

# Mahlmann vs Thunderf00t

On Feb 24 2021, YouTuber Thunderf00t surprised his fans by uploading a video titled "[I'm getting sued for 15 seconds of video.](#)" Apparently, he said that another YouTuber, [Trevor Mahlmann](#), threatened to take legal action against him for using his video in a larger video made by Thunderf00t.

The issues brought to bear seem quite similar with that in the recent [Akila Obviously vs Sargon of Akkad case](#). While it's unclear at this moment whether or not this case has gone to court, we will give a legal analysis ( **DMCA.com a private company cannot give you legal advice**) of the case to see what the court would likely decide if the case goes to court.

## What Happened?

On February 22, 2021, Thunderf00t uploaded the video [SpaceX busted Part 2](#), which was a continuation of his earlier video with a similar title. Towards the end of the video, there was a 15 seconds clip showing the failed launch of the SpaceX Starship SN9 with Thunderf00t commenting:

"Yeah... interesting to have people excited about it I guess. But I find the rockets that successfully land more impressive."

Some days later, Thunderf00t gets an email from Trevor Mahlmann, accusing him of copyright infringement and demanding that he pay him a sum of \$750 in order to get a license to use the video.

Thunderf00t responded that his usage of [Mr Mahlmann's video](#) falls under fair use and as such there was no copyright infringement. To which Mr. Mahlmann responded that Thunderf00t would hear from his lawyers.

So, this is the question -- does Thunderf00t's usage of a portion Mr. Trevor Mahlmann's video amount to fair use?

## What is Fair Use?

Fair use has been a part of copyright law for a long time. It essentially excuses people from liability for copyright infringement if they used a copyrighted material for a parody, criticised, or used it for academic or news reportage.



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The rationale behind this was that the holder of a copyright would be reluctant to grant a copyright license to people who want to parody or criticise their work. As such, in a society that engenders public free speech and criticism, there has to be fair use to prevent copyright holders from effectively censoring their critics.

Fair use has been part of case law for a very long time. Meaning that even if it wasn't enacted as law, the courts applied it as common law. One of the earliest cases to use the doctrine of fair use was the case of *Folsom vs March* in 1841.

In this case, Justice Joseph Story said:

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

In 1976, the US Congress passed fair use into law under the Copyright Act of 1976.

The act provides in 17 U.S.C. § 107:

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a 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; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Essentially, what the above provision is stating is that a fair use of a work protects it from copyright infringement if it is used for:

- Criticism
- Comment
- News reporting
- Teaching



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- Scholarship
- Research

The law then goes on to provide that there are four factors which would be used to determine if a case falls under fair use in any of the categories stated above. We will discuss the four factors below.

## **The Purpose or Character of the Use, Including whether such Use is for Commercial or Non-Profit Use**

The purpose or character of the use of the copyrighted material talks about how the work was used by the alleged copyright violator. To qualify as fair use, the purpose and character of the use has to be transformative.

This means that the copyrighted work has to have been edited, or comments have to be made about it to a substantial degree. For instance, in the *Akila Obviously vs Sargon of Akkad Case*, Sargon of Akkad edited Akila's video, making the original clip shorter. He also gave it a new title "SJW Level of Awareness."

The court held that this was sufficiently transformative because the video was edited and it was clearly a parody/mockery based on the renaming of the title of the video.

In the case of *Campbell vs Acuff Rose Music Inc*, the court held that a parody of another song which sounded similar to the original song was fair use, as different lyrics were largely used. So, the court decided that there was substantial transformation in the use of the copyrighted material.

The second part of this requirement is based on whether the use of the copyrighted material is for commercial or non-profit purposes.

The general attitude of the courts is that if the use of the material is for non-profit use, it would lean towards granting it as fair use, and vice versa. However, this is not set in stone and the issue would be decided on the facts of individual cases.

For instance, in the case of *L.A Times vs Free Republic*, the court held that even though the defendant used the copyrighted material for non-commercial purposes, it wasn't fair use. This was because by making it freely available to other people, it discouraged them from buying it from the LA Times.



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## The Nature of the Copyrighted Work

What this means is whether or not the copyrighted material was one that covered a factual issue or one that is fictional. If the copyrighted material covers a factual issue, especially one that is clearly of public interest, then the court would be likely to decide that it was fair use.

In the case of *Times Inc vs Bernard Geis Associates* the defendant used stills of a documentary owned by Times Inc. in a textbook about the Kennedy assassination. The court held that it was fair use since what was copyrighted is factual information that is of public interest.

## The Amount of the Portion Used in Relation to the Copyrighted Work

If the parts used by the alleged copyright violator is a very small section of the copyrighted work, the courts would lean towards granting it as a fair use. But once again, this is not set in stone.

For instance, in the case of *Sony Corp vs Universal City Studios*, the court held that copying televised material in full for later private viewing is fair use.

In another case of *Kelly vs Arriba Soft Corporation* the court held that a search engine displaying the thumbnail of a copyrighted picture in search results served as fair use.

## The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

What this means is that the use of the material by the defendant must not be one that would infringe on the commercial success of the copyrighted material itself. If the use is one that affects the potential sale, or publicity of the original work by seeking to replace it, then it doesn't count as fair use.

In the case of *Harper and Row vs Nation Enterprises* former US President Gerald Ford published a memoir that detailed why he decided to pardon Nixon. The work was unpublished and he chose Harper and Row as his publisher. Harper and Row licensed Time Magazine to publish parts of the work as excerpts in its magazine.



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Somehow, The Nation got access to the unpublished work and published about 300 to 400 words of it verbatim in its own magazine. They did this without the permission of either Gerald Ford, Time Magazine, or the Publishers.

When Time Magazine discovered that parts of the work had been published by another paper before they could publish it, they withdrew from the contract. As a result, Harper and Row sued The Nation.

The court held that the publication of the copyrighted material was not fair use even if it was about a matter of public policy (impeachment of a US President). The court held that the sections published by Time were not purely fact as they were the opinion of Gerald Ford.

The court also held that more importantly, by The Nation publishing the material without asking the copyright holder, this deprived it of financial gain it would have gotten as evidenced by the loss of their contract with Time Magazine.

## **So, What does this Mean in the Context of Malmann vs Thunderf00t?**

Now, to the meat of the matter. What are the implications of the above in respect of the dispute between Trevor Malmann and Thunderf00t? We'll discuss the four factors on their relevance to the issue at hand.

### **The Purpose or Character of the Use, Including whether such Use is for Commercial or Non-Profit Use**

So, as was stated earlier, was Thunderf00t's use of Trevor Malmann's video transformative enough? From watching the original video, Thunderf00t didn't do much editing to the original video. However, he made some sarcastic comments. Meaning that he modified the audio of the original video.

Would this be enough to count as being transformative enough? That is left for the courts to decide. But if we were to go by the decision in the recent Akila vs Hughes case, the courts are likely to rule that it was transformative enough.

This is because Thunderf00t added sarcastic comments to the video, and it was clear that he was making a criticism of the people recording the video who were jubilating despite the failure of the launch.



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As to whether the use was for a non-profit or commercial use, it was clearly for a commercial use. This is because the video and its description asked users to support Thunderf00t on Patreon. As such, he would make money from the video. The video is also monetised by YouTube ads, meaning that it's for commercial purposes.

Remember though, that it being commercial or not is alone not enough to determine whether there was fair use. The other requirements have to be taken into consideration.

## **The Nature of the Copyrighted Work**

So, this section concerns whether or not the copyrighted material covered a factual event or was a work of fiction or opinion. The copyrighted video is about a SpaceX Launch, which is a factual event.

However, it could be said that Mr Mahlmann filming it using his own cameras and effect was adding something unique to it, and as such, it wasn't entirely factual.

That is for the courts to decide. But this requirement leans slightly in favor of Thunderf00t. It should also be worthy of note that the reason why Thunderf00t used that video wasn't because of the fact of the launch failure, but the reactions of the people making the video.

## **The Amount of the Portion Used in Relation to the Copyrighted Work**

On this issue, Thunderf00t made use of about 15 seconds from a roughly 7 minutes video, which is about 400 seconds. Although it could be said that the 15 seconds of the video used was the central and most important part of the entire video, and it's infringement is very significant.

Once again, it's for the courts to decide, but we lean slightly in favor of Thunderf00t. This is because the video which included the copyrighted material wasn't entirely about the copyrighted material. There were other sections of the more than 20 minute video. So, the copyrighted material was an insignificant part of the entire video by Thunderf00t.

## **The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work**



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This is a very important element. What is the intention of the alleged infringement? Is its purpose to serve as a replacement for the protected material? Does it poach the audience of Mr. Trevor Mahlmann?

It seems that Thunderf00t's video was not addressed to Mr. Mahlmann's audience. Even if it was, the use of the 15 second clip doesn't appear to directly affect Mr Mahlmann's market share.

Mr. Mahlmann has to prove to the court how the use of a portion of his video has affected him financially, especially by encroaching on his audience.

As it stands, Thunderf00t's use of the video doesn't appear to aspire to be a replacement for Mr. Mahlmann's video.

## What Next?

In all, it would be best for this case to be settled out of court. The potential gains from the copyright infringement claim is about \$2000. It wouldn't ultimately justify the legal fees involved in the prosecution of the case.

However, it's possible that the winning party might apply for the court to charge the losing party with paying the legal fees incurred by the winning party as was done in the Akilah case.

I guess we'll just have to wait and see if the parties take the case to court. If they do, we would wait to see the court's judgement.



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