

## Are Anime Music Videos Fair Use?

Written by Patrick McKay

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Anyone who knows me probably knows I like studying issues related to copyright law—a fascination driven by the fact that as a child of the Net Generation, I have grown up immersed in what [Lawrence Lessig](#) calls the “read-write” culture fostered by digital technology, where virtually any action I take online raises potential copyright implications.

Nowhere is this true than the hobby I have had since high school of creating “anime music videos” or AMVs (music videos setting footage from anime shows and video games to popular songs) and posting them on websites such as [YouTube](#) and [animemusicvideos.org](#). And it’s not just me; there are tens of thousands of these videos posted online and they have taken on a life of their own as an art form in their own right, with a whole subculture of AMV editors with contests, awards, and websites dedicated to them.

Yet despite their popularity, I am astonished at the lack of articles analyzing where these videos stand in relation to copyright law. Most articles I have been able to find on the subject simply assume they are copyright infringement, in which case American copyright laws have essentially rendered this entire art form presumptively illegal. However, I am not convinced of this, and I think a solid case could be made that AMVs fall firmly under the doctrine of “fair use” in US copyright law. After my own experiences with [copyright run-ins](#) related to my AMVs (and subsequent victories), I thought I’d post a brief analysis of why I think there’s a good case to be made for AMVs as fair use.

As audio/visual works, there are two separate components of AMVs that raise potential copyright concerns and must be analyzed separately to determine if they constitute fair use—namely the video and audio tracks.

### Video Track

AMVs typically take ripped footage from anime movies, TV shows, and video games and re-edit them using brief clips no more than a couple seconds in length each set to music, telling a new story by juxtaposing video clips with the beat and lyrics of the song that emphasize different aspects of the original plot. Because this heavy re-editing is so obviously transformative, there is a very strong case to be made that the video portion of AMVs constitutes fair use. Running down the four criteria for fair use in US copyright law, we get the following:

#### 1. The Purpose and Character of the Use

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**a. Non-commercial** – Non-commercial works are much more likely to be fair use than commercial works for profit. Anime music videos are purely non-commercial works created for fun and entertainment and not personal or financial gain.

**b. Transformative** – The more a work changes and adds to the original rather than merely copying it verbatim, the more likely the use is fair. The standard for determining whether something is “transformative” rather than merely “derivative” is whether it “merely supersedes the objects of the original creation or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message.” (*Campbell v. Acuff-Rose Music*).

At least in regards to the video track, AMVs so heavily modify the original source footage by clipping, reordering, and overlaying special effects as to make it an entirely new creation. While the use is certainly “derivative,” re-editing plus the new meaning imparted by the particular scenes selected and the music makes AMVs highly transformative, weighing significantly in favor of them being fair use.

## 2. Nature of the Copyrighted Work

Under copyright law, published materials are more likely to allow fair use than non-published works, and factual works are more likely than artistic works. In this case, the original copyrighted material (anime footage) is published (counting in favor of fair use) artistic work (counting against fair use). However, this factor is the least significant of the four, and can be outweighed by the other three.

## 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

Generally, the less of a copyrighted work that is used in relation to the whole the more likely it is to be fair use. In the case of AMVs, only 3-5 minutes of footage are typically used, consisting of 1 or 2 second clips, often out of hours of available source footage. While these clips may often contain the “heart” of the original work (the most significant scenes of the original anime), the minuscule amount of footage used combined with the brief duration of clips weigh significantly in favor of fair use.

## 4. The effect of the use upon the potential market for or value of the copyrighted work

This is often the most important prong of the fair use test, and together with the first prong is the one most strongly in favor of AMVs as fair use. In the case of non-commercial works, the burden of proof is on the copyright owner to prove harm to the market or value of the work (*Sony Corp. v. Universal City Studios*).

In the case of AMVs, the small amount of footage used, the reordering of brief clips, and the

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absence of the original audio track makes it almost impossible for an AMV to be a substitute for the original work (i.e. nobody would watch the AMV

*instead*

of the original work). There is also no market for licensing anime clips for use in amateur music videos. Thus AMVs would be highly unlikely to have a negative impact on the market for the original work. In fact, they are more likely to have a

*positive*

impact on sales of the original, as they would increase interest in the original work and drive increased sales, effectively acting as a free promotion for the source anime. This factor also weighs heavily in favor of fair use.

### Conclusion:

Because the video track of AMVs is non-commercial, highly transformative, uses only a small portion of the original, and has no negative impact on the market for the original, there is a very strong case that the video portion of AMVs constitutes fair use.

Two notes, however. First, in cases where an AMV creator had to break the copy protection on a DVD to obtain the source footage, that would be illegal as they violated the anti-circumvention provision of the DMCA, which prohibits any circumvention of copy protection regardless of whether or not the use is fair. Second, because AMV creators are usually their most avid fans and they wish to avoid upsetting them, anime creators are highly unlikely to ever mount legal challenges against AMVs. Thus the video portion of an AMV will likely never be the subject of copyright action. The most likely threat comes from the owners of the copyright for the audio track, to which I now turn.

### Audio Track

Since AMVs typically use popular songs by high profile artists signed under major record labels (an overall much more litigation-happy bunch than anime creators), it is because of the audio track that AMV creators are most likely to experience copyright problems. Wind-up Records (the label for Evanescence, Seether, and Creed) has already issued take down notices barring AMVs using their songs from animemusicvideos.org, and as I mentioned in my last post, I myself have run up against Warner Music's YouTube embargo with my own AMVs. Unfortunately, the audio portion of AMVs also has the weakest case for fair use, though I believe a good case can still be made that they are indeed fair use.

#### 1. The Purpose and Character of the Use

**a. Non-commercial** — Once again, AMVs are completely non-commercial works which makes them much more likely to be fair use. While they are often posted on commercial sites such as

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YouTube, that has no bearing on whether AMVS themselves are fair use or not. Because of this I find it highly ironic that YouTube has attempted to work out licensing agreements with music labels to allow users to use their music in user-generated videos. Under the DMCA safe harbor provision, the responsibility to ensure content is non-infringing is entirely that of the user that uploaded the videos, not YouTube. Thus whether or not sites like YouTube have a licensing agreement with labels such as Warner has no bearing on whether the videos are infringing or not.

**b. Transformative** — It is much less clear that AMVs are transformative in relation to the music source than the video source. Since they usually use a whole song without editing or altering it, they clearly don't transform the song in the sense that they make it into something different as with the video track. However, I think there is still a case to be made that AMVs are transformative in relation to the song used in "altering the original with new expression, meaning, or message." Overlaying the song with poignant video images which are often used to translate the lyrics literally on screen or otherwise highlight certain things about the song clearly adds a new layer of meaning and expression to the song. The video and music are combined to create an entirely new message which is much greater than the sum of its parts. The music reflects on the video and the video reflects on the music, imparting new significance to both. It is thus a qualitative transformation rather than a quantitative one. The viewing experience of watching an AMV is qualitatively different than either watching the anime by itself or listening to the song by itself, and thus AMVs could still be considered transformative and likely fair use.

## 2. Nature of the Copyrighted Work

As with the video, the source songs in AMVs are published artistic works. The fact that they're published (assuming you don't use a pre-release leak or something) is slightly in favor of fair use, while the fact that they're artistic rather than factual works is slightly against fair use. Overall, this prong isn't very significant either way.

## 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

This prong is slightly problematic, since an entire copyrighted song is used. This would tend to weigh against fair use. However, some cases where an entire work was copied have nevertheless been held to be fair use, "if the secondary user only copies as much as is necessary for his or her intended use." In this case it could be argued that the entire song is needed, since the whole point of an AMV is for the song to shape the video and for the video to illustrate the song. Using any less than the entire song would make for an incomplete video and would reduce the power of the video. If the audio in the video is encoded at a significantly lower quality than CD quality audio, you could also argue this point qualitatively, since the song in the video is too low quality to substitute for the original. Nevertheless, this argument is still

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fairly weak and it would be a better strategy to argue this prong is outweighed by the other prongs.

### 4. The effect of the use upon the potential market for or value of the copyrighted work

This is where the strongest case for usage of the song being fair use can be made. Once again, in non-commercial cases, the burden of proof is on the copyright holder to demonstrate a negative effect on the market for the original work. There are two possible ways they could show this—the effect on sales of the original song and the impact on a possible market for licensing the song for audiovisual synchronization:

**a. Effect on the market for the original song:** Copyright holders could argue that AMVs could serve as a substitute for buying the original song if people merely listen to the song on YouTube or rip the audio track from the video and save it to their computer instead of buying the song. While both of these things are certainly possible, it would be difficult for the copyright holder to prove an actual negative impact on sales. Those who are content to merely listen to the song on YouTube would not have been likely to buy the song anyway, while relatively few people possess the technical knowledge to rip the audio from a video and use that in place of buying the song. Those that do would most likely consider the audio rip of inferior quality to purchasing the song (or merely illegally downloading it a different way), and would thus not likely consider it worth the trouble. Both of these factors also most likely would be outweighed by the *positive* effect the video would have on the market for the original song by giving the artist additional exposure and free promotion, motivating people who otherwise might not have heard the song to buy the artist's work.

**b. Effect on a possible licensing market:** In large-scale commercial scenarios, there is an established market for audio visual synchronization rights, where musical artists sell the rights to filmmakers to “synchronize” their music with video footage such as in films or television commercials. However, there is at present no market for licensing tracks to individual hobbyists wanting to create amateur non-commercial music videos for fun. Indeed, if such an individual tried to license a song for an AMV, they would most likely find themselves lost in a maze of legal red tape or simply ignored by music labels who wouldn't take their request seriously. Even if they did, the labels would most likely insist on charging commercial-scale license fees on the level of several thousand dollars per use—an overwhelmingly cost prohibitive sum for amateur non-commercial use. Because a legitimate market for licensing songs for uses such as AMVs does not currently exist, there is therefore no potential for this use to have a negative effect on such a market. You cannot negatively impact that which does not exist.

### Conclusion:

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While the case for the use of copyrighted music in the audio track of an AMV is not as clearly fair use as the use of anime footage in the video track, I think a strong case for fair use can be made here as well. The best strategy in this area would be to emphasize the non-commercial transformative nature of the use and the absence of any negative impact on the market for the original song. Indeed, AMVs often have a *positive* effect on song sales, since many people discover bands through watching AMVs they would not otherwise have heard of and in turn go and buy their music. Music videos can serve as valuable promotion for musical artists—something artists themselves recognize when they create their own music videos to promote their music. The transformative nature of AMVs plus their non-commercial character and absence of harm are thus strong indicators that they constitute fair use.

### More resources about anime music videos and fair use:

- [Wikipedia article on fair use](#)
- [Copyright and Culture: Anime Music Videos](#)
- [Lawrence Lessig, "Creatives face a closed Net"](#)
- [Code of Best Practices in Fair Use for Online Video](#)
- [Stanford Center for Internet and Society: Fair Use Project](#)
- [ChillingEffects.org](#)