

Vox lawyers briefly censored YouTubers who mocked The Verge's bad PC build advice

Enlarge / We think copyright's fair use doctrine allows us to show you this screenshot from The Verge's video.

reader comments

255 with 142 posters participating, including story author

Share this story

Last week, The Verge got a reminder about the power of the Streisand effect after its lawyers issued copyright takedown requests for two YouTube videos that criticized—and heavily excerpted—a video by The Verge. Each takedown came with a copyright “strike.” It was a big deal for the creators of the videos, because three “strikes” in a 90-day period are enough to get a YouTuber permanently banned from the platform.

T.C. Sottek, the Verge's managing editor, blamed lawyers at the Verge's parent company, Vox Media, for the decision.

“The Verge's editorial structure was involved zero percent in the decision to issue a strike,” Sottek said in a direct message. “Vox Media's legal team did this independently and informed us of it after the fact.”

The move sparked an online backlash. Verge editor Nilay Patel (who, full disclosure, was briefly a colleague of mine at The Verge's sister publication Vox.com), says that when he learned about the decision, he asked that the strike be rescinded, leading to the videos being reinstated. Still, Patel defended

the lawyers' legal reasoning, arguing that the videos "crossed the line" into copyright infringement.

It's hard to be sure if this is true since there are very few precedents in this area of the law. But the one legal precedent I was able to find suggests the opposite: that this kind of video is solidly within the bounds of copyright's fair use doctrine.

The Internet mocked The Verge's error-ridden video

The original Verge video was posted last September alongside an article titled "How to build a custom PC for gaming, editing, or coding." It featured Verge reporter Stefan Etienne assembling a PC by installing a CPU, graphics card, power supply, and other hardware into a tower-style case.

The video soon became an object of ridicule among seasoned PC builders. Prominent YouTubers posted reaction videos showing clips of Etienne's instructions interspersed with their own incredulous commentary.

Among other problems, critics argued Etienne wore an anti-static bracelet without attaching it to anything, did not put his graphics card and memory chips in the best slots, and put way too much thermal paste on his CPU.

Etienne also appeared to install his power supply backward, with the fans pressed against the side of the case. That blocks airflow and creates a danger of the power supply overheating. And hilariously, Etienne told viewers to make sure that the power supply was resting on "these little insulating pads so the power supply doesn't short-circuit and come into contact with the rest of the system." In reality, the "insulating pads" are there to minimize vibration and noise.

After suffering a few days of ridicule, The Verge pulled the video offline. The Internet moved on, and for about four months everyone forgot about the whole controversy.

The Verge's lawyers get trigger happy

Last week, The Verge's lawyers suddenly asked YouTube to remove two reaction videos that had been online since September. Both videos reproduced the vast majority of the original Verge video, interspersed and overlaid with commentary, criticism, and ridicule.

These takedowns attracted widespread attention. Other prominent YouTubers posted videos weighing in on the controversy, with most blasting The Verge's decision.

Patel says he wasn't involved in the initial decision to issue the copyright strikes. When he learned of the decision, he says, he requested that the strikes be retracted.

"When this was brought to my attention a few hours later, I told them that although I fully agreed with their legal argument, I did not think we should use copyright strikes against legitimate channels," Patel wrote in a Friday post.

Patel says that at his request, The Verge asked YouTube to retract the strikes against the two videos.

Still, Patel said The Verge's lawyers were on solid legal ground.

"I fully agree with our legal team that these videos crossed the line of fair use," he wrote.

Fair use law is murky—especially on YouTube

The legal concept of fair use allows people to use other people's copyrighted works for purposes of comment and criticism, provided that certain conditions are met. Unfortunately, the rules have always been somewhat nebulous, and they've only gotten murkier in the Internet age.

We asked Betsy Rosenblatt, a copyright expert at Whittier Law School, to walk us through the legal standards that apply for videos like these. She said that several factors weigh in favor of a fair use finding.

Probably the most important is that the reaction videos are “transformative”—that is, they create a new work whose character and purpose are different from the original. The purpose of the original Verge video was to instruct people about how to build a PC. The purpose of the reaction videos was to criticize and even ridicule The Verge's original video. Users looking for an instructional video on PC building are unlikely to view these reaction videos as adequate substitutes. That makes the videos more likely to be fair use.

But at least one factor cuts against a finding of fair use: the large amount of the original video used in the new ones. Taking a few short clips for a video like this is unquestionably fair use. Excerpting most or all of another person's video—as these YouTubers did—is a closer call.

“The more you use, the more likely you are to be infringing,” Rosenblatt told Ars.

At the same time, context matters here. The purpose of these reaction videos was to point out the errors in the original video—and there were a lot of errors. Provided that the videos were genuinely focused on providing critical commentary—rather than using the commentary as a fig leaf for ripping off

someone else's work—they could still be on solid legal ground.

A court found a reaction video to be fair use

Unfortunately, there is very little case-law in this area. Most copyright disputes on YouTube stay within the boundaries of YouTube's own quasi-judicial system for resolving those disputes. Most of these videos do not make their creators large amounts of money, so there is rarely an incentive for copyright holders to shoulder the legal costs of a formal copyright lawsuit.

Indeed, while Rosenblatt is an expert on this area of the law, she could only think of one example of a court ruling on the fair use of reaction videos. Still, that ruling seems to cut in favor of the YouTubers and against The Verge.

In 2017, a federal judge ruled that YouTubers Ethan and Hila Klein had not infringed the copyright of another YouTuber, Matt "Hoss" Hosseinzadeh, when they created a reaction video that heavily excerpted and commented on one of Hoss' videos.

The basic format was the same as the reaction videos targeted by The Verge's lawyers. The Kleins played large portions of Hoss' video, talking over the video and periodically cutting back to themselves to discuss segments in more detail.

"Any review of the Klein video leaves no doubt that it constitutes critical commentary of the Hoss video," Forrest wrote in her decision. "There is also no doubt that the Klein video is decidedly not a market substitute for the Hoss video. For these and the other reasons set forth below, defendants' use of clips from the Hoss video constitutes fair use as a matter of law."

This reasoning certainly seems to apply to the videos The Verge targeted. Like the Klein video, those videos undeniably

constituted “critical commentary”—albeit occasionally sophomoric or racist—on The Verge’s video. The targeted reaction videos are “decidedly not a market substitute” for The Verge’s video.

Judge Forrest wrote that not all reaction videos were necessarily fair use.

“Some reaction videos, like the Klein video, intersperse short segments of another’s work with criticism and commentary, while others are more akin to a group viewing session without commentary,” the judge wrote. “Accordingly, the Court is not ruling here that all ‘reaction videos’ constitute fair use.”

But the videos targeted by The Verge seem to squarely fall into the first category. They’re critical commentary, not “a group viewing session.”

A spokeswoman for The Verge declined to elaborate on its lawyers’ reasoning, pointing us to Patel’s post on the subject. When I asked Patel for details, he told me that in one of the videos, “most of the commentary wasn’t about the video itself, but rather jokes about his heritage.”

Patel was talking about a video made by Kyle of the popular YouTube channel Bitwit. That video featured “Lyle,” a recurring character played by Kyle who speaks in broken English and has a penchant for insensitive commentary. Early in his commentary, “Lyle” refers to Etienne, who is black, as “Steve Urkel.” “Lyle” mocked Etienne’s shirt as cheap. When Etienne mis-described a pair of zip ties as tweezers, “Lyle” asked “how in God’s name is my Engrish better than his?”

The Steve Urkel joke seems racist, and none of the other attempts at humor are very funny. But it’s not clear if that’s relevant for copyright purposes. Some of Lyle’s commentary focused on Etienne’s appearance rather than his PC-building advice, but it was still commentary about the video.

Ultimately, lawsuits are so rare in this area that the exact legal boundaries probably don't matter as much as industry norms. And the reality is that reaction videos are now a well-established practice in the YouTube world. And Rosenblatt argued that the courts should—and often do—take that into account.

“If something has become normal, there's probably a good market reason for it and perhaps a good freedom of expression reason for it,” she told Ars.

Update: We've changed the headline and introduction to make clear that the takedown decision was made by lawyers for Vox Media, the Verge's parent company, not the Verge editorial team.

<https://arstechnica.com/?p=1458901>