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“Storytime: We’re Being Sued” – Copyright Infringement and Fair Use in the Digital Era

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To those who are well versed in the modern-day social media culture, it comes as no surprise that videos uploaded to online platforms like YouTube are often titled in a way that is meant to grab the user's attention and entice them to watch. This sort of shock factor was perfectly encapsulated with the upload of a video titled "We're Being Sued" by creators Ethan and Hila Klein, better known by their online moniker 'H3H3', in 2016.¹ The video, which has amassed over 7 million views to date, detailed the legal battle between the uploaders and fellow creator Matt Hosseinzadeh over the couple's use of his content in a harshly critical, reaction-style video. The Kleins uploaded a video giving their commentary and critique of Mr. Hosseinzadeh's video and included numerous clips of his video to demonstrate their criticisms. The plaintiff initiated the suit after the couple filed a formal dispute against his copyright takedown request, claiming their use of his content fell under fair use and thus was protected.² Following the announcement of the suit, the defendants received an outpouring of support, including the creation of a GoFundMe on their behalf to pay for their legal fees.³ Many members of the YouTube community viewed this suit as a representation of the legal battles often faced by online content creators attempting to navigate a system of laws enacted before their career even existed, and the outcome as crucial to the future of such online careers.

Ultimately the Kleins prevailed, with the Southern District of New York ruling that their use of the plaintiff's video, "no doubt. . . constitutes critical commentary" and was, "decidedly not a market substitute for [his] video," and as a result, "constitutes fair use as a matter of law."⁴ The

¹ H3H3 Productions, *We're Being Sued*, YOUTUBE (May 24, 2016), <https://www.youtube.com/watch?v=fEGVOysbC8w&t=8s>.

² Melissa Chan, *This YouTube Star Got Sued, Raised \$130,000, and Wants to Change the Site Forever*, TIME MAGAZINE (May 27, 2016), <https://time.com/4349864/ethan-klein-h3h3productions-fair-use-protection-account-fupa/>.

³ Shona Ghosh, *YouTubers Ethan and Hila Klein have won a 'landmark' copyright lawsuit*, BUSINESS INSIDER (Aug. 24, 2017), <https://www.businessinsider.com/youtube-ethan-and-hila-klein-copyright-lawsuit-2017-8>.

⁴ *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 42-43 (S.D.N.Y. 2017).

court also highlighted the nature of the video as primarily for purposes of commentary and critique, noting that such purpose justifies a “strong presumption” of fair use.⁵ While the Kleins’ success was viewed by many as a landmark victory for online content creators, it is a far cry from a final resolution to the myriad of uncertainties faced by such individuals, including those like the Kleins that utilize the subject matter of others in their videos. Both the individuals uploading content to YouTube and the platform itself are bound by a number of laws relating to copyright protection, which impose upon each party certain rights and obligation in regard to protectable subject matter. However, both the relationship between the two parties and the relative newness of the platform make it less clear just how these laws apply.

I. Background

While copyright law in the United States has long recognized “motion pictures and other audiovisual works” as eligible for copyright protection,⁶ our collective understanding of what this phrase means has continually evolved with the changes brought about by, among other things, developments of new media formats. The most notable of these developments in recent years has been the genesis of the internet and, as a result, video distribution platforms like YouTube. The creation and rapid spread of such platforms has made it easier than ever for individuals to both consume content and share their own independently created content with potentially millions of others.

Most videos uploaded to YouTube, at least those which are the independent creation of the uploader themselves, meet the minimum requisites for copyright protection. Similarly, at least

⁵ *Id.* (quoting *Wright v. Warner Brooks, Inc.*, 953 F.2d 731, 736 (2nd Cir. 1991)).

⁶ 17 U.S.C. §102(a).

some of these videos which make use of copyrighted material are protected by the fair use doctrine. However, the particulars of how our current system of copyright law is to be applied to these individuals and to YouTube as a platform is less clear.

A. Copyright Protection and the Fair Use Doctrine

Generally speaking, anything an author creates which is both minimally creative and fixed in a tangible form is eligible for copyright protection. This definition is undoubtedly broad, but it is this broadness which allows copyright law to meet the needs of rightsholders, especially as new forms of creative media emerge. The development of new technologies is essential to both allowing creators new mediums through which to express themselves and providing them new means through which to share their works with others. And as these new creative mediums emerge, they bring with them new questions about how existing copyright laws are to be applied, or whether the proper course of action is complete revision of the law itself. For copyright law to be efficient in its ultimate goal of "[promoting] the Progress of Science,"⁷ it must necessarily adapt to continue protecting the exclusive rights of creators; however, it is the best form for this evolution to take which is less clear. The scope of copyrightable subject matter has broadened significantly from the "map, chart, book, or books already printed," protected in the first federal copyright statute,⁸ to encompass media forms which were either not contemplated at the time or were not seen as deserving of this protection.

Additionally, it should be noted that copyright protection for a creative work comes into existence as soon as the work is fixed in a tangible form, as opposed to at the moment the work is

⁷ U.S. Const. Art. I, Sec. 8, Cl. 8.

⁸ 1 Stat. 124 (1790 Act).

registered with the copyright office.⁹ As soon as one has created something eligible for copyright protection, at least some degree of this protection comes into existence.

In addition to the general definition of copyrightable subject matters given previously, it is worth noting that U.S. copyright law explicitly protects, “compilations and other derivative works.”¹⁰ The statute defines compilations as a work formed through the collection and assembly of preexisting materials, which by virtue of its selection or arrangement constitutes an original work of authorship.¹¹ Derivative works, on the other hand, are defined by their transformation or adaptation of a preexisting work.¹² Protection for compilations and derivative works extends only to the original work of the creator, generally meaning the specific selection or adaptation of the original work, and not to the preexisting work employed in the creation of the work. Essentially, this law seeks to recognize the fact that some works which utilize other copyrighted material nonetheless possess a degree of creativity, and thus are worth protection. In cases of copyright protection for compilations or derivative works, the determinative inquiry is whether the creator employed a level of creativity in the creation of their work.

Of course, no protection is beneficial if it does not allow creators a method for challenging those who fail to respect their inherent rights. U.S. copyright law provides copyright holders the explicit right to bring suit against anyone who infringes upon their exclusive statutory rights.¹³ Infringement is characterized not merely by pure copying of one’s work, but rather by the substantial similarity between the copyrighted work and the alleged infringing work.¹⁴ Pursuant to

⁹ 17 U.S.C. §302(a).

¹⁰ 17 U.S.C. §103.

¹¹ 17 U.S.C. §101.

¹² *Id.*

¹³ 17 U.S.C. §501.

¹⁴ *Feist Publications v. Rural Telephone Service Co., Inc.*, 499 U.S. 361 (1991).

the United State's signation of the Berne Convention in 1989, copyrightable works are not required to provide notice of their copyrighted nature as a prerequisite to suit.¹⁵ However, registration of the copyright is required for a rightsholder to enforce their exclusive rights by means of litigation.¹⁶ Should they meet the requisites for suit, copyright holders are entitled to pursue a number of remedies, including injunction, destruction of the infringing copies, and collection of profits made by the infringer.¹⁷ Essentially, the purpose of an infringement suit is denying the infringer the ability to benefit from the copyright holder's exclusive rights in the material, and redistributing those benefits back to the copyright holder where the infringer has already benefited from his unauthorized use.

Despite the protections of copyright holders' interests via infringement suit, it is essential to note that not every use of a copyrighted material constitutes infringement. Copyright law provides for several exceptions or limitations on a copyright holder's exclusive rights, the most significant of which is the concept of fair use. The fair use doctrine is a judicially created exception which permits the use of copyrighted materials for certain purposes, such as commentary or research.¹⁸ The doctrine was codified with the Copyright Act of 1976, which also provided four factors for consideration in determining whether a use falls under fair use: (1) the purpose and character of the use, (2) the character of the original work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on the market for the copyrighted work.¹⁹ While no one factor is independently determinative, courts applying the test have indicated that the first factor,

¹⁵ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §7, 102 Stat. 2853 (1988).

¹⁶ 17 U.S.C. §411(a).

¹⁷ 17 U.S.C. §§502-504.

¹⁸ 17 U.S.C. §107.

¹⁹ *Id.*

whether the use is transformative in nature, is “the heart of the fair use doctrine.”²⁰ In other words, fair use of a copyrighted material must “[add] something new, with a further purpose or different character” compared to the original work.²¹ Should a use of a copyrighted work be classified as fair use, such use is not vulnerable to infringement suit, and the creator is free to continue reaping the benefits of this use.

B. The Digital Millennium Copyright Act

When it comes to attempts by legislators to keep copyright law in step with the contemporary needs and issues brought about by the internet, the most significant piece of legislation is the Digital Millennium Copyright Act of 1998, commonly referred to as the DMCA. The Act served as means for implementing two treaties ratified by the World Intellectual Property Organization (or WIPO), most notably the Copyright Treaty of 1996.²²

The WIPO Copyright Treaty, and by association the DMCA, came as a direct response to the growing significance of the internet and the unprecedented ways in which it allowed for the distribution of copyrighted materials. The treaty and the Act were intended to address these developments to ensure the protection of copyright owners’ exclusive rights in their works against new forms of infringement.

Of the changes made by the DMCA, the most significant, and controversial, are the anti-circumvention provision and the safe harbor provision. The former, the anti-circumvention provision, concerns the actions of individuals seeking to access copyrighted materials online. Many of these materials are protected by access controls, which are essentially technological

²⁰ *Campbell v. Acuff-Rose Music Co.*, 510 U.S. 569, 579 (1994).

²¹ *Id.*

²² Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

means for controlling who can access copyrighted material which exists online.²³ Common forms of access controls can include digital rights management, or DRM, technology and software which protects against the creation of unauthorized copies of copyrighted material.²⁴

To address efforts to skirt around such technologies, the Act created Section 1201 of the Copyright Act. Section 1201 contains two provisions to this aim: (1) the prohibition of the production and distribution of technology or devices designed to circumvent access controls, and (2) the criminalization of the simple act of circumventing an access control, regardless of whether this circumvention resulted in actual infringement. In essence, this provision allows for the criminal penalization of anyone who circumvents access controls to copyrighted material, as well as anyone who facilitates such circumvention by others through the distribution of technology to this aim. Should an individual violate this provision, they face the potential of up to \$500,000 in fines or up to five years of imprisonment, and repeat offenders face even harsher penalties.²⁵

In contrast, the safe harbor provision primarily concerns Online Service Providers, or OSPs, rather than individual users. To best meet its intended purpose, the DMCA necessarily had to balance concerns of unauthorized copying and distribution with the interests of OSPs in allowing the free dissemination of information through their platforms without the risk that they may be held liable for infringement committed through such dissemination. This balance was struck with the creation of Section 512 of the Copyright Act. This section established a means for OSPs to escape liability for the infringing acts committed by its users, provided it meets certain criteria.²⁶ The most significant of such criteria is that the OSP must implement a system for

²³ *Circumventing Copyright Controls*, DIGITAL MEDIA LAW PROJECT (last visited Nov. 7, 2021), <https://www.dmlp.org/legal-guide/circumventing-copyright-controls>.

²⁴ *Id.*

²⁵ 17 U.S.C. §1204.

²⁶ 17 U.S.C. §512.

promptly removing content that may potentially be infringing and must provide its users a system for challenging this removal.²⁷ So long as an OSP meets these criteria and all those set forth in the statute, they will be treated as an innocent intermediary and will not be held liable for monetary, injunctive, or other equitable relief.²⁸ In other words, this provision shields service providers from liability for the actions of their users where those actions amount to copyright infringement and instead places this liability with the individual users themselves. By protecting service providers from liability for the acts of their users, this provision seeks to foster an environment of innovation and competition among OSPs without fear of significant and unintended legal repercussions.

In the upwards of 20 years since its implementation, it has become increasingly clear that the DMCA is a far cry from addressing the many concerns brought about by the digital age, and in fact may be doing more harm than good. Criticism of the Act tends to stem from one of the above discussed provisions, and generally focuses on the fact that the Act shows a clear preference towards service providers and their interests over the individual users. The anti-circumvention provision has received scathing criticism, both in terms of its effectiveness at preventing online piracy and its widespread impact on fair use, free expression, and innovation. By criminalizing all acts of circumvention, regardless of the user's intent or the actual commission of infringing acts, the provision takes on an overly broad character that functions to stifle the creativity and innovation which is at the heart of copyright protection.²⁹ In practice, the anti-circumvention provision is insufficient to address legitimate issues of online infringement, and instead burdens

²⁷ *Id.*

²⁸ *DMCA Safe Harbor*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-safe-harbor/> (last visited Nov. 5, 2021)

²⁹ *Digital Millennium Copyright Act*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/dmca> (last visited Nov. 5, 2021).

individual users, most of whom are in a much less advantageous position than OSPs to bear this burden.

C. The Case of YouTube

YouTube originally launched in 2005 as a platform for individuals to upload and share video-based content virtually.³⁰ The site allows users to browse through videos uploaded by others, with options to like or dislike videos, leave comments, and share videos across social media platforms. While the platform was originally designed as little more than a convenient method for users to upload and browse individually created videos, it has seen an indescribable level of growth, rising to the status it holds today as the primary video-based sharing platform. The platform has evolved from its humble beginnings to a monolith of a platform and a legitimate means for pursuing an independent career in content creation online.

With this growth has come a shift in the primary legal issue concerning the platform as it pertains to copyright law. Like many early video sharing platforms, the primary concern was once likely the unauthorized copying and distribution of third-party copyrighted materials, such as motion pictures or musical audio files. While this is no doubt still a concern, the platform's expeditious removal of such clear-cut infringing materials means all but the most brazen users shy away from such distribution through the platform. Instead, the more prevalent, and indeed the less clear-cut legal issue, is the use of such third-party materials within a larger body of work independently created by the user. While at least some of these uses certainly fall within fair use, the exact determination of such has proven to be an increasingly difficult task for the platform to manage.

³⁰ Jefferson Graham, *Video websites pop up, invite postings*, USA TODAY (Nov. 21, 2005), https://usatoday30.usatoday.com/tech/news/techinnovations/2005-11-21-video-websites_x.htm.

In order to fully comprehend the copyright issues present on YouTube today, it is essential to acknowledge the unique triad of parties involved. As opposed to traditional issues of copyright infringement, where the parties involved are the copyright holder and the infringer, issues of copyright on platforms like YouTube involve three parties: the host platform, the rightsholder, and the alleged infringer. Each of these parties possess certain rights and owe one another certain duties as imposed by copyright law. As a host platform, YouTube owes third-party rightsholders a duty to ensure their platform is not being used to infringe upon those rightsholders exclusive rights to their content. At the same time, YouTube owes a similar duty to its creators, to protect them against the reupload or otherwise infringing use of their videos by other creators. In addition, YouTube must provide its users the opportunity to either resolve their uses of copyrighted material which are infringing or to dispute the assertion that such use is in fact infringing where the creator believes it to be fair use. And of course, users of the platform owe both YouTube and third-party copyright holders the fundamental duty to not upload content which they know to be infringing. It is precisely this interdependent system of rights and responsibilities which tends to create confusion and uncertainty as to how to resolve potential issues of copyright infringement on the platform.

Of course, with the potential reach of a platform such as YouTube comes a high probability that some users will engage in behaviors that constitute copyright infringement. YouTube has a general policy for its users informing them of how the copyright system works and what consequences they may face for infringing on the copyright of another.³¹ YouTube has also developed multiple systems for handling infringing content: Webform copyright strike, Copyright Match, and Content ID. Access to these systems is generally dependent on the classification of the

³¹ Copyright, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/copyright/> (last visited Nov. 5, 2021).

rightsholder and the volume of work they are claiming rights to. Any individual can submit a copyright takedown request, which informs the uploader that they may have published infringing content, allows them to dispute this claim, and ultimately results in the removal of a video determined to be infringing.³² The Copyright Match Tool is available only to users with a, “demonstrated history of successful DMCA takedowns,” and allows the user to upload their content to a database where it will be compared to any subsequently uploaded videos. Similarly, the Content ID system allows rightsholders of, “a substantial body of original material that is frequently uploaded” to upload their protected material to a database which will automatically compare it to new uploads to identify infringing content.³³ Rightsholders can then block the video from view or collect ad revenue from it, among other resolutions. Individuals whose content is identified by the Content ID system have the option to dispute, which in turn may initiate a DMCA takedown request.³⁴

Pursuant to the DMCA ‘safe harbor’ provision, YouTube has implemented a standard practice of removing videos that are reported as potentially infringing on copyrighted material,³⁵ as well as a counter-notice system to allow users whose videos are reported to dispute the report.³⁶ Regardless of the method through which the video is reported, any video reported as potentially containing copyrighted material is automatically removed from public display on the user’s channel. The user is given the opportunity to either edit the video to remove the infringing content

³² Copyright strike basics, YOUTUBE, https://support.google.com/youtube/answer/2814000?hl=en&ref_topic=9282678 (last visited Oct. 1, 2021).

³³ How Content ID works, YOUTUBE, <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id> (last visited Sept. 15, 2021).

³⁴ A Guide to YouTube Removals, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals> (last visited Sept. 27, 2021).

³⁵ Copyright strike basics.

³⁶ Submit a copyright counter notification, YOUTUBE, https://support.google.com/youtube/answer/2807684?hl=en&ref_topic=9282678 (last visited Oct. 1, 2021).

or challenge the assertion that the video is in fact infringing. And should an individual's challenge be unsuccessful, they are generally left with two options – deal with the outcome given to them by YouTube, or initiate legal proceedings.

It is important to note that YouTube's internal procedures for handling issues of potential copyright infringement are not the final step for rightsholders seeking resolution. Regardless of whether the rightsholder initiates a takedown request or utilizes the Content ID system, if the uploader disputes the claim and the parties cannot come to a resolution the rightsholder must initiate an infringement suit.³⁷ It is at this point that the burden of proving the infringement shifts to the rightsholder making the claim. Such suits can quickly become costly, both in terms of time and legal fees, and it is worth noting that the average creator on YouTube simply cannot afford the cost of defending against such a suit.

Beyond the issues of copyright infringement, there is an additional layer brought about by YouTube's monetization process. The platform introduced in-video and pre-roll advertisements in 2008 and 2007, respectively, and with them launched the YouTube Partner Program in late 2007.³⁸ These changes essentially enabled the 'career YouTuber' as we know them today – not only were individuals able to share their content with an unprecedented number of people, but they could also be paid if those videos performed well. Should an individual meet the requisites for monetization, they can expect to collect a portion of the revenue earned on every video uploaded to their channel that features advertisements.³⁹

³⁷ *Id.*

³⁸ Paige Leskin, *YouTube is 15 years old. Here's a timeline of how YouTube was founded, its rise to video behemoth, and its biggest controversies along the way*, BUSINESS INSIDER (May 30, 2020), <https://www.businessinsider.com/history-of-youtube-in-photos-2015-10>.

³⁹ How to make money on YouTube, YOUTUBE, https://www.youtube.com/creators/how-things-work/video-monetization/?utm_source=paidsearch&utm_medium=gyt&utm_id=ytgen&utm_content=ytcvm&gclid=Cj0KCQiAsqOMBhDFARIsAFBTN3fABQF4yaPrEckVr7V0IcY4YxsEavMy-GqvFWQTbLXd-IJjREYVj8aAuhqEALw_wcB (last visited Nov. 7, 2021).

Monetization brings with it an entirely new set of issues concerning copyright. Should a monetized video content infringing content, the uploader is collecting revenue that the copyright holder may be entitled to. This clearly creates a conflict between the two creators' interests, one that YouTube itself seems either unwilling or unable to resolve. While YouTube does provide content creators with general information on how the copyright system works and how it may affect their monetization status,⁴⁰ the information is far from comprehensive, in many cases leaving creators with more questions than answers. The consequences for these creators can be severe – not only can they lose revenue from videos deemed to be infringing, but repeated infringement can lead to their channels losing monetization altogether.⁴¹

These policies and how they interact with one another are crucial for individuals uploading videos to the platform, especially those using the platform to make a full-time living. Failing to understand these policies can result in the temporary placement of a 'strike' on the individual's channel, which in turn may impact their ability to monetize their videos.⁴² Should an individual receive three strikes on their channel within a six-month period, their channel and any other associated channels may be permanently terminated.⁴³ Clearly then, the issue is one with serious real life consequences for a number of people, and it is essential to resolve the legal uncertainties associated with it.

⁴⁰ See Copyright strike basics; What kind of content can I monetize?, YOUTUBE, <https://support.google.com/youtube/answer/2490020?hl=en#zippy=%2Ci-used-third-party-content-under-fair-use> (last visited Oct. 14, 2021).

⁴¹ YouTube Channel Monetization Policies, YOUTUBE, <https://support.google.com/youtube/answer/1311392?hl=en#zippy=%2Csuspend-your-participation-in-the-youtube-partner-program> (last visited Nov. 7, 2021).

⁴² Copyright strike basics.

⁴³ *Id.*

II. Discussion

It is inevitable that some portion of the videos uploaded to YouTube are infringing – after all, the platform sees an estimated 500 hours of content uploaded *every minute*.⁴⁴ At the same time, there is no doubt that many videos uploaded to YouTube which utilize third-party content are properly characterized as fair use. The issue, then, is discerning which videos are infringing and which constitute fair use. The inquiry is far from clear cut, and no doubt will continue to plague the platform and its users as it presumably continues to grow. While YouTube itself has put in place certain measures to combat this, there is clearly that more must be done before the issue is resolved.

Additionally, it must be acknowledged that both YouTube itself and its users are constrained by a system of laws which were by and large not created with them in mind. The issues of copyright as they exist on YouTube are complex, and are only made more so by the presence of these laws.

A. Fair Use on YouTube

The video uploaded by the Kleins that initiated the infringement suit is far from an anomaly on YouTube. The reaction-style commentary or critique videos have grown significantly in popularity on the platform, with channels specializing in the content amassing millions of subscribers and billions of views.⁴⁵ These videos generally center around the creator's live reactions to a separate piece of work, while often simultaneously playing part or all of this copyrighted work. Given both the portion of the copyrighted work utilized in this style of video

⁴⁴ Maryam Mohsin, *10 YouTube Statistics Every Marketer Should Know in 2021*, OBERLO (Jan. 25, 2021), <https://www.oberlo.com/blog/youtube-statistics>.

⁴⁵ See REACT, YOUTUBE, <https://www.youtube.com/finebros/about> (last visited Nov. 3, 2021); Reaction Time, YOUTUBE, <https://www.youtube.com/c/reactiontime/about> (last visited Nov. 3, 2021).

and the substantiality of the third-party work to the content, it is clear how issues of copyright infringement and fair use can arise.

As discussed in the *Klein* decision, certain factors of the fair use inquiry may be particularly significant to uses such as the reaction-style video. First, the District Court affords significant discussion to the first factor, the purpose and character of the use. This factor essentially turns to a question of the transformative nature of the use – or lack thereof. In the case of the reaction video, the Court notes that such videos can properly be classified as criticism or comment, both of which are, “classic examples of fair use.”⁴⁶ Regardless of the fact that the reaction videos do not actually do anything to transform the copyrighted work they are utilizing, the addition of commentary, comedy, and even mocking can be sufficient to impart the work with a transformative nature.⁴⁷ So long as the creators of these videos are actually providing their criticism or opinions on the content being used rather than amounting to no more than a “group viewing session,”⁴⁸ they are likely to satisfy this factor. Reaction-style videos seem to enjoy the benefit of the general preference towards treating criticism or commentary as fair use, and given the importance of this factor, are on some level strongly indicative of fair use.

Additionally, the District Court in *Klein* notes the importance of the third factor, the amount and substantiality of the portion used. At face value, it appears this factor would be detrimental to the fair use inquiry of the reaction video – after all, many of these videos include the entirety of the original work. However, the Court notes that this fact is not dispositive of the inquiry, and that, “quantity alone is not determinative.”⁴⁹ In the case of the *Klein* video, the Court ultimately decides

⁴⁶ Hosseinzadeh, 276 F. Supp. 3d at 45.

⁴⁷ Alyaman Amen & Adnan Obissi, *Reaction Videos and Fair Use*, JD SUPRA, <https://www.jdsupra.com/legalnews/reaction-videos-and-fair-use-29395/> (Dec. 4, 2017).

⁴⁸ *Id.*

⁴⁹ Hosseinzadeh, 276 F. Supp. 3d at 46.

not to weigh this factor in either party's favor, specifically noting that the inclusion of these clips was necessary to give the commentary proper context.⁵⁰ Therefore, the often significant portion of the original work used seems to be balanced out by the necessity of such use to accomplishing the objectives of the reaction video, and as a result does not weigh against the creator.

The triad of parties potentially involved in the copyright issues of YouTube further complicate the discussion, in that they create a unique environment for the fair use inquiry. Essentially, there are two forms of fair use that a content creator may engage in: the use of another content creator's work or the use of third-party copyrighted content. Both are subject to a similar inquiry, as both meet the general requirements of copyrightability, but in practice third-party rightsholders are shown a clear preference for protection. Because YouTube limits access to its most advanced infringement detection programs, Copyright Match and Content ID, to certain groups of rightsholders, many individual creators must rely on the manual copyright strike system to protect their content against infringing use. Not only does this shift the burden of detecting infringing videos to the individual creator, but it also often similarly shifts the burden of resolving the issue. Rightsholders with access to the advanced software have a wider array of potential remedies, such as blocking the infringing video from view or collecting the ad revenue from it, that are not available to the average user. Additionally, the inherent limitations of YouTube's infringement policies create an environment where a creator must initiate an infringement suit if they wish to see their rights fully enforced. Many of these creators simply cannot afford to spend the time and money required to pursue such a suit, meaning their only practical option is to drop the issue and allow the infringing use to continue.

⁵⁰ *Id.*

The issue present on YouTube today is that, even though many of these reaction-style videos fall under fair use, the platform's policies on copyright and systems for removing potentially infringing content demonstrate a clear preference towards rightsholders, especially third-party copyright owners. As discussed above, issues of access to advanced infringement detection software and monetary ability to pursue an infringement suit place individual creators in a position where they often do not have the time or money to seek proper vindication of their rights. But beyond this, YouTube's policies demonstrate a preference towards the rightsholder, even when it comes at the cost of a legitimate fair use of the content. At least anecdotally, YouTube has been known to remove videos which utilize any portion of a copyrighted work, especially where interest in that work belongs to a well-known corporate rightsholder.⁵¹ This preference is further demonstrated by the fact that YouTube limits access to its most sophisticated infringement detection tools, those which rely on automated detection, to certain rightsholders. In situations where YouTube must take a stance and choose between protecting the rights of its users or those of large, intimidatingly rich corporations, it seems the company has chosen to protect the latter, with its users bearing the costs of that decision.

B. YouTube and the DMCA

Given the fact that the DMCA still constitutes the most comprehensive piece of legislation on copyright in the digital age, there is no question that YouTube's policies are in some ways influenced by the Act. In particular, YouTube's treatment of potentially infringing videos is clearly impacted by the DMCA safe harbor provision. As a service provider, YouTube qualifies for the

⁵¹ See Julia Alexander, *YouTubers and record labels are fighting, and record labels keep winning*, THE VERGE, <https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover> (May 24, 2019); Katherine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> (Dec. 10, 2020).

protection under this provision, so long as they meet the requirements set forth in the Act. One of these requirements is that the service provider expeditiously remove the allegedly infringing content from their website. To meet this requirement, YouTube has a standard policy of removing all videos which receive a DMCA takedown request, although the videos may be reinstated if the creator files a counter-notification.⁵² Additionally, YouTube has chosen to implement a ‘three strikes and you’re out’ policy for copyright claims, meaning users with multiple Webform claims or Content ID matches may face demonetization or channel termination.⁵³

While many of the company’s copyright policies stem directly from a desire to maintain their eligibility for safe harbor protection, the practical implication is that individual users are forced to bear the burden of an ineffective system. Specifically in the case of the Content ID tool, creators face the removal of videos which clearly constitute fair use, simply because those videos contain a portion of a copyrighted work which an automated system was able to detect. And regardless of the system utilized, users must work within YouTube’s clearly limited procedures for appealing takedowns, unless they are both willing and able to handle a formal suit. Such policies have the practical implication of deterring creativity and specifically fair use among YouTube creators for fear of falling victim to the pitfalls of this system. While the safe harbor provision is unquestionably necessary to the protection of creativity and competition among OSPs, the provision as it stands fails to adequately balance this interest with those of the individuals using the service providers’ platforms.

Beyond this, YouTube’s copyright policies are highly susceptible to abuse, and again creators are forced to bear the burden of this flaw. Although manual copyright claims are subject

⁵² Sarah Clough-Segall, *YouTube’s Copyright Policy: Pitfalls Aplenty for Video Creators*, JD SUPRA, <https://www.jdsupra.com/legalnews/youtube-s-copyright-policy-pitfalls-23119/> (Oct. 13, 2020).

⁵³ *Id.*

to the claimant's sworn statement that they are submitting the request in good faith, the reality is that the system is abused by those looking to retaliate against creators who use their content, even where such use falls under fair use. The DMCA takedown request serves as a convenient means for those looking to remove content which may be unfavorable to them or which they generally do not like. It is worth noting that the DMCA takedown request is the only takedown request which, by law, must result in the prompt removal of the video, meaning a complaint made through this means almost guarantees quick removal of the video from public display.⁵⁴

The accessibility of the manual copyright takedown request is a double-edged sword – it allows any user to protect their rights in their independently created work, but it also allows individuals acting in bad faith an easy path to harm other creators in a way that can have serious consequences both on and off the platform.

The widespread impact of the DMCA on YouTube, and on YouTube content creators, is that it further encourages a preference towards the interests of rightsholders at the price of fair use and creativity. YouTube creators are forced to navigate within a system which is clearly inadequate and ineffective, both in terms of protecting their rights to their own content and to the fair use of other's content.

C. YouTube as a Regulating Body

The sheer volume of content uploaded to YouTube is massive. Not only does this volume speak to the success of the platform, but also one of the key issues underpinning its issues with regulating copyrighted content – it is simply impossible to manually keep track of all those videos. YouTube's attempts to address this issue have taken a dual path, relying on both the individual users and automated systems to regulate copyrighted content on the platform. YouTube allows any

⁵⁴ *Id.*

user to submit a manual copyright claim on a video which they believe to be impermissibly using content they possess rights to. However, the potential volume of manual claims, as well as the impracticality of filing such claims for those that possess rights in a large body of work, necessitates at least some automation within the process. This need is met by YouTube's Copyright Match and Content ID tools, which allow certain creators and third-party rightsholders, respectively, to upload their content to a database against which all subsequently published videos are automatically compared. This automation functions to both reduce the number of manual claims filed and, at least in theory, reduce the need for human review of videos uploaded to the platform.

As with any automated process, sometimes YouTube's systems fail – and when this happens, it is often the individual creator bearing the brunt of the impact. YouTube's automated software, Copyright Match and Content ID, function only to detect matches between audio or visual files uploaded to the system and those in an independently created video. The clear downfall to this system is that the software cannot distinguish between a legally permissible use of a copyrighted material and an infringing one. In practice, this often means users have videos removed or demonetized which are in fact legally permissible under fair use.⁵⁵ While both systems provide creators an opportunity to appeal, it is notably ambiguous whether such an appeal will result in a manual review of the video.⁵⁶ If such an appeal is unsuccessful, users' only options are to initiate legal proceedings or accept the outcome of the strike. The costs of these systematic flaws can be monumental to creators – not only do they have to manage the stress and anxiety that

⁵⁵ *Id.*

⁵⁶ A Guide to YouTube Removals.

accompanies a strike on their channel, but they may face demonetization or even a permanent ban from the platform.

D. The Future of Copyright and Digital Content

It is indisputable that the prevalence of the internet and digital content shows no indication of slowing down – if anything, it is only going to become more important to us in the future. These uncertainties regarding copyright and fair use, then, will persist if and until we reach a collective understanding of what fair use looks like in the context of digital content and what level of derivative use is too far. While the DMCA was intended to address these issues, the practical ramifications of the Act show that it failed to sufficiently do so. Additionally, the rapid pace with which the internet has evolved since the enactment of the DMCA necessarily indicates that further legislation is necessary to properly address the constantly evolving issues present. In 2020, the U.S. Copyright Office issued a report on the effectiveness of Section 512 specifically, as well as suggestions for where it may benefit from amendment.⁵⁷ And later the same year, a draft version of legislation aimed at addressing the contemporary issues of digital copyright was released by Sen. Thom Tillis, of the Senate Judiciary Intellectual Property Subcommittee.⁵⁸

YouTube itself, as the clear leader in video-based content distribution, has taken steps to address the shortcomings in their current systems for handling these issues. In March of 2021, YouTube rolled out an experimental system they call "Content Checks." This system is designed to automatically screen uploads for potentially infringing content, and if such content is found, warn the uploader before the video goes live.⁵⁹ However, this system faces many of the same issues

⁵⁷ United States Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights*, (May 2020).

⁵⁸ *DMCA Hearings and Legislative Reform*, Copyright Alliance, <https://copyrightalliance.org/trending-topics/dmca-hearings-and-legislative-reform/> (last visited Nov. 5, 2021).

⁵⁹ Julia Alexander, *YouTube can now warn creators about copyright issues before videos are posted*, THE VERGE (March 17, 2021), <https://www.theverge.com/2021/3/17/22335728/youtube-checks-monetization-copyright-claim-dispute-tool>.

already plaguing the company's copyright systems – it relies on automation, specifically the same database of copyrighted material as Content ID, and again places the burden of addressing the issue on the individual user. In addition, YouTube's CEO, Susan Wojcicki, had indicated her commitment to address the shortcomings of the company's current policies on copyright, though it is unclear exactly how she intends to do so.⁶⁰

Despite YouTube's demonstrated commitment to resolving the ongoing issues of copyright and fair use, many creators are understandably untrusting of the platform, and have instead chosen to take matters into their own hands. In 2016 the well-known YouTube creator Hank Green spearheaded the organization of a nonprofit known as the Internet Creator's Guild, or ICG. The organization, like other professional organizations, sought to protect the interests of those whose careers existed online, and specifically on YouTube.⁶¹ But the attempt was short-lived, and only three years after its inception the organization formally shut down.⁶² Since the shutdown of ICG little, if any, movement has been made in organized attempts to protect the rights of YouTube creators.

III. Conclusion

The task of navigating copyright law on the internet is a difficult one, made so both by the constraints imposed by laws enacted before genesis of the internet age and the power imbalances present in the laws intended to address the issue. As it pertains to YouTube, content creators are subject to similar rights and obligations as any other creator – however, the specifics of how these

⁶⁰ Julia Alexander, *YouTube CEO addresses top creator issues including copyright claims and trending section*, THE VERGE (Apr. 30, 2019), <https://www.theverge.com/2019/4/30/18524426/youtube-ceo-creators-copyright-claims-infringement-trending-section-comments>.

⁶¹ Julia Alexander, *YouTubers' first organizing attempt, the Internet Creators Guild, is shutting down*, THE VERGE (Jul. 11, 2019), <https://www.theverge.com/2019/7/11/20688929/internet-creators-guild-shutting-down-hank-green-youtube-copyright-claims-monetization>.

⁶² *Id.*

principles are to apply is unclear. Content creators must navigate a system of laws relating to the copyrightability of their work and their ability to use third-party copyrighted works which completely fails to contemplate their existence and unique needs. Additionally, YouTube's policies on copyright fail to sufficiently address the issues present, showing a clear preference towards third-party rightsholders and failing to adequately inform users of their rights and responsibilities. The result is an environment where creativity is stifled and creators are afraid to express themselves fully for fear of demonetization, removal of their content, or legal action.

In order to sufficiently address the issues surrounding copyright and fair use on YouTube, reform must occur both in legislation and company policies. Congress must address the pitfalls of the DMCA and pass comprehensive legislation to address the breadth of copyright issues present on the internet today. As the leading platform for video-based content sharing, YouTube has an obligation to continue to address the shortcomings of their policies, especially where these policies fail to protect the interests of content creators. Both will be necessary to the fulfillment of the ultimate goal of copyright law – to protect the creative expression of the individual, regardless of what form it takes.