



# Reminder: In the age of social influence, fair use must be considered

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## Return to Law à la Mode: Issue 28

Sharing, reposting and retweeting has become commonplace among social media users, to the point where many users hold the mistaken belief that content found on the internet is free for the taking and that traditional copyright rules do not apply. The result is widespread unauthorized use of materials in ways that may violated owners' rights.

Brands are of course eager to maintain control over all uses of their brand online. When they encounter what appears to be an infringing use of their work online, they may be eager to issue a takedown notice.

But, while the US Digital Millennium Copyright Act (DMCA) provides copyright owners with a quick mechanism for enforcing their copyrights online, rights holders must consider whether a particular use is "fair use" before taking action. Indeed, failure to consider fair use could expose a rights holder to liability for damages to the user who was responsible for posting the content.

The ultimate question of whether a particular use is a fair use is a judicial determination. But, in order to form a subjective good faith belief that the use in question is not authorized by law, rights holders should begin by considering whether the use at issue may qualify under one of the fair use exceptions.

This requirement was first articulated in a 2015 ruling out of the Ninth Circuit. Since that time, case law on fair use in the US has been evolving in an expansive way. This swift expansion, notably, may create practical difficulties for rights holders who are striving to distinguish between infringing uses and arguably permitted fair uses when evaluating whether to submit a takedown notice against a particular use. Given the evolving boundaries of fair use in US case law, seeking the advice of experienced copyright counsel can assist in identify the line between infringement and arguably permissible fair uses.

## Key questions to consider

Before sending a takedown notice, consider whether the use of the work at issue may be considered a fair use. Most critically, if the work is used for a transformative purpose, such as commentary, criticism or parody, the use may likely be fair.

Here are key questions to consider:

- Does the use make a comment on or criticism of the original work?
- Is the use making a political statement or an academic commentary?
- Is the use parodic or satirical? Does the use ridicule the original work by imitating it in a humorous way?

If the answer to any of these questions is in the affirmative, the use may qualify as a fair use, and the user responsible for posting the work may have a viable fair use defense. A takedown notice would likely be inappropriate and could expose the copyright owner to legal risk.

However, if the answer is in the negative, and if the copyright owners have a good faith belief that an alleged infringing use of the work is not otherwise allowed under the fair use doctrine, then it may be time to ponder sending the internet service provider a takedown notice under the DMCA.

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