

Creators v. YouTube: Fair Use Needs to Be Analyzed by Humans

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If you ask me, YouTube is the most incredible technological creation ever. I say that as someone who both creates content on YouTube and someone who spends way more hours on it per week than I am proud to admit. What was once a simple platform for sharing videos in 2005 has expanded to a billion-dollar platform.¹ YouTube reported more than a 30% revenue growth in just four years.² It generated \$28.8 billion in 2021, a 46% increase from 2020.³ Think about that the next time you watch your next How-To or gaming video.

Those same videos are the heart and soul of what makes YouTube, YouTube. Those videos range in kind from cooking videos to music videos, to gaming videos, to reaction videos, to videos about cartoon character morality, with the list going on and on. Those videos would not be possible without the creators that make them. Make no mistake, without content creators, and their videos there would be no YouTube. Whether you believe it or not, so much goes into even the simplest of videos. As a creator, I know that inspiration comes from anywhere and everywhere, especially from other famous copyrighted works.

With copyrighted work comes copyright infringement. Copyright infringement is the number one reason a video will get removed from YouTube.⁴ While I am in no way condoning copyright infringement, not every instance of using someone else's work is copyright infringement and that is because of the fair use. Fair use is a legal doctrine that says you can reuse copyright-protected material under certain circumstances without getting permission from the copyright owner.⁵ There are four factors of fair use. First is the purpose and character of the use.⁶ Second, the nature of the copyrighted work.⁷ Third the amount and substantiality of the portion used in relation to the copyrighted work as a whole.⁸ Finally, the effect of the use upon the potential market for, or value, of the copyright work.⁹ Different countries have different rules about fair use. For example, in the US, a judge or individual decides what is considered fair use by considering how the four factors apply to each case.¹⁰ Fair use is both an affirmative defense against copyright infringement and a YouTube creator's best friend.

The problem with fair use as it pertains to YouTube is that fair use has so much nuance and is not judged by having a specific percentage of each factor. It's a case-by-case issue that should be determined by a human that can look at every case with an individual nuanced lens specific to that specific case. YouTube does not do that. Instead, YouTube has an automated system that identifies the copyrighted material, strikes your video, and takes it down.¹¹ No

¹ Mansoor Iqbal, *YouTube Revenue and Usage Statistics* (2022), BUSINESS OF APPS, <https://www.businessofapps.com/data/youtube-statistics/> (last updated Sept. 6, 2022).

² *Id.*

³ *Id.*

⁴ Anna Peters, *YouTube Removing Videos? 3 Main Reasons (Explained)*, TECHPENNY, <https://techpenny.com/why-does-youtube-remove-videos/> (last visited October 15, 2022).

⁵ *Fair Use on YouTube*, YOUTUBE HELP, https://support.google.com/youtube/answer/9783148?hl=en#zippy_= (last visited Oct. 15, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Chance Bulger, *How to Handle a YouTube Copyright Claim Dispute*, THE MUSIC CASE, <https://www.themusiccase.com/blog/help/how-to-handle-youtube-copyright-claim> (last visited Oct. 15, 2022).

nuanced individual analysis of every video on a case-by-case basis. Just took down. Now, I get this is probably for cost and time on YouTube's behalf, but this is not the spirit of fair use. Most importantly, this is not how the creators and the videos that make YouTube what it is, should be treated.

With billions in revenue YouTubes should get humans to do the work only humans can do. I firmly believe that technology and convenience make most things better, but not a fair use analysis.