Step 2: Decide if your video is fair use

If your video was blocked for copyright reasons, either by an automated Content ID match or by a DMCA notice, you will have to decide if your video falls under the "fair use" exception to copyright, or if you had some other kind of authorization to use copyright content (such as getting permission from the copyright holder).

As described on the ChillingEffects website, "when a copyright holder sues a user of the work for infringement, the user may argue in defense that the use was not infringement but 'fair use.' Under the fair use doctrine, it is not an infringement to use the copyrighted works of another in some circumstances, such as for commentary, criticism, news reporting, or educational use." These specific purposes are highlighted in the law as particular types of uses which are strong examples of fair use, but they are by no means the only types of uses which are considered "fair use." Whether something qualifies as fair use typically depends on a case-by-case judgment of the facts.

Fair use is codified at Section 107 of the Copyright Act, which gives a non-exclusive set of four factors courts will consider in deciding whether a use is fair or not. These factors are:

1. **the purpose and character of the use,**
2. **the nature of the copyrighted work,**
3. **the amount and substantiality of the portion used, and**
4. **the effect of the use on the potential market for or value of the copyrighted work.**

ChillingEffects gives a good overview of the four factors, on which my summary below is based (*italics* indicate quotes from ChillingEffects).

FACTOR 1: THE PURPOSE AND CHARACTER OF THE USE

"This factor considers whether the use helps fulfill the intention of copyright law to stimulate creativity for the enrichment of the general public."

This and factor four are probably the most important parts of the fair use test. The key to this prong of the test is whether the use is **(1) commercial or non-commercial**, and **(2) *transformative* rather than merely *derivative***.

Non-commercial use of copyrighted material is much more likely to be considered fair use than commercial use, since particularly in video there is an established market for licensing material for commercial use. However, this does not necessarily mean that a commercial use *cannot* be fair use, but the burden of proof will be higher.

The most important part of this prong is whether the new use is **transformative**, which means that it must somehow alter the original work either quantitatively or qualitatively.
"The more transformative the use, the more likely it is to be fair, whereas if defendant merely reproduces plaintiff's work without putting it to a transformative use, the less likely this use will be held to be fair."
Even if a use does not necessarily alter the original in substance, if it does something to add a new meaning or message to it, it is still likely to be considered transformative.

FACTOR 2: THE NATURE OF THE COPYRIGHTED WORK

"The more creative, and less purely factual, the copyrighted work, the stronger its protection. In order to prevent the private ownership of work that rightfully belongs in the public domain, facts and ideas are separate from copyright--only their particular expression or fixation merits such protection. Second, if a copyrighted work is unpublished, it will be harder to establish that defendant's use of it was fair."

This is probably the least important part of the fair use test, and rarely makes the difference between a use being considered fair or not. Basically if your use of copyrighted material involves facts rather than creative works like movies or music, and if it involves published material rather than unpublished material, it is slightly more likely to be considered fair use.
Note: Since the original creation of the Fair Use Doctrine, Congress has amended it to explicitly say, "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."

FACTOR 3: THE AMOUNT AND SUBSTANTIALITY OF THE PORTION DEFENDANT USED

"In general, the less of the copyrighted work that is used, the more likely the use will be considered fair. If, however, the defendant copied nearly all of, or the heart of, the copyrighted work, his or her use is less likely to be considered fair."

This prong is closely related to whether your use is transformative or not, and is also very important. The key here is that in order to be fair use, you must use no more of the original copyrighted work than necessary for your purpose. Incorporating small amounts of copyrighted material into a larger presentation is much more likely to be considered fair use than something that makes use of the entire original. This prong not only looks at how much of the original you used *quantitatively*, but also *qualitatively*, and a use is less likely to be fair use if you used "the heart" of the original work.

However, even if you do use the entire original work, this prong can be outweighed by the first prong if your use is sufficiently transformative. A good example of this would be anime music videos and film mashups, which in my opinion qualify as fair use for the video portion because *q uantitatively*
they only use brief clips of much larger works, and for the music portion because even though they use entire copyrighted songs, the addition of the video footage
qualitatively
imparts a new message and is sufficiently transformative to outweigh the fact that the entire song is used.

FACTOR 4: THE EFFECT OF DEFENDANT'S USE ON THE POTENTIAL MARKET OF THE COPYRIGHTED WORK

"This factor is generally held to be the most important factor. This factor considers the effect that the defendant's use has on the copyright owner's ability to exploit his or her original work. The court will consider whether the use is a direct market substitute for the original work. The court may also consider whether harm to a potential market exists.

This factor is key to the whole analysis, and considers whether the new use of copyrighted content directly competes with the original work. To decide this, ask yourself if your use of copyright content would be likely to serve as a substitute for the original. In the context of online video, could someone watch your video *instead of* buying the original work and still obtain the same value as from the original? If the answer to that question is yes, your video is likely not fair use. If it is no, that weighs significantly in favor of your video being considered fair use.

ChillingEffects also notes: *The burden of proof here rests on the defendant for commercial uses, but on the copyright owner for noncommercial uses. ... It is important to note that courts recognize that some market harm may come from fair uses such as parodies or negative reviews, but that such market harm does not militate against a finding of fair use."*
This means that in the context of a lawsuit, the copyright holder would have the burden to prove that your use
does
harm their market. This market harm must be shown to come from
direct competition
between your work and the original. It is not enough to say that your use criticizes the original and might make someone not want to buy it. That is still fair use.

Deciding if your video is fair use

On YouTube, they key things to consider is if your video is **transformative** (i.e. you modified the source material in some way or did something to give it a different meaning or message), whether it is **nonco mmercial**
(you aren't making money from it), and whether it
competes with the market for the original work
(i.e. someone could watch your video and get the same benefit as buying it). The
Center for Social Media
publishes an excellent
Code of Best Practices in Fair Use for Online Video
, which lists the following six uses as being probable fair use:

1. **Commenting on or critiquing of copyrighted material**
2. **Using copyright material for illustration or example**
3. **Capturing copyrighted material incidentally or accidentally**
4. **Reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon**
5. **Copying, reposting, and recirculating a work or part of a work for purposes of launching a discussion**
6. **Quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements**

In addition to these things, here is a list of common types of videos on YouTube which ***in my personal opinion***
would likely be considered fair use (or at least should be under common sense logic and current online practice). Ultimately, though, it would depend on what arguments a court would be willing to accept, and the case for some is stronger than others.

1. **Anime music videos and film mashups**

- The video portion of such videos is very likely fair use as they only use small, highly edited portions of the original video footage. The audio portion is less likely to be fair use as these videos typically use an entire song, yet is still arguably fair use because of the non-commercial, transformative use of the song, low probability of harm to the market for the original song, and the impossibility of the average amateur video creator to license the song.

- **Parody videos (such as a political parody using satirical lyrics set to a copyrighted song)**

- Note that courts have drawn a distinction between parody (which comments on the original work) and satire (which comments on an unrelated subject), and have held that parody is more likely to be fair use. However many satires are still likely to be fair use based on their non-commercial, transformative nature, low possibility of harming the market for the original, and impossibility of licensing. Political parodies/satires are also likely to be protected against copyright claims by the higher first-amendment protection traditionally granted to political speech.

- **Filming yourself singing a copyrighted song (lip-sync videos may be less likely to be fair use)**

- This is questionably fair use since normally professional recording artists who perform cover recordings would be required to obtain a compulsory license and pay a fee set by statute to a performing rights organization in order to make a cover, and obtain a syncronization license from the record lable to use it in any kind of video production. However, at least in my opinion, it is doubtful this requirement was meant to apply to amateur performers like teenagers singing copyrighted songs in their bedrooms, and such people arguably could not be expected to navigate the complexities of the licensing process, which would be incomprehensible to the average person simply seeking to post a video of themselves singing a song on YouTube. Accordingly, I think a valid case could be made for fair use.

- **Movie reviews containing clips of copyrighted films**
- This counts as commentary and criticism of the original film and is very likely fair use.

- **Video game walkthroughs and tutorials with commentary**

- Even though video games are copyrighted, it is now a widely accepted practice on YouTube to post walkthroughs and tutorials ("let's plays"). Both the player's original commentary and the fact that their gameplay creates a unique subjective experience with the game make the use transformative. As long as you include your own original commentary about the game and don't just post straight raw footage from the game, it is likely fair use. It is possible that even un-commented gameplay is still fair use, though this is less certain.

- **Posting short news clips in order to comment on a current event**
- This also falls under the commentary category of fair use, though there likely would need to be some original comment on the clip rather than just posting the straight unedited clip.

- **Non-commercial podcasts and V-logs containing brief uses of copyrighted songs (especially for purposes of comment about the song)**

- This is likely fair use because of the minimal nature of the use and non-commercial aspect. If the podcast or V-log is for profit it is less likely to be fair use.

- **Home videos or documentary-type videos which capture copyrighted material in the background, such as a TV show playing on a TV or a song playing on the radio**
- When copyrighted material is incidentally captured in the background of a video (for example, a baby dancing to a Prince song as in the case *Lenz v. Universal*) courts have held it to be fair use. This would also include things like home recordings of a school talent show or dance performance that happen to include performances of copyright songs.

Videos that are **NOT** likely to be fair use include:

1. **Posting unedited clips from movies and TV shows**
2. **Posting professionally produced music videos in their entirety**
3. **Using copyrighted music in the soundtrack to a commercial or some type of video which you stand to gain financial benefit from, which would likely infringe on the artist's synchronization right.**
4. **Posting so-called "lyrics videos"**

- If your video is merely a copyrighted song with the text of the lyrics on the screen and maybe a few pictures of the artist or the album cover, this is likely not transformative enough to be considered fair use, since you are not really adding anything new or changing the message of the original. These are also much more likely to serve as a substitute for the original, defeating a claim of fair use.

These things are only examples and are by no means a complete list of types of videos that may or may not be fair use. The most important thing to keep in mind is whether your video is
(1) non-commercial,
(2) changes or alters the original work in some way
,
(3) uses no more of the work than necessary for your purpose
and (4)
does not harm the market or substitute for the original work
. With the last of these, it is important to keep in mind that even if you used an entire song to make an anime music video or film mashup for example, your video could actually have a
positive
effect on the market for the original song by serving as free advertising and motivating people to go out and buy the song.

Finally note that making money from a video does not necessarily preclude fair use, but it does reduce the chances of a video being found to be fair use. If the copyrighted material is highly factual and you are using it for news reporting or commentary, it may still be fair use to use it commercially, but a mashup that you make money from might not be. YouTube also has stricter rules for videos it allows to be monetized and generally requires you to prove that you have a license for the material, so claiming fair use may not be enough to satisfy YouTube that you have the right to use it.