1991). See generally Laura G. Lape, supra note 158, at 677 (arguing that the doctrine of productive use that comes in part from the Kinkos decision hinders the appropriate application of fair use for the purposes of public criticism and future transformative and derivative works).

popular art infringed the photographer’s copyright . . . . Many of the ways in which people use copyright works creatively involve both copying and reworking.\textsuperscript{171}

Thus, a fourth point in this manifesto will recognize the social value of the copy as a copy. While it is important to create the possibility of transformative works, the function of a copy as a copy is also important socially and politically.\textsuperscript{172}

A new copyright law that reinvigorates fair use, balances public and commercial interests, and reduces the regulation of intellectual property needs to be written. Lawrence Lessig offers several suggestions in his book \textit{Remix}, including deregulating the amateur remix, simplifying the copyright code, returning to the original fourteen-year term, and decriminalizing Generation X.\textsuperscript{173} These are all important steps that can help strike the appropriate balance. I also endorse reducing the copyright term to the original fourteen years, after which the copyright owner must affirmatively renew the copyright in order to maintain control. The burden needs to be shifted onto the shoulders of those who seek a monopoly over publically relevant materials, not the other way around.

While changing the law to eliminate ownership of noncommercial derivatives might work, one could also address the issue through the fair use protections. These could be expanded beyond the “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”\textsuperscript{174} Quiggin and Hunter call for an innovative copyright policy that helps encourage cooperation as much as it does competition.\textsuperscript{175} One way to enhance cooperative efforts is to expand the concept of fair use to include uses that go beyond comment and criticism to include remakes, mashups, and creative options that transform the work and become creative entities of their own. Efforts by reformists to reinterpret fair use are underway, but policy changes to broaden fair use should also be recommended.\textsuperscript{176}

Ultimately, the key change should be that instead of leaving possible infringement to a case-by-case analysis, transformative noncommercial use should be more clearly protected. As law professor

\begin{itemize}
\item \textsuperscript{171} Tushnet, \textit{supra} note 151, at 552.
\item \textsuperscript{172} \textit{Id.} at 561-65 (arguing for the value of a copy as a copy).
\item \textsuperscript{173} LESSIG, \textit{supra} note 31.
\item \textsuperscript{174} 17 U.S.C. \S 107 (2000). Littman argues that fair use has not expanded or shrunk, but moved around, and that fair use “remains a doctrine that permits a relatively narrow swath of exceptional, rather than everyday uses.” See Jessica Litman, \textit{Billowing White Goo}, 31 COLUM. J.L. & ARTS 587, 590-91 (2008).
\item \textsuperscript{175} Quiggin & Hunter, \textit{supra} note 7, at 243.
\item \textsuperscript{176} See Center for Social Media at American University, \textit{supra} note 43.
\end{itemize}
John Tehranian argues, “transformative, or productive, uses of copyrighted works that would otherwise constitute infringements should be made exempt from statutory or actual damages. Such uses would be deemed, per se, noninfringing.” In most ways, this simply changes the law to reflect a reality that exists regarding how those not fully indoctrinated into copyright law interact with culture. Changing the law to create a space for noncommercial flow will take the chilling effect off current Internet-related speech and creativity and instead develop an underlying commons that is much more free. Furthermore, it will help avoid selective enforcement and eliminate the problems associated with the vast lack of knowledge on the part of most users regarding both their own creative work and the work they appropriate from others. The culture industry rifles freely through our culture and appropriates what it wants without attribution; it is time that limits are placed upon what it can do with the products it generates so that the one-way street toward cultural commodification becomes a two-way street that recognizes what people contribute to cultural flows.

V. CONCLUSION

The future requires a different balance between self-expression and commercial content—one that recognizes the vast flow of creative work that violates copyright but serves social and political purposes. Furthermore, it is not sufficient to simply hope for “tolerated” content, which, as legal scholar Tim Wu suggests, might be the unintended consequence of the DMCA. Wu’s position allows corporate culture to retain the power when in fact that power should be redistributed to recognize the importance of cultural flows in creative production. Tolerating content does nothing to solve the chilling effects associated with the current system. Furthermore, when fair use claims are


178. Trombley, supra note 86, at 649 (arguing that while YouTube has generated interest publically, fanvids have existed for decades).

179. Rethinking control over derivative works does not in any way displace the fact that attribution to the original author is still required. Allowing for greater play with culture is not the same as advocating plagiarism.

decided through litigation on a case-by-case basis this tends to create fragmentation and, I would argue, chills future creativity because standard norms of acceptable use are unclear or unworkable.

We need a cultural world where de-commodified culture prevails and people are able to build something creative on the foundation of what already exists. What becomes clear from studying the cultural phenomena made possible by YouTube is that users create despite copyright law and without an interest in how the law would potentially protect their work. Users appropriate from the only culture we have—commercial culture—but do so in a way that de-commodifies that culture. This is what the law should preserve.

Allowing for corporate actors to negotiate the scope, possibility, and framework within which user-generated content exists is simply not appropriate. Despite YouTube’s general position in favor of user-generated content, allowing it to be a stand-in for the public interest means that the rules governing creative exchange will be negotiated among top-down corporate agents with their personal interests in mind.181 Such a landscape will limit creative possibilities to those that can turn a profit.

It could be argued that there is no need to make changes to the law because there remain spaces under the law where many can play without too much fear of retribution. Numerous fan cultures, for example, have developed their own norms of noncommercial exchange to stay under the radar of copyright enforcement and, despite engaging in copyright infringement, have created a sort of equilibrium that allows them to function.182 Additionally, under the current structure, even when an infringing work is taken down it is almost immediately replaced by other fans; thus, online creative content remains available despite the law. However, such an ad hoc process has serious drawbacks when the potential exists for draconian punishment, including fines and possible jail time.183 Furthermore, platforms agreeing to implement technological solutions to find copyright infringement will further limit the possibilities of open

181. See Jennifer E. Rothman, The Questionable Use of Custom in Intellectual Property, 93 VA. L. REV. 1899, 1957 (2007) (pointing out that the result of an inevitable imbalance of power when intellectual property customs are created by corporate entities “is that smaller players in the [intellectual property] markets and the public at large are inadequately represented by the emerging customs”).

182. Fiesler, supra note 29, at 735 (arguing that fan fiction has largely been left alone in the last forty years, but that this might change as battles over user-generated content heat up).

183. Pfanner, supra note 78.
systems prevailing.\textsuperscript{184} Such a technological solution would preemptively destroy possible infringing works and even further skew Internet ownership toward the corporate. Thus, revising the law to better reflect creativity is a superior option to doing nothing at all.

While the examples discussed in this Article focus on the user-generated world of YouTube, the web is ripe with creative works by people who want to express themselves and connect with others. There are different layers of connectivity and different methods through which people connect, but ultimately the underlying urge is to produce socially meaningful communication. Clay Shirky, in his recent book \textit{Here Comes Everybody}, touts the benefits of mass amateurization for both creativity and business.\textsuperscript{185} His book describes a range of new possibilities emerging from users generating content to amateur news media, to new business models, all of which should be encouraged.\textsuperscript{186} Shirky notes that if mass behavior runs contrary to the law, as it did during prohibition and the federally mandated fifty-five-mile-per-hour speed limit, the costs of imposing regulation outweigh the benefits of deregulating.\textsuperscript{187} Copyright is similar—as an industrial model, it only functions to support already existing actors. Given that it has historically been negotiated as an industry-based law,\textsuperscript{188} it is inapplicable to the world created by everybody for everybody.

The problem of user-generated content is not the users or their content, but the corporate model that has captured the regulatory process and needs to be dismantled. It is time to severely limit the monopoly grant associated with copyright and open up cultural terrain so that all can play. It is time to understand that what is good for a business monopoly is not the same as what is good for the public. The terrain of user-generated content demonstrates that most of what is created serves the purposes of social exchange. We need to resist the commodification of our world and instead see what happens when we “wrap the Internet around everyone and spin the planet.”\textsuperscript{189}

\begin{quote}
\textsuperscript{184} Tarleton Gillespie, \textit{Wired Shut: Copyright and the Shape of Digital Culture} (2007) (arguing that copyright law will stifle innovation in digital culture); Zittrain, \textit{supra} note 161 (discussing the efforts to “tether” technologies and limit openness).
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\textsuperscript{185} Shirky, \textit{supra} note 164.
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\textsuperscript{186} Id.
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\textsuperscript{187} Id. at 298.
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\textsuperscript{188} Litman, \textit{supra} note 162, at 53 (arguing that copyright as negotiated between multiple parties can often become difficult to apply to those who were not at the bargaining table).
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\textsuperscript{189} Moglen, \textit{supra} note 1.
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