



Public Knowledge



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The Berkman Center for Internet & Society
at Harvard Law School

Fair Use Principles for User Generated Video Content

Online video hosting services like YouTube are ushering in a new era of free expression online. By providing a home for “user-generated content” (UGC) on the Internet, these services enable creators to reach a global audience without having to depend on traditional intermediaries like television networks and movie studios. The result has been an explosion of creativity by ordinary people, who have enthusiastically embraced the opportunities created by these new technologies to express themselves in a remarkable variety of ways.

The life blood of much of this new creativity is fair use, the copyright doctrine that permits unauthorized uses of copyrighted material for transformative purposes. Creators naturally quote from and build upon the media that makes up our culture, yielding new works that comment on, parody, satirize, criticize, and pay tribute to the expressive works that have come before. These forms of free expression are among those protected by the fair use doctrine.

New video hosting services can also be abused, however. Copyright owners are legitimately concerned that a substantial number works posted to some UGC video sites are simply unauthorized, verbatim copies of their works. Some of these rightsholders have sued service providers, and many utilize the “notice-and-takedown” provisions of the Digital Millennium Copyright Act (DMCA) to remove videos that they believe are infringing. At the same time, a broad consensus has emerged among major copyright owners that fair use must be accommodated even as steps are taken to address copyright infringement.¹

Content owners and service providers have indicated their mutual intention to protect and preserve fair use in the UGC context, even as they move forward with efforts to address copyright concerns. The following principles are meant to provide concrete steps that they can and should take to minimize the unnecessary, collateral damage to fair use as they move forward with those efforts.

1. **A Wide Berth for Transformative, Creative Uses:** Copyright owners are within their rights to pursue nontransformative verbatim copying of their copyrighted materials online. However, where copyrighted materials are employed for purposes of comment, criticism, reporting, parody, satire, or scholarship, or as the raw material for other kinds of creative and transformative works, the resulting work will likely fall within the bounds of fair use.

¹ See User Generated Content Principles, Principle #6, <<http://ugcprinciples.com>>.

But a commitment to accommodating “fair use” alone is not enough. Because the precise contours of the fair use doctrine can be difficult for non-lawyers to discern, creators, service providers, and copyright owners alike will benefit from a more easily understood and objectively ascertainable standard.

Accordingly, content owners should, as a general matter, avoid issuing DMCA or other informal takedown notices for uses of their content that constitute fair uses *or* that are noncommercial, creative, and transformative in nature.²

2. **Filters Must Incorporate Protections for Fair Use.** Many service providers are experimenting with automated content identification technologies (“filters”) to monitor their systems for potential copyright infringements. If a service provider chooses to implement such filters, the following precautions should be taken to ensure that fair uses are not mistakenly caught in them:
 - a. **Three Strikes Before Blocking:** The use of “filtering” technology should not be used to automatically remove, prevent the uploading of, or block access to content unless the filtering mechanism is able to verify that the content has previously been removed pursuant to an undisputed DMCA takedown notice or that there are “three strikes” against it:
 - (1) the video track matches the video track of a copyrighted work submitted by a content owner;
 - (2) the audio track matches the audio track of that *same* copyrighted work; and
 - (3) nearly the entirety (e.g., 90% or more) of the challenged content is comprised of a single copyrighted work (i.e., a “ratio test”).If filtering technologies are not reliably able to establish these “three strikes,” further human review by the content owner should be required before content is taken down or blocked.
 - b. **Humans Trump Machines:** Human creators should be afforded the opportunity to dispute the conclusions of automated filters. If a user’s video is “matched” by an automatic filter, the user should be promptly notified by the service provider of the consequences of the “match” and given the opportunity to dispute the conclusions of the filtering process. Notice should be provided to the user whether or not the “match” results in the blocking of content (e.g., a parodist may not want the target of the parody receiving a share of revenues generated by it).

If the user disputes a “match” pursuant to the above dispute mechanism provided by the service provider, the provider should promptly notify the relevant content owner. The service provider may choose to impose a brief “quarantine” period on the content (no more than three business days), in order to afford content owner an opportunity to issue a DMCA takedown notice after human review of the disputed content.

² Viacom’s website, for example, states that “regardless of the law of fair use, we have not generally challenged users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for noncommercial purposes.” <http://www.viacom.com/NEWS/YouTube_Litigation/About_Fair_Use>

- c. **Minimization:** In applying automated filtering procedures, service providers should take steps to minimize the impact on other expressive activities related to the blocked content. For example, automated blocks should not result in the removal of other videos posted by the same user (e.g., as a result of account cancellation) or the removal of user comments posted about the video.
3. **DMCA Notices Required for Removals:** The DMCA’s “notice-and-takedown” procedures provide two important protections for creators whose noninfringing materials are improperly targeted for removal: (1) the right to sue where the removal is the result of a knowing material misrepresentation³ and (2) a “counternotice-and-putback” procedure that overrides a takedown notice unless a content owner is willing to file an infringement action in court.⁴

In order to preserve these protections, service providers should require compliant DMCA takedown notices from content owners before removing content in any manner that does not afford users the ability to contest and override the removal (such as the dispute and notice procedure described in Principle #2b above).

4. **Notice to Users upon DMCA Takedown:** Upon issuance of any DMCA takedown notice by a content owner, the service provider should provide prompt notice to the user who posted the allegedly infringing material. Such notices should include (1) an entire copy of the takedown notice, (2) information concerning the user’s right to issue a DMCA counter-notice and the provider’s procedures for receiving such notices, and (3) information about how to contact the content owner directly in order to request a reconsideration of the takedown notice (see Principle #5 below).

Where feasible, this information should be made available to the posting user on the page where the content formerly appeared, as well as in private communications (such as email).

5. **Informal “Dolphin Hotline”:** Every system makes mistakes, and when fair use “dolphins” are caught in a net intended for infringing “tuna,” an escape mechanism must be available to them. Accordingly, content owners should create a mechanism by which the user who posted the allegedly infringing content can easily and informally request reconsideration of the content owner’s decision to issue a DMCA takedown notice and explain why the user believes the takedown was improper.

This “dolphin hotline” should include a website that provides information about how to request reconsideration, and a dedicated email address to which requests for reconsideration can be sent.⁵ Service providers should ensure that users are informed of these mechanisms for reconsideration, both on the site where the removed material previously appeared, as well as in the notice described in Principle #4 above.

³ 17 U.S.C. § 512(f).

⁴ 17 U.S.C. § 512(g).

⁵ Viacom, for example, has established a dedicated email address for this purpose: counternotices@viacom.com.

Upon receiving an informal request for reconsideration of a particular takedown notice, the content owner should evaluate the request promptly, generally within three (3) business days, and retract the notice where it was issued in error.

6. **Mandatory Reinstatement upon Counter-notice or Retraction:** Service providers should establish and follow the formal “counternotice-and-putback” process contemplated by the DMCA. Service providers also should provide users with a streamlined mechanism to reinstate content in cases when a takedown notice has been retracted by the content owner.

These Principles endorsed by:

Electronic Frontier Foundation

Center for Social Media, School of Communications, American University

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