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## Lowering Barriers to Entry: YouTube, Fair Use, and the Copyright Claims Board

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## Lowering Barriers to Entry: YouTube, Fair Use, and the Copyright Claims Board

### Cover Page Footnote

\* J.D. Candidate, Class of 2023, Fordham University School of Law, Online Editor, Volume XXXIII, Fordham Intellectual Property, Media & Entertainment Law Journal; B.S., Political Science, the Ohio State University, 2020. I wish to thank the staff of the Journal, Cardozo and Brandeis, and all of the YouTubers whose passion inspired the creation of this paper. Finally, my thanks to Carolyn O'Neill who has always been my biggest supporter.

# Lowering Barriers to Entry: YouTube, Fair Use, and the Copyright Claims Board

Jamie O’Neill\*

*The Internet has transformed the landscape of media production by opening the doors of creation to anyone with a computer and an idea. YouTube allows for millions of individuals to post and disseminate content at a low cost to widespread audiences. But while the barriers to entry for content creation have lowered, the barriers to the legal copyright system have remained largely unmoved since YouTube’s inception. This Note seeks to explore the exact specifications of YouTube’s copyright system, both the one mandated by law and the one created voluntarily by YouTube, in order to understand where fair use stands in online copyright infringement detection. Additionally, the Note proposes the newly functional Copyright Claims Board as a way of lowering the barrier to entry into the legal system to allow for content creators to fight against online copyright abuse.*

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## INTRODUCTION

*Hit-driven economics is a creation of an age without enough room to carry everything for everybody. Not enough shelf space for all the CDs, DVDs, and games produced. Not enough screens to show all the available movies. Not enough channels to broadcast all the TV programs, not enough radio waves to play all the music created, and not enough hours in the*

*day to squeeze everything out through either of those sets of slots. This is the world of scarcity. Now, with online distribution and retail, we are entering a world of abundance.*

—Chris Anderson, “The Long Tail”<sup>1</sup>

Each day, YouTube viewers watch more than one billion hours of content.<sup>2</sup> Fifty-four percent of Americans use YouTube every single day,<sup>3</sup> and for young people, 95% use the platform.<sup>4</sup> Thirty percent of today’s children, when surveyed, said they aspire to be YouTubers (3 times more than those who answered “astronaut”).<sup>5</sup> YouTube has changed what and how people watch, but it has also lowered barriers to entry for people seeking to create content.

Five hundred hours of new video content is published on YouTube every minute.<sup>6</sup> Over 300,000 YouTube users have over 100,000 subscribers, and 17 million users have over 100 subscribers.<sup>7</sup> “Content creators” or “YouTubers” use the platform to upload content onto their “channels” that would otherwise not be available to the general public because most individuals, at least in the past, did not have access to a mode of creation that easily distributed a product to widespread audiences.<sup>8</sup>

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<sup>1</sup> Chris Anderson, *The Long Tail*, WIRED (Oct. 1, 2004, 12:00 PM), <https://www.wired.com/2004/10/tail/> [<https://perma.cc/96FP-2BRB>].

<sup>2</sup> Jack Nicas, *YouTube Tops 1 Billion Hours of Video a Day, on Pace to Eclipse TV*, WALL ST. J. (Feb. 27, 2012), <https://www.wsj.com/articles/youtube-tops-1-billion-hours-of-video-a-day-on-pace-to-eclipse-tv-1488220851> [<https://perma.cc/75MW-TPWG>].

<sup>3</sup> Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> [<https://perma.cc/T4YW-896S>].

<sup>4</sup> *Id.*

<sup>5</sup> See *LEGO Group Kicks Off Global Program to Inspire the Next Generation of Space Explorers as NASA Celebrates 50 Years of Moon Landing*, PR NEWswire (July 16, 2019, 9:32 AM), <https://www.prnewswire.com/news-releases/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing-300885423.html> [<https://perma.cc/85TB-Q8CV>].

<sup>6</sup> *YouTube for Press*, YOUTUBE, <https://blog.youtube/press/> [<https://perma.cc/NY4Q-Y426>].

<sup>7</sup> Matthias Funk, *How Many YouTube Channels Are There?*, TUBICS (Nov. 13, 2020), <https://www.tubics.com/blog/number-of-youtube-channels> [<https://perma.cc/BQW9-TDU3>].

<sup>8</sup> See Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, EFF (Dec. 10, 2020),

A YouTuber can make an independent film project, an educational video, news content, a video game recording, or they could sit there and record themselves eating a sandwich.<sup>9</sup> And the public can discover those videos and watch them. Through YouTube’s customized recommendation page, algorithms, and the search function, an individual can find specific content that they want to watch quickly and absolutely.<sup>10</sup> Accessible videos do not need to be massive hits, they just need to be searchable. Not everyone will be a successful YouTuber making money off the content they create, but success is a process more than luck. “[G]ood content, good thumbnailing, good titling, and . . . a smart way of getting it in front of people who are interested in [your type] of content” can allow for a video to be viewed by hundreds, thousands, or millions of YouTube users.<sup>11</sup> Nonetheless, due to the abundance of content, many videos only reach limited audiences, but that does not make them immune to YouTube’s copyright system.

Few content creators on YouTube have a management team<sup>12</sup> or are affiliated with an organization, save for the small minority of extremely popular channels that receive millions of views per

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<https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> [<https://perma.cc/UG4V-QGG2>]; see also Li Jin, *The Creator Economy Needs a Middle Class*, HARV. BUS. REV. (Dec. 17, 2020), <https://hbr.org/2020/12/the-creator-economy-needs-a-middle-class> [<https://perma.cc/QH34-GUE3>].

<sup>9</sup> See, e.g., Jamie Costa, *KENOBI - A Star Wars Fan Film*, YOUTUBE (Dec. 24, 2019), <https://www.youtube.com/watch?v=3uDwjIBR9s4> [<https://perma.cc/CES4-L9E7>]; Good Mythical Morning, *Blind Spicy Chicken Sandwich Taste Test*, YOUTUBE (Mar. 30, 2022), [https://www.youtube.com/watch?v=P\\_WiPh9Cyas](https://www.youtube.com/watch?v=P_WiPh9Cyas) [<https://perma.cc/23BA-4K6J>].

<sup>10</sup> See Matt G. Southern, *Google Explains How YouTube Search Works*, SEARCH ENGINE J. (June 28, 2020), <https://www.searchenginejournal.com/google-explains-how-youtube-search-works/373189/> [<https://perma.cc/3V38-SSRS>].

<sup>11</sup> Ludwig Ahgren, *I Made a Secret YouTube Channel to Prove It’s Not Luck*, YOUTUBE (Nov. 5, 2021), <https://www.youtube.com/watch?v=Ip2trao6dYw> [<https://perma.cc/XE7Y-SG5Q>].

<sup>12</sup> “Management team” refers to different types of managers including talent managers and content network managers. See Amanda Perelli, *How YouTube Talent Managers are Helping Shape the Future of the Influencer Industry*, BUS. INSIDER (Oct. 13, 2019, 8:41 AM), <https://www.businessinsider.com/youtube-talent-managers-helping-shape-influencer-industry-2019-10> [<https://perma.cc/L26J-KBT2>]; see also Inkoo Kang, *Can Vloggers Really Make a Fortune?*, SLATE (Jan. 16, 2018, 6:00 AM), <https://slate.com/technology/2018/01/how-professional-youtubers-can-make-so-much-money.html> [<https://perma.cc/RG52-QZTJ>].

month.<sup>13</sup> Most YouTubers also tend to use YouTube as a secondary source of income, while the top 3% of YouTubers attract on average of 1.4 million views per month that is only an estimated \$16,800 a year in income from advertisements.<sup>14</sup> So, when the time comes, as it does for millions of videos every year,<sup>15</sup> for a copyright infringement action against a content creator's video—YouTubers of any level of popularity often lack the resources to defend themselves against infringement claims, even ones that can be defended with fair use.<sup>16</sup> Additionally, YouTube has little incentive to support individual creators, rather than movie studios, when such disputes do occur due to the lack of legal threat that individual YouTubers pose.<sup>17</sup>

For about the past decade, individual-driven, online video sharing sites have taken the internet by storm. YouTube, which was founded in 2005, moved quickly from a short-form, low-quality video host to a 1.65-billion-dollar acquisition by Google in 2006.<sup>18</sup> And by present-day, YouTube has made a major impact on entertainment and content consumption. While entertainment, content, and accessibility have developed over time to allow individuals to become a part of the entertainment creation industry, the copyright system and YouTube itself have not updated to meet their needs.

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<sup>13</sup> See Sissi Cao, *Here's Why Becoming a Lucrative YouTube Star Keeps Getting Harder*, OBSERVER (Feb. 28, 2018, 1:29 PM), <https://observer.com/2018/02/study-youtube-stars-earnings-us-median-income/> [<https://perma.cc/K7CT-TTH2>].

<sup>14</sup> *Id.* It is important to note that YouTubers can make sponsorship deals with companies for set sums or they can create pages on sites such as Patreon for income on top of the \$16,800 figure.

<sup>15</sup> See *Copyright Transparency Report H1 2021*, YOUTUBE, [https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22\\_2021-1-1\\_2021-6-30\\_en\\_v1.pdf](https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2021-1-1_2021-6-30_en_v1.pdf) [<https://perma.cc/QW9K-2V27>].

<sup>16</sup> See Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95, 113 (2015); see also Scott Hervey, *Lawsuits Are the Inevitable Cost of YouTube Success*, WEINTRAUB TOBIN: IP L. BLOG (Apr. 27, 2017), <https://www.theiplawblog.com/2017/04/articles/cyberspace-law/lawsuits-are-the-inevitable-cost-of-youtube-success/> [<https://perma.cc/QBM4-WU4A>].

<sup>17</sup> See Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 84–85 (2015).

<sup>18</sup> See Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, N.Y. TIMES (Oct. 9, 2006), <https://www.nytimes.com/2006/10/09/business/09cnd-deal.html> [<https://perma.cc/95NB-RH6Q>].

Part I of this Note describes the steps of online copyright and copyright disputes, including the current systems put in place by YouTube and Twitch. Part II of this Note goes on to exemplify abuses of YouTube's copyright system and discusses the death of fair use in online copyright disputes. Finally, Part III suggests a possible solution in the Copyright Small Claims Board, as recently functional, in allowing independent content creators to easily declare non-infringement, to protect their own intellectual property, as well as to raise the possibility of retribution for corporations who would prefer not to disrupt the status quo.

## I. CONTENT CREATION AND INTERNET COPYRIGHT

### A. *The YouTube Copyright System: An Explanation*

Most YouTubers making content run into the copyright system eventually—both the system that has been created in law and the one that has been created by YouTube itself—and the process can often be confusing and is widely misunderstood.<sup>19</sup> Copyright infringement detection starts on YouTube the moment a creator begins to upload a new video and, using the various methods of YouTube's system, copyright infringement detection never ceases.<sup>20</sup>

YouTube offers several different methods for protection of copyright on their platform. These tools include: a copyright takedown webform, a copyright match tool, a content verification program, and Content ID.<sup>21</sup> The following is a description of each

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<sup>19</sup> See Casey Fiesler et al., *Understanding Copyright Law in Online Creative Communities*, PROC. 18TH ACM CONF. ON COMPUT. SUPPORTED COOP. WORK & SOC. COMPUTING (Feb. 28, 2015).

<sup>20</sup> YouTube "Checks" is a relatively new tool that shows a creator, prior to submission and during upload, if the video contains copyrighted material. This tool seems to just use Content ID for this check. See Julia Alexander, *YouTube Can Now Warn Creators About Copyright Issues Before Videos Are Posted*, THE VERGE (Mar. 17, 2021, 4:08 PM), <https://www.theverge.com/2021/3/17/22335728/youtube-checks-monetization-copyright-claim-dispute-tool> [<https://perma.cc/WN39-6ANT>]. YouTube also has copyright detection for live-streamed broadcast. See *Copyright issues with live streams*, YOUTUBE HELP, <https://support.google.com/youtube/answer/3367684?hl=en> [<https://perma.cc/3GE4-UU5G>].

<sup>21</sup> *Overview of copyright management tools*, YOUTUBE HELP, <https://support.google.com/>

tool and the process, requirements, and repercussions that they bring.

### 1. The DMCA & YouTube's Copyright Takedown Webform

Under the Digital Millennium Copyright Act ("DMCA"), certain online service providers<sup>22</sup> ("OSPs") are protected from copyright infringement liability from infringement by users of their platform so long as they meet the set of requirements and guidelines set out in the DMCA's safe harbor.<sup>23</sup> First, YouTube, as an OSP,<sup>24</sup> must not have "actual knowledge" that the material on their site is infringing.<sup>25</sup> They also must not be aware of apparent infringement,<sup>26</sup> and if they become aware they must act to expeditiously remove or disable access to the material.<sup>27</sup> YouTube must also not receive a financial benefit directly attributable to the infringing activity.<sup>28</sup> The next requirement of the safe harbor is the implementation of a "notice-and-takedown" system.<sup>29</sup> YouTube, to qualify for the DMCA, needed to create a process to receive notifications of infringing material on their site.<sup>30</sup> The notification must contain: a physical or electronic signature of the copyright owner or their agent, identification of the copyrighted work, identification of the infringing

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youtube/answer/9245819?hl=en&ref\_topic=9282364 [https://perma.cc/D2XU-34KQ].

<sup>22</sup> An online service provider is "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received" or is "a provider of online services or network access, or the operator of facilities therefor." 17 U.S.C. §§ 512(k)(1)(A)–(B).

<sup>23</sup> See generally *id.* § 512.

<sup>24</sup> YouTube has generally been viewed as an OSP, although not under a traditional, narrower definition. See *Viacom Int'l., Inc. v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012) ("No such limitation appears in the broader definition, which applies to service providers—including YouTube—falling under § 512(c) . . . . In the absence of a parallel limitation on the ability of a service provider to modify user-submitted material, we conclude that § 512(c) "is clearly meant to cover more than mere electronic storage lockers.").

<sup>25</sup> See 17 U.S.C. § 512(c)(1)(A)(i); accord Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1, 19 (2007).

<sup>26</sup> See *id.* § 512(c)(1)(A)(ii).

<sup>27</sup> See *id.* § 512(c)(1)(A)(iii).

<sup>28</sup> See *id.* § 512(c)(1)(B).

<sup>29</sup> See *id.* § 512(c)(2).

<sup>30</sup> *Id.*

material, reasonable contact information, a statement of their good faith belief that the infringer is not authorized to use the copyrighted material, and a statement that the notification is accurate and is being made under penalty of perjury.<sup>31</sup>

YouTube created their Copyright Takedown Webform to satisfy the above requirements. YouTube provides this description of the takedown process: “If your copyright-protected work was posted on YouTube without authorization, you can submit a copyright takedown request. Submitting a takedown request will start a legal process.”<sup>32</sup> At the top of the form there is a disclaimer stating that, “Remember that not all copyright content is eligible for removal. Some videos are protected by fair use and similar laws.”<sup>33</sup>

The webform to submit a request clearly follows the requirement set out in the DMCA. First, the submission must come from either the copyright owner or their agent.<sup>34</sup> Next, the form requires the copyright owner request which videos they want removed.<sup>35</sup> Then the copyright owner must submit the following: their name, phone number, primary email, relationship to the copyrighted content, country, and address.<sup>36</sup>

The copyright owner then can select from two options: whether they want the video removed with a seven-day notice (whereby YouTube gives the video uploader seven days to remove the video and avoid a copyright strike)<sup>37</sup> or whether they want removal immediately (the video is removed after YouTube “validates” the request).<sup>38</sup> Additionally, a copyright owner can also check a box that reads “prevent copies of these videos from appearing on YouTube

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<sup>31</sup> *Id.* § 512(c)(3).

<sup>32</sup> *Submit a copyright removal request*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807622?hl=en> [<https://perma.cc/YE6B-4DJ4>] (last visited Oct. 13, 2022).

<sup>33</sup> *Request video removal*, YOUTUBE STUDIO, <https://studio.youtube.com/channel/UCT1j48klG9tl54rzLZ7VOWg/copyright/history> [<https://perma.cc/PL5F-H5ET>] (last visited Oct. 13, 2022) (requires login).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

going forward”<sup>39</sup> which puts the video into the Content Match system, which will be discussed next.<sup>40</sup>

Finally, the copyright owner must agree to the following terms:

- (1) I have a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
- (2) The information in this notification is accurate, and under penalty of perjury, I am the owner, or an agent authorized to act on behalf of the owner, of an exclusive right that is allegedly infringed; and
- (3) I understand that abuse of this tool, such as submitting removal requests for content that I do not own, may result in the termination of my YouTube account.<sup>41</sup>

Of note, if a video is removed under this process, the name of the copyright owner will be visible on YouTube in place of the video that has been taken down.<sup>42</sup> The copyright owner’s name that is entered will also become part of the “public record” of the request.<sup>43</sup> The primary email address and full legal name may also be shared with the uploader of the video if the video is removed, but the address and phone number are confidential unless they are requested as part of a lawsuit.<sup>44</sup>

Anyone with a YouTube account can access this webform, and in the first half of 2021, 296,000 YouTube account owners utilized the Copyright Takedown Webform for a total of over 2 million copyright takedown notices.<sup>45</sup> Invalid requests and abuse of this form, as well as the repercussions of a video takedown, will be discussed in the following sections.

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<sup>39</sup> *Id.*

<sup>40</sup> *See* discussion *infra* Section I.A.2.

<sup>41</sup> *See supra* note 33.

<sup>42</sup> *Submit a Copyright Removal Request, supra* note 32.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Copyright Transparency Report H1 2021, supra* note 15.

## 2. Copyright Match Tool

The next tool in YouTube’s copyright detection arsenal is the Copyright Match Tool. The Copyright Match Tool “automatically identif[ies] videos that are matches or potential matches of other videos on YouTube.”<sup>46</sup> Once a takedown request is approved through the above described webform, this tool scans YouTube uploads for potential other matches to the videos reported in the original takedown request.<sup>47</sup>

For YouTube partners, or any channel that has filled out the above-described form, it scans for full re-uploads of videos.<sup>48</sup> The copyright owner can then view all potential matches from a tab in the YouTuber Creator Studio, and they can choose to request removal for the matches through the above form once again.<sup>49</sup> YouTube disclaims, “Before you review your matches, keep in mind that just because we’ve found a matching video doesn’t mean it’s infringing on your copyright. It’s your responsibility to review each matching video and consider whether fair use, fair dealing, or a similar exception to copyright applies.”<sup>50</sup> This disclaimer continues the theme of YouTube allowing copyright owners to self-govern the copyright process.

Over 2 million channels, as of July 2021, have access to this tool, however, it was reportedly expanded in October 2021 so now anyone with a YouTube account who is in the YouTube Partner Program or who has submitted a valid copyright takedown notice is eligible.<sup>51</sup> In the first half of 2021, 98,572 YouTube account owners utilized this tool for a total of 1.6 million content matches.<sup>52</sup>

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<sup>46</sup> *Use the copyright match tool*, YOUTUBE HELP, <https://support.google.com/youtube/answer/7648743?hl=en> [<https://perma.cc/EW4D-V4JF>] (last visited Oct. 13, 2022).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See Copyright Transparency Report H1 2021*, *supra* note 15.

<sup>52</sup> *Id.*

### 3. The Enterprise Form: Content Verification Program

The Content Verification Program is less often used and was specifically designed for companies.<sup>53</sup> It sends a copyright owner to a webform for enterprises, which is similar to the general webform, but it also lets companies search through publicly available YouTube videos to find videos that include content that the company owns the rights to.<sup>54</sup>

While YouTube does not make this takedown process specifically clear, it appears that the copyright owner can enter keywords relevant to their intellectual property into YouTube's system, the system uses pre-existing videos' titles, descriptions, tags, and other metadata to match the keywords to pre-existing videos.<sup>55</sup> The copyright owner receives a list of matched videos and can then check each video they wish to report, allowing them to submit a mass takedown request for all of the matched videos.<sup>56</sup>

### 4. Fully Automatic Detection: Content ID

The tool that often gets the most recognition is the automatic copyright infringement detection system of Content ID which was developed by YouTube and Google starting in 2007.<sup>57</sup>

Content ID is a system where copyright owners can “easily identify and manage their content on YouTube.”<sup>58</sup> Videos uploaded to YouTube are scanned against a database of files that have been submitted by copyright owners.<sup>59</sup> YouTube only allows certain copyright owners to add their files to the Content ID system, specifically

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<sup>53</sup> See *Content verification program*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6005923?hl=en> [https://perma.cc/NK4H-PYUJ] (last visited Oct. 13, 2022).

<sup>54</sup> See *id.*

<sup>55</sup> See *Use the content verification tool*, YOUTUBE HELP, <https://support.google.com/youtube/answer/3010500?hl=en> [https://perma.cc/T8G6-V4J7] (last visited Oct. 21, 2022).

<sup>56</sup> See *id.*

<sup>57</sup> Saba Hamedy, *YouTube Has Paid \$2 Billion to Rights Holders Through Content ID*, MASHABLE (July 13, 2016), <https://mashable.com/article/youtube-content-id-piracy-update> [https://perma.cc/3U29-Z7S5].

<sup>58</sup> *How Content ID works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [https://perma.cc/A75U-WXAV] (last visited Oct. 21, 2022).

<sup>59</sup> See *id.*

“to be approved [as an owner who can submit files], you must own exclusive rights to a substantial body of material that is frequently uploaded by the YouTube user community.”<sup>60</sup> The exact eligibility and qualification criteria are not disclosed by YouTube,<sup>61</sup> but YouTube states that examples of Content ID partners are movie studios, record labels, and collecting societies.<sup>62</sup>

YouTube and Content ID partners “enter into an agreement that sets the parameters for the use of the tool and allows YouTube to make appropriate use of the copyright owner’s content for the purpose of making Content ID function.”<sup>63</sup> YouTube states that once provided with the reference files, their system creates “digital fingerprints” for the works and then their program conducts automatic scans.<sup>64</sup> Copyright owners have the choice to instruct the system either to block, monetize, or track matching content.<sup>65</sup> This system has nothing directly to do with the DMCA; a Content ID claim that leads to the blocking, alternative monetization, or tracking is not the same as a DMCA notification or copyright strike.<sup>66</sup>

In the first half of 2021, there were 9,115 Content ID partners (companies able to use Content ID) and 4,893 of them actually used

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<sup>60</sup> *Id.*

<sup>61</sup> However, YouTube’s application form for Content ID partner is available. *Let Us Know Your Copyright Management Needs!*, YOUTUBE HELP, [https://support.google.com/youtube/contact/copyright\\_management\\_tools\\_form](https://support.google.com/youtube/contact/copyright_management_tools_form) [<https://perma.cc/38HZ-2QG2>] (last visited Oct. 13, 2022).

<sup>62</sup> See Ted Johnson, *Lawmakers Press Google, YouTube On Making Anti-Piracy Tool Available To Wider Range Of Content Creators*, DEADLINE (Feb. 28, 2020, 12:22 PM), <https://deadline.com/2020/02/google-youtube-content-id-1202870730/> [<https://perma.cc/QJH7-RKX5>].

<sup>63</sup> *Copyright Transparency Report H1 2021*, *supra* note 15, at 3.

<sup>64</sup> YouTube Creators, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010), <https://www.youtube.com/watch?v=9g2U12SsRns> [<https://perma.cc/6T4Q-77HP>].

<sup>65</sup> *How Content ID Works*, *supra* note 58. To block is to remove the ability to view the video, to monetize is to take all of the revenue made from advertisements run on the video from the content creator, and to track is to view the video’s viewership statistics.

<sup>66</sup> Content ID serves as a preventative mechanism, it is not a mechanism mandated by law. Because Content ID is an over-inclusive, broad net of copyright infringement detection, YouTube is possibly exposed to less liability via the copyright system that is mandated by law. By removing large amounts of possibly infringing content voluntarily using Content ID, there is obviously less actually infringing content on the platform that can trigger DMCA notices or lawsuits. See discussion *infra* Section II.B.

the Content ID system.<sup>67</sup> Those 4,893 companies made 722,659,502 claims within six months, which accounts for over 99% of all copyright infringement claims on YouTube.<sup>68</sup> There can be multiple claims on a single video by multiple companies. Out of all of those 722 million claims, only 3.7 million were disputed by content creators (.5%).<sup>69</sup>

If a YouTuber is upset with a Content ID claim, they have a few limited options. The YouTuber can do nothing if they believe the claim is legally valid; however, this implies that the YouTuber has a decent understanding of what claims are legally valid, such as having knowledge about fair use.<sup>70</sup> The YouTuber can alternatively remove the claimed content by trimming out a segment of the video, replacing an audio track, or muting a portion of the audio, however, this also implies that a brief portion of sound in the video would not constitute fair use.<sup>71</sup> The YouTuber could also choose to share revenue if they are in the YouTube partner program and music in the video is claimed.<sup>72</sup> The last option would be to dispute the claim. YouTube advises, “[i]f you’re not sure what to do, you may want to seek your own legal advice.”<sup>73</sup>

“Videos can earn money during a Content ID dispute if both the content creator and Content ID partner want to monetize the video.”<sup>74</sup> A Content ID claim can be disputed at any time. If it is disputed within five days, YouTube holds any revenue from the

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<sup>67</sup> *Copyright Transparency Report H1 2021*, *supra* note 15, at 5.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See Dispute a Content ID claim*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797454?hl=en> [<https://perma.cc/9JCQ-AVVK>] (last visited Oct. 13, 2022).

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* This is specifically designed for the sharing of revenue for music covers. For information, see *Monetizing eligible cover videos*, YOUTUBE HELP, <https://support.google.com/youtube/answer/3301938> [<https://perma.cc/8FKX-KNEK>] (last visited Oct. 13, 2022). For further discussion and examples of revenue sharing, see *infra* Section II.A.1.

<sup>73</sup> *Dispute a Content ID Claim*, *supra* note 70.

<sup>74</sup> *Monetization during content ID disputes*, YOUTUBE HELP, <https://support.google.com/youtube/answer/7000961> [<https://perma.cc/9HMA-FBL7>] (last visited Oct. 13, 2022).

video, starting with the first day the claim was placed.<sup>75</sup> If it is after five days from the original claim date, YouTube starts holding revenue the date the dispute is made.<sup>76</sup> Once the dispute is resolved, YouTube pays out to the winner of the dispute.<sup>77</sup>

If a claim is disputed by the YouTuber, the copyright owner has thirty days to respond.<sup>78</sup> That could lead to numerous outcomes: (1) the copyright owner could choose to release the claim and if the video was previously monetized then monetization is restored and the video is released; (2) the claim could be reinstated if they believe it is valid, and the creator can choose to appeal; (3) the copyright owner can submit a takedown request which will lead to a copyright strike; (4) the copyright owner can choose to not respond within that thirty days and the claim will disappear.<sup>79</sup>

During the creator appeal process, the copyright owner can (1) allow the claim to expire in the next thirty-day window; (2) release the claim; (3) request immediate removal of the video via a takedown request and the creator will get a copyright strike; or (4) schedule a takedown request and the creator can cancel the appeal within seven days – which would prevent a copyright strike.<sup>80</sup>

### 5. Three Strikes and You're Out: The Strike System

A copyright strike occurs when a copyright owner submits a “complete and valid” legal takedown request.<sup>81</sup> A video can only have one copyright strike at a time and Content ID claims do not result in a strike by themselves.<sup>82</sup> If a creator gets three copyright strikes: the account is terminated, all videos on the account will be removed, and a new channel cannot be created.<sup>83</sup> If the creator is a YouTube Partner then they are eligible for a seven day courtesy

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Dispute a Content ID Claim, supra* note 70.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *Copyright strike basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000?hl=en#> [<https://perma.cc/K8KX-A4MV>] (last visited Oct. 13, 2022).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

period, after three strikes the creator has an additional seven days to act before the channel is disabled.<sup>84</sup> If a counter notification is submitted, then the channel will not be disabled until the counter notification is resolved.<sup>85</sup> Copyright strikes do expire after ninety days, so the three strikes would have to occur within the same ninety-day span for the channel to be terminated.<sup>86</sup>

Disputes about Content ID can lead to copyright strikes. While Content ID itself will not strike a YouTube channel, at any point in a dispute, as discussed in the prior section, the copyright owner can choose to issue a takedown request via the webform which does mean that a channel will receive a strike.<sup>87</sup> This would likely serve to dissuade YouTubers from ever submitting an appeal to a Content ID claim and causing a dispute, unless the content that has been blocked or demonetized is more valuable to the creator than the chance of a YouTube copyright strike. If they are not a YouTube partner, copyright strikes are likely to stop a YouTuber from being partnered.<sup>88</sup> Additionally, if a YouTuber deals with a subject matter that commonly receives copyright strikes, such as a movie reviewer or reaction channel, an unnecessarily risked strike can mean channel termination.<sup>89</sup>

## 6. The Counter-Notification Procedure

The DMCA states:

[A]n [OSP] shall not be liable to any person for any claim based on the [OSP's] good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See supra* Section I.A.1.

<sup>88</sup> *See YouTube Partner Program overview & eligibility*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851?hl=en> [<https://perma.cc/NGR6-QPJ8>] (last visited Oct. 10, 2022).

<sup>89</sup> *See generally* James Hale, *YouTube Dismissed 60% of Copyright Claims Disputed In The First Half Of 2021*, TUBEFILTER (Dec. 8, 2021), <https://www.tubefilter.com/2021/12/08/youtube-copyright-transparency-report/> [<https://perma.cc/P5YR-WLZ4>].

of whether the material or activity is ultimately determined to be infringing.<sup>90</sup>

The above rule does not apply if the counter notification procedure is not followed. The OSP can be liable after content is removed pursuant to a notice unless the OSP (1) takes reasonable steps to promptly notify the user that it has removed or disabled access to the material; (2) promptly provides the individual who made the notification a copy of the counter notification; and (3) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following the receipt of the counter notice.<sup>91</sup> A counter notification needs to contain: (1) Signature; (2) Identification of removed material; (3) Good faith statement it was removed by mistake or misidentification; (4) User's name, address, phone number, and stating they submit to federal jurisdiction.<sup>92</sup>

If a content creator was copyright-stricken following any of the above-described paths, they can submit a copyright counter notification through a separate form.<sup>93</sup> YouTube simply states that the counter notification must “meet all the legal requirements” and that the YouTuber must, “Clearly explain your right to use the copyrighted content in your own words. If you think the content was identified as a mistake, explain why in a clear and concise manner.”<sup>94</sup> The counter notification is then forwarded to the copyright owner and the claimant has 10 business days to respond, following the DMCA, and they need to respond with evidence that they have taken legal action to keep the content from being restored.<sup>95</sup>

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<sup>90</sup> See 17 U.S.C. § 512(g)(1). This is to mean a content creator could not sue YouTube for the removal of the content unless infringement was not apparent from the circumstances. It is unclear why Content ID, an automatic and unregulated system, that has many false positives, would satisfy “apparent.”

<sup>91</sup> *Id.* § 512(g)(2)(A–C).

<sup>92</sup> *Id.* § 512(g)(3)(A–D).

<sup>93</sup> See *Requirements for copyright counter notifications*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6005919?hl=en> [https://perma.cc/4LEJ-SVUK] (last visited Oct. 12, 2022).

<sup>94</sup> *Submit a copyright counter notification*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807684?hl=en> [https://perma.cc/Z3RM-SYJ8] (last visited Oct. 12, 2022).

<sup>95</sup> *Id.* (ignoring that the cost to a corporation to go through this process would be likely unnoticeable but for an individual creator, a court battle would be impossible to fund); see *infra* Section II.B.

Problematically, if a YouTube channel was suspended due to copyright violations, which occurs after three strikes within 90 days, then the creator must email, fax, or mail YouTube with contact information, the supposedly infringing URLs, they must consent to federal jurisdiction, and include a statement why the removal was mistaken.<sup>96</sup>

### *B. An Interlude into Twitch's Copyright System*

Twitch, a live-streaming site currently owned by Amazon and founded in 2011, boasted of 1.3 trillion minutes of watch time and 31 million daily viewers in 2021.<sup>97</sup> Twitch “streamers” live broadcast themselves and their computer screens to audiences and, like YouTube, the types of content available vary.<sup>98</sup> Twitch is mostly used for livestreaming the playing of video games, but Twitch also allows for streamers to broadcast things such as board games, painting, or “just chatting.”<sup>99</sup>

While YouTube does have a livestreaming function, which some content creators do use,<sup>100</sup> Twitch is still generally seen among online communities to be the primary platform for live streaming video game content.<sup>101</sup> Due to Twitch's particular function, different

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<sup>96</sup> See *Submit a copyright counter notification*, *supra* note 94.

<sup>97</sup> *Twitch Advertising*, TWITCH, <https://twitchadvertising.tv/audience/> [<https://perma.cc/28X2-4WEC>] (last visited Oct. 12, 2022).

<sup>98</sup> See *Browse*, TWITCH, <https://www.twitch.tv/directory> [<https://perma.cc/Q4E7-T2JL>] (last visited Oct. 12, 2022).

<sup>99</sup> See *id.*

<sup>100</sup> Increasingly, live-streamers are moving over to YouTube Gaming in order to stream live content due to a more beneficial payment scheme and contracts. See Riddhima Pal, *Twitch vs YouTube Streaming: Why is Twitch seeing a mass exodus as streamers shift over to YouTube?*, INSIDESPORT (July 15, 2022), <https://www.insidesport.in/why-is-twitch-seeing-a-mass-exodus-as-streamers-shift-over-to-youtube/> [<https://perma.cc/EF5J-RJSP>].

<sup>101</sup> See Ethan May, *Streamlabs and Stream Hatchet Q2 2022 Live Streaming Report*, STREAMLABS: CREATOR RESOURCE HUB (Aug. 9, 2022), <https://streamlabs.com/content-hub/post/streamlabs-and-stream-hatchet-q2-2022-live-streaming-report> [<https://perma.cc/NBT2-BRBQ>]; Jordan Ashley, *YouTube vs Twitch Streaming - Which is Better for Streaming?*, ESPORTS NEWS (July 15, 2021), <https://www.esports.net/news/youtube-vs-twitch-streaming/> [<https://perma.cc/88PR-BMMJ>]; see also Nathan Grayson, *The Battle Between Twitch and YouTube Has Only Just Begun*, WASH. POST (Sept. 14, 2021, 10:50 AM), <https://www.washingtonpost.com/video-games/2021/09/14/youtube-strategy-twitch/> [<https://perma.cc/3B5T-BWH7>].

aspects of copyright law are invoked.<sup>102</sup> The process of streaming on Twitch is as follows: A streamer goes live to their audience, they can share their computer screen or camera with their audience, while live they interact with their chat, and after ending stream, the video-on-demand (“VOD”) or recording of the live stream can be saved onto the streamer’s account.<sup>103</sup> Twitch streamers broadcast content live and display it to the public,<sup>104</sup> which makes any sort of automatic copyright detection much more difficult.<sup>105</sup> Twitch, like YouTube, as an OSP, complies with the DMCA and has a notice-and-takedown procedure, as well as a policy to remove channels who are repeat infringers.<sup>106</sup>

However, unlike YouTube, for many years Twitch was much more lenient when it came to copyright. In late 2020, Twitch made the first major change in following YouTube’s footsteps in copyright detection with a major update to their policies on using music content in broadcasts.<sup>107</sup> Prior to this, Twitch streamers generally played copyrighted music in the backgrounds of their streams while either playing video games or speaking with their viewers.<sup>108</sup> At some points in the past, streamers have been temporarily banned for copyright violations relating to music, for example, in June of 2018,

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<sup>102</sup> For implications relating to copyright and live broadcasting, see *American Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 447–49 (2014).

<sup>103</sup> *Twitch 101*, TWITCH: CREATOR CAMP, <https://www.twitch.tv/creatorcamp/en/paths/getting-started-on-twitch/twitch-101/> [<https://perma.cc/2EL9-YVV6>] (last visited Oct. 22, 2022).

<sup>104</sup> See *Twitch Advertising*, *supra* note 97.

<sup>105</sup> See Jacob Kastrenakes, *Twitch Will Begin Scanning and Deleting Clips That Contain Copyrighted Music*, VERGE (June 11, 2020, 3:30 PM), <https://www.theverge.com/2020/6/11/21288220/twitch-scan-clips-copyrighted-music-dmca-takedowns-audible-magic> [<https://perma.cc/QL2Q-7A92>].

<sup>106</sup> See *Digital Millennium Copyright Act Notification Guidelines*, TWITCH, <https://www.twitch.tv/p/en/legal/dmca-guidelines/> [<https://perma.cc/4MCB-A89V>] (July 19, 2021).

<sup>107</sup> Kastrenakes, *supra* note 105.

<sup>108</sup> See Shannon Liao, *Music is Big on Twitch. Now Record Labels Want It to Pay Up*, CNN BUS. (Aug. 14, 2020), <https://www.cnn.com/2020/08/14/tech/twitch-record-dmca-copyright-notices/index.html> [<https://perma.cc/5MEJ-RAP2>] (“For years, Twitch has been the Wild West for streaming music, but in recent months it has attracted attention from record labels as its viewership has jumped during the pandemic.”)

several popular streamers were given 24-hour suspensions for DMCA strikes.<sup>109</sup>

In October of 2020, there was again a wave of DMCA notifications against Twitch streamers relating to saved VODs using copyrighted music;<sup>110</sup> at this point Twitch, who also has a three-strike policy prior to a ban for copyright infringement,<sup>111</sup> likely made the choice to make a policy change in fear that they would lose accessibility to the safe harbor of the DMCA. Twitch was aware that thousands of archived videos on their platform contained unlicensed copyrighted music and that DMCA take-down requests for those videos were heavily backlogged.<sup>112</sup> This meant Twitch was likely in violation of the DMCA as expeditious removal of infringing content is a safe-harbor requirement.<sup>113</sup>

Instead of sifting through the extremely large amount of DMCA claims, Twitch began to delete all past VODs that had been flagged for infringement, stating in an email to streamers: “We are writing to inform you that your channel was subject to one or more of these DMCA takedown notifications, and that the content identified has

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<sup>109</sup> See Nathan Grayson, *Popular Twitch Streamers Temporarily Banned For Playing Copyrighted Music*, KOTAKU (June 22, 2018, 8:30 PM), <https://kotaku.com/popular-twitch-streamers-temporarily-banned-for-streami-1827066551> [<https://perma.cc/36SU-UPJW>].

<sup>110</sup> See Bijan Stephen, *Twitch Streamers Are Getting DMCA Takedown Notices (Again)*, VERGE (Oct. 20, 2020, 3:23 PM), <https://www.theverge.com/2020/10/20/21525481/twitch-streamers-dmca-takedown-notices-riaa-copyright> [<https://perma.cc/ZZ8N-9TWP>] (VOD meaning the entire stream is saved as a video that can be viewed from the streamer’s Twitch page).

<sup>111</sup> *DMCA & Copyright FAQs*, TWITCH HELP, [https://help.twitch.tv/s/article/dmca-and-copyright-faqs?language=en\\_US](https://help.twitch.tv/s/article/dmca-and-copyright-faqs?language=en_US) [<https://perma.cc/6Z54-AMRN>] (last visited Oct. 12, 2022).

<sup>112</sup> See Bijan Stephen, *Twitch Streamers Are Getting Blindsided By Years-Old Copyright Notices*, VERGE (June 8, 2020, 3:45 PM), <https://www.theverge.com/21284287/twitch-dmca-copyright-takedowns-clips-controversy-broken-system> [<https://perma.cc/8LRR-RNJ9>]; Cale Michael, *Twitch Receives Mass DMCA Claims Against Clips Due To Copyrighted Background Music*, DOTESPORTS (June 7, 2020, 8:43 PM), <https://dotesports.com/streaming/news/twitch-updates-music-terms-of-service-guidelines-escalates-music-related-dmcas> [<https://perma.cc/NA59-PXPA>]; Marcus McGinnis, *Time To Cut The Music?: Twitch’s Unfair Solution To An Inevitable Digital Millennium Copyright Act Problem*, J. INTELL. PROP. L.: BLOG (Mar. 19, 2021), <https://jiplonline.com/2021/03/19/time-to-cut-the-music-twitchs-unfair-solution-to-an-inevitable-digital-millennium-copyright-act-problem/> [<https://perma.cc/CA6G-6SAW>].

<sup>113</sup> See 17 U.S.C. § 512(g)(2)(A–C).

been deleted. We recognize that by deleting this content, we are not giving you the option to file a counter-notification or seek a retraction from the rights holder. In consideration of this, we have processed these notifications and are issuing you a one-time warning to give you the chance to learn about copyright law and the tools available to manage the content on your channel.”<sup>114</sup>

That decision to remove the content without allowing for streamers to submit a counter-notification could also violate the DMCA.<sup>115</sup> Not only that, but thousands of streams and clips were permanently deleted,<sup>116</sup> which meant that a counter-notice could never be filed for the deleted content. There were never any repercussions to Twitch for this decision, and content creators would obviously be too unaware of the intricacies of the DMCA to raise this argument. It is possible that many of those DMCA claims were false and would have fallen under fair use, however, we will never know.

### C. *Fair Use and the Internet*

There are brief mentions of fair use in the above sections and throughout the entirety of YouTube’s copyright system are in minimal YouTube Help informational pages.<sup>117</sup> Fair use is also mentioned in YouTube Copyright School, a program whereby creators who are facing their first strike are forced to watch an informational video and answer multiple-choice questions about the content so that they do not commit other copyright violations.<sup>118</sup> Fair use in that video is limited to a sped-up summary of 17 U.S.C. § 107, and the video advises YouTubers to get a lawyer if they think they need

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<sup>114</sup> See Nicole Carpenter, *Twitch Streamers Were Issued Tons of DMCA Takedown Notices Today*, POLYGON (Oct. 20, 2020, 6:05 PM), <https://www.polygon.com/2020/10/20/21525587/twitch-dmca-takedown-notice-content> [<https://perma.cc/233G-SUR6>].

<sup>115</sup> See 17 U.S.C. § 512(g)(2)(A–C).

<sup>116</sup> See sources cited *supra* note 112.

<sup>117</sup> See *Fair use on YouTube*, YOUTUBE HELP, <https://support.google.com/youtube/answer/9783148?hl=en> [<https://perma.cc/4EER-6LLT>] (last visited Oct. 17, 2022).

<sup>118</sup> See YouTube, *YouTube Copyright School*, YOUTUBE (Mar. 24, 2011), <https://www.youtube.com/watch?v=InzDjH1-9Ns> [<https://perma.cc/EP7J-39LQ>].

one.<sup>119</sup> The fair use factors and the types of works that fair use seeks specifically to protect are never clearly listed.<sup>120</sup>

### 1. Fair Use Factors

To assess whether the use of a copyrighted work is “fair use,” the courts weigh the following four 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.<sup>121</sup> Fair use includes purposes such as such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>122</sup> The fair use doctrine permits and requires courts to avoid rigid application, as that would stifle the creativity fair use was designed for.<sup>123</sup>

There is no bright-line rule for fair use, but there is an essential need for a case-by-case analysis.<sup>124</sup> This is what makes YouTube’s copyright system so problematic. Content ID and the appeals process for DMCA-based copyright strikes ignore the need for case-by-case analysis; Content ID is done en masse, without human interaction or a consideration of fair use, and many parts of the appeals process are controlled by the copyright owner,<sup>125</sup> who obviously

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<sup>119</sup> See *id.* Examples of multiple-choice questions contained in the YouTube Copyright School program are: “Is it impossible for a remix or mashup to infringe copyright. True or False,” “Creating 100% original new content for YouTube will help to protect you against claims of copyright infringement. True or False,” and “Content that was once allowed by a content owner may be subsequently removed by YouTube. True or False.” See Sam I Am, *YouTube Copyright School*, YOUTUBE (June 23, 2013), <https://www.youtube.com/watch?v=IfaQczyomR0> [https://perma.cc/PR99-C5MC]. Ironically, the source video’s description reads, “[T]his is such a pain!!! [I] got sued, and now [I] have to go to copyright school :(,” which really shows that the video’s informational value is not very high, because receiving a YouTube copyright strike is not equivalent to being sued.

<sup>120</sup> See YOUTUBE, *supra* note 118.

<sup>121</sup> See 17 U.S.C. § 107.

<sup>122</sup> See *id.*

<sup>123</sup> See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021) (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>124</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>125</sup> See discussion *supra* Section I.A.4.

would never side against themselves in an oftentimes subjective, confusing analysis.<sup>126</sup>

Here, the factors of fair use will be broken down to later do an analysis of commonly found issues and abuses of YouTube's copy-right system:

The first prong of the fair use test is the purpose and character of the use.<sup>127</sup> For the first prong, whether the factor weighs in favor of the copyright owner or alleged infringer depends both on whether the use is transformative and whether the use is commercial.<sup>128</sup> The essential inquiry is: does the new work merely supersede the object of the original creation or does it instead add something new with a further purpose or different character, altering the first and original work with a new expression, meaning, or message.<sup>129</sup> The more transformative the new work, the less the significance of other factors, like commercialism, in weighing against a fair use finding.<sup>130</sup> Commercialism does weigh against a fair use finding, but many activities that often fall under fair use "are generally conducted for profit in this country," meaning that nearly everything would fall out of fair use if it was restricted to solely nonprofit material.<sup>131</sup>

In *Bill Graham Archives v. Dorling Kindersley*, the Second Circuit found that the use of thumbnail-sized concert posters in a biography of the band the Grateful Dead was covered under fair use.<sup>132</sup> Specifically, the court restated *Campbell* that the question of the first factor transformativeness is "whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>133</sup> In this case, the

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<sup>126</sup> See Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 326 (2013).

<sup>127</sup> See 17 U.S.C. § 107.

<sup>128</sup> See *Campbell*, 510 U.S. at 579.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 584 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

<sup>132</sup> See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006).

<sup>133</sup> *Id.* at 608 (quoting *Campbell*, 510 U.S. at 579).

biography had a purpose that was separate and distinct from the original artistic and promotional purpose of the poster images.<sup>134</sup>

As to commerciality, the *Bill Graham* court stated that “nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . are generally conducted for profit,” and, moreover, that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>135</sup> The use of the poster images was found incidental to the commercial biographical value of the book and thus weighed in favor of the creator of the biography on the first factor.<sup>136</sup>

Exemplifying the subject and changing nature of the first factor, the Supreme Court recently decided to grant certiorari to the Second Circuit case *Andy Warhol Foundation for the Visual Arts v. Goldsmith*.<sup>137</sup> The Second Circuit found that a Warhol silkscreen print of the musical artist Prince’s portrait, based on a photograph, did not constitute fair use of the original photo.<sup>138</sup> The court held that the secondary work’s transformative purpose and character must, at a bare minimum, comprise “something more than the imposition of another artist’s style on the primary work” such that the secondary work remains both obviously recognizable and retains elements of the source material.<sup>139</sup> An aesthetic change was deemed to not be enough. The court went on to say that, “[c]rucially, the [silkscreen prints] retain[] the essential elements of the [photograph] without significantly adding to or altering those elements.”<sup>140</sup>

The posters in *Bill Graham*—deemed “transformed” just by being reduced in size and placed within a larger work—are questionably transformative under the first prong following the Second Circuit’s *Goldsmith* approach. The test generally is whether a new work

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<sup>134</sup> *See id.* at 610.

<sup>135</sup> *See id.* at 612 (quoting *Harper*, 471 U.S. at 562).

<sup>136</sup> *See id.*

<sup>137</sup> *Andy Warhol Found. for Visual Arts v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

<sup>138</sup> *See id.* at 51.

<sup>139</sup> *Id.* at 42.

<sup>140</sup> *Id.* at 43.

has a new meaning or message different from the original,<sup>141</sup> and the Second Circuit went beyond this standard to come to their much narrower understanding of the first factor in *Goldsmith*.<sup>142</sup> While the biography and posters in *Bill Graham* had distinct different purposes, if the image is still highly recognizable in the biography and has solely been shrunk to a smaller size with the imposition of the style of the biography surrounding it—does that not change the outcome of the first factor analysis?

The second prong of the test, the nature of the copyrighted work, calls for “recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”<sup>143</sup> When a work is expressive or creative, such as a work of fiction, it is allowed greater leeway for a claim of fair use than where the work is factual or informational;<sup>144</sup> there is also a distinction between published and unpublished works where the scope of fair use involving unpublished works is much narrower.<sup>145</sup>

This factor was recently given much more weight in the analysis in the Supreme Court’s decision in *Google v. Oracle*.<sup>146</sup> In *Google*, Google copied roughly 11,500 lines of declaring code from the Java SE program for their own Android Operating System.<sup>147</sup> The Supreme Court held, as to the second factor,<sup>148</sup> that because computer declaring code is far from the core of copyright that the application of fair use would not seriously undermine what copyright law is

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<sup>141</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>142</sup> *See, e.g., Cariou v. Prince*, 714 F.3d 694, 707–08 (2d Cir. 2013) (“Here, looking at the artworks and the photographs side-by-side, we conclude that Prince’s images, except for those we discuss separately below, have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s.”).

<sup>143</sup> *Campbell*, 510 U.S. at 586.

<sup>144</sup> *See Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (quoting 2 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 15:52 (2006)).

<sup>145</sup> *See id.*

<sup>146</sup> *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202 (2021).

<sup>147</sup> *Id.* at 1191.

<sup>148</sup> It is of note that while nature is the second factor found in 17 U.S.C. § 107, the Court analyzed it first in *Google*. *See id.* at 1201.

trying to protect.<sup>149</sup> Combining the factors, the Court ultimately found that Google's copying constituted fair use.<sup>150</sup>

It is possible that the *Google* decision could impact the Court's future decision in *Goldsmith* if the Court decides that the *Google* ruling applies to works other than those related to technology.<sup>151</sup> Following the decision in *Google v. Oracle*, the Warhol Foundation has argued that the Google Court found in favor of Google even though they copied a work of the same type of content and that served the same high-level purpose.<sup>152</sup> Paired together, the Warhol Foundation argues, *Google* and *Campbell* set forth a straightforward rule that a work is transformative if it adds something new with new expression, meaning, or message and "how much of the original material is discernible" is irrelevant.<sup>153</sup>

The third prong of the test, the amount and substantiality used, asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying.<sup>154</sup> This is both in the quantitative and qualitative sense. If "the heart" of the work has been taken and released, that weighs heavier against a finding of fair use; but just because an insubstantial amount has been taken or used in a larger

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<sup>149</sup> See *id.* at 1202.

<sup>150</sup> See *id.* at 1209.

<sup>151</sup> The *Google* Court did state: "The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. In doing so here, we have not changed the nature of those concepts. We do not overturn or modify our earlier cases involving fair use . . . . Rather, we here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue. As such, we have looked to the principles set forth in the fair use statute, § 107, and set forth in our earlier cases, and applied them to this different kind of copyrighted work." *Id.* at 1208–09. Seemingly this makes it clear that the case only applies to other technology or computer-related cases.

<sup>152</sup> Brief for Petitioner at 35–36, *Andy Warhol Found. for Visual Arts v. Goldsmith*, 142 S. Ct. 1412 (2022) (No. 21-869) ("Applying these principles, the Court [in *Google*] found that Google's use of the copyrighted work was 'transformative' because of the socially productive purpose for which the copying was done. And this was so in spite of the fact that both the original and follow-on works were the same type of content (computer software), deployed for commercial profit, in the service of the same high-level purpose (providing tools for third-party developers to create applications)." (citations omitted)).

<sup>153</sup> See *id.* at 36–37.

<sup>154</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

work, that does not mean it can be excused as fair use.<sup>155</sup> Additionally, verbatim copying of material can be evidence of the work's qualitative value to both the originator and the alleged infringer.<sup>156</sup>

Context, however, is really everything with the third factor. In *Campbell*, a parody song needs to take from the heart of the original work in order to be an effective parody.<sup>157</sup> In *Bill Graham*, even though the full-sized poster images were used in their entirety, the visual impact of their artistic expression was deemed limited by their size; the images were limited to the minimal image size and quality necessary to ensure the reader's recognition of the images.<sup>158</sup> This factor is quite relevant to YouTube videos because many YouTube channels create video compilations using just moments of other creators' content.

The fourth prong of the test, the market impact, looks to the effect of the use upon the potential market for or value of the copyright work.<sup>159</sup> It requires courts to consider both the extent of the market harm caused by the alleged infringer, but also whether the conduct when unrestricted and widespread would result in a substantially adverse impact on the potential market for the original.<sup>160</sup> The inquiry must also take into account the harm to both the original work but also harm to the ability to make and market derivative works.<sup>161</sup> The secondary work must usurp the market of the original work in order to weigh against fair use.<sup>162</sup>

## 2. Bad Faith and *Lenz v. Universal Music Corp.*

In 2007, prior to the days of Content ID and of YouTube's massive success, Stephanie Lenz posted a 29-second clip of her son dancing to a Prince song.<sup>163</sup> The audio of the clip was barely

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<sup>155</sup> *See id.* at 587.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.* at 589.

<sup>158</sup> *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

<sup>159</sup> 17 U.S.C. § 107.

<sup>160</sup> *See Campbell*, 510 U.S. at 590.

<sup>161</sup> *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

<sup>162</sup> *See Campbell*, 510 U.S. at 592.

<sup>163</sup> Stephanie Lenz, "Let's Go Crazy" #1, YOUTUBE (Feb. 7, 2007), <https://www.youtube.com/watch?v=N1KfJHFWlhQ> [<https://perma.cc/77RH-DRZD>]

intelligible, but Lenz was sent a DMCA takedown notice by Universal.<sup>164</sup> The video was removed and Lenz sent a counter-notification claiming fair use and demanding the reposting of the video.<sup>165</sup> The video was eventually reposted but Lenz sued Universal for misrepresentation under the DMCA's requirement that the copyright holder must consider whether the material's secondary use was allowed by law—in this case fair use.<sup>166</sup>

Eight years later, in 2015, the case was before the Ninth Circuit and the court held that while copyright holders do have a duty to consider fair use in good faith prior to sending a takedown notice, senders of those notices could be excused so long as they subjectively believed that the material they targeted was infringing.<sup>167</sup>

Because Content ID does not send a DMCA notification and remains outside the law, the Content ID system is able to avoid fair use considerations completely. YouTube does not want to be in the position of determining fair use at all, in both Content ID and the notification procedure, and because of *Lenz*, fair use determinations fall into the hands of the subjectively good faith efforts of copyright owners.<sup>168</sup> But this policy is in direct disregard of the kind of content that YouTube was created for, the livelihoods of content creators, and the large amount of transformative, informative, and critical content that is currently uploaded.<sup>169</sup> Content creators are simultaneously both unaware of many of the intricacies of fair use and copyright law and then are put into a position of trusting the good will of a copyright owning corporation, this ultimately puts them in a

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<sup>164</sup> See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2016).

<sup>165</sup> See *id.* at 1150.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 1153.

<sup>168</sup> See *Fair Use on YouTube*, *supra* note 117; see also Ryan Noormohamed, *Computer Blown: How an Objective Standard of Good Faith Could Transform the Internet*, 19 TUL. J. TECH. & INTELL. PROP. 167, 185–86 (2016).

<sup>169</sup> YouTube claims that it can choose to indemnify creators who been sued for copyright infringement for some fair use videos. This statement was made in 2015 following the district court opinion in *Lenz*; however, I have no knowledge of any such case. See Sarah Perez, *YouTube Says It Will Offer Legal Protection of Up To \$1 Million For Select Video Creators Facing DMCA Takedowns*, TECH CRUNCH (Nov. 19, 2015, 11:10 AM), <https://techcrunch.com/2015/11/19/youtube-says-it-will-offer-legal-protection-to-some-video-creators-facing-dmca-takedowns> [<https://perma.cc/9W4G-ZM3T>].

very unequal position of power when it comes to fighting against copyright abuse or fighting for their content.

## II. FAIR USE WITH A SIDE OF ABUSE

### A. *The Process in Action: Examples of the YouTube Copyright System*

#### 1. Mass Automatic Content ID Striking

In May 2019, a YouTuber currently with over 8 million subscribers who uses the screen name “Mumbo Jumbo,” received more than 400 copyright claims over the course of a few hours.<sup>170</sup> This occurred due to the addition of new files to the Content ID system introduced by the music publishing company, Warner Chappell Music, as well as Pan European Digital Licensing.<sup>171</sup> The new files were automatically compared to all videos on the platform and they matched with 400 of the seconds at the beginning and end of 25% of Mumbo Jumbo’s video catalogue.<sup>172</sup> At the beginning of many of his videos, as his opening song, Mumbo Jumbo would play “Can’t Stop Me” by musician ProleteR for 5 seconds and at the end of the videos he would play 17 seconds of “April Showers” by ProleteR.<sup>173</sup> Mumbo Jumbo properly licensed use of these songs, but he did not

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<sup>170</sup> See Terry Matthew, *YouTuber Receives 400 Copyright Claims Before Lunch*, 5MAG (May 19, 2019), <https://5mag.net/news/mumbo-jumbo-youtube-copyright-warner-chappell> [<https://perma.cc/S4NQ-AWZ8>]; Mumbo Jumbo (@ThatMumboJumbo), TWITTER (May 19, 2019, 3:17 AM), <https://twitter.com/thatmumbojumbo/status/1130009515766755328> [<https://perma.cc/X75R-EM9D>].

<sup>171</sup> See Matthew, *supra* note 170; see also Lars Brandle, *Warner/Chappel Creates Euro Digital License*, BILLBOARD (June 2, 2006), <https://www.billboard.com/music/music-news/warnerchappell-creates-euro-digital-license-1353727/> [<https://perma.cc/F3R2-5D5F>].

<sup>172</sup> See Mumbo Jumbo, *YouTube’s Copyright System Is Broken*, YOUTUBE (May 19, 2019), <https://www.youtube.com/watch?v=LZplh8rd-I4> [<https://perma.cc/7C62-6RLQ>]. It is also of note that Mumbo Jumbo creates long-form video game content with videos that are generally between 15 and 30 minutes long.

<sup>173</sup> See *id.*; Mumbo Jumbo’s original intro and outro music can be found here, even though he himself has scrubbed his YouTube page of the music: *The Talentless Cult, Mumbo Jumbo: Hermitcraft Intro and Outro*, YOUTUBE (June 21, 2021), <https://www.youtube.com/watch?v=oAvuNuGcSqM> [<https://perma.cc/79FX-C3A8>].

license the underlying samples used by ProleteR and the musician did not license them either.<sup>174</sup>

Once the videos were claimed, Mumbo Jumbo stated that “currently [myself and Warner Chappell Music] are sharing revenue” on all of the videos under dispute.<sup>175</sup> This is because ProleteR’s songs were considered covers and thus Mumbo Jumbo’s use of them was eligible for revenue sharing.<sup>176</sup> Revenue sharing is the splitting of all revenue that the video makes between the video creator and the copyright owner, and it can only occur in music-based disputes according to YouTube policy.<sup>177</sup> It is not immediately clear what the revenue sharing proportions looked like and they were not disclosed by Mumbo Jumbo<sup>178</sup> nor are they available online through information provided by YouTube.

Some examples of revenue sharing can be found sparingly online. YouTube music channel AmaZane posted a video entitled “How Much Does YouTube Pay for Cover Songs?—It May Shock You” where she described her experiences with revenue sharing on her cover videos.<sup>179</sup> She described that a video of hers with over 100,000 views with revenue sharing enabled due to a copyright claim, she made a total of about \$28 dollars since upload.<sup>180</sup> On a second video with revenue sharing enabled and 45,000 views, she made \$33.<sup>181</sup> There is obviously a video-by-video difference of amount of advertisement revenue received, but that all depends on the types of ads that are being played on the video,<sup>182</sup> but regardless

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<sup>174</sup> See *The Ballad of Mumbo Jumbo*, LICENSE LAB, <https://blog.licenselab.com/blog/the-ballad-of-mumbo-jumbo> [<https://perma.cc/ZRZ6-ES35>] (last visited Oct. 12, 2022).

<sup>175</sup> See *YouTube’s Copyright System Is Broken*, *supra* note 172.

<sup>176</sup> See *Monetizing Eligible Cover Videos*, *supra* note 72.

<sup>177</sup> See *id.*

<sup>178</sup> It was not disclosed by Mumbo Jumbo because it is likely he did not know the percentage of his share.

<sup>179</sup> AmaZane Channel, *How Much Does YouTube Pay for Cover Songs? - It May Shock You*, YOUTUBE (Dec. 9, 2020), <https://www.youtube.com/watch?v=8pOr3kQKzMI> [<https://perma.cc/6P2B-KWDA>].

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *Understand ad revenue analytics*, YOUTUBE HELP (last visited Oct. 6, 2022), <https://support.google.com/youtube/answer/9314357?hl=en> [<https://perma.cc/7FQT-DBZL>].

for revenue-shared videos AmaZane made between .0003 and .0007 cents per view.

AmaZane also shared how much she made from videos with no copyright claims. A video of hers with only 5,000 views, but with no revenue sharing enabled or copyright claims, made \$5.56.<sup>183</sup> On a separate video she gained 69,000 views without copyright claims or revenue sharing and made \$138.<sup>184</sup> In comparison, that is between .001 and .002 cents per view. That is a fairly significant difference. Non-revenue sharing videos gave her 3 times the amount of revenue.

However, in a tutorial video on how to record covers, AmaZane sang for a brief moment and was copyright claimed and forced to revenue share; but on that video, which had around 100,000 views, she made \$100 which would once again be .001 cent per view.<sup>185</sup> It seems that there is some sort of formula derived for revenue sharing from the amount of copyrighted content claimed compared to the total length of the video. She stated in the video discussing her revenue sharing, “I don’t know exactly how much goes to me and how much goes to the copyright owners” and this is apparently because content creators cannot see it at all; they are given no information on the proportions of this system.<sup>186</sup>

Mumbo Jumbo, who was unaware of the issue or law regarding sampling, disputed these claims but eventually chose to trim out all of the possibly infringing material from all 400 of the claimed videos.<sup>187</sup> The claims were then withdrawn, likely because the allegedly infringing material was removed. But was Mumbo Jumbo’s use actually fair?

First, both of ProleteR’s songs used in the beginning and end of Mumbo Jumbo’s videos were highly transformative but obviously and blatantly sampled pre-existing material. “Can’t Stop Me” sampled Gene Chandler’s 1965 single “Nothing Can Stop Me,” and “April Showers” sampled Terry Joyce’s 1935 song “March Winds

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<sup>183</sup> *See id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* To note, this is likely an example of fair use and could possibly be disputed and found in AmaZane’s favor due to the clip’s educational purpose and fair use factors. *See supra* Section I.C.1.

<sup>186</sup> *See* AmaZane Channel, *supra* note 179.

<sup>187</sup> *See* The Ballad of MumboJumbo, *supra* note 174.

and April Showers.”<sup>188</sup> ProleteR transformed both songs into modern, electronic, hip-hop inspired remixes.<sup>189</sup> Second, neither of ProleteR’s songs are sold commercially, both songs are available for free on Bandcamp and YouTube.<sup>190</sup> It is also quite clear that ProleteR added a lot of new expression and style to the songs in a highly creative way. Lastly, the music is not replacing the market for the original because the songs fall within an entirely different genre of music that is possibly listened to by a generation who would never seek out the original and vice versa with an older generation who would never seek out the electronic remix.

However, Mumbo Jumbo himself did not sample the songs, he used a highly edited version in his videos that was cut to a minimal length and did not even include the lyrics that would be the instantly recognizable parts of the original songs.<sup>191</sup> The “Can’t Stop Me” instrumental plays for a mere 4 seconds as an introduction to his YouTube videos and it is barely recognizable as anything relating to the original Gene Chandler song.<sup>192</sup> It is also a mere fraction of the entire video length because generally Mumbo Jumbo’s videos are between 20 and 30 minutes long, meaning that song plays for about .2% of the video’s runtime.<sup>193</sup> Such a small proportion could not be a substitute for the original as it does not touch the heart of the original work and because it does not contain the highly recognizable lyrics; it is incredibly minimal—spanning only 4 seconds—and is transformed into a brief moment in a longer work that is about the playing of a video game.<sup>194</sup> The same goes for “April Showers,”

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<sup>188</sup> Compare GENE CHANDLER, NOTHING CAN STOP ME (Constellation Records 1965), and TERRY JOYCE AND HIS ORCHESTRA, MARCH WINDS AND APRIL SHOWERS (His Master’s Voice 1935), with PROLETER, CAN’T STOP ME (ProleteR 2013), and PROLETER, APRIL SHOWERS (ProleteR 2011).

<sup>189</sup> See Guillaume Kurkdjian, *Interview of ProleteR*, WERTN (June 26, 2013), <https://wertn.com/2013/06/interview-proleter/> [<https://perma.cc/E35F-6823>].

<sup>190</sup> See ProleteR, BANDCAMP <https://proleter.bandcamp.com/> [<https://perma.cc/7ST4-C9FX>] (last visited Oct. 6, 2022); ProleteR, YOUTUBE, <https://www.youtube.com/channel/UC08NVDi0tgVdM6YxHoBPTTw> (last visited Oct. 6, 2022).

<sup>191</sup> See The Talentless Cult, *supra* note 173.

<sup>192</sup> See *id.*

<sup>193</sup> See Mumbo Jumbo, YOUTUBE, <https://www.youtube.com/c/MumboJumboOfficial/videos> [<https://perma.cc/6ST8-QHWT>].

<sup>194</sup> See *id.*; The Talentless Cult, *supra* note 173.

once again Mumbo Jumbo did not use the parts of the song that contain lyrics and he also reduced the volume to be a gradual fade out at the end of his videos; the ProleteR song is recognizable to a reasonable person listening to both songs, but whether a person could see the similarity between the 1935 song and the video outro, that is hard to say.<sup>195</sup> Even then, the copying is still quite possibly de minimis.<sup>196</sup>

If Mumbo Jumbo had fought these claims and the music production company had denied his appeals and struck the videos, Mumbo Jumbo would likely have been given 400 strikes and as a result his YouTube channel would have disappeared. That is obviously not a risk that he would want to take, even though it is possible that he was using the songs under fair use all along.

## 2. Humming Songs: De Minimis Actions with Extreme Repercussions

Never before the internet would someone expect the momentary humming of a song to face immediate and dramatic repercussions for someone's livelihood.<sup>197</sup> It is nearly baffling hearing content creators be so afraid of "DMCA strikes" after someone starts humming a song to pass the time in a YouTube video or on a Twitch stream.<sup>198</sup> YouTube simply states in one of their answers to commonly asked questions that, "When you sing, hum, or play all or some of the song

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<sup>195</sup> Compare PROLETER, April Showers (ProleteR 2011), with *The Talentless Cult*, *supra* note 173.

<sup>196</sup> See Adam Baldwin, *Music Sampling and the De Minimis Defense: A Copyright Law Standard*, 19 UIC REV. INTELL. PROP. L. 310, 313, 318 (2020).

<sup>197</sup> There does not seem to be any case law concerning the humming of a song in any media.

<sup>198</sup> See, e.g., Lia (@SSSniperWolf), TWITTER (Nov. 23, 2018, 4:48 PM), <https://twitter.com/sssniperwolf/status/1066086219803615233?lang=en> [<https://perma.cc/8RGT-G5JG>] ("I really just got copyright for HUMMING part of a song LMAO."). There is also a large argument concerning the singing of "Happy Birthday to You." The song was being copyright claimed by Warner/Chappell for years before a judge ruled that they had no rights to the song. See Eriq Garner, *Warner Music Pays \$14 Million to End 'Happy Birthday' Copyright Lawsuit*, HOLLYWOOD REP. (Feb. 9, 2016, 4:44 AM), <https://www.hollywoodreporter.com/business/business-news/warner-music-pays-14-million-863120/> [<https://perma.cc/ZS9A-89S7>]. The question remains about whether this file was ever removed from YouTube's Content ID: can creators still be copyright claimed for it? YouTube does not provide an answer.

on an instrument, even if you do it in an entirely original way, you are using the copyrighted melody and/or words and may receive a claim.”<sup>199</sup>

From humming, to the sound of a frequency wave,<sup>200</sup> to the faint sound of a radio playing within a video game,<sup>201</sup> to portions of a video that have already been muted,<sup>202</sup> YouTubers are hit with both DMCA claims and Content ID violations that outside the internet would not exist. Yet, YouTubers lose the revenue that they would be making from the content they create or worse they lose their channels.

NYU School of Law hosted a panel in June 2019 about a copyright infringement case of two somewhat similarly sounding songs.<sup>203</sup> The panel opened with experts discussing the songs and included short clips that were both the recordings of the song as well as clips of specific musical elements.<sup>204</sup> The video was first posted to YouTube with just a video of the individuals on the panel and was eventually re-uploaded with legible versions of the presentation

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<sup>199</sup> @David (YouTube), *Answers to common questions About Copyright claims on YouTube*, YOUTUBE HELP (Jan. 25, 2019), <https://support.google.com/youtube/thread/1281991?hl=en> [https://perma.cc/9K6A-UKQA].

<sup>200</sup> See, e.g., @littlescale, TWITTER (Jan. 4, 2018, 4:38 PM), <https://twitter.com/littlescale/status/949032404206870528> [https://perma.cc/GAP6-742W].

<sup>201</sup> See *Guide: List of All Video Games with YouTube Copyright Claim IDs*, BAI-GAMING (last visited Oct. 6, 2022), <https://bai-gaming.com/tech-guides/video-game-youtube-copyright-claim-list/> [https://perma.cc/T279-9ZGE]. YouTube has claimed that their policies have been updated to make sure that very short or unintentional uses of music could not lead to a diversion of revenue to the copyright holder, the copyright holder must choose to either let the video go unclaimed or to block it entirely—however, this is only for manual claiming, not automatic Content ID which is where this problem could actually occur. See The YouTube Team, *Updates To Our Manual Content ID Claiming Policies*, YOUTUBE OFFICIAL BLOG (Aug. 15, 2019), <https://blog.youtube/news-and-events/updates-to-manual-claiming-policies/> [https://perma.cc/X6GD-W8A4].

<sup>202</sup> See, e.g., @TheGregAlba, TWITTER (Aug. 2, 2021, 10:52 AM), <https://twitter.com/thegregalba/status/1422208588466987014> [https://perma.cc/W3LW-WCCP].

<sup>203</sup> See *How Explaining Copyright Broke the YouTube Copyright System*, ENGELBERG CTR. ON INNOVATION L. & POL’Y N.Y.U., <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> [https://perma.cc/RT42-KCQM].

<sup>204</sup> See *id.*

slides in the video.<sup>205</sup> The second video was hit numerous Content ID claims.<sup>206</sup>

NYU's use of the songs was clearly educational, highly transformative, non-commercial, unsubstantial, and could not impact the market value for the songs.<sup>207</sup> The school appealed and was rejected by Universal Music Group with the rejection helpfully stating that, "UMG has decided that their copyright claim is still valid."<sup>208</sup> Because this was a group of lawyers and law students, they were aware that they could send a counter notification and could further appeal, but they soon realized that if they did and lost, then the video would be subject to a strike.<sup>209</sup> Which, for a channel posting high amounts of content within short periods of time, could mean an accidental wiping of all of the work on NYU's YouTube channel.

Their solution? They reached out to YouTube "through private channels" and were later told that the claims had been removed without any further information.<sup>210</sup> A few seconds of music and a harsh disincentive was enough to stop a law school in its tracks.<sup>211</sup>

There is a mountain of content on YouTube that utilizes pre-existing material in critique and commentary.<sup>212</sup> Whether that be in film reviews, videos on theories about television shows, movie summaries, or "reaction videos," YouTubers take clips from other content in order to create an engaging video experience.

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<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See id.* ("The primary purpose of the panel was to have these two musical experts explain to the largely legal audience how they analyze and explain songs in copyright litigation. The panel opened with each expert giving a presentation about how they approach song analysis. These presentations included short clips of songs, both in their popular recorded version and versions stripped down to focus on specific musical elements.")

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See* Jonathan Bernstein, *How YouTube Reaction Videos Are Changing the Way We Listen*, ROLLING STONE (Aug. 24, 2020, 11:43 AM), <https://www.rollingstone.com/music/music-features/youtube-reaction-videos-interviews-in-the-air-tonight-lost-in-vegas-1046225/> [<https://perma.cc/8JJN-M368>].

There have been numerous occurrences where major studios, from both video game and film companies, ignore fair use in favor of taking down videos that are critical of their works or companies strike videos which use clips from trailers or gameplay footage to exemplify a theme or assist in explaining a scene.<sup>213</sup>

In 2018, YouTube movie reviewer, Chris Stuckmann was the victim of a series of problems with Universal Pictures.<sup>214</sup> Stuckmann claimed that the movie studio issued a DMCA takedown for every video he created that used footage for any of their films.<sup>215</sup> Stuckmann, unlike some YouTube movie reviewers, generally only uses movie footage sparingly and from trailers that are available free from the studios online for his reviews.<sup>216</sup> He displays the footage to exemplify critiques, show a way the film was lit, or to just present what the film is that he is reviewing. His videos clearly fall under fair use.<sup>217</sup>

### *B. The Statistics and Fallacy of Abuse of YouTube's Mechanisms*

There is no true estimate of total content on YouTube that is infringing on someone's copyright—from the 75-80% of all content figure found by interviewing YouTube personnel in *Viacom v.*

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<sup>213</sup> See, e.g., Will Nelson, *YouTuber Gets Copyright Strike After Contacting 'New World' Support*, NME (Dec. 21, 2021), <https://www.nme.com/news/gaming-news/youtuber-gets-copyright-strike-after-contacting-new-world-support-3123763> [<https://perma.cc/VW7E-7MAU>]; Hiron Cryer, *Bungie Gets Copyright Strikes for Its Own Game as Destiny 2 Takedowns Swarm YouTube*, GAMES RADAR (Mar. 22, 2022), <https://www.gamesradar.com/bungie-gets-copyright-strikes-for-its-own-game-as-destiny-2-takedowns-swarm-youtube/> [<https://perma.cc/5RWH-35Q9>] (video game studio received DMCA strikes for their own content, even though that is supposedly not an entirely automatic process); Jonathan Bailey, *Gaming YouTuber Targeted by Strategic DMCA Notices*, PLAGIARISM TODAY (Mar. 22, 2021), <https://www.plagiarismtoday.com/2021/03/22/gaming-youtuber-targeted-by-strategic-dmca-notices/> [<https://perma.cc/6PF7-KD7D>].

<sup>214</sup> See Sam Gutelle, *Film Critic Chris Stuckmann Calls Out Universal For Abusing YouTube's Copyright-Claiming System*, TUBEFILTER (Mar. 30, 2018), <https://www.tubefilter.com/2018/03/30/chris-stuckmann-universal-studios/> [<https://perma.cc/3EYZ-E5H9>].

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*

<sup>217</sup> It is of note that many of Stuckmann's complaints about this occurred on Twitter in many messages that have since been deleted possibly because he sought legal representation.

*YouTube, Inc.* in the pre- and very early days of Content ID<sup>218</sup> to the massive 722 million claims made by Content ID on the over one billion videos currently on YouTube in just 6 months<sup>219</sup>—and the data on how many of those infringement claims are valid is fraught with uncertainty.

Using the DMCA-required webform, YouTube states that over 8% of videos requested for removal were the subject of abusive copyright removal requests which is 30 times more than the abuse rate in their other tools that have more limited access.<sup>220</sup> For the required counter notification, only 5% of all webform takedown submissions receive a counter notification.<sup>221</sup>

For Content ID, out of those 722 million claims, YouTube boasts that less than 1% of those claims are disputed by content creators,<sup>222</sup> seemingly implying that 99% of those claims then must be valid. Even assuming the validity of that statement, that means every year there are millions of YouTubers fighting claims they believe to be false. Troublingly, out of that less than 1%, for content creators who do choose to dispute, over 60% of the claims are found in favor of the YouTuber.<sup>223</sup>

The assumption being made here, however, is that there is an incentive, or rather lack of disincentive, to dispute any claim. Most YouTubers are individuals without internal connections or management, and they are using YouTube as a secondary source of income.<sup>224</sup> Most YouTubers are not making “hits” they are making multiple videos a month with varying degrees of viewership.<sup>225</sup> Some content creators are full time YouTubers who quit their jobs in hopes of being able to sustain themselves by just making internet content.<sup>226</sup> Because many YouTubers are individuals who rely on

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<sup>218</sup> See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012).

<sup>219</sup> *Copyright Transparency Report H1 2021*, *supra* note 15, at 13.

<sup>220</sup> See *id.* at 10.

<sup>221</sup> See *id.* at 6.

<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

<sup>224</sup> Cao, *supra* note 13 and accompanying text.

<sup>225</sup> See *id.*

<sup>226</sup> See, e.g., Rachel Maksy, *One Year as a Full-Time YouTuber? || An Honest Update*, YOUTUBE (Dec. 18, 2019), <https://www.youtube.com/watch?v=EoblBSVSPpg> [<https://perma.cc/6C6H-LFU2>].

their channels for income—there is little incentive or means to fight against copyright abuse.<sup>227</sup>

A few strikes on a channel can completely silence a creator by decimating their income. If a claim is disputed and YouTube deems the dispute as invalid and then copyright owner requests a takedown of the video in response, the YouTube channel gets a strike anyway; if this happens three times and YouTube doesn't recognize its education fair use, the channel is terminated.<sup>228</sup> We do not know to what extent copyright abuse is occurring on YouTube because we do not have an actual way of measuring or viewing how many YouTubers receive claims they disagree with, but know challenging them could lead to far worse consequences.

The 60% success rate of disputing claims is extremely worrying.<sup>229</sup> YouTube may want that number to show YouTubers that they can dispute and be successful. But it also shows that YouTube's system is broken on clear cut cases the majority of the time. The YouTubers who are choosing to dispute are likely weighing the risks and deciding that they are so sure that they are not infringing that they do not see a threat of a strike. Fair use generally is not that clear cut, so it is unlikely many of the educational or critical content, that would fall under fair use outside of the online world, is being fought for by content creators.

Without income, a YouTuber cannot fight a court case or afford a lawyer to do a fair use analysis. The safest course of action for any YouTuber dealing with a Content ID claim or a DMCA notification is to accept the copyright match and let their video be taken down even if it is obviously creative or falls under fair use.<sup>230</sup> The copyright owner never has anything to lose in YouTube's system because there is essentially no threat of a lawsuit from a YouTuber. It is extremely rare for a case to ever be brought.<sup>231</sup>

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<sup>227</sup> Bartholomew, *supra* note 17, at 84; Depoorter & Walker, *supra* note 126, at 347.

<sup>228</sup> *See supra* Section I.A.5.

<sup>229</sup> *Copyright Transparency Report H1 2021*, *supra* note 15.

<sup>230</sup> Trendacosta, *supra* note 8.

<sup>231</sup> *See, e.g.*, Hosseinzadeh v. Klein, 276 F. Supp. 3d 34, 40 (S.D.N.Y. 2017); Hughes v. Benjamin, 437 F. Supp. 3d 382, 387 (S.D.N.Y. 2020).

### III. THE COPYRIGHT CLAIMS BOARD, LOWERING BARRIERS TO ENTRY, AND POSSIBLE ISSUES

Hypothetically, a YouTuber who publishes content which uses copyrighted material, but whose use is possibly covered by fair use, could (1) fight a likely Content ID match and possibly fight it successfully within YouTube's copyright system, or be given a strike due to the dispute that can lead to the loss of the channel; (2) receive a DMCA notification, the YouTuber could send a counter-notification, and then risk a lawsuit from a company that the YouTuber cannot afford; or (3) do nothing at all, let Content ID matches happen, fair use no longer is even a question, the channel stays safe but educational, critical, or otherwise fair use videos are demonetized or taken down.<sup>232</sup> And thus the least risky option for a reasonable YouTuber is the death of fair use and the destruction of 17 U.S.C. § 107.

Other papers have argued that YouTube needs to change this system which puts much of the power into the hands of copyright owners, and though many solutions have been posed, why would YouTube ever choose to make a change to their copyright system?<sup>233</sup> They do not have liability, they have no incentive to try to attract a lawsuit like *Viacom* again, and their creators have no alternative, highly successful platform.<sup>234</sup> YouTube could post a full list of companies using their Content ID system and could increase visibility of copyright abuses, but that would still not save fair use.

It is possible, however, that the newly formed Copyright Claims Board has a solution that is much more accessible for, at least some, YouTubers or internet content creators who are facing copyright disputes.

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<sup>232</sup> See *supra* Sections I.A.1–6.

<sup>233</sup> See, e.g., Bartholomew, *supra* note 17, at 84, 85; Timothy S. Chung, *Fair Use Quotation Licenses: A Private Sector Solution to DMCA Takedown Abuse on YouTube*, 44 COLUM. J.L. & ARTS 69, 85 (2020); Natalie Marfo, *Playing Fair: YouTube, Nintendo, and the Lost Balance of Online Fair Use*, 13 BROOK. J. CORP. FIN. & COM. L. 465, 487 (2019).

<sup>234</sup> One could argue that a YouTuber could move over to another video hosting platform; however, daily traffic on YouTube far exceeds that of sites such as Twitch, DailyMotion, or Vimeo. YouTube is the second-most used website in the world and follows only Google.com. See *Top Websites Ranking*, SIMILARWEB, <https://www.similarweb.com/top-websites/> [<https://perma.cc/FZL9-8NP8>] (last visited Oct. 14, 2022).

### A. *The Copyright Claims Board: An Explanation*

The Copyright Alternative in Small-Claims Enforcement Act of 2020 (the “CASE Act”) was passed by Congress and established the Copyright Claims Board (the “CCB”) which was proposed as a small claims court that would sit as an “alternative to federal court for copyright disputes.”<sup>235</sup> The CCB became functional on June 16, 2022.<sup>236</sup> Between June 16 and late September 2022, there have been over 150 claims filed with the Copyright Claims Board so far.<sup>237</sup>

#### 1. Structure, Function, and Requirements

The CCB is a three-member tribunal that works to resolve eligible copyright claims that have been brought before it.<sup>238</sup> Two of these tribunal members or “officers,” in order to be appointed, need to have substantial experience in copyright infringement claim litigation and adjudication.<sup>239</sup> The third officer needs substantial familiarity with copyright law and needs experience in the field of alternative dispute resolution.<sup>240</sup> While located at the Copyright Office’s location in Washington, D.C., all proceedings are typically going to be held electronically so there is no need to travel to the tribunal.<sup>241</sup> Attorneys are also not necessary, and perhaps will not even be common, to bring a claim to the CCB. Users of the CCB, both claimants and respondents, are permitted to have an attorney, however.<sup>242</sup>

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<sup>235</sup> See 17 U.S.C. § 1502; Samantha Handler, *Copyright Office Proposes Ways to Opt Out of Small Claims Board*, BLOOMBERG L. (Sept. 28, 2021, 12:06 PM), <https://news.bloomberglaw.com/ip-law/copyright-office-proposes-ways-to-opt-out-of-small-claims-board> [<https://perma.cc/MBB5-8PZL>].

<sup>236</sup> *Copyright Claims Board to Begin Accepting Claims Later This Month*, U.S. COPYRIGHT OFF. (June 2, 2022), <https://copyright.gov/newsnet/2022/966.html> [<https://perma.cc/5FKQ-WBSB>].

<sup>237</sup> COPYRIGHT CLAIMS BD., <https://dockets.ccb.gov/search/cases> [<https://perma.cc/P8NA-T44T>] (last visited Oct. 14, 2022).

<sup>238</sup> As of publication, the three officers are David Carson, Monica McCabe, and Brad Newberg—all very experienced copyright attorneys. See *About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., <https://ccb.gov/about/> [<https://perma.cc/Y5T8-4ACZ>] (last visited Nov. 4, 2022).

<sup>239</sup> See 17 U.S.C. § 1502(b)(3).

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* § 1506(c).

<sup>242</sup> See *About the Copyright Claims Board*, *supra* note 238.

There are numerous requirements for bringing a claim before the CCB. The CCB can hear claims of infringement, but it can also hear claims for declarations of noninfringement and for claims regarding misrepresentations when filing a notice to takedown material under the DMCA.<sup>243</sup> However, an individual who brings an action before the CCB seeking that declaration of noninfringement could reasonably expect a counterclaim for infringement of that same work.<sup>244</sup> Counterclaims can be filed and any defense under copyright law that exists in the federal courts is also available.<sup>245</sup> It is of note that the choice between filing in the CCB or federal court has to be made—the same claim or counterclaim cannot be filed simultaneously in both venues.<sup>246</sup>

The CCB is voluntary, and parties can choose to opt-out of a CCB proceeding after receiving notice.<sup>247</sup> However, the party who brings the claim, but then is counterclaimed, is unable to opt-out of the CCB.<sup>248</sup> This is intended to maintain fairness. If the party chooses to opt-out, either party can then choose to bring the suit or counterclaim in a federal court.<sup>249</sup>

The claimant also must meet certain pleading requirements so that the respondent can assess the claim and determine if they want to opt-out of the proceedings.<sup>250</sup> Claimants must provide a “fair amount of detail” in the complaint, including registration of the copyrighted work.<sup>251</sup> For individuals pleading non-infringement, they must plead facts alleging the existence of a dispute or controversy, as is required for declaratory judgments.<sup>252</sup> Claimants do not have to plead specific monetary harm, just the relief they are seeking.<sup>253</sup>

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<sup>243</sup> See 17 U.S.C. § 1504(c).

<sup>244</sup> See 37 C.F.R. § 223 (2022).

<sup>245</sup> See 17 U.S.C. § 1504(c).

<sup>246</sup> See *id.* § 1504(d)(2).

<sup>247</sup> See *id.* § 1504(a); Handler, *supra* note 235.

<sup>248</sup> See 37 C.F.R. § 223 (2022).

<sup>249</sup> See 17 U.S.C. § 1504(a).

<sup>250</sup> Copyright Claims Board: Initiating of Proceedings and Related Procedures, 87 Fed. Reg. 16989 (Mar. 25, 2022).

<sup>251</sup> *Id.*

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

The CCB can refuse to hear any claim or counterclaim if (1) the claim is already decided or is pending before a federal court, unless a stay has been granted to allow it proceed in front of the CCB; (2) the claim is against a federal or state entity; (3) the claim is asserted against a person or entity residing outside of the United States, unless the nonresident party initiates the proceeding; or (4) the determination of a relevant issue of law or fact could either exceed the number of proceedings the CCB could reasonably administer or the subject matter competence of the CCB (the example given of this is complex factual questions regarding infringement of a computer program).<sup>254</sup>

As to the statute of limitations, a claim can be filed with the CCB within three years after a claim has accrued.<sup>255</sup> And for registration, an individual would need to either (1) have a registration from the Copyright Office for the work at issue or (2) have filed an application with the Copyright Office to register the work at issue either before or simultaneous with filing a claim with the CCB; this differs from the normal requirement that an application is not enough.<sup>256</sup>

For damages, which is not necessarily the aim of this Note because damages are not available for noninfringement claims, the amount will cap at \$30,000 total.<sup>257</sup> For statutory damages, the CCB can award up to \$15,000 per work, meaning for multiple works, the amount possible is much higher than the cap.<sup>258</sup> If the works are not registered according to 17 U.S.C. § 412, then statutory damages are limited to \$7,500.<sup>259</sup> The CCB can also require bad faith parties to pay the other party's reasonable costs and attorneys' fees.<sup>260</sup> Bad faith parties can also be banned from CCB proceedings for a year or can have all of their pending claims dismissed.<sup>261</sup>

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<sup>254</sup> See 17 U.S.C. § 1506(f).

<sup>255</sup> See *id.* § 1504(b).

<sup>256</sup> See *id.* § 1505.

<sup>257</sup> Copyright Claims Board: Initiating of Proceedings and Related Procedures, 87 Fed. Reg. 16989 (Mar. 25, 2022).

<sup>258</sup> See 17 U.S.C. § 1504(e).

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*

<sup>261</sup> See *Frequently Asked Questions*, COPYRIGHT CLAIMS BD., <https://ccb.gov/faq/> [<https://perma.cc/34VS-YVN8>] (last visited Oct. 14, 2022).

As for costs, if bringing an infringement or non-infringement action for a single work, the filing fee is \$100, designation of a service agent is \$6, the small claims expedited registration fee is \$50, and a review of the final determination by the Register of Copyrights would be \$300.<sup>262</sup>

The CCB has also made educational material available to provide guidance to claimants concerning what information they are required to provide, and attorneys are available to answer questions.<sup>263</sup> Also, in contrast to routine court procedure, if one of the CCB attorneys determines that the complaint does not provide sufficient information to give the respondent notice of the claim, the CCB will allow the claimant to provide further information and detail without penalty.<sup>264</sup>

### *B. Lowering the Barrier to Declare Non-Infringement*

The Copyright Claims Board presents an opportunity for an easy, lower-cost path for content creators to declare non-infringement on videos that have been struck or limited by YouTube for copyright infringement either by the Content ID system or by a DMCA notification. Non-infringement itself cannot lead to any damages, but if the cost of the CCB stays low, which it is currently a two-tiered fee system with a \$40 initial filing fee and a \$60 fee when the case becomes active, then that would likely balance out the amount of money that is possibly made from a YouTube video.<sup>265</sup> For DMCA claims, a YouTuber could also go to the CCB with a claim of misrepresentation, where they would be able to recover damages, but they would run into the *Lenz* decision—however, the CCB would not necessarily be required to follow it.<sup>266</sup>

Due to the unequal position of power corporations possess over individual YouTubers, the law needs to adapt to allow for individuals to fairly access copyright law. YouTube is in no position to make

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<sup>262</sup> See *About the Copyright Claims Board*, *supra* note 238.

<sup>263</sup> Copyright Claims Board: Initiating of Proceedings and Related Procedures, 87 Fed. Reg. 16989 (Mar. 25, 2022).

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> See 17 U.S.C. § 1506(a). Unless the case would have been brought in a jurisdiction that follows *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

these changes because there is no incentive to change due to the lack of bargaining power that YouTubers have, and the lack of alternatives present to creating video content online. While YouTube lacks incentive to fully change their system or side with content creators in disputes, YouTube could easily provide more information on fair use and could make a streamlined guide for disputing a copyright claim on their platform.

This is where the CCB could step in in two separate ways. The first is the “fear factor” and the second is education. The goal of a declaration of non-infringement by the CCB would not be to bring every struck single video to the panel, but instead could possibly serve as a “fear factor” to companies showing them that individuals have recourse against copyright abuse and corporate ignorance of fair use in extremely blatant examples. Companies can opt-out as they wish, but the pressures of social media in the modern age are strong and YouTubers have large audiences that spread news of legal issues on the platform like wildfire.

Bringing a claim would also present an opportunity for education, unlike YouTube who has no incentive to educate its creators on fair use in the face of powerful corporations, the CCB does not have that same burden and has access to lawyers who could inform content creators what should be in a claimant’s notice. This would also likely positively inform what would be contained in a counter-notification that could be sent by the YouTuber through YouTube’s counter-notification webform.

Because the costs are also so low, no transportation costs need to be paid, and foreign creators could also submit claims digitally against American companies, there is a much weaker monetary disincentive. And any disincentive could possibly be decimated with a GoFundMe campaign held up by a Youtuber’s followers or a follow-up video that is monetized on a YouTuber’s channel. YouTubers would need to be made aware that this process is possible for them and that would be something YouTube could do quite easily with brief additions to their informational pages or Creator Studio. A web campaign once the CCB has made some ground, so that it could fulfill the purpose of its creation of being a low-cost alternative, would also serve to bring this to the attention of YouTubers.

### *C. The Possibility of Corporate Revenge and Retribution*

For the CCB to be a viable alternative, YouTubers would need an incentive to go to the CCB rather than just allow for a DMCA or Content ID claim, which as discussed above could be from group-funded support or backing by YouTube itself.

The larger issue that is posed, however, is if a YouTuber brings an instance of possible copyright infringement to the attention of lawyers of a corporation or business with a CCB claim, the business can then bring suit in federal court, reject the jurisdiction of the CCB, or bring a counterclaim. A YouTuber would have to be certain that their video does not infringe or constitutes fair use or else they could facing an expensive lawsuit. It would be a risk to bring a claim like this, but there would likely be large backlash against corporations for going after individual YouTubers or perhaps there could be backlash via YouTube itself.

In response to this, if a YouTuber is certain that the claim against their video is frivolous, a fee-shifting scenario could be possible.<sup>267</sup> A district court should give “substantial weight to the objective reasonableness of the losing party’s position” when deciding to award attorney’s fees in an infringement dispute.<sup>268</sup> A YouTuber could, if brought to federal court over an issue that they had initially brought to the CCB, successfully argue for fee-shifting if they had been brought to court over something like the minor humming of a song in a background of a video or the frequency of white noise.

## CONCLUSION

The Copyright Claims Board presents a new opportunity that individuals creating content across the internet can utilize. YouTube lowered the barrier to entry in the creation of media, allowing for millions of individuals to upload creative content every single day. And the Copyright Claims Board can lower the barrier to entry for those same individuals, so they can also access the legal system when it comes to copyright disputes. YouTube currently lacks incentive to change and content creators lack support, so an outside

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<sup>267</sup> See 17 U.S.C. § 505.

<sup>268</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 209–10 (2016).

solution is necessary to create an even playing field for YouTubers and corporations alike. Via the CCB, content creators could receive declarations of non-infringement, but importantly the CCB could become a scare-tactic bringing attention to both YouTube itself and copyright holders that YouTubers have legal recourse against false copyright claims. Ultimately, it could be possible that YouTube would seek to update to provide for a fairer and more equitable copyright infringement detection system.