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NOTE

FAIR USERS OR CONTENT ABUSERS? THE AUTOMATIC FLAGGING OF NON-INFRINGEMENT VIDEOS BY CONTENT ID ON YOUTUBE

I. INTRODUCTION

When was the last time you watched a video on YouTube? How about the last time you uploaded one onto the site? Now, when was the last time you thought about the copyright implications of any of those videos? Most people have probably never contemplated the implications of copyright law with respect to YouTube, and that is where the trouble begins, because copyright law has not caught up with modern means of creation on the Internet.¹

Congress did recognize the necessity of updating copyright laws in the late 1990s when it enacted the Digital Millennium Copyright Act² (“DMCA”), but since then, the law has not progressed, while the Internet has grown in leaps and bounds.³ Not only has the Internet expanded, but so has the popularity of video-sharing websites.⁴ Title II of the DMCA governs the liability of Internet service providers (“ISPs”) for copyright

1. See U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (1998), <http://www.copyright.gov/legislation/dmca.pdf> (summarizing the Digital Millennium Copyright Act (“DMCA”), which, in 1998, was the last change made to copyright law); Martin B. Robins, *A Good Idea at the Time: Recent Digital Millennium Copyright Act § 512(c) Safe Harbor Jurisprudence—Analysis and Critique of Current Applications and Implications*, 15 TUL. J. TECH. & INTELL. PROP. 1, 3-5 (2012).

2. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 101-1301 (2012)).

3. 17 U.S.C. § 512; Robins, *supra* note 1, at 3-5.

4. See David E. Ashley, Note, *The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 563, 572-73 (2010) (mentioning the tremendous growth of YouTube since its inception, which Congress did not anticipate when enacting the DMCA). See generally U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001) (recognizing that “the only thing that remains constant is change”), <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

infringement by website users.⁵ One of the functions of the DMCA is to provide safe harbors to ISPs that limit their liability for infringement on their websites.⁶ To be eligible for these safe harbors, however, ISPs have to meet a series of criteria.⁷

Since the DMCA has been around for well over a decade, its application to websites like YouTube⁸ indicates that it is governing websites that did not even exist when it was enacted in 1998.⁹ As a result, the application of the DMCA heavily favors the mass media copyright holders, and not the small users who generate much of the content on YouTube.¹⁰ Furthermore, YouTube launched an automated digital fingerprinting system, called “Content ID,” in 2007.¹¹ This system makes it much easier, and much more likely, for user-generated content to be flagged as infringing, regardless of the context in which it is uploaded.¹² The favoritism that arises and the automated systems

5. See U.S. COPYRIGHT OFFICE, *supra* note 1, at 1, 8.

6. 17 U.S.C. § 512(c)(1).

7. See *id.*

8. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25-26, 40, 42 (2d Cir. 2012) (holding that 17 U.S.C. § 512(c) is applicable to YouTube, and that YouTube is eligible for the limitations on liability that the section provides).

9. Robins, *supra* note 1, at 4.

10. See Patrick McKay, Note, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 124-27 (2011) (discussing the DMCA takedown procedure and the dominant position that mass media has in easily stopping online expression without any consequences). Henry Jenkins identifies the problem with current copyright law as follows:

Current copyright law simply doesn’t have a category for dealing with amateur creative expression. Where there has been a “public interest” factored into the legal definition of fair use . . . it has been advanced in terms of legitimated classes of users and not a generalized public right to cultural participation. Our current notion of fair use is an artifact of an era when few people had access to the marketplace of ideas, and those who did fell into certain professional classes. It surely demands close reconsideration as we develop technologies that broaden who may produce and circulate cultural materials.

HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 189 (2006). For purposes of this Note a “mass media copyright holder” is a “major media compan[y] that control[s] significant copyrighted properties” and a “small user” is a “non-professional creator[] of User-Generated Video Content.” Ashley, *supra* note 4, at 570.

11. See Bryan E. Arsham, Note, *Monetizing Infringement: A New Legal Regime for Hosts of User-Generated Content*, 101 GEO. L.J. 775, 791 (2013); Thabet Alfshawi, *Improving Content ID*, YOUTUBE OFFICIAL BLOG (Oct. 3, 2012), <http://youtube-global.blogspot.com/2012/10/improving-content-id.html>.

12. See Taylor B. Bartholomew, Note, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 69-70 (2015) (pointing out that frivolous claims get filed through Content ID that never would have been filed otherwise); see also *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370> (last visited Nov. 22, 2015) (describing how the system works).

used contradict the constitutional purpose of copyright law because they discourage smaller users from creating content for fear of being sued for infringement.¹³

This Note will explore the problems inherent in the Content ID system, given the fact that it is automated and the law governing copyright favors mass media holders.¹⁴ Part II of this Note will explain the development of the impact of copyright law on the Internet, focusing on the DMCA and its application to YouTube.¹⁵ Part II will also explore how the DMCA affects users and the content they generate.¹⁶ Then, Part III will begin with a discussion of the increasing use of automated infringement filters by ISPs and the problems with automated systems like Content ID.¹⁷ The first problem Part III will examine is the system's inability to recognize fair use coupled with the necessity of educating users about their rights under the fair use doctrine.¹⁸ The second problem Part III will address is the disproportionate monetization of videos flagged by the system, which allows mass media copyright holders and YouTube to split all of the profits, while the content creator gets nothing.¹⁹ Part IV of this Note will propose additional statutory provisions to be enacted for educating users about their rights—in the hope that it will encourage them to use the counter-notification systems available to them—and requiring proportional monetization of videos for content creators who largely upload original works.²⁰ This Note will conclude by reaffirming the notion that copyright law must be updated to catch up with the modern Internet, including updating protections for users and the content they generate.²¹

II. THE HISTORY AND IMPLEMENTATION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

In order to properly understand where copyright law stands today and the significance of the DMCA, it is important to first understand the

13. See U.S. CONST. art. I, § 8, cl. 8; Ashley, *supra* note 4, at 570, 587-88; Andrea Frey, Note, *To Sue or Not to Sue: Video-Sharing Web Sites, Copyright Infringement, and the Inevitability of Corporate Control*, 2 BROOK. J. CORP. FIN. & COM. L. 167, 170 (2007) (noting that the framers of the Constitution recognized “the value of artistic expression” when including clause 8 of Article I).

14. See *infra* Parts II–III.

15. See *infra* Part II.A–C.

16. See *infra* Part II.D.

17. See *infra* Part III.

18. See *infra* Part III.B.

19. See *infra* Part III.C.

20. See *infra* Part IV.

21. See *infra* Part V.

origins of copyright law in the United States.²² Therefore, Subpart A will outline a very brief history of U.S. copyright law.²³ Once this background is established, Subpart B will cover the evolution of copyright law and the Internet with the enactment of the DMCA.²⁴ Next, Subpart C will use case law to explore the application of the DMCA to ISPs, specifically video-sharing websites like YouTube.²⁵ Finally, Subpart D will examine the treatment of user-generated content under the DMCA in the current, increasingly user-generated online world.²⁶

A. A Brief History of U.S. Copyright Law

Article I, section 8 of the U.S. Constitution allows Congress to enact legislation to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁷ The first U.S. copyright law was adopted in 1790 and was much more limited in scope than the copyright laws of today.²⁸ The exclusive rights afforded to creators were limited to “printing, reprinting, publishing, and vending.”²⁹ These rights only lasted for fourteen years, and the only works covered by the law were books, charts, and maps.³⁰

Since the first U.S. copyright law in 1790, the list of protected works has grown immensely.³¹ Musical compositions were added in 1831, as were designs, etchings, and engravings.³² Photographs were made part of the list in 1865; moving pictures were incorporated in 1911; and, in 1971, sound recordings became protected works, as well.³³ Today, the list of protected works has expanded even more and is fairly extensive.³⁴ The list includes: literary works; musical works; dramatic

22. See *infra* Part II.A.

23. See *infra* Part II.A.

24. See *infra* Part II.B.

25. See *infra* Part II.C.

26. See *infra* Part II.D.

27. U.S. CONST. art. I, § 8, cl. 8.

28. Act of May 31, 1790, ch. 15, 1 Stat. 124 (amended 1831); see Frey, *supra* note 13, at 170 (describing extensive additions to U.S. copyright law since 1790); *infra* text accompanying notes 32-37 (listing an expansive scope of works protected by amended copyright laws).

29. Act of May 31, 1790, ch. 15, § 1.

30. *Id.*

31. See *infra* text accompanying notes 32-37.

32. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436; Frey, *supra* note 13, at 170.

33. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 34-35 (1973) (referencing the Act adding photographs); Mark G. Tratos, *Entertainment on the Internet: The Evolution of Entertainment, Production, Distribution Ownership and Control in the Digital Age*, in ENTERTAINMENT LAW 331, 340 (Howard Siegel ed., 3d ed. 2004); Frey, *supra* note 13, at 170.

34. 17 U.S.C. § 102(a) (2012).

works; pantomimes; choreographic works; pictorial works; graphic works; sculptural works; motion pictures; sound recordings; and architectural works.³⁵ Furthermore, derivative works³⁶ are also protected to the extent of the material contributed by the author.³⁷ In addition to the expansion of the list of protected works, the exclusive rights afforded by copyright protection have increased, as has the duration of this protection.³⁸ A creator's exclusive rights to his copyrighted works include: the right to reproduce the work in copies; the right to prepare derivative works based on the original; the right to distribute copies of the work; the right to perform the work publicly; and the right to display the work publicly.³⁹ These rights generally last for the life of the creator plus seventy years after the creator's death.⁴⁰

While the exclusive rights granted to content creators by copyright protection have been expanded over the years, several limitations on those rights have also been incorporated as part of the copyright law when it was amended in 1976.⁴¹ One such limitation is the exception allowing fair use of a copyrighted work for criticism, comment, news, reporting, teaching, scholarship, or research.⁴² It has been noted:

Fair use originated as a common law doctrine developed by judges "to perform the vital constitutional goal of ensuring that the balance between encouraging authors to create through the grant of a limited monopoly and the need to permit reasonable, unconsented-to and uncompensated uses by second authors and the public is not upset by overbroad assertion of rights." In other words, the doctrine protects uses that are "of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."⁴³

35. *Id.*

36. Black's Law Dictionary defines a "derivative work" as follows:

A copyrightable creation that is based on a preexisting product; a translation, musical arrangement, fictionalization, motion-picture version, abridgement, or any other recast or adapted form of an original work. Only the holder of the copyright on the original form can produce or permit someone else to produce a derivative work.

Derivative Work, BLACK'S LAW DICTIONARY 1744 (9th ed. 2009).

37. 17 U.S.C. § 103 (2012).

38. *Id.* §§ 106, 302(a) (indicating that copyright protection lasts for seventy years past the author's life, much longer than the fourteen years provided for by the first copyright act passed in 1790, and listing rights far more extensive than those provided in the original act as well).

39. *Id.* § 106.

40. *Id.* § 302.

41. *Id.* §§ 107–112; Pub. L. No. 94-553, 90 Stat. 2541, 2546-60.

42. 17 U.S.C. § 107.

43. Matt Williams, *The Truth and the "Truthliness" About Knowing Material Misrepresentations*, 9 N.C. J.L. & TECH. 1, 34-35 (2007) (footnotes call numbers omitted) (citations omitted).

Fair use is determined on a case-by-case basis, but there are several non-exhaustive factors to be considered when making the determination about whether something falls within fair use or not, including:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁴

The determination of fair use is often complicated because there is no agreed upon definition of the doctrine, nor are there any bright line rules.⁴⁵ The first factor looks at whether the new work that is using copyrighted material adds some new purpose or character to the work—whether the new work is transformative.⁴⁶ Second, the analysis examines whether the new work is closer to the type of work intended to be protected; the more creative a work is, that is, the less fact-based it is, the more likely a judge is going to consider it one that is intended to be protected.⁴⁷ The third factor of the fair use analysis simply looks at how much copyrighted material the new work uses.⁴⁸ Fourth, and finally, fair use requires a court to look at the impact the new work will have both on the potential market for the copyrighted work and for derivative works based on it.⁴⁹ Because there are no bright line rules for fair use and the factors are just a starting point, judges are left with their own understanding of the doctrine, the four factors above, precedents that vary from each other, and their instincts whenever they are confronted with a fair use case.⁵⁰ Inevitably, individual judges consider the factors differently, and each case has to be decided entirely based on its own facts, making a uniform doctrine impossible to identify by legal professionals, let alone laypeople trying to understand or navigate the applicable copyright law when they upload videos online.⁵¹

44. 17 U.S.C. § 107.

45. Williams, *supra* note 43, at 36, 39 (2007); see also Rebecca Alderfer Rock, Comment, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 699 (2014) (mentioning the difficulty of identifying fair use).

46. 17 U.S.C. § 107(1); Rock, *supra* note 45, at 698.

47. 17 U.S.C. § 107(2); Rock, *supra* note 45, at 698.

48. 17 U.S.C. § 107(3); Rock, *supra* note 45, at 698.

49. 17 U.S.C. § 107(4); Rock, *supra* note 45, at 698-99.

50. Williams, *supra* note 43, at 36.

51. See *id.* at 35-37. Williams points out:

If judges, treatise writers, and the Register of Copyrights cannot comfortably predict the outcome of fair use cases, how can we hold a copyright owner liable for asserting in a takedown notice that something is infringing when a potentially successful fair use

*B. Copyright Law and the Internet: The Enactment of the
Digital Millennium Copyright Act*

During the late 1990s, Congress became concerned about the effect the Internet had on copyright protection, and so, in 1998, President Bill Clinton signed the DMCA into law.⁵² The DMCA has five titles, but the one relevant to this Note is Title II: The Online Copyright Infringement Liability Limitation Act.⁵³ Title II creates limitations on the liability of ISPs for copyright infringement committed by their users for four different types of activities: (1) “[t]ransitory communications;” (2) “[s]ystem caching;” (3) “[s]torage of information systems and networks at the direction of users;” and (4) “[providing] information location tools.”⁵⁴ This Note focuses on the third activity covered by the DMCA, which encompasses the category of activity that YouTube engages in.⁵⁵

Under § 512(c), an ISP is not liable for copyright infringement if it:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.⁵⁶

If even one of these criteria is not met, the ISP is not eligible for the safe harbors that would limit its liability for infringement.⁵⁷ In another

argument exists? Moreover, how can we hold a user of copyrighted material who sends a putback notice liable for seeking the replacement of material that the user mistakenly believes to be fair?

Id. at 39; see also Rock, *supra* note 45 (explaining the relevance, or lack thereof, of the fair use doctrine when determining the copyright liability of video-sharing websites).

52. U.S. COPYRIGHT OFFICE, *supra* note 4, at vi (noting Congress’s concerns about piracy at the time of the enactment of the DMCA).

53. *Id.* The amendments adopted in Title II are codified in 17 U.S.C. § 512 (2012).

54. U.S. COPYRIGHT OFFICE, *supra* note 1, at 8.

55. See *Viacom Int’l, Inc. v. YouTube Inc.*, 676 F.3d 19, 25-26, 40, 42 (2d Cir. 2012) (holding that YouTube can be protected by the limitation on liability for copyright infringement provided for by 17 U.S.C. § 512(c)).

56. 17 U.S.C. § 512(c)(1).

57. See *id.* (indicating by the structure of the statute that the factors are conjunctive).

provision, § 512(i), the DMCA provides general criteria for eligibility for the limited liability provided by the statute that applies to all of the sections.⁵⁸ Under § 512(i), the ISP must have reasonably implemented a policy for the termination of user accounts under appropriate circumstances that does not interfere with standard technical measures and informs users of this policy.⁵⁹ An ISP does not, however, have to monitor its website for infringing material; it only has to take down material for which it receives valid infringement notifications.⁶⁰

Section 512(c) also lays out the elements necessary for a notification of infringement to be valid.⁶¹ For a notification to satisfy § 512(c)(1)(C), it must be: (1) signed by someone authorized to act on behalf of the copyright holder; (2) identify clearly the work infringed; (3) identify clearly the allegedly infringing content; (4) contain the information of the complaining party so that the ISP can contact it; (5) contain a statement that the complaining party has submitted the notification in good faith; and (6) contain a statement that all the information in the notification is accurate.⁶² If the notification fails to “include[] substantially” the above-mentioned criteria, then it will not be considered in determining whether the ISP has knowledge of the infringement.⁶³ But when a valid notification is submitted to the ISP or its designated agent, the ISP must take down the infringing material.⁶⁴

In addition to criteria for eligibility and notification procedures, § 512 also provides for counter-notification procedures.⁶⁵ An online user can use these procedures if it believes that the removal of the content was invalid or a mistake.⁶⁶ The requirements for a counter-notification are similar to those for a notification and include: (1) the signature of the ISP user; (2) an identification of the material that was taken down and where it was beforehand; (3) a statement of good faith; (4) the ISP user’s information; and (5) consent to the jurisdiction of the relevant federal district court.⁶⁷

58. *Id.* § 512(i).

59. *Id.*

60. *Id.* § 512(m)(1).

61. *Id.* § 512(c)(3).

62. *Id.*

63. *Id.*

64. *Id.* § 512(c)(1)(C).

65. *Id.* § 512(g)(3).

66. *Id.* § 512(g)(2); Jon M. Garon, *Tidying Up the Internet: Takedown of Unauthorized Content Under Copyright, Trademark, and Defamation Law*, 41 CAP. U. L. REV. 513, 525 (2013) (explaining that the counter-notification system encourages reinstatement of material that was wrongly flagged).

67. *Id.* § 512(g)(3).

When the DMCA was enacted, its primary purpose was to combat piracy,⁶⁸ and the Internet was still in the world of Web 1.0 where websites presented all the content to users.⁶⁹ Commentators have noted:

At the time that Congress crafted [the DMCA], the World Wide Web was a simpler place. [ISPs] hosted websites managed by webmasters who actively controlled the materials made available on webpages. Industry negotiators had a relatively clear sense of how the safe harbor would function in this Web 1.0 ecosystem.⁷⁰

Since that time, however, the Internet has shifted to what is now called Web 2.0,⁷¹ where websites are essentially platforms for content uploaded by users—the opposite of Web 1.0.⁷² As a result, the application of the DMCA was complicated by the increasing use of Web 2.0 websites and applications.⁷³ The potential liability of ISPs became more uncertain as users gained the ability to disseminate information themselves and as websites began to use automated systems.⁷⁴ Despite this change in the Internet and its uses, copyright law has not caught up, still favoring the mass media copyright holders who dominated in the last century.⁷⁵ In fact, copyright law may have even taken a step back with the implementation of the Copyright Alert System (“CAS”) in 2013, which further supports the notice and takedown system.⁷⁶ Five of the country’s largest ISPs, which copyright law already favors—AT&T, Cablevision, Time Warner Cable, Verizon, and Comcast—together with consumer advocacy groups, created the CAS.⁷⁷ Development of the CAS began in 2011 with 5 key goals: (1) understanding what consumers knew about online infringement; (2) protecting consumer privacy while ensuring accuracy in identifying infringing material; (3) developing an alert and delivery system when infringing material is identified; (4) creating a neutral and independent review process for identified material so consumers could challenge claims of infringement; and (5) creating

68. See U.S. COPYRIGHT OFFICE, *supra* note 4, at vi-vii; see also Ashley, *supra* note 4, at 581-82 (considering how Congress intended to combat piracy with the DMCA).

69. Robins, *supra* note 1, at 3-4.

70. *Id.* (citation omitted).

71. See *id.* at 4 (describing the evolution of technology that led to Web 2.0).

72. See *id.*

73. See *id.*

74. *Id.*

75. See McKay, *supra* note 10, at 122-24, 126 (examining how the domination of mass media corporations in the entertainment creation industry allows copyright law to favor those corporations).

76. See CTR. FOR COPYRIGHT INFO., THE COPYRIGHT ALERT SYSTEM: PHASE ONE AND BEYOND 1, 6 (2014), <http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And-Beyond.pdf>.

77. *Id.* at 3, 13 n.4.

educational materials for consumers.⁷⁸ The Center for Copyright Information describes the CAS as follows:

[A] tiered notice and response system aimed at reducing copyright infringement over peer-to-peer (P2P) networks. It is built simultaneously to encourage consumers to embrace the growing number of affordable licensed sources of films, music, and television programming content available online from a variety of different services and in many different formats. The first-of-its-kind collaboration, the CAS is a multi-stakeholder effort focused on approaching the issue of digital copyright infringement in a fair and consumer-friendly manner.⁷⁹

The CAS works through multiple levels of alerts that notify users of infringement on their accounts and is based on the premise that most Internet users will correct the problem if it is brought to their attention.⁸⁰ While the CAS is aimed at influencing the “vast majority of internet users who may not fully understand the legal, economic or social consequences of their behavior,” it does not take into account the fact that people will likely respond to alerts out of fear of being sued for infringement by huge media conglomerates and lack of education about their own rights.⁸¹ Given the DMCA’s original intent of battling piracy,⁸² its application to websites like YouTube,⁸³ and the implementation of the CAS, which also favors mass media copyright holders over ISP users, it is no surprise that copyright law is far behind the Internet’s development and desperately needs to catch up to protect online users.⁸⁴

C. *The Application of the Digital Millennium Copyright Act to Video Sharing Websites Such as YouTube*

Since the enactment of the DMCA, there have been several cases interpreting the statute and its application to ISPs.⁸⁵ Many of the cases

78. *Id.* at 4.

79. *Id.* at 1.

80. *Id.* at 6.

81. *Id.* at 2; Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 936 (2009); Laura Leister, Note, *YouTube and the Law: A Suppression of Creative Freedom in the 21st Century*, 37 T. MARSHALL L. REV. 109, 118 (2011); see also Garon, *supra* note 66, 524-26 (pointing out abuses of the takedown and notification system as well as the only recourse the average Internet user has—counter-notifications).

82. See U.S. COPYRIGHT OFFICE, *supra* note 4, at vi; Ashley, *supra* note 4, at 581-82.

83. See *infra* Part II.C.

84. See generally Halbert, *supra* note 81 (discussing the failure of the DMCA to protect users and the content that they generate online).

85. See Robins, *supra* note 1, at 10-21 (reviewing the case law applying the DMCA to ISPs).

that deal with the application of the DMCA are circuit court or district court cases.⁸⁶ However, there is also one important Supreme Court case on the subject that sets the tone for DMCA application to ISPs.⁸⁷

*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*⁸⁸ was decided by the Supreme Court in 2005, and held that the limitations on liability provided by the DMCA safe harbors are not available to ISPs that promote infringing uses of their websites.⁸⁹ In *Grokster*, the defendants were in the business of distributing free software that allowed computer users to share files with each other.⁹⁰ The plaintiff, Metro-Goldwyn-Mayer, sued, alleging that the defendant knowingly and intentionally distributed its software, so that users could copy and share copyrighted works.⁹¹ Since the use of the software itself was not always an infringing activity,⁹² the issue in the case became whether a distributor of software that can be used for both infringing and non-infringing purposes is liable for copyright infringement committed by third party users of the product.⁹³ The Court found the defendant liable for the infringing activity of third party users of its software because it expressly told recipients to use the software to download copyrighted work, and actually encouraged infringement by the users.⁹⁴ Therefore, *Grokster* established the rule that an ISP is liable for infringement committed by its users when it actually encourages infringement as the primary use of its platform.⁹⁵ This rule makes sense in light of the DMCA's requirements for an ISP to be eligible for the safe harbors, namely the requirements that the ISP does not know of the infringing activity or of any facts or circumstances that would raise suspicion of infringing activity.⁹⁶ If the ISP is encouraging infringement, it stands to reason that it at least knows of facts or circumstances that would raise the suspicion that infringement is in fact occurring.⁹⁷

and its evolution).

86. See *id.* at 10-19.

87. See *id.* at 17.

88. 545 U.S. 913 (2005).

89. See *id.* at 919, 936-37; see also Robins, *supra* note 1, at 17-19 (explaining the pertinence of this case to the DMCA despite it not being a direct DMCA case).

90. *Metro-Goldwyn-Mayer Studios, Inc.*, 545 U.S. at 919-20.

91. *Id.* at 920-21.

92. See *id.* at 922.

93. *Id.* at 918-19; see also Robins, *supra* note 1, at 17-19 (considering the relevance of this case to the DMCA and its subsequent application to DMCA cases).

94. *Metro-Goldwyn-Mayer Studios, Inc.*, 545 U.S. at 923-24.

95. *Id.* at 936-37.

96. 17 U.S.C. § 512(c)(1)(A) (2012).

97. See *Metro-Goldwyn-Mayer Studios, Inc.*, 545 U.S. at 936-37.

One of the most important cases interpreting how the DMCA applies to ISPs is *Viacom International, Inc. v. YouTube, Inc.*⁹⁸ This case began in 2007 in the Southern District of New York, when Viacom filed suit against YouTube alleging direct and secondary copyright infringement based on the playback and reproduction of its works on the website.⁹⁹ The case was appealed to the Second Circuit¹⁰⁰ and then remanded back to the Southern District in 2012,¹⁰¹ before finally being settled in 2014.¹⁰² This case required the Second Circuit to clarify the DMCA's safe harbor provisions, especially as they related to § 512(c), because that was the section at issue.¹⁰³

In clarifying the relevant provisions of the DMCA, the Second Circuit construed several terms found in § 512(c), starting with "actual" and "red flag" knowledge.¹⁰⁴ The court decided that actual knowledge meant knowledge of specific identified instances of infringement because the statute only requires the takedown of specific infringing materials once the ISP has been notified of them.¹⁰⁵ The court proceeded to say that "red flag" knowledge also requires knowledge of specific instances, but differs from actual knowledge because it requires an objective standard in determining that knowledge.¹⁰⁶ Thus, "the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."¹⁰⁷ The Second Circuit remanded the issue of whether YouTube had actual or red flag knowledge back to the lower court.¹⁰⁸ On remand, the Southern District of New York decided that Viacom failed to meet its burden in proving that YouTube had actual or

98. 676 F.3d 19 (2d Cir. 2012).

99. *Id.* at 28.

100. *Id.* at 30.

101. *Id.* at 41-42.

102. Diana Sanders, *Seven-Year Battle Between Viacom and Google Finally Ends in Settlement*, LEXOLOGY (Mar. 25, 2014), <http://www.lexology.com/library/detail.aspx?g=f7c0ac64-1690-48e9-b3c1-7f8f1af1a0ef>; Susan M. Stith & Edwin Komen, *The DMCA: Seeking Safe Harbor in a Sea of Troubles*, LEXOLOGY (Mar. 28, 2014), <http://www.lexology.com/library/detail.aspx?g=4df87e27-6b31-414f-a14e-8bflccb0c551>.

103. *Viacom Int'l, Inc.*, 676 F.3d at 25-27.

104. *Id.* at 30-36.

105. *Id.* at 30, 32.

106. *Id.* at 31.

107. *Id.*

108. *Id.* at 34.

red flag knowledge of any of the specific infringements at issue in the suit.¹⁰⁹

The Second Circuit also tackled the phrase “right and ability to control” in § 512(c)(1)(B).¹¹⁰ It concluded that the “right and ability to control” content on a website “requires something more than the ability to remove or block access to materials on the [ISP’s] website.”¹¹¹ The court never defined what “something more” means, but gave several examples of what it could look like.¹¹² Finally, the court looked at what “by reason of storage at the direction of the user” means.¹¹³ On this issue, the court determined that storage is more than just actually storing the material; it includes the functions necessary to allow users access to the videos and to stream them.¹¹⁴ As to whether YouTube had the right and ability to control the content on its website, the court decided that it did not because all of the algorithms on the website were fully automated and reacted entirely to user input, without any kind of employee involvement.¹¹⁵

The decisions of both the Second Circuit and the Southern District of New York on remand have been cited numerous times by courts throughout the United States¹¹⁶ in cases such as *UMG Recordings, Inc. v. Veoh Networks, Inc.*,¹¹⁷ *Disney Enterprises, Inc. v. Hotfile Corp.*,¹¹⁸ and *Capitol Records, LLC v. Vimeo, LLC*.¹¹⁹ All of these cases went a

109. *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013).

110. *Viacom Int’l, Inc.*, 676 F.3d at 36.

111. *Id.* at 38 (internal quotation marks omitted).

112. *Id.*

113. *Id.*

114. *Id.* at 39.

115. *Id.* at 40.

116. See, e.g., *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427, 2013 WL 6336286, at *26-28 (S.D. Fla. Sept. 20, 2013) (examining actual and “red flag” knowledge); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 543, 545, 553-55 (S.D.N.Y. 2013) (considering the meanings of “red flag” knowledge, control, and willful blindness).

117. 718 F.3d 1006 (9th Cir. 2013). In this case, “UMG filed suit against Veoh for direct, vicarious, and contributory copyright infringement.” *Id.* at 1013. The court cited the Second Circuit’s definitions of actual knowledge, red flag knowledge, and control. *Id.* at 1025-27. The court also added to the definition of “right and ability to control” stating that an ISP must “[e]xert substantial influence on the activities of users” for it to have control. *Id.* at 1030. Finally, this court also held that the DMCA protects ISPs against vicarious liability, as well as direct and contributory liability. See *id.* at 1028-30.

118. 2013 WL 63368386, at *1 (S.D. Fla. Sept. 20, 2013). The plaintiffs in this case claimed that defendant’s users abused defendants’ online file storage system by sharing copyrighted materials on it. *Id.* at *1. Here, the court first found that defendants were not eligible for DMCA safe harbors at all because they didn’t meet the threshold requirement of having a repeat infringer policy. *Id.* at *25. The court then went on to say that even if defendants had met the threshold requirements, they would not have been eligible for the DMCA’s safe harbors because they encouraged and induced infringement by users. *Id.* at *32.

119. 972 F. Supp. 2d 537 (S.D.N.Y. 2013). In this case, the court focused primarily on the

long way in assuring that video-sharing websites, like YouTube, are covered by the DMCA, as long as they adhere to all of the statute's provisions.¹²⁰ This is great for the ISPs, and even for copyright holders, because they are assured of a notice-takedown procedure that they can rely on.¹²¹ These cases provide no assurance to users of ISPs, however.¹²² They do not even address the rights of users in relation to the claims of infringement, which is a huge problem because those rights get violated every time a video is taken down invalidly.¹²³ In fact, users and the content they generate have virtually no protection under the current regime of the DMCA.¹²⁴

D. *The Treatment of User-Generated Content Under the Digital Millennium Copyright Act*

The prevalence of user-generated content on the Internet has been on the rise for several years now,¹²⁵ and recently, it has become something of the backbone of video-sharing websites like YouTube.¹²⁶ As its name suggests, the users of websites, those people traditionally seen as "cultural consumers," are those that create user-generated content, not the traditional "cultural producers" like mass media copyright holders.¹²⁷ This kind of content is relatively new, only becoming prominent in 2005,¹²⁸ which means mass media copyright holders do not yet know how to react to it, especially as it becomes more

objective/subjective distinction between actual and red flag knowledge. *Id.* at 547-48. The court determined that when the defendants or its employees never viewed or interacted with the videos uploaded, the defendants were covered by the DMCA's protections. *See id.* at 555. Furthermore, the court found that even for those videos that the employees did watch, the DMCA could apply to several of them depending on their content. *See id.* at 547-49. The court remanded decision about those videos back to the lower court. *Id.* at 549.

120. 17 U.S.C. § 512(c) (2012); *see also* Ashley, *supra* note 4, at 587 (discussing the policy most ISPs, including YouTube, use when dealing with infringing material).

121. 17 U.S.C. § 512(c)(2)-(3). *Contra* Ashley, *supra* note 4, at 585-87 (mentioning the drawbacks for copyright holders in how the notice and takedown procedures work).

122. *See* Ashley, *supra* note 4, at 587-88 (noting that the current notice and takedown procedures don't provide users of ISPs with much incentive to fight back).

123. *See* Jennifer M. Urban & Laura Quilter, *Efficient Process of "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 628 (2006); *see also* Ashley, *supra* note 4, at 587-88 (addressing users' general lack of knowledge of copyright law and what most users will do upon getting notification that their content has been removed).

124. *See infra* Part II.D.

125. *See* Halbert, *supra* note 81, at 925-26.

126. *See id.* at 924-25.

127. *Id.* at 924, 927.

128. *See id.* at 926.

and more prevalent.¹²⁹ At the same time, users want more control over their own content, which means that they need more rights under the copyright law—rights that they currently do not have.¹³⁰

The biggest problem that mass media producers have with user-generated content is that it often uses pieces of copyrighted works to create something entirely new.¹³¹ Some users create content that is entirely their own, others copy already existing works and then edit them into something new, and there are those combine their own material with pre-existing works.¹³² Most of these videos take existing works and reimagine them in new and creative ways, keeping the cultural interest in them alive, and therefore they likely deserve fair use protections.¹³³ Given the constitutional purpose of copyright law,¹³⁴ one would think that it would embrace user-generated content considering this content awakens the cultural conscience and has become such a part of our cultural framework¹³⁵—YouTube's statistics prove that practically everyone either watches or creates online videos.¹³⁶ Unfortunately, this has not been the case.¹³⁷

The mass media copyright holders have been at the top of the copyright game for a long time,¹³⁸ and many of the additions to copyright protection coverage were made for their benefit.¹³⁹ These mass media companies have been favored by the copyright law and see it primarily as a unidirectional model—the companies actively create and

129. See *id.* at 927-29.

130. See *id.* at 926.

131. ORG. ECON. COOPERATION & DEV., PARTICIPATIVE WEB AND USER-CREATED CONTENT: WEB 2.0, WIKIS AND SOCIAL NETWORKING 18 (2007) (noting that users add their own value to whatever copyrighted work they use); see also Ashley, *supra* note 4, at 572-73 (discussing what user-generated content can be made up of and what kind of protection it deserves); McKay, *supra* note 10, at 121-22 (indicating the cultural work of fan-made user-generated content).

132. See Ashley, *supra* note 4, at 566.

133. Halbert, *supra* note 81, at 936-41; see also Ashley, *supra* note 4, at 572-73 (discussing the changing definition of the creator in an increasingly online world); *What Is Fair Use?*, YOUTUBE, <https://www.youtube.com/yt/copyright/fair-use.html> (last visited Nov. 22, 2015) (setting forth the four factors of fair use).

134. U.S. CONST. art. I, § 8, cl. 8; Frey, *supra* note 13, at 170.

135. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1513 (2008) (discussing the rise of YouTube and how it has transformed the Internet).

136. *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited Nov. 22, 2015) (indicating that hundreds of millions of hours of video are watched each day and that YouTube has over one billion users).

137. See *supra* Part II.B-C.

138. See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 5 (2009) (indicating the model that has been “long-favored” by copyright industries is one of vertical monopolization).

139. PATRY, *supra* note 138 at 6; see also McKay, *supra* note 10, at 121-24 (pointing out that copyright laws are one sided so they favor mass media copyright holders and noting the reaction of mass media copyright holders to the rise of user-generated content).

the public passively consumes.¹⁴⁰ The rise of the Internet and user-generated content has turned this model on its head,¹⁴¹ and the mass media holders have not been taking it well.¹⁴² User-generated content is based on the opposite philosophy than that of mass media and, therefore, poses a direct threat to the mass media copyright holders.¹⁴³ Thus, mass media holders want to suppress user generated content.¹⁴⁴ On the other hand, mass media companies also want to control user-generated content because they recognize it as a means to promote their products.¹⁴⁵ Mass media companies control user-generated content through copyright protection and infringement notices, both because this is how they have controlled it historically and, more importantly, because the current copyright law leans overwhelmingly in their favor.¹⁴⁶ Over time, some mass media companies began to embrace user-generated content, but they did so very much on their own terms, quickly putting a stop to content that went in directions that they did not like.¹⁴⁷

The attitude of mass media companies towards user-generated content is entirely hypocritical, however.¹⁴⁸ When mass media companies were still new, they were able to freely borrow from pre-existing folk culture without anyone to stop them, but when online users do essentially the same thing with mass media products, those same companies are quick to claim copyright protection and halt user creation.¹⁴⁹ This is completely contrary to the constitutional intention of copyright law, which is to encourage the growth of culture.¹⁵⁰

Even when the government attempted to update the law in response to the rise of the Internet, it never contemplated the existence, let alone the prevalence, of user-generated content.¹⁵¹ Therefore, the DMCA's main focus was to stop piracy or the direct copying and distribution of copyright works.¹⁵² It is entirely unequipped to deal with user-generated

140. PATRY, *supra* note 138, at 8; McKay, *supra* note 10, at 123.

141. See McKay, *supra* note 10, at 123.

142. See PATRY, *supra* note 138, at 10-11; McKay, *supra* note 10, at 123.

143. See JENKINS, *supra* note 10, at 135-36; McKay, *supra* note 10, at 123.

144. See PATRY, *supra* note 138, at 10-11; McKay, *supra* note 10, at 123.

145. See JENKINS, *supra* note 10, at 138; McKay, *supra* note 10, at 123.

146. See PATRY, *supra* note 138, at 11; McKay, *supra* note 10, at 122-23.

147. See JENKINS, *supra* note 10, at 156-59; McKay, *supra* note 10, at 123-24.

148. See JENKINS, *supra* note 10, at 135-36; see also McKay, *supra* note 10, at 122 (expressing the increasing relevance and existence of fan culture and the content it creates).

149. See JENKINS, *supra* note 10, at 135; McKay, *supra* note 10, at 122.

150. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 96 (2008); Leister, *supra* note 81, at 120 (discussing the power that copyright owners possess and how that power suppresses online users from creating content of their own); McKay, *supra* note 10, at 119 (articulating the goal of the Copyright Clause in the Constitution).

151. See Robins, *supra* note 1, at 3-4.

152. U.S. COPYRIGHT OFFICE, *supra* note 4, at vi; Ashley, *supra* note 4, at 581-82.

content that transforms and reworks copyrighted material and makes it into something new.¹⁵³ Furthermore, the DMCA only provides safe harbors for ISPs themselves, so the creators of user-generated content have absolutely no protection in a world where the mass media copyright holder rules and ISPs' liability is limited.¹⁵⁴ The lack of protection for users has become even more problematic since YouTube launched its Content ID system, discussed further below,¹⁵⁵ because the system monitors everything that is uploaded onto the website and flags any video that has copyrighted content in it¹⁵⁶—even a video of a child dancing to a song in the background uploaded to YouTube by his mother.¹⁵⁷

*Lenz v. Universal Music Corp.*¹⁵⁸ arose in the Northern District of California after Lenz uploaded a twenty-second video of her child dancing to a Prince song on YouTube.¹⁵⁹ The song was audible in the background of the video, and Universal Music Corp. sent YouTube a takedown notification demanding that the video be removed from the site.¹⁶⁰ YouTube removed the video and then sent Lenz an email notification of the removal.¹⁶¹ Lenz then sent a counter-notification claiming that the video was fair use and demanding that it be put back on the site. YouTube complied.¹⁶² Lenz also sued Universal Music Corp., alleging misrepresentation under § 512(f) of the DMCA.¹⁶³ Lenz

153. Robins, *supra* note 1, at 3-5. The Internet has changed a lot since the DMCA was enacted and commentators have said:

[T]he most fundamental change in the web over the last 10 years has been the rise of “user generated content,” that is, the shift from websites that present packaged content created or controlled by the websites owner, to websites that are essentially services for publishing content uploaded by others.

With this significance has come legal uncertainty

Id. at 3-4 (footnote call number omitted).

154. Halbert, *supra* note 81, at 931 (establishing that the DMCA rules “balance content-owner concern with service-provider concern,” and that even when private initiatives are taken to do the same, key ISPs are left out as are the actual users who create content online).

155. *See infra* Part III.A.

156. *How Content ID Works*, *supra* note 12.

157. *See generally* *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008). Stephanie Lenz sued Universal Music Corp. for misrepresentation pursuant to § 512(f) of the DMCA after it flagged the video she uploaded of her young child dancing to a Prince song in the background. *Id.* at 1152-53.

158. 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

159. *Id.* at 1151-52.

160. *Id.* at 1152.

161. *Id.*; *see also* Rock, *supra* note 45, at 704-06 (explaining the decision made in this case and the possible implications that it could have).

162. *Lenz*, 572 F. Supp. 2d at 1152.

163. *Id.* at 1152-53; *see also* Ashley, *supra* note 4, at 592-97 (taking up the case as it relates to fair use and how Stephanie Lenz decided to pursue her claim).

maintained that Universal did not actually check the video to see if it was fair use and just took it down because it had Prince's music in it—not based on a good faith belief that it was infringing.¹⁶⁴

The court framed the issue as whether the takedown provision of the DMCA “requires a copyright owner to consider the fair use doctrine in formulating 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.’”¹⁶⁵ In other words, the court had to determine whether a fair use analysis is required to meet the subjective good faith belief standard established in *Rossi v. Motion Picture Ass'n of America*.¹⁶⁶ In construing the *Rossi* standard, the court held that in order to have a good faith belief that use of material is infringing, a copyright owner has to actually conduct a fair use analysis before issuing a § 512 takedown notice to the host website.¹⁶⁷ Stated differently, this means that if a user makes an allegation that a copyright holder acted in bad faith in issuing a takedown notice without actually conducting a fair use analysis, it is enough for a misrepresentation claim under § 512(f).¹⁶⁸

Lenz establishes the proposition that copyright holders actually have to look through every video that is flagged with copyrighted content before sending a takedown notification,¹⁶⁹ which is practically impossible.¹⁷⁰ It is also an example of a successful use of the counter-notification system by an online user.¹⁷¹ Although *Lenz* successfully used the counter-notification process and actually pursued a suit against Universal Music Corp.,¹⁷² this is not typically the case because most users do not know about the system, do not know about their rights under copyright law, or are too scared to pursue a lawsuit against a mass media corporation.¹⁷³ This is especially true in the current climate when

164. See *Lenz*, 572 F. Supp. 2d at 1155-56.

165. *Id.* at 1154.

166. 391 F.3d 1000 (9th Cir. 2004). In *Rossi v. Motion Picture Ass'n of America*, the 9th Circuit held that the “good faith belief” requirement in 17 U.S.C. § 512(c)(3)(A)(v) (2012) requires a subjective, rather than an objective standard, and that there must be subjective bad faith for a misrepresentation claim to survive. 391 F.3d at 1004. The Court further found that for a copyright holder to be liable for knowing misrepresentation it must have had actual knowledge of the misrepresentation. *Id.* at 1004-05. Therefore, *Rossi* established a subjective actual knowledge standard for misrepresentation and fair use. *Id.* at 1005; see also *Lenz*, 572 F. Supp. 2d at 1155.

167. *Lenz*, 572 F. Supp. 2d at 1155-56.

168. See *id.*

169. *Id.* at 1154; see also *Rock*, *supra* note 45, at 704-06 (discussing the decision made in this case and the possible implications that it could have).

170. See *infra* text accompanying note 207.

171. See *Lenz*, 572 F. Supp. 2d at 1152, 1157.

172. *Id.* at 1152-53.

173. See *Garon*, *supra* note 66, at 524-26.

increasing numbers of ISPs are using automated infringement filters to flag uploads.¹⁷⁴

III. CONTENT ID DEPRIVES YOUTUBE USERS OF THEIR RIGHTS

Content ID is a great system for YouTube and for copyright holders, but it is not so great for YouTube users because it not only fails to protect them, but also effectively deprives them of their rights under copyright law.¹⁷⁵ The system is incapable of recognizing fair use, which means that a lot of videos are flagged as infringing even when they are not.¹⁷⁶ Furthermore, when these videos are flagged, most users fail to dispute the claims made against them.¹⁷⁷ In addition to the fair use problems that arise when using a system like Content ID, the monetization of videos also deprives users of their rights because that monetization is not proportional to the amount of copyrighted content used in the video.¹⁷⁸

A. *The Evolution of YouTube's Content ID System*

Despite the fact that the DMCA does not require ISPs to actively monitor their own websites for infringing content,¹⁷⁹ many websites are implementing automated filtering systems to find infringing content before the copyright holders do, and to notify those copyright holders of the content's existence on the website.¹⁸⁰ YouTube was one of the first websites to implement an automated filtering system, as well as to try to improve it.¹⁸¹ Content ID was introduced in 2007,¹⁸² around the same time as the *Viacom* case was initiated,¹⁸³ and YouTube has been using the system ever since.¹⁸⁴

174. See *infra* Part III.A.

175. See *infra* Part III.B–C.

176. See *infra* Part III.B.

177. See *infra* Part III.B.

178. See *infra* Part III.C.

179. See 17 U.S.C. § 512(m) (2012).

180. See Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 COLUM. L. REV. SIDEBAR 83, 93 (2012) (arguing the advantages of using an automated filtering system and the difficulties of finding the perfect one).

181. Rachel King, *YouTube Improving Content ID with New Appeals Process*, ZDNET (Oct. 3, 2012), <http://www.zdnet.com/youtube-improving-content-id-with-new-appeals-process-7000005199>.

182. Christiane Cargill Kinney & Laurin H. Mills, *User-Generated Content on the Web: Implications of Viacom v. YouTube*, LEXOLOGY (Apr. 17, 2012), <http://www.lexology.com/library/detail.aspx?g=d32b505c-2f23-448f-a0a4-20f3fe32e2c4>.

183. *Id.*

184. See *id.*

Content ID functions as YouTube's automated infringement filter, which was developed entirely by YouTube.¹⁸⁵ Content ID uses the digital fingerprints¹⁸⁶ of copyrighted works and compares them to every video that is uploaded on the website.¹⁸⁷ The system flags a video if it contains either a full or partial match to any copyrighted material contained in certain algorithms.¹⁸⁸ Once a video has been flagged as containing copyrighted content, the system sends a notification to the copyright holder.¹⁸⁹ If the copyright holder wants to take action with regard to the video, she can: (1) mute the audio of the video; (2) block the whole video from being viewed on the website; (3) monetize the video by running ads; or (4) track the video's viewership statistics.¹⁹⁰ Monetizing the video is an increasingly popular option because it allows the copyright holder to benefit without compromising users' ability to upload videos that contain copyrighted work.¹⁹¹ Monetization also poses a problem, however, when the majority of the content uploaded is original content or the uploader's livelihood depends on her YouTube videos.¹⁹² In addition to the copyright holder being notified of a flag, the original uploader of the video also gets a notification that the video was flagged and if the copyright holder takes action, the uploader can dispute the claim.¹⁹³ Unfortunately, most users do not dispute Content ID claims because they are either unaware of their rights under copyright law, are afraid to actually be sued for infringement by a mass media copyright holder, or both.¹⁹⁴

After Content ID was launched in 2007, it soon became clear that the system was not perfect, but it took a few years for any improvements to be made.¹⁹⁵ In 2012, YouTube launched improvements to the Content

185. See *How Content ID Works*, *supra* note 12.

186. The digital fingerprinting process employed by Content ID is also known as steganography. *Steganography*, BLACK'S LAW DICTIONARY 1549 (9th ed. 2009) (defining "steganography," also termed "digital fingerprinting" or "digital watermarking" as "a cryptographic method that digitally embeds or encodes one item of information in another" and stating that "[c]opyright or trademark tags can be hidden in every fragment of a digital work, making disassociation almost impossible").

187. *How Content ID Works*, *supra* note 12.

188. David Kravets, *YouTube Changes Copyright Algorithms, Manually Reviewing Infringement Claims*, WIRED.CO.UK. (Oct. 4, 2012), <http://www.wired.co.uk/news/archive/2012-10/04/google-copyright-algorithms>.

189. *How Content ID Works*, *supra* note 12.

190. *Id.*

191. See *infra* Part III.C.

192. See *infra* Part III.C.

193. *Dispute a Content ID Claim*, YOUTUBE, https://support.google.com/youtube/answer/2797454?hl=en&ref_topic=2778545 (last visited Nov. 22, 2015).

194. See Garon, *supra* note 66, at, 524-26.

195. See Alfshawi, *supra* note 11.

ID system in the form of a new appeals process, smarter detection of unintentional claims, and improved matching quality.¹⁹⁶ The new appeals process provided users with two options when their dispute to a Content ID claim was rejected: release the claim or file a formal DMCA notification.¹⁹⁷ Though this was a change from the original appeals process, where users were left with no recourse if a dispute was rejected,¹⁹⁸ it is not exactly a big improvement. The two choices users really have are either to accept the claim, even if the content is not infringing, or file a lawsuit, which most users will not do for fear of taking on a mass media corporation.¹⁹⁹ The smarter detection of unintentional claims involves new algorithms to detect potentially invalid claims that are then put in a queue to be manually reviewed by the content owner.²⁰⁰ This is certainly a step in the right direction, but it still runs up against the problem of the inefficiency of manually reviewing countless videos in the world of automated filters.²⁰¹ The final improvement made to the system involved improving the matching quality of the algorithms on the system.²⁰² While those updates have helped, there are still issues that arise from using an automated filter like Content ID.²⁰³

B. Content ID Is Incapable of Recognizing Fair Use

The inability to recognize fair use is an issue inherent in automated filters like the Content ID system.²⁰⁴ The entirely automated system flags every video that is even a partial match to copyrighted content, regardless of whether the video would be considered fair use.²⁰⁵ Several students and scholars have proposed solutions to this issue,²⁰⁶ but all of

196. *Id.*

197. *See id.*

198. *Id.*

199. *See infra* Part III.B.

200. Alfshaw, *supra* note 11.

201. *See* Rock, *supra* note 45, at 715-18 (arguing that fair use should not be considered in a DMCA analysis because it would be inefficient).

202. Alfshaw, *supra* note 11.

203. *See infra* Part III.B-C.

204. *See* Mike Masnick, *How Google's ContentID System Fails at Fair Use & The Public Domain*, TECHDIRT (Aug. 8, 2012, 2:55 PM), <https://www.techdirt.com/articles/20120808/12301619967/how-google-contentid-system-fails-fair-use-public-domain.shtml>.

205. *See id.*

206. *See, e.g.,* Halbert, *supra* note 81, at 955-59 (proposing more comprehensive user generated rights, and more balance in the Copyright Law in general, so that users are more protected in an increasingly online and automated world); Ashley, *supra* note 4, at 602-06 (proposing amendments to the DMCA itself so that users are more equally protected online); Leister, *supra* note 81, at 128-37 (noting the uselessness of the fair use doctrine in an increasingly digital world, especially following the *Lenz* case, which established that a fair use analysis had to be done before

them require human review of all flagged videos, which is an entirely unrealistic requirement to impose upon ISPs given how many reports of infringement are made through automated filters.²⁰⁷ Requiring ISPs to manually review every video flagged for infringement would very quickly put them out of business because the sheer number of people and hours required for the endeavor would be more than they could handle.²⁰⁸ Furthermore, *Lenz* set a standard that requires copyright holders to do a fair use analysis before sending a takedown notification (or acting on a Content ID flag), which also imposes the unrealistic expectation of human review on ISPs and copyright holders.²⁰⁹

The inability of the system to recognize fair use gives rise to another problem on the user side.²¹⁰ The vast majority of people do not use the counter-notification system set up by YouTube, even if the flagged videos would qualify as fair use.²¹¹ Most people have no idea what the fair use doctrine is or that, under this doctrine, they have any right to use copyrighted works.²¹² This issue is only exacerbated by the fact that the information provided about fair use on YouTube is minimal at best, and thus, even if users were to go look at that webpage, they would still be largely uninformed.²¹³ Furthermore, even if a user is aware of the fair use doctrine, and what it allows, most users are reluctant to use the counter-notification system that YouTube provides for claim disputes out of fear of a lawsuit by a large mass media corporation.²¹⁴ Between the lack of education about the fair use doctrine, and the fear of being sued for copyright infringement, the counter-notification system within Content ID is rarely used.²¹⁵ This only makes the fair use situation worse because when Content ID flags those videos for infringement, there is no one there ready to dispute that claim or fight for her rights under the fair use doctrine.²¹⁶ Therefore, this Note proposes a

issuing a takedown notice); McKay, *supra* note 10, at 139-45 (proposing stricter penalties for invalid flags and takedown notifications on videos, and more protections for transformative works uploaded by users online).

207. *Statistics*, *supra* note 136 (indicating that hundreds of millions of videos have been claimed using Content ID since its inception); *see also* Rock, *supra* note 45, at 715-18 (illustrating the inefficiency of the fair use doctrine when determining copyright liability for online content).

208. *See id.*

209. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008).

210. *See infra* notes 211-16 and accompanying text.

211. *See* Garon, *supra* note 66, at 523-27; Leister, *supra* note 81, at 116-20.

212. *See* Garon, *supra* note 66, at 523-27; Halbert, *supra* note 81, at 936.

213. *See What is Fair Use?*, *supra* note 133.

214. hankschannel, *How to Deal with Copyright Claims (and More)*, YOUTUBE, <https://www.youtube.com/watch?v=ZM9Z9us-urI> (last visited Nov. 22, 2015) (explaining how Content ID works and showing step by step how a claim and dispute can be made).

215. *Id.*

216. *See* Garon, *supra* note 66, at 523-27.

solution to the fair use problem through education of users, as opposed to through further regulation of the ISPs.²¹⁷

C. *The Monetization of Videos Flagged by Content ID Is Not Proportional*

Another issue that arises out of the Content ID system is related to the way in which videos are monetized once they have been flagged and claimed as infringing.²¹⁸ When a video gets monetized on YouTube, an ad is run in front of the video before it starts. The profits from monetization are split between the copyright holder and YouTube itself, leaving nothing for the content creator, even if the majority of the video is not infringing.²¹⁹ Furthermore, a copyright holder can monetize the video regardless of whether the content creator already had an ad running in front of it or not.²²⁰ In addition, when a copyright holder chooses to do this, the whole video gets monetized without respect to how much copyrighted content is actually in the video.²²¹ Therefore, the user who uploaded the video gets absolutely nothing and is deprived of her rights to her own original material that is in the video.²²² Even if the user did not have ads on the video and does not want to financially benefit from the video, monetization is in favor of the copyright owner, takes opportunity away from the content creator, and results in copyright holders benefiting from more than just their copyrighted work.²²³

A prime example of the dangers of the Content ID system, and the monetization option it offers, is the recent flood of flags on YouTube videos, especially those videos that provide commentary on video games, which are entitled to fair use protection.²²⁴ In 2013, there was a

217. See *infra* Part IV.A.

218. See *infra* notes 219-23 and accompanying text.

219. See vlogbrothers, *The Bizarre State of Copyright*, YOUTUBE, https://www.youtube.com/watch?v=hG_FCQiKUws (last visited Nov. 22, 2015) (explaining the general state of copyright with respect to YouTube).

220. See *id.*

221. See hankschannel, *supra* note 214.

222. See *id.*; vlogbrothers, *supra* note 219.

223. See hankschannel, *supra* note 214.

224. See, e.g., Colin Campbell, *Everything You Need to Know About the Youtube Copyright Crisis and Why You Should Care*, POLYGON (Dec. 14, 2013, 2:57 PM), <http://www.polygon.com/2013/12/14/5208782/everything-you-need-to-know-about-the-youtube-copyright-crisis> (explaining that gameplay videos with commentary are eligible for fair use protection); Kieran Mackintosh, *YouTube Content ID Crackdown, YouTube Confirms New Copyright Claims*, CHEAT CODE CENT. (Dec. 16, 2013), <http://dispatches.cheatcc.com/607> (discussing how YouTube decided to cover itself against infringement by gameplay creators and removed their videos down even when the party making the claim was not the copyright holder); Paul Tassi, *YouTube Unleashes Strange Storm of Copyright Claims on Video Game Content Producers*, FORBES (Dec. 11, 2013, 9:15 AM), <http://www.forbes.com/sites/insertcoin/2013/12/11/youtube-unleashes-strange-storm-of-copyright->

sudden crackdown on gameplay videos by YouTube, which were not previously enforced against, because the video game companies who held the copyrights allowed the commentary and criticism videos knowing that they acted as a form of advertisement for their games.²²⁵ YouTube began this crackdown to try and shield itself from liability,²²⁶ however, most of the flags were not coming from the video game companies at all, but rather from completely unrelated third parties.²²⁷ The new Content ID algorithm implemented during this crackdown²²⁸ flagged anything with matching content and issued notices accordingly.²²⁹ When the videos were flagged, whoever did the flagging and sent the notice was able to do whatever they wanted with the video—take it down, monetize it, or otherwise—regardless of whether they were the actual copyright holders.²³⁰ These third parties should not be able to flag copyrighted materials when the copyright holders have allowed them to remain online for so long, especially when the copyright holders allow the content for their own benefit.²³¹

With third parties cracking down on these gameplay videos, a huge number of content creators on YouTube lost their main source of income, since they make a living on monetizing videos with commentary and criticism of video games.²³² This is even more of a problem considering the fact that when a claim is filed, Content ID immediately diverts all ad revenue from the video to whoever filed the claim.²³³ Therefore, the ad revenue from the videos monetized by the

claims-on-video-game-content-producers [hereinafter Tassi, *YouTube*] (referring to the flood of flags on gameplay video creators); Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google's Dark Side*, FORBES (Dec. 19, 2013, 10:00 AM), <http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side> [hereinafter Tassi, *The Injustice*] (identifying the adverse impact that the recent crackdown on gameplay videos had on the creators of those videos).

225. See Tassi, *YouTube*, *supra* note 224.

226. See *id.*

227. See *id.*

228. See *supra* text accompanying notes 195-203 (discussing the changes made to Content ID since its inception).

229. See Tassi, *YouTube*, *supra* note 224 (maintaining that the likely cause of the sudden crackdown was a new algorithm implemented by YouTube).

230. See *How Content ID Works*, *supra* note 12 (mentioning the options of the Content ID system and how they can be used).

231. See Mackintosh, *supra* note 224 (pointing out that the sudden crackdown jeopardized the livelihoods of many content creators who had made a career on YouTube); Tassi, *YouTube*, *supra* note 224 (stating that video game copyright holders had allowed the gaming videos to remain on YouTube because they were good publicity).

232. Tassi, *YouTube*, *supra* note 224 (emphasizing that many content creators on YouTube rely on monetized videos as their income).

233. hankschannel, *supra* note 214 (explaining what happens to ad revenue when a monetized video is flagged); Tassi, *The Injustice*, *supra* note 224.

content creators of gameplay videos was diverted not to the copyright holder, who had allowed these videos to remain online, but to the completely unrelated third party who filed the claim, which YouTube failed to prevent.²³⁴ These content creators are being deprived of their livelihood and of their rights to the gameplay videos—most of which contain criticism or commentary, which are both covered by fair use—because of the automated nature of Content ID and the disproportionate nature of the monetization used by the system.²³⁵

The example of what happened to the creators of gameplay videos illustrates how the automated Content ID system can be taken advantage of, both in terms of flagging, and in terms of monetization.²³⁶ This problem extends beyond these gameplay creators, however, to all content creators on YouTube who are at the mercy of Content ID and copyright holders.²³⁷ Changes to the system must be effected so that monetization becomes in some way proportional, content creators benefit from the rights that they are entitled to, and copyright holders are unable to take advantage of videos made by content creators just because they use some part of copyrighted material in their video.²³⁸

IV. PROTECTING THE UNPROTECTED: REASSERTING CONTENT CREATORS' RIGHTS THROUGH NEW REGULATION

Online content creators are largely unprotected by the current copyright law, in large part because a lot of it was drafted and enacted with mass media copyright holders in mind as the leaders in the entertainment creation industry.²³⁹ Therefore, the current copyright law needs to be amended in some way to enable the ISP users to freely create the content that is becoming increasingly prevalent as entertainment.²⁴⁰ Changes need to be made with respect to how ISPs are required to handle content that uses copyrighted work in compliance with the fair use exception, largely through education of users as to their rights.²⁴¹

234. Tassi, *The Injustice*, *supra* note 224.

235. See 17 U.S.C. § 107 (2012); Tassi, *The Injustice*, *supra* note 224.

236. See Mackintosh, *supra* note 224; Tassi, *The Injustice*, *supra* note 224; Tassi, *YouTube*, *supra* note 224.

237. See hankschannel, *supra* note 214; vlogbrothers, *supra* note 219.

238. See *infra* Part IV.

239. JENKINS, *supra* note 10, at 189; see also McKay, *supra* note 10, at 124-27 (considering the DMCA takedown procedure and the dominant position that mass media has in easily stopping online expression without any consequences).

240. See Robins, *supra* note 1, at 4.

241. See *infra* Part IV.A.

Changes also have to be made to the monetization of online user content by copyright holders so that it is proportional to the amount of copyrighted work used in the content.²⁴²

A. Educating the Creator: A New Requirement for Internet Service Providers to Supply Information to Creators About Fair Use Protections

The current YouTube Content ID system is completely incapable of recognizing fair use in videos uploaded by content creators.²⁴³ As such, content that is not infringing is flagged and then taken down or monetized in favor of the mass media copyright holder more often than not, which, in turn, deprives the content creator of her rights.²⁴⁴ The problem of automated systems' inability to recognize fair use is not a new one, and several scholars and students have proposed various solutions to it.²⁴⁵ Most of these solutions propose amendments to the DMCA to better protect users by requiring the ISPs to better monitor fair use on their websites and penalizing them for false flags when monitoring fails.²⁴⁶

These proposals are unrealistic because requiring an ISP to monitor fair use requires it to use more manpower than it can afford, since automated systems cannot recognize the exception.²⁴⁷ Furthermore, these requirements to monitor fair use on the website would directly oppose the section of the DMCA that explicitly states that ISPs do not have to monitor their sites for infringement.²⁴⁸ Therefore, this Note proposes amending the DMCA by adding the following provision, which would require the ISPs to educate content creators on their rights under the fair use doctrine:

(o) Fair Use.—A service provider will be required to have a page on its website describing the fair use doctrine in layman's terms. All users shall be redirected to this page both when they upload a video, and

242. See *infra* Part IV.B.

243. See Bartholomew, *supra* note 12, at 77; Masnick, *supra* note 204; *supra* Part III.B.

244. See Jonathan Bailey, *Why Fair Use Suffers on YouTube*, PLAGIARISMTODAY (Sept. 4, 2007), <https://www.plagiarismtoday.com/2007/09/04/why-fair-use-suffers-on-youtube/>; *supra* Part III.B.

245. See *supra* note 206 and accompanying text.

246. See Halbert, *supra* note 81, at 955-59 (proposing more comprehensive user generated rights); Ashley, *supra* note 4, at 602-06 (proposing amendments to the DMCA to protect users); Leister, *supra* note 81, at 128-37 (noting the uselessness of the fair use doctrine in an increasingly digital world); McKay, *supra* note 10, at 139-44 (proposing stricter penalties for ISPs for invalid flags and invalid takedowns).

247. See Rock, *supra* note 45, 715-18; *supra* Part III.B.

248. 17 U.S.C. § 512(m)(1) (2012).

when they receive a notification about a video they previously uploaded being flagged for infringement.

The purpose of this amendment will be to further educate content creators so that they may be more inclined to utilize the counter-notification procedures available to them under the DMCA and YouTube's Content ID system.²⁴⁹ Of course, there is no guarantee that content creators will read the pages they are redirected to, but if people are more educated about fair use and their rights under the doctrine, they are less likely to be afraid to fight for those rights against the mass media copyright holders that could be making false claims without checking for fair use.²⁵⁰ Additionally, if people are more educated and more inclined to fight against false claims based on fair use, perhaps copyright holders will be more careful when making claims based on the flags of automated infringement filters.²⁵¹ If, however, educating content creators about fair use does not motivate them to dispute false claims, or content creators are not inclined to read the fair use pages to which they are directed, then an amendment that addresses disproportional monetization will still act as a partial solution.²⁵²

*B. Compensating the Creator: A New Requirement for
Internet Service Providers to Proportionally
Monetize Any Automatically Flagged Videos*

A further problem with YouTube's Content ID system is that when a copyright holder files a complaint and chooses to monetize a video uploaded by a content creator, then the entire video is monetized for the copyright holder, regardless of how much copyrighted content is used.²⁵³ Once a video is monetized, all the ad revenue from that video is split between YouTube and the copyright holder, leaving nothing for the content creator, even if the majority of the video is the creator's original work.²⁵⁴ Additionally, if the content creator does not want to make any money from the video and has not monetized it herself, once a copyright holder has monetized the video, it begins to make money on more than

249. See Garon, *supra* note 66, at 523-27; Bartholomew, *supra* note 12, at 73-74.

250. See Bailey, *supra* note 244; *supra* Part III.B.

251. See hankschannel, *supra* note 214.

252. See *infra* Part IV.B.

253. See Tassi, *The Injustice*, *supra* note 224.

254. See hankschannel, *supra* note 214; see also Danielle Duarte, *Video Monetization, YouTube, and Multi-Channel Networks 101*, DLREPORTER (Apr. 3, 2014), <http://dlreporter.com/2014/04/03/video-monetization-youtube-and-multi-channel-partnerships-101> (examining a new option that content creators are using to avoid the problem of revenue from monetized videos being diverted to those who file complaints against their videos).

just the copyrighted material because the whole video is monetized, including the parts with the creator's original work.²⁵⁵

Therefore, this Note proposes amending the DMCA by adding the following provision, which will ensure that any monetization of videos will be proportional to the amount of copyrighted material used in it:

(p) Monetization.—When a video is monetized a service provider will be required to ensure that this monetization will be done in a manner proportional to the amount of copyrighted material used by the content creator in the video. A copyright holder who chooses to monetize a flagged video shall not be able to make money on the portions of that video that do not contain his copyright materials.

The purpose of this amendment is to ensure that copyright holders are not benefitting from more than just the works for which they hold the copyrights, and that the content creators are not taken advantage of when the copyright holders decide to monetize videos that have been flagged as infringing.²⁵⁶ Furthermore, this amendment is something of a backup for the amendment proposed above because content creators will still be protected in some way if the education about fair use is not effective in increasing the use of counter-notifications.²⁵⁷ Although it is impossible to monitor all the fair uses on an ISP's website, and there is no guarantee that the content creators will read the webpages detailing the fair use doctrine, the ISPs can at least be required to make sure that videos are not monetized disproportionately to the amount of copyrighted content in them.²⁵⁸

Automated systems like Content ID already flag videos based on the existence of a certain (usually small) amount of copyrighted material and provide options to copyright holders to track a video's viewership statistics.²⁵⁹ Since the algorithms are based, at least in part, on the duration of the copyrighted work's usage in the video, and certain things about the video can already be tracked, it does not seem like much of a stretch to require these systems to monitor exactly what proportion of the video contains a copyrighted work.²⁶⁰ Then, when copyright holders monetize a video flagged as infringing, these new statistics about the

255. See hankschannel, *supra* note 214; *supra* Part III.C.

256. See Bartholomew, *supra* note 12, at 68; Mackintosh, *supra* note 224; Tassi, *The Injustice*, *supra* note 224.

257. See *supra* Parts III.C, IV.A.

258. See Bailey, *supra* note 244; Statistics, *supra* note 136; *supra* Parts III.C, IV.A.

259. *How Content ID Works*, *supra* note 12.

260. See *id.*

amount of copyrighted work in the video can be used to set the revenue received by the copyright holder without allowing it to benefit from the content creator's original works in the video.²⁶¹

C. Arguments Against These Proposed Solutions and Responses to Them

Several scholars and students have already proposed different solutions to the continuing issues posed by the application of current copyright law to the content that users upload to YouTube.²⁶² The biggest criticism to any proposed solution to the fair use problem is that the fair use doctrine has become antiquated in the age of the Internet and the DMCA.²⁶³ A criticism of the idea of proportional monetization is that those proportions will not take into account the heart of the matter, or main purpose, of the content in the video in question.²⁶⁴

The fair use doctrine is too seminal within copyright law to eliminate it completely as some authors have proposed.²⁶⁵ The fair use doctrine preserves the essential constitutional purpose of copyright law because it allows content creators to use copyrighted work to advance art, education, research, and science.²⁶⁶ Without the fair use doctrine, no one would be able to use copyrighted works for anything at all when they are relevant to the cultural consciousness because copyright protections last so long.²⁶⁷ By the time that the works are no longer protected by copyright, most of them will not be relevant to advancing the goals of copyright law, given that copyright protection lasts for seventy years beyond the death of the author.²⁶⁸ Since the fair use doctrine is so important, the solution proposed in this Note is the most effective alternative to resolve the problem posed by Content ID's inability to recognize fair use in videos.²⁶⁹ This is especially true given the fact that it is physically and economically impossible for YouTube to

261. See *Statistics*, *supra* note 136; *supra* Part III.C.

262. See *supra* note 206 and accompanying text.

263. Rock, *supra* note 45, at 719.

264. See *Fair Use and Permission*, N.C. ST. U., <http://www.provost.ncsu.edu/copyright/resources/tutorials/FairUseandPermission.php> (last visited Nov. 22, 2015) (discussing the considerations necessary for the proportionality factor of the fair use doctrine, which can be related to proportional monetization).

265. See Rock, *supra* note 45, at 711-19.

266. U.S. CONST. art. I, § 8, cl. 8; see also Lee, *supra* note 135, at 1513, 1522 (emphasizing the importance of user-generated content to the constitutional purpose of copyright law).

267. 17 U.S.C. § 302 (2012) (pointing out that copyright protections last for seventy years beyond the death of the author).

268. See *id.*

269. See *supra* Parts III.B, IV.A.

have each video manually reviewed for fair use.²⁷⁰ As a result, if fair use is to continue to be a major exception to copyright law, content creators must be educated about the doctrine so that they can fight for their rights when videos are erroneously flagged.²⁷¹

It could be argued that proportional monetization could prove to be problematic, because it may only take into account the actual timing of the copyrighted material and not the impact that material has on viewership of the video.²⁷² Arguably, if the copyrighted work in the video gets to the heart of the matter of the copyrighted work, or is the main reason why anyone watches the video, then the content creator's proportion of the revenue should be less than that of the copyright holder.²⁷³ The concept of "the heart of the matter" of a copyrighted work appears in the fair use doctrine primarily,²⁷⁴ but it is just as applicable to the proportional monetization of videos.²⁷⁵ This argument against proportional monetization is defeated, however, by the way that a YouTube video is ranked.²⁷⁶ There are several factors that determine the ranking of a YouTube video: relevant keywords; video tags;²⁷⁷ title;²⁷⁸ descriptions;²⁷⁹ thumbnails;²⁸⁰ video transcripts;²⁸¹ channel authority;²⁸² views and video retention;²⁸³ comments; subscribers;²⁸⁴ shares;²⁸⁵

270. See *Statistics*, *supra* note 136 (specifying that hundreds of millions of videos have been claimed using Content ID by the over 8000 partners who take advantage of the system); see also *Rock*, *supra* note 45, at 716-17 (expressing that the capability of automated filters far surpasses the ability of people to review the same material).

271. See *supra* Part IV.A.

272. See Arsham, *supra* note 11, at 790-91 (illustrating that the monetization model used by YouTube could lead to over-regulation and under-regulation).

273. See generally *Fair Use and Permission*, *supra* note 264.

274. *Id.*

275. See *id.*; *supra* note 273 and accompanying text.

276. See Navneet Kaushal, *How to Make Your Videos Rank Better on YouTube*, CLICKZ (June 23, 2014), <http://www.clickz.com/clickz/column/2351591/how-to-make-your-videos-rank-better-on-youtube>.

277. *Id.* Tags are descriptive keywords that can help viewers find a video. *Formatting Tags*, YOUTUBE, <https://support.google.com/youtube/answer/146402?hl=en> (last visited Nov. 22, 2015).

278. Kaushal, *supra* note 276.

279. *Id.*

280. *Id.* A thumbnail is an image that shows viewers a quick snapshot of the video before they view it in full. *Video Thumbnails*, YOUTUBE, <https://support.google.com/youtube/answer/72431?hl=en> (last visited Nov. 22, 2015).

281. Kaushal, *supra* note 276. Transcripts contain only the text of what is said in the video. *Transcripts*, YOUTUBE, <https://support.google.com/youtube/answer/2734799?hl=en> (last visited Nov. 22, 2015).

282. Kaushal, *supra* note 276.

283. *Id.* An audience retention report shows, among other things, the average view time for all videos and also shows the viewership for specific parts of each video. *Audience Retention Report*, YOUTUBE, <https://support.google.com/youtube/answer/1715160?hl=en> (last visited Nov. 22, 2015).

284. Kaushal, *supra* note 276.

favorites;²⁸⁶ thumbs up or down;²⁸⁷ and backlinks.²⁸⁸ Some of these features can be used to track how much of a copyrighted work is used in a video and how it impacts the video's viewership (whether the copyrighted material is the heart of the matter of the video).²⁸⁹ Specifically, video transcripts and video retention can be used to track the impact of the copyrighted work on a video.²⁹⁰ Since video transcripts only show the spoken material in the video, it should be simple to pick out the text of any copyrighted material that was used, especially if it contains movie or television clips.²⁹¹ Video retention statistics can be especially helpful, as well, since viewership statistics are available for each and every part of a video.²⁹² This directly addresses the potential problem with proportional monetization because content creators, YouTube, or copyright holders can check the statistics for the part of the video that includes the copyrighted work.²⁹³ If that part of the video has higher viewership statistics than the rest of the video, then it is probably safe to assume that the copyrighted material is the primary reason people watch the video and the proportional split of the revenue can be adjusted accordingly.²⁹⁴ Therefore, the solution proposed by this Note²⁹⁵ can directly address the problem posed by a copyrighted work being the heart of the matter of the video instead of the content created by the user.²⁹⁶

V. CONCLUSION

Huge changes in technology and the increased use of the Internet as a source of entertainment have allowed more and more people to create original content and to use copyrighted material to create something new.²⁹⁷ The current copyright law does not reflect these changes despite the implementation of the DMCA.²⁹⁸ The DMCA heavily favors mass

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*; see also *What Are Backlinks and How Do I Use Them?*, GOOGLE, <https://support.google.com/blogger/answer/42533?hl=en> ("Backlinks display other webpages that link to your posts.") (last visited Nov. 22, 2015).

289. See *Audience Retention Report*, *supra* note 283.

290. See *id.*; *Transcripts*, *supra* note 281.

291. See *Transcripts*, *supra* note 281.

292. *Audience Retention Reports*, *supra* note 283.

293. See generally *id.*

294. See generally *id.*; *Fair Use and Permission*, *supra* 264.

295. See *supra* Part IV.A–B.

296. See *supra* notes 272–73 and accompanying text.

297. See *supra* Part II.B.

298. See *supra* Part II.B.

media copyright holders because it was enacted before the explosion of user-created content on the Internet.²⁹⁹ Furthermore, the application of the DMCA to ISPs like YouTube heavily favors the websites over the content creators who made them big.³⁰⁰ This puts online content creators at a severe disadvantage given their lack of resources and knowledge of the law.³⁰¹

This Note has proposed amendments to the DMCA that seek to educate the content creators about their rights, ensure that they are protected, and allow them to benefit from original works if they choose to do so.³⁰² The proposed modifications seek to educate content creators about fair use with the goal of encouraging them to utilize the counter-notification and dispute features available to them through Content ID.³⁰³ The proposed legislation further seeks to guarantee that any of the original works of content creators are not taken advantage of and that monetization only leads to revenue for the copyright holder based on the actual copyrighted work in the video.³⁰⁴ These new amendments to the DMCA will allow online content creators to be better informed about their rights and more confident about their ability to benefit from the original content that they spent so much time working on.³⁰⁵

*Leron Solomon**

299. *See supra* Part II.B.

300. *See supra* Part II.C.

301. *See supra* Part III.

302. *See supra* Part IV.

303. *See supra* Part IV.A.

304. *See supra* Part IV.B.

305. *See supra* Part IV.

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