Step One

Source A:

Hunt, Kurt. “Copyright and YouTube: Pirate’s Playground or Fair Use Forum?” *Michigan Technology Law Review* 197 (2007).

Available at <http://repository.law.umich.edu/mttlr/vol14/iss1/6>

Without safe harbor protections, the public can only rely on the limitations the Copyright Act places on copyright owners’ rights. Most of these limitations, however, are extremely narrow and apply only to specific circumstances like reproductions made by libraries or materials prepared for the blind.61 Worse, argues Professor Michael Madison, these limitations “have come under such sustained attack that they are widely viewed, in practical terms, as unimportant.”62 As a result, the flexible (and inconsistent) fair use doctrine may be considered YouTube users’ only line of defense against alleged infringement. (Hunt 205)

Safe harbor provisions have allowed many sites to be absolved of any legal liability for copyright violation, provided they comply with Digital Media Copyright Act (DMCA) policies regarding claims. The average user does not fall under this umbrella protection and therefore must rely on the limitations and Fair Use Clause built into the existing copyright law. Hunt uses this quotation an essential part of his argument as to why the exceptions and limitations of copyright law do not work. In the passage he quotes, Madison passes judgment on the public’s view of copyright limitations. He asserts public opinion of these laws has deteriorated to the point of disregard, due to repeated challenges to them. He uses this quote to assert that because the limitations of copyright law have come under so much attack, it is the least likely route to clearing a claim. Hunt then cites the Fair Use Clause as the best chance that Youtube users have against infringement claims. He could have made the case without the quotation; however, its presence gives Hunt more credibility.

Source B:

Madison, Michael J. “Rewriting Fair Use and the Future of Copyright Reform.” *Cardozo Arts & Entertainment Law Journal* 23 (2005), 391-93.

The second use wins only where society trumps the individual, and that means that we need some mechanism in fair use for linking what the individual defendant is doing to what society gets out of the deal. The typical formal solution to the problem — declaring that creative re-uses provide third-party benefits that are systematically incapable of being internalized in two-party transactions—doesn’t wash as a practical matter.52 Neither courts nor litigants can take “third party benefits” to the bank unless they have some structured sense for figuring out what those third party benefits are.

52 It’s not clear that it washes as a formal matter, either, since there is no way to determine whether and how these alleged third-party effects happen. For what it’s worth, and as a matter of faith, I am highly sympathetic to the intuition that third-party effects are central to copyright generally (Madison 403).

The paraphrase in this section in this section refers to one of the exceptions to the mathematical model interpretation of copyrighted information created by Cohen. Madison uses this idea to bolster his idea that some practical exceptions need to be clarified in the Copyright law. Before this section, Madison looks at the issue of copyright infringement and justification for fair use from a one-on-one standpoint. In this paraphrase he uses Cohen’s model to incorporate a possible third party into the mix. He states that this third party is, in his opinion, vital to the consideration of copyright, but economically and often evidentially intangible. He thus recognizes a possible fault that someone could find in his argument and turns it into a strength. He points out that if we are to use the excuse of third-party effects, we have to come up with financial and tangible reasons to include them.

Source C:

Cohen, Julie E. “Copyright and the Perfect Curve.” *Vanderbilt Law Review* 53 (2000): 1799.

it is not clear that we want any one individual or entity to control decisions about which uses of a work are valuable. It is worth noting that some of the most detailed arguments about the importance of coordination, or stewardship, of improvements have been made about computer software ⎯ technical subject matter that has never fit comfortably within the copyright scheme.28 Even for computer software, moreover, the rise of the open source movement suggests that formal, centralized control is not needed to ensure high performance and interoperability. (Cohen 1810)

This source was the most technically abstruse. It took the issue of copyright law and turned it into a math problem. This passage, however, refers to the argument made by Dam on the place of software in the *copyright scheme*. Dam asserts that because software has balanced between protection from patent law and copyright law, and there are two halves to the concept of software (conceptual vs. technical), it is difficult to make a full claim of infringement on grounds of copyright. Cohen uses this paraphrase of research to explain why judging the monetary value of progress is difficult to assess when it comes to the advancement of technology such as software.

Source D:

Dam, Kenneth W. “Some Economic Considerations in the Intellectual Property Protection of Software.” *Coase-Sandor Institute for Law & Economics* (1994) No. 26.

This is a brief look at the development of intellectual protection in software. In the early 1990s, protection of software had become common practice. Software developers protected their programs under both copyright and patent law. One of the major issues the paper raises is that promoting innovation requires a careful balance between protecting the rights of software developers to receive payment for their efforts and making sure that what gets protected under copyright law actually rises to the level of intellectual property. If the law fails at the former, the incentive for software innovation (which, unlike a novel or song typically does not bring the creator any fame or artistic immortality) evaporates. If the law fails at the latter, then innovation grinds to a halt because developers can exert excessive control over the marketplace of ideas.

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Fair Use and Copyright Law: Monopolizing Creativity in the Digital Age

Recent years have brought repeated challenges to the application of traditional copyright law to the digital age. From the implementation of intellectual property protections on software to the safe-harbor provisions used as a business model by entities such as YouTube, the focus of copyright protection has consistently been the creator’s economic interest. Future innovation depends on the foundation of existing works, but that has always been a secondary concern for the courts. Laws can be challenged in court; however, the courts are slow and can take years to reach a definitive ruling. This leaves many people forced to defend themselves through Fair Use clauses, but these often are in dire need of clarification.

In 1994, Kenneth Dam was one of the first legal scholars to consider the issue. In the early 1990s, attempts to protect software as intellectual property had become commonplace and were being regularly challenged in court. The developers argued that while one could debate whether the logistics of how the programs interacted with a platform needed protection, specifics of coding and programing should be patented and copyrighted. Thus, the courts could accept either protection as grounds to litigate infringers. One of the issues Dam raised was that software development was fundamentally different from other types of creative effort, which offer incentives other than financial gain: “much of the writing of software is a faceless, team effort without such nonmonetary incentives, and in any event, many modern software products are so complex that they will be undertaken only by commercial firms operating with commercial incentives” (335). Although this paper was written almost a quarter-century ago, the core issues it raises remained relevant to all my later sources. Controlling access to and usage of information limits the progress of culture, science, and art.

In an article published six years later, Julie Cohen takes an analytical approach to Copyright and Fair Use. She asserts that copyright law obeys an inherent mathematical model that allows it operate smoothly only within a sweet spot or zone in which a monopoly of information can be maintained. However, outside of this zone, consumer demand overwhelms the ability to maintain a monopoly. Cohen cites Dam to support the contention that “computer software . . . has never fit comfortably within the copyright scheme” (1810). In essence, she suggests that Dam’s efforts to apply copyright law to software development are doomed to collapse into a muddle of confused exceptions and arguments in search of justifications. Moreover, she argues, such efforts are unnecessary: “Even for computer software, moreover, the rise of the open source movement suggests that formal, centralized control is not needed to ensure high performance and interoperability” (1810). Of course, even if this is true, it addresses only the overall function of the market and not the issue of whether people (individually or collectively) are paid for their efforts.

In a 2005 article, Michael Madison examines the desperate need for clarification in our copyright laws. He denotes several issues that are inherent in Fair Use. He divides the issue into two groups, “personal” and “productive,” and one subgroup he calls “personally productive” or “personally creative” (393-94). He cites the subgroup as being the most difficult to deal with. He argues that that the courts, although theoretically capable of handling these issues, are too slow to keep up with the copyright challenges of the digital age. Madison also looks at the issue of copyright infringement and justification for fair use from a one-on-one perspective. He realizes most of the copyright dispute occurs between two individuals, but that there is a third-party to consider. Cohen states that the third-party benefits, or societal benefits, should be considered in decisions regarding copyright. Although Madison agrees with Cohen that third parties should be playing a much larger role in the decision process, he acknowledges that the third-party effects are extremely difficult to quantify. He doubted that anyone would likely take this on a viable argument, due to its lack of financial implications or gain.

Finally, in 2007, Kurt Hunt discussed the practicality of copyright laws to YouTube. This article appeared right as the YouTube platform was exploding in popularity. Hunt writes at length on the effect of the DMCA on users and the culture of the website. DMCA creates a safe harbor for sites that may host copyrighted materials. It allows these sites to be absolved of legal liability in event that one of its users has posted materials that infringe on someone’s copyright. YouTube’s business model depends upon the clip culture that exploded in the early 2000s. The safe harbor provision of DMCA allows YouTube the ability to host infringing materials without having to protect its users. The terms of service allow for YouTube to remove any clip with or without the user’s consent or even knowledge. They also allow individuals to make individual claims against another user. YouTube does have an appeals process; however, it is lengthy and can lead to the loss of personal revenue in the interim. Hunt cites Madison’s observation of public view of limitations that he constant questioning and attack of copyright limitations also makes appeals difficult. Many people either ignore the importance or deem them irrelevant on a user generated content site such as YouTube (Hunt 205), but “flexible (and inconsistent) fair use doctrine may be considered YouTube users’ only line of defense against alleged infringement” (205). The problem is the application of the fair use doctrine is inconsistent and has created a confusing series of precedents in which the punishment for infringement ranges from practically negligible to extreme.

Reading these four articles in succession reveals that the issue of copyright law in the digital age is intractable because it involves incompatible modes of thinking. In one way, it is a legal issue, but the legal precedents that exist, and that were written to protect texts (and then applied, with some difficulty, to other works such as film), are a poor fit for lines of code running invisibly behind a screen. It is also an economic issue, because the regulations created to protect intellectual effort ⎯ as well as those overturned or rendered moot ⎯ will have huge effect on our increasingly digital economy. It is an issue of foreign policy, because even if one could work out effective laws to protect people in the United States, those protections become fruitless when language barriers are irrelevant and the web renders distance meaningless. Finally, it is an ethical issue, because which aspects of the issue we prioritize depends on what kind of world we want to live in.