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# You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms

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# You(Tube), Me, and Content ID

## PAVING THE WAY FOR COMPULSORY SYNCHRONIZATION LICENSING ON USER- GENERATED CONTENT PLATFORMS

### INTRODUCTION

Ever wonder about how the law regulates your cousin's wedding video posted on her YouTube account? Most consumers do not ponder questions such as "Who owns the content in my video?" or "What is a fair use?" or "Did I obtain the proper permission to use Bruno Mars's latest single as the backing track to my video?" These are important questions of law that are answered each day on YouTube<sup>1</sup> by a system called Content ID.<sup>2</sup> Content ID identifies uses of audio and visual works uploaded to YouTube<sup>3</sup> and allows rights holders to collect advertising revenue on that content through the YouTube Partner Program.<sup>4</sup> It is easy to see why Content ID was implemented—300 hours of video are uploaded to YouTube per minute.<sup>5</sup> Over six billion hours of video are watched each month on YouTube (almost an hour for every person on earth),<sup>6</sup> and it is unquestionably the most popular streaming video site on the Internet.<sup>7</sup> Because of the staggering amount of content

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<sup>1</sup> See *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals> [<http://perma.cc/BF4Y-PW6E>] (last visited June 6, 2016).

<sup>2</sup> *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> [<http://perma.cc/QF35-F64J>] (last visited June 6, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *YouTube Partner Program Overview*, YOUTUBE, <https://support.google.com/youtube/answer/72851?hl=en> [<http://perma.cc/U42N-3XH5>] (last visited June 6, 2016).

<sup>5</sup> Craig Smith, *By the Numbers: 120+ Amazing YouTube Statistics*, DMR (Sept. 26, 2014), <http://expandedramblings.com/index.php/youtube-statistics#.VCq6TSldXA4> [<http://perma.cc/R84K-R72Z>].

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

<sup>7</sup> *Top 15 Most Popular Video Websites, December 2015*, EBIZMBA, <http://www.ebizmba.com/articles/video-websites> [<http://perma.cc/5HZZ-57DC>] (last visited June 6, 2016). According to sproutsocial, a management and engagement platform for social business, "YouTube is without a doubt the highest-trafficked web-based video publishing platform." Kevin King, *Vimeo Vs. YouTube: Which Is Best for Business?*, SPROUTSOCIAL

available on YouTube, an automated system such as Content ID is necessary to help manage content owners' rights.

Music rights holders in particular have benefitted greatly from YouTube's monetization of content through advertising.<sup>8</sup> YouTube is the world's largest streaming music service.<sup>9</sup> To date, over \$1 billion has been paid to owners of sound recordings and musical compositions.<sup>10</sup> All major record companies and music publishers—from Universal, to Sony, to Warner—are YouTube partners and utilize the Content ID system to generate advertising revenue.<sup>11</sup> This revenue pool has increased over the years and will continue to expand as YouTube grows, providing a much-needed boon to a sinking music industry.<sup>12</sup>

This revenue pool is also unique because it is largely derived from the *unlicensed* use of sound recordings and music compositions.<sup>13</sup> To pair a copyrighted recording or song with a

(Sept. 15, 2014), <http://sproutsocial.com/insights/youtube-vs-vimeo-business/> [<http://perma.cc/8DXE-U8X6>].

<sup>8</sup> See Steve Knopper, *YouTube's Billion-Dollar Payout Provides New Revenue for Musicians*, ROLLING STONE (Feb. 5, 2014), <http://www.rollingstone.com/music/news/youtubes-billion-dollar-payout-provide-new-revenue-for-musicians-20140205> [<http://perma.cc/EB8W-JGKK>].

<sup>9</sup> See Stuart Dredge, *YouTube Reveals \$1bn Music Payouts, but Some Labels Still Unhappy*, THEGUARDIAN (Feb. 3, 2014, 5:05 PM), <http://www.theguardian.com/technology/2014/feb/03/youtube-reveals-1bn-music-payouts-but-some-labels-still-unhappy> [<http://perma.cc/M7BP-2ZCP>] (“A recent piece of research by VideoInk and video analytics firm Tubular Labs claimed that music videos account for 38.4% of all views on YouTube, reinforcing the Google subsidiary's position as the world's biggest streaming music service.”); *The YouTube Musiconomy: Just How Big Is It? (Infographic)*, VIDEOINK (Dec. 17, 2013), [http://www.thevideoink.com/features/special-issue/the-youtube-musiconomy-just-how-big-is-it-infographic/#.VCq\\_CyldXA7](http://www.thevideoink.com/features/special-issue/the-youtube-musiconomy-just-how-big-is-it-infographic/#.VCq_CyldXA7) [<http://perma.cc/G574-ERSG>] (“Five of the top 10 trending videos on YouTube for 2013 were music videos . . .”).

<sup>10</sup> *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> [<http://perma.cc/S5FX-ZTEM>] (last visited June 6, 2016); Knopper, *supra* note 8.

<sup>11</sup> See Michelle Jaworski, *YouTube's Content ID Now Flagging Music in the Public Domain*, DAILY DOT (Dec. 26, 2013), <http://www.dailydot.com/business/youtube-content-id-public-domain-silent-night/> [<http://perma.cc/7KE2-DNQ3>] (mentioning that a user video was flagged by BMG, Warner/Chappell, and Universal Music Publishing Group, and that these companies receive all ad revenue from flagged videos).

<sup>12</sup> In fact, in 2014, streaming royalties made up for the current decline in digital downloads. Hannah Karp, *Spotify Royalty Payments Outpace iTunes in Some Markets*, WALL ST. J. BLOG (Nov. 4, 2014, 11:01 PM), <http://blogs.wsj.com/digits/2014/11/04/spotify-royalty-payments-outpace-itunes-in-some-markets/> [<http://perma.cc/5UUU-7EE4>]; cf. Paul Resnikoff, *Streaming Isn't Saving the Music Industry After All, Data Shows . . .*, DIGITAL MUSIC NEWS (June 26, 2014), <http://www.digitalmusicnews.com/permalink/2014/06/26/streaming-isnt-saving-music-industry-new-data-shows> [<http://perma.cc/TE2L-CLAM>] (showing that streaming revenues for ad-supported, on-demand streaming are increasing at a healthy pace, reflecting one of the few areas of growth in the music industry).

<sup>13</sup> See generally Bryan E. Arsham, *Monetizing Infringement: A New Legal Regime for Hosts of User-Generated Content*, 101 GEO. L.J. 775 (2013) (describing how monetizing infringing/unlicensed content is a new paradigm for copyright owners).

visual image, users must obtain permission from the copyright owner of the underlying musical composition and/or the sound recording (depending upon whether one or both are being used) by securing a synchronization, “synch,” or “sync” license.<sup>14</sup> One secures these rights from a record label (usually the owner of the sound recording) and/or a music publisher<sup>15</sup> (usually the owner of the underlying musical composition).<sup>16</sup> This process is cumbersome,<sup>17</sup> confusing,<sup>18</sup> and oftentimes expensive.<sup>19</sup> Thus, most users upload videos without obtaining licenses, thereby committing infringement.<sup>20</sup> Rights holders, however, derive

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<sup>14</sup> *Types of Copyright*, BMI, [http://www.bmi.com/licensing/entry/types\\_of\\_copyrights](http://www.bmi.com/licensing/entry/types_of_copyrights) [<http://perma.cc/K2CA-HPQG>] (last visited June 6, 2016) (“Music Publishers issue licenses . . . granting the right to *synchronize the musical composition in timed relation with audio-visual* images on film or videotape.” (emphasis added)); *Common Music Licensing Terms*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> [<http://perma.cc/5AYX-W2Y5>] (last visited June 6, 2016); *License Your Music*, CD BABY, <http://members.cdbaby.com/license-your-music.aspx> [<http://perma.cc/VQC2-49J2>] (last visited June 6, 2016).

<sup>15</sup> *How to Acquire Music for Films*, ASCAP, <http://www.ascap.com/music-career/articles-advice/film-tv/How-To-Acquire-Music-For-Films.aspx> [<http://perma.cc/PTT9-9F6A>] (last visited June 6, 2016); see BMI, *supra* note 14.

<sup>16</sup> Generally, sync rights only refer to securing use of the *musical composition* from the music publishers, while master use rights are used to refer to securing use of the *master recording* from the record label, and thus, each of these rights must be obtained separately. See *Obtain a SESAC License*, SESAC, <http://www.sesac.com/Licensing/obtainlicense.aspx> [<http://perma.cc/3AYJ-ULTM>] (last visited June 6, 2016); Heather McDonald, *Master License*, ABOUT CAREERS, <http://musicians.about.com/od/ip/g/masterlicense.htm> [<http://perma.cc/7MJG-SAYX>] (last visited June 6, 2016); Heather McDonald, *Sync License*, ABOUT CAREERS, <http://musicians.about.com/od/qz/g/synclicensing.htm> [<http://perma.cc/2ZE6-47ZN>] (last visited June 6, 2016); ASCAP, *supra* note 15. For the sake of simplicity, however, this note may use the term “sync” rights throughout to mean both securing the right to use a musical composition and the right to use a sound recording.

<sup>17</sup> See Christiane Cargill Kinney, *Posting Cover Songs on YouTube: Music Licensing Law Explained*, DIY MUSICIAN BLOG (Mar. 28, 2012), <http://diymusician.cdbaby.com/youtube/on-posting-cover-songs-on-youtube-music-licensing-law-explained/> [<http://perma.cc/N8SQ-JTJ3>] (describing the complicated web of rights under the copyright act, as well as the variety of licenses that must be obtained to properly license a cover song for a YouTube video). See generally Solveig Whittle, *How to License a Cover Song for a Music Video*, HYPEBOT (Feb. 27, 2013), <http://www.hypebot.com/hypebot/2013/02/how-to-license-a-cover-song-for-a-music-video.html> [<http://perma.cc/6ETB-TEMK>] (describing the multistep process of obtaining a mechanical license and a sync license).

<sup>18</sup> Andy Baio, *Criminal Creativity: Untangling Cover Song Licensing on YouTube*, WIRED (May 2, 2012, 3:24 PM), <http://www.wired.com/2012/05/opinion-baio-criminal-creativity/> [<http://perma.cc/E8N7-9MNY>] (mentioning that there is much conflicting information on the Internet as to how a song is licensed for a YouTube cover video); see Kinney, *supra* note 17 (“[T]his topic touches on an extremely common misconception that I frequently run across . . .”).

<sup>19</sup> *Money for Your Music: The Cold Hard Facts About Music Licensing*, MUSIC BIZ ACADEMY, [http://www.musicbizacademy.com/articles/gman\\_money.htm](http://www.musicbizacademy.com/articles/gman_money.htm) [<http://perma.cc/5KWV-9NNL>] (last updated Apr. 2010) (one experienced music supervisor has synched thousands of songs over the years and has charged anywhere from \$1 to \$250,000 per use).

<sup>20</sup> See Kinney, *supra* note 17 (“So, you didn’t get your synch license. What happens now? Well, *we’ve all seen tons of examples that suggest that doing cover songs is largely tolerated* on YouTube.” (emphasis added)).

online streaming revenue chiefly from these unlicensed uses by “claiming”<sup>21</sup> and “monetizing” these videos.<sup>22</sup> Every day, rights holders ratify these unlicensed uses by allowing otherwise infringing content to remain on YouTube.<sup>23</sup> In other words, users can post any music they want without first obtaining a license, so long as the content owner opts in to Content ID monetization (and most have).<sup>24</sup> In practical effect, Content ID has created a de facto compulsory sync licensing regime.<sup>25</sup>

For illustrative purposes, consider the Bruno Mars wedding video example above. Your cousin uploads the video with a Bruno Mars recording as the backing track without obtaining permission from the record label (to use the sound recording) or music publisher (to use the underlying composition). Your cousin then receives a small copyright notice, and a week later, ads appear on the video. This means that the publisher(s) and label(s) that own the song and sound recording claimed and monetized the video with the help of Content ID, and your cousin gets to keep her video up as if she had secured a license in the first place. In essence, she is granted a compulsory sync license.

This note proposes that Congress should amend the Copyright Act to create a compulsory sync license and require the use of a Content ID–like system across user-generated content

<sup>21</sup> *What Is a Content ID Claim?*, YOUTUBE, <https://support.google.com/youtube/answer/6013276?hl=en> [<http://perma.cc/8UNK-V7KX>] (last visited June 6, 2016).

<sup>22</sup> *See Video Monetization Criteria*, YOUTUBE, <https://support.google.com/youtube/answer/97527?hl=en> [<http://perma.cc/W2TA-GBFN>] (last visited June 6, 2016). Monetizing one’s video means that “YouTube may display ads served via the AdSense auction as well as ads sold on a reservation basis via DoubleClick (DCLK) and other YouTube-sold sources.” *How Ads Are Chosen*, YOUTUBE, <https://support.google.com/youtube/answer/94523?hl=en> [<http://perma.cc/QMH9-D3QG>] (last visited June 6, 2016).

<sup>23</sup> Interview with Brandon Martinez, CEO and Co-Founder, INDmusic, in New York, New York (Oct. 31, 2014) (on file with author). INDmusic is a digital video startup that operates one of the most active and successful multichannel networks for music on YouTube. They first gained notoriety when they were responsible for monetizing all “Harlem Shake” content on YouTube—one of the fiercest viral Internet sensations of this decade. Andrew Hampp, *‘Harlem Shake’: The Making and Monetizing of the Latest YouTube Dance Craze*, BILLBOARDBIZ (Feb. 14, 2013), <http://www.billboard.com/biz/articles/news/branding/1539260/harlem-shake-the-making-and-monetizing-of-the-latest-youtube> [<http://perma.cc/U8K5-MS2K>].

<sup>24</sup> *See infra* note 198 and accompanying text.

<sup>25</sup> A compulsory license

provides a third party with the right to use copyrighted works without the copyright owner’s permission so long as an established royalty fee is paid for such use. Also known as statutory licensing, compulsory licensing is primarily utilized in situations where high transaction costs prevent beneficial negotiations and agreements from taking place.

(UGC) platforms<sup>26</sup> to issue these otherwise de facto compulsory sync licenses. This would improve users' experiences, reduce market transaction costs, grant higher royalty splits to artists on YouTube, increase First Amendment protections for web-based content, and improve overall access to content. Additionally, it would enable copyright owners to better manage their content, since Content ID–like systems would be mandated across the web. It would also represent a natural evolution of copyright law by responding to advancements in content management technology, distribution, and consumption. Content ID has revolutionized the licensing, management, aggregation, and organization of copyrighted works and presents an excellent model for reforming the copyright licensing system.<sup>27</sup> If the technology is available, and a de facto compulsory licensing regime already exists by virtue of Content ID, why not extrapolate this model across the Internet to facilitate better licensing practices?

Part I of this note describes the YouTube Content ID system and its background, structure, inner workings, and flaws. For purposes of this note, Content ID serves as a case study that exemplifies the issues that arise on UGC platforms generally. Part II discusses the genesis of compulsory licensing in the United States, especially under section 115 of the Copyright Act,<sup>28</sup> and describes its interaction with UGC platforms. Part III explains why amending the Copyright Act to create a compulsory sync license for UGC platforms is the natural evolution of compulsory licensing and is necessary to establish a functional ecosystem of copyright licensing on the Internet. It also describes how a compulsory regime would solve various issues that exist under the current framework, including by reducing Content ID errors, improving user experience, and reducing transaction costs. Part IV explains some of the issues inherent in the implementation

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<sup>26</sup> For the sake of clarity, this scheme would only apply to UGC platforms. User-generated content is “any digital content that is produced and shared by end users of an online service or website. This includes any content that is shared or produced by users that are members or subscribers of the service, but it is not produced by the website or service itself.” UGC includes anything from status updates/tweets, to blogs, to images/videos. *User-Generated Content (UGC)*, TECHOPEDIA, <https://www.techopedia.com/definition/3138/user-generated-content-ugc> [<http://perma.cc/8NZ4-LHM9>] (last visited June 6, 2016). Thus, it follows that UGC platforms, such as Facebook, Twitter, and YouTube, are websites or applications that thrive mainly on content uploaded by users. *See id.*

<sup>27</sup> For a fantastic discussion about central copyright clearinghouse licensing generally, see WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004), <http://cyber.law.harvard.edu/people/ffisher/PTKChapter6.pdf> [<http://perma.cc/WG98-T4XX>].

<sup>28</sup> 17 U.S.C. § 115 (2012).

of the proposed compulsory licensing system. This note concludes by highlighting that the benefits of a compulsory system far outweigh any costs and calling on Congress to take action and amend the Copyright Act to reflect the otherwise de facto compulsory synchronization license.

## I. THE YOUTUBE CONTENT ID SYSTEM

### A. Overview

YouTube's Content ID is the system that allows copyright holders to manage their rights on YouTube.<sup>29</sup> First, vetted content owners<sup>30</sup> sign up with YouTube and upload large catalogues of their copyrighted content, most commonly audio and visual files.<sup>31</sup> These audio and visual files are known as "reference files."<sup>32</sup> When users upload videos to YouTube, the videos are scanned against the reference files to ascertain whether there is a match.<sup>33</sup> If either the audio or visual fingerprint of the reference file matches the uploaded content, Content ID claims the user-uploaded video on behalf of the rights holder, and the claim appears in the rights holder's Content ID account dashboard.<sup>34</sup>

Upon viewing the claim, the content owner usually has the option to "block, monetize, or track" the video.<sup>35</sup> These options are known as match policies, and if the content holder has already set

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<sup>29</sup> *How Content ID Works*, *supra* note 2. Content ID is unique to YouTube, although there are other comparable systems that have been launched on other UGC sites. See Mike Masnick, *Vimeo Pressured into Setting Up Its Own Content ID*, TECHDIRT (May 22, 2014, 12:59 PM), <https://www.techdirt.com/articles/20140522/06193627322/vimeo-pressured-into-setting-up-its-own-content-id.shtml> [<http://perma.cc/XY72-CY7E>]; Michael McWhertor, *Twitch Implements YouTube-Like System for Blocking Copyrighted Audio*, POLYGON (Aug. 6, 2014, 6:13 PM), <http://www.polygon.com/2014/8/6/5976565/twitch-music-content-id-dmca> [<http://perma.cc/E8EX-9ZEP>]. Vimeo and Twitch are just two examples of a UGC platform adopting this technology. Facebook and SoundCloud both have similar systems as well. Interview with Brandon Martinez, *supra* note 23.

<sup>30</sup> "Content owner," "rights holder," and "copyright owner" are terms used interchangeably throughout this note. They are one and the same for purposes of Content ID.

<sup>31</sup> Katherine Oyama, *Why the Digital Millennium Copyright Act Is Working Just Fine . . .*, DIGITAL MUSIC NEWS (Apr. 10, 2014), <http://www.digitalmusicnews.com/permalink/2014/04/10/dmcaworkingjustfine> [<http://perma.cc/JV7N-7KWW>]; Interview with Brandon Martinez, *supra* note 23.

<sup>32</sup> See *How Content ID Works*, *supra* note 2.

<sup>33</sup> *Id.*

<sup>34</sup> Carlos Pacheco, *YouTube Content ID Handbook—Google*, SLIDESHARE (Dec. 10, 2013), <http://www.slideshare.net/carospacheco74/you-tube-content-id-handbook> [<http://perma.cc/2UZ5-2T26>].

<sup>35</sup> Interview with Brandon Martinez, *supra* note 23.

a policy for a specific piece of content, these policies are applied automatically when a claim is generated.<sup>36</sup>

Performing a block on a video makes the video unavailable for viewing in the territories in which the content owner asserts his rights,<sup>37</sup> but the video remains viewable in other territories (unless a rights holder who implements a block asserts worldwide rights, which would then result in a “takedown”).<sup>38</sup> Blocking does not permanently delete the video from YouTube’s databases; it simply makes it unavailable for viewing.<sup>39</sup>

Monetizing means the video will play with advertisements, but only in the territories in which the content owner is asserting its rights.<sup>40</sup> When the video is selected for monetization, it becomes available to advertisers as inventory.<sup>41</sup> The inventory (i.e., each piece of content) is priced at a certain rate and is usually sold in an advertising auction.<sup>42</sup> The ads then appear in or around the content, and the advertiser usually pays YouTube based upon the number of impressions the piece of content generates.<sup>43</sup> The revenue is then split between the rights holder(s) and YouTube,<sup>44</sup> and the user usually does not receive any of the monies associated with the video.<sup>45</sup> If there is a dispute as to who owns the copyright of the claimed content, or if YouTube cannot identify all the copyright owners, YouTube will hold all advertising revenue in escrow until the dispute is resolved.<sup>46</sup> To be clear, monetization, just like blocking, only puts advertisements on the user’s video in territories in which the content owner is asserting its rights.<sup>47</sup>

Finally, tracking a video allows the video to remain viewable on YouTube, which only tracks viewership and other statistics and does not assign ads to the video.<sup>48</sup> Most content

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

<sup>37</sup> This is as opposed to the territories where the content owner *has* the rights.

<sup>38</sup> Pacheco, *supra* note 34.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* “Impressions” means the number of times an advertisement is shown. See *Impressions: Definition*, ADWORDS, <https://support.google.com/adwords/answer/6320?hl=en> [<http://perma.cc/2XCM-J7YW>] (last visited June 6, 2016). Ads do not appear every time the video is watched. Thus, “views” would be an inaccurate measure to determine payment. “Views” simply means the number of times a video is watched, regardless of whether an impression was made. See Nick Faber, *Advertising Glossary: Pageviews vs Impressions*, BLOGADS (Dec. 12, 2011), <http://web.blogads.com/blog/2011/12/12/advertising-glossary-pageviews-vs-impressions/#axzz3zD5ucRtj> [<http://perma.cc/R6GA-GHHW>].

<sup>44</sup> For a breakdown of the revenue allocation, see *infra* Section I.D.

<sup>45</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>46</sup> *Id.*

<sup>47</sup> Pacheco, *supra* note 34.

<sup>48</sup> *Id.*



owners prefer not to track and will instead take the proactive approach of either monetizing or blocking a piece of content, simply because tracking really does not benefit content owners.<sup>49</sup> If there is an infringing piece of content not being monetized, it should be blocked, if for no other reason than because it results in missed revenue opportunities by diverting engagement away from monetized content.<sup>50</sup>

Once a policy is applied, the *uploader* will receive a notification that the video has been claimed, and the uploader has to acknowledge whether they agree with the claim. If they do not, they may dispute the claim, in which case the claim is put on hold pending further review. The content owner has 30 days to manually review the claim.<sup>51</sup>

There is a fourth, typically nonautomated<sup>52</sup> option available to rights holders: performing a takedown<sup>53</sup> under the Digital

<sup>49</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>50</sup> *Id.*

<sup>51</sup> Pacheco, *supra* note 34; see *YouTube's Joke of a Fair-Use Appeal Process*, JWZ, <http://www.jwz.org/blog/2014/10/youtubes-joke-of-a-fair-use-appeal-process/> [http://perma.cc/RB7Z-W9GW] (last visited June 6, 2016).

<sup>52</sup> See Stephen McArthur, *How to Beat a YouTube ContentID Copyright Claim—What Every Gamer and MCN Should Know*, GAMASUTRA (June 24, 2014, 4:41 PM), [http://gamasutra.com/blogs/StephenMcArthur/20140624/219589/How\\_to\\_Beat\\_a\\_YouTube\\_ContentID\\_Copyright\\_Claim\\_What\\_every\\_Gamer\\_and\\_MCN\\_Should\\_Know.php](http://gamasutra.com/blogs/StephenMcArthur/20140624/219589/How_to_Beat_a_YouTube_ContentID_Copyright_Claim_What_every_Gamer_and_MCN_Should_Know.php) [http://perma.cc/2P8R-NEPM] (“[T]akedown notices cannot be automated.”). *But see* Mike Masnick, *EFF Argues That Automated Bogus DMCA Takedowns Violate the Law and Are Subject to Sanctions*, TECHDIRT (Mar. 8, 2012, 2:08 PM), <https://www.techdirt.com/articles/20120308/03505018034/eff-argues-that-automated-bogus-dmca-takedowns-violate-law-are-subject-to-sanctions.shtml> [http://perma.cc/4ZTD-3ZN8] (describing automatic takedowns as “pretty typical”). For purposes of this note, I will assume that takedowns are performed manually because companies wish to avoid liability for automatic and recklessly submitted takedown notices. See McArthur, *supra*; Masnick, *supra*. I will also assume most takedowns are performed manually in the wake of *Lenz v. Universal Music Corp.*, a recent Ninth Circuit decision holding that copyright owners must consider fair use before submitting a takedown notice. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016). More specifically, the court reiterated a prior holding that a copyright owner must form a “subjective good faith belief” that a use is unauthorized before submitting a takedown. *Id.* at 1153. Further, the court issued an amended opinion where

it removed nearly two pages of its original opinion, including its statement that “a copyright holder’s consideration of fair use need not be searching or intensive,” and dicta that “the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA’s requirements to somehow consider fair use.”

Vivian Cheng & Kristen McCallion, *Ninth Circuit Issues Amended Opinion in “Dancing Baby” DMCA Notice-and-Takedown Case*, JDSUPRA BUS. ADVISOR (Apr. 1, 2016), <http://www.jdsupra.com/legalnews/ninth-circuit-issues-amended-opinion-in-90660/> [http://perma.cc/FYP5-6CW6]. The court’s conscious decision to remove this language effectively extinguishes the viability of any automatic takedown system. It shows that the court is skeptical about the ability of computers to perform a good faith fair use analysis or complete a searching/intensive inquiry.

<sup>53</sup> Pacheco, *supra* note 34.

Millennium Copyright Act (DMCA).<sup>54</sup> The DMCA provides a “notice-and-takedown” process by which rights holders can request removal of content from a service provider.<sup>55</sup> Choosing to perform a takedown is a legal action that sends the uploader a DMCA notice stating that the content owner believes a piece of content to be infringing.<sup>56</sup> If the uploader takes no further action, such as filing a counter notice, the uploader is issued a copyright strike to her account.<sup>57</sup> If an uploader receives three copyright strikes, her account will be deactivated.<sup>58</sup> A takedown will result in a video being removed from all of YouTube, regardless of the jurisdiction in which the owner is asserting her rights.<sup>59</sup>

Content ID’s powerful technology can generate partial matches of uploaded content that is as short as a few seconds.<sup>60</sup> The program is also versatile because if a content owner has provided a reference file that contains portions of public domain material or content licensed from another rights holder, Content ID’s filters can be adjusted to claim only the original content in that reference file.<sup>61</sup> Further, Content ID can generate separate matches for multiple content holders based on who has rights to

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<sup>54</sup> 17 U.S.C. §§ 101, 104, 104A, 108, 112, 114, 117, 512, 701, 1201-1205, 1301-1332, 4001 (2012).

<sup>55</sup> Ken Liu, *The DMCA Takedown Notice Demystified*, SFWA, <http://www.sfw.org/2013/03/the-dmca-takedown-notice-demystified/> [<http://perma.cc/QKU6-5R7X>] (last visited June 6, 2016). A service provider is defined by the DMCA as “a provider of online services or network access, or the operator of facilities therefor.” 17 U.S.C. § 512(k)(1)(b). This is quite an expansive definition that encompasses traditional websites such as YouTube, Facebook, and Twitter, as well as newer apps such as Snapchat. Furthermore, a service provider must act expeditiously to remove access to allegedly infringing material, or may face liability. 17 U.S.C. § 512(c)(1)(A)(iii).

<sup>56</sup> Pacheco, *supra* note 34. *See generally* 17 U.S.C. § 512(c)(3) (listing the elements of an effective DMCA notification). A takedown notice is submitted under penalty of perjury and can expose a content owner to civil liability if submitted frivolously. *See* McArthur, *supra* note 52.

<sup>57</sup> *Id.*

<sup>58</sup> *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000?hl=en> [<http://perma.cc/7UWG-LWS2>] (last visited June 6, 2016).

<sup>59</sup> Pacheco, *supra* note 34.

<sup>60</sup> Interview with Brandon Martinez, *supra* note 23. *See generally* McArthur, *supra* note 52. A copyright claim on any tiny portion of a gamer’s video threatens the entire video. It does not matter that the flagged, copyrighted content is only a few seconds of a long video. For example, TotalBiscuit (a popular game reviewer and Let’s Player) uploaded a three-hour video that included a one minute trailer from a Nintendo Pokémon game, and the entire video could not be monetized because of that one minute of copyrighted content. *Id.*; Stephen Totilo, *YouTube Pulls Official The Last of Us Trailer Due to ‘Copyright Claim,’* KOTAKU (Dec. 13, 2011, 7:08 PM), <http://kotaku.com/5867852/youtube-pulls-official-the-last-of-us-trailer-due-to-copyright-claim> [<http://perma.cc/C9KZ-LQW2>].

<sup>61</sup> For example, if Lil Wayne legally samples an Al Green recording on one of his tracks, and a user uploads a video with the Lil Wayne track, Content ID will not generate a copyright claim on behalf of Al Green for the use of his master recording because Lil Wayne has already licensed the Al Green master. Rather, it will only generate a claim on behalf of Lil Wayne.

specific portions of the uploaded content (whether it be the audio or the visual). YouTube does not tolerate abuse of the Content ID system to make frivolous infringement claims.<sup>62</sup> There are strict guidelines in place for content owners that use Content ID, and “[c]ontent owners who repeatedly make erroneous claims can have their Content ID access disabled and their partnership with YouTube terminated.”<sup>63</sup> Content ID access is not to be taken lightly.

Not everyone who is a content owner qualifies for Content ID. Those approved to use Content ID “must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community.”<sup>64</sup> For example, corporations like Universal and Sony, as well as huge content aggregators ranging from Viacom to Telemundo, are approved to use Content ID. Practically any entity that has a “substantial body” of content will qualify for and utilize Content ID.<sup>65</sup> Someone with one or two channels would not qualify, as they would lack a substantial body of original material frequently uploaded to YouTube.

### B. *Reasons for Content ID’s Implementation*

Multiple factors influenced the development of Content ID. The most important was likely section 512 of the DMCA,<sup>66</sup> which created a “safe harbor”<sup>67</sup> from liability for online service providers that host user-generated content if they comply with special “notice and takedown provisions.”<sup>68</sup> The exact provision that YouTube follows in order to avoid infringement liability is section 512(c), entitled “Information Residing on Systems or

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<sup>62</sup> See McArthur, *supra* note 52.

<sup>63</sup> *How Content ID Works*, *supra* note 2. In fact, YouTube has reaffirmed their staunch commitment to ensure that Content ID is not abused by recently announcing “that it would pay the legal bills of certain users who are hit with frivolous Digital Millennium Copyright Act takedown requests for videos that are clearly protected by the fair use doctrine.” Bill Donahue, *YouTube Will Defend Users Against Unfair DMCA Takedowns*, LAW360 (Nov. 19, 2015, 4:23 PM), [http://www.law360.com/media/articles/729422?nl\\_pk=9c836e32-5578-4c4b-966f-f32310a54235&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=media](http://www.law360.com/media/articles/729422?nl_pk=9c836e32-5578-4c4b-966f-f32310a54235&utm_source=newsletter&utm_medium=email&utm_campaign=media) [<http://perma.cc/Q45W-PWRN>].

<sup>64</sup> *How Content ID Works*, *supra* note 2.

<sup>65</sup> *Id.*

<sup>66</sup> 17 U.S.C. § 512 (2012).

<sup>67</sup> *DMCA Safe Harbor*, LUMEN, <https://www.lumendatabase.org/topics/14> [<http://perma.cc/9YWK-P2ZN>] (last visited June 6, 2016).

<sup>68</sup> *The Notice and Take Down Provisions of the DMCA*, IVANHOFFMAN, <http://www.ivanhoffman.com/dmca.html> [<http://perma.cc/98U7-NVGX>] (last visited June 6, 2016).

Networks At Direction of Users.”<sup>69</sup> This provision requires that “upon notification of claimed infringement . . . , [the service provider] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”<sup>70</sup> Section 512(c) also requires that a service provider designate an agent to receive notifications of claimed infringement<sup>71</sup> and comply with discrete elements of the notification, which must be a written communication embodying, among other things, a statement that the content owner possesses a good faith belief that its content is being infringed.<sup>72</sup> Content ID’s system is robust and possesses the infrastructure to handle these notices in order to comply with section 512(c).

Content ID was also intended to placate disgruntled content owners who, notwithstanding the DMCA’s framework, had difficulty managing their content and believed YouTube was committing copyright infringement despite its apparent compliance with the DMCA. A mid-2000s showdown between YouTube and Viacom, a huge content aggregator, is what some believe may have pushed YouTube to develop Content ID.<sup>73</sup> The case settled, but its effects on the UGC landscape have been everlasting.

### C. *Content Owners Prefer Monetization over Takedowns*

Content providers monetize far more than they perform takedowns or blocks for a variety of reasons. First, monetization is preferred because takedowns must be done manually, while

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<sup>69</sup> 17 U.S.C. § 512(c).

<sup>70</sup> *Id.* § 512(c)(1)(C).

<sup>71</sup> *Id.* § 512(c)(2).

<sup>72</sup> *Id.* § 512(c)(3)(A). The elements of the notification are:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed . . . .
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity . . . and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party. . . .
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

*Id.*

<sup>73</sup> See Kevin J. Delaney, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (June 12, 2007, 11:59 PM), <http://online.wsj.com/news/articles/SB118161295626932114?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB118161295626932114.html> [<http://perma.cc/8NN6-7FPL>].

monetization can be automatic. The DMCA takedown framework puts the onus on copyright holders to patrol their content on user-generated content platforms, and there is no duty for service providers to seek out infringing content.<sup>74</sup> Although Content ID is immensely helpful because it automatically recognizes instances of infringement, DMCA takedowns must nonetheless be done manually by a human sitting at a computer—a highly cumbersome process when one is dealing with a seemingly unlimited amount of content.<sup>75</sup> Unlike takedowns, Content ID can instantly monetize videos after they are claimed and immediately accumulate revenue for rights holders.<sup>76</sup>

Second, monetization is preferable to takedowns because users will repost infringing content no matter what. Many users find ways to shirk the Content ID technology, such as creating mirror images of visuals or changing the musical key of an audio clip so that it passes through the filters undetected.<sup>77</sup> It is likely that in many scenarios, in the time it takes to perform a takedown, the content has been reposted numerous times.<sup>78</sup> Endless resources are needed to carry out a “whack-a-mole” strategy to counteract this problem, and most copyright holders embrace monetization instead.

Another reason why monetization is preferred is because performing takedowns on user videos creates bad publicity for music artists, as well as content owners in general.<sup>79</sup> Fans naturally do not like it when their cover of their favorite artist is removed permanently from YouTube. Many fans are laypeople who do not understand why they cannot use or access certain

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<sup>74</sup> See Masnick, *supra* note 29.

<sup>75</sup> See Interview with Brandon Martinez, *supra* note 23.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Fun with YouTube's Audio Content ID System*, SCOTT SMITELLI (Apr. 19, 2009), <http://www.scottsmitelli.com/articles/youtube-audio-content-id> [<http://perma.cc/7E46-GZXB>] (modifying a copyrighted audio file, including through pitch alteration, time alteration, time chunks, resampling, and adding noise, to see whether Content ID's filters detected the recording); *My Parody and How to Avoid YouTube Content ID Detection*, PAUL NABIL MATTHIS (May 21, 2014), <http://paulmatthis.com/blog/my-parody-and-how-to-avoid-youtube-content-id-detection> [<http://perma.cc/LL39-6PTA>].

<sup>78</sup> Stephen Carlisle, *Copyright Blog Update: Meet the New and Improved "WhackAMole"*, NOVA SOUTHEASTERN UNIV. (Oct. 30, 2014), <http://copyright.nova.edu/blog-update-whack-a-mole/> [<http://perma.cc/53GL-EWGN>].

<sup>79</sup> Compare Timothy Geigner, *Sega Goes Nuclear on YouTube Videos of Old Shining Force Game*, TECHDIRT (Dec. 7, 2012, 7:32 AM), <https://www.techdirt.com/articles/20121206/17321021296/sega-goes-nuclear-youtube-videos-old-shining-force-game.shtml> [<http://perma.cc/SH8V-9A2R>] (discussing Sega fans' annoyance with excessive takedowns of gaming clips), with Jacqui Cheng, *Musician Angry After BPI Forces YouTube to Pull His Video*, ARS TECHNICA (July 23, 2009), <http://arstechnica.com/business/2009/07/musician-has-strong-words-after-youtube-video-takedown/> [<http://perma.cc/EV7X-BK8J>] (“When things like this happen and the artists get angry, the entire system gets bad PR . . .”).

content.<sup>80</sup> They will receive a notice to the effect of, “Your video may include clips that are owned by a third party,” without much further explanation.<sup>81</sup> Fans are led to believe that it is the artist’s fault, and they do not understand the underlying reasons why their content is being claimed. In fact, fans are so ill-informed about the reposting of copyrighted material that many believe writing “No Copyright Intended” or cutting and pasting fair use provisions from the 1976 Copyright Act verbatim into the description box will absolve them from any copyright liability or claims on their video.<sup>82</sup> This confusion and lack of explanation results in an eroded user experience. Fans who don’t know any better may believe that the claim came at the direction of the artist, when this could very well be a policy of the artist’s record label that is beyond the artist’s control. And the sting of getting blocked is only magnified when the blocked content is an artist tribute video, because precluding a fan from expressing her adoration of the artist amounts to a slap in the face. Thus, it comes as no surprise that fans may leave the side of a once-loved artist when there are many copyright claims filed on the artist’s content. The fans may leave YouTube altogether, disgruntled and disgusted by their poor user experience, and take their content to another site that does not have a system akin to Content ID in place or that is patrolled less stringently than YouTube. All in all, it is bad for business for both the content owner and the service provider.<sup>83</sup>

Finally, videos that are taken down will never produce any revenue for rights holders or YouTube. The only way to generate revenue is to monetize the content and allow it to remain on YouTube. Rights holders are benefitting more than ever from streaming royalties.<sup>84</sup> In fact, in 2014, streaming royalties made up for the current decline in digital downloads.<sup>85</sup>

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<sup>80</sup> YouTube has an entire help module dedicated to teaching users about copyright on YouTube. *What Is Copyright?*, YOUTUBE HELP, [https://support.google.com/youtube/answer/2797466?hl=en&ref\\_topic=2778546](https://support.google.com/youtube/answer/2797466?hl=en&ref_topic=2778546) [<http://perma.cc/3LDP-9ZT5>] (last visited June 6, 2016).

<sup>81</sup> *YouTube’s Joke of a Fair-Use Appeal Process*, *supra* note 51.

<sup>82</sup> Andy Baio, *No Copyright Intended*, WAXY (Dec. 9, 2011), [http://waxy.org/2011/12/no\\_copyright\\_intended/](http://waxy.org/2011/12/no_copyright_intended/) [<http://perma.cc/X8F9-AHH8>].

<sup>83</sup> *See generally I Posted a Video That Had a Little Snippet of Rihanna’s Song “We Found Love” and Youtube Took it Down!*, YOUTUBE HELP FORUM, <https://productforums.google.com/forum/#!topic/youtube/tqbuMCA3hKE> [<http://perma.cc/W7NA-AMZN>] (last visited June 6, 2016) (“So I posted a video that had a little part of Rihanna’s song ‘We Found Love’ and I truly DO NOT understand why Youtube took it down! Why can’t I post a video with a song in it?! All the other videos that go onto Youtube do the same and they don’t get taken down due to copyright issues! It clearly makes no sense at all and it has pissed me off!”).

<sup>84</sup> *See* Masnick, *supra* note 29.

<sup>85</sup> Karp, *supra* note 12.

While people may not think of it as such, YouTube is one of the top streaming content destinations<sup>86</sup> and streaming music services on the web, existing in the same realm as Spotify, Apple Music, and Pandora.<sup>87</sup> Thus, it only makes sense for rights holders to take advantage of this gigantic revenue pool.

#### D. *Content ID's Drawbacks*

There is no question that Content ID has positively impacted rights holders by revolutionizing the management and monetization of copyrighted content. There are, however, various drawbacks to Content ID's current system. Among these are (1) the lack of direct accessibility to Content ID for small-market musicians, (2) inequitable revenue allocation, (3) Content ID's inability to recognize third-party licensing arrangements, (4) ex post ratification of infringing uses, and (5) the cumbersome and frustrating user appeals process.

First, only rights holders with a substantial amount of content on YouTube may sign up for Content ID, leaving legitimate, small-market artists out of the equation.<sup>88</sup> A songwriter or artist with a single YouTube channel would not be able to register to manage and patrol their content directly through Content ID. Oftentimes, songwriters and artists have transferred the rights in their compositions or sound recordings to music publishers or record labels.<sup>89</sup> Because music publishers and record labels are aggregators of large amounts of content, they

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<sup>86</sup> Jeremy Scott, *YouTube 2nd Most Popular Website With 790 Million Unique Monthly Visitors*, REELSEO (Aug. 25, 2011, 8:09 AM), <http://www.reelseo.com/youtube-790-million-unique/> [<http://perma.cc/3J2D-656V>].

<sup>87</sup> Stuart Dredge, *Adele's Manager: 'Streaming's the Future, Whether People Like it or Not'*, GUARDIAN (Nov. 6, 2014, 11:05 EST), <http://www.theguardian.com/technology/2014/nov/06/adele-manager-jonathan-dickens-streaming-spotify> [<http://perma.cc/TX39-XF8A>] (“[B]ut the biggest music streamer out there is YouTube, without a doubt . . .” (quoting Jonathan Dickins, Manager of Adele and founder of September Management)).

<sup>88</sup> *How Content ID Works*, *supra* note 2.

<sup>89</sup> See Paul Resnikoff, *Now You Know Everything About Music Publishing . . .*, DIGITAL MUSIC NEWS (Feb. 28, 2014), <http://www.digitalmusicnews.com/2014/02/28/understandpublishing/> [<http://perma.cc/7TFL-3ETE>] (“However, recordings are typically made in assignment of record labels, whom have negotiated deals with both the artist and producer in which they transfer ownership of their copyright to the label in exchange for royalty payments. . . . The composition, made by the writers, is typically represented by a publisher. The sound recording, made by the performing artist and producer, is typically represented by a label.”); Scott Rubin, *Music Publishing: Everything You Wanted to Know (But Were Afraid to Ask)*, SOS (Dec. 2005), <http://www.soundonsound.com/sos/dec05/articles/allaboutpublishing.htm> [<http://perma.cc/3Y6D-V5M9>] (“If you want to make money as a songwriter, composer or lyricist, the obvious answer is to find yourself a publisher.”).

easily qualify for Content ID.<sup>90</sup> Thus, artists without labels or publishing deals are out of luck. Artists that are not fortunate enough to sign a record or publishing deal, however, may be able to sign up with a multichannel network (MCN) as an alternative, but again this requires a certain level of subscribership that cuts out the “little guy.” MCNs are content aggregators, and some function almost as miniature record labels that live on YouTube.<sup>91</sup> MCNs will monitor and assert content owners’ rights on YouTube, and many artists partner with MCNs for help with overall YouTube strategy and revenue maximization.<sup>92</sup>

Second, the royalty pie is somewhat arbitrary, and the revenue allocation cuts out the owners of compositions. The way money is distributed on YouTube is about an even split between YouTube and the content owners (representing the visual, audio, and underlying composition).<sup>93</sup> The exact split is 55-45, where YouTube receives 45% of ad revenue and rights holders receive 55%.<sup>94</sup> On the rights holder’s side, “10% goes to the owner of the visual, 30% goes to the owner of the sound recording, and 15% goes to the owner of the composition.”<sup>95</sup> These ratios are somewhat arbitrary. For example, songwriters get paid half of what sound recording owners receive. Owners of compositions have expressed a general sentiment that they

<sup>90</sup> Music labels range from the major record labels (Sony, Warner Music Group, and Universal) to independent labels like Glassnote Records (Mumford & Sons) and Big Machine Records (Taylor Swift). See Heather McDonald, *Big Four Record Labels*, ABOUT CAREERS (Dec. 16, 2014), <http://musicians.about.com/od/musicindustrybasics/g/BigFour.htm> [<http://perma.cc/5MCC-XGEN>]; Ed Christman, *Could the Big Machine, Glassnote Deals with Clear Channel Set Market Rate for Radio Royalties?*, BILLBOARD (Mar. 6, 2013, 2:50 PM), <http://www.billboard.com/biz/articles/news/1551224/could-the-big-machine-glassnote-deals-with-clear-channel-set-market-rate> [<http://perma.cc/DZ5J-99BE>] (mentioning that independent labels such as Glassnote Records and Big Machine Records have signed deals with large radio networks). Music publishers also range from major publishers (Sony, WarnerChappell, Universal) to independent publishers like SONGS Music Publishing (Lorde, The Weeknd, Diplo). See Rubin, *supra* note 89; SONGS MUSIC PUBLISHING, <https://www.songspub.com/> [<http://perma.cc/UA5H-V8ES>] (last visited June 6, 2016); *Songwriters*, SONGS MUSIC PUBLISHING, <https://www.songspub.com/Songwriters> [<http://perma.cc/SPN6-XPXK>] (last visited June 6, 2016).

<sup>91</sup> Interview with Brandon Martinez, *supra* note 23.

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

<sup>93</sup> Todd Spangler, *YouTube Standardizes Ad-Revenue Split for All Partners, but Offers Upside Potential*, VARIETY (Nov. 1, 2013, 4:39 PM), <http://variety.com/2013/digital/news/youtube-standardizes-ad-revenue-split-for-all-partners-but-offers-upside-potential-1200786223/> [<http://perma.cc/S3ZX-DZBF>].

<sup>94</sup> *Id.*; see Hampp, *supra* note 23. Content owners are generally disgruntled over this royalty split arrangement because it is not in line with Apple’s 70/30 arrangement, where content owners are paid 70% of profits. YouTube justifies this split because of the resources, bandwidth, servers, and maintenance that is spent on maintaining its system. Spangler, *supra* note 93.

<sup>95</sup> Interview with Brandon Martinez, *supra* note 23.



are underpaid, not only on YouTube, but across streaming music services.<sup>96</sup>

The inequity does not end there. Not only are owners of compositions stiffed, but so are users. Returning to the wedding video example: your cousin uploads her wedding video backed by Bruno Mars's latest hit. Your cousin's video is comprised of Mars's recording and composition and your cousin's visual of her wedding. In theory, your cousin should be entitled to 10% of the revenue for her visual, and the other 45% should go to Bruno Mars's publisher and record label. Yet your cousin will most likely never see any money.<sup>97</sup> Perhaps it is because amateur users like your cousin do not have access to Content ID to be able to properly monetize the visual component of their videos, or perhaps YouTube feels that as a penalty for infringing on the rights holder's copyrights in the first place, your cousin's 10% of the pie should be split by the other rights holders.

The impact is magnified when it comes to the amateur cover artist because he is cut out of two revenue streams—the visual (10%) *and* the sound recording (30%).<sup>98</sup> Although users have the option to monetize their videos from their channel dashboard, this option does not let a user assert his rights as to specific copyrightable components, and the owner must own all the content in the video to see any money from it.<sup>99</sup> And even if the revenue from the visual or sound recording of a user's video is collected on behalf of the user and held in escrow, it most likely would only remain in escrow for a limited period of time before it is absorbed by YouTube.<sup>100</sup>

Third, Content ID is unable to account for third-party licensing agreements.<sup>101</sup> YouTube has no way of knowing whether a user has precleared his use by licensing a master recording or composition directly from a record label, music publisher, or some other third party,<sup>102</sup> because their respective licensing databases

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<sup>96</sup> See David Israelite, *Future of Streaming Music Must Include Fairness for Songwriters*, FOX NEWS OPINION (June 26, 2014), <http://www.foxnews.com/opinion/2014/06/26/future-streaming-music-must-include-fairness-for-songwriters.html> [<http://perma.cc/FM9T-2PYU>].

<sup>97</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* For example, SoundExchange, the statutorily created body that collects digital performance royalties for sound recordings, typically absorbs royalties that remain undistributed after three years. SOUNDEXCHANGE, SOUNDEXCHANGE ANNUAL REPORT FOR 2013, at 4 (2013), <http://www.soundexchange.com/wp-content/uploads/2014/06/2013-SoundExchange-Fiscal-Report.pdf> [<http://perma.cc/EU7U-UVGL>].

<sup>101</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>102</sup> *Id.*

do not communicate with YouTube.<sup>103</sup> For example, a cover artist who wishes to post a Sam Smith cover could go to Sam Smith's publishers to license the use of the composition for a YouTube video. Nevertheless, the cover artist's video could be claimed by the composition owner as if the content were not licensed at all—a patently unfair result.<sup>104</sup> Users must essentially overcome the presumption that they have not licensed the content—and to make matters worse, they must overcome this presumption via the cumbersome user appeals process discussed below, where the rights holder is in the driver's seat. There are companies that specialize in issuing licenses for master recordings and compositions for digital video distribution,<sup>105</sup> but they do not communicate to YouTube information about who and what they license.<sup>106</sup> The only way that YouTube knows whether content has been licensed properly is if it is licensed on-platform from small, precleared music and sample libraries that YouTube itself has made available.<sup>107</sup> Because there is no way of knowing whether a use is licensed, Content ID discourages users from obtaining licenses in the first place. The policy is likely a reflection of the general sentiment among consumers that content is “free” and no license is ever necessary, because the worst that can happen is a copyright strike on a user's YouTube account.<sup>108</sup>

Fourth, Content ID is designed to ratify infringing use; it is an ex post enforcement tool.<sup>109</sup> This is in opposition to ex ante enforcement, where the user obtains a license before using the copyrighted content. In a perfect world, intellectual property is licensed before the use occurs. In reality, rarely if ever do users

<sup>103</sup> *Id.*

<sup>104</sup> YouTube is putting somewhat of a bandage on the situation via a special covers program that allows cover artist to receive the revenue from their videos, but that is currently in a limited-rollout beta phase. *Id.*

<sup>105</sup> See, e.g., AUDIOSOCKET, <https://www.audiosocket.com/> [<http://perma.cc/T3EK-LJYV>] (last visited June 6, 2016); RUMBLEFISH, <http://rumblefish.com/> [<http://perma.cc/K6MX-SCSB>] (last visited June 6, 2016); Ryan Lawler, *Rumblefish's Friendly Music Relaunches With 750k Songs*, GIGAOM (Mar. 16, 2012, 10:22 AM), <https://gigaom.com/2012/03/16/rumblefish-friendly-music-relaunch/> [<http://perma.cc/B8TF-B3MK>].

<sup>106</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>107</sup> Jacob Kastrenakes, *YouTube Launches Library of Free Music That Anyone Can Use*, VERGE (Sept. 25, 2013, 10:12 AM), <http://www.theverge.com/2013/9/25/4769332/youtube-audio-library-launches-150-royalty-free-songs> [<http://perma.cc/QWN5-4Y7F>]; see also *Audio Library*, YOUTUBE, <https://www.youtube.com/audiolibrary/music> [<http://perma.cc/D4TG-Y9AX>] (last visited June 6, 2016) (containing the YouTube audio library).

<sup>108</sup> There is some penalty, although not criminal: once the user has accumulated three strikes, the user loses his or her YouTube account. *Copyright Strike Basics*, *supra* note 58.

<sup>109</sup> See generally Arsham, *supra* note 13 (defining ex post and ex ante enforcement of the copyright law, and discussing the pros and cons of each).

obtain licenses prior to uploading content because again, it is so ingrained in users' minds that they can post anything they want. It is a persistent issue that plagues rights holders, as it requires them to constantly patrol content instead of knowing that uses are precleared and accounted for beforehand. Further, this phenomenon is bad for content owners because they cannot monetize views before the video is claimed. Thus, in the time it takes content owners to track down infringing videos, they miss out on key revenue opportunities, especially because many videos garner the most engagement in the few days after they are initially uploaded.<sup>110</sup> This problem may be bigger than Content ID itself, perhaps reflecting a general shift from preclearing rights to ratification of infringement. In other words, it is an "upload first, assess later" paradigm, and the law must adapt to this reality, as expansion of the compulsory license would alleviate these issues.

Finally, Content ID's cumbersome appeals process is a headache that users must undergo when disputing claims. It negatively affects content owners as well. When an upload is matched against copyrighted content, the user has the ability to file a dispute with YouTube against the claim by saying that it is the user's original, wholly owned content, that it is a fair use,<sup>111</sup> or that the use has been licensed.<sup>112</sup> When a user disputes the claim, the claim goes from active to pending, and the match policy (whether it be block, monetize, or track) is lifted temporarily until the rights holder has assessed the dispute.<sup>113</sup> At that point, the rights holder must decide within 30 days whether to release the claim, reinstate the claim, or perform a takedown.<sup>114</sup> If the rights

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<sup>110</sup> See Chris Atkinson, *A Quarter of Branded Video Shares Happen in the First Three Days: Unruly's Social Diffusion Curve*, REELSEO (Apr. 23, 2013), <http://www.reelseo.com/quarter-video-shares-happen-days-unrulys-social-diffusion-curve/> [<http://perma.cc/R5WT-PTBL>].

<sup>111</sup> A fair use is

any copying of copyrighted material done for a limited and "transformative" purpose, such as to comment upon, criticize, or parody a copyrighted work. Such uses can be done without permission from the copyright owner. In other words, fair use is a defense against a claim of copyright infringement. If [a] use qualifies as a fair use, then it [is] not [considered an illegal infringement. So what is a "transformative" use? . . . [T]his definition [is] ambiguous [and] vague . . . [M]illions of dollars in legal fees have been spent attempting to define what qualifies as a fair use. There are no hard-and-fast rules, only general rules and varied court decisions, because the judges and lawmakers who created the fair use exception did not want to limit its definition.

Rich Stim, *What Is Fair Use?*, STANFORD UNIV. LIBR., <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/> [<http://perma.cc/9X36-BYSS>] (last updated Mar. 11, 2014, 4:32 PM).

<sup>112</sup> *YouTube's Joke of a Fair-Use Appeal Process*, *supra* note 51.

<sup>113</sup> Pacheco, *supra* note 34.

<sup>114</sup> *Id.*

holder does nothing, the claim on the content is released.<sup>115</sup> If the claim is reinstated, users in good copyright standing<sup>116</sup> who have provided an address and phone number may appeal the reinstatement, shifting the burden back to the rights holder to either release the claim or issue a takedown.<sup>117</sup>

There are a few drawbacks to this user appeals process. First, the rights holder must *manually* review the dispute, meaning that a human being representing the rights holder must log in to Content ID, view the allegedly infringing content, and determine whether the dispute is valid.<sup>118</sup> More often than not, users will dispute the claim because no user wants to have their video blocked.<sup>119</sup> Thus, tens of thousands of claims stack up daily that must be manually reviewed—an impossible task.<sup>120</sup> Many claims are released because they are not reviewed within the 30-day window, and content owners lose revenue as a result.<sup>121</sup>

Next, those manually reviewing the content in the user appeals process are often not qualified to do so, resulting in abusive and mismanaged claims practices.<sup>122</sup> If a user disputes a claim on a fair use basis, the decision of whether to honor the dispute rests largely in the hands of interns and other

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<sup>115</sup> *Id.*

<sup>116</sup> Good standing means that a user account must have “[n]o Community Guidelines strikes, [n]o copyright strikes, [and] [n]o more than one video blocked worldwide by Content ID.” *Keep Your YouTube Account in Good Standing*, YOUTUBE, <https://support.google.com/youtube/answer/2797387?hl=en> [<http://perma.cc/9V74-GZBU>] (last visited June 6, 2016).

<sup>117</sup> *Id.*; See Frederic Lardinois, *YouTube Changes Its Content ID Appeals Process*, TECHCRUNCH (Oct. 3, 2012), <http://techcrunch.com/2012/10/03/youtube-changes-its-content-id-appeals-process/> [<http://perma.cc/WM2Z-7JC4>]; Baio, *supra* note 18. For a visualization of the claim and disputes process, see *Disputes*, YOUTUBE, [https://support.google.com/youtube/answer/6085539?hl=en&ref\\_topic=6084219](https://support.google.com/youtube/answer/6085539?hl=en&ref_topic=6084219) [<http://perma.cc/CX42-6XM2>] (last visited June 6, 2016).

<sup>118</sup> Interview with Brandon Martinez, *supra* note 23.

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

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See *Orchard Uses UNPAID INTERNS to Handle Content ID Related Disputes*, YOUTUBE (July 29, 2013), <https://productforums.google.com/forum/#!topic/youtube/10XE-nsJbaM> [<http://perma.cc/MBL3-7V57>] [hereinafter *Orchard*]. In fact, drawing from personal experience, I worked extensively in Content ID as an intern at several large companies and made countless final judgments on submitted user disputes, many of which involved fair use. What constitutes fair use is not a simple matter, as even the most astute lawyers and judges struggle to define it. See *supra* note 109 and accompanying text. Thus, it is baffling that interns are tasked with making these decisions on a daily basis. One bit of good news is that a recent Ninth Circuit decision now requires copyright holders to consider fair use before issuing DMCA takedown notices. See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1132 (9th Cir. 2015). Thus, rights holders must take more precaution before requesting takedowns, which will likely assist in curbing abuse and provide a bit of relief to prejudiced users.

unqualified individuals.<sup>123</sup> This is especially troubling because these decisions, which necessarily involve questions of fact and law, happen outside an administrative body or court of law and are virtually free from any oversight.<sup>124</sup> YouTube cannot even begin to provide human oversight because their resources are far too limited to identify and diagnose indiscretions by innumerable content holders. Also, YouTube prefers to turn a blind eye and limit its oversight, or else it may be liable for copyright infringement.<sup>125</sup>

Furthermore, Content ID as a whole heavily favors copyright owners.<sup>126</sup> Rights holders are in a position of power for regulating user content, as they make the final decision in their sole discretion about whether to issue a takedown.<sup>127</sup> There is no hearing or opportunity to present evidence to a neutral body.<sup>128</sup> Content owners are the ultimate arbiters, which is troubling because of the inherent bias that rights holders possess in favor of protecting their content at all costs.<sup>129</sup> YouTube is also inherently biased, as it is a corporation with a goal of maximizing profits for shareholders, and the more content that is claimed, the more money YouTube makes. It seems preposterous that fair use copyright adjudications are being made by anyone other than a judge, let alone in such large numbers. As a result, the user appeals method of resolving content disputes is wrought with

<sup>123</sup> *Orchard*, *supra* note 122; Concord Music Group, *YouTube Rights Management Intern*, ENTERTAINMENTCAREERS, <http://www.entertainmentcareers.net/Concord-Music-Group/YouTube-Rights-Management-Intern/job/199903/> [<http://perma.cc/F7Y7-C2HV>] (last visited June 6, 2016) (posting for a YouTube Rights Management Intern).

<sup>124</sup> Philip Daniels & Tyler Malin, *Content ID & DMCA Takedowns: What Creators Need to Know*, VIDEOINK (Jan. 3, 2014), [http://www.thevideoink.com/features/voices/content-id-dmca-takedowns-what-creators-need-to-know/#.VF59x4vF\\_A4](http://www.thevideoink.com/features/voices/content-id-dmca-takedowns-what-creators-need-to-know/#.VF59x4vF_A4) [<http://perma.cc/67K9-F8AR>] (“Many argue that the current system seems to skew in favor of copyright owners. In fact, everything prior to the DMCA takedown notice required after an appeal is just internal policy and completely extrajudicial—undoubtedly leaving the vast majority of these potentially important legal arguments without proper consideration, which is damaging for everyone involved.”).

<sup>125</sup> 17 U.S.C. § 512 (2012). *See generally* *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) (discussing that the DMCA provides a “safe harbor” from liability stemming from copyright infringement for service providers such as YouTube, provided that they follow certain rules and procedures regarding copyrighted content; the safe harbor can be forfeited in a variety of circumstances, including if the service provider has actual knowledge of infringement, and thus, service providers wish to limit their knowledge when it comes to specific instances of infringement on their sites).

<sup>126</sup> Daniels & Malin, *supra* note 124.

<sup>127</sup> *See id.* (“[T]he decision to accept or reject a counter-notification is purely based on the decision of the party that Content ID matched with [the user’s content].”).

<sup>128</sup> Jennifer Atkins, *Ashley Madison, the DMCA, and the Misuse of Copyright Law*, CLOUDIGY L. (July 29, 2015), <http://cloudigylaw.com/ashley-madison-dmca-misuse-copyright-law/> [<http://perma.cc/9AYM-QKJJ>]; *see* Baio, *supra* note 18; Daniels & Malin, *supra* note 124.

<sup>129</sup> *See* Daniels & Malin, *supra* note 124.

widespread abuse<sup>130</sup> and results in erosion of the user experience.<sup>131</sup> This is grossly unfair to users, and rights holders know it.<sup>132</sup>

## II. THE SECTION 115 COMPULSORY LICENSE

The current section 115 compulsory license for musical works provides a necessary backdrop against which to evaluate a compulsory synchronization licensing system. It helps inform our understanding of how compulsory licensing currently works, what rights it covers, and how it interacts with YouTube. It also shows that a compulsory sync license is practically attainable because Congress has shown its willingness to expand compulsory licensing for music to encompass new technologies, such as Internet radio. Finally, the section 115 license serves as a model for evaluating the pros and cons of compulsory licensing systems.

Generally, a compulsory license allows the use of a copyrighted work without the consent of the copyright owner, provided that the user pays royalties and meets certain conditions.<sup>133</sup> Section 115 of the Copyright Act<sup>134</sup> provides for compulsory licensing of nondramatic musical works if the work has been distributed by the copyright owner to the public in the United States and the licensee complies with the various provisions of section 115.<sup>135</sup> The compulsory license grants a licensee the right to “make and distribute phonorecords” of the work, and the licensee’s purpose must be to distribute the musical

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<sup>130</sup> See Tim Cushing, *Fair Use Continues to Pay the Price for YouTube’s Direct Takedown Deal with Universal Music Group*, TECHDIRT (July 14, 2014, 2:14 PM), <https://www.techdirt.com/articles/20140706/13381127795/fair-use-continues-to-pay-price-yo-utubes-direct-takedown-deal-with-universal-music-group.shtml> [<http://perma.cc/93V2-X9QA>] (discussing erosion of fair use because of potential abuse of Content ID-type system on popular music streaming service SoundCloud).

<sup>131</sup> Daniels & Malin, *supra* note 124. Even more troubling is that the only mechanism Congress provided to combat abuse of the DMCA (and thus, the only way for a user to have the rights holder’s decision reviewed) is to file a costly section 512(f) lawsuit, alleging that the rights holder misrepresented that the user content was infringing. See Amanda Schreyer, *Misrepresentation Under the DMCA: The State of the Law*, 25 NYSBA ENT., ARTS, & SPORTS L.J. 72, 72-73 (2014). There have been few lawsuits filed under section 512(f) because no normal, everyday user has the incentive to be litigious over a simple cover video. As if costly litigation isn’t bar enough, most section 512(f) cases settle before making it past the motion to dismiss stage, and the first time a court *ever* awarded damages under this provision was March 2015. Atkins, *supra* note 128. Undoubtedly, whether intentional or not, this is a system built to abuse the “little guy.”

<sup>132</sup> See *YouTube’s Joke of a Fair-Use Appeal Process*, *supra* note 51.

<sup>133</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 73, COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 3 (2015), <http://copyright.gov/circs/circ73.pdf> [<http://perma.cc/H4MD-K8A8>] [hereinafter COMPULSORY LICENSE].

<sup>134</sup> 17 U.S.C. § 115 (2012).

<sup>135</sup> *Id.*

works to the public for private use.<sup>136</sup> Not only are physical goods included within the scope of section 115, but digital phonorecord downloads and Internet streaming are included, as well.<sup>137</sup> For clarity's sake, the section 115 provisions do not apply to the performance right—only to reproduction and distribution.<sup>138</sup>

To obtain a compulsory license, one must serve notice of the intention to do so on the copyright owner “before or within thirty days after making, and before distributing any phonorecords of the work.”<sup>139</sup> Failure to comply with this provision makes the act of reproduction or distribution of phonorecords an infringing activity. To receive royalties under section 115, the copyright owner must be identified in the work's registration in the Copyright Office's records.<sup>140</sup>

Statutory royalties are provided for in paragraph (c) of section 115, which states in relevant part,

[T]he royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, . . . a phonorecord is considered “distributed” if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.<sup>141</sup>

Contrary to the above passage, the mechanical-license royalty rates have been adjusted over the years to reflect changes in

<sup>136</sup> *Id.* Phonorecords are defined by the copyright act as

material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (2012). Phonorecords include digital files such as mp3s. MARY LAFRANCE, COPYRIGHT IN A NUTSHELL 163 (2d ed. 2011).

<sup>137</sup> See Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 40,802 (July 16, 2008) (to be codified at 37 C.F.R. pts. 201, 255) (“[M]indful of the attempts to develop legislation that would reform Section 115, the Office now proposes to amend its regulations in a way that would enable digital music services to utilize the compulsory license to clear all *reproduction* and *distribution* rights in musical works that might be necessary in order to engage in activities such as the making of full downloads, Limited Downloads, *On-Demand streams* and non-interactive streams.” (emphasis added)).

<sup>138</sup> 17 U.S.C. § 115(a)(1). Section 115 explicitly states that one may obtain a compulsory license only to “*make* and *distribute* phonorecords of the work,” not to perform it. *Id.* (emphasis added).

<sup>139</sup> 37 C.F.R. § 201.18 (2012).

<sup>140</sup> 17 U.S.C. § 115(c)(1).

<sup>141</sup> *Id.* § 115(c)(2).

the marketplace and inflation.<sup>142</sup> In fact, the Copyright Royalty and Distribution Reform Act of 2004 created the Copyright Royalty Board (CRB), which sets the rates and terms for use of the section 115 license.<sup>143</sup>

Considering the section 115 provisions as applied to YouTube, the following is a breakdown of the rights a user must obtain to post a video to YouTube. In the example from the introduction, where a Bruno Mars recording is synced to a wedding video, the uploader should obtain the rights to use both the sound recording from the record label and the composition from the music publisher. The exclusive rights in the composition that are implicated by uploading a video to YouTube include the right to reproduce the work,<sup>144</sup> distribute copies of the work,<sup>145</sup> and synchronize the work with a visual image.<sup>146</sup> The exclusive rights implicated in the use of the sound recording include the reproduction right,<sup>147</sup> the distribution right,<sup>148</sup> and the “master

<sup>142</sup> *What Are Mechanical Royalty Rates?*, HARRY FOX AGENCY, [https://www.harryfox.com/license\\_music/what\\_mechanical\\_royalty\\_rates.html](https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html) [<http://perma.cc/EYF6-SQX5>] (last visited June 6, 2016).

<sup>143</sup> See COMPULSORY LICENSE, *supra* note 133. The current statutory rate is the greater of 9.1 cents per song or 1.75 cents per minute of playing time. See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 63 Fed. Reg. 7288, 7289 (Feb. 13, 1998). This rate has not changed since January 1, 2006. *Id.*

<sup>144</sup> See 17 U.S.C. § 106(1) (2012). The reproduction right is implicated because the user necessarily makes a copy of the digital file of the recording when uploading it to YouTube. YouTube is also responsible for paying a royalty for the right to stream the content. This “streaming” right is a subset of the reproduction right. Jeff Price, *Music Industry Survival Guide*, TUNECORE, <http://www.tunecore.com/guides/sixrights> [<http://perma.cc/Z3AR-M4XJ>] (last visited June 6, 2016).

<sup>145</sup> See 17 U.S.C. § 106(3). The distribution right is implicated when the user uploads the video to YouTube, because the content is being published to the world for public viewing.

<sup>146</sup> The synchronization right is neither explicitly mentioned in the current Copyright Act nor in its predecessor. Yet courts and commentators generally agree that the right is statutorily protected. Indeed, the House Report to the 1976 Act confirms this conclusion: “[The] exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases.” Lewis Rinaudo Cohen, *The Synchronization Right: Business Practices and Legal Realities*, 7 CARDOZO L. REV. 787, 793-95 (1986) (footnotes omitted) (quoting H.R. REP. NO. 94-1476 (1976)). There may also be a performance right involved depending upon what entity is considered to be “performing” the video and whether individual plays of a video are considered “public” performances for the purposes of the Copyright Act. The most plausible explanation is that once the user uploads the content, YouTube itself is the one *performing* the content from its servers, not the user. Thus, the user does not have a duty to obtain performance rights from the copyright holder. This is supported by the fact that YouTube pays performance royalties to performing-rights organizations before any royalty distributions are made to rights holders. See ASCAP *Members: License Your YouTube Synchs Through NMPA & HFA*, ASCAP (Nov. 30, 2011), <http://www.ascap.com/playback/2011/11/action/license-your-youtube.aspx> [<http://perma.cc/658R-CF8C>] (ASCAP acknowledging that YouTube pays it performance royalties separately from Content ID revenue).

<sup>147</sup> 17 U.S.C. § 106(1).

<sup>148</sup> *Id.* § 106(3).



use” or synchronization right.<sup>149</sup> For a cover artist video, it is only necessary to obtain the rights implicated in the use of the *composition*, because the cover artist provides his own original sound recording of his performance of the musical composition.

Section 115 only provides for the licensing of musical compositions and not for sound recordings.<sup>150</sup> In the Bruno Mars wedding video hypothetical, then, the user can use the section 115 license to obtain the reproduction and distribution rights for the composition without the publisher’s consent, but the user must obtain separate permission to use the sound recording as well.

Further, even if a user were to obtain a section 115 license for the use of the composition, the current section 115 license does not go far enough to clear all the rights necessary to fully exploit the musical composition on YouTube. Section 115 only provides for the reproduction and distribution rights, but not the synchronization right.<sup>151</sup> This right must then be obtained separately from the owner of the composition in order to cover the use of the composition on YouTube.<sup>152</sup> These myriad restrictions and regulations beg the question: How is it possible for a layperson to figure out and understand the patchwork of rights that are necessary to post a video to YouTube without being susceptible to liability for copyright infringement?

In addition to section 115, section 114 of the Copyright Act creates a compulsory license for “non-interactive services” to digitally perform phonorecords.<sup>153</sup> The license grants qualifying services the ability to perform sound recordings (i.e., broadcast

<sup>149</sup> *How to Acquire Music for Films*, *supra* note 15.

<sup>150</sup> *Id.* at 2.

<sup>151</sup> Modifications in the Copyright Act of 1976 make clear that section 115 does not cover the “synchronization” right. This is because only the reproduction of *phonorecords* (not audiovisual works) is covered under the compulsory license. 17 U.S.C. § 115 (a)(1) (2012) (“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute *phonorecords* of the work.”). See *supra* note 133 for a discussion of what a phonorecord is.

<sup>152</sup> Furthermore, if it is assumed that users are the ones publicly *performing* the composition on YouTube and are thus responsible for obtaining performance rights, the section 115 license would fail to cover this as well. See 17 U.S.C. § 115 (a)(1). Moreover, assuming users are publicly performing the content could preclude use of the section 115 license altogether, as section 115 only provides for licenses for reproduction and distribution of phonorecords to the public for *private* use. A public performance on a public platform is probably not a private use. An alternate theory is that the user is not responsible for the performance right because each time a video is performed on YouTube, it is a private performance that an individual, unique user requests, most likely in the privacy of his own home. In that case, the section 115 license *would* cover the distribution right.

<sup>153</sup> 17 U.S.C. § 114 (2012); *Compulsory Licensing Provisions*, DiMA, <http://www.digmedia.org/issues-and-policy/copyright-and-royalties/140-compulsory-licensing-provisions> [<http://perma.cc/BE8M-2Z6E>] (last visited June 6, 2016).

them across the Internet) at a per stream rate determined by the CRB. Noninteractive services include Pandora, Sirius XM, and any other streaming services where users can only dial up a station or playlist but not specific songs.<sup>154</sup> YouTube is not considered a noninteractive service because users have the ability to select any piece of content for viewing on the platform at any time.<sup>155</sup> Although YouTube does not fall within its scope,<sup>156</sup> section 114 is nonetheless important, because it evinces Congress's willingness to expand the reach of the compulsory license. It shows that we are closer than we think to compulsory sync licensing because Congress has recognized the specific need for compulsory licensing on other streaming services.

Many commentators have criticized compulsory licensing on various grounds.<sup>157</sup> One argument is that the purpose of the law seems inconsistent with the policy behind copyright because it "create[s] a mandatory non-negotiable contract where the property owner is forced to give virtually unlimited use of his

<sup>154</sup> Ken Consor, *The 2 Types of Streaming Royalties & How You Can Collect Both*, SONGTRUST (Aug. 4, 2014), <http://blog.songtrust.com/publishing-tips-2/the-2-types-of-digital-music-streams-how-you-can-collect-royalties-from-both/> [<http://perma.cc/R7SJ-WPED>]; see also John Simson, *Spotify, Pandora and the Changing Nature of Payments in the Music Industry*, LOMMEN (2012), <http://www.lommen.com/pdf/SXSXW-2012/Spotify-Pandora-and-the-Changing-Nature-of-Payment.aspx> [<http://perma.cc/8QHQ-FXHY>].

<sup>155</sup> 17 U.S.C. § 114(j)(7) defines an "interactive service" as

one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

<sup>156</sup> Nonetheless, the section 114 license is an important talking point because it shows Congress's willingness to expand the compulsory right and adjust licensing practices to changes in consumption. Most importantly, it also shows a patchwork of statutorily granted rights evincing a trend towards a statutorily granted synchronization right. See *infra* Section III.E.

<sup>157</sup> See generally Jeffrey A. Wakolbinger, *Compositions Are Being Sold for a Song: Proposed Legislation and New Licensing Opportunities Demonstrate the Unfairness of Compulsory Licensing to Owners of Musical Compositions*, 2008 U. ILL. L. REV. 803 (2008); Theresa M. Bevilacqua, *Time to Say Good-Bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 299 (2001); Dina LaPolt et al., *A Response to Professor Menell: A Remix Compulsory License Is Not Justified*, 38 COLUM. J.L. & ARTS 365 (2015); Skylia Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239 (2007).

work in exchange for a rate he cannot determine.”<sup>158</sup> It seems constitutionally questionable that the government provides a mechanism for taking private intellectual property without any balancing of the copyright owner’s interest.<sup>159</sup> Others have criticized compulsory licensing on the grounds that it creates a false price ceiling<sup>160</sup> and that its arbitrary rate-setting procedures hurt artists by not taking into account the relative value of each individual piece of intellectual property.<sup>161</sup> Critics have also argued that compulsory licensing fails to provide an adequate remedy short of launching a full-blown copyright infringement lawsuit<sup>162</sup> and that it chills innovation by “ossify[ing] around existing patterns of use.”<sup>163</sup> These arguments are certainly justified; however, the myriad benefits of compulsory licensing outweigh its negatives. Further, the only way that compulsory licensing “ossifies” around existing patterns of use is if Congress allows that to happen.

On the other hand, many also support expansion of the compulsory right.<sup>164</sup> One justification is that in a “remix culture,”<sup>165</sup> a compulsory licensing regime is the best and most practical application of the Copyright Act’s protections.<sup>166</sup> Because producing, chopping up, and remixing music has become seamless due to the proliferation of desktop audio software, it is more and

<sup>158</sup> Bevilacqua, *supra* note 157, at 299.

<sup>159</sup> *Id.*

<sup>160</sup> Jason S. Rooks, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255, 272 (1995).

<sup>161</sup> Bevilacqua, *supra* note 157, at 302; see MATTHEW SAG, THE PERILS OF COMPULSORY LICENSES IN COPYRIGHT LAW, <http://www.cardozo.yu.edu/sites/default/files/Sag,Matthew.pdf> [<http://perma.cc/L8AN-M7YS>] (last visited June 6, 2016).

<sup>162</sup> This is because the improper or unlicensed use of material under section 115 would be an infringement of the copyright owner’s exclusive rights. See 17 U.S.C. §§ 501-505 (2012). Costly litigation where there are only pennies at stake (although the Copyright Act also provides statutory damages) leaves owners with little incentive to act upon infringement.

<sup>163</sup> SAG, *supra* note 161.

<sup>164</sup> See generally Tyler, *supra* note 25; Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811 (2011); James H. Richardson, *Create a Compulsory Licensing Scheme for On-Demand Digital Media Platforms*, 31 ENT. & SPORTS LAW., Summer 2014, at 9; Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 TOURO L. REV. 375 (2006); James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45 (2014).

<sup>165</sup> See generally Matt Jessell, *Remix Culture: Rethinking What We Call Original Content*, MARKETING LAND (Apr. 30, 2013, 9:45 AM), <http://marketingland.com/remix-culture-rethinking-what-we-call-original-content-41791> [<http://perma.cc/CX4P-C5PJ>] (describing how the remix culture represents a shift in how we think about what is original, what is not original, and whether it even matters in the first place).

<sup>166</sup> Vrana, *supra* note 164, at 852.

more difficult to track music samples and pay rights holders. This can be confusing when some recordings or remixes include hundreds of samples of other recordings. It would be a nightmare to call each label and publisher to clear the rights to every sample, for every sample of a recording must be licensed, no matter how short.<sup>167</sup> Compulsory licensing would alleviate the massive headache and impracticability of clearing all those samples. Expansion of the compulsory right would also create a profit incentive for authors of past works to develop new works.<sup>168</sup> Further, Congress has been active and forthcoming in continually recognizing the need for the expansion of the compulsory right with section 114 (noninteractive webcasters) and section 111 (secondary transmissions by cable systems).<sup>169</sup> Finally, developments and improvements in technology have made possible complicated licensing schemes that were not feasible in the past.<sup>170</sup>

### III. THE NEED FOR A SPECIAL COMPULSORY SYNCHRONIZATION LICENSE FOR UGC PLATFORMS

This part discusses several rationales that support the implementation of a special compulsory synchronization license for UGC platforms. It also discusses how the implementation of a compulsory sync license would provide direct solutions to the issues raised above, and is a natural extension of the current regime.

#### A. *Resolution of Content ID's Flaws*

Many Content ID issues, including the inability of YouTube to recognize third-party licensing arrangements, the ex post enforcement of infringement, the cumbersome user appeals process, and unfair royalty splits would be alleviated by a special compulsory sync license. Beyond YouTube, it would also alleviate similar issues on other user-generated content platforms (such as Facebook) that provide a Content ID-like system for managing content and improve overall management of copyrighted works by mandating uniformity across platforms.

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<sup>167</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample.”).

<sup>168</sup> Vrana, *supra* note 164, at 853.

<sup>169</sup> 17 U.S.C. §§ 111, 114 (2012). In 1976, Congress gave cable television companies compulsory licenses for rebroadcasting content originally aired on a broadcast network, and in 2002, it extended licensing to “small and noncommercial ‘webcasters.’” Vrana, *supra* note 164, at 851.

<sup>170</sup> Vrana, *supra* note 164, at 851.

First, YouTube would be able to recognize third-party licensing arrangements because a compulsory licensing system would necessitate a central database/clearinghouse for content. As described earlier, the system treats those who follow the law and obtain a license the same as those who upload content they do not own without first obtaining a license.<sup>171</sup> YouTube does not have any way of knowing whether rights have been precleared from a third party and does not currently remit royalties to these parties. In the case of a cover artist who wishes to derive revenue from his original visual and sound recording of a licensed composition, a special compulsory sync license would allow him to take advantage of his rightful revenue streams. A compulsory sync license system would have a central database of licensed uses that communicates and exchanges metadata and ownership information among UGC platforms, labels, and publishers, facilitating the free flow of revenue. The third-party licensing issue would be ameliorated by accounting for licensed uses in the database.

The proposed licensing scheme would also resolve the issue of ex post enforcement of infringement (i.e., enforcing content owners' rights *after* an infringement has been committed) by moving the system back into an ex ante regime, where all uses are automatically licensed and precleared. This is good for both users and content holders, because users won't have to worry about losing the content they post, and content holders will no longer bear such a large burden in patrolling their content. This would allow content owners to focus on other things, such as ensuring that the correct metadata and royalty split information is attached to each license so that remittance of royalties happens seamlessly.

A compulsory license would also eliminate the need for the cumbersome user appeals process that is currently in place. Content owners would not have a queue of tens of thousands of disputed uses that require manual clearing, because a license would already be granted. This would eliminate manual review and alleviate the issue of unqualified individuals making determinations as to whether a piece of content has in fact been appropriated. If the system finds a match, a license will be issued and the user will go on without even knowing this has happened.

But the compulsory licensing system is not a panacea for user appeals; the question of whether the use is "fair" would still loom. In theory, those invoking fair use would have to be exempt from the license altogether. This would require some human

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<sup>171</sup> See *supra* notes 98-105 and accompanying text.

action to make a determination as to how the malleable standard is applied. But compulsory license terms would conceivably not require any further action on the part of the user (e.g., paying royalties for the use<sup>172</sup> or fighting the claim to avoid having a video taken down). Thus, users in most circumstances would be indifferent as to whether the use is fair or not, because a compulsory regime would allow users to keep their content online at no personal consequence to them.

Finally, a compulsory sync license would divide the royalty pie more fairly by giving composition owners the opportunity to grab a bigger, more equitable share of the revenue. It would also allow Congress another opportunity to consider different metrics when setting the price of the license. Instead of a flat rate, the license rate could be based loosely on ad network rates and real-time shifts in market demand for certain pieces of content. Advances in technology and mathematical modeling will enable systems capable of indexing license rates across various ad networks while taking into account other metrics necessary to formulate a fairer market value for content. At the very least, a special compulsory sync license would allow Congress the opportunity to equalize the current royalty breakdowns that give owners of musical compositions, namely songwriters and publishers, the short end of the stick.

A compulsory sync license divides the royalty pie more fairly by giving users and cover artists the shares of revenue they deserve. As discussed earlier, users who appropriate a copyrighted sound recording and composition (such as the wedding video backed by Bruno Mars) do not see their 10% share of the revenue from their visual contributions, and cover artists generally do not see their 40% share of the revenue from the visual and sound recording contributions.<sup>173</sup> A compulsory sync license system, however, would allow users to take advantage of these revenue streams and avoid being penalized for committing infringement. The license would apply automatically, meaning that no infringement would occur. As a result, the user would not forfeit his share of the revenue.

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<sup>172</sup> See *infra* Section IV.B.

<sup>173</sup> See *supra* Section I.D.

*B. Stronger First Amendment Protections for Web-Based Content*

As discussed above, the oft-invoked “fair use” defense<sup>174</sup> is subject to a lack of diligence and fairness because it is the copyright holder who ultimately decides whether or not the content is infringing. A compulsory license would eliminate this problem, as the content would remain hosted and publicly available, fair use or not, because the rights will have already been cleared.<sup>175</sup> This would strengthen the First Amendment protections by correcting the current trend of biased and abusive overcensoring of content by overzealous copyright owners.<sup>176</sup>

Further, the DMCA provides that when a takedown happens, the party whose content was taken down has the opportunity to file a counter notice.<sup>177</sup> When a user files a counter notice, access to the removed content cannot be reinstated for a statutorily provided period of at least 10 business days.<sup>178</sup> This is quite troubling, because regardless of whether there actually was an infringement, the content must stay down for at least 10 days. This result chills free speech and freedom of expression because fair uses and licensed uses can be censored by a disgruntled and abusive copyright owner. Those copyright owners, knowing that the process of adjudicating claims on Content ID is already biased in their favor, are given further incentive to abuse the system under the DMCA, knowing full well that even if there is no *actual* copyright infringement occurring, the content will nevertheless be censored for a minimum of 10 days.<sup>179</sup> To make matters worse, as discussed above, the only recourse for a user is to file a DMCA misrepresentation suit, which is not worth the time, money, or stress for most, if not all, users.<sup>180</sup> Essentially, the DMCA singlehandedly imparts mass censorship power to all copyright

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<sup>174</sup> See *supra* note 109 and accompanying text for a discussion of fair use.

<sup>175</sup> Then the operative question would be whether the content is exempt from the royalty pool, but that inquiry is ancillary to this discussion.

<sup>176</sup> See generally Tiffany Rad & Christopher Mooney, *The DMCA & ACTA vs. Academic & Professional Research: How Misuse of This Intellectual Property Legislation Chills Research, Disclosure, and Innovation*, <https://media.blackhat.com/bh-us-10/presentations/Rad/BlackHat-USA-2010-Rad-DMCA-slides.pdf> [http://perma.cc/4YR7-W9Y9] (last visited June 6, 2016) (describing how copyright owners have abused the laws to censor content, creating a chilling effect; for example, 37% of DMCA takedown notices Google receives are invalid).

<sup>177</sup> 17 U.S.C. § 512(g) (2012).

<sup>178</sup> *Id.* § 512(g)(2)(C).

<sup>179</sup> See generally Rad & Mooney, *supra* note 176 (describing how copyright owners have abused the laws to censor content, creating a chilling effect).

<sup>180</sup> See *supra* note 129 and accompanying text.

holders. A compulsory licensing system would ameliorate this chilling effect by extinguishing the specter of infringement altogether, resulting in evisceration of the DMCA takedown regime. Fair use or not, infringement or not, content would be prelicensed and unencumbered.

### C. *Historical Analogy*

Throughout the years, Congress has recognized the need to amend the copyright law to respond to changes in content consumption. No compulsory licensing provisions were in place until what has become the current section 115, section 1(e), was enacted in 1909.<sup>181</sup> Leading up to the passage of section 1(e), there had been “significant growth of both player pianos and the earlier forms of recorded music.”<sup>182</sup> But because reproducing a song on a player piano roll<sup>183</sup> was not illegal under the then-current copyright act, music publishers lobbied Congress to expand protection.<sup>184</sup> Although willing to expand protection of the reproduction right for publishers, Congress was concerned that publishers would exercise “monopoly power over the recording of music,”<sup>185</sup> just as recording technology was beginning to grow. Striking a tough balance, Congress expanded protection over new forms of reproduction and created the section 1(e) compulsory license, allowing anyone to record a composition without obtaining a license directly from the copyright holder (provided that certain other conditions were met).<sup>186</sup> Thus, from a use perspective, in the same way that Congress wanted to protect against monopolies over *recorded music*, Congress should enact a compulsory sync license to protect against the present-day

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<sup>181</sup> The compulsory licensing provision of the 1909 Copyright Act was known as section 1(e). An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

<sup>182</sup> Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMP. & HIGH TECH. L.J. 215, 217 (2010) (footnote omitted).

<sup>183</sup> A player piano is “a piano that can play automatically when the keys are actuated electronically or by a pneumatic device controlled by a piano roll.” *Player Piano*, DICTIONARY.COM, <http://dictionary.reference.com/browse/player-piano> [<http://perma.cc/2N35-TA32>] (last visited June 6, 2016).

<sup>184</sup> Abrams, *supra* note 182, at 218-19.

<sup>185</sup> *Id.* at 219; *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Prop., Comm. on the Judiciary*, 109th Cong. 108 (2005) (statement of Marybeth Peters, The Register of Copyrights), <http://copyright.gov/docs/regstat071205.html> [<http://perma.cc/B2NB-QZPD>] (“However, due to concerns about potential monopolistic behavior, Congress also created a compulsory license to allow anyone to make and distribute a mechanical reproduction of a nondramatic musical work without the consent of the copyright owner. . .”).

<sup>186</sup> Abrams, *supra* note 182, at 220-21.



monopoly copyright owners have on *music recorded with visuals*. From a technology perspective, Congress should expand the scope of the compulsory license to recognize advances in technology that have given people the capability to make and post music recorded with visuals with the same ease that they have been able to make recordings since the early twentieth century. It is quite simply the natural and necessary extension of our current framework that reflects modern attitudes towards the use and availability of copyrighted content.<sup>187</sup> The player piano of yesterday is the YouTube of today.

Another compelling justification for expansion towards a compulsory sync license is that copyright scholars have found that the synchronization right may have roots in the prior section 1(e). Copyright scholar Professor David Nimmer believes that although the synchronization right is not explicitly found in the section 1(e) compulsory license, the right itself may stem from that section.<sup>188</sup>

#### D. *YouTube Could Easily Administer This System*

YouTube is many things. It is both a video platform and a streaming music service. It is also an enormous database that is constantly maintained and filled with metadata and ownership information about every piece of content it hosts. In the past, the music industry has attempted to install a central repository of rights-management information, but it has proved infeasible because of logistical issues.<sup>189</sup> This is largely due to the various collection agencies operating in their own respective vacuums of rights and refusing to share their catalogs of information and metadata with other agencies. For example, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. are both collective-licensing bodies that license and collect performance royalties for musical compositions. Another collective-licensing body, the Harry Fox Agency, licenses mechanical rights for the reproduction and distribution of musical compositions. Yet another collection body, SoundExchange, commissioned by Congress, only collects royalties for

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<sup>187</sup> To reiterate, Congress has not been bashful about expanding the scope of compulsory licensing over the years by creating sections 114 and 111. *See infra* notes 150-57; Section III.E.

<sup>188</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09[E][3] (1985).

<sup>189</sup> Kate Holton, *Music Industry Working on Global Copyright Database*, REUTERS (Jan. 21, 2011, 12:09 PM), <http://www.reuters.com/article/2011/01/21/us-global-rights-idUSTRE70K56420110121> [<http://perma.cc/3PCH-NVW6>].

noninteractive streaming of sound recordings.<sup>190</sup> Each of these entities maintains a separate database, and the information is not cross-referenced with other collective rights bodies to ensure that ownership information and metadata are correct.<sup>191</sup> These databases are not as comprehensive or complete as YouTube's because the various royalties and the patchwork of rights necessary to make licensing of content possible on YouTube (e.g., composition, sound recording, and audio-visual rights) requires that data from many of these central bodies reside on YouTube's servers. YouTube has properly linked and cross-referenced all of this data to ensure accurate remittance of royalties.<sup>192</sup> YouTube is the database that the industry has been waiting for, as it has ingested and catalogued more metadata and information about each unique piece of content than any other music rights database before it.<sup>193</sup> Now that the database and technology exists, why not use it to facilitate better licensing practices?

### *E. The De Facto Compulsory License Regime*

Content ID already functions like a compulsory license system because all major content owners have opted into it.<sup>194</sup> It gives content owners a mechanism by which to monetize user-generated content despite no license being in place, as if it were already a compulsory system. In fact, when content owners contractually agree to manage their content through Content ID, they technically grant YouTube the right to issue a synchronization license on behalf of the content owner(s) to the user account each time a video is claimed for monetization.<sup>195</sup> For all intents and purposes, this is a private compulsory

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<sup>190</sup> *General FAQ*, SOUNDEXCHANGE, <http://www.soundexchange.com/generalfaq/> [<http://perma.cc/2QPC-WF6P>] (last visited June 6, 2016). The Copyright Office would be another potential example of a government entity that maintains a large database of ownership data. But because the law does not require that one register with the Copyright Office to obtain copyright protection, the Copyright Office's database is inevitably incomplete, as many do not register. *Copyright in General*, COPYRIGHT.GOV, <http://copyright.gov/help/faq/faq-general.html#register> [<http://perma.cc/JL58-L4VB>] (last visited June 6, 2016).

<sup>191</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Most content owners have opted into YouTube, like it or not. Hugh McIntyre, *YouTube Is About to Delete Independent Artists from Its Site*, FORBES (June 18, 2014, 9:15 AM), <http://www.forbes.com/sites/hughmcintyre/2014/06/18/youtube-is-about-to-delete-independent-artists-from-its-site/> [<http://perma.cc/6ZVP-AJRN>] ("Vice President and Global Head of Business at YouTube Robert Kyncl recently claimed that they already had deals with 90% of the industry . . .").

<sup>195</sup> Interview with Brandon Martinez, *supra* note 23.

licensing scheme that has developed in the shadow of the copyright law in response to changing patterns of consumption.

A striking similarity between Content ID and a traditional compulsory license regime is that the user never negotiates a license for the use. Whether the terms are set by statute or by YouTube, users' only concern is keeping their content hosted. There are, however, differences between our current system<sup>196</sup> and a compulsory system that could complicate the transition. First, in a traditional licensing scheme, rates are set by either federal copyright royalty judges<sup>197</sup> or arms-length bargaining, whereas in the current system, advertiser demand sets the rate.<sup>198</sup> Having advertisers set the rate is not necessarily a bad thing. Some critics of the current compulsory regime believe that a statutory minimum devalues content by setting a false price ceiling that does not account for the inherent variance in value between differing pieces of intellectual property.<sup>199</sup> Second, the formalities of the section 115 statutory framework do not exist on YouTube.<sup>200</sup> This difference is beneficial to users because it makes the entire licensing process seamless. Casual, everyday users of YouTube cannot be expected to follow administrative formalities in clearing a license. Like it or not, this is the world we live in today, where nearly everyone has Internet access and is able to create, reproduce, and disseminate content instantaneously.

From a purely legal perspective, today's compulsory licensing structure is not far from a compulsory synchronization regime. The patchwork of rights that are granted between

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<sup>196</sup> For an explanation of our current compulsory licensing system, see *supra* Part II.

<sup>197</sup> Ali Sternburg, *The Copyright Royalty Board: An Explainer*, DISRUPTIVE COMPETITION PROJECT (Dec. 16, 2015), <http://www.project-disco.org/intellectual-property/121615-the-copyright-royalty-board-an-explainer/#.VqIqk7ArIUE> [<http://perma.cc/X94Q-3F7T>]. The Copyright Royalty Board is a panel of "three Copyright Royalty Judges who set statutory license rates for certain music services." *Id.* They only set rates for noninteractive streaming services (i.e., services that function like radio, such as Pandora), not YouTube (which is an interactive streaming service). *Id.* For further discussion of interactive versus noninteractive services, see *supra* notes 157-58 and accompanying text.

<sup>198</sup> *How Ads Are Chosen*, *supra* note 22.

<sup>199</sup> Bevilacqua, *supra* note 157, at 299; see *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Prop., Comm. on the Judiciary*, 109th Cong. 118 (2005) ("Because section 115 and its predecessor have rarely been used as functioning compulsory licenses and have served simply as a ceiling on the royalty rate in privately negotiated licenses, it has placed artificial limits on the free marketplace."); SAG, *supra* note 161 ("By definition, a compulsory license bypasses the information aggregation function of the market. Whether by legislative [fiat], administrative rule-making [or] quasi-judicial arbitration, the bodies responsible for determining prices under a compulsory license are typically starved of information and lack the expertise and ability to acquire it.").

<sup>200</sup> When a user uploads a video and a copyright holder claims it for monetization, the user must merely check a box indicating that they consent to having their video claimed. No further action is required by the user, and the user is allowed to keep the video. Pacheco, *supra* note 34.

sections 114 and 115 is merely a step away from being a special sync license. Between the section 115 license, which provides for reproduction and distribution of compositions, and the section 114 license, which provides for performance royalties for noninteractive streaming of sound recordings, Congress has shown its willingness to expand the compulsory right and adjust licensing practices to changes in consumer consumption. The proliferation of video-content providers should prompt Congress to expand the right in the same way it did when Internet radio providers came into being.

*F. Reducing Transaction Costs, Improving User Experience, and Expanding Access to Content*

Content ID and compulsory licenses are extremely efficient because of the minimal transaction costs, given that the user negotiates nothing. For most people, the transaction cost of licensing music for a video is too high. For example, the content creator might not know how to get in touch with the copyright owner or how to ask the copyright holder for the rights. In addition, the content creator might not be able to afford to send a lawyer to negotiate the contract. Both Content ID and compulsory licenses help users by dramatically lowering transaction costs so the user can create derivative content and so the copyright owner can get some payment without having to play legal whack-a-mole. Lowering the transaction costs of using copyrighted content is great for the “little guy” who does not have the wherewithal to license or pay, and it would also highly benefit artists and songwriters through large cost savings on administration fees.<sup>201</sup>

A special compulsory license for UGC platforms would also result in a much-improved user experience. No longer would users receive frivolous copyright claims on their videos and have to undergo the cumbersome user appeals process that weighs so heavily in favor of content owners. Curing the cumbersome user appeals process would benefit rights holders by reducing their load on reasserting rights to disputed claims. A compulsory license system would also make users “partners” in a sense. Instead of telling users that their video has been “claimed by Sony” on copyright grounds, a compulsory licensing system would

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<sup>201</sup> See Holton, *supra* note 189 (“The industry estimates that 100 million euros each year could be saved in copyright administration fees and returned to song writers and the industry by simplifying the current system.”); see also Andrew D. Stephenson, *Webcaster II: A Case Study of Business to Business Rate Setting by Formal Rulemaking*, 7 HASTINGS BUS. L.J. 393, 399 (2011) (explaining that imposition of a compulsory scheme lowers transaction costs for both copyright owners and copyright users).

perhaps tell them they have been issued a limited license to use the work on YouTube only, making all users “partners.” It would result in a less adversarial system where users would not have such an “us-versus-them” mentality when dealing with posted content.<sup>202</sup> Further, a compulsory sync license would have a democratizing effect on access to content. The current framework serves to chill content via the provisions of the DMCA<sup>203</sup> and abusive claim practices that disenfranchise users.<sup>204</sup> The compulsory sync license would eliminate this inequity by expanding access to content.

The compulsory sync license would eliminate other chilling effects as well. One problem with the current system is that any individual stakeholder to a piece of copyrighted content may veto its use on YouTube, despite the intentions of the other stakeholders.<sup>205</sup> For example, take a song that has seven writers (which is certainly not uncommon today),<sup>206</sup> of which one of the writers owns 1%. Even if the other six songwriters have set up Content ID so that matches are monetized, if the 1% writer has instituted a block or takedown policy, he will block the other rights holders from receiving any revenue from the work, despite their preference to monetize. This is because YouTube must always abide by the most conservative policy set on a video,<sup>207</sup> or else an infringement of the 1% owner’s rights would occur. Any cowriter, no matter how small the stake, is given a nuclear veto power that forecloses other rights holders from enjoying revenue from a specific piece of content. Even worse are instances where an entity that does not even own the rights to the content it is

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<sup>202</sup> See generally *YouTube’s Joke of a Fair-Use Appeal Process*, *supra* note 51. The tenor of this article demonstrates that users feel betrayed, that they do not have a fair shot at having their voices heard, and that the process is a “joke.”

<sup>203</sup> See *supra* Section III.C.

<sup>204</sup> See *supra* Section I.E.

<sup>205</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>206</sup> Bob Lefsetz, *The Story Is Not the Music*, LEFSETZ LETTER (Dec. 19, 2013), <http://lefssetz.com/wordpress/index.php/archives/2013/12/19/the-story-is-not-the-music/> [<http://perma.cc/CF64-MBC4>] (“Come on. Art is about inspiration. How much inspiration is there in records made by committee? It’s all formula, all the time.”).

<sup>207</sup> *Pro Tips & Advanced Resources: Rights Management*, YOUTUBE, [https://support.google.com/youtube/answer/6106902?hl=en&ref\\_topic=6084219](https://support.google.com/youtube/answer/6106902?hl=en&ref_topic=6084219) [<http://perma.cc/55BZ-84CW>] (last visited June 6, 2016) (“YouTube associates a policy with a video whenever someone claims the video. When a video has multiple valid claims and therefore multiple valid policies associated with it, YouTube applies whichever policy results in the most restrictive action. If one policy says to monetize the video and another says to block it, YouTube blocks the video.”); see also Ari Hestand, *Jeff Price and Audiam Look to Fix YouTube’s Royalty System*, DIGITAL MUSIC NEWS (Jan. 21, 2014), <http://www.digitalmusicnews.com/permalink/2014/01/21/jeff-price-audiam> [<http://perma.cc/287M-FNRM>] (explaining that “YouTube will not monetize a video unless they have clearance” for the copyright in the composition, master, and video).

claiming seeks to block or take down content that the rightful copyright owners want to monetize.<sup>208</sup> Again, one disgruntled rights holder or abusive content claimant has the power to stall the money train for everyone else. And aside from the monetary concern, it also has a chilling effect on ideas, innovation, and proliferation of content due to overcensorship.<sup>209</sup>

A compulsory sync license would ameliorate these issues by automatically granting a license to use the work, regardless of whether one co-owner or all the co-owners wanted to veto the use. A disgruntled cowriter or abusive content claimant would have no choice but to automatically grant a license. From a policy perspective, rights holders should be able to enjoy revenue on digital platforms despite the preferences of a cowriter. Not allowing one stakeholder to prevent other stakeholders from spreading their ideas and content, all while generating revenue for the whole pie, aligns with the utilitarian goals of copyright law to “promote the Progress of Science and useful Arts.”<sup>210</sup>

#### G. *Burden Shifting in Copyright Cases: A Change in Ideology*

A recent notable case, *Field v. Google*,<sup>211</sup> highlights courts’ changing expectations of how licenses are issued. In 2004, Field filed a copyright infringement suit against Google alleging violation of his reproduction and distribution rights.<sup>212</sup> For Google to be able to provide its search engine service, it crawls the Internet creating cached versions, or “snapshots,” of websites to better enable indexing of results.<sup>213</sup> Google provides cached versions of webpages in its search results as well.<sup>214</sup> Field alleged that Google’s copying and distribution of his website in the form of cached pages constituted infringement.<sup>215</sup> The court granted Google’s motion for summary judgment<sup>216</sup> and ruled that Google had an “implied license” to make the reproductions and distributions of Field’s webpage because Field did not attach the

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<sup>208</sup> See Patrick McKay, *YouTube Copyfraud & Abuse of the Content ID System*, FAIR USE TUBE.ORG (Nov. 23, 2011, 3:22 PM), <http://fairusetube.org/youtube-copyfraud> [<http://perma.cc/22KE-LVFT>].

<sup>209</sup> Currently, millions of dollars in accumulated revenue is tied up in escrow because of this issue. Interview with Brandon Martinez, *supra* note 23.

<sup>210</sup> U.S. CONST., art I, § 8, cl. 8.

<sup>211</sup> *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>212</sup> *Id.* at 1109-10.

<sup>213</sup> *Id.* at 1110.

<sup>214</sup> *Id.* at 1111 (“Google has provided ‘Cached’ links with its search results since 1998.”).

<sup>215</sup> *Id.* at 1114.

<sup>216</sup> *Id.*

appropriate metatags to his website to prevent it from being cached.<sup>217</sup> In other words, because Field did not take the appropriate steps to prevent third parties from caching his site, his inaction granted Google an implied license.

*Field* is noteworthy in that it shifts the burden to copyright owners to “opt out” of a default licensing system instead of traditionally “opting in” to a specific use. The onus is on rights holders to prevent or veto uses of content, not on users to ask for permission, reflecting modern views as to how copyrighted material on Internet platforms should be managed. The compulsory system evinces similar attitudes and seeks to achieve the same end—it presumes that a work is available for use without prior approval or permission. *Field* shows that as a society, we are ideologically and doctrinally closer to embracing and achieving a compulsory license system. *Field* signals a paradigm shift for licensure of copyrighted web content from express to implied licensing, bringing us closer to a compulsory licensing regime by moving the needle along the continuum towards less restrictive licensing practices.<sup>218</sup>

#### IV. DIFFICULTIES WITH IMPLEMENTATION

##### A. *Establishing Uniformity Across Platforms*

Establishing uniformity across platforms is one of the biggest hurdles to implementing a compulsory synchronization license. Requiring UGC services to participate in issuing these licenses on-platform seems technologically and logistically impossible because it requires UGC services to be technically sophisticated enough to handle a Content ID-type system. This may have a crippling effect on innovation by creating a higher barrier to entry for any platform that hosts user-generated content. One solution may be that the compulsory system merely sets certain minimum standards, even if the system is not as sophisticated as Content ID.<sup>219</sup> Perhaps one could envision a

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<sup>217</sup> *Id.* at 1115-16.

<sup>218</sup> An example of a more restrictive licensing practice would be one that requires arms-length negotiation and express authorization, whereas examples of less restrictive licensing practices include implied licenses, creative commons licenses, and compulsory licenses (i.e., those that do not require permission or negotiation with the rights holder).

<sup>219</sup> Think of a system somewhat akin to the European Union Data Privacy Directive, which set minimum standards for data privacy compliance for all E.U. member nations. See Press Release, Directorate of Communications, Council of Europe, Council of Europe Adopts Recommendation of Profiling and Data Protection (Nov. 25, 2010), [https://wcd.coe.int/ViewDoc.jsp?Ref=PR892\(2010\)&Language=lanEnglish&Ver=original&Si](https://wcd.coe.int/ViewDoc.jsp?Ref=PR892(2010)&Language=lanEnglish&Ver=original&Si)

system where a third-party licensing body, akin to ASCAP, would issue and administer these licenses by connecting to and communicating with UGC platforms to enable that support. A positive point to note is that Content ID–like systems are becoming increasingly common across UGC platforms,<sup>220</sup> perhaps signifying that implementing this technology is quite feasible.

Another potential roadblock to implementation is that a compulsory license system may impliedly or directly create a duty for UGC platforms to scan for infringement through the use of audio-recognition technology. Currently, there is no duty for UGC platforms to search for copyright infringement.<sup>221</sup> On the other hand, Google CEO Eric Schmidt has regarded Content ID as “key” for avoiding infringement liability.<sup>222</sup> But UGC platforms should find solace in the fact that a compulsory system would effectively eliminate the specter of liability for copyright infringement, because all uses that qualify would be licensed by default.

### B. *The Money Train Isn't Long Enough*

The looming question in this new compulsory sync licensing system is: “Who pays?” In the current compulsory license system, the licensee pays the licensor.<sup>223</sup> On Content ID, YouTube arranges for the licensor to be paid with ad revenue.<sup>224</sup> A new compulsory sync license may require the licensee, the intermediary, or both to pay—or perhaps there could be a choice as to who pays based on the platform.

If advertisers continue to foot the majority of the bill when it comes to paying copyright holders, this may levy an unsustainable strain on the revenue pool. Advertisers only have so much money they can use to fill inventory,<sup>225</sup> and perhaps it is not possible to monetize all content. It is concerning to think that the system would fail if advertisers stopped bringing huge bags of money to the table. Do we want a licensing scheme that is

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te=COE&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE [http://perma.cc/YZN3-7PVV].

<sup>220</sup> Interview with Brandon Martinez, *supra* note 23.

<sup>221</sup> See, e.g., Masnick, *supra* note 29.

<sup>222</sup> Delaney, *supra* note 73.

<sup>223</sup> 17 U.S.C. § 115 (2012).

<sup>224</sup> Interview with Brandon Martinez, *supra* note 23; *YouTube Partner Earnings Overview*, YOUTUBE, <https://support.google.com/youtube/answer/72902?hl=en> [http://perma.cc/K3XY-5TDL] (last visited June 6, 2016).

<sup>225</sup> Remember that monetized and claimed videos become inventory for advertisers to fill. See *supra* Section I.A. Thus, references to inventory here merely mean claimed and monetized videos that are waiting to be filled with ads.



dependent solely upon the viability of the advertising industry? And even if this were possible, do we want a scheme where royalty rates are set by ad networks?

As long as content is free, perhaps the answer to these questions is “yes.” That answer, however, comes with some qualifications. A system that utilizes ad networks to set royalty rates would possess inherent inequities because it would depend upon the advertisers’ interests. Advertisers want to fill inventory that, among other factors, corresponds with the demographic they are trying to reach. This means two separate pieces of content that are similar in terms of quality, views, and engagement could be treated differently. One piece of content could be filled with lower-rate ads while another, similar piece of content could be filled with higher-rate ads, resulting in more royalties to the latter content owner. Thus, it seems unfair to pay a copyright holder a royalty equal to its relative value to advertisers, rather than the value it contributes to YouTube and society overall.

Another revenue consideration is that if the royalty rate depends on the ad networks, which fluctuate constantly, this could result in devaluation of copyrighted content. Currently, there are statutorily prescribed, minimum royalty rates in place for content licensed via section 115.<sup>226</sup> A compulsory sync license dependent solely on ad revenue may result in market forces pushing the price of content down (via simple supply and demand economics) because the amount of digital content available is virtually endless. One possible solution would be to set a statutory minimum for content, and advertisers would have the option of paying more than the minimum for premium content. Implementing a statutory minimum is a risky situation, however. If the minimum is too high, it could drive disgruntled advertisers off-platform. If the minimum is too low, copyrighted content may be devalued anyway because setting a low floor reflects that content is worth less.

Perhaps a compulsory sync license system that gives users the option and ability to foot some of the bill for licensing the content would be beneficial as well. Knowing that they have a direct impact on the artist’s bottom line might bring users closer to artists and copyright holders. Any user payment would also be factored into increasing the value that ad networks attribute to specific pieces of content, thus resulting in higher-grossing ad placements. All in all, though taking money from advertisers may be problematic, as long as consumers are not willing to pay for

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<sup>226</sup> *What Are Mechanical Royalty Rates?*, *supra* note 142.

content, advertiser dollars are here to stay and would be the prevailing source of revenue in a compulsory synchronization licensing scheme.

*C. Who Administers? Private Industry or the Government?*

A concern of rights holders under a compulsory sync system is: Who administers and distributes the royalties? Different conflicts of interest would exist depending on whether a private body (i.e., UGC platforms) or the government administers this system and distributes royalties. The question truly boils down to whether licensing should be done on-platform (by a UGC platform like YouTube) or via a neutral third party (like the government). There are arguments for and against both. Private corporations may argue that they should not be saddled with taking on a statutory licensing scheme enacted by the people because that is the government's duty. Another concern is that on-platform licensing involves an inherent conflict of interest. On one hand, platforms desire to maximize revenue for their administration services. On the other hand, platforms should ensure that the value enjoyed by rights holders is maximized by cheapening administration services. Although transaction costs would decrease if licenses were issued on-platform, the inherent conflict of interest and burden placed on UGC platforms could weigh against having a private corporation administer a special compulsory synchronization license.

Perhaps governmental regulation and oversight of private corporations would ensure that rights holders are paid fairly and that the system is managed properly. Again, corporations will most likely fight against the government imposing any sort of duty. Moreover, licensing could be conducted by a neutral, statutorily created body that connects and communicates with various UGC platforms' technology to record data on all claims and views, similar to the services SoundExchange provides for noninteractive streaming platforms.<sup>227</sup>

*D. What About the DMCA Takedown?*

A compulsory sync license regime would necessarily displace provisions of the DMCA as they apply to infringement of

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<sup>227</sup> SoundExchange collects noninteractive streaming royalties for the use of sound recordings. *About*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/> [<http://perma.cc/KK5B-7W7G>] (last visited June 6, 2016).

the reproduction, distribution, and synchronization rights on UGC platforms. It would mean that content owners could not submit a takedown notice for these uses on UGC platforms. The protections of the DMCA in this context, however, would not have to be completely abolished. Perhaps an amendment to the DMCA would condense the scope of takedowns on UGC platforms so that takedowns are only available where there is objectively offensive material paired with a copyright owner's specific composition or recording. Although it would be difficult to draw the line as to what constitutes "objectively offensive," a start would be banning porn/obscenity and building up from there.<sup>228</sup> Moreover, it would be prudent not to strip all the protections that the DMCA currently affords to rights holders, because in a compulsory system, rights holders already have little control over their content.<sup>229</sup> Thus, in the interest of fairness, content owners should not lose complete control over certain rights that they once fully possessed. In sum, the DMCA would potentially serve as a statutory outer boundary that curtails the expansion of a compulsory rights system.

#### *E. Scope of the License*

The scope of a compulsory sync license would be difficult to define. It must be drawn narrowly and with great caution so as not to disrupt licensing practices in other sectors of the music industry. For starters, the present day system prescribes natural, logical bounds, as one of the main reasons for implementation is that there is already a *de facto* system in place. Next, the policy motivations behind the compulsory regime are instrumental to defining the scope of the license. In theory, this license is meant to benefit the "little guy," such as people like your cousin merely trying to post her wedding video. It is also meant to alleviate the challenges faced by content owners that necessarily arise in licensing vast amounts of content. Bearing these goals in mind, a compulsory sync license must be drafted to achieve, but not exceed, these ends.

To be clear, the license would only cover the use of sound recordings and musical compositions for synchronization with an original visual representation for use on UGC platforms. And the

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<sup>228</sup> Although admittedly, most UGC platforms would, in their terms of service/terms of use agreements, expressly prohibit porn or obscenity.

<sup>229</sup> Bevilacqua, *supra* note 157, at 299 ("Compulsory licenses create a mandatory non-negotiable contract where the property owner is forced to give virtually unlimited use of his work . . .").

law's definitions are imperative to determining the scope of the license. What is classified as a UGC platform would be any platform akin to YouTube, Facebook, Snapchat, Vine, Instagram, Vimeo, or Daily Motion, which all allow individual, amateur users to sign up for accounts to upload video content. Use on any other platform, such as Cable TV, Netflix, HBO, or any other video site that does not have user-generated content would not qualify for the license.<sup>230</sup> Curated video sites like Vevo would also not qualify because Vevo does not maintain user-generated content—it is a music video distributor.<sup>231</sup> The traditional method of obtaining a synchronization license, via arms-length negotiation, would still be available in all other instances.

Further, it is equally important to limit the types of users permitted to invoke the license. The scope must initially be limited to amateurs. Corporations with large artist rosters (who have already negotiated ancillary royalty agreements with YouTube)<sup>232</sup> should not be able to take advantage of what may perhaps be a more economically favorable arrangement under the compulsory license. Small and medium-sized record labels and music publishers should not be able to take advantage of the compulsory license unless the entity is so small that it would be cost prohibitive to obtain a traditional license.<sup>233</sup> And large multichannel networks such as Fullscreen or Maker Studios<sup>234</sup> that gross millions of dollars a year from syndication of content<sup>235</sup> are obviously not within the scope of the license.

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<sup>230</sup> If the platform has user tiers and syndicated tiers, the license would apply only to user-uploaded content.

<sup>231</sup> Catherine Shu, *YouTube Confirms Renewed VEVO Deal, Takes Stake in Company*, TECHCRUNCH (July 2, 2013), <http://techcrunch.com/2013/07/02/youtube-renewed-vevo-deal/> [<http://perma.cc/WR92-JR6G>].

<sup>232</sup> Most major content owners have opted in to YouTube, like it or not. McIntyre, *supra* note 194 (“Vice President and Global Head of Business at YouTube Robert Kyncl recently claimed that they already had deals with 90% of the industry . . .”).

<sup>233</sup> The entity would have a duty to show that it could not afford a traditional synchronization license for online syndication.

<sup>234</sup> See FULLSCREEN, <http://www.fullscreen.com/> [<http://perma.cc/6MCK-CLCZ>] (last visited June 6, 2016); MAKER STUDIOS, <http://www.makerstudios.com/> [<http://perma.cc/9A5T-NNZ9>] (last visited June 6, 2016); *see also* Carla Marshall, *Beyond YouTube: Why MCNs are Looking to Other Video Platforms for New Opportunities*, REELSEO (Aug. 13, 2015), <http://www.reelseo.com/beyond-youtube-multichannel-networks/> [<http://perma.cc/4YSG-4B2R>] (showing that Maker Studios and Fullscreen were the top two multichannel networks on YouTube in June 2015, ranked by total views).

<sup>235</sup> Wagner James Au, *YouTube's Machinima Channel Earning Up to \$8.6M a Year!*, NEW WORLD NOTES (Oct. 4, 2011), <http://nwn.blogs.com/nwn/2011/10/youtube-machinima-channel-revenue.html> [<http://perma.cc/7HBU-B5Y9>].

## CONCLUSION

The establishment of a special compulsory synchronization license for UGC platforms that host musical compositions and sound recordings is crucial to creating a uniform standard for content management across the web. Currently, there is no consistency in enforcing and monetizing copyright on the Internet. YouTube is the leading innovator in evolving licensing schemes, and it makes sense to follow its system and attempt to implement a similar system on other UGC platforms. Statutory implementation of a special compulsory synchronization license will encourage other UGC platforms to provide an infrastructure that does not thrive on widespread ratification of infringement. In the process, this system will alleviate the chilling of content, inadequate compensation, bias in adjudicating user disputes, and licensing's high transaction costs. All in all, artists, songwriters, and users alike should be fairly compensated for their creations, and this system brings us one step closer to realizing that goal.

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