
NaSTA/Youtube Legal Guide

A condensed introduction to
Media Law

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Hello there, this guide is here to help you understand the wonderful¹ world of Media Law, which you'll need to be familiar with as we enter this new partnership with Youtube.

The important thing to recognise is that the specific torts involved with Media Law are very hard to define. Media law is (by comparison to other areas of the law) in its infancy and as it deals with creative disputes that come in all varieties it wouldn't make sense to have one concrete rule.

This is further complicated by the fact that some copyrighted material has right holders in America which differs to laws in the European Union and England. Keep in mind that this is being written by a Scotsman, and Scots Law has a whole boat load of differences that you won't find anywhere else!

So this guide will try to incorporate as much as you'll need to know in the most general, easy to understand way. Most of the time I'll refer to English Media Law, and also way Youtube will want the law interpreted, there's no need for me to regurgitate every single precise detail, just the bits that well help you.

One last point (and it's the most important) is that this guide is **not** to be taken as **actual legal advice**. I'm not a lawyer, I've just been doing a lot of research into Media Law to give you a rough guide about how it works (and how it will work with Youtube). On Youtube's Copyright page² you aren't given actual legal advice either, just a lot of links that lead you all across the internet. They aren't trying to be unhelpful; it's just that they want to avoid being referred to as an actual source of legal knowledge, because if that was the case they would be involved in a lot of potential lawsuits. With that in mind this guide is here to collect some of the vast swathes of information out there into one document so you aren't going to left in the dark, but in the unlikely event you are in court over something then don't say "this guide said it was ok". This guide is here just to introduce things to you, **it is not a professional legal document, if you end up getting sued over something then that is not my fault.**

I'm not actually a law student so I've been sticking to books that introduce Media Law. So as to not avoid getting sued I'll give a list of good websites to check out but in all seriousness the vast majority of details in this here document are taken from the very comprehensive "**MEDIA LAW: Fourth Edition**" by Peter Carey . I highly recommend you pick up a copy, but law books (even the basic introduction books) are hard going so this guide should make the very intimidating world of media law a little less scary!

¹ [citation needed]

² http://www.youtube.com/t/copyright_center

Copyright and Related Rights.

There are many different definitions of what copyright entails, but the differences are all semantic so don't get confused. Here is a good definition:

"Protects a creator's interest in certain works by virtue of the property right that is deemed to exist in the work as soon as it is created it prevents from unfairly exploiting it."

There are three kinds of copyright (as defined by the Copyright, Designs & Patents Act 1988)

- 1 – Original literary, dramatic, musical or artistic works
- 2 – Sound recordings, films or broadcasts
- 3 – Typographical arrangements of published editions

For this we'll only need to focus on no2. These are called derivative works because they consist of (derive from) other copyrighted works. No1 and No3 are types of copyright that you aren't going to encounter all the time because they don't relate to video all the time (but there are exceptions, more on that later)

Infringement of Copyright

Section 16 of the Copyright, Designs & Patents Act states that infringement happens in four different ways:

- Copying the work
- Issuing copies of the work
- Renting copies of the work
- Making an adaptation

In terms of video content using any part of the video can be considered e.g. reproducing a still image of a film is an infringement of copyright.

This should be very self-explanatory but there is a much bigger problem that we have to deal with, and that is the matter of how to legally use copyrighted material. While the law is there to protect the rights of artists from being ripped off you are still allowed to use material so as long as it follows the correct rules.

At this point English and American Law begin to differ but I'll provide both forms so you can get an idea of the bigger picture as there are at heart a lot of similarities in terms of basic principles and rules.

English Law

In England are a multitude of ways that copyrighted material can be used that respects the rights of the copyright holder.

Fair Dealing

Using the material in a way that is fair to the rights holder. You should note that there isn't really a concrete definition of what exactly this entails but it's not difficult to understand.

The most common form of this is seen in the form of a criticism or review, so as long as the criticism is considered to be fair. The work in question has to be something publicly available – you can't use footage of a film that hasn't been released yet.

But what counts as fair? Here's an example:

TW Entertainments Co V Channel 4 Television, 1994.

The subject of the case was a documentary on A Clockwork Orange, focusing on the banning of the film and the issues around it. The documentary used about 10 minutes of the film (around 8% - I didn't make that up, someone actually worked out how much they took out by the percentile, that's lawyers for you!), specifically the parts that focused on the violence in the film.

The judge rejected the injunction, ruling that the use of footage was fair as the review discussed decisions that did not relate to the copyrighted work at all – it wasn't a review of the film but a discussion about the events involved in the banning of the film.

Sufficient Acknowledgement

Section 178 of the Act states that:

"... an acknowledgement identifying the work in question by its title or other description, and identifying the author, unless

a) in the case of a published work, it is published anonymously

b) in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable enquiry”

This means you have to be able to recognise the holder of the rights and make it absolutely clear in the video that you are using their content. At the start of this document I made a reference to the book that a lot of this information is taken from, acknowledging that plays a major part of this work. I’ve made it clear that information from that book is appearing in here. If you are using copyrighted material then make sure it’s 100% clear that the work you are using is acknowledged.

This particular element is fine in the UK but it will not be enough for Youtube (as I’ll discuss later).

Reporting Current Events

If the use of a copyrighted work is fair then it can be used to report current events. It should be noted that it’s the allegedly infringing act that must constitute current events – the copyright used for the report does not need to be current.

Section 30 Subsection 2 states that:

“Fair dealing with a work (other than a photograph) for the principle of reporting current events does not infringe any copyright in the work provided that (subject to Subsection 3) it is accompanied by a sufficient acknowledgement.

Section 30 Subsection 3 states that:

“No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise”.

Note that there’s no concrete definition of what actually counts as “current” or “fair dealing”. What counts as being “current” is defined by what exactly is “current” about the events that are being reported, and then the usage being made of the copyrighted work.

It’s important to recognise the purpose of the article before considering whether the use being made of the copyrighted work could be within the reporting of current events.

“Fairness” is something that is judged on a case to case basis. Take for example the current phone-hacking scandal, where we’ve found the sky really was the limit for Rupert Murdoch. A lot of the cases that involve tabloid journalists have the papers accused of performing unfair actions for commercial gain.

So if you are going to have copyrighted material in your program please keep in mind that what you submit should not be exploitative – “fairness” is something that is hard to define but you should use your own judgement as to what is fair and what is not.

Incidental Inclusion

Accidental inclusion or inclusion of elements not central to the them of the work e.g. an advertisement in the back of a passing bus caught on camera during an interview. Music works differently in this regard as it’s very difficult to accidentally include music in a video, the best example I can think of is if you’re interviewing someone in a nightclub and the microphone picks up the audio.

Reproducing Speeches & Interviews

Copyright on spoken words is conferred as soon as they are spoken. If the speech is spoken in the course of employment, the speaker’s employer holds the copyright.

Section 58 of the Copyright Designs & Patents Act 1988 says reproducing speeches is allowed when

- a) the record is a direct record of the spoken word & not taken from a previous record or from a broadcast
- b) the making of the record was not prohibited by the speaker, it did not infringe any existing copyright
- c) the use being made of the record, or material taken from it, is not a kind prohibited on behalf of the speaker or copyright owner before the record was made.
- d) The use being made of the record is by or with the authority of the person who is lawfully in possession of it.

It’s common practice for someone to sign a consent form before an interview, but it’s actually not required in law. A journalist can still record the persons words and use them regardless.

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That's a small selection of what counts under English Law. How does this compare to **American law**?

America has a much more compact way of dealing with copyright disputes. Section 107 details four different ways where a fair use defence can be used:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

You should notice here that there is some crossover with some elements of English law except it's far less strict because there's a clear line of questioning that you can use to work out whether or not but there are some points to remember:

- You cannot use an acknowledgement or a disclaimer to avoid a copyright claim. It's something that would be taken into account in a court but you cannot base an entire defense around it
- American law is based more on the **implied covenant of good faith and fair dealing**, a several-century old concept that has its groundings in contract law. In the UK copyright law has its groundings in property law (as in intellectual property), whilst in America media law has more of a grounding in contract law. Cases involving copyright law in America are based on the aforementioned rule. When you read the details of American court cases they will be written as if one of the parties is breaking a 'contract' with the other.

This brings me to one very important point. Both English and American law recognise that copyright does not need to be legally registered for it to have full copyright status. In England the moment the work is created then it is considered to have copyright, there is no registration necessary (it's different for trademark and patents). In America the moment a work is "fixed in any tangible medium of expression" then it is considered to have copyright.

One problem that has arisen from this is that sometimes you cannot always trace who the copyright holder is and ask for their permission, because the copyright holder is difficult to find – these works are called 'orphan works'.

In most cases if you are using something that is copyrighted you have to find the original copyright holder yourself and ask permission which can be difficult if you aren't able to find any contact details for them.

How Youtube works

That's some of the basics that make up copyright law. But how does this work with Youtube?

The issue of copyright – specifically with musical content – is one that youtube has wrestled with for quite some time. There's a lot of history in the development of arguments between the rights of users and the rights of copyright. To give you the abridged argument one of these sides doesn't really have money and/or lawyers on their side.

Here's an example of how it works: you use a copyrighted song on a video. Youtube is able to recognise the song and check if it's copyrighted. Videos that break their code of conduct are flagged up for review, and one of two things happens:

- 1) The video has a link below it that lets the user buy the song in question from iTunes
- 2) The video is pulled completely.

While it's possible that you could use copyrighted material and still be allowed to use it as in case 1), it really depends on the will of the copyright holder – Youtube is merely a third party in these circumstances, but they would be responsible if they attempted to fight the decision.

This is why with the NaSTA youtube project you'll be asked to use music from what's known as the Creative Commons, which allows everyone to share material, so while you won't be able to use one particular song for a video that you have in mind you'll be able to find alternatives.

You might not be familiar with the concept of Creative Commons (from now on referred to as CC) so I'll keep it brief.

The main advantage of CC is that literally anyone can submit material to it, so there's a wide variety of material that you can use.

The main disadvantage of CC is that literally anyone can submit material to it, so there's a wide variety of material that you can use which is utter dross. 80% of the internet is *awful*.

A lot of websites that are part of the whole CC shebang aren't very good, but a small amount of them are. I don't have time to go through every single website that offers CC material but I've highlighted a few that are worth checking out. Really it's up to you. The majority of these sites deal with music (as that's what you'll be using most of the time.)

ccMixer – very professional, comprehensive site but it focuses more on creating music to be shared with other musicians (for remixes and the like). Has its own community and editors who pick recommend songs. Initial search function on the website itself is clunky but they have set up a specific music only search engine (<http://dig.ccmixer.org/>) which allows you to preview whole tracks, although the sit itself is in beta.

Free Music Archive – allows users to rate songs, has a comprehensive system for searching by genre, and you can play and download songs as they appear so searching is quick. However while there is a chart system in place it places emphasis on new songs and songs that receive a lot of recommendation so it seems clunky. Still in it's beta stage so again worth monitoring, standard of music is good.

Jamendo – definitely the best site by far. Wide variety of search functions – tag cloud is useful, wide range of albums. Recommended.

BeatPick – Simple layout, has the best search system by far – you can search by principle instrument, bpm, language etc. Haven't been able to get the preview player to work, but it's biggest problem is that the majority of music costs money to license. Definitely a good second choice.

Opsound – minimalist in nature but it's a substantial website with a wide range of genres. Good but not the best.

AudioFarm - again a good website, music player loads very quickly, UI is at least a bit more user friendly.

Copyright is really the most you'll have to deal with but now that I'm here there's two other elements I'd like to go over. I won't go into a lot of details because they are things that will be looked at on a case-to-case basis, so I'll give you some basic explanations.

The reason for this is that while I'm here to explain some of the terms in the law I'm not here to dictate to you what you should do content wise. All I can do is explain the terms and insist that you stick by them.

Defamation

A difficult term to define exactly, the 1975 Faulks Commission states that

"... The publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonably people generally..."

Two defining elements of the tort of defamation are

- 1) The discerning statement must be made to someone *other* than the claimant.
- 2) Statement must be in the form of words which leads to do one or more of the following:
 - a. Lower the claimant in the estimation of others
 - b. Expose claimant to ridicule/hatred
 - c. Causes claimant to be shunned or avoided.

It's not a matter of whether or not the statement in question does actually do any damage – if it has the potential to defame then that's all that counts.

There is a lot to defamation but it needs to be looked at in a case to case basis. When you send me in your video and there's an element of your video that is potentially defamatory then please highlight it and let me know any details surrounding it (e.g. a news story with details on an important figure).

Obscenity

Obscene content is material that is liable to offend someone, but there are arguments about how some material is offensive in different contexts and so on, so it is again a difficult thing to define.

The way obscenity will be checked is entirely by me. Again, I won't dictate what content you use so it'll be easier if you make what you want and I attempt to point what counts and what doesn't. I'm all for freedom of expression so I feel uncomfortable telling what's wrong and what's right.

Do be considerate however. If you intend for your video to push some boundaries then make this blatantly clear how and why you intend the video this sort of content, this will help me when I look at your video.

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What you've read should give you an idea of how the law works, thank you for reading! In terms of acknowledgements I'm indebted to **"MEDIA LAW: Fourth Edition" by Peter Carey** as it's the essential guide to understanding this tricky subject.

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