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DMCA Statement 2021 on behalf of Proposed Class 1: Audiovisual Works - Criticism and Comment (Education and Noncommercial Videos)

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I am Professor of English and Film Studies and Director of Women's Studies at Muhlenberg College, as well as one of the founders of the Organization for Transformative Works. My comment is directed toward the exemption as it pertains to noncommercial remixers like vidders. I am an expert on vidding as an art and as a practice, and my forthcoming book, *Vidding: A History* (University of Michigan Press) traces the development of vidding from 1975 to the present.

Vidders rely on fair use and presume that, because they are engaged in fair use, they have the right to re-edit portions of the TV and movies they've bought for the purposes of expression, commentary, or critique. The broad terms of fair use and of the DMCA exemption-- that it's okay to use portions of a work to create a noncommercial remix--are clear, but an exemption whose technical terms seem arbitrary or hard to distinguish in practice makes no sense to vidders and will be hard to explain to them, presuming you could even reach them.

Vidding has exploded as a practice; vids are now made, literally, in the millions. Regular people--mostly women or those assigned female at birth, as well as those wishing to articulate minoritarian perspectives on mainstream media (i.e. queer people, people of color, resistant readers of all kinds)--still turn to vidding as a popular mode of expression. Searching for "fanvid" or "vidding" on YouTube gets you millions of hits: not only vids themselves, which continue to comment on popular media past and present, but also how-to videos about vidding practice. In the late aughts it seemed possible that an organization like the Organization for Transformative Works might be a clearinghouse of information that vidders would turn to; today, there are vidders all over the world, working individually--having come to the idea of remix on their own--as well as in groups. Some vidders join collectives or "studios" and may collaborate on individual vids (called "collabs" or "MEPs", i.e. multi-editor projects) where a vidder is given a particular section to work on, or they might otherwise share tools or clips. Vidders from all over the world congregate on forums, bulletin boards, mailing lists, Discord channels, and social media sites, and talk tech on language-specific (Russian, German, Spanish) boards. Vidders learn from each other or figure things out for themselves far more often than they learn from any sort of centralized source.

When I first testified before the Library of Congress as part of the 2009 DMCA Hearings, it was possible to outline a common technical practice for vidding: vidders bought and ripped DVDs, created clips, and edited them together in Final Cut Pro, Adobe Premiere, or Windows Movie Maker, and some vidders did additional manipulation with AfterEffects. Today, vidding is so widespread that it's impossible to articulate a single standard of practice or even a common set of tools. Premiere, Final Cut Pro, Avid, and Sony Vegas are all still popular, and most computers come with some form of video editing and graphics software pre-installed. Many more options

are available as free or cheap apps, and a program like DaVinci Resolve provides a free version of the incredibly robust set of tools formerly associated only with professional software.

In terms of obtaining source material, we are also in a time of tremendous flux. People consume television and film through a wide variety of broadcast and streaming media services, and also still buy and watch DVDs. Vidders still use both regular DVDs and Blu-Ray discs for creating clips (though in fact regular DVDs are often preferred as some computers can't handle the large files produced by ripping HD DVDs). Screen capture software has also improved significantly and may be used when DVDs do not (or do not yet) exist.

Within this increasingly global mish-mash of materials and tech, a vid might be made by five people working in three different countries with footage from any number of video sources. Vidders are not likely to distinguish legally or morally between a clip made by ripping a DVD or one made via screen-capturing a scene streamed on their HBO. What matters is whether the clip is of sufficient quality to hold up to editing and graphical manipulations the vidders want to make, which might include cropping, changing speed or color, compositing images, or adding text or special effects. The cutting edge of vidding is often occupied by those with the skill and technical capacity to make extraordinary transformations. But they are unlikely to know exactly what they're going to make before they actually make it: vidders have an idea and will try to get the best footage available to say what they want to say. We have documented cases of vidders melting their motherboards or burning out their graphics cards while attempting to execute a particular vision of a vid. Many vidders live on the bleeding edge of tech.

A moral or legal distinction between making a clip via ripping DVDs or via screen capture is relatively meaningless on the ground, as a vidder may not have a choice: a source may not have been released on DVD, or may only be available via streaming. But vidders will always try to obtain the highest quality footage their editing systems are capable of working with. The bright line that most vidders recognize is the distinction between legally acquired media and piracy: that is, whether or not they've paid for the video source, whether that means buying DVDs or a subscription to Hulu, HBO, or Amazon Prime. Despite the assertion that noncommercial remixers have "disdain for copyright law," fans and vidders typically work hard to support the creators whose work they remix, often buying a source in multiple formats. (I myself own *Star Trek* on VHS, on two different sets of DVDs, and as part of two different streaming services that I pay for. I am not atypical. I expect that at some point I'll buy *Star Trek* again in holographic 3D.) Vidders who have used screencapture to make clips will often buy the DVDs later when they are available; some vidders will remaster their own vids or beloved fan-favorite vids with higher quality footage when that footage becomes available. (For example: *Data's Dream*, made with VCR footage and remastered with DVD footage; the Iron Man *Handlebars*, made with captured footage and later remastered with DVD footage).

Vidding continues to be a vibrant visual art and an important mode of media criticism in 2021. Vids were part of the massive exhibit *MashUp: The Birth of Modern Culture* at the Vancouver Art Gallery in 2017, and a vid about the importance of showing characters of color (Bironic's *The Greatest*) in science fiction was a finalist for a 2018 Webby award. Endangered VCR vids are

being collected by the library at Texas A&M University, and also by the Internet Archive. E. Charlotte Stevens's monograph *Fanvids: Television, Women, and Home Media Remaking* was published by the Amsterdam University Press in 2020, and vids are increasingly shown and studied in classroom context both as filmic art objects and as examples of on the ground media criticism. Moreover, a new academic field of practice, videographic criticism, has emerged in film and media studies, and scholars are discussing the debt they owe to vidding and vidders.

Vidding is a remix art, and vidders don't pretend to have filmed the visuals or composed the music; in fact, it is crucial that the audience recognize the sources because they are what's being commented upon. But it is important for vidders, and those exhibiting vids in academic and artistic contexts, to have confidence in the works' status as a transformative fair use.