

NO SAFE HARBOR: YOUTUBE'S CONTENT ID AND FAIR USE

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Abstract: YouTube is arguably the world's foremost platform for user-generated content. When users upload material to YouTube, there is a possibility that the uploaded content is protected by copyright. Under traditional copyright law, YouTube is technically liable for allowing copyrighted material to be disseminated. But the Digital Millennium Copyright Act (DMCA) insulates YouTube and other internet service providers from liability if the companies take certain steps to filter out copyrighted material. For YouTube, the only feasible way to fulfill its copyright protection obligations is to utilize automated copyright protection software. Nevertheless, YouTube's software, Content ID, and the copyright policies associated with it, pose a challenge to its users' rights to create content in fair use. This Essay argues that, to mitigate this challenge, Congress should amend the DMCA to require platforms such as YouTube to protect fair use as much as they protect copyrighted material.

INTRODUCTION

Every minute, over four hundred hours of content are uploaded to YouTube.¹ Because some of this content uses copyrighted material without permission, YouTube uses its own proprietary automated copyright protection system, Content ID.² Content ID sifts through uploaded videos to determine whether a video's content is protected by a copyright.³ YouTube is heavily dependent on its automated system, and handles ninety-eight percent of copyright issues on the platform through Content ID.⁴ Copyright owners have become reliant on Content ID as well, submitting more than 800 million claims through the software since its launch and receiving over \$3 billion dollars from such claims.⁵ Content ID and YouTube's copyright dispute procedure largely mimic and function as a private alternative to the notice-and-takedown provisions of the Digital Millennium Copyright Act (DMCA).⁶ Some argue, however, that YouTube's use

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¹ HOW GOOGLE FIGHTS PIRACY, GOOGLE 19 (2018), https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

² *Id.* at 24.

³ *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en>.

⁴ HOW GOOGLE FIGHTS PIRACY, *supra* note 1, at 14.

⁵ *Id.* at 13–14.

⁶ See Digital Millennium Copyright Act 17 U.S.C. § 512(b)(2)(E) (2018) (outlining the notice-and-takedown process); *Dispute a Content ID Claim*,

of the Content ID process often stifles users' ability to use copyrighted material in fair use.⁷ Although the DMCA does ordinarily protect YouTube and similar platforms from copyright claims, the DMCA is, at heart, a copyright law.⁸ Fair use is an important and recognized component of copyright law.⁹

This Essay argues that Congress should amend the DMCA so that platforms such as YouTube cannot take safe harbor from liability under the DMCA unless they provide reasonable protection for fair use in their determinations of copyright claims.¹⁰ Part I provides an overview of the DMCA and how fair use is involved with its notice-and-takedown process.¹¹ Part II summarizes YouTube's Content ID claim process and the challenge it poses for users relying on fair use in their content creation.¹² Finally, Part III argues that Congress should amend the DMCA and proposes that platforms like YouTube should consider fair use if they wish to remain eligible for safe harbor under the DMCA.¹³

I. THE DMCA, SAFE HARBOR PROVISIONS, AND FAIR USE

Given the new realities of the then-nascent internet age, Congress enacted the DMCA in 1998 to modernize traditional copyright law.¹⁴ Its primary objective was to criminalize methods that could be used to defeat mechanisms that protected copyrighted material from unlawful reproduction.¹⁵ Arguably, however, the most consequential aspect of the DMCA for copyright law has been its safe harbor provisions, which are discussed in Section A below.¹⁶ The DMCA also attempts to provide for fair use in its provisions, but has largely depended on courts, discussed in detail in Section B, to determine the extent to which fair use is protected under the DMCA.¹⁷

A. The DMCA and Safe Harbor Provisions

The safe harbor provisions of the DMCA shield service providers like YouTube from liability when copyright owners claim, for example, that someone

https://support.google.com/youtube/answer/2797454?hl=en&ref_topic=9282678 (describing the similarly back-and-forth process that YouTube utilizes for copyright disputes).

⁷ Elliot Harmon, *Content ID and the Rise of the Machines*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2016), <https://www.eff.org/deeplinks/2016/02/content-id-and-rise-machines>.

⁸ Nicolo Zingales, *Digital Copyright, "Fair Access" and the Problem of DRM Misuse*, B.C. INTELL. PROP. & TECH. F. 1, 2 (2012).

⁹ DAN HUNTER, *INTELLECTUAL PROPERTY* 70–73 (Dennis Patterson ed., 2012).

¹⁰ See 17 U.S.C. § 512(b) (discussing the conditions for safe harbor eligibility).

¹¹ See *infra* notes 14–42 and accompanying text.

¹² See *infra* notes 43–80 and accompanying text.

¹³ See *infra* notes 81–98 and accompanying text.

¹⁴ Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 500 (2017).

¹⁵ Zingales, *supra* note 8, at 2 (discussing the general purpose DMCA's adoption).

¹⁶ See Sag, *supra* note 14, at 500 (proposing that § 512 has been the most important feature of the DMCA since its adoption).

¹⁷ See 17 U.S.C. § 512(f) (discussing misrepresentation under the DMCA); *Lenz v. Universal Music Group*, 815 F.3d 1145, 1153 (9th Cir. 2016) (holding that copyright claimants must consider fair use prior to making a claim under § 512).

has uploaded infringing material to YouTube.¹⁸ “Copyrighted materials” are defined in the United States Code as “original works of authorship, fixed in any tangible medium of expression from which they can be reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁹ The definition of “online service providers” includes entities such as YouTube.²⁰ To protect itself from liability under the DMCA, a service provider must act to take-down or block any content from its platform upon notice from a copyright owner that the owner is claiming said content as its copyright.²¹ This is known as the notice-and-takedown system.²²

The DMCA further requires the service provider to take reasonable steps to promptly notify the user who uploaded the disputed material.²³ The uploader then has the option to file a counternotification, which is the uploader’s statement that the material in question is not infringing.²⁴ If the dispute persists beyond the notice-and-takedown stage, the parties then file their claims in federal court.²⁵ Critically, the DMCA protects a service provider from liability as long as it is responsive to the notices and counternotifications of the parties in dispute, regardless of whether the disputed content is eventually found to be infringing.²⁶

B. Fair Use Under the DMCA: Lenz v. Universal

Fair use balances copyright owners’ right to protect their material from infringing uses with the public’s right to engage in the freedom of expression that underpins copyright law.²⁷ Fair use limits a copyright owner’s right to control the copyrighted material by recognizing that not all reproductions of the material constitute infringements.²⁸ These limits are important because they protect many transformative uses of copyrighted material such as satire, parody, and educational uses.²⁹ Courts judge transformative uses, or uses derivative of copyrighted material that transform the material into its own work, favorably due to their role in free expression.³⁰ Whether an unauthorized reproduction of copyrighted material is considered fair use depends on four factors: (1) the purpose or character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the

¹⁸ 17 U.S.C. § 512(c)(1)(C) (2018).

¹⁹ See 17 U.S.C. §§ 102(a)(1)–(8) (listing sound recordings, motion pictures, and other audiovisual works as examples of works of authorship).

²⁰ See 17 U.S.C. § 512(k)(1)(B) (defining a “service provider”).

²¹ 17 U.S.C. § 512(b)(2)(E).

²² Elliot Harmon, *Don’t Put Robots in Charge of the Internet*, ELECTRONIC FRONTIER FOUND. (Jan. 18, 2019), <https://www.eff.org/deeplinks/2019/01/dont-put-robots-charge-internet>.

²³ 17 U.S.C. § 512(g)(2)(A).

²⁴ See 17 U.S.C. § 512(g)(3) (discussing the DMCA counternotification requirements).

²⁵ See 17 U.S.C. § 501(b) (providing for traditional copyright infringement claims); § 512(f) (describing the DMCA notice-and-take-down process and when it gives way to traditional infringement claims).

²⁶ 17 U.S.C. § 512(g)(1).

²⁷ *Sag*, *supra* note 14, at 500.

²⁸ See 17 U.S.C. § 107 (discussing the forms of reproduction considered non-infringing).

²⁹ See Hunter, *supra* note 9, at 74–75 (listing activities fair use protects).

³⁰ See *id.* (explaining courts’ view on transformative uses of copyrighted material).

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.³¹

None of these factors are dispositive on their own, as courts conduct fair use determinations contextually, on a case-by-case basis.³² This is important considering the inability of automated systems to analyze content contextually.³³ Further, fair use is an authorized form of reproduction under copyright law.³⁴ As the Supreme Court recognized in 1984 in *Sony Corporation of America v. Universal City Studios, Inc.*, copyright owners cannot prevent all forms of reproductions of their copyrighted material.³⁵

The DMCA itself addresses fair use only by requiring that an individual making an infringement claim must not misrepresent reproductions in fair use as infringing activity.³⁶ It was not until the United States Court of Appeals for the Ninth Circuit's 2016 decision in *Lenz v. Universal Music Group* that copyright owners were required, prior to filing a takedown notice under the DMCA, to consider whether the use of the copyrighted material in dispute was fair use.³⁷ In *Lenz*, a record label filed a Content ID claim against a woman who posted a video of her child dancing to a song by the musical artist Prince on YouTube.³⁸ The Ninth Circuit concluded that a party seeking to make a claim under the DMCA must consider whether the content in dispute is fair use before making its claim.³⁹ The court also concluded that a copyright owner needs only a "subjective good-faith belief" that content infringes on its copyright, and did not require a more comprehensive assessment of the material in question.⁴⁰ This standard is met even if the subjective belief was poorly or incorrectly formed.⁴¹ Though the threshold for considering fair use in *Lenz* is minimal, it is still a stricter application of the DMCA than copyright owners previously faced when making legal claims to their copyrighted material.⁴²

³¹ *Id.*

³² Hunter, *supra* note 9, at 70–71.

³³ See *infra* note 49 and accompanying text. (discussing "fingerprint" content filtering algorithm and its associated shortcomings).

³⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432–33 (1984).

³⁵ See *id.* (assessing that fair use is an example of an area over which a copyright owner's exclusive rights do not extend).

³⁶ See 17 U.S.C. § 512(f) (discussing the liability for misrepresentations of claims under § 512).

³⁷ *Lenz*, 815 F.3d at 1154.

³⁸ *Id.* at 1149.

³⁹ *Id.* at 1154.

⁴⁰ See *id.* (discussing that copyright holders only need to demonstrate a good faith belief that the reproduction was not in fair use).

⁴¹ See *id.* at 1160. (Smith, J., dissenting) (arguing that the majority's subjective belief holding would not place any actual duty on copyright owners to consider fair use in good faith).

⁴² See *id.* at 1153–60. (discussing the court's requirement that claimants must consider fair use).

II. CONTENT ID AND COPYRIGHT PROCEDURES ON YOUTUBE

YouTube has two general types of copyright dispute procedures: copyright takedowns and Content ID claims.⁴³ Even though they are distinct dispute resolution methods, the Content ID system, discussed in Section A, and its procedure closely mirror, albeit with key differences, the DMCA's notice-and-takedown system.⁴⁴ Section B discusses the Content ID dispute process and how it provides opportunities for copyright owners to be more aggressive in making copyright disputes.⁴⁵

A. Content ID Generally

Content ID operates as a filter through which content uploaded to the platform is checked against a database of copyrighted material that YouTube maintains.⁴⁶ The database is assembled through voluntary participation of copyright owners.⁴⁷ If Content ID finds a match to copyrighted material, the uploaded content is flagged by the system's algorithm.⁴⁸

Content ID's algorithm functions using a filtering technique known as fingerprinting.⁴⁹ Copyright owners upload their copyrighted material to YouTube's database and create their own fingerprint with Content ID.⁵⁰ Content ID then constantly analyzes the fingerprint of every video uploaded to the site against the content in its database for matches.⁵¹ Problematically, though, fingerprinting algorithms can produce both false positives and false negatives.⁵² Furthermore, no automated system, including those based on fingerprinting algorithms, can assess content contextually, which fair use analyses require.⁵³

⁴³ See *The Difference Between Copyright Takedowns and Content ID Claims*, YOUTUBE, https://support.google.com/youtube/answer/7002106?hl=en&ref_topic=2778546 (last visited Mar. 15, 2020) (distinguishing between YouTube's compliance with DMCA notice-and-takedown procedure and their private Content ID system).

⁴⁴ See *infra* notes 46–59 and accompanying text (discussing the basic operations of the Content ID system).

⁴⁵ See *infra* notes 60–80 and accompanying text. (analyzing the problems for fair use posed by YouTube's Content ID dispute procedure).

⁴⁶ See *How Content ID Works*, *supra* note 44 (outlining the Content ID claim procedure).

⁴⁷ See *id.* (stating how Content ID's database is compiled).

⁴⁸ See *id.* (discussing when Content ID flags content).

⁴⁹ EVAN ENGSTROM & NICK FEAMSTER, *THE LIMITS OF FILTERING: A LOOK AT THE FUNCTIONALITY & SHORTCOMINGS OF CONTENT DETECTION TOOLS* 13–15 (2017), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>. Fingerprinting algorithms are generally limited to analyses of audio and video content, which does not present an issue for YouTube because all content uploaded to the platform is in video format. *Id.*

⁵⁰ See *How Content ID Works*, YOUTUBE, *supra* note 44 (discussing where Content ID gets reference files).

⁵¹ See *id.* (stating that Content ID checks every video uploaded to YouTube against its database).

⁵² ENGSTROM & FEAMSTER, *supra* note 49, at 13–15.

⁵³ See *id.* (discussing filtering algorithms inability to assess content for context).

Critics of Content ID's algorithm therefore doubt its accuracy.⁵⁴ As stated above, the nature of fingerprinting-type algorithms is characterized by a number of false positives.⁵⁵ This presents a problem for YouTube, given that protecting against copyright infringement on its platform is Content ID's purpose.⁵⁶ Any fair use determination—whether positive or negative—is inherently contextual and Content ID is based on an algorithm that cannot, axiomatically, assess the content for context.⁵⁷ This has led to some very public cases of false positives where content creators have had their YouTube channels pick up a Content ID claim for white noise, public domain works, or even a creator's own voice conducting a microphone check.⁵⁸ Granted, these are extreme examples, but they highlight an important problem with YouTube's reliance on Content ID which, in combination with YouTube's copyright dispute procedure, poses a risk to the platform's users' fair use rights.⁵⁹

B. Content ID Dispute Process

The Content ID dispute process begins when the software identifies a potential match to copyrighted material in YouTube's database.⁶⁰ Once a copyright owner is alerted to a Content ID claim, it can proceed in one of three ways.⁶¹ The owner can request that the video be (1) monetized, (2) tracked for viewer statistics, or (3) blocked.⁶² If an owner chooses to monetize the video flagged by Content ID, advertisements will run on the video with the copyright owner getting a portion of the ad revenue.⁶³ The monetization option is the most commonly selected of the three options, with roughly ninety percent of claims being monetized by copyright owners.⁶⁴

⁵⁴ *The Mistake So Bad, That Even YouTube Says Its Copyright Bot 'Really Blew It'*, ELECTRONIC FRONTIER FOUND. (Jan. 8, 2019), <https://www.eff.org/takedowns/mistake-so-bad-even-youtube-says-its-copyright-bot-really-blew-it> [hereinafter *The Mistake So Bad*].

⁵⁵ See ENGSTROM & FEAMSTER, *supra* note 49 at 13–15 (highlighting the tendency of fingerprinting algorithms to produce false positives).

⁵⁶ See *How Content ID Works*, *supra* note 44 (discussing the basic purpose of the Content ID system).

⁵⁷ See HUNTER, *supra* note 9, at 70–71 (stating the importance of conducting fair use determinations contextually); ENGSTROM & FEAMSTER, *supra* note 49, at 13–15 (discussing algorithms inability to assess content contextually).

⁵⁸ *The Mistake So Bad*, *supra* note 54.

⁵⁹ See *id.* (listing examples of notable incidents where Content ID has produced false positives).

⁶⁰ See *Upload Policies and Match Policies*, YOUTUBE, https://support.google.com/youtube/answer/107129?hl=en&ref_topic=24332 (last visited Mar. 12, 2020) (describing when the Content ID procedure begins).

⁶¹ *Policy & Claim Basics*, YOUTUBE, https://support.google.com/youtube/answer/107383?hl=en&ref_topic=24332 (last visited Mar. 12, 2020).

⁶² See *id.* (discussing the three options for Content ID claims).

⁶³ *Policy & Claim Basics*, *supra* note 61; see HOW GOOGLE FIGHTS PIRACY, *supra* note 1, at 25. (providing the available options for copyright owners when a Content ID match is made).

⁶⁴ See HOW GOOGLE FIGHTS PIRACY, *supra* note 1, at 25 (naming monetization as the most popular option among copyright owners).

When a copyright owner makes a Content ID claim on a video, the video's uploader is notified and has the option to dispute the claim.⁶⁵ But the uploader has to dispute the claim to the copyright owner and not a third party.⁶⁶ If the copyright owner rejects the appeal and continues the claim, the Content ID process gives way to the traditional notice-and-takedown regime specified by the DMCA.⁶⁷ YouTube states that claimants under the Content ID system should avoid over-claiming or making erroneous claims, but does not specify the platform's criteria for satisfying this requirement.⁶⁸

The imbalance of power that copyright owners have in the Content ID process poses a challenge for users who rely on fair use to create their content.⁶⁹ The copyright owners have sole discretion over whether a disputed claim in the Content ID process will remain disputed and users have no other party to make their case to within the system.⁷⁰ The Content ID claim process is a private system and owners are thus not bound to consider fair use to the extent they would be obligated to in legal proceedings.⁷¹ The system even allows participating copyright owners to choose a default selection from the three options available to them—monetization, statistical tracking, or blocking—when the software flags a content match.⁷² Claiming copyright infringement by default is not consistent with the case-by-case approach fair use determinations require.⁷³ Yet, such claims are encouraged in the Content ID system and the ability to monetize such claims incentivizes copyright owners to make them as often as possible.⁷⁴

Because disputing a Content ID claim could ultimately result in a DMCA takedown notice, uploaders must consider this possibility when deciding whether to dispute a claim in the first place.⁷⁵ If the dispute were to reach the notice-and-takedown stage, the uploader would receive a “copyright strike” on their account, which is a recorded designation that the account has potentially violated copyright law.⁷⁶ An uploader's account is subject to termination by YouTube if it accrues

⁶⁵ See *Dispute a Content ID Claim*, *supra* note 6 (explaining the beginning stages of the Content ID dispute system).

⁶⁶ See *id.* (discussing the steps involved in the Content ID dispute process).

⁶⁷ 17 U.S.C. § 512(b)(2)(E) (2018); see *Dispute a Content ID Claim*, *supra* note 6 (stating that copyright owners can choose to continue a dispute by filing a copyright takedown notice).

⁶⁸ *Clean Up Incorrect Claims*, YOUTUBE, <https://support.google.com/youtube/answer/4352063> (last visited Mar. 12, 2020).

⁶⁹ See *Dispute a Content ID Claim*, *supra* note 6 (describing the dispute process where the copyright owner has nearly all decision-making power).

⁷⁰ See *id.* (describing the process by which claimants and alleged infringers dispute a Content ID claim).

⁷¹ See U.S.C. § 512(f) (discussing the criteria & penalties for misrepresentation *Lenz v. Universal Music Group*, 815 F.3d 1145, 1154 (9th Cir. 2016) (holding that copyright claimants must consider fair use prior to making a § 512 claim)).

⁷² *Upload Policies and Match Policies*, *supra* note 60.

⁷³ See *Hunter*, *supra* note 9, at 70–71 (discussing the fact-specific nature of fair use determinations).

⁷⁴ See *Upload Policies*, *supra* note 60 (describing the claimant's option to monetize allegedly infringing content).

⁷⁵ See *Dispute a Content ID Claim*, *supra* note 6 (displaying the potential for a Content ID dispute to end up in federal court).

⁷⁶ *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000> (last visited Mar. 12, 2020).

three copyright strikes.⁷⁷ Merely removing a flagged video will not remove a copyright strike from the uploader's account, so they must calculate the potential risk to their income even when disputing a private Content ID claim, as it exposes them to the deletion of their account and even possible litigation.⁷⁸ These risks, and the ease with which the Content ID policies allow copyright owners to expose uploaders to them, would make most people, to say nothing of those relying on their YouTube channel for income, have second thoughts about disputing a Content ID claim, even if they thought the video was fair use.⁷⁹

Though much of the Content ID claim procedure largely mirrors the DMCA notice-and-takedown provisions, several key aspects of Content ID effectively allow copyright owners to circumvent aspects of the copyright law that they would be subject to in non-private proceedings.⁸⁰

III. REQUIRING FAIR USE PROTECTION IN SAFE HARBOR CRITERIA

Fair use is a fundamental part of copyright law.⁸¹ As the Court of Appeals for the Ninth Circuit determined in 2016 in *Lenz v. Universal Music Group*, copyright claims brought under the Digital Millennium Copyright Act (DMCA) cannot be made by copyright owners without consideration of fair use.⁸² But, the DMCA does not require platforms to consider fair use when responding to takedown notifications or counternotifications.⁸³

Nothing in the DMCA prevents platforms from establishing private agreements with users to handle copyright disputes.⁸⁴ A private procedure like YouTube's Content ID, however, allows copyright owners to act far more aggressively in making copyright claims than traditional legal avenues would.⁸⁵ Content ID allows claims to be made by default, allows copyright owners to profit from making infringement claims, and places little-to-no burden on copyright owners to consider fair use either before making a Content ID claim or even when a claim is disputed.⁸⁶ Very little, if any, of the foregoing is consistent with the DMCA or the statute's requirements as determined by the courts.⁸⁷

YouTube's Content ID allows copyright owners to, in effect, circumvent copyright law on its platform by removing their responsibility to consider fair use

⁷⁷ *Id.*

⁷⁸ *See id.* (describing the requirements users must meet to rectify a copyright strike on their accounts).

⁷⁹ *See Dispute a Content ID Claim*, *supra* note 6 (listing the Content ID dispute procedures).

⁸⁰ 17 U.S.C. § 512; *Dispute a Content ID Claim*, *supra* note 6.

⁸¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432–33 (1984).

⁸² *Lenz v. Universal Music Group*, 815 F.3d 1145, 1154 (9th Cir. 2016).

⁸³ *See* 17 U.S.C. § 512(b)(2)(E) (2012) (discussing the requirements to be eligible for safe harbor, which do not include considering fair use).

⁸⁴ *Id.*

⁸⁵ *Dispute a Content ID Claim*, *supra* note 6.

⁸⁶ *Claims Basics*, *supra* note 61; *Clean Up Incorrect Claims*, *supra* note 68; *Dispute a Content ID Claim*, *supra* note 6.

⁸⁷ *See Lenz*, 815 F.3d at 1154 (concluding that copyright owners must consider whether a reproduction is fair use before making an infringement claim).

prior to making an infringement claim.⁸⁸ Although the DMCA does protect online service providers, including YouTube, from liability in copyright infringement cases, it only does so if they adhere to copyright law.⁸⁹ YouTube, or any other service provider, should not be able to find safe harbor from the very same law that its procedures, private or otherwise, act to undermine.⁹⁰ Congress should therefore amend the DMCA to require a service provider, such as YouTube, to take steps to abide by the entirety of copyright law, including and especially fair use, for that platform to be eligible for safe harbor under 17 U.S.C. § 512.⁹¹

At a minimum, any amendment of the DMCA's safe harbor provisions should prohibit a copyright claim from being made by default on a platform, as is possible with YouTube's Content ID.⁹² Such a prohibition would ensure that, at the very least, the platforms would force copyright owners to conduct a manual review of any material they wish to claim, which would bring the process more in line with how the Ninth Circuit envisioned it in *Lenz*.⁹³

Ideally, Congress should require the platforms to take a role in the disputes themselves, unlike the hands-off approach taken by YouTube in its Content ID procedure.⁹⁴ YouTube's Content ID procedure limits the platform's role to that of a middle man transmitting the parties' arguments to one another, while leaving almost all of the adjudicatory power in the hands of the copyright owner.⁹⁵ Specifically, the DMCA should require that in the case of private copyright dispute procedures, platforms must make determinations of their own on the merits of the parties' cases at some point in the process in order to reduce the imbalance of power that algorithms facilitate in such disputes.⁹⁶ In YouTube's case, such a change would force it to either abandon its problematic private process and stick to the notice-and-takedown provisions of the DMCA, or increase the extent to which fair use is a determining factor if it wants to continue to seek safe harbor, with both of these being more consistent with the purpose of the DMCA.⁹⁷ Ultimately, amending the DMCA in these ways would prevent online service providers like YouTube from establishing private dispute procedures that circumvent the very copyright law they wish to take safe harbor from.⁹⁸

⁸⁸ 17 U.S.C. § 512(b)(2)(E); *Dispute a Content ID Claim*, *supra* note 65.

⁸⁹ See 17 U.S.C. § 512(b)(2)(E) (describing service providers' obligations in order to remain protected from liability under § 512).

⁹⁰ *The Difference Between Copyright Takedowns and Content ID Claims*, *supra* note 43. See generally 17 U.S.C. § 512 (detailing the conditions and purposes of the safe harbor provisions of the DMCA).

⁹¹ See *Sony Corp.*, 464 U.S. at 432–33 (recognizing fair use as a part of copyright law).

⁹² See *Upload Policies*, *supra* note 60.

⁹³ See *Lenz*, 815 F.3d at 1154–55 (outlining the process copyright owners would ideally go through prior to making a copyright claim).

⁹⁴ *Dispute a Content ID Claim*, *supra* note 65.

⁹⁵ *Id.*

⁹⁶ See *id.* (describing the Content ID dispute procedure where almost all decision-making power rests with the claimants).

⁹⁷ 17 U.S.C. § 512(b)(2)(E); *Claims Basics*, *supra* note 61; *Dispute a Content ID Claim*, *supra* note 6; *Upload Policies*, *supra* note 60.

⁹⁸ 17 U.S.C. § 512(f); *Dispute a Content ID Claim*, *supra* note 6.

CONCLUSION

Fair use is codified and well-recognized by the Supreme Court as an important and legitimate aspect of copyright law. Underlying fair use is the policy that the public should be able to freely use portions of copyrighted materials for certain purposes. The DMCA exempts online service providers, such as YouTube, from liability in copyright infringement claims if they take steps to obey copyright law. Yet, YouTube has set up a private dispute resolution system that relies on flawed software and procedure to handle copyright disputes. The system is so flawed that it allows copyright owners to abuse their rights by stifling fair use. YouTube, and other similar platforms, should not be allowed to take advantage of a copyright law safe harbor when it is helping copyright owners circumvent such law in the first place. To resolve this issue and prevent similar situations in the future, Congress should amend the DMCA so that the service providers' safe harbor is contingent on adherence to the entirety of copyright law, including considerations of fair use. Service providers should be required to not only protect copyright owners' rights, but also those rights of individuals relying on fair use in creating their content.

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