



**WHAT IS FAIR GAME WHEN IT COMES TO FAIR USE?: EXAMINING  
THE USE OF VIRAL VIDEOS WITHOUT A LICENSE**

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## **What Is Fair Game When It Comes To Fair Use?: Examining the Use of Viral Videos Without a License**

The internet is teeming with “viral videos,” or video clips that become instantly popular through Internet sharing via social media. But at what point does the ping-pong, posting, and liking infringe upon the creator’s rights? The case of Equals Three LLC v. Jukin Media, Inc. is one of the first to address copyright ownership of viral videos. 2015 U.S. Dist. Lexis 143389 at \*2 (C.D. Cal Oct. 13, 2015).

By way of background, Equals Three and Jukin Media are both digital media companies whose businesses involve the use of viral videos. Id. at \*2, \*4. Jukin’s business searches the internet for viral videos, obtains the rights to them, and then uploads these videos to its YouTube channel or its own website. Id. at \*2-\*3. Jukin then, in turn, licenses its videos to other media platforms. Id. at \*4. Equals Three produces short segments based on parts of these viral videos, which it broadcasts on YouTube. Id. at \*4-\*5. Equals Three’s episodes feature a host who adds humorous commentary to develop its storyline. Id. at \*5.

This lawsuit arose after Equals Three refused to pay Jukin a licensing fee in connection with its use of Jukin’s videos in eighteen of its episodes. Equals Three, 2015 U.S. Dist. Lexis 143389 at \*2. When Equals Three refused to obtain a license from Jukin, Jukin filed multiple complaints of infringement with YouTube. Id. at \*7. As a result of Jukin’s complaints, Equals Three was no longer able to earn advertising revenue from the allegedly infringing episodes pursuant to YouTube policy. Id. at \*10. In response, Equals Three filed suit seeking a declaratory judgment and relief under § 512(f) of the Digital Millennium Copyright Act for fraudulent takedown notices. Id. at \*2 Jukin filed a counterclaim for copyright infringement. Id.

The central issue before the United State District Court for the Central District of California was whether Jukin’s use of the viral videos without a license was fair use. Id. The Fair Use doctrine provides a defense to potential copyright infringers as it proclaims “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. In evaluating fair use, courts apply the following factors:

- (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. 17 U.S.C. § 107

The court applied each of these four factors in turn. In doing so, the court explained that “the key inquiry for the first statutory factor is ‘whether and to what extent the new work is transformative.’” Id. at 15. For a work to be transformative it must not “merely supersede the

objects of the original creation but rather add[s] something new, with a further purpose or different character, altering the first with new expression, meaning or message.” Id. at 15. Examples of transformative uses include criticism, comment, or parody. Id. at \*15- \*16. Equals Three argued that it was protected by the fair use doctrine because the works in question were parodies of Jukin’s videos. Id. at \*16. “A parody is a work that uses ‘some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.” Id. (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)). The court sided with Equals Three on this factor and found that “the jokes, narration, graphics, editing, and other elements that Equals Three adds to Jukin’s videos add something new . . . with different purpose or character.” Id. at \*19-20.

As to the second factor, the Court acknowledged that Jukin’s works were creative and that creative works generally “fall closer to the core of copyright’s protection.” Id. at \*23. Nevertheless, the court noted that this factor is not particularly important where the new work is found to be “highly transformative.” Id. at \*24. Similarly, with the third factor, the court acknowledged that Equals Three used the heart of Jukin’s videos, yet found that Equals Three did not use more than “reasonably necessary to convey enough of the events to allow the host’s jokes, comments, and criticisms to make sense to the viewer and resonate.” Id. at \*14. As to the fourth and final factor, the Court found that it did not favor either party. Id. at \*30.

Ultimately in weighing these four factors, the Court found that all but one of Equal Three’s episodes to be highly transformative and, therefore, shielded by the fair use doctrine. Id. at \*30-31. Despite this holding, it is worth noting that the Court advised that when it comes to the doctrine of fair use, there really is no bright-line rule. Thus, the important take-away is that “fair use must be evaluated on a case-by-case basis by reference to the four statutory factors.” Id. at \*16.

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