How can online creators with derivative creative works on YouTube protect themselves from questionable usage of Intellectual Property Rights?

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Table of Contents

I. Introduction - The Research Question and Outline of This Thesis

Over the last few decades, a huge shift has occurred towards digitalization. Almost all activities in some way, whether that be talking with friends or family, playing games, or even meeting new people has become a digital activity. While this is still done in real life, the internet has become an even greater tool for socialization, entertainment and other activities. One of these being art. Years ago, in order to become famous or share your works with others you would have to be lucky enough to possess a significant talent, have the right connections, or simply be found by the right person who could elevate you. Nowadays anyone could upload their work or thoughts onto the internet for a handful or even millions and billions of strangers to stumble upon it. This system makes the creation of videos, music and other content a lot more accessible and rewarding than trying to get an appearance in film, television or radio.[1] Starting a YouTube channel is relatively easy compared to becoming an actor or starting your own program. In the case someone worked hard enough or has enough connections to start their own show on television, radio, or star in a movie, their content could still be restricted by the broadcaster or language. Meanwhile, content uploaded online is accessible worldwide, and could even contain subtitles for foreign audiences in markets that regular broadcasters would never attempt approaching. This makes it no mystery why so many people with big dreams are looking towards online content creation as opposed to the more classic venues to fame. In fact, it has led to the point where approximately 75% of children ages 6 to 17 want to become online content creators.[2] With the vast majority of these wanting to become online content creators on YouTube specifically. It comes as no surprise that this platform is also the most popular one used by teenagers when it comes to content and media consumption.[3]

There are many social media platforms with different types of artistic content gravitating towards them, currently the most major ones are Facebook, Twitter, Instagram, YouTube, Tumblr, LinkedIn, Kickstarter, Reddit, and 4chan.[4] But there are of course many more, with new platforms such as TikTok gaining popularity by the day. There is one problem they have in common however, and that is copyright claims, or in the case of YouTube copyright strikes even.[5] This is something that is even more relevant when we're speaking of derivative works such as reviews or remixes. These derivative works can by no means be unoriginal or contain theft of other works in many cases, with most of this content relying on fair use.[6] However

[1] Natalie Guyette, 'YouTube Culture And Why So Many Young People Want YouTube Fame' (*Wisconsin Public Radio*, 2 January 2019) <https://www.wpr.org/YouTube-culture-and-why-so-many-young-people-want-YouTube-fame> accessed 27 February 2021.
[2] Mediakix 'Why 75% Of Children Are Dead Set On Becoming A YouTuber' (*Mediakix*) <https://mediakix.com/blog/percent-children-becoming-a-YouTuber/> accessed 17 June 2021.
[3] Megan Farokhmanesh, 'YouTube Is The Preferred Platform Of Today's Teens' (*The Verge*, 31 May 2018) <https://www.theverge.com/2018/5/31/17382058/YouTube-teens-preferred-platform> accessed 14 May 2021.
[4] 'Statista Most Popular Social Networks Worldwide As Of October 2021, Ranked By Number Of Active Users' (*Statista*, October 2021) <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> accessed 1 December 2021.
[5] Whitney N. Alston, 'The Power Of Social Media As An Evolving Force And Its Impact On Intellectual Property' (2020) 11(2) Cybaris 7-11 <https://open.mitchellhamline.edu/cybaris/vol11/iss2/3> accessed 12 June 2021.
[6] *Matt Hosseinzadeh v Ethan Klein and Hila Klein* N. 16-CV-3081 (SDNY Aug 23, 2017).

despite this being the case, someone's hard work can be removed along with their entire platform and sometimes only source of income.

There are of course cases where there are definitely infringements, one could try to upload the entirety of a movie on YouTube with a small silent reaction in the bottom. In such a case it would be understandable to see this as a simple copyright infringement. However there are also more questionable instances when it comes to copyright claims and strikes when fair use should be applicable.[7] Take film reviews as an example, say a filmmaker or even the movie studio disagrees with scathing criticism from a review, they could claim or strike the copyrighted material that was used in accordance with the fair use doctrine in order to silence the reviewer. That means that despite reviewers being legally in the right in such a situation, the ones getting criticized can still silence and censor them. A platform such as YouTube, where more than 500 hours' worth of content is uploaded per minute, could realistically not be expected to employ workers to check all of this content manually.[8] As a result, they implement automated monitoring and filtering, which leads to the blocking of whatever is flagged as copyright infringement using content ID. This problem could also occur when companies or even other content creators report content for copyright infringement, and as a default YouTube will believe the accuser and again block the content even if it was uploaded in accordance with the law.[9] This often leads to creators being helpless, as they would be private actors who do not have the means to take large companies on in court. Not just in the sense that these large companies have more resources, but also that it could involve various different companies for every single false copyright claim on a different video.

Many of these private actors and creators on the internet are thus stuck in an unclear gray area of the law with their creations and livelihood and have no trustworthy way to appeal against copyright claims, besides YouTube's own redress mechanisms that already seem to favor the accuser by taking their word first. This becomes especially difficult since many of these copyright claims can occur against media that isn't prominent in the created work. Many have used their Intellectual Property Rights to claim the monetization of creative works for simply having a television with their work on in the background or even having short clips of music appear in the background. There are even instances where copyright strikes have been filed for someone singing a part of a song without a beat or background music.[10]

It is clear that there is a definite problem within social media platforms that allow for questionable usage of Intellectual Property Rights, especially when it comes to derivative creative works. Since there is not 1 specific best way to deal with them, that leaves a lot of

[7] Niva Elkin-Koren, 'Fair Use By Design' (2017) 64(5) UCLA Law Review 1088 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217839#> accessed 2 April 2021.
[8]James Hale, 'More Than 500 Hours Of Content Are Now Being Uploaded To YouTube Every Minute - Tubefilter' (*Tubefilter*, 5 July 2019) <https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-YouTube-per-minute/> accessed 15 June 2021.
[9] YouTube Help 'What Is A Content ID Claim?' (*Support.google.com*) <https://support.google.com/YouTube/answer/6013276?hl=en-GB> accessed 20 January 2021.
[10]Virginia Glaze, 'Mrbeast Calls Out YouTube After Being Hit With False Copyright Strike' (*Dextero, 13* February 2019)<https://www.dexerto.com/entertainment/mrbeast-calls-out-YouTube-after-being-hit-false-copyright-strike-357775/> accessed 17 May 2021.

confusion and speculation amongst online creators. It would be pertinent to analyze which defenses are able to be used, their efficiency, and how much effort or money would have to go into their usage, since not everyone can simply afford to take their matters to court.

As we see in other literature there are 3 main defenses when a copyright holder invokes a copyright claim. These are fair use, the first sale doctrine, and an implied license when it comes to US law specifically.[11] However, the one most relevant to situations as described earlier, when we're speaking of derivative works, would be fair use as described in Title 17 of the United States Code §107. This concept does not translate directly into European Union law, however a similar concept to fair use can be found in the exceptions and limitations of Article 17(7)[12] of the Directive on Copyright in the Digital single Market, also known as the DSM Directive. Both the Code[13] and the Article[14] lay out that there are certain purposes or exceptions for which there is no infringement of copyright. Examples of purposes or exceptions that occur in both would be parody, criticism, or even quotation to a degree.[15] Different social media platforms have different policies and ways of handling copyright claims[16], whether this is Twitter, YouTube, or Pinterest.[17] For a more specific view, we are going to limit our current look to just one of them. Since YouTube has a large platform aimed at creating content, with much of it being derivative, this platform would be great to analyze from a fair use perspective.

Consider the fact that a lot of the content on YouTube is derivative in some kind, since their online creators largely do not have the resources to create fully original content. We named reviews as an example, but also video game "playthroughs" can come to mind.[18] Here the video game is being played, this will never be played the exact same way twice and can be seen as a transformative work by any additional editing or commentary from the online creator. Still this would be a derivative work since it does contain something in it that is copyrighted, the game itself. Here fair use could have allowed for this content to appear by it being a transformative work. This of course depends on how transformative the work actually is, as some could argue that some story-heavy games with minimal player-input would lead to situations where the

[11] Whitney N. Alston, 'The Power Of Social Media As An Evolving Force And Its Impact On Intellectual Property' (2020) 11(2) Cybaris 26-33 <https://open.mitchellhamline.edu/cybaris/vol11/iss2/3> accessed 12 June 2021.
[12] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, art 17(7).
[13] Title 17 United States Code §107.
[14] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17(7).
[15] Title 17 United States Code §107.
[16]Osborne Clarke, 'US Copyright infringement is no joke on Twitter' (*Osborne Clarke*, 17 September 2015) <https://marketinglaw.osborneclarke.com/media-and-ip/us-copyright-infringement-is-no-joke-on-twitter/> accessed 21 September 2021.
[17] Jean Murray, 'How Copyright Works with Social Media' (*The Balance Small Business*, 23 July 2020) <https://www.thebalancesmb.com/copyrights-and-social-media-issues-397821> accessed 1 December 2021.
[18] Dan Hagen, 'Fair Use, Fair Play: Video Game Performances And "Let's Plays" As Transformative Use' (2018) 13 Washington Journal of Law, Technology & Arts 245 <https://digitalcommons.law.uw.edu/wjlta/vol13/iss3/3/> accessed 12 September 2021.

player input cannot make it transformative enough to fall under fair use.[19] Analyzing derivative works when it comes to the question on how to protect creators from questionable usage of intellectual property rights would add that it would indeed only tackle questionable usage. Say it is a fully copied work, the intellectual property owner is fully within their right to strike and claim the uploaded work. These will not be the types of situations we will be considering. If a work has no bearing to the original work, such as an accidental shot in the background containing the work, then it is a definite misuse of the intellectual property rights to have this content removed. Only a derivative work relying on fair use or exceptions and limitations would be fully relevant to question such a situation, and could then also be used to strengthen the defense against direct misuse of the intellectual property rights.

Thus we will limit the scope of the question to the social media platform of YouTube, and derivative works uploaded by the content creators. We will mostly focus on derivative works that fall within the scope of the exception, limitations and fair use laws. Seeing as how derivative works that are fully legal can already be removed or disabled on the platforms, it may not be useful to look into the more gray areas of copyright infringement until this is sorted first. We don't want to analyze situations where usage of intellectual property rights such as copyright claims are fully in the right, such as when there is a clear copyright infringement. We want to analyze what happens against the questionable uses of copyright claims or strikes, such as when it's used to censor or claim content that is not fully owned by these copyright holders. Thus we ask "How can online creators with derivative works on YouTube protect themselves from questionable usage of Intellectual Property Rights."

The best way to do this would thus be to see what type of actors are important when it comes to copyright claims, and see what types of claims these tend to be. Are they mostly towards music, visuals, or the entire package? Do we know if these tend to be actual music producers, filmmakers, larger studios, or even other individual creators? If this is the case, does this difference matter and to which degree?

Following that we have to analyze how these copyright claims work. Does YouTube require copyright owners to have any evidence of a copyright violation before they can put in a claim or strike? Are these manually handled or does this happen with the help of an algorithm? Can online creators defend themselves from (false) claims and strikes, if yes to which degree and how quickly?

Finally we must see what types of defenses have been used so far. By doing this, we can actually tell what works and what does not. If something works, we can then also see how cost-effective this tactic is. Thus we must cast a wide net over different copyright claims and strikes, see how online creators have dealt with them, and make a comparison.

[19] Dan Hagen, 'Fair Use, Fair Play: Video Game Performances And "Let's Plays" As Transformative Use' (2018) 13 Washington Journal of Law, Technology & Arts 254 <https://digitalcommons.law.uw.edu/wjlta/vol13/iss3/3/> accessed 12 September 2021.

This means the main methodologies will thus be doctrinal legal research and interdisciplinary research, by using both the actual legal texts and how they're applied, as well as the actual social impacts of current law and practice. We shall lay out the legal basics and key concepts first. This will then be followed by seeing how the law is applied in action, aka how does YouTube actually handle cases of copyright infringement by looking at more specific cases. This will also help those who want to know how one can defend themselves from questionable usage of intellectual property rights right now. We will look at what type of impact this has on actual content creators and their freedom of expression. Then we can return back to the law to see how YouTube might have arrived at their current position in their dealings with copyright law, how the laws might differ between different legal systems, and possibly where the law might create issues for YouTube's improvement when it comes to protecting content creators with derivative works.

II. Chapter 1 - Key Concepts

In order to evaluate this paper's central research question, it is necessary to first understand three key concepts:

A. Intellectual property
B. Copyright
C. Derivative works

These concepts are central to the question of how online creators can protect themselves from questionable usage of intellectual property rights. We must focus on what these legal principles exactly entail, what their origins are, and how they show themselves in practice. Specifically how they show themselves on the YouTube platform when it comes to copyright protection for derivative works, or in what other ways they might interact. Furthermore, we will especially focus on how derivative works on YouTube are addressed by both YouTube itself and the surrounding legal systems.

II.A. What is intellectual property?

Intellectual property covers a vast range of activities that play an important role in both cultural and economic life. In general, we can understand intellectual property to encompass 'the creations that arise from the intellectual activities in the industry, the science, the literature and the art'.[20] In plain terms, intellectual property is a creation of the mind, the subject of which can be very disparate. An example could be a mathematical formula, a piece of art or any idea. The central purpose of intellectual property law is to protect the producers and creators of this intellectual property, through granting rights of control over the use of these productions. This

[20] Ana Pepeljugoska & Valentin Pepeljugoski, 'Social Media and the Challenges to Intellectual Property Law' (2017) 8(1) Iustinianus Primus L Rev 5 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/iusplr8&div=6&id=&page=> accessed 1 December 2021.

importance is illustrated in the various laws that have been designed to protect intellectual property rights. Patents, for example, have long been recognized in various legal systems and were granted in Venice as far as the fifteenth century.[21] Then modern initiatives to protect IP through international law started with the Paris Convention for the Protection of Intellectual Property in 1883, and the Berne Convention for the Protection of Literary and Artistic Works in 1886. IP rights are safeguarded by Article 27 of the Universal Declaration of Human Rights and there are more than 25 international treaties on IP administered by the World Intellectual Property Organization.

Intellectual property law is concerned with the safeguarding of original creators and producers of intellectual goods and services by granting them the right to control who may use this intellectual property and who may not. There are many different types of IP rights, such as copyright, patents, and trademarks.[22] All these different types of IP rights can be viewed like any other property right, and allow the creators or owners of IP to benefit from their work or from their investment in a creation. The logic behind this is that artists, businesses, investors and scientists put a lot of effort and time into the development of creations and innovations. IP rights are designed to encourage them to take this effort, because they would facilitate a chance to make a fair return on that investment.

II.B. What is Copyright?

Copyright is a type of intellectual property right and covers an enormous range of works. It is used to describe the rights that creators have for their literary, artistic and scientific creations. This right is typically granted to the original authors of creative works and grants them control over who can use their intellectual property and how.[23] Thus copyrights include economic rights which involve the right to control distribution of a work. They also include moral rights of the creator, such as the right to be acknowledged as the author of the work. Moral rights are also used to prevent works from being altered in a way that might damage the creator's reputation. The previously mentioned economic rights can also be transferred and divided to other actors. The copyright owner could let someone use a work under certain conditions for example, or even sell the rights to someone else and make them become the new owner. If a copyright owner dies, their heirs or descendants will often inherit these rights. Moral rights cannot be traded or transferred in many countries, but a creator can agree to refrain from exercising them.[24]

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[21] *What Is Intellectual Property?* (World Intellectual Property Organization 2020) 2 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf> accessed 2 February 2021.
[22] Ibid.
[23] Ana Pepeljugoska & Valentin Pepeljugoski, 'Social Media and the Challenges to Intellectual Property Law' (2017) 8(1) Iustinianus Primus L Rev 2-7 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/iusplr8&div=6&id=&page=> accessed 1 December 2021.
[24] *What Is Intellectual Property?* (World Intellectual Property Organization 2020) 23 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf> accessed 2 February 2021.

One of the defining features of copyright is that it focuses on protecting the 'expressions of ideas and not the ideas themselves'.[25] For example, if the intellectual property right is a piece of music, copyright law will give the owner of that intellectual property the right to control who can publish that music. The exact mode of expression or domain it belongs to is usually unimportant, as copyright laws generally don't provide exhaustive lists of the types of works protected. When it comes to copyright the expression of ideas and not the ideas themselves are what is important in determining whether it falls within copyright protection. Thus it can concern itself with the protection of every production in artistic areas, regardless of the expression being used. This artistic expression could include film, music, painting, etc. Do note, that not artistic expressions alone are protected, but also computer programs, databases, advertisements, maps and technical drawings amongst other things.[26] There is not a comprehensive list of every single work protected by copyright, but all national laws practically provide the protection of most types of artistic expression as long as the work is original. There are also rights related to the copyright of the creators that protect the interests of those closely associated with copyrighted works. These can be performers, broadcasters, producers of sound recording or others when it comes to the music industry for example. These rights are called related rights or neighboring rights. The protection is similar to copyright, in the sense that owners can stop people from broadcasting, recording or communicating without their permission. The duration of this protection is often shorter than that of regular copyright however. In most countries this lasts for 50 years after the date of broadcast, recording or performance.

This is in contrast to copyright where often countries are required to protect the copyrighted works for the entire lifetime of the creator and at least 50 years after the creator's passing. [27]While there are different national laws on copyright in different territories, laws such as previously mentioned are established as a minimum standard of protection in international law. Another is that copyright arises as soon as the work is created, therefore there is no need to register a work or perform any other formalities to gain copyright protection. These international laws make it so that copyrighted works are generally protected in most countries and not just the country of origin. These mentioned minimum standards are guaranteed by international treaties administered by the World Intellectual Property Organization. Note that these are examples of minimum protection, longer copyright terms can still be provided and other stronger protections can still be provided by countries, but they simply cannot provide less.

In general, copyright like other intellectual property ensures that creators can earn a fair reward for their work. This in turn encourages further creative endeavors and makes sure that authors of works are properly acknowledged, thus serving public interest. However copyright

[25] Ana Pepeljugoska & Valentin Pepeljugoski, 'Social Media and the Challenges to Intellectual Property Law' (2017) 8(1) Iustinianus Primus L Rev 6 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/iusplr8&div=6&id=&page=> accessed 1 December 2021.
[26] *What Is Intellectual Property?* (World Intellectual Property Organization 2020) 20 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf> accessed 2 February 2021.
[27] Ibid 23.

is not without its limits. International law recognizes that there should be limitations and exceptions towards the applicability of copyrights, these vary from country to country due to particular social, economic and historical conditions but are still present. An example within the European Union for example is that under Article 17(7) of the Directive on Copyright in the Digital single Market. This article lays out that where copyright and related rights are not infringed, or where exceptions and limitations such as specifically parody apply, the availability of works or other subject matter uploaded by users shall not be prevented. Thus even if this parody content contains elements of an existing copyrighted work, the exceptions and limitations make it so that the copyright owner cannot prevent this usage under EU law. Parody can meanwhile also be found in US law under Title 17 of the United States Code §107. Here parody is described as a part of fair use instead. This is a doctrine that permits limited use of copyrighted material without having to acquire permission from the copyright holder, thus being similar to an exception as described in Article 17(7) in the DSM Directive. With parody specifically falling under that fair use in situations such as the Campbell v. Acuff-Rose Music Inc case.[28] This illustrates that an owner's economic and moral rights are restricted by exceptions and limitations for the sake of public interest by preventing the discouragement of new creative endeavors if these are in part based on existing copyrighted materials, but are not direct copies of course. It is exactly in this area where Derivative Works operate. However what we come to find is that copyrights are still enforced even where exceptions and limitations should apply.

II.C. What are Derivative Works?

The widespread adoption of the Internet has led to a greater ease in the sharing of homemade content. Online creators can use websites such as YouTube to share any type of content they want, within specific guidelines of course, with potentially the entire world as their audience. When the subject matter of such content is protected by copyright, this content could make use of that copyrighted material in a way that is not allowed and violate someone else's copyright. A substantial amount of such content are derivative works that are usually created without permission of the copyright owner.

In copyright law, a derivative work is an expressive creation that includes major copyrightable elements of an original, previously created first work.[29] This previous work that most likely contains copyrights is then called the underlying work, while the derivative work becomes a second, separate work independent in form from the first. One example being the documentary movie "Hearts of Darkness: A Filmmaker's Apocalypse" which was about the production of the movie "Apocalypse Now". The documentary is a separate but derivative work based on the previously created first work of the movie. The original work still keeps its copyright as an original creation, but the documentary film on the production, even if it may contain content of the Apocalypse Now film, counts as a derivative work through its transformation of the original.

[28] *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 584 (1994).
[29] Copyright In Derivative Works And Compilations (US Copyright Office 2020) <https://www.copyright.gov/circs/> accessed 14 January 2021.

Like in the example above, in order for the derivative work to be protected by copyright the underlying work must be transformed, modified, or adapted in a substantial way and bear it's author's personality sufficiently to be original. Most countries' legal systems seek to protect both original and derivative works, but they tend to phrase the exact definition and scope in different ways. Title 17 of the United States Code §106(2) protects derivative works in the US. The exact definition of derivative works is then elaborated on in 17 U.S.C. §101 to specify that "A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"."[30] Article 10(2) of the Dutch Copyright Act states that reproductions in a modified form of a work of literature, science or art, such as translations, musical arrangements, adaptations, and other elaborations, can be protected as original, without prejudice to the primary work.[31] Article 4 of the Italian Copyright Act affords protection to creative elaborations of works, such as translations in another language, transformations from a literary or artistic form into another one, modifications or additions that constitute a substantial remake of the original work, adaptations, "reductions", compendia, and variations which do not constitute original works.[32]

Here we see 3 great examples of national laws that already allow for derivative works. They all contain specific situations where something becomes a Derivative Work deserving of its own copyright protection, with an option for transformations and modifications outside of the exact mentioned examples. For example "other modifications" in the US, "other elaborations" in the Netherlands, or "modifications or additions that constitute a substantial remake" in Italy. This is then further set out in international law as well. Article 2(3) of the Berne Convention also sets out that "Translations, adaptations, arrangements of music and other alterations of a literary or artistic work" shall be protected under Copyright law as Derivative Works.[33] This provision is also then incorporated into the TRIPS agreement.[34] This Agreement on Trade-Related Aspects of Intellectual Property Rights is an international legal agreement between all the member nations of the World Trade Organization. All of this together illustrates that Derivative Works are not just recognized in national laws but are also seen as relevant and protected under international law in most countries.

YouTube is a platform that offers a wide array of content created by all types of people, but of course not all of this content is fully original. Reaction channels, movie edits, and let's plays are all huge chunks of the types of content one could encounter on the platform. All of these works are based on existing copyrighted material. One of the most iconic examples of

[30] Title 17 United States Code §101.
[31] Auteurswet (NL), Article 10(2).
[32] Law for the Protection of Copyright and Neighboring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003) (ITA), Article 4.
[33] Berne Convention for the Protection of Literary and Artistic Works (amended 28 September 1979, entered into force 19 November 1984), Article 2(3).
[34] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1.

derivative works on YouTube, going back all the way to its inception with channels such as the Nostalgia Critic are the review channels. These are YouTube channels completely dedicated to reviews of movies, technology, video games or any other topic. However when it gets to movies and tv shows, copyright can become a bit tricky. In order to make a decent-looking product these review channels would have to contain bits and pieces of the original product in order to give examples or point out scenes they want to criticize. This can become a problem when the owner of the underlying work is unhappy with the review itself. [35]

One of the more iconic examples of the previous years has been when the previously mentioned Nostalgia Critic has had their review of The Room taken off of online platforms for violating copyrights.[36] The creator of this movie, Tommy Wiseau, claimed in 2010 that the usage of the movie scenes in the review violated his copyright, despite the fact that one could argue that a review of a movie is a transformative work. The content creator eventually managed to get his review back up, and even managed to interview Tommy Wiseau on his channel. Only for the interview to later be hit with a copyright strike in 2016, together with a copyright strike against another popular channel named "I Hate Everything" for the same movie.[37] Despite Tommy Wiseau being fully aware that reviews would fall under fair use on YouTube, he managed to keep hitting channels with false copyright strikes even 6 years later after the copyright infringement had already been solved. This also shows that YouTube has thus not attached enough negative consequences for these fake strikes, as they still took down these reviews based on his name alone. Sadly there does not seem to be any intention from the side of YouTube when it comes to actually addressing this problem.

YouTube revealed that millions of videos get hit with incorrect copyright claims. Specifically between the periods of January 1st 2021 and the 30th of June of the same year, a total of 722.649.659[38] total content ID claims were brought forward. Out of this number, only 3.698.019 of the claims were disputed. 60% of this number so approximately 2,2 million cases are then ruled in favor of the uploaders and are seen as incorrect. Now one could argue that this means that YouTube has a relatively small amount of false copyright claims, as the disputes won by content creators make up less than 1% of the total amount of copyright claims. However one could also look at the fact that perhaps not every resolution in favor of the claimant is justified. We could even take it a step further, as we will also discuss later, and consider that even if the content ID claims are false, that not every content creator is willing to try and dispute this. Either way, YouTube's opinion on this is shown quite clearly in their Copyright

[35]Katharine Trendacosta, 'Unfiltered: How YouTube'S Content ID Discourages Fair Use And Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <https://www.eff.org/nl/wp/unfiltered-how-YouTubes-content-id-discourages-fair-use-and-dictates-what-we-see-online#fn24> accessed 25 March 2021.
[36] Jonathan Bailey, "The Nostalgia Critic vs. Tommy Wiseau Debacle" (*Plagiarism Today*, 22 July 2010) <https://www.plagiarismtoday.com/2010/07/22/the-nostalgia-critic-vs-tommy-wiseau-debacle/> accessed 1 December 2021.
[37] I Hate Everything, 'Oh hi copyright strike' (*Twitter*, 23 August 2016) <https://twitter.com/ihe_official/status/767988550243590145> accessed 26 Febuary 2021.
[38] *Copyright Transparency Report* (YouTube 2021) <https://transparencyreport.google.com/report-downloads> accessed 7 December 2021.

Transparency Report where they state that "no system is perfect".[39] At most they seem to admit that even though Content ID is limited to partners who, according to them, have "demonstrated a great need for a scaled solution, working knowledge of copyright, and the necessary resources to manage a complex tool", while admitting that there are still errors despite this. They then try to justify it by claiming that indeed fewer than 1% of Content ID claims were actually disputed, whether this means they were correct or not. An interesting addition is that YouTube also claims that Content ID makes up more that 99% of the total copyright removal requests.[40]

The issue of false copyright strikes against YouTube channels and content creators is not purely restricted to movie producers or large companies against YouTube channels. The YouTube channel H3H3 was sued as a reaction to them making a video criticizing that of another creator named Matt Hosseinzadeh.[41] The main claim in this civil action was that the channel had infringed on the other's copyright by using clips of his video in the one that they uploaded to his channel. This came in the form of a reaction video, which is a type of video where people quite literally react to something. This can be a song, another video, foods of different cultures, or anything else. This specific reaction video however was not simply H3H3's content creators watching it, they only showed the video as far as this was necessary and added in a lot of criticism and commentary against the original copyrighted work in theirs. In particular the acting and the portrayal of women in the original work was criticized. As a result of this legal action, a fundraiser was started by YouTuber Philip DeFranco to raise money for their legal fees, with many well-known creators on the platform donating money to protect fair use on YouTube. Philip DeFranco himself stated on the GoFundMe page "If they are bullied and drained of funds because of this ridiculous lawsuit and/or they lose this case it could set a terrible precedent for other creators".[42] Furthermore the GoFundMe page shows the opinions of Philip DeFranco and many content creators on the platform in how they see the copyright system as broken and stepping on freedom of speech. The legal action was seen by content creators as an attempt to silence content creators, even if they were able to rely on fair use. Ethan and Hila Klein, the defendants, had estimated that even if they won, it would take them 100.000 dollars to defend themselves to the end. This shows the vast amount of resources necessary for creators to protect themselves, as they were able to afford their legal fees by being relatively large content creators with the backing of others. In the end, it was ruled that this video by H3H3 constituted critical commentary on the video, is not a market substitute for the original, and taking into account several other factors this meant that their usage of clips constitutes fair use as a matter of law.

However within this same ruling it is also stated that this is not a blanket defense for all reaction videos. Remember that reaction videos are simply put, videos where someone reacts to something. The judge's opinion here argued that not all reaction videos constitute fair use,

[39] *Copyright Transparency Report* (YouTube 2021) 10 <https://transparencyreport.google.com/report-downloads> accessed 7 December 2021.
[40] Ibid.
[41] *Matt Hosseinzadeh v Ethan Klein and Hila Klein* N. 16-CV-3081 (SDNY Aug 23, 2017)
[42] Philip DeFranco, 'Help For H3H3, Organized By Philip Defranco' (*GoFundMe*, 2 June 2016) <https://www.gofundme.com/f/h3h3defensefund> accessed 14 October 2021.

but they do not go into a lot of detail which ones do. She goes on to explain that the work uploaded by H3H3, while being very critical, is equivalent to the kind of commentary and criticism that might occur in a film studies class. She makes a point to add that indeed some reaction videos are similar to a group viewing session with someone online, with barely any commentary or additions. However she sees H3H3's content as interspersing short segments of a copyrighted work for the purposes of criticism and commentary. This derivative work therefore constitutes fair use, where other reaction videos might not. The critical commentary is decidedly not a market substitute for the original work created by the plaintiff. Reaction videos are probably one of the larger categories of derivative works on the YouTube platform, bringing with them a lot of confusion. As we see in this specific case, reaction videos can apparently amount to fair use, but the exact requirements for it to constitute fair use might be less obvious to other content creators. Which could either unknowingly make reaction videos that infringe on others' copyrights after seeing other content creators get away with it, or potentially worse, having content creators not even attempt to make this type of work out of fear of the work and their livelihoods being put at stake. Remember, the best case estimate that the defendants had in the H3H3 case was that it would cost them 100.000 dollars, which is a huge amount of money that could bankrupt most of the smaller content creators. An additional problem with reaction videos is that the same type of reaction video, such as someone reacting to a trailer, could be taken down for copyright on one channel but be left alone on another.

We thus see that derivative works are recognized and allowed in both national and international law. As long as the work is transformed in such a way that it can be considered a substantial remake, modification, or addition, along with several other specific ways to make a derivative work, this is protected under copyright law. The TRIPS agreement went into force on January 1st 1995 in order to protect Intellectual Property and includes the Berne Convention's provision that allows for Derivative Works, and was later added onto by the WIPO Copyright treaty.[43] This latter treaty provides for additional protections for copyright, in order to respond to the advances in information technology since the original copyright treaties before they were formed. It emphasizes the incentive nature of copyright protections and classifies computer programs as literary works.[44] However this treaty was implemented into United States law in the form of the Digital Millennium Copyright Act[45], which has been a root cause for the problems that content creators have had on the YouTube platform concerning copyright.

Takedown notifications under the DMCA can be used very abusively, as they often supersede the fair use doctrine.[46] One such situation is when a law professor named Wendy Seltzer posted a video for criticism, comment and research. This video got taken down by the National Football League because she included a short clip of the NFL's copyright and

[43] Wipo Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002).
[44] Ibid, Article 4
[45] Digital Millennium Copyright Act (DMCA).
[46] Jeffrey Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2008) 10(1) Minn JL Sci & Tech 391 <https://scholarship.law.umn.edu/mjlst/vol10/iss1/15> accessed 11 October 2021.

broadcast policy, which when taking into account the purpose of the video, makes this takedown certainly illegitimate. Previously mentioned cases such as the ones involving the Nostalgia Critic, I Hate Everything, or even the H3H3 case shows that throughout its existence YouTube has not properly addressed the problem of these illegitimate takedown notifications.

There is also abuse in the sense that there are situations where the person sending the takedown notice is not always the actual copyright holder of the material. This can result in long periods where the legitimate copyright holder's rights are violated because the material is taken down. An example of this is when Christopher Knight produced a video and posted it to YouTube. A show on Viacom used a portion of his video for their own program, and Knight reposted the portion of his video that was shown on Viacom with their commentary. [47]This reposted material then got taken down when Viacom sent 100.000 takedown notices to YouTube, despite the work belonging to Knight himself. Do note that this eventually got solved and the video was reposted. This shows that the takedown notices are flawed to such a degree where not only derivative works can be removed from YouTube, but also completely original content. It is therefore no wonder that Derivative Works get taken down by YouTube, as there really seems to be no check whether the content receiving the takedown notification is original or falls within derivative usage before being blocked.

There is of course a third abuse that is rampant with takedown notices under DMCA that have been mentioned earlier. Parties can use the takedowns for the sake of censorship, instead of its original purpose of protecting legitimate copyright holders' rights online. An example of this is when Michelle Malkin uploaded a video to YouTube where she spoke negatively of the rapper Akon.[48] He and United Music group, the company that produced his records then, issued a takedown notice to get rid of this negative commentary about him. This type of content is not very effective in longer term censorship, as the works can be reposted or put back on the platform, but if the review or commentary is time sensitive this can become quite problematic. Say a reviewer wanted to leave a very negative review of a movie, with the goal of advising their viewers that they should not go see it in cinemas, a movie studio could leave a false takedown notice to stop the video from releasing until it might already be too late.

Original works are barely safe on the YouTube platform from false takedown notices, and this problem then becomes even worse when it comes to Derivative Works. They still operate on a "block first, check later" approach when an actual claim gets filed, so whereas the abuse against completely original content can probably be fixed comparatively quick, derivative works depending on fair use could be taken down for long periods of time or even lead to lawsuits.

III. Chapter 2 - Stakeholder Analysis

[47] Jeffrey Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2008) 10(1) Minn JL Sci & Tech 392 <https://scholarship.law.umn.edu/mjlst/vol10/iss1/15> accessed 11 October 2021.
[48] Ibid 391.

To understand how we got to this point where derivative works and online content creators cannot fully expect their freedom of speech and copyright laws to be respected, we must look at the stakeholders at the center of the question.

A. Online content creators
B. Intellectual Property Owners
C. YouTube

III.A. Online Content Creators

The term 'content creators' has evolved as a label for the modern phenomenon of 'digitally enabled' producers who both create and circulate content on social media platforms.[49] For example, a person can record a video of themselves via webcam (the digitally enabled producer) and upload the video (the content) directly to a social media platform such as YouTube.

III.B. Intellectual Property Owners

Intellectual property owners retain legal rights over the use of their creative works. The type of intellectual property owners we are most interested in for the purpose of this paper's research question are copyright holders. Websites such as YouTube are often used as platforms for copying creative works and thus copyright is typically the most used IP right enforced against YouTube content creators. The type of copyright holders relevant to this paper vary from movie production companies, to singular artists, to record labels. Typically, the most active domain in enforcing copyright on YouTube is the arts industry.

There are many different types of creators who would be able to use their intellectual property rights in a questionable way on YouTube. This is not only video game companies, composers, film studios, and other big industries. But it also relates to other individual creators with perhaps large budgets. An example of this is the case of Matt Hosseinzadeh v. Ethan Klein and Hila Klein as mentioned earlier.[50] Here the defendants had made a "reaction video" which can be seen as a type of derivative work that comments on the plaintiffs' video in a negative way. However it is a great example of the amount of effort that had to be put into defending against this questionable use. The plaintiff sent a takedown notification, the defendants sent a counter notification. Afterwards the plaintiff filed an action, and added a defamation claim after the defendants made a video about the lawsuit. A lot of money and time had to be put into this case by the defendants, which are resources that not every individual creator has ready access to. Note that here the defendants did not use the courts to get their video back but simply defended themselves from the action filed.

[49] Arturo Arriagada and Francisco Ibáñez, " "You Need At Least One Picture Daily, if Not, You're Dead": Content Creators and Platform Evolution in the Social Media Ecology" (2020) 6(3) Social Media + Society <https://journals.sagepub.com/doi/full/10.1177/2056305120944624> accessed 1 December 2021.
[50] *Matt Hosseinzadeh v Ethan Klein and Hila Klein* N. 16-CV-3081 (SDNY Aug 23, 2017).

III.C. YouTube

What is important for us to know about YouTube is that it is a public social media website that allows its users to upload and share videos.[51] It also generates some of the highest search traffic in the world, with over 2 billion users and over 30 billion monthly website visits.[52] With over 500 hours of videos being uploaded per minute, it is unreasonable to expect the company to have the manpower to supervise the content individually.[53] But this content needs to be managed because content creators on YouTube may be sharing content that copies another person's intellectual property, and intellectual property owners have rights and a reasonable expectation of the law to uphold their rights. If YouTube is unable to remove content that violates intellectual property rights on a mass scale, then they would be disallowed from operating as a website.

YouTube is a huge platform with content creators all over the world. Naturally, this also means that various different nations could have various different copyright laws or copyright protections for their citizens. This eventually leads to YouTube having to try and stay within the legal scope of multiple different laws as long as they allow their platform to be accessible in these various countries. The 2 main copyright law systems that we'll be addressing here, which could arguably be seen as most relevant as their cases have had impacts on the entirety of the YouTube platform, are the Digital Millennium Copyright Act from the United States and the Directive on Copyright in the Digital Single Market from the European Union. Both address platforms such as YouTube in a similar way, with the DMCA naming them Online Service Providers, while the DSM Directive names them online content-sharing service providers. This latter naming is important, because only these OCSSPs fall under the scope of Article 17 of the DSM Directive.

In the case of the United States, this is important because Title 17 US Code §512(c) lays out that when it comes to these online service providers, they will not be held liable for monetary other relief for infringement of copyright if their services are to store materials uploaded by users under several conditions. The first being that the OSP, or online service provider, is not allowed to have knowledge that a material or activity using this material on the network is infringing. When this lack of direct knowledge existed, they should have also been unaware of any facts or circumstances that would have made this infringement apparent.

Upon gaining this knowledge, the OSP has to act expeditiously to remove or disable access to this material. The second condition is that the OSP is not allowed to receive a financial

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[51] Patricia G Lange, 'Publicly Private And Privately Public: Social Networking On YouTube' (2007) 13(3) Journal of Computer-Mediated Communication <https://academic.oup.com/jcmc/article/13/1/361/4583074> accessed 11 April 2021.

[52] YouTube Official Blog 'YouTube For Press' (*blog.YouTube*) <https://blog.YouTube/press/> accessed 1 January 2022; Dorothy Neufeld, "The 50 Most Visited Websites in the World" (*visualcapitalist*, 27 January 2021) <https://www.visualcapitalist.com/the-50-most-visited-websites-in-the-world/> accessed 1 December 2021.

[53] OMNICORE, "YouTube by the Numbers: Stats, Demographics & Fun Facts" (*OMNICORE*, 3 January 2021) <https://www.omnicoreagency.com/YouTube-statistics/> accessed 1 December 2021.

benefit that is directly attributable to the infringing activity in the case that they have the right and ability to control such an activity. The third condition is that when they are notified of claimed infringement they must, as earlier described, respond expeditiously to remove or disable access to the infringed work. This part of DMCA Title II, the Online Copyright Infringement Liability Limitation Act (OCILLA), is designed to create a conditional safe harbor for the OSPs by shielding them for their own acts. It creates 17 U.S.C. §512(c) to perform this function.[54] If OSPs adhere to these rules, they fall under the safe harbor and will therefore not be held directly liable for cases of copyright infringement. OCILLA even includes the counter notification provision that offers OSPs a safe harbor from liability towards their users as well, in cases where material was not actually infringing. [55]

YouTube's standard of liability in accordance with the DMCA was established in detail in the Viacom International, Inc. v. YouTube, Inc. case. Here Viacom filed a lawsuit against YouTube and Google for copyright infringement, seeking more than 1 billion dollars in damages in the U.S. District Court for the Southern District of New York.[56] According to Viacom this OSP was engaging in massive intentional copyright infringement, with Google relying on the DMCA safe harbor for protection. The District Judge granted a summary judgment in favor of YouTube stating that they were protected by the safe harbor of the DMCA, before the case was appealed in the Second Circuit. The second circuit specified under which 2 situations this safe harbor could be lost. In one situation, the OSP has to have actual knowledge of the copyright infringement. They have to be subjectively aware of specific instances of this infringement. The other possible situation is that they would have to be willfully blind to such instances of copyright infringement. At the time of the suit, it showed that 75% to 85% of all videos on YouTube infringed copyright, and YouTube's staff had revealed they considered removing certain infringing videos.[57] The second circuit therefore claimed that YouTube had specific knowledge of the infringement. The case was sent back to the District Court in New York, but the Judge again granted a summary judgment in favor of YouTube. According to the district court, YouTube did not have the right and ability to control the infringing activity to such a degree to where they would lose safe harbor protections. This is because they did not directly induce the users to upload the infringing content. The internal emails within YouTube's staff also did not constitute specific knowledge, because they never referenced any particular infringing clip. YouTube retained its safe harbor under §512(c), but became careful to avoid such substantial copyright infringement in the future. In order to keep their safe harbor from liability they focused on complying with the special "notice and takedown provisions" through the form of Content ID.

[54] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 70 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021.
[55] Title 17 United States Code §512(c).
[56] *Viacom International, Inc v YouTube, Inc*, 940 F. Supp. 2d 110 (SDNY 2013).
[57] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 71 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021.

This safe harbor through the DMCA made YouTube feel safe against liability for a while, nonetheless during this entire period content creators still found their content to be claimed despite fair use far too often for their liking. A problem that could even become worse with the introduction of the DSM Directive. This directive limits the scope to online content-sharing service providers, or OCSSPs. The exact definition of what an OCSSP is, can be found in Recital 62, and Article 2(6) of the same Directive. The recital and article entail that only those services that play an important role in the online content market should fall under the definition of OCSSP, such as online audio and video streaming services. The services covered by the Directive are those whose main purpose it is to store and enable users and content creators to upload copyrighted-protected content with the purposes of obtaining profit from them. This content has to be directly or indirectly organized and promoted towards a larger audience for this profit-making purpose.[58] Non-profit services such as online encyclopedias would therefore fall outside of this definition. It seems that the recital seeks to limit the scope of Article 17 to these OCSSPs that can be seen as direct competitors to rights holder-authorized subscription based services.

Article 17 then goes on to introduce the possibility of liability to OCSSPs such as YouTube, by stating that they perform an act of communication to the public when they allow the making available to the public of copyright-protected works through uploading of the users. This steers away from this previous safe harbor approach offered by the US system, and takes a strict liability as its starting point.[59] Article 17 then presents OCSSPs with two possible ways to prevent this liability. First, they should attempt to seek authorization from right holders for the use of copyright protected works. This enormous licensing task is set out in Article 17(2), and creates a rights clearance task which platform providers could hardly ever accomplish. YouTube would have to cover everything that a potential user could upload. This is where Article 17(4) comes in, as it deals with situations where OCSSPs are unable to obtain a license for content showing up on their platform. The deal is that they have to have made their best efforts to obtain an authorization. In the case where this authorization was not granted they have to make best efforts, in accordance with high industry standards of professional diligence, to ensure the specific works and other subject matters become unavailable upon being provided with the relevant and necessary information by the rights holders. In case they get this sufficiently substantiated notice from the rights holders, they would have to act expeditiously to disable access or remove this content from their website, along with trying to prevent future uploads of this same work.

Article 17(8) does specify that they do not wish a general monitoring duty to be performed. This general monitoring duty is prohibited in accordance with the Sabam/Netlog

[58] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Recital 62.

[59] Martin Sentfleben, 'Bermuda Triangle – Licensing, Filtering And Privileging User-Generated Content Under The New Directive On Copyright In The Digital Single Market' (2019) 2 <https://ssrn.com/abstract=3367219> accessed 10 March 2021.

case, thus Article 17 attempts to frame the efforts to prevent availability of infringing content.[60] It does so by stating that the scope of the obligation pertains to the making unavailable of these specific works where rights holders have provided the service providers with relevant and necessary information in Article 17(4)(b). However it seems more realistic that these OCSSPs will receive long lists of all works by copyright holders, which when adding up all "Specific works and other subject matter" will seem quite close to a general monitoring obligation already. In fact YouTube already has a filtering system in place that is automatically designed to match parts of any uploaded content against the rest of their content ID database.

This goes to show that back when YouTube could rely on safe harbor to prevent liability towards copyright holders, the takedown notifications were already intense and barely took into account fair use for derivative works. With the copyright laws concerning OCSSPs set out in the DSM Directive, a positive change for derivative works became even less likely. YouTube does its best to protect themselves from liability, which is especially predictable after seeing how Viacom had attempted to sue them for 1 billion dollars in the past. Thus currently in order to prevent being held liable, their mechanisms for protecting copyrighted works can be quite harsh, while content creators relying on fair use, exceptions, and limitations are limited in how much they can protest.

IV. Chapter 3 - YouTube's mechanisms for protecting copyright

When it comes to protecting copyrighted works on the platform, there are three main mechanisms that are employed by YouTube:

A. Content ID
B. Manual claim
C. Copyright strike

IV.A. Content ID

This is a claim that is automatically generated when an uploaded video matches with parts or as a whole with another video within the content ID system.[61] This system is a database of files that have been submitted to YouTube by their respective copyright holders. Within this Content ID system, the rights holders can specify what they want to happen to videos that match their intellectual property, such as blocking, restricting certain platforms, or placing ads whose revenue goes to them instead of the online creator. Naturally this type of system is very unhandy for derivative works who might use clips from other works, because the system simply scans for similarities and not whether there is a fair use context.

[60] Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECLI:EU:C:2012:85.
[61] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 69 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021.

IV.B. Manual Claim

A manual claim differs from a content ID claim as the process is not automated. IP owners must search through YouTube videos and submit their copyright claim manually. This can be achieved both with and without YouTube's 'manual claiming tool'.[62] The manual claiming tool is available to partners who have demonstrated a need for it and proper knowledge of content ID. The tool enables filtering of public videos to find copyrighted content and easier options of submitting copyright claims or alternatively, copyright takedown requests.[63]

This operates in a similar way to the Content ID claim with the difference being that the copyright owner themselves have to identify the content on the video. This tool is said to be used by copyright owners who demonstrate advanced knowledge of the Content ID system, specifying that improperly claiming content can result in penalties including legal liability and partnership termination.

IV.B.A) Resolving Manual or Content ID Claims

YouTube's Help Centre lists 6 options that content creators can take in response to receiving a manual or content ID claim.[64]

1. Do nothing - this option is for content creators that agree with the claim or are not sure and would like the time to change their mind.
2. Share revenue - this option is available for those in the YouTube Partner Programme who have had their music claimed. In some cases, you can apply to have the revenue from your video shared with the music publisher.
3. Dispute the claim - This option is for those users that believe that the claim on their video is incorrect.[65] The copyright owner will be notified of the dispute and have 30 days to respond. The copyright holder may decide to 'release the claim', which would remove the claim from the video and restore any monetization settings, uphold the claim (which can be appealed), file a takedown request and possibly take down the video (leaving the user in a worse position), or do nothing. Without a response, the copyright holder's claim on your video will expire.
4. Trim out a segment - the content creator can choose to trim out whatever parts of the video violate the copyright claim and re-upload their video. This is not a great solution if the majority of the video or if a key part of the video is violating the copyright claim however.
5. Replace the song - for audio claims, the content creator can choose to replace the audio in their video with a non-copyrighted track.

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[62] YouTube Help 'Use The Manual Claiming Tool - YouTube Help' (*Support.google.com*) <https://support.google.com/YouTube/answer/9346683?visit_id=637633280750110137-3467669854&rd=1> accessed 20 January 2021.
[63] YouTube Help 'What Is A Content ID Claim?' (*Support.google.com*) <https://support.google.com/YouTube/answer/6013276?hl=en-GB> accessed 20 January 2021.
[64] Ibid
[65] YouTube Help 'Dispute A Content ID Claim - YouTube Help' (*Support.google.com*) <https://support.google.com/YouTube/answer/2797454> accessed 20 January 2021.

6. Mute a song - for audio claims, the claimed song in the video can be muted or all of the audio in the video can be muted entirely.

IV.C. Copyright Strike

The third mechanism YouTube enables for protecting copyrighted works are copyright strikes. Copyright strikes occur when a copyright holder has submitted a valid takedown request of your video.[66]

The first time a user receives a copyright strike, their video will be taken down from YouTube. The user may be required to go to 'Copyright School', where they will have to watch educational videos on copyright law and how this is enforced at YouTube.[67] Users will not be able to receive monetization from their taken down video if that had been the case before. If a livestream had been taken down for copyright reasons then the user's access to livestreaming may also be restricted for 90 days.

If a user receives three copyright strikes, their account and associated channels will be subject to termination. All of the videos uploaded to the user's account will be removed and the user will not be permitted to create new channels.[68]

IV.C.A) Resolving a Copyright Strike

YouTube's Help Centre leaves three options for content creators wishing to resolve a copyright strike[69]:

1. Wait for it to expire: copyright strikes expire after 90 days
2. Get a retraction: the content creator can personally request a retraction of the copyright strike from the person who claimed their video
3. Submit a counter-notification: this option is available for content creators who believe that their video was removed by mistake or qualifies for fair use. A counter-notification is a 'legal request for YouTube to reinstate a video that was taken down for alleged copyright infringement'.[70] YouTube's Help Centre states that the counter-notification will be forwarded to the original claimant and under most circumstances will not be forwarded to any other party. The claimant will have 10 business days to respond to the notification and will need to respond with evidence that they have taken legal action to keep the content from being restored on YouTube.

[66] YouTube Help, "Copyright strike basics" (*support.google.com*) <https://support.google.com/YouTube/answer/2814000?hl=en-GB#zippy=%2Cwhat-happens-when-you-receive-a-copyright-strike%2Ccourtesy-period%2Chow-to-get-info-about-your-strike> accessed 1 December 2021.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] YouTube Help 'Submit A Copyright Counter Notification' (*Support.google.com, 2022*) <https://support.google.com/YouTube/answer/2807684> accessed 20 January 2021.

- Do Manual and Content ID claims, as well as copyright strikes, enable questionable usage of IP rights? Do YouTube's resolution mechanisms offer enough protection for online content creators?

IV.D. The system in practice

It is understandable that YouTube requires a system of evaluating whether uploaded videos infringe copyright. However, it is a commonly identified problem among literature and online content creators that YouTube is heavy handed in labeling creations as copyright violations and in its response to perceived copyright abuses.[71] One of these examples happened in January 2020 at a panel moderated by Vanderbilt Law Professor Joseph Fishman. Judith Finell and Sandy Wilbur were music experts discussing the "Blurred Lines" lawsuit, and showed how experts analyze songs for similarity in case of copyright infringement. Despite intellectual property law experts at NYU Law being certain that the video of the panel uploaded to YouTube did not infringe, they were flagged for Content ID. They had a hard time figuring out whether or not challenging the Content ID could result in the channel being deleted, and when it was restored YouTube did not clarify why it was taken down in the first place.[72] This shows that the counter notice process and Content ID is not very intuitive to navigate.

When a Content ID claim occurs, the automated algorithm detects a match between the content creator's video and the database of copyrighted material that is submitted by rights holders. These matches can be made with even a few seconds of material. It is not clear how much copyrighted material will trigger a content ID match, but there have been cases where a 10 hour video of white noise had less than a second claimed by a rights holder. These matches are then also made against anything in the database, which means that even if the content creator has a license or permission to use a certain copyrighted material in their content, it will still trigger the match and incur a penalty.[73] Furthermore fair use as allowed in Section 107 allows content creators to upload derivative works without getting permission or paying a rights holder.[74] A similar provision can be found in Article 17(7) of the DSM Directive. However a

[71] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 69 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021; Toni Lester and Dessislava Pachamanova, 'The Dilemma Of False Positives: Making Content ID Algorithms More Conducive To Fostering Innovative Fair Use In Music Creation' (2017) 24(1) UCLA Entertainment Law Review 53-67 <https://escholarship.org/uc/item/1x38s0hj> accessed 29 June 2021; Laura Zapata-Kim, 'Should YouTube's Content ID Be Liable For Misrepresentation Under The Digital Millennium Copyright Act?' (2016) 57(5) Boston College Law Review 1847 <https://lawdigitalcommons.bc.edu/bclr/vol57/iss5/10> accessed 17 September 2021; Nicholas T. DeLisa, 'You(Tube), Me, And Content ID: Paving The Way For Compulsory Synchronization Licensing On User-Generated Content Platforms' (2016) 81(3) Brooklyn Law Review 1288 <https://brooklynworks.brooklaw.edu/blr/vol81/iss3/8/> accessed 15 June 2021; Brian Gabriel, 'Internet Creators Are Pressuring YouTube To Respect Fair Use Laws' (*Cartoon Brew*, 23 February 2016) <https://www.cartoonbrew.com/law/internet-creators-pressuring-YouTube-respect-fair-use-laws-137274.html> accessed 10 December 2021.

[72] Katharine Trendacosta, 'Unfiltered: How YouTube'S Content ID Discourages Fair Use And Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <https://www.eff.org/nl/wp/unfiltered-how-YouTubes-content-id-discourages-fair-use-and-dictates-what-we-see-online#fn24> accessed 25 March 2021.

[73] Ibid.

[74] Title 17 United States Code §107.

Content ID system is unable to actually recognize whether or not fair use is applicable on created content.

Then the next problem shows up when a content creator actually attempts to fight the claim or strike. YouTube's user interface changes frequently and without warning, which can make it more difficult for those who want to bother with challenging claims. Furthermore YouTube makes sure to repeat that going through the process of challenging claims can actually result in the loss of content creator's accounts. The only check against Content ID is content creators disputing Content ID matches, which is undermined by the fear behind disputing. So when YouTube claims that "over claiming" can lead to a right holder being kicked off of Content ID, this is really empty because it's an automated process that requires a challenge from the video creator to even happen in the first place.

If a video creator disputes a Content ID claim and the rights holder rejects the dispute, the video creator can appeal this. The only option left for the rights holder then is a copyright strike.[75] After 3 of these copyright strikes, the content creator's channel is removed and they can lose what is potentially their only source of income. It would also lead to all their work and content being disabled or removed. This is a harsh deterrent that could stop people from disputing their copyright claims. However if they do, the copyright holder can decide to either let the content be restored or take legal action against the content creator. But remember as we've seen in the H3H3 case for a content creator to defend themselves, even if they win, such a lawsuit would be very expensive and often unaffordable for most content creators.[76] If the content creators also have 3 copyright strikes and YouTube is their source of income, this means that they also become deprived of their only way to afford this lawsuit. Before this occurs, the Content ID claim could have also led to money being directed away from the content creator towards these rights holders. As ninety percent of Content ID partners choose to automatically monetize a match and claim the advertising revenue of the content creator's work for themselves.[77]

An example of the latter is the YouTuber Todd Nathanson, who simply allows the money to be let go for videos where he reviews well-known artists and their songs. He is a large creator which allows him to still make income off of Patreon, because he is fully aware that he cannot fight Content ID, despite the law not requiring critics to share revenue with the rights holder they are critiquing. Another creator who attempts to use external sources of revenue is Lindsay Ellis, examples being also Patreon or sponsorships. However the latter is still not safe as Content ID has put a match on a video she purposely not monetized because her sponsorship deal forbade this. Therefore Content ID put her in violation of her contract.

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[75] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 73 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021.

[76] *Matt Hosseinzadeh v Ethan Klein and Hila Klein* N. 16-CV-3081 (SDNY Aug 23, 2017).

[77] Katharine Trendacosta, 'Unfiltered: How YouTube'S Content ID Discourages Fair Use And Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <https://www.eff.org/nl/wp/unfiltered-how-YouTubes-content-id-discourages-fair-use-and-dictates-what-we-see-online#fn24> accessed 25 March 2021.

There is also another provision in the DMCA which is intended to discourage false takedowns. Title 17 US Code §512(f) states that if a person knowingly misrepresents that a material or activity was infringing, they shall be liable for any damages, including costs and attorneys' fees. These can be incurred by the alleged infringer who is injured by such misrepresentation and the OSP relying on this misrepresented knowledge in removing or disabling access to the material. However this would mean that they would have to challenge what is often a better-funded and resourced rights holder. The fact that attorneys' fees would be the paid out damages could potentially help motivate some content creators to still take action, but it would require them to actually win the case. Lenz v Universal makes this unlikely, as the Ninth Circuit indeed held that when a rights holder sends out a DMCA notice they have to consider whether the use is lawful under the fair use doctrine.[78] However this is seen as subjective, and as long as the rights holder claims they believed that there was no fair use, they cannot be held liable. Effectively a plaintiff would need to show bad faith by the rights holder.

This means that the rights holder has no incentive to learn what fair use would entail, because if they do not, they cannot be held liable for not applying this knowledge. In essence the case makes it so an improper takedown cannot suffer liability under 17 US Code §512(f) and removes this legal protection. The case itself started with an incident back in 2007, and was eventually decided in 2015. The Supreme Court declined to grant certiorari as recently as 2017, showing that they still firmly stand behind this decision. Certiorari being a court process to seek judicial review. In the end it shows that when it comes to false copyright strikes, there is no actual way for content creators to fight back without risk if the rights holders are determined. They are left at their mercy.

This leaves a situation where copyright strikes can be used to censor content creators. Famous examples of this are the situation of Akon and United Music Group against a blogger who spoke negatively about him.[79] Another is the copyright owners of the movie "Coolcat saves the kids" who kept trying to remove any negative reviews of their movie across various YouTube channels. Even other YouTubers, such as JustDestiny[80], have used false strikes to try and silence YouTuber LtCobra when he was critical about using photos of underage girls in thumbnails. In this last case, public outrage and attention from other larger YouTubers is probably the sole reason the strike got dropped according to LtCobra.

Thus if a copyright holder is truly determined, they can keep sending false copyright claims or hold channels hostage. YouTube's systems for fighting these false claims put the content creators on the back foot, and makes it hard for them to protect themselves. There is only really one recent case that stands out when it comes to fighting false copyright strikes. This

[78] *Lenz v Universal Music Corp*, 801 F 3d 1126 (9th Cir 2015).
[79] Jeffrey Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2008) 10(1) Minn JL Sci & Tech 391 <https://scholarship.law.umn.edu/mjlst/vol10/iss1/15> accessed 11 October 2021.
[80] Lindsay Dodgson, 'YouTube Channels Are Being Held Hostage With False Copyright Claims, But The Platform's Hands Are Tied' (*Insider*, 2 June 2020) <https://www.insider.com/YouTubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6> accessed 18 May 2021.

is when YouTube started a lawsuit against Christopher Brady.[81] However in this case Christopher Brady had allegedly attempted to use the copyright system to directly extort specific Minecraft YouTubers. This case shows egregious abuse where the copyright removal process was used for extortion, which might be the main reason why legal action was actually taken, as normally false claims do not result in this. The case was eventually settled. This at least means that when it comes to direct extortion, section 512(f) could potentially be used. Otherwise, content creators are quite helpless against questionable copyright claims.[82]

V. Chapter 4 - Redress and legislation

So now we know how YouTube's content ID claim and copyright strike systems work respectively. YouTube sets out a certain set of guidelines on how someone can defend themselves from a copyright strike or claim. The main point is that the user has to submit a copyright counter notification when it comes to the extreme case of a copyright strike.[83] This is a legal request for YouTube to reinstate a video that was taken down for alleged copyright infringement.

This counter notification has to be performed by the video's original uploader, or an authorized agent acting on their behalf. YouTube specifies that it should only be used if the video was taken down due to mistake or misidentification. Specifically they mention cases of fair use. They also specify that there is an option to reach out to the copyright owner directly.

That last part is quite interesting, because that is actually what a lot of YouTubers have to end up doing. YouTubers claim to have the most success when they try to solve the problem outside of the system itself. Whether this be emailing someone at YouTube directly, contacting the rights holder, or other personal connections. Fighting against copyright strikes or even content ID is an uphill battle, a risk that many are not willing to take since their livelihood is on the line.[84]

In the case that neither the regular counter notification nor the personal connection works out, the only way left for the content creator would be to take legal action. This is sadly where the problem really starts, so far the case law for YouTube copyright has been very limited. The biggest problem being that it is very expensive to take or be taken to court, especially with the bigger companies that tend to control the copyrights. One of the most famous

[81] Julia Alexander, 'Youtube Sues Alleged Copyright Troll Over Extortion Of Multiple Youtubers' (*The Verge*, 19 August 2019) <https://www.theverge.com/2019/8/19/20812144/youtube-copyright-strike-lawsuit-alleged-extortion-minecraft> accessed 3 November 2021.
[82]Ernesto Van der Sar, 'YouTube Terminates Account Of 'Fraudulent' Copyright Takedown Sender' (*Torrentfreak.com*, 2 November 2021) <https://torrentfreak.com/YouTube-terminates-account-of-fraudulent-copyright-takedown-sender-211102/> accessed 31 November 2021.
[83] YouTube Help 'Submit A Copyright Counter Notification' (*Support.google.com*) <https://support.google.com/YouTube/answer/2807684> accessed 20 January 2021.
[84] Katharine Trendacosta, 'Unfiltered: How YouTube'S Content ID Discourages Fair Use And Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <https://www.eff.org/nl/wp/unfiltered-how-YouTubes-content-id-discourages-fair-use-and-dictates-what-we-see-online#fn24> accessed 25 March 2021.

cases when it comes to YouTube copyright is still the H3H3 case from 2016.[85] Even here, one of the parties had to resort to a fundraiser in order to pay for the lawsuit.

This case of "Matt Hosseinzadeh v. Ethan Klein and Hila Klein" shows how much effort it would take to defend a derivative work when it comes to a lawsuit. In order to address if a content creator could truly defend themselves from dubious usage of copyright claims and strikes, we will have to look at the statutory law of various legal systems and see where we truly find a gap.

V.A. United States

In the United States, online service providers are kept safe against liability for copyright infringement on their platform as long as they stick to Title 17 Code §512(c). This safe harbor means that as long as the OSP is unaware of an infringing work, or removes the infringing work upon being made aware of it, they can shield themselves from lawsuits against copyright holders. §512(g) then sets out under which circumstances the OSP cannot be held liable towards content creators who might falsely have their works disabled or removed. In order for the safety against liability to apply, YouTube will have to take reasonable steps to promptly notify the content creator that it has removed or disabled this access to their material. Furthermore, upon receiving a counter notification, they have to provide the copyright holder who claimed infringement with a receipt of this information along with the details that the removed or disabled content shall be restored within 10 business days. Following this they have to restore access to the work between 10 and 14 business days upon receiving the counter notice, unless the original claimant files an action seeking a court order to restrain the content creator from engaging in infringement.[86]

When it comes to the United States, the main source of legislation that is important for Derivative works is the Doctrine of Fair Use as laid out in §107 of the Copyright act.[87] This section lays out the principles for fair use. The point of it is to encourage content creation even if it is derived from the work of another. Fair use is the exception and limitation to copyright laws in the United States, and brings with it the legal ground under which online content creators should be able to upload their derivative works.

The first element of the first factor for determining fair use relies on whether or not a copyrighted work is transformative. This was elaborated in Campbell v Acuff-Rose Music Inc. where the court assessed that it was transformative in the case that it "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message."[88] The second element of the first factor questions the use of the work. More specifically it asks whether such use is of a commercial nature or is for nonprofit educational purposes. The question here is if the user stands to profit from exploitation of the copyrighted material without paying the customary price. However just because a derivative work has a

[85] *Matt Hosseinzadeh v Ethan Klein and Hila Klein* N. 16-CV-3081 (SDNY Aug 23, 2017).
[86] Title 17 United States Code §512(g).
[87] Ibid, §107.
[88] *Campbell v Acuff-Rose Music, Inc,* 510 US 569, 584 (1994).

commercial use, does not mean that the defendant is undeserving of the protections of fair use.[89] This means that a general derivative work on YouTube could still deserve protections of fair use despite commercial use, as long as it adds something new.

The second factor looks at the nature of the copyrighted work. Creative works are afforded less protection, while factual works are given a greater scope of protection.[90] Take books for example, published work is afforded a broader scope of fair use protection because the author has already been given the chance of the right of first publication.[91] So say that one were to make a video that gives commentary or review on a book or television show, we could say that this would more realistically fall under fair use as this is already a published creative work.

The third factor asks the question whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable in relation to the purpose of copying. In simpler terms, we must look at the quality and quantity of the material that is used. Quotations in a book used to create an effective tone for the reader do not qualitatively go to the heart of the original copyrighted work.[92] In the same sense, someone using an occasional clip from a movie in a review would realistically also still be allowed according to the third factor.

The fourth factor in the fair use analysis is the effect of the use of the potential market for or value of the copyrighted work. This does not mean that a negative review or parody that might lower people's interest in a work cannot fall under fair use.[93] Instead what it relates to is the possibility of market substitution. Could this derivative work be used to substitute the original? If the answer were yes, then this would fall outside of fair use.

However this fair use does not fully protect content creators when it comes to YouTube. In its current iteration, content ID cannot identify clear cases of fair use, even if they have an incredibly transformative and critical nature. The content creators could potentially file a counter notice, however this only leaves copyright holders that have received a counter notification against either Content ID or their copyright claim with the option to respond with a copyright strike, which will lead to the termination of the channel and possibly source of income after 3. When the strike gets a counter notification, then the rights holder is only left with the option of a lawsuit. Fair use is an important policy that gets eroded by the inherent incentives that the DMCA provides to copyright holders. Injunctions can be obtained with minimal efforts, and counter-notices are rare as smaller content creators are unwilling to take the risk of a lawsuit.

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[89] Taylor B Bartholomew, 'THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID' (2015) 13(1) Duke Law & Technology Review 75 <https://scholarship.law.duke.edu/dltr/vol13/iss1/3/> accessed 28 June 2021.
[90] *Consumers Union of US, Inc v Gen Signal Corp*, 724 F 2d 1044 (2d Cir 1983).
[91] *New Era Publ'ns Int'l, ApS v Carol Publ'g Grp,* 904 F 2d 152 (2d Cir 1990).
[92] Ibid.
[93] *Campbell v Acuff-Rose Music, Inc,* 510 US 569, 584 (1994).

V.B. European Union

Meanwhile when it comes to the European Union, one needs to first get authorization from the rights holder of the original work in order to create a derivative work.[94] So if one were to try and make a translation of an existing novel, they need authorization of the original writer first.[95] These derivative works would then be protected without prejudice to the copyright of the original work. This means that if one wants to make a derivative work of the former derivative work, they would need authorizations of both the author of that work and the original work before it. However a list of exceptions to this rule can be found in Article 5.3 of the Infosoc Directive.[96] These exceptions can include criticism, review, caricature, parody, or pastiche, along with several others. This later gets reaffirmed in the DSM Directive, while narrowing down which specific works are allowed for OCSSPs. Here Article 17(7) also lays out that there are exceptions and limitations in order to go against the prevention of the availability of works or other subject matters uploaded by users. These are also quotation, criticism, review, caricature, parody or pastiche. These specific exceptions and limitations are the ones currently relevant for YouTube when it comes to the European Union.

In fact, this Directive seeks to modernize EU copyright rules to provide higher protection of copyright by introducing potential liability of online content-sharing providers (OCSSPs) such as YouTube.[97] Article 17(4) even goes into detail that these OCSSPs need to obtain authorizations of rights holders before making these works available to the public.[98] In case this does not happen the OCSSP at least has to make sure to take their best efforts to prevent such access in case authorizations have not been obtained and this has been alerted. What is expected is that the "best efforts" from the OCSSPs come in the form of monitoring and filtering technology systems like YouTube has been using so far.[99]

This entire Directive strengthens copyright to the detriment of online content creators, by terrifying OCSSPs such as YouTube. But when it comes to avoiding excessive content censorship, Article 17 depends on industry cooperation.[100] The decisions that companies like YouTube will perform can be expected to be done rationally. However the rational decision in a situation where YouTube could be held liable for not performing their best efforts for

[94]Christophe Geiger and Franciska Schönherr, *CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT* (European Union Intellectual Property Office 2017) 26 <https://euipo.europa.eu/ohimportal/nl/web/observatory/faqs-on-copyright> accessed 11 September 2021.

[95] Berne Convention for the Protection of Literary and Artistic Works (amended 28 September 1979, entered into force 19 November 1984) Article 8.

[96] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[97] Dirk JG Visser, 'Trying to Understand Article 13' (2019) SSRN digital publication (Forthcoming) 4 <https://ssrn.com/abstract=3354494> accessed 9 October 2021.

[98] SAJ Barrett, 'Article 17 Of The DSM-Directive: Striking A Fair Balance?' (Master Thesis, Tilburg University 2019) 20 <https://arno.uvt.nl/show.cgi?fid=148248> accessed 16 August 2021.

[99] Dirk JG Visser, 'Trying to Understand Article 13' (2019) SSRN digital publication (Forthcoming) 8 <https://ssrn.com/abstract=3354494> accessed 9 October 2021.

[100] Martin Sentfleben, 'Bermuda Triangle – Licensing, Filtering And Privileging User-Generated Content Under The New Directive On Copyright In The Digital Single Market' (2019) 8 <https://ssrn.com/abstract=3367219> accessed 10 March 2021.

monitoring and filtering content, would be filtering with minimal risks. Article 17(5)(b) states that whether the service provider has complied with its obligations under paragraph 4 can be partially based on the "the availability of suitable and effective means and their cost for service providers". To be reasonable it cannot be expected that OCSSPs would develop and adopt the most sophisticated filtering systems with the smallest chances to unjustly remove content that falls under a limitation of copyright protection. The only reasonable chance for this to occur is if somehow the least intrusive measure is also the least costly measure. However, filtering more than necessary is less risky than filtering only the most obvious cases of copyright infringement. So if a platform is seeking to minimize their risk of liability, it makes sense for them to take the route of overblocking content. Simply put, the industry stakeholders on whom we depend for cooperation to avoid excessive content censorship are instead aligning with the efficiency considerations that push them towards excessive content censorship. Article 17 simply does not contain a strong incentive to prevent overblocking but instead provides incentives for the opposite to occur.[101]

Article 17(7) is the source of the limitations and exceptions towards the rest of Article 17, and obliges Member States to ensure that the content creators and users are able to rely on these for the purposes of quotation, criticism, review, caricature, parody or pastiche. However this assurance that lawful content shall not be made unavailable is dependent on cooperation between rights holders and OCSSPs as mentioned earlier. When it comes to the expression "are able to rely on", there is not actually a hard obligation to ban filter systems that are unable to see the difference between an actual infringing copy and a parody or other exception.[102] It comes across more as a weak indication of what the Directive hopes that the cooperation will result in, instead of actually stating that proportionality has to take center stage when it comes to cooperation.

Article 17(9) seems to be fully aware that overblocking will take place and provides that content creators must be provided with "an effective and expeditious complaint and redress mechanism that is available to users of their services" when it comes to disputes over the disabling or removal of works or other subject matter that is uploaded by the content creators.[103] This is how the directive attempts to prevent the possibility of non-compliance with the fundamental freedom of expression. This redress mechanism is put in place to ensure that lawful content is made available again after it has been made wrongly inaccessible. The mechanism must be effective and expeditious with complaints being processed "without undue delay". However when it comes down to it, it is still a platform such as YouTube that will have the final say about the status of the uploaded content. We can assume that their legal assessment will be a lot more defensive as they are trying to avoid the risk of liability for infringement even if a broad application of these exceptions and limitations could be in line with CJEU

[101] Ibid.
[102] Ibid.
[103] SAJ Barrett, 'Article 17 Of The DSM-Directive: Striking A Fair Balance?' (Master Thesis, Tilburg University 2019) 44 <https://arno.uvt.nl/show.cgi?fid=148248> accessed 16 August 2021.

jurisprudence.[104] Furthermore "without undue delay" does not mean the same thing as "promptly". When it comes to proportionate filtering, it is important to have a high standard of efficiency and reliability in this redress mechanism. However we know that if users try to fight false claims of copyright infringement on YouTube, this can lead to the claim becoming a copyright strike. In which case content creators are on thin ice, and can lose their livelihoods if there are 3 of these present.[105] If it takes quite a while for a decision to be made on whether uploaded content is infringing in nature, this risk of a copyright strike and its duration make the redress mechanism unattractive to content creators and becomes incapable of safeguarding the freedom of expression. Sometimes the duration of the redress mechanism to be performed successfully and put back the lawful content can even impede the very nature and purpose of the content in the first place. It is often important when it comes to quotation, review, or parody to be able to react to topical news or other media.[106] If it takes a prolonged amount of time for the lawful content pertaining to such topics to be brought back, it can completely defeat the purpose of the content in the first place. Freedom of expression could thus be impeded by content creators fearing the filtering mechanism, even if the uploaded content falls within the scope of an exception, by not even trying to upload these works anymore.

Another problem that occurs here is that users are only able to complain through these redress mechanisms against unjustified content blocking. There is not actually a way for them to challenge the legitimacy of the filtering systems.[107] This all leads back to Article 17(10)[108] again, where the development of best practices in content filtering are left to be performed through stakeholder dialogues. Content censorship as a result of industry cooperation in the area of filtering mechanisms are not subject to thorough scrutiny by the courts. This overblocking of content as a result of OCSSPs trying to prevent the risk of liability directly impacts the freedom of expression, which one would otherwise assume should lead to stricter control. Taking it back to the beginning, recital 70 clarifies that it is important to strike a fair balance between relevant fundamental rights.[109] User complaints regarding the blocking of content should be "processed without undue delay and be subject to human review". However with the amount of content being blocked through the filtering mechanism, and that in the end the complaints about the blocking have to be subject to human review, the mechanism will not be effective and expeditious in practice. The redress mechanism is thus bogged down and ineffective due to the amount of content falsely being blocked by the content filters. However the content filters are in place because OCSSPs don't want to be held liable for not performing

[104] Martin Sentfleben, 'Bermuda Triangle – Licensing, Filtering And Privileging User-Generated Content Under The New Directive On Copyright In The Digital Single Market' (2019) 9 <https://ssrn.com/abstract=3367219> accessed 10 March 2021.
[105] YouTube Help, "Copyright strike basics" (*support.google.com*) <https://support.google.com/YouTube/answer/2814000?hl=en-GB#zippy=%2Cwhat-happens-when-you-receive-a-copyright-strike%2Ccourtesy-period%2Chow-to-get-info-about-your-strike> accessed 1 December 2021.
[106] Martin Sentfleben, 'Bermuda Triangle – Licensing, Filtering And Privileging User-Generated Content Under The New Directive On Copyright In The Digital Single Market' (2019) 9 <https://ssrn.com/abstract=3367219> accessed 10 March 2021.
[107] Ibid 10.
[108] Ibid.
[109] SAJ Barrett, 'Article 17 Of The DSM-Directive: Striking A Fair Balance?' (Master Thesis, Tilburg University 2019) 44 <https://arno.uvt.nl/show.cgi?fid=148248> accessed 16 August 2021.

their best efforts in filtering and monitoring content and thereby running the risk of having to pay fines. On top of that, the filtering systems will most likely not be changed either because these depend on the relevant stakeholders who do not have enough incentive from the Directive to improve the situation. Through this, it seems that the DSM Directive only continues the problems that online content creators have had with YouTube in terms of freedom of expression and false removal of their content for the last several years.

V.C. A possible step in the right direction

At least that's what it looked like until recently, as a new development could cause change in this status quo.[110] On the 22nd of June 2021, the European Court of Justice ruled that YouTube is not liable for user uploaded copyright infringement.[111] Going forward, online platforms "do not, in principle, themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms". The exception being that YouTube could still be held liable if it "has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it,".[112] This means that when an information society service such as YouTube provides storage of information that is provided by a recipient, they are not held liable for the information unless they are aware of the illegal activity or information, or if they gain awareness that they act expeditiously to disable access to this illegal information. This is in line with Article 14(1) of the Directive on electronic commerce.[113] Overall this case is a great step in the right direction when it comes to content creators because it means that YouTube will not have to be as wary of the DSM Directive as before, since they would not be held liable as they have been in the past.[114] Over the last 12 months before July 22nd a YouTube spokesperson mentioned that the company had paid over 4 billion dollars to the music industry, with 30% of that sum coming from monetized videos.[115] If YouTube has less reason to be afraid because they would not have to pay such high fines anymore, the chances that they could be coerced into improving their systems for filtering and even their redress mechanisms improve.

Additionally, the Court of Justice's Advocate General also brought out an opinion, which is a non-binding recommendation for the EU Court of Justice, on the 15th of July

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[110] Joined Cases C-682/18 and C-683/18, *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* (2021) EU:C:2021:503.
[111] Ryan Browne, 'YouTube Secures A Big Win In The EU Over Copyright' (*CNBC*, 22 June 2021) <https://www.cnbc.com/2021/06/22/YouTube-secures-a-big-win-in-the-eu-over-copyright.html> accessed 29 September 2021.
[112] Todd Spangler, "YouTube Wins Key Copyright Ruling by Top European Court" (*Variety.com*, 23 June 2021) <https://variety.com/2021/digital/news/YouTube-eu-copyright-ruling-1235003346/> accessed 1 December 2021.
[113] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.
[114] Gregor Pryor and Sophie Goossens, 'Liability Of Video Sharing Platforms – ECJ'S Decision On The YouTube Case And Article 17 Of The DSM Directive | Perspectives | Reed Smith LLP' (*Reedsmith.com*, 29 June 2021) <https://www.reedsmith.com/en/perspectives/2021/06/liability-of-video-sharing-platforms--ecjs-decision-on-the-YouTube-case> accessed 5 October 2021.
[115] Ryan Browne, 'YouTube Secures A Big Win In The EU Over Copyright' (*CNBC*, 22 June 2021) <https://www.cnbc.com/2021/06/22/YouTube-secures-a-big-win-in-the-eu-over-copyright.html> accessed 29 September 2021.

concerning the case of the 24th of May 2019,[116] Republic of Poland v European Parliament and Council of the European Union. This case concerns Poland seeking annulment of crucial parts of Article 17 before the CJEU, specifically 17(4)(b) and 17(4)(c) pertaining to best efforts to ensure unavailability of specific works, and to act expeditiously upon receiving a sufficiently substantiated notice form the rights holder to remove or disable notified works or subject matter.[117] Advocate General Saugmandsgaard Øe sided with the EU institutions and advised the CJEU to dismiss Poland's claim.[118] At first this might not sound too great for content creators. He acknowledges that Article 17 constitutes a limitation on the exercise of the right to freedom of expression and information as set out in the EU Charter of Fundamental Rights as claimed by Poland. His argument is that freedom of expression is not an absolute right and can be limited in accordance with Article 52(1) of the Chapter. When it comes to filtering content through automated means, he claims that it is a necessity as it is not possible to check all uploaded content manually. Specifically he mentions "Sharing service providers must, in many cases, put into place automatic content recognition tools, in order to filter the content that users upload and, where appropriate, block certain content before it is uploaded".[119] The reasoning being that there is simply too much content and without the filters they would not be able to demonstrate that they have made best efforts to ensure unavailability and prevent future uploads of the infringing content. After first defending these parts of Article 17, he does go on to stress that Article 17 may result in "over-blocking".[120] He even recognizes the problem that content creators face such as that filtering mechanisms are prone to fail in cases where copyrighted content is used in a transformative way. Therefore directly addressing derivative content. He goes on to state that platforms may be inclined to block content in an excessive way, "where there is the slightest doubt as to its lawfulness". This over-blocking, where the user's content is being blocked despite being legal entails a risk to freedom of expression. He suggests that if the scope of filtering was limited to only manifestly infringing, or "content where the unlawfulness of which is obvious from the outset", this risk would be minimized. Platforms should only be required to filter or block identical reproductions of copyrighted works, or as he calls it "content which is 'identical' or 'equivalent' to works and other protected subject matter identified by right holders".

He notes that in its recent case-law, the court emphasizes the need to "safeguard the effectiveness" of exceptions and limitations of copyright. These being quotation, criticism,

[116] Michal Salajczyk, 'Advocate General Delivers Opinion In Landmark Challenge To The New Copyright Directive In The Court Of Justice Of The European Union' (*Bird & Bird*, September 2021) <https://www.twobirds.com/en/news/articles/2021/poland/ag-delivers-opinion-in-landmark-challenge-to-the-new-copyright-directive> accessed 12 October 2021.
[117] Case C-401/19, *Poland v Parliament and Council* [2021] ECLI:EU:C:2021:613, opinion of AG Saugmandsgaard Øe.
[118] Luca Bertuzzi, 'Advocat General Dismisses Poland's Challenge To Copyright Directive' (*www.euractiv.com*, 20 July 2021) <https://www.euractiv.com/section/copyright/news/advocat-general-dismisses-polands-challenge-to-copyright-directive/> accessed 12 August 2021.
[119] Case C-401/19, *Poland v Parliament and Council* [2021] ECLI:EU:C:2021:613, opinion of AG Saugmandsgaard Øe.
[120] Christoph Schmon, 'Article 17 Copyright Directive: The Court Of Justice'S Advocate General Rejects Fundamental Rights Challenge But Defends Users Against Overblocking' (*Electronic Frontier Foundation*, 15 July 2021) <https://www.eff.org/nl/deeplinks/2021/07/article-17-copyright-directive-court-justices-advocate-general-rejects-fundamental> accessed 17 November 2021.

review, caricature, parody, or pastiche as outlined in Article 17(7) of the DSM Directive. He stresses the importance of out of court redress mechanisms and effective judicial remedies for users. Article 17 grants users ex ante protection, which is protection from the moment they upload their content, which would limit permissible filtering and blocking measures. He does also make note that while out of court redress mechanisms are important, when it comes to situations where it is not apparent whether the content in question is unlawful, the courts instead of platforms should have the final say. On top of that all, the Advocate General reaffirms the ban on mandated general monitoring. By doing so he rejects the interpretation where providers are "turned into judges of online legality, responsible for coming to decision on complex copyright issues". In the end however, he still permits mandated upload filters. According to him the safeguards should be implemented through parameters in content recognition tools and through dialogue between stakeholders. Leaving the most important part of his opinion for content creators in the hands of national law makers and companies such as YouTube themselves. However the recognition that there are limits to the use of upload filters is still a welcome clarification and possibly a warning to Member States that national laws will undermine the essence of the right to freedom of expression if there are not sufficient user safeguards. This is particularly welcome for states whose laws implementing Article 17 would otherwise offer far too little protection for legitimate use of copyright exceptions. While the opinion is not legally binding, it will be considered by the CJEU, who typically agrees with the reasoning of the Advocate General, so this is often indicative of the Court's final ruling. Another example of this being the Frank Peterson v Google LLC, and Elsevier Inc v Cyando AG cases that were decided upon on July 22nd[121], where the ruling of the case fell very closely in line with the opinion given by Henrik Saugmandsgaard Øe the previous year.[122]

V.I. Conclusion

Intellectual property law refers to the law that governs creations of the mind, with the law itself being designed to encourage inventors, artists, business and others into developing innovations and creative works. This is done through giving them rights to protect this intellectual property and giving them control over how their property is used.[123]

Copyright is the intellectual property right that concerns creative expressions of ideas in various forms. They include both economic and moral rights. Economic rights concern themselves with who could distribute a work, and allows the copyright owner to stop anyone from using a work without their permission. Examples of using a work without permission could come in the form of translations, reproductions, performances or broadcasts. The moral rights include the right to be acknowledged as the author of the created work, without allowing

[121] Joined Cases C-682/18 and C-683/18, *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* [2021] EU:C:2021:503.
[122] Joined Cases C-682/18 and C-683/18, *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* [2021] EU:C:2021:503, opinion of AG Saugmandsgaard Øe.
[123] *What Is Intellectual Property?* (World Intellectual Property Organization 2020) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf> accessed 2 February 2021.

alterations that could damage the creator's reputation. The exact nature of how these copyrights are enforced, are dependent on the national laws of the country concerned, however part of this is also set up in international law through the form of a minimum protection.

While copyright grants exclusive rights to copyright holders, derivative works are content based on, or content that use parts of these copyrighted works. This is legally allowed in the case where exceptions and limitations apply. The Berne Convention is incorporated into the TRIPS agreement and sets this out in their Article 2(3).[124] It elaborates that certain alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original works. However while the TRIPS agreement incorporated this Article from the Berne Convention, many bilateral agreements were created to adopt a higher standard of protection. One of these was the WIPO Copyright Treaty, which provides additional protections for copyright to respond to advances in information technology.[125] This was implemented, among others, in the European Union through various Directives such as the InfoSoc Directive[126], and in the United States through the DMCA.[127]

When it comes to the platform of YouTube, Derivative Works are found to be legally protected as fair use under §107 of the Copyright act.[128] Meanwhile, since YouTube is classified as an OCSSP, derivative works are protected under Article 17(7) of the DSM Directive that provides exceptions and limitations.

Content creators are one of the main stakeholders when it comes to Derivative works on YouTube. They want to be able to express their freedom of speech or art using video or audio as their medium, they want to be able to profit off their online works, and importantly they want to be able to rely on the exceptions and limitations provided for in the previously mentioned laws.

Meanwhile copyright holders want to be able to profit off of their copyrighted works and make use of their exclusive rights. They want to prevent others from copying these copyrighted works and uploading them to YouTube without their permission, or at the very least they want to make money off of these uploads.

YouTube, as an OSP or OCSSP depending on the legal system, wants to have a working platform where users can upload their works. They also want to avoid liability for copyright infringement, as this could potentially lead to costly lawsuits that could bankrupt the platform. Therefore they put in place mechanisms on their platform that will help copyright holders to order the disabling or removal of works.

[124] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1; Berne Convention for the Protection of Literary and Artistic Works (amended 28 September 1979, entered into force 19 November 1984).
[125] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002).
[126] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.
[127] Digital Millennium Copyright Act (DMCA).
[128] Title 17 United States Code §107.

These mechanisms include Content ID, where a copyright holder can add their work to a database to be compared to other works on the YouTube platform. The rights holder also decides what happens to the work, such as whether it gets taken down or whether the rights holder simply will make the profits off of it. The problem here is that Content ID is a filtering mechanism that automatically flags an instance where copyrighted material is present, but is unable to check whether it falls within exceptions and limitations or fair use.[129]

Copyright holders can also submit manual claims against works with the same types of results. The video will be disabled, or potentially the claimant can seek to make profits. However YouTube takes these claims for their word, and will block without checking. This leaves the content creator with the option to submit a counter notification, after which the copyright holder can relent or keep going until a copyright strike is issued.

These copyright strikes can also be issued by copyright holders from the start. Once a channel receives 3 copyright strikes, they lose their channel and a content creator potentially loses their sole source of income. The copyright strike can also be fought with a counter notification, which only leaves the copyright holder with the option to let go or take legal action. The potential to lose the channel or enter into a lawsuit is a deterrent for many content creators to attempt to fight copyright claims.[130]

Even if a content creator fights a claim, this process can take a long period of time where the creator loses income on the work, which is an additional deterrent for them to not make derivative works even if they have the legal right. Unless explicit extortion has been performed, YouTube does not seem to show a lot of effort to stop those who perform false copyright claims.[131] Meaning that there is a potential for censorship if a rights holder targets a content creator with endless false claims to disable their videos. 17 US Code §512(f) was designed to combat this by allowing content creators to take situations like this to court, even including the rewarding of damages including attorneys' fees to make it more accessible. However, because of the ruling in Lenz v Universal, the content creator would have to prove bad faith by the rights holder to not have the misrepresentation claim rejected.[132]

This in the end means that while there are ways to possibly combat copyright claims, when a rights holder is determined to use the system for questionable purposes such as censorship, the content creator becomes powerless. Thus when asking how content creators with derivative creative works on YouTube can protect themselves from questionable usage of

[129] YouTube Help 'What Is A Content ID Claim?' (*Support.google.com*) <https://support.google.com/YouTube/answer/6013276?hl=en-GB> accessed 20 January 2021.
[130] Trendacosta K, 'Unfiltered: How YouTube's Content ID Discourages Fair Use And Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <https://www.eff.org/nl/wp/unfiltered-how-YouTubes-content-id-discourages-fair-use-and-dictates-what-we-see-online#fn24> accessed 25 March 2021.
[131] Julia Alexander, 'Youtube Sues Alleged Copyright Troll Over Extortion Of Multiple Youtubers' (*The Verge*, 19 August 2019) <https://www.theverge.com/2019/8/19/20812144/youtube-copyright-strike-lawsuit-alleged-extortion-minecraft> accessed 3 November 2021.
[132] *Lenz v Universal Music Corp*, 801 F 3d 1126 (9th Cir 2015).

Intellectual Property Rights, the answer is they cannot. At its current stage, YouTube and copyright laws have created a situation where the exceptions and limitations or fair use are not properly protected.

The Advocate General of the CJEU stresses the importance of out of court redress mechanisms, and recognizes that there should be limits to the use of upload filters. He claims that safeguards should be implemented through parameters in content recognition tools.[133]

If YouTube were to take this seriously, then they could start with the Content ID system. Instead of automatically claiming a video, the Content ID system would be considerably fairer if it instead flagged the copyrighted material and sent a message to the copyright holder. The copyright holder should then decide whether or not they want to make a copyright claim. This would stop the overblocking that is currently present in the filtering system, and leave the question of whether something is fair use in the hands of the rights holders. This on its own would not fix the problem for questionable uses of copyright claims however, as these had been performed deliberately already.

Thus such a change would have to be paired with the overturning of the Lenz v Universal case. This case has basically removed the protection provided by 17 US Code §512(f), unless in the most severe cases such as extortion. However if a copyright holder were to claim ignorance on the fair use, then no justice can be found. The Supreme Court has declined to grant certiorari in this case as recently as 2017, so this happening could be unlikely in practice.

However if this were to somehow happen, and it was paired with the suggested adjustment to the Content ID system, then there would finally be a way for content creators to defend their derivative works against questionable usage of intellectual property rights. It would not be ideal, as a lawsuit would still be costly, but in the very least content creators could legally protect themselves.

[133] Case C-401/19, *Poland v Parliament and Council* [2021] ECLI:EU:C:2021:613, opinion of AG Saugmandsgaard Øe.

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