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Fair Use Response Guidelines

When someone accuses you of copyright infringement there is an important initial consideration:

- Does that person actually have the rights to the material they are claiming?
- Is the material they are claiming copyrightable?

Assuming the answers to the first two questions are yes (or you don't wish to contest the first two points), you can argue that your use of the copyrighted material is exempted under the doctrine of "Fair Use".

IMPORTANT NOTE: "Fair Use" is what is called an "affirmative defense". This means that legally, you can only allege it as a defense to a charge of infringement. Basically, this means that you need to wait until you get sued to be able to raise this defense. Arguing "Fair Use" will not keep you from getting sued, but it may keep you from losing an infringement lawsuit. Even if you believe your conduct falls under "Fair Use", you will most certainly be expending money and time with attorneys and litigation before you can argue it.

Platforms (YouTube, Twitch, Twitter, etc) will not make a determination of whether your conduct was infringement or excused under a doctrine like "Fair Use". By law they are required to immediately take-down potentially infringing material when served with a valid take-down notice, and allow for a counter-notification process (see "YouTube Claim Dispute Process" as an example).

- If you respond to a take-down with a counter-notification, this is an opportunity to explain potentially excusable "Fair Use" of the material to the copyright holder who issued the take-down
- The platform will not determine who is right/wrong at this stage, the copyright holder may be persuaded with your argument however and choose not to pursue their next step in the process, filing a lawsuit.

How To Think About "Fair Use":

The fact that you may be making money from your content does not disqualify you from arguing "Fair Use". Whether or not your use qualified for "Fair Use" is determined by a number of factors. For general purposes the factors that are going to be most important to argue are the following:

- Purpose and Character of the Work
 - Here you would argue how "Transformative" your work was of the copyrighted material
 - Did your work add new expression, meaning, aesthetics

- Generally, the more value you add to the copyrighted works used rather than just purely reproduce the copyrighted work, the stronger the argument for this factor favoring “Fair Use”
 - Uses that are educational, teaching, criticisms, or commentary are usually seen as more favoring “Fair Use”
- The amount of copyrighted material taken
 - The less of copyrighted material you use the better. There is no formula, but using a very insubstantial part of the copyrighted work as a whole would make this factor favor “Fair Use”
- Effect on potential market
 - This factor looks at if your use is causing the copyright holder to lose money
 - Also, if the copyrighted work you are using could’ve been easily licensable, this factor could weigh against you

Summary

After reviewing the above, if you believe your use of copyrighted material qualifies for “Fair Use”, you could argue the following. First, explaining how your use is transformative, and explaining what new value your work has added to the underlying copyrighted material. Also, if your work is educational, criticism or commentary you should include this in your description. Second, explaining how the “heart of the work” was not taken, only an insubstantial part of the copyrighted work as a whole. Finally, describing how your work is not negatively affecting the copyright holder’s potential market, or leading to lost sales.

- It should be known that copyright claim issuers are required to give a good faith consideration to “Fair Use” before filing a claim, according to *Lenz v. Universal Music Group*, and
- Fraudulent issuers of copyright takedown claims can face monetary penalties according to *Section 512(f)* of the DMCA

Please use this as a tool to empower yourself with the knowledge to assess and potentially respond to a claim against your material.

If you have any questions about an infringement matter feel free to contact me and we can discuss strategies, steps to respond, or simply educating you on the law.

Sincerely,

-Alex

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