

THE DEATH OF FAIR USE IN CYBERSPACE: YOUTUBE AND THE PROBLEM WITH CONTENT ID

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ABSTRACT

YouTube has grown exponentially over the past several years. With that growth came unprecedented levels of copyright infringement by uploaders on the site, forcing YouTube's parent company, Google Inc., to introduce a new technology known as Content ID. This tool allows YouTube to automatically scan and identify potential cases of copyright infringement on an unparalleled scale. However, Content ID is overbroad in its identification of copyright infringement, often singling out legitimate uses of content. Every potential case of copyright infringement identified by Content ID triggers an automatic copyright claim on behalf of the copyright holder on YouTube and subsequently freezes all revenue streams, for all parties, regardless of the legitimacy of the underlying claim. Using the plight of one video game reviewer known as "Angry Joe" as a paradigmatic example of the problems that Content ID can create, this Issue Brief argues that in its present form, Content ID has had disastrous consequences for the doctrine of fair use, YouTube itself, and ultimately, the very spirit of copyright law. By shifting the neutral presumption accompanied with fair use against the uploader, Content ID effectively overrides judicial precedent.

INTRODUCTION

On December 11, 2013, a well-known video game reviewer known as "Angry Joe" uploaded a video entitled, "Youtube Copyright Disaster! Angry Rant."¹ Angry Joe's usual presentation involves a great deal of

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¹ AngryJoeShow, *Youtube Copyright Disaster! Angry Rant*, YOUTUBE (Dec. 11, 2013), available at <http://www.youtube.com/watch?v=JQfHdasuWtI> [hereinafter *Youtube Copyright Disaster*].

theatrics, including the use of visual effects, colorful images, and insightful commentary. But in this video, gone were all of those qualities, except for his most distinguished one. Instead of directing his anger towards the flaws of a particular video game, Angry Joe directed his attention toward YouTube itself.²

In the video, Angry Joe revealed that sixty-two of his videos had been “flagged” for alleged copyright infringement, instantly halting the income that he was deriving from them.³ With over five hundred videos on his channel,⁴ Angry Joe’s livelihood depends upon his production of video game reviews on YouTube.⁵ Why were Angry Joe’s videos flagged?

Angry Joe had come face-to-face with YouTube’s new “Content ID” technology. Content ID was created in response to a mass proliferation of videos on YouTube, the upload of which had grown so large that a case-by-case check for copyright infringement for each video on the website was simply not feasible.⁶ Content ID is made up of a database composed of both audio and video to which copyright holders on YouTube contribute. Content ID compares the information in YouTube’s database with the audio and video that is contained in newly uploaded user videos. If a match is found, the system automatically files⁷ a copyright infringement claim on behalf of a purported copyright owner against the uploader. In each instance, this filing triggers an automatic freeze of advertisement revenue

² *Id.*

³ Monetization is the process by which uploaders of original content can gather revenue on YouTube. This is accomplished when the user opts to strategically place advertisements at the beginning of the uploaded video in exchange for a small revenue payment. *See Video Monetization Criteria*, GOOGLE, https://support.google.com/youtube/answer/97527?hl=en&ref_topic=1115890 (last visited Feb. 28, 2015). A user like Angry Joe earns as much as one hundred dollars for every fifty-thousand views that a video accumulates; Angry Joe has over five hundred videos, most with millions of views. *See* Owen Good, *YouTube’s Copyright Crackdown: Everything You Need To Know*, KOTAKU (Dec. 18, 2013), <http://kotaku.com/youtubes-copyright-crackdown-simple-answers-to-compli-1485999937>.

⁴ AngryJoeShow, *The Angry Joe Show*, YOUTUBE (Oct. 3, 2008), <https://www.youtube.com/user/AngryJoeShow/featured> [hereinafter *The Angry Joe Show*].

⁵ *Id.*

⁶ Over one hundred hours of content is uploaded onto YouTube every minute. *See* YouTube Help, *YouTube Content ID*, YOUTUBE (Sep. 28, 2010), <https://www.youtube.com/watch?v=9g2U12SsRns>.

⁷ As used throughout this Issue Brief, “filing” refers to the initiation of a website-driven copyright infringement process and associated responses on YouTube.

that the uploader was earning from the disputed video; the freeze occurs without the uploader having the chance to defend himself.⁸

Content ID *should* be the perfect solution for enforcing copyright law in the digital age. But, the system, widely applied as of December 2013, has proven to be problematic in its application on YouTube by undermining the doctrine of fair use through indiscriminate flagging of *legitimate* uses of original content.⁹ Put simply, Content ID is blatantly hostile to users' interests because it shifts the neutral presumption of fair use against them. If reform of Content ID is not effectuated, YouTube risks losing a substantial portion of its user-base, and hence, its main source of content.

Part I of this Issue Brief explains how Content ID works, describes the liability standard for YouTube in accordance with the Digital Millennium Copyright Act (DMCA), and relays the elements of fair use pursuant to § 107 of the Copyright Act.¹⁰ Part II explains the plight of Angry Joe to demonstrate how Content ID subverts fair use, discourages criticism, and stifles creativity on YouTube.¹¹

⁸ [Letter from YouTube] *Managing Rights and Content ID on YouTube*, REDDIT (Mar. 18, 2014), http://www.reddit.com/r/letsplay/comments/20qdkx/letter_from_youtube_managing_rights_and_content/ [hereinafter *Letter from YouTube*].

⁹ It should be noted that Content ID has been live on the website for years, but was just recently applied to “managed” channels, generating this current controversy. These channels were under a sort of safe harbor from copyright infringement claims by virtue of being managed a larger media entity, called a “multi-channel network” (MCN), which took responsibility for any copyright infringement by content creators within its network. Users like Angry Joe could be managed by an MCN and were not subject to Content ID scrutiny until December of 2013, when YouTube changed its user policy, causing widespread outcry in the gaming community in particular. MCNs “offer assistance in areas such as product, programming, funding, cross-promotion, partner management, digital rights management, monetization/sales, and/or audience development.” *Multi-Channel Networks 101*, YOUTUBE, <http://www.youtube.com/yt/creators/mcns.html> (last visited Feb. 28, 2015).

¹⁰ The author assumes that the readers of this Issue Brief are already familiar with the basic functionality of YouTube. For an excellent Note that details this functionality, as well as the history of the website itself, see Kurt Hunt, Note, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197 (2007).

¹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (noting that fair use avoids creative stifling associated with rigid application of the copyright statute).

I. BACKGROUND

A. Content ID

So, how does Content ID work? By its own description, YouTube explains:

Copyright holders¹² give us copies of their audio recordings and videos that they want us to look for on YouTube. We call these copies “reference files” and put these files in a database. This database contains over 3 million files, from pop songs to full length movies. Every time you upload a video to YouTube, we quickly compare it to every reference file in our entire database, looking for a match. Content ID can identify audio matches, video matches, partial matches, and can even identify a match when one video’s quality is worse than the other. Each time Content ID finds a match, we do what the copyright holder asks us to do with that video; either block it, leave it up, or even start making money from it. With over twenty-four hours of video uploaded to YouTube every minute, Content ID works around the clock and scans over one hundred years of video every day. It’s like 36,000 people staring, without blinking, at 36,000 monitors: all day, every day. Now, copyright management is easy and accessible for everyone.¹³

Although YouTube claims that Content ID ushers in a new golden age of creativity, problems have already begun to surface.

While Content ID can recognize copyrighted material, it cannot recognize whether that material has been licensed for use.¹⁴ This is especially important in the context of the video game industry, where a game developer may have contractual understandings with music studios and publishers for the inclusion of their work in a video game. Oftentimes, bundled with these licensing regimes is the developer’s right to allow the creation of derivative works (including works of criticism) from the original video game by fans, enthusiasts, and gamers alike.¹⁵ Content ID cannot

¹² *Qualifying for Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/1311402?hl=en> (last visited Feb. 28, 2015) (“Applicants must be able to provide evidence of the copyrighted content for which they control exclusive rights. Content ID will match a user’s reference content against every upload to YouTube . . . Content ID applicants may be rejected if other tools better suit their needs.”).

¹³ YouTube Help, *supra* note 6.

¹⁴ AngryJoeShow, *The Elder Scrolls V: Skyrim Angry Review*, YOUTUBE (Nov. 23, 2011), <http://www.youtube.com/watch?v=54XwUi7Hc0k> [hereinafter *The Elder Scrolls*].

¹⁵ Licensing is very inconsistent in the video game sphere. Companies like Electronic Arts (“EA”) and Sony Online Entertainment (“SOE”) allow full fair use of their content on YouTube, even if it’s monetized, whereas companies like

recognize these subtle and often complicated licensing regimes, resulting in a substantial impediment to a functioning copyright system on the internet.¹⁶

By automatically flagging copyright infringement *en masse* with Content ID, YouTube affords copyright owners an automatic response to the allegedly unauthorized use of their content by uploaders. Advertising revenue generated from the allegedly infringing video as part of YouTube's monetization program is automatically frozen until the video is either removed from YouTube at the conclusion of a lengthy appeals process or the copyright owner voluntarily relinquishes the infringement claim.¹⁷ In the wake of the full-scale implementation of Content ID, many video game developers have released frivolous claims on reviews that they never would have filed in the first place, suggesting that Content ID is over-inclusive in its current application.¹⁸

Finally, while the process of automating copyright infringement recognition is (crudely) realized with Content ID, the process of automating fair use recognition is not implemented *at all* on YouTube. So long as Content ID facilitates a vast increase of copyright infringement claims on YouTube while simultaneously failing to effectuate the doctrine of fair use, Content ID will need a significant overhaul as a result of the many inequities that it creates.

B. The Digital Millennium Copyright Act

1. YouTube's Safe Harbor: § 512(c)

Under the DMCA, an Online Service Provider (OSP) like YouTube enjoys immunity from liability of copyright infringement carried out by its users so long as it:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

Bungie and Capcom do not allow monetized use of their content at all. Alloy Seven, *How to Monetize Gaming Videos Legally*, YOUTUBE (Feb. 6, 2013), <https://www.youtube.com/playlist?list=PLzwQfBinnPoq-ZNgySx9c4EoYfQIOwfs>.

¹⁶ *The Elder Scrolls*, *supra* note 14.

¹⁷ *Dispute a Content ID Claim*, GOOGLE, <https://support.google.com/youtube/answer/2797454?hl=en> (last visited Feb. 28, 2015).

¹⁸ *Youtube Copyright Disaster*, *supra* note 1.

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁹

The standard for YouTube's liability in accordance with the DMCA was established in *Viacom Int'l, Inc. v. YouTube, Inc.*,²⁰ where the Second Circuit articulated that, in order for the safe harbor provision of § 512(c) to be lost, an OSP must either: (1) have actual knowledge of copyright infringement, which requires that the OSP be *subjectively* aware of specific instances of infringement, or (2) be willfully blind to such instances of copyright infringement.²¹ In that case, Viacom argued that YouTube should lose its § 512(c) protection because it hosted 79,000 infringing video clips owned by Viacom on its servers, and that these clips had received over one billion views.²²

At the time of the suit, surveys showed that between seventy-five and eighty percent of all videos hosted on YouTube infringed copyright.²³ Internal communications among YouTube's staff revealed that they considered the removal of certain infringing videos; as a result, the Second Circuit held that YouTube had specific knowledge of the infringement, and remanded the case to the district court for further fact-finding.²⁴

After responding to the Second Circuit's instructions, the district court granted summary judgment in favor of YouTube, finding that YouTube did not have the right and ability to control the infringing activity sufficient to lose its safe harbor protections because it did not directly induce its users to upload the infringing content.²⁵ Furthermore, the internal circulation of emails by YouTube's staff was not found to constitute specific knowledge of the infringement because the emails did not specifically reference any particular infringing clip.²⁶ Thus, YouTube retained its statutory safe harbor under § 512(c).

Notwithstanding its victory, YouTube was careful to avoid such substantial copyright infringement in the future by implementing Content ID. By overzealously addressing copyright infringement, YouTube

¹⁹ 17 U.S.C. § 512(c) (2012).

²⁰ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

²¹ *Id.*

²² *Id.* at 26.

²³ *Id.* at 33.

²⁴ *Id.* at 34.

²⁵ *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 122 (S.D.N.Y. 2013).

²⁶ *Id.* at 117.

continues to shield itself from liability from copyright owners and preserves its safe harbor under § 512(c).

2. DMCA Notification and Counter Notification Under § 512(g)

In order to qualify for the statutory safe harbor of § 512(c), YouTube must comply with the provisions of the DMCA. A properly filed DMCA notice²⁷ from a copyright holder puts the OSP on notice of infringement and constitutes knowledge for the purposes of § 512(c).²⁸ Upon verification by the OSP, the OSP must remove the infringing content and subsequently inform the uploader that the content has been taken down.²⁹ The uploader may then send a counter-notice to the OSP if he feels that it was taken down erroneously.³⁰ The OSP then notifies the claimant and must wait between ten and fourteen business days for a formal lawsuit to be filed against the uploader.³¹ If the claimant does not file suit, the OSP may restore the content to the website.³²

Additionally, to qualify for the safe harbor, the OSP must “not receive a financial benefit directly attributable to the infringing activity.”³³ At the very least, Content ID carries out its intended function by ensuring that blatantly infringing content is expeditiously removed from the website, and thus adequately protects YouTube from liability.

3. YouTube’s Appeal Process

When a claim is initially filed on YouTube, the uploader may dispute it. The purported copyright holder may then decide to drop or reinstate the claim on the video.³⁴ Upon reinstatement of the claim, the uploader may appeal.³⁵ Only three appeals may be filed by the uploader at once.³⁶ Once the uploader appeals, the purported copyright holder may either release the claim on the video or send a formal legal copyright

²⁷ Typically, a boilerplate form letter is electronically submitted to the website hosting the alleged infringement. See *Copyright Takedown Notice*, YOUTUBE, <https://www.youtube.com/yt/copyright/copyright-complaint.html> (last visited Feb. 28, 2015).

²⁸ 17 U.S.C. § 512(c)(3)(A)(i)–(vi) (2012).

²⁹ § 512(g).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (holding that the presence of infringing material constituted a “draw” for internet traffic, and was thus a financial benefit for the purposes of determining Section 512(c) eligibility).

³⁴ *Dispute a Content ID Claim*, *supra* note 17.

³⁵ *Id.*

³⁶ *Id.*

notification under the DMCA.³⁷ This is the first time that the DMCA is incorporated into YouTube's copyright infringement enforcement process. If a notification is exercised, the uploader receives a copyright "strike" on his account.³⁸

Once the user accumulates three of these strikes, regardless of whether these strikes are legitimate, his entire channel is automatically deleted. The claimant may file an *unlimited* number of copyright claims, legitimate or illegitimate.³⁹ The uploader's only recourse after receiving a strike is to wait six months for the copyright strike to expire, allow the copyright owner to retract his claim, or submit a formal counter-notification.⁴⁰

The counter-notification is filed pursuant to § 512(g) of the DMCA.⁴¹ Upon receipt of this counter-notification, the claimant must notify YouTube within ten to fourteen days that he will be seeking an injunction.⁴² If this is not done, the video is finally evaluated by YouTube and, if found to have been removed from the website erroneously, YouTube will remove the copyright strike from the uploader's account and reinstate the video to the website.⁴³

The contest between copyright holder and uploader can continue for months, while the uploader may only appeal three copyright infringement cases at once.⁴⁴ The longer the process takes, the longer the uploader is losing actual revenue from his work due to the revenue freeze imparted by the purported copyright holder. Even assuming relinquishment of the copyright infringement claim by the purported holder, the best-case-

³⁷ *Id.*

³⁸ *Copyright Strike Basics*, GOOGLE, <https://support.google.com/youtube/answer/2814000?hl=en> (last visited Feb. 28, 2015).

³⁹ *Id.*

⁴⁰ See 17 U.S.C. § 512(g) (2012) (describing counter-notifications).

⁴¹ *Id.*

⁴² *Guide to YouTube Removals*, FAIR USE TUBE, <http://fairusetube.org/guide-to-youtube-removals> (last visited Feb. 28, 2015).

⁴³ This assumes that YouTube has no contract with the purported copyright holder. Recent events have suggested that YouTube has incorporated a clause into its end-user agreement that allows it to deny, at its discretion, the restoration of content back onto the website, despite a properly filed Section 512(g) counter notification. This clause is a result of bargaining between companies like Universal Music Group and YouTube for exclusivity of content. Thus, not only are derivative works not allowed, but, as a result of the contract, effectively neither is fair use. See Patrick McKay, *YouTube Refuses to Honor DMCA Counter-Notices*, FAIR USE TUBE (Apr. 4, 2013), <http://fairusetube.org/articles/27-youtube-refuses-counter-notices>.

⁴⁴ *Youtube Copyright Disaster*, *supra* note 1.

scenario is not so bright: a claim resolved in the uploader's favor fails to yield back-pay of frozen revenue.⁴⁵

C. The Doctrine of Fair Use: §107 of the Copyright Act

In pertinent part, §107 of the Copyright Act sets out the principles for fair use, which are designed to foster creativity and the encouragement of content creation, even if the content is derived from the work of another:⁴⁶

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁷

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court explained that fair use is not a bright-line test and that there is *no presumption* for or against the fair use of a work.⁴⁸

Fair use functions as a defense to an action for copyright infringement.⁴⁹ By its own policy, YouTube avoids determining fair use and defers to the courts if the issue arises.⁵⁰ Similarly, YouTube cannot determine ownership of copyright without deferring to the courts.⁵¹

The purpose and character of the use under the first prong of the fair use analysis depends upon two elements: (1) whether the use is transformative, and (2) whether the use is commercial.⁵² In *Campbell*, the Supreme Court held that use of a copyrighted work is transformative if it

⁴⁵ Telephone Interview with Jacob Baldino, Creator, Host & Producer, BecauseVideogames (Jan. 18, 2014).

⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

⁴⁷ 17 U.S.C. § 107 (2012).

⁴⁸ *See Campbell*, 510 U.S. at 584.

⁴⁹ *Id.* at 580.

⁵⁰ YouTube establishes the aforementioned four factors as a convenience and articulates that it cannot make determinations of fair use. *What Is Fair Use?*, YOUTUBE, <http://www.youtube.com/yt/copyright/fair-use.html> (last visited Feb. 28, 2015).

⁵¹ *What Is Copyright?*, YOUTUBE, <http://www.youtube.com/yt/copyright/what-is-copyright.html> (last visited Feb. 28, 2015).

⁵² *Campbell*, 510 U.S. at 579.

“adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message.”⁵³

In *Bill Graham Archives v. Dorling Kindersley Ltd.*,⁵⁴ the Second Circuit affirmed a holding of fair use of images for the publishers of a biography of the famous music group the Grateful Dead.⁵⁵ The court held that the application of fair use was especially apt in this case because the biography fulfilled “a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.”⁵⁶ The court noted that works incorporating criticism and commentary are often given fair use protection.⁵⁷

In evaluating the commerciality of a work, the question is “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁵⁸ There is no presumption that the commercial use of a work necessarily renders a defendant undeserving of the protections of fair use.⁵⁹

Under the second prong of the analysis (“nature of the copyrighted work”), creative works are afforded less protection, while factual works are given a greater scope of protection.⁶⁰ The Second Circuit has articulated that “the doctrine [of fair use] has some application to communicating information pertinent to consumer choices.”⁶¹

In *New Era Publications*, the Second Circuit held that the use of quoted works dealing with the life of Scientology founder L. Ron Hubbard were protected by fair use because his biographies had been published and the work in dispute was one of criticism.⁶² The court wrote that a published work is afforded a broader scope of fair use protection than one that is unpublished.⁶³ This is because the author has already been given the chance of the right of first publication, which “encompasses not only the choice

⁵³ *Id.*

⁵⁴ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

⁵⁵ *Id.*

⁵⁶ *Id.* at 610.

⁵⁷ *Id.*

⁵⁸ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

⁵⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

⁶⁰ *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983).

⁶¹ *Id.*

⁶² *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 157 (2d Cir. 1990).

⁶³ *Id.*

whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”⁶⁴

The third prong of the fair use analysis asks “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 the copying.”⁶⁵ Quantity, as well as quality and importance of the material used is factored into the analysis, as well as if they “go to the ‘heart’” of the original.”⁶⁶

In *New Era Publishing*, the Second Circuit noted that the L. Ron Hubbard biography that was protected by fair use used as much as “8% or more of 11 [copyrighted] works.”⁶⁷ The court found that the borrowed quotations did not go qualitatively to the heart of the original copyrighted work because the quotes were set separately apart from the text at the beginning of a chapter in order to create an effective tone for the reader.⁶⁸

The fourth and final prong of the fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”⁶⁹ The Supreme Court has said that the purpose of this prong is to evaluate the effect of market substitution for the markets that the “creators of original works would in general develop or license others to develop.”⁷⁰

For example, in *Authors Guild, Inc. v. Google, Inc.*,⁷¹ the court held that Google’s appropriation of millions of digitally reproduced copies of copyrighted books was protected by fair use against a class-action claim of copyright infringement. The court found that fair use of a copyright can not only not harm a work’s market – but can also *enhance* its market by generating increased visibility and awareness of its presence.⁷²

⁶⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

⁶⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

⁶⁶ *Id.* at 587–88.

⁶⁷ *New Era Publ’ns Int’l, ApS*, 904 F.2d at 158.

⁶⁸ *Id.* (citing *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 729 F. Supp 992, 1000 (S.D.N.Y., 1990)).

⁶⁹ 17 U.S.C. § 107 (2012).

⁷⁰ *Campbell*, 510 U.S. at 592–93.

⁷¹ *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 284 (S.D.N.Y. 2013).

⁷² *Id.* at 293.

II. ANALYSIS

A. The Angry Joe Show: The Paradigmatic Game Review Under the Lens of Fair Use

Consumers view video game reviews for the same reasons that they read a movie critic's column in the local newspaper when deciding whether to see a summer blockbuster. Reviews can be the difference between an enjoyable and imaginative journey into another realm and a savings of over sixty dollars (for a newly released title). Commentary and criticism are important, especially in the digital age where conflicts of interest are not immediately evident, and bias is undetectable.⁷³

Enter YouTube. YouTube offers the perfect platform for the independent entrepreneurial enthusiast to offer their opinion on the latest release, while simultaneously garnering modest revenue from each offering. YouTube gains a percentage of that revenue too. So, everybody wins, right?

Given the reliance on YouTube as a platform for independent reviews by multitudes of content creators, fair use should be a cornerstone for creativity on the site. But by automating the process of filing copyright infringement claims with Content ID and giving the purported copyright holder the "preemptive strike" of freezing revenues without a formal finding of fair use, YouTube effectively shifts the presumption of fair use *against* the uploader. A video game review is a relatively straightforward example of fair use that is completely misidentified, and ultimately undermined by Content ID. This Issue Brief examines this conflict in turn.⁷⁴

⁷³ A well-known video game reviewer named Totalbiscuit has shared emails confirming the existence of a paid review model: "We would need a gameplay video from him by [redacted], and I can offer \$2,000. A [video game company] is making some improvements to the game that they want to feature in his video that won't be completed until [redacted], so he will need to wait until then to start filming anything, but he can get a good feel for the game by trying it out right now at [redacted]." See *Untitled*, PASTEBIN (Apr. 2, 2014), <http://pastebin.com/cZpRbpxd>.

⁷⁴ The following fair use analysis assumes that the copyright holder actually owns the content. However, Content ID is far from perfect in this regard. It can misidentify original content and assign its ownership to a purported copyright owner. This was the case when an individual, independent game developer created his own video game and uploaded clips of the game onto YouTube. Content ID subsequently misidentified and filed a copyright infringement claim against him, removing his video from YouTube entirely. See Owen Good, *The Most Ridiculous Victim of YouTube's Crackdown is a BASIC Game*, KOTAKU (Dec. 17, 2013), <http://kotaku.com/the-most-ridiculous-victim-of-youtubes-crackdown-is-a-1484998183>.

1. *The Purpose and Character of the Use*

The purpose and character of the content's use under the first prong of the fair use analysis is composed of two elements: (1) whether the use is transformative, and (2) whether the use is commercial.⁷⁵

a. *Transformative Use*

In *Campbell*, the Supreme Court ruled that a use is transformative if it “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message.”⁷⁶

Consider the Angry Joe review for the video game *The Elder Scrolls V: Skyrim*: A snowy mountain from the game is shown on the screen.⁷⁷ Out walks Angry Joe, dressed in a brown robe reminiscent of a monk's attire. Superimposed in front of the serene mountaintop, he bows respectfully. The camera pans from Angry Joe to a resting dragon,⁷⁸ also taken from the game, which says, “Greetings, Angry Joe. You've trained hard over this past decade. Now it's time. Show me what you've learned.”⁷⁹ Obviously not a part of the original game, this audio clip represents one of innumerable creative embellishments by Angry Joe, who then proceeds to review the game using several imaginative scenes that involve costumes, digital effects, and props that draw from game content.⁸⁰ Not stopping there, Angry Joe adds comedy to the mix by enlisting some of his friends to dress in brown robes and dance wildly to an original song against another video game background.⁸¹ From these differences, it is clear that watching Angry

⁷⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁷⁶ *Id.*

⁷⁷ *The Elder Scrolls*, *supra* note 14. The problems exemplified by Angry Joe in this Issue Brief occurred under a different Content ID paradigm. In December 2013, YouTube allowed copyright holders to impose revenue diversion upon those videos found to be potentially infringing copyright by Content ID. Such was the case here with Angry Joe. The advertisement revenue that was generated for a content-creator like Angry Joe on his original video was automatically diverted to those claiming ownership of the copyrights used in his video. Diversion occurred until the process was resolved. In March 2014, YouTube responded to community outcry and eliminated the controversial revenue diversion option, instead opting to utilize revenue freezing for all parties. *Letter from YouTube*, *supra* note 8.

⁷⁸ Named Pararthurnax, if the reader is curious.

⁷⁹ This, too, was not part of the original game. Voice work and editing, among other things, had to be done to the video to allow this exchange to occur convincingly. *See AngryJoeShow*, note 14 (incorporating obvious non-game elements).

⁸⁰ *Id.*

⁸¹ Parody may also be implicated here. In *Campbell*, the Supreme Court noted that parody “can provide social benefit, by shedding light on an earlier work, and in the process, creating a new one.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). In that case, the Court articulated that ridiculing the original song, as

Joe review a video game is vastly different than actually playing the game itself.

Playing a game is not the same as *watching* gameplay footage on YouTube. The purpose of playing a game varies from person to person, but a widely cited reason is to have fun—to experience a world outside of our own.⁸² On the other hand, the purpose of watching a video game review is simple: to decide whether to purchase the game. Thus, like the transformative use of the posters within the biography in *Bill Graham Archives* that are ultimately protected by fair use, Angry Joe’s review fulfills a separate and distinct purpose from that of the original game itself.

Besides his creativity and extensive preparation for the review by playing the game, Angry Joe injects a very distinct kind of commentary and criticism, sufficient to satisfy a fair use analysis under *Bill Graham Archives*, into his review. For almost twenty minutes, Angry Joe launches into a comprehensive and transparent review of the award-winning video game. And in the comments below the video, thousands of viewers continue the critical discussion of the game, all started by Angry Joe’s review.⁸³ Therefore, a video game review is clearly transformative.

b. Commercial Nature of the Use

In evaluating the commerciality of a work, the question is “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁸⁴ There is no presumption that a commercial use of material necessarily renders a defendant undeserving of the protections of fair use.⁸⁵

Angry Joe operates a channel known as “AngryJoeShow” where all of his videos are gathered in one place. His channel lists over five hundred videos, some of which have garnered over one million views.⁸⁶ Each video is monetized on his channel.⁸⁷ YouTube, as part of its terms of service for monetization, keeps fifty-five percent of the generated funds from the

well as commenting on the naiveté of an earlier day rendered the use a parody, protected under fair use. *Id.* at 583. Surely Angry Joe’s sustained use of comedic tropes in his many reviews creates an even stronger indication of fair use.

⁸² Video games can also make you more intelligent, can slow the biological aging process, and can even help you train to become a surgeon. See Drew Guarini, *9 Ways Video Games Can Actually Be Good For You*, HUFFINGTON POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/video-games-good-for-us_n_4164723.html.

⁸³ *The Elder Scrolls*, *supra* note 14.

⁸⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

⁸⁵ *Campbell*, 510 U.S. at 584.

⁸⁶ *The Angry Joe Show*, *supra* note 4.

⁸⁷ *Youtube Copyright Disaster*, *supra* note 1.

advertisement. The other forty-five percent goes to the user, thus generating a win-win situation in which content creation can be encouraged for uploaders. YouTube makes revenue to support its platform and so viewers can enjoy YouTube free of charge.⁸⁸ Since Angry Joe makes advertising revenue from his videos,⁸⁹ his game reviews are clearly commercial for the purposes of a fair use analysis because he derives income from the videos listed on his channel.

2. The Nature of the Copyrighted Work

Much like the work of L. Ron Hubbard in *New Era Publications*, the underlying content that Angry Joe relies upon is work that has already been published. Critics will likely argue that the underlying work is one of pure fiction and is therefore a work of creativity, but there is a redeeming factor in Angry Joe's borrowing: the new content created by Angry Joe attempts to "communicat[e] information pertinent to consumer choices"⁹⁰ in the context of the video game market. The dissemination of criticism and consumer information presumably favors Angry Joe despite the fictitious nature of the original work.⁹¹ Indeed, by its own terms, §107 carves out an explicit protection for works of criticism, thus highlighting their extreme importance in American society.⁹² In the context of video game reviews, the dichotomy between gameplay and criticism is ever present. Thus, this prong favors Angry Joe.

3. The Amount and Substantiality of the Portion Used

The third prong of the fair use analysis asks "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 the copying."⁹³ Quantity, as well as quality and importance of the material used is factored into the analysis, as well as if they "go to the 'heart'" of the original.⁹⁴

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Consumers Union of U.S., Inc., v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983).

⁹¹ Moreover, the Second Circuit also articulated that there is no bright-line test for this factor, lest it undermine the flexible nature of copyright law, leading to a further inference in favor of Angry Joe. *See New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990).

⁹² 17 U.S.C. § 107 (2012).

⁹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

⁹⁴ *Id.* at 587–88.

As to quantity, the Angry Joe review for the video game *The Elder Scrolls V: Skyrim* is just over nineteen minutes in length.⁹⁵ Angry Joe attests to playing over sixty hours in the first few weeks of its release alone.⁹⁶ Thus, the review is substantially less than the quantity of the hours contained within the original work. In *New Era Publishing*, the Second Circuit noted that the L. Ron Hubbard biography that was ultimately protected by fair use used as much as “8% or more of 11 [copyrighted] works.”⁹⁷ Assuming the video game contains only sixty hours of content (which, in actuality, *The Elder Scrolls V: Skyrim* contains far more because the content is presented in a non-linear fashion and has a vast amount of secondary content that does not need to be completed in order to finish the storyline), Angry Joe’s review borrows *less than one percent* of its material from the original content.

As to quality, the Angry Joe review superimposes an environment reminiscent of a weather channel report: Angry Joe stands at the foreground in the corner of a room, with gameplay rolling in the background on a digital screen. On this digital screen is Angry Joe, either performing some kind of parody over the top of gameplay footage or superimposing words onto the screen in order to make his point. Thus, if viewers watched his review in order to experience the true quality of the game, they would be hard-pressed to find it there.

Consider the quintessential “let’s play” videos that are also popular on YouTube.⁹⁸ A “let’s play” video is a recording of an uploader playing a particular video game, often with insightful commentary on gameplay mechanics or the storyline.⁹⁹ The viewer merely watches the gamer on YouTube and has no opportunity to make any gameplay decisions like walking down a certain corridor or choosing a witty dialogue option when conversing with a non-player character. While certainly useful to understand how a certain game looks in action, it is no substitute for actually *playing* the game: decisions and all.

⁹⁵ It should be noted that this is substantially longer than other video game review outlets. Most reviews are not longer than five minutes. *See generally* GAMESPOT, <http://www.gamespot.com> (last visited Feb. 28, 2015).

⁹⁶ At last check, the author himself has over one hundred hours logged in play time.

⁹⁷ *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990).

⁹⁸ A search for “let’s play” reveals approximately 22,600,000 results. YOUTUBE, https://www.youtube.com/results?search_query=let%27s+play (last visited Feb. 28, 2015).

⁹⁹ Patrick White, *Fan Fiction More Creative than Most People Think*, THE COLLEGIAN (Apr. 18, 2013), <http://www.kstatecollegian.com/2013/04/18/fan-fiction-more-creative-than-most-people-think/>.

At baseline, the “let’s play” videos are an exact duplication of substantial portions of gameplay. Sometimes, entire storylines from a game are copied over a series of videos. Although the purpose of this Issue Brief is not to look at “let’s play” videos in depth, there is a fundamental disconnect between *watching* a video of a game, and actually *playing* the game itself.

Gameplay is dynamic. The player can interact with the virtual environment and make the experience different each and every time. Watching a “let’s play” video is static. The uploader has already made his choices in terms of experiencing the game, and, more importantly, the viewer is not actually *playing* the game: no controller, no choices. Thus, watching something as simple as a “let’s play” video, which is vastly less innovative than an Angry Joe review because it is a wholesale recording of entire portions of a game, cannot possibly go to the heart of the original game itself. The game must be *played* in order to experience that aspect. This is not possible when simply watching a YouTube video.

Finally, the gameplay selected by Angry Joe illustrates and supports his reviews. These moments demonstrate something that is particularly great or laughably cringe-inducing about the particular video game. Analogous to the quotations taken from the multiple works in *New Era Publications*, these selected moments are *far* from the heart of the work. A video game is not the sum of its selected flawed moments or triumphs. It is a mixture of these moments in addition to the countless hours of substance that connect them during gameplay, which are not being shown in the review. Hence, this factor favors Angry Joe too.

4. *The Effect on the Value of the Copyrighted Work*

The final prong of the fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰⁰ The Supreme Court has articulated that the purpose of this prong is to evaluate the effect of market substitution for the markets the “creators of original works would in general develop or license others to develop.”¹⁰¹

Like how Google’s service enhanced the market for books in *Google Books*,¹⁰² video game reviews equally enhance the market for video games generally via an increase of visibility.¹⁰³ Substitution of the original work simply cannot be accomplished because of the stark dichotomy

¹⁰⁰ 17 U.S.C. § 107 (2012).

¹⁰¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994).

¹⁰² *See* *Authors Guild, Inc.*, 954 F. Supp. 2d 293 (2013).

¹⁰³ Consistent with the theme of this Issue Brief, a search for “*Skyrim* review” generates approximately 712,000 results. YOUTUBE, https://www.youtube.com/results?search_query=skyrim+review (last visited Feb. 28, 2015).

between playing a game and watching a game.¹⁰⁴ Moreover, courts are typically sensitive to infringement that replaces the original work and obviates the need to purchase it altogether, which necessarily damages the bottom-line of the copyright holder.¹⁰⁵ But this is not what is occurring with Angry Joe's reviews, or any review.

"I've put more than sixty hours of gameplay into this thing. I've been playing it non-stop since its release And I'm here to tell you that we are in the midst of a championship franchise dynasty that keeps on giving."¹⁰⁶ Market substitution cannot be accomplished with criticism, which is at the core of every video game review. Criticism, negative or positive, facilitates visibility for the given market, especially in the digital age. It is so important in American jurisprudence and worthy of protection that is at the very core of §107 in plain language.¹⁰⁷ If one subscribes to the old adage, "[n]o publicity is bad publicity," then no review, negative or positive, can impair the marketability of a video game. Indeed, cult classic games that have received overwhelmingly negative reviews in the past often generate significant amounts of sales due to their increased visibility; presumably because gamers want to see how truly bad the particular game really is.¹⁰⁸

Thus, each and every factor of the fair use analysis favors protection for Angry Joe's reviews under §107. But, in its current iteration, Content ID cannot identify even clear cases of fair use like Angry Joe's reviews, despite their incredibly transformative and critical nature. Making matters worse, Angry Joe will continue to have his revenues frozen without being afforded any back-pay so long as Content ID continues in its current form. Content ID not only ignores unmistakable cases of fair use like Angry Joe's reviews, but also unnecessarily implicates other areas of copyright law into the analysis as a result of its imprecision.

¹⁰⁴ See discussion *supra* p. 17.

¹⁰⁵ See, e.g., *Campbell*, 510 U.S. at 591 ("[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur." (internal quotation marks and citation removed)).

¹⁰⁶ *The Elder Scrolls*, *supra* note 14.

¹⁰⁷ 17 U.S.C. § 107 (2012).

¹⁰⁸ For example, a game known as *Postal 2* is widely known as the worst-reviewed game of all time, but the game still maintains a cult following because it is so comically terrible: "Love 'em or hate 'em, *Postal* . . . [is] hard to forget and difficult to ignore . . . [it] comprise[s] a phenomenon within the game industry and a reminder that it's still possible to survive and succeed without following the conventional rules for products and marketing." *POSTAL Franchise – Awards & Honors*, *RUNNING WITH SCISSORS*, <http://www.runningwithscissors.com/main/?page=3> (last visited Feb. 28, 2015).

B. The Unforgiving Omnipresent

The chief problem with Content ID is not in its automated scan function, able to duplicate the work of tens of thousands of employees, but in its incredibly broad scope that is unforgiving in its application. Angry Joe's frustrations are a prime example of the apparent problems created by Content ID's over breadth: "I'm getting flagged for music that is playing from the game in the background which is a part of the game"¹⁰⁹ Content ID eliminates the fair use analysis and ineffectively presumes to solve a problem by creating one with its imprecision and indiscriminate flagging.

Even assuming that publishers, developers, and music companies could continue to impose revenue freezing upon videos protected by fair use on YouTube, this does nothing to further the development of their market share in video games. Many prominent YouTube reviewers like Angry Joe operate their own separate websites where the videos are still available to viewers, regardless of their status on YouTube.¹¹⁰ Assuming YouTube does nothing to change the status quo, viewers looking for quality video game reviews may migrate to different websites that are independent of YouTube.

But there is an inherent incentive problem that will make any reversal of policy at YouTube difficult to effectuate. Simply put, YouTube is unlikely to revert back to a case-by-case copyright infringement system because it costs too much. Even for Google Inc., one hundred hours of video, every minute, is simply too much to process. Thus, the only solution is to reform Content ID to preserve YouTube's current user audience.

For respectable game developers, Content ID ultimately hurts their profit margins because it reduces the visibility of their video games if reviewers are incentivized to stop reviewing their games. Major content uploaders are equally damaged. While it is true that Content ID makes copyright infringement claims easier to detect and file, Content ID overburdens a YouTube channel with vast amounts of illegitimate claims. Time that *was* spent posting new content to the website will *now* be spent weeding through countless frivolous copyright infringement claims for videos likely protected by fair use, or videos that are licensed or endorsed by the developers themselves. In addition, the possibility of expeditious resolution is dismal: remember that only three appeals per channel at a time are allowed. This is simply unmanageable for a channel with hundreds, or even thousands, of videos to upkeep.

¹⁰⁹ *Youtube Copyright Disaster*, *supra* note 1.

¹¹⁰ *E.g.*, ANGRYJOESHOW <http://angryjoeshow.com/> (last visited Feb. 28, 2015).

Individual uploaders like Angry Joe are adversely affected by Content ID too. If game developers and record labels become aggressively litigious at the end of the appeals process, uploaders will be forced to forfeit all future revenue to owners because uploaders are in a lesser bargaining position, whether fair use can be applied or not. Uploaders like Angry Joe are less likely to be able to afford adequate legal representation, or any representation for that matter, to litigate a single fair use claim on a video of which there can be many more to resolve.¹¹¹ The costs of litigation vastly outweigh the revenues generated from a YouTube video. Eventually, users like Angry Joe will be incentivized to stop making new content entirely if YouTube does not reform their approach, leading to substantially depressed profits for YouTube. This is opposed to the spirit of copyright law, which encourages creativity.¹¹²

C. Solutions

1. Encouraging Reform of YouTube's Copyright Infringement Process

How could YouTube encourage its viewers to stay? YouTube currently enjoys a relative monopoly in the video-sharing sphere.¹¹³ Other sites like Dailymotion or Vimeo barely come close to matching the sheer volume of users that YouTube commands daily.¹¹⁴ So, there is still hope for YouTube to realize their mistake and reform their approach accordingly before content creators begin the virtual Exodus.

Starting at the most conservative option, YouTube could impose an institutionalized *proportional* licensing scheme between uploaders and the original copyright owners. Assuming fair use does not enter the analysis (although it should), uploaders like Angry Joe could share a proportion of their revenue equal to that of the copyrighted material that they are using in their monetized reviews. However, this ultimately creates a market for licensing works that do not have to be legally licensed, which encourages

¹¹¹ Lawrence Lessig has taken up the mantle of defending the doctrine of fair use in cyberspace. The Harvard Law professor included a copyrighted song on his video "Open" which was subsequently identified by Content ID. The infringement action was maintained by the copyright owner. Lessig sued the copyright owner and settled out of court soon after. The copyright owner has vowed to "ensure that mistakes like this will not happen again" by supporting the fair use of their copyrighted works. See Sam Gutelle, *Lawrence Lessig Settles ContentID Dispute Out of Court*, TUBEFILTER (Feb. 28, 2014), <http://www.tubefilter.com/2014/02/28/lawrence-lessig-contentid-lawsuit-settle/>.

¹¹² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

¹¹³ *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Feb. 28, 2015).

¹¹⁴ Dailymotion boasts over 200 million users accessing their video players each month. See *Stats & Figures*, DAILYMOTION, http://press.dailymotion.com/us/?page_id=375 (last visited Feb. 28, 2015).

further abuse of copyright law. This option is akin to patching a scratch with a cast.

Another option is for YouTube to revert back to its pre-December 2013 model. Allowing uploaders like Angry Joe to enjoy the safe harbor of their affiliate company, and thereby enjoy relative immunity from Content ID, would certainly seem to solve some uploaders' problems. By virtue of their affiliation, uploaders would be trusted to not infringe upon the copyright of others lest their affiliate "parent" suffer legal consequences. Given the recent "reform" of this old approach, YouTube is not likely to reverse its policy anytime soon.¹¹⁵

The equitable (but not necessarily best) option is to increase in the number of allowable strikes on user channels, as well as the number of permitted appeals against copyright infringement claims that can be issued at once. Uploaders would be on equal footing with copyright holders on YouTube.¹¹⁶ But this option would continue to impact the bottom-line of game reviewers like Angry Joe who are making fair use of the copyrighted material, and so, is less than ideal because it ignores the underlying problem.

As already mentioned, YouTube could allow larger channels to file more appeals rather than the current limit of three. Extending this option to larger channels incentivizes the creation of new, original content by bigger content creators without overburdening the creator with an increase in potentially frivolous copyright infringement claims filed by Content ID. YouTube should carefully select a conservative figure for appeals limits, lest too much power be given to the uploader at the expense of copyright owners: the key is to balance the scales, not to tip them in the other direction.

Ultimately, the best option is to incorporate an escrow account for each copyright infringement dispute because it is the most equitable. When infringement is identified by Content ID, the revenue that the offending video is generating could go into an escrow account that accumulates advertising revenue until the matter is resolved, instead of being frozen throughout the process. Once resolved, YouTube could award the revenue

¹¹⁵ There is a resounding lack of data on *why* YouTube changed its policies regarding affiliated channels. Though this is mere conjecture, the author posits that affiliated uploaders were perhaps infringing a substantial number of copyrights, thus subjecting them to YouTube's ire.

¹¹⁶ If not uniformly, it at least makes sense for large uploaders like Gamespot and IGN. It does not make rational sense to allow only three appeals to be filed at one time when a channel can have thousands of videos. It makes business hard to conduct, and it makes large companies want to move away from YouTube as a platform for their videos.

in the escrow account to the rightful copyright owner, hopefully after a determination of fair use is made. YouTube could continue making its share of profits throughout the process, so long as the video remains live on the site. This is likely the lowest-cost option for every party involved.

2. Automating Fair Use with Content ID

The problem with Content ID is not that it fails to detect copyright infringement, but that it detects legitimate uses of copyright too. So in order to shift the presumption of fair use to its rightful neutral position, one must ask the question: can YouTube automate a fair use analysis?

Given the statistics on the processing power of Content ID,¹¹⁷ it is unlikely that YouTube will revert back to a manual copyright infringement system. It is equally unlikely that YouTube will hire an armada of tens of thousands of intellectual property lawyers to analyze fair use problems. Nonetheless, it is also unlikely that fair use will be able to be automated under Content ID (or any algorithm for that matter).

The purpose and character of the use can only be partially determined using automation. Allowing Content ID to determine commerciality on the basis of monetization solves one half of the first prong of the analysis. But how does a bot evaluate a work's transformative value based upon an algorithm? If YouTube wanted to utilize a bright-line test, it could allow Content ID to calculate the number of novel nuances introduced to the infringing content (superimposition of text, voice input, alteration of picture), identify the type of nuance, and make a preliminary determination of transformative use.

The nature of the copyrighted use is equally problematic. A computer program likely cannot determine if a use is for purposes of criticism. In its current form, Content ID cannot tell the difference between wholesale piracy and an in-person interview.¹¹⁸ As Angry Joe so complained: "My Tomb Raider interview with the Tomb Raider people has been claimed [on behalf of] Tomb Raider [by Content ID]."¹¹⁹ YouTube could allow Content ID to look at the title of the video and any supporting descriptions to determine what the uploader has characterized the video as, but this is unwieldy and easily circumvented by pirates uploading copyrighted content in bad faith.

Assessment of the amount and substantiality of the work used can certainly be automated. YouTube can likely introduce basic calculations to Content ID in order for it to determine percentage-based-infringement.

¹¹⁷ See YouTube Help, *supra* note 6 ("It's like 36,000 people staring, without blinking, at 36,000 monitors, all day, every day.").

¹¹⁸ *Youtube Copyright Disaster*, *supra* note 1.

¹¹⁹ *Id.*

Taking the above discussion of Angry Joe's *The Elder Scrolls V: Skyrim* review as an example, Content ID would be able to determine that the review is infringing less than one percent of the original piece. The copyright owner could certify the length of the actual video game as part of their copyright ownership registration to YouTube's database. Once both sets of data are collected by Content ID, it could cross-reference this with a judicially-created percentage, and determine eligibility of this prong of the analysis accordingly, or it could establish a presumption for its own purposes.

The effect on the value of the copyrighted work is another problematic element that most likely cannot be automated. Content ID would simply have to defer to certifications made by developers and publishers that allow derivative use of their work. Although this is not an independent determination, it is a better starting point than the current model of ignoring clear-cut cases of fair use altogether.

Content ID most likely cannot be automated given the current technology available to YouTube. But since there is relatively little in the way of defense for uploaders like Angry Joe, in stark contrast to the current Content ID model, an inelegant solution may be better than no solution at all. If the doctrine of fair use is to survive in cyberspace, then it needs a defense of its own on YouTube.

CONCLUSION

In theory, Content ID is a novel technology: it allows YouTube to simultaneously and efficiently protect a copyright holder against the unknowing theft of their content, while allowing users to continually create new content. In practice, however, it is a poor proxy for a case-by-case analysis of alleged copyright infringement. Content ID is ideal for a situation where, for example, a user uploads a full movie or song, without alteration, to the website: a blatant infringement of copyright. But infringement is not always this simple on YouTube. With Content ID in effect, YouTube is using a hammer where a scalpel is required. By ignoring fair use altogether in its faulty application, Content ID effectively shifts the neutral presumption of the fair use doctrine *against* the uploader as a content-creator and stifles the creation of any new works. Thus, Content ID ultimately undermines the doctrine of fair use, significantly impinging the encouragement of creativity that is a central tenet of copyright law itself.