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## Flipping the DMCA and its Progeny on Their Heads: Content Creators Reclaiming Revenue From Improper Copyright Claims, 54 UIC L. Rev. 757 (2021)

Justin Lizalek

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# FLIPPING THE DMCA AND ITS PROGENY ON THEIR HEADS: CONTENT CREATORS RECLAIMING REVENUE FROM IMPROPER COPYRIGHT CLAIMS

JUSTIN R. LIZALEK\*

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## I. INTRODUCTION

Since its global launch in 2018, TikTok has exploded as one of the most popular social media applications<sup>1</sup> with “more than 2

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1. *Musical.ly and TikTok Unite to Debut New Worldwide Short Form Video Platform*, PR NEWSWIRE (Aug. 2, 2018), [www.prnewswire.com/news-releases/musically-and-tiktok-unite-to-debut-new-worldwide-short-form-video-platform-300690719.html](http://www.prnewswire.com/news-releases/musically-and-tiktok-unite-to-debut-new-worldwide-short-form-video-platform-300690719.html) [perma.cc/8X6C-UXBP].

billion downloads globally.”<sup>2</sup> TikTok features, among other things, users lip-syncing and dancing to popular music.<sup>3</sup> Due to TikTok users’ ability to upload allegedly unlicensed music on the platform, major music labels are seeking “payment for lost royalties in any licensing agreement.”<sup>4</sup> Because more than fifty percent of music published in TikTok videos is unauthorized, many are left “comparing TikTok’s actions to those of Napster” in the early 2000s.<sup>5</sup> Now, “thousands of music publishing companies” are considering suing TikTok for copyright infringement.<sup>6</sup>

Many social media platforms “across industries already employ a wide variety of . . . tools” that copyright holders can employ to prevent copyright infringement.<sup>7</sup> One of these services allows a copyright holder (sometimes referred to as a “rightsholder”) to levy a copyright strike against a user that published allegedly infringing content.<sup>8</sup> The strike is essentially a warning that removes the allegedly infringing content from the social media platform and punishes the user that published the allegedly infringing content.<sup>9</sup> Copyright strikes have been a widespread issue for individuals who create content on online social media platforms.<sup>10</sup> These individuals, often referred to as “content creators,” regularly experience unjustified use of their work product to create revenue for other entities.<sup>11</sup>

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2. Ashley Carmen, *TikTok Reaches 2 Billion Downloads*, VERGE (Apr. 29, 2020), [www.theverge.com/2020/4/29/21241788/tiktok-app-download-numbers-update-2-billion-users](http://www.theverge.com/2020/4/29/21241788/tiktok-app-download-numbers-update-2-billion-users) [perma.cc/ZR7R-E44N].

3. Stephen Elliott, *Musical.ly, TikTok, and the Lip Sync Video Revolution*, JULIUS (Aug. 3, 2018), [www.blog.juliusworks.com/tiktok-lip-sync-video-revolution](http://www.blog.juliusworks.com/tiktok-lip-sync-video-revolution) [perma.cc/39VA-CCUL].

4. Frances Josephine Espeso, *Music Publishers Threaten to Sue TikTok for Copyright Infringement – FT*, S&P GLOB. MKT INTEL. (Apr. 6, 2020), [www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/music-publishers-threaten-to-sue-tiktok-for-copyright-infringement-8211-ft-57919103](http://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/music-publishers-threaten-to-sue-tiktok-for-copyright-infringement-8211-ft-57919103) [perma.cc/PTN5-JJAA].

5. Martin Joseph, *Music Companies Threaten to Sue TikTok Over Copyright*, THAKONI (Apr. 4, 2020), [www.thakoni.com/music-companies-threaten-to-sue-tiktok-over-copyright/](http://www.thakoni.com/music-companies-threaten-to-sue-tiktok-over-copyright/) [perma.cc/6AD4-EPSJ].

6. *Id.*

7. Maria Strong, *Section 512 of Title 17 – A Report of the Register of Copyrights*, U.S. COPYRIGHT OFF., 1, 177 (May 2020).

8. *Copyright Strike Basics*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2814000?hl=en](http://www.support.google.com/youtube/answer/2814000?hl=en) [perma.cc/79GL-PWBG] (last visited July 12, 2021).

9. *Id.* (requiring first time offenders to attend “Copyright School,” potentially impacting an offender’s ability to monetize, removing the ability to livestream for ninety days if the offense occurred during a livestream, and subjecting the offender’s account(s) to termination for repeat offenses).

10. Jonathan Bailey, *YouTube’s Copyright Insanity*, PLAGIARISM TODAY (Jan. 10, 2019), [www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/](http://www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/) [perma.cc/BV7M-7G38] (describing that almost every YouTuber has experienced issues with copyright on the platform).

11. *Id.*

Jackie M is one such content creator.<sup>12</sup> She posts cooking videos to her YouTube channel with “legally obtained” music.<sup>13</sup> Despite her efforts to comply with the law and YouTube’s copyright policies, some of her videos receive copyright claims which inform her that advertising revenue generated therefrom will be “diverted to” and seized by the claimant.<sup>14</sup> Jackie is then faced with three options: remove the claimed videos and lose traffic to her channel, leave the video up and let the claimant reap the revenue she should be receiving, or refute the claim and open herself up to a copyright strike which could lead to the removal of her channel.<sup>15</sup> Can YouTube, TikTok, and other social media platforms improve their tools to prevent improper copyright claims? If not, do content creators have any meaningful legal recourse?

In undertaking an assessment of copyright infringement services provided by online social media platforms, what online social media platforms can do to improve these services, and ways that content creators can push back on illegitimate claims, this comment proceeds in three parts. Part II describes the history of copyright law in the U.S. and the rise of content identification systems after the enactment of the Digital Millennium Copyright Act. Part III then explores one such content identification system called Content ID; the legal precedent for the doctrine of fair use (referred to herein as “fair use”)<sup>16</sup> as codified under the Copyright Act of 1976;<sup>17</sup> a recent landmark case in fair use, *Lenz v. Universal Music Corp.*<sup>18</sup> and past solutions. Finally, Part IV offers unique proposals to protect and uphold fair use in the U.S. going forward.

## II. BACKGROUND

To properly understand the current framework of online service providers, content creators, and rightsholders, Part II of this comment conducts a review of U.S. copyright law, the reason for

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12. See generally Jackie M, *How I Deal With Fake YouTube Copyright Claims* by Believe Music, MEDIUM (June 8, 2018), <https://jackiem.medium.com/how-i-deal-with-fake-youtube-copyright-claims-by-believe-music-b9cb9067fff9> [perma.cc/UA5S-Q38E] (recounting the content creator Jackie M’s problems with copyright strikes on YouTube).

13. *Id.*

14. *Id.*

15. *Id.*

16. *More Information on Fair Use*, U.S. COPYRIGHT OFF., [www.copyright.gov/fair-use/more-info.html](http://www.copyright.gov/fair-use/more-info.html) [perma.cc/5JTR-MF3T] (last visited July 12, 2021) (describing that the doctrine of fair use “promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances” and depends on the “[p]urpose and character of the use,” the “[n]ature of the copyrighted work,” the “[a]mount and substantiality of the portion used in relation to the copyrighted work as a whole,” and the “[e]ffect of the use upon the potential market for or value of the copyrighted work”).

17. Copyright Act of 1976, 17 U.S.C. § 107 (2012).

18. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2016).

certain developments therein, and online service providers' responses to rampant infringement online. First, this background reviews U.S. copyright law today and how it has evolved since the Copyright Act of 1790.<sup>19</sup> Next, this background reviews Congress' motivation for the Copyright Act of 1976 and the legislative response to the birth of the Internet.<sup>20</sup> Then, Part II explores a case study that illustrates how copyright infringement on the Internet can get out of hand<sup>21</sup> before reviewing online service providers' responses to prevent widespread infringement.<sup>22</sup> Finally, this background reviews the general operation of content identification systems and problems therein that have yet to be solved.

### A. Review of U.S. Copyright Law

In the U.S., a copyright is an intellectual property right that protects "original works . . . fixed in any tangible medium of expression."<sup>23</sup> That means the author of an original work can receive copyright in that work if it is in a physical form.<sup>24</sup> Today, U.S. copyright protections provide a rightsholder with the exclusive right to (1) "reproduce the copyrighted work;" (2) "prepare derivative works based upon the copyrighted work;" (3) "distribute copies . . . of the copyrighted work;" (4) "perform the copyrighted work publicly;" and (5) "display the copyrighted work publicly."<sup>25</sup> Generally, a copyright lasts for "the lifetime of the author and [seventy] years after the author's death."<sup>26</sup> However, this has not always been the case.<sup>27</sup>

Copyright protections in the U.S. were originally modeled off of the British Statute of Anne and were first codified as the

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19. Copyright Act of 1790, 1 Stat. 124, U.S. COPYRIGHT OFF., [www.copyright.gov/about/1790-copyright-act.html](http://www.copyright.gov/about/1790-copyright-act.html) [perma.cc/ASH8-ZY2N] (last visited July 12, 2021).

20. 17 U.S.C. § 101 *et seq.* (2021).

21. *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000) (noting that "[a]pproximately 10,000 music files [were] shared per second using Napster" "without payment to . . . copyright owners.").

22. Nicholas Thomas DeLisa, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 BROOKLYN L. REV. 1275, 1285 (2016).

23. 17 U.S.C. § 102 (2021).

24. Betsy Rosenblatt, *Copyright Basics*, BERKMAN KLEIN CTR.: INTELL. PROP. IN CYBERSPACE 2000, [www.cyber.harvard.edu/property/library/copyprimer.html](http://www.cyber.harvard.edu/property/library/copyprimer.html) [perma.cc/NL28-LHUT] (last modified Mar. 1998).

25. 17 U.S.C. § 106 (2021).

26. *Id.* § 302(a).

27. 1 Stat. 124, U.S. COPYRIGHT OFF., [www.copyright.gov/about/1790-copyright-act.html](http://www.copyright.gov/about/1790-copyright-act.html) [perma.cc/4P4M-5EVS] (last visited July 12, 2021); Copyright Act of 1909, 35 Stat. 1075 (repealed 1976).

Copyright Act of 1790 (herein referred to as the “Original Act”),<sup>28</sup> which provided authors with “the sole right and liberty of printing, reprinting, publishing and vending” of their works.<sup>29</sup> The works protected under the Original Act were books, maps, and charts, and the protections only lasted for a fourteen-year term with a one-time option to renew the protections for another fourteen years.<sup>30</sup> During the nineteenth century, the works protected under the Original Act were expanded through various amendments to include historical and other prints, dramatic works, photographs, and visual art.<sup>31</sup> In 1831, the initial term of copyright protections was extended to twenty-eight years.<sup>32</sup> Between 1856 and 1897, the exclusive rights of authors were expanded to include the right of public performance for dramatic works and musical compositions and the right to create derivative works.<sup>33</sup>

Specifically, in the 1841 case *Folsom v. Marsh*,<sup>34</sup> the U.S. Circuit Court for the District of Massachusetts expanded copyright protections to include the exclusive right to create derivative works.<sup>35</sup> The case concerned Jared Sparks, the editor of a twelve-volume biography on George Washington that was published by the publishing firm Folsom, Wells, and Thurston (hereinafter “Folsom”).<sup>36</sup> Folsom and Sparks alleged that Charles Upham, another biographer, had taken 353 pages of their twelve-volume biography and published his own biography on the first President with the publishing firm Marsh, Capen, and Lyon (hereinafter “Marsh”).<sup>37</sup> Among other things, Upham and Marsh’s argument relied on the fact that, even if Upham’s selection infringed on Sparks’ copyright, Upham’s use of Sparks’ work was fair because it was “an original and new work, and . . . in no just sense . . . [constituted] a piracy of the work of the plaintiffs.”<sup>38</sup> The court disagreed with Upham and Marsh; in its ultimate determination

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28. *The 18<sup>th</sup> Century*, U.S. COPYRIGHT OFF., [www.copyright.gov/timeline/timeline\\_18th\\_century.html](http://www.copyright.gov/timeline/timeline_18th_century.html) [perma.cc/Z6W7-X8JF] (last visited July 12, 2021).

29. Copyright Act of 1790, *supra* note 19.

30. *The 18th Century*, *supra* note 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D.Mass. 1841).

35. Oren Bracha, *Commentary on: Folsom v. Marsh (1841)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900), [www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary\\_us\\_1841](http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_us_1841) [perma.cc/EU2X-WQWM] (last visited July 12, 2021) (describing that *Folsom* greatly expanded copyright protections, which were previously limited in scope and did not prohibit uses such as abridgements, translations, or imitations, to include potentially any derivative work so long as it is not “fair and bona fide.”).

36. *Folsom*, 9 F. Cas. at 345; Bracha, *supra* note 35.

37. *Folsom*, 9 F. Cas. at 345; Bracha, *supra* note 35.

38. *Folsom*, 9 F. Cas. at 347.

that Upham's use was not fair, the court considered the following three factors: "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."<sup>39</sup> As such, *Folsom* established fair use.<sup>40</sup> The importance of *Folsom* was not recognized until fair use was officially codified<sup>41</sup> as 17 U.S.C. § 107 in 1976.<sup>42</sup>

The beginning of the twentieth century brought another change in U.S. copyright law with the passing of the Copyright Act of 1909.<sup>43</sup> The 1909 Act limited federal copyright protections to published works that provided notice of the rightsholder's copyright.<sup>44</sup> Accordingly, if a work was not published, its protections were the subject of state law; if a work was published without proper notice, it fell into the public domain.<sup>45</sup> The Copyright Act of 1909 also established a compulsory mechanical license for musical compositions—the first of its kind in the U.S.<sup>46</sup> The Copyright Act of 1909 was later amended three times: first in 1912 to extend protection to motion pictures, again in 1953 to extend protection to nondramatic literary works, and finally in 1972 to extend protection to sound recordings.<sup>47</sup>

Today, copyright law is codified in Title 17 of the U.S. Code as the Copyright Act of 1976 (herein referred to as "the Act"), which provides protections for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>48</sup> The Act overhauled existing copyright law, extending protection to both published and unpublished works and changing the term of the copyright to the lifetime of the author plus an

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39. *Id.* at 348.

40. Bracha, *supra* note 35.

41. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 UNIV. PA. L. REV. 549, 560 n.41–42 (2008) (finding that *Folsom* was cited in 44 federal cases between 1841 and 1977, that the case was under-cited in legal texts concerning fair use during the same period, and that in the 46 years since codification, the case has been cited in over 15% of cases concerning fair use).

42. Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 321, 325 (2014).

43. U.S. COPYRIGHT OFF., *1950-2000*, [www.copyright.gov/timeline/timeline\\_1950-2000.html](http://www.copyright.gov/timeline/timeline_1950-2000.html) [perma.cc/2P8F-WMJJ] (last visited July 12, 2021).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Copyright Act of 1976, 17 U.S.C. § 102(a) (2021).

additional fifty years.<sup>49</sup> In 1978, the term of the copyright was altered again under the Copyright Term Extension Act to change the additional period of protection after the author's death from the original fifty years to the current seventy years.<sup>50</sup> The Act also codified fair use.<sup>51</sup> Thus, today's copyright laws essentially protect all original works<sup>52</sup> as soon as they are embodied in a tangible form.<sup>53</sup>

### *B. Congressional Motivation for the Copyright Act of 1976*

Ushered in by the Act and subsequent amendments, the shift in copyright law was largely due to Congress' concerns over how technological advancements might impact "what might be copyrighted, how works might be copied, and what constituted infringement."<sup>54</sup> Additionally, Congress' motivation to revise copyright laws stemmed from anticipation that the U.S. would enter the Berne Convention.<sup>55</sup> The Berne Convention is an international treaty that provides authors of works various rights operating on the following three principles: (1) other contracting states must give "works originating in one . . . contracting state" the same rights that they give to "works of [their] own nationals;" (2) rights must be afforded automatically;<sup>56</sup> and (3) international rights must be given regardless of the existence of the rights in the state in which the work was made.<sup>57</sup> Thus, the Act brought U.S. copyright law "into accord with international copyright law, practices, and policies."<sup>58</sup>

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49. U.S. COPYRIGHT OFF., *supra* note 43.

50. *Id.*

51. 17 U.S.C. § 107 (2021).

52. *Id.* at § 102(a).

53. *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), WORLD INTELL. PROP. ORG., [www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html) [perma.cc/QW8Y-TS6U] (last visited July 12, 2021).

54. *Copyright Timeline: A History of Copyright in the United States, Description of 1976: Revision of the U.S. Copyright Act*, ASS'N RES. LIBRS., [www.arl.org/copyright-timeline/](http://www.arl.org/copyright-timeline/) [perma.cc/25UZ-XL5Y] (last visited July 12, 2021).

55. *Id.*

56. *Summary of the Berne Convention*, *supra* note 53.

57. *Id.* (noting that the third principle makes an exception "if . . . a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin," which can result in denial of protection abroad "once protection in the country of origin ceases.").

58. *Copyright Timeline: A History of Copyright in the United States, Description of 1976: Revision of the U.S. Copyright Act*, *supra* note 54, but see Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, ARTREPRENEUR (Feb. 15, 2014), [www.alj.artrepreneur.com/mickey-mouse-keeps-changing-copyright-law/](http://www.alj.artrepreneur.com/mickey-mouse-keeps-changing-copyright-law/) [perma.cc/9KKY-EM6H] (arguing that many of



While Congress considered technological advancements in the Act, it was primarily focused on “radio, television, communications satellites, cable television, computers, photocopying machines, and videotape recorders.”<sup>59</sup> The Act could not consider the Internet because it was not invented until 1983.<sup>60</sup> However, as technology advanced, the Internet became a more prevalent medium by which information was communicated.<sup>61</sup> The Internet had the potential to allow people to quickly disseminate copyrighted materials with almost no barriers.<sup>62</sup> Copyright holders were concerned that the advent of “smaller file sizes . . . would enable ordinary users to easily spread unauthorized near-perfect digital copies of copyrighted works to other users across the globe, at a pace limited only by download speed.”<sup>63</sup> Online service providers (“OSPs”), such as Facebook, SoundCloud, Twitch, Vimeo, and Verizon Wireless, had a difficult time regulating digital piracy while also “balancing the appropriate degree of oversight over their users’ activities with the need to minimize their own liability for copyright infringement.”<sup>64</sup>

### C. Legislative Response to the Birth of the Internet

To curtail the copyright issues that the Internet created, members of the World Intellectual Property Organization (“WIPO”), including the U.S., drafted the WIPO Internet Treaties to substantially address the copyright issues presented by the digital age.<sup>65</sup> In 1998, the Digital Media Copyright Act (“DMCA”) was enacted to implement the WIPO Internet Treaties, specifically addressing “anti-circumvention technologies and protection of rights management information.”<sup>66</sup> Anti-circumvention technologies include those technologies that are used by or for rightsholders to protect access to their copyrighted works.<sup>67</sup> Rights management information includes the title of a protected work, the

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the changes to the longevity of a copyright were largely influenced by lobbying from Disney in its pursuit to protect the copyright on Mickey Mouse).

59. Marybeth Peters, *General Guide to the Copyright Act of 1976*, U.S. COPYRIGHT OFF., 1 (1977), [www.copyright.gov/reports/guide-to-copyright.pdf](http://www.copyright.gov/reports/guide-to-copyright.pdf) [perma.cc/C9Q4-8WCP].

60. Evan Andrews, *Who Invented the Internet?*, HISTORY (Dec. 18, 2013), [www.history.com/news/who-invented-the-internet](http://www.history.com/news/who-invented-the-internet) [perma.cc/6EYU-TANR].

61. Martin Bryant, *20 Years Ago Today, the World Wide Web Opened to the Public*, NEXT WEB (Aug. 6, 2011), [www.thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/](http://www.thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/) [perma.cc/68SK-X575] (describing that adoption of the Internet by the general public was largely catalyzed by the “growth of easy-to-use Web browsers [which] coincided with the growth of the commercial ISP business.”).

62. Strong, *supra* note 7, at 14.

63. *Id.*

64. *Id.* at 14-15, 177.

65. *Id.* at 17-18.

66. *Id.* at 18-19.

67. Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2000).

author of a protected work, the copyright owner of the protected work, the terms and conditions of use of the protected work, among others.<sup>68</sup> The DMCA also established a safe harbor provision to “clarify [OSP] liability in the context of the internet and infringing works.”<sup>69</sup> The DMCA created a framework by which OSPs could be eligible for the safe harbor provision depending on how the infringing content interacted with an OSP’s network or system.<sup>70</sup> For example, OSPs that store infringing material on their system or network “at the direction of a user”<sup>71</sup> could be eligible for the safe harbor provision so long as they “implement a ‘notice-and-takedown’ system,” under which rightsholders can provide notice to the OSPs to take down allegedly infringing content.<sup>72</sup>

Section 512(c) of the DMCA states that an OSP that stores infringing material on their system or network at the direction of a user will not be liable for monetary relief if the OSP follows three main provisions.<sup>73</sup> The first provision is codified as Section 512(c)(1)(A) and includes three sub-parts: (1) the OSP must “not have actual knowledge that the material or an activity using the material on the system or network is infringing;” (2) the OSP, “in the absence of actual knowledge,” must not be “aware of facts or circumstances from which infringing activity is apparent;” and (3) the OSP must, “upon obtaining knowledge or awareness” of infringement, act “expeditiously to remove, or disable access to,” the allegedly infringing material.<sup>74</sup> The second provision is codified as Section 512(c)(1)(B) and provides that the OSP must “not receive a financial benefit directly attributable to the infringing activity” if the OSP “has the right and ability to control” the infringing activity.<sup>75</sup> The final provision, similar to section 512(c)(1)(A), is codified as Section 512(c)(1)(C) and specifies that “upon notification of claimed infringement,” the OSP must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”<sup>76</sup> Together, these safe harbor provisions provide OSPs with extensive protections, allowing them to avoid liability for rightsholders’ works on their platforms.<sup>77</sup>

Closely related to Section 512(c)(1)(C) of the DMCA, Section 512(c)(2) sets forth that an OSP must designate “an agent to receive

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68. *Id.* at § 1202(c).

69. Strong, *supra* note 7, at 19.

70. 17 U.S.C. § 512 (2021).

71. *Id.* at § 512(c).

72. *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/intellectual-property/guide-to-youtube-removals](http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals) [perma.cc/UWS2-2VB9] (last visited July 12, 2021).

73. 17 U.S.C. § 512(c) (2021).

74. *Id.* at § 512(c)(1)(A)(i)-(iii).

75. *Id.* at § 512(c)(1)(B).

76. *Id.* at § 512(c)(1)(C).

77. *A Guide to YouTube Removals*, *supra* note 72.

notifications of claimed infringement.”<sup>78</sup> The incredible volume of copyrighted work available through OSPs motivated the development of content identification systems (“CIDS”) that are “robust and [possess] the infrastructure to handle these notices in order to comply with” the safe harbor provisions.<sup>79</sup> The development of CIDS was also motivated by the fact that copyright holders had difficulty identifying infringing content hosted by OSPs, and were concerned that OSPs might still be infringing despite their compliance under the safe harbor provision.<sup>80</sup>

#### *D. Napster: A Case Study of How Copyright Infringement can Run Rampant on the Internet and OSP Responses Thereto*

One of the most notable embodiments of online copyright issues was the software suite offered by Napster starting in 1999.<sup>81</sup> Napster was a peer-to-peer file sharing service where users could find other users who had files for which they were searching.<sup>82</sup> Napster allowed a user to request a file from another user who already had the file downloaded on their hard drive.<sup>83</sup> Napster’s user count quickly ballooned as users started sharing music in the MP3 format, allowing for quick and easy downloads over the Internet.<sup>84</sup> Just one year after its inception, Napster was sued by the Recording Industry Association of America (“RIAA”) on the grounds of “contributory and vicarious copyright infringement” under the DMCA.<sup>85</sup> Specifically, the lawsuit alleged that Napster was “engaging in or assisting others in copying copyrighted music without payment or the express permission of the” rightsholders.<sup>86</sup> The RIAA also alleged that Napster “would significantly harm the

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78. 17 U.S.C. § 512(c)(2) (2021).

79. DeLisa, *supra* note 22, at 1285 (describing that Content ID was developed shortly after Google settled a DMCA-related copyright infringement lawsuit brought by Viacom).

80. *Id.*

81. *Napster*, BRITANNICA, [www.britannica.com/topic/Napster](http://www.britannica.com/topic/Napster) [perma.cc/8UX6-NBP3] (last visited July 12, 2021).

82. Jeff Tyson, *How the Old Napster Worked*, HOW STUFF WORKS, [www.computer.howstuffworks.com/napster.htm](http://www.computer.howstuffworks.com/napster.htm) [perma.cc/7RKP-7KML] (last visited July 12, 2021) (describing that while Napster was focused on MP3 files, other peer-to-peer file sharing services have appeared where “virtually anything [can] be shared” among users).

83. *Id.*

84. Michael Gowan, *Requiem for Napster*, PC WORLD (May 18, 2002), [www.peworld.idg.com.au/article/22380/requiem\\_napster/](http://www.peworld.idg.com.au/article/22380/requiem_napster/) [perma.cc/GW6Q-9JT9] (estimating that Napster had 80 million registered users at its peak).

85. *A & M Records, Inc.*, 114 F. Supp. at 900.

86. *The Napster Controversy: RIAA vs. Napster*, IBS CTR. MGMT. RES., [www.icmrindia.org/free%20resources/casestudies/napster-controversy-1.htm](http://www.icmrindia.org/free%20resources/casestudies/napster-controversy-1.htm) [perma.cc/5PCX-WU9J] (last visited July 12, 2021).

sales of the recording industry.”<sup>87</sup>

Because Napster was a peer-to-peer system that did not store allegedly infringing works on its own system, a different section of the DMCA, Section 512(a), applied to the platform for purposes of the safe harbor provision.<sup>88</sup> Pursuant to this section, the Northern District of California found Napster liable for violating the DMCA and enjoined the software provider to “polic[e] the system within the limits of the system” for infringing content.<sup>89</sup> Section 512(a) allows safe harbor for an OSP that “transmit[s], rout[es], or provid[es] connections for, material through a system or network controlled or operated by or for the” OSP, so long as the OSP satisfies five provisions.<sup>90</sup> First, a person other than the OSP must have directed or initiated the transmission.<sup>91</sup> Second, “the transmission, routing, provision of connections, or storage” must be automated.<sup>92</sup> Third, the OSP must “not select the recipients of the material” but for any automated “response to the request of another person.”<sup>93</sup> Fourth, the material cannot be stored by the OSP other than as required to transmit the material to the selected recipients.<sup>94</sup> Finally, the OSP must not modify the material when it is “transmitted through the system or network” of the OSP.<sup>95</sup>

Napster failed to satisfy Section 512(a)’s safe harbor provision because the court found that “transmission [did] not occur ‘through’ the system or network,” but rather, Napster opted to connect one peer directly to another.<sup>96</sup> The inability to identify content on an OSP’s platform as infringing, compounded by Napster’s inability to manually redress DMCA notices, led many OSPs to create CIDS to help identify content that may be infringing on a rightsholder’s copyright.<sup>97</sup> For example, YouTube developed Content ID,<sup>98</sup> and Facebook created a similar system known as Rights Manager.<sup>99</sup> Recently, Facebook ported Rights Manager to Instagram.<sup>100</sup>

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87. *Id.*

88. Digital Millennium Copyright Act, 17 U.S.C. § 512(a) (2021).

89. *A & M Records, Inc. v. Napster, Inc.*, 2001 U.S. Dist. LEXIS 2186, at \*5 (N.D. Cal. Mar. 5, 2001).

90. 17 U.S.C. § 512(a) (2021).

91. *Id.* at § 512(a)(1).

92. *Id.* at § 512(a)(2).

93. *Id.* at § 512(a)(3).

94. *Id.* at § 512(a)(4).

95. *Id.* at § 512(a)(5).

96. *A & M Records, Inc.*, 2000 U.S. Dist. at ¶¶, 22–23.

97. DeLisá, *supra* note 22, at 1285.

98. *Using Content ID*, YOUTUBE HELP, [www.support.google.com/youtube/answer/3244015?hl=en](http://www.support.google.com/youtube/answer/3244015?hl=en) [perma.cc/G2LX-K2QT] (last visited July 12, 2021).

99. Analisa Tamayo Keef, *Introducing Rights Manager*, FACEBOOK FOR MEDIA (Apr. 12, 2016), [www.facebook.com/facebookmedia/blog/introducing-rights-manager](http://www.facebook.com/facebookmedia/blog/introducing-rights-manager) [perma.cc/SH92-9UAB].

100. Andrew Hutchinson, *Facebook Expands Rights Manager to Detect*

### *E. General Operation of CIDS and Persisting Problems*

Many CIDS create “metadata and fingerprint files for each copyrighted work” that are then included in a database.<sup>101</sup> Such CIDS also create similar metadata and fingerprints for content that is uploaded to or will be uploaded to an OSP.<sup>102</sup> This means that the OSP can automatically identify whether the content matches copyrighted content stored in the database.<sup>103</sup> Upon detecting a match, an OSP can respond based on an agreement that has been negotiated by the OSP and the rightsholder.<sup>104</sup> Responses include blocking the allegedly infringing upload or allowing the allegedly infringing upload to remain on the OSP’s platform and subsequently monetizing the content for the benefit of the rightsholder.<sup>105</sup>

Despite the advent of CIDS, many content creators still receive unwarranted copyright claims on their videos.<sup>106</sup> Some claims result from a nefarious entity making a fraudulent copyright claim in a plot to hold a content creator’s profile “hostage.”<sup>107</sup> While this activity is problematic, it can easily be classified as bad actors taking advantage of an OSP’s systems. A larger issue stems from CIDS-based copyright claims.<sup>108</sup> Because of CIDS, content creators have received copyright claims for their own original content<sup>109</sup> and even for singing only a few seconds of a song in an almost fifteen-minute video.<sup>110</sup> Other examples include content creators on

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*Copyrighted Image Use Across Facebook and Instagram*, SOC. MEDIA TODAY (Sept. 21, 2020), [www.socialmediatoday.com/news/facebook-expands-rights-manager-to-detect-copyrighted-image-use-across-face/585624/](http://www.socialmediatoday.com/news/facebook-expands-rights-manager-to-detect-copyrighted-image-use-across-face/585624/) [perma.cc/886B-BA37] (describing that this expansion of Rights Manager allows rightsholders to protect their copyrights across both platforms which can be helpful to identify Instagram posts embedded in news articles).

101. Strong, *supra* note 7, at 177-178.

102. *Id.* at 178.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See generally* Bailey, *supra* note 10 (recounting various content creators testimonials of copyright strikes and/or Content ID claims the creators regard as mistaken or fraudulent).

107. Lindsay Dodgson, *YouTube Channels are Being Held Hostage with False Copyright Claims, but the Platform’s Hands are Tied*, INSIDER (June 2, 2020), [www.insider.com/youtubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6](http://www.insider.com/youtubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6) [perma.cc/5GZS-639W] (recounting that one YouTuber had their account removed by a scam artist requesting \$50 in Bitcoin and promotion of their Twitter account).

108. Bailey, *supra* note 10 (arguing that “most of the false claims on YouTube are not the work of bad actors, but rather, mistakes.”).

109. *Id.*

110. Virginia Glaze, *MrBeast Calls Out YouTube After Being Hit with False Copyright Strike*, DEXTERO (Feb. 13, 2019),

YouTube reviewing trends on TikTok but having their videos monetized by the copyright claimant because the TikTok videos include copyrighted music.<sup>111</sup>

Some content creators have been claimed for performing simple microphone checks on new equipment.<sup>112</sup> One content creator even received a CIDS-based copyright claim for birds chirping in his video.<sup>113</sup> Even worse, one CIDS has been shown to issue copyright claims against public domain performances by long-dead composers including Bela Bartok, Franz Schubert, Giacomo Puccini, Richard Wagner, and Ludwig van Beethoven.<sup>114</sup>

To avoid these problems, some content creators, such as Danny Gonzalez, have started “performing terrible a capella [*sic*] covers of popular songs” while a corresponding TikTok video plays on screen.<sup>115</sup> This move means that Gonzalez is still able to monetize his video without concerns regarding overzealous copyright infringement claims.<sup>116</sup> Other content creators, such as game critic Jim Sterling, have included copyrighted material from multiple rightsholders in hopes that their content will remain claim free as “the corporations battle it out.”<sup>117</sup> Even though OSPs have begun to provide content creators with tools that allow them to edit allegedly infringing content out of their uploads,<sup>118</sup> the underlying problem

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[www.dexerto.com/entertainment/mrbeast-calls-out-youtube-after-being-hit-false-copyright-strike-357775/](http://www.dexerto.com/entertainment/mrbeast-calls-out-youtube-after-being-hit-false-copyright-strike-357775/) [perma.cc/U8S8-VKPA].

111. See generally Julia Alexander, *YouTube Creators are Using a Hilarious Tactic to Combat Copyright Policies*, VERGE (Mar. 17, 2019), [www.theverge.com/2019/3/17/18265484/tiktok-youtube-danny-gonzalez-kurtis-conner-react-commentary](http://www.theverge.com/2019/3/17/18265484/tiktok-youtube-danny-gonzalez-kurtis-conner-react-commentary) [perma.cc/DD94-J4MA] (describing the method and effectiveness of Danny Gonzalez’s technique of preventing unwarranted Content ID claims on YouTube).

112. *The Mistake So Bad, That Even YouTube Says Its Copyright Bot Really Blew It*, ELECTRONIC FRONTIER FOUND., [www.eff.org/takedowns/mistake-so-bad-even-youtube-says-its-copyright-bot-really-blew-it](http://www.eff.org/takedowns/mistake-so-bad-even-youtube-says-its-copyright-bot-really-blew-it) [perma.cc/L6EB-9AZM] (last visited July 12, 2021).

113. Nancy Messieh, *A copyright claim on chirping birds highlights the flaws of YouTube’s automated system*, NEXT WEB (Feb. 27, 2012), [www.thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/](http://www.thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/) [perma.cc/F7GY-NE88].

114. Ernesto Van der Sar, *YouTube’s Content-ID Flags Music Prof’s Public Domain Beethoven and Wagner Uploads (Updated)*, TORRENT FREAK (Sept. 3, 2018), [www.torrentfreak.com/youtube-targets-music-profs-public-domain-beethoven-and-wagner-uploads-180903/](http://www.torrentfreak.com/youtube-targets-music-profs-public-domain-beethoven-and-wagner-uploads-180903/) [perma.cc/7FYA-QREU].

115. Alexander, *supra* note 111.

116. *Id.*

117. Patricia Hernandez, *Game Critic Uses Brilliant Workaround For YouTube’s Copyright Bullshit*, KOTAKU (Apr. 27, 2016), [www.kotaku.com/game-critic-uses-brilliant-workaround-for-youtubes-copy-1773452452](http://www.kotaku.com/game-critic-uses-brilliant-workaround-for-youtubes-copy-1773452452) [perma.cc/9EAJ-2CQ9] (recognizing that this approach requires a content creator to “actively try and ‘infringe copyright’ to exercise your fair use rights.”).

118. Sarah (TeamYouTube), *New YouTube Studio Tools to Help You Deal with Copyright Claims*, YOUTUBE HELP, (Dec. 19, 2019), [www.support.google.com/youtube/thread/23233238/new-youtube-studio-tools-](http://www.support.google.com/youtube/thread/23233238/new-youtube-studio-tools-)

with CIDS is that they do not recognize fair use.<sup>119</sup> Creators whose content includes fair uses of rightsholders' content may be taken advantage of under the current systems.<sup>120</sup> As such, rightsholders may be misusing their own copyrights via OSPs' automated CIDS.

### III. ANALYSIS

In one of his YouTube videos titled "TikTok's Weirdest Mom,"<sup>121</sup> Danny Gonzalez hopelessly belts snippets of "Believer" by Imagine Dragons,<sup>122</sup> "Let Me Down Slowly" by Alec Benjamin,<sup>123</sup> "In the End" by Linkin Park,<sup>124</sup> and "People Like Us" by Kelly Clarkson,<sup>125</sup> among others, in order to prevent copyright claims simply for reviewing a TikTok video including the songs.<sup>126</sup> As comedic as Gonzalez's strategy is, it highlights the copyright battle faced by content creators, warranting a closer look. Part III of this comment first analyzes YouTube's Content ID and how content creators are disadvantaged by the system. Part III explores the vast reach of fair use through a case study of Danny Gonzalez and evaluates *Lenz v. Universal Music Corp.*, a 2016 Ninth Circuit decision involving a home video being removed from YouTube through DMCA takedown requests.<sup>127</sup> Part III concludes by evaluating solutions proposed by institutional authorities<sup>128</sup> and

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to-help-you-deal-with-copyright-claims?hl=en [perma.cc/NPR2-E8E3] (describing additional information that content creators who receive copyright strikes can use to resolve strikes such as which videos were removed, the claimant, the copyrighted work at issue, the ability to contact YouTube's copyright team, a tool to trim the allegedly infringing content, and a filter to see which videos have been affected by copyright strikes or Content ID claims).

119. Strong, *supra* note 7, at 44 (describing that "user advocacy groups expressed concern that [Content ID] is 'prone to false positives and cannot properly take fair use considerations into account.'" *But see id.* (finding that "some rightsholders argue that [Content ID] fails to capture a significant percentage of unauthorized uploads, forcing content owners to independently search YouTube for infringements.")).

120. *Id.* at 147 n. 787 (reporting several examples of fraudulent or improper takedown requests including an example from Google where a bad actor automated their DMCA takedown request which resulted in "over 50 percent of the DMCA notices [Google] received that week [being] fraudulent.").

121. Danny Gonzalez, *TikTok's Weirdest Mom*, YOUTUBE (Mar. 9, 2019), [www.youtube.com/watch?v=SH7rgUcLix4&t=609s&ab\\_channel=DannyGonzalez](http://www.youtube.com/watch?v=SH7rgUcLix4&t=609s&ab_channel=DannyGonzalez) [perma.cc/GHC5-YDGM].

122. BELIEVER, EVOLVE (Interscope Records & Kidinakorner 2017).

123. LET ME DOWN SLOWLY, NARRATED FOR YOU (Atlantic Recording Corporation 2018).

124. IN THE END, HYBRID THEORY (Warner Bros. Records 2000).

125. PEOPLE LIKE US, GREATEST HITS – CHAPTER ONE (RCA Records 2012).

126. *TikTok's Weirdest Mom*, *supra* note 121.

127. *Lenz*, 815 F.3d at 1148.

128. *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUND., [www.eff.org/pages/fair-use-principles-user-generated-video-content](http://www.eff.org/pages/fair-use-principles-user-generated-video-content) [perma.cc/7J9S-SRCQ] (last visited Jan. 8, 2021).

private entities<sup>129</sup> as well as a review of Section 512 of the DMCA undertaken by the U.S. Copyright Office.<sup>130</sup>

### A. Content ID – Solution to Problems or a Cause Thereof?

This section will analyze ContentID, the CIDS that is implemented by YouTube,<sup>131</sup> to better understand and evaluate the issues with CIDS more generally. Content ID claims offer rightsholders actions that they may take prior to statutorily authorized action.<sup>132</sup> Despite YouTube’s efforts to provide content creators with tools to mitigate copyright claims, these options unfairly favor rightsholders.<sup>133</sup> For instance, filing a DMCA counter notice is an available option for many content creators, but it is highly unrealistic.<sup>134</sup>

Content ID was first developed by YouTube in 2007,<sup>135</sup> shortly after the video-sharing platform prevailed in a lawsuit against Viacom regarding an alleged plot by YouTube to profit from Viacom’s content.<sup>136</sup> Content ID is a fingerprint-based CIDS available to rightsholders who meet YouTube’s standards.<sup>137</sup> The standards include the following criteria, among others: the ability of Content ID to claim the rightsholder’s content, the rightsholder’s “demonstrated need” for Content ID, and the exclusivity of the

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129. Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: Youtube and the Problem With Content ID*, 12 DUKE L. & TECH. REV. 66, 68 (2015); DeLisa, *supra* note 22, at 1301–04; M. Jake Feaver, *Correcting Computer Vision: The Case for Real Eyes After Lenz*, 68 HASTINGS L.J. 397, 415 (2017).

130. Strong, *supra* note 7, at 13.

131. David King, *Content ID turns three*, YOUTUBE OFFICIAL BLOG: NEWS & EVENTS (Dec. 2, 2010), [www.blog.youtube/news-and-events/content-id-turns-three/](http://www.blog.youtube/news-and-events/content-id-turns-three/) [perma.cc/SLX8-NB57].

132. *How Content ID works*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797370?hl=en](http://www.support.google.com/youtube/answer/2797370?hl=en) [perma.cc/8MSL-AMJD] (last visited June 12, 2021).

133. Katharine Trendacosta, *A Tool That Removes Copyrighted Works Is Not a Substitute for Fair Use*, ELECTRONIC FRONTIER FOUND. (Jan. 20, 2020) [www.eff.org/deeplinks/2020/01/tool-removes-copyrighted-works-not-substitute-fair-use](http://www.eff.org/deeplinks/2020/01/tool-removes-copyrighted-works-not-substitute-fair-use) [perma.cc/KX3U-M8LC].

134. Jackie M, *supra* note 12.

135. David King, *Latest content ID tool for YouTube*, GOOGLE OFFICIAL BLOG (Oct. 15, 2007), [www.googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html](http://www.googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html) [perma.cc/ZU2A-L3KY].

136. Todd Spangler, *Why the Viacom-YouTube Case Wasn’t a Giant Waste of Time*, VARIETY (Mar. 18, 2014), [www.variety.com/2014/biz/news/why-the-viacom-youtube-case-wasnt-a-giant-waste-of-time-1201137664/](http://www.variety.com/2014/biz/news/why-the-viacom-youtube-case-wasnt-a-giant-waste-of-time-1201137664/) [perma.cc/6YPX-5Z8K] (arguing that despite spending seven years in litigation only to lose the case, Viacom’s lawsuit catalyzed YouTube’s development of Content ID and expanded its use from exclusively YouTube’s business partners to all copyright holders).

137. *How Content ID works*, *supra* note 132.



rightsholder's rights in the content.<sup>138</sup> After identifying a qualifying rightsholder's content on YouTube, Content ID typically issues a copyright claim against the content automatically.<sup>139</sup> Content ID copyright claims include a usage restriction on the claimed content of a user that can be country-specific.<sup>140</sup> The usage restrictions include blocking the claimed content, monetizing the claimed content, or tracking statistical data on the viewership of the claimed content.<sup>141</sup> A user that uploaded the content flagged by Content ID can accept the Content ID claim, take an action to obviate the claim, or dispute the claim.<sup>142</sup> For users that have uploaded covers of copyrighted music, a fourth option exists where the user may be able to share the revenue generated by the video.<sup>143</sup> Actions to obviate the claim include trimming out the claimed content, removing audio during the claimed portion of the user's video,<sup>144</sup> or swapping the audio during the claimed portion of the user's video with licensed music.<sup>145</sup>

If a user disputes the claim, the claimant must respond within thirty days by releasing the claim, upholding the claim, issuing a formal DMCA takedown request, or issuing a time-delayed DMCA takedown request.<sup>146</sup> The time-delayed DMCA takedown request effectively operates as a threat to intimidate the user to recall their dispute or appeal.<sup>147</sup> If the claimant does not respond within the thirty day limit, the Content ID claim will expire, and the user's video will be released without further action.<sup>148</sup> If the claimant

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138. *Qualify for Content ID*, YOUTUBE HELP, [www.support.google.com/youtube/answer/1311402](http://www.support.google.com/youtube/answer/1311402) [perma.cc/27UR-9F2F] (last visited Jan. 8, 2021).

139. *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/intellectual-property/guide-to-youtube-removals](http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals) [perma.cc/S83Z-H9AQ] (last visited July 12, 2021).

140. *How Content ID works*, *supra* note 132.

141. *Id.*

142. *What is a Content ID claim?*, YOUTUBE HELP, [www.support.google.com/youtube/answer/6013276?hl=en](http://www.support.google.com/youtube/answer/6013276?hl=en) [perma.cc/5DV2-WY6U] (last visited Jan. 8, 2021).

143. *Monetizing eligible cover videos*, YOUTUBE HELP, [www.support.google.com/youtube/answer/3301938?hl=en](http://www.support.google.com/youtube/answer/3301938?hl=en) [perma.cc/9XXC-QMZB] (last visited July 12, 2021).

144. *Remove claimed content from videos*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2902117?hl=en](http://www.support.google.com/youtube/answer/2902117?hl=en) [perma.cc/KSB3-XWVA] (last visited July 12, 2021).

145. *Add an audio track to your video*, YOUTUBE HELP, [www.support.google.com/youtube/answer/94316?hl=en](http://www.support.google.com/youtube/answer/94316?hl=en) [perma.cc/M85T-YY2D] (last visited July 12, 2021).

146. *What happens after I dispute?*, YOUTUBE CREATOR ACADEMY, [www.creatoracademy.youtube.com/page/lesson/respond-to-content-id-claims\\_content-id-disputes-and-appeals\\_list](http://www.creatoracademy.youtube.com/page/lesson/respond-to-content-id-claims_content-id-disputes-and-appeals_list) [perma.cc/F8EB-7VSB] (last visited July 12, 2021).

147. *Dispute a Content ID claim*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797454](http://www.support.google.com/youtube/answer/2797454) [perma.cc/Y922-G9VP] (last visited July 12, 2021).

148. *Id.*

upholds the Content ID claim, the user is then able to appeal.<sup>149</sup> In response to an appeal, the claimant has the same options, still subject to the thirty day limit.<sup>150</sup>

Under a DMCA takedown request, YouTube must take down the claimed content “expeditiously” in order to maintain the safe harbor provision of the DMCA.<sup>151</sup> The time limit for expedient removal is not specified in the DMCA but litigation has determined expediency based on the particular facts of the case, including the amount of content to be removed.<sup>152</sup> Once the claimed content is taken down, the user can file a counter notice which must include their legal reasoning for why their use of the claimed content does not infringe on the copyright holder’s rights.<sup>153</sup> If the user files a counter notice, then the video will be restored or the claimant will file a lawsuit.<sup>154</sup>

When a user receives a Content ID claim on one of their videos but believes that they have fairly used the allegedly infringing content, they are left with the options of obviating the claim, disputing the claim and risking an immediate copyright strike or disputing the claim and being bullied into canceling their dispute.<sup>155</sup> Admittedly, time-delayed DMCA takedown requests do benefit content creators, but functionally, they operate as a threat.<sup>156</sup> These so-called solutions offer content creators one potentially non-

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149. *Id.*

150. *Id.*

151. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(iii) (2021).

152. *See Long v. Dorset*, 369 F. Supp. 3d 939, 946 (N.D. Cal. 2019) (finding that Facebook’s restoration of the rightsholder’s access to his page five day after it was hacked and material subject to his copyright was misused was expeditious); *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 612 (9th Cir. 2018) (finding that removal of 33 infringing video clips on the same date as receipt of notice was expeditious); *Avdeef v. Google, Inc.*, 2015 WL 5076877, at \*1, 3–4 (N.D. Tex. Aug. 26, 2015) (finding that removal 14 days after notice is expeditious).

153. *Submit a copyright counter notification*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2807684](http://www.support.google.com/youtube/answer/2807684) [perma.cc/27KY-JU6C] (last visited July 12, 2021) (warning that if a content creator files a counter notice, the “claimant may use [the] info [in the counter notice] to file a lawsuit against [the content creator] to keep the [flagged] content from being restored to YouTube.”).

154. *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/intellectual-property/guide-to-youtube-removals](http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals) [perma.cc/Q3XU-DL64] (last visited July 12, 2021).

155. *Dispute a Content ID claim*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797454](http://www.support.google.com/youtube/answer/2797454) [perma.cc/S94R-FV2T] (last visited Jan. 8, 2021).

156. *What is a scheduled copyright takedown request?*, YOUTUBE HELP, [www.support.google.com/youtube/answer/9167045?hl=en](http://www.support.google.com/youtube/answer/9167045?hl=en) [perma.cc/2U78-PSBH] (last visited Jan. 8, 2021) (describing that time delayed DMCA takedown requests allow content creators to withdraw a dispute or an appeal without receiving a copyright strike).

inflammatory option: obviating the Content ID claim.<sup>157</sup> These paths forward either assume the content creator has infringed the claimant's copyright or force the content creator to risk their source of income due to monetization restrictions they may be subject to as a result of a DMCA takedown request.<sup>158</sup> Despite fair use, content creators often fail to dispute Content ID claims and instead alter their videos out of fear of a DMCA takedown request.<sup>159</sup> Conversely, when a rightsholder issues a Content ID claim, they have only beneficial options regardless of whether the claimed content actually infringes their copyright.<sup>160</sup>

Each copyright strike lasts for ninety days, disables a content creator's ability to livestream among other features, and may impact the content creator's ability to monetize their videos.<sup>161</sup> If a content creator receives more than three copyright strikes on their channel within an allotted period of time, the entire account and any associated channels may be removed from YouTube.<sup>162</sup> Furthermore, disputing a copyright strike (e.g., the result of a valid DMCA takedown request) opens a content creator up to legal liability because the claimant may sue to maintain the takedown.<sup>163</sup> Simply put, Content ID is an inherently flawed system because it favors claimants over content creators.

While it has been very uncommon for rightsholders to sue individual users of YouTube, the practice has been employed previously for peer-to-peer file sharers.<sup>164</sup> Thus, many content

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157. *Remove claimed content from videos*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2902117?hl=en](http://www.support.google.com/youtube/answer/2902117?hl=en) (last visited Jan. 8, 2021); *Add an audio track to your video*, YOUTUBE HELP, [www.support.google.com/youtube/answer/94316?hl=en](http://www.support.google.com/youtube/answer/94316?hl=en) [perma.cc/67X3-URPX] (last visited Jan. 8, 2021).

158. Trendacosta, *supra* note 133.

159. *Id.*; Jackie M, *supra* note 12.

160. *See What is a Content ID claim?*, YOUTUBE HELP, [www.support.google.com/youtube/answer/6013276?hl=en](http://www.support.google.com/youtube/answer/6013276?hl=en) [perma.cc/S9E8-622S] (last visited Jan. 8, 2021) (providing rightsholders with immediate control over a content creator's video regardless of whether the content actually infringes on the rightsholder's copyright).

161. *Copyright strike basics*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2814000?hl=en](http://www.support.google.com/youtube/answer/2814000?hl=en) [perma.cc/88TV-47B7] (last visited Jan. 8, 2021) (limiting a content creator's ability to livestream only if the flagged content occurred during a livestream).

162. *Id.* (removing all their videos from YouTube and prohibiting creation of new channels on YouTube if a content creator receives three copyright strikes within the allotted period of time); *see also How YouTube Fights Fraudulent Copyright Claims and Takedowns*, YOUTUBE CREATORS (Mar. 26, 2019), [www.youtube.com/watch?v=ddS\\_vmEbUwY&ab\\_channel=YouTubeCreators](http://www.youtube.com/watch?v=ddS_vmEbUwY&ab_channel=YouTubeCreators) [perma.cc/FX7M-CWTL] (describing that tens of thousands of YouTube takedown requests are deemed fraudulent by YouTube every year).

163. *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/intellectual-property/guide-to-youtube-removals](http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals) [perma.cc/9XJJ-2ZV5] (last visited Jan. 8, 2021).

164. *Id.*

creators simply let Content ID claims go unfettered.<sup>165</sup> As a result, Content ID claimants freely monetize, block, and/or track a content creator's content when a claim is undisputed.<sup>166</sup> In 2018, YouTube reported that it has paid out \$3,000,000,000 as a result of Content ID monetization.<sup>167</sup> YouTube also boasts that less than one percent of all Content ID claims are disputed.<sup>168</sup> However, with over 400 hours worth of content being uploaded to the platform every minute (or 24,000 years worth of content being uploaded every year), disputed Content ID claims represent more than 5,700 hours worth of content that is uploaded to YouTube daily.<sup>169</sup> Based on this data, approximately \$30,000,000 of revenue generated from disputed Content ID claims may end up in the hands of rightsholders, despite fair use.<sup>170</sup> With Content ID claims comprising more than ninety-eight percent of all copyright management on YouTube,<sup>171</sup> it's no wonder this relationship has been dubbed a form of techno-feudalism<sup>172</sup> or a de facto licensing agreement because content creators may upload copyrighted works at the cost of their own monetization of the upload.<sup>173</sup>

While Content ID unfairly favors rightsholders, YouTube's CIDS is not totally flawed. Content ID can be used for legitimate copyright purposes, such as preventing the upload of complete copies of copyrighted works or portions thereof that do not fall under the protection of fair use.<sup>174</sup> These are clear violations of U.S. copyright law<sup>175</sup> and are justifiably subjected to Content ID

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165. Jackie M, *supra* note 12.

166. *How Content ID works*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797370?hl=en](http://www.support.google.com/youtube/answer/2797370?hl=en) [perma.cc/Q3NE-8EB2] (last visited Jan. 8, 2021).

167. Paul Sawers, *YouTube: We've Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VENTUREBEAT (Nov. 7, 2018), [www.venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/](http://www.venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/) [perma.cc/68VP-KV49].

168. Stuart Dredge, *YouTube Defends Content ID Following Music Labels' Criticism*, MUSICALLY (Apr. 25, 2016), [www.musically.com/2016/04/25/youtube-defends-content-id-following-music-labels-criticism/](http://www.musically.com/2016/04/25/youtube-defends-content-id-following-music-labels-criticism/) [perma.cc/68YZ-EALE].

169. *Id.*; Kevin Tran, *Viewers Find Objectionable Content on YouTube Kids*, BUS. INSIDER (Nov. 17, 2017), [www.businessinsider.com/viewers-find-objectionable-content-on-youtube-kids-2017-11?utm\\_source=feedly&utm\\_medium=referral](http://www.businessinsider.com/viewers-find-objectionable-content-on-youtube-kids-2017-11?utm_source=feedly&utm_medium=referral) [perma.cc/3E6U-9248].

170. *Monetization During Content ID Disputes*, YOUTUBE HELP, [www.support.google.com/youtube/answer/7000961?hl=en](http://www.support.google.com/youtube/answer/7000961?hl=en) [perma.cc/YWD6-2D9M] (last visited Jan. 8, 2021).

171. Dredge, *supra* note 168.

172. Katrina Geddes, *Meet Your New Overlords: How Digital Platforms Develop and Sustain Techno-feudalism*, 43 COLUM. J.L. & ARTS 455, 476–80 (2020).

173. DeLisa, *supra* note 22, at 1278.

174. Copyright Act of 1976, 17 U.S.C. § 106(1), (2) (2021).

175. *Id.*

copyright claims. However, with the large sum of money at risk,<sup>176</sup> unjustified copyright claims cannot be ignored.

### *B. Fair Use – Disputed Content ID Claims and Danny Gonzalez as a Case Study*

This section will analyze the boundaries of fair use<sup>177</sup> to show when the doctrine applies. Subsequently, this section will argue that TikTok reviews, a common video type on YouTube, fall within the protections of fair use<sup>178</sup> but nevertheless receive Content ID claims.<sup>179</sup> Apart from the other factors of fair use, this argument hinges on the notion that these uses of copyrighted music negligibly impact the value of and the potential market for the copyrighted work.<sup>180</sup>

#### *1. The Boundaries of Fair Use*

Fair use is codified in 17 U.S.C. § 107 and specifies that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>181</sup> Specifically, “in determining whether the use made of a work in any particular case is a fair use,” four factors are considered: the purpose, nature, amount, and effect of the use.<sup>182</sup>

First, the purpose and character of the use determines whether such use is of a commercial nature or is for nonprofit and educational purposes.<sup>183</sup> This factor was derived from “the nature and objects of the selections made,” established in *Folsom*, and primarily focuses on whether the work is transformative in nature.<sup>184</sup> The key determination is whether the work supplants the original. Whether it “merely ‘supersede[s] the objects’ of the original creation,” or whether it instead “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>185</sup> For example, critiques of artistic works such as films or television shows are often considered

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176. *See supra* notes 167-170 (providing a basis for the conclusion that as much as \$30,000,000 or revenue generated from disputed Content ID claims may end up in the hands of rightsholders, despite potential issues concerning fair use).

177. Copyright Act of 1976, 17 U.S.C. § 107 (2021).

178. Alexander, *supra* note 111.

179. *Id.*

180. 17 U.S.C. § 107(4) (2021).

181. *Id.*

182. *Id.*

183. *Id.* at § 107(1).

184. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (citing *Folsom*, 9 F.Cas at 348).

185. *Id.* at 579 (citing *Folsom*, 9 F.Cas at 348).

transformative because they do not simply reproduce the film or television show, but instead alter it by commenting on various excerpts or the entirety of the work.<sup>186</sup>

Second, the nature of the copyrighted work factor<sup>187</sup> focuses on the degree by which the work that was used relates to a copyright's purpose of encouraging creative expression.<sup>188</sup> Under this second factor, using a creative or imaginative work (e.g., a novel, movie, or song) typically cuts against a claim of fair use while using a factual work (e.g., a technical article or news item) weighs in favor of a claim of fair use.<sup>189</sup> This factor also considers whether the work is published; if it is unpublished, this typically favors a finding that the use is not fair.<sup>190</sup> Using non-fictional works or published works often weighs in favor of a finding of fair use, making it more likely that a court would find that the alleged infringement is actually covered under fair use.<sup>191</sup>

The third factor assesses the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>192</sup> This third factor focuses on the quantity and quality of the copyrighted material that was used.<sup>193</sup> The more of a work that is used, the less likely the use will be deemed fair<sup>194</sup>—but using all of a work, or only a fraction of a work, does not preclude a finding of fair use or unfair use, respectively.<sup>195</sup> For fractional uses, if the fraction constitutes the “heart” of the work, the use may be unfair.<sup>196</sup> Using the most significant content within a work cuts against a finding of fair use.<sup>197</sup>

The fourth factor concerns the effect of the use upon the potential market for the copyrighted work or upon the value of the copyrighted work itself.<sup>198</sup> This fourth factor allows the court to consider whether the specific use of the copyrighted work

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186. *What is Fair Use?*, FLA. ATL. UNIV. LIBRS., [www.libguides.fau.edu/scs-copyright/fair-use](http://www.libguides.fau.edu/scs-copyright/fair-use) [perma.cc/7226-A6KX] (last visited July 13, 2021).

187. 17 U.S.C. § 107(2) (2021).

188. *More Information on Fair Use*, U.S. COPYRIGHT OFF., [www.copyright.gov/fair-use/more-info.html](http://www.copyright.gov/fair-use/more-info.html) [perma.cc/95AK-ZHSF] (last visited July 13, 2021).

189. *Id.*

190. *Id.*

191. *What is Fair Use?*, *supra* note 186.

192. 17 U.S.C. § 107(3) (2021).

193. *More Information on Fair Use*, *supra* note 188.

194. *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 565, 569 (1985) (finding that even though a derivative use was “infinitesimal” it was not fair use because the quoted passages were selected “precisely because they qualitatively embodied Ford’s distinctive expression”).

195. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984) (holding that copying entire television programs for private viewing was protected by Fair Use, at least when done for the purpose of time-shifting).

196. *Harper & Row, Publrs.*, 471 U.S. at 564–65.

197. *What is Fair Use?*, *supra* note 186.

198. Copyright Act of 1976, 17 U.S.C. § 107(4) (2021).

significantly harmed the copyright owner or whether, if widespread, the use would harm the market of the original.<sup>199</sup> The burden falls on the rightsholder to demonstrate by a preponderance of the evidence that their market has been or would be substantially harmed by the use.<sup>200</sup> Courts typically consider two types of harm when evaluating the fourth factor.<sup>201</sup> The first is whether the use in question acts as a direct market substitute for the original work.<sup>202</sup> The second is whether a potential market might exist beyond that of direct substitution,<sup>203</sup> such as in the potential existence of a licensing market.<sup>204</sup> Some types of harm are not considered by courts, however, such as those resulting from parody and negative reviews.<sup>205</sup> Courts heavily weigh the market impact of use when making a determination of fair use.<sup>206</sup> Ultimately, the salient issue with the fourth factor is whether reusing work in the manner at issue makes the work less valuable or affects the demand for the work.<sup>207</sup>

## 2. *Danny Gonzalez TikTok Reviews*

YouTuber Danny Gonzalez often includes a capella version of popular songs in lieu of the actual music accompanying a corresponding TikTok video to avoid Content ID claims, and he isn't the only one to do so.<sup>208</sup> Assuming that he intentionally included the music that is subject to a Content ID claim, would that use be fair? To make this determination, an evaluation of (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on the potential market for the copyrighted work is necessary.<sup>209</sup>

Regarding the purpose and character element, the purpose of videos reviewing TikTok, such as those of Danny Gonzalez, is to provide commentary on and/or lampoon embarrassing and awkward TikToks.<sup>210</sup> First, the original creation is music, the object

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199. *Harper & Row, Publr.*, 471 U.S. at 568.

200. *Id.* at 565, 593; *Sony Corp. of Am.*, 464 U.S. at 451.

201. *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 513 (S.D.N.Y. 2017) (considering whether the use impacts any additional markets such as licensing agreements); *Campbell*, 510 U.S. at 591 (considering whether the use constituted a market substitution of the original work).

202. *Campbell*, 510 U.S. at 591.

203. *Lombardo*, 279 F. Supp. 3d at 513.

204. *Campbell*, 510 U.S. at 592.

205. *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 44 F.3d 925, 930–31 (11th Cir. 1995).

206. *Harper & Row, Publr.*, 471 U.S. at 567.

207. *What is Fair Use?*, *supra* note 186.

208. Alexander, *supra* note 111.

209. Copyright Act of 1976, 17 U.S.C. § 107 (2021).

210. Alexander, *supra* note 111.

of which is entertainment.<sup>211</sup> The videos do not merely “repackage or republish the original copyrighted [musical compositions]” but instead evaluate why these video clips are embarrassing and/or awkward.<sup>212</sup> Notably, Gonzalez’s commentary provides insight into why these video clips, when paired with the music, are so uncomfortable or awkward to watch.<sup>213</sup> For example, when a facet of TikTokers began posting point of view (POV) videos, Gonzalez was quick to point out how awkward and embarrassing they were.<sup>214</sup> As such, Gonzalez’s commentary is transformative in nature, thereby weighing in favor of fair use.

With respect to the nature of the copyright work, the music played in the TikTok videos includes original “creative expression[s] for public dissemination,” and therefore “fall[] within the core of the copyright’s protective purposes.”<sup>215</sup> Accordingly, because the nature of the videos falls within copyright’s purpose of encouraging creative expression, the second factor weighs against fair use.<sup>216</sup> The Supreme Court, however, has noted that the second factor sometimes has little impact on a determination of fair use in commentary or parodic uses because such uses often rely on “publicly known, expressive works.”<sup>217</sup>

The evaluation of the third element, the quantity and quality of the copyrighted materials used, is of paramount importance.<sup>218</sup> Danny Gonzalez’s video, “TikTok’s Weirdest Mom,” published March 9, 2019, is fifteen minutes and fifty-two seconds in length and includes excerpts of seven songs that are only featured for eight,

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211. *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003).

212. *Compare id.* (finding the use of television clips to be transformative where “the clips play for only a few seconds and are used for reference purposes while a narrator talks over them or interviewees explain their context in Elvis’ career.”), *overruled on other grounds as stated in Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011) (per curiam), *with Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79, 93 (D. Mass. 2020) (holding that video of live performance did nothing more than “repackage or republish the original copyrighted [musical compositions]” and was not transformative).

213. Andreas Anestis & Christos Gousios, *How Cinema Sounds Affect the Perception of a Motion Picture*, 3 UNIVERSAL J. PSYCHOL. 147, 148 (2015).

214. Danny Gonzalez, *POV I’m Your Vampire Dad*, YOUTUBE (July 24, 2020), [www.youtube.com/watch?v=1tNlsjtMMAQ&t=390s&ab\\_channel=DannyGonzalez](http://www.youtube.com/watch?v=1tNlsjtMMAQ&t=390s&ab_channel=DannyGonzalez) [perma.cc/3WZJ-ZPDG] (describing that POV TikToks are a genre of TikToks where the content creator acts out a scene and the viewer is a character in that scene).

215. *Campbell*, 510 U.S. at 586.

216. *More Information on Fair Use*, *supra* note 188 (describing that “using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item)”).

217. *Campbell*, 510 U.S. at 586.

218. *More Information on Fair Use*, *supra* note 188.



fifteen, four, three, five, seven, and fifteen seconds, respectively.<sup>219</sup> The first excerpt represents an undeterminable percentage of the first song and the second excerpt represents 6.88 percent of the second song.<sup>220</sup> Additionally, the third excerpt represents 1.78 percent of the third song,<sup>221</sup> and the fourth excerpt represents an undeterminable percentage of the fourth song. The fifth excerpt represents 2.45 percent of the fifth song<sup>222</sup> and the sixth excerpt represents 3.41 percent of the sixth song.<sup>223</sup> Finally, the seventh excerpt represents 8.88 percent of the seventh song.<sup>224</sup> In sum, the quantity of copyrighted material accounts for just under six percent of the full playtime of Gonzalez’s video.<sup>225</sup> These clips surely do not reproduce the “heart” of the song.<sup>226</sup> Specifically, two of the excerpts do not use any recognizable portion of the song. While the remaining five excerpts include either portions of the pre-chorus or chorus,<sup>227</sup> they do not include the verses which serve to provide “the listener with more depth and understanding about the song.”<sup>228</sup> Additionally, Gonzalez did not choose these quantities of the songs for their quality, instead they are artifacts of the TikTok videos on which he is commenting.<sup>229</sup> As such, the third factor weighs in favor of fair use.

Regarding the fourth element, Danny Gonzalez’s use of these excerpts has little, if any, effect on the rightsholders’ markets.<sup>230</sup> This use does not in any way provide a direct market substitute for the original songs but instead only includes brief excerpts that are either unrecognizable or only repeat a portion of an element (e.g.,

219. Danny Gonzalez, *TikTok’s Weirdest Mom*, YOUTUBE (Mar. 9, 2019), [www.youtube.com/watch?v=SH7rgUcLix4&t=609s&ab\\_channel=DannyGonzalez](http://www.youtube.com/watch?v=SH7rgUcLix4&t=609s&ab_channel=DannyGonzalez) [perma.cc/G2C3-HYYT].

220. IN THE END, HYBRID THEORY (Warner Bros. Records 2000).

221. PEOPLE LIKE US, GREATEST HITS – CHAPTER ONE (RCA Records 2012).

222. BELIEVER, EVOLVE (Interscope Records & Kidinakorner 2017).

223. LOVE SOMEONE, 3 (THE PURPLE ALBUM) (Copenhagen Records, Then We Take the World & Warner Bros. Records 2018).

224. LET ME DOWN SLOWLY, NARRATED FOR YOU (Atlantic Recording Corporation 2018).

225. *TikTok’s Weirdest Mom*, *supra* note 219.

226. *Harper & Row, Publs.*, 471 U.S. at 564-65.

227. *In the End Lyrics*, GENIUS, [www.genius.com/Linkin-park-in-the-end-lyrics](http://www.genius.com/Linkin-park-in-the-end-lyrics) [perma.cc/V2X2-JG7P] (last visited July 13, 2021); *People Like Us Lyrics*, GENIUS, [www.genius.com/Kelly-clarkson-people-like-us-lyrics](http://www.genius.com/Kelly-clarkson-people-like-us-lyrics) [perma.cc/B7XS-XJRC] (last visited July 13, 2021); *Believer Lyrics*, GENIUS, [www.genius.com/Imagine-dragons-believer-lyrics](http://www.genius.com/Imagine-dragons-believer-lyrics) [perma.cc/W7FF-7FCL] (last visited July 13, 2021); *Love Someone Lyrics*, GENIUS, [www.genius.com/Lukas-graham-love-someone-lyrics](http://www.genius.com/Lukas-graham-love-someone-lyrics) [perma.cc/W9BK-6F4K] (last visited July 13, 2021); *Let Me Down Slowly Lyrics*, GENIUS, [www.genius.com/Alec-benjamin-let-me-down-slowly-lyrics](http://www.genius.com/Alec-benjamin-let-me-down-slowly-lyrics) [perma.cc/26YY-UCTM] (last visited July 13, 2021).

228. Harry Levin, *What is a Verse in a Song and Why it’s Important*, ICON COLLECTIVE (June 22, 2020), [www.iconcollective.edu/what-is-a-verse-in-a-song/](http://www.iconcollective.edu/what-is-a-verse-in-a-song/) [perma.cc/FA7G-KFAX].

229. *Harper & Row, Publs.*, 471 U.S. at 565–66.

230. Copyright Act of 1976, 17 U.S.C. § 107(4) (2021).

pre-chorus, chorus, etc.) of the songs.<sup>231</sup> Danny Gonzalez’s use of these songs stands in stark contrast to complete reproductions of songs on YouTube, which would be a clear violation of U.S. copyright law.<sup>232</sup> While commercial licensing activity may exist between rightsholders and OSPs such as TikTok,<sup>233</sup> it is unlikely that rightsholders “will license critical reviews or lampoons of their own productions” or similar media, including their songs, such as that created by Gonzalez.<sup>234</sup> Thus, the fourth factor weighs in favor of fair use.

Factors one, three, and four weigh in favor of the determination that Danny Gonzalez’s use is fair, including “the single most important element of fair use:” effect.<sup>235</sup> Accordingly, Gonzalez’s use of the copyrighted music is likely fair and a use that is not protected by the copyright protections of the rightsholders per 17 U.S.C § 107.<sup>236</sup>

### C. *Lenz v. Universal Music Corp.* – A Window of Opportunity

Next, this section will analyze *Lenz v. Universal Music Corp.*, a recent Ninth Circuit decision involving a home video that was removed from YouTube via a DMCA takedown request<sup>237</sup> to show the legal basis for requiring rightsholders to consider fair use. This case considered if a copyright claimant must consider whether the allegedly infringing material is a fair use before making a DMCA takedown request.<sup>238</sup> Some have argued that the *Lenz* approach is incorrect, while others find it fitting to the current landscape.<sup>239</sup>

In the landmark 2016 case, *Lenz v. Universal Music Corp.*, the Ninth Circuit considered whether a rightsholder was required to make a determination of good faith before issuing a DMCA

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231. *Campbell*, 510 U.S. at 591.

232. The Copyright Act of 1976, 17 U.S.C. § 106(1), (4), (5), and (6) (2021); *About Piracy*, REC. INDUS. ASS’N OF AM., [www.riaa.com/resources-learning/about-piracy/](http://www.riaa.com/resources-learning/about-piracy/) [perma.cc/HN3Q-AFSS] (last visited July 13, 2021).

233. Frances Josephine Espeso, *Music Publishers Threaten to Sue TikTok for Copyright Infringement – FT*, S&P GLOB. MKT INTEL. (Apr. 6, 2020), [www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/music-publishers-threaten-to-sue-tiktok-for-copyright-infringement-8211-ft-57919103](http://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/music-publishers-threaten-to-sue-tiktok-for-copyright-infringement-8211-ft-57919103) [perma.cc/4YXL-D6GE] (recounting that ByteDance, TikTok’s parent company, already has music licensing agreements with some independent music labels, it has yet to establish such agreements with major music labels such as Universal Music, Warner Music Group Corp., and Sony Music Entertainment Inc.).

234. *Campbell*, 510 U.S. at 592.

235. *Harper & Row, Publrs.*, 471 U.S. at 567.

236. 17 U.S.C. § 107 (2021).

237. *Lenz*, 815 F.3d at 1148.

238. *Lenz*, 815 F.3d at 1151.

239. Strong, *supra* note 7.

takedown request.<sup>240</sup> The case concerned Stephanie Lenz who, in 2007, uploaded a twenty-nine-second home video of her children and family dancing to the song “Let’s Go Crazy” by Prince.<sup>241</sup> At the time of Lenz’s upload, Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively “Universal”) managed Prince’s copyright enforcement.<sup>242</sup>

After reviewing Lenz’s video without explicitly considering fair use, Universal issued a DMCA takedown request to YouTube that was promptly processed.<sup>243</sup> The DMCA takedown request included, in relevant part, a statement in compliance with Section 512(c)(3)(A)(v), which requires “that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”<sup>244</sup> After her video was removed, Lenz issued a counter-notice, her video was reinstated, and she sued Universal on claims of misrepresentation under Section 512(f) of the DMCA, which makes anyone who “knowingly materially misrepresents . . . that material or activity is infringing . . . shall be liable for any damages . . . incurred by the alleged infringer.”<sup>245</sup>

In deciding whether a rightsholder was required to make a determination of good faith before issuing a DMCA takedown request, the Ninth Circuit found that, because “17 U.S.C. § 107 both ‘empowers’ and ‘formally approves’ the use of copyrighted material if the use constitutes fair use, fair use is ‘authorized by the law’ within the meaning of § 512(c).”<sup>246</sup> Accordingly, *Lenz* stands for the proposition that “because 17 U.S.C. § 107 created a type of non-infringing use, fair use is ‘authorized by the law’ and a copyright holder must [have a subjective good faith belief that] fair use [does not apply] before sending a takedown notification under § 512(c).”<sup>247</sup>

Many were left concerned over the result handed down by the Ninth Circuit.<sup>248</sup> One advocacy group, Engine Advocacy, was concerned primarily by the belief that the subjective standard of *Lenz* would allow a claimant to make an objectively false takedown

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240. *Lenz*, 815 F.3d at 1151.

241. *Id.* at 1149.

242. *Id.*

243. *Id.* at 1149–50.

244. *Id.* at 1149; Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A)(v) (2021).

245. *Lenz*, 815 F.3d at 1150; Digital Millennium Copyright Act, 17 U.S.C. § 512(f) (2021).

246. *Lenz*, 815 F.3d at 1152 (citing *Authorize*, BLACK’S LAW DICTIONARY (10th ed. 2014) and 17 U.S.C. § 512(c) (2021)).

247. *Id.* at 1153 (citing 17 U.S.C. § 512(c) (2021)).

248. Strong, *supra* note 7; *see also* Handshoe v. Perret, 270 F. Supp. 3d 915 (S.D. Miss. 2017) (following *Lenz* in a 5th Circuit District Court) *and* Op. Corp. v. Roca Labs, Inc., No. 8:15-CV-811-17AEP, 2016 U.S. Dist. LEXIS 159562 (M.D. Fla. Nov. 17, 2016) (following *Lenz* in an 11th Circuit District Court).

request, so long as they refrained from admitting it was false.<sup>249</sup> Another advocacy group, the Electronic Frontier Foundation, believed that the subjective standard “may reward sloppiness and create[] a perverse incentive for copyright owners not to learn about the law before sending a takedown [request].”<sup>250</sup> However, neither of these concerns appear to be particularly founded in the *Lenz* decision because the court specifically noted that a “copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability.”<sup>251</sup> Another advocacy group, Copyright Alliance, argued that the subjective standard is appropriate because any lower standard “would risk subjecting copyright owners to ‘limitless lawsuits just [for] policing [their] copyrighted material on the Internet,’ on top of the burdens rightsholders already face in enforcing their rights online.”<sup>252</sup>

While the *Lenz* decision impacted DMCA takedown requests, no similar case has addressed CIDS, such as Content ID, which need not include a statement in compliance with Section 512(c)(3)(A)(v) of the DMCA.<sup>253</sup> As such, rightsholders may still issue Content ID claims without making a good faith determination of whether fair use applies.<sup>254</sup> However, OSPs have expressed concern about what liability they may open themselves to by using CIDS under *Lenz*.<sup>255</sup>

#### D. Previously Proposed Solutions

While the Danny Gonzalez case study explored above demonstrates a derivative use that is likely protected by fair use, Content ID will flag similar videos that do not include impromptu cappella. To properly understand the best way to solve the underlying problems with CIDS, this section will conduct a review of some prior approaches. First, this section will review solutions provided by institutional authorities.<sup>256</sup> Then this review will tackle

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249. Strong, *supra* note 7.

250. *Id.*

251. *Lenz*, 815 F.3d at 1154.

252. Strong, *supra* note 7 (citing Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 9 (Apr. 1, 2016)).

253. *The difference between copyright takedowns and Content ID claims*, YOUTUBE HELP, [www.support.google.com/youtube/answer/7002106?hl=en](http://www.support.google.com/youtube/answer/7002106?hl=en) [perma.cc/KAE5-UF6G] (last visited Jan. 8, 2021).

254. *Id.*

255. Strong, *supra* note 7, at 151-52.

256. *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUND., [www.eff.org/pages/fair-use-principles-user-generated-video-content](http://www.eff.org/pages/fair-use-principles-user-generated-video-content) [perma.cc/V9A7-T4C2] (last visited Jan. 8, 2021).

solutions proposed by private entities.<sup>257</sup> Finally, this section will examine a recent review of Section 512 of the DMCA undertaken by the U.S. Copyright Office.<sup>258</sup>

1. *Institutional Authority – Electronic Frontier Foundation: A Good, but Unbalanced Effort*

The Electronic Frontier Foundation (EFF) has been the leading nonprofit defending digital privacy, free speech, and innovation for the last thirty years.<sup>259</sup> The EFF promotes principles that service providers and rightsholders should consider when making copyright claims with CIDS or DMCA takedown requests online.<sup>260</sup> Regarding improvements to CIDS, the EFF recommends that CIDS do not automatically take action (e.g., blocking, monetizing, tracking, etc.) unless the CIDS determines that the content being uploaded was previously taken down via an undisputed DMCA request.<sup>261</sup> Alternatively, the EFF recommends that CIDS do not automatically take action unless the content being uploaded satisfies the following three prong test.<sup>262</sup> First, the EFF recommends that the video included in an upload should match the video of the protected work.<sup>263</sup> Next, the EFF recommends that the audio included in the upload should match the audio of the protected work.<sup>264</sup> Finally, the EFF recommends that nearly the entirety (e.g., greater than or equal to ninety percent) of the upload should include a single copyrighted work.<sup>265</sup>

When evaluating and developing proposed solutions to the problems associated with fair use, it is important to remember to balance the interests of rightsholder's and those of content creators.<sup>266</sup> While the EFF principles are highly beneficial to content creators, they are incredibly averse to rightsholders. A bad actor could easily exploit this high standard and successfully

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257. See generally Bartholomew, *supra* note 129 (arguing for an “institutionalized proportional licensing scheme between uploaders and the original copyright owners.”); See generally DeLisa, *supra* note 22 (arguing that YouTube should implement a compulsory licensing agreement between content creators that use copyrighted works and rightsholders); See generally Feaver, *supra* note 129 (arguing that OSPs should employ legal services to confirm questionable takedown requests).

258. Strong, *supra* note 7, at 13.

259. ELECTRONIC FRONTIER FOUND., [www.eff.org/](http://www.eff.org/) [perma.cc/PKM3-6ZXE] (last visited July 13, 2021).

260. *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUND., [www.eff.org/pages/fair-use-principles-user-generated-video-content](http://www.eff.org/pages/fair-use-principles-user-generated-video-content) [perma.cc/H6E9-LXZ2] (last visited July 13, 2021).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Bartholomew, *supra* note 129, at 86.

circumvent the rightsholders' copyrights. For example, a bad actor might upload, with a first OSP, hundred percent of the video of a protected work but with no audio track, and with a second OSP, upload hundred percent of the corresponding audio track but with no video track. Patrons of the bad actor could then access both the first and second OSPs simultaneously to recreate the complete protected work, despite the EFF's principles suggesting that these two uploads should not be acted upon.<sup>267</sup> Additionally, the near entirety prong<sup>268</sup> is highly unfavorable to rightsholders because it prohibits rightsholders from enforcing legitimate copyright infringement on fractional uses of their protected works.<sup>269</sup> For these reasons, the EFF's principles, while developed in good faith, place an unreasonable onus on the rightsholders and tip the balance unjustifiably in favor of content creators. The EFF's principles essentially reverse the roles and experiences that content creators and rightsholders experience today.<sup>270</sup>

The EFF also encourages rightsholders to implement a fair use hotline that would allow content creators who feel their upload is covered by fair use to contact the rightsholder and give an informal request to remove the copyright claim.<sup>271</sup> While this sounds good in theory, it seems unlikely that a rightsholder would voluntarily remove a claim and admit that the content creator's use of their work is fair simply because such a release and admission is not in the rightsholder's interests. Furthermore, these informal CIDS-based copyright claims are not subject to the same standard as DMCA notice and takedown requests.<sup>272</sup>

## 2. Private Plans – Problems Abound

As opposed to institutions, private plans provide a different perspective to OSPs and Congress. Three authors have introduced prominent ideas as to the future of CIDS and fair use: Taylor Bartholomew, Nicholas DeLisa, and M. Jake Feaver.

The first private solution was provided by Taylor Bartholomew in his paper, *The Death of Fair Use in Cyberspace: YouTube and the Problem With Content ID*.<sup>273</sup> In his paper, Bartholomew describes the problems that content creators on YouTube face with respect to

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267. *Fair Use Principles for User Generated Video Content*, *supra* note 260.

268. *Id.*

269. *Harper & Row, Publs.*, 471 U.S. at 564-65.

270. *Compare Fair Use Principles for User Generated Video Content*, *supra* note 260 (providing many benefits for content creators at the expenses of rightsholders) with *What is a Content ID claim?*, YOUTUBE HELP, [www.support.google.com/youtube/answer/6013276?hl=en](http://www.support.google.com/youtube/answer/6013276?hl=en) [perma.cc/2PEN-HEZX] (last visited Nov. 1, 2020) (providing many benefits for rightsholders at the expense of content creators).

271. *Fair Use Principles for User Generated Video Content*, *supra* note 260.

272. Digital Millennium Copyright Act, 17 U.S.C. § 512(f) (2021).

273. Bartholomew, *supra* note 129, at 66–69.

Content ID, such as “indiscriminate flagging of legitimate uses of original content” and “shift[ing] the neutral presumption of fair use against” content creators.<sup>274</sup> To solve these issues, Bartholomew suggests that YouTube should impose an “institutionalized proportional licensing scheme between uploaders and the original copyright owners” that would allow uploaders to share a portion of their revenue with the rightsholder where the share would be proportional to the amount of copyrighted material subject to the claim.<sup>275</sup> However, Bartholomew acknowledges that this fails to address instances of fair use and could lead to abusive licensing regimes.<sup>276</sup> Specifically, Bartholomew describes that such a licensing scheme would “create[] a market for licensing works that do not have to be legally licensed,” thereby leading to abuse.<sup>277</sup>

Bartholomew also argues that YouTube should increase the number of copyright strikes and the number of appeals that a user can receive before their channel is terminated.<sup>278</sup> While this approach seems good in theory, it would make more lenient YouTube’s “policy . . . for the termination . . . of subscribers and account holders . . . who are repeat infringers,” which would potentially create issues for YouTube’s safe harbor privilege.<sup>279</sup> Additionally, this system keeps the responsibility on the content creator to defend fair use, despite the fact that courts have recognized that rightsholders “must consider the existence of fair use before sending a takedown notification” in similar contexts.<sup>280</sup> Bartholomew also notes that this change would still fail to prevent unfounded copyright claims.<sup>281</sup>

Bartholomew is not optimistic that CIDS such as Content ID can be fully automated,<sup>282</sup> a sentiment shared by some OSPs.<sup>283</sup> However, he does note that Content ID could be altered to assess the commercial nature and transformativeness of an upload.<sup>284</sup> Regarding the nature of the copyrighted use, Bartholomew posits an evaluation based on the metadata surrounding an upload, such as the title, but realizes that a bad actor could easily subvert an automated analysis by including false or misleading metadata.<sup>285</sup>

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274. *Id.* at 68.

275. *Id.*

276. *Id.*

277. *Id.* at 85–86.

278. *Id.* at 86.

279. Digital Millennium Copyright Act, 17 U.S.C. § 512(i)(1)(A) (2021).

280. *Lenz*, 815 F.3d at 1153.

281. Bartholomew, *supra* note 129, at 86.

282. *Id.* at 87.

283. Strong, *supra* note 7, at 151 n.812, 152 n.813.

284. Bartholomew, *supra* note 129, at 86 (describing that Content ID could assess the commerciality of an upload based on whether that upload is monetized, and that Content ID could assess the transformativeness of the upload based on the number of novel instances in the upload, the type of novel instances, and the number of infringing instances).

285. *Id.*

Finally, Bartholomew suggests that to evaluate the amount and substantiality of the use, Content ID could determine the percentage of the protected work that was used and that the percentage could be compared to a judicially-created threshold.<sup>286</sup> In the end, Bartholomew offers creative changes to improve Content ID but does not shy away from the understanding that these changes are flawed and could be obviated by bad actors. Moreover, his judicially created threshold for the amount and substantiality<sup>287</sup> seems to be too binary of an approach given the complex analysis performed by courts with respect to this element of fair use.<sup>288</sup>

Next, in his paper, *You(Tube), Me, and Content ID: Paving The Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, Nicholas DeLisa argues that YouTube and other OSPs should establish a compulsory licensing agreement between content creators that use copyrighted works and the rightsholders.<sup>289</sup> While DeLisa recognizes that such a compulsory licensing regime would subject content creators who fall within fair use to an unrequired license, he believes this would not be an issue for content creators.<sup>290</sup> DeLisa describes that the licensing fee under a compulsory licensing regime would either fall on advertisers or content creators themselves.<sup>291</sup>

While content creators footing the bill for videos that do not fall under the umbrella of fair use might be happy to do so, those paying licensing fees for videos that are protected by fair use would not likely maintain the same sentiment. Given the incredible sums of money at issue regarding false Content ID claims, this does not seem like an issue content creators would or should let slide.<sup>292</sup> Additionally, this solution continues to place the burden on content creators to retrieve the revenue that is rightfully theirs. Alternatively, if advertisers are responsible for paying licensing fees, they would almost certainly like to retain the money at stake.<sup>293</sup> Additionally, the scenario where advertisers pay licensing fees may result in driving advertisers from OSPs, which would not be in either the OSPs', content creators', or rightsholders'

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286. *Id.* at 87–88.

287. *Id.*

288. *Compare Harper & Row, Publs.*, 471 U.S. at 565, 569 (finding that even though a derivative use was “infinitesimal” it was not fair use because the quoted passages were selected “precisely because they qualitatively embodied Ford’s distinctive expression) *with Sony Corp. of Am.*, 464 U.S. at 455 (holding that copying entire television programs for private viewing was protected by fair use, at least when done for the purpose of time-shifting).

289. DeLisa, *supra* note 22, at 1301–04.

290. *Id.* at 1303.

291. *Id.* at 1313–14.

292. Paul Sawers, *YouTube: We’ve invested \$100 million in Content ID and paid over \$3 billion to rightsholders*, VENTUREBEAT (Nov. 7, 2018) [www.venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/](http://www.venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/) [perma.cc/6HDP-YVDE].

293. *Id.*



interests.<sup>294</sup>

Finally, M. Jake Feaver suggests in his paper, *Correcting Computer Vision: The Case for Real Eyes After Lenz*, that solving issues with fair use requires OSPs to employ human review as a safety net.<sup>295</sup> Feaver notes that current CIDS are unable to recognize fair use, and thus encourages OSPs to employ legal services to identify whether a particular takedown request is fair use.<sup>296</sup> Specifically, Feaver notes that some OSPs, such as YouTube, already implement systems that ask rightsholders to confirm potential claims<sup>297</sup> when, for example, Content ID renders the claim with low confidence.<sup>298</sup> He also identifies that many rightsholders already employ attorneys that can and do make determinations of fair use and that for smaller rightsholders, public interest groups and legal clinics could provide the requisite legal counsel.<sup>299</sup>

Feaver argues that if no human intervention is employed, the millions of questionable claims made each year should be punished.<sup>300</sup> YouTube has some sort of rightsholder penalty system that is invoked for “abusive or fraudulent claims,” although the specifics of the system are not available.<sup>301</sup> Feaver provides a good approach, but in so far as he discusses it, the approach is only applied to automated takedown requests made via Content ID. It is not extended to content restrictions levied by Content ID (e.g., monetization, blocking, tracking),<sup>302</sup> which are not subject to Section 512(f) of the DMCA.<sup>303</sup>

### 3. Governmental Approach

On May 21, 2020, the U.S. Copyright Office published a report evaluating the effectiveness of Section 512 of the DMCA.<sup>304</sup> It found that Section 512 of the DMCA is unbalanced and favors OSPs in spite of content creators’ and rightsholders’ interests.<sup>305</sup> Regarding fair use, the report indicates that many rightsholders are

294. DeLisa, *supra* note 22, at 1314.

295. Feaver, *supra* note 129.

296. *Id.*

297. *Id.*

298. *Review potential claims*, YOUTUBE HELP, [www.support.google.com/youtube/answer/3310838](http://www.support.google.com/youtube/answer/3310838) [perma.cc/86JD-Y8NB] (last visited Nov. 1, 2020).

299. Feaver, *supra* note 129.

300. *Id.* At 416.

301. *Clean up incorrect claims*, YOUTUBE HELP, [www.support.google.com/youtube/answer/4352063?hl=en&ref\\_topic=3011554](http://www.support.google.com/youtube/answer/4352063?hl=en&ref_topic=3011554) [perma.cc/6JRW-TE6P] (last visited Nov. 1, 2020).

302. *How Content ID works*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797370?hl=en](http://www.support.google.com/youtube/answer/2797370?hl=en) [perma.cc/DMG9-ZZ4T] (last visited Nov. 1, 2020).

303. Digital Millennium Copyright Act, 17 U.S.C. § 512(f) (2021).

304. Strong, *supra* note 7, at 1.

305. *Id.* at 72-83.

“uncertain about [the] implication of *Lenz* for their ability to use automated processes to identify infringing material and send takedown notices.”<sup>306</sup> Chiefly this concern resonates with rightsholders who fear they may be open to liability for sending takedown requests without considering fair use, regardless of whether the flagged content is actually infringing.<sup>307</sup>

In response to these concerns, the U.S. Copyright Office suggested that Congress monitor the effect of the *Lenz* decision to see how courts apply this ruling.<sup>308</sup> In particular, the Office suggested that if rightsholder liability gets out of control, Congress should consider clarifying the statutory language on which *Lenz* is based.<sup>309</sup> Because fair use is not an excused infringement to a rightsholder’s copyright, but instead, no infringement whatsoever,<sup>310</sup> rightsholder’s are required by Section 512(c)(3)(A)(v) to consider whether fair use applies before issuing a takedown request.<sup>311</sup> Additionally, while it is important to prevent overzealous lawsuits against either rightsholders or content creators, it seems unrealistic that a creator whose use of a protected work does not fall under the doctrine of fair use would sue a rightsholder for violating their duty under *Lenz*.

#### IV. PROPOSAL

Part IV of this comment proposes improvements that OSPs can make to their CIDS. However, if OSPs do not implement these or similar changes, Part IV of this comment proposes a last resort option that content creators could employ to protect their rights online.

##### A. Improvements to CIDS

The ultimate goal for any fair use solution is to improve CIDS to the point where it can recognize fair use at a level that makes unfounded copyright claims almost negligible. Up to this point, this comment has analyzed solutions that either ignore the concerns of content creators or offer a temporary fix that does not solve the underlying issues. A better solution would be to look at the technology behind CIDS itself.

The content matching aspects of CIDS are implemented

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306. *Id.* at 151.

307. *Id.* at 152.

308. *Id.* at 5.

309. *Id.* at 152.

310. *Lenz*, 815 F.3d at 1152–53 (agreeing with the proposition that as a common law doctrine, fair use “was an infringement that was excused[,]” but as a statutory doctrine, fair use “should no longer be considered an infringement to be excused” but “as a right.”).

311. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A)(v) (2021).

through algorithms that rely on artificial intelligence.<sup>312</sup> Generally, during a training phase, artificial intelligence systems are trained using data that reflect patterns existing in real-world scenarios to which the artificial intelligence system will be applied.<sup>313</sup> After the artificial intelligence system is trained, the entity that trained it may deploy the artificial intelligence system for use in an inference phase where the artificial intelligence system analyzes real-time data to determine a result according to its training.<sup>314</sup> Thus, a better solution to the underlying issues related to CIDS would be to modify and improve the training. Specifically, OSPs could include documented examples of fair use in the training data used to create CIDS. In their paper, *The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music Creation*, Professors Toni Lester and Dessislava Pachamanova encouraged adjusting the training of CIDS.<sup>315</sup> Although their work suggested improving training data and including humans in the training process, it did not suggest a mechanism by which to achieve the result.<sup>316</sup>

Contrary to Lester and Pachamanova, this comment proposes that major OSPs form a coalition to develop a training dataset for CIDS that includes documented examples of what does and does not fall under the purview of fair use. Specifically, this dataset could be formed by looking to previously adjudicated fair use cases. A comprehensive training dataset could easily be developed using examples of fair use jurisprudence compiled by institutional authorities,<sup>317</sup> and legal databases, such as Lexis and Westlaw.

By forming and regularly updating this dataset, OSPs can be confident in the training data and the inferences of the CIDS being used. To form the dataset, OSPs could involve copyright experts in the training process. Specifically, to develop the training data, these copyright experts would work with technical experts to filter out salient data from the previously settled fair use issues. Employing copyright experts would likely be cost prohibitive for an individual OSP, therefore OSPs should form a coalition that reduces the capital burden on any one OSP. This coalition could start with the major online social media platforms (e.g., YouTube, Facebook, Twitter, Reddit, etc.) and other OSPs who have the infrastructure

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312. Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24(1) UCLA ENT. L. REV. 51, 68 (2017).

313. Paul DeBeasi, *Training Versus Inference*, GARTNER (Feb. 14, 2019), [www.blogs.gartner.com/paul-debeasi/2019/02/14/training-versus-inference/](http://www.blogs.gartner.com/paul-debeasi/2019/02/14/training-versus-inference/) [perma.cc/W6AE-WML8].

314. *Id.*

315. Lester & Pachamanova, *supra* note 312, at 68–69.

316. *Id.*

317. *Summary of Fair Use Cases*, STAN. UNIV. LIBRS., [www.fairuse.stanford.edu/overview/fair-use/cases/#internet\\_cases](http://www.fairuse.stanford.edu/overview/fair-use/cases/#internet_cases) [perma.cc/U2TR-UHUL] (last visited Nov. 21, 2020).

in place to establish such a dataset. Lester and Pachamanova caution, however, that individual programmers may unintentionally infuse their own biases into CIDS.<sup>318</sup> To prevent major OSPs from infusing their biases, the coalition should eventually include smaller scale social media platforms and other small scale OSPs to represent and protect their interests in online copyright protection.

These improvements to training data would help solve the ultimate problem of fair use online. In the meantime, flawed CIDS, such as Content ID, still remain in effect. As CIDS are augmented to identify fair use, OSPs should employ alternative techniques to reduce incorrect claims.

### B. Candidates for Fair Use – A New Content ID

CIDS must be adjusted to accommodate for fair use. While a potential solution would be to increase the threshold of time used to identify infringing content,<sup>319</sup> even using the entirety of copyrighted works can be considered fair.<sup>320</sup> Regarding Content ID and similar CIDS, a better change would be for OSPs to identify content that may fall under the guise of fair use when making Content ID claims. These non-DMCA takedown request claims can then be reviewed by copyright experts to evaluate whether they qualify for fair use. This augmentation to the current Content ID could be put in place while OSPs improve the training data for CIDS.

YouTube already asks rightsholders to confirm potential Content ID claims.<sup>321</sup> The potential Content ID claims can result from poor confidence in Content ID's flagging of the content or a rightsholder's match policy.<sup>322</sup> Each rightsholder can specify their own match policy which includes "the type of content that matches [the] reference file" (e.g., audio and/or video), "the length or percent of the uploaded video that matches [the] reference file," and "the length or percent of [the] reference file that matches the" flagged content.<sup>323</sup> However, YouTube does not specify a baseline match policy that all custom match policies must exceed.

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318. Lester & Pachamanova, *supra* note 312, at 68.

319. Jonathan Bailey, *YouTube's Copyright Insanity*, PLAGIARISM TODAY (Jan. 10, 2019), [www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/](http://www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/) [perma.cc/ZC8A-Y6AK].

320. *Sony Corp. of Am.*, 464 U.S. at 455.

321. *Review potential claims*, YOUTUBE HELP, [www.support.google.com/youtube/answer/3310838](http://www.support.google.com/youtube/answer/3310838) [perma.cc/EZ6Y-YENT] (last visited Nov. 1, 2020).

322. *Id.*; *Route claims for manual review*, YOUTUBE HELP, [www.support.google.com/youtube/answer/106966](http://www.support.google.com/youtube/answer/106966) [perma.cc/FML6-9V5D] (last visited Nov. 1, 2020).

323. *Upload and match policies*, YOUTUBE HELP, [www.support.google.com/youtube/answer/107129](http://www.support.google.com/youtube/answer/107129) [perma.cc/G5YJ-W45K] (last visited Nov. 1, 2020).

Identifying fair use candidates could be made in combination with increasing the threshold for detection or implementing a baseline match policy. Identifying content that may fall under the guise of fair use would involve, for each rightsholder, generating a report identifying content that is potentially fair use. This report could include the content that is identified as potentially falling under fair use, the CIDS confidence that the content is or is not a fair use, and a listing of criteria that the CIDS used to make its determination. The report could be sent to a rightsholder who could then undertake a good faith effort to evaluate the potentially infringing works for fair use. After the rightsholders make their determination regarding fair use, the output of this process could be fed into the training dataset to aid in its creation and refinement.

This may seem to perpetuate some of the problems that fostered the development of CIDS in the first place.<sup>324</sup> However, rightsholders with large copyright repositories have demonstrated that they are already willing to spend significant capital to evaluate the merits of material uploaded to OSPs' platforms.<sup>325</sup> Additionally, requiring this review of smaller scale rightsholders would not be impractical. Smaller scale rightsholders have smaller copyright repositories and would likely have smaller amounts of potential fair use cases to review, making such review more manageable. This aspect is distinguishable from Feaver, who only suggested applying a human review section to DMCA takedown requests and did not supplement training data with the output of such review.

### *C. Rightsholder Copyright Strikes – Evening the Playing Field*

The goal of the rightsholder-focused copyright strike system would be to discourage baseless CIDS claims. Accordingly, OSPs should develop a copyright strike system for rightsholders. Currently, such a system exists, but no specifics are available.<sup>326</sup> Specifically, OSPs could employ a periodic (e.g., weekly, monthly, yearly, etc.) limit on the number of unfounded claims that rightsholders can leverage using CIDS. This type of system would not prevent rightsholders from enforcing their copyrights because it would still allow them the ability to control their works on an OSP's platform through formal DMCA takedown requests. Importantly, under this system, rightsholders would not be able to abuse DMCA takedown requests, tipping the power balance back towards content

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324. DeLisa, *supra* note 22, at 1285.

325. Stuart Dredge, *YouTube defends Content ID following music labels' criticism*, MUSICALLY (Apr. 25, 2016), [www.musically.com/2016/04/25/youtube-defends-content-id-following-music-labels-criticism/](http://www.musically.com/2016/04/25/youtube-defends-content-id-following-music-labels-criticism/) [perma.cc/KM9V-4JY2].

326. *Clean up incorrect claims*, YOUTUBE HELP, [www.support.google.com/youtube/answer/4352063?hl=en&ref\\_topic=3011554](http://www.support.google.com/youtube/answer/4352063?hl=en&ref_topic=3011554) [perma.cc/5Z43-N9KT] (last visited Nov. 1, 2020).

creators. Specifically, under *Lenz*, rightsholders would still be required to make subjective good faith evaluations of whether fair use applies to their claims.<sup>327</sup> This rightsholder-focused copyright strike system could be implemented with the candidate Content ID claims while OSPs further develop the improved training data.

While the rightsholder-focused copyright strike system may appear to open OSPs to liability for interfering with the rightsholders' copyrights, OSPs already subject themselves to this risk.<sup>328</sup> YouTube routinely evaluates the legitimacy of Content ID claim disputes.<sup>329</sup> Additionally, it is unlikely that OSPs would be open to liability because under the proposed system, OSPs would still allow rightsholders to issue formal DMCA takedown requests, thereby preserving their safe harbor privileges.<sup>330</sup>

Rightsholders are not likely to find the fair use candidacy system or the rightsholder-focused copyright strike system amenable.<sup>331</sup> For example, major rightsholders already argue that Content ID and similar systems do not go far enough in catching alleged infringement.<sup>332</sup> However, simply because rightsholders do not favor these new additions to CIDS does not mean they are invalid or unworthy of consideration. Fair use has been recognized as a legal right<sup>333</sup> and therefore should not be tossed aside simply because rightsholders wish it did not exist.

#### *D. Last Resort – Class Action Retaliation*

Finally, if all else fails, content creators could sue outright under the Copyright Act of 1976 because they are entitled to copyrights in their works even if they fall under the fair use doctrine.<sup>334</sup> Specifically, the creators would be suing under a theory that when their works qualify as fair use, the blocking, monetization, and/or tracking of their works constitutes infringement on their exclusive rights under 17 U.S.C. § 106(3).<sup>335</sup> As mentioned previously, the effort for an individual content creator to file a copyright lawsuit may not be worth it due to their limited means and the small amount each individual would likely

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327. *Lenz*, 815 F.3d at 1152.

328. *Dispute a Content ID claim*, YOUTUBE HELP, [www.support.google.com/youtube/answer/2797454](http://www.support.google.com/youtube/answer/2797454) [perma.cc/63YU-P3BR] (last visited Nov. 1, 2020).

329. *Id.*

330. *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/intellectual-property/guide-to-youtube-removals](http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals) [perma.cc/JPG8-QQ4H] (last visited July 15, 2021); Digital Millennium Copyright Act, 17 U.S.C. § 512(e) (2021).

331. Dredge, *supra* note 325.

332. *Id.*

333. *Lenz*, 815 F.3d at 1152.

334. Copyright Act of 1976, 17 U.S.C. § 106 (2021).

335. *Id.* at § 106(3).

recover.<sup>336</sup> However, content creators may be able to sue rightsholders as a class.<sup>337</sup>

A successful content creator or group of successful content creators could file a lawsuit against the Big Three music labels, provided they register their copyrights in their works.<sup>338</sup> The Big Three music labels include Sony Music Entertainment, Universal Music Group, and Warner Music Group which collectively, made up more than sixty percent of the market share for revenue in the music industry in 2018 and are likely to continue to increase their control over the market.<sup>339</sup>

U.S. Copyright law prohibits “civil action for infringement” before “preregistration or registration of the copyright claim has been made.”<sup>340</sup> Many content creators do not register their copyrights simply because laypeople are unaware of their rights or they do not know that registration is needed to file a lawsuit.<sup>341</sup> Thus, a condition to be a member of the class could be that content creators must register their copyrights prior to claiming what is owed to them in any settlement or damages.<sup>342</sup>

It is important to look at the impacts such a lawsuit would have on the copyright industry. Filing a class action lawsuit against the Big Three music labels would generate significant publicity that is likely to bring negative attention to the music labels.<sup>343</sup> The lawsuit, as well as the negative attention, may cause the Big Three and other rightsholders to take a closer look at their Content ID practices on YouTube and their practices on other OSPs. Additionally, whether the case ends in a settlement or a verdict for the plaintiffs, rightsholders are likely to reconsider completely automating their CIDS policies across OSPs. Thus, such a lawsuit would be beneficial for content creators on YouTube and other platforms despite the costs associated therewith.

## V. CONCLUSION

In sum, the current systems implemented to prevent copyright infringement on OSPs are overly broad and frustratingly capture content that does not amount to a violation of rightsholder’s copyrights. CIDS currently in place allow those copyright claimants

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336. Jackie M, *supra* note 12.

337. Fed. R. Civ. P. 23.

338. 17 U.S.C. § 411(a) (2021).

339. Jackie M, *supra* note 12.

340. 17 U.S.C. § 411 (2021).

341. *Id.* at § 411(a).

342. *Id.* at §§ 411, 501(a).

343. *Class Action Lawsuits Seem Good but Have a Lot of Drawbacks That Don't Make Them Very Ideal*, N.C. CONSUMERS COUNCIL, [www.nconsumer.org/news-articles-eg/class-action-lawsuits-sound-like-a-good-thing-but-they-arent-always-that-great-for-you.html](http://www.nconsumer.org/news-articles-eg/class-action-lawsuits-sound-like-a-good-thing-but-they-arent-always-that-great-for-you.html) [perma.cc/V7YJ-S6J2] (last visited July 15, 2021).

who lack a valid claim to monetize that content and unfairly take revenue away from the content creator. OSPs should adjust CIDS to allow copyright holders to perform a good faith analysis of whether potentially infringing content is a fair use of their copyrighted work. CIDS should concurrently be improved by augmenting the training data used to create it with known examples of fair use.

OSP's have the ability, and perhaps the obligation, to implement a framework to limit the number of unfounded claims a rightsholder can make during a specified period, and thereby discourage the practice of making illegitimate claims while encouraging rightsholders to perform good faith analyses. If OSPs do not take the initiative to protect content creators from the abuses of copyright holders, the content creators may be able to find recourse through the courts under the very acts that have been used to harm them.



