

Joseph Gallucci

Rina Pantalony

Copyright, Legal Issues and Policy

15 December 2008

Subtext, Meet Text: Fanvids and Fair Use

Fan cultures for works of art have existed for nearly as long as the objects being admired have. For many fans, it is not merely enough to pronounce one's devotion to the oeuvre of a particular author, or to a series of a particular television show; with great passion comes an equally great desire to participate, in some way, with the creative direction of the work itself. To this end, many fan cultures, dating as far back as an anonymously penned fake sequel to the first book of *Don Quixote*, have created "tributes" that rely on characters and settings theretofore established by another author. Such works, usually created by non-professionals who are avid fans of the source material, are often frowned upon by proponents of what we can call "serious" art, yet the practitioners of this craft are devoted to the work they do and take it very seriously. With the democratizing capabilities of the Internet, which allow for easy access and dissemination of information as well as affording a measure of anonymity to those who seek it, it has become easier than ever for fans to take a more participatory stance with the works which they so love. At the same time, this increased ability of fans to take material that is only theirs in sentiment alone – that is to say, material for which they do not own the rights – is coupled with the increasingly palpable risk of copyright infringement litigation.

Such is the case with "fanvids," a concept dating back to the early 1970s that has

now become more popular and easier than ever to perform with the advent of consumer-grade video editing technology. The “fanvid,” whose creators are dubbed “vidders” within the community, is a collage video that, in its most frequent incarnation, “mashes up” film from one source with audio from another source to create a new video. The resulting work is usually regarded as a comment on one portion of the work which it comprises. For instance, one of the first results when “Harry Potter fanvid” is typed into YouTube’s search engine is a video that takes footage from the film version of *Harry Potter and the Goblet of Fire* and re-edits it to the Smashing Pumpkins’ song “Tonight, Tonight.” The resulting video syncs up the more dramatic moments of the Pumpkins’ song, which boasts bombastic string arrangements and portentous lyrics such as “And our lives will forever change/We will never be the same...”, with visually exciting and emotionally visceral moments in the film. The song thus becomes a comment on how the creator, in this case a YouTube user named “humanhosepipe”, feels about the film, that there is a certain something about *Goblet* that appeals to him or her that cannot be expressed through the original film’s editing and narrative structure.

While there is a great deal to be said, and that has already been said, about the affective nature of fanvids and the culture from which they arise, this paper will deal instead with the legal ramifications of this practice, such as they present an interesting example of the state of current copyright restrictions in the digital age. The wholesale lifting of someone else’s piece of music and the piecemeal editing of someone else’s film, coupled with the intent to distribute the two in tandem, obviously offers a number of potential legal hassles for the creator, particularly if the resulting fanvid runs *contra* the intentions of the original creators (cf. any number of fanvids that attempt to locate a

homosexual subtext in the original work, vids that cast aspersion on the cultural worth of the source material, etc.). A fair use argument for the creation and dissemination fanvids can, and as I argue, should, exist for fanvids; however, the current formulation of United States copyright law straitjackets the potential for unfettered artistic expression.

Before the Internet, fan cultures were based in the written word. Francesca Coppa traces modern incarnations of fandom's origins to science fiction periodicals from the 1920's such as *Amazing Stories*, where fans were encouraged to communicate with one another about story arcs and character development in their favorite sci-fi serials (42). *Star Trek* especially was an early locus for fan-centered activity, and one of the earliest fanvids is, in fact, a slide show created in 1975 by Kandy Fong¹. In the 1970's, with the advent of home-based video-recording technologies, it became possible for authors of fanfiction to visually imagine an alternate take on an established text. The process by which this was initially undertaken was fairly arduous: to dub a VHS tape onto another VCR can take hours and, in the case of television shows, the source material was usually itself home-recorded, resulting in mediocre image quality (to say nothing of audio, which was generally recorded from an analog source onto analog tape). Since the turn of the century it has become even easier for vidders to produce their art, thanks to DVD ripping software, Internet downloads, and high-quality, easily accessible video editing software such as Final Cut Pro. The final result exemplifies what Lawrence Lessig has dubbed "remix culture," the creative use of various sources of sound, video and text to create new works of fiction and non-fiction (Trombley 653).

¹ For reasons that go outside the scope of this paper, it is interesting to note that the majority of "fanvidders" are, and historically have been, female. Nevertheless this paper aims for gender neutrality when discussing hypothetical, non-specific vidders.

As Anna Rogozinska additionally points out, cultures of fandom have changed significantly with the introduction of both new media and the Internet. Where before fanfiction communities were “members-only” – one had to know someone who was already producing material and to rely on that person to introduce him or her into the fold, as it were – it is now easier than ever to obtain access to the communities producing fanfiction (or even to start one’s own community). Fan activity is hardly unique to YouTube; there are also fan fiction archives, fan websites, and LiveJournal communities (Rogozinska 35), many of which host fanvids as well as text-based fan fiction. YouTube is, however, the ideal medium of transmission for fanvids, owing to the substantial amount of bandwidth that hosting a number of large video files would take up on an individual’s ISP (Trombley 654). The Internet also makes it incredibly easy to locate and critique or comment on work produced by other fanvidders, with sites like LiveJournal offering a comment system for published works that mimics casual real-life conversation, and thus creates the potential for a degree of collaboration that was previously unknown to first-generation vidders (Rogozinska 39).

As noted in this paper’s introduction, however, there is a downside to the establishment of an accessible and visible network of fanvidders. There are a number of potential copyright infringement issues involved with vidding that pertain to both the video and audio elements that comprise the typical fanvid. While the motion picture industry has largely tolerated vidding, with only a couple of exceptions, record companies have been somewhat less kind, particularly to the audio portion of fanvids distributed on YouTube. The irony of this situation is not lost on Francesca Coppa, a member of the Organization of Transformative Works, a group dedicated to the

promotion and preservation of vids: “I can’t tell you how many songs I’ve bought after hearing them for the first time in a vid” (Walker). Many fanvidders, as a matter of fact, defend their practice by pointing out that it serves as free publicity for movies and television. Through screenings at conferences and tape exchanges, other fanvidders can take up interest in new shows, and the exchange of ideas afforded by LiveJournal communities and other sites of fanvid activity encourages active participation on the part of a show’s fans, which extends to an increased audience viewership for the television show or movie.

The comparison of fanvids to, say, a fanzine that produces Captain Kirk/Dr. Spock fanfiction, however, falls apart somewhat at the level of reception. Fanzines have typically limited distribution; they are often self-published and, as a result, only so many copies are usually produced, with some of the more popular magazines boasting a readership of no more than a thousand (Gran). The aforementioned *Harry Potter/Smashing Pumpkins* video was uploaded in November of 2006 and has already garnered 33,370 views. There are two potential ways to view this fact. If you are a production company or a record label that stands to turn a profit from each publicly transmitted broadcast of your film or song, that means that, 33,370 times over, somebody did not pay to access them. This line of thinking holds that, as the custodian of content, you are being ripped off by not receiving compensation. Many artists levy the claim that they are being robbed of their livelihood with every illegal download of their film or song, and a fanvid that makes use of their copyrighted material is no different in their eyes. On the other hand, and many fanvidders use this as a justification for their own actions, fanvids can be said to represent free publicity for the film or musician.

That this video has been available on YouTube for more than two years as of this writing is somewhat surprising in itself. Fanvids are theoretically easier targets for litigation than texts that adopt characters from the source work. Stories merely use the characters and settings established in the original work, which presents a minimal legal risk, especially if the author takes pains to point out that their work is not meant to be mistaken as something penned by the original author of the work. Fanvids, meanwhile, co-opt copyrighted video and audio material and the videos are placed on the Internet, most commonly on websites like YouTube, where anyone can view and listen to them. Additionally, as Rachael Vaughn Stiegel notes, litigation by publishers against authors of fanfic is typically a David vs. Goliath scenario: the fiscally superior monster versus the hapless little guy (Stiegel 26). It should be noted that so far, little actual litigation has been taken against fanvidders for their activities, largely because it is enough to send a fanvidder a cease and desist letter for them to take their material off of the Internet. Henry Jenkins, author of *Convergence Culture: Where Old and New Media Combine*, notes on his blog that “[fanvidders] were nervous that their works were vulnerable to prosecution for copyright violation from film studios, networks, and recording studios alike” (Jenkins). Most fanvidders do not have the resources required to take their case to court, and the end result is, essentially, censorship of fan work. However, many fanvidders persist in keeping their content posted, perhaps because they are well aware that a cease and desist letter will be a worst case scenario.

Fan culture has been extensively written about in law journals and magazines in terms of whether or not they violate the doctrine of fair use. In a 2007 article in the *William and Mary Law Review*, Jacqueline Lai Chung lay out the rights of the author

versus the rights of the reader in terms of the appropriation of characters in new works. The former's rights, Chung argues, are grounded in economic, property and moral rights-based rationales – I own the exclusive right to these characters, they are mine from which to reap a benefit, and furthermore, I worked hard to create them and it is immoral for you to infringe on my property in any way because the rights of attribution and integrity belong to me. However, readers, it may be argued, hold just as much a stake in the configuration of characters in new texts, especially stacked against a literary and artistic tradition increasingly marked by a postmodern concept of the “death of the author” and, in concordance, the death of originality as a romantic ideal. This flies directly in the face of the guiding concept of copyright, which protects the *original* creative expression of an idea and also points towards Lessig's conception of the “remix,” where the use of non-original materials is used to create a work that comments on the original text in ways its author did not intend. Chung also points out that many works seek to uproot dominant cultural icons by infusing new readings into the text. The entirety of “slash” fiction – fan works usually created by women that imply a homosexual subtext between male characters in an original text and are often very sexual in nature – falls into this category (Chung 908-17). Trombley, however, points out that fanvids are not often created purely as a countercultural stance, and many who practice it do not see what they are doing as subversive, necessarily, but many do argue that what they do should be legal and that copyright laws should be relaxed to allow them the free practice of their craft (657).

The four factors which constitute fair use are: 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 on the potential market for or value of the copyrighted work (§ 107). Ultimately, fan videos differ from one another in their approach to the genre and their aesthetic concerns, but there are a number of similarities that the majority of fanvids share that are worth considering in the context of fair use. The “purpose and character of the use” as far as fanvids are concerned relies to a large part on the extent to which the new work is being put to commercial use or is transformative. As far as commercial use goes, the justification that because one is not making money off his or her works that he or she is not violating fair use is a wrongheaded assumption (Stiegel 28), however much this might hold true for fanvidders. Most fanvidders do not charge for their works, except perhaps when it comes to physically trading tapes and one fanvidder asks another to cover shipping or purchasing costs. There thus needs to be an additional criterion that must be satisfied to gauge whether a fanvid fulfills fair use principles. Generally, the more transformative a work is, the better a chance it stands at falling under terms of fair use. Many fanvids are parodies or use the original footage to produce a commentary on either the show or film itself or on a larger political theme, both of which are afforded a measure of protection by fair use. It is not, however, a “get out of jail free” card to assert that a fanvid is a parody and thus protected from copyright infringement; the work must, per *Campbell v. Acuff-Rose Music*, “conjure up the work parodied if it is to have any artistic effectiveness” (Trombley 665). Trombley invokes *Campbell v. Acuff-Rose Music* in her analysis of fair use and fanvids to assert that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against the finding of fair use” (Campbell 579).

The second factor in fair use refers to the “nature” of the copyrighted work. This often refers to whether the original work is fictional or non-fictional. The former is less prone to copyright protection because facts, in and of themselves, are not copyrightable; their specific expression in a work, however, is. The third factor, the amount of the original work that is used in the new work, is usually less cut-and-dry. Video content, at the very least, certainly would be protected under fair use in the instance of fanvids. It is rare to see a fanvid make use of one particular clip of a movie for more than a few seconds at a time, and the majority of fanvids’ total running time is less than ten minutes, with many going well below even that length. Also, because the original work is usually transformed in significant ways in the user’s new work (e.g. through removal of the original audio track and rapid-fire editing and montage techniques), it is unlikely that the new work will reveal the “heart” of the original work in ways that will discourage viewers to seek out the original work (Trombley 668).

The fourth factor – the effect of the use of the work on the potential market for that work – is often the most important in determining whether or not a work constitutes a violation of fair use or not. It seems inconceivable that a fanvid would eat into a significant share of a film or television studio’s profits, given how, as a replacement for the original work, the new work would be considered a poor substitute by anyone’s standards. Watching all two and a half hours of *Harry Potter and the Goblet of Fire* in a movie theater or on one’s television is hardly the same thing as watching a six-minute fan tribute on a tiny computer screen, no matter how novel the scenarios presented in the fanvid are. Furthermore, the actual community of fanvidders, though their visibility has increased considerably thanks to the Internet, hardly constitutes a majority of either

Harry Potter or *The Lord of the Rings* or any other popularly fan-targeted work's audience, and given the time-consuming nature of the work, it does not seem like they will anytime soon. A fair use defense for the use of video in fanvids thus leans mostly, though not entirely, in users' favor (Trombley 672).

As Trombley's keen analysis of fanvids' legality points out, however, audio is a much trickier area to deal with than video. It is equally as noncommercial as film or video used in fanvids, but is decidedly less transformative. Many fanvids essentially function as music videos during which the entirety of a song plays to accompany the edited video footage. While the video and audio act of a piece in the total fanvid, it is hard to mount a defense of wholesale co-optation of an audio track as something which is there for the video to comment upon; much more often the opposite is the case.

Additionally, musical recordings come with their own set of legal underpinnings that make them more likely to fall under copyright protection (i.e. synchronization and performance rights). The relevant question here, however, is whether or not the audio track in a fanvid can be said to replace the original work in the marketplace, and Trombley argues that this is likely not the case. Much as no one would accept a grainy, streamed, highly edited and condensed work to be anything like a substitute for the original, nobody would likely either download a considerably large video file or listen to low-bit streaming audio on the Internet and accept it as a substitute for an actual .mp3 file.

Others writing about fanvids have supported the conclusions which Trombley draws in her essay. Judith Gran, an attorney and author of Star Trek fan fiction, applies *Campbell v. Acuff-Rose Music* to the writing and distribution of fan fiction.

Because fan fiction is a non-commercial, transformative use of the original material, there is a stronger presumption of fairness than there would be if the work was simply being copied verbatim or if the author of the fan work was collecting a profit. As she additionally points out, many readers of fan fiction have already seen the source material, or presumably, they would not be reading fan fiction about it (Gran). It therefore does not stand to reason that fan fiction serves as a replacement for the original text, as no reasonable person would confuse the fan work with the original. This argument equally applies to fan videos; nobody stumbling upon a clip of rapidly edited footage of the original movie soundtracked to a pop song would confuse it for an excerpt of the original work (though I add that it is nonetheless in the interests of whoever uploaded the clip to clarify this where possible.)

It is beyond dispute at this point to suggest that the copyright regime as we have traditionally known it can sustain itself in a digital age without resorting to increasingly unsavory mechanisms for self-enforcement. Under the Digital Millennium Copyright Act, for instance, it is considered illegal to rip a DVD for personal use, whether you are a fanvidder or a professor looking to compile a clip reel as an illustrative audiovisual teaching aid and regardless of whether you have actually paid for the disc itself. The Electronic Frontiers Foundation, aided by a consortium of sympathetic institutions such as the Center for Social Media at American University and the American Civil Liberties Union of Northern California, have thus taken it upon themselves to draft a best practices guidelines for fair use principles as they relate to user generated video content. The key principles include allowing a wide berth for transformative, creative use of material. Copyright owners are encouraged to pursue and take proceedings against non-

transformative, verbatim copying of their content, but works that use the original material in creative ways and that transform it in sufficient as manner such that it does not impact the market for the original work should be left well enough alone. The guidelines also discourages service providers from using “filtering” to block out or remove copyrighted content without first ensuring that the material being removed falls under fair use principles, while encouraging copyright owners’ adherence to a “three strikes, you’re out” policy for online user generated content. This policy states that it is acceptable to remove video content if and only if it satisfies the following three criteria: the video matches exactly video supplied by a content owner, the audio matches the work from that specific video, and that 90% or more of the content is composed of a single copyrighted work.

Further to these goals, on December 2, 2008, the EFF filed a petition with the Copyright Office urging exemptions for noncommercial video creators and for cell phone users who wish to “jailbreak” their phones to acquire applications from alternative providers (e.g. not from Apple, in the case of iPhones) or “unlock” their phones to allow their use on other networks. The former category consists of people who post homemade videos on YouTube, which includes creators of fanvids. Fred von Lohmann argues that this is a necessary step not merely towards creative expression but towards encouraging visual literacy in the 21st century. Vidders, he argues, should have the protections necessary to rip DVDs for not just personal expressions of fandom but to use images in a critical way (a good example of the latter would be Eric Faden’s *A Fair(y) Use Tale*, a video collage in which brief snippets of Disney films are pieced together to create a 10-minute-long educational film about fair use that is simultaneously a subtle critique of

Disney's fondness for litigation and copyright extensions) (von Lohmann).

Regardless of what one might actually think of fanvids as an artistic practice, they are certainly interesting for being both a technological extension of traditional fan practices as well as for their enduring popularity in spite of the potential for litigation that their makers face every day. Fanvids complicate the argument that fan fiction falls under fair use through their co-optation of not just already established characters and settings but of copyrighted audio and video segments. However much they might flaunt content owners' copyright to the works used in fanvids' creations, fanvidders should not be held liable to such and potentially damaging strict enforcements of copyright law. There is enough evidence to suggest that the fanvid as it is popularly known does not pose a considerable threat to movie studios' or record companies' market shares and hence their incentive to produce, and furthermore that to suppress the creation of fanvids not only bodes ill for consumers of content but, adversely, for its producers as well.

Works Cited

- Campbell v. Acuff-Rose Music*. 510 U.S. 579 (1994).
- Coppa, Francesca. "A Brief History of Media Fandom." *Fan Fiction and Fan Communities in the Age of the Internet*, eds. Karen Hellekson and Kristina Busse. McFarland, 2006.
- Copyright Act of 1976, 17 U.S.C. § 107.
- Electronic Frontier Foundation, et al. "Fair Use Principles for User Generated Video Content." *Electronic Frontier Foundation*.
http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf, accessed 13 December 2008.
- Gran, Judith. "Fan Fiction and Copyright." *Judith Gran's Fan Fiction*. August 1999,
<http://www.alternateuniverses.com/judygran/copyright.html>, accessed 14 December 2008.
- "Harry Potter fanvid: Tonight, Tonight." Uploaded by YouTube user "humanhosepipe" Nov. 19, 2006. http://www.youtube.com/watch?v=_eKNWtY4qHw, accessed 11 December 2008.
- Jenkins, Henry. "Fan Vidding: A Labor of Love (Part Two)". *Confessions of an Aca-Fan: The Official Weblog of Henry Jenkins*. Published 8 December 2008,
http://henryjenkins.org/2008/12/in_many_ways_the_emergence.html, accessed 14 December 2008.
- Lai Chung, Jacqueline. "Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters." *William and Mary Law Journal*. Vol. 49(903), 2007, pp. 903-939.

Rogozinska, Anna. "Virtual Fan Communities: The Case of *Harry Potter* Slash Fans."

Masaryk University Journal of Law and Technology, 2(2007), 33-42.

Stiegel, Rachael Vaughn. "Harry Potter and the Creative Lab." *Phoenix Rising Papers*

(2007). <http://works.bepress.com/sensibleip/2>, accessed 10 December 2008.

Trombley, Sarah. "Visions and Revisions: Fanvids and Fair Use." *Cardozo Arts &*

Entertainment Law Journal, 25(2) (2007): 647-685.

Von Lohmann, Fred. "Remixers, Unlockers, Jailbreakers, Oh My!" *Electronic Frontiers*

Foundation: DeepLinks Blog. 3 Dec. 2008,

<http://www.eff.org/deeplinks/2008/12/remixers-unlockers-jailbreakers-oh-my>,

accessed 10 Dec. 2008.

Walker, Jesse. "Remixing Television: Francesca Coppa on the vidding underground."

Reason Online. August/September 2008, <

<http://www.reason.com/news/show/127432.html>>, accessed 10 December 2008.