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## Fair Use in the Classroom; A Conundrum for Digital User-Generated Content in the “Remix” Culture

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# Fair Use in the Classroom; A Conundrum for Digital User-Generated Content in the “Remix” Culture

*by* SAMANTHA VON HOENE\*

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## Introduction

The age of digital media has broadened the ability of consumers to access, create, manipulate and reproduce content with great ease and speed.<sup>1</sup> With these advances in technology comes the growing trend of user-generated content, which involves a wide variety of media that is created by consumers and end-users.<sup>2</sup> While this user-generated content has allowed creativity to flourish, and has in part led to the creation of the “remix culture,” many copyright concerns have arisen from this growing trend.<sup>3</sup>

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\* University of California, Hastings College of the Law, J.D. Candidate, 2015. Special thanks to Professor Ben Depoorter.

1. Peter Menell, *Envisioning Copyrights Law's Digital Future*, 46 NYL SCH. L. REV. 63, 118 (2002-2003).

2. Webopedia, UGC, <http://www.webopedia.com/TERM/U/UGC.html> (last visited Apr. 1, 2014).

3. Electronic Frontier Foundation, *Fair Use Principles for User-Generated Video Content*, <https://www.eff.org/pages/fair-use-principles-user-generated-video-content> (last visited Mar. 28, 2014).

The entertainment and original content industry, in an effort to preserve their copyright interests during this time, have created programs and services to deal with the ever-increasing amount of user-generated content available online.<sup>4</sup> However, these programs and services have not been able to handle the increasing demands of an online system that is being overloaded by the constant stream of uploaded user-generated content.<sup>5</sup> Because of this, the programs that were designed to help the content industry patrol their legitimate copyright interests have become overly formulaic and label user-generated content as infringing without first considering if the content falls within in the range of acceptable fair use.<sup>6</sup>

By filing content removals and takedowns, without a full fair use consideration, the content industry is violating the Digital Millennium Copyright Act.<sup>7</sup> This functional absence of fair use in our current copyright system, as it relates to user-generated content and digital media, has created fear and a misunderstanding of the implications of fair use.<sup>8</sup> This fear and misunderstanding is extremely prevalent in the educational setting, where teachers have been stifled and scared away from using user-generated content in their classrooms because they don't understand fair use and its role in copyright law.<sup>9</sup>

User-generated content provides a critical opportunity for the "remix culture" to express their creativity and communicate effectively, which is why user-generated content must play a key role in classrooms and education.<sup>10</sup> However, the current state of copyright and fair use rules makes it hard for teachers and educators to allow user-generated content in their teaching, which leads to lower levels of student engagement and understanding.<sup>11</sup> In order to help fix the copyright and fair use laws, a complete overhaul of the law is not what needs to occur, but rather an

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4. Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 909 (2004).

5. Steven Seidenberg, *Copyright in the Age of YouTube*, ABA JOURNAL (Feb. 1, 2009, 11:29 PM), [http://www.abajournal.com/magazine/article/copyright\\_in\\_the\\_age\\_of\\_youtube/](http://www.abajournal.com/magazine/article/copyright_in_the_age_of_youtube/).

6. Johnathan Mukai, *Joint Ventures and the Online Distribution of Digital Content*, BERKELEY TECH L.J. 780, 783 (2014).

7. 17 U.S.C. § 512 (2006).

8. *The Cost of Copyright Confusion for Media Literacy*, The Univ. of R.I. Harrington School of Comm. and Media, <http://mediaeducationlab.com/video-cost-copyright-confusion-media-literacy> (last visited Apr. 1, 2014).

9. Martine Courant Rife, *The Importance of Understanding and Utilizing Fair Use in Educational Contexts: A Study on Media Literacy and Copyright Confusion*, <http://www.ncte.org/cccc/committees/ip/2007developments/copyrightconfusion> (2008).

10. See *supra* note 8.

11. Kerry L. Cheesman, *Methods of Engaging Students at the Start of Class: Encouraging Students to Be Involved in Their Own Learning*, (2005), <http://www.indiana.edu/~ensiweb/tt.engage2.pdf>.

overhaul in the way society views fair use.<sup>12</sup> If fair use can, again, be weighted with the same importance that it was originally intended to have, then educators, teachers, and the entire “remix culture” would benefit tremendously.

Part I provides a brief background of user-generated content and the remix culture. Part II examines the inherent problems with user-generated content in the realm of copyright law. Part III discusses the potential disappearance of fair use and Part IV examines the implications of this disappearance. Finally, Part V discusses possible changes to fair use rules and how those proposed changes would affect education.

### I. User-Generated Content and the Remix Culture

The history of the term “user-generated content” (UGC) is a short one, with its first use appearing in articles around 1995.<sup>13</sup> After about ten years, the term began to gain some fame, as Internet use became more prominent.<sup>14</sup> User-Generated content refers to “a range of media content available in a range of modern communications technologies.”<sup>15</sup> The term is used to describe a wide variety of applications, including news, research and trending issues, and “reflects the expansion of media production through new technologies that are accessible and affordable to the general public.”<sup>16</sup> UGC can be found everywhere from individualized wikis and blogs to popular websites like YouTube, Facebook and Twitter, with the future reach of UGC yet to be described or envisioned.<sup>17</sup>

Modern Internet users want more new technology development, in addition to more connectivity and user control with each new technological advance.<sup>18</sup> But the growing scope of UGC includes many problematic issues within the realm of copyright law.<sup>19</sup> In order to understand why

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12. Kevin Smith, “Fixing” Fair Use, (Aug. 22, 2008), <https://blogs.library.duke.edu/scholcomm/2008/08/22/fixing-fair-use-2/>.

13. Using Lexis Nexis search, the earliest article that references “user-generated content” was in 1995 by Dana Blankenhorn, Cf. Dana Blakenhorn, *Judge: Prodigy is Liable for User-Generated Content*, *Interactive Age*, June 5, 1995, at 35.

14. 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, LexisNexis edition.

15. Wikipedia, User-Generated Content, [http://en.wikipedia.org/wiki/User-generated\\_content](http://en.wikipedia.org/wiki/User-generated_content) (last visited Apr. 1, 2014).

16. *Id.*

17. Steven Hatcher, *User-Generated Content and the Future of Copyright; Part One- Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008).

18. Mark Domiak, *Millennial’s Defying the Old Models; Younger Online Consumers Learning More Toward User Generated Content*, *TELEVISION WEEK*, May 7, 2007, at 68.

19. See *supra* note 17.

copyright law can clash against this wave of UGC, it is necessary to first consider the historical context of this new kind of content.

Lawrence Lessig, one of the reigning authorities on intellectual property in the Internet age, likens this shift in content to what computer geeks would refer to as “read only” versus “read/write” content.<sup>20</sup> Lessig traces this history back to 1906, when the “new technology” of phonographs hit the market.<sup>21</sup> During this time, people were concerned that the days of singing outside and creating music, by piano or other instruments, would end because the new mechanical music devices, such as phonographs, created a shortcut to hearing your favorite song.<sup>22</sup> These new technologies meant you didn’t have to learn how to play the piano or guitar if you wanted to hear music—all you have to do is stick a record on the machine.<sup>23</sup> The creative era was in danger of a complete wipe-out by the start of the 20<sup>th</sup> century, with the new culture morphing into what Lessig refers to as the “read only” culture, where people only soak in what they hear and see.<sup>24</sup>

As technology developed, the 20<sup>th</sup> century became a time of “happy competition” among “read only” technologies.<sup>25</sup> Each new technology was better than the last, with records being replaced by tapes, then CDs and MP3s, while radio, television and eventually the Internet began to take shape.<sup>26</sup> By the turn of the 21st century, this competition had made a wide range of technology and culture available to the masses like never before.<sup>27</sup> The boom in “read only” culture had brought jobs to millions, raked in billions of dollars in revenue, and created superstars who spoke powerfully to the millions of people “listening.”<sup>28</sup>

But as the speed in technology development continues to increase, the “read only” culture has started to reshape itself into what Lessig now dubs the “Read/Write” culture.<sup>29</sup> With mass accessibility to applications like YouTube, Instagram, Pinterest and Facebook, technology users are no longer just soaking in what they hear and see, but now are interacting with

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20. Lawrence Lessig, *REMIX; Making Art and Commerce Thrive in The Hybrid Economy*, 28 (The Penguin Press, 2008).

21. *Id.* at 24.

22. *Id.* at 26.

23. *Id.*

24. *Id.* at 26–27.

25. *Id.* at 30.

26. Lawrence Lessig, *REMIX; Making Art and Commerce Thrive in The Hybrid Economy*, 30 (The Penguin Press, 2008).

27. *Id.* at 30–31.

28. *Id.*

29. *Id.* at 57.

the content and changing it to make their own transformative videos, pictures and other works called UGC. The assembly line approach of the “read only” culture, where content was made by the original few and dispersed out to the uncreative masses for consumption, is morphing into a world where amateur producers create new content based on their own feelings, emotions and skills.<sup>30</sup> The term “user” in UGC now attaches to anyone who allows their creative energies to be a part of the new, uncommodified culture they create.<sup>31</sup>

With the advance of technology to its current point, the number of users who interface with programs and applications on a daily basis is continuing to skyrocket. Couple this with the ability of the masses to post, snap or pin almost anything online, and you get very few *original* options out there for people to showcase as their own. Thus, the only thing left to do—the only content left to generate—is made by remixing another persons content with your own to make a novel work.<sup>32</sup> As the amount of true original content continues to dwindle, the “remix culture” and the UGC they rely on have run head on into several copyright problems.

## II. Problems with UGC

These remixed works cut across all different varieties of UGC and pop up on almost any popular website or blog. UGC has become a major headache for those who hold the copyrights to certain original works because of the sheer amount of potentially infringing UGC that is created each day. Take, for example, the viral video recently posted by movie star Vin Diesel, in which he spends over seven minutes dancing and singing to two different famous songs created by other artists.<sup>33</sup> This homemade video currently has over 200,000 views and is being shared on multiple online platforms.<sup>34</sup> Diesel’s video was not aired to further his own commercial impression or name, but rather, as per Diesel’s words, to show how happy he was that his fans support him.<sup>35</sup> Yet, this fan “shout-out” has a glaring copyright infringement problem—Diesel has “remixed” his own thoughts

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30. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAN. J. ENT. & TECH. L. 921, 929 (2009).

31. *Id.* at 929-30.

32. Lessig, *supra* note 20, at 1-9.

33. *Vin Diesel Doing Beyonce’s Surfboard Dance*, YouTube, <https://www.youtube.com/watch?v=SnVGQeMmgN8> (last visited Apr. 1, 2014).

34. *Id.*

35. Kelly Canniff, *6 Things We Learned for Watching Vin Diesel Dance to Katy Perry and Beyonce*, Time, (Jan. 28, 2014), <http://time.com/2253/6-things-we-learned-from-watching-vin-diesel-dance-to-katy-perry-and-beyonce/>.

and feelings (along with his unique dance moves) with the copyrighted songs of other famous artists.

According to the current copyright law under the Digital Millennium Copyright Act (DMCA), this video could promptly be removed from all online platforms, should the copyright holders wish to do so, because Diesel has merely used the song of another artist (even though the song is only in the background and not the main focus of the video).<sup>36</sup> This is an example of the illegal copying that DMCA was designed to protect against.<sup>37</sup> A casual viewer of the video would not see any copyright problem with this video, as Diesel clearly is not trying to claim these songs as his own. However, Diesel's video remains in the sphere of infringing user-generated content because copyright law has not adapted to the current "remix" culture.

The DMCA was enacted into law in 1998 as an amendment to Title 17 of the United States Code, with goals to extend the reach of copyright protection for copyright owners, amending the original copyright laws codified in 1976.<sup>38</sup> It has had slight changes and additions over the years, with the most recent being in 2010.<sup>39</sup> However, none of these changes or additions have taken into account the new "remix culture" we find ourselves in today. Videos like Vin Diesel's stand as proof of this new "remix culture." Vin Diesel could have shared a video with his fans that only included his own voice and his own content, but he did not send a message in that way, because that is not how our current culture operates. The current "remix culture" communicates by using the sounds of sights of other people and places to make our own product and our own message stronger.

The Internet has provided the current culture with the instantaneous ability to find a picture, search for a song or video, or edit existing content to make it *just right* for their own needs. "Remixers" post and exchange content multiple times per day on the Internet, through a variety of apps and online programs and don't see any problem with that process—they are simply expressing themselves by making user-generated content. But the DMCA and the current copyright laws view this UGC process a bit differently. From the prospective of the industry (the original content producers), the consumers (the "remixers") have become thieves who are

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36. The Digital Millennium Copyright Act of 1998, <http://www.copyright.gov/legislation/dmca.pdf>

37. *Id.*

38. *Id.*

39. Wikipedia, Digital Millennium Copyright Act, [http://en.wikipedia.org/wiki/Digital\\_Millennium\\_Copyright\\_Act](http://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act) (last visited Mar. 30, 2014).

taking over the technologies of production for their own personal gain.<sup>40</sup> Due to this theft and loss of control the industry feels, they now police their content more closely and more actively than ever before.<sup>41</sup>

### III. Fair Use Abandonment

Sites like YouTube and Google continue to receive hundreds and thousands of takedown notices for “infringing” UGC from the industry.<sup>42</sup> DMCA requires that these host sites do something about these notices in a timely manner through Section 512, which was written as a safe-harbor provision for online service providers.<sup>43</sup> This safe harbor was created at a time when the technology was simpler, and the boom of UGC had yet to occur.<sup>44</sup> But because of the constant removal burdens placed on the online service providers through Section 512, the system of content consideration for removal has become bogged down, causing erroneous takedowns and other negative legal ramifications.<sup>45</sup> Paul Goldstein, a copyright law professor at Stanford Law School, points out that “the system is working on a scale that Congress never intended, with millions of postings every day.”<sup>46</sup>

With millions of postings and subsequently high numbers of takedown requests, the reporting process regarding alleged infringing content has become standardized to a fault. The process has now become automated and robotic, and often involves a computer algorithm that scans for specific copyrighted words, notes, phrases, or pictures.<sup>47</sup> If the UGC that is attempting to be uploaded or used contains any part of a copyrighted works already in the computer system, the UGC will be labeled as copyright infringement, without any fair use consideration.<sup>48</sup>

Overly sensitive computer algorithms are not the only problem with copyright reporting. A glaring and well-known instance of the reporting process gone wrong involves a video titled “Beijing Olympics Opening

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40. Hatcher, *supra* note 17, at 930.

41. Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights, (Oct. 18, 2007), [http://ugcprinciples.com/press\\_release.html](http://ugcprinciples.com/press_release.html).

42. Mike Masnick, *DMCA Copyright Take-downs to Google Increased 10x Just in Past Six Months*, (Dec. 12, 2012 at 10:00AM), <http://www.techdirt.com/articles/20121211/16152021352/dmca-copyright-takedowns-to-google-increased-10x-just-past-six-months.shtml>.

43. 17 U.S.C. § 512.

44. *See supra* note 36.

45. Seidenberg, *supra* note 5.

46. *Id.*

47. How Content ID Works, <https://support.google.com/youtube/answer/2797370?hl=en>, (last visited Mar. 25 2014).

48. *Id.*

Ceremony” that the International Olympic Committee (IOC) ordered YouTube to take down. Presumably, the people of the IOC had not looked past the video’s title when ordering YouTube to take down the video, as they were sure it would infringe on their copyrighted material.<sup>49</sup> If they had looked at the video, even for five seconds, they would have immediately seen that the video was, in fact, not an infringement of their copyrighted material at all, but rather a showing of a protest outside of the Chinese Consulate in New York City, made by an impassioned student group.<sup>50</sup> These hasty removals of content, where reporters seem to neglect the consideration of fair use in its entirety, are increasingly problematic to the current “remix culture,” who rely on UGC to communicate effectively.

The DMCA and its safe harbor provisions were not designed to allow content owners to silence legitimate speech, but that is exactly what happened in the IOC example.<sup>51</sup> And this example is just one of thousands like it, where videos and other legitimate UGC get taken down simply because they fall into the formula of infringement that an overwhelmed system has been forced to use.<sup>52</sup> However, Section 512(c) “requires a copyright owner to consider the fair-use doctrine in formulating a good-faith belief that ‘use of the material . . . is not authorized by . . . the law.’”<sup>53</sup> Thus, issuing a takedown notice “without proper consideration of the fair-use doctrine” exposes the copyright owner to liability for misrepresentation under section 512(f) of the DMCA.<sup>54</sup>

However, even with this fair use provision written into the DMCA, which places liability on copyright owners to first consider fair use, it seems that the trend is to remove UGC without any of the legally required fair use considerations. This careless removal of content has lasting effects on the perception of copyright law, including forcing many to see fair use as an exception to copyright law.<sup>55</sup> Fair use however, is not the exception, but rather, the rule of copyright law—a rule that seems to be continuously

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49. Corynne McSherry, *Olympic Committee Takedowns Show Risk of Ill Times Takedowns*, (Aug. 13, 2008), <https://www.eff.org/deeplinks/2008/08/olympic-committee-takedown-shows-risks-ill-timed-t>.

50. *Id.*

51. *Id.*

52. John Paul Titlow, *5 Absurd Copyright Takedowns that Make the Law Look Outdated*, (Jan. 22, 2013), <http://readwrite.com/2013/01/22/5-absurd-copyright-takedowns-that-make-the-law-look-outdated#awesm=~oAeixnXUFsHykQ>.

53. 17 U.S.C. § 512.

54. *Id.*

55. Mike Masnick, *Copyright Week: Fair Use is Not the Exception But the Rule*, (Jan. 17, 2014), <https://www.techdirt.com/articles/20140117/10562125920/copyright-week-fair-use-is-not-exception-rule.shtml>.

forgotten by copyright owners in the current digital age of the “remix culture.”

The formulaic reporting system now used by content owners and online service providers, allowing essentially automatic UGC removal, leaves no space for a fair use determination because fair use is something that threatens the control that content owners seek.<sup>56</sup> However, without fair use, almost all UGC would be of an infringing nature. Through these erroneous and prevalent content takedowns, the “remix culture” has been sent a message that fair use is not an important or relevant part of copyright law. Ironically enough, that message couldn’t be further from the truth.

#### IV. Fair Use Standards and their Implications in the Educational Setting

Fair use is critical because it provides a way for creators to fairly use parts of the content of others to create novel content and ideas without committing copyright infringement. Fair use has a four-part evaluation process that involves looking at the original work and the UGC and weighing each of the factors involved.<sup>57</sup> The four factors considered are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect of the use upon the potential market.<sup>58</sup> Per the current copyright laws, these factors are supposed to be weighed in every instance of alleged copyright infringement, and if the UGC falls within the scope of fair use, then it does not violate any copyright laws.<sup>59</sup> In most Internet cases where the alleged copyright infringement is taken to court, fair use is found in favor of the UGC creator.<sup>60</sup> Despite this fact, much of the UGC that is removed from websites like YouTube and Facebook is taken down without any fair use consideration whatsoever.

While the four factors of fair use are not particularly challenging to comprehend or apply, they have an important role in protecting UGC from being reported as copyright infringement. In addition to the general societal importance of fair use rules, fair use plays a critical role in allowing educators and students to express themselves creatively and

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56. Mukai, see *supra* note 6, at 783.

57. *Measuring Fair Use, the Four Factors*, <http://fairuse.stanford.edu/overview/fair-use/four-factors/>, (last visited Mar. 30, 2014).

58. *Id.*

59. Copyright Law, Fair Use, <http://www.copyright.gov/fls/fl102.html>, (last visited Apr. 1, 2014).

60. Summaries of Fair Use Cases, [http://fairuse.stanford.edu/overview/fair-use/cases/#consider\\_fair\\_use\\_before\\_requesting\\_dmca\\_takedown](http://fairuse.stanford.edu/overview/fair-use/cases/#consider_fair_use_before_requesting_dmca_takedown), (last visited Mar. 28, 2014).

efficiently through various forms of UGC made in the “remix culture” for classroom use. Unfortunately, the threat of content removal, incorrect reporting and possible litigation have all cast a large shadow over the creative sphere that UGC flourishes in.

In education, the confusion and misinformation about copyright laws and acceptable use in the classroom is an ongoing problem that affects thousands of teachers, and consequently, their students.<sup>61</sup> Because the role of fair use has been essentially removed from copyright law as a practical matter, at least in the eyes of copyright holders and online providers, educators are afraid to rely on fair use and instead rely on rigid copyright recitations that have been passed down to them from their school and

Medium	Specifics	What you can do	The Fine Print
Printed Material (short)	<ul style="list-style-type: none"> <li>Poem less than 250 words; 250-word excerpt of poem greater than 250 words</li> <li>Articles, stories, or essays less than 2,500 words</li> <li>Excerpt from a longer work (10 percent of work or 1,000 words, whichever is less)</li> <li>One chart, picture, diagram, or cartoon per book or per periodical issue</li> <li>Two pages (maximum) from an illustrated work less than 2,500 words, e.g., a children's book</li> </ul>	<ul style="list-style-type: none"> <li>Teachers may make multiple copies for classroom use, and incorporate into multimedia for teaching classes.</li> <li>Students may incorporate text into multimedia projects.</li> </ul>	<ul style="list-style-type: none"> <li>Copies may be made only from legally acquired originals.</li> <li>Only one copy allowed per student.</li> <li>Teachers may make copies in nine instances per class per term.</li> <li>Usage must be "at the instance and inspiration of a single teacher," i.e., not a directive from the district.</li> <li>Don't create anthologies.</li> <li>"Consumables," such as workbooks, may not be copied.</li> </ul>
Printed Material (archives)	<ul style="list-style-type: none"> <li>An entire work</li> <li>Portions of a work</li> <li>A work in which the existing format has become obsolete, e.g., a document stored on a Wang computer</li> </ul>	<ul style="list-style-type: none"> <li>A librarian may make up to three copies "solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen."</li> </ul>	<ul style="list-style-type: none"> <li>Copies must contain copyright information.</li> <li>Archiving rights are designed to allow libraries to share with other libraries one-of-a-kind and out-of-print books.</li> </ul>
Illustrations and Photographs	<ul style="list-style-type: none"> <li>Photograph</li> <li>Illustration</li> <li>Collections of photographs</li> <li>Collections of illustrations</li> </ul>	<ul style="list-style-type: none"> <li>Single works may be used in their entirety, but no more than five images by a single artist or photographer may be used.</li> <li>From a collection, not more than 15 images or 10 percent (whichever is less) may be used.</li> </ul>	<ul style="list-style-type: none"> <li>Although older illustrations may be in the public domain and don't need permission to be used, sometimes they're part of a copyright collection. Copyright ownership information is available at <a href="http://www.loc.gov">www.loc.gov</a> or <a href="http://www.mpa.org">www.mpa.org</a>.</li> </ul>

Figure 1: [http://www.techlearning.com/techlearning/pdf/events/techforum/tx05/teachercopyright\\_chart.pdf](http://www.techlearning.com/techlearning/pdf/events/techforum/tx05/teachercopyright_chart.pdf).  
[num/tx05/teachercopyright\\_chart.pdf](http://www.techlearning.com/techlearning/pdf/events/techforum/tx05/teachercopyright_chart.pdf).

district administrators. Educators and teachers are often held to rigid and specific standards about what they can and cannot do to remain within the copyright laws in their classroom.<sup>62</sup> These standards are usually written

61. Star Lawrence, *Teachers Should Know Copyright from Wrong*, <http://www.edutopia.org/copyright-rules-teachers> (2014).

62. Copyright and Fair Use Guidelines for Teachers, (2014) [http://www.techlearning.com/techlearning/pdf/events/techforum/tx05/teachercopyright\\_chart.pdf](http://www.techlearning.com/techlearning/pdf/events/techforum/tx05/teachercopyright_chart.pdf).

down for teachers in the form of a chart or diagram, created by textbook companies who have attempted to make copyright law easier to understand for educators.<sup>63</sup>

The problem with these charts is that they often have the label or title of “Fair Use” across the top, but in reality, they are just strict explanations of what teachers are allowed to use in their classroom to be in compliance with copyright law.<sup>64</sup> These charts only amplify the conflicting messages teachers get from their colleagues and supervisors about what fair use actually entails, because they don’t properly describe fair use considerations.<sup>65</sup> Because of this, teachers and educators often have no idea what the fair use factors are or why fair use can actually help them in the classroom.<sup>66</sup> They, instead, are crippled by the fear of litigation and incorrect reporting that they see in our current culture.<sup>67</sup> This fear leads to teachers relying almost exclusively on these charts and diagrams outlining copyright law, instead of on the rules related to fair use.

These charts are created to detail the educator and classroom “exemptions” available in our current copyright law.<sup>68</sup> But such charts are problematic because they are verbose, confusing, and misleading to educators and teachers regarding the rules of fair use in copyright law.

These charts force teachers to assume that fair use really doesn’t exist at all, unless they follows the strict “fine print” of these charts and diagrams. As a relevant example, this chart showcases the reason these copyright rules can be

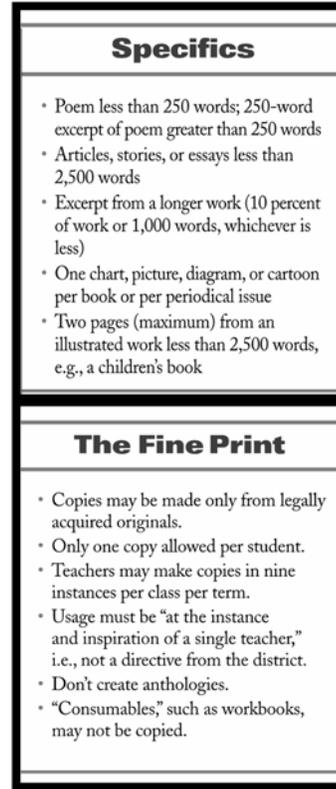


Figure 2:

[http://www.techlearning.com/techlearning/pdf/evnts/techforum/bx05/teachercopyright\\_chart.pdf](http://www.techlearning.com/techlearning/pdf/evnts/techforum/bx05/teachercopyright_chart.pdf)

63. Copyright and Fair Use Guidelines for Teachers, (2014), <http://www.halldavidson.net/chartshort.html>.

64. See *supra* note 60.

65. See *supra* note 8.

66. *Id.*

67. See *supra* note 8.

68. Copyright, Fair Use and the Education Dilemma, University of Central Florida Libraries, (2014), <http://library.ucf.edu/Reference/Instruction/copyright.php>.

confusing.<sup>69</sup> The chart tells teachers what printed material can be used in the classroom.<sup>70</sup> Rules like “teachers may make copies in nine instances per class per term” are so rigid and inflexible that teachers steer clear of using copies of printed copyrighted material at all, even when it could be of huge benefit to their teaching and classroom instruction.

In addition, teachers are forced to follow detailed and often-constricted specifics when choosing what works they want to use. As seen in the “Specifics” portion of the chart, when a teacher wants to use a printed work, they would first have to engage in word counts and genre determinations before feeling comfortable using certain copyrighted material in their classroom.<sup>71</sup> While these guidelines may have been written to show teachers an example of what fair use could look like, many teachers assume that these rigid specifics are actually the fair use laws for copyright use in the classroom. This ignorance of copyright law, coupled with the fear of legal action, keeps educators from engaging in a fair use analysis of their materials used for teaching, and instead forces strict adherence to the copyright charts and listed requirements.<sup>72</sup>

The Center for Social Media at the School of Communication at American University released a report called *The Cost of Copyright Confusion for Media Literacy*, which detailed the understanding and use of fair use and copyright law by educators.<sup>73</sup> This report explored the relationship between copyright beliefs and teaching practices.<sup>74</sup> It found that teachers are often unaware of the expansive nature of fair use, and instead rely on various “guidelines” and charts circulating on the web, like the ones previously pictured.<sup>75</sup> These guidelines are mainly products of the publishing industry and either negate fair use completely or cast it in a conservative light.<sup>76</sup>

Although these guidelines are often not an accurate picture of copyright law and fair use rules, educators adhere to them out of the fear of legal battles and litigation over copyright infringement.<sup>77</sup> This fear is validated in some ways by the forceful actions the content industry

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Study: Teacher Copyright Confusion Causes Students to Lose Out*, Temple University, University Communications, (2013), [http://www.macfound.org/media/article\\_pdfs/2006\\_09\\_19\\_AU\\_COPYRIGHT.PDF](http://www.macfound.org/media/article_pdfs/2006_09_19_AU_COPYRIGHT.PDF).

73. Rife, *see supra* note 9.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See supra* note 72.

currently takes against possible infringing works, and the outright refusal by copyright holders to consider fair use before filing a legal claim against UGC. This behavior is evidenced by stories of people like Stephanie Lenz, a young mother, who has been locked in a six-year legal battle with Universal Music Corporation over a 29-second video she posted to YouTube that showcases her young son dancing to a popular Prince song.<sup>78</sup> Upon watching the video, the faint Prince song in the background is hardly noticeable, as Ms. Lenz's son and his dance moves take center stage.<sup>79</sup>

However, despite how insignificant or miniscule the use of the Prince song was in the Lenz family video, the video's YouTube posting we expeditiously removed once Universal Music Corporation made the report to the online service provider, claiming that the video infringed on their copyrighted material.<sup>80</sup>

This simple act of immediate removal sends yet another message to creators of UGC that fair use determinations are almost non-existent when dealing with powerful corporations and overwhelmed Internet service providers. When the four factors of fair use are applied to the dancing baby video Stephanie Lenz posted, three out of four factors seem to slant toward fair use versus infringement (Inf.), yet the video was still stripped from the Internet and has caused Ms. Lenz to seek legal counsel from the Electronic Frontier Foundation in order to reinstate her video.<sup>81</sup>

When educators see an example like the Lenz case, it undoubtedly causes concern and confusion. Just as Stephanie Lenz had created a



Figure 3: <http://jitp.commons.gc.cuny.edu/lets-go-crazy-lenz-v-universal-in-the-new-media-classroom/>.

78. Corynne Mesherry, *Lenz v. Universal, This Baby May be Dancing to Trial*, (Jan. 28, 2013), <https://www.eff.org/deeplinks/2013/01/lenz-v-universal-baby-may-be-dancing-trial-0>.

79. Emily Erickson, *Let's Go Crazy: Lenz v. Universal in the New Media Classroom* (2012), <http://jitp.commons.gc.cuny.edu/lets-go-crazy-lenz-v-universal-in-the-new-media-classroom/>.

80. Mesherry, *see supra* note 78.

81. *Id.*

personal video by remixing parts of her daily culture together, educators and classroom teachers do the same thing to make their lessons more efficient and engaging. In addition, educators continuously request that their students create UGC to express their own understanding of concepts and curriculum. This approach is taken because there are many benefits to engaging students with user-generated content, including building stronger critical thinking and problem solving skills.<sup>82</sup>

But educators, faced with verbose charts of strict copyright laws in addition to cases where fair use has been completely disregarded, are left scared of copyright law completely. The Brennan Center for Justice at NYU School of Law researched fair use and its effect on people who make critical contributions to culture and democratic discourse.<sup>83</sup> This study found that out of 320 cease and desist letters that had been sent to UGC creators claiming alleged copyright infringement, over 50% of those claims has the potential to chill protected speech, meaning the that the UGC the letter was sent remove fell within the bounds of fair use, and should not have been sighted as copyright infringement in the first place.<sup>84</sup> This high percentage of fair use oversight continues to fuel the fear of educators, who feel forced to give up on using UGC in their classroom and with their students, at the risk of being slapped with, at the very least, a cease and desist letter from a corporate copyright holder.

#### IV. Confusion of Fair Use Rules in Education

The cost of educator confusion regarding copyright law is great.<sup>85</sup> The fear of copyright regulations and the uncertainty of fair use considerations can lead to the less effective teaching materials, constriction of creativity for teachers and students, and the perpetuation of misinformation.<sup>86</sup> If fair use is not actively discussed and given weight in all arenas of copyright law, then confusion and a trend against UGC will occur, making it almost impossible to be a relevant and engaging educator in the age of the “remix culture.”

Copyright confusion by teachers limits the quality of teaching and learning in the classroom.<sup>87</sup> Quality teaching occurs when students are

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82. WikiBooks, *User-Generated Content in Education/ Learning By Creating*, [http://en.wikibooks.org/wiki/User-Generated\\_Content\\_in\\_Education/Learning\\_by\\_Creating](http://en.wikibooks.org/wiki/User-Generated_Content_in_Education/Learning_by_Creating) (last visited Mar. 24, 2014).

83. Majorie Heins, Tricia Beckles, *Will Fair Use Survive: Free Expression in the Age of Copyright Law*, (page ii), <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>.

84. *Id.*

85. Rife, *see supra* note 9.

86. *Id.*

87. *See supra* note 8.

engaged in their own learning.<sup>88</sup> One of the easiest ways to engage students is to bring in relevant material like jokes, poems, or articles from the student's culture into the classroom and ask questions about it.<sup>89</sup> But the problem with this approach from a copyright law perspective is that as soon as another person's work is being used, like the comic of a famous cartoon artist, teachers immediately fear that they will suffer legal ramifications from copyright infringement. This is because educators are unclear about the implications of copyright law in the classroom. The current trend of pricey litigation and numerous alleged copyright infringement reports make teachers feel that it is easier to just forgo the use of another's materials completely.

In addition, copyright confusion limits student's creative expression.<sup>90</sup> If teachers do not feel comfortable using other people's work in their

	2008	2009	2010	2011	2012	2013
User-Generated Video	36.0 %	39.8%	42.5%	44.8%	47.2%	49.2%
Social Networking	41.2%	44.2%	46.9%	49.1%	50.5%	51.8%
Blogs	54.0%	58.0%	61.0%	64.0%	67.0%	69.0%
Wikis	33.9%	36.6%	39.0%	41.0%	42.6%	43.9%
<b>User-Generated Content Consumers</b>	<b>60.0%</b>	<b>62.0%</b>	<b>64.0%</b>	<b>66.0%</b>	<b>68.0%</b>	<b>70.0%</b>

Figure 4: <http://www.ametys.org/en/news/expert-advice/user-generated-content->

teaching, then they will feel less compelled to allow students to use other's work when sending creating their own projects and presentations. In the "remix culture," the integration of Internet use and UGC has been a growing trend, with over 70% of Internet users being consumers of UGC themselves.<sup>91</sup> The implication of this statistic is that if students aren't

88. See *supra* note 11.

89. *Id.*

90. See *supra* note 8.

91. Rules and Recommendations for Building User-Generated Content, <http://www.ametys.org/>

permitted to creatively use the works of others to make UGC, then their educational experiences with suffer because of the limitations on creativity they are constrained by.<sup>92</sup>

Lastly, the perpetuation of misinformation affects educator's views of copyright law when unclear information about fair use and its importance continues to circulate.<sup>93</sup> When speaking about educators and their knowledge of fair use rules, Peter Jaszi, a professor at the Washington College of Law at American University remarked, "the collective judgment of every creative community informs the interpretation of fair use. Courts take notice of what creators regard as fair and reasonable."<sup>94</sup> If educators want a change in the fair use rules, they must first be well-informed about the rules that govern fair use. If more educators knew the true considerations of fair use, and weren't clouded by the hasty takedown trends of the current era, educators could focus on effective teaching through UGC without worrying about the legal ramifications of copyright law.

### V. Proposed Copyright Law Changes to Allow UGC in the Remix Culture

Copyright law has been through changes and adaptations as each era brings new challenges to the rules.<sup>95</sup> However, the historical change of fair use rules and the effect of fair use rules on educators has morphed at a far slower pace than general copyright regulation, with the last major review of fair use designations for educators taking place in 1994 and 1996.<sup>96</sup> Because of this slow pace and the resistance to change, fair use rules have continued to confuse educators and leave a general haze of misconception among teachers regarding what they can and cannot use in their classroom to educate the "remix culture."

In 1994, the U.S. Department of Commerce established CONFU: The Conference on Fair Use, to bring together copyright owners and users to discuss fair use issues that new technologies raise and to develop guidelines for fair use by librarians and educators.<sup>97</sup> The CONFU participants spent

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en/news/expert-advice/user-generated-content-ugc.html (last visited on Mar. 8, 2014).

92. *See supra* note 8.

93. *See supra* note 9.

94. *See supra* note 8.

95. Copyright Timeline, A History of Copyright In the United States, (2006), (20http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.UzzFca1dVLc.

96. Applying Fair Use to New Technologies, [http://www.educationworld.com/a\\_curr/curr280d.shtml](http://www.educationworld.com/a_curr/curr280d.shtml) (last visited Apr. 1, 2014).

97. *Id.*

over two years trying to develop new fair use guidelines, but in the end, the participants could not reach a consensus regarding changes to fair use laws.<sup>98</sup> Copyright owners thought the guidelines gave too much away, and educators and librarians thought the guidelines were unworkable and overly restrictive.<sup>99</sup> “The unfortunate result of the situation,” Nancy Willard of the College of Education at the University of Oregon said, “is that teachers are in an incongruent position of trying to push the limits of the fair use exception at the same time that they have an obligation to teach students about respect for copyright law.”<sup>100</sup>

Following CONFU, members of a number of educational, scholarly, and copyright user organizations—including the National Education Association, the National School Boards Association, and the American Library Association—issued the following Conference on Fair Use Joint Statement: “CONFU participants’ inability to craft consensus guidelines presents educators, scholars, and librarians—and their national representatives—with the opportunity and responsibility to explore the appropriate parameters of fair use to the extent that experience and good faith permit.”<sup>101</sup> However, many feel that if even the experts can’t agree on acceptable fair use guidelines for UGC created using new technologies, then this leaves educators in a strange position.<sup>102</sup>

By 1996, the Consortium of College and University Media Centers (CCUMC) brought together a diverse group of publishers, educators, industry representatives, and legal experts to draft a set of fair use guidelines for educators and students to use while creating UGC and other multimedia projects.<sup>103</sup> The guidelines they developed are not legally binding, but rather, represent an agreement among most institutions and organizations affected by educational multimedia.<sup>104</sup> While the new shift in views is helpful to educators, the constant borage of guidelines and specifications about what teachers can and cannot use in their classroom continues to overwhelm teachers and feed the fear of copyright infringement through the use of UGC in classrooms.

The inability of copyright law to adapt to the “remix culture” and the practical loss of fair use in education has sparked many influential scholars to comment regarding proposed changes to copyright law. Some, like Peter

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Applying Fair Use to New Technologies, [http://www.educationworld.com/a\\_curr/curr280d.shtml](http://www.educationworld.com/a_curr/curr280d.shtml) (last visited Apr. 1, 2014).

103. *Id.*

104. *Id.*

Jaszi remark that our copyright law is actually more slanted to UGC creators and educators than we think, saying:

Trying to ‘fix’ fair use through legislation would be a high risk undertaking. The codification of the doctrine in 1976 was, generally speaking, a victory for the creators, educators, journalists, artists, and others. Developments in the courts since then (especially the rise of “transformativeness” analysis) have underlined just how big a victory it actually was! If Sec. 107 were “opened up” for amendments there is a real chance (nay, a near certainty) that owners would seize the opportunity to rework the statute to their own advantage—and (believe me) there are many ways this could be accomplished. We would be looking then at a naked political contest that I’m afraid users would lose, as they have in so many other battles in recent years.<sup>105</sup>

Jaszi does admit, however, that the vagueness of fair use can sometimes be problematic, thus he recommends a Code of Best Practices to fix the issues of educators misinterpreting or not understanding the doctrine of fair use.<sup>106</sup>

Anthony Falzone, executive director of the Fair Use Project at Stanford University, agrees with Jaszi, commenting that “The open-ended nature of the fair use framework is a net positive. While it can reduce predictability in some situations relative to say, a laundry list of very specific exemptions, it’s that open-ended nature that makes fair use a dynamic tool that can respond effectively to changes in technology and culture.”<sup>107</sup> When the original copyright law was codified in 1976, the Internet was an unforeseen entity, an entity that completely revolutionized the way copyright law is affected by culture.<sup>108</sup> However, Falzone argues that the beauty of the open-ended rules of fair use is that they can adapt quickly to unforeseen changes and can be applied even when culture is changing rapidly.<sup>109</sup>

However, Falzone realizes the burdens of the open-ended framework of fair use and their effect on UGC creators.<sup>110</sup> He comments:

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105. Mark Glasser, *Should Copyright Law Change in the Digital Age*, (Aug. 11, 2008), <http://www.pbs.org/mediashift/2008/08/should-copyright-law-change-in-the-digital-age224/>.

106. *Id.*, see also [http://www.copyright.gov/copyrightmatters/speakers/matters\\_jaszi.html](http://www.copyright.gov/copyrightmatters/speakers/matters_jaszi.html)

107. *Id.*, see also <http://fairuse.stanford.edu/>

108. Glasser, see *supra* note 105.

109. *Id.*

110. *Id.*

The people who feel [the burdens] most are the masses—the ordinary people who create for the sake of creating and do so non-commercially. For them, the system is complicated and expensive to use and they are not equipped to bear the risk of guessing wrong. The burdens this system imposes on ordinary people who use copyrighted content in genuinely creative and transformative—but non-commercial—ways is tremendous, and seriously out of whack relative to the tiny impact these non-commercial uses have on copyright holders.<sup>111</sup>

Falzone believes that one way to fix the copyright system is to create safe harbors for certain uses that will relieve noncommercial actors of this burden.<sup>112</sup>

Yet another copyright scholar, J.D. Lasica, has a more detailed and formal approach to fixing the copyright system. Lasica, co-founder of OurMedia and author of Darknet, suggests that the digital generation will eventually come to embrace the concept of digital rights, through the cultural norms that are now taking shape.<sup>113</sup> He recommends that “Congress should specify users’ digital rights by mapping out an expansive, affirmative set of rights delineating the scope of the public’s right to sample, reuse, build upon, and share the digital works they legally acquire.”<sup>114</sup>

The trend among media and copyright law professionals appears to be a proposed slant in the application and understanding of fair use and copyright laws, rather than a complete overhaul of the rules.<sup>115</sup> The suggestions given by these scholars would leave the fundamental structure of fair use intact, but would simply change the way some common digital uses, like UGC, were treated within copyright law.<sup>116</sup> By continuing to keep fair use open ended, it would allow for new technologies and creative uses not yet conceived or discovered, but would also allow for specific exceptions for activities that are well-known and clearly of benefit to consumer, like UGC in the educational setting.<sup>117</sup>

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111. *Id.*

112. *Id.*

113. *Id.*

114. Glasser, see *supra* note 105.

115. Smith, see *supra* note 12.

116. *Id.*

117. *Id.*

The real movement in copyright laws and fair use rules will not come with legislation and doctrinal shifts, but rather through societal changes. Like Lawrence Lessig has spoken about time and time again, we are now in the era of the “remix culture.”<sup>118</sup> This culture creates user-generated content as a main method of communication. In order to teach and interact with this remix culture, we must speak their language. If we as a society continue to allow fair use to be shifted to the back burner and given little to no weight in copyright considerations, then we will lose our ability to communicate with the “remix culture.”

One of the most crucial places we must feel comfortable with UGC is in the classroom. Teachers cannot continue to live in confusion regarding copyright laws and what fair use really is. These misunderstandings only generates fear and an adherence to misleading standards. Teachers should be explicitly taught the four factors of fair use and given the opportunity to carefully consider their own UGC and that of their students, in order to assess if it falls within the acceptable range of fair use.

In addition, like Antohny Falzone recommends,<sup>119</sup> certain educational uses, like UGC used for classroom purposes, should fall completely within a safe harbor, where teachers and students do not have to worry about the threat of legal action against certain educational UGC they have created. Until we see these societal shifts and a true compliance with the rules of fair use by copyright holders, educators and the “remix culture” they teach will continue to have their creativity and UGC stifled by copyright confusion and the looming threat of legal action.

Luckily, recent activity in the copyright sphere supports a finding that a shift in society’s views of fair use and copyright law has already begun. Four years ago, Lawrence Lessig gave a lecture on copyright law at a conference for the organization Creative Commons.<sup>120</sup> In this lecture, he used clips of fans dancing to the band Phoenix’s song “Lisztomania” as an example of proper “fair use” principles.<sup>121</sup> He later uploaded the full lecture, which included the clips, to YouTube, but Phoenix’s managers removed the video and the threat of legal action followed, as Phoenix saw the video as a copyright infringement of their songs.<sup>122</sup>

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118. Lessig, *see supra* note 20.

119. Glasser, *see supra* note 105.

120. August Brown, *After Suits, Phoenix Backs Fair Use and Copyright Law Changes*, (Feb. 28, 2014), <http://articles.latimes.com/2014/feb/28/entertainment/la-et-ms-after-suits-phoenix-backs-fair-use-of-their-music-and-copyright-law-changes-20140228>.

121. *Id.*

122. *Id.*

By February of 2014, a complete apology by Phoenix's managers had been issued to Lessig regarding the takedown of Lessig's video.<sup>123</sup> Phoenix's manager stated "[The video] was removed by a member of our staff without being reviewed and [was removed] under a misunderstanding of the relevant law. Upon learning of the mistake, we immediately reinstated Lessig's video, amended our review process and have worked cooperatively with Lessig to resolve this matter as quickly as possible."<sup>124</sup>

The band Phoenix later commented:

Not only do we welcome the illustrative use of our music for educational purposes, but, more broadly, we encourage people getting inspired and making their own versions of our songs and videos and posting the result online. One of the great beauties of the digital era is to liberate spontaneous creativity—it might be a chaotic space of free association sometimes but the contemporary experience of digital re-mediation is enormously liberating. We don't feel the least alienated by this; appropriation and recontextualization is a long-standing behavior that has just been made easier and more visible by the ubiquity of the internet.<sup>125</sup>

It is indeed one of the great beauties of the digital era, and the "remix culture," to liberate spontaneous creativity through user-generated content and other unique and transformative works. This creativity brought by user-generated content can only be freed through the adaptation and recognition of fair use as a critical part of copyright law in the classroom and beyond.

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123. Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets, Electronic Frontier Foundation, (Feb. 27, 2014), <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets>.

124. Brown, *see supra* note 120.

125. *Id.*