Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody

Aaron Schwabach

Thomas Jefferson School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffaloipjournal

Part of the Intellectual Property Law Commons

Recommended Citation


Available at: https://digitalcommons.law.buffalo.edu/buffaloipjournal/vol8/iss1/1

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Intellectual Property Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
Continuing advances in consumer information technology have made video editing, once difficult, into a relatively simple matter. The average consumer can easily create and edit videos, and post them online. Inevitably many of these posted videos incorporate existing copyrighted content, raising questions of infringement, derivative versus transformative use, fair use, and parody.

This article looks at several such works, with its main focus on one category of examples: the Downfall Hitler meme. Downfall Hitler videos take as their starting point a particular sequence – Hitler's breakdown rant – from the 2004 German film Der Untergang [Downfall in the US]. The user then adds English subtitles, creating a video that is, or is intended to be, humorous, with the humor largely derived from the incongruous and anachronistic content of the subtitles as well as from the inherently transgressive use of the original content for comic purposes.

This article examines whether the Downfall videos, and other similar works, are more transformative than derivative under 17 USC section 107, as well as whether the use of the copyrighted material, even if otherwise derivative, is fair use under 17 USC section 107. The article also considers whether the videos are parody within the meaning of Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
INTRODUCTION

It is a familiar scene, or at least it was not too long ago: Hitler is in his bunker in Berlin, and things are going badly for him. When he finds out just how badly, he flies into a rage, his sanity visibly crumbling. He storms and rants, and finally collapses with a defeated grumble.

But what news has brought about Hitler’s disintegration? Well, that depends. It might be the lack of new features in the Microsoft game Flight Simulator X. Or it might be that his generals have bought him a ticket to see the Adam Sandler film You Don’t Mess with the Zohan. His tantrum might be triggered by an iPad, or Usain Bolt breaking the world record for the hundred-meter dash, or even by learning about the existence of the Downfall Hitler meme.

Of course, all of these are parodies, posted on YouTube and elsewhere, using clips from the 2004 German film Der Untergang (released in the US as Downfall), particularly the climactic rant scene after Hitler (played by Bruno Ganz) learns that Felix Steiner has not mobilized troops to break the Soviet assault on Berlin – meaning that the Nazis have lost the war.

One can question whether turning the twentieth century’s avatar of evil into a sort of lolcat is in good taste; the original film was criticized by some for humanizing Hitler, and the parodies have in turn been criticized for disrespect and for trivializing tragedy. For some it will be more disturbing than amusing to see a

---

2 Sim Heil, YOUTUBE, http://www.youtube.com/watch?v=tcW3hbnR2EI. (last visited Apr. 27, 2012). This was probably the first Downfall parody, and the original post has been removed from YouTube due to a copyright claim by Constantin Film Produktion GmbH. See generally Jamie Dubs, Downfall / Hitler Reacts, KNOW YOUR MEME (2009), http://knowyourmeme.com/memes/downfall-hitler-reacts#fn2 (listing the many different parody remixes of the same scene).

3 Adam Sandler Films, YOUTUBE (June 30, 2008), http://www.youtube.com/watch?v=s0sLcXyg29c.

4 Hitler’s Angry Reaction to the iPad, YOUTUBE (Jan. 29, 2010), http://www.youtube.com/watch?v=9_EcybyLJS8&feature=related.

5 Usain Bolt Breaks 100m World Record and Hitler Reacts, YOUTUBE (Aug. 16, 2009), http://www.youtube.com/watch?v=9xUS30-RFf0&feature=related.

6 Hitler rants about the Hitler Parodies, YOUTUBE (May 1, 2009), http://www.youtube.com/watch?v=cqqxRPZdfs&feature=related.

7 DER UNTERGANG (Bernd Eichinger 2004).

8 See, e.g., Andy Eckhardt, Film Showing Hitler’s Soft Side Stirs Controversy, MSNBC (Sept.16, 2004), http://www.msnbc.msn.com/id/6019248/from/RL.1/.

9 See, e.g., Hitler ‘Downfall’ Parodies Removed from YouTube, CBS NEWS (Apr. 22, 2010), http://www.cbsnews.com/stories/2010/04/21/tech/main6419452.shtml. Abraham Foxman of the Anti-Defamation League said of the parodies “We find them offensive. We feel that they trivialize not only the Holocaust but World War II. Hitler is not a cartoon character.” Id. If Hitler were, in fact, a cartoon character instead of a historical figure, the copyright issue might be simplified. See, e.g., Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).
Hitler who really wanted to watch *Kung Fu Panda*; for others laughing at Hitler is a way of striking back against horror. For us, though, the question is not whether the parodies are funny, offensive, or some combination of both, but whether they infringe copyright; alas, copyright is too often the enemy of humor.

The film’s director, Oliver Hirschbiegel, apparently approved of the meme: “Many times the lines are so funny, I laugh out loud, and I’m laughing about the scene that I staged myself! You couldn’t get a better compliment as a director.”\(^{(10)}\) (Pragmatically, he adds, “If only I got royalties for it, then I’d be even happier.”\(^{(11)}\) But as so often happens in copyright, the rights-holders who did not actually create the content took a dimmer view of others’ use of that content than did the content creator. Once the meme hit the mainstream,\(^{(12)}\) it attracted the attention of Constantin Films, which then demanded that YouTube take down the videos.\(^{(13)}\) (Hitler, of course, was enraged when he learned of Constantin Films’ demand, and launched into a now-familiar tantrum.\(^{(14)}\) The ranting Hitler points out the short-sightedness of most such copyright actions by content owners against fan works: “Their movie’s been getting so much free publicity from this meme for the past two years! Before people started making fun of this scene, there were only a few people outside of Germany who knew about *Downfall*! The movie got international attention because of YouTube users’ hard work.”\(^{(15)}\) Constantin Films executive Martin Moszkowicz disagreed, however: “We have not been able to see any increase in DVD sales. There is no correlation between Internet parodies and sales of a movie, at least not that I am aware of.”\(^{(16)}\)

In addition to this pragmatic argument in favor of fan works, there is a legal argument as well: Fan works are often transformative.\(^{(17)}\) Or, as Hitler points


\(^{11}\) Id.


\(^{14}\) *Hitler Reacts to the Hitler Parodies Being Removed from YouTube*, YOUTUBE (Apr. 20, 2010), http://www.youtube.com/watch?v=kBO5dh9qrfQ.

\(^{15}\) Id.


out later in his rant, "Haven't they ever heard of fair use? Title 17, U.S.C., Section 107? Parody is not an infringement of copyright!"  

And while it may be a mistake, or at least in poor taste, to allow Hitler – even a YouTube parody of a Swiss actor playing Hitler in a German movie – to raise the central question of this article, I'm afraid he has just done so. More specifically, this article addresses the question of whether the addition of subtitles or audio commentary to part or all of a copyrighted video work infringes on the copyright in that work.

A SPECTRUM OF ORIGINALITY

The *Downfall* parody videos are hardly unique. They are not even the first to use parodic subtitles with footage of Hitler. Monty Python's "Killer Joke" skit...

---

1. "Hitler Reacts to the Hitler Parodies Being Removed from YouTube, *YouTube* (Apr. 20, 2010), http://www.youtube.com/watch?v=kBO5dh9qriQ. This is a bit inconsistent, as it was movie-Hitler himself who ordered the videos removed: "I want DMCA takedown notices sent on all these videos immediately!" Hitler, as "Downfall" producer, orders a DMCA takedown, *YouTube* (May 27, 2009), http://www.youtube.com/watch?v=PzUoWkbNLe8.
uses footage of the real Hitler with subtitles purporting to show that he is trying to create a joke: "My dog's got no nose." As a side note, part of the relatively high level of public comfort with the *Downfall* clip comes from the knowledge that the ranting figure is not actually Hitler at all, but only Bruno Ganz; the use of actual Hitler footage makes the Monty Python clip a bit edgier.

The internet is awash in works incorporating audio and video content from better-known, copyrighted works. Many of these are fan works, created out of attachment to and affection for the borrowed source material, or some of it. Others, like most makers of *Downfall* videos, use well-known source material for its memetic value, rather than because they are fans of the original movie. These works involve differing degrees of borrowing and of creativity; it may be helpful to organize a few similar works along a spectrum of originality. The *Downfall* videos lie somewhere in the middle of this spectrum. At one end of the spectrum, with a high degree of originality and no borrowing at all, lie works like Rifftrax and *Wizard People, Dear Reader*. At the other, with content either completely borrowed or generated by accident, lie accidentally humorous translations like the garbled *Star Wars* translation *Backstroke of the West*. In the middle ground, along with the *Downfall* meme, lie Buffalax, Mystery Science Theater 3000, and sundry others.

*Wizard People, Dear Reader* is an alternate soundtrack to the first Harry Potter movie, *Harry Potter and the Sorcerer's Stone*, written and recorded by Brad Neely. Taken alone, the audiorecording is a parody of the movie. The problem comes when it is combined, as intended, with the video portion of the movie. In 2004 and 2005 Neely performed the work, either live or via audiorecording, in theaters playing the movie with the sound off. Warner Brothers allegedly objected and, using the threat of withholding access to future Warner Brothers films, pressured theaters to cancel scheduled performances. A few copies of the work were also distributed through video rental stores with rentals of the movie, and far more were distributed via the website Illegal Art.

Neely's work is a retelling – to a certain extent, a reverse engineering – of the story of *Harry Potter and the Sorcerer's Stone*. On its own, it is probably protected as parody; to the extent that it is controversial, it is so because its comedic effect

---


20 When Turkish shampoo Biomen subtitled footage of the real Hitler in a television commercial, it found that few were amused. See *Hitler shampoo ad deemed 'totally unacceptable!'*, MSN Now, Mar. 26, 2012, http://now.msn.com/living/0326-hitler-shampoo-ad.aspx.


derives from being played alongside the video portion of the film it parodies. However, Neely himself did not copy any portion of the video; thus, apart from any possible infringement of Rowling’s and Warner Brothers’ copyrights in the characters and the underlying story, there is no infringement of the video work under US law.

*Wizard People, Dear Reader,* while unusual, is not unique. Replacing the entire soundtrack of a movie for comedic effect has been done commercially for decades. In the early 1960s the television show *Fractured Flickers* added dubbed dialogue to silent movies. More famously, the 1966 Woody Allen film *What’s Up, Tiger Lily?* was a remix of two connected Japanese movies, *Kokusai himitsu keisatsu: Kayaku no taru* and *Kokusai himitsu keisatsu: Kagi no kagi* with absurd English dialogue added. Unlike Neely, Allen first purchased the rights to the two films. Unlike Allen, however, Neely did not copy any content from the original film; his entire performance could be treated as two hours of commentary on the original.

*What’s Up, Tiger Lily?* inspired many imitators, from the Situationist International’s *La Dialectique Peut-Elle Casser Des Briques?* (based on a Chinese martial-arts film) through Spike TV’s *MXC* (based on a Japanese game show) to the better-known, if not better, *Kung Pow! Enter the Fist* (based on another Chinese martial-arts film). (The fact that the films chosen for such treatment in English, at least commercially, are so often from China and Japan, along with the filmmakers’ apparent perceptions of otherness and humor, is worthy of an article in itself. Not this article, though.)

Noncommercial alternative soundtracks have proliferated as technology has made them easier to create and share. Attempting to synchronize Pink Floyd’s *The Dark Side of the Moon* with *The Wizard of Oz* is a long-standing stoner tradition; replacing the original soundtrack of the skateboard chase from *Back to the Future* with an a cappella dub of the same dialogue and sound effects is somewhat more obscure, as is its purpose. Bad Lip Reading provides several recent examples.

A less drastic step than replacing the entire soundtrack of a film is to play that film in its entirety, adding commentary, as in the now-defunct *Mystery Science Theater 3000 (MST3K)*, in which a silhouette of a man and his robot companions watched old B-movies, barracking and kibitzing throughout. *MST3K* used movies in the public domain and movies that could be licensed inexpensively. The makers of *MST3K* later created Rifftrax, applying the same concept to better-known,

28 *MXC: Most Extreme Elimination Challenge* (Spike TV television broadcast 2003-07).
30 *Kung Pow! Enter the Fist!* (20th Century Fox 2002).
31 虎鶴雙形[Tiger and Crane Double Fist] (Dai Yat/First Films 1976).
32 See, e.g., BadLipReading, "Edward and Bella" — A Bad Lip Reading of Twilight, YouTube, http://www.youtube.com/watch?v=FmxSk0wZcss (visited October 6, 2012).
higher-budget movies by releasing commentary tracks independently; viewers obtain a legal copy of the movie elsewhere and play the commentary simultaneously. MST3K’s Michael J. Nelson, a cofounder of Rifftrax, explained that this was done to avoid copyright issues, despite a good-faith belief that the combination of humorous commentary with the original work would have been a protected parody (or, in Nelson’s word, “satire”):

Years ago, I’d done some research into – and actually paid a lawyer... to answer the question – could you just do this commentary on a DVD... call it satire and get away with it. And the answer was, “Sure, but you, by that time, will have been sued out of existence. You would actually be sued to where there was no matter left, you would be a black hole of humanity and your family would no longer exist either by extension. But you would eventually win – perhaps – but that would be thousands of years down the line.” ...So the only way to do it would be to somehow make it separate and avoid that.

There, once again, is the chilling effect of fear of litigation: The fuzzy boundaries of fair use and the high cost of litigation (let alone of losing) serve to prevent the testing of those boundaries.

A slightly different use of copyrighted video content is made by YouTube users posting soramimi kashi (空耳歌詞: [intentionally] misheard or mistranslated lyrics). The process is sometimes called buffalaxing after YouTube user Buffalax, who has posted many such videos, or “Benny Lava,” after a Buffalax video of that name. Buffalax’s version of “Moskau” is representative. The dreadful original song was recorded in German by German ersatz-folk-rock/disco band Dschinghis Khan. While this genre remains inexplicably popular in the land of Karl May, it rarely succeeds elsewhere. (For a rough English-language analog, in taste if not in style, consider the appalling Big Bopper/Johnny Preston song “Running Bear [and Little White Dove].”) “Moskau,” however, was an exception; it was released in Australia at just the right time to be picked up by a television station as its theme song for coverage of the 1980 Moscow Olympics. The familiarity of the tune to a large number of English speakers who do not understand the lyrics, plus the video’s over-the-top kitschiness, make it ripe for soramimi parody. Buffalax’s version replaces the original’s lyrics with what looks like stream-of-consciousness nonsense but is somehow oddly catchy when combined with the original tune and video:

Moskau

---

34 Buffalax: Dschinghis Khan – Moskau Buffalax (English Lyrics), YouTube, http://www.youtube.com/watch?v=mAz50pZn6Ys; the original song is Dschinghis Khan, Moskau (Dschinghis Khan 1979).
35 Johnny Preston, Running Bear (My Heart Knows 1959). Among the many unnecessary covers of this wretched song is this one: Gus Backus, Brauner Bar und Weiße Taube (Gus Backus 1960).
Enter the hymen store
Two men are scorched and burned
Kite me a sign
Moskau
Don’t worry Bill is dead
There lies the toy opened
Indians are high

This sort of multilingual mondegreen is possible between any languages, giving rise to, for example, Malayalam subtitles (presumably comical) to a Russian folk song. English-language songs, heard (but not always understood) the world over, are popular targets; thus the Beatles’ “I Want to Hold Your Hand” becomes, in Japanese, “Aho na honyohan” (“Stupid public urination”). In Germany such lyrics are labeled “Agathe Bauer,” after a mishearing of “I Got the Power.”

This sort of fan repurposing of visual content by adding new text is not restricted to video. Similar effects can be achieved with static visual works – paintings, clip art, photographs, and comic strips. The first two rarely have original accompanying text, so text is added without replacing existing text – done often enough, this becomes an image macro meme. Adding text to a familiar painting gives us the Joseph Ducreux meme. Adding text to a clip-art drawing gives us Philosoraptor, while adding text to a photograph gives us the Xzibit “Yo dawg” meme, and of course an apparently inexhaustible supply of lolcats.

Adding text where none was present before presents a weaker case for parody than does replacing text already present. In the former case, though, the amounts borrowed from the original work are generally quite small and any borrowing is de minimus: The images of Xzibit and Philosoraptor are tiny portions of much longer works (the television show Pimp My Ride and the Jurassic Park movies, respectively) and the clip-art velociraptor image was created by T-shirt artist Sam Smith from images of several velociraptors found online. Smith’s explanation demonstrates the unavoidably collaborative nature of the creative process, even when the “author” is apparently working alone:

The image itself was a mix of several images of velociraptors I got online, which I compressed to one-color images, then mixed together.

I took the jaw off of one at the mouth, and cut it open to make the mouth

37 Buffalax, supra note 34. A rough translation, incorporating my own possible mishearing and misunderstanding of the lyrics: “Moscow/Strange and mysterious/Towers of red gold/Cold as the ice/Moscow/But one who really knows you/Knows, a fire burns [or “the white fire is burning”]/In you so hot.”

38 Chackochaaa... (Malayalam Buffalax), YOUTUBE, http://www.youtube.com/watch?v=j52BMWFXnSU.

39 See e.g., Tamori Club: The Soramimi Hour (TV Asahi) (Japanese late-night program with a recurring feature where misconstrued song lyrics are set to amusing videos). See also, e.g., Giba Assis Brasil, Mondegreen, Virundum, Soramimi, Pitching. CASA DE CINEMA DE PORTO ALEGRE (Oct. 9, 2009), http://www.casacinepoa.com.br/o-blog/giba-assis-brasil/mondegreen-virundum-soramimi-pitching.

40 For a medley, see Songverhöerer! Die besten Agathe Bauer Songs, YOUTUBE (Aug. 11, 2008 posted by Elidiron, http://www.youtube.com/watch?v=CYwnXJuBNTU.

41 Joseph Ducreux, Portrait de l’artiste sous les traits d’un moqueur (1793).
look like it was hanging open. The claw was based off an image of an
eagle talon that I flattened, drew in some bits, and moved and enlarged
one of them to make the raptor-like claw. The last thing I did was nudge
the eye slit over to the right like three times, and that pulled it all together
- really gives him that far-away look.

It was inspired by our friend Devin, who was a philosophy major
and was always hunched over his desk thinking, so we called him the
philosoraptor. We had never heard of it before at the time, but apparently
the joke had been made previously on the interwebs.42

Smith’s use of material from several original photos to create a digital collage is
not parody, but it is transformative. (Incidentally, Smith’s source “velociraptors”
must themselves have been from or in some way inspired by the Jurassic Park
films: Philosoraptor, like the dinosaur named “velociraptor” in the films and thus
now in the popular consciousness, is in fact the larger Deinonychus.43)

Parodies of comics can be created fairly easily by erasing the contents of
the speech balloons in the originals and replacing them with new text. Among one-
panel comics, The Family Circus is a favorite target for online parody;
“Dysfunctional Family Circus”44 replaces the text with new original text, while
“Cthulhu Family Circus” replaces the text with text from the works of H.P.
Lovecraft. While Lovecraft’s works are out of copyright,45 spin-offs such as Jersey
Family Circus, using dialogue from the reality TV show Jersey Shore, use in-
copyright works. In either case they contain no truly “original” content; like
Smith’s Philosoraptor image, they are mash-ups of existing non-original content,
put together in a way that is itself original.

Parodies of full-length comics may require more originality on the part of
the creator, as they require not only one-line quips but a coherent story matching
the provided series of images and parodying the original storyline.46 Combining
images from other media – for example, using screen shots from the three Lord of
the Rings films to tell a parody version of the same story47 - is more original still,
and almost certainly transformative in the same manner as Smith’s Philosoraptor
picture.

The nadir of creativity, although not of humor, in inaccurate subtitling can
be found in the mistranslated subtitles (sometimes called “Engrish subtitles” or
“fractured subtitles”) on some zero-day and pre-DVD-release pirated videos.

43 Deinonychus antirrhopus is not classified by most paleontologists as a velociraptor, but Michael Crichton, in writing the original Jurassic Park novel, relied on Gregory S. Paul, Predatory Dinosaurs of the World 464 (New York: Simon & Schuster, 1988).
44 See, e.g., Dysfunctional Family Circus Archive, http://dfc.furr.org/.
45 For the most part, the tangled disputes over Lovecraft’s copyrights (see, e.g., Chris J. Karr, The Black Seas of Copyright: An investigation into the copyright status of the H.P. Lovecraft fiction, Aug. 13, 2008, http://www.aetherial.net/lovecraft/) became moot at midnight on December 31, 2007, Lovecraft having died in 1937.
These pirated videos are often the product of a multinational illicit enterprise: On the first day of a movie's release, it may be surreptitiously filmed with a hat-cam in Montreal, then uploaded to an affiliate in Moscow who translates the text into Russian on the fly; this is then re-translated, usually using translation software, into several other languages — including English. The dissonance between the actual English dialogue and the wildly inaccurate English subtitles is often hilarious. A well-known example is Backstroke of the West, from a re-translation of a pirated Chinese DVD of the bathetic third episode in the Star Wars prequel trilogy, Revenge of the Sith. The subtitles are actually a considerable improvement on the original's notoriously wooden dialogue. (Words such as "dreamses" and "troopseses" suggest the not particularly helpful intervention of a non-mechanical translator, probably Gollum.) While it is amusing to see "Jedi Council" repeatedly translated as "Presbyterian Church," subtitles of this sort present the weakest case for transformative use. They are, rather, derivative; the humor is an unintended by-product and not the result of a deliberate act of creativity or originality. Nonetheless, they remain popular and in some cases ("All your base are belong to us") have become internet clichés.

A different intent, but sometimes similar result, underlies anime fansubs: Translations of anime works not yet available in English (or some other language) made by fans for other fans. Unlike video pirates, fansubbers are part of an audience intensely devoted to the original works, and therefore not a group that the content owners particularly want to antagonize. As a result, a market solution appears to be emerging: Speeding up the subtitling and dubbing processes to reduce demand for fansubs.

ORIGINALITY, COPYRIGHT, AND DERIVATIVE WORKS

To the extent that these parodic subtitles are created by fans of the original works, they place content owners in an awkward position: Even when fan works infringe on intellectual property rights, enforcing those rights can alienate the fans and thus diminish the market for the underlying work. It seems probable, though,
that most of the creators of, for example, Downfall parodies are not only not fans of the original, but have not even watched it in its entirety.

Copyright protects "original works of authorship fixed in any tangible medium of expression."\(^5\) including motion pictures and, for that matter, subtitles. Adding parodic subtitles to an existing work, while it may be original, may fall within the copyright owner's sole right to control the making and distribution of derivative works.\(^5\) However, certain uses that might seem to be derivative and thus infringing may be protected if the use is sufficiently transformative, as in parody.

As is perhaps inevitable when the interpretation of non-legal technical terms is left in the hands of the courts, the legal definitions of some terms used to describe works of literature, including "derivative" (and, we shall see later, "parody") have begun to deviate from their non-legal definitions. The Copyright Act defines, or at least describes, a "derivative work" [as] a work based upon one or more preexisting works...\(^5\) While true in a general sense, most or even all works are derivative in this sense. The Downfall meme and its kin are necessarily "derivative" in a literary sense as well; for that matter, Downfall itself is in dialogue with and relies for its impact on earlier cinematic and literary depictions of Hitler and World War II. Most if not all fiction is derivative, floating briefly on the surface of Tolkien's "cauldron of story"\(^5\) before sinking again beneath the surface to form an ingredient in the next story to float to the top. The degrees of derivativeness vary. An adaptation to a new medium is a derivative work, as when Shakespeare adapted more or less all of Arthur Brooke's poem The Tragical History of Romeus and Juliet. A translation is derivative, as when Brooke for his part translated Pierre Boaistuau's awkwardly (and spoilerifically) titled Histoire troisieme de deux Amants, don't l'un mourut de venin, l'autre de tristesse,\(^5\) or when Boaistuau in turn had translated Matteo Bandello's Giulietta e Romeo,\(^5\) itself a modified version (and thus derivative) of Luigi da Porto's story of the same name.\(^5\) A more complete reworking, changing the setting and the names of the characters, involves more originality but is still derivative, as when da Porto changed the names of the characters of Masuccio Salernitano's Mariotto and Gianozza\(^5\) and moved the setting from Siena to Verona, adding in elements of

\(^{54}\) J.R.R. TOLKIEN, Tree and Leaf, in THE TOLKIEN READER 26, 52 (1966).
\(^{55}\) PIERRE BOAISTUAU, Histoire Troisième De deux amants, don’t l’un mourut de venin, l’autre de tristesse, in HISTOIRES TRAGIQUES 63, 63 (Paris, 1559).
\(^{56}\) MATTEO BANDELLO, Giulietta e Romeo, in NOVELLE (1554-73; Villon Society, John Payne trans., 1890).
\(^{57}\) LUIGI DA PORTO, "Giulietta e Romeo," HISTORIA NOVELLAMENTE RITROVATA DI DUE NOBILI AMANTI (1530).
\(^{58}\) MASUCCIO SALERNITANO, Mariotto and Gianozza, in IL NOVELLINO (1476).
Ovid's *Pyramus and Thisbe*, or when Montagues and Capulets become Jets and Sharks and Verona becomes mid-twentieth-century New York in *West Side Story*. A work may be derivative of another even when the source work contributes only a minor story element, as when the "rude mechanicals" of *A Midsummer Night's Dream* perform *Pyramus and Thisbe*, badly. An argument might even be made that a passing reference, even an ambiguous one, is derivative; is the donkey's head placed on Bottom in *A Midsummer Night's Dream* a reference to *The Golden Ass*? Is Bottom's dream drawn from the Bible, or from Chaucer's *The Book of the Duchess*, or both? In a literary sense, even the incorporation of an existing trope is derivative; the "star-crossed lovers" trope, for example, is surely as old as fiction, and Ovid no more invented it than did Shakespeare a millennium and a half later.

Obviously not all of these levels of literary derivativeness can be legally derivative within the meaning of 17 U.S.C. § 106 without utterly paralyzing creativity. Concerns about the restrictive effect of copyright law on creativity predate, if not the internet, at least the age of near-universal access and use. In the era of the internet as a participative mass medium, however, copyright law has moved out of its specialized pigeonhole and become a matter of more general concern, and post-Web legal developments have given rise to a widespread, though not universal, perception that current interpretations of section 106 are too restrictive and are already producing such paralysis.

---


Where one might quibble with Boyle and others like him is in his sweeping embrace of "open" development models or "sharing" economies as solutions to the current propertization problem.... Boyle discounts a lot that is troubling about the new "sharing" modes. For one thing, they do not provide an easy path to earning a living for creative professionals in the way that intellectual property ownership does. Research in the software industry suggests that the monetary benefits of these arrangements inures primarily to the benefit of big, established players. Entrepreneurs still need property rights to gain access to capital. Even beyond start-ups, "crowdsourcing" of projects, for example, provides opportunity for those looking to break into a field, but by providing labor cost-free, undermines the viability of the very field participants wish to enter.

See also Edward Lee, "Warming up to User-Generated Content," 2008 *U. Ill. L. Rev.* 1459, 1461 (2008):

Whether in blogs, fan fiction, videos, music, or other mashups, many users freely use the copyrighted works of others without prior permission and even beyond our conventional understandings of fair use. Yet, often, as in the case of
The *Pyramus and Thisbe* thread is, after all, but one of many in the several works mentioned. Brooke’s translation of Romeus and Juliet also works in elements of Chaucer’s Troilus and Criseyde, from which Shakespeare borrowed far

noncommercial uses of copyrighted works on blogs or in fan fiction, the copyright holders do not seem to care, and, in some cases, publicly condone the general practice. Moreover, the mass practices of many users of popular Web 2.0 sites, like YouTube, of ignoring the need to obtain permission before using someone else’s copyrighted work have even prompted the securing of commercial licenses between Web 2.0 sites and the copyright holders in order to ratify the mass practices of users. Thus, instead of being condemned as infringement, the unauthorized mass practices of users may have, in some instances, turned out to be the catalyst for subsequent ratification of those practices, albeit in some bargained-for exchange not even involving the users themselves.


[S]ome commentators’ solutions for reconciling copyright and the First Amendment focus on eliminating the uncertainty of copyright’s internal safeguards in some way. However, while it is hard to deny the ambiguity and malleability of copyright’s internal safeguards, it may be that eliminating the legal uncertainty of the idea/expression dichotomy and fair use doctrine may, at best, do nothing for free speech, and at worst, further burden free speech interests rather than accommodate them.

more heavily for *Troilus and Cressida*. Chaucer in turn had borrowed from Boccacio, who had borrowed from Guido delle Colonne, who borrowed from Benoît de Sainte-Maure, and so on. Arthur Golding’s translation of Ovid’s *Metamorphoses* influenced Shakespeare in a way that the untranslated work could not have. The creative process is always, or nearly always, a collaborative one; the ostensible author draws on the works of an entire civilization, or even of all of humanity.

Taken to one extreme, as noted, a strict interpretation of Section 106 could prevent the creation of any new works: Surely in every new work, elements of older works still in copyright can be found. At the other extreme, the denial of copyright to any adaptation of a broadly defined idea or trope found in an out-of-copyright work would effectively make most or even all works uncopyrightable: Tales of star-crossed lovers have persisted for thousands of years in part because they are based on universal human experience, and thus are not particularly original. Yet new stories in the genre are published every year, and continue to be protected by copyright. (Despite the absence of any mention of varying standards of originality in the statute, courts have tended to set the bar for originality needed to make a derivative work copyrightable in its own right higher than that for a completely “original” work.)

The level of derivativeness to which Section 106 refers must lie somewhere between the extremes of an adaptation or translation of the entire story at one end and the casual reference at the other. The definition from the first sentence of Section 106, reproduced in part above, provides little guidance:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.

---

65 Guido delle Colonne, Historia destructionis Troiae (Mary Elizabeth Meek ed. & trans., Harvard University Press 1956) (c. 1287).
66 Benoît de Sainte-Maure, Roman de Troie (William Caxton ed. & trans., Bruges 1473)(c. 1155-1160). Caxton’s translation (Caxton both translated and published the work) was probably the first book published in English, and thus an important copyright milestone in its own right. See Craig W. Kallendorf, A Companion to the Classical Tradition 240 (2d ed. 2010).
68 See, e.g., Gracen v. Bradford Exch., 698 F.2d 300 (7th Cir. 1983). On transformative works generally, see, e.g., Jo-Na Williams, The New Symbol of “Hope” for Fair Use: Shepard Fairey v. The Associated Press, LANDSLIDE, Sept. -Oct. 2009, at 55. Of course, where the use of the underlying work in a derivative work is unlawful to begin with “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.” 17 U.S.C. § 103(a) (2006).
What does this mean for subtitles and text replacement? An adaptation from one medium, form, or language to another is a derivative work, as are shortened versions. Subtitles generally would seem to fall within this: They are most commonly used for translation from one language to another or as a second means of conveying information in the same language—a change of form, that is.

The inclusion of “fictionalization” in the list of derivative works is interesting; it suggests that a movie—Downfall, for example—based on a work of history might be a derivative work, even though there is no copyright in historical facts or even theories. According to the U.S. Copyright Office, “fictionalization is a treatment of a factual work in which the elements are recast, transformed, or adapted to produce a work of fiction. A work which is only loosely based on the ideas or facts found in an earlier work, is not considered to be a derivative work.”

Bernd Eichinger’s screenplay for Downfall draws on several historical works; necessarily, considering the subject, several of the authors of the first-hand accounts were themselves controversial historical figures. The tirade and breakdown so often parodied on YouTube is drawn partly from the account of Gerhardt Boldt, who was present at the time the news of Steiner’s failure to mobilize arrived.

Downfall is not loosely based on the underlying non-fiction works, but is a fairly faithful portrayal and thus perhaps a fictionalization. However, it is itself a work of historical fiction and, perhaps, of historical fact. For the most part the movie strives for accuracy. There are a few departures, such as the boy who helps Traudl Junge escape through the Russian lines; in Junge’s memoirs there was no such boy and in fact Junge did not escape, but was captured by the Russians after hiding in the Russian sector for two weeks. Still, the movie is a source of historical information, which the Downfall parodies are not; they are, among other things, fictionalizations of the movie’s factual content and thus derivative, notwithstanding the originality they embody. The second sentence of Section 106 greatly expands the potential scope of the derivative works right when it points out, “A work consisting of editorial revisions, annotations, elaborations, or other modifications...”
which, as a whole, represent an original work of authorship, is a 'derivative work.'” 73

FAIR USE

This does not mean, though, that the Downfall parodies and their kin are necessarily infringing. Even if the vids are derivative works within the meaning of Section 106, the copyright holder’s exclusive right to make derivative works is limited, in the US, by the right of fair use under 17 U.S.C. § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 74

In the case of Downfall, the second factor weighs in favor of the copyright holder: The work is a movie made for commercial distribution, at the core of the category of economic and intellectual activity copyright is designed to protect. The first factor is less clear. On the one hand, the Downfall parodies are not of a commercial nature; on the other, they are not, except incidentally, for nonprofit educational purposes; they are presented as entertainment. The third factor weighs in favor of the parodists: The short clip used for the Downfall vids, while representing a crucial point in the film, is a small portion of the entire work: less than four minutes out of a 156 minute film.

Although Congress has given no clear guidance on how the factors are to be weighted and applied, it is often argued that the fourth factor should outweigh the others. 75 Economic effect, after all, is what copyright law is or should be about, at least in the U.S. The subtitled Downfall clip does not replace the complete movie in the market place, nor does it compete with it. It is unlikely to cannibalize sales and rentals of the original; if anything, it may augment them by bringing attention to a movie many non-Germans might otherwise have overlooked.

75 See, e.g., Harper & Row, 471 U.S. at 566.
although the copyright owner denies this.\footnote{See note 16, supra, and accompanying text.} Factor four also covers effects on the market for possible future derivative works by the copyright holder. It is possible that Hirschbiegel or Constantin Films might wish to make its own *Downfall* videos. (Hitler might, for example, fly into a rage upon learning that Hirschbiegel actually approves of the meme.) Certainly filmmakers are not always averse to parodying their own content: *Carrotblanca*, *Break-Dancing Yoda*, and *School-Time Shipping* are all "official" or quasi-official parodies.\footnote{The first item on the list might be "quasi-official" because Warner Brothers, which made *Casablanca* in 1942, no longer owned the copyright when it made *Carrotblanca* in 1995.} So far, though, they have made no effort to do so.

With only one of the four factors – the nature of the copyrighted work – clearly weighing against a finding of fair use, and two of the four (including the market-effect factor) weighing in favor, it seems likely that the *Downfall* parodies are fair use and thus not infringing. As noted, though, the problem for the individual in relying on fair use is the chilling effect of fear of litigation.

As a side note, one complaint frequently made by users and information rights advocates lacks merit: YouTube itself, by complying with Constantin Films’ takedown requests and removing allegedly infringing videos, is not violating the users’ “right to fair use” or any related right of freedom of expression. YouTube is a private enterprise, not a state actor; it is free to control the content on its servers as it wishes, within the bounds set by contract between itself and its users.\footnote{See generally, e.g., Cyber Promotions, Inc. v. America Online, Inc., 948 F.Supp. 436 (E.D. Pa 1996).} That being said, YouTube’s Content ID system is still friendlier to persons claiming copyright than is the DMCA’s notice and takedown procedure.\footnote{17 U.S.C. § 512(c)(3)(A). See also, e.g., Laura Sydell, YouTube Pulls Hitler ‘Downfall’ Parodies, *NPR*, April 23, 2010, http://www.npr.org/templates/story/story.php?storyId=126225405: [Corynne] McSherry [an attorney with the Electronic Frontier Foundation] has seen many of the Downfall parodies. “All the ones that I’ve seen are very strong fair use cases and so they’re not infringing, and they shouldn’t be taken down. But via this filter system they are taken down virtually automatically,” she says. Hitler parodies are appearing on other sites, including one that makes fun of Constantin Films. YouTube’s Zamost says that the people who put their parodies on YouTube can appeal and have them put back up. Then, if Constantin Films wants to take them down it will have to sue. And if McSherry is right, the company is not likely to win in a U.S. court.} Under YouTube’s procedure, a person claiming copyright ownership of a work can upload the work to the Content ID system and set permission levels. Content ID then searches YouTube for portions of uploaded videos that match part or all of the content uploaded by the alleged copyright holder, and apply the rules that person has set. The process is automated; in contrast to the DMCA procedure, there is no need to file a notice for each disputed video. A YouTube spokesperson says that, with their system, copyright owners are allowed to decide what level of fair use
they're comfortable with. Allowing content owners to decide what fair use is might seem to undermine the concept and allow content owners to stifle creativity from flourishing on the internet.

One potential effect may be that YouTube users re-work their videos to bring them into compliance with the limits set by Content ID, rather than contesting those limits. This may cause them to forgo legally protected creative expression and, given the market dominance of YouTube, may create new, diminished normative expectations regarding the scope of fair use.

PARODY

We have thus established two arguments the creators of the Downfall videos might use to defend against a claim of copyright infringement: First, the use is not actually derivative under Section 106, but transformative; and second, the use is a fair use under section 107. A related argument, incorporating the first two, is that the use is a parody protected under Campbell v. Acuff-Rose.

In Campbell the U.S. Supreme Court addressed a parody of Roy Orbison's annoying 1964 song "Oh, Pretty Woman." The song had been covered by several other musicians, some of whom – notably Van Halen – have managed to make their versions even more irritating than the original. The song attracted the attention of Luther Campbell, of 2 Live Crew, a group whose talents as First Amendment provocateurs greatly exceeded their talents as musicians. Campbell requested permission to perform a parody of the song, which Acuff-Rose refused to give. Campbell and 2 Live Crew recorded and distributed the parody nonetheless, titled "Pretty Woman" but more often known by the repeated phrase "Big Hairy Woman." While relatively mild by comparison to some of 2 Live Crew's other works, the song could be considered shocking; the Supreme Court seemed to agree with the dissenting opinion of the appellate court's Judge Nelson that "Big Hairy Woman":

"[W]as clearly intended to ridicule the white bread original" and "reminds us that sexual congress with nameless streetwalkers is not

---

82 None of these – not even the video for the Van Halen version – comes close to the fingernails-on-a-blackboard quality of the movie, though.
necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.\textsuperscript{85}

The Supreme Court agreed that the work was a parody, although it intimated that it might not be a particularly good one. The quality and tastefulness of the parody were irrelevant, though: "[H]aving found [the element of parody] we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."\textsuperscript{86}

Parodies of popular works are often a way, as G.K. Chesterton pointed out, for fans to express their affection for the original, laughing with it rather than at it.\textsuperscript{87} The 2 Live Crew parody of "Oh, Pretty Woman" is considerably less affectionate, apparently written in a "spirit of contempt" for the original.\textsuperscript{88} But fond parody and hostile parody are equally protected under \textit{Campbell}: "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."\textsuperscript{89}

The amount of the original that may be copied for the parody is limited; where those limits lie is unclear, but parodies may not copy so much that they become substitutes for the original:

The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely "supersede the objects" of the original.\textsuperscript{90}

There is a problem here, however. The \textit{Downfall} parodies do not seem to be intended to parody the movie \textit{Downfall}. Rather, what is being parodied is Hitler himself – the historical Hitler rather than the fictional one. This sort of confusion

\textsuperscript{85} Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 582.

\textsuperscript{86} Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 582. A much better, if arguably equally offensive, parody (albeit in Cantonese) is Sam Hui’s "Pretty Woman" on the album \textit{Aces Go Places} (Fortune Star 1981).

\textsuperscript{87} G.K. CHESTERTON, VARIED TYPES 179 (Project Gutenberg ed., Dodd, Mead & Company 2004) (1905), available at http://infomotions.com/etexts/gutenberg/dirs/1/4/2/0/14203/14203.htm. Chesterton opined that all American parody was of the laughing at, rather than laughing with, variety; one hopes we have become a bit more sophisticated since then.

\textsuperscript{88} G.K. CHESTERTON, VARIED TYPES 179 (Project Gutenberg ed., Dodd, Mead & Company 2004) (1905), available at http://infomotions.com/etexts/gutenberg/dirs/1/4/2/0/14203/14203.htm. Yielding to this spirit of contempt, Chesterton says, "destroys parody." While this may be true in a literary sense, \textit{Campbell} draws no such distinction.


\textsuperscript{90} Campbell, 510 U.S. at 583 n.16 (1994).
between the work and its subject may be an inevitable problem when works of
historical fiction are parodied. In this case, though, it may be necessary, at least for
Chestertonian affectionate parody, for the historical Hitler to be mediated through
Hirschbiegel's film and Ganz's performance. It is impossible to feel affection for
the "real" Hitler, but Ganz's Hitler, reduced to a box in a browser window,
becomes a more comfortable subject for parody. A parodist might argue that both
Chestertonian and anti-Chestertonian parody are present: The parodies laugh at
Hitler but with Ganz and Hirschbiegel.

PARODY, SUBTITLES, AND LANGUAGE

The humor of the Downfall Hitler meme depends in part on the viewer's
being unable to understand German. For most viewers outside German-speaking
countries, this is probably the case. In the US, for example, of students who study
a foreign language, only about four per cent study German. For a viewer who
speaks German the dissonance between what is said and what the subtitles show is
confusing and undermines the humor, at least to some extent. As Hirschbiegel, the
director, says of the parodies "Of course, I have to put the sound down when I
watch." But for the viewer who does not speak German, the incomprehensibility
of the words enhances the overall madness of Ganz's performance, and thus
magnifies the incongruity of the (usually mundane) subtitles. The audio portion of
the original is thus valued in the parody not for the information it contains, but for
the opposite reason: for its failure to convey information. This leads to the result
that the degree of transformativeness of the work varies depending on the audience.
The work is most transformative to the viewer who reads English but cannot
understand spoken German. At the other extreme, the viewer who understands
spoken German but not written English will perceive no transformation at all, aside
from some incomprehensible text at the bottom of the screen; for all the viewer
knows, the subtitles might be an accurate translation.

PARODY AND TRANSFORMATION

Parody is necessarily derivative in a literary sense; as Justice Souter points
out in Campbell, parody must "'conjure up' at least enough of [the] original to
make the object of its critical wit recognizable." But works that are transformative
are not derivative within the meaning of section 106(2), and parody is

---

91 American Council on the Teaching of Foreign Languages, Foreign Language
Enrollments in K–12 Public Schools: Are Students Prepared for a Global Society?,
92 Rosenblum, supra note 10. See also Comment of Vernon, Atlanta, USA to The
Rise, Rise and Rise of the Downfall Hitler Parody, BBC News Magazine, Apr. 13, 2010,
http://news.bbc.co.uk/2/hi/uk_news/magazine/8617454.stm: "As a German teacher I
understand everything the actor is saying in the original film so its [sic] hard for me to
appreciate the subtitled jokes."
94 See generally, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th
Cir. 2001).
transformative. The lack of any clear distinction between parody and other transformative uses, plus the *Campbell* court’s explanation that parodies need not be particularly funny in order to be protected as parodies, provides an argument that all transformative uses are not only not derivative, but also protected both as fair use and by the First Amendment, and thus not infringing:

The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”

Quoting *Yankee Publishing*, the *Campbell* court then pointed out that “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”

The question of transformativeness thus replaces, or perhaps becomes the test for, whether the work is a “parody.” It strikes at the first of the four Section 107 factors:

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). . . . The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

---

95 Campbell, 510 U.S. at 579 (“Suffice it to say now that parody has an obvious claim to transformative value.”).
98 Campbell, 510 U.S. at 578-79.
99 Campbell, 510 U.S. at 578-79.
The *Campbell* court seems to be saying that while not all fair use is transformative, all transformative use is fair use.\(^{106}\) Or, if that is overstating *Campbell*, or at least transformativeness tilts the first Section 107 factor in favor of the transformative user. The more transformative the use, the more heavily the first factor weighs in the transformative user’s favor.

**VIDEO AND TRANSFORMATIVE WORKS**

Video editing is growing less difficult and more accessible to a larger number of people, although given the relative complexity of the medium, it will always lag a bit behind photo editing in universality. Editing video will continue to become easier as technology advances; instead of dedicated fans spending hours to create the perfect *Game of Thrones* vid, anyone can spend two minutes creating a *Downfall* video in which Hitler complains about people who leave their lunch in the office fridge until it grows mold, and circulate it to their co-workers as a not-so-subtle reminder.

Previous attention to user-edited video works incorporating copyrighted content has mostly focused on fan videos (fanvids or vids).\(^{101}\) Like the *Downfall* parodies, fanvids use clips from existing movies and television shows. The fans (vidders) may splice clips from multiple sources, along with copyrighted audio content and perhaps original voice-over or text content, for humorous or dramatic effect. Thus scenes from the Twilight movies, the fourth Harry Potter movie, and the television show *Buffy the Vampire Slayer* may be combined to create a mini-movie highlighting the incompatible treatments of similar material in the Twilight and Buffy universes, with a predictable yet still amusing ending.\(^{102}\) The case for transformativeness in “Edward Cullen Meets Buffy Summers” is an easy one; the video organizes the source material in a new and original way, creating an entirely different work. While “sweat of the brow” is not a basis for copyright,\(^{103}\) the

---


\(^{101}\) See, e.g., Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317 (2007).


The amount of work required for the creation of a video like “Edward Cullen Meets Buffy Summers” ensures that the number of such videos will remain relatively small, and will for the most part be created only by devoted fans of the original work or works. Where the magnitude of the problem is small, content owners may be reluctant to risk alienation of their customers by suing fans.104

The Downfall videos, in contrast, require little work to create — although some may involve no less originality than far more difficult works. (Interestingly, as a meme grows, the originality of each successive addition to the memebase is, on average, decreased. And as a meme ages, the funniness of each successive addition decreases as well, on average. As one entry’s ranting Hitler has it, “This joke stopped being funny in 2008. This was only half-way clever the first time around.”105) In addition, the videos may be less transformative than they appear:

As for the idea of such a serious scene being used for laughs, Hirschbiegel thinks it actually fits with the theme of the movie. “The point of the film was to kick these terrible people off the throne that made them demons, making them real and their actions into reality,” he says. “I think it’s only fair if now it’s taken as part of our history, and used for whatever purposes people like.”106

Ironically, Hirschbiegel’s approval might undermine the transformative use argument: If the fan uses are consistent with the director’s intended interpretation of the work, perhaps they are not transformative after all. In the director’s home country, however, his lack of objection might work the other way, torpedoing a moral rights argument. German copyright law gives broader protection to the author than US law; the alienability of copyright is more restricted than in the US, and the moral rights of the author are protected. In this case, the moral right that might be infringed is the right of integrity. Moral rights are recognized under German copyright law, but not under U.S. law, with very limited exceptions.107 The moral right at issue in this case — integrity — would allow the author to “prohibit any distortion… of his work” if the distortion “would jeopardize his legitimate

104 See generally, e.g., AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION (FARNHAM, SURREY, UK: ASHGATE PUBL. 2011).


107 See Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Ab. 4, Unterab. 2, § 14, (Sept. 9, 1965) (Ger.) (as amended: “Der Urheber hat das Recht, eine Entstellung oder eine andere Beeinträchtigung seines Werkes zu verbieten, die geeignet ist, seine berechtigten geistigen oder persönlichen Interessen am Werk zu gefährden.”) (“The author shall have the right to prohibit any distortion or any other mutilation of his work which would jeopardize his legitimate intellectual or personal interests in the work.”) Note that “Urheber” here is “author,” not “copyright holder.” The U.S. exception is the Visual Artists’ Rights Act, 17 U.S.C. 106A.
CONCLUSION

With Campbell in mind, we can tie together two threads of a defense of the Downfall videos and similar works: First, such works are sufficiently transformative that they are not a violation of the copyright holder’s right under Section 106 to create derivative works; and second, they are not an infringing use of the copyrighted material they contain because they are fair use under Section 107.

Both of these threads are linked to the question of “parody,” as the term is used, or misused, by the Campbell court. Parody is transformative (and thus not derivative within Section 106), but not all transformative works are parodies. Parody is fair use, but not all fair uses are parodies. It may be that even the overlap between these sets may not be co-extensive with parody: There may be uses that are both transformative and fair, but that are still not parodies.

For the past decade and a half the cauldron of copyright law has been boiling over; when the steam and bubbles eventually clear we may be able to see the outlines of these categories more clearly. The internet has shifted the balance of power in the dialogue between author and audience, and online fan works are an important part of that shift. Meanwhile, the heavy hand of the law and the invisible hand of the marketplace may be pulling in different directions. By October 2010 Constantin Films had reportedly stopped blocking Downfall parodies on YouTube, and had begun placing advertisements on some. It may be that the lobbying success of content-industry associations has resulted in laws so draconian that many content owners prefer to forego their legal rights in favor of making a profit. In choosing to be guided by the voice of the market, rather than to attack potential customers or make a laughingstock of itself, Constantin Films is far from alone. Google reports that video copyright owners “are . . . monetizing 90% of all claims created through Video ID,” apparently through advertising, rather than blocking the video content. The work of the fans in creating fan works thus benefits the original content owners without harming the

---


109 See generally, e.g., Judith Fathallah, Becky is my hero: The power of laughter and disruption in Supernatural, Transformative Works and Cultures, No. 5, doi:10.3983/twc.2010.0220, and most of the sources cited in note 17, supra.

110 My apologies for the uncalled-for stew of metaphor in this sentence and the two preceding it.

111 See Dubs, supra note 2; Constantin Film are not blocking parodies any more, Post of hitlerrantsparodies, Oct. 17, 2010, 7:16 PM, http://s1.zetaboards.com/downfallparodies/topic/3868429/1/.

fans or deterring the creation of such works and, interestingly, without actually requiring any resolution of possible copyright claims.