

# COPYRIGHT AND TRADEMARK



## What is copyright and trademark policy?

Copyright and trademark policy are largely governed by the intermediary liability frameworks created by the Digital Millennium Copyright Act and jurisprudence around contributory trademark infringement liability. These frameworks protect Internet companies that host user content from ruinous legal costs if a user uploads and shares content that infringes on someone else's copyright or trademark. Another important part of the copyright system is the fair use doctrine, which allows for the unauthorized use of copyrighted material if the material is being transformed or used for things like reporting and parody. While fair use doctrine is critical for innovation and expression, whether something is protected by fair use is fact-specific and determined on a case-by-case basis in court.

## KEY TAKEAWAYS:

- Changing the framework for online copyright and trademark claims would have an outsized, negative impact on startups that encounter user-generated content.
- Mandating filtering technology—which is very expensive and inherently error-prone—would create high costs and risks for startups without catching much (if any) more infringement.

## Why does it matter to startups?

Copyright and trademark intermediary liability frameworks are critical to startups that host user content, ranging from social media platforms, to photo and video sharing services, to websites that host user reviews, to e-commerce platforms, and much more. These frameworks strike a valuable balance that is especially important to startups, because the law provides certainty and guards against mere threats or unaffordable legal exposure putting startups out of business. Many Internet companies that host user content establish notice-and-takedown processes for resolving allegations of infringement, removing accused content upon receipt of a complaint. But these systems can be gamed by anyone who alleges infringement but simply doesn't like another user's content, putting Internet companies in the impossible position of risking removing a user's content or risking allowing infringing content to stay online. The threat of steep statutory damages and imbalanced procedures for resolving infringement claims compound these problems—stifling speech, economic opportunity, and creativity online.

## Where are we now?

Some rightsholders and some lawmakers are pushing to change copyright and trademark law despite the successful and balanced frameworks discussed above. For example, some have argued it should be easier to sue companies for copyright infringement they have no knowledge of or involvement in. Others have argued that all Internet platforms, regardless of whether their users have ever been accused of infringement, should be required to review or filter every single user post to find infringing content before it can be shared. This would be especially problematic for startups who can't hire teams of intellectual property experts to review every element of every piece of user content—from the music playing in the background of a video on social media, to the art in a photograph on a review website, to the validity of a piece of vintage clothing being sold on a secondhand e-commerce site—to see if it's allowed under intellectual property law, including whether it's protected by fair use or allowable because it's part of the public domain, etc.

