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Teaching Transformativity / Transformative Teaching: Fair Use and the Video Essay

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Exercises in audiovisual argumentation further media studies' project of developing critical visual literacies, but they also afford an important opportunity to open conversations with students about copyright. Just as some professors presume a high degree of digital fluency (i.e., students will "figure out" how to obtain/edit raw audiovisual materials), many assume that the framing of the video essay as a scholarly exercise automatically protects it legally. Because the video essay's power as a critical intervention in popular discourse is wedded to its spreadable potential, and because these assignments rely on fair use doctrine, it's as vital to teach our students about their *copyrights* as it is to instruct them on how to visually marshal "evidence" towards a broader argument. Here, I suggest a need for media scholars to develop our own code of best practices in fair use for the video essay assignment, one that recognizes both their transformative scholarly impact and the pedagogical transformations they necessitate.

The fair use doctrine, described in [Section 107 of U.S. copyright law](#), is a powerful limitation on exclusive (and ever-longer and stronger) copyright because of its flexibility, but it's precisely this flexibility that has cultivated a "culture of fear and doubt" that deters us from seizing "opportunities to assert rights that already exist, and to challenge behaviors that intimidate new makers of culture" (Aufderheide and Jaszi 2011, 5). Aufderheide and Jaszi (2011) contend that the "deliberate vagueness" (24) of the "Four Factors" considered in fair use cases (the character of the use, the nature of the copyrighted work, the amount of the work taken, and the use's impact on the value of the copyrighted work) is simultaneously the doctrine's strength and weakness, creating a "valuable, contextually defined, 'floating' public domain" (15) that is plagued by misunderstanding. Common fair use myths (e.g., "You can only use X seconds of footage," or "Educators don't need fair use, assignments are non-commercial") tend to either paralyze or instill a false sense of invincibility in faculty embarking on video essay assignments, and in both cases conversations around copyrights are avoided rather than thoughtfully engaged.

Increasingly, fair use cases hinge on how "transformative" the use is, if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message" (Campbell v. Acuff-Rose Music Inc. 1994). There is a synchronicity between this legal definition of transformativity and the goals of media scholarship, as we encourage our students to adopt a transformative approach to media texts and topics, adding something new to the critical conversation. Assigning an essay like Virginia Kuhn's

“The Rhetoric of Remix” before embarking on a video project can make the argumentative capacity of the form explicit and model the close analysis of transformative video. If, as Kuhn argues, in approaching these videos as “arguments with claims and evidence, we are better equipped to gauge the veracity of the information presented by all media” (2012, n.p.), these assignments might have a similarly transformative impact on our students’ relationship to media culture.

Keeping this emphasis on transformativity in mind, developing codes of best practices has become a successful tactic for asserting and retaining fair use rights. The remainder of this piece replicates the structure of a code of best practices, briefly identifying and describing common scenarios, offering principles, and acknowledging limitations. I’ve added an “Application” section to this preliminary code, drawing on my experiences in designing, implementing, and assessing video essay assignments [1].

ONE: Frame video essays as transformative scholarship

Description: Because transformative uses of copyrighted content are central to fair use claims, introducing this concept early, and developing it as a critical through line for the assignment, can function as a fair use “litmus test” for faculty and students.

Principle: Transformativity should be stressed in the assignment’s framing, students’ analyses, and the instructor’s assessment.

Limitations: Sometimes the most compelling content to “transform” can only be obtained through questionable legal means (e.g. torrenting), raising piracy concerns. Alternately, faculty who offer a selection of short video clips with the sound stripped, or edited audio, take on the temporal burden of creating these “transformed” raw materials, in order to further justify the project’s fair use claim.

Application: Before creating [metavids](#), students in my Fandom and Participatory Culture course (Fall 2011) read and discussed Francesca Coppa’s framing of vidding as “a visual essay that stages an argument,” in which music serves a transformative function “as an interpretive lens to help the viewer to see the source text differently” (2008, n.p.). At various stages during the assignment (planning, production, and screening), students were required to orally and textually convey how they transformed the copyrighted content.

This fan vid by Olivia Warshaw and Tyler Rosen couples a mash-up from Glee with gendered images of fan resistance to comment producer/consumer relationships within convergence culture. Click image for video.



Students in my Copyright + Culture class often explicitly made formal decisions to strengthen their uses as “transformative” and argument-driven.

This remix video by Rivi Sacks and Catherine Anderson uses an oft-sampled and remixed audio track and color effects to visualize the power of the public domain to keep culture “Forever Young.”

TWO: Collaboratively develop a code of best practices for the assignment

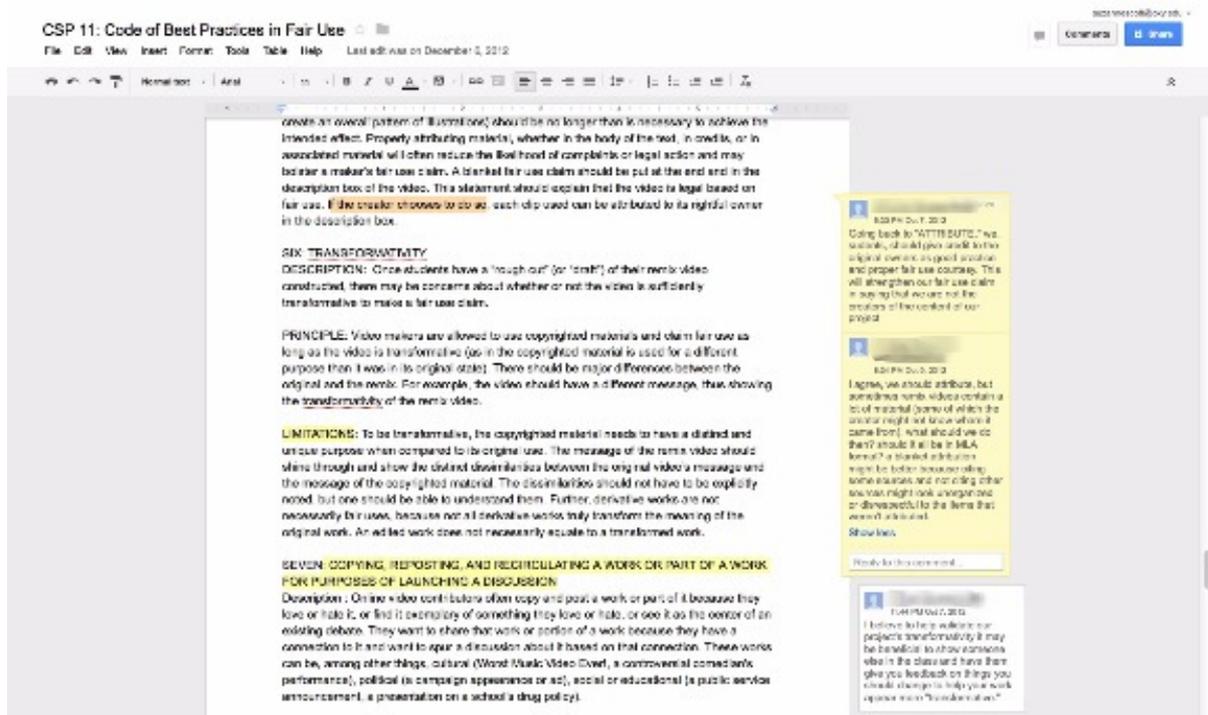
Description: One effective strategy when preparing students to assert their right to write about media through media is to collaboratively create a code of best practices. Codes of best practices delineate how fair use rights apply in particular situations (like an assignment), based on the consensus of a community of practice. Preexisting codes developed for [online video](#) and [media studies education](#) could serve as foundational texts for the assignment’s code.

Principle: Treating the class as a “community of practice” that encourages students to identify and debate common concerns, as well as authorial principles, creates a culture of accountability and allows students to hone their fair use claims.

Limitations: It might be untenable to spend weeks of class time refining a code and unrealistic to presume an institution’s general council would sign off on such a document. While a course-developed code might not be vetted by a legal advisory board or prevent sites like YouTube from pulling student-created content for copyright violations, it can help students contest these decisions with confidence in their legal reasoning and language. When scaling this assignment to larger courses, instructors should consider creating a rough code for students to discuss and vote on in class, rather than authoring the entire document collectively.

Application:

Students in Occidental College’s CSP 11: Copyright + Culture (Fall 2012) debate how to reconcile remixing practices with scholarly citation practices in the Code of Best Practices for their video assignment.



First, I modified and shared a version Aufderheide and Jaszi’s Code of Best Practices template (2011, 156-161) as a Google Doc with the class, with rough principles included sample questions posed in comments to begin the conversation. Over the course of a week, students completed the code and raised/debated key points, ultimately coming to a consensus on standards for the assignment. Overwhelmingly, the class reported that this process was helpful in delineating clear expectations and fostering confident in their use of copyrighted material as they worked on their remix videos.

THREE: Develop a sustainable plan to license and archive student projects

Description: As students learn more about copyright, they’re more inclined to take ownership over how their video essay is disseminated and used. Allowing students to select a [Creative Commons license](#) for their video can open up broader conversation about intellectual property. It is equally important to plan a sustainable way to archive and extend the life of these projects after the semester is over in a mutually beneficial manner for faculty and students.

Principle: In addition to teaching students about fair use, we should make a concerted effort to model best practices, granting students agency over how they would like their copyrighted video essay licensed and archived.

Limitations: More stable and sustainable archiving options like Learning Management Systems (Blackboard, Moodle, etc.) limit the reach and impact of video essays. Alternately, public and spreadable options (YouTube, a course WordPress blog, etc.) risk videos being pulled or privatized by the platform or the account user. Instructors should be transparent in their requirements for how video projects are licensed and archived and

amenable to student requests around these issues.

Application: In the past, I've required students to upload videos to personal YouTube accounts and strongly encouraged them to select a Creative Commons License that allows others to build on their work. I've also required students submit their video files directly to me to archive. In the future, I'd give students a more active role in deciding how their video essays are disseminated and what level of licensing they're comfortable with and require them to explain their choices.

In conclusion, when we ask our students to rip and remix media texts as a mode of critical engagement, our pedagogy must undergo a similar de/reconstruction. As media courses adopt (and adapt to) video essay assignments, Lawrence Lessig's distinction between Read/Only Culture (that values consumption) and Read/Write Culture (that encourages amateurs to [re]create culture) (2008, 28), and their respective relationships to culture industries and technologies, becomes increasingly vital to consider. Lessig contends that Read/Write Culture "can't help but expand the sense of 'writing,'" but that "legal culture will force the institutions that teach writing to stay far away from this new expressive form" (2008, 108). When we expand media scholarship through the video essay, we must also be prepared to speak back to that legal culture and to teach our students to do the same.

Notes

[1] Sample [fan vid](#) and [remix video](#) assignments, along with examples of students' [vid](#) and [remix](#) projects, can be found on these course blogs, along with [other assignments](#) that rely on fair use, and a [remix video rubric](#) adapted from Julie Levin Russo.

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