



# COPYRIGHT INFRINGEMENT ON YOUTUBE: MICHELLE PHAN

photo: Joanna Kosinska

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Influencer Michelle Phan became a beauty titan by posting high-quality makeup tutorials on YouTube. By 2014, she had millions of subscribers and a channel with over 50 million views. By advertising in her videos, Phan was able to turn her love for beauty into millions of dollars in earned revenue.

At the height of her success, Phan found herself in the midst of legal trouble, when she was sued by Ultra Records for more than 50 instances of copyright infringement (with penalties of \$150,000 each), totalling over \$7 million in penalties. The record company alleged that they owned the rights to background music that she used in her videos. Despite Phan's insistence that she obtained permission to use the music, her videos were removed and she lost the copyright lawsuits.

Phan's copyright mistakes in this case can serve as a cautionary tale for other entrepreneurial influencers who seek to avoid the same outcome. Below are two important intellectual property points to consider.

## **ANY CONTENT WITH A REVENUE STRATEGY NEEDS TO ADHERE TO "FAIR USE" RULES**

**It is important that creators who use content to generate revenue understand fair use.**

Influencers have to bear the responsibility if their content violates the [fair use doctrine](#)—potentially leading to video takedowns, litigation, and loss of revenue in the process. The Fair Use provisions of the Copyright Act allow you to copy and use copyrighted material for specific purposes (including criticism, comment, news reporting, teaching, scholarship, or research) that serve the public interest. For instance, you can quote a line from a book in a published book review.

IF PHAN SOUGHT THE ADVICE OF AN EXPERIENCED IP ATTORNEY OR AT LEAST OBTAINED AN EXPLICIT LICENSING AGREEMENT (IN WRITING), SHE MAY HAVE AVOIDED OVER \$7 MILLION IN PENALTIES.

When Ultra Records sued Phan, they specifically mentioned that her substantial advertising revenue played a role in their decision to sue. After being served with the lawsuit, she replaced the infringing content with links directing viewers back to original songs on platforms like Spotify. However, this was not enough to put an end to the lawsuit; Ultra still wanted compensation for the prior use of their copyrighted music in her videos.

It is fair to assume, given this case and others like it, that using music for “viral” or profitable videos increases fair use flags.

## USING ANOTHER PARTY’S IP REQUIRES A LICENSING AGREEMENT

Phan claimed that she got permission from Ultra’s new media manager to use the music in question. Yet, she couldn’t prove such an agreement existed because she could not produce an official **written licensing agreement**.

While early social media adopters may have gotten away with the unauthorized use of music or an oral agreement, now there is more money flowing to influencers and intellectual property (IP) lawsuits are on the rise. Copyright holders want to ensure they get their fair share of profits if their work is used by other content creators.

If Phan sought the advice of an experienced IP attorney or at least obtained an explicit licensing agreement (in writing), she may have avoided over \$7 million in penalties.

Other creators, however, can learn from Phan’s mistakes to protect their content, income, and reputation. An intimate understanding of fair use rules and a written agreement go a long way toward protecting one against IP lawsuits.

## GLOSSARY OF TERMS

**Intellectual Property:** result of creativity, such as inventions and artistic works, for which the creator is rewarded with proprietary protection.

**Fair Use:** a legal doctrine that permits a party to use a copyrighted work without the permission of the copyright owner for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.

**Intellectual Property License:** an agreement which enables an IP owner (individual or business entity) to authorize another party to exercise some of the IP owner's rights in the IP, while retaining ownership and control of the IP.

**Trademark:** an intellectual property right granted by the federal government to an individual, business, or legal entity that creates and uses a distinctive word, name, symbol, or device to distinguish its products or services from any other entity in the marketplace.

## RESOURCE TOOLKIT

[IP for Social Media Influencers and Content Creators](#)

[Fair Use Explained \(Video\)](#)

[The Fundamentals of IP Licensing](#)

## DISCUSSION QUESTIONS

Why was Michelle Phan's use of music that Ultra Records owned the rights to an example of copyright infringement and not following fair use laws?

Can you think of other common examples where content creators need to be aware of fair use?

Thought Exercise: Think about a few of your favorite YouTube channels/influencers. Find a popular video for each, watch a few minutes, and read the description box. Pay attention to how they use language or certain editing techniques to avoid claims of infringement.

**Scenario Challenge:** Devon, an up-and-coming YouTuber with over 40,000 subscribers, recently went viral on Twitter for posting parts of his lively review video featuring a new indie film. It was recently released on a well-known streaming platform. The indie film's streaming numbers skyrocket as a result and so do Devon's subscribers. Is Devon teetering on the edge of copyright infringement with consequences? *(Answer at publication end.)*