

# THE NEXT GREAT YOUTUBE: IMPROVING CONTENT ID TO FOSTER CREATIVITY, COOPERATION, AND FAIR COMPENSATION

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## ABSTRACT

YouTube prides itself on its automatic copyright detection and filtering program known as Content ID because it goes beyond YouTube's legal responsibilities under the Digital Millennium Copyright Act and because it allows copyright holders to control and profit from their content. However, Content ID is not the technological paragon YouTube and some scholars see it as. By relying on a system that automatically matches, blocks, and monetizes videos that allegedly contain any amount of infringing content, both YouTube and copyright holders have promoted a system that opposes the Copyright Act and YouTube's goals of promoting creativity and protecting fair use. Without earlier human review and involvement, this costly Content ID system is susceptible to false positives and accidental matches, harming the public's access to new forms of creativity. Without limiting monetization to the proportion of matched content in a video, Content ID also encourages copyright holders to take advantage of the hard work and creativity of YouTubers by stripping away all of their monetary incentives. This article demonstrates why these problems exist and it sets forth a proposal that seeks to slightly modify Content ID to better align it with the Copyright Act and YouTube's own goals, while encouraging communication, cooperation, creativity, and fair compensation between copyright holders and YouTubers.

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## I. INTRODUCTION

Thanks to Google's efforts to go beyond the Digital Millennium Copyright Act's (DMCA) notice and takedown requirements, YouTube's automatic copyright detection and filtering technology, Content ID, has been claiming content at the expense of the public domain, fair use, and agreements between YouTubers<sup>1</sup> and copyright holders. Content ID has also been enabling claimants to take advantage of the creativity and work of YouTubers.<sup>2</sup>

In December 2013, hundreds of YouTube Multi-Channel Network (MCN) affiliates, such as Angry Joe and Ohmwrecker of the Polaris MCN, were met with what seemed like a thousand mistakes: their video game reviews, interviews, and playthroughs had been tagged, blocked, or monetized by companies they thought they could trust or by third parties they never heard of.<sup>3</sup> Some well-known gaming personalities blamed

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<sup>1</sup> YouTubers are individuals who upload videos to YouTube, such as to use YouTube as a source of creative expression, information or creative sharing, or compensation. *The Benefits of Becoming a YouTuber*, VLOG NATION, <http://www.vlognation.com/make-money-youtube-business-benefits> (last visited Jan. 26, 2015).

<sup>2</sup> See Chris Zabriskie, *How I End Up With YouTube Copyright Claims On My Own Songs*, MEDIUM (Jan. 8, 2015), <https://medium.com/@chriszabriskie/how-i-end-up-with-youtube-copyright-claims-on-my-own-songs-58d57484ffc6> (stating how Content ID has led to copyright notices and claims being put on a YouTuber's own music).

<sup>3</sup> These affected account holders were part of Multi-Channel Networks, "entities that affiliate with multiple YouTube channels, often to offer assistance in areas such as product, programming, funding, cross-promotion, partner management, digital rights management, monetization/sales, and/or audience development." *Multi-Channel Networks 101*, YOUTUBE, <https://www.youtube.com/yt/creators/mcns.html> (last visited Jan. 26, 2015). Originally, in exchange for being required to police their network and being liable for copyright violations, YouTube allowed the MCNs to quickly monetize their videos and to have some protection from Content ID. David La Rosa, *What's With All These YouTube Content ID Claims?*, VIDEOTER (Dec. 13, 2013, 1:46 PM), <http://videoter.com/youtube-content-id-claims-mcn-affiliates>. However, YouTube changed its MCN policy, requiring the networks to determine which channels are managed partners and which are affiliates. *Id.* Managed partners would still receive the benefits of quick monetization and protection from Content ID sweeps, and the network would be liable for any copyright strike against the managed partner; affiliates, though, would now be subject to Content ID sweeps and monetization review without affecting the network. *Id.*

YouTube's MCN policy change for the massive sweep,<sup>4</sup> thanks to a lawsuit between an MCN and the recording industry.<sup>5</sup> However, the real culprit was YouTube's Content ID system. Once YouTube applied the automatic filtering technology to previously posted material and to MCNs, its tentacles automatically matched videos, in-game music, and trailers and adhered to the blanketed pre-rendered choices of the alleged copyright holders.<sup>6</sup> Even one mistake by an employee who accidentally claimed all affiliated videos during a routine monetization check shut down its affiliates' channels and individuals outside the MCN.<sup>7</sup>

Some copyright holders worked quickly to help those harmed by the automatic system.<sup>8</sup> In the end, the YouTubers suffered. Even when they moved through the dispute and appeal system<sup>9</sup> or renegotiated the agreement, YouTubers lost viewers and profits they need to continue creating for the public.<sup>10</sup> The industry relying on YouTubers also suffered. By trusting an automated system with limited human involvement and no incentive to oversee the matching scheme, game publishers and music distributors had to convince YouTubers and the public that

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<sup>4</sup> Ohmwrecker/Maskedgamer, *MCN Follow-Up-Content ID, & the Greedy MCNs*, YOUTUBE (Dec. 12, 2013), <http://www.youtube.com/watch?v=K2gswd iH3VE>; see also Jim Sterling, *Copyright War*, ESCAPIST MAG. (Dec. 10, 2013), <http://www.escapistmagazine.com/videos/view/jimquisition/8565-Copyright-War> (discussing the argument that a change in YouTube policies could be the result of the massive sweep).

<sup>5</sup> Mike Masnick, *YouTube Fails in Explaining Flood of Takedowns for Let's Play Videos*, TECHDIRT (Dec. 12, 2013, 9:58 AM), <http://www.techdirt.com/articles/20131211/17365325537/youtube-fails-explaining-flood-takedowns-lets-play-videos.shtml>.

<sup>6</sup> See Saroj Kar, *YouTube Multi-Channel Networks Copyright Shakeups Aren't Going Anywhere*, SILICONANGLE (Dec. 18, 2013), <http://siliconangle.com/blog/2013/12/18/youtube-multi-channel-networks-copyright-shakeups-arent-going-anywhere> (discussing how the filter technology resulted in many notifications of copyright infringement).

<sup>7</sup> Owen Good, *YouTube Copyright Fiasco Get Wilder, but This Time Someone Admits Error*, KOTAKU (Dec. 16, 2013, 7:30 PM), <http://kotaku.com/mistake-zaps-youtubers-with-thousands-of-erroneous-co-1484535253>.

<sup>8</sup> Rob Crossley, *Industry Fights Back as YouTube Begins Mass Cull of Game Videos*, COMPUTERANDVIDEOGAMES (Dec. 11, 2013, 7:05 AM), <http://www.computerandvideogames.com/442245/industry-fights-back-as-youtube-begins-mass-cull-of-game-videos>.

<sup>9</sup> AngryJoeShow, *Youtube Copyright - Whats Broken & How to Fix It*, YOUTUBE (Dec. 13, 2013), [http://www.youtube.com/watch?v=QAi81\\_uvztM](http://www.youtube.com/watch?v=QAi81_uvztM).

<sup>10</sup> Owen Good, *Game Critic Says YouTube Copyright Policy Threatens His Livelihood [Update]*, KOTAKU (Dec. 12, 2013, 3:30 PM), <http://kotaku.com/game-critic-says-youtube-copyright-policy-threatens-his-1482117783>.

they were not to blame and that YouTubers should dispute claims even though there was a possibility that all their videos would be removed from YouTube.<sup>11</sup>

YouTube and the public saw the warning signs. For example, in 2012, one year before this attack on creativity, Jonathan McIntosh, the acclaimed creator of the fair use “Buffy v. Edward” video, battled both an audiovisual content claim and a separate video content claim by Lionsgate, who acquired *Twilight* in 2012.<sup>12</sup>

Additionally, the EFF has attempted to convince YouTube to change its policies by advocating that “[f]ilters [m]ust [i]ncorporate [p]rotections for [f]air [u]se.”<sup>13</sup> The EFF’s proposal, however, has not resulted in any substantial change. Rather, Lawrence Lessig personally felt the effects of Content ID. When Lessig used “short clips of amateur dance videos set to the song ‘Lisztomania’ by the French band Phoenix” in his 2010 lecture on content collaboration,<sup>14</sup> Content ID claimed the song on behalf of Liberation Music, who owns the rights in Australia only.<sup>15</sup> When Lessig disputed the claim, a single employee who did not even review the video initiated a takedown notice and threatened a lawsuit.<sup>16</sup> The parties eventually settled in early 2014, and Liberation Music has vowed that it “will still rely on YouTube’s system, but it will ensure that no takedown notice is issued without human review, including fair use considerations.”<sup>17</sup>

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<sup>11</sup> Jeffrey Grubb, *YouTube Ignores Content-Creator Concerns in Statement Regarding Mass Copyright Flagging*, VENTURE BEAT (Dec. 11, 2013, 1:00 PM), <http://venturebeat.com/2013/12/11/youtube-ignores-content-creator-concerns-in-statement-regarding-mass-copyright-flagging>; see also *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000?hl=en> (stating that receiving a copyright strike will result in a video being taken down from YouTube) (last visited Jan. 26, 2015).

<sup>12</sup> Kevin Collier, “Buffy vs. Edward” Back on YouTube After 3-Month Legal Battle, THE DAILY DOT (Jan. 11, 2013), <http://www.dailydot.com/news/buffy-vs-edward-youtube-copyright-battle>.

<sup>13</sup> *Fair Use Principles for User Generated Video Content*, ELEC. FRONTIER FOUND., <https://www.eff.org/pages/fair-use-principles-user-generated-video-content> (last visited Jan. 26, 2015).

<sup>14</sup> Corynne McSherry, *Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets*, ELEC. FRONTIER FOUND. (Feb. 27, 2014), <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets>.

<sup>15</sup> Mike Masnick, *Band Whose Label Threatened Larry Lessig Comes Out Strongly In Favor Of Fair Use*, TECHDIRT (Feb. 28, 2014, 5:29 PM), <http://www.techdirt.com/blog/?company=liberation+music>.

<sup>16</sup> McSherry, *supra* note 14.

<sup>17</sup> *Id.*

Unfortunately, this may only impact takedown notices after a YouTuber has disputed an automatic claim.

Eventually, in a letter sent out to YouTubers on March 14, 2014, YouTube finally acknowledged that the changes they made in December 2013 “didn’t go as we hoped and we left some of our community feeling frustrated and confused.”<sup>18</sup> It also proposed how it would improve Content ID.<sup>19</sup> But, YouTube’s proposed changes will not solve the problems affecting Content ID. Even though YouTube will disable monetization for all parties of a disputed video, the new approach still punishes YouTubers by preventing them from sharing ad revenue for their own creative content.<sup>20</sup> Additionally, YouTube still allows the claimant to review and reinstate claims without any public oversight.<sup>21</sup>

Thus, this article seeks to redress the problems of Content ID through a proposal that encourages more direct human involvement, oversight, fair compensation, and that demonstrates how YouTube can slightly modify its Content ID policies using the current framework already in place. Part I discusses YouTube and the role of the DMCA safe harbor, the Content ID system as a private ordering mechanism that goes beyond the DMCA, and the problems Content ID has created. Part II proposes to have YouTube slightly modify Content ID to restrict automatic blocking to clearly egregious instances, in which the uploaded video’s proportion of claimed content and uploaded content is near 100 percent, to encourage manual review and communication between copyright holders and YouTubers for non-egregious uses of copyrighted content, and to support fair compensation for both copyright holders and YouTubers. Finally, Part III addresses a few concerns.

## II CONTENT ID FACILITATES FALSE IDENTIFICATION, IMPROPER CLAIMS, & UNJUST COMPENSATION

The Internet has become an integral part of people’s lives. Countries are beginning to recognize it as a powerful medium for

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<sup>18</sup> Vocino, *[Letter from YouTube] Managing Rights and Content ID on YouTube*, REDDIT (Mar. 18, 2014), [http://www.reddit.com/r/letsplay/comments/20qdkx/letter\\_from\\_youtube\\_managing\\_rights\\_and\\_content](http://www.reddit.com/r/letsplay/comments/20qdkx/letter_from_youtube_managing_rights_and_content).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

expression,<sup>22</sup> one that “is a vital tool in today’s world for sharing original works,” discussing existing works, and participating in cultural and political movements.<sup>23</sup> An important part of the Internet is YouTube; it “blurs the line between publication and everyday conversation.”<sup>24</sup> It has been a “place of empowerment where millions of wannabe Spielbergs” can show off their creativity and see what others are creating.<sup>25</sup> It has provided political officials new ways to communicate with their constituents.<sup>26</sup> It has even housed the muse that inspired a group of people to Free Bieber in their fight against SOPA.<sup>27</sup> But, as Part I discusses, YouTube’s insistence on using Content ID to clamp down on allegedly infringing content is threatening YouTube’s cherished role in advancing society and creativity.<sup>28</sup>

#### A. *YouTube & the Spectre of the DMCA*

Although YouTube has become a popular platform for uploading and sharing videos containing infringing material, it has escaped liability because it falls under the DMCA safe

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<sup>22</sup> For example, on March 25, 2014, Brazil passed the Marco Civil that guarantees certain civil rights in the use of the Internet in Brazil. *Brazil: Internet ‘Bill of Rights’ Approved in Key Vote*, BBC (Mar. 27, 2014, 9:58 AM), <http://www.bbc.com/news/blogs-news-from-elsewhere-26771713>. See Also Anna Edgerton, *Brazil House Passes Internet Bill as Rousseff Drops Data Demand*, BLOOMBERG (Mar. 25, 2014), <http://www.businessweek.com/news/2014-03-25/brazil-house-passes-internet-bill-as-rousseff-drops-data-demand>.

Additionally, the Philippines is considering adopting its own Magna Carta for Internet freedom. Jillian York, *A Brief Analysis of the Magna Carta for Philippine Internet Freedom*, ELEC. FRONTIER FOUND. (July 8, 2013), <https://www.eff.org/deeplinks/2013/07/brief-analysis-magna-carta-philippine-internet-freedom>.

<sup>23</sup> Kurt Hunt, Note, *Copyright and YouTube: Pirate’s Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197, 199 (2007).

<sup>24</sup> *Id.* at 199–200.

<sup>25</sup> Laura Leister, *YouTube and the Law: A Suppression of Creative Freedom in the 21st Century*, 37 T. MARSHALL L. REV. 109, 110 (2011).

<sup>26</sup> Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 101 (2004).

<sup>27</sup> See EDWARD LEE, THE FIGHT FOR THE FUTURE: HOW PEOPLE DEFEATED HOLLYWOOD AND SAVED THE INTERNET—FOR NOW 39 (2013).

<sup>28</sup> See Trevor Cloak, Note, *The Digital Titanic: The Sinking of Youtube.com in the DMCA’s Safe Harbor*, 60 VAND. L. REV. 1559, 1577 (2007) (“YouTube, as it currently operates, provides a marketplace for the sharing of ideas and creative expression.”).

harbor.<sup>29</sup> The DMCA was enacted by Congress to balance the copyright holder's demands for greater online protection and the online service provider's demands that they not be held liable for the infringing content uploaded on their sites.<sup>30</sup> Because "the purpose of the safe harbors is to promote the means of sharing and distribution," the burden for policing online infringement is on the copyright holder.<sup>31</sup> Online service providers, like YouTube, need to "only cooperate when necessary to eliminate copyright infringement."<sup>32</sup> The DMCA recognizes that the copyright holder has the knowledge to determine infringing uses and that the service provider has the means to takedown those infringing uses.<sup>33</sup> Accordingly, the safe harbor provisions require copyright holders and service providers to cooperate through a notice and takedown procedure.<sup>34</sup>

In fact, the DMCA safe harbor protected YouTube in a 2007 lawsuit by Viacom because YouTube lacked knowledge of any specific infringement that was not already taken down after Viacom issued its takedown notices.<sup>35</sup> After an agreement failed between Viacom and YouTube regarding whether Viacom would use YouTube's nascent Content ID technology, Viacom sought to show that YouTube was not protected by the DMCA safe harbor because YouTube had failed to find and locate the infringing videos.<sup>36</sup>

The district court in 2013 stated that the DMCA safe harbor does not require a service provider to search and find videos when the claimant provides little specific information on the video's location.<sup>37</sup> Additionally, the district court concluded that

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<sup>29</sup> John T. Williams & Craig W. Mandell, *Winning the Battle, but Losing the War: Why the Second Circuit's Decision in Viacom Int'l, Inc. v. Youtube, Inc. Is A Landmark Victory for Internet Service Providers*, 41 AIPLA Q.J. 235, 244–45 (2013).

<sup>30</sup> Amir Hassanabadi, *Viacom v. Youtube-All Eyes Blind: The Limits of the DMCA in A Web 2.0 World*, 26 BERKELEY TECH. L.J. 405, 412 (2011).

<sup>31</sup> Kevin C. Hormann, *The Death of the DMCA? How Viacom v. Youtube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345, 1373 (2009).

<sup>32</sup> Brandon Brown, *Fortifying the Safe Harbors: Reevaluating the DMCA in A Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 438 (2008).

<sup>33</sup> *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 114 (S.D.N.Y. 2013).

<sup>34</sup> Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99, 120 (2006); *see also* 17 U.S.C § 512 (2012) (listing the safe harbor requirements).

<sup>35</sup> *See Viacom*, 940 F. Supp. 2d at 115.

<sup>36</sup> *Id.* at 119.

<sup>37</sup> *Id.* at 117.

YouTube lacked the right and ability to control infringing activity even though it instituted a digital fingerprinting technology.<sup>38</sup> Therefore, YouTube was allowed to place “much of the burden on Viacom . . . to search YouTube 24/7 for infringing clips.”<sup>39</sup>

As seen by *Viacom International Inc. v. Google Inc.*, because courts have accepted that websites like YouTube fall under the safe harbor and because courts have placed a high burden on plaintiffs to show that the service provider has not complied with the safe harbor requirements, many copyright holders no longer view the DMCA as an effective solution to copyright protection.<sup>40</sup> For instance, they must search and then notify the service provider, even though the content may be reposted on the same site or a different site.<sup>41</sup>

Accordingly, many copyright holders have demanded that online service providers act as “copyright gatekeepers.”<sup>42</sup> Because of the sheer volume of uploaded content<sup>43</sup> and because of technological advances and the use of digital fingerprinting technology,<sup>44</sup> they argue that the resulting high cost of human review means “the copyright owner may no longer be the least-cost-avoider for detecting” online infringement;<sup>45</sup> instead, online service providers can more quickly and cheaply locate and block infringing content.<sup>46</sup>

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<sup>38</sup> *Id.* at 120. A service provider does not need to affirmatively monitor its content to remain under the safe harbor unless the monitoring is a standard technical measure. See Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(m)(1) (2012).

<sup>39</sup> *Viacom*, 940 F. Supp. 2d at 120 (quoting *Viacom Int’l Inc. v. Google, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012)). The parties eventually settled in March 2014. Joan E. Solsman, *Google, Viacom Settle Outmoded YouTube Copyright Suit*, CNET (Mar. 18, 2014), <http://www.cnet.com/news/google-viacom-settle-outmoded-youtube-copyright-suit>.

<sup>40</sup> Lauren G. Gallo, *The (Im)possibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J.L. & ARTS 283, 290 (2011).

<sup>41</sup> Cloak, *supra* note 28, at 1594–95.

<sup>42</sup> Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 183 (2010).

<sup>43</sup> Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 365 (2009).

<sup>44</sup> See John M. Owen, *Graduated Response Systems and the Market for Copyrighted Works*, 27 BERKELEY TECH. L.J. 559, 592 (2012) (discussing mechanisms for identifying infringed works).

<sup>45</sup> Brown, *supra* note 32, at 467.

<sup>46</sup> Owen, *supra* note 44, at 606. In fact, because of an online service provider’s control over and access to the infringing material, those advocating for more online service provider responsibility “deem the host to share some responsibility for the infringement.” Seltzer, *supra* note 42, at 183.

B. *The Lure of Private Ordering  
& the Use of Content ID*

Therefore, some scholars have touted Content ID as the new technological savior of online infringement.<sup>47</sup> Content ID is not required by the DMCA.<sup>48</sup> So, as a private ordering mechanism, Content ID relies upon contractual or technical means<sup>49</sup> to increase a copyright holder's control over every use of their work and to protect "one's interests beyond the protection devoted by the . . ." Copyright Act.<sup>50</sup> Content ID originated in mid-2007 through agreements between YouTube, EMI, Time Warner, and Disney.<sup>51</sup> YouTube's agreements initially focused on "authorizing the use of copyrighted works by its users," but later expanded the protections and monopolies of copyright holders.<sup>52</sup>

Content ID is a system of "advanced set of copyright policies and content management tools."<sup>53</sup> Content ID works by "comparing uploaded YouTube videos against reference files provided by content owners."<sup>54</sup> Content ID currently scans over 400 years-worth of video and utilizes more than twenty-five million references files of more than 5,000 partners, including U.S. network broadcasters, record labels, and movie studios.<sup>55</sup>

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<sup>47</sup> See, e.g., Hassanabadi, *supra* note 30, at 438 ("Indeed, YouTube's Content ID has essentially solved most disputes between YouTube and content providers.").

<sup>48</sup> See *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (holding that DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider).

<sup>49</sup> Symposium, *Sharing Access to Intellectual Property Through Private Ordering*, 82 CHI.-KENT L. REV. 1391, 1393–94 (2007).

<sup>50</sup> *Id.* at 1393. Google readily promotes that Content ID "is the next step in a long list of content policies and tools that . . . goes above and beyond our legal responsibilities" and that lets YouTube Partners choose what they want done with the videos. David King, *Latest Content ID Tool for YouTube*, GOOGLE OFFICIAL BLOG (Oct. 15, 2007), <http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html>.

<sup>51</sup> Kenneth Li & Eric Auchard, *YouTube to Test Video ID with Time Warner, Disney*, REUTERS (June 12, 2007), <http://www.reuters.com/article/2007/06/12/us-google-youtube-idUSWEN871820070612>; see also Stefanie Olsen, *Youtube, EMI sign breakthrough licensing pact*, CNET (May 31, 2007), [http://news.cnet.com/YouTube,-EMI-sign-breakthrough-licensing-pact/2100-1030\\_3-6187759.html](http://news.cnet.com/YouTube,-EMI-sign-breakthrough-licensing-pact/2100-1030_3-6187759.html).

<sup>52</sup> Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 153 (2012).

<sup>53</sup> Charles S. Sims & Elizabeth A. Figueira, *Youtube, Google Find Safe Harbor in New York Court*, 27-SEP COMM. LAW. 3, 4 (2010).

<sup>54</sup> Gallo, *supra* note 40, at 296–97.

<sup>55</sup> *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Jan. 26, 2015).

The system “can identify user-uploaded videos comprised entirely or partially of copyrighted content.”<sup>56</sup> When Content ID finds a match, it implements a policy, which consists of if-then statements that determine whether to implement one of three predefined policies: track, monetize, or block.<sup>57</sup> For example, one if-then statement may monetize a video if the uploaded video uses two minutes of the reference file, while another may block a video if the proportion of the reference file to the rest of the video’s content is 90 percent.

When Content ID implements a policy, it recognizes the owner of the reference file as claiming ownership over the matched video.<sup>58</sup> Moreover, when a claimant creates a reference file, either by uploading content or by claiming an already uploaded video, that claimant asserts ownership over the content in the video.<sup>59</sup> However, Content ID is a geographically limited system: a claimant can only assert the rights it has in its geographical location.<sup>60</sup> Thus, an Australian record label that does not have any rights in the US cannot use Content ID to block or monetize a video in the U.S. Additionally, as YouTube stresses, Content ID is limited by what the claimant has the exclusive rights to in a video, meaning the claimant cannot claim public domain content, fair use content, or third party content like gameplay footage.<sup>61</sup>

As a system outside the confines of the DMCA, Content ID “makes the licensing process shorter, clearer, and more efficient.”<sup>62</sup> Instead of expending resources to search and notify YouTube of infringing content, copyright holders rely on reference files, algorithms, and bots.<sup>63</sup> “[With] using bots rather than human spotters, a broader range of potential infringements can be detected at far less cost than is required for manual

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<sup>56</sup> Gallo, *supra* note 40, at 297.

<sup>57</sup> *What Is a Policy?*, YOUTUBE, [https://support.google.com/youtube/answer/107383?hl=en&ref\\_topic=24332](https://support.google.com/youtube/answer/107383?hl=en&ref_topic=24332) (last visited Jan. 26, 2015).

<sup>58</sup> Carlos Pacheco, *YouTube Content ID Handbook*, SLIDESHARE, at 59 (2013), <http://www.slideshare.net/carlospacheco74/you-tube-content-id-handbook#>.

<sup>59</sup> *What Is a Policy?*, *supra* note 57.

<sup>60</sup> See Pacheco, *supra* note 58, at 37–38 (stating that a policy should be selected and should define what a partner wants to do only in countries where the partner owns the right to control content).

<sup>61</sup> See generally *Qualifying for Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/1311402?hl=en> (last visited Jan. 26, 2015) (listing common examples of content that may not be exclusive to individuals).

<sup>62</sup> Lev-Aretz, *supra* note 52, at 158.

<sup>63</sup> Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 326, 333 (2013).

enforcement.”<sup>64</sup> In fact, Content ID has become quite successful; “with every major U.S. network broadcaster, movie studio, and record label using it,” YouTube has stored more than 100,000 hours of material in its database.<sup>65</sup>

Moreover, by automatically locating and then monetizing the matched videos, Content ID has enabled YouTube to function “as an intermediary that lowers the cost of transacting over valuable cultural goods” and allows uploaders to escape liability.<sup>66</sup> Non-owners upload content they do not own and a Content ID match “signals the potential transaction to the copyright owner and facilitates a ‘yes’ or ‘no’ decision by the owner who can then profit from the deal.”<sup>67</sup> Consequently, a copyright holder can choose to monetize all flagged videos to “initiate a stream of profits, circumventing the normally high transaction costs” associated with licensing.<sup>68</sup>

Finally, because Content ID allows a copyright holder to choose to track a video, it may encourage tolerated uses.<sup>69</sup> A tolerated use is an infringing use of copyrighted content which the owner may know about but does nothing about.<sup>70</sup> A copyright holder may choose to tolerate a use because it may not want to expend costs for enforcement or because it may want to create goodwill in the community.<sup>71</sup> One study has even shown that tolerated uses on YouTube have added to the public domain.<sup>72</sup> Relatedly, a copyright holder may tolerate a use because it has calculated “that the infringement creates an economic complement to the copyrighted work.”<sup>73</sup> Thus, many copyright holders use the standardized, automated system to make money instead of

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<sup>64</sup> *Id.* at 326.

<sup>65</sup> Lev-Aretz, *supra* note 52, at 158.

<sup>66</sup> Paul J. Heald, *How Notice-and-Takedown Regimes Create Markets for Music on Youtube: An Empirical Study*, at 13 (Mar. 26, 2014), available at <http://ssrn.com/abstract=2416519>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 6.

<sup>69</sup> See generally Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 633 (2008) (discussing the copyright owner’s decision to allow limited tolerated uses).

<sup>70</sup> *Id.* at 619.

<sup>71</sup> *Id.*

<sup>72</sup> See generally Heald, *supra* note 66, at 14–15 (discussing the potential creation of a market for older copyrighted musical works that would fall into public domain if the copyright holder is willing to monetize the upload or tolerate the infringement).

<sup>73</sup> Wu, *supra* note 69, at 619.

blocking potentially infringing material.<sup>74</sup>

Therefore, compared to the DMCA, which demands copyright holders to be intimately involved in monitoring, Content ID seems to benefit both copyright holders and YouTubers.<sup>75</sup> Advocates of Content ID see it as solving many of the problems with online infringement.<sup>76</sup> Some scholars have even argued to require host-provided filtering as a requirement to obtain safe harbor protection under the DMCA.<sup>77</sup>

### C. Harms of Content ID

Nevertheless, Content ID is not the technological savior scholars wish it to be. As a system outside the reaches of the law and devoid of real human involvement, it has imposed burdensome restrictions on access to and use of information and has led to increased uncertainty and transaction costs. Additionally, Content ID's current monetization scheme unjustly enriches claimants and harms YouTubers because a claim automatically disables the YouTuber's monetization and the copyright holder can take all ad revenue from the YouTuber.

#### 1. False Positives Harm Public Access to and Use of Information

First, Content ID is easily susceptible to false positives.<sup>78</sup> A false positive occurs when Content ID matches a video with a reference file and automatically blocks or monetizes the video

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<sup>74</sup> Lev-Aretz, *supra* note 52, at 158. See also Danny Cowan, *Nintendo Mass-Claims Revenue From YouTube 'Let's Play' Videos*, JOYSTIQ, <http://www.joystiq.com/2013/05/16/nintendo-mass-claims-revenue-from-youtube-lets-play-videos> (last visited Jan. 26, 2015) (explaining that in May 2013, Nintendo began a mass-claim campaign in order to monetize Nintendo-related videos). Nintendo defended its practice by stating, "[w]e continually want our fans to enjoy sharing Nintendo content on YouTube, and that is why, unlike other entertainment companies, we have chosen not to block people using our intellectual property." Cowan, *supra*.

<sup>75</sup> See Brian Leary, Note, *Safe Harbor Startups: Liability Rulemaking Under the DMCA*, 87 N.Y.U. L. REV. 1135, 1165 (2012) (noting that copyright holders have the ability to submit their videos and sound recordings to Content ID, and Content ID will block duplicates from being posted to YouTube and will seek review of videos that incorporate or remix the copyright holder's content).

<sup>76</sup> See, e.g., Hassanabadi, *supra* note 30, at 438 (discussing the benefits of using the Content ID method as opposed to the takedown policy under the DMCA).

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

<sup>78</sup> Sawyer, *supra* note 43, at 383.

when the video is not an actual infringement.<sup>79</sup> As of 2010, “more than 100 million videos have been claimed with Content ID.”<sup>80</sup> But, as an automated system, Content ID has been unable to determine which of those 100 million videos has been licensed, which will be tolerated, which is fair use, or even which song in the video is in the public domain.<sup>81</sup>

False positives wreck the information sharing system of the Internet and YouTube. They take away uses and information that could have actually been tolerated had the system merely provided copyright holders with notice. Due to Content ID authorizing copyright holders to control every use of their content, they can “stifle American culture for the sake of a dime.”<sup>82</sup> For instance, although Warner Music originally opted to monetize its content, it was “reportedly unhappy with the amount of money it was receiving from YouTube,” and at least between 2011 and 2013, all matches were automatically blocked.<sup>83</sup> Additionally, Content ID’s oversimplification of copyright law and its inability to determine legitimate or tolerated content prevented thousands from seeing NASA’s mission to Mars.<sup>84</sup> It blocked Michelle Obama’s Democratic National Convention speech,<sup>85</sup> and a live stream in which people were singing the “Happy Birthday” song.<sup>86</sup> It even blocked Justin Bieber from uploading one of his videos, who, outraged, Tweeted,

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<sup>79</sup> Depoorter & Walker, *supra* note 63, at 319.

<sup>80</sup> David King, *Content ID Turns Three*, YOUTUBE (Dec. 2, 2010), <http://youtube-global.blogspot.com/2010/12/content-id-turns-three.html>.

<sup>81</sup> See Chris Morran, *YouTube’s Content ID System Will Take Away Your Money If You Dare Sing “Silent Night,”* CONSUMERIST (Dec. 26, 2013), <http://consumerist.com/2013/12/26/youtubes-content-id-system-will-take-away-your-money-if-you-dare-sing-silent-night> (providing a discussion of one instance where Content ID reported a copyright violation for use of a song in a video uploaded to YouTube where the song had been public domain for a number of years).

<sup>82</sup> Leister, *supra* note 25, at 121.

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

<sup>84</sup> Parker Higgins, *Mars Landing Videos, and Other Casualties of the Robot Wars*, ELEC. FRONTIER FOUND. (Aug. 8, 2012), <https://www.eff.org/deeplinks/2012/08/mars-landing-videos-and-other-casualties-robot-wars>.

<sup>85</sup> Britney Fitzgerald, *YouTube Pulls Michelle Obama’s Democratic National Convention Speech In ‘Error’*, HUFFINGTON POST (Sept. 5, 2012, 11:53 AM), [http://www.huffingtonpost.com/2012/09/05/youtube-pulls-michelle-obama-speech\\_n\\_1857708.html](http://www.huffingtonpost.com/2012/09/05/youtube-pulls-michelle-obama-speech_n_1857708.html).

<sup>86</sup> Tim Cushing, *YouTube Kills Livestream Of Convention When Audience Starts Singing ‘Happy Birthday’*, TECHDIRT (Oct. 15, 2013, 10:57 AM), <https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthday.shtml>.

“yo youtube...how u gonna block my own song?!?!?”<sup>87</sup>

Content ID is not entirely automatic,<sup>88</sup> and YouTube does offer a dispute and appeal process.<sup>89</sup> The YouTuber can dispute by choosing one of seven options, including fair use or that the YouTuber has the proper license or permission.<sup>90</sup> When a YouTuber disputes a claim, the claimant will receive notice and has thirty days to uphold the match or reject the dispute before the claim is automatically released.<sup>91</sup> If the owner upholds the match, the claim is reinstated and once again, the video is either blocked or monetized; however, the YouTuber can then appeal.<sup>92</sup> The owner has thirty days to either release the claim on the video or send a legal copyright notification, which results in the YouTuber receiving a copyright strike against their account.<sup>93</sup> Three strikes and YouTube bans the account.<sup>94</sup> As for copyright holders, if they “repeatedly make erroneous claims” YouTube can disable their Content ID access and terminate their partnership with YouTube.<sup>95</sup>

Unfortunately, Content ID allows the claimants to determine the ultimate fate of the YouTuber’s video; the claimant and the claimant alone reviews and either accepts or rejects the dispute.<sup>96</sup> This lack of human oversight has allowed the music licensing company, Rumblefish, through a single employee’s “mistake,” to falsely claim and attempt to block a garden harvesting video containing no music at all.<sup>97</sup> Additionally, the claimant can easily

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<sup>87</sup> Oliver Chiang, *Justin Bieber Swears Off YouTube for Facebook, Unwittingly Steps in Copyright Minefield*, FORBES (Nov. 30, 2010, 9:03 PM), <http://www.forbes.com/sites/oliverchiang/2010/11/30/justin-bieber-swears-off-youtube-for-facebook-unwittingly-steps-in-copyright-minefield>.

<sup>88</sup> See Pacherco, *supra* note 58, at 55, 77 (describing the procedure for setting up manual review of a claim).

<sup>89</sup> *Dispute a Content ID Claim*, YOUTUBE, <https://support.google.com/youtube/answer/2797454> (last visited Jan. 26, 2015).

<sup>90</sup> FrozenFoxy, *Let’s Learn How to Dispute Content ID Matches*, YOUTUBE (Dec. 20, 2013), <http://www.youtube.com/watch?v=Qxc1cp7vjiw>.

<sup>91</sup> Pacherco, *supra* note 58.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Dispute a Content ID Claim*, *supra* note 89.

<sup>95</sup> *How Content ID Works*, YOUTUBE, <http://support.google.com/youtube/answer/2797370> (last visited Jan. 26, 2015).

<sup>96</sup> See Nicole Wilke, *Copyright Kings Are Judge, Jury and Executioner on YouTube*, WIRED (Feb. 29, 2012, 1:29 PM), <http://www.wired.com/business/2012/02/opinion-baiodmcayoutube> (describing an instance in which a claimant was given full authority alone to review a copyright claim).

<sup>97</sup> Mike Masnick, *Rumblefish CEO: Claiming Copyright on Your Incidental Recordings of Birds Was Merely a Series of Unfortunate Errors*, TECHDIRT (Feb.

re-claim a different content type or re-claim by pointing to a different location in the video.<sup>98</sup> And, as seen most recently, Content ID has allowed a single employee of Liberation Music, a claimant who only held Australian rights to a song, to reinstate a claim and issue a takedown notice on a fair use video with limited, if no, consequences for the claimant even though the employee did not first review the video.

## 2. Content ID Harms YouTubers and Copyright Holders by Increasing Transaction Costs

Second, Content ID actually increases transaction costs for both copyright holders and YouTubers because copyright holders cannot choose which content to tolerate and because YouTubers must seek out the owners to negotiate or renegotiate the content's use. The Copyright Act allows copyright holders to "decide how they will use their rights to achieve what they want in exchange for their original works."<sup>99</sup> But, Content ID was created to give copyright holders more automatic control over their works, beyond the limitations of the DMCA.<sup>100</sup> As a result, YouTube's Content ID took the owner's choice of how to use their rights away from them, especially from game developers and publishers.

Currently, before a video is claimed, copyright holders have no reasonable way to determine who was authorized to upload the content and whether the use of the content was actually infringing: two key pieces of information a copyright holder must know.<sup>101</sup> Even if a company has announced that they tolerate and

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27, 2012, 2:35 PM), <https://www.techdirt.com/articles/20120227/13044117890/rumblefish-ceo-claiming-copyright-your-incidental-recordings-birds-was-merely-series-unfortunate-errors.shtml>.

<sup>98</sup> Das24680, *Let's Play YouTube Content Id*, YOUTUBE (Dec. 17, 2013), <http://www.youtube.com/watch?v=u2U5xbbyIzo>.

<sup>99</sup> Armen Boyajian, *The Sound of Money: Securing Copyright, Royalties, and Creative "Progress" in the Digital Music Revolution*, 62 FED. COMM. L.J. 587, 617 (2010).

<sup>100</sup> See generally *What Is a Policy?*, *supra* note 57 (discussing how YouTube's Content ID system has predefined monetize, track, and block policies that allow for automatic control over works).

<sup>101</sup> Greg Jansen, *Whose Burden Is It Anyway? Addressing the Needs of Content Owners in DMCA Safe Harbors*, 62 FED. COMM. L.J. 153, 172–73 (2010). Although claimants can choose to whitelist channels, the YouTuber must still contact the proper copyright holder. See, e.g., *Music Label Partner Guide, Definitions of Commonly Used Terms*, YOUTUBE, <https://support.google.com/youtube/answer/2822035?hl=en> (last visited Jan. 26, 2015) (listing the policies that a copyright holder can apply that are automatic, which can be a negative

encourage YouTubers to upload their content, such as in game reviews and walkthroughs, YouTubers must still work through the system and dispute the claims.<sup>102</sup> For instance, Valve has recognized the burdens of the system and its current policy is to request that users not ask them “to write YouTube and tell them its fine with us to post a particular video” because it is “not possible to respond to each such request . . . , but [instead], [p]oint them to this page.”<sup>103</sup>

When Content ID went into overdrive in late 2013, many of the claims were filed automatically on behalf of “developers who *do* own the material, but have publicly expressed no desire to pursue action against the video makers.”<sup>104</sup> So, many copyright holders like Blizzard were stuck asking YouTubers to contact them or contest the matches so they could approve and tolerate the uses.<sup>105</sup> Other copyright holders had to ask YouTubers to contest the matches so they could determine and then contact who claimed the content.<sup>106</sup>

Additionally, not all sections of a company know that a use is being tolerated,<sup>107</sup> and the owners of in-game music may not share the same free-play sentiments as game publishers.<sup>108</sup> For example, in December 2013, Ubisoft acknowledged that some of the matches may have been “auto-matched against the music

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drawback because copyright holders have no reasonable way at first to determine whether use of the content is actually infringing).

<sup>102</sup> See Paul Tassi, *Blizzard, Capcom, Ubisoft and More Rally Behind Copyright-Afflicted YouTubers*, FORBES (Dec. 12, 2013, 12:38 PM), <http://www.forbes.com/sites/insertcoin/2013/12/12/blizzard-capcom-ubisoft-and-more-rally-behind-copyright-afflicted-youtubers>.

<sup>103</sup> *Valve Video Policy*, VALVE, <http://www.valvesoftware.com/videopolicy.html> (last visited Jan. 26, 2015).

<sup>104</sup> Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Revealed by 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>.

<sup>105</sup> Crossley, *supra* note 8.

<sup>106</sup> *Id.*

<sup>107</sup> See Tristan Oliver, *Sega Issuing Copyright Claims, Strikes On Multiple YouTube Videos*, TSSZ NEWS (Dec. 20, 2013), <http://www.tssznews.com/2013/12/20/sega-issuing-copyright-claims-strikes-on-multiple-youtube-videos/> (indicating that Sega Japan used Content ID and copyright claims to take down YouTube videos even though a Sega US representative said that Sega in North America does not typically take any action); *Material Usage Policy, Eidos Montreal Community Blog*, SQUARE ENIX (Jan. 27, 2014), <http://community.eidosmontreal.com/blogs/Material-Usage-Policy> (explaining that different policies apply to different games developed by Square Enix studios).

<sup>108</sup> Crossley, *supra* note 8.

catalogue on our digital stores - it might show up as being claimed by our distributor 'idol.'"<sup>109</sup> To rectify this problem, Ubisoft requested that the YouTubers leave the video live and send them information on the video and who flagged it so that Ubisoft could "get it cleared hopefully same day."<sup>110</sup> Consequently, Content ID currently increases transaction costs and imposes barriers to approve particular uses.

### 3. Content ID Monetization Unjustly Enriches Copyright Holders and Punishes YouTubers

Finally, Content ID unjustly enriches claimants, even if the claimant is the actual owner of the allegedly infringing content. When a copyright holder seeks to obtain profits obtained by an infringer under § 504(b), the owner can only obtain profits that are attributable to the infringing work.<sup>111</sup> The recovery of profits "is designed to remove from the defendant all benefit derived from the misappropriation of the plaintiff's intellectual property"; it is not designed to punish.<sup>112</sup> Thus, the Copyright Act creates a balance between deterring infringing content and promoting creative uses of content;<sup>113</sup> it deters infringing conduct by disgorging specific profits and encourages creative conduct by prohibiting excessive profits that are not related to the infringing conduct.<sup>114</sup> For example, if a collection of poems contains an unauthorized poem by one author, that author cannot collect profits of the overall work under § 504(b); the author can only collect profits that the infringement contributed to. If the author were allowed to collect profits for the entire work, even when his single poem was completely unrelated to the consumers' reasons to buy the collection, this award "would add a punitive as distinct from a restitutionary element to copyright damages."<sup>115</sup>

Nevertheless, contrary to the Copyright Act, Content ID acts

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 17 U.S.C. § 504(b) (2012); *see also* *Walker v. Forbes, Inc.*, 28 F.3d 409, 415 (4th Cir. 1994) (sating that profits a plaintiff "receives under the Copyright Act are those attributable to the use of the infringed work").

<sup>112</sup> *Walker*, 28 F.3d at 415.

<sup>113</sup> Arian Galavis, *Reconciling the Second and Ninth Circuit Approaches to Copyright Preemption: A Universal System Is Paramount to the Protection of Idea Purveyors' Rights*, 19 B.U. J. SCI. & TECH. L. 157, 184–85 (2013).

<sup>114</sup> Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 EMORY L.J. 1, 15 (1999).

<sup>115</sup> *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 931 (7th Cir. 2003).

as a punitive reward only benefiting claimants. Content ID's monetization "permits holders to place ads around the videos while also providing the holders with a percentage of YouTube's profit," regardless of the amount used in the video.<sup>116</sup> If an uploaded video was already monetized, YouTube strips the monetization from the video and the YouTuber receives no share in the profits for any successful ad.<sup>117</sup> Although revenue "for disputed videos are accrued and frozen by YouTube until the matter is resolved," this only occurs when the account holder disputes the Content ID match.<sup>118</sup>

Thus, in its current state, Content ID unjustly enriches claimants at the expense of a YouTuber's hard work and creativity. Content ID denies authors who have uploaded original content, public domain content or even fair use content the "opportunities to tap into the advertising revenue generated" by their work.<sup>119</sup> And yet, "the copyright owner choosing to monetize the use enjoys the fruits of the second author's work."<sup>120</sup> In fact, in late 2013, with the great wave of Content ID claims against game videos, many YouTubers "received hundreds of notices that their content is in violation of copyrights. Some report[ed] that up to 15 percent of their content is now diverting ad revenues to third parties."<sup>121</sup> Content ID's system that favors claimants and lacks any human involvement limits a YouTuber to two options: sign over monetization rights "or lose access to the most popular online distribution channels."<sup>122</sup>

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<sup>116</sup> Leister, *supra* note 25, at 121; *see also Understand the Copyright Claim on Your Video*, YOUTUBE, [https://support.google.com/youtube/answer/2818443?hl=en&ref\\_topic=2778545](https://support.google.com/youtube/answer/2818443?hl=en&ref_topic=2778545) (providing guidance for understanding a copyright issue with a YouTube video); AngryJoeShow, *supra* note 9 (discussing YouTube's Content ID).

<sup>117</sup> Joel Hruska, *YouTube's ContentID system guts game streaming, pushes away loyal audience*, EXTREME TECH (Dec. 13, 2013, 4:03 PM), <http://www.extremetech.com/computing/172829-youtubes-contentid-system-guts-game-streaming-pushes-away-loyal-audience>. *See also* Pacheco, *supra* note 58, at 38.

<sup>118</sup> Carly Smith, *INDMUSIC Responds to False Content ID Claims With YouTube*, TUNE CORE, ESCAPIST (Dec. 19, 2013, 6:29 PM), <http://www.escapistmagazine.com/news/view/130710-INDMUSIC-Responds-to-False-ContentID-Claims-with-YouTube-TuneCore#g4fLzbnhYRTrTCs6.99>.

<sup>119</sup> Sawyer, *supra* note 43, at 386.

<sup>120</sup> Lev-Aretz, *supra* note 52, at 175.

<sup>121</sup> Colin Campbell, *YouTube video game shows hit with copyright blitz*, POLYGON (Dec. 10, 2013, 9:10 PM), <http://www.polygon.com/2013/12/10/5198276/youtube-video-game-shows-hit-with-copyright-blitz>.

<sup>122</sup> Sawyer, *supra* note 43, at 387.

Thus, unlike the Copyright Act, Content ID is not “designed to remove from the defendant all benefit derived from the misappropriation of the plaintiff’s intellectual property.”<sup>123</sup>

### III. RE-HUMANIZING COPYRIGHT PROTECTION ON YOUTUBE

Therefore, to reduce the harmful effects of false positives, to give copyright holders more control over how their content is used, to encourage tolerance and to provide more certainty about which content is tolerated, and to reduce unjust enrichment, this article sets out how YouTube should change its Content ID policy. As Part II explains, these are not drastic changes; rather, these are slight modifications to the already existing Content ID framework.

#### *A. Reframing Content ID to Encourage Tolerance & Communication*

To encourage tolerance, creativity, and communication between copyright holders and YouTubers, while maintaining Content ID as a private ordering mechanism, this article proposes that YouTube limits the use of Content ID’s automatic matching and claiming system and limits the amount of revenue percentage a claimant receives from a monetized video. First, YouTube should change Content ID so that it no longer automatically claims and then blocks or monetizes all videos. Instead, Content ID should only automatically claim egregious uses of a reference file. Second, for all non-egregious uses of a reference file, YouTube should adopt a procedure that encourages copyright holders and YouTubers to communicate to determine whether blocking or monetizing the content is the best course of action. Third, YouTube should change Content ID’s monetization scheme to allow YouTubers to share in ad revenue for their creations.

#### 1. Uploading Content, Specifying Allowed Uses, and Matching Content

First, this article recognizes that Content ID can be beneficial and that “[c]opyright holders should remain free to use

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<sup>123</sup> Walker v. Forbes, Inc., 28 F.3d 409, 415 (4th Cir. 1994).

automated systems to identify potentially infringing content, but the actual judgment that a work is infringing must be made by a human.”<sup>124</sup> To encourage creativity and communication, YouTube should allow, for all videos, YouTube partners to pre-approve certain uses when a video is used as a reference file. Currently, YouTube allows a video uploader to select which category or channel their video falls under.<sup>125</sup> So, adding a section of “approved uses” is not a drastic change. YouTube should provide default options such as walkthroughs, reviews, interviews, background, education, and criticism, as well as entries for custom uses. When YouTubers upload videos, they would then indicate which use their video falls into. The YouTubers would also have the option to specify information regarding who has given permission for the use. This could include a statement by a game publisher or a copy of relevant language of a license or contract with the copyright holder.<sup>126</sup>

But, to help copyright holders guard against obvious instances of infringement, in which an entire movie or TV show is uploaded, YouTube should divide Content ID’s claiming system into two groups: egregious uses and non-egregious uses. For egregious uses, defined as a 95 percent<sup>127</sup> proportion of a single

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<sup>124</sup> Patrick McKay, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 142 (2012).

<sup>125</sup> *Upload Advanced Settings*, YOUTUBE, [https://www.youtube.com/edit?video\\_id=DMiC3xxD8K8](https://www.youtube.com/edit?video_id=DMiC3xxD8K8) (last visited Jan. 26, 2015).

<sup>126</sup> For instance, Paradox Interactive AB, a Swedish game publisher, has uploaded a letter on its forums giving “permission to any third party to use images and sounds from Paradox Interactive’s video games in his or her ‘let’s Play’ videos or equivalent solely on [YouTube],” provided that a copyright notice is displayed. BjornB, *Monetizing from Youtube videos containing Paradox Interactive material!*, PARADOX INTERACTIVE FORUM (Feb. 27, 2013, 2:14 PM), <http://forum.paradoxplaza.com/forum/showthread.php?671169-Monetizing-from-Youtube-videos-containing-Paradox-Interactive-material!>

<sup>127</sup> One factor of fair use, the amount and substantiality of the use, requires a court to analyze the quantity and quality of the use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994). Courts tend to be averse to verbatim copying, whereby “defendants who disseminate copyrighted material with little or no alteration often lose on the fair use front.” Stephen McIntyre, *Private Rights and Public Wrongs: Fair Use As A Remedy for Private Censorship*, 48 GONZ. L. REV. 61, 89–90 (2013). But, as YouTube readily admits, “Content ID can’t identify context (like ‘educational use’ or ‘parody’), [so] we give partners the tools to use length and match proportion as a proxy.” Shenaz Zack, *Content ID and Fair Use*, GOOGLE PUB. POLICY BLOG (Apr. 23, 2010), <http://googlepublicpolicy.blogspot.com/2010/04/content-id-and-fair-use.html>.

Thus, a 95 percent proportion of a single reference file is a good proxy for verbatim copying and an initial determination of no fair use.

reference file to other content in an uploaded video, the system will run as it currently does. For non-egregious uses, the system will no longer automatically claim the uploaded video. Instead, YouTube should modify and expand its current manual review process that is already in place.<sup>128</sup> This is not a drastic change to the current Content ID system; as YouTube acknowledges, because “YouTube’s Content ID system claims user-uploaded videos automatically, without human intervention, you have the option to require a manual review before the claim becomes active.”<sup>129</sup>

Accordingly, the manual review process should be modified to require earlier human intervention so that the claimant reviews the match and verifies that the uploader’s specified use was correct before requesting a block or monetization policy. If the specified use is correct and the uploader has provided information about permission, the claimant must contact who provided the permission. If the specified use was not correct and if the claimant has a good faith belief that the use is infringing, the claimant must notify the uploader to initiate the blocking or monetization process.

Furthermore, to ensure that the copyright holder and the YouTuber are communicating to determine the best course of action, the new blocking and monetization processes should include the following steps: (1) the claimant has thirty days to send the request after receiving notice of a match; (2) the YouTuber has thirty days to respond, and the YouTuber can respond with a dispute or a monetization counter-request; (3) the claimant has thirty days to respond to the dispute or counter-request; (4) if the claimant rejects the dispute or monetization counter-request, the YouTuber can appeal; (5) if the YouTuber agrees to the request or fails to respond within the timeframe, to block or monetize the video the claimant must provide, or have

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<sup>128</sup> When a match occurs, a notification is sent to both the uploader and the copyright holder, specifying all the relevant information. The owner has the option to manually review the match, to release the match, or to wait thirty days for the match to expire. *Manage Your Claims*, YOUTUBE, <https://support.google.com/youtube/answer/3310838?hl=en> (last visited Jan. 26, 2015). As YouTube explains, manual review is useful when a video contains non-exclusive content, such as fair use content or public domain content. Pacheco, *supra* note 58, at 55. Manual review allows the claimant to verify that the claimed content includes only content they have exclusive rights to. *Id.*

<sup>129</sup> *Route Claims For Manual Review*, YOUTUBE, <https://support.google.com/youtube/answer/106966?hl=en> (last visited Jan. 26, 2015).

provided, proof of a right to control and claim the content through a license agreement with the copyright holder, a copyright registration, or other similar method, and YouTube must make this information generally available; (6) monetization is limited to a percentage of revenue based on the proportion of the claimant's content to the entire content in the uploaded video; and (7) if the claimant rejects the YouTuber's dispute, counter-request, and appeal, and has provided sufficient evidence to demonstrate it has a right to control the content, the claimant can send a takedown notice to YouTube, which then starts the already established takedown process.<sup>130</sup>

## 2. Encouraging Copyright Holders to Follow the Rules and to Tolerate Uses

Second, the current Content ID system has little transparency and oversight outside of the confines of YouTube and the claimant acts as the ultimate judge of infringement;<sup>131</sup> so, to increase transparency and to encourage oversight and tolerated uses, a third-party website similar to ChillingEffects.org must be set up either by YouTube or a third-party like EFF. This website will act much like ChillingEffects.org; blocking requests and monetization requests will be sent to the website along with information on whom the claimant is, why the video was blocked or monetized, and any other information the reporter feels is necessary to explain the story.<sup>132</sup> However, unlike ChillingEffects.org, the public can comment on the block or monetization.<sup>133</sup>

Similarly, this proposal will seek to reduce the chances that a claimant or YouTuber abuses the system by expanding YouTube's current three-strike rule. Currently, only the

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<sup>130</sup> *Copyright on YouTube*, YOUTUBE, <https://www.youtube.com/yt/copyright/index.html> (last visited Jan. 26, 2015).

<sup>131</sup> Thabet Alfishawi, *Improving Content ID*, YOUTUBE OFFICIAL BLOG (Oct. 3, 2012), <http://youtube-global.blogspot.jp/2012/10/improving-content-id.html>.

<sup>132</sup> See *Reporting a Cease and Desist Notice: Step 1, Chilling Effects Clearinghouse*, CHILLING EFFECTS, <https://www.chillingeffects.org/input.cgi> (last visited Jan. 26, 2015) (walking through the steps required by a user who has received a cease and desist notice for images or content on their created site to have their claim categorized and analyzed as an example of what YouTube could use for their own content cease and desist notices in the future).

<sup>133</sup> This site therefore will use the wisdom, or at least, voice, of the crowds; "[t]he public can recognize when content has been wrongly removed. Erroneously removed content can generate headlines." Sawyer, *supra* note 43, at 392.

YouTuber is punished by the Content ID's appeal process; if the YouTuber appeals the reinstated claim and the claimant submits a takedown notice, the video will be taken down and the uploader will receive a copyright strike, risking the YouTuber's ability to upload videos or to monetize videos.<sup>134</sup> YouTube has stated that claimants who abuse the system may be punished, but there are no known instances of a claimant losing its ability to monetize or block videos. Thus, under this proposal, both YouTubers and claimants will be subject to strikes. If YouTube discovers that the claimant or the uploader has misused the system, then the claimant or the uploader receives a strike. After three strikes, YouTube suspends the claimant or the uploader from using or benefiting from the Content ID system.

*B. Advantages to the  
Proposal*

Unlike the current version of Content ID, this article's proposal will create more benefits for both copyright holders and YouTubers because this proposal allows copyright holders to better tolerate uses of their works; reduces the current imbalance of power between copyright holders, YouTubers, and the Content ID system; and prevents claimants from punishing YouTubers for using infringing content.

1. Bringing Back the Human Element to Reduce False Positives

First, this proposal reduces the chances of false positives by preventing the claimant from being the sole judge of infringement. Under the current Content ID system, a YouTuber's choice is very limited: either accept the restrictions on their uses or "relinquish access to the work altogether" even if the content is fair use or in the public domain.<sup>135</sup> But, by removing the automatic blocking or monetization policies for non-regious uses and requiring the claimant to review the uploaded content before seeking to block or monetize, Content ID will be less susceptible to false positives and a YouTuber's choice of how to use a work will not be limited by the copyright holder's pre-rendered decision.

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<sup>134</sup> See *Dispute a Content ID Claim*, *supra* note 89 (discussing briefly the consequences of disputing a Content ID claim).

<sup>135</sup> Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 110 (1997).

Not only does the actual copyright holder have the best access to information to determine whether a use is infringing,<sup>136</sup> but the users of that content have the best access to information for why they have chosen to use that content. Accordingly, both the copyright holder and the YouTuber have the most to gain from a system that monitors illegal uses of copyrighted content but does not automatically block those uses. They are the human character—the necessary ingredient in copyright that Congress recognized in the DMCA—that acts as a check to ensure fair play” and to promote sharing and distribution.<sup>137</sup> Thus, under this proposal, an errant employee will no longer be able to accidentally claim all uses of a video that it never had the rights to, as seen in the Scale Labs incident, or to intentionally block the video without first determining what the video contains, as seen in the Liberation Music incident.

Furthermore, this proposal encourages claimants to not abuse the system and takes advantage of YouTubers because the publicly accessible site will act as a form of public shaming. Shaming is a method of publicizing someone’s behavior, “where such behavior is perceived to have violated a social norm.”<sup>138</sup> The process of shaming publicly and self-consciously draws “attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.”<sup>139</sup> Shaming can occur when a copyright holder has internalized values regarding copying, is ashamed to violate them because they would be going against those internalized values, or fears the public criticizing them.<sup>140</sup>

Accordingly, in contrast to the current state of Content ID, by using public shaming, this proposal limits “powerful intellectual property owners from overextending their rights.”<sup>141</sup> Having

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<sup>136</sup> See Defendant’s Opposition to Plaintiffs’ Motions for Partial Summary Judgment at 35, *The Football Ass’n Premier League Ltd. v. Youtube, Inc.*, No. 107CV03582 (S.D.N.Y. May 21, 2010) (indicating that copyright holders are far better positioned to determine whether a use is illegitimate, so refraining from proactive monitoring “keeps service providers from having to guess whether particular materials are or are not authorized”).

<sup>137</sup> Jansen, *supra* note 101, at 176.

<sup>138</sup> Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 665 (2011).

<sup>139</sup> Symposium, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1814 (2001) (internal quotations omitted).

<sup>140</sup> Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 20, 26 (2013).

<sup>141</sup> *Id.* at 26.

complaints go through a public channel could deter fraudulent or unfounded claims.<sup>142</sup> Furthermore, public comments could persuade claimants to adjust their Content ID and copyright policies, including deciding to tolerate a use.<sup>143</sup>

## 2. Encouraging Limited Forbearance to Promote Creativity and Cooperation

Second, this proposal encourages tolerance and promotes creativity and cooperation between copyright holders and YouTubers. Under the current Content ID system, copyright holders can tolerate uses, but their tolerance is subject to the automatic system and to others who may have rights to other content in the video, such as in-game music. In contrast, the proposal increases the ability of companies like game publishers to tolerate uses without an automated system claiming an entire video or all uses of a reference file.

The proposed changes thus encourage IP forbearance because copyright holders like game publishers and musicians will be able to quickly and easily tolerate uses and will be able to work with claimants.<sup>144</sup> IP forbearance “occurs when traditional intellectual property protection is available to creators, but those creators commonly opt either to forego protection, or not to pursue infringers.”<sup>145</sup> As many game publishers currently recognize, IP forbearance is “built on a theoretical foundation of

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<sup>142</sup> Symposium, *Who's Feeling Lucky? Skewed Incentives, Lack of Transparency, and Manipulation of Google Search Results Under the DMCA*, 1 BROOK. J. CORP. FIN. & COM. L. 209, 229 (2006).

<sup>143</sup> For example, in the case between Rumblefish and a video containing faint bird noises, Rumblefish upheld the automatic “musical composition” claim to the video, but because of significant amounts of comments on Reddit and Slashdot, Rumblefish realized its mistake and dropped the claim. See Nancy Messieh, *Rumblefish CEO Explains Why a YouTube Video with Chirping Birds Was Hit with a Copyright Claim*, THENEXTWEB (Feb. 12, 2012, 10:22 AM), <http://thenextweb.com/insider/2012/02/28/rumblefish-ceo-explains-why-a-youtube-video-with-chirping-birds-was-hit-with-a-copyright-claim> (exploring the public scrutiny of overprotective copywriters).

<sup>144</sup> The informal arrangement of announcing approved uses and allowing uploaders to select their use gives the copyright holders a “hedge,” or the ability to “wait and see.” Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1486 (2008). This hedge reduces costs to major corporate copyright holders because a publicly announced policy providing YouTubers with certain approved uses “is far cheaper and easier than having to figure out what requests to approve and on what terms.” *Id.* at 1487.

<sup>145</sup> Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 330 (2011).

creation and sharing without direct monetary remuneration.”<sup>146</sup> The game publishers receive indirect benefits from publicity, and they may also be able to receive ad revenue from monetized videos. Accordingly, if a game publisher wants YouTubers to promote its games, it may decide to proactively work with in-game music license holders to tolerate the music’s use. Similarly, if a music band like the French band Phoenix supports fair use of its music, it may decide to work with the rights holder to institute a new policy that does not block or monetize fair uses.<sup>147</sup>

### 3. Limiting Unjust Enrichment to Encourage Creativity and Tolerance

Lastly, this proposal will limit unjust enrichment because claimants will only be able to obtain a share of the ad revenues based on how much of their work makes up the uploaded video. This proposal recognizes that not all game publishers want to tolerate uses without obtaining some direct financial benefit.<sup>148</sup> Nevertheless, the claimant’s share in the revenue cannot unjustly punish the YouTuber.

The Copyright Act limits profits to those attributable to the infringing work, less certain expenses unrelated to the infringement by the defendant, including non-infringing content.<sup>149</sup> Under the proposal, “attributable to the infringement” means the percentage of the claimant’s content to the overall video; the greater the percentage, the more central the claimed content was in the uploaded video. If the claimant’s content makes up ten percent of the video, the claimant receives ten percent of the ad revenue. Consequently, the more the claimed content comprises the uploaded content the less the uploader will receive and the more the claimant will receive. With this information, an uploader may decide to use more original content to increase their revenue. Alternatively, a claimant may hedge on YouTubers using more of its copyrighted content so it can earn more revenue.

This is not a radical departure from YouTube’s current policy. First, Content ID already matches videos based on an uploaded

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<sup>146</sup> *Id.*

<sup>147</sup> See Masnick, *supra* note 15 (analyzing fair use in the Phoenix/Larry Lessig dispute).

<sup>148</sup> See *Nintendo to Profit From User Videos Posted to YouTube*, BBC NEWS (May 16, 2013), <http://www.bbc.com/news/technology-22552756>.

<sup>149</sup> See *On Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001).

video's proportional use of a reference file.<sup>150</sup> Second, YouTube currently allows cover artists who upload videos to share ad revenue with the owner of the covered song.<sup>151</sup> Accordingly, it will not be difficult for YouTube to adopt an improved monetization scheme.

#### IV. CRITICISMS TO MODIFYING CONTENT ID & RESTRICTING THE USE OF AUTOMATIC FILTERING

To further demonstrate the benefits of this proposal, this section will address possible objections to the proposal, which include issues with YouTube accepting the changes, concerns about an increase in DMCA takedown notices by claimants who are circumventing the Content ID process, and concerns about copyright holders accepting the proposal.

##### *A. YouTube May Be Hesitant to Limit Automatic Blocking & Monetization*

First, YouTube may not choose to implement the proposed changes because it has been reworking the automated system since 2010 to handle an enormous amount of uploaded content.<sup>152</sup> Accordingly, YouTube may not accept any change that restricts automatic blocking and monetizing videos and that requires a more manual process.

Although this proposal does suggest that YouTube limit its automatic filtering technology, the proposal has attempted to outline how YouTube could implement small changes to its current Content ID policy to further assist YouTube in its mission of “supporting new forms of original creativity, protecting fair use.”<sup>153</sup> Moreover, this proposal supports YouTube in its ever-constant attempts to investigate “new ways to give rights holders even better tools, while supporting new forms of

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<sup>150</sup> See Pacherco, *supra* note 58, at 42 (discussing and defining terms for Advanced Policy Options for Match Policies).

<sup>151</sup> See *Monetizing eligible cover videos*, YOUTUBE, <https://support.google.com/youtube/answer/3301938?hl=en> (last visited Jan. 26, 2015); see also Morran, *supra* note 81.

<sup>152</sup> See Alfishawi, *supra* note 131 (explaining the numerous ways in which YouTube continues to improve and adjust Content ID technology to better suit users and content owners).

<sup>153</sup> Zack, *supra* note 127.

creative expression”<sup>154</sup> and “to keep YouTube a vibrant place where . . . *everyone can control their original content* and make money from it.”<sup>155</sup>

Relatedly, Google has a history of amending its policies to provide transparency to the takedown procedures and to copyright law on the Internet. When Google took down links at the Church of Scientology’s request, internet critics accused Google of censoring its search results.<sup>156</sup> As a result, Google created a new policy and a new way to handle complaints: it would begin sending all takedown notices to ChillingEffects.org to provide more transparency to the notice takedown process.<sup>157</sup> Google also now publishes a transparency report and has taken steps to reinstate websites based on public comments.<sup>158</sup>

In a similar fashion, this proposal is just a continuation of Google’s efforts to add a level of public transparency and accountability to a very vague and opaque system. Having a public record of all notices, blocked videos, and monetized videos will allow YouTube to show, much like with Google’s voluntary joint effort with ChillingEffects.org, that it is encouraging transparency, accountability, and communication with all parties involved and with the public. In fact, by slightly modifying its policies and helping to create a public website, YouTube can continue operating Content ID outside the reach of the DMCA and avoid any potential government intervention to nudge it into making better choices for online copyright filtering.<sup>159</sup>

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<sup>154</sup> King, *supra* note 80.

<sup>155</sup> Alfshawi, *supra* note 131 (emphasis added).

<sup>156</sup> David F. Gallagher, *New Economy; A Copyright Dispute with the Church of Scientology is Forcing Google to Do Some Creative Linking*, N.Y. TIMES, Apr. 22, 2002, <http://www.nytimes.com/2002/04/22/business/new-economy-copyright-dispute-with-church-scientology-forcing-google-some.html?src=pm>.

<sup>157</sup> *DMCA Policy For Customers of Our Customers*, GOOGLE DEVELOPERS, <https://developers.google.com/storage/docs/dmca> (last visited Jan. 26, 2015).

<sup>158</sup> Betsy Isaacson, *55 Charts That Prove Governments Are Increasingly Censoring Your Internet*, HUFFINGTON POST (July 3, 2013), [http://www.huffingtonpost.com/2013/07/03/government-censor-internet\\_n\\_3535322.html](http://www.huffingtonpost.com/2013/07/03/government-censor-internet_n_3535322.html). See also Richard Spillett, *Google Backs Down in Censorship Row and Starts Re-instating Links Torn Down Under Controversial ‘Right to be Forgotten’ Ruling Following Storm of Criticism*, MAIL ONLINE (July 4, 2014, 7:13 PM), <http://www.dailymail.co.uk/news/article-2680463/Google-faces-250-000-backlog-censorship-requests.html>.

<sup>159</sup> However, in case YouTube does need a governmental nudge in the right direction, the DMCA could be amended so that service providers are no longer shielded by the safe harbor if the filtering technology results in a pattern of false positives or unjustly enriched claimants. See *Proposed Amendment to the DMCA*, LET’S PLAY FOR FAIR PAY, <http://dmcareform.weebly.com/proposed->

*B. Takedown Notices May Increase  
with Claimants Circumventing  
the New System*

Second, critics and some YouTubers might argue that the proposal will allow claimants to circumvent the Content ID process and immediately file numerous takedown notices, thus eliminating the two-tiered approach of YouTube's current Content ID system. At first glance, Content ID currently has two layers of dispute: the claimant must exhaust the Content ID dispute and appeal process before seeking a DMCA takedown notice.<sup>160</sup> Thus, with the proposed changes, critics may fear that once the system automatically finds content, the claimant will submit a takedown notice without going through the new dispute and appeal process; therefore, YouTubers may then be more susceptible to receiving strikes and getting banned.<sup>161</sup>

However, the current Content ID system does not require all claimants to go through the dispute and appeal process before submitting a takedown notice. When a claimant utilizes the current manual review option, the claimant can immediately seek to takedown the video without first using the dispute and appeal process.<sup>162</sup> In fact, takedown notices must be manually created and are not generated from automatically matched videos.<sup>163</sup> Thus, YouTube can choose to keep the current takedown notice requirements and prevent claimants from filing notices for automatically matched videos until the YouTuber has

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language.html (last visited Jan. 26, 2015) (providing more information and the proposed language).

<sup>160</sup> Patrick McKay, *Victory! YouTube Reforms Content ID Dispute Process*, FAIR USE TUBE (Oct. 4, 2012, 8:03 AM), <http://fairusetube.org/articles/25-content-id-victory>.

<sup>161</sup> See Owen Good, *YouTube's Copyright Crackdown: Everything You Need to Know*, KOTAKU (Dec. 18, 2013), <http://kotaku.com/youtubes-copyright-crackdown-simple-answers-to-compli-1485999937> (examining YouTube's automatic Content ID match notices); see also Ben Jones, *Why YouTube's Automated Copyright Takedown System Hurts Artists*, TORRENTFREAK (Feb. 23, 2014), <http://torrentfreak.com/why-youtubes-automated-copyright-takedown-system-hurts-artists-140223/> (arguing that Content ID ignores fair use and the automated notices have no evidentiary standard); Owen Good, *The Most Ridiculous Victim of YouTube's Crackdown is a BASIC Game*, KOTAKU (Dec. 17, 2013, 3:30 PM), <http://kotaku.com/the-most-ridiculous-victim-of-youtubes-crackdown-is-a-1484998183> (discussing how YouTube's automated system issued a Content ID notice to the creator of a video game when he uploaded a gameplay video).

<sup>162</sup> Pacherco, *supra* note 58, at 80.

<sup>163</sup> *Id.* at 67.

disputed the match. Moreover, the DMCA takedown process contains certain safeguards that may dissuade abusing takedown requests, such as Google submitting takedown notices to ChillingEffects.org,<sup>164</sup> and the requirement that the claimant considers fair use before issuing the takedown notice.<sup>165</sup>

Still, the proposal adds two additional safeguards to lower the chances of abusing the new Content ID system. First, all matches will be sent to a publicly accessible website, so the information about the video, the claimant, and the respondent will appear in two public locations. But, because the Content ID-focused website allows for public comments, individuals angry over the takedown notice may decide to leave comments in the hope that it will shame the claimant or persuade YouTube to reinstate the video. Second, in requesting that YouTube expand its three-strike policy to claimants, the proposal seeks to reduce abuses of even takedown requests derived from automatically matched videos. That is, if a claimant is repeatedly sending takedown notices without analyzing fair use or without moving through the new dispute and appeal process, not only could the claimant be subject to liability under 17 U.S.C. § 512(f),<sup>166</sup> but the claimant could be banned from using Content ID—which includes having access to automatically matched videos—because the claimant has misused the system or used it in bad faith.

### C. *Manual Review May Increase Transaction & Review Costs*

Finally, some copyright holders may be reluctant to accept the new proposal because it requires them to manually review each video before submitting a block or monetization request, thus increasing their transaction and review costs.

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<sup>164</sup> Nate Anderson, *Victims Fight Back Against DMCA Abuse*, ARS TECHNICA (Mar. 16, 2007, 11:43 AM), <http://arstechnica.com/tech-policy/2007/03/victims-fight-back-against-dmca-abuse>; see also *DMCA Policy For Customers of Our Customers*, *supra* note 157 (stating that under Google's DMCA policy, the content of each takedown notice will be forwarded to Chilling Effects for publication).

<sup>165</sup> Benjamin Wilson, Comment, *Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-Faith Removal of Web Content*, 29 ST. LOUIS U. PUB. L. REV. 613, 627 (2010).

<sup>166</sup> See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154–55 (N.D. Cal. 2008) (holding that the copyright owner acted in bad faith, and violated Section 512(f), by issuing a takedown notice without proper consideration of the fair use doctrine).

Although the new system may increase certain costs, manual review is not impossible and can be very effective.<sup>167</sup> More importantly, though, according to the current Content ID policies, claimants must review each disputed and appealed claim, and claimants like Rumblefish, who have “accidentally” avoided this manual review requirement, have announced they will make sure to review each claim.<sup>168</sup> The proposal supports the efforts of many of these claimants and just moves the human review to earlier steps so that claimants cannot make mistakes and blame the automated system as easily as they can now.

Additionally, requiring manual review for non-egregious uses will help form the norms necessary for creativity and cooperation in the YouTube and online gaming and music communities. IP forbearance norms have to come from somewhere.<sup>169</sup> Currently, they come from claimants agreeing to allow certain uses on YouTube; however, the current system and third party claimants are impacting their desire to promote creativity and sharing and increasing transaction costs. Thus, with the new Content ID system, copyright holders can effectively promote these norms without having to work against an automated system or third-party claimants. They can pre-approve certain uses and they can publicly proclaim that certain uses are allowed.

## V. CONCLUSION

This article provides a way for YouTube to eliminate or reduce many of the problems afflicting its current Content ID system. By restricting automatic blocking and monetization to egregious infringing uses of content and by having claimants communicate with YouTubers before the content is either blocked or

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<sup>167</sup> In fact, as one study on online censorship in China found, automated censorship was largely ineffective, relying on more accurate large-scale post hoc human censors who corrected the mistakes of the automated review. See Gary King et al., *Reverse Engineering Chinese Censorship through Randomized Experimentation and Participant Observation*, 35 SCI. MAG. 1251722-1 (2014), [http://gking.harvard.edu/files/gking/files/experiment\\_0.pdf](http://gking.harvard.edu/files/gking/files/experiment_0.pdf) (providing additional information regarding the Chinese study, including its findings and a description of its research designs).

<sup>168</sup> *Music Publisher Partner Guide: Claim Status*, YOUTUBE, [https://support.google.com/youtube/answer/2663646?hl=en&ref\\_topic=2660671](https://support.google.com/youtube/answer/2663646?hl=en&ref_topic=2660671) (last visited Jan. 26, 2015); Pacherco, *supra* note 58, at 55, 80.

<sup>169</sup> “Norms and customs must arise from somewhere. They do not spring from the void; rather, they exist to enforce a state of affairs that is favorable for a critical mass of the community to which they apply.” Rosenblatt, *supra* note 145, at 340.

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monetized, YouTube can actually begin to protect fair uses and promote new creative uses of content as YouTube has envisioned. Additionally, by limiting monetization to a proportion calculation, this proposal supports a Content ID system that complies with the Copyright Act and reduces the chances of an unjustly enriched claimant at the expense of a YouTuber's creative hard work.