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## Contracting in the Dark: Casting Light on the Shadows of Second Level Agreements

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## CONTRACTING IN THE DARK: CASTING LIGHT ON THE SHADOWS OF SECOND LEVEL AGREEMENTS

### ABSTRACT

*In the early days of the Internet, copyright owners concentrated on eliminating infringement threats posed by the new technology. Today, many copyright owners are partnering with major user-generated content platforms in order to participate in and receive compensation for some third-party infringement occurring on the Internet. YouTube pioneered such partnership arrangements in 2006 with a new kind of copyright license now referred to as a “second level agreement.” In 2008, YouTube unveiled Content ID, which streamlined the process for entering into second level agreements with the site. This Note analyzes Content ID and the second level agreements underlying it to determine how the average YouTube uploader is legally affected, and how the agreements square with federal copyright law when Content ID does not adequately safeguard against false ownership claims.*

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## INTRODUCTION

When a new technology emerges that can exploit copyrighted works, copyright owners have three basic options: do nothing, try to eliminate the new kind of dissemination, or participate in it and receive compensation.<sup>1</sup> In the early 2000s, copyright owners concentrated on eliminating the rising infringement threats posed by the Internet by shutting down file-sharing programs and suing the users of those programs.<sup>2</sup> Today user-generated content (UGC) platforms<sup>3</sup>—websites like YouTube, MySpace, and Yahoo—present an opportunity for copyright owners to participate in and receive compensation for some third-party exploitation occurring on the Internet.<sup>4</sup>

Many major UGC platforms enter into licensing agreements with copyright owners, turning potential courtroom opponents into business partners with the stroke of a pen.<sup>5</sup> Yafit Lev-Aretz coined the term “second level agreements” to describe these licenses in her 2012 article by the same name.<sup>6</sup> Lev-Aretz succinctly describes this new breed of copyright license:

While a First Level Agreement involves the copyright owner on the one hand and the [UGC platform] user on the other, Second Level Agreements are negotiated and executed by copyright owners and platform operators. In other words, Second Level Agreements authorize unidentified uses of copyrighted content by users in UGC platforms.<sup>7</sup>

YouTube is probably the most popular UGC platform today and pioneered the development of these agreements in 2006.<sup>8</sup> The first second

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<sup>1</sup> See Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1613–14 (2001).

<sup>2</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); John Borland, *RIAA Sues 261 File Swappers*, C|NET (Sept. 8, 2003, 10:57 AM), [http://news.cnet.com/2100-1023\\_3-5072564.html](http://news.cnet.com/2100-1023_3-5072564.html).

<sup>3</sup> “UGC is often defined as content uploaded and sometimes created by Internet users, rather than produced by the website itself.” Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 142 (2012).

<sup>4</sup> See, e.g., Brian Stelter, *Some Media Companies Choose to Profit from Pirated YouTube Clips*, N.Y. TIMES, Aug. 16, 2008, at C1 (“After years of regarding pirated video on YouTube as a threat, some major media companies are having a change of heart, treating it instead as an advertising opportunity.”).

<sup>5</sup> See generally, Lev-Aretz, *supra* note 3.

<sup>6</sup> Lev-Aretz, *supra* note 3, at 138–39.

<sup>7</sup> *Id.* at 152.

<sup>8</sup> *Id.* at 140, 155–56 (“YouTube was initiated in February 2005.... YouTube’s popularity in its first years was mainly due to the copyrighted material users uploaded to the site.... Attempting to avoid lawsuits and to make YouTube a better source for profit, [YouTube’s parent company] Google has entered into content partnerships with various

level agreements were individually negotiated between YouTube and major music conglomerates.<sup>9</sup> YouTube now enters into these agreements en masse through its popular service, Content ID.<sup>10</sup> Content ID streamlines the contracting process with a simple online form<sup>11</sup> and implements special technology that automatically searches YouTube's digital library for videos containing the copyrighted material that claimants<sup>12</sup> provide.<sup>13</sup> Most claimants use Content ID to permit otherwise infringing videos to remain on YouTube in exchange for a percentage of the advertising revenue the videos generate.<sup>14</sup>

At first blush, Content ID deftly preserves the status quo on YouTube with minimal disruption to the visitor experience: copyright owners gain control over the use of their works on the site and receive compensation, YouTube contracts out of infringement liability, and YouTube visitors retain access to a variety of copyrighted content (which was largely responsible for the site's early popularity<sup>15</sup>) in exchange for viewing a few advertisements. But this synopsis excludes one key party: the people who create and upload those otherwise infringing videos (the user-creators). This synopsis also fails to account for a phenomenon known as Content ID abuse, which occurs when dishonest claimants use Content ID to profit from works to which they do not own valid copyrights (usually public domain works).<sup>16</sup>

This Note analyzes Content ID and the second level agreements underlying it to determine how the user-creator is legally affected and how the agreements square with federal copyright law when Content ID does not adequately safeguard against abuse. Part I surveys the traditional copyright law implications for user-creators and YouTube prior to the advent of

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music and entertainment companies. The first Second Level Agreement took place in 2006 ....").

<sup>9</sup> *Id.* at 152, 156.

<sup>10</sup> See, e.g., *Content Identification Application*, YOUTUBE, [http://www.youtube.com/content\\_id\\_signup](http://www.youtube.com/content_id_signup) (last visited Jan. 12, 2014); David King, *Making Money on YouTube with Content ID*, GOOGLE BLOG (Aug. 27, 2008), <http://googleblog.blogspot.com/2008/08/making-money-on-youtube-with-content-id.html>; Stelter, *supra* note 4.

<sup>11</sup> *Content Identification Application*, *supra* note 10.

<sup>12</sup> I use the term "claimant" to refer to anyone who signs up for Content ID. Usually, that means the bona fide owner of the copyrighted material submitted during the Content ID application process. See *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Jan. 12, 2014) ("YouTube only grants Content ID to content owners who meet specific criteria. To be approved, content owners must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community."); *infra* Part II. But see *infra* Part IV.

<sup>13</sup> *How Content ID Works*, *supra* note 12.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> Lev-Aretz, *supra* note 3, at 155.

<sup>16</sup> Patrick McKay, *YouTube Copyfraud & Abuse of the Content ID System*, FAIR USE TUBE (Oct. 19, 2012), <http://www.fairusetube.org/youtube-copyfraud>.

second level agreements. Part II explains how Content ID works and how it alters the legal framework laid out in Part I. Part III proposes that Content ID impliedly grants a license from the copyright owner to the user-creator. Part IV addresses Content ID abuse and urges YouTube to more fairly balance users' interests by instituting up-front copyright ownership verification in the Content ID application process and by promulgating clear guidelines and penalties for abusers.

### I. LEGAL BACKDROP OF CONTENT ID

*Numa Numa*<sup>17</sup> is one of the most viewed viral Internet videos of all time,<sup>18</sup> and will help illustrate the following survey of traditional copyright infringement liability pre-Content ID. In a low-quality home video, a teenage boy with the YouTube account name xloserkidx lip-synchs and performs an interpretive dance to O-Zone's Romanian-language hit song, *Numa Numa*,<sup>19</sup> in what appears to be his childhood bedroom. When *Numa Numa* was uploaded in 2006, YouTube probably displayed banner advertisements across the top of the screen and collected all the ad revenue generated by the video's hundreds of millions of views.<sup>20</sup> Before Content ID created an incentive to leave the video on the site by giving copyright owners direct access to the ad revenue pie, O-Zone was probably reluctant to remove the video through prescribed statutory means<sup>21</sup> due to other market and reputational concerns.<sup>22</sup> For example, the video's popularity may have contributed to increased album sales, and the band may have worried that removing the high-profile video would lead to a backlash from music fans.<sup>23</sup> The chance of

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<sup>17</sup> xloserkidx, *Numa Numa*, YOUTUBE (Aug. 14, 2006), <http://www.youtube.com/watch?v=60og9gwKh1o>.

<sup>18</sup> As of December 2006, only six months after its original upload, the video had over 700 million views, making it the second-most viewed YouTube video at that time. *See, e.g., Most Viral Video of All Time*, MSNBC (Dec. 1, 2006, 11:12 AM), [http://www.msnbc.msn.com/id/15958470/ns/msnbc-countdown\\_with\\_keith\\_olbermann/t/most-viral-video-all-time/](http://www.msnbc.msn.com/id/15958470/ns/msnbc-countdown_with_keith_olbermann/t/most-viral-video-all-time/); *Star Wars Kid Is Top Viral Video*, BBC NEWS (Nov. 27, 2006, 12:26 GMT), <http://news.bbc.co.uk/2/hi/entertainment/6187554.stm>.

<sup>19</sup> Unless otherwise indicated, *Numa Numa* refers to the YouTube video, not the song itself.

<sup>20</sup> *See* Complaint ¶ 37, *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 1:07CV02103), 2007 WL 775611 (“[A]dvertisers pay YouTube to display banner advertising to users whenever they log on to, search for, and view infringing videos.”).

<sup>21</sup> 17 U.S.C.A. § 512(c)(3) (West 2013); *see also infra* Part IV.

<sup>22</sup> Assume that the band O-Zone exclusively owns all rights to the song.

<sup>23</sup> Music fans responded to Metallica's aggressive campaign against peer-to-peer file sharing network Napster and its users in the early 2000s with the “Boycott Metallica” movement. Ron Kaufman, *Boycott Metallica*, KILL YOUR TELEVISION (Aug. 21, 2001, 11:50 AM),

minimal collateral financial gain and the fear of negative press probably kept O-Zone from enforcing its rights to remove the video from the site and to sue YouTube and xloserkidx for infringement.

This Part of the Note sets O-Zone's incentives aside and surveys the copyright law landscape prior to second level agreements and Content ID. In other words, it considers O-Zone's *ability*, not its *desire*, to vindicate its rights regarding the video prior to Content ID. Subparts A and B outline direct and secondary infringement liability theories. Subpart C introduces the Digital Millennium Copyright Act (DMCA) and explains how it limits ISP liability, severely curtailing O-Zone's and other similarly situated copyright owners' ability to recover from YouTube.<sup>24</sup> Subpart D discusses *Viacom International, Inc. v. YouTube, Inc.*, which threatened to remove YouTube's DMCA protection and tip the scale back into copyright owners' favor. *Viacom* was, therefore, a major catalyst for developing Content ID, and it sets the stage for a thorough analysis of the service.<sup>25</sup>

#### *A. Direct Infringement Liability Under the Copyright Act*

At the height of *Numa Numa*'s popularity, O-Zone could have easily established prima facie claims for direct infringement against xloserkidx and YouTube. Section 501 of the Copyright Act provides for direct infringement liability.<sup>26</sup> Courts generally follow the two-pronged test for direct infringement set out in *Arnstein v. Porter*,<sup>27</sup> which requires a plaintiff to prove (1) "that defendant copied from the plaintiff's copyrighted work" and (2) "that the copying ... constitute[d] improper appropriation."<sup>28</sup> Improper appropriation has its own two-pronged test, which requires a plaintiff to prove (1) "that the defendant's work appropriated protected expression from the copyrighted work" and (2) "that audiences will perceive substantial similarities between the defendant's work and the plaintiff's protected expression."<sup>29</sup>

By making a clear analog copy of the entire recording of the song in his video, xloserkidx satisfied both elements of infringement in a textbook-like

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<http://web.archive.org/web/20010821115030/http://www.netreach.net/~kaufman/metallica.html> (accessed by searching for the original URL in the Internet Archive).

<sup>24</sup> See 17 U.S.C.A. § 512.

<sup>25</sup> See *supra* note 8 and accompanying text; Kevin J. Delaney, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (June 12, 2007, 11:59 PM), <http://online.wsj.com/article/SB118161295626932114.html>.

<sup>26</sup> 17 U.S.C.A. § 501(a) ("Anyone who violates any of the exclusive rights of a copyright owner ... is an infringer ....").

<sup>27</sup> 154 F.2d 464 (2d Cir. 1946); see also PAUL GOLDSTEIN, 2 GOLDSTEIN ON COPYRIGHT § 9.1 n.2 (3d ed. 2005).

<sup>28</sup> *Arnstein*, 154 F.2d at 468.

<sup>29</sup> GOLDSTEIN, *supra* note 27, § 9.3.1.

manner. YouTube satisfied both elements in a similarly straightforward manner when xloserkidx uploaded the video to the site because YouTube's computer systems created a copy of the video—including its audio component—to store in YouTube's digital database.<sup>30</sup>

### *B. Secondary Infringement Liability at Common Law*

O-Zone might have established prima facie claims for secondary infringement against YouTube as well. Two theories of secondary infringement liability have developed at common law: vicarious and contributory.<sup>31</sup> Under these theories, YouTube could be liable for xloserkidx's direct infringement if certain conditions are met.

The leading case on vicarious liability, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, found the owner of a chain of record stores liable for direct infringement committed by one of its record dealers.<sup>32</sup> Establishing vicarious liability requires (1) “the right and ability to supervise” and (2) “an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge” of the direct infringement.<sup>33</sup>

A defendant may be liable for contributory infringement if he (1) had actual or constructive “know[ledge] of the infringing activity” and (2) “acted in concert with the direct infringer—materially inducing, causing or contributing to the conduct of the direct infringer.”<sup>34</sup>

### *C. Limited Liability for ISPs Under the Digital Millennium Copyright Act*

The DMCA, enacted in 1998, severely limits monetary and injunctive relief available to copyright owners from Internet service providers (ISPs) for both primary and secondary infringement.<sup>35</sup> That is, even if O-Zone could establish a prima facie case of infringement against YouTube, YouTube could invoke DMCA protection as a defense. Title II of the DMCA,<sup>36</sup> commonly referred to as the “safe harbor provision,”<sup>37</sup> “endeavors to balance the

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<sup>30</sup> See *Viacom Int'l, Inc. v. YouTube, Inc. (Viacom I)*, 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010) (explaining how YouTube functions as a website).

<sup>31</sup> See *Viacom Int'l, Inc. v. YouTube, Inc. (Viacom II)*, 676 F.3d 19, 28 n.5 (2d Cir. 2012) (listing the doctrines of secondary copyright infringement); see also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930–31 (2005).

<sup>32</sup> 316 F.2d 304 (2d Cir. 1963).

<sup>33</sup> *Id.* at 307.

<sup>34</sup> GOLDSTEIN, *supra* note 27, § 8.1. See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).

<sup>35</sup> See 17 U.S.C.A. § 512 (West 2013).

<sup>36</sup> Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 101, 512 (2012)).

<sup>37</sup> See *Digital Millennium Copyright Act*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/dmca> (last visited Jan. 12, 2014).

interests of [ISPs] and copyright owners when copyright infringement occurs” on the Internet.<sup>38</sup> It immunizes ISPs from monetary relief for certain activities that otherwise constitute direct, contributory, or vicarious infringement.<sup>39</sup>

An ISP must meet several threshold requirements to enjoy safe harbor protection. An ISP must qualify as a “service provider” as defined in the DMCA.<sup>40</sup> A qualifying ISP must implement an account termination policy according to the DMCA’s specifications, and must “accommodate[] and not interfere[] with standard technical measures.”<sup>41</sup> An ISP that meets those general requirements is eligible for protection for four types of activities, some of which carry their own additional conditions: (1) transitory digital network communications, (2) system caching, (3) storing information on systems or networks at the direction of users, and (4) information location tools.<sup>42</sup>

YouTube qualifies as a “service provider” for purposes of the safe harbor as “a provider of online services or network access.”<sup>43</sup> YouTube stores information at the direction of users, which is governed by § 512(c) of the DMCA. YouTube only qualifies for safe harbor protection for that activity if it:

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (3), 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>44</sup>

With this last piece of the puzzle in place, the pre-Content ID liability picture is clear: O-Zone has a strong case against xloserkidx and YouTube for direct infringement, O-Zone may have a prima facie case for secondary

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<sup>38</sup> *Overview*, HARVARD UNIV., <http://dmca.harvard.edu/pages/overview> (last visited Jan. 12, 2014).

<sup>39</sup> GOLDSTEIN, *supra* note 27, § 8.3.2; *see also* 17 U.S.C.A. §§ 504–05, 512 (West 2013).

<sup>40</sup> 17 U.S.C.A. § 512(k)(1)(A)–(B) (West 2013).

<sup>41</sup> *Id.* § 512(i)(1)(A)–(B); *see also id.* § 512(i)(2) (defining “standard technical measures” as certain “technical measures that are used by copyright owners to identify or protect copyrighted works ...”).

<sup>42</sup> *Id.* § 512(a)–(d).

<sup>43</sup> *Id.* § 512(k)(1)(B); *Viacom II*, 676 F.3d at 39.

<sup>44</sup> *Viacom I*, 718 F. Supp. 2d at 516–17 (quoting 17 U.S.C. § 512(c)(1)(A)–(C)).

infringement against YouTube, and the DMCA probably limits O-Zone's ability to recover from YouTube under either infringement theory.

Before Content ID, countless other copyright owners were in a similar position. But unlike O-Zone, some of those similarly situated copyright owners laid claim to many more infringing videos on the site and had greater financial resources to pursue YouTube in court. On March 13, 2007, the international media conglomerate Viacom filed suit against YouTube and its parent company Google in the Southern District of New York.<sup>45</sup> Viacom alleged that YouTube had fallen out of the § 512(c) safe harbor provision, and sought injunctive relief and at least \$1 billion in damages.<sup>46</sup>

*D. Viacom International, Inc. v. YouTube, Inc. and the Inception of Content ID*

Viacom alleged that YouTube failed to satisfy the additional requirements for safe harbor protection listed in § 512(c)(1)(A) and (B).<sup>47</sup> Viacom's theory depended on a broad interpretation of the statute; namely, that YouTube needed only general knowledge of widespread infringing activity on its site to lose safe harbor protection.<sup>48</sup> To be sure, email correspondence among YouTube executives evidenced a general awareness of and perhaps complicity in the presence of infringing videos on the site.<sup>49</sup>

The ISP and entertainment communities followed *Viacom* closely, unsure of how the court would interpret "actual knowledge" of infringement, "aware[ness] of fact or circumstances" indicating infringement, and the "right and ability to control" user-creators.<sup>50</sup> Although the DMCA "endeavors to balance the interests of [ISPs] and copyright owners,"<sup>51</sup> the *Viacom* decision would likely represent a thumb on the scale to the affected industries.

In *Viacom I*, the Southern District of New York granted YouTube's motion for summary judgment, holding that YouTube was entitled to § 512(c) safe harbor protection and dismissing all infringement claims.<sup>52</sup> In so holding, the court rejected Viacom's view that "[m]ere knowledge of prevalence

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<sup>45</sup> Complaint, *supra* note 20, at 1.

<sup>46</sup> First Amended Complaint ¶¶ 10, 37–39, *Viacom Int'l Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 1:07-cv-02103 (LLS)), 2008 WL 2062868; *see also* Lev-Aretz, *supra* note 3, at 148–49.

<sup>47</sup> *Viacom I*, 718 F. Supp. 2d at 516.

<sup>48</sup> *Id.* at 518–19.

<sup>49</sup> *Viacom II*, 676 F.3d at 33–34.

<sup>50</sup> 17 U.S.C.A. § 512(c)(1)(A)–(B) (West 2013); *see, e.g.*, Amir Hassanabadi, Note, *Viacom v. YouTube—All Eyes Blind: The Limits of the DMCA in a Web 2.0 World*, 26 BERKELEY TECH. L.J. 405, 406–07 (2011).

<sup>51</sup> *Overview*, *supra* note 38.

<sup>52</sup> *Viacom I*, 718 F. Supp. 2d at 529.

of [infringing] activity in general” should disqualify YouTube from safe harbor protection.<sup>53</sup> Instead, the court held that failure to comply with § 512(c)(1)(A) requires “actual or constructive knowledge of specific and identifiable infringements of individual items.”<sup>54</sup> The court held that disqualification under § 512(c)(1)(B) also requires item specific knowledge of infringing activity before YouTube can be said to have the “right and ability to control” the infringing activity of its users.<sup>55</sup>

On appeal to the Second Circuit, *Viacom II* affirmed *Viacom I*'s interpretation of § 512(c)(1)(A), but remanded the issue of whether YouTube had disqualifying constructive knowledge of infringement or, alternatively, had exercised willful blindness.<sup>56</sup> The Second Circuit reversed *Viacom I*'s interpretation of § 512(c)(1)(B), holding that an ISP's “right and ability to control” infringing activity only requires a general awareness of such activity, and remanded the issue of whether YouTube in fact had the requisite “right and ability” to control such activity.<sup>57</sup> On remand to the Southern District of New York, *Viacom III* found for YouTube on each issue and dismissed Viacom's claims.<sup>58</sup>

The *Viacom* cases chart the evolution of interpreting § 512(c) safe harbor eligibility, which is of great interest and import to the ISP community. But the public court battle set into motion potentially far more interesting and important private licensing developments. When YouTube began testing Content ID in 2007, a spokesperson for Google acknowledged that its development was necessary to resolve the pending legal dispute with Viacom.<sup>59</sup> Because YouTube risked falling out of the safe harbor if the courts sided with Viacom's statutory interpretation, YouTube needed a mechanism to appease copyright owners and immunize itself from infringement liability. YouTube's goal was two-fold: mitigate the Viacom litigation and prevent future claims by other copyright owners.<sup>60</sup> As evidence that Viacom found Content ID

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<sup>53</sup> *Id.* at 523. YouTube did not dispute that it had general awareness of infringing content residing on its network at the direction of its users. *Viacom II*, 676 F.3d at 28–29.

<sup>54</sup> *Viacom I*, 718 F. Supp. 2d at 519, 523. The opinions refer to this as “item-specific knowledge.” *Id.* at 527; *Viacom II*, 676 F.3d at 26, 30, 36, 42.

<sup>55</sup> *Viacom I*, 718 F. Supp. 2d at 527.

<sup>56</sup> *Viacom II*, 676 F.3d at 30–32, 41–42.

<sup>57</sup> *Id.* at 35–38, 41–42.

<sup>58</sup> *Viacom Int'l, Inc. v. YouTube, Inc. (Viacom III)*, 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013).

<sup>59</sup> Delaney, *supra* note 25 (“Google Chief Executive Eric Schmidt has said that fingerprinting technology is key to resolving copyright battles between media and technology companies over online video, such as Viacom[,] Inc.'s \$1 billion suit against Google filed in March. Some media executives have accused YouTube of dragging its feet in implementing such technology in order to profit from copyright infringement as long as possible, a charge the video site has denied.”).

<sup>60</sup> See Lev-Aretz, *supra* note 3, at 155–56.

to be a satisfactory solution, Viacom did not seek damages for any actions after YouTube implemented Content ID in 2008.<sup>61</sup>

## II. CONTENT ID

This Part of the Note outlines the nuts and bolts of YouTube and Content ID, serving as the bridge between the well-trodden copyright law landscape outlined above and the murky new world of second level agreements explored below.

YouTube operates like most other UGC sites. Any visitor can search for and watch videos simply by visiting the site, but a YouTube account is required to upload videos and use some other site features, such as commenting on videos and accessing mature content.<sup>62</sup> The account is free and the user must agree to YouTube's Terms of Service.<sup>63</sup> A user can upload video files from her hard drive or record a video using a webcam.<sup>64</sup> YouTube does not review or approve each uploaded video before making it publicly accessible.<sup>65</sup> Instead, policing is more democratic: users are expected to use "common-sense" when uploading,<sup>66</sup> viewers can "flag" inappropriate videos,<sup>67</sup> and copyright owners can notify YouTube of infringing videos.<sup>68</sup>

Any copyright owner may participate in Content ID, although it was originally "designed for exclusive rights holders whose content is frequently uploaded to YouTube by the user community."<sup>69</sup> In order to participate, the

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<sup>61</sup> Miguel Helft, *Judge Sides with Google in Viacom Video Suit*, N.Y. TIMES, June 24, 2010, at B1.

<sup>62</sup> *YouTube Essentials*, YOUTUBE (Mar. 4, 2013, 9:38 PM), [http://wayback.archive.org/web/20130304213858/http://www.youtube.com/t/about\\_essentials](http://wayback.archive.org/web/20130304213858/http://www.youtube.com/t/about_essentials) (accessed by searching for *YouTube Essentials* in the Internet Archive index).

<sup>63</sup> *Sign up for an Account on YouTube*, YOUTUBE, <https://support.google.com/youtube/answer/161805?hl=en> (last visited Jan. 12, 2014); *Create a New Google Account*, GOOGLE, <https://accounts.google.com/SignUp?service=youtube> (last visited Jan. 12, 2014).

<sup>64</sup> *How to Upload Videos*, YOUTUBE, <https://support.google.com/youtube/answer/57924?hl=en> (last visited Jan. 12, 2014).

<sup>65</sup> *Id.*; see also *Google Terms of Service*, GOOGLE (Nov. 11, 2013), <http://www.google.com/intl/en/policies/terms/> (stating that, across all of Google's products and services, "content is the sole responsibility of the entity that makes it available").

<sup>66</sup> *YouTube Community Guidelines*, YOUTUBE, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Jan. 12, 2014).

<sup>67</sup> *Flagging Content*, YOUTUBE, <https://support.google.com/youtube/answer/2802027?hl=en> (last visited Jan. 12, 2014).

<sup>68</sup> *Copyright Infringement Notification Basics*, YOUTUBE, <http://www.youtube.com/yt/copyright/copyright-complaint.html> (last visited Jan. 12, 2014).

<sup>69</sup> *Content ID*, YOUTUBE (Jan. 6, 2013, 5:01 PM), <https://web.archive.org/web/20130106170131/http://www.youtube.com/t/contentid> (accessed by searching for the original URL in the Internet Archive). Slightly modified language appears on the current version of the site. See *supra* note 12.

copyright owner fills out a short form<sup>70</sup> and delivers a reference file of the claimed content to YouTube.<sup>71</sup> The copyright owner selects in advance the course of action to be taken when that content is identified: block, track, or monetize.<sup>72</sup> Blocking makes the video unplayable or mutes the audio.<sup>73</sup> Tracking provides the content owner with video viewership statistics.<sup>74</sup> Monetizing inserts advertisements before the video or lays them over the video,<sup>75</sup> and YouTube shares the generated ad revenue with the content owner.<sup>76</sup> Through an automated process, using a combination of video fingerprinting technology created by Google and audio fingerprinting technology licensed from Audible Magic,<sup>77</sup> Content ID scans YouTube's library of user-uploaded videos and applies the owner's selected course of action whenever a match is found.<sup>78</sup> A user may dispute a Content ID match if she believes it was an error,<sup>79</sup> a process discussed in greater depth in Part IV. According to YouTube's parent company Google, as of 2008, copyright owners opting into an early test version of Content ID chose to monetize ninety percent of claims.<sup>80</sup>

### III. LEGAL RELATIONSHIPS FORMED BY CONTENT ID

Content ID creates an express contractual nonexclusive licensing agreement between YouTube and the claimant, just like the early, individually

<sup>70</sup> *Content Identification Application*, *supra* note 10.

<sup>71</sup> *How Content ID Works*, *supra* note 12.

<sup>72</sup> *Id.*; see also Liz Gannes, *From Monitor to Monetize: The Evolution of YouTube Content ID*, GIGAOM (Sept. 28, 2009, 9:00 AM), <http://gigaom.com/2009/09/28/from-monitor-to-monetize-the-evolution-of-youtube-content-id/> (“[T]oday, YouTube’s Content ID is a market standard, with every major U.S. network broadcaster, movie studio, and record label using it .... More than 1,000 content owners have uploaded more than 1 million reference files to the system, and the majority of partners elect to leave infringing content up and try to monetize it ....”) (citing *Over 1,000 Content Owners Now Using Content ID*, YOUTUBE BIZ BLOG (Sept. 16, 2009, 10:36 AM), <http://ytbizblog.blogspot.com/2009/09/over-1000-content-owners-now-using.html>).

<sup>73</sup> *How Content ID Works*, *supra* note 12.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Stelter, *supra* note 4 (“[T]he YouTube users who post the content without permission will not share in the advertising revenue generated by their posts. Instead, it is split between the media companies and YouTube.”).

<sup>77</sup> Steve Chen, *The State of Our Video ID Tools*, GOOGLE BLOG (June 14, 2007), <http://googleblog.blogspot.com/2007/06/state-of-our-video-id-tools.html>; *YouTube Warning Video Taken Down*, NOISE ADDICTS (Jan. 2010), <http://www.noiseaddicts.com/2010/01/youtube-contentid-system/>.

<sup>78</sup> *How Content ID Works*, *supra* note 12.

<sup>79</sup> *Content ID Claim Basics*, YOUTUBE, <http://www.youtube.com/yt/copyright/content-id-disputes.html> (last visited Jan. 12, 2014).

<sup>80</sup> King, *supra* note 10.

negotiated second level agreements between YouTube and particular major copyright owners.<sup>81</sup> Content ID scans its database for reference file matches, meaning YouTube acquires disqualifying item specific knowledge even when YouTube does not profit from the infringing videos.<sup>82</sup> Therefore, § 512(c) safe harbor protection is no longer available, and YouTube needs a license to avoid committing secondary infringement.

The contractual relationships created by Content ID might be viewed this way: the copyright owner is the licensor, YouTube is the licensee, and the user-creator is a non-contracting party—perhaps a “tolerated” infringer or the beneficiary of a waiver. This Note argues that a better view is that Content ID creates an implied, nonexclusive, royalty-free license between the copyright owner and the user-creator, which is limited in scope by YouTube’s Terms of Service and the terms of the second level agreement.

#### *A. Theories of Tolerated Use and Waiver*

Because the user-creator is not an express contracting party under Content ID and is legally bound by YouTube’s Terms of Service, the second level agreement might not affect her legal status at all.<sup>83</sup> One might argue that the Content ID claimant is simply tolerating infringement or granting a waiver to users. Facially, both theories have some merit, but ultimately they are inappropriate.

The term “tolerated use” was coined by Professor Tim Wu to describe “infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about.”<sup>84</sup> The copyright owner seeks neither to stop the activity nor to be compensated for it.<sup>85</sup> A cursory glance at Content ID suggests infringing user-creators are being tolerated: a monetizing claimant is at least constructively aware of infringing use, chooses to allow the videos to remain on YouTube when she could easily have them removed or blocked, and does not seek compensation from user-creators.

Waiver is an affirmative defense to a copyright infringement claim.<sup>86</sup> It is “the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it.”<sup>87</sup> Waiver “refers only to a decision not to enforce rights against a particular party.”<sup>88</sup> There is scant case law

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<sup>81</sup> See Lev-Aretz, *supra* note 3, at 153–54.

<sup>82</sup> For example, when the claimant opts to block or track videos containing their content.

<sup>83</sup> Lev-Aretz, *supra* note 3, at 139.

<sup>84</sup> Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008).

<sup>85</sup> Lev-Aretz, *supra* note 3, at 138.

<sup>86</sup> WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 5:154 (2013).

<sup>87</sup> *United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988).

<sup>88</sup> PATRY, *supra* note 86, § 5:157.

on the waiver doctrine, but in *Courtney-Clarke v. Rizzoli International Publications, Inc.*,<sup>89</sup> a New York appellate court shed some light on what it means to express an intent to relinquish a known right. The court held that the Plaintiff's intent to relinquish her known right to a royalty rate in a publishing agreement could not be inferred from her "mere silence, oversight or thoughtlessness in failing to object to the lower royalty rate she had been receiving."<sup>90</sup> *Courtney-Clark* suggests that opting into Content ID and receiving *some* payment from YouTube does not evidence a copyright owner's intent to relinquish her right to the *full value* of payments due directly from infringing users.

The flaw in both of the foregoing theories is that they ignore the basic purpose of the second level agreement: Content ID claimants only profit if and when users upload infringing videos. That users will infringe is a basic assumption of the contract. The copyright owner is not sitting on her rights against the user-creator in exchange for nothing or for less than optimum payment; she is sitting on her rights precisely so that she can maximize payment in the form of shared ad revenue. The second level agreement is a new licensing device developed in response to a relatively new market.<sup>91</sup> Prior to Content ID, media giants actively tried to quash infringement directly by submitting individual takedown notices and indirectly by suing YouTube.<sup>92</sup> Now many of those media giants are authorizing the very same infringement via Content ID.<sup>93</sup> It is too formalistic to conclude that copyright owners are authorizing what they consider to be secondary infringement without impliedly authorizing the inseparable direct infringement. Therefore, tolerated use and waiver are inappropriate, and the arrangement is more properly described by a contract theory that recognizes the user-creator as an intended beneficiary.

### *B. Implied License Theory*

This Note advocates a contract theory that relies on the implied license doctrine. Admittedly, courts are reluctant to find implied licenses,<sup>94</sup> but Content ID presents a factual scenario that lends itself well to application of the doctrine. The second level agreement is a radically new licensing tool occupying the edge of copyright law; therefore, it is not so radical to employ a licensing doctrine that also occupies the edge of the law. This subsection of

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<sup>89</sup> 251 A.D.2d 13 (N.Y. App. Div. 1998).

<sup>90</sup> *Id.* at 13.

<sup>91</sup> See Lev-Aretz, *supra* note 3, at 152–53.

<sup>92</sup> See *id.* at 155, 176–77.

<sup>93</sup> See *id.* 153–55, 163.

<sup>94</sup> See JAY DRATLER, JR., LICENSING OF INTELLECTUAL PROPERTY § 3.04(1) (1994).

the Note will argue that the guiding principles of contract law—party intent and equity—are best served by the implied license theory.

In her article, *Second Level Agreements*, Yafit Lev-Aretz presents the first ever in-depth legal analysis of second level agreements.<sup>95</sup> She highlights their novelty, acknowledges that they might create implied licenses between copyright owners and users (using Content ID as a case study), and concludes that their future is dim because UGC does not generate much ad revenue.<sup>96</sup> This Note challenges two aspects of Lev-Aretz's analysis. First, the implied license theory has more merit than she gives it. Second, determining the legal significance of second level agreements is not irrelevant merely because of declining profits in the original setting for which they were created or because law suits are unlikely so long as they are in place. Second level agreements are unprecedented in the world of copyright licensing,<sup>97</sup> and the nature of the Internet as an ever-evolving marketplace promises that new applications not yet contemplated will emerge. For those reasons, the legal significance of second level agreements cannot be discounted.

In his article, *Using the Implied License to Inject Common Sense into Digital Copyright*, John S. Sieman traces the evolution of the implied license doctrine and predicts that courts will extend it further to resolve fundamental conflicts between copyright law and Internet technology.<sup>98</sup> Content ID is ripe for testing the limits of the modern doctrine as applied to Internet technology.

### 1. *Effects Test*

The leading case on the traditional implied license doctrine is *Effects Associates, Inc. v. Cohen*.<sup>99</sup> Under the *Effects* test, an implied nonexclusive license is created “when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee copy and distribute his work.”<sup>100</sup> The *Effects* test contemplates direct contact between two parties and the creation of a new, copyrighted work. Looking

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<sup>95</sup> See Lev-Aretz, *supra* note 3, at 138–39.

<sup>96</sup> *Id.* at 158–59, 180–82.

<sup>97</sup> See *id.* at 139 (“While licenses for the purpose of pure reproduction are common in copyright practice, these [second level] agreements mark the first time in copyright history that a user creates a derivative work pursuant to a license that was not granted directly to her.”).

<sup>98</sup> John S. Sieman, Comment, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885 (2007).

<sup>99</sup> 908 F.2d 555 (9th Cir. 1990).

<sup>100</sup> Sieman, *supra* note 98, at 899 (citing *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002)); see also *Effects Assoc., Inc.*, 908 F.2d at 558–59.

at the *Effects* test alone, Content ID is a rough fit: there are three parties to the arrangement, they are not in direct contact, and the user-creator makes a *derivative* work from the licensor's *original*.

Courts have expanded the implied license doctrine beyond the *Effects* test in two ways, making the doctrine more amenable to the facts of Content ID.<sup>101</sup> First, other circuits following the *Effects* test have placed special emphasis on the third prong: the licensor's intent.<sup>102</sup> Given the difficulty of shoe-horning Content ID into the classic *Effects* test, the intent-based approach is more useful. Second, modern courts have been willing to modify and extend the implied license doctrine even further in cases involving “nontraditional circumstances.”<sup>103</sup>

## 2. Field Test

In *Field v. Google, Inc.*,<sup>104</sup> a federal district court was presented with very nontraditional circumstances. Plaintiff Blake Field created and copyrighted a number of works, put them on a website, and allowed Google to create cached copies of the site—and therefore his copyrighted works—by failing to opt out of Google's “indexing” robot.<sup>105</sup> Sieman explains that:

[i]ndexing is the term used to describe how search engines collect data. Search engines have automated programs called “robots” (or “spiders”) that visit as many websites as they can discover. For each one, the robot copies the page onto a computer owned by the search engine and creates an index of all the data on the page. All of this data is then ordered so that when users search for the data, the search engine can find it efficiently.<sup>106</sup>

Google provides instructions on how to opt out,<sup>107</sup> which can be done in a variety of ways.<sup>108</sup> Field admitted that he knew of the opt-out system, but did not use it.<sup>109</sup>

<sup>101</sup> *Id.* at 899–901.

<sup>102</sup> *Id.* at 899 n.89 (citing *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003) (“The touchstone for finding an implied license ... is intent.”); *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, at 515 (calling intent “the determinative question”); *Johnson v. Jones*, 149 F.3d 494, 502 (6th Cir. 1998) (“Without intent, there can be no implied license.”)).

<sup>103</sup> *Id.* at 900–01, 906–15 (discussing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) and *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006)).

<sup>104</sup> 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>105</sup> Sieman, *supra* note 98, at 906–09.

<sup>106</sup> *Id.* at 890 n.22.

<sup>107</sup> *Block or Remove Pages Using a Robots.txt File*, GOOGLE, <https://support.google.com/webmasters/answer/156449?hl=en> (last visited Jan. 12, 2014).

<sup>108</sup> Sieman, *supra* note 98, at 907–08 nn.144–53 and accompanying text.

<sup>109</sup> *Field*, 412 F. Supp. 2d at 1116.

The *Field* court radically departed from the *Effects* test, establishing a new implied license test based on licensor conduct.<sup>110</sup> Under the *Field* test, an implied license is created “[w]hen the copyright owner (1) ‘knows of the use’ and (2) ‘encourages it.’”<sup>111</sup> “Knowledge” and “encouragement” were interpreted very broadly.<sup>112</sup> The court found that Field had “knowledge” of Google’s use by his own admission.<sup>113</sup> Sieman, on the other hand, characterized the court’s analysis of the knowledge prong thusly: “Field satisfied the knowledge requirement by knowing of Google’s use of the opt-out system to determine what to cache and what not to cache.”<sup>114</sup> The court found that Field “encouraged” the use by knowing how to opt out and failing to do so, thereby making “a conscious decision to permit” Google to cache his webpage.<sup>115</sup> Sieman summarizes the *Field* test as creating the following rule: “[W]here a copyright owner ... knows about an opt-out system ... and purposely fails to opt out, an implied license is created.”<sup>116</sup>

### 3. Applying the Field Test to Content ID

Even the *Field* test presents a small wrinkle when applied to Content ID: *Field* involved only two parties, whereas second level agreements involve three parties. But this wrinkle can be ironed out with the fact that privity is not required to create an implied license.<sup>117</sup> Even if the second level agreement’s terms purport to exclude the user-creator, the agreement grants rights to YouTube that are inseparable from the user’s content.<sup>118</sup> That is, copyright owners authorize YouTube to display and perform user-created derivative works. Because privity is not required to create an implied license, the fact that the copyright owner communicates directly only with YouTube when she opts into Content ID does not preclude the grant of an implied license to allegedly infringing user-creators.<sup>119</sup> Accordingly, Content ID should be analyzed under the *Field* test, using evidence of both contracting parties’ conduct toward the user-creator.

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<sup>110</sup> See Sieman, *supra* note 98, at 912.

<sup>111</sup> See *id.* at 912 (quoting *Field*, 412 F. Supp. 2d at 1116).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 913.

<sup>114</sup> *Id.* at 914.

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

<sup>116</sup> *Id.*

<sup>117</sup> *NASCAR, Inc. v. Scharle*, 356 F. Supp. 2d 515, 526–27 (E.D. Pa. 2005), *aff’d*, 184 F. App’x 270 (3d Cir. 2006) (“This court can find no case that injects a privity requirement into the implied license doctrine, and it declines to be the first to do so.”); MELVILLE NIMMER & DAVID NIMMER, 3–10 NIMMER ON COPYRIGHT § 10.03, n.70 (2012).

<sup>118</sup> See Sieman, *supra* note 98, at 914–15 (“The burden to opt out is on the copyright owner—if he does not, the use will be allowed by an implied license.”).

<sup>119</sup> See *Scharle*, 356 F. Supp. 2d at 526–27; NIMMER & NIMMER, *supra* note 117.

The agreements between YouTube and copyright owners are opaque; users can only divine the terms of these agreements from a few press releases and media reports.<sup>120</sup> Users are legally bound by YouTube's Terms of Service,<sup>121</sup> which do not reflect the existence of second level agreements.<sup>122</sup> For example, YouTube's Terms of Service prohibit uploaders, without qualification, from uploading videos containing copyrighted materials that they have not been authorized to use.<sup>123</sup>

Despite such unequivocal language, YouTube's conduct absolutely reflects second level agreements because user videos containing "unauthorized" copyrighted material are treated differently depending on whether that material is in the Content ID system.<sup>124</sup> Even without opting into Content ID, a copyright owner may notify YouTube of an infringing video and have it blocked.<sup>125</sup> The user will be notified that her video was identified as infringing, and she will receive a "copyright strike" on her YouTube account.<sup>126</sup> If a user accumulates three copyright strikes, her account and all the videos uploaded under that account will be removed.<sup>127</sup> On the other hand, users do not receive copyright strikes for videos matched through Content ID, no matter which option the claimant selected.<sup>128</sup> YouTube's Help guide even explains: "Copyright strikes are often confused with Content ID matches, which can result in a video being blocked. They are not the same."<sup>129</sup> In other words, a video affected by Content ID does not carry the same account penalties threatened by YouTube's Terms of Service. Moreover, the user receives some notification that the video has been matched using Content ID, affirmatively telling her that YouTube and the copyright owner have detected the video. There can be no inference that the lack of reprimand is merely because the video has gone unnoticed by interested parties. All of this conduct would lead the user to reasonably infer that despite what the Terms of Service declare, it is sometimes acceptable to upload copyrighted material that she has not personally acquired permission to use.<sup>130</sup>

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<sup>120</sup> Lev-Aretz, *supra* note 3, at 139.

<sup>121</sup> *Terms of Service*, YOUTUBE ¶ 1, <http://www.youtube.com/t/terms> (last visited Jan. 12, 2014).

<sup>122</sup> Lev-Aretz, *supra* note 3, at 139; *see also Terms of Service*, *supra* note 121.

<sup>123</sup> *Terms of Service*, *supra* note 121, ¶ 6.

<sup>124</sup> *How Content ID Works*, *supra* note 12.

<sup>125</sup> *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000?hl=en> (last visited Jan. 12, 2014).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

In light of the foregoing, the monetizing claimant satisfies the *Field* test. The claimant's knowledge of YouTube users' use can be inferred from her decision to opt into Content ID. After all, YouTube is adamant that Content ID is appropriate for those who hold "exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community."<sup>131</sup> Monetizing claimants particularly encourage fraudulent use by knowing how to opt out—either by filing claims against individual videos, which would result in copyright strikes, or by selecting "block" under Content ID—and failing to do so, thereby making a "conscious decision to permit" users' use.<sup>132</sup>

The scope of the implied license of course should be limited by YouTube's Terms of Service and the information YouTube reveals about Content ID to users on its website. For example, YouTube's help guide alerts users that a Content ID claimant "may change the policy being applied to your video at any time."<sup>133</sup>

#### IV. CONTENT ID ABUSE

Content ID is an effort by major industry players to contract around federal copyright law. Copyright and contract law have "long co-existed symbiotically."<sup>134</sup> In the last fifteen years, however, courts and commentators have debated the enforceability of contractual license terms that "alter the 'delicate balance' of rights that the Copyright Act strikes between owners and users of works of authorship."<sup>135</sup> The second level agreement is an unprecedented form of copyright license because the user-creator is not a party to the license.<sup>136</sup> Courts have been unreceptive to preemption of contract claims,<sup>137</sup> but the common rationale for courts' reticence might not insulate the exotic, new second level agreement.

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<sup>131</sup> *How Content ID Works*, *supra* note 12; see also *Qualifying for Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/1311402> (last visited Jan. 12, 2014) ("Content ID acceptance is based on an evaluation of each applicant's actual need for the tools.... Content ID applicants may be rejected if other tools better suit their needs.").

<sup>132</sup> *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

<sup>133</sup> *Determine What Happened to Your Video*, YOUTUBE, <https://support.google.com/youtube/answer/2818443?hl=en-GB> (last visited Jan. 12, 2014).

<sup>134</sup> Deanna L. Kwong, *The Copyright-Contract Intersection: Softman Products Co. v. Adobe Systems, Inc. & Bowers v. Baystate Technologies, Inc.*, 18 BERKELEY TECH. L.J. 349, 349 n.1 and accompanying text (2003) (citing Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 829 (1998) ("Contract and intellectual property law have always co-existed, not only peacefully, but [also] in an aggressive interaction between mutually supportive fields.")).

<sup>135</sup> Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616, 616 (2008).

<sup>136</sup> See *supra* note 97.

<sup>137</sup> Bohannon, *supra* note 135, at 618 ("[C]ourts virtually never preempt these contracts, no matter how much their terms conflict with the [Copyright] Act's provisions.").

Persistent Content ID abuse casts doubt on whether Content ID squares with federal copyright policy. Content ID does not seem to conflict with copyright policy when it comes to limiting YouTube's secondary infringement liability. The DMCA<sup>138</sup> was intended in part to balance the interests of copyright owners and ISPs with regard to secondary liability. It is reasonable to view the DMCA as a set of default rules, which parties ought to be free to contract around.<sup>139</sup> However, Content ID abuse does seem to conflict with copyright policy when it comes to balancing the interests of authors (copyright owners) and future creators (users). Content ID abuse refers to intentionally false Content ID claims, often of public domain works.<sup>140</sup> False claimants can monopolize and profit from works on YouTube that they do not actually own.<sup>141</sup> Because Content ID lacks front-end copyright ownership verification and operates outside of the copyright statutes unless and until a user disputes a claim,<sup>142</sup> claimants can acquire temporary contractual rights to monopolize and profit from works in the public domain. YouTube's dispute process ultimately defers to the DMCA, which generally halts abusive claims.<sup>143</sup> But without front-end copyright ownership verification, Content ID creates a marketplace in which individuals can monopolize public domain works in direct contravention of federal copyright law.

Most inaccurate Content ID matches flow from two fundamental flaws in the Content ID system. The first flaw is technological: over-filtering. In a nutshell, over-filtering is a false positive.<sup>144</sup> Although a pet peeve of users, it is grudgingly tolerated because Content ID's software, like all software, is not infallible. The second flaw is procedural: Content ID abuse. Content ID claimants need not prove copyright ownership in the application process, allowing unscrupulous parties to lay claim to whatever materials they wish.<sup>145</sup> Public domain works are the false claim of choice among documented, repeat abusers.<sup>146</sup> Content ID abuse is less tolerated by users because YouTube

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<sup>138</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 101, 512); *Overview, supra* note 38.

<sup>139</sup> See Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 854-57 (1998).

<sup>140</sup> See, e.g., McKay, *supra* note 16.

<sup>141</sup> *Id.* ("While it seems obvious that a system which allows alleged copyright owners to upload any audio/visual work and claim copyright ownership over that work should at minimum require that person to provide some documentation of proof that they own the copyright to each work they claim, anecdotal evidence suggests that no such proof is in fact required.").

<sup>142</sup> See Sieman, *supra* note 98, at 898-900.

<sup>143</sup> See *Content ID Claim Basics, supra* note 79.

<sup>144</sup> See McKay, *supra* note 16.

<sup>145</sup> *Id.*

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

could eliminate it by implementing front-end verification, but simply chooses not to.

Regardless of whether an inaccurate Content ID match flows from over-filtering or from abuse, the real aggrieved party is the user whose non-infringing video is improperly blocked or monetized. Accordingly, Content ID arguably clashes with some of copyright law's core goals: balancing the interests of authors and future creators and protecting free use of public domain works.<sup>147</sup> There is no common law theory to cure this conflict. It can only be remedied by modifications to Content ID's application process and policies. This Part of the Note explains how Content ID's dispute process works, why it alone is not enough to cure the conflict with federal copyright law, and what steps YouTube should take to cure the conflict.

#### A. Content ID Dispute Process

##### 1. As a Solution to Over-Filtering

Content ID's dispute process is a sensible solution to the over-filtering problem and upholds copyright policy. To understand why, a brief explanation of the dispute process—especially the recent changes to it—is necessary.

In October 2012, YouTube announced its much-anticipated reforms to the Content ID dispute process.<sup>148</sup> The old process was roundly criticized in tech blogs and the YouTube help forum.<sup>149</sup> It effectively circumvented the DMCA notice-and-takedown process, trapping users in a back-and-forth that gave Content ID claimants the last word. The user filed a dispute, the Content ID claimant could “confirm” her claim to the video, and that was the end of it.<sup>150</sup> Because there is no statutory right to upload or monetize videos online, this was certainly a bad business practice, but not illegal.<sup>151</sup> The reform is arguably an attempt by YouTube to balance users' interests under Content ID and it aligns Content ID more closely with copyright policy.

The new dispute process replaces unilateral “confirmation” with a formal DMCA notice-and-takedown claim.<sup>152</sup> Now YouTube defers to user disputes, giving the claimant two options: release the Content ID claim or file an official DMCA notification to override the dispute.<sup>153</sup> The new process

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<sup>147</sup> See, e.g., Bohannon, *supra* note 135, at 616–17.

<sup>148</sup> Thabet Alfshawi, *Improving Content ID*, YOUTUBE OFFICIAL BLOG (Oct. 4, 2012), <http://youtube-global.blogspot.com/2012/10/improving-content-id.html>.

<sup>149</sup> See, e.g., McKay, *supra* note 16.

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

<sup>151</sup> Lev-Aretz, *supra* note 3, at 177–78.

<sup>152</sup> *Appealing Rejected Content ID Disputes*, YOUTUBE, <https://support.google.com/youtube/answer/2770411> (last visited Jan. 12, 2014).

<sup>153</sup> *Id.*

injects human review into the system, providing a cost-effective remedy to the over-filtering problem, which appears to be a genuine limitation of modern filtering technology. In other words, imperfect technology is to blame for over-filtering, and the new dispute process relies on honest claimants and users to police innocent, technological errors. Requiring copyright owners and users to be the first line of defense against over-filtering maintains the DMCA's policy against over-burdening ISPs with policing copyrighted content on their sites.<sup>154</sup>

## 2. *As a Solution to Abuse*

The dispute process is not as sensible a solution to the false claim problem. Unlike over-filtering, false claims need not be dealt with on a video-by-video basis. Over-filtering requires human review to assess why Content ID matched a particular video and whether the match is justified. In contrast, matches arising from false claims are unjustified in every case.

In the case of Content ID abuse, the underlying second level agreement is unenforceable because the claimant purports to convey rights to YouTube that it does not own. It is not, therefore, a classic preemption issue, which would involve a true licensor attempting to expand its monopoly or restrict licensee rights in a way that contradicts federal copyright law.<sup>155</sup> If the concern was the harm to YouTube, the remedy would almost certainly be a matter of contract law.<sup>156</sup> But the concern is the harm to users, in the form of time spent disputing false claims and money lost from an inability to monetize non-infringing videos. Applying principles of equity, a court might be willing to invalidate the entire second level agreement scheme due to its potential to exert control over non-negotiating parties in contravention of federal copyright policy.

Courts have been unreceptive to preemption of contract claims, reasoning “that because contracts contain an element of agreement and bind only those in privity, contract claims are qualitatively different from copyright claims.”<sup>157</sup> Second level agreements, if found to create an implied license between the copyright owner and the user-creator, may risk preemption because they affect a third party not in privity with any party to the express agreement. If YouTube wants to prevent Content ID from becoming a test

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<sup>154</sup> 17 U.S.C.A. § 512 (West 2013); *see also supra* Part I.C.

<sup>155</sup> *See, e.g.,* Nimmer, *supra* note 139, at 861–63.

<sup>156</sup> *See, e.g.,* Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTEL. PROP. L. 259, 259, 270–71 (1994); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1094 (2006).

<sup>157</sup> Bohannon, *supra* note 135, at 618.

case for invalidating second level agreements on preemption grounds, it should proactively correct the interest imbalance its system creates. Specifically, false claims should be weeded out on the front-end and there should be clearly delineated consequences for abusers.

### *B. Proposed Changes to Content ID*

One reason YouTube has been hesitant to fix Content ID abuse may be the obvious conflict of interest: YouTube stands to gain more from maintaining a claimant-friendly application procedure. Pursuing false claimants to recover shared revenue already paid out or creating barriers on the front end to prevent false claims in the first place will probably result in a net loss for YouTube. YouTube evidently considers front-end verification to be too costly and prefers to rely solely on its dispute process, as it is legally entitled to do.

Despite strict verification requirements for other modes of monetization,<sup>158</sup> YouTube evidently believes the honor system is sufficient to regulate Content ID. Against the backdrop of its creation outlined in this Note, this is not surprising. Content ID was designed to convert potential courtroom opponents into allies as quickly and easily as possible. Its central purpose is to limit YouTube's liability, and because users have no readily apparent cause of action against YouTube for paying false claimants, YouTube has no economic impetus to guard against such abuse. In YouTube's defense, the site's economic model compels this result: users can upload and consume unlimited videos free of charge, and the legal protection and ad revenue YouTube receives from partnering with copyright owners through Content ID powers the machine. YouTube's enormous user base<sup>159</sup> means that those comparatively few affected users who vote with their feet and leave the site cannot threaten its continued operation. But second level agreements are yet untested, and YouTube should avoid knowingly contravening federal copyright policy if it wants to maintain the status quo.

Two changes to Content ID would close the loophole, bringing the service into harmony with federal copyright law. First, YouTube should require proof of copyright registration in the Content ID application process. This could be as simple as entering a U.S. or international registration number. Because Content ID was originally "designed for exclusive rights holders

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<sup>158</sup> McKay, *supra* note 16 ("YouTube has quite stringent copyright verification procedures for users wishing to qualify for partnership status and monetize the videos on their channel.").

<sup>159</sup> Lev-Aretz, *supra* note 3, at 155 ("[As of 2012], YouTube is the world's largest repository for video clips on the Internet, with over 48 hours of video uploaded to YouTube every 60 seconds and hundreds of millions of videos watched every day.").

whose content is frequently uploaded to YouTube by the user community,” this would not be an onerous requirement for many claimants.<sup>160</sup> YouTube could conduct automated searches for each claim using online databases.

Second, YouTube needs to articulate a clear policy for Content ID abusers. Currently, YouTube’s website meekly and vaguely warns potential Content ID claimants: “Content owners who repeatedly make erroneous claims can have their Content ID access disabled and their partnership with YouTube terminated.”<sup>161</sup> When a user disputes a match because she believes an abuser has claimed a public domain work, YouTube should conduct a registration search. If indeed the claim was abusive, YouTube should automatically release that claim from the Content ID system—not just from the disputed video—and give that claimant a “copyright strike.” If a claimant receives three strikes, her YouTube account should be terminated and she should be permanently blocked from partnering with Content ID. An unscrupulous claimant could, with some effort, set up a new account and seek Content ID partnership using a different name, IP address, email address, and bank account information. Many of the biggest abusers, however, act as Content ID clearinghouses for a large number of genuine copyright owners.<sup>162</sup> The burden of re-filing a long list of genuine claims after partnership termination hopefully would be a sufficient inconvenience to the businesses to curb the practice of making false claims.

#### CONCLUSION

Because second level agreements diminish the need for copyright owners to resort to litigation over UGC platforms, Lev-Aretz argues there is no practical need to determine the legal contours of these exotic, new contracts.<sup>163</sup> But the Internet and second level agreements will continue to evolve, and the economic model will probably continue to encourage the expressly contracting parties to look out for their interests alone. The phenomenon of second level agreements—the first arrangement in copyright history whereby “a user creates a derivative work pursuant to a license that was not granted directly to her”<sup>164</sup>—may remain isolated on UGC platforms, and its impact on the average UGC platform user may decline, exactly as Lev-Aretz predicts.<sup>165</sup> But the phenomenon may evolve and expand, and the agreement’s legal contours eventually will be tested in court.

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<sup>160</sup> *Content ID*, *supra* note 69.

<sup>161</sup> *How Content ID Works*, *supra* note 12.

<sup>162</sup> McKay, *supra* note 16.

<sup>163</sup> Lev-Aretz, *supra* note 3, at 193–99.

<sup>164</sup> *Id.* at 139.

<sup>165</sup> *Id.* at 140 (“[A]dvertisers have found that original and derivative UGC is far less appropriate for commercials than premium content. Consequently, platforms’ operators

Not knowing how the agreements will be tested, this Note highlights the main legal issues that the agreements raise in the Content ID context. The express contracting parties should be prepared for courts to find that the third party creator cannot be legally excluded from a license. The expressly contracting parties should also be prepared for a court to invalidate a contract formation system that turns a blind eye to contraventions of federal copyright policy in the name of making fast money.

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began to search for new revenue generators in the form of professionally produced content and the importance of UGC in the licensing priority has diminished.”).

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